

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2679/2009  
PERMIT APPLICATION NO. 2090083

**CATCHWORDS**

Application under section 77 of the *Planning and Environment Act 1987* to review a **decision to refuse** a permit. Subdivision in a Residential 1 Zone. Provision of on-site wastewater treatment and disposal on new lots. Proximity to water course.

<b>APPLICANT</b>	Merilyn Sellman and Robert Sellman
<b>RESPONSIBLE AUTHORITY</b>	Macedon Ranges Shire Council
<b>RESPONDENT</b>	Western Water
<b>SUBJECT LAND</b>	71 Sandy Creek Road, Riddells Creek
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Ian Potts, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 March 2010
<b>DATE OF ORDER</b>	7 May 2010
<b>CITATION</b>	Medium neutral

**ORDER**

- 1 The decision of the Responsible Authority is affirmed.
- 2 In permit application 2090083 a permit no permit is granted.

Ian Potts  
**Member**

## APPEARANCES

For Merilyn and Robert Sellman	Merilyn and Robert Sellman in person.
For Macedon Ranges Shire Council	Ms Sharon Macauley, a town planner and Mr Philip Harvey Team Leader Health Unit, both from the Macedon Ranges Shire Council.
For Western Water	Mr Jason Michie, a town planner from Western Water.

## INFORMATION

Description of Proposal	<p>A two lot subdivision of a 6,950qm lot is proposed. The lot is an irregularly shaped wedge with its northern boundary to Sandy Creek Road, southern boundary to Sandy Creek and north-eastern boundary to the road reserve of Plantation Lane.</p> <p>The existing lot contains a dwelling, office, sheds and a swimming pool. There is formal landscaping around the lot, with mature exotic and native trees and lawns. The dwelling is serviced by a septic tank system which has a discharge line extending in a south-westerly direction from the unit, which is located to the southwest of the dwelling.</p> <p>Lot 1 of the subdivision would retain the existing dwelling and proposes two effluent disposal fields along the northern and north-eastern boundaries. Lot 2 is proposed to contain a building envelope of 25m by 15m and an effluent disposal field between the building envelope and northern property boundary.</p>
Nature of Application	Section 77 <i>Planning and Environment Act</i> 1987.
Zone and Overlays of the Macedon Ranges Planning Scheme	Residential 1 Zone (Clause 32.01)

Permit triggers under the  
Macedon Ranges Planning  
Scheme

Clause 32.01-2 (Subdivision).

Other particular and general  
provisions of the Macedon  
Ranges Planning Scheme

Clause 56 (subdivision).

Clause 65 Decision guidelines.

Relevant State and Local  
Planning Policy Framework  
provisions of the Macedon  
Ranges Planning Scheme

Clauses 11, 15, 21.02, 21.06, 21.07, 22.01,  
22.02 and 22.03.

Cases referred to

*Rozen v Macedon Ranges SC (includes  
Summary) (Red Dot)* [2009] VCAT 2746 (23  
December 2009) and *Archibald v Moorabool  
SC* [2010] VCAT 163 (8 February 2010).

## REASONS

### INTRODUCTION

- 1 Mr and Mrs Sellman seek to subdivide their existing residential lot into two. They wish to construct a new dwelling on the smaller of the two lots so that can continue to live in Riddells Creek, but without having to maintain the large lot on which they have lived for some time.
- 2 Macedon Ranges Shire Council has refused to grant a planning permit for the subdivision. It has done so on the grounds that the subdivision would result in lots that are too small to contain the on-site treatment and disposal of domestic wastewater. This is required because neither lot would be connected to reticulated sewerage. The Council also contends that the lot sizes would be contrary to neighbourhood character.
- 3 The Council's grounds have been informed in part by concerns raised by Western Water to whom the permit application was referred to under s. 52 of the *Planning & Environment Act 1987*.
- 4 Western Water advises that the subdivision should be connected to sewer as it is considered that the use of on-site wastewater management systems on the smaller lots presents a high risk of environmental impact to the nearby Sandy Creek. However, Western Water also recognises that the cost of connection to the nearest service could be prohibitive for such a small development.
- 5 The Sellmans resist the need to connect to the reticulated sewer system because of the cost and because they do not accept that on-site treatment of domestic wastewater is a risk to the environment. They rely on a land capability assessment (**the LCA**) submitted in support of their application which indicates on-site treatment is possible. Accordingly, they seek a review of the Council's decision and seek to gain a permit for the two lot subdivision.
- 6 It is clear that the determinative issue in this proceeding is whether there is capacity for appropriate onsite treatment and disposal of wastewater on the proposed lots. Clearly, any consideration of neighbourhood character should only follow if I was to find that this question was answered in the affirmative.
- 7 I have considered the submissions of each party and the materials tendered in the application or tabled during the hearing against those matters I am required to consider for this permit application. I find that I am not satisfied that on-site wastewater disposal can be achieved in accordance with the requirements of the Planning Scheme. My reasons for reaching this conclusion are set herein. Because the proposal has failed to cross this determinative hurdle, I have not addressed the issue of neighbourhood character.

