

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1226/2023

CATCHWORDS

Section 149A(1)(a) of the *Planning and Environment Act 1987* (Vic); General Residential Zone – Schedule 2; activity of breeding, keeping, training and racing pigeons; declaration; whether land is being used for the purposes of agriculture; animal husbandry or domestic animal husbandry for the purposes of clause 73.03 of the Darebin Planning Scheme; whether land is being used for the purposes of an innominate land use.

APPLICANT / RELEVANT AUTHORITY

Darebin City Council

FIRST RESPONDENT

Victorian Racing Pigeon Body Inc.

SECOND RESPONDENT

Traianos Varelas

SUBJECT LAND

1/228 Mitchell Street
NORTHCOTE VIC 3070

HEARING TYPE

Hearing

DATE OF HEARING

2 May 2024

DATE OF ORDER

13 June 2024

CITATION

Darebin CC v Victorian Racing Pigeon
Body Inc [2024] VCAT 552

ORDER

Question

1 Question:

In relation to land situated at 1/228 Mitchell Street, Northcote Victoria, does the current land use or activity of breeding, keeping, training and racing pigeons conducted by the second respondent –

- a. constitute or is included in the following land use terms in clause 73.03 of the Darebin Planning Scheme;
 - i. Agriculture;
 - ii. Domestic animal husbandry;
 - iii. Animal husbandry; or
- b. constitute and be characterised as a separate use of land not defined in land use terms in clause 73.03 of the Darebin Planning Scheme (and so as to be a land use not specified in the Table to clause 32.08-2 relating to the General Residential Zone).



Answer:

I find that:

- a. the land at 1/228 Mitchell Street, Northcote Victoria is being used for the purposes of pigeon racing and associated pigeon keeping, training and breeding; and
- b. the use of the Land for this purpose:
 - a. is not properly characterised as use of the Land for the purpose of agriculture, domestic animal husbandry or animal husbandry as defined in clause 73.03 of the Scheme; and
 - b. is an innominate land use, being a land use that is not defined in clause 73.03 of the Scheme.

Declaration

- 2 Pursuant to section 149A of the *Planning and Environment Act 1987* (Vic), in VCAT Application P1226/2023 the Tribunal declares that the land at 1/228 Mitchell Street, Northcote is being used for the purposes of pigeon racing and associated pigeon keeping, training and breeding, which is an innominate land use, being one that is not defined in clause 73.03 of the Scheme.

Susan Whitney
Member

APPEARANCES

For applicant/relevant
authority

Mr Basil Stafford, solicitor, of Elliot Stafford
& Associates.

For first respondent and
second respondent

Mr Tom Callander, solicitor, of Rigby Cooke
Lawyers instructed by Charles Hider &
Associates.

Mr Callander called the following witness:

- Dr Colin Walker, veterinarian and pigeon
racer and breeder.



REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

Site context

- 1 This proceeding involves a declaration being sought by the Darebin City Council ('Council') with respect to pigeon racing that is occurring on and from the land at 1/228 Mitchell Street, Northcote ('Land').
- 2 Pigeon racing involves specially bred and trained homing pigeons being taken to a location and released, with the aim that they fly home to their loft whilst their performance is being timed. Persons involved in pigeon racing are often colloquially referred to as 'pigeon fanciers'.
- 3 The second respondent, Mr Traianos Varelas, is the owner and occupier of the Land. Mr Varelas has been a member of the Victorian Racing Pigeon Union Inc. and is now a member of the Northcote Pigeon Racing Club, which itself is a member of the Victorian Homing Association Inc.
- 4 The Land is in the General Residential Zone – Schedule 2 ('GRZ2') of the Darebin Planning Scheme ('Scheme') and is subject to the Development Contributions Plan Overlay – Schedule 1.
- 5 The Land is shown in the image below,² where the dwelling has the orange roof and the existing pigeon loft on the Land is the structure with the dark grey roof that runs perpendicular to the dwelling. The adjoining property at 2/228 Mitchell Street is located to the rear of the Land.



Figure 1: Land and surrounds

¹ The submissions and evidence of the parties, any supporting exhibits given at the hearing 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.

² Provided by the respondents, undated.

- 6 The first respondent, Victorian Racing Pigeon Body Inc., is the peak body for the administration and management of the sport of pigeon racing in Victoria and is an umbrella body for many Victorian pigeon racing associations, federations and clubs. Among other things, this body controls the conduct of pigeon races and has developed the Code of Practice for Pigeon Keeping and Racing in Victoria 2023 ('Code').

Circumstances surrounding proceeding

- 7 The Council has lodged this application for declaration under section 149A(1)(a) of the *Planning and Environment Act 1987* (Vic) ('Act') to:³

Make a declaration under s149A to determine the meaning and effect of clause 32.08 of the Darebin Planning Scheme

- 8 As to the Council's reasons for seeking the declaration, the Council states in the application form:⁴

The owner of the land keep racing pigeons and the the time had 63 but the number varies as he breeds them. Under the planning scheme the use could be animal husbandry where under clause 32.08 the maximum number of pigeons would be 5. It could be that they are categorized as non-domestic animals and possibly raised for agricultural purposes. This is an issue for several councils and there is no a consistent approach.

