

Agriculture Victoria Planning and Advisory Service

VCAT Decisions that impact Rural zoned land

July 2024 edition: VCAT cases from April to June 2024

This update includes VCAT cases from April to June 2024. 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.

A Closer look.... Dwelling in association with Agriculture (FZ)

Brown v Macedon Ranges SC [2024] VCAT 400

Michael Deidun, Member

Council decision upheld, no permit granted.

The use and development of a dwelling to support the agricultural production of the land. The land has an overall area of 41,200 square metres (4.12 hectares). The land presently supports open grazing land, and agricultural sheds.

10 Contrary to these submissions, it is my finding that the proposal that is before me constitutes a rural residential use of the land as the primary land use, with agricultural activities a distant secondary aspect of the proposal. This will result in a loss of agricultural productive land to rural residential land uses, which is at odds with the guidance provided by both the Farming Zone and the policy at Clause 14.01-1L of the Macedon Ranges Planning Scheme.

11 I make this finding for the following reasons.

- a. The agricultural production amounts to the milking of 20 sheep, and the processing of that milk into cheese and yoghurt. This a very small number of sheep, which amounts to a low scale agricultural activity. That is, even with the added complexity of milking the sheep and processing that milk into cheese and yoghurt, a flock of 20 sheep is a very low base for such an agricultural activity. The Integrated Land Management Plan and the Business Plan do not address this issue, by failing to set out the extent of cheese and yogurt product that can be derived from a flock of just 20 sheep.
- b. Both the Integrated Land Management Plan and the Business Plan prepared on behalf of the applicant fail to demonstrate how the milking of 20 sheep, including the processing of the milk to cheese and yoghurt, would be a viable agricultural operation. Indeed, the Business Plan fails to provide any economics around the initial establishment costs, as well as the operational costs and income associated with the proposed agricultural production, to demonstrate that it would be viable as an ongoing operation on the review site. To clarify, by referring to viability, I am not suggesting that an agricultural activity should provide the equivalent of a full time income. Rather, I would expect a Business Plan to demonstrate that the proposal agricultural activity can run at a profit, rather than a loss, and that the upfront costs can be recouped over a reasonable period of time. This is important as if the proposed agricultural activity is to run at a loss, then it will likely not be pursued over the medium to long term. Alternatively if the upfront establishment costs are too high, as compared to the expected returns, then the agricultural activity may never be commenced at all. The failure to explain any of the economics involved with the proposal in a purported Business Plan, fail to provide an appropriate level of certainty as to the likelihood of the agricultural pursuit, which is said to be the basis for the proposed dwelling.
- c. The plans that accompany the application also fail to detail the layout and design of a milking shed (dairy) and of a building used to produce and store the milking products, such as cheese and yoghurt, that are proposed to be produced on site. One would have thought that if these processes are central to the proposed agricultural land use, then the necessary infrastructure would have been detailed on a set of

plans. Instead, all I have is a suggestion that the dairy and food processing will occur in a converted farm shed. No layout of that shed is provided, and no information is provided as to the extent of works required for the necessary conversion. This contrasts with the proposed dwelling, which is comprehensively detailed on a complete set of site plans, floor plan and elevations.

d. The proposed processing of milk into cheese and yoghurt on the review site is defined as a Rural industry. Prior to my raising that fact as a preliminary matter in this proceeding, the applicant had not turned their mind to this land use category, and whether it can comply with the conditions on which it is a Section 1 use of land in the Farming Zone. While Mr Livingston attempted to address this matter 'on the run,' I am not yet persuaded as to whether the proposed Rural industry can be contained within the converted farm shed, or whether other parts of the review site would also be required for this land use, that may trigger the need for a planning permit for the land use.

e. While the Proposed Improvements Plan at Appendix 4 of the Integrated Land Management Plan depict areas of the review site that are proposed to be used as an orchard and an olive grove, neither of these agricultural activities are described at all in either the Integrated Land Management Plan or the Business Plan. I therefore am provided with absolutely no information as to the intensity of these agricultural pursuits, when they might commence, or their likely agricultural production.

f. Two of the largest paddocks depicted on the Proposed Improvements Plan at Appendix 4 of the Integrated Land Management Plan are noted as horse paddocks, with the accompanying text noting the following:

There are two horse paddocks that will be used for keeping the family horse.

