

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P758/2014
PERMIT APPLICATION NO. YR-2013/142

CATCHWORDS

Yarra Ranges Planning Scheme; Application under Section 77 of *Planning and Environment Act 1987* to review refusal to grant a permit; Low Density Residential Zone; BMO; SLO22; Drug and Alcohol Rehabilitation Centre; Appropriateness of Location; Risk Management; Net community benefit; Off-site impacts.

APPLICANT	Association for Better Living and Education
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
RESPONDENTS	J Sowde & E Felber; P Rex; P Godenzi (CEDA); G & M Graham; M Bernet; L Hooper; A Peeler; M Hastings; K Muller; H Zerno; P Young; S Wyles; K Warner; J Walker; E Stormer; L Smith; L Schneider; G Rumball; J Robertson; T Reynolds; V Prtenjaca; L Nichols; Y Koula; J Kakafikas; A Hunter; S & G Harrison; M Grimshaw; A Gange-Houllouaz; N Fox; T Fitzgerald; P Fisher; G Farrow; S Dollmann; S Clarke; A W Clarke; R J Campbell; M Brown; P Pohlner & E Rawlinson; I Moira.
SUBJECT LAND	16 La La Avenue, Warburton
WHERE HELD	Melbourne
BEFORE	Laurie Hewet, Senior Member (Presiding) Mary-Anne Taranto, Member
HEARING TYPE	Hearing
DATES OF HEARING	10, 11, 12, 13, 14, 17 November and 11 December 2014
DATE OF ORDER	5 February 2015
CITATION	

ORDER

- 1 The decision of the Responsible Authority is affirmed.
- 2 In permit application YR-2013/142, no permit is granted.

Laurie Hewet
Senior Member

Mary-Anne Taranto
Member

APPEARANCES

For Applicant

Mr Chris Townshend with Ms Emma Pepler, of counsel, instructed by Moray and Agnew, lawyers.

They called the following witnesses to give expert evidence:

- Mr Robert Milner, town planner of 10 Consulting Group.
- Dr Tony Zalewski, security and safety consultant of Global Public Safety.

The following lay witnesses were also called:

- Mr Eddie Micallef, former Member of Parliament.
- A former student and current part-time employee of the program.
- Parents of a former student of the program.
- The sister of a former student of the program.¹

For Responsible Authority

Ms Maria Marshall, Solicitor of Maddocks.

For Nicole Fox

In person and on behalf of Shayne Wyles.

For Andrew Hunter

In person and as a representative of the Warburton Primary School – School Council.

He called the following witnesses to give evidence:

- Sgt Tom Wilkinson, Station Commander, Warburton Police Station.
- Ms Mandy Brown, former Narconon employee.

For Kenneth Muller

In person.

For Tom Fitzgerald

In person.

For Gordon Rumball

In person.

¹ To maintain confidentiality, and with the agreement of the parties, we have not included the names of three of the lay witnesses.

For Community Economic Development Association (CEDA) ²	Ms Peta Godenzi.
For Lindy Schneider	In person.
For Jenny Kakafikas	In person
For Theresa Reynolds	In person and on behalf of Upper Yarra Community House (Cerini campus) and as a representative of the Warburton Primary School – School Council.
For Michelle Grimshaw	In person
Mr Hans Zerno	In person
Ms Kate Warner	In person
For J Sowde & E Felber; P Rex; G & M Graham; M Bernet; L Hooper; A Peeler; M Hastings; P Young; J Walker; E Stormer; L Smith; G Rumball; J Robertson; V Prtenjaca; L Nichols; Y Koula; S & G Harrison; M Grimshaw; A Gange-Houllouaz; P Fisher; G Farrow; S Dollmann; S Clarke; A W Clarke; R J Campbell; M Brown; P Pohlner & E Rawlinson; I Moira.	Mr Andrew Hunter, Ms Nicole Fox and Ms Lindy Schneider.

² Comprising Warburton's Tourism Association and the Chamber of Commerce.

INFORMATION

Description of Proposal	Drug and alcohol rehabilitation facility based on the Narconon program which adopts non-medical, non-drug techniques.
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Zone and Overlays	<ul style="list-style-type: none">▪ Low Density Residential Zone – (LDRZ).▪ Bushfire Management Overlay – (BMO).▪ Significant Landscape Overlay – Schedule 22 (SLO22).
Permit Requirements	<ul style="list-style-type: none">▪ Clause 32.03-1 – Use of the land for a drug and alcohol rehabilitation facility (LDRZ).▪ Clause 32.03-4 – Buildings and works (LDRZ).▪ Clause 42.03-2 – Buildings and works (SLO22).³
Relevant Scheme policies and provisions	<ul style="list-style-type: none">▪ Clauses 10, 11, 13, 15, 16, 17, 19, 21.04, 21.05, 21.11, 22.01, 52.06, 53 and 65.

³ The proposal as originally expressed did not involve buildings and works. However, the Applicant agrees to the closure of the driveway entry and the widening of the existing exit point to facilitate two-way access and this is a condition sought by the Council on any permit granted. The provision of a boom gate at the entry/exit point is also proposed in the evidence of Dr Zalewski.

Land Description

This 2.72ha irregular shaped parcel is located about 750m from the central business district of Warburton on the south-west corner of La La Avenue and Clarke Avenue, Warburton. The site has frontages to both streets and an abuttal to a Right of Way (ROW) known as Gable Lane on its north-western side.⁴ A U-shaped driveway provides one way vehicle access from north to south in La La Avenue. The land has undulating topography, generally falling to the east but elevated above Clarke and La La Avenue.

Previously used as a conference centre for many decades, ceasing in April 2014 as the “Green Gables Conference Centre”, the land is developed with a collection of buildings that occupy the north-eastern part of the site. These comprise the main building with dining, meeting, recreation and kitchen facilities and three separate outbuildings providing ensuite accommodation in 38 rooms. The remaining half of the site is more topographically varied and includes areas of dense vegetation around a tennis court and pond.

