

FOLEY'S | LIST

RECENT VCAT CASES

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1. This paper addresses the following:
 - a) *Trends in 'Mode-shift' cases;*
 - b) *The recent Amendment VC148;*
 - c) Heritage in the context of integrated decision making - *Icon Co (Jessamine Avenue) Land Pty Ltd v Stonnington CC (Red Dot)* [2018] VCAT 1134
 - d) 'Transformation' is the *Fox* dead or alive?
 - e) A warning from the Tribunal as to accuracy of information.
2. Full copies of decisions referred to in this paper are available on Austlii.

Mode Shift decisions are increasing – Ronge and more recently, KM Tram Enterprises

3. The *Ronge* case related to a proposal for the construction of 59 townhouses on a relatively large site (c.8700m²) in Brunswick.
4. The location of the site is illustrated in the Melway extract below.



5. The land was zoned NRZ.

6. The case is of particular interest because of the Tribunal's commentary in relation to:
- a) Car parking reductions in the context of Melbourne's future housing growth;
 - b) Recent changes to the purposes and provisions of the Neighbourhood Residential Zone.

7. As to car parking reductions, Moreland has been the focus of cases about sustainable transport and car parking reductions/waivers (see for example the 'Nightingale' case¹). As observed by the Tribunal in *Ronge* at 65:

At the municipal level, Moreland has long been recognised as being at the forefront of encouraging less reliance on car based transport.

8. In *Ronge*, the Tribunal made some very strong 'future based' comments in relation to housing provision, 20 minute neighborhoods and transport in the context of the objections to the proposal to reduce carparking provision. For example:

WHAT DOES THE FUTURE HOLD FOR MELBOURNE IN THE COMING DECADES?

- 15 *Melbourne is rapidly changing and the metropolitan area in future will be a very different place from the past or the present. On 31 March 2017, the new metropolitan planning strategy was released and changes made to all Planning Schemes in Victoria. Plan Melbourne 2017-2050 in essence updates and revises Plan Melbourne released in 2014.*
- 16 *Underpinning the whole strategy is the necessity to accommodate a population which is projected to increase from approximately 5 million to 8 million people by 2050. Aside from population growth, listed key challenges are remaining competitive in a changing economy, providing housing that is affordable and accessible, keeping up with the growing transport needs of the city, and mitigating and adapting to climate change.*
- 17 *In summary, the strategies set out in Plan Melbourne 2017-2050 include an intention to constrain the outward spread of the urban area and to focus employment, services and development in national employment and innovation clusters, urban renewal precincts and activity centres linked by public transport.*
- 18 *It is anticipated that Melbourne will require an additional 1.6 million homes by 2050 and that the northern region, which includes Moreland, will need to accommodate approximately 175,000 to 180,000 new dwellings in established areas.*
- 19 *Specifically there is an intention to locate medium and higher density development near services, jobs and public transport to support objectives concerning urban consolidation and housing choice. There is support for new housing in activity centres and other places that offer good access to jobs, services and public transport. There*

¹ *Chaucer Enterprises Pty Ltd v Moreland CC* [2015] VCAT 1615 in which the Tribunal refused a permit for a proposal for 20 apartments with no car parking provision.

is still an intention to create 20-minute neighbourhoods to enable residents to walk, cycle or catch public transport rather than rely on longer trips and the use of private motor vehicles with benefits in reduced travel costs, traffic congestion and carbon emissions.

...

64 *We have already referred to what can only be described as the massive increase in Melbourne's population projected through until 2050. Our roads are already congested and will be unimaginably so if a 'business-as-usual' approach is accepted through until 2050. The stark reality is that the way people move around Melbourne will have to radically change, particularly in suburbs so well served by different modes of public transport and where cycling and walking are practical alternatives to car based travel.*

9. In relation to reliance upon census statistics to assess carparking reductions, the Tribunal stated at 70:

Census data from 2011 or 2016 is simply a snapshot in time, a base point, but we are not persuaded that such data should be given much weight in determining what number of car spaces should be provided in future, for dwellings with different bedroom numbers. Policy tells us the future must be different. We consider that oversupplying parking, whether or not to comply with Clause 52.06, has the real potential to undermine the encouragement being given to reduce car based travel in favour of public transport, walking and cycling.

