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# Victorian Civil and Administrative Tribunal

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## Stupak v Hobsons Bay CC (includes Summary) (Red Dot) [2011] VCAT 618

(11 April 2011)

Last Updated: 19 April 2011

### RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as ‘Red Dot Decisions’. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows.

This Red Dot Summary does not form part of the decision or reasons for decision.

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO.  
P1901/2010

### IN THE MATTER OF

Mandy Stupak v Hobsons Bay City  
Council

### BEFORE

Helen Gibson, Deputy President

<b>NATURE OF CASE</b>	Public open space contribution
<b>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</b>	
<b>LEGISLATION – interpretation or application of statutory provision</b>	Consideration of distinction between issues to be determined under sections 18(1) and 18(1A) <a href="#">Subdivision Act 1988</a>

## SUMMARY

If there is no amount specified in the schedule to clause 52.01 of a planning scheme as the public open space contribution required when land is subdivided, a contribution for public open space may still be required under [section 18](#) of the [Subdivision Act 1988](#).

There are two separate questions to be addressed when assessing a public open space contribution under [section 18](#) of the [Subdivision Act 1988](#):

- Whether, on the facts of the case, there will be a need for more open space having regard to the factors set out in [section 18\(1A\)](#).
- If there will be a need for more open space, what percentage is appropriate under [section 18\(1\)](#).

The distinction between these issues formed the basis for the decision by the majority of the Court of Appeal in *Maroondah City Council v Fletcher and Minister for Planning*<sup>[1]</sup>, which held that clause 52.01 must be read as subject to the limitations contained in [section 18\(1A\)](#). If the planning scheme has fixed the level of public open space contribution in clause 52.01, there is no power to vary or reduce it in the event that [section 18\(1A\)](#) applies.<sup>[2]</sup> In a case where there is no amount specified in the schedule to clause 52.01, there is discretion to vary the 5% allowed for by [section 18](#), but the exercise of this discretion is separate to the consideration of whether there will be a need for more open space under [section 18\(1A\)](#).

The difficulty associated with considering the criteria in [section 18\(1A\)](#) is that whilst they may lead to a conclusion there is need for more open space, no assistance is provided about quantifying the percentage of the open space contribution that should be required under [section 18\(1\)](#). The lack of guidance in [section 18\(1\)](#) about what percentage of public open

space may be required means that a discretion must be exercised in each case. This decision considers what factors may be relevant in deciding what percentage of public open space should be required under [section 18\(1\) Subdivision Act 1988](#).

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### ADMINISTRATIVE DIVISION

#### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO.  
P1901/2010

#### CATCHWORDS

[Section 18 Subdivision Act 1998](#) – difference between the need for more open space and the percentage of contribution required.

<b>APPLICANT</b>	Mandy Stupak
<b>RESPONSIBLE AUTHORITY</b>	Hobsons Bay City Council
<b>SUBJECT LAND</b>	4 Prentice Street ALTONA NORTH VIC 3025
<b>WHERE HELD</b>	55 King Street, Melbourne
<b>BEFORE</b>	Helen Gibson, Deputy President
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	7 March 2011
<b>DATE OF ORDER</b>	11 April 2011
<b>CITATION</b>	Stupak v Hobsons Bay CC (includes Summary) (Red Dot) <a href="#">[2011] VCAT 618</a>

#### ORDER

1. Pursuant to [section 127](#) of the [Victorian Civil and Administrative Tribunal Act 1998](#) the application is amended by changing the name of the applicant to:

Mandy Stupak

1. Pursuant to [section 127](#) and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998* the permit application is amended by changing the name of the permit applicant to:

Mandy Stupak

1. The decision of the responsible authority is affirmed.
2. No change is made to the conditions in planning permit No PA0919669.

