

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1713/2007
PERMIT APPLICATION NO. YR-2006/1619

APPLICANT	Woolworths Limited (substituted for Mr A Carswell in accordance with this order)
RESPONDENT/RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
OTHERS	Jim Humphrey, Margaret Watson, Frank Curzon, Jim Bentley, Ian M Draper, E.F. Ford, William Harry Hardy MBBS, Liesje Woning, Carolyn Byrne, Jean Sietzma- Dickson, Rodney Larkins, Robyn Speering, C & M Clavant, Philip & Rosemary Baker, John Stroud, Robyn Taylor, John & Sue Koole, L A & J N Ewart, Mr S & Mrs M Bendall, Helen Holmes, Ms G Falkingham, Ken Knuckey, Susan Hamilton, Clare Worsnop, Jeffrey Birkett, Francis M. Smith, G & A Ingpen, Susan Henderson, Glenis & Al Ilian, S Thorne, Robyn Speering, Linda & David Rawlings, Susan Henderson, Aldy McKrell, Ernie Hewitt, D & J Edwards, Jennifer Brill, Glenis May Ellis, R.W Ellis, Margaret Newman, Gwenda Donaldson, Ian G James, Mr Lawrence Irwin Mobsby, MEEPPA Inc, Mount Evelyn IGA Supermarket, Mount Evelyn IGA Supermarket, Barry Marshall, A Sykes, Dawn Shaw, E.G. Van Smaalen, J Wilson, Susan Hamilton, Allan & Jean Stroud, Fred Sampson, Woolworths Limited
SUBJECT LAND	25-29, 35-39,41,41A Wray Cres, 16-18 Station St & 3 Snowball Avenue MOUNT EVELYN VIC 3796
WHERE HELD	55 King Street, Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Practice Day Hearing

DATE OF HEARING

19 October 2007

DATE OF ORDER

23 October 2007

ORDER

- 1 Woolworths Limited (c/- Mallesons Stephen Jaques, Solicitors, Level 50 Bourke Place, 600 Bourke Street, Melbourne 3000) is substituted as the permit applicant and applicant for review in lieu of Mr A Carswell, and the permit application and application for review are amended accordingly.
- 2 The six (6) day hearing scheduled to commence on 12 November 2007 is adjourned.
- 3 The proceeding is to be re-listed for a six (6) day hearing before a two member Tribunal, not before mid-March 2008.
- 4 Orders 4, 5, 6 and 7 of the orders of Deputy President Gibson made on 29 August 2007 are confirmed in relation to any amendment of plans or the filing and service of any statements and reports. For the avoidance of doubt, the reference in orders 4 and 6 of those orders to “the hearing” is to be taken as a reference to the re-listed hearing of the proceeding.
- 5 Costs are reserved.

Mark Dwyer
Deputy President

APPEARANCES:

For Mr A Carswell and Woolworths Limited	Mr Chris Townshend of counsel, instructed by Mallesons Stephen Jaques.
For the Respondent/ Responsible Authority	Ms Maria Marshall, solicitor of Maddocks Lawyers.
For MEEPPA Inc. and several Objectors.	Mr Frank Smith.
Ms Robyn Taylor	In person.
For Mount Evelyn IGA Supermarket	Mr Mark Bartley, solicitor of DLA Phillips Fox.

