VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1550/2020
PERMIT APPLICATION NO. 567/2018/14P

CATCHWORDS

Nillumbik Planning Scheme; Application pursuant to Section 77 of the *Planning and Environment Act 1987*; Rural Conservation Zone (RCZ3); Environmental Significance Overlay (ESO1); Bushfire Management Overlay (BMO); Consolidation and subdivision to create three lots; Construction of a dwelling; Metropolitan green wedge; Planning policy; Repeat appeal principles.

APPLICANTS	Matthew & Rachelle Stickland and Allan Green
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
REFERRAL AUTHORITIES	APA Group, AusNet Electricity Services Pty Ltd, Country Fire Authority, Melbourne Water, Yarra Valley Water
RESPONDENT	Greg Johnson (President Friends of Nillumbik Inc)
SUBJECT LAND	170, 190 & 200 Watery Gully Road KANGAROO GROUND VIC 3097
HEARING TYPE	Hearing
DATE OF HEARING	21 June 2021
DATE OF ORDER	29 June 2021
CITATION	Stickland & Green v Nillumbik SC [2021] VCAT 695

ORDER

1 Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following person is joined as a party to the proceeding:

Greg Johnson, President Friends of Nillumbik Inc.

2 In application P1550/2020 the decision of the Responsible Authority is affirmed.

3 In planning permit application 567/2018/14P no permit is granted.

J A Bennett
Senior Member

APPEARANCES

For Matthew & Rachelle Stickland and Allan Green	Mr Glenn Kell, Town Planner of Planning Central Pty Ltd, with Mr Allan Green.
For Nillumbik Shire Council	Mr Gareth Gale, Town Planner of Gareth Gale Consulting.
For Greg Johnson(President of Friends of Nillumbik Inc)	Mr Greg Johnson, President of Friends of Nillumbik Inc.

INFORMATION

Description of proposal	Consolidation of three lots and re subdivision to create three new lots and construction of a dwelling on the new vacant 4.06 hectare lot.
Nature of proceeding	Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.
Planning scheme	Nillumbik Planning Scheme.
Zone and overlays	Rural Conservation Zone – Schedule 3 (**RCZ3**). Environmental Significance Overlay – Schedule 1 (**ESO1**). Bushfire Management Overlay **(BMO**).
Permit requirements	Clause 35.06 (subdivision and construction of a dwelling in RCZ3). Clause 42-01-2 (construct a building or construct or carry out works in ESO1). Clause 44.06-1 (Subdivide land and construct a building or construct or carry out works associated with accommodation in BMO).
Relevant scheme policies and provisions	Clauses 11, 12, 13, 16, 21.05, 21.08, 22,04, 22.13, 35.06, 42.02, 44.06, 51.02, 65 and 71.02.
Land description	The review site is located on the northern side of Watery Gully Road. It comprises three lots - No. 170 of 7.83 hectares, No. 190 of 0.29 hectares and No. 200 of 8.32 hectares. Re-subdivision will create three lots – No. 170 of 3.74 hectares containing an existing dwelling, No. 190 of 4.09 hectares on which a new dwelling will be constructed and No. 200 of 8.61 hectares containing an existing dwelling.

REASONS[1]

WHAT IS PROPOSED AND WHAT IS IN DISPUTE?

