

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1354/2016  
PERMIT APPLICATION NO. 376/2015/P

### CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*; East Gippsland Planning Scheme; Farming Zone Schedule 1, Erosion Management Overlay; Significant Landscape Overlay; Use of land for Group Accommodation ; Planning Policy; Impacts on Agricultural Land; Cultural Heritage.

<b>APPLICANT</b>	Hugh Deacon
<b>RESPONSIBLE AUTHORITY</b>	East Gippsland Shire Council
<b>RESPONDENTS</b>	John Ward, J.R. Armstrong and N.D Hopkins
<b>SUBJECT LAND</b>	275 Hardys Road Metung.
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Katherine Paterson, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	31 January 2017
<b>DATE OF ORDER</b>	28 February 2017
<b>CITATION</b>	Deacon v East Gippsland Shire Council [2017] VCAT 275

### ORDER

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
  - a Prepared by: Hugh Deacon Architect
  - b Drawing numbers: DA1 to DA3 inclusive
  - c Dated: August 2016
- 2 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by deleting the words ‘use of land for place of assembly’.
- 3 In application P1354/2016 the decision of the responsible authority is affirmed.
- 4 In planning permit application 376/2015/P no permit is granted.

**Katherine Paterson**  
**Member**

**APPEARANCES**

For Hugh Deacon

Mr Hugh Deacon, in person

For East Gippsland Shire  
Council

Mr Ben Marchbank, Town Planner, East  
Gippsland Shire Council

For John Ward

Dr John Ward, in person

For J.R Armstrong & N.D  
Hopkins

Mr Neil Hopkins, in person

## INFORMATION

Description of proposal	Construction of two group accommodation dwellings. Each dwelling will contain a living bedroom area, kitchen, bathroom and private courtyard with spa. The architectural style of the proposed dwellings is neo-classical with columns and a flat roof.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	East Gippsland Planning Scheme
Zone and overlays	Farming Zone Schedule 1; Erosion Management Overlay; Significant Landscape Overlay Schedule 2
Permit requirements	Clause 35.07-1 – To use land for group accommodation Clause 35.07-4 – Construction of a building and to construct and carry out works
Land description	The subject site is 27.5 hectares in area and has been developed with a dwelling and associated garden. The land has been used for wedding ceremonies in the past. The land is also used to graze cattle.
Tribunal inspection	1 February 2017

## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 The land at 275 Hardys Road is located adjacent to Lake King, which forms part of the Gippsland Lakes, and enjoys magnificent water views. Historically it has been used for grazing.
- 2 Mr Deacon purchased the property at 275 Hardys Road Metung with the intention of building a holiday home for his disabled son. The house was completed with a large formal garden, and used for a period of time, but when difficulties arose due to the site's distance from a hospital and the area's limited ambulance service it was decided to lease the house for holiday accommodation. Mr Deacon now wishes to extend this use of the land by constructing an additional two dwellings to be leased for holiday purposes.
- 3 The land has also been previously used to host weddings without planning permission. Mr Deacon originally sought permission for 'place of assembly' to legitimise this use of the land, but following the Tribunal's decision that a cultural heritage management plan was required for this aspect of the proposal,<sup>2</sup> the application was amended to delete reference to 'place of assembly' and the associated buildings and works such as the car park and marquee.
- 4 With regards to the group accommodation, Member Whitney found that the use of land for group accommodation did not trigger a requirement for a cultural heritage management plan, finding:

...the proposed buildings and works associated with "group accommodation" do not fall within regulation 43(1) of the Regulations as "Group Accommodation" is not a listed purpose in regulation 43 (1)(b). However, the construction of three or more dwellings on a lot is a high impact activity pursuant to regulation 45 of the Regulations. Notwithstanding this, given the proposed location of the Group accommodation structure outside of the area of cultural heritage sensitivity, and following the approach of Senior Member Baird in *Big Hill Vineyard Pty Ltd v Greater Bendigo City Council*, it would appear that none of the activity area for this activity is located within an area of cultural heritage sensitivity. However, confirmation that this is the case with greater detailed plans is required.
- 5 The amended plans clearly show that the proposed group accommodation dwellings are outside of the area of cultural heritage sensitivity, and the number of new dwellings has been reduced from three to two. It was common ground at the hearing that the amended proposal would not require

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<sup>1</sup> 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 of this material will be cited or referred to in these reasons.

<sup>2</sup> Contained in the Tribunal's order dated 10 October 2016.

a cultural heritage management plan under the provisions of the *Aboriginal Heritage Act 2006*.

