VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P311/2020Permit Application no. TPA/47486 |
| CATCHWORDS |
| Two lot subdivision and creation of two reserves – refusal to grant a permit – application of the term ‘generally in accordance with’ - Development Plan - secure surplus land  |

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| APPLICANT | Ryman Healthcare (Australia) Pty Ltd |
| responsible authority | Monash City Council |
| SUBJECT LAND | 6-30 Brandon Park Drive WHEELERS HILL VIC 3150 |
| WHERE HELD | Melbourne |
| BEFORE | Dalia Cook, Member |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 17 June 2020 |
| DATE OF ORDER | 1 July 2020 |
| CITATION | Ryman Healthcare (Australia) Pty Ltd v Monash CC [2020] VCAT 701 |

# Order

1. In application P331/2020 the decision of the Responsible Authority is set aside.
2. In planning permit application TPA/47486 a permit is granted and directed to be issued for the land at 6-30 Brandon Park Drive, Wheelers Hill in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
* Two lot subdivision and creation of two reserves in accordance with endorsed plans pursuant to Clause 32.08-3 of the Monash Planning Scheme.

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| **Dalia Cook****Member** |  |  |

# Appearances[[1]](#footnote-1)

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| For Applicant | Mr David Passarella, Solicitor, Mills Oakley |
| For Responsible Authority | Mr Terry Montebello, Solicitor, Maddocks |

# Information

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| Description of proposal | Two lot subdivision– one lot of 3.65 hectares and a balance lot of 9,056sqm. Creation of two reserves - a 901sqm treed reserve is proposed on the north west corner of the land and a linear open space reserve of 9,119sqm orientated east-west is proposed to the south of the retirement village and aged care facility.  |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review a refusal to grant a permit |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone (Schedule 10)Development Plan Overlay (Schedule 4) – Brandon Park Residential Development PlanHeritage Overlay (part) (Schedule 102)  |
| Permit requirements | Clause 32.08-3 (General Residential Zone)[[2]](#footnote-2)  |
| Land description | The subject land is an L-shaped site located near the corner of Springvale Road and Ferntree Gully Road, east of Brandon Park Shopping Centre. The subject land has a total area of approximately 5.76 hectares and is the site of the former Brandon Park Secondary College. The northern part of the land has been recently developed with a complex of buildings known as the Nellie Melba Retirement Village and aged care facility. The balance of the subject land to the south west is fenced and undeveloped with scattered established trees. That part of the land adjoins the Monash Special Developmental School.  |

# Reasons[[3]](#footnote-3)

## Introduction

1. The use and development of the subject land is regulated by an approved Development Plan in addition to other relevant parts of the Monash Planning Scheme (Planning Scheme).
2. Ryman Healthcare (Australia) Pty Ltd (the Applicant) seeks to subdivide the subject land to create two reserves to vest in Monash City Council and to create two lots including a balance lot which is not required for the use and development of the aged care and retirement facility on the property.
3. Clause 43.04-2 of the Planning Scheme requires all planning permits to be generally in accordance with an applicable Development Plan. The Responsible Authority refused to grant a planning permit on the sole ground that the two lot subdivision would not be generally in accordance with the approved Development Plan. In its view, this would preclude the grant of the permit under review.
4. The Applicant responded that the two lot subdivision was generally in accordance with the Development Plan and that it was appropriate to grant the permission sought.

