

# KELLEHERS AUSTRALIA

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## In-House Memorandum

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### ***Seeking Subdivision? Rescue in Realignment.***

When considering changes to property boundaries, realignment can often be used as a viable alternative to subdivision. The advantages of realignment over subdivision are that, whilst subdivision and re-subdivision are often restricted by *Victoria Planning Provisions* (VPP), boundary realignment is generally possible without having to apply for a planning permit (Cl.62.04).

Ensuring your application is viewed as a boundary realignment can be legally complex. Some legal wrangling is often required to distinguish a boundary realignment from a subdivision. Significant case law exists regarding shape, size and degree of boundary adjustment, all of which needs to be assessed to determine whether it in fact constitutes a re-subdivision.

#### **What the Planning Scheme says**

General rules for boundary realignments are set out in the *Victoria Planning Provisions* (VPP). Cl. 62.04 provides that a subdivision which *realigns* the common boundary between two lots does **not** require a planning permit, if it meets certain criteria. These criteria are designed to distinguish between urban and non-urban zones.

If all the land is in one urban zone, no permit is required if the proposed realignment meets the minimum dimensions for each lot specified for the zone. If no minimum area is specified, the area of the smaller lot (created by the realignment) must not exceed 230 square meters<sup>1</sup>. No permit is required if the new boundary coincides with a boundary fence that is more than five years old.

If all the land is in one non-urban zone and the proposed realignment does not allow the number of dwellings to increase, no permit is required if the proposed realignment meets the minimum lot area and minimum dimensions specified for each lot by the zone. If no minimum area is specified for the zone, the boundary must not be moved more than one metre, or the boundary must coincide with the location of a fence that is more than five years old and no part of the boundary must move more than three metres.

#### **What VCAT says**

VCAT has taken a 'common sense' approach to determining whether a boundary alteration is a realignment or actually a re-subdivision. It determines the matter 'by its merits in the ordinary way'<sup>2</sup>. Therefore, merely satisfying the criteria in relevant Planning Provisions will **not** mean an applicant is necessarily entitled to realignment<sup>3</sup>. VCAT does not interpret Clause 62.04 expansively and will not allow it to be used to bypass other planning controls and provisions<sup>4</sup>:

*"[T]he realignment of a common boundary means that the existing boundary is moved. It does not mean that the common boundary is significantly altered in dimension or direction"* (DP Gibson)<sup>5</sup>

Broad principles are that the boundary cannot 'significantly' alter its 'dimension or direction' and cannot result in 'two completely different shaped and sized lots'<sup>6</sup>.

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<sup>1</sup> The area of either lot must not be reduced in area by less than 30 sq. m or 5%, whichever is lesser.

<sup>2</sup> *Maino v Nillumbik SC* [2006] VCAT 2129.

<sup>3</sup> *Mooney v Yarra Ranges SC* [2011] VCAT 1866.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Maino v Nillumbik SC* [2006] VCAT 2129, at [32].

<sup>6</sup> *Mooney v Yarra Ranges SC* [2011] VCAT 1866, at [21]; and *Maino v Nillumbik SC* [2006] VCAT 2129, at [32].

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## Realigning a common boundary

In deciding a VicSmart application to realign the common boundary between two lots<sup>7</sup>, the Responsible Authority must consider the suitability of the subdivision including how the layout and dimensions of the subdivision respond to significant planning elements. It must also take into account whether the provision of common property is appropriate for the purpose for which the land is to be commonly held and, if the land is in a residential zone and the realignment of the common boundary will result in a vacant lot, the objective and standard of the “Lot Area and Building Envelopes Objective” (Clause 56.04-2)<sup>8</sup>.

Providing proper consideration is paid to the relevant criteria, there are certain instances where it is possible to realign a boundary without applying for a permit. The need for legal advice is important in preparation, as the grounds must be established why the development application is a realignment and not a subdivision application to avoid confusion in planning approvals process.

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30 January 2014

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<sup>7</sup> VicSmart is a streamlined assessment process for straightforward planning permit applications (DTPLI); see <http://www.dtpli.vic.gov.au/planning/about-planning/improving-the-system/vicsmart-a-simpler-planning-permit-process>, accessed 5/2/14.

<sup>8</sup> The full list of conditions is specified in Cl.93.01-2, *Victoria Planning Provisions*.

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