The site is within an established residential area with seven dwellings on abutting lots. Lots in the area range in size from about 750sq.m to 0.6ha. The Four Mile Creek in a steep gully runs along the opposite side of La La Avenue.

Tribunal Inspection

We undertook an accompanied inspection of the site and surrounds on Thursday 13 November 2014. We also inspected the existing Narconon facility at O’Shannassy Lodge in Woods Point Road East Warburton, about 15km from the Warburton township.

⁴ Three carriageway easements affect the site and two restrictive covenants have also been registered on title. These do not have any bearing on this proposal.

Cases Referred To

Odyssey House Victoria v Benalla Rural CC & Ors
[2003] VCAT 15.

Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council 44 LGRA 346.

Loudi Pty Ltd v Banyule CC [2007] VCAT 1282

Trustees of Ukrainian Catholic Church in Australia v Melbourne CC [2008] VCAT 2388.

Ryan v Port Phillip CC [2006] VCAT 1923.

Angels Health Service Aust Pty Ltd v Manningham CC
[2014] VCAT 1517

Tulcany Pty Ltd v Knox CC [2003] VCAT 1627

Alfred Hospital v City of Melbourne [1986] P86/1260-1

REASONS⁵

WHAT IS THIS PROCEEDING ABOUT?

- 1 There are few amongst us who have not been touched in some way by the destructive effects of drug and alcohol addiction. Drug addiction affects communities everywhere and it is broadly recognised that there are no simple solutions in treating addiction.
- 2 Various drug rehabilitation programs are available throughout Victoria, some as stand-alone facilities and as others within a medical or hospital based setting.
- 3 One program, known as Narconon, has been operating for more than 12 years as a stand-alone facility at O'Shannassy Lodge, in a bushland setting on public land managed by Parks Victoria under a lease arrangement. That site is located in a relatively remote location within the catchment of the O'Shannassy River and Reservoir, some 15km from the Warburton township in Woods Point Road. The program is run by a not for profit organisation "Get Off Drugs Naturally" (GODN).
- 4 The Narconon program has been established in a number of other countries but is the only one of its kind presently in Australia. The program is based on drug-free techniques, is voluntary and being a private self-funded program involves the payment of a fee, which we understand is about \$30,000 in addition to fees for board and lodging, presently \$260 per week.
- 5 The Association for Better Living and Education (ABLE) ("the applicant") is a not for profit organisation that has the rights to the Narconon programme. It purchased the review site in early 2014 and has sought planning permission from Yarra Ranges Council to use the land for the Narconon program which it then hopes to relocate from O'Shannassy Lodge. The applicant says that continued use of the O'Shannassy site is not viable because of the need for prohibitively expensive upgrading works and because its lease arrangement is coming to an end. If a permit is granted, it intends to lease the site to its affiliated organisation GODN, who would then continue to operate the Narconon program.
- 6 There has been a large number of objections to the proposal from within the Warburton community and the Council has refused the grant of a permit, a decision which the applicant now seeks to review. The Council's reasons for refusal include community safety arising from the scale and intensity of the proposal and the site's location, amenity concerns, the degree to which the proposal would be integrated into the community, the lack of suitable

⁵ We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons.

information with which to properly assess the risks posed by the proposal and the absence of a net community benefit.

- 7 Objectors largely support the Council's submissions but also expressed concerns about the proximity of the site to dwellings and other community facilities. With the local primary school less than 200m away and a bus stop for secondary school students accessed by a path that runs past the site's frontage, the use was said to be located too close to some of the most vulnerable in our community - children. The site's proximity to the Warburton township, some 750m away, was also said to be problematic. The town plays host to a hotel, bottle shop and chemist in easy reach of the site and it is said by those opposing the grant of a permit that these might prove a temptation for some students undertaking the program, reducing the effectiveness of the program, and leading to students absconding from the facility.
- 8 The capacity for GODN to properly manage the facility in light of previous incidents within the grounds of O'Shannassy Lodge, its immediate surrounds and in the Warburton township itself was also raised as a concern by objectors. These incidents have on occasion involved police intervention. Details of these events were obtained under Freedom of Information. A total of 26 events that were said to be of significant concern to the community, were presented to us.
- 9 The potential for a decline in school enrolments and ultimately its closure, a decline in the tourist dollar, diminished perceptions of safety, and the loss of Warburton's unique 'energy' and tranquil image were some of the broad ranging adverse effects upon the Warburton community that are feared by objectors.
- 10 Concerns were also expressed about the potential for vehicle conflicts at the site entry near Green Gables Lane and carparking availability during graduation ceremonies but we consider that these matters can be acceptably managed.
- 11 The applicant contends that the Green Gables site will provide superior accommodation and facilities, is almost 'purpose built' for the applicant's needs and is in a location that is more readily accessible with resultant benefits for staff, clients and visitors. We were also urged to consider the important need that facilities like this serve, not just within the immediate local community, but also more broadly. While it was conceded that some incidents have occurred in the past and that no guarantees can be given that they won't continue to occur with this proposal, the applicant submits that their number is, in relative terms, small and that the usual day to day operation of the facility does and will continue to occur in an orderly and professional manner without incident. With the implementation of security measures proposed by Dr Zalewski, including the requirement for a management plan as a condition of permit, the applicant says that the risk of adverse incidents would be low and within acceptable limits.

