

see p 6

APPEALS NOS PB6/0713 AND PB6/0714

DATED 10-9-86

Russell D. Barton

SENIOR MEMBER R D BARTON

Mr G Garde of Counsel instructed by Leo Dimos and Associates, Solicitors, appeared on behalf of the Appellant Applicants.

Mr John Cicero, Solicitor of the firm of Maddock Lonie and Chisholm, appeared on behalf of the Responsible Authority.

Mr George Wright, Director of the Upper Yarra Valley and Dandenong Ranges Authority, appeared on behalf of the Authority.

Mr John Kaufman of Counsel instructed by Molomby and Molomby, Solicitors, appeared on behalf of the Respondent Objector, Ashdale Crest Pty Ltd.

RDB/MCM-49

North boundary 11.5 metres
 East boundary 47.69 metres
 West boundary to Dudley Road 48.89 metres
 South boundary to Jumping Creek Road 32.86 metres

PLANNING CONTROL AND ZONING

Shire of Lillydale Planning Scheme 1965 - Residential
 Development Zone No 10A.

The history of this matter can be briefly stated.

- a) On 29 May 1957 the Shire of Lillydale granted a permit to Mr A Davis, who was described on the relevant certificate of title as a storekeeper, in the following terms:

"Permission is hereby granted on land situate at and described as Lot 1 on Lodged Plan 32864 north-west corner of Warrandyte and Dudley Roads, Wonga Park, to be used for the purpose of erection of shop and dwelling to replace existing shop and dwelling.

Conditions

(1) Plans and specifications to be approved by the Council's Building Surveyor.

(2) Shop to be set back a minimum of 20 feet from Warrandyte Road as a provision for parking.

(3) Should default be made in the above conditions this permit is cancelled."

It is believed that none of the plans referred to in Condition 1 have survived to the present time.

- b) A building was erected on the site pursuant to the permit. At present it comprises a general store, including a post office and kitchen, the total floor area of which is approximately 157.5 square metres. The range of goods sold includes groceries, fruit and vegetables, dairy products and cold meats, cakes and confectionery, magazines, videos, stationery and hardware items. As well there is a post office and dry cleaning service. Originally a dwelling was part of the premises but the dividing wall was removed to extend the retail and display area. The existing kitchen is also used mainly as a storeroom due to an existing lack of storage facilities. Generally, the building is in a run down state with very basic inside furnishings and display areas while, outside, a discarded refrigerator cabinet and other rubbish litter the site. A post box and public telephone are located to the west of the general store's entrance and there is a single petrol bowser to the east. A sealed unmarked area between the general store and the site frontage to Jumping Creek Road provides a space for indiscriminate car parking.

The general store is set back approximately 13 to 4 metres from Jumping Creek Road, the set back area being used for indiscriminate car parking and petrol filling from the single bowser beside the shop entrance, 4 metres from Dudley Road, 9.0 to 6.0 metres from the eastern boundary and about 30 metres from the northern boundary.

- c) Having regard to the out of date building at present on the site it is proposed to rebuild, extend and upgrade the existing general store in accordance with the definition of 'shop' contained in the Shire of Lillydale Planning Scheme with an ancillary petrol filling area with two petrol bowsers and 11 on-site car parking spaces. The proposed development will have a total floor area of 253.2 square metres. There will be no attached dwelling. The development is located over the central portion of the site approximately 15 metres from the Jumping Creek Road frontage, 3 metres from the Dudley Road frontage, 17.5 metres from the rear or northern boundary and 1.85 metres from the eastern boundary. The premises comprise a shop with a retail and display area of 150 square metres, a kitchen of 21 square metres, a large storage and coolroom area of 75 square metres, two toilets of 7.2 square metres. The gross or total floor space area is 253.2 square metres. Seven car spaces will be located at the front of the site and four spaces at the rear. Two petrol bowsers will be provided in order to cater for diesel as well as petrol. The bowsers will be located in the south-eastern corner of the site away from the proposed entrance to the shop. A narrow one metre wide buffer is proposed along the site's frontage which will separate the 7 proposed car parking spaces on the road reservation. Existing vegetation along the site's western boundary with Dudley Road is to be retained with further landscaping undertaken, particularly on the south-west corner of the site. A 1.8 metre high brick fence is proposed along the site's northern boundary in order to improve the privacy of the adjacent dwelling.
- d) The Responsible Authority was in favour of granting the applications. However, the matter was one which needed to be referred to the Upper Yarra Valley and Dandenong Ranges Authority. That Authority determined that the application should be refused. Accordingly, it was refused on the following grounds.
1. That the proposals are contrary to the retail and commercial policies contained within the Regional Strategy Plan.
 2. The location of the site and the access thereto will create a traffic hazard.