Given this description, it is fair to conclude that the horse paddocks are part of the proposed rural residential use of the land.

g. Otherwise, the extent of the land to be used for rural residential purposes is largely undefined. That is, there is not a fenced area for domestic or residential land use marked on either the site plans that form a part of the proposed dwelling plans, or the Integrated Land Management Plan. On the Integrated Land Management Plan the dwelling is to be included in a large space that is also marked as an orchard, which does not limit the area used for domestic purposes, and perhaps explains why the orchard is not mentioned in the Integrated Land Management Plan. One might reasonably anticipate the orchard along with the aforementioned horse paddocks becoming part of the residential components of the review site, which would then comprise a substantial proportion of the review site. Integrated Land Management Plan.

14 My concerns regarding these matters are also amplified by the earlier information provided by the applicant during the course of the planning permit application, which set out the following.

Council has raised the following preliminary concern:

Dwelling applications within the farming zone should demonstrate how the proposal relates to the ongoing productive use of the land for agricultural purposes and should not promote rural lifestyle development. This does not appear to be the case with your submitted application. It is urged you reconsider the agricultural value of the site by submitting an amended proposal that better prioritises the use of the site for agriculture purposes with the residential activity as secondary or ancillary to the primary agricultural use of the land.

We respectfully submit that the proposal does support ongoing productive use of the land for agriculture that is reflective of its productive capacity. The agricultural 'value' of the land to sustain an agricultural enterprise or in terms of agricultural output is very low. It is also not a viable parcel for a farmer looking to add to their farming tenement due to its high land value and location.

15 This earlier submission seems to detail that the land owner considers the review site as not capable of containing an agricultural pursuit of a scale of any significance. It therefore would suggest that any agricultural pursuit proposed for the land, would not require full time management from a dwelling sited on the review site. While the applicant is entitled to alter their position over time, such a position would be enhanced by the type of evidence described earlier in these reasons, which was not forthcoming from the applicant.

Dwelling – Use of land

Citation	Zones, Overlays	Outcome	Summary
<p><u>Nguyen v Yarra Ranges SC [2024] VCAT 274</u> <i>Karina Shpigel, Member</i></p>	<p>GWZ2 BMO</p>	<p>Council decision upheld, certificate of compliance must not be issued</p>	<p>Whether land enjoys existing use rights for two dwellings</p> <p>26 In seeking to establish existing use rights based on the 15 year rule, it is incumbent on the applicant to prove there has been continuous use. The applicant did not tender any documentary evidence to support his assertion that 56A was continuously used as a second dwelling, such as copies of leases, records of rental income or rental expenses. He also did not call any of the individuals who he submits lived at 56A Courtneys Road during the 15 year period.</p> <p>27 The applicant placed reliance on the evidence of Mrs Kavanagh, which at best could be taken as indicating that at various times the dwelling at 56A Courtneys Road appeared to be occupied as a separate dwelling. she conceded that she had no personal knowledge about the nature or exact duration of the tenancies. I also agree with the responsible authority that it remains unknown if there were gaps in the use.</p>
<p><u>Northumberland Estate Pty Ltd v Macedon Ranges SC [2024] VCAT 309</u> <i>Nick Wimbush, Member</i></p>	<p>FZ ESO4</p>	<p>Council decision upheld, no permit granted</p>	<p>29 ‘Fragmentation’ of agricultural land was put to me in the hearing as including not only the obvious, subdivision, but also allowing uses such as dwellings that over time contribute to a degradation of the agricultural value and capacity of an area. In my view construction of a dwelling on this property will increase the property value accordingly. In a rural context this may well remove the land from production as its future value will be based on the presence of the dwelling as much if not more than the agricultural value of the land. Even if the Horse husbandry operation is still operating, or another agricultural use, the presence of the dwelling itself means that the property will be more likely to be attractive to the lifestyle market, and the cost may be prohibitive for productive agriculture.</p> <p>42 I accept that for some of these tasks it may be more convenient or ‘time efficient’ for the tasks to be carried out from a dwelling on site, but it is not in my view necessary or essential.</p> <p>46 Assuming some alarms are triggered during the day when there would be expected to be staff on site, the key time of concern would seem to be at night. If someone is present in an onsite dwelling, which may not always be the case, the response time to an alarm might be in the order of a few minutes. From a residence in Kyneton, as an example, it might be more like ten minutes. I do not consider this degree of response time to be materially different.</p> <p>48 Overall, I am not satisfied that the nexus between a dwelling and the importance of monitoring during foaling has been established. I accept that the dwelling may well be more convenient and desirable in the operation, but I am not satisfied that the dwelling is required or needed to support the Horse husbandry operation.</p>