- 12 The principal issue in this case is whether the proposal is an acceptable use for this site. There are a number of interrelated issues which are relevant to our deliberations: Of particular importance are the following:
- the particular operating characteristics of the Narconon program;
 - the appropriate categorisation of the proposed use and relevant planning scheme context;
 - the physical attributes of the site and its broader context;
 - the proposed management arrangements at the facility, including staff numbers, training and security measures.
- 13 The consideration of the social and economic effects of the proposal is also relevant and in reaching our decision, we are required to be satisfied that the proposal's social and economic effects contribute to a net community benefit.
- 14 We have found this to be a very difficult decision. On the one hand, the need to provide drug and alcohol rehabilitation facilities is compelling and not disputed. However, we have not been persuaded that the need to make provision for this use generally is in any significant way connected to this site, that is, there is nothing about this use that compels it to be located here. Nor can the applicant's purchase of the site influence our findings in any preferential way. The site's location within an established residential community, surrounded by dwellings, several of which have direct abutments with the site, therefore assumes significance in terms of our assessment of the proposal.
- 15 Having regard to the review site's location within a residential context, the acceptability of the proposal at this site is strongly influenced by our assessment of the applicant's management practices, and in particular the risk management regime, both of which are intrinsically linked. To some extent, the risk management regime in particular evolved during the course of the hearing, and we have not been persuaded that it has been prepared with sufficient rigour to allay our concerns about the site's suitability for this use. Importantly, much of the risk management regime remains unresolved and is heavily dependant on permit conditions requiring relatively complex management plans, significant aspects of which will be prepared subsequent to the grant of a permit, and will be subject to ongoing refinement and approval by secondary consent. There are some circumstances where this approach is acceptable. However in a case such as this, in which a decision about the acceptability of the use for the site is strongly influenced by the adequacy of the operational and risk management regimes, the issues sought to be addressed by the management plan are more appropriately resolved to a high level of finality before a decision can reasonably be reached about the acceptability of the proposal.

- 16 Similarly, we have not been persuaded that there is strong support within the policy framework of the planning scheme, for this proposal at this location. In this context, the balancing exercise we are required to carry out to determine the acceptability of this proposal, has lead us to conclude that the grant of a permit would not contribute to a net community benefit.

HOW SHOULD THE PROPOSED USE BE CATEGORISED?

- 17 Before turning to our assessment of the proposal and the relevant planning scheme controls, it is necessary for us to determine how the proposed use should be categorised.
- 18 The application for permit sought permission for an “*education centre and associated accommodation*”. The applicant accepts that the use could also be described as a “*residential drug and alcohol rehabilitation centre*” – the description adopted in the *Odyssey House* case. The applicant’s preferred description of the use is “*residential drug and alcohol rehabilitation and education centre*”. We note that neither is defined at Clause 74 of the planning scheme.
- 19 While we agree that there is an education component to the program, and participants are accommodated on site, the original planning permit application description does not accurately express the real and substantial purpose of the proposed use. We would accept either of the two latter descriptions which most importantly include the term “*drug and alcohol rehabilitation*”.
- 20 The proposed use is an unspecified use in the Low Density Residential Zone (LDRZ) and requires a planning permit. Buildings and works associated with a permit required use also require a permit.

WHAT ARE THE KEY FEATURES OF THE NARCONON PROGRAM GENERALLY?

- 21 During the course of the hearing, we received submissions primarily from objectors who sought to raise concerns about the methods employed by the applicant in the drug rehabilitation program. In response to attempts to raise these issues, the Tribunal went to considerable lengths to explain that the Tribunal is not charged with investigating or scrutinising the effectiveness of the rehabilitation program offered by the applicant. We reiterate here that this is not our role and the issues that the objectors sought to raise on this matter are not relevant to the decision we must make in this case. However, an understanding of the procedural and operational aspects of the proposed use is a necessary component of our assessment of the proposal’s acceptability for this site. The applicant did provide us with a detailed explanation of these aspects of the use, and it is appropriate therefore that we record a summary of the procedural aspects as presented to us.

- 22 Mr Cunningham, who is the Executive Director of GODN at the existing facility, gave evidence outlining details of the Narconon program. If a permit is granted, his role as Executive Director with the responsibility to oversee the program would continue at the new premises.
- 23 The program is based on a model which is used in other Narconon facilities around the world and which has evolved over the past 50 years or so. No drug treatment methods, such as methadone, are used during the program. The following is a description of the different steps that characterise the Narconon model, which is largely based on Mr Cunningham's written statement of evidence.

Program stages

Vetting and induction

- 24 Before starting the program, prospective students are vetted for their suitability to undertake the program by staff. This involves a private interview between the prospective student and a Narconon staff member, the completion of an application form by the student and an assessment by a GP to determine whether the candidate has stopped taking drugs and whether they are physically capable of undertaking the program without any medically supported drug intervention. Medically assisted withdrawal by other service providers may be required of some students before starting the Narconon program.
- 25 Once accepted, students undertake an induction program including student rules and a code of conduct. Students live on-site during the program and are not permitted to have a vehicle on the premises. Students are usually brought to the facility by a family member.
- 26 Some students enter the program as a bail condition.
- 27 The actual program itself, can take between 3 to 12 months to complete, but 6 to 8 months is said to be a typical timeframe. Students are permitted to stay until they are ready to leave, either upon completion of the course or earlier if they choose to do so, given that students embark upon the program voluntarily. Students who leave early may also be re-admitted into the program if they meet re-entry criteria. The program is broadly broken into the following stages:
- Withdrawal
 - Communication course
 - Detoxification
 - Course work

The Withdrawal phase

- 28 The first phase of the program lasts between about 3 to 7 days. Students undertaking this phase are accommodated in a separate building dedicated for this purpose and are kept physically separate from other students who have already completed this phase.
- 29 The withdrawal process is best described as ‘cold turkey’ with management of withdrawal symptoms limited to the use of heat, massage and vitamins by staff members in this role. Twenty-four hour staff supervision occurs during this phase.

Communication course

- 30 Following the withdrawal phase, students undertake a short course lasting about 10 days on communication skills.

Detoxification

- 31 The detoxification phase lasts for about 30 days. It involves 5 hours per day in a sauna, with breaks, and 30 minutes of exercise per day and students are provided with vitamins.

Course work

- 32 Students spend the remainder of their time on the program working through a self-paced education course that has six modules with titles that include “Learning improvement”, “Ups and downs in life”, “Personal values and integrity” and “The Way to Happiness”.
- 33 During this phase, students rise at 7.30am for breakfast, followed by set chores before undertaking coursework between 9:30am and 8:15pm, except on Mondays when classes start at 11:30am. Earlier finishing times of 6pm occur on Fridays and Saturdays. On Sundays there are no formal classes and visitors are permitted between midday and 5-6pm.