## WHAT IS PROPOSED?

- 8 The subject sit is located on the edge of a Residential 1 Zone. It is a large lot of almost 7,000sqm containing a dwelling. It is of an irregular wedge shape, with Sandy creek running along its southern boundaries. Sandy Creek is an ephemeral waterway, having defined bed and banks, but only flowing on a seasonal basis.
- 9 The existing dwelling is connected to a septic tank system that provides primary treatment of effluent with discharge to a soakage line that lies between the house and Sandy Creek. Photographs indicate that the discharge from this soakage line migrates down slope, toward the creek. The Sellmans submit that by including new treatments systems in their subdivision proposal, they can achieve a better environmental outcome than the current effluent treatment and disposal system.
- 10 The plan of subdivision proposed by the Sellmans would split the lot into two. Lot 1 would be almost 4,300sqm in size, while Lot 2 would be a triangular lot of approximately 2,700sqm. Both would retain southern boundaries to Sandy Creek.
- 11 The proposed plan of subdivision includes a building envelope on Lot 2 located some 18m from the boundary with Sandy Creek. As I have noted already, the existing dwelling on Lot 1 would be retained. It is located approximately 20m from the creek.
- 12 The proposed primary effluent disposal fields for each dwelling's wastewater treatment systems would have setbacks from the Sandy Creek boundary ranging from 62m to 34m due to the irregular shape of the lots and the effluent disposal fields. The majority of each disposal field would be within 60m of the creek. To achieve these setbacks the fields would be located on the northern most boundaries of each lot.
- 13 In accord with the recommendations of a the LCA commissioned by the Sellmans, it is proposed that the existing dwelling and any new dwelling will be connected to aerated wastewater treatments systems that will treat the domestic effluent to a class C level<sup>1</sup> with nitrogen reduction. The treated wastewater would be disposed by pressurised subsurface irrigation to the new disposal fields. The LCA recommends the disposal fields will need to be vegetated with vegetation (i.e. grasses) that can be harvested (own) to facilitate the uptake of nutrients.

## WHAT ARE THE REQUIREMENTS FOR WASTEWATER DISPOSAL?

- 14 This proposal is required to address the requirements of the State Environmental Protection Policy (Waters of Victoria) (**the SEPP**) and consequently the Guidelines for Environmental Management - Septic Tanks

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<sup>1</sup> Class C treated effluent has a standard of <20mg/L Biological Oxygen Demand (BOD), <30mg/L Suspended Solids (SS) and < 1,000 *E Coli* org/100ml. The proposed treatment system would perform secondary treatment of effluent to reduce BOD and SS and disinfection to reduce pathogen levels. The method of nutrient reduction was not provided.

