

Agriculture Victoria Planning and Advisory Service

VCAT decisions that impact Rural Zoned land

Edition 1: July 2023

This update includes VCAT cases from January to June 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 and the reasons provided by the members. The Advisory Service plans to circulate these updates quarterly.

A closer look... Rural workers accommodation – ancillary use

Redland Fruit Pty Ltd v Swan Hill Rural CC [2023] VCAT 601

Teresa Bisucci, Deputy President

1 Redland Fruit Pty Ltd (applicant) seeks a declaration under section 149B of the Planning and Environment Act 1987 (Vic) (PE Act) that:

- The proposed workers accommodation upon land situated at Lot 2 PS 421611W Long Lake Road Lake Boga to be contained in a complex of 6 detached buildings to be used only by workers on the subject land for the duration of the harvest at no cost to the workers, is ancillary to the main use of the subject land for horticultural activities.

37 I accept council's submission that the proposed use falls within the definition of rural worker accommodation as defined at clause 73.03 of the scheme. However, that does not mean ipso facto a permit is required under the scheme.

43 Further, the Minister's Reasons for intervention include:

The sustained and resilient operation of agriculture in Victoria relies on the availability of a continued workforce and their proximity to farm operations. The Victoria Planning Provisions (VPP) do not currently distinguish the use of land for rural workers accommodation from other forms of accommodation. This had led to complexity and confusion about when this form of accommodation is ancillary to the primary use of land for agriculture and when it is a separate land use in its own right.*

(*Tribunal Emphasis)

45 Having regard to the Explanatory Memorandum and the Minister's Reasons, it is clear there was a need to recognise accommodation for rural or seasonal workers because of the importance of the agricultural sector to the overall economy and the difficulty in securing the necessary workforce. Further, certain forms of accommodation that were permitted in the FZ prior to the gazettal of VC202 were not appropriate forms of accommodation for rural workers. Thus, the need to recognise and introduce a land use term that specifically recognises this type of land use. In addition, VC202 sets out parameters with regard to when such a land use requires a permit, and when it does not require a permit under the FZ.

46 The Explanatory Memorandum does not refer to the term 'ancillary' at all. The Minister's Reasons refer to 'ancillary' once as extracted above. This reference simply highlights the confusion between accommodation as a use that is ancillary to a primary agricultural use and when it is a separate use altogether. The reference does not remove the ability to rely upon an ancillary use.

51 Moreover, the fact the scheme now defines the use, further supports that accommodation for rural workers can be a separate use of land. However, that does not mean that accommodation for rural workers cannot be ancillary to a dominant use of land.

53 A similar conclusion can be made in this case, the scheme provides for use of land for rural worker accommodation, that use can be regularised by a permit, if conditions in the FZ are not met. However, that does

not mean that the use of land for accommodation of workers cannot be ancillary to the use of land for agriculture or in this case horticulture. Whether a land use is ancillary to another dominant use is a matter of fact and degree to be decided on the particular circumstances of each case.

64 Having regard to the above, I find the workers accommodation is a necessary adjunct to the dominant use of the land for horticulture and is thus, ancillary to that use.