Other relevant information

- 34 A graduation ceremony is held for students who complete the program and two or three ceremonies are held in a year. Friends, family and other interested members of the community are invited to attend, attracting up to 140 people.
- 35 In terms of staff, Mr Cunningham’s written evidence states that “The student to staff ratio varies with the number of students, the stages of the program and the time of day”.⁶ There are currently 23 staff members in either full or part time roles plus volunteers. Some are former students. Internal training is provided and some have or are completing first aid

⁶ Page 12.

training and the Certificate IV in Alcohol and Other Drugs by an external provider.

- 36 A ‘work for your program’ scheme has become recently available for a limited number of students who either work off a proportion of or the total program cost in the kitchen, grounds and lodging areas during the program.

What other relevant features form part of the proposal at the review site?

- 37 Re-use of the existing buildings is proposed for the various elements of the program, with course work proposed within the main former conference centre building (Building 1). Male and female students would be accommodated in separate motel style buildings (Buildings 5 and 6), with ensuite facilities.
- 38 Although details of the withdrawal facility were not originally provided with the permit application material, the applicant confirmed at the hearing that the smallest accommodation building (Building 4) would become the withdrawal facility. We understand that modifications to this building would be necessary before it could be used for this purpose. Indicative plans were tabled at the hearing (on days 4 and 6), with the preferred option⁷ involving internal modifications to create an office, massage/kitchen/lounge area and a corridor for access to three separate withdrawal rooms.
- 39 The application for permit proposed that up to 80 students would be accommodated. However, during the hearing Mr Townshend submitted that the applicant would accept a permit condition limiting student numbers to 40 unless further consent is given by Council.
- 40 Formalised and detailed security and site management measures are proposed by Dr Zalewski as a means of lowering the risks associated with the facility’s operation. These measures, which would be addressed through a management plan as a condition of permit, include the following:
- Perimeter access control measures including ‘virtual’ fencing through the use of CCTV, thermal and movement detection cameras, alarm/alert technology which can be remotely monitored, perimeter signage, lighting, installation of a boom gate and intercom system;
 - Evening ground patrols by a trained security guard and watch dog;
 - Use of staff in a “night-watchman” role (midnight to 8am);
 - Screening of visitors for contraband including vehicle, bag/person inspections and the use of drug sniffer dogs;
 - Random urinalysis of students;
 - Additional staff induction in security protocols;

⁷ Exhibit AR8 – Revised withdrawal house layout.

- Staff training in managing workplace violence and aggression;
- Community communication strategy including the establishment of a formal system for the registration, identification and handling of concerns by an appropriate manager. This also includes the introduction of a communication strategy with local police;
- Regular system monitoring and review including routine patrol logs, incident reports and any complaints.

- 41 The applicant also suggested that cyclone wire fencing ranging in height from 1.8m-2m could be provided along portions of the site boundary and within the site in addition to the virtual fencing proposed by Dr Zalewski.
- 42 At the commencement of the hearing, we sought to clarify the extent of permissions sought. Specifically, we asked whether ‘use’ permission only is sought or whether permission is also sought for ‘development’.
- 43 Both Ms Marshall and Mr Townshend confirmed their understanding that only use permission was being sought.⁸ The exception to this arises from a proposed permit condition sought by the Council for modifications to the driveway layout so that vehicle access is limited to a combined entry and exit point at the site’s south-eastern end.
- 44 However, during the course of the hearing it became apparent that the scope of development would be greater than this. The applicant proposes that hard landscaping works and the installation of infrastructure to implement site security measures as proposed in the evidence of Dr Zalewski would be given effect through permit conditions. These would include pole mounted security cameras and an entry boom gate that are likely to invoke additional development permissions.
- 45 Thus, by the conclusion of the hearing, the applicant’s version of proposed permit conditions sought to introduce buildings and works permissions beyond access alterations originally envisaged. This was resisted by Ms Marshall and the objectors.
- 46 We think it is worth making some brief observations about this approach.
- 47 We agree with Mr Townshend that the application as it has evolved is not ‘piecemeal’ in the sense of the principal⁹ identified by the High Court in the *Pioneer Concrete* case. We are satisfied that there is sufficient information before us with which to assess the planning merits of the proposal and all of the land required to facilitate the proposal is the subject of this application. In doing so, we have proceeded on the basis of the permissions originally

⁸ We note that the proposal is described in the permit application form as a “change of use from conference centre to education centre”.

⁹ That principal is cogently summarised by Deputy President Gibson in *Loudi Pty Ltd v Banyule CC* [2007] VCAT 1282 at paragraph 16 in the following terms “when the use is a single use no piecemeal series of applications is permissible: that the use must be stated in appropriate detail in one application, and all the land involved must be the subject of that application”.

sought and the material before us, with the understanding that further development permissions will be required. However, we observe that in the context of this case in which the sensitivities surrounding the proposal's residential location and residential interfaces are important considerations, it is unsatisfactory that information concerning key development elements, such as infrastructure required for the security, fencing and lighting systems have not been incorporated into the documentation that forms part of the application.

- 48 While some of the mooted development aspects could be seen as foreseeable, incidental to the use permission or are relatively minor, others are potentially not. For example, the security measures proposed by Dr Zalewski in particular involve a complex system that will need to be integrated with management practices to, in Dr Zalewski's evidence, reduce the inherent risk of this use in this location from high to low.
- 49 The level of integration of management and risk mitigation illustrates the complexity of the issues surrounding this proposal. We will address subsequently and in more detail the adequacy of the applicant's response to risk management issues, but in terms of the completeness of the material presented to us, we observe that the absence of detailed plans reflecting the development aspects of the proposal, is unsatisfactory.

IS THERE ANY COMMON GROUND?