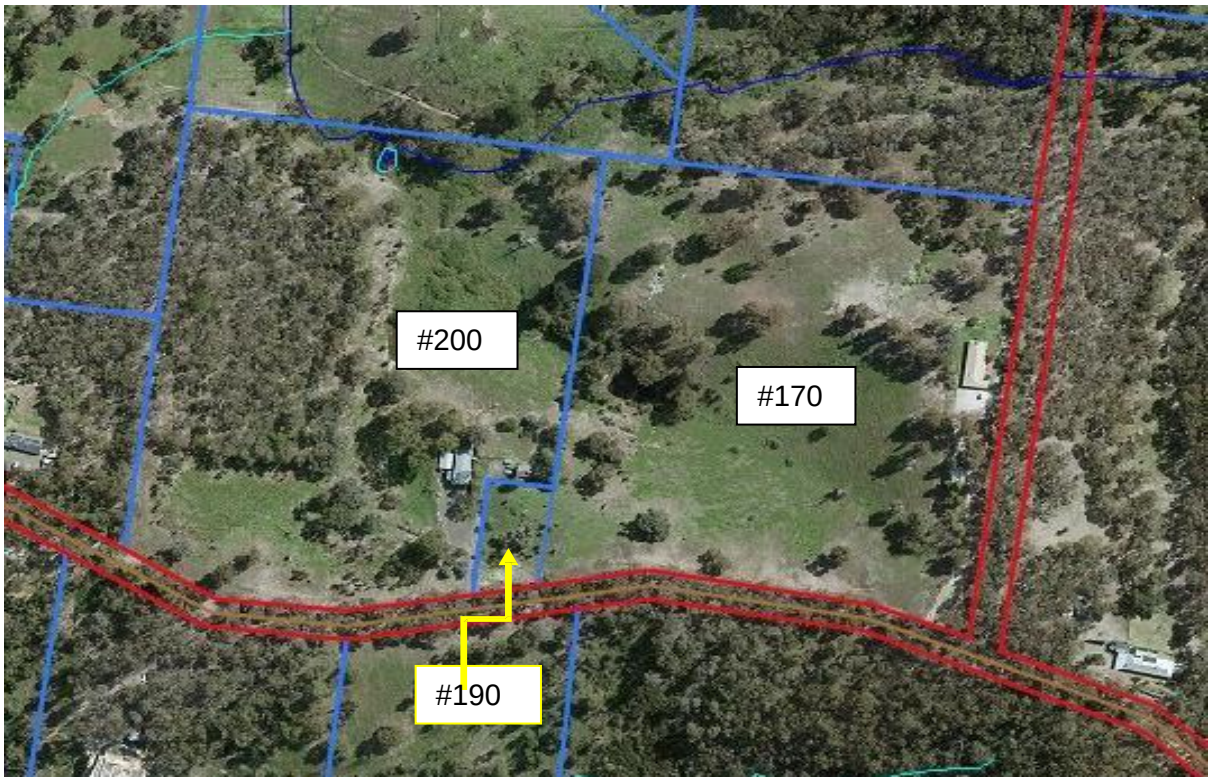
1 This is the third time that the Tribunal has considered a proposal for subdivision and/or development on land forming part of this latest application.

2 In 2010, there was a proposal to re-subdivide the two lots comprising Nos. 170 and 190 to create two more evenly sized lots of approximately 4 hectares each. No. 200 was not included in that application. The application was refused by Council and the decision was affirmed by the Tribunal in *Strickland v Nillumbik SC (Correction)* [2010] VCAT 688.

3 Approximately 12 months after that decision, the Tribunal affirmed a decision by Council to refuse to grant a permit for a dwelling at No. 190 *Stickland v Nillumbik SC & Ors* [2011] VCAT 1284.

4 In simple terms, this latest proposal proposes to transfer or combine No. 190 with No. 200 and to subdivide No. 170 into two lots and construct a dwelling on the vacant lot thereby created.

