

IN THE ADMINISTRATIVE APPEALS
TRIBUNAL OF VICTORIA

PLANNING DIVISION

APPEAL NO P87/2206

APPLICATION NO PP6111

HEARD AT MELBOURNE ON 7 MARCH, 1988

Appellant/Applicant	Woodleigh Heights Resort Developments Pty Ltd
Responsible Authority	Shire of Kyneton
Respondent/Objectors	H R and G M Neubauer and Others

NATURE OF APPEAL

Appeal against refusal to grant permit.

USE, DEVELOPMENT, MATTER OR THING FOR WHICH PERMIT SOUGHT

To erect houses on each of thirty-four lots in a cluster subdivision.

APPEAL SITE

a Address

Woodleigh Heights Estate, Melville Drive, Kyneton.

b Title Description

Lots 51-53, 60-62, 66-68, 84-89, 96-98, 102-113,
127-129 and Lot 100 on Cluster Plan No 1134 being
Part Crown Allotment 38, Parish of Carlsruhe.

c Area

Varying - average allotment size 0.27 hectare.

PLANNING CONTROL AND ZONING

Kyneton Planning Scheme (Blanket).

GROUND OF REFUSAL

- 1 The proposed development is incompatible with the existing Time Share Resort and will detrimentally affect other Time Share owners.
- 2 The proposed development is incompatible with the surrounding area and will detrimentally affect surrounding landowners and occupiers.
- 3 The proposed development does not conform with Council policy regarding subdivision in the area. The minimum density required for permanent residential development is one dwelling per 1.2 hectares as granted previously in Planning Permit No PP2191.
- 4 Insufficient physical and human services are available to the site.
- 5 The proposed development will have unfavourable effects on the environment.

DETERMINATION AND REASONS FOR DETERMINATION

This was an appeal by Woodleigh Heights Resort Developments Pty Ltd against a determination by the Shire of Kyneton, as Responsible Authority, to refuse to grant a permit for the erection of a house on each of thirty-four allotments forming part of a cluster subdivision known as the Woodleigh Heights Estate.

The Estate is constructed around Melville Drive which runs to the east of the east side of Edgecombe Road about one kilometre north of the north end of Kyneton township. The subdivisional layout is centred on Melville Drive which has a reservation width of twenty metres while the internal subdivisional roads have a width of ten metres. The land is generally flat to gently sloping and tree covered. An open space network is incorporated into the subdivision. There is a large lake while tennis courts, a recreation building and a children's playground have been established on other sections of the open areas. The erection of houses up to the present time has been concentrated in the south-west sector of the Estate. A manager's residence and an office/reception area are located on Melville Drive. Land to the north and west is used mainly for rural pursuits while hobby farms or rural-residential development extend from the appeal site to the south beyond Dettmans Lane. A golf course exists to the south-west on the south side of that lane. On the west side of Edgecombe Road beyond Dettmans Lane is the Kyneton

abattoir and a number of industrial premises which have been located on the north-eastern edge of Kyneton.

This matter has the following relevant history.

- 1 Woodleigh Heights Resort Developments Pty Ltd is a company which at all material time has been engaged in the provision of Time Share accommodation.
- 2 By a series of subdivisions and resubdivisions, the first taking place in 1976 and the final one taking place pursuant to a permit granted on 21 November, 1980, Woodleigh Heights Resort Developments Pty Ltd subdivided fifty hectares of land into 134 cluster allotments having an average lot size of 0.27 hectare.
- 3 By Planning Permit No PP4692 dated 20 June, 1984 the Shire of Kyneton permitted the Appellant/Applicant to *'erect dwellings on each and every allotment of cluster subdivision including: one bedroom residential units, two bedroom residential units, three bedroom residential units and large residential units plus sporting and recreational facilities all at Part Crown Allotment 38, Parish of Carlsruhe (off Melville Drive, Kyneton - Cluster Plan No 1134)'*.
- 4 The Shire of Kyneton granted various other permits in relation to the cluster plan. Some of these were prior to Permit PP4692. Beyond noting that they permitted specific holiday unit development and that Permit PP4469 dated 16 May, 1984 permitted a thirty unit motel plus a restaurant, an indoor bowling green and an indoor tennis stadium, they do not now seem to be relevant.
- 5 Pursuant to various permits, including PP4692, forty-two houses have been constructed on the Estate and put to a residential use. The Time Share concept is the sale of a one/fifty-first share of each property to purchasers as tenants in common. The Time Share Resort developers have sold approximately eighty percent of the Time Share development that has already taken place, namely forty-two houses. The remaining twenty percent has been sold to another company by Woodleigh Heights Resort Developments Pty Ltd.
- 6 The sales of Time Share accommodation which were achieved were not high enough to make the development viable. Losses have exceeded one million dollars. There is no prospect of any further extension of the Time Share Resort development.
- 7 Accordingly, there are now approximately ninety cluster lots which are vacant. Woodleigh Heights Resort Developments Pty Ltd now desires to sell thirty-four of such lots with a permit in each case which will permit the erection of a detached house. There are 1,260 Time Share owners in respect of the houses already

