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VCAT'S DECISION ON THE IMPACT OF CLIMATE CHANGE IN *L TAIP V EAST GIPPSLAND SHIRE COUNCIL*: A WARNING FOR COASTAL COUNCILS

Introduction

On 28 July 2010, Victorian Civil and Administrative (VCAT) handed down its decision in *L Taip v East Gippsland Shire Council*. This important decision will have broad consequences for infill development in Victorian coastal municipalities. It will also affect the way in which climate change issues are addressed more generally. To use the words of VCAT, the case brings into focus how the planning system in Victoria deals with climate change, rising sea levels and the vulnerability of coastal communities to the associated impacts of these conditions.

The case concerns a decision by the East Gippsland Shire Council to grant a permit for residential development of eight dwellings in Lakes Entrance, which is a coastal regional town in Eastern Victoria that is subject to flooding. The land the subject of the permit application is in a Business 1 Zone and is affected by a Land Subject to Inundation Overlay (LSIO).

A local resident sought review of Council's decision before VCAT. The core issue under consideration by VCAT was the impact of climate change risks on the site in question and its surrounds.

Physical risks to the site

In reviewing Council's decision, the Tribunal distinguished between two categories of risk, namely:

- flood risk
- climate change risk

With respect to the flood risk and associated issues that are required to be considered under the LSIO, VCAT considered that the proposed elevation of the dwellings in the permit application was a generally acceptable response to the flood risk. More specifically, the elevation would ensure that sensitive uses occurred above existing flood levels and would, thereby, minimise exposure of occupants to coastal hazards. It was also considered that safe passage to or from the site could be maintained. On this basis, VCAT concluded that current risks and level of flooding hazards were not a sufficient basis upon which to refuse the grant of the permit.





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In contrast, the Tribunal considered that the design response in the permit application did not adequately address the wider climate change risks. Based on material tabled by the East Gippsland Coastal Management Authority (who objected to the grant of the permit) and a CSIRO assessment of climate change vulnerability, VCAT considered that, over time, the depth of flooding would increase, flood events would become more frequent and there would be a corresponding increase in hazards to residents and emergency personnel. In the Tribunal's view, the elevation of the dwellings above projected water levels would not be sufficient to protect against the totality of climate change risks.

Council's approach

Before VCAT, Council did not dispute the existence of climate change risks, although there was some argument about the scale of those risks in the relevant locality. However, Council did question whether a moratorium on development should be imposed in light of these risks. More specifically, Council submitted that a balanced consideration of a range of relevant policies, strategies and planning materials indicated that development in existing coastal urban areas should not be halted because of climate change and sea level rise risks.

According to Council, this approach was justified because climate change impacts would not materialise for some time, that in the meantime, the economic life of the development could be realised and properly considered policy responses would be developed to guide future planning outcomes. It argued that refusal of a permit in these circumstances would be tantamount to an imposed, unsupported strategy for 'coastal retreat' for Lakes Entrance.

In support of its position, Council acknowledged that policy and strategies to address climate change impacts in Victoria and Lakes Entrance were still evolving. Nevertheless, it argued that the development was supported by the Urban Design Framework (**UDF**) and Planning Scheme Amendment C68.

VCAT noted that the purpose of Amendment C68 was to introduce design and landscape guidance for the future development in various coastal communities, including Lakes Entrance, through the Local Planning Policy Framework and introduction of various overlay controls. It also noted that the preparation and completion of the UDF, which forms the basis of Amendment C68, was developed at a time when climate change impacts were not a major policy consideration.

Subsequently, a Planning Panel assessment was undertaken of the adequacy of Amendment C68 to address the impact of climate change. The Panel made various recommendations to the Council to modify Amendment C68 to strengthen the way in which coastal hazards from climate change impacts should be considered and addressed. However, Council declined to make extensive changes in this regard because it did not consider that sufficient work had been undertaken to identify the extent of climate change impacts nor the social and economic impacts that may arise from responding to climate change. Furthermore, it did not consider it appropriate to 'go it alone'. Rather, in Council's view, the preferred approach was to await development of a state-wide set of guidelines and statutory responses, which was presently underway and would eventually be implemented through the Coastal Climate Change Advisory Committee.

Guiding principles

In rejecting the approach adopted by the Council, the Tribunal relied heavily on a somewhat curious application of the precautionary principle. VCAT explained that the overall approach in applying the precautionary principle is to ensure that:

- planning decisions about particular developments are made in the face of acknowledged climate change impacts and should not be deferred
- decisions should assess how the risks from climate change can be minimised to an acceptable level
- any uncertainty surrounding the potential impacts from climate change should not be a reason to defer decision-making

On the assumption that this application of the precautionary principle was correct, VCAT considered that:

- there were acknowledged and accepted risks to the development in question from coastal climate change impacts
- not all these risks had been properly considered and sought to be minimised
- Council had effectively deferred the difficult decisions as to how the risks of climate change impacts in Lakes Entrance could be addressed and minimised





VCAT concluded that the decision to grant the permit, which would allow more intensive development of Lakes Entrance, would not lead to an orderly planning outcome because it would fail to satisfy the purposes of planning in Victoria for intergenerational equity, sustainable, fair and socially responsible development. It advised that a cautious approach should be adopted in relation to development until future planning frameworks and responses are put in place to address and minimise these risks.

Implications of VCAT's decision

According to VCAT's analysis, if climate change risks – including sea level rise, storm surges and other associated coastal hazards – are likely to affect a proposed development in the future, approval of such development should be avoided until 'responses are put in place to address and minimise these risks'.

VCAT's decision raises significant questions regarding infill development in coastal municipalities where established settlements already exist.

- first, the decision implies that coastal development of low lying settlements should not be approved until the relevant climate change assessments have been undertaken and suitable responses to climate change have been developed. This will have a chilling effect on prospective development in the area in the intervening period, particularly since government at a higher level is yet to complete consideration of a state-led response to climate change

- second, the decision begs the question of the types of responses that will be needed to effectively address climate change risks. In particular, are the responses that are envisaged by VCAT coastal protection works to be undertaken by private and/or public landowners? If the latter, how will coastal protection works be funded? What type of coastal protection works will be adequate to address current and future climate change impacts? And where should they be located?
- thirdly, the decision will effectively blight existing developments in coastal communities that are particularly vulnerable to the impact of climate change. Property values are likely to decline in these areas. An associated consequence may be that the locality becomes less attractive to businesses and tourists and this, in turn, could affect the ongoing economic viability of the area

It would seem that there are quite drastic consequences that will flow from VCAT's decision if the decision is followed by other divisions of the Tribunal. Notably, unlike other cases where it has been suggested that a proposal should not proceed because there is further strategic planning to be undertaken, in this case, the Tribunal seem to be more prepared to halt a development proposal until that strategic work is undertaken. Furthermore, noting that the significant impacts of climate change so far as Lakes Entrance are concerned are still many years away, issues of the fair and orderly development of land as an objective of planning in Victoria seems to be a key issue up for debate.

The Victorian Parliament is currently debating the implications of this case and it is possible that the Minister for Planning will respond with interim guidance to help maintain investor guidance with respect to coastal development



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