Victorian Civil and Administrative Tribunal

LPD Property Pty Ltd v Moreland CC (includes Summary) (Red Dot) [2011] VCAT 65 (21 January 2011)

Last Updated: 2 February 2011

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P3059/2010
PERMIT NO. MPS/2010/147

IN THE MATTER OF	LPD Property Pty Ltd v Moreland City Council & Ors
BEFORE	Mark Dwyer, Deputy President

NATURE OF CASE	Whether s 82B application can be made after issue of permit
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LEGISLATION – interpretation or application of statutory provision	*Planning and Environment Act* 1987 s 82B; extent of Tribunal jurisdiction under s 82B; whether affected persons can make application under s 82B after a permit has issued.

SUMMARY

This decision relates to a preliminary matter in the proceeding, determined at a practice day hearing.

The responsible authority issued a Notice Of Decision to grant a permit subject to conditions, including a height reduction of 3 storeys in one building. A s 82 objector application was lodged, but subsequently withdrawn, and a permit issued. The permit holder then made application under s 80 to review conditions, including seeking to delete the condition requiring the 3 storey reduction.

The original objector believed a 'deal' had existed for the 3 storey reduction, that had led to his withdrawal of the s 82 application. Being unable to re-instate his s 82 application because the permit had issued, he made application for leave to bring an application as an affected person under s 82B. Another objector also made application under s 82B.

After applying principles and aids of statutory interpretation, the Tribunal determined that a s 82B application could not be made to review the decision to grant a permit after the permit had issued. The Tribunal also indicated that, even if s 82B could apply, leave would not be granted.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST (MAJOR CASES LIST)

VCAT REFERENCE NO. P3059/2010
PERMIT NO. MPS/2010/147

CATCHWORDS

Planning and Environment Act 1987 s 82B; extent of Tribunal jurisdiction under s 82B; whether affected persons can make application under s 82B after a permit has issued.

APPLICANT	LPD Property Pty Ltd
RESPONSIBLE AUTHORITY	Moreland City Council
RESPONDENTS	Elizabeth Wheelahan, George and Con Dakoulas & Ors
SUBJECT LAND	170 Edward Street BRUNSWICK EAST VIC 3057
WHERE HELD	55 King Street, Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Practice Day Hearing
DATE OF HEARING	14 January 2011
DATE OF ORDER	21 January 2011
CITATION	LPD Property Pty Ltd v Moreland CC (includes Summary) (Red Dot) [2011] VCAT 65

ORDER

1. The hearing of the application under s 80 of the *Planning and Environment Act* 1987 is confirmed for 27 January 2011 for 2 days (with a third reserve day listed on 9 February 2011 if required).
2. The applications for leave by Elizabeth Wheelahan and George and Con Dakoulas to bring separate proceedings under s 82B of the *Planning and Environment Act* 1987 are both dismissed. Those persons remain parties, along with other objectors who have filed statements of grounds, in the s 80 proceeding.

Mark Dwyer
Deputy President

APPEARANCES:

For LPD Property Pty Ltd — Ms Juliet Forsyth of counsel,

	instructed by Norton Rose solicitors
For Moreland City Council	Mr Ian Pridgeon, solicitor of Russell Kennedy
For Elizabeth Wheelahan	Mr Gavin Moodie, solicitor
For George & Con Dakoulas	Mr Con Dakoulas, in person
Other objectors	Ms Anne Schlusser, Ms Joanna Stanley, Mr John Tedge, Ms Deborah Tedge, and Mr Auddino all attended in person.

REASONS

Background

1. The responsible authority on 4 October 2010 issued a permit MPS/2010/147 for a large-scale mixed-use development on the land, subject to conditions. The permit holder has sought to review some of these conditions, including a condition that Building C within the development be reduced in height by three levels.
2. Prior to the issue of the permit, George & Con Dakoulas had lodged an objector application with the Tribunal under s 82 of the *Planning and Environment Act* 1987. That application was subsequently withdrawn, although Mr Con Dakoulas now says he was 'pressured' to withdraw his application on the basis of a compromise 'deal' that included the 3 level reduction in Building C. Following the withdrawal, the Council issued the permit under s 64 of the *Planning and Environment Act* 1987.
3. A number of other objectors, including Dr Wheelahan, had sought to make late objector applications under s 82 – i.e. after the prescribed 21-day application period for objectors. At an earlier practice day hearing on 3 December 2010, DP Gibson had initially and verbally granted leave for this, but later revoked this before a formal order had been made, upon being belatedly informed that the permit had already issued some weeks earlier. Her reasons accompany her order of 6 December 2010. In essence, clause 65 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act* 1998 prevents an extension of time to bring a late s 82 application where a permit has been issued.

