

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P295/2018
PERMIT APPLICATION NO. KP-832/2017

CATCHWORDS

Section 82 Planning and Environment Act 1987 – Public Park & Recreation Zone – Road Zone Category 1 – Design & Development Overlay Schedule 1 – removal of native vegetation – alteration to access to Beach Road – safety in relation to cyclists

APPLICANTS

Gavin & Robyn Nolan

RESPONSIBLE AUTHORITY

Kingston City Council

REFERRAL AUTHORITY

Vic Roads – Metropolitan South East Region

RESPONDENT

Kingston City Council

SUBJECT LAND

Bay Trail – Kitchener Street (Mentone Life Saving Club) Mentone to Rennison Street, Parkdale Vic

WHERE HELD

Melbourne

BEFORE

Jeanette G Rickards, Senior Member

HEARING TYPE

Hearing

DATE OF HEARING

23 – 25 July 2018

DATE OF ORDER

1 October 2018

CITATION

Nolan v Kingston CC [2018] VCAT 1512

ORDER

Permit granted

- 1 In application P295/2018 the decision of the responsible authority is varied.
- 2 In planning permit application KP-832/2017 a permit is granted and directed to be issued for the land opposite Kitchener Street (Mentone Life Saving Club) Mentone to Rennison Street, Parkdale in accordance with the endorsed plans and the conditions set out in the Notice of Decision to Grant a Permit dated 30 January 2018 subject to the following modifications:
 - (a) Conditions 1, 2 and 3 are deleted.
 - (b) Condition 4 is amended to read:

The works are to be carried out generally in accordance with plans prepared by Traffic Works "Bay Trail Mentone to Mordialloc – Functional Layout Plan, Revision P6, 9 October 2017 but modified to show:

- (a) the section of 2.9m wide path with 0.75m wide buffer and 0.5m internal lateral clearance.
- (c) Condition 7 is amended to read:

Before works start, native vegetation protection fencing must be erected around all patches of native vegetation and scattered trees to be retained on site. This fencing must be erected at the edge of the construction footprint.

The protection fencing must be constructed to the satisfaction of the responsible authority. The protection fencing must remain in place at least until all works are completed to the satisfaction of the responsible authority. Except with the written consent of the responsible authority, within this area:

 - (a) no vehicular or pedestrian access, trenching or soil excavation is to occur;
 - (b) no storage or dumping of tools, equipment or waste is to occur;
 - (c) no entry and exit pits for underground services are to be constructed.
- (d) Conditions in the planning permit are renumbered accordingly.

Jeanette G Rickards,
Senior Member

For applicants

APPEARANCES

Mr S Bird, Barrister, Direct Brief

He called as witnesses:

- Mr L Stone, Arboriculture
- Mr A O'Brien, Traffic Engineer
- Mr C Morrison
- Mr J Lynch

For responsible authority

Mr A Carnovale, Town Planner

He called as a witness:

- Mr S LeBel, Ecologist

For referral authority

For respondent

Mr S Wang, Town Planner

Ms M Foley, Barrister instructed by Ashurst
Australia

She called as witnesses:

- Dr J Yugovic, Ecologist
- Mr S McGurn, Town Planner
- Ms C Dunstan, Traffic Engineer
- Mr D Atkinson, Landscape Architect

