

Local Government and Planning – Recent Court of Appeal Decision

9 November 2009

MAROONDAH CITY COUNCIL v GC FLETCHER & MINISTER FOR PLANNING

[2009] VSCA 250

Court of Appeal (Warren CJ, Redlich JA & Osborn AJA – 23 October 2009)

Public open space requirement – percentage specified in cl 52.01 – operation of scheme of “separate but related” Subdivision/P&E Acts - Appeal allowed; remitted to tribunal for re-hearing.

[What follows is primarily intended for the purpose of bringing to the timely attention of the reader the fact of the delivery of this important judgment of the court and to identify the substance, and the effect, of the judgment. Accordingly, what follows will not descend to a detailed analysis of the reasons for decision of the members of the court and is not intended to be a substitute for a close consideration of the those reasons by the reader.]

The tribunal’s decision

The Court of Appeal handed down its judgment in the appeal from the decision of the tribunal¹, in which the tribunal (constituted by its then President) had determined, amongst other things, that:

- *... the effect of the opening words in clause 52.01 of the planning scheme is to fix the percentage (in this case at 5%, but which may be greater than 5%) of any contribution for open space, but to otherwise leave in place the provisions of the Subdivision Act as to the circumstances in which a contribution is required, the method of calculating the requirement and the trust in which funds or land the subject of a contribution must be used.*²

In so doing, the tribunal had canvassed the background and history of POS contributions policy and legislation and come to the view that its analysis supported the suggestion that:

- *... the circumstances in which a requirement for public open space may be specified in a planning scheme - ... – are the same circumstances in which a council may require a public open space contribution under section 18(1) of the Subdivision Act. That is, that a planning scheme requirement ought be interpreted as only applying to a subdivision which creates an additional separately disposal parcel of land. Of course, the first of the two subdivisions in this case does not do this.*³

Outcome on appeal

All three members of the court agreed that the appeal should be allowed for the reason that the tribunal had erred in law in interpreting clause 52.01 of the *Maroondah Planning Scheme* (in the schedule to which 5% was specified) as not applying to a subdivision which does not create additional disposal lots. The court was also unanimous in its view that the first stage of the two-stage subdivision contemplated in the application for planning permit was such that “...no council could have reached the view that it considered it unlikely the larger lot thereby created, would be further subdivided.”⁴

The significance of this long-awaited decision lies in the opinion of the majority (Warren CJ & Osborn AJA), who held that the provisions of s18(1A) of the *Subdivision Act* 1988 applied equally to a requirement for a public open space contribution whether made:

- pursuant to s18(1) of that Act; or
- by reason of the specification of a particular percentage in the schedule to clause 52.01 of a planning scheme.

¹ *Fletcher v Maroondah City Council* [2006] VCAT 2205 (Morris J.)

² *Fletcher* at [36]

³ *Fletcher* at [35]

⁴ *Maroondah City Council v GC Fletcher and Minister for Planning* [2009] VSCA 250 at [102] & [125]

In other words, even if a percentage is so specified, a council “... *may only make a public open space requirement if it considers that, as a result of the subdivision, there will be a need for more open space, having regard to ...*”⁵ the matters set out in s18(1A)(a)-(f).

In this regard, the majority of the court accepted the tribunal’s view that a POS requirement may only be lawfully imposed in circumstances in which the subdivision of land is likely to generate a need for more open space; albeit for reasons different to those identified by the tribunal.⁶

Clause 52.01 of planning schemes (a VPP clause) is, at least on the face of it, in mandatory terms in that it provides that:

- *A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule ...*[emphasis added]

It can, readily, be seen that an approach to interpreting (and applying) clause 52.01 other than in accordance with the view of Warren CJ and Osborn AJA, would produce two starkly different bases for the imposition of a POS requirement:

Percentage not specified in the scheme

- a council could only require a POS contribution in circumstances in which:
 - the proposed subdivision would create at least one additional separately disposal parcel of land; and
 - the council is satisfied, having had regard to the criteria in s18(1A), that “*as a result of the subdivision, there will be a need for more open space*”; and

Percentage specified in the scheme

- a council would, where none of the exemptions applied, be entitled to:
 - impose a POS requirement at the rate specified in the schedule by reason simply of the proposal to subdivide land; and
 - importantly, obtain a POS contribution at the rate specified in the schedule notwithstanding that, in a particular case, the subdivision would not result in the need for more open space.