constructed. Each of these was notified of the application pursuant to a direction made by the Shire of Kyneton. Of these, nine objected to the Responsible Authority. However, none carried forward their objection by appearing at the hearing of the appeal.

On the hearing Mr G Garde of Counsel appeared on behalf of the Appellant/Applicant and Mr Ian Lonie, Solicitor, appeared on behalf of the Shire of Kyneton and the Kyneton Water Board. In addition, the Tribunal permitted Mr G Thompson, who is a former owner of part of the site but was not an Objector, to make a submission to it. Written submissions were presented by Mr Garde and Mr Lonie. It is unnecessary to refer to these in detail. They will remain on the file as part of the permanent record of these proceedings. Mr Garde called Mr W H M Barr, a Town Planning Consultant, and Mr F L McGuire, an Engineer specialising in water supply and sewerage services. Mr Lonie called Mr Peter Everist, also an Engineer specialising in water supply and sewerage services, and Mr A Kuru, Town Planner to the Shire of Kyneton.

Before proceeding further we should say that we can only regard the present situation as a mess which has been brought about by the coincidence of an over-optimistic developer and a municipality which was prepared to stretch rules because it believed that the municipality was in need of just such a development as that provided.

We say this because it seems to us pointless to go back in point of time with the benefit of hindsight and say *'if we had known this was going to happen we would not have done that'*. The fact is that it was done and done in a fairly permanent form. This Division of the Tribunal has often stressed that however well-meaning the applicant for a subdivision and the responsible authority may be it is, subject to it not being old and inappropriate, of a permanent nature. We say this by way of preface because we do not think that we are called on to go back and attempt to unravel a skein which has been unravelled by others, albeit with the best of intentions and unwittingly. We must take our stand at the present time.

The matters which we regard as of importance in this appeal are as follows:

- 1 The difference between Time Share accommodation and ordinary residential accommodation.

The Responsible Authority stressed that it has always dealt with the matter on the basis of a Time Share Resort and not as a conventional residential subdivision with permanent occupiers. It emphasised that the physical services include water, sewerage, and gravel roads, all of which relate to a holiday resort development and not to an area containing permanent residents.

While it is true that there are differences between the Time Share Resort and an area containing permanent residents, inasmuch as the activities and needs of the Time Share occupant is primarily on rest and recreation, we find it difficult to delineate these in the present context. In each case there is the common element that the cluster allotments are suitable for the same degree of development. Under Permit PP4692 dated 20 June, 1984 Woodleigh Heights Resort Developments Pty Ltd was permitted to *'erect dwellings on each and every allotment of cluster subdivision including: 1 bedroom residential units, 2 bedroom residential units, 3 bedroom residential units and large residential units plus sporting and recreational facilities ...'*

Under that permit the Estate could have been fully developed with large residential units which might, if the project had been successful, have been occupied during the whole year by a number of people. Presumably those who purchase a share in a Time Share Resort will seek to use it with the maximum number of people possible for as long as possible in each year. As against this, purchasers of an allotment may consist only of two people who use it only for limited periods or at weekends each year. Even if they use it full-time it seems to us that the number of persons who are likely to occupy any cluster allotment at any given period could conceivably be many fewer than those who will occupy Time Share accommodation on the same allotment in any such period. However, it must be said that there are some differences such as were pointed out by Mr Kuru. He stressed the matter of definition of title boundaries by fences etc, the presence of outbuildings, the presence of gardens, the presence of pets and other animals and the presence of accumulated treasures such as old car bodies likely to be on land residentially used.