**Helen Gibson**  
**Deputy President**

#### APPEARANCES:

For Mary Stupak	Mr Lorraine Stupak, town planner, of L S Planning Pty Ltd
For Hobsons Bay City Council	Ms Adeline Lane, solicitor, of Maddocks

#### INFORMATION

Description of Proposal	Construction of three dwellings and three lot subdivision
Nature of Proceeding	Application under <a href="#">Section 80</a> of the <a href="#">Planning and Environment Act 1987</a> .
Zone and Overlays	Residential 1 Zone
Relevant Scheme policies and provisions.	Clause 11.03 open space planning Clauses 21.02, 21.04, 21.11 Clause 52.01
Land Description	Land is located on the northern side of Prentice Street, approximately 75m west of Blenheim Road, Altona North. Dimensions – 16.76m x 42.67m Area – 715.15 sqm
Cases Referred To	<i>Scarleett v Hobsons Bay CC</i> <a href="#">[2009] VCAT 203</a> ; <i>Ahmed v Hobsons Bay CC</i> <a href="#">[2008] VCAT 1673</a> ; <i>PM Kennedy Land Surveyor v Hobsons Bay CC</i> <a href="#">[2009] VCAT 48</a> ; <i>Stubbs Street Kensington Pty Ltd v Melbourne CC</i> <a href="#">[2009] VCAT 1947</a> ; <i>Maroondah City Council v Fletcher and Minister for Planning</i> <a href="#">[2009] VSCA 250</a> ; <i>Fletcher v Maroondah CC</i> <a href="#">[2010] VCAT 670</a>

#### REASONS

What is this proceeding about?

1. This proceeding is an application for review against a condition in a permit requiring a 5% public open space contribution pursuant to [section 18](#) of the [Subdivision Act 1988](#).<sup>[3]</sup>
2. The site value of the subject land has been assessed as \$530,000: 5% of this equates to \$26,500.00.
3. The issue in this case whether the figure of 5% should be reduced.
4. The applicant says that a 5% open space contribution is onerous and unreasonable particularly as the site is located within 200m of a regional park. She says that 5% is the maximum allowable under the [Subdivision Act 1988](#), but in the circumstances of this case it should be towards the bottom end of the range of 0% to 5%. She submits that 2% would be appropriate.

Statutory provisions

1. If there is no amount specified in the schedule to clause 52.01 of a planning scheme as the public open space contribution required when land is subdivided, a contribution for public open space may still be required under [section 18](#) of the [Subdivision Act 1988](#).
2. [Section 18](#) of the [Subdivision Act 1988](#) provides that:

**18 Council may require public open space**

(1) If a requirement for public open space is not specified in the planning scheme, a Council, acting as a responsible authority or a referral authority under the [Planning and Environment Act 1987](#) may require the applicant who proposes to create any additional separately disposable parcel of land by a plan of subdivision to—

(a) set aside on the plan, for public open space, in a location satisfactory to the Council, a percentage of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or

(b) pay or agree to pay to the Council a percentage of the site value of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or

(c) do a combination of (a) and (b) so that the total of the percentages required under (a) and (b) does not exceed 5 per cent of the site value of all the land in the subdivision.

(1A) The Council may only make a public open space requirement if it considers that, as a result of the subdivision, there will be a need for more open space, having regard to—

(a) the existing and proposed use or development of the land;

(b) any likelihood that existing open space will be more intensively used after than before the subdivision;

(c) any existing or likely population density in the area of the subdivision and the effect of the subdivision on this;

(d) whether there are existing places of public resort or recreation in the neighbourhood of the subdivision, and the adequacy of these;

(e) how much of the land in the subdivision is likely to be used for places of resort and recreation for lot owners;

(f) any policies of the Council concerning the provision of places of public resort and recreation.

#### Assessment of contribution required

1. Clause 52.01 of the planning scheme enables a council to specify an amount in the schedule as the public open space requirement when land is subdivided. Specifying a percentage in the schedule removes the uncertainties and inconsistencies that may occur when relying upon [section 18](#) of the *Subdivision Act 1988*, which only specifies 5% as the *maximum*. Hobsons Bay City Council has not included an amount in the schedule to clause 52.01. It chooses to rely on [section 18](#) and, as a consequence, can be placed in a position of having to defend permit conditions requiring 5% public open space contribution at the Tribunal, sometimes with inconsistent outcomes.<sup>[4]</sup>
2. As other divisions of the Tribunal have said, the council has done

considerable work in the planning and provision of public open space, and committed substantial resources in the preparation of its open space strategies, the ways to achieve it and the necessary improvement works and costings.[\[5\]](#)