4. Once the permit had issued (and objector application rights had expired), the permit holder made its application to review conditions. The permit holder acted legitimately within the relevant Acts and Regulations in doing so. However, the objectors are understandably upset that the differential prescribed periods for applications to the Tribunal have been used to the advantage of the permit holder. The objectors believe that the permit holder is endeavouring to undo a compromise that the objectors thought had been reached with the Council. It has put the extra three levels for Building C back in dispute, but in circumstances where the objectors cannot now re-raise some of their earlier objections on other issues.
5. I did not hear sufficient evidence to determine whether there had been any formal 'deal' in this case, although the objectors certainly believed the Council and permit holder had reached such a deal that included the 3 level reduction in Building C. Mr Dakoulas says he would not have otherwise withdrawn his s 82 application.
6. The Tribunal is aware, from the comments made by parties in a range of proceedings, of an increasing trend for permit applicants and permit holders to use the differential prescribed periods for Tribunal applications (i.e. as between s 82 and s 80), or to make a subsequent s 87 or s 87A application, to simply re-agitate matters that Councils or objectors may have thought had been negotiated or 'resolved' within the initial permit process or through permit conditions. Permit applicants and permit holders are clearly entitled to use legitimate measures under the Act or Regulations to their benefit, as has occurred here. However, if these measures are being used on occasion to undermine the spirit of the legislative regime, in a manner that alienates the legitimate expectations of responsible authorities and objectors, then this would be a matter worthy of review by the Minister for Planning and his Department. All parties are entitled to a 'fair' planning review process that deals with the substantive merits in dispute, freed to the extent possible from the tactical exploitation of process by other parties. As I have said, I have insufficient evidence to determine whether this case falls clearly into that category.
7. In any event, in this case, because of what had occurred, Dr Wheelahan and Mr Dakoulas sought to re-open or reinstate proceedings under s 82 of the *Planning and Environment Act* 1987.

However, because a permit had issued, this was not possible.

8. Dr Wheelahan and Mr Dakoulas have now sought, in the alternative, to apply for leave to bring proceedings under s 82B of the *Planning and Environment Act* 1987. Several of the other original objectors have written letters, or attended the Practice Day Hearing before me, in support of those applications under s 82B. This raises two issues for my determination:

a. can s 82B apply where a permit has already issued; and

b. if s 82B applies, should leave be granted in this case?

Can s 82B apply where a permit has already issued?

1. Unfortunately for Dr Wheelahan and Mr Dakoulas, their applications under s 82B of the *Planning and Environment Act* 1987 fail at a threshold level. I agree with Dr Wheelahan's solicitor that s 82B does not expressly state that an application cannot be made after a permit has issued, and Clause 65 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act* 1998 (referred to above) somewhat curiously excludes s 82B. However, having regard to a proper and purposive interpretation of s 82B, I do not believe an application can be made under that section to review a decision by a Council to grant a permit where that permit has already issued. I prefer the submissions of the permit holder's counsel in this regard. My reasons are essentially as follows.

2. The *Planning and Environment Act* 1987 contains quite separate regimes that apply before the issue of a permit (i.e. where the responsible authority issues a 'Notice of Decision' to grant or refuse a permit that is subject to various review processes), and after the issue of a permit (e.g. applications to cancel a permit under ss 87, 87A or 89, or to enforce the permit under s 114). Substantive and valuable rights are created upon the issue of a permit, and the planning system and development industry as a whole relies upon the certainty of a permit. It is most unlikely, in the absence of other compelling material, that Parliament would have intended that s 82B operate in a manner that allowed a review of the underlying decision to grant a permit after the issue of the permit. Indeed, relevant principles and aids to statutory interpretation suggest otherwise.