On the hearing the Appellant Applicants were represented by Mr Garde of Counsel, the Responsible Authority was represented by Mr J Cicero, Solicitor, the Upper Yarra Valley and Dandenong Ranges Authority was represented by its Director Mr George Wright and the Respondent Objector

Ashdale Crest Pty Ltd was represented by Mr John Kaufman of Counsel. Written submissions were presented to the Board on behalf of each of the parties. It is unnecessary to refer to these in detail. They will remain on the file as part of the permanent record of these proceedings.

At this stage various matters should be stated.

1. That while in the case of Appeal No P86/0713 the Applicant was Deeside Investments Pty Ltd and in the case of Appeal No P86/0714 the Applicant was Jack Nikolaou; it appears that Mr Nikolaou is a principal director of Deeside Investments Pty Ltd. Both appeals relate to precisely the same site.
2. That on the hearing the Responsible Authority supported the grant of the permits sought.
3. That the Objector Ashdale Crest Pty Ltd is at present in the course of constructing a shopping complex in Wonga Park.
4. That when the hearing had progressed for one day and the cases of the Responsible Authority, the Regional Authority and Ashdale Crest Pty Ltd had been concluded but before the commencement of the case of the Appellant Applicant I was asked by those representing the four parties if I would state my views. I accordingly did so orally. I now state them in writing.

It seems to me that the fundamental matter about these appeals is that the use is not and cannot be in question. It exists pursuant to the 1957 permit. Accordingly, I think the way in which I should approach the matter is that laid down by His Honour Mr Justice Ormiston in Muir v City of Prahran (12 March 1986) and by this Board in the ensuing proceedings Carter v City of Prahran (Appeal No P85/1505 16 July 1986 Messrs Barton, Buckley and D B Logan). The facts in that matter may be summarised as follows.

On 9 January 1962 the Melbourne and Metropolitan Board of Works granted a permit pursuant to the Melbourne and Metropolitan Board of Works Interim Development Order for the use of premises at 7 Gordon Street, Toorak, for the purpose of a private hospital subject to certain conditions. From 1962 until 1983 the hospital functioned as a minor medical and surgical hospital, apparently on a rather low-key basis. In 1983 it ceased to operate as a hospital due to its failure to meet various requirements of the Health Commission. The buildings were thereafter empty. In 1985 it was proposed to do certain alterations, renovations, etc in order to enable the buildings to be used for the purpose of a Maternity Hospital, which was a Column 4 use in the Residential 'C' Zone. In the course of his decision Mr Justice Ormiston said:

"In my opinion, the distinction between use and development is well established and in the present case the Applicants had a permit to use the site as a private hospital. They therefore did not require any further permission to use it as a private hospital because the definition of private hospital does not exclude a maternity hospital. That is obviously the common sense of the situation apart from the interpretation and the definition in the Melbourne and Metropolitan Planning Ordinance."

His Honour made the Order absolute and remitted the matter to the Planning Appeals Board with a direction that it be heard before a different division.

In its subsequent decision at page 16 the Board said: "In considering development we should take as established those considerations which are common to use and development and which must have been necessarily determined in relation to the use permit. It would be a ridiculous situation if, for example, the Responsible Authority was to grant a permit for use of vacant land as a private hospital and then go on in relation to considering a permit for development to say that the land was not suitable for development as a private hospital by reason of the very considerations which should have already been considered in relation to the use application. This, of course, is an extreme example."

I think that the above represents the basis on which I must approach the present appeals. In other words I must accept that the question of use of the site for the purposes of a shop has already been determined and that the only matters left for me to determine are whether the proposed development should take place. In considering this matter I must exclude all considerations necessarily determined in relation to the grant of the use permit. So considered, a great deal of the evidence put before me was irrelevant in that it completely overlooked the fact that the land was subject to a permit for the use of shop.

In relation to the Shire of Lillydale Planning Scheme I note that under this Scheme all use and development of land within a Residential Development Zone must be in accordance with an Overall Development Plan adopted by the Responsible Authority after consultation with the Melbourne and Metropolitan Board of Works. The Overall Development Plan adopted by the Responsible Authority did not initially show the appeal site as a site for a shop or other commercial development of a similar nature. However, the Responsible Authority at its meeting of 11 March 1986 resolved to adopt an amended Overall Development Plan showing the appeal site as the site for a shop. While that decision was much criticised at the hearing it seems to me of little importance having regard to the rights attached to the land by virtue of the 1957 permit.

Having examined the Shire of Lillydale Planning Scheme I am of the opinion that the Scheme presents no obstacle to the grant of a permit in the present case. I agree with Mr Cicero when he said on behalf of the Shire of Lillydale, "In conclusion, the Council contends that the opportunity presents itself by the application to control the use and development by appropriate conditions. The present development is unsightly and inappropriately located. A new development is proposed which will blend in aesthetically with the surrounding development and which will be set back a greater distance so as to create a better traffic situation. Finally, the Board must recognise the existing use rights that attach to the property and be mindful of what in the Council's opinion the Applicant would be able to do without the necessity of the grant of a permit from the Council and without indeed requiring the consent of the Regional Authority."