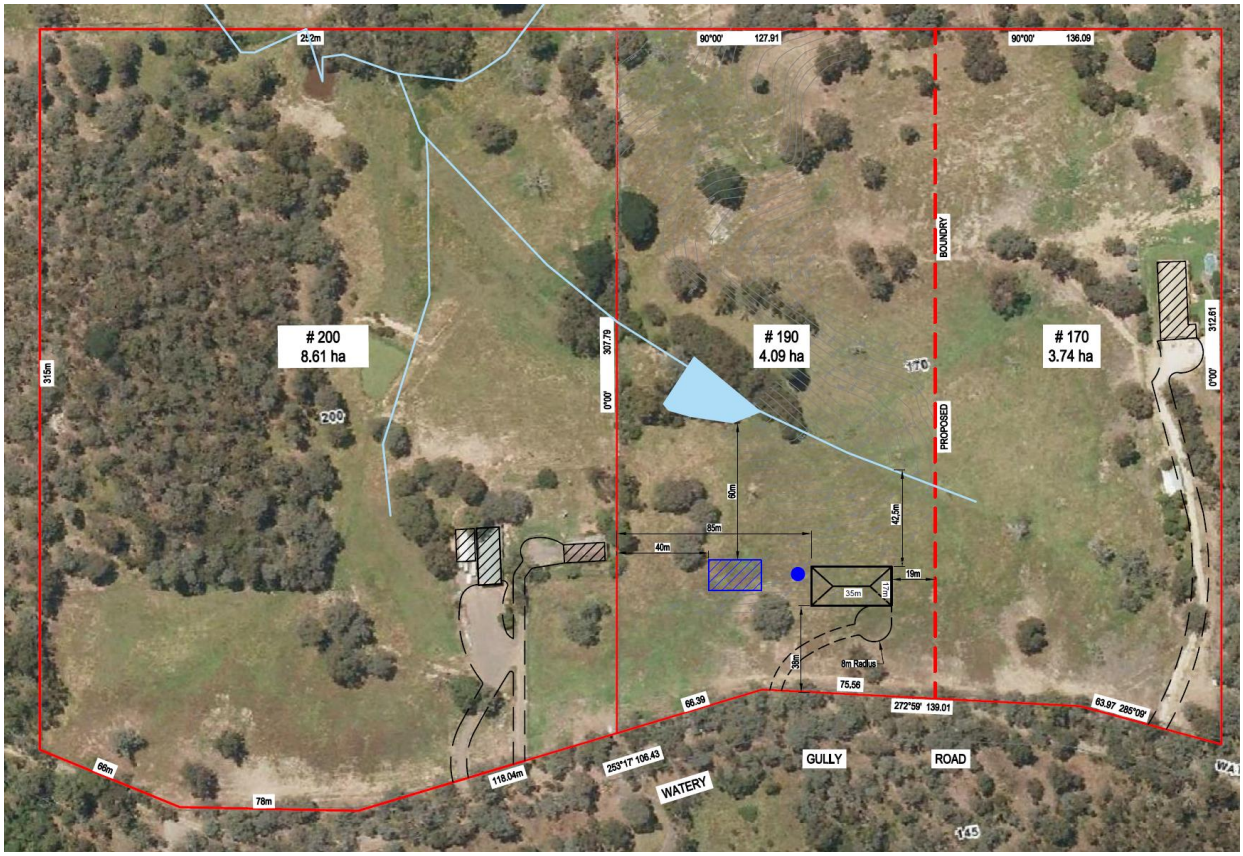
5 As can be seen from the following aerial photo, transfer of No. 190 to No. 200 'squares off' the boundary between Nos. 170 and 200. In the absence of the further subdivision of No. 170, it would create two lots of almost similar size.



[1] 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.

6 However, a fundamental component of the whole application is the further subdivision of No. 170 into two lots and the construction of a dwelling on the vacant lot.

7 That outcome can be seen on the following plan:



8 The result of the re-subdivision of the three lots is the creation of:

- one lot of 3.74 hectares (No. 170 - existing dwelling).
- one lot of 4.09 hectares (No. 190 - new dwelling).
- one lot of 8.61 hectares (No. 200 – existing dwelling).

9 Despite the different lot configuration, the outcome is largely the same as that rejected by Council and the Tribunal on the two previous occasions. The main difference, and the one of crucial importance to Mr Green who owns No. 200, is that the small area of land comprising No. 190 positioned adjacent to his dwelling, is transferred into his ownership.