3. The problem is that whilst the council prepared a detailed open space plan in February 2005, it has never amended its planning scheme to either include this plan as a reference document in any policy relating to the provision of public open space or to include an amount in the schedule to clause 52.01, notwithstanding this is identified as a key stage in implementing the plan. Funds to implement the plan are identified as coming from a number of sources, one of which is open space levies.
4. The council's failure to implement its open space strategy through amendments to the planning scheme has been criticised by the Tribunal in the past. In *PM Kennedy Land Surveyor v Hobsons Bay CC*[\[6\]](#), Deputy President Dwyer said:

[4] However, Mr Rantino's submission also appeared to suggest that a 5% contribution should be treated as a 'normal' contribution and, having regard to the factors in [s18\(1A\)](#) of the [Subdivision Act 1988](#) in a holistic way, should commonly support Council's policy for an open space request of 5%. He argued that do otherwise could lead to arbitrary outcomes between 0% and 5% that may be difficult to reconcile in planning terms across different parcels of land. If this is what Mr Rantino is contending on behalf of the responsible authority, I do not share that view. If the responsible authority wishes to apply the 5% as a 'standard', it should introduce a schedule into clause 52.01 of its planning scheme (as Councils have been encouraged to do in the past[\[7\]](#)). This would entrench the degree of proportionality and consistency across development that the Council apparently seeks to achieve. However, if the Council fails to deal with the matter through clause 52.01, it implicitly accepts the flexible exercise of discretion on a case-by-case basis, which may well lead to differing outcomes. As Senior Member Byard noted in *Agnew*, if 5% is the 'right amount', then it can be imposed just as can any lesser percentage thought to be appropriate.

1. In the *P M Kennedy* decision, Deputy President Dwyer chose not to deal with each of the six criteria in [section 18\(1A\)](#) of the [Subdivision Act 1988](#) individually, but sought to balance the criteria in "a holistic

way, leading to the exercise of discretion that is considered fair and reasonable” in that particular case.<sup>[8]</sup> This led to a conclusion that a 3% contribution was more appropriate than a 5% contribution.

2. Deputy President Dwyer was particularly critical of the approach apparently adopted by the council of applying a 5% contribution as an inflexible council policy. The same criticism cannot be levelled against the council officer report in the present case where each of the criteria in [section 18\(1A\)](#) was independently assessed.
3. In my view, there are two separate questions to be addressed when assessing a public open space contribution under [section 18](#) of the [Subdivision Act 1988](#):
  - Whether, on the facts of the case, there will be a need for more open space having regard to the factors set out in [section 18\(1A\)](#).
  - If there will be a need for more open space, what percentage is appropriate under [section 18\(1\)](#).
4. The distinction between these issues formed the basis for the decision by the majority of the Court of Appeal in *Maroondah City Council v Fletcher and Minister for Planning*.<sup>[9]</sup> This case concerned a situation in which the council had included a 5% public open space requirement in the schedule to clause 52.01. The question was whether a contribution of this amount was mandatory, with no discretion to either vary the amount or dispense with it having regard to the factors set out in [section 18\(1A\)](#), or whether [section 18\(1A\)](#) did apply and a decision was required about whether or not a public open space requirement could be made. The decision by the majority of the Court of Appeal was that clause 52.01 must be read as subject to the limitations contained in [section 18\(1A\)](#). The findings by Warren CJ and Osborn AJA were summarised by them as follows:

[122] In summary:

- (a) The limitations upon the power to fix a POS contribution pursuant to [s 18\(1\)](#) had no application to the proposed subdivision before the Tribunal, because it was concerned with a case in which the planning scheme fixed the level of such contributions.
- (b) [Section 18\(1A\)](#) did however apply to the proposed subdivision, because it (together with other provisions not expressed to relate to

requirements made pursuant to [s 18\(1\)](#) are of general application to requirements for POS made by municipal councils upon subdivision pursuant to the P&E Act. [\[46\]](#) [\[10\]](#)

(c) In the present case it remains for the Tribunal to determine whether in the terms of s 18(1A) the result of the proposed subdivision would ‘be a need for more open space’.