- 50 Ms Marshall provided an outline of matters over which there is common ground between the Council and applicant. While these were not universally accepted by all parties, these matters do helpfully focus our consideration of the breadth of matters that are relevant to the issues in this case. We summarise these in the following terms:
- The impact of drugs and alcohol is felt in the Shire of Yarra Ranges and more locally in Warburton as it is in any other place in Australia.
 - There is no one cure-all treatment approach that works for every individual with an addiction. It is therefore necessary to maintain an open mind about treatment options at both the individual level and societal level. Similarly, the identity of the operator and their particular religious beliefs or affiliation does not militate against the grant of a permit. This is a point the Tribunal found necessary to continually emphasise throughout the hearing.
 - The treatment methods adopted under the Narconon program and their efficacy are not matters that are before us for scrutiny. However, it is relevant that treatment methods are properly explained and understood as they inform the proposal's operational characteristics, the risks arising from this particular program's operation and thus the likely impacts on the surrounding area.

- Need for the provision of a rehabilitation centre is a relevant consideration. The parties however approach the issue of need from different perspectives in terms of its relevance to this application. We address this issue in more detail below.

IS THE PROPOSAL ACCEPTABLE HAVING REGARD TO THE POLICY FRAMEWORK OF THE PLANNING SCHEME?

- 51 The degree to which the planning scheme provides strategic support for the use in the location proposed is an important consideration relevant to our assessment of whether this proposal would produce an acceptable outcome.
- 52 Being a residential zone, the applicant contends that the LDRZ is an appropriate one for this use, given that students undertaking the program live on the premises and do so for a considerable period of time. It was submitted that when taken in the context of state and local policies, land in the LDRZ would facilitate an objective of planning in Victoria¹⁰ which underpins the desired social outcomes of inclusiveness rather than isolation in accommodating vulnerable members of our community.
- 53 Through its submissions and the evidence of Mr Milner, the applicant also made positive comparisons between the housing needs of the vulnerable accommodated in other specific housing types recognised in the Planning Scheme. Reference was made to “*Crisis accommodation*”, “*Shared Housing*” and “*Community Care Units*” which do not require a permit subject to certain limitations including if they are located in areas or zones used mainly for housing.¹¹ This was said to be indicative of the level of strategic support for different living arrangements to accommodate vulnerable members in our society within residential areas – accommodation that Mr Townshend submitted host communities rarely want in their midst but for which there is a need.
- 54 It was Mr Milner’s evidence that there is strong State and local planning policy support for both the use and the location. He referred to State policies that:
- promote health and safety in planning for settlement (Clause 11);
 - seek to provide safe physical and social environments for residents through the appropriate location of uses and development and quality of urban design (Clause 15);
 - ask for planning to recognise social needs by providing land for a range of accessible community resources, such as education, cultural

¹⁰ Specifically, “To secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria”.

¹¹ See in particular state housing policies at Clause 16.02-2 and particular provisions at Clause 52.22, 52.23 and 52.24 in all Victorian Planning Schemes.

health and community support (mental health, aged care, disability, youth and family services) facilities (Clause 19);

- seek to integrate both health and education facilities with local and regional communities with consideration to demographic trends and existing and future demand (Clause 19.02).

55 A number of local policies were also said to provide strategic support for the proposal in this location with the following themes and responses to them identified by Mr Milner:

- the consolidation and clustering of community and other services in established township centres that responds to consumer needs with benefits such as improved access to public transport and improved convenience for staff and visitors (Clauses 21.05 and 21.11);
- tourism objectives that promote facilities and attractions for visitors, especially development based upon the health resort industry and this proposal would reinforce Warburton's image and role as a centre of health, healing and visitation (Clause 21.04-2);
- establishment of this use in one of the Shire's larger "Rural Townships" with good accessibility provides for potential growth in local employment opportunities (Clause 21.04-2 and 21.05).

Assessment of the use in the planning scheme context

56 We begin by making some observations about the way in which the proposed use should be assessed against the various provisions of the planning scheme, particularly in relation to policies said to be relevant to our consideration of the proposal and its location.

57 It was Mr Milner's evidence that it is useful to break down the use into its various parts or layers, given the complexity of the proposal. It was said that those parts can then be assessed against relevant elements of the planning scheme, which will then enable a proper appreciation of the proposal's acceptability, with all its subtleties.

58 It seems to us that this approach stems from the absence of any clear planning scheme direction squarely referencing this particular use. In saying this, we fully appreciate that planning schemes cannot possibly contemplate every possible use or development for which permission may be sought.

59 While we can see the attractiveness of this approach, we are not persuaded that it is one that we should follow. Rather, we think the preferable and correct approach is to base our assessment of the proposal in the planning context with the real and substantial purpose of the use in the forefront of our minds. To do otherwise would most likely lead to artificial outcomes.

- 60 In the present case, the real and substantial purpose of the use is the rehabilitation of people with an addiction to drugs or alcohol.
- 61 While students reside on the premises and undertake an educative component, in our view, these elements are part and parcel of the rehabilitation program, not separate elements of it. Thus, we do not think that this proposal can rely on policies related to education facilities or tourism strategies such as that at Clause 21.04-2 which seeks to “promote Warburton township for tourist accommodation, facilities and attractions for visitors, especially development based on the health resort industry”, in support of this location.
- 62 We do agree however that the proposal can at the broadest level be regarded a ‘community’ resource or facility in the nature of that referred to in State policy at Clause 19 and there is some policy support for the clustering of such uses and integration into townships under local policies.
- 63 The nature of this use is however somewhat unique, in comparison with other community facilities. It is a use characterised by its high degree of self-reliance. It is not for example, dependent on the utilisation of other community or health services for the usual implementation of the program. We do not see any necessary or desirable symbiotic relationships between other community facilities nearby and the proposed use that weigh in favour of the review site’s location. Rather, the proposed use endeavours to provide a high degree of detachment for its students from activities occurring outside its site boundaries. The converse is also true. This is clearly evidenced by the detailed security management regime proposed by Dr Zalewski designed to monitor inbound and outbound interactions between students and outsiders
- 64 On the other hand, it is also self-evident that the proposal will accommodate vulnerable people in our community. Uses that perform this role, such as crisis accommodation, are identified in planning schemes as having a legitimate place in residential areas. But as the Tribunal in the *Odyssey House* case observed, because such uses may be located in residential areas, it does not necessarily follow that “areas zoned for housing must be the only places where such uses may locate”¹².
- 65 Indeed we are also mindful that although a permit may be granted for this use in the LDRZ, Clause 31.02 of the planning scheme cautions that because a use is in Section 2 does not imply that a permit should or will be granted. We must still decide whether the proposal will produce acceptable outcomes in terms of the State Planning Policy Framework, the Local Planning Policy Framework, the purpose and decision guidelines of the zone and any of the other decision guidelines in Clause 65.