- 9 The Council seeks this declaration as a precursor to any other action that it might take in relation to the Land. The Council seeks to act fairly and does not wish to pursue Mr Varelas for undertaking a prohibited use of the Land if there is a possible interpretation that enables Mr Varelas to undertake the use in accordance with the Scheme.
- 10 For context as to the circumstances in which the Council seeks this declaration, on 28 February 2022 the Council received a complaint regarding the alleged impact to the complainant of Mr Varelas keeping racing pigeons on the Land. The alleged impact was a rodent problem on the complainant's land that was believed to be due to the pigeons and their cage.⁵
- 11 On 3 March 2022, officers of the Council attended the Land and spoke with Mr Varelas, who informed the Council officers that he was a member of a pigeon racing club, at that time he had 63 pigeons on the Land, he breeds pigeons every year and he looks after his pigeons.⁶
- 12 On 12 August 2022, the Council received a further complaint regarding the keeping of the pigeons on the Land.
- 13 On 22 March 2023, officers of the Council again attended the Land, observing pigeons being kept on the Land and pigeons on a roof.⁷

³ Application for Declaration form dated 27 September 2023 at section 15.

⁴ Ibid, section 16.

⁵ Affidavit of Mark Bernhardt, 1 November 2023, [9].

⁶ Ibid, [10].

⁷ Ibid, [17].



- 14 The Council was provided with photographs taken by the complainant on various dates in March and April 2023 and again in October 2023. These photographs included the following:⁸



Figure 2: Photograph of 2/228 Mitchell Street taken 11 April 2023

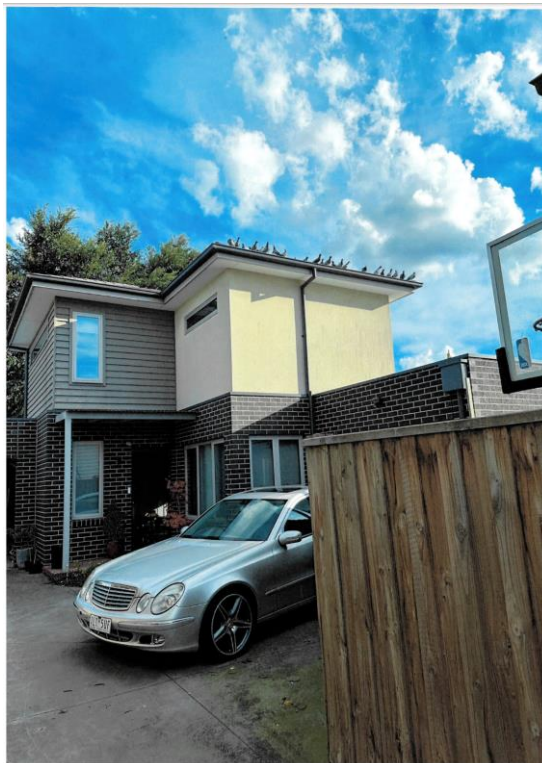


Figure 3: Photograph of 2/228 Mitchell Street taken 14 April 2023

⁸ Ibid, [MB8], [MB11], [MB13].



Figure 4: Photograph of 226 Mitchell Street taken 23 April 2023

- 15 On 1 August 2023, officers of the Council again attended the Land, observing pigeons being kept on the Land and the enclosures used to house the pigeons. The Council officers took photographs during their inspection and these included the following:⁹



Figure 5: Photograph of pigeon loft on Land taken 1 August 2023

⁹ Ibid, [MB14].



Figures 6 & 7: Photographs of pigeon loft on Land taken 1 August 2023

- 16 The foregoing information is provided for context of the circumstances of this declaration, noting that there is no enforcement proceeding before me with respect to the Land. Further, whilst the information provided derives from an affidavit of Mr Mark Bernhardt, an enforcement officer of the Council, I observe that Mr Bernhardt was not called during the hearing to speak to his affidavit and hence the content of that affidavit was not tested. I note that whilst the respondents contended that the affidavit should not be taken as proof of any amenity issue being raised, there was no request that the affidavit be excluded from the material before the Tribunal. As such, the affidavit remains amongst the material before me in this proceeding.

Questions before the Tribunal

- 17 The proceeding was referred to a practice day hearing, the purposes of which included to consider the framing of any questions of law or of mixed fact and law to be determined at the hearing in the process of determining the declaration.
- 18 The Tribunal's order dated 11 January 2024 arising from the practice day hearing states that the questions of law and fact to be determined in this proceeding are as follows:
1. In relation to land situated at 1/228 Mitchell Street, Northcote Victoria, does the current land use or activity of breeding, keeping, training and racing pigeons conducted by the second respondent –
 - a. constitute or is included in the following land use terms in clause 73.03 of the Darebin Planning Scheme;
 - i. Agriculture;
 - ii. Domestic animal husbandry;
 - iii. Animal husbandry.
 - b. constitute and be characterised as a separate use of land not defined in land use terms in clause 73.03 of the Darebin Planning Scheme (and so as to be a land use not

specified in the Table to clause 32.08-2 relating to the General Residential Zone); or