### **WHAT ARE THE KEY ISSUES?**

- 6 The original application was refused by East Gippsland Shire Council on a number of grounds including planning policy, inconsistency with the farming zone, impact on the amenity of neighbouring properties and car parking.
- 7 During the hearing Mr Marchbank advised that the amended proposal would receive support at an officer level, but as the Council did not have an opportunity to review the revised proposal their decision to refuse the application would still stand. However during the hearing he took the somewhat usual step of outlining why the proposal was now supported at an officer level.
- 8 Dr Ward and Mr Hopkins live on adjoining and nearby rural properties that are predominantly used for grazing sheep and cattle. They are concerned that the proposal would result in unreasonable traffic impacts on Hardys Road and that the additional dwellings would compromise the rural settling and the agricultural enterprises of the area. Furthermore they submitted that the proposed use of the land for group accommodation was contrary to the purposes and decision guidelines for the farming zone.
- 9 Having considered all the submissions and evidence and inspected the subject land and its locality I am of the opinion that the key issues in this proceeding are:
  - Is the proposal for group accommodation supported by state and local planning policy?
  - Is the proposal consistent with the purposes of the farming zone?
  - Will the proposal have an unreasonable impact on the functionality of nearby agricultural uses?
  - Will the proposal have an unreasonable impact on the amenity of nearby dwellings?
  - Is the design of the group accommodation acceptable?
  - Will the proposal result in unreasonable traffic impacts on Hardys Road?
- 10 Following the hearing I received a further written submission from Mr Deacon, essentially responding to the submissions made by Dr Ward and Mr Hopkins during the hearing. This information was not provided to the other parties and I have had no regard to this further submission in this decision.

## Summary of Findings

11 I have decided to refuse to grant a permit for the following reasons:

- The proposal is inconsistent with state and local planning policy
- The proposal is inconsistent with the purposes of the Farming Zone.

My reasons follow.

## IS THE PROPOSAL FOR GROUP ACCOMMODATION SUPPORTED BY STATE AND LOCAL PLANNING POLICY?

### State Planning Policy

- 12 It is state planning policy to manage land use change and development in rural areas to promote agricultural and rural production,<sup>3</sup> and to protect productive farmland which is of strategic significance in the local or regional context.<sup>4</sup> Strategies to implement this policy include preventing inappropriately dispersed urban activities in rural areas and to limit new housing development in rural areas.
- 13 At the same time, it is state planning policy to support the development of the tourism industry within Gippsland,<sup>5</sup> whilst avoiding the loss of agricultural land of strategic significance. To do this tourism is encouraged in the following locations and circumstances:
- In strategic tourism investment areas.
  - In existing urban settlements to maximise access to infrastructure, services and labour and to minimise impacts on the environment and exposure to natural hazards.
  - Support nature-based tourism proposals that complement and are compatible with the region's environment and landscape attractions or are close to identified strategic tourism investment areas.
- 14 Clause 12.02 encourages the provision of a diverse range of tourist accommodation options, however tourist operators need to demonstrate a tourist accommodation need and support a nature based approach in non urban areas.
- 15 The *Victorian Coastal Strategy 2014*<sup>6</sup> defines nature based tourism as 'tourism that relies on experiences directly related to natural features'.
- 16 The Gippsland Lakes are identified in the planning scheme as a strategic tourism investment area. Whilst the proposal would contribute towards the provision of tourist accommodation in Metung, it could not be described as a nature based tourism facility or farm stay group accommodation facility,

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<sup>3</sup> Clause 11.05-3

<sup>4</sup> Clause 14.01-1

<sup>5</sup> Clause 11.08-1 and Clause 17.03-1

<sup>6</sup> A reference document at Clause 12.02 of the East Gippsland Planning Scheme

as save for walking through the formal garden and enjoying the expansive water views from the proposed decks there are no nature based or farm based activities proposed as part of the group accommodation. In my view a ‘nature based tourist facility’ needs to be more than passive enjoyment of a view for guests. Nor has the permit applicant demonstrated a need for such a facility to be established in this farming location.

- 17 I therefore find that the proposed development is not supported by the state planning policy. I will now consider the local planning policy framework with respect to this application.

### **Local Planning Policy Framework**

- 18 East Gippsland Shire’s Municipal Strategic Statement (MSS) seeks to ensure that rural land is used and developed in a way that will support efficient agricultural production.<sup>7</sup> Strategies to achieve this objective include:

Support appropriate tourist-related or other economic development in non-urban areas, where this is consistent with maintaining the generally rural character of the area and with environmental protection.

- 19 Clause 21.09-3 of the East Gippsland Planning Scheme seeks to develop and promote East Gippsland as a major tourist destination. Strategies to achieve this include:

- Encourage nature based tourism.
- Encourage development of a range of types and scales of tourist accommodation options in the region, including ‘bed and breakfast’, self-contained units or cottages, farm stay accommodation.
- Support new ‘freestanding’ tourist resorts or developments, at a variety of scales, on undeveloped land that is environmentally and aesthetically capable of supporting development and able to be serviced appropriately.
- Avoid a major component of private residential (especially where this involves subdivision of land for detached dwellings) in tourist developments outside existing urban areas.

