

## **2 SUBDIVISION OF THE LAND INTO TWO (2) LOTS AT 26-28 HOLM PARK ROAD, BEACONSFIELD**

FILE REFERENCE INT1944547

RESPONSIBLE GENERAL MANAGER Peter Benazic

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### **RECOMMENDATION**

That a Refusal to Grant Planning Permit **T180499** be issued for **Subdivision of the land into two (2) lots at 26-28 Holm Park Road, Beaconsfield VIC 3807** for reasons set out in this report.

### **Attachments**

- |   |  |          |
|---|--|----------|
| 1 | Locality Map                                       | 1 Page   |
| 2 | Development Plans                                  | 1 Page   |
| 3 | Copy of Objections, circulated to Councillors only | 18 Pages |

### **EXECUTIVE SUMMARY:**

APPLICATION NO.: **T180499**

APPLICANT: **Mr David Fysh**

LAND: **26-28 Holm Park Road, Beaconsfield VIC 3807**

PROPOSAL: **Subdivision of the land into two (2) lots**

PLANNING CONTROLS: **Clause 32.08-3 (General Residential Zone)**

NOTIFICATION & OBJECTIONS: The application has been advertised by way of sending notices to the owners and occupiers of the residents of Holm Park Road, as well as adjoining properties. The applicant was also instructed to display a sign on site for 14 days; however it is believed that the sign was not displayed.

Twelve (12) objections have been received to date

KEY PLANNING CONSIDERATIONS: Orderly planning, neighbourhood character, pattern of subdivision in the area

RECOMMENDATION: Refusal

### **BACKGROUND:**

The Subject Site has no planning history.

## SUBJECT SITE

The Subject Site is an approximately 2000 square metre rectangular allotment that is located on the southern side of Holm Park Road.



The lot is currently vacant, and is not burdened by an easement. It has a gentle upwards slope from front to rear (approximately a 3 metre rise across 35 metres).

The surrounding allotments are uniform in size and shape, each measuring approximately 2000 square metres. Each allotment contains a single, large dwelling, with manicured landscaping. To the north (across Holm Park Road) are large rural residential allotments measuring between 4000 square metres and 4 hectares. Holm Park Reserve is approximately 500 metres west of the Subject Site, and Beaconsfield – Emerald Road is further west, approximately 740 metres from the lot.

## PROPOSAL

The Application proposes the subdivision of the land into two (2) lots. Each proposed lot will measure 1064 square metres and will have frontage to Holm Park Road.

The existing lot (defined as Lot 1413 on Plan of Subdivision 507848L) is burdened by a restrictive covenant that states, in relevant part:

*The Transferee . . . will not:*

*(a) Build or allow to be built more than one dwelling house together with the usual outbuildings (unless the land is designated a dual occupancy site) . . . .*

The covenant does not designate the Subject Site as a 'dual occupancy site'.

## PLANNING SCHEME PROVISIONS

### State Planning Policy Framework (SPPF)

The relevant clauses of the SPPF are:

- Clause 15.01-3S (Subdivision design)
- Clause 15.01-5S (Neighbourhood character)

### Local Planning Policy Framework (LPPF)

The relevant clauses of the LPPF is:

- Clause 21.03-1 (Housing)

**Relevant Particular/ General Provisions and relevant incorporated or reference documents**

The relevant provisions/ documents are:

- Clause 56 (Residential subdivision)
- Clause 65.01 (Approval of an application or plan)
- Clause 65.02 (Approval of an application to subdivide land)

**Zone**

The land is subject to the General Residential Zone – Schedule 1.

**Overlays**

The land is not subject to any overlays.

**PLANNING PERMIT TRIGGERS**

The proposal for subdivision of the land into two (2) lots requires a planning permit under the following clauses of the Cardinia Planning Scheme:

- Pursuant to Clause 32.08-3 (General Residential Zone), a planning permit is required for subdivision.

**PUBLIC NOTIFICATION**

The application has been advertised pursuant to Section 52 of the Planning and Environment Act 1987, by:

- Sending notices to the owners and occupiers of adjoining land and land benefitted by the restrictive covenant burdening the Subject Site.

The applicant was also advised to place a sign on site for 14 days, but to the best of Council's Planning Department's knowledge this has not occurred. No statutory declaration was submitted by the applicant.

Council has received 12 objections to date.

The key issues that were raised in the objections are:

- All blocks on Holm Park Road should remain the same size.
- Potential traffic blind spots for two driveways exiting the blocks (Subject Site is located on a hill).
- Subdivision will adversely alter residential character of the area.
- Residences likely to be built on the smaller allotments will not be of same standard and character of existing houses.
- Will likely lead to devaluation of current residential properties on street.
- All properties on the street were built with homes that suited the size of the 2000sqm blocks.