¹² At paragraph 44.

- 66 We also note that the LDRZ is a residential zone and there is no specific support in the zone purpose for community facilities broadly or for this use more specifically in the LDRZ. Being a residential zone, issues of residential amenity are a very relevant consideration.
- 67 Setting aside the purpose common to all zones which is to implement state and local policies, the only other purpose of the LDRZ is:
To provide for low-density residential development on lots which, in the absence of reticulated sewerage, can treat and retain all wastewater.
- 68 This is in contrast to the Neighbourhood Residential, General Residential, Residential Growth and Township Zones that all refer to the purpose that allows educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.¹³
- 69 In addition, there are no decision guidelines specifically directed at the consideration of use based applications in the LDRZ at Clause 32.03-6 other than the need to consider decision guidelines at Clause 65 and the state and local planning policy frameworks.
- 70 Ultimately the specific characteristics of this use and the physical context must also be considered in determining its acceptability in this location, matters to which we will return.
- 71 To conclude, having regard to the real and substantial purpose of this use, the planning scheme does not provide clear strategic support for the proposal in this location.

WHAT WEIGHT SHOULD BE GIVEN TO THE ISSUE OF NEED?

- 72 To the extent that this proposal is for a facility that seeks to address drug and alcohol addiction, we agree with the applicant's submission that:
- there is a community need for such facilities; and
 - community need is not limited to the local community of Warburton or Yarra Ranges.
- 73 It is important for us to emphasise that we do not under-estimate in any way the critical role that facilities of the type proposed here play in providing assistance to people afflicted by drug and alcohol addiction. We also acknowledge that there are a range of different facilities available, each providing different responses to the issue. Each of these facilities and the methods they adopt, form a legitimate part of the total spectrum of services available to those that need access to those services.

¹³ For a more detailed discussion of this issue, see for example *Angels Health Service Aust Pty Ltd v Manningham CC* [2014] VCAT 1517 at paragraphs 24 to 27.

- 74 As we have mentioned above, there was no dispute in this case, about the need to provide drug and alcohol rehabilitation services, although the objectors did seek to raise concerns about the methodology used by the applicant. We have addressed those concerns and the relevance of them separately in this decision.
- 75 The need for drug and alcohol rehabilitation facilities is therefore one of the many relevant factors that we must balance against other relevant and sometimes conflicting policies, expectations and objectives, in arriving at our decision. The planning scheme requires us to undertake the balancing exercise in favour of net community benefit and sustainable development for the benefit of present and future generations.¹⁴
- 76 The extent to which the need for a use will influence the decision to grant a permit, has been addressed by the Tribunal in many cases over a long period. In a relatively recent case, the Tribunal for example observed that need as a relevant consideration:
- 35 ... will vary depending on the circumstances of each case. I can, for example, envisage circumstances in which greater or lesser weight would be given to this factor depending on a proposal's location within the residential area, the character of that area and the pattern of surrounding land uses, and also depending on the nature of the use itself.¹⁵
- 77 In the present case, our consideration of the issue of need has been primarily related to our assessment of the suitability of this use for this site. Principally, in relation to need, the question for us is to decide whether the need for this facility is so great as to influence our assessment of the concerns expressed about the location of the use in a residential area, and the impacts of the use on the amenity and character of that residential area.
- 78 The Tribunal has also previously commented on the complexity of the issue of need and its relationship to the consideration of site suitability:
- 11 Need is a fundamental concept in town planning, because town planning is essentially concerned with shaping our physical environment to meet the social economic and environmental needs of the community. However in individual development applications the role of need is complex. At one end of the scale, there are ubiquitous land uses in relation to which the Tribunal has said that need is not a matter for the planning system, rather it is a matter for the competitive market place. On the other hand there are important community based uses where the Tribunal has found that the need for the use can outweigh other important, and ordinarily decisive, planning considerations. An

¹⁴ Yarra Ranges Planning Scheme, Clause 10.04.

¹⁵ *Trustees of the Ukranian Catholic Church in Australia v Melbourne CC [2008] VCAT 2388* .

often quoted example of this latter case is the helipad at the Alfred Hospital.¹⁶

- 79 The reference to the Alfred Hospital helipad in that decision is pertinent because in that decision the Tribunal found that the provision of a helipad at the hospital was of such overwhelming community benefit, a permit should issue notwithstanding the significant amenity impacts it would have on neighbouring residents¹⁷. The decision probably represents the “high water mark” in terms approving proposals on the basis of need and community benefit overriding other relevant considerations. In the Alfred Hospital case, the need for the helipad to be located on that site was a determinative consideration.
- 80 The proposal before us does not fall into the category of a use that, by virtue of its overriding importance for it to be located on a specific site, need assumes a determinative status.
- 81 In fairness, the applicant did not submit that the issue of need ought to be determinative. Rather the applicant submits that this proposal falls into that category of use in which need will be a factor that influences the balance to be struck between competing planning policy considerations.
- 82 The Council and the objectors submit that the proposal should be regarded as being at the lower end of the “need spectrum” because:
- It has not been demonstrated whether the facility will serve local residents.
 - It is the only Narconon facility in Australia and will therefore attract attendees Australia wide.
 - The existing facility at O’Shannassy Lodge employs mainly ex students the majority of whom do not live locally.
 - The significant cost of the program will limit the ability of local residents to access the facility.
 - The program is not Government funded or accredited.
 - Local policy does not support non residential uses in residential areas unless the use meets the needs of the local community.
- 83 We do not regard these points as significant factors in determining the weight to be accorded to the issue of need. We have commented previously that the program is one of a range of services available within the community aimed at addressing drug and alcohol addiction. In this respect, the lack of government funding for the program is of no great consequence. Both the existing and the proposed use form part of the totality of the provision of facilities intended to provide drug and alcohol rehabilitation.