## Relevant approvals

1. A Development Plan for a Comprehensive Care Retirement Village on the subject land (dated August 2016) was approved by the Responsible Authority on 31 January 2017.[[4]](#footnote-4)
2. Key development objectives include respecting the Garden City character; appropriate setbacks and graduation in building height; retention of trees; east-west permeability; provision of land for public use and appropriate access and parking.[[5]](#footnote-5)
3. Key Development Plan objectives include an assessment of the site and surrounds; an outline of the design response by reference to legislation and policy; plans for high quality development; addressing traffic management, parking and the movement network; outlining 16.4% open space with landscaping strategies, and describing sustainable and innovative design solutions.
4. Although Cause 3.0 of the schedule to the Development Plan Overlay provides that the Development Plan should show “the subdivision layout of the site including lot numbers, and approximate lot sizes”, the Development Plan ultimately approved did not explicitly indicate proposed lot boundaries or the number of lots to be created for the ultimate configuration of the subject land.
5. Notably, the south western part of the subject land now proposed to be subdivided is identified on the approved Development Plan as ‘secure surplus land’ (surplus land).[[6]](#footnote-6)
6. A planning permit issued in March 2017 allowing the development of the subject land for a retirement village and residential aged care facility.[[7]](#footnote-7)
7. Condition 6 of this permit required that before the development commences, a Plan of Subdivision must be lodged with the Responsible Authority to vest the public open space reserve (including heritage trees), pedestrian link and open space areas in Council. Separate title to these reserves was required to issue before a Certificate of Occupancy for the facility.
8. The Applicant acted on this permit and submitted that the current permit application seeks to implement this condition.

## Party submissions

### Relevant case law

1. Both parties relied on similar case law principles in this proceeding pertaining to the term “generally in accordance with” a development plan. In summary, these decisions indicate that:
* general accordance is a question of fact to be judged on the facts of each case;
* the meaning of this term does not necessitate exact or precise accordance;
* the degree of accordance is relative to the type of document and its level of detail. The less detail and precision in the primary document, the more flexibility is afforded by the term and vice versa; and
* the development plan should be read as a whole to discern general accordance. [[8]](#footnote-8)

### Responsible Authority

1. The Responsible Authority accepted that the element of the permission sought to create two reserves to vest in Council *would* be generally in accordance with the Development Plan. It pointed out that a subdivision for this purpose could have been facilitated under the provisions of the *Subdivision Act 1988* as an alternative to the current permit application.[[9]](#footnote-9)
2. However, the Responsible Authority submitted that the component of the application that sought to subdivide the surplus land into a balance lot separate from the lot developed for the aged care and retirement facility was premature and *would not* be generally in accordance with the Development Plan.
3. It emphasised that:
	* the approved Development Plan is a very detailed and relatively precise document yet is silent on the issue of subdivision;
	* the subdivision of the subject land was not depicted in the Development Plan in circumstances where the head Clause 43.04-4 requires the Development Plan to depict the proposed use and development of each part of the land;
	* the south western part of the subject land should be regarded as part and parcel of the singular approved use of retirement village and aged care facility for the whole of the land;
	* a permit can not be generally in accordance with a plan if the document does not contemplate what the permit proposes, especially when the head clause requires the form and conditions of future development to be shown; and
	* general accordance evokes a *positive requirement* rather than being passive in nature. The test is not one of a lack of inconsistency with the Development Plan.
4. The Responsible Authority did not appear to take issue with the merits of the subdivision. Rather, it opposed the lawfulness of the grant of a permit in circumstances where not all elements of the proposed subdivision would be generally in accordance with the approved Development Plan.
5. The Responsible Authority was also concerned that it would not represent orderly planning to allow the subdivision of the remainder of the subject land without identifying its future use or development, especially given the absence of third party rights in the planning scheme.
6. It submitted that the appropriate course of action would be for the Applicant to apply to amend the approved Development Plan to depict the proposed use and development (including subdivision) of the surplus land. Permission could then be pursued for the two lot subdivision generally in accordance with that plan.

### Applicant

1. The Applicant conceded that the Development Plan does not expressly depict proposed subdivision in any form. However, it submitted that it is difficult to reconcile condition 6 of the development permit with the Responsible Authority’s submission that the Development Plan “does not contemplate subdivision of the Subject Land”.
2. Notwithstanding, the Applicant submitted that it was clear from the Development Plan that the surplus land was to be treated differently from the balance of the subject land to be developed. The Applicant acknowledged that the Development Plan contains a ‘reasonable amount of detail’ in relation to the retirement village and residential aged care developments on the northern part of the land but contrasted this with the “little to no detail” regarding the surplus land.
3. It emphasised that the subdivision would not of itself effect any change to any key features of the Development Plan. It also considered that “the approval of the Permit Application would bear a direct, almost identical, resemblance to the key features of the Development Plan”.
4. The Applicant submitted that whether the subject land is subdivided or remains in one title has no impact on the proposed function of the land based on the Development Plan in its current form. It further submitted that the subdivision to create a balance lot on its own title would not prejudice third parties since any change to the future use or development of this land would need to be shown in an amended Development Plan to be approved by the Responsible Authority.