10 As he explained at the hearing, this represents a very significant benefit for him as it removes the long-standing uncertainty about how No. 190 may be developed or used given it is in the same ownership as No. 170. Even in the absence of a dwelling being constructed on No. 190, there are issues about ongoing land management over which he has no control, despite any use or

development on the land potentially having major adverse amenity impacts on the enjoyment of his dwelling.

11 Whilst I understand the significant benefit to Mr Green in him obtaining ownership of No. 190, I am required to balance a whole range of matters in the Planning Scheme to arrive at a decision that achieves both an acceptable planning outcome as required by Clause 65 and a net community benefit as required by Clause 71.02-3.

IS THIS A REPEAT APPEAL?

12 Both Mr Garth and Mr Kell referred to the repeat appeal principles that have been enunciated in previous Tribunal decisions including *K & B Reichert v Banyule and ors* (1996/38819) and *Sprut Pty Ltd v Stonnington CC* [2012] 1675.

13 *K & B Reichert* listed four factors or principles which might justify a departure from an earlier determination:

- Significant changes to the application itself;
- Changes in the circumstances of the land and its surrounds;
- Changes in planning policy; and/or
- Changes in the interpretation of the facts or law relevant to the Tribunal's consideration.

14 In *Batsis Nominees Pty Ltd v Hobsons Bay CC* [2009] VCAT 928[2] I refined the four principles:

> [4] While these factors are a good starting point I think they have two flaws. The first is that factors 2, 3 and 4 do not attempt to qualify the changes as being material or significant. Clearly some changes to circumstances, policy, fact or law may not be material or significant to the application under consideration. For example, in this case the traffic volumes along Queen Street have increased from 16,000 to 17,000 vehicles per day over a 4-5 year period. It is a change but it is broadly in line with the percentage increase in traffic volumes across Melbourne and at less than 2% per annum is not a significant or material change.
>
> [5] The second flaw is that there is no reference to a consideration of the primary reasons for refusing the previous application. For example, if the primary reason for refusal was the inappropriate use of the land, then a new application which has, for example, a different site layout but which includes the same land use previously rejected, (it) is not a significant change to the application.
>
> [6] I therefore consider that these factors need to be revised as follows:

[2] As reported in Victorian Planning Reports (34 VPR pages 123 and 124).

i Significant or material changes to the application itself which address the primary reasons for the previous proposal being refused;

ii Significant or material changes in the circumstances of the land or its surrounds;

iii Significant or material changes in planning controls and policy; and/or

iv Significant or material changes in the interpretation of the facts or law relevant to the Tribunal's consideration.

15 I consider these revised principles are relevant to my consideration of the latest application at Watery Gully Road. Unless there have been significant or material changes in the four factors listed above then there must be good reasons to depart from the previous Tribunal decisions.

16 I acknowledge that although I should have regard to the previous decisions, this is a new application and I must independently assess the current proposal and reach my own conclusions about whether it is acceptable having regard to the site context and the relevant planning scheme provisions

WHAT ARE THE RELEVANT PLANNING CONTROLS AND POLICIES FOR THE LAND?

17 The land is outside the Urban Growth Boundary (**UGB**) and within a metropolitan green wedge. Clause 51.02 (metropolitan green wedge land: core planning provisions) applies to such land and, as relevant, seeks:

> To protect metropolitan green wedge land from uses and development that would diminish its agricultural, environmental, cultural heritage, conservation, landscape natural resource or recreation values.
>
> To ensure that the scale of uses is compatible with the non-urban character of metropolitan green wedge land.
>
> To encourage the location of urban activities in urban areas.

18 Clause 51.02 includes a dwelling provision that it must be the only dwelling on a lot. It also includes a subdivision provision that the creation of lots less than the zone minimum are prohibited except that the re-subdivision of existing lots is possible provided the number of lots is not increased and the number of dwellings that the land can be used for does not increase. A similar exemption applies in the RCZ.

19 The RCZ is within the suite of rural zones and the purposes in summary are focussed on:

- Protecting and enhancing the natural environment and natural processes.
- Protecting and enhancing natural resources and biodiversity.