- c. constitute a hobby or activity incidental to the residential use (including a dwelling) of the land; or
 - d. if a use, is that use ancillary to the residential use for the purposes of clause 64 of the Darebin Planning Scheme.
- 2. In determining Question 1, is the number of the birds kept, trained and raced a relevant consideration?
 - 3. Subject to the operation of clause 63.11 of the Darebin Planning Scheme, is a permit required under the Darebin Planning Scheme for the breeding, keeping and training and racing of pigeons by the second respondent on the subject land?
- 19 At the commencement of the hearing, both the Council and the respondents addressed the Tribunal regarding an agreed position that they had reached as to questions that they no longer sought to be answered. The parties now only seek an answer to question 1(a) and (b). The parties arrived at the hearing prepared to address question 1(a) and (b). Both parties indicated an acceptance of the potential consequences of the Tribunal not answering certain questions at this time.¹⁰
- 20 Given these are the only matters for which the Council (and the respondents) seek an answer, and the parties are accepting of the consequences, I will only answer question 1(a) and (b).
- 21 In essence, the question that remains before the Tribunal is one of characterisation of land use: whether the activity described in question 1 as breeding, keeping, training and racing pigeons is properly characterised as one of the nominated land use terms that are defined in clause 73.03 of the Scheme or whether it is properly an innominate land use term that is not defined in the Scheme.
- 22 Having heard from the parties, I have determined that the Land is being used for an innominate land use. My reasons follow.

CHARACTERISATION OF LAND USE

Meaning of nominated land use terms in the Scheme

- 23 The question that remains before the Tribunal is as follows:

In relation to land situated at 1/228 Mitchell Street, Northcote Victoria, does the current land use or activity of breeding, keeping, training and racing pigeons conducted by the second respondent –

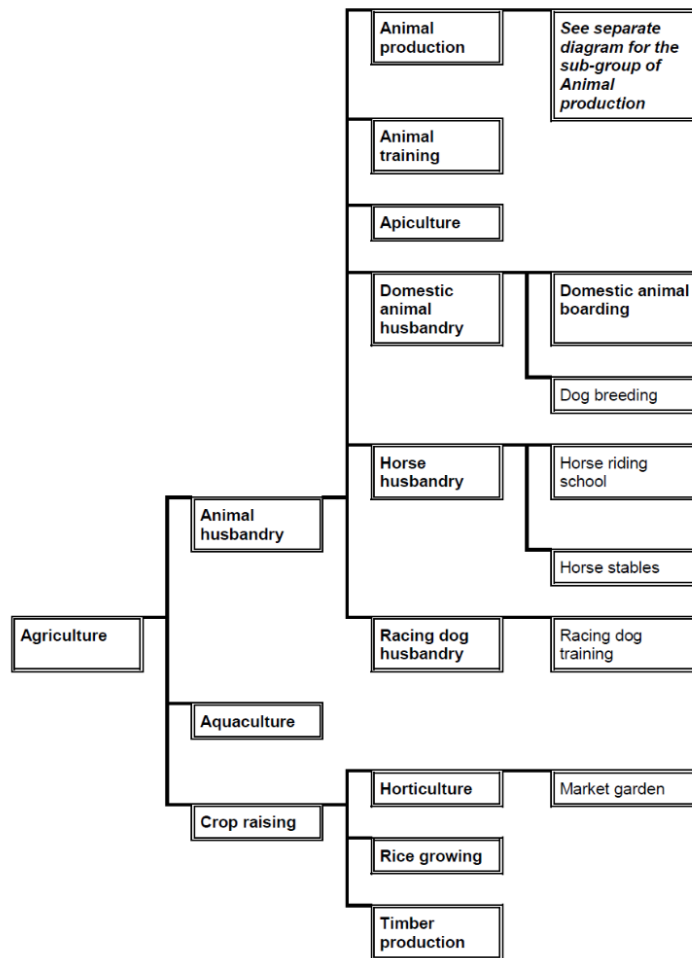
- a. constitute or is included in the following land use terms in clause 73.03 of the Darebin Planning Scheme;

¹⁰ For instance, that there might need to be further applications made to the Council and/or the Tribunal in order to address matters the subject of questions no longer pursued, depending on the declaration made by the Tribunal.



- i. Agriculture;
 - ii. Domestic animal husbandry;
 - iii. Animal husbandry; or
- b. constitute and be characterised as a separate use of land not defined in land use terms in clause 73.03 of the Darebin Planning Scheme (and so as to be a land use not specified in the Table to clause 32.08-2 relating to the General Residential Zone).

24 The nominated land use terms are nested within the Agriculture group in clause 73.04-2 of the Scheme, where that nesting diagram is as follows:



25 As can be seen from the nesting diagram, 'Agriculture' is the overarching categorisation under which first 'Animal husbandry' is nested and then, within that term, 'Domestic animal husbandry'.

26 'Agriculture' is defined in clause 73.03 of the Scheme as follows:

Land used to:

- a) propagate, cultivate or harvest plants, including cereals, flowers, fruit, seeds, trees, turf, and vegetables;

- b) keep, breed, board, or train animals, including livestock, and birds; or
- c) propagate, cultivate, rear, or harvest living resources of the sea or inland waters.

27 'Animal husbandry' is defined in clause 73.03 of the Scheme as follows:

Land used to keep, breed, board, or train animals, including birds.