## Tribunal discussion

1. The Tribunal accepts the case law principles outlined by both parties as current and applicable to this application. The question is how these principles should be applied in practice to the facts in this proceeding having regard to the nature of the approved Development Plan and the permission sought.

### Subdivision to create two reserves

1. The Applicant submitted and the Responsible Authority accepted that a subdivision for the purpose of creating two reserves would be generally in accordance with the approved Development Plan.
2. The Tribunal agrees. The Development Plan is premised on a 16.4% public open space contribution, to be given effect to by subdivision. It would be facilitated by the permit condition requiring the two reserves to vest in Council.
3. It appears that both the boundaries and purposes of the land identified for the two reserves generally reflect (if not replicate) the mapping in the approved Development Plan.
4. There are positive community benefits as well as integrated site outcomes that would be achieved by subdividing the reserves and vesting them in Council (which is an automatic outcome upon registration by operation of the *Subdivision Act 1988*). These considerations warrant support for the planning merits of this aspect of the subdivision.

### Subdivision of the ‘surplus land’

1. It is clear from the Development Plan Overlay applying to the subject land that subdivision was contemplated as a potential element of the future development of the land. Similarly, the provisions of Schedule 4 of that overlay would expressly permit subdivision of the subject land into ‘superlots’ or to realign property boundaries or create a road or create or remove easements, even *before* a Development Plan was approved.
2. Still, the Tribunal acknowledges that there is nothing explicit in the approved Development Plan that depicts the subdivision of this land onto its own title. While this may be required for a finding of “accordance” with the Development Plan, case law demonstrates that “general accordance” is a potentially more flexible concept based on context.
3. The Development plan clearly delineates between the following in terms of both form and function:
	* the northern part of the subject land to be developed for the retirement village and aged care residential facility;
	* the east-west link and community park reserve;
	* the treed open space reserve in the north western corner; and
	* the surplus land.
4. While the Development Plan descends into great detail in respect of development and land use on the northern part of the subject land, it is relevant that there is a stark distinction in the way it treats the surplus land. No detail is provided in any form to indicate its future use or development, other than commentary about the need to protect identified existing trees on that part of the land.
5. The Tribunal does not accept the Responsible Authority’s in principle submission that something needs to be expressly included in a development plan for general accordance to be demonstrated (in this instance, subdivision).
6. This much is clear from decisions of former Deputy President Gibson in *Java Sands Pty Ltd v Frankston CC[[10]](#footnote-10)* and *Amber Vision PL v Wyndham CC[[11]](#footnote-11)* where she found that a child care centre would be generally in accordance with a development plan in an area identified as residential but not expressly designated for a child care centre. In *Java Sands*, Deputy President Gibson concluded:

24. I do not consider that the identification of sites for schools, pre-schools and infant welfare centres is relevant to a consideration of where commercial child care centres may be established.  I consider that commercial child care centres fall into a different category of use and the approved development plan simply does not descend to this level of detail.