On behalf of the Upper Yarra Valley and Dandenong Ranges Authority Mr Wright submitted that the grounds of refusal should be upheld. He pointed to action requirement A2.78 of the Regional Strategy Plan which is as follows:

(b) The Responsible Authority shall make the development of a retail and/or commercial facility subject to the grant of a permit which shall only be granted when the applicant has demonstrated to the satisfaction of the Responsible Authority and the Authority that:

(i) there is an economic need for further retail and/or commercial development and

(ii) the proposed development is consistent with any overall Plan of Development which may exist for the particular commercial centre or

(iii) in the absence of an overall Plan of Development the proposed use and development does not prejudice the future planning for the particular commercial centre and

(iv) adequate provision has been made for landscaping, car parking, access and maintenance of the local amenity.

There is no doubt that the present proposal falls within the action requirement set out above. It is undoubtedly the development of a retail and/or commercial facility. However, it does so only marginally. It seems apparent that this requirement is directed to what would ordinarily be understood as a commercial centre consisting of more than one shop. According to Mr Lawrie Wilson the total floor area of the present establishment is approximately 157.5 square metres. The total floor area of the proposed development which will include retail and display area, kitchen, storage and coolroom area and two toilets will be 253.2 square metres. The difference between the two developments, the present and that proposed, therefore seems to be fairly inconsequential. It could hardly be described as "further retail....development." It appears that due to the singularity and small-scale of the proposal

there was no requirement to produce an overall Plan of Development. In regard to (iv) there seems to be no question as to any detriment to local amenity by reason of the proposed development. In summary, action requirement A2.78 seems to have very little application to the proposed rebuilding of the existing shop.

In view of what has been said above I have come to the conclusion that the objectives and requirements of the Upper Yarra Valley and Dandenong Ranges Authority Regional Strategy Plan will not, except in the most marginal way, be infringed by the present proposed development. While I must give great weight to that Plan nevertheless I have concluded that it presents no real obstacle to the present proposal.

Before parting with this matter I should say that if the question of use had been in issue I might have come to a very different conclusion.

Appeal No P86/0714 was, it seems to me, instituted out of an abundance of caution. It is unnecessary and will be disallowed.

Appeal No P86/0713 will be allowed. It is directed that a permit issue for the development of Lot 1 LP 80419 Jumping Creek Road, Wonga Park, with buildings and works as specified generally in the plans lodged with the application (which shall be the endorsed plans) and subject to the following conditions:

1. The layout of the site and the size of the proposed buildings and works as shown on the endorsed plan shall not be altered or modified nor shall any tree be removed other than those authorised by this permit, without the written consent of the Responsible Authority.
2. The development hereby permitted shall be provided with the following services:
 - (a) SEC electricity supply
 - (b) Drainage to the satisfaction of the Responsible Authority
 - (c) Reticulated water supply (MMBW)
 - (d) A reticulated sewerage service (MMBW) or if not available a sewage treatment system to the satisfaction of the Responsible authority.
3. The parking areas and vehicular access ways shown on the endorsed plan shall be constructed prior to the commencement of the use of the land for the purpose hereby permitted.
4. The parking areas and vehicular access ways shown on the endorsed plan shall be constructed, drained, delineated, and maintained at all times to the

satisfaction of the Responsible Authority.

5. The parking areas and vehicular access ways shown on the endorsed plan shall be kept available for their intended use at all times during business hours and shall not be obstructed or otherwise rendered inaccessible.
6. No advertising sign other than as shown on the endorsed plan shall be erected, or affixed to the exterior of any building without the written consent of the Responsible Authority.
7. Any landscape area shown on the endorsed plans shall be planted with trees and/or shrubs and retained where necessary to prevent erosion of the soil. The landscaping works shall be carried out within three months of the commencement of the use of the land hereby permitted, and thereafter maintained to the satisfaction of the Responsible Authority.
8. No external lighting other than that shown on the endorsed plans shall be provided to the site without the written consent of the Responsible Authority.
9. This permit for the use or development of land shall expire if the permitted development is not commenced within two years, or completed within three years of the date hereof.
10. No part of the development hereby permitted shall be used for any purpose other than a shop without the written consent of the Responsible Authority.
11. The internal retail floor area available for display and sales purposes shall not exceed 150 square metres.
12. This permit shall have no force or effect until the owner executes an agreement with the Responsible Authority pursuant to Section 52A of the Town and Country Planning Act 1961 under which it agrees to consent to an application by the Responsible Authority to revoke Permit No E198 dated the 28th day of May 1957 and not to claim any compensation from the Responsible Authority by reason of such a revocation.