Code of Practice<sup>2</sup> (**the Code**). It is variously a requirement under State planning policy<sup>3</sup> and a relevant matter under the *Planning and Environment Act 1987*.<sup>4</sup> The proposal must also address state and local planning policy that seeks to protect water quality and manage development within the bounds of environmental and infrastructure constraints.<sup>5</sup>

- 15 The SEPP requires 'on-site domestic wastewater to be managed to prevent the transport of nutrients, pathogens and other pollutants to surface water and to prevent any impacts on groundwater beneficial uses'.<sup>6</sup> To achieve this, the capacity of the land is to be assessed and any approved system is to be managed in accord with the Code. Assessment of the land's capacity is to be guided in part by the Environment Protection Authority's guidelines for *Land Capability Assessment for Onsite Wastewater Management*.<sup>7</sup>
- 16 As noted earlier the Sellmans commissioned an LCA. The Council and Western Water express concerns about this LCA. It is unfortunate that the author of that assessment was not called so that such concerns could be examined further. Nevertheless the Sellmans rely on it and the proposed benefits of the new systems to support their applications.
- 17 I have considered this LCA, as well as other materials tendered by the parties in respect to this site. I have done so in the context of that which is ultimately required to be addressed under the SEPP and planning policies which is that:

...responsible authorities should ensure that land use activities potentially discharging contaminated runoff or wastes to waterways are sited and managed to minimise such discharges and to protect the quality of surface water and ground water resources, rivers, streams, wetlands,....

- 18 For the reasons I set out below, I have found that a number of aspects of the LCA are inadequate or unsatisfactory. Further while I acknowledge that the quality of the wastewater being discharged from the proposed new systems would be better than that which occurs now, I am not satisfied that this discharge can be contained within the reduced size of each new lot.

#### **THE ISSUES WITH THE LAND CAPABILITY ASSESSMENT AND LEVEL OF RISK**

- 19 The LCA assessment identifies a number of physical constraints of the land. Of these the following are key matters that I find to be of particular concern:
- The setbacks from Sandy Creek would be less than the Code's recommended 60m from a waterway;

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<sup>2</sup> Publication 891.2, Environment Protection Authority, December 2008.

<sup>3</sup> Refer to Clauses 15.01-2 and 18.09-2.

<sup>4</sup> Section 60(1A)(f).

<sup>5</sup> Clauses 15.01-2, 21.06, 21.05 and 22.03.

<sup>6</sup> Clause 32 of the SEPP.

<sup>7</sup> Publication 746.1, March 2003.

- The dispersive, swelling clay that has slow drainage and is present across the site will require ongoing management; and
  - The presence of seasonal shallow perched groundwater is likely and will also require ongoing management.
- 20 The LCA contains a number of recommendations to manage these conditions and relies on a very high standard of water quality being achieved by the treatment unit to support the reduced setback from Sandy Creek.
- 21 The Council and Western Water express concerns that the LCA assumes the most conservative of water use rates based on the installation of full water reduction fixtures and appliances in each dwelling. They highlight that since the assessment the wastewater flow rates recommended under the Code have been revised. With these new rates, coupled with the less conservative values for standard water use fixtures, the Council and Western Water argue that the proposed disposal fields are inadequate.
- 22 Western Water also express a concern about the degree of management required for wastewater disposal on this site, said to arise from the risks identified in the LCA. It is considered that with onerous management requirements there is a higher risk of system failure.
- 23 As a consequence of these concerns, the Council and Western Water consider that the proposal presents an unacceptable risk to Sandy Creek and the wider catchment's water quality.

#### **The level of site and system management**

- 24 The conclusion reached in the LCA that the site is suitable for on-site wastewater treatment and disposal is based on an assumption that all the identified site risks can and will be appropriately managed.
- 25 In more recent times there has been a consistent view expressed by various divisions of the Tribunal<sup>8</sup> that onerous site and system management requirements should not be relied on to address risks to water quality from domestic wastewater treatment systems. The management plan contained within the LCA identifies that 'assiduous' adherence to the management program is required. This may be no more than prudent advice, but I am of the view that the degree of management required is a clear indication of the risks involved. Indeed, the ultimate conclusion drawn from the LCA that onsite wastewater treatment and disposal in accord with the SEPP can be achieved is, in reality, based on a number of assumptions about pro-active management of the system, including the disposal field conditions, as well as the treatment unit.

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<sup>8</sup> See for example *Rozen v Macedon Ranges SC (includes Summary) (Red Dot)* [2009] VCAT 2746 (23 December 2009) at [66] and [77] and *Archibald v Moorabool SC* [2010] VCAT 163 (8 February 2010).

