

Agriculture Victoria Planning and Advisory Service

VCAT decisions that impact Rural Zoned land

October 2023

This update includes VCAT cases from July to September 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.

Dwellings

Citation	Zones, Overlays	Outcome	Summary
<u>Calder v Yarra Ranges SC [2023] VCAT 744</u> <i>Christopher Harty</i> Member	GWZ5 ESO1 SLO6 BMO	Council decision varied, Permit Granted	Replacement dwelling – permission required for development, not land use 16 The issues raised within the context of this review relate generally to the proposal's scale and visual impacts on the rural landscape character of the Steels Creek valley, impacts on agricultural activity and on local amenity.
<u>Walsh v Moyne SC [2023] VCAT 795</u> <i>Dalia Cook</i> Member	FZ No overlays	Council decision varied, Permit Granted	Buildings and works for the construction of a dwelling within 100 metres of a waterway in the Farming Zone (Section 1 conditions met for use). 15 For the record, I consider it is important to have regard to all relevant aspects of the Farming Zone provisions, not simply to confine consideration of the proposal to impacts on the unnamed waterway because this is the sole permit 'trigger'. Once triggered, the acceptability of the proposal relative to the purpose of the zone will depend on a number of inputs, including siting and design as provided for in the decision guidelines. 79 The proposal for a single storey farmhouse in this part of the subject land responds well to the purpose and decision guidelines of the Farming Zone. There would be no direct impact on views to the Hopkins Falls. To the extent it would be visible within the broader landscape, it would be suitably subordinate to that landscape and entirely consistent with expectations for development in this rural setting.
<u>Radici v Baw Baw SC [2023] VCAT 869</u> <i>Michael Nelthorpe</i> Member	FZ LSIO	Council decision upheld, no permit granted	Use of land for a dwelling (on 7.1 ha) in association with calf rearing (4 x 40 calves per year) 23 As I have found that there is insufficient information to determine if the calve-rearing activity was a viable or sustainable, I find that the proposal is not supported by planning policy or the Farming Zone.

<p><u>Dempster v Strathbogrie SC [2023] VCAT 901</u></p> <p><i>Nick Wimbush</i> Member</p>	<p>FZ</p>	<p>Council decision upheld, no permit granted</p>	<p>Dwelling on a lot less than the minimum size in the schedule to the zone</p> <p>27 One of the difficulties in considering the application is the ‘point in time’ nature of the application. If a caretaker’s house was approved and constructed, there is nothing preventing the sale of the property and dwelling whether to another farmer or a lifestyle inhabitant.</p> <p>32 I conclude, and my reasoning follows, that in this case the need to protect agricultural land in larger holdings and prevent intensification of dwellings in a rural area carries greater policy weight than the needs or convenience of a particular farming operation.</p> <p>33 For this particular application, for a caretaker’s house, I also find that the ‘supervisory nexus’ between the need for a caretaker’s residence and the underlying land use does not exist.</p>
<p><u>Victoria Cornick Drago v Yarra Ranges SC [2023] VCAT 921</u></p> <p><i>Claire Bennett</i> Member</p>	<p>GWZ4 ESO1 SLO4 LSIO</p>	<p>Council decision upheld, no permit granted</p>	<p>Flood Risk – Objection from Melbourne Water (determining Authority)</p> <p>83 This case introduces a new dwelling onto vacant land with a high flood hazard. It intensifies the population residing in a hazardous situation and is contrary to the objectives, purposes, strategies and decision guidelines of the planning scheme, including those for clause 13.03-1S (Floodplain management) and clause 44.04 (Land Subject to Inundation Overlay).</p> <p>84 The proposed use and development of a dwelling on the subject land would create an unacceptable risk to life and safety of occupants of the dwelling during a flood event, as defined by the planning scheme and the DELWP Guidelines.</p>

