

Agriculture Victoria Planning and Advisory Service

VCAT decisions that impact Rural zoned land

January 2024 edition: VCAT cases from October to December 2023

This update includes VCAT cases from October to December 2023. It provides council officers a summary of recent decisions that impact rural zoned land. The Agriculture Victoria Planning and Advisory Service does not provide comment as to the merits of each case or the reasons provided by the members.

New – Farm Management Plans eGuide

Agriculture Victoria has launched a new eGuide titled ***Farm Management Plans to support a planning application for the primary use of the land for Agriculture, an eGuide for council planners, consultants and applicants.***

The overall aim of the eGuide is to help council planners, applicants and their consultants to develop a common understanding of the purpose and content requirements for a Farm Management Plan that accompanies a planning permit application for the primary use of the land for Agriculture.

It will assist in:

- Developing materials with a clear purpose
- Ensuring appropriate information is included
- Assessing planning applications
- Reducing the need for requests for further information that can delay an outcome

Find it here: <https://agriculture.vic.gov.au/farm-management/planning-and-farm-development/eguides-planning-and-farm-development>

Dwelling – Use of land

Citation	Zones, Overlays	Outcome	Summary
<u>Mazeika v Casey CC [2023] VCAT 1108</u> <i>Teresa Bisucci, Deputy President</i>	GWZ BMO PAO	Application struck out	Council issued a NOD to Grant a planning permit for the development of a replacement dwelling and outbuilding. The application is struck out because it is lacking in substance.
<u>Uren v Latrobe CC [2023] VCAT 2023</u> <i>Katherine Paterson, Member</i>	FZ LSIO BMO	Council decision set aside, permit granted	Retrospective approval for the construction of a dwelling, a horse arena and sheds on 31.6 hectares. 26 I am also satisfied based on the evidence before me that a dwelling is reasonably required to conduct the agricultural uses on this land, particularly the horse breeding and calf rearing which I accept require 24 hour supervision for animal welfare reasons. 27 Importantly the dwelling has been sited on the land designated with Class 4, ensuring that the Class 3 land is entirely used for agricultural purposes. The dwelling has been located within a clearly defined

			envelope and is separate from the remainder of the property. I am satisfied that the dwelling is secondary to the primary use of the property for agriculture. I have required the implementation of the Farm Management Plan as a condition of permit.
<u>Binney v Macedon Ranges SC [2023] VCAT 1189</u> <i>Jeanette G Rickards, Senior Member</i>	FZ	Council decision upheld, no permit granted	2 The proposal is for the use and development of the land for a dwelling in association with an agricultural use being horse husbandry and cattle/sheep grazing. 25 I am not satisfied that a dwelling on the subject land is necessary for the proposed agricultural activity of Horse husbandry. Nor am I satisfied of the suitability of the proposed agricultural activity of Horse husbandry on the land given the steep terrain referred to above.
<u>McCormick v Golden Plains SC [2023] VCAT 1295</u> <i>Alison Glynn, Member</i>	FZ BMO	Council decision upheld, no permit granted	15 The question is whether this benefit to the owners in managing what the farm management plan acknowledges is a small amount of livestock (being 30 breeding ewes and their offspring) outweighs the potential disbenefits of establishing a house on a small rural lot in this location in the FZ. 16 The capacity to use the land for agriculture is limited by the land size and the dwelling area only takes away further land from this potential. The risk is that this leads to the dwelling use becoming the primary purpose of the land (as a rural residential type use), rather than it being an adjunct to the agricultural use..... 18 In granting a permit, a responsible authority must be confident that conditions that could apply to a permit can and will be implemented. I find the proposition of a condition to enter an agreement to farm the land in a particular way to be problematic. For example, the onus would remain on the council to enforce that the ongoing operation of a use that does not require a planning permit. It is not clear how the council would be expected to monitor the ongoing use of the land to determine that the house remained part of the specific farming enterprise, rather than transforming into a rural lifestyle lot. 36 I find there are no extenuating circumstances, such as could be identified in <i>Parkin</i> or other cases referred to, that can be applied to this site. I am therefore not satisfied that on balance of the possible benefits of having a dwelling on this land outweigh the policy directions of clause 14.01-1S to avoid such circumstances. Further, I find the risk of the permanent loss of agricultural land through the use and development of a dwelling on such a lot is not balanced against the convenience of having a dwelling associated with the scale of enterprise proposed.
<u>Phinn v Loddon SC [2023] VCAT 1301</u> <i>Christopher Harty, Presiding Member</i> <i>Phil West, Member</i>	FZ SMO	Council decision set aside, permit granted	Use and development of a single storey dwelling. 3 lots consolidated to single lot totalling 83.29 hectares (100 hectare minimum for Section 1 dwelling). 4 adjoining and nearby stone quarries ... objectors potential impact that the proposed dwelling may have on the ongoing operation and expansion of the existing quarries that are in proximity to the site ... 21 We find the proposed dwelling is located at the margins of the separation distance of 500 metres from

