

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P950/2021  
PERMIT APPLICATION NO. 442/2019/05P

### CATCHWORDS

Nillumbik Planning Scheme; outbuilding in a Rural Conservation Zone; policy at Clause 12.05-2L of the Nillumbik Planning Scheme; relevant considerations in an application for buildings and works.

<b>APPLICANT</b>	Dr Michael Aldred, Friends of Nillumbik
<b>RESPONSIBLE AUTHORITY</b>	Nillumbik Shire Council
<b>RESPONDENT</b>	J Loustas
<b>SUBJECT LAND</b>	165 Mittons Bridge Road, St Andrews
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	28 January 2021
<b>DATE OF ORDER</b>	28 January 2021
<b>CITATION</b>	Alfred v Nillumbik SC [2022] VCAT 107

### ORDER

- 1 In application P950/2021 the decision of the responsible authority is varied.
- 2 In planning permit application 442/2019/05P a permit is granted and directed to be issued for the land at 165 Mittons Bridge Road, St Andrews in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
  - To construct a building and construct or carry out works

**Michael Deidun**

**Member**



## APPEARANCES

For applicant	Dr Michael Aldred appeared in person Greg Johnson, President Friends of Nillumbik Inc
For responsible authority	Briana Barnes, Town Planner of Nillumbik Shire Council
For respondent	Paul Beeson, Solicitor of Equipe Lawyers

## INFORMATION

Description of proposal	To construct an outbuilding
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Nillumbik Planning Scheme
Zone and overlays	Rural Conservation Zone 3 Bushfire Management Overlay Environmental Significance Overlay 1 (part)
Permit requirements	Clause 35.06-5 to construct a building or works associated with a Section 2 Use on land within the Rural Conservation Zone Clause 35.06-5 to construct a building within 20 metres of a road or within 100 metres of a dwelling not in the same ownership, on land within the Rural Conservation Zone Clause 44.06-2 to construct a building or construct or carry out works associated with an accommodation use
Relevant scheme policies and provisions	Clauses 02.03, 11, 12, 13, 14, 15, 21, 35.06, 44.06, 52.06, 65 and 71.02.
Land description	The land has an area of approximately 4.7 hectares, and comprises mostly native vegetation on undulating land. A dwelling and existing buildings are sited at the eastern end of the lot, near one of the site's abuttals to Mittons Bridge Road.
Tribunal inspection	The Tribunal inspected the site and surrounding area prior to the hearing, on 27 January 2022



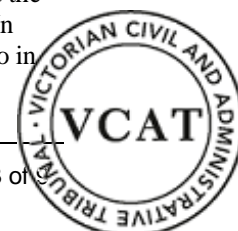
## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Dr Michael Aldred and Friends of Nillumbik Inc (the ‘Applicants’) seek to review the decision of the Nillumbik Shire Council (the ‘Council’) to grant a permit for a proposed outbuilding on land at 165 Mittons Bridge Road, St Andrews (the ‘review site’).
- 2 I have decided to affirm the Council’s decision and direct the grant of a planning permit. Reasons for the decision were given orally at the conclusion of the hearing. What follows is an edited version of those oral reasons.
- 3 Both Dr Aldred and the Friends of Nillumbik Inc in their written submissions raised a number of matters that are not relevant to the dispute that is before me, and my decision making task. These include the following:
  - a. The extent and nature of materials that are currently and have previously been stored on site, and the nature of the materials that are proposed to be stored in the outbuilding, as what is before me is an application for buildings and works, not one for a change of land use. If the Applicants believe that a different land use is occurring on the land, then they could potentially make an application for a declaration, or commence enforcement proceedings. As neither has occurred to date, the only matter that is before me is the current permit application for the construction of an outbuilding.
  - b. The process Council has employed in dealing with previous planning permit applications and enforcement requests on the review site. The only matter that is before me is the current permit application, and I cannot review the past or recent actions of the Council.
  - c. Whether an existing outbuilding on the land has been made habitable, or is otherwise in a form contrary to a previous approval. Again, as no declaration or enforcement application has been made, I cannot turn my mind to anything other than the current planning permit application to construct an outbuilding.
  - d. The old planning policy framework of the Nillumbik Planning Scheme. In particular, Dr Aldred relies on Clause 22.04, which no longer forms a part of the Nillumbik Planning Scheme. As I need to apply the Nillumbik Planning Scheme as I find it on the day of my decision, I cannot turn my mind to Clause 22.04.

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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.