28 'Domestic animal husbandry' is defined in clause 73.03 of the Scheme as follows:

Land used to keep, breed, board or train domestic animals.

29 In light of the declaration sought by the Council, below I extract the relevant parts of the land use table at clause 32.08-2 of the GRZ2, showing the three nominated land use terms:

Table of uses

Section 1 - Permit not required

Use	Condition
...	
Domestic animal husbandry (other than Domestic animal boarding)	Must be no more than 2 animals.

...

Section 2 - Permit required

Use	Condition
...	
Agriculture (other than Animal production, Animal training, Apiculture, Domestic animal husbandry, Horse husbandry and Racing dog husbandry)	
...	
Domestic animal husbandry (other than Domestic animal boarding) – if the Section 1 condition is not met	Must be no more than 5 animals.

30 Pursuant to clause 71.03-2 of the Scheme, if the condition opposite the use in the GRZ2 is not met, the use is prohibited in the GRZ2.

Parties' submissions¹¹

Council

- 31 The Council submits that the term 'Animal husbandry' would fit the use of the Land because of the term's reference to birds.
- 32 However, the Council relies on the more specific term 'Domestic animal husbandry' because the Council submits that pigeons are 'domestic animals':¹²
12. Pigeons were the first birds to be domesticated, going back some 5,000 years to Mesopotamia. Initially it was for food then developed to messaging, war-time use, breeding of fancy pigeons, and pigeon racing. Pigeons have a long history of domestication.
- 33 The Council distinguishes between 'animals' in 'Animal husbandry' and 'domestic animals' in 'Domestic animal husbandry', stating that domestic animals are a different type of animal: one that has been tamed or are friendly to humans.
- 34 Whilst the term 'Domestic animal husbandry' does not include reference to birds, the Council submits that because the term 'Animal husbandry' includes reference to birds, 'so does every use nested below it'.¹³
- 35 The Council acknowledges that the term 'Agriculture' includes reference to livestock and birds but submits that the effect of the 'Oxford comma'¹⁴ after 'livestock' results in the 'and' before birds being unlinked. The Council submits that the effect of this drafting is that the reference to 'animals' in 'Agriculture' includes livestock and birds.
- 36 Further, the Council submits that the concept of 'animals' as per its ordinary meaning includes birds. As such, it is unnecessary to specifically refer to birds when referring to animals.
- 37 The Council submits that the Land is clearly being used for pigeon breeding and keeping, where these are aspects of the definition of 'Domestic animal husbandry'. The Council accepts that this land use term does not refer to the racing of birds/animals but submits that the land use term does not need to be a neat fit, it just has to be a fit, and in this case it is a fit because of the breeding and keeping that is occurring on the Land. Further, the Council submits that the racing that does occur is occasional and so would be ancillary to the keeping and breeding of the pigeons.

¹¹ I note that the parties' oral submissions at the hearing necessarily departed from their written submissions given their written submissions canvassed matters that the parties advised at the commencement of the hearing that the Council (with agreement from the respondents) were no longer seeking the Tribunal to determine though this declaration.

¹² Submissions for the applicant dated 11 December 2023, [12].

¹³ Ibid, [11].

¹⁴ That is, a comma in a series of items before a conjunction (here the conjunction is: 'and').



- 38 The Council submits that because the use comes within ‘Domestic animal husbandry’, satisfying two of the four aspects of the definition, it is not open to argue that it is an innominate use.

Respondents

- 39 According to Mr Varelas, in addition to his residential use of the Land, he has been undertaking what he submits is the hobby of pigeon racing on and from the Land since around 1988.¹⁵
- 40 Among other things, this has involved Mr Varelas breeding pigeons for racing, training those pigeons for racing and racing those pigeons. Mr Varelas submits that he has up to 12 pairs of breeding pigeons (former racing pigeons) and up to 50 racing pigeons, all kept in a pigeon loft on the Land that measures approximately 4 metres long, 1.8 metres deep and 2 metres high. The breeding pigeons and racing pigeons are kept in separate sections of the pigeon loft.¹⁶
- 41 The respondents rely on the evidence of Dr Colin Walker, whose written statement contained both expert evidence given in his capacity as a veterinarian and also lay evidence based on his life experience as a pigeon fancier who breeds and races pigeons. At the hearing, the respondents relied on Dr Walker’s evidence regarding pigeon racing to assist the Tribunal in understanding what is involved in the activity.
- 42 Dr Walker is experienced in both racing pigeons and their veterinary care. Amongst other things, Dr Walker has raced pigeons since 1969, has travelled internationally and lectured on pigeon racing and has published four books on pigeon health. I accept Dr Walker’s experience and expertise in this field.
- 43 Dr Walker described the breeding, caring, training and racing of racing pigeons. His evidence included the following information:
- a. There are usually separate sections of a loft or separate lofts for breeding pigeons and racing pigeons;
 - b. Breeding occurs between November and January/February. Babies are removed at approximately 4 weeks of age, at which time they can feed themselves but not fly;
 - c. A routine is established whereby pigeons are given access to the outside of the loft and then the owner makes a noise (whistle or call) to signal to them to return to be fed. A racing pigeon has an innate desire to return home where it is safe and it can find food, water and its partner;
 - d. The pigeons are let out for up to approximately 1.5 hours per exercise session, for one or two exercise sessions per day;

¹⁵ Written Outline of Submissions for the Interested Parties dated 4 January 2024, [1].