¹⁶ *Tulcan Pty Ltd v Knox CC* [2003] VCAT 1627.

¹⁷ *Alfred Hospital v City of Melbourne* [1986] P86/1260-1.

The suitability of a site for a drug and rehabilitation use, its acceptability having regard to the policy framework of the planning scheme and, importantly in the context of this case, its impacts on neighbouring and surrounding properties, should be assessed in the same way irrespective of whether the facility is the recipient of government funding or not.¹⁸

Whether the use is intended to serve an exclusively or even primarily local community is not a significant factor in this case. We note that there is nothing in this proposal that precludes a local resident from accessing the services on offer, but the unfortunate reality is that the need for the facility is not localised, but rather it is a community wide need that the proposal seeks to address.

- 84 To conclude, need has a role to play in determining the community benefits of this proposal, but in the circumstances of this case, it is not a factor that is determinative in terms of the acceptability of the use to the site on which it is proposed to be located.

AMENITY, CHARACTER AND THE RISK ASSESSMENT. WHAT ARE THE IMPACTS OF THIS PROPOSAL?

- 85 One of the difficulties we have encountered in this case, is concerned with gaining a thorough, reasonable and balanced appreciation of the impacts of the use in a residential context, in which issues of residential amenity are a very relevant consideration.
- 86 We have been presented with two diametrically opposed versions of the use and its impacts.
- 87 At one extreme, the objectors, relying largely on material obtained under Freedom of Information (the FOI incidents), presented a stark picture of the existing facility at O'Shannassy Lodge. Acts of violence, clients absconding from the facility, drug taking, theft and property damage were amongst the recorded incidents. One of these incidents involved a break-in and theft of prescription medication from the pharmacy run by Ms Kakafikas, an objector. Commenting on this and other incidents, she aptly summarised the objectors' concerns by posing the question "*how can we really be sure that these won't be replicated and amplified deep in the heart of our community?*"
- 88 Objectors also submit that the FOI incidents do not represent the totality of all incidents that can reasonably be inferred to have occurred because there may have been others which did not attract police intervention.
- 89 The applicant on the other hand, paints a different picture. The submissions and some of the evidence presented to us emphasise the educative methods applied at the facility and the drug free environment in which participants engage. It is Mr Milner's evidence that, subject to the adoption of the

¹⁸ This is consistent with the approach adopted by the Tribunal in *Healthscope Ltd v Moreland CC & Ors (includes Summary) (Red Dot)* [2013] VCAT 99.

recommendations of Dr Zalewski, the proposal would not contribute in any significant way to increased crime in Warburton, and would be compatible with the residential neighbourhood when considered in the context of the previous use of the site as a conference centre. The use is described as passive and benign.

90 In attempting to reconcile the two versions of this proposal's impacts, we agree with and have adopted the approach taken by the Tribunal in earlier cases where the Tribunal has been required to perform the same or similar tasks. This approach is concisely summarised in a case involving an application for a drug and alcohol rehabilitation counselling service in a residential area of Carnegie. The Tribunal said:

56 While we can appreciate the concerns expressed by the resident objectors on these matters, in any assessment of the amenity impacts of this proposal, a distinction must be drawn between what people perceive the impacts of this use will be, and the reality of those impacts. It is perfectly reasonable for the residents to hold the fears that they do, but from the Tribunal's perspective we must be satisfied that there is a factual or realistic basis to those fears in order for us to conclude that this use will result in the amenity impacts alleged by the residents.¹⁹

91 The FOI incidents presented to us in this case by the objectors therefore need to be considered in the appropriate context. In this respect, we regard the number of incidents identified as relatively small given that the use has been operating at O'Shannassy Lodge for about 12 years. The FOI incidents covered a period of 6 years, a period that Mr Townshend estimated amounted to about 20,000 people days. A high percentage of the incidents occurred within the site boundaries, and conversely, a low proportion occurred off site. We agree with Mr Townshend that many of the incidents were relatively innocuous and few required a significant level of police intervention.

92 Our analysis of the FOI material, leads us to conclude that the objector version of this proposal's impacts tend toward the extreme. This is not to say however that their concerns are trifling or inconsequential, or that we have concluded that the proposal does not have the potential for adverse offsite impacts on the amenity of the surrounding residential area. There are aspects of the use that concern us in terms of their potential to give rise to adverse impacts. We are unable to conclude therefore that the applicant's description of the use as a benign or passive use that will fit comfortably into its residential context, is an accurate description.