			<p>land used for extractive industry and we do not consider it will be significantly impacted by quarrying activities nor will the proposed dwelling represent a significant restriction on future quarrying activities in the area.</p> <p>50 There was much debate concerning the FMP and the viability of how the site would be farmed with stock numbers and predicted income streams and farm viability. Farm viability is not a key consideration under the planning scheme. We are satisfied the proposal will assist with farm management, acknowledging the site is already being farmed.</p> <p>51 We note that the three titles have now been consolidated into one titled parcel of land. We consider this a positive outcome in that it eliminates existing separate titles that could be used for a re-arrangement of lots. It also supports policy to encourage consolidation of existing isolated small lots and to maintain agricultural land in large lots to support the agricultural industry.</p> <p>61 We note neither code of practice (<i>Code for Managing heifers during and after calving</i>, <i>Code for Accepted Farming Practice for the Welfare of Cattle</i>) is referenced in the planning scheme and neither suggest that a dwelling is required to provide the appropriate level of welfare to cattle.</p>
<p><u>Buncle v Yarra Ranges SC [2023] VCAT 1344</u> <i>Michael Nelthorpe, Member</i></p>	<p>GWZ2 SLO6 ESO1 EMO1 BMO</p>	<p>Council decision varied, permit granted</p>	<p>Use and development of a dwelling, garage, shed and swimming pool (6.4ha site).</p> <p>6 The site is one of six similarly sized lots created by a 1991 subdivision. Some of these lots are used and developed for dwellings and small-scale agriculture. The remainder are vacant.</p> <p>15 I find that the use of the site for a dwelling and a small-scale agricultural activity is acceptable. I acknowledge the objectors' submission on the nexus between these uses but note that the decision guidelines of the Green Wedge Zone do not require this nexus. An earlier iteration of these decision guidelines did so, but it was removed from the Green Wedge Zone some time ago.</p> <p>16 I agree with the permit applicant's submission that the site is too small to be regarded as 'productive agricultural' land under the definition for productive agricultural areas in clause 2.03-1. ...</p> <p>19 I also agree with the permit applicant's submission that this pattern of development is characteristic of Macclesfield. This is apparent by the lot sizes in the area and the use of these lots.</p>
<p><u>Zed's Projects Pty Ltd v Murrindindi SC [2023] VCAT 1422</u> <i>Sarah McDonald, Member</i></p>	<p>FZ FO</p>	<p>Council decision upheld, permit not amended</p>	<p>Amend the existing permit that allows 'Use and development of the land for the purpose of a dwelling'. The amendment proposes to change the siting and design of the dwelling, along with other associated changes.</p> <p>48 It is apparent that this proposal was poorly conceived with the plans not having proper regard to the detailed contours of the land and how the proposed fill was to be retained on such steeply sloping land. It is not the role of the Tribunal to rectify issues that are the result of poorly prepared or ill-conceived proposals.</p>

		55 As I commented at the hearing, my decision in this proceeding cannot 'undo' the permit for the use of the land for the dwelling. What is relevant is whether the proposal impacts the agricultural use of the land in accordance with the Farm Management Plan that forms part of the permit.
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Subdivisions