<p><u>Kenny v Cardinia SC [2024] VCAT 415</u> <i>Christopher Harty, Member</i></p>	<p>GWZ LSIO</p>	<p>Council decision upheld, no permit granted</p>	<p>The use and development of a single storey dwelling on 2.163 hectares, no agricultural use proposed.</p> <p>12 I find the proposal fails to achieve an acceptable outcome. This is fundamentally a proposal for a dwelling within a rural setting. It's main failing is the absence of any form of established agricultural production on the site.</p> <p>32 land within 2.5 kilometres of the site is predominantly used for grazing purposes and includes two broiler chicken farms</p> <p>50 I also find that despite the assertions that the applicant will assist and support neighbouring agricultural activity, the proposal for a dwelling represents a permanent change in land use. As a result, it risks not only changing the ability of the site to be used for agricultural production, but also, risks conflict with, or reduction of, the capacity for future agricultural activity on adjoining or nearby land. Once the dwelling is constructed its use as such will remain in place for many years and risks producing long term issues on continued agricultural production on surrounding land. A dwelling comes with expectations for amenity protection and in an area where agricultural production is supported under the GWZ1, creates an expectation that is unrealistic to protect given the working nature of agriculture in the area.</p>
<p><u>Brown v Macedon Ranges SC [2024] VCAT 400</u> <i>Michael Deidun, Member</i></p>	<p>FZ BMO ESO4</p>	<p>Council decision upheld, no permit granted</p>	<p>The use and development of a dwelling to support the agricultural production of the land. The land has an overall area of 41,200 square metres (4.12 hectares). Featured in A Closer Look... above</p>

Subdivisions

Citation	Zones, Overlays	Outcome	Summary

Agricultural Use

Citation	Zones, Overlays	Outcome	Summary
<p><u>Darebin CC v Victorian Racing Pigeon Body Inc [2024] VCAT 552</u></p>	<p>GRZ</p>	<p>Declaration made</p>	<p>Land Use classification of the racing, keeping and breeding of racing pigeons.</p>

<p><i>Susan Whitney, Member</i></p>			<p>56 As was stated by Ashley J of the Supreme Court of Victoria in <i>Cascone, A & Vella, Mario v Shire of Whittlesea</i> [21] ('Cascone'), it is always necessary to ascertain the purpose of the use, described as the 'real and substantial' purpose to emphasise the distinction between the 'purpose of use' and the 'use' in the sense of activities, processes or transactions. Further, it is not correct to undertake this exercise with the view that the purpose of use must fit within one of the defined land uses, at least where the relevant planning scheme makes provision for innominate land uses.</p> <p>62 As such, I find that the real and substantial purpose of the use of the Land as it relates to pigeons is for pigeon racing, although I qualify this finding by adding that it is not just use for the purpose of pigeon racing but also for the associated keeping, breeding and training of pigeons.</p> <p>69 As such, I characterise Mr Varelas' use of the Land as use for the purposes of pigeon racing and associated pigeon keeping, training and breeding.</p> <p>76 Accordingly, there is an important difference between the land use term 'agriculture' and what I have found is the purpose of the use of the Land. This difference is that the use of land for agriculture does not include the racing of the pigeons. The reason why this is an important omission is that I regard the use of the Land for the purpose of pigeon racing to be the reason why the other activities of keeping, breeding and training are occurring on the Land at all. That is, were it not for the pigeons racing on and from the Land, on the facts before me there would be no associated keeping, breeding or training taking place.</p> <p>81 Accordingly, I find that the use of the Land for the purposes of pigeon racing and associated pigeon keeping, training and breeding is use of the Land for the purposes of an innominate land use; that is, a land use that is not defined in clause 73.03 of the Scheme.</p>