- Encouraging development and use of land which is consistent with sustainable land management and land capability practices, while considering conservation values and environmental sensitivity.
- Providing for agricultural use consistent with the conservation of environmental and landscape values.
- Conserving and enhancing cultural significance and character of open rural and scenic non-urban landscapes.

20 There is no reference in the purposes to residential, rural residential or other forms of housing types. Whilst housing is referenced in other schedules of the RCZ in Nillumbik, that reference does not appear in the RCZ3. For the RCZ3 the single conservation value is:

> To ensure land use changes do not have an adverse impact on the landscape or strategic environmental values of the land.

21 Decision guidelines at Clause 35.05-6 are grouped into issues – general; rural; environmental; dwelling; design and siting. Of these, the general, environmental, dwelling, and design and siting issues are of relevance in assessing the application.

22 Aside from the general requirement to consider the Municipal Planning Strategy, Planning Policy Framework and any Regional Catchment Strategy, the other decision guidelines of relevance to be considered are:

- The capability of the land to accommodate the proposed use or development.
- How the use or development conserves the values identified for the land in a schedule.
- Whether use or development protects and enhances the environmental, agricultural and landscape qualities of the site and its surrounds.
- Whether the site is suitable for the use or development and the compatibility of the proposal with adjoining land uses.
- The need to prepare an integrated land management plan.
- The impact on the existing and proposed infrastructure.
- Whether the use or development will have an adverse impact on surrounding land uses.
- An assessment of the likely environmental impact on the biodiversity and in particular the flora and fauna of the area.
- The protection and enhancement of the natural environment of the area, including the retention of vegetation and faunal habitats and the need to revegetate land including riparian buffers along waterways, gullies, ridgelines, property boundaries and saline discharge and recharge areas.
- How the use and development relates to sustainable land management and the need to prepare an integrated land

management plan which addresses the protection and enhancement of native vegetation and waterways, stabilisation of soil and pest plant and animal control.

- The location of on site effluent disposal areas to minimise the impact of nutrient loads on waterways and native vegetation.
- Whether the dwelling will result in the loss or fragmentation of productive agricultural land.
- Whether the dwelling will be adversely affected by agricultural activities on adjacent and nearby land due to dust, noise, odour, use of chemicals and farm machinery, traffic and hours of operation.
- Whether the dwelling will adversely affect the operation and expansion of adjoining and nearby agricultural uses.
- The need to minimise any adverse impacts of siting, design, height, bulk, and colours and materials to be used, on landscape features, major roads and vistas.
- The location and design of existing and proposed infrastructure services which minimises the visual impact on the landscape.
- The need to minimise adverse impacts on the character and appearance of the area or features of archaeological, historic or scientific significance or of natural scenic beauty or importance.
- The location and design of roads and existing and proposed infrastructure services to minimise the visual impact on the landscape.

23 Planning policy at the State, Regional and Local levels provide context for decisions about use and development of land within the RCZ.

24 Specific policy for green wedges at Clause 11.01-1R seeks to support development in such areas that provide environmental, economic, and social benefits, consolidate new residential development in existing settlements and in locations where planned services are available and green wedge values are protected, and protect areas of environmental, landscape and scenic value.

25 Design for rural areas policy at Clause 15.01-6S seeks to ensure development respects valued areas of rural character and that the siting, scale and appearance of development protects and enhances rural character.

26 Policy at 16.01-3S for rural residential development seeks to avoid inappropriate rural residential development, discourage development of small lots in rural zones for residential use or other incompatible uses, and encourage consolidation of existing isolated small lots in rural zones.

27 At the local level, policy at Clause 21.05-2 observes that the maintenance of the existing settlement pattern consisting of distinct urban areas and clearly defined rural townships surrounded by non-urban areas is critical to the ongoing sustainability of the Shire of Nillumbik as a ‘green wedge’

municipality. Expansion of townships into surrounding areas is contrary to State Planning Policy and the principles of the 'green wedge'. The Shire of Nillumbik is located on the fringe of metropolitan Melbourne and it does not form part of a designated growth corridor. Outward metropolitan development, therefore, will not be a significant feature of the municipality.