On behalf of the Appellant/Applicant Mr Barr stressed the following matters:

- (a) That the density of development will be similar to that existing at the present time and will be in accordance with the subdivision pattern previously approved by the Responsible Authority which was at a higher density than specified in its Policy. The cluster density was approved at a density of one house per 4,000 square metres.
- (b) The introduction of additional houses can be better absorbed in visual terms in the wooded environment existing than on cleared land elsewhere.
- (c) The developers of the resort have invested in the provision of a wide range of recreational facilities and services which are an important attribute of the whole development which sets it apart from a more traditional small lot rural subdivision. Such recreation areas and activities substantially increased the attractiveness of the Estate as a housing area. Thus, from the point of

view of facilities, the Estate was better able to support more intensive activities. Inasmuch as it is a self-contained development the proposal is not incompatible with the surrounding areas. Mr Barr concluded:

"It seems to be preferable to build on the existing and considerable investment in the Woodleigh Heights Estate than to restrict its development to a Time Share Resort. The experience of the Applicant would suggest that there is only relatively limited demand for this specific form of accommodation in this location."

We accept the evidence of Mr Barr in relation to this matter. The other matters which we regard as relevant are as follows:

1 Potential conflict between Time Sharers and permanent residents.

It was pointed out that at present Time Sharers may wander at large in the wooded portion of the Estate along gravel roads etc, and that this will not be possible in the event of areas becoming fenced etc. However, we do not think that this is likely to lead to any conflict. In a great many resorts in the world people are able to wander at large while at the same time respecting property boundaries. Presumably at present, Time Sharers are not permitted to wander at large in the houses of other Time Sharers, except by invitation. The same consideration, we suggest, would apply in regard to use of recreational facilities such as tennis courts as between Time Sharers and cluster allotment owners.

2 Effect on the environment.

So far as we can see, there will be no difference between each cluster allotment developed by a detached house or by Time Shared accommodation. In each case, trees would have to be removed. However, the lots are large enough to ensure that there will be sufficient trees retained to maintain the atmosphere and appearance which is still evident in those parts of the Estate which have been developed. Moreover, experience would seem to teach that owners of an allotment in such an area are much more likely to engage in the planting of trees than are Time Sharers. The only changes which we can foresee will be a demand for better roads on the part of lot owners. However, as the beauty of the Dandenong Ranges attests, good roads are not inconsistent with a heavily treed environment.

3 Lack of services to support a resident population.

We shall subsequently deal with the matters of water supply and sewerage. It was said that development of the cluster allotments into a residential area would create a new township with a population in excess of 400 persons without any of the normal facilities that would be expected and ultimately demanded by residents in the Estate, such as commercial services, garbage collection, public transport, schools, health facilities, home help, child care, recreation etc. It was further said that the provision and duplication of such services to the subdivision would create an economic burden on the community.

We do not think that this is so. While it is conceded that none of the specified services are available, it must further be conceded that many of the persons who will buy allotments will either have no need for them or will be prepared to travel a distance of approximately one kilometre which separates the site from the northern development of Kyneton. In fact, Time Sharers presumably have to obtain their food and daily necessities in Kyneton. There is no shop on the site. The situation will not be very different in the case of permanent or semi-permanent residents.

4 Conflicts between the proposal and the requirements of the Corporate Affairs Commission, Victoria and with the objectives of the Time Share Resort and By-laws of Club Kyneton Pty Ltd.

Neither of these matters amount, in our opinion, to town planning considerations. It may be that the Corporate Affairs Commission or those who have purchased Time Share accommodation have legal remedies available. If they have, they must be pursued elsewhere.

We turn now to the matters of water supply and sewerage. There was a good deal of evidence at the hearing as to these matters. Such evidence was given by Mr Peter Everist, an Engineer called by the Responsible Authority, and Mr L McGuire, an Engineer called by the Appellant/Applicant. There was no real difference between the evidence given by the two Engineers. The existing Time Share development is supplied by water and sewerage facilities provided by the Kyneton Water Board pursuant to agreements between the Appellant/Applicant and that Board. It is unnecessary to go into the history of these agreements. In brief, the Kyneton Water Board operates and maintains the water main along Edgecombe Road to Melville Drive while the internal reticulation system is the responsibility of the developer. However, the development has now reached the stage that water supply during warm periods may not be sufficient. In these circumstances it will be necessary to upgrade the system.