INFORMATION

Description of proposal	Stage 2 construction of the Bay Trail shared bicycle path between Mentone Life Saving Club and Rennison Street, Parkdale requiring removal of native vegetation and alterations to access to Beach Road.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Kingston
Zone and overlays	Public Park & Recreation Zone (Clause 36.02) Road Zone Category 1 (Clause 36.04) Design & Development Overlay Schedule 1 – Urban Coastal Height Control Area (Clause 43.02)
Permit requirements	Clause 52.017 – removal of native vegetation Clause 52.29 – alterations to access to Beach Road
Relevant scheme policies and provisions	Clauses 11, 12, 12.01-2S, 12.02-2S, 15.01-1S, 18.02-1S, 18.02-1R, 21.08, 21.11-3, 62.02, 65, 71.02
Land description	<p>The subject land comprises a 2.4km section of Crown Land located from Kitchener Street, Mentone to Rennison Street, Parkdale between the Port Phillip Bay and Beach Road.</p> <p>The subject land contains a range of vegetation including planted locally indigenous coastal trees and shrubs. The land also contains remnant and naturally colonised locally indigenous coastal flora. The area contains two ecological vegetation classes, being Coastal Headland Scrub (EVC161) and Sand Heathland (EVC6).</p> <p>Land in the immediate area also consists of informal vegetation, pedestrian pathways and Beach Road. The Mentone Lifesaving Club is located in the northern section of the proposed trail with the Parkdale Yacht Club and the Parkdale Beach Café and Kiosk located towards the southern end.</p>

Land to the north of Beach Road predominantly consists of single and double storey dwellings. Other sites in this locality also include the Mentone Hotel site, Mentone Girls Grammar and St Bede's College¹.

Tribunal inspection

28 July 2018

¹ Extract from submission by Responsible Authority 23 July 2018

REASONS²

WHAT ARE THE KEY ISSUES?

- 1 The applicants seek review of the decision of Kingston City Council (the council) to issue a Notice of Decision to Grant a Permit dated 30 January 2018 allowing for the removal of native vegetation and alteration of access to a Road Zone Category 1 (Beach Road) for the Bay Trail– Kitchener Street (Mentone Life Saving Club) Mentone to Rennison Street, Parkdale.
- 2 The applicants identified a number of issues in their statement of grounds in relation to vegetation removal and the safety and amenity of the alterations of the road for the proposed crossovers to car parks.
- 3 The applicants at the hearing indicated they now took no issue with the removal of vegetation, nor do they oppose the shared path that is being proposed. What they are opposed to is the current location of the shared path. They submit the path should be moved west of the current proposal as the proposed location of the path will result in significant safety risk for all road users. The alterations to the crossovers to Beach Road from various car parks will result in conflicts with users of the path and the narrowing of Beach Road will result in safety issues for cyclist using Beach Road.

PROCEDURAL ISSUES & RULINGS

- 4 Following the hearing Amendment VC148 was gazetted on 31 July 2018. The amendment included a wide range of modifications to the Kingston Planning Scheme. The parties were given a period in which to make further submissions in light of the amendment.
- 5 The council and respondent/permit applicant both considered the amendment to be 'largely policy neutral' and both indicated they continued to rely upon the submissions made at the hearing. Both referred to the change to Clause 52.29.
- 6 Clause 52.29 (Land adjacent to a Road Zone, Category 1, or a Public Acquisition Overlay for a Category 1 Road) has been amended to exempt an application from third party notice and review rights³. As such the amendment removes the rights of the applicants to seek review of the matters in Clause 52.29.
- 7 The applicants submit Clause 52.09-5 is not retrospective and that the provisions of Clause 52.29 at the time the hearing was conducted should stand. Both the council and permit applicant submitted the Tribunal is

² The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed, have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all this material will be cited or referred to in these reasons.

³ *An application is exempt from the notice requirements of section 51(1) (a), (b) and (d), the decision requirements of section 64 (1), (2) and (3) and the review rights of section 82 (1) of the Act.*

required to determine the application on the planning scheme in place at the time of its determination.

- 8 In *Ungar v City of Malvern*⁴ a determination by the Court of Appeal frequently applied by the Tribunal, as well as the Supreme Court in *Sisters Wind Farm Pty Ltd v Moyne Shire Council & Ors*⁵ have found that in determining an application, the Tribunal is bound to apply the relevant planning scheme to the facts at the time of making the determination.