¹⁶ Ibid, [13].



- e. When the pigeons are outside the loft, the owner cleans the loft. When the pigeons return, they are fed and then they sleep in the cleaned loft;
- f. In or around July, when the pigeons are approximately 7 months old, the pigeons are young adults and are ready to start race training;
- g. The first training toss involves the pigeons being taken in a basket to a location approximately 7 to 8 kilometres away, let out and they then fly back to the loft;
- h. The training distances are increased to approximately 150 kilometres;
- i. The shortest races are approximately 200 kilometres, while the longest races are approximately 1,200 kilometres. Around 700-800 kilometres is a normal flying distance per day although up to 1,000 kilometres can be flown in a day;
- j. The usual pigeon racing speed is 70 km/hr;
- k. Most races are between 500 and 700 kilometres;
- l. Dr Walker is able to watch his pigeons' training/racing progress on his mobile phone while he returns from the release point;
- m. When the pigeon arrives back at its loft, its electronic chip implant automatically records the time at which it arrived home when it flies over the sensor pad in the loft (this has replaced the previous manual method involving pigeon racing clocks). The race ends for each pigeon when it returns to its loft;
- n. The racing season runs from approximately July to November/December (including a championship section within this period);
- o. There are different federations that run races and they run multiple races throughout the year (for example, one federation runs 17 races, another runs 21 races);
- p. Generally, prior to a race the pigeons are transported to the pigeon club on the Thursday night, scanned and then in due course loaded into the purpose-built transfer crates/containers and taken to the start of the race. The pigeons are then released and fly back to their loft;
- q. The owner keeps the necessary administrative material for their pigeon racing;
- r. 60 pigeons would be an absolute minimum number of pigeons that will give an owner a chance of racing in any racing season, noting that some owners start a season with 300 pigeons. The average racing pigeon owner has 150 pigeons. Less than 60 pigeons is problematic because pigeons die during races while others go out of form during a season;
- s. A pigeon should have a 2-3 week break between races;



- t. There is a 50 pigeon maximum per racing team although some owners have multiple teams competing from their loft;
 - u. Mr Varelas' loft is one of the smallest that Dr Walker has seen, noting that many lofts have closed fronts and running water and some have heating;
 - v. There are approximately 850 pigeon fanciers in Victoria and approximately 5,000 across Australia, with 500-600 fanciers living in the Melbourne metropolitan area;
 - w. In Australia, prizes up to \$100,000 are available although most prizes range between \$30,000 and \$70,000. There is an entry fee payable for each race; and
 - x. On average, a pigeon will race in 5 to 8 races per year.
- 44 It was Dr Walker's evidence that it is possible to train a pigeon out of undesirable behaviour, such as sitting on house roofs, by creating a negative experience for the pigeon that it will associate with that behaviour – such as throwing a tennis ball or a bucket at the pigeon.
- 45 Dr Walker accepts that his evidence describes the way in which he undertakes the practice of pigeon caring, training and racing and that other persons may not adopt the same good practices. Dr Walker stated that even if a member of a pigeon racing club was found to have their pigeons landing on the roofs of neighbours' buildings, there is nothing that the club can do to stop this occurring. Further, whilst the Code recommends that pigeons should be under supervision, there is no penalty for non-compliance with the Code.
- 46 The respondents describe pigeon racing in the following terms:¹⁷
- 14. The nature of pigeon racing is that, particularly during pigeon races, some pigeons do not return back to the pigeon loft, usually because they succumb to birds of prey, or objects such as power lines, or natural causes or, occasionally, because they chose not to. By the end of the pigeon racing season (conducted between the months of July and November) two thirds of the racing pigeons may have been lost. The remainder may be raced in the next year or will replace stock birds who have died.
 - 15. The hobby of racing pigeons is undertaken by pigeon fanciers principally at their place of residence. This is because of the daily care and attention required to look after pigeons, to feed them, keep health checks, exercise them, leading to training and racing. A high standard of hygiene is essential. Pigeons require daily feeding and watering. Their lofts require daily cleaning. Racing pigeons require daily exercise and then perhaps once a week taken a distance from the loft for training return flights. Pigeons are only fed when they return to the loft after exercise or training. It is therefore very unlikely that pigeons will defecate during flight.

¹⁷ Written Outline of Submissions for the Interested Parties dated 4 January 2024, [14]-[16].



16. When pigeons are raced, they are taken in baskets to a central point and transported in specially designed carriers to the intended race start location. They are then released and undertake the race which always finishes at the pigeons' home pigeon loft where the pigeon is timed either manually by the pigeon fancier or by a computer system as the pigeons return into the loft itself. The velocity of each returning pigeon is calculated against the distance to that loft and measured in metres per minute so that the speed of a bird in one suburb can be measured against the speed of a bird in another suburb. Thus, the races always involve a finish line (so to speak) back at the loft.