- 20 It is clear that local planning policy is strongly encouraging the provision of a range of tourism accommodation within East Gippsland. However uses which include a major component of private residential, such as the one before me, are discouraged outside of the existing urban areas. Again I note that this proposal is not for farm stay or nature based tourism, but purely for short term residential accommodation.

- 21 I therefore find that on balance, the proposed use is not supported by the local planning policy framework.

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<sup>7</sup> Clause 21.06-1

## **IS THE PROPOSAL CONSISTENT WITH THE PURPOSES OF THE FARMING ZONE?**

22 The purposes of the Farming Zone are:

- To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- 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.
- To encourage the retention of employment and population to support rural communities.
- To encourage use and development of land based on comprehensive and sustainable land management practices and infrastructure provision.

23 When considering an application for a non-agricultural use in the Farming Zone, I am required to consider the following:

- Whether the use or development will support and enhance agricultural production.
- Whether the use or development will adversely affect soil quality or permanently remove land from agricultural production.
- The potential for the use or development to limit the operation and expansion of adjoining and nearby agricultural uses.
- The capacity of the site to sustain the agricultural use.
- The agricultural qualities of the land, such as soil quality, access to water and access to rural infrastructure.
- Any integrated land management plan prepared for the site.

24 The subject site has been developed with a large formal garden, effectively removing a significant portion of the site from agricultural production. The remainder of the land is currently used for grazing cattle. The new dwellings are to be located close to the existing dwelling and garden, but in an existing paddock. As such the proposal will be removing a further portion of the site from agricultural production. It is unclear from the plans before me as to how much of the land is to be removed from agricultural production, and as such it is difficult to determine the uses overall impact. During the hearing Mr Deacon advised that only an additional 0.3% of the site would be removed from agricultural production. If this is the case, the group accommodation may only have a negligible impact on agricultural production capacity of the land. However I have been unable to verify this figure and I have been unable to assess the current agricultural capacity of



the land and the potential impact this development would have on that capacity.

- 25 The decision guidelines of the zone also require me to consider whether the use will adversely affect the use of the neighbouring properties for agricultural production.
- 26 Dr Ward's property is to the west of the site, and is currently used for grazing cattle and for his veterinary practice. His chief concern was the traffic impact of the proposal, and I am satisfied that the proposed development would have limited impact on his current production.
- 27 Mr Armstrong and Mr Hopkins own the land to the east of the site, and currently use it to breed and run sheep and for cattle grazing. Their property has also been developed with a large dwelling and associated garden, but is more intensively used for agricultural purposes than the subject site.
- 28 During the hearing Mr Hopkins raised a number of concerns that the proposed use would lead to other uses establishing within the area, and changing the purpose of the area from agricultural to tourism. He had a similar experience with other properties he has owned and operated in the past and he does not wish for this scenario to be repeated. He recently lost a sheep to a dog attack, and he is concerned that the proposed use would increase the likelihood of further such incidents, particularly as the accommodation is 'dog friendly'.
- 29 I share his concerns with respect to the dog attacks, but note that the Council's municipal strategic statement is strongly supportive of tourism operations establishing throughout the municipality including in the farming zones. This encouragement may lead to similar proposals being established in the area in the future, particularly those directly related to nature based or farm based tourism.
- 30 This proposal, like other tourism based proposals, has the potential to limit the agricultural use of other farming properties including Mr Hopkins and Dr Wards, which is contrary to the purpose of the farming zone. Care needs to be taken to ensure that this use does not affect the viability of the adjoining businesses. I am not satisfied based on the material before me that the viability of the adjoining and nearby agricultural businesses will not be affected. As such the proposal is contrary to the purposes of the farming zone.

#### **ARE THERE ANY OTHER ISSUES?**

- 31 Having found that the proposal is inconsistent with both the state and local planning policy frameworks and the Farming Zone, there is no need for me to answer the other questions in any great detail. However for completeness, I make the following findings:

- Nearest dwellings to the proposed development are a dwelling located approximately 200 metres to the west of the proposed development, and Mr Armstrong and Mr Hopkins dwelling located approximately 600 metres to the east. Whilst the proposed dwellings will be visible from these property I find that due to the distance from these dwellings, and the small scale of the proposal before me that the amenity of these properties are unlikely to be affected. As the colour was a concern, if I was of a mind to grant a permit, I would have required a colour and materials schedule showing the buildings constructed in muted tones, similar to those of the existing dwelling.
- In terms of traffic impacts, I was not provided with any details as to the likely amount of traffic to be generated by the proposal. However, as this application is now only for two additional dwellings, it is likely that the traffic generated by the dwellings could be accommodated safely within the existing road network of Hardys Road.

32 There were a number of other matters raised during the hearing which indicated that there has been an ongoing neighbourhood dispute, such as issues with locked gates. These matters are not relevant to my decision as a Tribunal member ‘standing in the shoes of the responsible authority’ and I have not had any regard to these matters in my decision.

## **CONCLUSION**

33 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

**Katherine Paterson**  
**Member**