Other Use

Citation	Zones, Overlays	Outcome	Summary
<p><u>BCA Asset Management Group Pty Ltd v Benalla RCC</u> <u>[2024] VCAT 330</u> <i>K Birtwistle, Presiding Member</i> <i>Colin Mcintosh, Member</i></p>	<p>RLZ FZ</p>	<p>Council decision upheld, no permit granted</p>	<p>Extractive Industry: Proposed sand mine operation</p>

<u>Preema v Macedon Ranges SC [2024] VCAT 370</u> <i>K Birtwistle, Member</i>	RLZ BMO VPO	Council decision varied, permit granted	Amendment to existing permit to allow the use of the existing building as a Function Centre
<u>Tate v Wellington SC [2024] VCAT 423</u> <i>Teresa Bisucci, Deputy President</i>	RLZ BMO	Application summarily dismissed	Request for cancellation of permit; Permit for music festival; Application for cancellation made four years after permit issued. Summarily dismissed because it is lacking in substance.
<u>Humphris v Bass Coast SC [2024] VCAT 397</u> <i>Jeanette G Rickards, Senior Member</i>	FZ	Declaration refused	Declaration – interpretation of the planning scheme – clause 52.11 home based business - proposed use as a wedding venue. The proposed is not properly characterised as a home-based business which can operate as of right pursuant to clause 52.11-1, a planning permit is required to operate the use pursuant to the Bass Coast Planning Scheme.
<u>Clifftop at Hepburn Pty Ltd v Hepburn SC [2024] VCAT 433</u> <i>Susan Whitney, Presiding Member</i> <i>Peter Gaschk, Member</i>	FZ BMO ESO1	Council decision set aside, permit granted	Use and development of the land for a caravan and camping park ('glamping') within 11 accommodation units (consisting of four yurts, three dome tents, four airstream caravans) along with one associated business identification sign.
<u>Dance v Colac Otway SC [2024] VCAT 443</u> <i>Rachel Naylor, Senior Member</i> <i>Claire Bennett, Member</i>	RCZ SLO4 EMO1 BMO	Interim order issued	Group accommodation and caretaker's house ; Visual impact in State significant landscape; Tribunal's limited consideration of two of the four planning controls contained in the planning application; Landslip risk; Construction and onsite effluent disposal; Land management plan; Extent of screen planting and revegetation required; Relevance of EMO1 and BMO permissions to amended proposal before the Tribunal; Emerging case law that limits Tribunal's jurisdiction creating confusion and difficulties for permit applicants and responsible authorities;
<u>Booth v Strathbogie SC [2024] VCAT 468</u> <i>Sarah McDonald, Member</i>	FZ EMO	Council decision varied, permit granted	Use and Development of land for a distillery and associated sales ; Use and Development for a manager's dwelling and associated outbuilding; Use and Development for group accommodation ; Signage; and Liquor License
<u>Mildura RCC v Brown [2024] VCAT 505</u> <i>Susan Whitney, Member</i>	FZ SCO	Enforcement order allowed	The Council seeks this enforcement order on the basis that it alleges the Land has been used for a store and/or materials recycling without a planning permit, contrary to the Scheme.
<u>Hepburn SC v Coward [2024] VCAT 517</u> <i>Philip Martin, Senior Member</i>	FZ ESO1 HO936	Enforcement order allowed	Seeking Enforcement order ; Permit issued for materials recycling (automotive recycling); permit conditions requiring no more than 50 vehicles stored on the site at any one time and certain plans to be provided by the permit holder to Council; Council alleging that there is now at least 147 cars on the site and all requisite plans have not been provided.
<u>McNaughton v Moira SC [2024] VCAT 561</u> <i>Jeanette G Rickards, Senior Member</i>	FZ SCO1	Cultural heritage management plan not required	12 I accept that the development of the land for purposes associated with 'Outdoor recreation facility' (motorbike track) would be a high impact activity pursuant to regulations 46 (1)(a) and (b)(xv) of the AH Regulations. I also accept that use of the land for such activities would be

			a high impact activity pursuant to regulations 58(1) and 58(4) of the AH Regulations. However, as the entire area has been subject to significant ground disturbance, the activity area is not an area of cultural heritage sensitivity and therefore no CHMP is required.