93 Our assessment of the proposal's impacts sit somewhere between the two versions presented to us.

¹⁹ *Self Help Addiction Resource Centre Inc v Glen Eira City Council* [2005] VCAT 2647

- 94 Similarly, we tend to agree with Ms Marshall that the site is not necessarily a “downtown” location described by the Tribunal in the *Odyssey House* case, but nor does “it exude a degree of detachment” that we also agree is necessary for a facility like this.²⁰ We therefore share the concerns raised by the Council and objectors that the proximity of the site to the township reduces the opportunity for absconders to ‘cool their heels’ within the relative safety of a more remote location.
- 95 We have concluded that because the proposal does not benefit from the separation from sensitive residential uses currently enjoyed by O’Shannassy Lodge, the acceptability of the proposal on this site is to a very large extent, dependant on the adequacy of the operational management of the use and the related risk management practices.
- 96 Our conclusions about this are very largely consistent with the evidence of Dr Zalewski, who was called by the applicant to give evidence on the risk management aspects of the proposal. It is his evidence that the existing facility at O’Shannassy Lodge is a “low risk” facility because of its relative isolation from sensitive uses. Dr Zalewski described the proposed use at the review site as having an inherently “high risk” because of its location within a residential context. Dr Zalewski identifies 17 issues/risks associated with the proposal in his risk analysis. These risks are categorised under three elements:
- Perimeter, access control and general security/safety.
 - Conflicts, aggression and difficult people.
 - Communications (Community and police).
- 97 Dr Zalewski recommends a series of initiatives that in his evidence are required to convert the inherent high risks of this use to a residual low risk.
- 98 The applicant agrees to implement all of the recommendations. The applicant proposes that the recommendations be implemented by way of permit conditions that in effect require the applicant to prepare and implement a comprehensive management plan addressing all the relevant issues. The plan would be prepared following the issue of a permit and would be subject to approval by the responsible authority, following consultation with the police. The applicant submits that we are entitled to proceed on the basis that permit conditions and the management plan will be complied with and implemented on an ongoing basis. Mr Townshend submits that the applicant and operator of the site demonstrably possess the resources, expertise and capacity to prepare and implement the management regime contemplated in the proposed permit conditions. The applicant would also accept a condition making the permit personal to it. Mr Townshend submits that while a personal permit is rare in the planning

²⁰ At paragraph 58.

jurisdiction, in the circumstances of this case, such an approach is appropriate.

- 99 Notwithstanding the stated intentions of the applicant to abide by all of Dr Zalewski's recommendations, an intention that we unreservedly accept is presented in good faith, we are not confident that the applicant has fully appreciated either the necessity for or the complexity of the recommendations. Dr Zalewski's recommendations necessitate a fundamental and intricate integration of operational and risk management methods in order to achieve the desired residual low risk outcome necessary for this site.
- 100 We cite one example of the proposed risk strategy that we think is sufficient to highlight our concerns in this respect. Currently, entrance screening of participants in the program, is largely dependant on a self-reporting process. Dr Zalewski acknowledges the importance of there being a mechanism of third party verification of the participants' self-reporting. While this is not a critical element of risk management at O'Shannassy Lodge, because of that site's isolation, it is an important part of the risk strategy at the review site. Dr Zalewski however acknowledges the difficulties of obtaining third party verification of information provided by participants, given limitations on access to private information.
- 101 It is unclear how this aspect of the proposed operation would be addressed in the management plan. In terms of deciding whether the use is acceptable on this site, the uncertainty about the effective integration of security and operational management presents a significant difficulty for us.
- 102 We have observed previously that in this case, where the review site is located within an established residential with a number of direct residential abutments, a decision about the acceptability of the use for the site is strongly influenced by the adequacy of the operational and risk management regimes. In the absence of detailed and comprehensive information about how the issues sought to be addressed by the management plan are to be resolved, a decision that the proposal is acceptable on this site cannot reasonably be reached.
- 103 On the last day of the hearing, we invited the parties to comment on the Tribunal's findings in the case of *Ryan v Port Phillip CC*.²¹ While that case involved an application for an outdoor smoking area, the Tribunal described different planning measures and their likely efficacy in addressing off-site amenity impacts including the role of management plans. In broad terms, that decision found that management plans should not normally be relied on as a means to convert an unacceptable use into an acceptable one. The Tribunal said:

33 ... Management plans are a less effective option and should only be accepted as a solution when there is no other alternative.

²¹ *Ryan v Port Phillip CC* [2006] VCAT 1923.

They work best as a back-up to other measures. Their effectiveness will depend upon the responsiveness of people responsible for implementing and monitoring them, and there is always the risk that problems will arise before they are brought under control by action under the management plan.

- 104 We agree with Mr Townshend's response that the use of management plans through the secondary consent provisions in permit conditions is a legitimate means of achieving desired planning outcomes.
- 105 However, we find that in this case, the issues required to be addressed by the management plan, and the manner in which they are to be addressed, ought to be considered as part of the application, and in that way, a reasoned and balanced decision can then be made about the acceptability of the proposal.
- 106 We are also conscious of the level of ongoing monitoring, reporting and enforcement likely to be necessary as part of the implementation of any management plan. This may take the form of self-regulation by the applicant, but is also likely to necessitate some role by the responsible authority. It is not known whether the responsible authority will possess the necessary capabilities, capacity and resources to fulfil this task. This is a further factor that would form part of any consideration about the success of a management plan for this use on this site.
- 107 Suffice to say, in the particular circumstances of this case, we find that the measures required to be addressed under the management plan would necessitate a high level of vigilance and expertise by those responsible for implementing and monitoring them. We have not been presented with sufficient information that would enable us to have sufficient confidence about the successful implementation of the management plan, notwithstanding the applicant's best endeavours in this respect. For example, we retain some reservations about the capacity of staff engaged on a voluntary basis to obtain the necessary skills and qualifications to act in accordance with the complex and intricate measures contemplated in Dr Zalewski's recommendations. In the absence of a detailed management plan, there remains too much uncertainty about the final outcome given the range of variables at play.

OTHER MATTERS

- 108 During the course of the hearing we were presented submissions covering a wide range of issues, some of which are, to varying degrees relevant to the decision we are required to make in this case. One such matter relates to the site's location within an area susceptible to bushfires, raising logistical questions in the event of an evacuation. While this matter is not necessarily insurmountable, it does require further detailed consideration and resolution. Some other matters are of no relevance.

109 We have outlined above our reasons for affirming the Council's decision in this application, and it is not necessary for us to record our findings on all the other matters raised during the hearing.

CONCLUSION

110 It follows from the above reasons that it is our conclusion that the decision of the Responsible Authority should be affirmed and no permit issued.

Laurie Hewet
Senior Member

Mary-Anne Taranto
Member