Dwelling – Use of land

Citation	Zones, Overlays	Outcome	Summary
<p><u>Moore v Greater Bendigo CC [2023] VCAT 418</u> <i>J A Bennett</i> <i>Senior Member</i></p>	<p>FZ BMO ESO1</p>	<p>Council decision upheld No permit granted</p>	<p>Use and development of the land for a dwelling, outbuildings and pet therapy centre.</p> <p>45 My concern is that there is no guarantee that the pet therapy business, even with the best will in the world, will continue once a dwelling is constructed.....</p> <p>49 The MPS and PPF set clear directions about development of dwellings on small rural lots within the Farming Zone. Whilst I acknowledge the wider benefits to the community of establishing a pet therapy business, I am not persuaded that the use of the land for a dwelling is acceptable given the many policies discouraging additional dwellings on small rural lots.</p>
<p><u>Nicholls v Bass Coast SC [2023] VCAT 581</u> <i>Rachel Naylor</i> <i>Senior Member</i></p>	<p>RCZ LSIO ESO1 BMO</p>	<p>Council decision upheld Permit expired</p>	<p>The permit was issued on 27 August 2014 for the use and development of the land for the purpose of a dwelling Application.....to review the Council's decision to refuse to extend the permit for the fourth time.</p>
<p><u>Proctor v Mornington Peninsula SC [2023] VCAT 251</u> <i>Tracy Watson</i> <i>Member</i></p>	<p>GWZ ESO4 ESO28 VPO2</p>	<p>Council decision varied Permit amended</p>	<p>Dwelling (in association with Horse Husbandry) in proximity to an existing Broiler farm (but outside the required buffer distance). Owner of Broiler farm appealed to VCAT on the grounds that that the subject site would end up being a rural residential property and not remain as agricultural land.</p> <p>21 In summary, I find that the proposed agricultural enterprise is a genuine one and can be sustainable and viable over the longer term. This therefore tips the scales in favour of granting a permit for the new dwelling.....</p>
<p><u>Robinson v Baw Baw SC [2023] VCAT 564</u> <i>Shiran Wickramasinghe</i> <i>Member</i></p>	<p>FZ ESO4 DCPO1 EMO</p>	<p>Council decision upheld No permit granted</p>	<p>Dwelling ancillary to farm activities including dairy cows, beef cattle, silage and grass hay, bee keeping and honey production, orchard tree and timber slab production, calf rearing and chicken egg production.</p> <p>39 The site has been used for farming activity such as grazing of dairy cows. This activity has been, and can continue to be, carried out without a dwelling being constructed on the site.</p> <p>41 Therefore, I do not find sufficient nexus between the proposed dwelling use and the farming activity to support the proposal. The proposal is inconsistent with relevant strategy at clause 14.01-1L that discourages development of a dwelling unless it is required for a commercial farming purpose. The proposal is also inconsistent with relevant strategy at clause 14.01-1S that discourages development of isolated small lots in the rural zones from use for dwellings and directs housing into existing settlements.</p>

<p><u>Roccisano v Mildura Rural CC [2023] VCAT 545</u> <i>Alison Slattery</i> Member</p>	<p>FZ DCPO SCO</p>	<p>Council decision set aside Permit Granted</p>	<p>Dwelling on 6.9 hectares in association with Horticulture (table grapes) 10 I find that in exercising the balance between these policy thrusts, that the use and development of the land in the manner proposed will further the objectives of both appropriate growth and maintenance of viable agricultural areas. 12 I find that there is limited undue impact from the use and development of the site as a dwelling due to the close location of several dwellings in this portion of Karadoc Avenue. 14 I am satisfied that there will be no unreasonable impact on agricultural production and the normal operation of agricultural activities.</p>
<p><u>Scott v Nillumbik SC [2023] VCAT 497</u> <i>Claire Bennett</i> Member</p>	<p>RCZ ESO1 BMO ESO4</p>	<p>Council decision set aside Permit Granted</p>	<p>Dwelling on 6.2 hectares, currently used for agriculture (Hay production) with significant remnant vegetation. 125 Having heard the submissions of the parties, the Tribunal finds that the proposal is in accordance with all relevant provisions of the Nillumbik Planning Scheme. We agree with the reasons summarised by the applicant as:</p> <ul style="list-style-type: none"> • the proposed dwelling is a sensitively considered development with minimal impact on the rural character and environmental values of the subject land; and • the associated onsite living (and adherence to the LMP required by the conditions) will actively assist in the long term ongoing management of the environmental values that are central to the RCZ5, the ESO1, and the ESO4 applying to the subject land.
<p><u>Xerri v Strathbogie SC [2023] VCAT 673</u> <i>Bill Sibonis</i> Senior Member</p>	<p>FZ EMO HO4</p>	<p>Council decision upheld No permit granted</p>	<p>Dwelling on 0.81 hectares (former school site), no Agriculture. 21 The weight of policy does not support the proposal. I acknowledge the agreement between the parties that the land, as it currently stands, has limitations with respect to its size that do not make it practical or suitable for farming or other activities that would be consistent with the purpose of the FZ. That said, I agree with the Council that the land could be consolidated with the adjoining larger landholdings to form part of an existing agricultural enterprise. 24 The purpose of the FZ does not recognise or provide for rural living. It is related to farming and seeks to protect agricultural activities which are consistent with the zone provisions from encroachment of incompatible uses which have the potential to restrict their operation.....</p>
<p><u>Hanes v Baw Baw SC [2023] VCAT 141</u> <i>Karina Shpigel</i> Member</p>	<p>FZ ESO2 EMO BMO DCPO1</p>	<p>Council decision upheld No permit granted</p>	<p>Existing use rights/ Use and development of land for a dwelling on 1.2 hectares (2 lots), heavily vegetated.</p> <ul style="list-style-type: none"> • Existing use (continuous use for 15 year) not established. • Permit required for buildings and works as the use (dwelling) is section 2. <p>89 The application did not identify any need for the dwelling to facilitate grazing, commercial farming, agricultural production or tourism activities. The application also did not address any of the matters set out in the decision guidelines in clause 35.07-6, including the capability of the land to accommodate the development, how the development relates</p>