1. In both those cases, the Tribunal’s findings were predicated on the fact that the Development Plan did not provide specific directions to the contrary.
2. Likewise, there is no specific direction to the contrary here; such as indicating that some other form of subdivision would be appropriate.
3. The Tribunal accepts that the Responsible Authority could legitimately have accepted the designation of ‘secure surplus land’ as an indication of its future use and development at the time the Development Plan was approved. In saying that, it is not obvious to the Tribunal what was intended by the reference to the word ‘secure’ in ‘secure surplus land’. It is likely to simply reflect the fact it is fenced off from the part of the land to the north.
4. If the surplus land was intended to be kept entirely free from development as some sort of vegetation offset site or contribution to public open space, presumably this would have been reflected in a legally binding restriction such as a section 173 agreement or covenant on title. For example, it is not apparent that this land forms part of the Native Vegetation Offset plan required under condition 41 of the development permit for the retirement village and aged care facility.
5. The Tribunal concludes that there is no express use or development foreshadowed for this land at the current time in the approved Development Plan, including any subdivision layout or landscape plan. Notwithstanding, by virtue of that part of land being clearly identified throughout the approved Development Plan as ‘surplus’ with no particular form of development, the Tribunal regards it as implicit that this component was always regarded as a residual part of the property that was not necessarily tied to the use or development of the northern part of the subject land.
6. While Schedule 4 to the overlay indicated that the Development Plan ‘should show’ proposed subdivision, this was not a necessary precondition for either the approval of the Development Plan or a finding that a subdivision of the land in two parts is generally in accordance with such plan.
7. The boundaries of the two proposed lots on the Plan of Subdivision are entirely consistent with the delineation of relevant parts of the subject land in the Development Plan. The subdivision of the land into two lots is a natural consequence of this particular Development Plan.
8. Arguably, the same could not be said of a proposal to subdivide the surplus land into conventional residential lots for example.
9. The Tribunal has also had regard to the overall scope of the Development Plan in determining general accordance. Although subdivision is a form of ‘development’ as this term is defined by the *Planning and Environment Act 1987*, key objectives of the Development Plan focus on guiding future land use and development in the sense of built form.
10. While a lack of inconsistency is not the key test for a finding of “general accordance”, it acts as a further useful check or safeguard in this instance. The Tribunal accepts submissions for the Applicant that title arrangements and ownership of the surplus land are not a matter of any consequence to the key objectives of the approved Development Plan.
11. Irrespective of title boundaries, there is potential for this land in future to achieve the overall objective for the land as indicated in Clause 2.0 of the schedule to the Development Plan Overlay, namely “to achieve an integrated residential development offering choice and diversity of housing opportunities and types in a neighbourhood setting that has been master planned to provide a distinctive and attractive urban design”.
12. Another factor affirming general accordance with the Development Plan is that the subdivision of the land into two lots would not affect the fact that its use and future development would continue to be controlled by the provisions of the Development Plan. Therefore, if the surplus land became a lot in its own right, it could not be used or developed for any purpose unless the Development Plan was amended to reflect this.
13. The concerns the Responsible Authority expressed in relation to the benefits of retaining existing vegetation on the surplus land are valid, especially in light of objectives of the Development Plan. Relevantly though, the creation of separate title for this land as proposed would not alter any obligations that may exist to protect this vegetation.
14. In hindsight, while the Responsible Authority may have preferred greater specificity about the future use and development of the balance lot, it approved the Development Plan without this level of detail. In these circumstances, there is nothing to prevent subdivision before its more detailed use and development is identified.
15. The planning merits of the proposed subdivision are non controversial - consideration of the matters in Clause 2.0 of Schedule 4 to the Development Plan Overlay, Clauses 53.01, 56 and 65 together with provisions of the General Residential Zone would support the grant of a permit subject to conditions proposed by the Responsible Authority.[[12]](#footnote-12) No contrary submissions were made in this ‘single issue’ case.
16. Since there is no intention by the current owner to expand the existing aged care facility into the surplus land, there are potential benefits in facilitating its subdivision to precipitate further planning for this site in line with the objectives of the underlying zone, overlay controls and approved Development Plan.

## Conclusion

1. The proposed two lot subdivision and subdivision to create two reserves is generally in accordance with the approved Development Plan for the subject land. Subdivision of the subject land was also clearly encompassed by the schedule to the Development Plan Overlay.
2. The subdivision proposed would progress objectives for the subject land to create two reserves to vest in Council in accordance with the Development Plan. These reserves have been identified through mapping that is entirely consistent with the Development Plan.
3. The creation of a new lot for the south western part of the property identified in the approved Development Plan as ‘secure surplus land’ is either implicit or at least a natural consequence of this designation in the Development Plan. It was dealt with in the most basic terms, with no specific guidance or detail provided and there is no indication in the document to the contrary.
4. The future use and development of the surplus land would still require approval under the Development Plan irrespective of new title being created. In this way, the substantive objectives of the Development Plan can continue to be achieved.
5. The subdivision into two lots and two reserves is supported on the planning merits, warranting the grant of a permit.