Subdivisions

Citation	Zones, Overlays	Outcome	Summary
<p><u>Osborne v Moorabool SC [2023] VCAT 773</u></p> <p><i>Ian Potts, Senior Member</i> <i>Peter Cole, Member</i></p>	<p>RLZ DDO2 DDO3 ESO1 LSIO</p>	<p>Council decision upheld, No permit granted</p>	<p>Two lot subdivision of 12.32 hectares</p> <p>3 The Moorabool Shire Council (Council) refused to grant planning permission because the determining referral authorities Greater Western Water (GWW) and Southern Rural Water (SRW) objected to the application.</p> <p>33 To summarise our findings:</p> <ul style="list-style-type: none"> • The installation and use of a 20/30 AWTS system as proposed does not sufficiently negate the residual risk to the quality of the water entering Pykes Creek Reservoir • The proposed subdivision of the subject land is an intensification in land use that may result in the construction of an additional dwelling
<p><u>Griffiths v Mitchell SC [2023] VCAT 811</u></p> <p><i>Katherine Paterson</i> Member</p>	<p>FZ BMO SLO</p>	<p>Council decision upheld, no permit granted</p>	<p>Staged Multi Lot Subdivision of seven lots into 15 lots and Removal of Native Vegetation, total of 624 hectares, each lot meets 40 ha minimum.</p> <p>8 I have decided to refuse to grant a permit for the proposed subdivision as it is inconsistent with the purposes of the farming zone, the planning policies that</p>

			apply to this site, would lead to a reduction in the agricultural capability on both the site and within the area and would lead to a proliferation of dwellings. Finally, I am concern that the removal of vegetation is inconsistent with Clause 52.17.
<u>Ferres v Macedon Ranges SC [2023] VCAT 1118</u> <i>Nick Wimbush</i> Member	FZ ESO4 HO	Council decision set aside, permit granted	<p>Re-subdivision of two lots to create two new lots and creation of a carriageway easement. The site is 16 hectares in area approximately 700 metres south of the Kyneton Railway Station. It is bounded on the north and south by low density residential development.</p> <p>14 However, I consider the reliance on such policy in this case fails to properly appreciate the planning context of the subject land. It is within the southern boundary of the Kyneton Township in an area earmarked for future growth. The re-subdivision is also proposed to incorporate a heritage listed dwelling and its surrounds on to one distinct lot.</p> <p>36 On any reading this points to either a non-agricultural future for the site in the medium to long term or at the very least significant constraints on agricultural use from the existing surrounding low density residential areas.</p>

Agricultural Use

Citation	Zones, Overlays	Outcome	Summary
<u>Vickers v South Gippsland SC [2023] VCAT 813</u> <i>Christopher Harty</i> Member	FZ ESO2 ESO5	Council decision set aside, no permit granted	<p>To use and develop land at Mirboo North for a low density mobile outdoor pig farm.</p> <p>47 I note that Agriculture Victoria was notified of the proposal and advised that the site should be able to support a low density mobile outdoor pig farm. However, Agriculture Victoria say the proposal does not clearly describe how the objectives and standards of the LDMOPF Guidelines will be met. Agriculture Victoria advised that the respondent should be provided the opportunity to submit further information using a Low Density Mobile Outdoor Pig Farm Development Plan template developed to assist proponents to develop a planning application covering all the required sections of the LDMOPF Guidelines. I understand that Agriculture Victoria provided a template to Council which was not provided to the respondent.</p> <p>48 Agriculture Victoria advised that once the Low Density Mobile Outdoor Pig Farm Development Plan template was completed Agriculture Victoria would be able to provide Council and the respondent with assistance and a complete assessment of the proposal against the requirements of the LDMOPF Guidelines.</p> <p>49 As this did not occur, I can only surmise a missed opportunity has occurred in this instance which reflects poorly on what is before me now and to which I am unable to be satisfied that what is proposed can achieve an acceptable outcome.</p>

<p><u>Rokewood Livestock Farms Pty Ltd v Golden Plains SC [2023] VCAT 855</u> <i>Michael Deidun, Member</i> <i>Phil West, Member</i></p>	<p>FZ SLO16</p>	<p>Council decision set aside, permit granted</p>	<p>Use of the land for a Broiler Farm (400,000 bird capacity)</p> <p>1 The applicant seeks to review the failure of the Council to grant a permit within the prescribed time Subsequent to the lodgement of the application for review, the Council determined that it supports the grant of a planning permit, subject to conditions.</p> <p>2 A number of nearby land owners oppose the proposal, They raise concerns regarding the potential off-site impacts of the proposal, the impacts on nearby agricultural uses, the lack of suitable infrastructure to support the proposal, the impact on the waterway on the review site, and the inconsistency of the proposal with the Farming Zone, planning policy and the Broiler Code.</p> <p>10 It is the evidence of Mr Crowder that the proposal complies with the Boiler Code. We are persuaded by this evidence,</p> <p>13 In relation to the review site, in addition to the general proposition that a Broiler farm is an appropriate use of land within the Farming Zone, we consider that the proposed land use is also supported by the relevant Planning Policy Framework...</p>
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Other Cases