			to sustainable land management and whether the development supports and enhances agricultural production.
<u>Burford v Mildura Rural CC [2023] VCAT 599</u> <i>Tracy Watson</i> Member	FZ SCO1	Council decision set aside Permit Granted	Dwelling on 11.54 hectares in association with Horticulture. 19 I accept the applicant's submission that allowing for the farm manager (and potentially other personnel) to live on site will result in an enhancement of the overall productivity of this horticultural enterprise. I say this because an on-site presence will allow for a much more timely and effective response to these identified farm management issues. 20 I therefore accept that the proposed dwelling has a direct link to and will enhance the operation of the existing agricultural enterprise. I do not think that the proposal can in any way be characterised as rural living, rural lifestyle or low density residential development.....

Subdivisions

Citation	Zones, Overlays	Outcome	Summary
<u>Burns v Swan Hill RCC [2023] VCAT 280</u> <i>Michael Deidun</i> Member	FZ ESO1 LSIO SCO1	Council decision upheld Permit not amended	An amendment to a subdivision permit to allow a varied lot layout to be achieved via a second stage to the subdivision (boundary re-alignment to create a lot smaller than the minimum 20ha allowed in the schedule to the zone). 11 In the end, this Applicant seeks approval for a form of a two lot subdivision that is prohibited, and they have arrived at a creative way of achieving that end outcome.
<u>Harris v Murrindindi SC [2023] VCAT 570</u> <i>Shiran Wickramasinghe</i> Member	FZ BMO	Council decision varied Permit amended	Dwelling excision - Impact on drainage, waterflow and flooding from proposed driveway construction Application did not include any buildings or works including the construction of a driveway, such works would require a planning permit. It will be at that time if a permit is required the matters of concern to the applicant would be considered.
<u>Walton v Greater Bendigo CC [2023] VCAT 698</u> <i>Nick Wimbush</i> Member	RCZ ESO2 EMO BMO	Council decision upheld No permit granted	2 lot subdivision (lot 1(existing dwelling) - 16.3 ha, lot 2 (with building envelope) - 11.29 ha) 52 I find Council's view persuasive on the issue of access and its relationship to the need for a bunker. If a bunker is required to protect human life and signal that 'the site is high risk and evacuation is dangerous' this to me is a clear indication that the site is not suitable for a dwelling in the first place. Therefore, an application for a subdivision which would facilitate a dwelling should not be approved. 69 It does not imply that meeting the minimum subdivision lot size will ensure a subdivision permit is granted; the control could have been written this way to make subdivision as of right, perhaps conditionally, but it has not.
<u>ID Ross Watt Road Pty Ltd v Macedon Ranges SC [2023] VCAT 556</u>	RCZ ESO5 VPO9	Council decision set aside	Re-subdivision of the land from two lots into four lots proposed Lot 1(existing dwelling) – 51.58 ha, lot 2 (existing dwelling) – 41.5 ha, Lot 3 (includes building

<i>K Birtwistle Member</i>	BMO	Permit Granted	envelope) – 40.64 ha, Lot 4(includes building envelope) – 40.64 ha. 52 I am satisfied that the LMP (and the protection of the conservation reserve area – the most significant part of the site from a biodiversity perspective), together with the revegetation along the northern and southern boundaries, weighs in favour of the grant of a permit. 66 Based on the evidence of Mr Beever, I agree that the site is already fragmented below an optimal or commercial scale and its consolidation with other similar properties is unlikely based on its specific physical context, including the abutting residentially zoned land to its south.
<u>Delmenico v Swan Hill RCC [2023] VCAT 580</u> <i>Laurie Hewet Senior Member</i>	FZ ESO1 LSIO SCO1	Council decision upheld Permit not amended	3 lot subdivision of lots above the minimum area for a section 1 dwelling - subdivision approved with condition for section 173 agreement that no dwellings permitted on lots 2 and 3 (lot 1 already having a dwelling) application to VCAT to remove conditions for section 173, refused on grounds of flood risk