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| **Dalia Cook****Member** |  |  |

# Appendix A – Permit Conditions

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| Permit Application No: | TPA/47486 |
| Land: | 6-30 Brandon Park Drive WHEELERS HILL VIC 3150 |

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| What the permit allows |
| In accordance with the endorsed plans:* Two lot subdivision and creation of two reserves in accordance with endorsed plans pursuant to Clause 32.08-3 of the Monash Planning Scheme
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## Conditions:

### No alterations

1. The subdivision as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
2. Each lot shown on the endorsed plans must be drained to the satisfaction of the Responsible Authority.

### Mandatory conditions

1. The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity and gas to each lot shown on the endorsed plan in accordance with that authority’s requirements and relevant legislation at the time.
2. All existing and proposed easements and sites for existing or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
3. The plan of subdivision submitted for certification under the *Subdivision Act 1988* must be referred to the relevant authority in accordance with Section 8 of that Act.
4. The owner of the land must enter into an agreement with:
	1. a telecommunications network or service provider for the provision of telecommunication services to each lot shown on the endorsed plan in accordance with the provider’s requirements and relevant legislation at the time; and
	2. a suitably qualified person for the provision of fibre ready telecommunication facilities to each lot shown on the endorsed plan in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.
5. Before the issue of a Statement of Compliance for any stage of the subdivision under the *Subdivision Act 1988*, the owner of the land must provide written confirmation from:
	1. a telecommunications network or service provider that all lots are connected to or are ready for connection to telecommunications services in accordance with the provider’s requirements and relevant legislation at the time; and
	2. a suitably qualified person that fibre ready telecommunication facilities have been provided in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.

### Melbourne Water requirements

1. Prior to the issue of a Statement of Compliance, the Owner must enter into and comply with an agreement with Melbourne Water Corporation for the acceptance of surface and storm water from the subject land directly or indirectly into Melbourne Water’s drainage systems and waterways and other matters in accordance with the powers of Melbourne Water Corporation under the *Water Act 1989*.

### Permit expiry

1. This permit will expire in accordance with section 68 of the *Planning and Environment Act 1987*, if one of the following circumstances applies:
	1. The plan of subdivision is not certified with two (2) years of the date of this permit; or
	2. The plan of subdivision is not registered within five (5) years of the date of certification.

In accordance with section 69 of the *Planning and Environment Act 1987*, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within six months afterwards.

**- End of conditions -**

1. In writing. [↑](#footnote-ref-1)
2. The proposal is exempt from notice and review requirements by virtue of Clause 43.04-3 of the Development Plan Overlay. [↑](#footnote-ref-2)
3. The submissions of the parties with appendices 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. [↑](#footnote-ref-3)
4. TP/433. [↑](#footnote-ref-4)
5. Chapter 1.2, page 5. [↑](#footnote-ref-5)
6. Site Development Plan S01 A0-020. An approved Tree Offset Plan (Dwg No. 0931-001-L1000) identifies trees to be removed from the central portion of the land to be subdivided but retained near the linear open space and Academy Avenue frontage. [↑](#footnote-ref-6)
7. TPA/47002. [↑](#footnote-ref-7)
8. Including *City of South Melbourne v Raftopoulos* (Application for Review No. 1999/34936), *Mainstay Group Pty Ltd v Moreland SC* [2005] VCAT 2189, *Casey Gardens Developments Pty Ltd v Casey CC* [2009] VCAT 2489 and the like. [↑](#footnote-ref-8)
9. Section 35. [↑](#footnote-ref-9)
10. [2006] VCAT 2168. [↑](#footnote-ref-10)
11. [2007] VCAT 1297. [↑](#footnote-ref-11)
12. An assessment of the subdivision against Clause 56 objectives was provided by the Applicant by letter dated 11 April 2017. [↑](#footnote-ref-12)