3. Section 82B uses the same language as ss 77, 79 and 82 of the *Planning and Environment Act* 1987 – i.e. review of a decision of the

responsible authority to grant/refuse a permit. From this wording, s 82B is clearly tied to, and forms part of, the suite of applications that can be made after a responsible authority has issued a Notice of Decision under the Act expressing its intent to issue or refuse a permit if no applications for review are made to this Tribunal within the relevant time periods. The wording of ss 77, 79, 82 and 82B can be contrasted with s 80, which clearly allows a permit applicant or holder to seek review of conditions in a permit which the responsible authority has issued [i.e. after the permit has issued] or decided to grant [i.e. using the language of the other provisions relating to a review before a permit has issued]. The wording in ss 77, 79, 82 and 82B can also be contrasted with the wording and statutory regime for amending and cancelling permits after they have been issued, which is set out in ss 87, 87A and 89.

4. Section 82 of the *Planning and Environment Act* 1987 gives an original objector (i.e. a person who objected to the responsible authority in relation to the initial planning permit application) an automatic right to seek review of the responsible authority's decision to grant a permit, provided application is made within 21 days. If no application is made within that time, the responsible authority must issue the permit. The intent of s 82B, and the way in which it is commonly used, is to allow an affected person who was not an original objector to still seek to review a decision prior to the issue of a permit. The leave of the Tribunal is required, so that the Tribunal can assess whether the person is truly affected and to what extent, whether there is good reason why that person didn't initially object to the responsible authority, and other relevant matters[1]. Leave is rarely granted to a s 82B applicant where there is no application by original objectors already on foot[2]. It would seem incongruous for s 82B to have been intended to operate more widely than s 82 in either:
    - allowing an original objector to avoid the 21 day prescribed period for s 82 objector applications to the Tribunal (a time limit upon which much certainty in the planning system is predicated), by simply bringing a later application under s 82B; and/or
    - by allowing a s 82B application to be made after a permit has issued, in circumstances where a s 82 application cannot.
5. These views are all reinforced by the second reading speech to

Parliament that accompanied the introduction of s 82B in 1998. There the then Minister indicated:

A person who has a genuine reason for wanting to appeal but did not object will need to seek leave of the tribunal to appeal under clause 19 [which became s 82B]. If no other appeals have been lodged the tribunal will need to hear and determine the request quickly because the Council is required to issue the permit after 21 days if there are no appeals.

A reasonable inference can be drawn from the second reading speech (including this quotation) that Parliament intended s 82B to operate in a similar way to s 82 – i.e. to allow genuinely affected people to have their views considered within the process prior to the issue of a permit.

1. I have mentioned earlier that clause 65 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act* 1998 prevents a late objector application under s 82 where a permit has issued, but this express prohibition does not apply to an application under s 82B. The objectors argued that this evidenced some intent to allow a post-permit review under s 82B. However, I agree with the permit holder's counsel that clause 65 of Schedule 1 applies to the Tribunal's power to extend time under s 126 of the *Victorian Civil and Administrative Tribunal Act* 1998 to allow a late application. Despite its wording, it doesn't really apply to s 82B as there is no prescribed time limit for a s 82B application and therefore no 'late' application where the application time might need to be extended and where clause 65 would be triggered.
2. The objectors also rely upon s 82B(6)(b) of the *Planning and Environment Act* 1987, which indicates that s 82B does not apply where a permit has been issued under s 63 (i.e. where a permit issues directly without a Notice of Decision in circumstances where there were no initial objectors at all). They argue that s 82B can thus still apply where the permit has issued following a Notice of Decision process under s 64, as there is no similar express prohibition. Whilst this provision is at least potentially anomalous, I do not consider that the 'negative' position set out in s 82B(6)(b) – i.e. the limited restriction on the operation of s 82B – necessarily supports the 'positive' view that s 82B applies in all other circumstances. I prefer the interpretation of s 82B that I have set out at some length above.

As I have indicated, the language used in s 82B is similar to that in ss 77, 79 and 82 and the section only operates following a Notice of Decision process and before the issue of a permit. Under this interpretation and operation of s 82B, a permit could not already have issued under s 64, and it is thus unnecessary for s 82B(6) to refer to or exclude the issue of a permit under s 64.

3. Counsel for the permit holder properly drew my attention to an order of then Justice Morris P., where he had expressed a view to a self-represented litigant that it 'may' be possible to seek leave under s 82B after a permit had been granted[3]. That comment was made as an aside at a practice day hearing concerned with the cancellation of a permit, without the benefit of any legal argument, and there is no indication that leave was ultimately sought or granted. It does not therefore materially assist in this case, nor change the view I have reached.
4. It follows therefore in my view that the s 82B applications by Dr Wheelahan and Mr Dakoulas must fail, as the relevant permit has already issued. Both Dr Wheelahan and Mr Dakoulas remain parties to the s 80 conditions application brought by the permit holder and can nonetheless continue to support the Council's conditions, and contest the permit holder's application to delete the condition relating to the three level reduction in Building C.