47 The respondents submit that if pigeon racing is not a hobby incidental to residential use but is a separate and distinct use, it is an innominate use:¹⁸

41. Whilst many of the "components" of pigeon racing may be components of the defined terms of Agriculture, Animal husbandry or (if it were to apply) Domestic animal husbandry, particularly breeding, keeping and training components, there is an overriding fundamental aspect concerning racing pigeons which is not embraced by those definitions namely the preparation for and the actual racing of the pigeons. Whilst pigeon races start distant from the pigeon loft (whether close by or far away) it is essential that the pigeons race back onto the land to the pigeon loft and be timed as they complete the race at the loft.
42. This racing component sufficiently and essentially differentiates Racing Pigeons from those defined terms so that it is proper to treat the use of land for the purpose of racing pigeons as an unspecified or innominate use, applying the principles in *Casconi v City of Whittlesea* 11 AATR 175 (a decision of the Supreme Court of Victoria, judgment delivered 7 May 1993 citation *Cascone, Azvella, Mario v Shire of Whittlesea* [1993] Vic SC 223 (7 May 1993)). The Tribunal is referred, in particular, to the six principles relating to characterisation on page 190.

48 The respondents submit that if pigeon racing is defined land use term, the appropriate defined land use term is 'Animal husbandry'. This is based on the fact that the definition of the land use term 'Animal husbandry' (and 'Agriculture') refer to birds whereas 'Domestic animal husbandry' does not, which the respondents submit is a significant point of difference between the terms.

49 In this respect, the respondents submit:¹⁹

45. Applying the principle of construction "inclusio unius est exclusio alterius" (the inclusion of one is the exclusion of another) it follows that Domestic animal husbandry cannot relate to birds and therefore the limits on bird numbers (whether as a Section 1 or Section 2 use) for that definition do not apply to Pigeon Racing.
46. It follows that if a permit is required for Pigeon Racing as falling within the definition of Agriculture or Animal husbandry, any grant of a permit is unfettered by the prescriptive conditions for Domestic animal husbandry. "Animal husbandry" should be preferred.

¹⁸ Ibid, [41]-[42].

¹⁹ Ibid, [45]-[46].



50 The respondents also contend that pigeons are not ‘domestic’:²⁰

47. A further reason why Domestic animal husbandry should not be construed as applying to pigeons is that pigeons are inherently not “domestic”. To be retained, they must be kept in a caged loft and enticed back to the caged loft by food. They can survive by themselves if released and if they decide not to return. Unlike dogs or cats, they are not creatures which are brought inside a dwelling house or treated as pets. They are racing pigeons.

48. The planning scheme does not contain a specific definition for Racing Pigeons in contrast to Horse husbandry or Racing dog husbandry.

51 In summary, the respondents submit that there is more to pigeon racing than just the keeping, breeding and training of pigeons and that the whole purpose of the keeping, breeding and training of pigeons is to race them: the pigeons would not be on the Land if not for the racing that occurs.

52 As such, what is occurring on the Land should be found to be an innominate land use, as none of the nominated land use terms sufficiently cover the purpose of the land use.

Tribunal’s determination

Question

53 As stated earlier, the remaining question before the Tribunal asks whether the activity stated as being the breeding, keeping, training and racing of pigeons is properly characterised as a land use term defined in clause 73.03 of the Scheme, specifically one of the land use terms nominated in question 1(a), or whether it is properly an innominate land use term that is not defined in the Scheme.

What is the purpose of the use of the Land?

54 Whilst the question refers to the activity of breeding, keeping, training and racing pigeons, I am mindful that as a starting point I need to ascertain what is the real and substantial purpose of the use of the Land.

55 Whilst it is common ground that the use of the Land involves the activities of breeding, keeping, training and racing of the pigeons that are on the Land, I am conscious that listing the activities occurring on the Land may inadvertently lead me into error regarding the correct characterisation if this exercise does not occur mindful of the overarching real and substantial purpose of the use of the Land.

56 As was stated by Ashley J of the Supreme Court of Victoria in *Cascone, A & Vella, Mario v Shire of Whittlesea*²¹ (‘*Cascone*’), it is always necessary to ascertain the purpose of the use, described as the ‘real and substantial’ purpose to emphasise the distinction between the ‘purpose of use’ and the

²⁰ Ibid, [47]-[48].

²¹ [1993] VicSC 223 (7 May 1993) (Unreported Judgments)



‘use’ in the sense of activities, processes or transactions. Further, it is not correct to undertake this exercise with the view that the purpose of use must fit within one of the defined land uses, at least where the relevant planning scheme makes provision for innominate land uses.

- 57 For context and completeness, I extract the relevant quote from *Cascone* that discusses the principles to apply when ascertaining the purpose of the use of land:²²

With respect to permit applications, the following principles, in my opinion, emerge from the cases to which I have been referred:

- (1) In characterising the proposed use of premises it is always necessary to ascertain the purpose of the proposed use.
- (2) Whilst intended use of premises, in the sense of activities, processes or transactions to be undertaken, will be useful in casting light upon the purpose of the proposed use, it is wrong to determine the relevant purpose simply by identifying activities, processes or transactions and then fitting them to some one or more uses as defined in a scheme.
- (3) It is wrong to approach the ascertainment of purpose of proposed use on the footing that it must fit within one (or more) of the uses defined in a scheme; at least that is so where there is provision for innominate uses in the scheme.
- (4) The ascertainment of purpose of a proposed use may yield the result that the purpose revealed very largely falls within a defined use. The extent to which it does not may be so trifling that it should be ignored. In that event the purpose as revealed should be taken to fall within the defined use.
- (5) The ascertainment of purpose of a proposed use may yield the result that more than one separate and distinct purpose is revealed. In that event the question initially arises whether one is dominant. The further question that may arise is whether the lesser purpose or purposes are ancillary to the dominant purpose. If the answer to both questions is "Yes", and the dominant purpose is available as of right or is permitted, the lesser purpose or purposes are legitimised. Then, in planning terms, there is but one purpose. But if the answer to the first question is "No", each revealed purpose must be available as of right or permitted, else there will be a breach of the scheme. The mere fact that one purpose is authorised will not prevent other revealed purposes from being prohibited.
- (6) In resolving the problems of characterisation raised in the preceding paragraphs (1) to (5) the preferable view, in my opinion, is that the adjectival phrase "real and substantial" qualifying "use" will always be nominally present. But it is unlikely to be of practical importance in many cases. It will

²² Ibid, pp 27-29



always serve to emphasise that there is a distinction between "purpose of use" and "use" in the sense of activities, processes or transactions. It should not be used to cloud the potential for more than one purpose being revealed. It should not be thought to provide a basis for treating a combination of activities, processes or transactions as necessarily attracting the appellation of "innominate use". It is likely to be of practical importance in cases falling within paragraphs (4) and (5) above.

The alternative conclusion to be drawn from the authorities, which may well produce very little difference in a practical way to the determination of cases, is that the "real and substantial" purpose of use test will be applicable in factual situations having the perceived potential to fall within paragraph (4) or (5) above.

- 58 Accordingly, the first step is to describe the real and substantial purpose of the use of the Land. Then, I need to check whether this comes within one of the nominated defined land use terms in clause 73.03 of the Scheme or whether this is properly an innominate land use.
- 59 I was assisted by the respondents' submissions as to what is occurring on the Land and why those activities are occurring on the Land, along with the evidence of Dr Walker as to what is, in his opinion and experience, the usual conduct of pigeon fanciers as regards pigeon care and racing. I accept Dr Walker's evidence as a statement of his considerable experience and knowledge in this field, mindful that he was not called to speak to what is occurring on the Land, but rather, what in his experience generally occurs in relation to pigeon racing and the associated keeping, breeding and training of pigeons.
- 60 It is common ground between the parties that the Land is being used for the purposes of a dwelling. In dispute is how to characterise the breeding, keeping, training and racing of pigeons on the Land.
- 61 Having regard to the material before me, I agree with the respondents that the purpose of Mr Varelas keeping, breeding and training the pigeons on the Land is in order for the pigeons to engage in the activity of pigeon racing. The material before me supports the contention that were it not for the activity of pigeon racing that Mr Varelas is involved in, he would not be keeping, breeding and training the pigeons on the Land.
- 62 As such, I find that the real and substantial purpose of the use of the Land as it relates to pigeons is for pigeon racing, although I qualify this finding by adding that it is not just use for the purpose of pigeon racing but also for the associated keeping, breeding and training of pigeons.
- 63 I qualify the purpose of the land use in this way for two reasons.
- 64 First, simply referring to 'pigeon racing' has the potential to inadvertently omit the other activities that are undertaken in using the Land for the purposes of pigeon racing; that is, their breeding, the training and the keeping of the pigeons on the Land. Based on the material before me, these



other activities go hand in glove with Mr Varelas' engagement in pigeon racing and are an integral part of Mr Varelas' overall pursuit of pigeon racing.

- 65 As to the 'keeping' aspect, this is important because in order to undertake pigeon racing on and from the Land, the pigeons need to identify the Land as the end point of the race, which means that they need to associate the Land with their loft and their home. As such, this is where they need to live (be kept), and be trained, in order to understand that this is where they must return to.
- 66 As to the 'breeding' aspect, I understand that the breeding activity that takes place on the Land is to replenish pigeon numbers when racing pigeons are lost (die or fly away) or are lost to racing (retire). Based on the material before me, I do not understand the breeding activity to be taking place for any other reason (for instance, a commercial endeavour).
- 67 As to the 'training' aspect, the evidence before me is that the pigeons use their home loft as part of the necessary training they undertake in order to learn how to race and return 'home'. Notwithstanding different training practices that might be employed by different owners, based on the evidence of Dr Walker there is a general, accepted way in which pigeon training is undertaken in order to teach the pigeons to return home during a race, and this involves the pigeon's home loft. There is nothing before me to suggest that Mr Varelas is not undertaking pigeon training on the Land, nor is this suggested by the Council.
- 68 Second, unlike other forms of racing such as horse racing, the racing of pigeons does not just occur on the Land. Rather, the Land is the end point in the race, with the majority of the race occurring through the sky and over other land between the release point and the end point at the Land. As such, strictly, the pigeon race occurs over much land, including the Land, although it could not reasonably be said that all of the land over which the pigeons fly is being used for the purposes of pigeon racing. However, this does not discount the importance of the Land to the pigeon race: if not for the end point, there would be no racing, as there would be no way to ascertain who won without the pigeon flying over the home plate of their own loft. As such, without the Land being used as part of the race, the Land would not be being used for the purpose of pigeon racing.
- 69 As such, I characterise Mr Varelas' use of the Land as use for the purposes of pigeon racing and associated pigeon keeping, training and breeding.