28 A relevant related strategy is to strongly discourage the realignment of boundaries of rural properties for the purpose of creating de facto residential lots. Generally, realignments are only supported for minor boundary adjustments which respond to topography or physical man-made features and do not provide for further development opportunities.

29 There are also policies at Clause 22.04 about the siting and design of buildings in non-urban areas and wildfire management policies at Clause 22.13.

30 For completeness, I record that a small strip along the western side of No. 200 and a much larger portion of No. 170 (but none of No. 190) is also affected by an Environmental Significance Overlay Schedule 1. The ESO1 is relevant in the assessment of buildings and works.

31 The site is also fully within a BMO and I record that the CFA has given its conditional support for the proposal. I note that the BMO specifically excludes third party review rights, which in this case would apply to Mr Johnson and the Friends of Nillumbik Inc.

IS THE PROPOSAL AN ACCEPTABLE RESPONSE TO SITE CONTEXT AND THE RELEVANT PLANNING SCHEME PROVISIONS?

32 The short answer is no. I say that for the following reasons.

33 Firstly, the RCZ3 is a rural zone and the purposes are primarily directed at protecting and enhancing the natural environment and processes; conserving, enhancing the cultural significance and character of open rural and scenic non-urban landscapes; and providing for agricultural use consistent with the conservation of environmental and landscape values of the area. Whilst many uses can be allowed subject to a permit, the decision guidelines at Clause 35.05-6 are focused on protecting environmental, agricultural and landscape values. The three guidelines for dwellings concern impacts on agriculture whilst design and siting issues concern visual impact on the landscape.

34 Non-agricultural use and development are certainly not prohibited but it is necessary to enquire how a new use or development, including subdivision, protects and enhances the environmental, agricultural and landscape qualities of the site and surrounds and how it conserves the values identified for land within RCZ3 (i.e. to ensure land use changes do not have an adverse impact on the landscape or strategic environmental values of the land).

35 Planning policy is unambiguous that green wedge land should be protected for its environmental, landscape values, that it not be utilised for inappropriate rural residential development and that small lots should not be used for residential development. Policy at Clause 21.05 is clear that minor boundary adjustments will only be generally supported if they do not provide for further development opportunities. Given the previous refusal for a dwelling on No. 190, the proposed boundary realignment in this application does provide for, or facilitate, a further development opportunity in the form of an extra dwelling.

36 In rejecting this proposal as being contrary to planning policy, I acknowledge that the policies applying to green wedge land are implemented differently across the various metropolitan green wedges depending on what zones and schedules are applied. Within Nillumbik the different RCZ schedules have different minimum subdivision lot sizes. The RCZ1 has a minimum lot size of 1 hectare, the RCZ2 has a minimum lot size of 2 hectares, and the RCZ4 and RCZ5 have a minimum lot size of 40 hectares.

37 However, with the exception of the very small areas in the RCZ1 and RCZ2 near the Plenty Gorge which do provide for rural residential development compatible with environmental values, the vast majority of the municipality within the RCZ3 does not specifically provide for rural residential development. It is therefore consistent with the broader outcomes sought for green wedge land.

38 That does not mean that there are no small lots within the areas zoned RCZ3, RCZ4 and RCZ5 given many were created before the current planning controls, or even before any planning had been introduced into Victoria during the 20th century. It is evident from the subdivision plan tabled by Mr Kell that this part of the RCZ3 does contain lots below the 8 hectares minimum. In the absence of applying a Restructure Overlay such has been applied to the old and inappropriate, suburban sized residential subdivisions in parts of the Dandenong and Macedon Ranges, such lots have the potential to be developed.