Citation	Zones, Overlays	Outcome	Summary
<u>Niven v Greater Bendigo CC [2023] VCAT 1133</u> <i>Ian Potts, Senior Member</i>	FZ	Council decision upheld, no permit granted	Subdivision of a 177.75 hectare lot into two lots. Lot 1, 173 ha grazing and cropping, Lot 2, 4.75 ha with two dwellings and various outbuildings, (shedding), yards, shearing shed and silos. 28 On balance, this proposed excision of the dwelling to create a small lot in this district is one that is counter to many of the purposes and objectives of planning and of limited benefit in advancing the agricultural outcomes sought under the planning scheme.
<u>Carlin v East Gippsland SC [2023] VCAT 1199</u> <i>Karina Shpigel, Member</i>	RLZ LDRZ, ESO1 VPO3 DDO11 EMO LSIO BMO	Council decision set aside, no permit granted	5 This is a large and complex site that is within two zones and affected by 7 overlays, including environmental and landscape overlays. I consider that the respondents have failed to satisfactorily address the environmental context of the land or the purposes and objectives of the vegetation and landscape overlays that apply to the subject land. I find that the application is not consistent with orderly and proper planning for the reasons that follow.
<u>Burns v Swan Hill RCC [2023] VCAT 1184</u> <i>Christopher Harty, Member</i>	FZ ESO1 LSIO SCO1	Council decision upheld, permit not amended	2 The amendment sought relates to part (a) of Condition 4. pursuant to section 173.... 27 Amendment of Condition 4(a) would allow for an application to be made for a re-subdivision and boundary realignment that could reduce one of the lots to an area less than the minimum lot size under the FZ schedule.... 38 I find the condition reasonable and regard it as a safeguard to limit lots that will contain a dwelling from being created below the minimum lot size under the FZ as it relates to irrigated areas and the minimum 20 hectares lot size for these areas.
<u>Roccisano v Mildura RCC [2023] VCAT 1201</u> <i>Shiran Wickramasinghe, Member</i>	FZ SCO1 DCPO2	Council decision upheld, no permit granted	58 On balance, I find the proposed boundary re-alignment that results in the creation of four new lots and use and development of two of the new lots to each contain one dwelling to be unacceptable. The insertion of two dwelling lots, with each having an area of 4000 m ² on the south-east side of Sandilong Avenue would unacceptably fragment the FZ and is inconsistent with relevant zone purposes and policy.

<p><u>Davoli v Swan Hill RCC [2023] VCAT 1257</u> <i>Bill Sibonis, Senior Member</i></p>	FZ	Council decision upheld, no permit granted	<p>Two lot subdivision (dwelling excision). Total area 10.42 hectares. Land is used for Horticulture (vineyard).</p> <p>28 ... I agree with the Council that the proposal is designed to meet personal and financial circumstances of the applicants and is not consistent with policy that discourages small-lot subdivisions which are proposed for such reasons.</p> <p>29 The establishment of rural lifestyle lots in farming areas is discouraged by policy. These can give rise to land use conflict associated with noise, dust and spray drift and, while there are numerous examples of these in the locality, this is not justification for further such outcomes.</p> <p>33 An additional excised lot containing a dwelling will incrementally add to the development of a cluster of these lots and contribute to further introduction of non-agricultural uses into this area. This is an outcome which can further undermine agricultural activities, and introduce, entrench or exacerbate land use conflict. It is discouraged by policy.</p>
<p><u>Carson v Wangaratta Rural CC [2023] VCAT 1326</u> <i>Rachel Naylor, Senior Member</i></p>	FZ	Council decision set aside, permit granted	<p>To re-subdivide the existing two lots. Proposed Lot 1 will be a smaller lot of 3,545sqm containing the nearly completed dwelling. Proposed Lot 2 will have an area of 77.41 hectares and contain the agricultural land...</p> <p>19 Hence, the potential for a rural lifestyle purpose already exists on this site. The difference between the existing condition and the proposal is the lot size – that proposed Lot 1 is 3,545 square metres rather than the existing lot size of 24.51 hectares.</p>
<p><u>Murphy v Nillumbik SC [2023] VCAT 1337</u> <i>Alison Glynn, Member</i></p>	RCZ3 BMO	Council decision set aside, permit granted	<p>Re-subdivision of three lots into three lots with common property (combined area of 3.07 hectares).</p> <p>13 The council submits that existing Lot B cannot practically be used for a dwelling and therefore the subdivision will result in lots that could be used for 3 dwellings when currently the land can only support 2 dwellings</p> <p>28 ... I am satisfied that, both legally and factually, that the number of dwellings the land could be used for does not increase with the proposed re-subdivision....</p> <p>50 I am satisfied that the realigned lots in the subdivision proposal is an acceptable response to the RCZ objectives and rural landscape objectives for the area. The lots can be sufficiently serviced and managed, subject to an amended land management plan being submitted and approved through relevant permit conditions.</p>
<p><u>Hanson Construction Materials Pty Ltd v Greater Bendigo CC (Corrected) (Red Dot) [2023] VCAT 1341</u> <i>Geoffrey Code, Senior Member</i></p>	RLZ	Council decision set aside, matter remitted	<p>Subdivision of land into 3 lots [and] use and development of 3 dwellings in the Rural Living Zone'</p> <p>ORDER</p> <p>1 Cultural heritage management plan required</p> <p>2 Decision set aside and matter remitted</p>