...

1. The case was remitted to the Tribunal by the Court of Appeal and was determined in *Fletcher v Maroondah CC*.[\[11\]](#) In that case, heard before me, I dealt with the two issues separately and found that if the planning scheme has fixed the level of public open space contribution in clause 52.01, there is no power to vary or reduce it in the event that section 18(1A) applies.[\[12\]](#)
2. In a case where there is no amount specified in the schedule to clause 52.01, there is discretion to vary the 5% allowed for by section 18, but the exercise of this discretion is separate to the consideration of whether there will be a need for more open space under section 18(1A).

Is there a need for more open space?

1. Having regard to each of the factors in section 18(1A), I make the following observations:

**(a) The existing and proposed use or development of the land.**

There is an existing three bedroom dwelling on the land. It will be replaced by three new dwellings having a total of eight bedrooms. Thus, there will be a net increase of two additional dwellings and five additional bedrooms. The subdivision will therefore result in increased development for residential purposes.

**(b) Any likelihood that existing open space will be more intensively used after than before on the subdivision.**

The subdivision will result in an increase in population, which will mean that existing open space will be used more intensively after the subdivision. Any increase in population adds pressure, no matter how minimally, on existing public open space. Smaller dwellings with less

private open space tend to mean an increased reliance on public open space for residents' recreational needs.

**(c) Any existing or likely population density in the area of the subdivision and the affect of the subdivision on this.**

The neighbourhood in which the subject land is located is a conventional, suburban residential area of single dwellings on lots. It is in a state of transition. Multi unit developments are beginning to replace single dwellings and the subject development is part of this trend. According to council's studies, the population density of the area is predicted to increase.[\[13\]](#) Whilst the increase in population density may be so slight as to be imperceptible, nevertheless it will add to the cumulative increase in population, which is projected to occur within the municipality. There is no reason to assume that population density in the area of the subdivision will not also increase cumulatively through the effects of infill development such as this subdivision.

**(d) Whether there are existing places of public resort or recreation in the neighbourhood of the subdivision, and the adequacy of these.**

There are relatively large areas of open space within walking distance of the subject land, such as Paisley Park. This is a 42 hectare reserve, which provides facilities for both passive and active recreation, such as sports ovals, an indoor swim and fitness centre, and a nine hole golf course. There are a number of other smaller open space reserves such as the Maddigan Reserve, which are also in relatively close proximity. Those reserves are all identified in the open space plan as requiring improvement and upgrading.

**(e) How much of the land in the subdivision is likely to be used for places of resort and recreation for lot owners.**

I do not consider that this criterion refers to private open space forming part of individual lots. Section 18(1A) is part of a provision dealing with public open space and needs to be interpreted in this context. I consider this criterion refers to any areas of public open space or community facilities for the benefit of all lot owners, which are provided within the subdivision. No such public open spaces or facilities are provided within this subdivision.

**(f) Any policies of the council concerning the provision of places of**

## **public resort and recreation.**

I do not consider that this reference is confined to policies within the planning scheme. The council has an open space plan, which I consider is a policy within the meaning of this criterion. The open space plan contains a series of detailed actions for public open space within the vicinity of the subject land, of which residents from the subdivision could be expected to enjoy the benefit. In addition, the council has prepared a number of more detailed plans for individual reserves, such as the Paisley Park Future Directions Plan, June 2007.

1. Having considered each of these criteria, I find that as a result of the subdivision there will be a need for more open space.

What percentage of open space should be provided?

1. The difficulty associated with considering the criteria in section 18(1A) is that whilst they may lead to a conclusion there is need for more open space, no assistance is provided about quantifying the percentage of the open space contribution that should be required under section 18(1).
2. The applicant argued that small subdivisions, which result in only a modest increase in population, should pay less than large subdivisions. In fact they do – 5% of land in a subdivision worth \$500,000[14] is substantially less than 5% of a site valued at \$5 million. What the applicant has failed to convince me of is why the amount paid by a small subdivision should be *proportionally* less than a large subdivision. Why should the percentage be 5% in the case of a subdivision of 100 lots, or even 10 lots, compared with a percentage of only 2% in the case of a subdivision of three lots?
3. The following proposition is stated in the council's open space plan[15]:

... the amount an additional dwelling will contribute to the provision of open space should be the same regardless of the size of the development, and therefore, assuming that in most instances residential subdivisions will be small and contributions will be taken as cash, the proportion of the value will be the same for a two dwelling development as it will be for a 20 dwelling development. ...