- Holm Park Road deserves to be preserved as half acre blocks because it abuts the fringe of a conservation area, which flows through Inglis Road and provides connectivity to Inglis Road Park. Intensification of development is not in keeping with preserving this area's nature flora and associated wildlife.
- Residents have bought into the street to avoid high-density living, this is protected by the covenant.
- A greater likelihood that double storey dwellings will be constructed and will be sited close to existing dwellings, which will cause privacy/amenity impacts to adjacent land.
- Half acre blocks were created to act as a buffer between the semi-rural land holding on the north site of Holm Park Road and the remainder of the Berwick Views Estate, as well as the land to the north affected by the Environmental Significance Overlay.
- Will encourage a breach of restrictive covenant.
- Will create a precedent for other blocks to be subdivided in the future. This could greatly increase traffic on Holm Park Road.

## REFERRALS

The Application was not required to be referred to any external referral authorities.

## DISCUSSION

### The proposal is contrary to orderly planning

As a threshold matter, the proposal should not be supported because it will create a vacant lot incapable of being developed for a dwelling. As such, the subdivision would be contrary to the orderly planning of the area, which is a relevant consideration under Clause 65.01 of the Planning Scheme.

The Subject Site is burdened by a 'single dwelling' restrictive covenant; i.e. a covenant that prohibits the construction of more than one dwelling on the Land. Legally, the covenant defines the 'Land' subject to the restriction as Lot 1414 on Plan of Subdivision 507848L. The covenant's definition of 'Land' will persist if the subject lot is subdivided and new lots are created on a subsequent plan of subdivision. So, even if the Land is subdivided into two lots, the covenant prohibits more than one dwelling on the entirety of the physical Land that existed within the parent title. The practical result is that one of the newly-created child lots would be incapable of being developed for the purposes of a dwelling.

Here, it is noted that the subdivision will not create a breach of the covenant *per se*; the breach is actually created by the construction of a second dwelling on the Land. However, the matters set out in Clause 65.02 require the responsible authority to consider "The . . . possible future development of the land and nearby land". The creation of a new residential lot that would be incapable of being developed for a dwelling without breaching the covenant is therefore a relevant consideration. It would not be orderly planning to create such a lot.

The Tribunal has taken a cautious approach in situations such as this where the future development of the land may breach a restrictive covenant even when the subdivision itself is not prohibited. *Chester v Banyule City Council* [2003] VCAT 167 and *Carmrer Pty Ltd v Port Philip City Council* [2003] VCAT 1319 are both refusing subdivision permits where covenants burdened the review site that would prohibit likely future development.

It is noted that there is an instance where the Tribunal has granted a subdivision permit despite the existence of such a covenant; however a condition was placed on that permit requiring the removal or variation of the covenant prior to the issuance of a statement of compliance. See *Wade v Yarra Ranges SC*

[2005] VCAT 111. This approach was later repudiated in part by *Samson v Moorabool SC* [2012] VCAT 1435, where Member G Rundell decided to refuse a subdivision permit rather than grant conditional approval, stating:

*I think this application is premature in these circumstances. It is my view that orderly planning requires the current problems to be rectified before further approvals are granted. It is not obvious or inevitable that the existing problems can be rectified. The beneficiaries of the covenant may not support its removal. . . . Relying on conditions in a permit for subdivision that may not be completed only further complicates the current circumstances and requires the parties to invest further time and monies pursuing outcomes that may not be successful. I think this approach would further compound the existing difficulties leaving the responsible authority and [the applicant] with further delays, costs and uncertainty.*

The proposal currently before Council is similarly premature. It is not obvious or inevitable that the existing problems can be rectified: as mentioned in many of the objections, the applicant has approached the beneficiaries of the covenant regarding amending the current application to include a potential variation or removal of the covenant; many have vehemently opposed this proposal. As a result, the applicant chose to not amend the permit application to include the covenant variation. Granting a conditional subdivision permit now would only create further delays, costs, and uncertainty. It would not be orderly planning to grant a planning permit for subdivision where it is highly unlikely the applicant would ever obtain a statement of compliance.

**The proposed subdivision is inconsistent with the subdivision pattern of the area and will result in development that does not respond to the existing neighbourhood character**

Nonetheless, even if it is assumed the covenant will be removed at some point, the subdivision is still unsuitable as it does not respond to the existing neighbourhood character.

Reliance is placed on two sections of the Cardinia Planning Scheme: Clause 56.03-5 (Neighbourhood character objective) and Clause 15.01-5S (Neighbourhood character). As there is no local policy establishing a preferred neighbourhood character for this area, the existing character must be considered.

Under Clause 56.03-5 (Neighbourhood character objective), subdivision design must respond to neighbourhood character. Standard C6 elaborates on this objective, stating that subdivision should:

- Respect the existing neighbourhood character or achieve a preferred neighbourhood character consistent with any relevant neighbourhood character objective, policy or statement set out in this scheme.
- Respond to and integrate with the surrounding urban environment.
- Protect significant vegetation and site features.

Further, Clause 15.01-5S (Neighbourhood character) has an objective to recognise, support and protect neighbourhood character, cultural identity, and sense of place. Strategies within this policy aim to ensure development<sup>1</sup> contributes to existing or preferred neighbourhood character, and that development responds to its context and reinforces a sense of place and the valued features and characteristics of the local environment and place by emphasising, among other things, the pattern of local urban structure and subdivision.