- e. That another outbuilding is not needed on the review site. The Applicants are not required to prove a need for the new outbuilding.
  - f. That the building envelope restrictions that apply to Dr Aldred's land, should also be applied to the review site. Dr Aldred's land is burdened by a s173 Agreement that simply does not apply to the review site.
  - g. That there might be a better or alternative site for the proposed outbuilding. My role is to assess the proposal that is before me. In making that assessment, I do not need to be persuaded that this is the best location for the proposed outbuilding, only that it is a reasonable and appropriate one.
- 4 Relevant to the task that is before me, the Applicants submit that the proposed outbuilding will have an unreasonable impact on the rural landscape of the area, and the visual amenity enjoyed by the property on the opposite side of Mittons Bridge Road. They argue that the proposed outbuilding will add to an already large congregation of buildings on the review site, that will spread across a wide frontage of the review site to Mittons Bridge Road. In support of these submissions Dr Aldred relies on policies at Clause 11.01-1R and 15.01-6S which are set out below.
- To protect the green wedges of Metropolitan Melbourne from inappropriate development.
- Ensure that the siting, scale and appearance of development protects and enhances rural character.
- 5 In addition to these submissions, the Friends of Nillumbik submit that the proposed outbuilding will not achieve a consolidation of buildings on the review site, and instead will result in a number of buildings being spread across a large area. This they say will detract from the rural landscape, and the intent of the green wedge area and Rural Conservation Zone. In particular, the Friends of Nillumbik are concerned with the proximity of the proposed outbuilding to the road reserve, and the extent to which the outbuilding will be visible from what they describe as a tourist route.
- 6 I accept the submissions of Council that the key guidance from the Nillumbik Planning Scheme are the purposes and decision guidelines of the Rural Conservation Zone, and the policy guidance provided by Clause 12.05-2L Rural landscapes in Nillumbik. While the permit requirement under the Bushfire Management Overlay is also relevant, I note that bushfire matters are not in dispute between the parties. I accept and adopt the submissions set out by Council as to why a permit should issue under the Bushfire Management Overlay. In particular I note that these submissions party rely on a bushfire management statement prepared by relevant professionals, which has demonstrated that appropriate defensible space and access is to be provided for the proposed outbuilding.



- 7 The decision guidelines of the Rural Conservation Zone include the following:
- 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.
- 8 The policies at Clause 12.05-2L include the following:
- Discourage the proliferation of multiple buildings across the landscape.
  - Support the consolidation of buildings on a site, including outbuildings.
- 9 I find that the proposed outbuilding is an appropriate response to the guidance from the Nillumbik Planning Scheme, and the physical attributes of the site and surrounding area. I make this finding for the following reasons.
- 10 Firstly, the proposed outbuilding will achieve the policy objective of a consolidation or cluster of buildings on a site. The review site comprises an area of approximately 4.7 hectares, the overwhelming majority of which will remain an undulating and vegetated landscape. The proposed outbuilding will be sited close to an existing dwelling and other outbuildings at the eastern end of the review site. Through this siting, it will become part of the cluster of buildings located at one end of the review site, with a consistency in the materials used by the existing buildings, and the proposed outbuilding. Importantly, the proposed outbuilding will also form part of a cluster of low scale buildings, that sit below the level of Mittons Bridge Road, and which do not, either individually or as a cluster, detrimentally affect the rural landscaped character of this locality.
- 11 Secondly, the siting of the proposed outbuilding will not have an unreasonable visual impact on the surrounding landscape, or the views from Mittons Bridge Road or nearby properties. It will also not detract from the existing rural character of this locale. I form this view as the proposed outbuilding will be viewed as a minor building amongst a broader rural landscape that also supports a number of buildings with similar scale and siting. The proposed outbuilding will have a minor visual presence when viewed from Mittons Bridge Road, due to the size and scale of the proposed outbuilding, the falling topography from the road, and the extent of existing roadside vegetation. The proposed outbuilding will also not be prominent from Dr Aldred's property, as that property falls in the opposite direction from the road, and therefore has limited direct views towards the review site. For these reasons I find that the proposed outbuilding will achieve the decision guidelines from the Rural Conservation Zone, and also achieve the relevant policy objectives.
- 12 Thirdly, the siting of the proposed outbuilding will also not unreasonably impact the amenity of any nearby properties. As I have set out above, the proposed outbuilding will have a limited visual presence from Dr Aldred's



property, due to the changing topography. In addition, an appropriate separation distance is provided by the front setback to the outbuilding, and the width of Mittons Bridge Road, to ensure that there will be no other unreasonable amenity impacts as a result of the domestic use of the outbuilding. As a permit has not been sought for any other land use, that is the proper basis for my assessment.

- 13 Finally, the proposed outbuilding will not require the removal of any native vegetation. It will also not create a new break between patches of native vegetation, and therefore will not impact the habitat values of the broader locality. As such, the proposed outbuilding will achieve the conservation values as expressed through the purposes of the zone, and the related decision guidelines from the Rural Conservation Zone.
- 14 For these reasons I find that the proposed outbuilding is consistent with the outcomes that are sought to be achieved by the Nillumbik Planning Scheme.
- 15 It therefore follows that I will vary the Council's decision, and direct the grant of a planning permit, containing the conditions as set out in Council's Notice of Decision to grant a planning permit, except that I will apply the time limit permit condition that the Tribunal adopts as the standard condition.