- 9 In the *Sisters Wind Farm*, Emmerton J stated:

In *Unger*, the responsible authority refused a permit to use land as a car park and the owner appealed to the Planning Appeals Tribunal. After the appeal had been lodged but before the Planning Appeals Tribunal had heard the appeal, the planning scheme was amended to preclude the grant of a permit to use the land as a car park. The Full Court of the Supreme Court rejected the argument that instituting an appeal to the Town Planning Appeals Tribunal created a right to have an application for a planning permit decided on the basis of the law as it existed at the time the appeal was instituted. The Court held that the Planning Appeals Tribunal was obliged to give effect to the amendments to the planning scheme. The institution of the appeal gave the owner no more than a hope or expectation that his appeal would succeed and that he would be granted a permit. As the grant of a permit was discretionary, the question was open and unresolved, and no right or privilege had accrued to the owner

I find that no right was acquired or accrued under the planning scheme. The applicant had no more than “a power to take advantage of an enactment”. No right is given under the planning scheme; rather, it establishes a process which is to decide whether a right in the form of a planning permit should or should not be given. It is a situation which, in my view, falls squarely within the principle enunciated in *Ungar*. It does not matter that the process of decision making is being made upon remittal from the Supreme Court or upon an initial application for review: the task of the Tribunal is the same in each case. It must consider the original permit application *de novo* (albeit in the present instance confined to the issue of noise.

The statutory regime contemplates that the content of planning schemes is not fixed but can be changed in accordance with the procedures set out in the P&E Act. The responsible authority has a duty to administer and enforce the planning scheme, to comply with the planning scheme and to implement the objectives of the planning scheme ‘as in force from time to time’ under the P&E Act.

- 10 Whilst the applicants, following the gazettal of Amendment VC148, have no rights of review in relation to access to Beach Road under Clause 52.29, having heard their submissions, as well as evidence presented on their behalf by Mr O’Brien I consider that pursuant to section 98(1)(c) of the

⁴ [1979] VR 259

⁵ [2012] VSC 324 (3 August 2012)

Victorian Civil and Administrative Tribunal Act 1998 I may inform myself on any matter as I see fit and will therefore give appropriate weight in light of the amendment to the matters they raised.

PROPOSAL

- 11 The proposal relates to the construction of what is referred to as Stage 2⁶ of the Bay Trail a shared pedestrian/cyclist path which forms part of the Principal Bicycle Network. The path is to be 3m wide for most of the trail with a 1m buffer on the road side and 0.5m wide vegetation buffer along the foreshore side.
- 12 To facilitate the construction of the Bay Trail it is proposed to remove 0.571 hectares of native vegetation along the foreshore. This is made up of 0.568 hectares of Coastal Headland Scrub (EVC161) and 0.003 hectares of Sand Heathland (EVC6). The path is proposed to be narrowed for a 50m section to a 0.75m road buffer and 2.9m wide path adjacent to the Sand Heathland (EVC6).
- 13 It is also proposed to alter access points along the southern side of Beach Road.
- 14 A Functional Layout Plan has been prepared by Traffic Works.

PERMIT TRIGGERS

- 15 As the City of Kingston is the public land manager for the foreshore in which the path is to be located no permit is required under the Public Park and Recreation Zone (PPRZ). Any buildings and works carried out by or on behalf of the public land manager are also exempt.
- 16 The subject land is also located within a Road Zone (RZ). Under the provisions of the RZ any use listed in Clause 62.01 is considered a section 1 use and does not require a permit:

The use of land for a Road except within the Urban Floodway Zone and a Public Conservation and Resource Zone.
- 17 I accept the definition of 'road' in the *Planning and Environment Act 1987* includes the proposed shared path. As there is no requirement for a permit for use in section 1, there is also no requirement for buildings and works under the RZ.
- 18 The land is also subject to Design and Development Overlay Schedule 1 (DDO1). No permit is required under DDO1 for buildings and works for 'Roadworks, bicycle pathways and trails' as they are exempt under Clause 62.02-2. There is no specific requirement within the planning scheme for a permit.