Citation	Zones, Overlays	Outcome	Summary
<p><u>Booth v Strathbogrie SC [2023] VCAT 782</u> <i>S P Djohan</i> <i>Acting Senior Member</i></p>	<p>FZ EMO</p>	<p>Clause 13.02 not relevant</p>	<p>Site located in a Bushfire Prone Area</p> <p>5 I have determined that the Tribunal is not required to consider clause 13.02 (Bushfire) when determining the merits of the planning application. Given that my determination is contrary to the submissions of all parties, it is necessary to provide detailed reasons that underpin my determination.</p>
<p><u>Jackson v Greater Shepparton CC [2023] VCAT 818</u> <i>Geoffrey Code</i> <i>Senior Member</i></p>	<p>FZ LSIO SCO3</p>	<p>Application stuck out</p>	<p>Application for enforcement order against planning permit 2020-15 which allows the subject land to be used and developed for 'intensive animal production (lambs)'.</p> <p>1 The application is struck out because it is lacking in substance</p>
<p><u>Telstra Corporation Limited v Warrnambool CC [2023] VCAT 894</u> <i>Shiran Wickramasinghe</i> <i>Member</i></p>	<p>FZ</p>	<p>Council decision set aside, permit granted</p>	<p>Telecommunications facility; Visual impact</p>
<p><u>Whiting v Warrnambool CC [2023] VCAT 887</u> <i>Ian Potts</i> <i>Senior Member</i></p>	<p>FZ ESO2 HO</p>	<p>Council decision upheld, no permit granted</p>	<p>....to use the Subject Land as a function centre including live music and waiver of bicycle facility requirements</p>

<u>Rix BWR Pty Ltd v Moorabool SC [2023] VCAT 954</u> <i>Nick Wimbush</i> <i>Member</i>	FZ ESO1 DDO2 DDO3	Council decision upheld, no permit granted	Use of land for a Road freight terminal, Previous use as Timber yard, 5.4 ha over 2 titles. Primary school opposite site and nearby houses – amenity concerns 39 This appears to be a significant industrial proposal, and if approved, would ensure that this part of Bungaree becomes a de-facto industrial area.
<u>Prosser v Campaspe SC [2023] VCAT 1038</u> <i>Nick Wimbush</i> <i>Member</i>	FZ ESO2 FO LSIO SCO2	Council decision upheld, no permit granted	Solid Fuel Depot: The use and development of land to receive approximately 90 tonnes of firewood a week.
<u>Indara Corporation Pty Ltd & CPS Technology and Infrastructure Pty Ltd v Surf Coast SC [2023] VCAT 1084</u> <i>K Birtwistle</i> <i>Member</i>	FZ	Council decision varied, permit conditions changed	Development of a Telecommunications Facility

A blast from the past: a closer look at an historical VCAT case of significance

Estate of JE Walker v Wangaratta RCC [2021] VCAT 1257

Member: Philip Martin, Senior Member

Zone, Overlays: Farming Zone, no overlays

Outcome: Council decision upheld, no permit granted

Description of proposal: Three lot subdivision and creation of an easement

1 The subject land here has an area of 129 hectares and is essentially cleared and used for livestock grazing. The Council expert agricultural capacity witness Ms McGuinness describes it as “productive agricultural land of moderate agricultural versatility, suited to broadacre cropping, broadacre grazing or viticulture”. It has some form of road running around all four sides of the lot. The site is zoned Farming Zone (FZ), which sets a minimum lot size for subdivision of 40 hectares.....

2 A planning permit application has been lodged with respect to the subject land for a three lot subdivision and the creation of an easement. A similar planning permit was issued in 2007, but was not properly acted upon. The subdivision would split the overall site into three equal lots, with vertical boundaries between them. Each new lot would have an area of 43.15 hectares. The Whole Farm Plan put forward loosely identifies the proposed farm activities for each new lot as being grazing and cropping.

4 It is common ground that if the proposal went ahead, each new lot could have a dwelling built on it, as-of-right from a planning perspective.

33 To the extent that Mr Haydon urged me to place a high degree of strategic weight simply on each of the intended three new lots satisfying the ‘minimum of 40 hectares’ subdivision benchmark, I regard this approach as overly simplistic and misguided. Rather, I consider this ‘minimum of 40 hectares’ benchmark as more being in the nature of a condition-precedent to an owner even seeking approval to further subdivide her or his land. Even where this ‘minimum size’ benchmark is met, a proposed subdivision of land zoned Farming Zone still needs to establish that it would be an acceptable planning outcome in terms of the broader planning framework.