There are a number of options available. In regard to this matter we quote from the evidence of Mr McGuire:

"The existing supply main with the addition of booster pumping, is considered to be capable of supplying the estimated water consumption for the proposed development, subject to there being sufficient residual capacity in the existing town distribution system. If there is not sufficient residual capacity, some distribution system upgrading with possible additional storage at Woodleigh Heights would enable estimated future demands to be met. At present the Water Board is unable to advise as to the residual capacity available."

It was generally agreed that the change of proposed land use from Time Share to private residences is likely to result in an increase in water consumption, depending on the extent of garden development for the private residences. It was also generally agreed that waste water discharge will be reduced by the change from Time Share to private residential development.

Some of the difficulties about the matter were set out by Mr McGuire as follows:

"We have been advised that the average lot size is approximately 0.25 hectare, and that soils are generally granitic sands with poor absorption qualities during wet weather. This lot size is considered to be too small for permanent in-ground absorption systems as there is insufficient space for a drain field plus space for an alternative drain field, in addition to the developments that generally occur on such urban lots."

As the area has an average annual rainfall of 860mm, the use of transpiration beds as an alternative disposal system is not considered to be suitable in accordance with the Victorian Health Commission Guidelines.

Roof water tanks as a source of water supply are commonly used but are not considered to be of sufficient reliability and capacity for use with a reticulated sewerage system.

These options are therefore not considered to be practicable for the development."

Our conclusion as to the matters of water supply and sewerage are that, in all the circumstances, it is essential that prior to occupancy of any detached house to be erected reticulated water supply and reticulated sewerage facilities are available to such house.

This has not been an easy decision to make largely due to matters which have taken place in the past. However, we are of the opinion that the appeal should be allowed and that a permit should issue.

The appeal will be allowed. It is directed that a permit issue for the erection of a detached house and outbuildings on each of Lots 51-53 inclusive, 60-62 inclusive, 66-68 inclusive, 84-89 inclusive, 96-98 inclusive, 102-113 inclusive, 127-129 inclusive and Lot 100 on Cluster Plan No 1134 generally in accordance with the plans lodged with the application and subject to the following conditions:

- 1 Prior to the erection of a house and associated works on any allotment there shall be submitted to and approved by the Responsible Authority all plans and information deemed requisite by the Responsible Authority.
- 2 Without the written permission of the Responsible Authority no living tree shall be destroyed, felled, lopped or uprooted.
- 3 Prior to the occupancy of any detached house hereby permitted the same shall be connected to a reticulated sewerage system and a reticulated water supply system.
- 4 Prior to the occupation of any house hereby permitted the site for the same shall be landscaped so that the buildings cause as little injury or prejudicial effect to the visual amenity of the area as possible. Any fence to be erected on any allotment shall be as little visually intrusive as possible to the satisfaction of the Responsible Authority.
- 5 No building shall be located within twenty metres from the frontage except with the permission of the Responsible Authority.
- 6 No dogs, cats, horses or donkeys shall be kept or permitted on the land.
- 7 The keeping of livestock shall be restricted to those animals which can be kept in pens having a maximum area of 500 square metres.
- 8 Land used for the purpose of a kitchen garden shall not exceed 300 square metres.
- 9 Car parking areas shall be situated on each allotment to the satisfaction of the Responsible Authority so as to be as little visually and environmentally intrusive as possible.
- 10 The external fabric, including the roofing of the building shall be of muted tonings to blend with the environment and preserve the aesthetic amenity of the area to the satisfaction of the Responsible Authority.

- 11 All outbuildings shall be constructed of materials of a similar character to those used in the principal building, or alternatively shall be painted in colours having the same characteristics as those specified in Condition 10 hereof.
- 12 All dwellings to be constructed shall have a minimum area of ninety square metres.
- 13 Prior to the commencement of any dwelling, suitable private roads and turning bays shall be constructed to provide ready access by fire fighting trucks and equipment.

* * * * *

DATED 29 MAR 1988

Russell D Barton

PRESIDING
SENIOR
MEMBER

R D BARTON

W R Gould

MEMBER

W R GOULD

Mr G Garde of Counsel, instructed by Gair and Brahe, Solicitors, appeared on behalf of the Appellant/Applicant.

Mr I Lonie, Solicitor of the firm of Maddock Lonie and Chisholm, appeared on behalf of the Shire of Kyenton and the Kyneton Water Board.

There was no appearance on behalf of any of the Objectors.

RDB:AM 22.3