1. As a general principle, I consider there is merit in supporting this proposition.

2. The residential areas of Hobsons Bay are well established with an established network of public open space throughout. This network comprises small local reserves, regional reserves, coastal areas and linear open space. Residents will use different areas of open space at different times and in different ways depending on the activities they seek to pursue. In my view, it would be fallacious to assume that the majority of people will only use reserves closest to their homes exclusively.
3. Residents have various recreational needs and the council should plan to provide open space to meet this variety of needs. Such an objective is reflected in clause 11.03 “Open Space Planning” of the State Planning Policy Framework, which has the objective:  
To assist creation of a diverse and integrated network of public open space commensurate with the needs of the community.

1. At a local level, clause 21.11-2 of the Municipal Strategic Statement sets out a series of objectives relating to open space, which include the following:

### **Objective 1**

To provide adequate open space for active recreation to meet the needs of the community and to provide a diverse range of experiences and leisure opportunities.

### **Objective 2**

To improve the overall quality of the open space system by enhancing the diversity of the leisure opportunities available throughout the municipality.

1. Implementing these objectives requires the council to take a municipal-wide approach. It does this through its budgetary process. Over time, spending is allocated to projects in different parts of the municipality based on the council’s overall open space plan and other plans for specific locations. In these circumstances, I consider that as a general principle, when seeking contribution towards funding for open space, there is no basis to discriminate between different areas in terms of the *proportion* they should contribute unless there is a clear policy on the part of the council otherwise or in special circumstances. I am wary of suggestions that the percentage

should be varied depending on the number of lots or new dwellings unless the council has resolved to adopt such an approach on a consistent and transparent basis. If a council did decide to adopt a sliding scale, the best means of implementing this would be by way of inclusion in the schedule to clause 52.01, but it could be adopted as a policy or form part of an open space plan.

2. In the present case, I am not persuaded that the applicant has established why the percentage of contribution should be reduced from 5% to 2%. I am not persuaded that the exemption set out in section 18(8) for a two lot subdivision necessarily implies that there should be a sliding percentage scale based on the number of lots. Such a scale was included at one time in the former Vic Code 2[16], but this scale has not existed for many years.[17]
3. Ultimately, I have taken a different view about the proportion of public open space contribution that is appropriate to the conclusions of the Tribunal in *PM Kennedy* and *Scarlett*. I have reached a similar conclusion to (then) Member Rickards in *Ahmed v Hobsons Bay CC*. She also required a 5% contribution in respect of a three lot subdivision. I also note that according to council, over the last three years nine subdivisions (all of three or four lots) in proximity to the subject land had a public open space contribution of 5% imposed except the property at 227 Wood Street, which had a 5% contribution reduced to 3% on appeal in the *PM Kennedy* case.
4. The lack of guidance in section 18(1) about what percentage of public open space may be required means that a discretion must be exercised in each case and this may lead to apparent inconsistencies from time to time. This is unfortunate and potentially inequitable. The decisions of *PM Kennedy*, *Scarlett* and *Ahmed* illustrate this point.
5. Consistency would be better assured if the council included a figure in the schedule to clause 52.01 of the planning scheme. However, the absence of such inclusion does not mean that the council is necessarily wrong to pursue a policy of seeking 5% on the basis that the amount an additional dwelling will contribute to the provision of open space should be the same regardless of the size of the development. I see no reason why a different proportion should be paid by small subdivisions compared to large subdivisions. The amount will be different, with small subdivisions paying less than

large subdivisions by virtue of the difference in their site value, but the amount paid should not be confused with the proportion paid. I regard the provision of public open space contributions to be a benefit to the public good. As I said in *Stubbs Street Kensington Pty Ltd v Melbourne CC*[\[18\]](#):