10. It may be that we will see less census information in traffic engineering evidence in future.

11. In relation to replacing carparking with car-share pods, the Tribunal stated:

75 *We also sound a word of caution about relying on car pods as replacement for individual cars. Policy is seeking a shift from car based travel to public transport, walking and cycling. Although car share schemes may assist in reducing the number of privately owned cars in an area, they are still facilitating car based travel which is something that planning policy is seeking to discourage*

12. The case is a striking illustration on the subject of car parking provision in inner city locations such as Brunswick. In such locations, one can fairly expect an increased emphasis on lesser provision rather than over-supply of carparking.

13. A very recent decision of the Tribunal in *KM Tram Enterprise Pty Ltd v Boroondara CC* [2018] VCAT 1237 ('KM Tram') provided a similar insight as to the likely direction of Tribunal decisions relating to proposals to provide for less or no carparking.

14. In *KM Tram*, the matter was before VCAT for a range of reasons relating to the building which we settled at a Compulsory Conference. The proposal was for a mix of residential and office use. The only remaining ground of the Council was that it opposed the grant of a permit on the basis that it did not support the proposed carparking provisions for the office

component of the development. 64 spaces were required for the office use under the scheme, a reduction by 39 was sought.

15. The Tribunal stated:

26 *The council contends that it would be inequitable to allow fewer car spaces because the overflow from this office use would use all available vacant long-term car spaces. It says that an acceptable option would be to reduce the amount of office space so that it better aligns with on-site parking supply.*

27 *Ms Dunstan says that the proposed supply is adequate because it would lead to a mode shift of employees from private vehicles to public transport and other alternative transport modes.*

28 *I favour Ms Dunstan's opinion. I agree that the Planning Scheme encourages taking a forward-looking approach towards decreasing reliance on car-based travel.*

16. The Tribunal then went on to endorse the approach taken in the *Ronge* decision and stated:

29 *In this context of a change from the 'business as usual' approach, I agree with Ms Dunstan that office workers are prime candidates for a mode change given their commuting patterns of travel to and from work during peak times. This is the time when public transport services run at highest frequencies and when Melbourne's roads are most congested. The combination of 'carrot' and 'stick' makes it viable for many office workers commuting to a site such as this to change from private vehicle to public transport.*

17. It is anticipated that similar 'mode shifting' decisions will continue.

Amendment VC148

18. The Government is undertaking an ongoing reform of the Planning System the Smart Planning program which included a discussion paper titled *Reforming the Victoria Planning Provisions* that was released for public comment in October 2017².

19. The Smart Planning Program is described as '*simplifying planning rules and delivering a suite of modern digital tool.*' It is an ongoing program with the third round of the Program to be undertaken shortly.

20. As described on the Department website, amendment VC148 was gazetted on 31 July 2018 and:

- a) introduces a new Planning Policy Framework (PPF)
- b) enables the future introduction of a Municipal Planning Strategy (MPS)

² https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/1115/0846/2231/Reforming_the_Victorian_Planning_Provisions_20_October_v7_FinalVersion_.pdf

- c) simplifies the VPP structure by:
 - i. restructuring particular provisions
 - ii. integrating VicSmart into applicable zones, overlays and particular provisions
 - iii. consolidating operational and administrative provisions
 - d) amends specific zones, overlays and particular provisions to improve their structure and operation, and to support the future translation of Local Planning Policy Frameworks (LPPFs) to the MPS and PPF
 - e) introduces a new Specific Controls Overlay to replace Clause 52.03 Specific Sites and Exclusions
 - f) deletes outdated particular provisions
 - g) deletes permit requirements for low-impact uses in industrial zones
 - h) reduces car parking requirements for uses in commercial areas and for land within walking distance of high-quality public transport
21. The new Specific Controls Overlay to replace clause 52.03 will assist users to understand controls as areas will be mapped and the relevant controls will be viewable in undertaking searches of the planning scheme.
 22. Another notable change was the changes to the carparking requirements. In particular, relating to visitor parking within PPTN Areas – which are generally within 400 metres of the PPTN. As a result, large areas of inner Melbourne will no longer need to provide visitor parking.
 23. It is anticipated that this will result in a number of applications to amend permits which previously had a visitor parking requirement.
 24. Whilst we are getting used to the new clauses, there is a useful online VC148 Clause Finder tool where the user can plug in the new or old clause number and the tool will produce to new or old equivalent clause number:

<https://www.planning.vic.gov.au/schemes-and-amendments/Amendment-VC148-reforms>
 25. VCAT is generally requiring submissions in relation to the impact of VC148 on applications currently before Tribunal.