How should the purpose of the use of the Land be characterised?

- 70 Having ascertained that the real and substantial purpose of the use of the Land is for pigeon racing and associated pigeon keeping, training and breeding, I must now determine whether this land use properly falls within one of the nominated land use terms in clause 73.03 of the Scheme or whether this is appropriately an innominate land use term.



71 The Scheme requires us to first consider whether a use or activity on land is obviously or commonly included in one of the land use terms contained in clause 73.03 'Land use terms' of the Scheme. If so, that land use term is the appropriate land use characterisation for the proposed use or activity. Clause 73.03 of the Scheme states:

The table to this clause lists terms which may be used in this planning scheme in relation to the use of land. A term describing a use or activity in relation to land which is not listed in the table must not be characterised as a separate use of land if the term is obviously or commonly included within one or more of the terms listed in the table.

72 The three nominated land use terms are all within the Agriculture group.

73 'Agriculture' as a land use term includes the keeping, breeding and boarding of birds.

74 Accordingly, there is an overlap between these activities occurring as part of the use of land for agriculture and the use of the Land for pigeon racing and associated pigeon keeping, training and breeding.

75 However, I do not regard that the Land is being used for the purposes of 'agriculture'. Although the activities of pigeon keeping, training and breeding are in common with the defined use of land for agriculture, I am not persuaded that the Land is being used *for the purposes of* agriculture: the Land is not being used for the purposes of keeping, breeding and training pigeons. Rather, I have found that the Land is being used for the purposes of pigeon racing, where this land use includes the associated keeping, training and breeding of pigeons.

76 Accordingly, there is an important difference between the land use term 'agriculture' and what I have found is the purpose of the use of the Land. This difference is that the use of land for agriculture does not include the racing of the pigeons. The reason why this is an important omission is that I regard the use of the Land for the purpose of pigeon racing to be the reason why the other activities of keeping, breeding and training are occurring on the Land at all. That is, were it not for the pigeons racing on and from the Land, on the facts before me there would be no associated keeping, breeding or training taking place.

77 Whilst I accept that the pigeon races are not occurring all of the time, I do not accept that this makes the pigeon racing component of the Land less important. Rather, in the circumstances before me, I regard the pigeon racing component to be the fundamental reason *why* the other associated activities are occurring on the Land.

78 Similarly, I find that the Land is also not being used for the purposes of the nominated land use terms of 'animal husbandry' and 'domestic animal husbandry'. Again, this is because neither of these land use terms extend to use of the Land for the purposes of pigeon racing. Again, whilst I accept that there is breeding occurring on the Land, this is occurring as an

associated *part of* the use of the Land for the purposes of pigeon racing; husbandry is not *itself* the purpose of the use of the Land.

- 79 Given the reason that I have found that neither ‘animal husbandry’ nor ‘domestic animal husbandry’ is an appropriate characterisation of the purpose of the use of the Land, I need not make findings as to whether pigeons are domestic animals for the purposes of the term ‘domestic animal husbandry’ or whether the term properly includes reference to birds.
- 80 In short, for the reasons set out above, I find that the use of the Land for the purposes of pigeon racing and associated pigeon keeping, training and breeding, does not come within the nominated land use terms of agriculture, animal husbandry or domestic animal husbandry.
- 81 Accordingly, I find that the use of the Land for the purposes of pigeon racing and associated pigeon keeping, training and breeding is use of the Land for the purposes of an innominate land use; that is, a land use that is not defined in clause 73.03 of the Scheme.

WHAT DECLARATION IS APPROPRIATE?

- 82 In the application form, the Council seeks the Tribunal to make a declaration ‘to determine the meaning and effect’ of the GRZ2.
- 83 In light of the questions that were then framed, and the subsequent reduction of those questions before the Tribunal to in effect one issue, I am not prepared to make a declaration on the terms sought by the Council.
- 84 However, I am prepared to make a declaration that the Land is being used for the purposes of pigeon racing and associated pigeon keeping, training and breeding, which is an innominate land use, being one that is not defined in clause 73.03 of the Scheme.
- 85 I observe that the Table of uses in clause 32.08-2 of the GRZ2 provides that a permit is required for any use not listed in clause 1 or 3 of the Table of uses. The innominate land use that I have identified is not a land use listed in clause 1 or 3 of the Table of uses.

CONCLUSION

- 86 For the reasons given above, the answer to the question posed is that the Land is being used for the purposes of pigeon racing and associated pigeon keeping, training and breeding, which:
- a. is not properly characterised as use of the Land for the purpose of agriculture, domestic animal husbandry or animal husbandry as defined in clause 73.03 of the Scheme; and
 - b. is an innominate land use, being a land use that is not defined in clause 73.03 of the Scheme.



- 87 For the reasons given above, I am prepared to make a declaration that the Land is being used for the purposes of pigeon racing and associated pigeon keeping, training and breeding, which is an innominate land use, being one that is not defined in clause 73.03 of the Scheme.

Susan Whitney
Member