⁶ Stage 1 extended the Bay Trail between Charman Road and Rennison Street

- 19 Pursuant to Clause 52.17 a permit is required for the removal of native vegetation. As the application was made prior to Amendment VC138 (12 December 2017) transitional provisions apply to the application.

The requirements of Clause 52.17 of this scheme in force immediately before the commencement of Amendment VC138 continue to apply to an application for:

- A permit lodged before that date.
- 20 Pursuant to Clause 52.29 a permit is required to alter access points (crossovers) to Beach Road, a road in a Road Zone Category 1. The relevant determining referral authority is Vic Roads who have not objected to the proposal.
- 21 The Department of Environment, Land, Water and Planning pursuant to section 40 of the *Coastal Management Act 1995* and as delegated by the Minister, consent to the proposed use and development subject to conditions.
- 22 The subject land is also located within an area of Aboriginal Cultural Heritage Sensitivity. A Cultural Heritage Management Plan (CHMP 1105) was approved on 5 August 2010.

PATH LOCATION

- 23 The location of the path is not a matter for consideration by the Tribunal. This is because there is no permit requirement for the use or development of the path within the PPRZ, the RZ, or the DDO1 which apply to the subject land.
- 24 The only matters the Tribunal can consider are the two permit triggers which relate to the removal of native vegetation under Clause 52.17 and the alteration of access to crossovers to Beach Road under Clause 52.29. As the location of the path is not a matter for consideration I am unable to consider the submissions by the applicants that the path should be moved west of the current proposal.
- 25 The Tribunal is only required to consider the two issues that trigger a requirement for a permit, they are:
- Whether the removal of the proposed native vegetation is appropriate? and
 - Whether the proposed alterations to the crossovers to Beach Road are appropriate?

REMOVAL OF NATIVE VEGETATION

- 26 It is proposed to remove 0.571 hectares of native vegetation consisting of 0.568 hectares of Coastal Heathland Scrub and 0.003 hectares of Sand Heathland to facilitate the construction of the path.

- 27 Evidence in relation to the removal of vegetation was provided to the Tribunal by Mr Leigh Stone, an aboricultural consultant on behalf of the applicants, Mr Shannon LeBel, consultant Botanist on behalf of the council and Dr J Yugovic, Ecologist on behalf of the permit applicant.
- 28 The purpose of Clause 52.17 (prior to VC138) is to:
- To ensure permitted clearing of native vegetation results in no net loss in the contribution made by native vegetation to Victoria's biodiversity. This is achieved through the following approach:
 - Avoid the removal of native vegetation that makes a significant contribution to Victoria's biodiversity.
 - Minimise impacts on Victoria's biodiversity from the removal of native vegetation.
 - Where native vegetation is permitted to be removed, ensure that an offset is provided in a manner that makes a contribution to Victoria's biodiversity that is equivalent to the contribution made by the native vegetation removed.
 - To manage native vegetation to minimise land and water degradation.
 - To manage native vegetation near buildings to reduce the threat to life and property from bushfire.
- 29 In accordance with the Biodiversity Guidelines⁷ the proposed native vegetation to be removed has been defined as being within the low risk-based pathway. Based on the assessment by both Biosis and Ecology and Heritage Partners they have a general biodiversity equivalence score of 0.021 (Habitat hectares (0.132) x strategic biodiversity score (0.162)). The offset requirement of 0.032 general units was identified in Mr LeBel's statement of evidence at Appendix 2.
- 30 The applicants submit 'it is common ground between the parties that the vegetation along the Subject Land is low level and not significant'.
- 31 The council submits 'the location of the vegetation to be removed at the road edge of the foreshore is deemed to have the least impact on the foreshore environs while also supporting the creation of the Bay Trail envisaged in the Coastal Management Plan 2014'.
- 32 Of relevance to the consideration of the removal of native vegetation is Clause 12.01-2S Native vegetation management which has as an objective:
- To ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation.
- 33 Clause 12.02-2S relates to Coastal Crown land which has as an objective:
- To achieve coastal crown land development that provides an environmental, social and economic balance.