Heritage

26. Integration of decision making is a consistent theme in town planning cases.
27. In *Icon Co (Jessamine Avenue) Land Pty Ltd v Stonnington CC* (Red Dot) [2018] VCAT 1134 the Tribunal considered a proposal for the demolition of C graded contributory building and

replacement of that building with a contemporary 12 dwelling development. The site was within an intact heritage precinct.

28. The Tribunal 'Red-Dotted' this decision because of the discussion of principles associated with the decision of the Court of Appeal in *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27.

29. The Tribunal found:

We are not persuaded that an application of the principles of integrated decision-making found in clause 10.01 and articulated in the 1045 Burke Road case justify demolition of these two heritage buildings for a net increase of 10 dwellings.

30. The Tribunal referred to an example at the University of Melbourne³ where a permit was granted to demolish a C graded building to facilitate the construction of the Peter Doherty Institute:

55. The Tribunal decided that a permit for demolition should be granted under the Heritage Overlay. It found that establishment of the Peter Doherty Institute in this specialised biomedical precinct was strongly supported by State and local policy. This, together with its public health benefits and the contribution it would make to Melbourne's economic development, would outweigh the loss to Melbourne's heritage of the former Ampol House. The grant of the permit would result in a significant net community benefit to present and future generations not just locally but at a national and international scale.

56. The decision in the University of Melbourne case is at one end of the spectrum of cases where non-heritage considerations have been held to outweigh the adverse effect that demolition will have on the significance of the heritage place.

57. However, in the present case we do not consider that the demand for additional housing to meet the needs of future population outweighs all other policies and objectives in the planning scheme relating to heritage for a development of this scale

31. It is an interesting question as to whether there would be a number or form of residential development that would tip the balance – in this case, it was found that a net increase of dwellings didn't influence the Tribunal.

'Transformation'

32. If time permits, the Tribunal's decision in *Alkero Development Pty Ltd v Stonnington CC (Red Dot)* [2018] VCAT 1120 will be discussed.

A warning to provide accurate information

33. In *Tika v Yarra CC (Red Dot)* [2018] VCAT 894, the Tribunal sounded a warning in relation to the accuracy of application materials. In *Tika*, the Tribunal put together a list of 'errors or omissions' that arose:

³ *University of Melbourne v Minister for Planning* [2011] VCAT 469.

- a) *the applicants' dining room is incorrectly denoted as a carport;*
- b) *the applicants' SPOS is shown with an area of 36.83sqm, whereas my best estimate suggests its true area is closer to 24sqm (including the useable space beneath the southern-most awning which, in my view, has the characteristics that allow it to be included as SPOS);*
- c) *windows and glazing to doors which are either to habitable rooms or provide an outlook to habitable rooms along the edge of an enclosed verandah are incorrectly depicted in relation to the applicant's property;*
- d) *the SPOS of the abutting dwelling to the south at No. 29 Little Kent Street is shown with an area of 28sqm whereas my best estimate suggests its true area is closer to 12sqm;*
- e) *the footprint of the existing dwelling at No. 34 Kent Street is incorrectly depicted at the rear. Its true position is approximately 4m further north than the location shown in the permit application plans;*
- f) *the building at the rear of No. 34 Kent Street was originally depicted as a workshop on the permit application plans. In response to my interim order it is now shown as a single-storey brick flat with two north facing habitable windows;*
- g) *various windows to the dwelling at No. 34 Kent Street are incorrectly depicted; and*
- h) *existing trees are either omitted or incorrectly depicted.*

34. The Tribunal gave an interim order and provided the opportunity for some of these matters to be addressed. It went on to find that only some of the matters identified in the interim order had been addressed. It went on to state:

While it should be self-evident, the absence of accurate information makes it very difficult to undertake an accurate and properly informed assessment of a proposal's impacts. It is therefore important that accurate information is provided before the giving of any notice and before decisions are made on permit applications. Such information may, for example, influence the involvement by third parties in the permit application process. For decision makers, the provision of accurate information is an essential element on the path to making the correct or preferable decision. It is appropriate and necessary for the responsible authority and Tribunal on review to critically assess with some rigour whether the information provided is accurate before accepting that material and subsequently applying it during the decision-making process.

35. No permit was granted.

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