The majority approached the interpretation of “separate but related” legislation upon the assumption that “... *Parliament intended its legislation to operate harmoniously or, in other words, rationally, efficiently and justly together*” in circumstances in which they were “... *ultimately concerned with the construction of a planning scheme made pursuant to the P&E Act, in the context of related legislation comprised by the Subdivision Act.*”⁷

Redlich JA, however, took the view that clause 52.01 should not be construed as subject to s18(1A) of the Subdivision Act.⁸ His Honour, having come to the view that a construction of s18 and clause 52.01 “...according to their ordinary and plain meaning...” would not give rise to any inconsistency or ambiguity between the two pieces of legislation, observed that:

- *... To pursue what some may consider to be the most rational, desirable and equitable regime, over-reaches the permissible boundaries of statutory construction.*⁹

Nevertheless, for present purposes, the majority judgment represents the law applicable in this State and, accordingly:

- (a) s18(1) of the Subdivision Act and, in particular, the trigger that there first be the creation of “*any additional separately disposable parcel of land*” applies only in circumstances in which a percentage is not specified in a scheme; but

⁵ s 18(1A) Subdivision Act

⁶ *Maroondah* at [93]

⁷ *Maroondah* at [85]

⁸ *Maroondah* at [153]

⁹ *Maroondah* at [207]

- (b) “... section 18(1A) and the subsequent provisions, unless expressed to relate only to a requirement pursuant to section 18(1), govern both the situations contemplated by section 18(1), namely the making of a requirement by a council acting as a responsible authority or referral authority under the P&E Act either in respect of a requirement for POS specified in the planning scheme or a requirement in the absence of such specification pursuant to the provisions of section 18(1).”¹⁰

The Court, quite properly, dealt only with the issues that were raised in the appeal before it; the majority declining to enter into any deliberations concerning whether the specification of a percentage under cl 52.01 would amount to a tax.

On one view, the fact that the court was required to resolve this issue at all might reasonably be attributed to poor drafting of cl 52.01 or, more likely, an inadvertent ‘loss in translation’; in the absence of the vigilance necessary to ensure the harmonious operation of separate but related legislation.

There will, no doubt, be other instances when the court will be called upon to untangle similar ‘losses in translation’.

While the court has determined this aspect of POS requirement (including, incidentally, adjudicating between disparate views in the tribunal); it will, unfortunately, be some time before the appropriate vehicle arrives in the court to facilitate the pronouncement of a binding opinion as to, for example, whether:

- a POS requirement must be imposed by way of planning permit condition; or
- in circumstances in which permission to, for example, construct multiple dwellings had already been granted, a POS requirement could still be made with respect to a subsequent application for permission to subdivide.

Disparate views in the tribunal on these issues will, in an appropriate case, require the adjudication of a judge of the Supreme Court or the Court of Appeal.

It is worth noting, however, that since the amendments made in 2004 to ss 62(5) and (6) of the P&E Act; a condition may be included in a permit under which, for example, multiple dwellings are to be constructed that land be set-aside and made available for POS purposes; provided only that a nexus between the occupation of those dwellings and the generation of the need for such additional POS is established. Such a condition could, arguably, be made independent of both clause 52.01 of a scheme and the Subdivision Act: see discussion in *Casey City Council v Carson Simpson Pty Ltd* (2007) 18 VR 19. [Compare, for example, the reasoning and outcome, in *Hand v Warrnambool City Council* [2004] VCAT 19; where the tribunal had to apply ss 62(5) and (6) in their unamended form.]

If you have any queries concerning this decision, please contact Ian Pridgeon or Ragu Appudurai.



Ian Pridgeon
Principal

Ph: +61 3 9609 1542
E: ipridgeon@rk.com.au



Ragu Appudurai
Special Counsel

Ph: +61 3 9609 1542
E: rappudurai@rk.com.au

¹⁰ *Maroondah* at [39]

DISCLAIMER

The information contained in this alert is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on this topic, please contact the author/s directly.