[15] In my view, there is no justification for attempting to demonise public open space requirements as some form of tax that, as a matter of principle, the Tribunal should seek to constrain. Public open space requirements are a long standing and recognised means by which councils can collect money to help pay for the acquisition and upgrading of public open space land and facilities for the benefit of the community[\[19\]](#). The objective is not to tax development, but to provide councils with a source of land or funds to help carry out a legitimate and beneficent responsibility. As communities evolve, it is incumbent on councils to maintain, improve, upgrade and add to public open space facilities as a means of meeting the social needs and changing demands for passive and active open space. Councils are encouraged to prepare public open space strategies and may include open space objectives and strategies in the local planning policy framework of their planning schemes. Thus one of the criteria included in section 18(1A)(f) refers to any policies of the council concerning the provision of places of public resort and recreation.

1. Having regard to all these considerations, I have reached the conclusion that there is no basis why the public open space contribution in the present case should be reduced from 5% to 2%. I will therefore confirm the condition.

**Helen Gibson**  
**Deputy President**

[\[1\]](#) [2009] VSCA 250 [\[2\]](#) *Fletcher v Maroondah CC* [\[2010\] VCAT 670](#) at [\[30\]](#) – [\[35\]](#) [\[3\]](#) The condition under review is condition 14 in the planning permit No PA0919669 for the construction of three dwellings and a three lot subdivision, which provides as follows:

14. Prior to a Statement of Compliance being issued by the responsible authority, a public open space contribution fee equivalent to 5% of the value of the subject land shall be paid to council, pursuant to [section 18](#) of

the [Subdivision Act 1988](#).<sup>[4]</sup> Compare *Scarleett v Hobsons Bay CC* [\[2009\] VCAT 203](#), which reduced the contribution to 3% with *Ahmed v Hobsons Bay CC* [\[2008\] VCAT 1673](#), which upheld the contribution of 5%.<sup>[5]</sup> *Scarleett v Hobsons Bay CC* [\[2009\] VCAT 203](#) at [\[29\]](#)<sup>[6]</sup> [2009] VCAT 48<sup>[7]</sup> See for example the general comments of Member Hewet in *Georgiou v Bayside City Council* [\[2006\] VCAT 1134](#), particularly at paras [15]-[18]. In relation to Hobsons Bay City Council, see also the comments of Member Rickards in *Ahmed v Hobsons Bay City Council* [\[2008\] VCAT 1673](#)<sup>[8]</sup> [\[2009\] VCAT 48](#) at [\[18\]](#)<sup>[9]</sup> [2009] VSCA 250<sup>[10]</sup> [46] Requiring satisfaction pursuant to [s 21](#) as a pre-condition to the issue of a statement of compliance pursuant to the [Subdivision Act](#).<sup>[11]</sup> [2010] VCAT 670<sup>[12]</sup> [\[2010\] VCAT 670](#) at [\[30\]](#) – [\[35\]](#)<sup>[13]</sup> *City of Hobsons Bay 2006 Population and Household forecasts*: forecast.id. Whilst I discount the scale of forecast residential development for Altona North in the population and household forecasts prepared by forecast.id due to the uncertainty associated with strategic redevelopment of the Altona North Industrial Area, which has projected 1650 dwellings, due to the serious contamination issues affecting this area, the Altona North area is still predicted to grow even if this number of dwellings is removed from the calculation.<sup>[14]</sup> The subject land has been valued at \$530,000.00<sup>[15]</sup> [Section 4.3](#) Open Space Planning Processes and Open Space Contribution Policy (unfortunately no page numbers are included in the copy of the open space plan that I was given a copy of).<sup>[16]</sup> Victorian Code for Residential Development – Multi Dwellings (November 1993)<sup>[17]</sup> It was not included in the Good Design Guide for Medium Density Housing, which replaced Vic Code 2 in 1995.<sup>[18]</sup> [2009] VCAT 1947<sup>[19]</sup> In this context, it is well established that a need for more open space includes improvements to existing open space. For example see *Georgiou v Bayside CC* [\[2006\] VCAT 1134](#) at [\[22\]](#), and *Barker Monaghan Pty Ltd v Moreland CC* [\[2008\] VCAT 2432](#) at 15