**Michael Deidun**

**Member**



## APPENDIX A – PERMIT CONDITIONS

<b>PERMIT APPLICATION NO</b>	442/2019/05P
<b>LAND</b>	165 Mittons Bridge Road, St Andrews

### WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- To construct a building and construct or carry out works

### CONDITIONS

- 1 Before the development commences, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of this permit. The plans must be generally in accordance with the submitted plans but modified to show:
  - (a) A colours, finishes and materials schedule.
  - (b) The roof colour shown to be Woodland Grey.
  - (c) The location of the outbuilding moved a further 4 metres south-east so the outbuilding is setback 4 metres from the internal post and wire fence.
  - (d) The location of the outbuilding moved a further 1 metre south-west so the outbuilding is setback 8 metres from the front property boundary.
  - (e) Elevation plans to accurately show the cut and fill for the outbuilding in its altered location per condition 1c and 1d.
  - (f) A construction exclusion zone shown with a dashed line to the north, west and south of the outbuilding.
  - (g) The location of the construction exclusion zone fencing per condition 4.
- 2 The development once endorsed must not be altered unless with the prior written consent of the Responsible Authority.
- 3 The materials to be used in the construction of the buildings and works hereby permitted shall be of non-reflective type, to the satisfaction of the Responsible Authority.
- 4 Prior to development commencing (including any demolition, excavations, tree removal, delivery of building/construction materials and/or temporary buildings), a construction exclusion zone must be established to the satisfaction of the Responsible Authority. The fencing associated with this construction exclusion zone must meet the following requirements:



(a) Extent

The construction exclusion fencing is to be provided to the extent as shown on the endorsed plans.

If works are shown on any endorsed plan of this permit within the confines of the calculated construction exclusion zone, then the fencing must be taken in to only the minimum amount necessary to allow the works to be completed.

(b) Fencing

The Construction Exclusion Zone Fencing must be erected to form a visual and physical barrier, be a minimum height of 1.5 metres above ground level and of chain mesh or similar material. A top line of high visibility plastic tape must be erected around the perimeter of the fence.

(c) Signage

Fixed signs are to be provided on all visible sides of the Construction Exclusion Zone Fencing clearly stating “Construction Exclusion Zone – No Entry”, to the satisfaction of the Responsible Authority.

(d) Irrigation

The area within the Construction Exclusion Zone Fencing and Construction Exclusion Zone Fencing must be irrigated during the summer months with 1 litre of clean water for every 1cm of trunk girth measured at the soil/trunk interface on a weekly basis.

(e) Access to Construction Exclusion Zone

Should temporary access be necessary within the Construction Exclusion Zone be required during the period of construction, the Project Arborist must be informed prior to relocating the fence, and must supervise the works until the fencing is reinstated to the approved location.

- 5 Once erected to the required standard, the Construction Exclusion Zone Fencing shall be maintained in good condition and may only be removed upon completion of all development works, to the satisfaction of the Responsible Authority.
- 6 The following actions must not be undertaken in any Construction Exclusion Zone as identified in this permit, to the satisfaction of the Responsible Authority:
  - (a) Materials or equipment stored within the zone;
  - (b) Servicing and refuelling of equipment and vehicles;
  - (c) Storage of fuel, oil dumps or chemicals;
  - (d) Attachment of any device to any tree (including temporary service wires, nails, screws or any other fixing device);





- (e) Open cut trenching or excavation works (whether or not for laying of services);
  - (f) Changes to the soil grade level;
  - (g) Temporary buildings and works; and
  - (h) Unauthorised entry by any person, vehicle or machinery except under the supervision of the Project Arborist.
- 7 No vegetation on-site, unless specifically exempt in the Nillumbik Planning Scheme, shall be removed, destroyed, felled, lopped, ringbarked, uprooted or otherwise damaged except with the prior written consent of the Responsible Authority.
- 8 The development, including any new paved areas, must be drained so as to prevent the uncontrolled discharge of stormwater from the subject site across any road or footpath or onto any adjoining land. Stormwater must not cause any nuisance or loss of amenity in any adjacent or nearby land.
- 9 Stormwater from the roof of building must be directed to a holding tank for storage and detention purpose and absorbed on-site in accordance with the Shire of Nillumbik's "Drainage of Unserviced Allotments" document. All works are to be carried out to the satisfaction of the Responsible Authority.
- 10 Water in the holding tank storage area may be used for one or more of the following purposes: toilet flushing; property irrigation; vehicle washing and any other purpose approved by the Responsible Authority.
- 11 The bushfire mitigation measures forming part of this permit or shown on the endorsed plans, including those relating to construction standards, defendable space, water supply and access, must be maintained to the satisfaction of the responsible authority and the relevant fire authority on a continuing basis. This condition continues to have force and effect after the development authorised by this permit has been completed.
- 12 This permit as it relates to development (buildings and works) will expire if one of the following circumstances applies:
- (a) The development is not started within two (2) years of the issue date of this permit.
  - (b) The development is not completed within four (4) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

**– End of conditions –**