Additionally, Clause 65.02 (Approval of an application to subdivide land) also requires the responsible authority to consider the subdivision pattern, having regard to the physical characteristics of the land. This is a separate, but related, provision that is affected by the proposal's divergence from the existing neighbourhood character.

<sup>1</sup> Under the *Planning and Environment Act 1987* s 3, the definition of 'Development' includes the subdivision of land.



The Subject Site is the last vacant allotment on Holm Park Road, which exclusively consists of uniform lots measuring approximately 2000 square metres each. The configuration of these lots appear to be a deliberate attempt to provide a transition between the smaller residential lots to the south (measuring between 600 and 700 square metres) and the semi-rural Green Wedge A-zoned land to the north. Further, each allotment is burdened by the same single-dwelling covenant as the Subject Site. The existence of the single dwelling covenants on these allotments has established a clear neighbourhood character: no lot in this street has been subdivided, which has allowed for the development of quite large dwellings.

Permitting the creation of two approximately 1000 square metre lots here would introduce a discordant element in the neighbourhood and disturb the clear rhythm of development on Holm Park Road. The built form on this street between Beaconsfield-Emerald Road and Fieldstone Boulevard consists of single dwellings with a building width equalling or exceeding 30 metres. By comparison, each new lot in the proposal would have a street frontage of approximately 28 metres. Because of this reduced frontage, it is likely that any future development on these lots would stand in stark contrast to the otherwise uniform pattern of development on the street. Even if a party wall is introduced between two dwellings to allow for an overall wider building width, such a development would still be inconsistent with the existing neighbourhood character as nothing of the type exists in the area.

It is noted that under the General Residential Zone, compliance with clauses 56.04-2, 56.04-3, 56.04-5, and 56.06-8 to 56.09-2 is also required. The proposed subdivision complies with these clauses because:

- The proposed lots will measure over 1000 square metres and therefore do not require consideration of building envelopes, and the dimensions of the lots will allow for adequate solar access (56.04-2 and 56.04-3).
- There is no common property proposed (56.04-5).
- The configuration of the proposed lots provide for safe vehicle access between roads and lots (56.06-8).
- The lots will have ready access to water and sewer, as well as adequate stormwater drainage and other services (56.07, 56.09-1, 56.09-2).
- It is possible to manage during any construction period to prevent erosion, dust, and run-off (56.08).

Despite compliance with the other provisions of Clause 56, the application should not be supported as it is inconsistent with Clause 56.03-5 (Neighbourhood character). Compliance with *all* objectives of the relevant sections of Clause 56 is required under Clause 32.08-3. Therefore, the application should not be supported.

### **Response to objections**

The twelve objections submitted focussed on six main themes:

- Subdivision will adversely alter residential character of the area.
- Proposal will disturb the subdivision pattern as half acre blocks were created to act as a buffer between the semi-rural land holding on the north site of Holm Park Road and the remainder of the Berwick Views Estate, as well as the environmentally sensitive land to the north.
- Subdivision will create a precedent for other blocks to be subdivided in the future.
- Subdivision will cause an increase in traffic.
- Subdivision will likely lead to devaluation of current residential properties on street.
- Subdivision will cause privacy/amenity impacts to adjacent land.

It is advised that these objections are largely relevant to the planning considerations at issue in this proposal. As discussed above, the future development of the land is a consideration under Clause 65.02. Responsiveness to neighbourhood character is a relevant consideration under clauses 15.01-5S and 56.03-5.

It is also noted that the subdivision pattern having regard to the physical characteristics of the land is a consideration under Clause 65.02. The configuration of the half-acre blocks as a buffer between the Berwick Views Estate and the environmentally sensitive semi-rural land to the north is relevant under this clause.

The effect on the amenity of the area is a relevant consideration under Clause 65.01.

Finally, whilst the proposed subdivision's effect on the value of the neighbouring properties is not a relevant planning consideration with regards to subdivision, under Section 60(2)(a) of the Planning and Environment Act 1987, financial loss is a relevant consideration with regards to any permit application that allows the removal or variation of a restrictive covenant. This would be considered in a subsequent application to remove the restrictive covenant should this application be approved.

## RECOMMENDATION

The Application has been assessed against all relevant clauses of the Cardinia Planning Scheme and the proposed subdivision is determined to be inconsistent with these requirements. As such, it is recommended that a Refusal to Grant Planning Permit **T180499** be issued for **Subdivision of the land into two (2) lots at 26-28 Holm Park Road, BEACONSFIELD VIC 3807** on the following grounds:

1. **The proposal is contrary to the orderly planning of the area.**
2. **The proposed subdivision is inconsistent with the subdivision pattern of the area and will result in development that does not respond to the existing neighbourhood character.**
3. **The proposal is not in accordance with the requirements of Clause 65.02 of the Cardinia Planning Scheme.**
4. **The proposed subdivision and possible future development of the land will result in a loss of amenity for residents of the neighbourhood.**

## T180499 PA - Advertising map





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