- 26 Apart from the management of a sophisticated wastewater treatment system with regular inspections and testing, ongoing monitoring and conditioning of the soils will be required to manage the dispersive character and poor drainage conditions. Management of the surface diversion and subsurface drainage system will also be required to maintain functionality. The LCA also assumes ongoing 'harvesting' of the vegetation over the disposal field to maintain nitrogen uptake.
- 27 While the Sellmans express their best intentions of adhering to such requirements, the passage of time and new owners cannot guarantee such compliance. Indeed the submissions made by the Sellmans about proposed landscaping, irrigation of garden areas and ability to increase the areas for disposal if necessary indicate a failure to comprehend all the implications of the LCA recommendations.
- 28 I find it is reasonable to expect an eventual dilution in future management of the whole system as properties transfer to new owners. This is part of human nature and any management requirements need to accept this weak link in the system. These are after all domestic situations and not formalised, professionally managed regimes.
- 29 Further to this many aspects of the recommended management regime rely on an understanding of soil behaviour and sub-surface drainage systems that go beyond the fair and reasonable expectations for an urban resident. It would be reasonable to assume that such requirements would be viewed as onerous or at best not properly understood. A degree of non-compliance, whether intentional or not, is likely to occur.
- 30 I therefore concur with the submissions made by Western Water, that the degree of risk requires onsite management regimes that are too onerous in for an urban residential development. The LCA relies too heavily on strict compliance with a number of requirements which are unfair to expect of residents and ultimately I find too onerous and too complex to expect ongoing compliance with. The assumption made in the LCA that the identified risks can be addressed in this manner thus fall away.

### **The set backs from Sandy Creek**

- 31 Another aspect of the LCA that I do not accept is that the reduction in the set backs are acceptable or automatic because of the higher level of wastewater treatment. The purpose of the setbacks is to address the residual risk from the failure of the treatment unit and disposal field even when the system is properly designed, installed and maintained. The Code recognises such residual risk, and setbacks are recommended accordingly.
- 32 These setbacks can be varied depending on the consequences of such failures. In this respect, the Code sets out that:

Council may increase setback distances where it considers that the residual risk to public health and the environment are too high.



Council may also reduce setback distances where it considers that the residual risk to public health and the environment is negligible.

- 33 Clearly, the residual risk to the environment arising from a system failure at this site is not negligible due to the proximity of Sandy Creek.
- 34 Further, the Code is quite specific that the setbacks are to be applied to not only the field but also the treatment unit in order to account for any failure in the whole of the system. A perusal of the proposed lots indicates that there is limited available area other than in the building envelope for Lot 2 or areas to its south. This would place the unit well within the recommended 60m setback and even the 30m setback adopted in the LCA. The position of the new unit on Lot1, being around the same area as the existing septic tank, would also be well within 30m of the creek.
- 35 Taking into account the relevant matters set under the Code, I find that the setbacks should be maintained at the recommended 60m distance. There is no justification for their reduction. The location of the treatment units and disposal fields within these setbacks does not provide a satisfactory response to the residual risk of system failures.

#### **The sizing of the disposal fields**

- 36 The LCA sets out that a conservative approach has been adopted to address the potential level of risk and to size the disposal fields. I do not accept this is entirely the case. While the water balance assumes the 90<sup>th</sup> percentile rainfall and a nutrient balance has been completed, the hydraulic loading rates assume the use of full water reduction fixtures and appliances. A conservative approach to more properly address the level of risk would assessed the potential size of the disposal field based on the worst case scenario of standard water fixtures.
- 37 When this approach is adopted, as the Council has done, much larger fields are required.
- 38 Further the Council's submissions as to the rates of wastewater generation are correct. Domestic residence effluent generate rates have been increased under the revised Code of December 2008. Even if it was accepted that full water reductions could be achieved, the size of the disposal fields would need to be increased by 37% to 40% beyond that allowed for under the present proposal.
- 39 By either result, an increase in the disposal field sizes would encroach further into the available setbacks from Sandy Creek that I have found to be inadequate under the proposed arrangements.
- 40 I also note that the nutrient balance, which ultimately is adopted as the driver of the field size I the LCA, is based on vegetation management regime that is at odds with the actual site conditions and what is proposed by the Sellmans. As I have set out earlier, the LCA assumes that grass will be grown and 'harvested' regularly from the fields in order to promote

nitrogen uptake. The Sellmans submit that they will use some of the treated water in formal garden areas. Nutrient uptake will obviously vary from that which has been assumed.