39 It is my experience that if those small lots are individually owned, then Council's across the State are often prepared to grant a planning permit for a dwelling, depending on whole range of factors including lot size. The examples cited by Mr Kell for a new dwelling on a lot of 21.67 hectares in RCZ4 (40 ha minimum)[3] appears to be of this type whist the dwelling on a lot of 11 hectares in RCZ3 (8 hectare minimum)[4] appears consistent with the RCZ3 lot size minimum.

40 Secondly, the size of two new lots are significantly below the minimum lot size for the RCZ3. I consider that the overall area of land being re-subdivided and whether the size of the subsequent lots approximates the lot

[3] 1279 Skyline Road North, Christmas Hills (App No 11/2016/05P).
[4] 110 Turnung Road, Panton Hills (App No 527/2016/05P)

size minimum for the zone is of great relevance. For example, if two lots have a combined area of 14 or 15 hectares and are to be re-subdivided to create two lots just short of the 8 hectare minimum, that seems to me to be far more consistent with the RCZ3 than in this application where the two re-subdivided lots are approximately half what the zone is a calling for. To approve such small lots flies in the face of policies trying to protect and enhance the environmental and landscape qualities of the green wedge and discourage development of small lots in rural zones for residential use.

41 Thirdly, although the details of the re-subdivision are different from that considered by Council and the Tribunal over a decade ago, the result of creating two lots of approximately 4 hectares and allowing an extra dwelling has been rejected once before. Whilst in theory the two lots known as Nos. 170 and 190 could accommodate two dwellings without re-subdivision, that proposal was rejected by Member Rae in the 2011 decision.

42 In the absence of a significant change to the planning provisions applying to the land, it is unrealistic to expect approval for an additional dwelling on Nos. 170 and 190, no matter what the lot configuration. Whilst I can understand why the RCZ3 and Clause 51.02 re-subdivision provisions may create an expectation for an additional dwelling, the landowner needs to accept that the Council and the Tribunal have consistently found that an additional dwelling is unacceptable no matter the lot sizes and configuration.

43 Fourthly, I accept that in principle an additional dwelling could be physically accommodated on the land. Whilst Council is concerned about certain aspects of the design and siting of the dwelling, such as the height of and prominence of the northern elevation these could be modified if they were of concern. Likewise, with the point of vehicle access and the location of the effluent disposal field. These detailed design and siting matters do not go to the core policy issues in this case, which I have discussed earlier in my reasons.

44 Finally, I appreciate that this latest subdivision proposal which involves the transfer of No. 170 to No. 200 represents a very significant benefit for Mr Green who owns No. 200. I agree with him that it would remove the long-standing uncertainty about how No. 190 may be developed or used given it is in the same ownership as No. 170. I acknowledge that there may well be issues about ongoing land management over which he has no control, despite any use or development on the land potentially having major adverse amenity impacts on the enjoyment of his dwelling.

45 However, for the reasons I have already given above, I do not support the creation of two 4 hectare lots and the construction of an additional dwelling even though that means the existing situation remains unchanged.

CONCLUSION AND DECISION

46 All proposals invariably provide positive and negative outcomes when assessed against the full suite of relevant controls and policies and taking into consideration the site context.

47 My task is to decide, in accordance with Clause 65, whether the proposal in this application will produce an acceptable outcome. I am also required to consider and balance all relevant policies to achieve a net community benefit in accordance with Clause 71.02-3. This is the third attempt at achieving a third dwelling on land forming Nos. 170, 190 and 200 Watery Gully Road. After balancing relevant policies, I find that the proposal is neither acceptable nor that it achieves a net community benefit.

48 Whilst the landowner of Nos. 170 and 190 has tried different ways of obtaining approval for the additional dwelling, all have been rejected by the Council and the Tribunal on the basis of clearly stated planning policy for land in the green wedge and within the RCZ3. In the absence of any significant or material change to those controls and policies it is difficult to imagine a scenario where an additional dwelling could be approved.

49 I will affirm Councils' refusal of the permit application.

J A Bennett
Senior Member