REASONS

- 1 This matter initially came before me by way of a Practice Day request seeking to have Woolworths Limited joined as a party to the proceeding, and with a consequential request by Woolworths Limited for an adjournment. Had the matter proceeded on this basis alone, I may well have been disinclined to join an “additional” party on such basis.
- 2 However, at the Practice Day hearing, Mr Townshend amended his Practice Day request to instead seek that Woolworths Limited be substituted as the permit applicant and applicant for review in lieu of Mr Carswell. He filed with the Tribunal a letter dated the same day as the Practice Day hearing, through which Mr Carswell consented to the substitution, and consented to Mr Townshend and his instructing solicitors effectively representing Mr Carswell on that basis. Through the same letter, Mr Carswell also provided written consent to an adjournment, although that consent is perhaps less relevant if Woolworths Limited is substituted as the applicant for review and Mr Carswell ceases to be a party.
- 3 The applications before me were all vigorously opposed by the responsible authority and several objectors.
- 4 After hearing argument from those attending, I indicated that I would grant leave for Woolworths Limited to be substituted as the permit applicant and applicant for review, and that I proposed to vacate the six (6) day hearing scheduled to commence on 12 November 2007. My reasons for so doing can be summarised briefly as follows:
 - The substitution of a party is a very different thing to the joinder of an additional party. It clarifies the record as to who is the correct party representing a particular interest. In the present case, both Mr Carswell and Woolworths Limited have indicated that they have been involved in negotiations to enter a conditional contract for the sale of the land to Woolworths Limited. It is therefore appropriate that Woolworths be substituted as the permit applicant and applicant for review on the basis that Woolworths is the party who is now in reality seeking to obtain the benefit of the permit.
 - There is some evidence that Woolworths’ interests have for some time been noted on some plans for the proposed supermarket. In my view, there will be less confusion and a greater transparency of process if the interests of Woolworths Limited are acknowledged openly to the other parties and the Tribunal by Woolworths being the named applicant “on the record”.
 - Although there was some cryptic references made by objectors to Mr Carswell’s health, and its potential relevance to why Woolworths Limited is now “taking over” the application, I do not believe the issue of Mr Carswell’s health is at all relevant to me in considering the

application for substitution. There may be a myriad of factors, commercial or otherwise, which have led Mr Carswell to consider selling his land to Woolworths.

- Given the now more formal involvement of Woolworths, I consider it would be a farce to continue with the hearing scheduled to commence on 12 November 2007. Indeed, I find it surprising that several objectors wanted the adjournment application refused and to have the matter still proceed to a hearing in November. There are a number of reasons for this. First, if as Woolworths contends, it seeks time to review the plans, it may be that a “better” proposal evolves although I am perhaps being optimistic that there is any supermarket plan for this site which would be countenanced by some of the objectors. Secondly, if Woolworths is forced to proceed on Mr Carswell’s plans in November, it may either lose (in which case it may still come back to the Tribunal with its own application next year) or it may obtain a permit for something it does not really wish to build (in which case it may come back seeking to amend its permit). Either way, the plans which Woolworths might *really* seek to pursue would be considered sometime next year. The November hearing would therefore waste significant resources for all parties and the Tribunal for no real purpose, and without finally determining the matter.

5 I indicated at the Practice Day that I would reserve my position on whether the current proceeding should be re-listed for hearing in or after March 2008, as requested by Mr Townshend on behalf of Woolworths, or whether Woolworths should be required to start again with a fresh permit application. The responsible authority and several objectors were clearly of the view that Woolworths should “go back to square one” (Mr. Smith MEEPPA Inc.) and start the process again. Ultimately, this is not a view that I support for the following reasons:

- Any modified proposal by Woolworths is still fundamentally for the same purpose – ie an application for a permit for a supermarket on the subject land. Mr Townshend indicated that Woolworths had not fully reviewed all of the application plans, and it may be that some of the modifications were relatively minor in nature.
- By adjourning the matter until at least mid March 2008, there is plenty of time for Woolworths to circulate amended plans, and for all parties (including the responsible authority) to have the opportunity to consider their position ahead of a re-listed hearing. No one will therefore be materially prejudiced through the continuation of the existing permit process and application for review. Indeed, Deputy President Gibson had, in August 2007, given the former permit applicant Mr Carswell an opportunity to amend plans in a similar manner.

- Given the vocal opposition to the proposal by the responsible authority and several objectors, it is unlikely that the seeking of a fresh permit application would serve any useful purpose other than increasing the costs and delay to all parties. This runs contrary to the objectives of the Tribunal to provide timely and efficient dispute resolution.
- It is preferable, in the Tribunal's view, for Woolworths to be given a reasonable time to review its proposals for the site, to notify relevant parties and give them a reasonable opportunity to consider any modifications, and then to bring the matter on for a proper merits hearing in or after March 2008.

Mark Dwyer
Deputy President