- 41 Site photographs also indicate that the disposal fields will be located close to large, native canopy trees, where nutrient uptake will be less. The trees will also shade parts of the fields, reducing vegetation vigour and nutrient (and water) uptake.

### **The level of risk**

- 42 Having regard to the above, I find that the proposed subdivision, with the consequential introduction of two wastewater treatment systems onto the land, introduces a risk to the environment of Sandy Creek. I have not been satisfied that this level of risk can be addressed as assumed under the LCA. The recommended management program does not address the issue of residual risk arising from system failures. I have also found that the level of system management required introduces rather than prevents further risk of failure. Such risks are unacceptable while relying on reduced setbacks from Sandy Creek. In light of the identified risks, what is required as a minimum is an adherence to the recommended setback distances.
- 43 In part the Sellmans justify the subdivision by stating it will provide an opportunity to remove the existing septic tank system which they consider presents a greater risk. The material they have tendered would indicate that the performance and location of this septic tank is of concern. Nevertheless they are at liberty to address his present risk by installing a new system. Indeed by having a large lot, this affords an opportunity to address at least those issues about field size and maintaining the maximum possible setback from the creek.
- 44 The current level of risk however is not a justification to allow a proposal that I have found would introduce greater, not lesser risks.

### **THE RISK VERSUS THE NEED FOR SUBDIVISION**

- 45 The Sellmans set out at some length the process that they had been through in consulting with the Council and others before applying for the subdivision permit. They indicate that various indications were made about the subdivision being acceptable because the land was within a Residential 1 Zone.
- 46 It is not for me to adjudicate on what may have been said to them or what they understood to have been said. I must have regard to and give effect to the requirements of the planning scheme and other relevant matters as set out under the Planning and Environment Act.
- 47 Under the zoning, subdivision is not as of right. It is subject to a permit application process. The purpose of that process is amongst things to ensure that subdivision is part of orderly planning and that the land is

suitable for subdivision.<sup>9</sup> Various requirements need to be met before approval can be given.

- 48 As I have noted earlier, the Sellmans seek the subdivision in order to remain in the area but downsize the property. While this is an understandable aim, it does not give this application any particular special status against those matters I am required to consider.
- 49 The Sellmans also point to local policy objectives that promote infill development at Riddells Creek.<sup>10</sup> They contend that their proposal is in line with such policy.
- 50 There is no disputing that there is planning policy promoting future residential growth within the existing urban centres of the shire. This includes Riddells Creek. However such policy is to be balanced with other policy requirements I have referred to earlier about managing environmental and water quality outcomes. Further, I note that the local policy, while encouraging future growth within the existing urban areas makes a particular point of referring to this being in serviced areas. There is thus a recognition in policy that some development will be constrained.
- 51 It is quite clear from what I have set out earlier that this site has a number of inherent constraints. The lack of reticulated sewer is a fundamental constraint in view of the environmental sensitivity of the nearby Sandy Creek. The size of the proposed lots and limited capacity for on-site wastewater disposal is another. Any contemplation of more intensive residential use of this site would need to overcome these constraints. I have found that once stripped of various assumptions about risk management, the LCA indicates that there is no readily apparent opportunity to overcome those constraints and satisfactorily deal with the level of environmental risk. It is not for me to find alternative answers to this problem. However it would seem to me that these constraints to subdivision will not be overcome by relying on on-site wastewater disposal.

## **CONCLUSION**

- 52 It is for the above reasons that I find that the proposed subdivision is not to be supported. It is my conclusion that the Responsible Authority's decision to refuse to grant a permit be affirmed and direct that no permit issue.

Ian Potts  
**Member**

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<sup>9</sup> Clauses 65.01 and 65.02.

<sup>10</sup> See Clauses 21.07, 22.02-1 and 22.02-5.