Agricultural Use

Citation	Zones, Overlays	Outcome	Summary
<u>Webb v Corangamite SC [2023] VCAT 120</u> <i>Peter Gaschk Member</i>	FZ PCRZ FO1	Council decision varied Permit amended	Domestic animal husbandry – Dog breeding (retrospective) Applicant seeking deletion of some conditions and amendment of others Outcome – some conditions upheld, others amended
<u>Remilton v Yarra Ranges SC [2023] VCAT 671</u> <i>Michael Deidun Member</i> <i>Colin McIntosh Member</i>	GWAZ SLO6 ESO1 ESO2 BMO	Council decision set aside No permit granted	Poultry Farm (quail) expansion Existing poultry farm operating under existing permit. Aging infrastructure. Proposal to upgrade infrastructure and increase bird numbers. Residential encroachment. Buffer distances. 14 The proposal that is before us therefore creates an interesting planning dilemma. On the one hand, the land use is already established, and no further planning permit is required for the use of the land. On the other hand, the proposal that is now before us seeks permission for a significant expansion of an existing use, in a manner and a context where a range of significant off-site amenity impacts are possible..... 55 The effect of these successive planning decisions is to dramatically change the context that existed when the first planning permit was issued in 1981, that permitted the present use of the land for a quail farm. Those successive planning decisions have resulted in the quail shed being brought much closer to the new western boundary of the site. It has also resulted in a sensitive land use, being a dwelling, having been constructed on a new lot in close proximity to the quail shed.

Other Cases

Citation	Zones, Overlays	Outcome	Summary
<u>Blackhall v Greater Geelong CC [2023] VCAT 399</u> <i>Sarah McDonald, Member</i> <i>Phil West, Member</i>	FZ SLO10 ESO2	Council decision varied Permit amended	Use and development of land for a Place of Assembly (function centre)
<u>Chan v Greater Geelong CC [2023] VCAT 549</u> <i>Shiran Wickramasinghe, Member</i>	RLZ ESO4	Council decision set aside No permit granted	Use and development of land for a Place of Assembly (Place of worship) 5 The Council decision is contrary to Council officer's recommendation to refuse the proposal.
<u>DZZ Pty Ltd v Greater Geelong CC [2023] VCAT 321</u> <i>Dalia Cook, Member</i> <i>Tracey Bilston- McGillen, Member</i>	FZ LSIO2	Council decision upheld No permit granted	Removal of restrictive covenant Use and development of land for Accommodation (Camping and caravan park)
<u>Jordan v Baw Baw SC [2023] VCAT 358</u> <i>Judith Perlstein Member</i>	FZ LSIO	Enforcement order allowed	Application for enforcement order; Earthworks which change the rate of flow or the discharge point of water across a property boundary; Works in a LSIO; Alleged breaches of planning permit.
<u>Maynes v Yarra Ranges SC [2023] VCAT 532</u> <i>Alison Glynn, Presiding Member</i> <i>Nick Wimbush, Member</i>	GWZ SLO5 BMO EMO	Council decision upheld No permit granted	Use and development of land for a contractors depot
<u>Slingo Earthmoving Pty Ltd v Mount Alexander SC [2023] VCAT 5</u> <i>Michael Deidun, Member</i>	FZ LSIO SLO1	Council decision set aside Permit Granted	Use and development of land for a contractors depot
<u>Thomasson v Mildura RCC [2023] VCAT 410</u> <i>Jeanette G Rickards, Senior Member</i>	FZ UFZ FO ESO LSIO DCPO2 SCO1	Council decision varied Permit amended	Use and development of land for Rural Industry (service of plant and equipment)
<u>Webster v Macedon Ranges SC [2023] VCAT 695</u> <i>Susan Whitney, Member</i>	GRZ PSB	Application rejected	Section 173 agreement Not a rural zone but relevant due to its discussion of the use of Section 173 agreements to restrict further subdivision

<p><u>Meeke v Golden Plains SC [2023] VCAT 686</u> <i>Bill Sibonis, Senior Member</i> <i>Philip West, Member</i></p>	<p>FZ ESO2 FO HO103 SLO16</p>	<p>Council decision set aside No permit granted</p>	<p>Use and development of land for a Place of Assembly (function centre)</p>
<p><u>Redland Fruit Pty Ltd v Swan Hill Rural CC [2023] VCAT 601</u> <i>Teresa Bisucci, Deputy President</i></p>	<p>FZ SCO1</p>	<p>Declaration – use is ancillary</p>	<p>Application for a declaration – rural workers accommodation as ancillary use</p>