If (contrary to the above) s 82B can apply, should leave be granted?

1. It will be apparent from the above that, although I consider the statutory intent and operation of s 82B of the *Planning and Environment Act* 1987 to be reasonably clear, the express wording of the provision is not beyond some level of doubt. In case I am wrong in my interpretation of s 82B, I consider it appropriate to still consider whether leave would or should be granted under s 82B in this case if it did apply.
2. For the following reasons, I would not have granted leave to either Dr Wheelahan or Mr Dakoulas under s 82B even if that provision applied. In forming these views, I have had regard to the principles commonly applied in relation to the granting of leave under s 82B, set out in cases such as *STY Building Supplies (Shepparton) Pty Ltd v Greater Shepparton City* Council[4], although these principles are not exhaustive.

3. First, both of the s 82B applicants were original objectors and could have brought s 82 objector applications within the prescribed 21-day time limit. As I have indicated, much certainty in the planning process is predicated on this time limit, and it should not be lightly over-ridden. Indeed, one of the objectors (Mr Dakoulas) did bring such an application within time.
4. Secondly, although Mr Dakoulas may have been naïve or ill-advised to withdraw his application without greater certainty of the compromise 'deal' he thought had been reached, s 82B should not provide a back-door to reinstate his application by other means. Section 74(1)(d) of the *Victorian Civil and Administrative Tribunal Act* 1998 prevents an applicant who has withdrawn a proceeding from bringing another application arising from the same facts and circumstances without leave, and the requirement for leave implies that a good case must be made out. Despite the "pressure" that Mr Dakoulas says was applied to him to withdraw the application, I am not convinced a good case is made out here. A permit has now issued. If, indeed, Mr Dakoulas was placed under duress (about which I have no evidence to form a view either way), there may be other legal remedies for this.
5. Thirdly, there is no remaining s 82 application being made by other original objectors, to which the s 82B applications could be added without undue prejudice to other parties. With the withdrawal of the only s 82 application, the then permit applicant was entitled to the expectation that all objections had been resolved, and was entitled to have a permit issue.
6. Fourthly and critically, a permit has issued. Even if this is not an absolute legal bar to leave being granted under s 82B, it provides a strong basis to refuse leave in this case for similar reasons to those I have set out earlier in these reasons. The permit holder is entitled to the certainty of its permit. It has already acted on the permit. I received affidavit evidence[5] that it has, in good faith, now entered into contracts of sale to sell dwellings within the development. It would suffer great prejudice, as might purchasers and financiers, if the issue of the permit was now placed in doubt.
7. Fifthly, neither Dr Wheelahan nor Mr Dakoulas indicated that the s 82B applications, even if leave was granted, should lead to a refusal of the permit. For them, it is still all about conditions. Both are

parties to the permit holder's application to review conditions, and can maintain through that process their opposition to the 3 extra levels in Building C. If they accept that the permit now issued represented a fair compromise that they were willing to accept, then that is a position they should advocate at the s 80 hearing – i.e. that the permit conditions should not be altered, and that the permit holder's s 80 application should be dismissed. Whilst these objectors may have 'lost' the opportunity to raise some other objections or concerns, the fact is that Dr Wheelahan had not raised any such additional concerns through lodging a s 82 application within time, and Mr Dakoulas had withdrawn his application.

8. It follows that I would not consider it just and fair in the circumstances, after considering and balancing the competing interests of the parties, to grant leave under s 82B in this case.

9. The s 80 proceeding remains listed for hearing as scheduled.

Mark Dwyer

Deputy President

[1] see for example the commonly applied principles set out in *Spathos v Greater Geelong CC* (1994) AATR 188 and *STY Building Supplies (Shepparton) Pty Ltd v Greater Shepparton CC* (2000) 5 VPR 246[2] see *Bedros v Melbourne CC* [2004] VCAT 1191 at [14][3] *Zardaloudis v Banyule CC* [2005] VCAT 1622[4] (2000) 5 VPR 246 at [85].[5] Affidavit of Ian Hanley dated 13 January 2011