<p><u>Phillips v Wodonga CC</u> [2023] VCAT 1014 <i>Nick Wimbush, Member</i></p>	<p>FZ SLO1 BMO</p>	<p>Council decision upheld, no permit granted</p>	<p>A three lot subdivision to create lots over 40 hectares in the Farming Zone</p> <p>24 Because the subdivision meets the minimum lot size of 40 hectares does not mean that a permit must be granted. Council took me to the decision of the Estate of JE Walker v Wangaratta RCC ('JE Walker') in support of this proposition. In JE Walker the Tribunal found that the minimum lot size is a condition precedent for making the application; it is not a matter that goes to the merits of whether a permit should be granted. I agree.</p> <p>32 A case has not been made out as to why the subdivision should be supported when viewed against the considerable policy in the planning scheme to avoid the fragmentation of agricultural land and the proliferation of dwellings in farming areas. There is no clear evidence before me that the subdivision will result in more productive agricultural outcomes or help to sustain the current production.</p> <p>33 I also note the applicant's view that the over 40 hectare lot sizes proposed do not constitute 'small lots' in the sense that might ordinarily be considered in, for example, a rural residential subdivision. Forty hectares is a significant amount of land and the applicant submitted that they should not be pejoratively thought of as 'lifestyle' lots. I consider there is a risk that the lots may be taken out of the current production and used for 'lifestyle' purposes, particularly given their proximity to Wodonga.</p> <p>68 ... for the proposed Lot 2, given the long, in parts steep, driveway, with a significant distance through woodland, I do not consider it is consistent with bushfire policy to introduce a new dwelling (as a result of subdivision) into a high fire risk environment such as this....</p>
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Agricultural Use

Citation	Zones, Overlays	Outcome	Summary
None this quarter			

Other Use

Citation	Zones, Overlays	Outcome	Summary
<p><u>Frawley v Ballarat CC</u> [2023] VCAT 1126 <i>Rachel Naylor, Senior Member</i></p>	<p>FZ DDO2 PAO1</p>	<p>Council decision set aside, no permit granted</p>	<p>Residential Hotel (111 rooms), bar, restaurant, function centre, spa, gin distillery</p>
<p><u>Crafter v Cardinia SC</u> [2023] VCAT 1163 <i>Rachel Naylor, Senior Member</i></p>	<p>GWZ ESO1 BMO</p>	<p>Council decision varied, permit granted</p>	<p>Development of a telecommunications facility</p>

<u>Muley Investments Pty Ltd v Cardinia SC [2023] VCAT 1268</u> <i>Peter Gaschk, Member</i>	GWZ LSIO	Council decision upheld, no permit granted	To develop and use the land for a Contractor's Depot (retrospective application).
<u>Parry v Moorabool SC [2023] VCAT 1261</u> <i>Sarah McDonald, Member</i>	FZ BMO	Council decision varied, permit granted	Amendment to the existing permit that allows the 'development of a camping ground and caravan park associated with a place of assembly'. The amendment proposes the development of additional camping and caravan sites, communal kitchen and amenities buildings, and internal roads.
<u>Concrete Equipment Australia (Trading) Pty Ltd v Yarriambiack SC [2023] VCAT 1318</u> <i>Mary-Anne Taranto, Member</i>	FZ ESO2	Council decision upheld, no permit variation granted	Industry: Amendment to hours of operation in condition 4 of permit TP 49-22. The permit granted relates to infrastructure associated with a new concrete batching plant that is intended to replace existing plant.
<u>Viva Lifestyle Villages Pty Ltd v Macedon Ranges SC [2023] VCAT 1377</u> <i>Sarah McDonald, Member</i> <i>Nick Wimbush, Member</i>	RLZ2 ESO4	Council decision upheld, no permit granted	To use and develop the land for a residential village in a Rural Living Zone (Schedule 2) and Environmental Significance Overlay (Schedule 4), and to remove native vegetation.