⁷ 'Permitted clearing of native vegetation – Biodiversity assessment guidelines' (Department of Environment and Primary Industries, September 2013)

- 34 The strategies to achieve this objective are:
- Ensure that use and development on or adjacent to coastal foreshore Crown land:
- Maintains safe, equitable public access and improves public benefit.
 - Protects local environmental and social values.
 - Demonstrates need and coastal dependency.
 - Minimises impact on the coast by locating within a defined activity or recreation node.
- 35 I accept, based on the evidence provided by the three experts that the vegetation to be removed will not result in any significant impacts to the ecological values of the area. No national or State significant listed flora and fauna were recorded within the subject area, nor does the area provide an important habitat for rare or threatened species.
- 36 It is not a matter for the experts or the Tribunal to consider additional vegetation removal for a relocated path.

ACCESS TO BEACH ROAD

- 37 There are approximately twelve access and egress points to Beach Road for vehicles along the proposed section of the path. These points are to be either replaced, relocated, or realigned. A Functional Layout Plan (Revision P6, 9 October 2017) has been adopted by the council and approved by the relevant road authority VicRoads under the *Road Management Act 2004*.
- 38 Mr Andrew O'Brien provided expert traffic engineering evidence on behalf of the applicants. He expressed wide ranging views some which were outside the Tribunal's consideration in this application, including car parking and cyclist safety along Beach Road.
- 39 Mr O'Brien previously advised the council regarding the Stage 1 Bay Trail path⁸.
- 40 In relation to the crossovers Mr O'Brien stated:
- Best practice is that the vehicular crossings of a shared path need to have one car length between the crossing and the line of kerb of the road to allow a vehicle to stop and wait for users to cross an entry, or to cross an exit then wait at the kerb for a gap in traffic when exiting. Preferably, driveways should be one-way, either IN only, or OUT only.
- 41 Ms Dunstan, traffic engineer on behalf of the permit applicant indicated 'sight distance triangles of 2m wide and 2.5m deep would be expected at the interface between the crossovers and shared path consistent with requirements of AS2890.1-2004'.

⁸ *Kingston Residents Association v Kingston CC* [2015] VCAT 365

- 42 Ms Dunstan identified two crossovers where it may be necessary to remove additional vegetation to allow for the sight distance triangles. I agree this could be addressed at the detail design stage and may need an amendment to the permit for the removal of additional vegetation.
- 43 The crossovers to be realigned or relocated are close to existing crossovers and the amendments will, in my view, improve safety aspects of access and egress. I agree with Ms Dunstan that the reduction in vegetation along the shared path will improve these areas and allow for improved sight distances between existing traffic and through traffic.
- 44 One issue of concern raised by the applicants relates to the variation of the width of the path to 2.9m with a 0.75m wide buffer and 0.5m internal lateral clearance for a distance of 50m to retain significant vegetation. This narrowing for a small section of the path is to avoid impact on the sensitive vegetation adjacent to the remnant Sand Heathland vegetation.
- 45 As a result, the carriageway along Beach Road is to be amended by VicRoads. VicRoads has provided in principle support for the following typical carriageway configurations:
- A total road width spaces of 12.7 metres, 3.0 metre shared path behind the kerb along the foreshore side and 1.0 metres nature strip, when parking is not permitted all day in the kerbside lands on both sides (this may be difficult to achieve along the entire length);
 - A total road width spaces of 13.4 metres, 3.0 metre shared path behind the kerb along the foreshore side and 1.0 metre nature strip. With “No Stopping” restricted parking between 6 and 10 am during weekends, on both sides in line with the existing parking restrictions along Beach Road.
- 46 In relation to indented on-street parking VicRoads indicated it would accept:
- A total road width of 12.7 metres, 3.0 metre shared path behind the kerb along the foreshore side, 1.0 metre nature strip and indented parking where such provision is feasible.
- 47 The applicants consider that the resultant changes to the Beach Road carriageway will result in issues of cyclist safety. The cyclists indicated they would be at risk when riding along the road from the opening of doors of parked cars requiring them to move to the centre lane.
- 48 Firstly, the reconfiguration of Beach Road carriageway is a matter for VicRoads and not a matter for the Tribunal. The permit requirements currently before the Tribunal do not lead in any way to a consideration of the width or otherwise of Beach Road.
- 49 Secondly, although parking along the western side of Beach Road is prohibited between 6 and 10am on weekends, parking of vehicles outside these times in any location along Beach Road is not a matter for