35 With the second issue, I find that the Farming Zone and relevant policy provisions for the subject land give priority to promoting its productive agricultural use. When I use the word ‘productive’ here, which I take from the purposes of the Farming Zone and aspects of the relevant policy framework, I am referring to ‘meaningful’ farming, or perhaps ‘genuine’ farming.

36 For example, Clause 14.01 of the State planning policies has the planning objective of 'To protect the state's agricultural base by preserving productive farmland'. Whilst the associated 'strategies' do not refer to subdivision, one of them is related in promoting the following – 'Encouraging consolidation of existing isolated small lots in rural zones'.

40 The purposes of the Farming Zone are shown below:

- To implement the Municipal Planning Strategy and the Planning Policy Framework.
- To provide for the use of land for agriculture.
- To encourage the retention of productive agricultural land.
- To ensure that non-agricultural uses, including dwellings, do not adversely affect the use of land for agriculture.

41 The last three purposes are very on point here – a focus on protecting/retaining productive agricultural land and avoiding non-agricultural uses which would undermine such productive agricultural focus. Similarly, I accept that the planning policy framework is also promoting the productive agricultural use of land zoned Farming Zone and discouraging subdivision that would compromise same.

45 the proposal largely assumes a similar on-going cattle grazing scenario with the new lots, perhaps with some cropping thrown in. Surely having three much smaller lots rather than the existing 129 hectare lot will only exacerbate the existing 'economic viability' constraints.

46 Second, with the subject land being merely a nine minute or so drive away from Wangaratta, I do see a major prospect that if the three lot subdivision went ahead, the new lots would be attractive to use as lifestyle properties. This would run directly counter to the thrust of the strategic planning framework which I have set out above. Again I rely on the credible evidence of Ms McGuinness in this regard.

47 Third, if in theory the three lot subdivision went ahead and some or all of the new lots were used for lifestyle purposes/as hobby farms, I do not share Mr Heydon's view that this would still advance the main strategic planning aims for the subject land as set out above. The point is that this strategic planning framework is not just promoting any form of farming, but is encouraging 'productive' farming. As alluded to above, I see the decision by the Planning Scheme draftsman to include the word 'productive' as pointing to a desire that the farming activity not be token, but be meaningful/genuine. Or to put this another way, the word 'productive' in the relevant text in the Planning Scheme must be given work to do, not just 'wished away' or inappropriately 'read down'.

52 It is common ground that if the proposal went ahead, a dwelling could be placed on each new lot on an 'as-of-right basis, from a 'planning system' point of view. If the proposal went ahead, the likely resulting land speculation/pushing up of land prices on land zoned Farming Zone again is contrary to the aim of the productive farming use of the subject land. This is because of the risk that genuine farmers potentially interested in expanding their existing farm holdings are 'priced out of the market' by potential 'lifestyle lot owners'. My findings on this issue mirror those of the Tribunal at [53] of Gibson v Bass Coast SC (2015) VCAT 857.

53 I also see a risk that if the proposal went ahead and the three new lots were purchased as 'lifestyle properties', possibly by a 'tree-changer', there could over time develop 'reverse amenity' conflicts between these new 'lifestyle occupants' vis-à-vis the on-going conventional farming activities occurring in this area.

54 Sixth, my concerns set out above are not assuaged or mitigated simply by the fact that there are many other lots in this broader area that are of a size that is in the range of 40 hectares or lower. On the one hand, I do not contest that this situation is factually the case, as was highlighted by Mr Haydon. On the other, this situation does not relieve the applicant of the need to demonstrate that the proposal enjoys an acceptable level of strategic planning support. That is to say, the fact that there are already a significant number of smaller lots in this area:

- Is not in itself a form of planning 'get out of jail card'.
- Does not mean that the normal Planning Scheme purposes and strategies for this site just get jettisoned and it becomes 'anything goes'. If the Victorian Planning System took this approach to resolving planning disputes in locations where the status quo is already somewhat compromised, the whole planning system would become 'open slather' and unworkable.

56 In summary then, subject to my discussion below about the relevant case law, I find that the proposal has a fatal lack of strategic planning support. I do not see this fundamental position as altered in any particular way by Mr Haydon's point that the subject land is not designated as being 'strategic agricultural land' in the relevant planning framework – the site is still 'moderate agricultural land', it is zoned Farming Zone and it is currently used for productive cattle grazing.