Blast from the past

Our *blast from the past* highlights older decisions that we believe have importance or well-articulated discussion points.

The following cases have been chosen because they were referenced and quoted in the recent decision *Binney v Macedon Ranges SC [2023] VCAT 1189* and relate to applications for the Use and development of a dwelling in association with Horse husbandry.

Citation	Zones, Overlays	Outcome	Summary
<u>Bourke-Finn v Ballarat CC & Anor [2013] VCAT 908</u> <i>Ian Potts, Member</i>	FZ ESO2 EMO	Council decision upheld, no permit granted	<p>8 The permit application is for a dwelling to be constructed on a lot of approximately 2.5ha, in a Farming Zone. ... proposes to carry out thoroughbred horse breeding, training and stabling on the property. It is submitted that an on-site presence is necessary for such activity.</p> <p>19 The urban edge of Ballarat is some 2km to the south and a rural living area lies some 1.7km to the east...</p> <p>37 The only detail about the proposed thoroughbred activity provided in the application is that up to a maximum of six mature age horses would be kept on the land and that training would include use of the Dowling Forest racecourse. The application is short on the specifics such as the level of breeding, training or other thoroughbred activities or programs, workforce needs or inputs, day to day operations and the like.</p> <p>39 Based on the information before me, the proposed nature of the thoroughbred horse keeping activity has the hallmarks of horse keeping activity at a personnel interest or hobby level rather than a full time</p>

			<p>thoroughbred enterprise. Thus while the proposal may have a similar character to that of an agricultural enterprise, I am not persuaded that what is proposed represents the level of agricultural enterprise intended to be supported by the Farming Zone and rural land use policy. It has the character of a lifestyle 'horse' property rather than a bona-fide thoroughbred husbandry enterprise.</p> <p>41 While tending to thoroughbred horses may require a high degree of animal management, the scale of the activity leads me to conclude that it would not be a full time requirement that justifies full time residency on the site.</p> <p>44 I find this (land) management plan, at best, to be a superficial assessment of the land's agricultural production capacity. While various statements are made about the ability to lift productive capacity through active land management and soil/pasture improvements, none of these activities establishes a reasonable need to have a dwelling on the lot. Pasture and soil improvement activities do not need a day to day presence on the site.</p> <p>52 The small size of the property should not raise expectations that the land is suitable only for a rural lifestyle dwelling that underlies the case that has been put to me about this property.</p>
<p><u>Ward v Macedon Ranges SC [2013] VCAT 1758</u> <i>Ian Potts, Member</i></p>	<p>FZ ESO4</p>	<p>Council decision upheld, no permit granted</p>	<p>20 A number of questions remain as to why the issues about stock and land security cannot be addressed by other means or what activities the resident would be engaged in that requires a full time presence.</p> <p>22 I accept that having a regular presence of a stock and property manager would assist in some of the day to day activities of the horse raising and training operations. However, as I will now explain, the need for a regular presence does not persuade me to set aside the balance of relevant planning considerations that weigh against a dwelling on this land.</p> <p>25 Another dwelling on this smaller lot would incrementally be further fragmentation of this character.</p> <p>26 Allowing a dwelling on this land would mean future consolidation into larger land holdings would be unlikely. The effect of the dwelling would be to de-couple this land from its agricultural value and hence the purposes of the zone.</p> <p>27 I have also considered the ongoing effect of this proposed dwelling if it were not under the present landowners control. I am not persuaded ... that future use of this land by others would retain an agricultural focus. Given the land's proximity to Kyneton the very real risk is that once a dwelling is located on this land, it could equally be used for rural residential living. There are clear objectives to avoid this outcome under the zone and relevant policies.</p>