consideration by the Tribunal. The parking of vehicles on the western side of Beach Road is a matter for the council and VicRoads.

- 50 I note the plans for the path were referred to Bicycle Network who stated:

By extending the off-road shared path, less experienced and less confident riders will no longer have to risk the on-road environment of Beach Road. This is a major safety enhancement.

For the many on-road riders along route 33, the new road conditions will match similar sections of the corridor that have been shown to function safely.

- 51 I am satisfied based on the evidence of Ms Dunstan that adequate sight lines are provided at crossovers for vehicles entering Beach Road and the vegetation removal will ensure there is adequate sight lines ensuring safety between users of the path and vehicles at the various crossovers.

LANDSCAPING

- 52 Landscaping buffers and replacement vegetation are to be provided along the path, these plantings will have a positive impact on the Beach Road Streetscape.

- 53 Mr Atkinson on behalf of the permit applicant prepared a landscape concept plan. The plan in my view indicates landscaping will make a significant contribution on the Beach Road side of the path as well as the foreshore side.

- 54 Mr Atkinson recommended 'a timber retaining wall with steel uprights like the retaining wall on sections of the shared pathway further north of the subject site. I suggest a maximum height of 900mm terraced back into the foreshore reserve and subject to future detail design. The objective of the retaining wall is to assist minimising the impact of this structure on the significant vegetation'.

CONCLUSION

- 55 The proposal in my view responds appropriately to the considerations outlined in the Kingston Planning Scheme. The proposal will 'facilitate sustainable development that takes full advantage of existing settlement patterns and investment in transport, utility, social, community and commercial infrastructure and services'⁹.

- 56 The proposal will meet the objective of 15.01-1S Urban design:

To create urban environments that are safe, healthy, functional and enjoyable and that contribute to a sense of place and cultural identity.

- 57 It will meet the strategies under Clause 15.01-1S to:

Ensure development supports public realm amenity and safe access to walking and cycling environments and public transport.

⁹ Clause 11 Kingston Planning Scheme

Ensure that the design and location of publicly accessible private spaces, including car parking areas, forecourts and walkways, is of a high standard, creates a safe environment for users and enables easy and efficient use.

Ensure that development provides landscaping that supports the amenity, attractiveness and safety of the public realm.

Ensure that development, including signs, minimises detrimental impacts on amenity, on the natural and built environment and on the safety and efficiency of roads.

Promote good urban design along and abutting transport corridors.

- 58 The objective of Clause 18.02-1S is also met 'to promote the use of sustainable personal transport'. The proposal will provide opportunities to promote more walking and cycling in an environment that is safe and attractive. The path provides accessibility 'to footpath-bound vehicles such as wheelchairs, prams and scooters' and will contribute to and improve accessibility to the coastal area¹⁰.
- 59 There is in my view a clear net community benefit because of the proposed Stage 2 path works.
- 60 For the reasons given above, the decision of the responsible authority is varied. A permit is granted subject to conditions.

**Jeanette G Rickards,
Senior Member**

¹⁰ Clause 21.08-3 Kingston Planning Scheme