

Kerry Stow

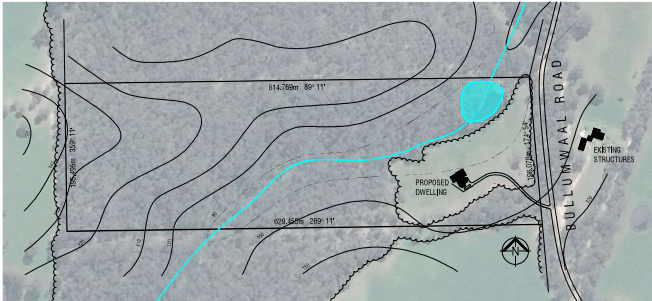
From: SeamlessCMS@seamless.com.au
Sent: Wednesday, 29 May 2019 1:47 PM
To: Planning Department
Subject: Planning Permit Submitted
Attachments: Vol8331Fol738.pdf; 18446_Dwelling_Plans.pdf; 18446_Report_D.pdf; 18446_LCA_Report_-_May_2019_-_Primary.pdf; 18446_LCA_-_APPENDIX_A_-_SITE_PLAN_002.pdf; 18446_BMS_D.pdf; 18446_BMP_V1.pdf

Online Form Submitted

Date Submitted: 29 May 2019 01:46 PM

Name	
Business trading name	Crowther & Sadler Pty Ltd
Email address	contact@crowthersadler.com.au
Postal address	PO Box 722, Bairnsdale
Home	5152 5011
Work	5152 5011
Mobile	
Owners name	Chris & Debbie Andrews
Owners business trading name. (if applicable)	
Owners email address	econocuts@wideband.net.au
Owners postal address	150 Mt Lookout Road, Mount Tylor
Home.	0419 398 651
Work.	
Mobile.	0407 335 642
Street number	1321
Street name	Bullumwaal Road
Town	Mount Taylor
Post Code	3875
Lot Number	
Plan Number	
Plan type	
Copy of plan	No file attached
Crown allotment No	CA102
Section No	
Parish/Township name	Wy Yung
Has there been a pre-application meeting:	No
Officers name	
Your reference number	
Is there any encumbrance on the Title such as a restrictive covenant, section 173 agreement or other obligation such as an easement or building envelope?	No

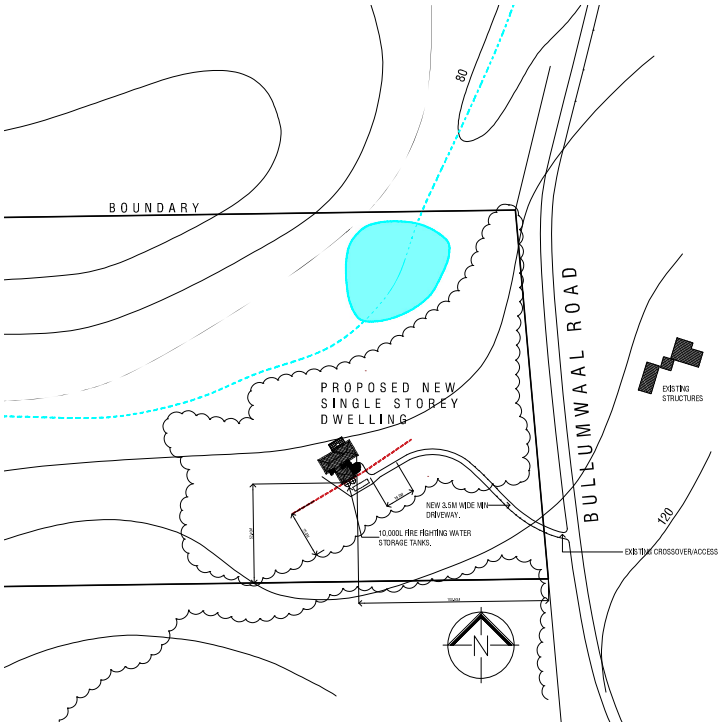
Will the proposal result in a breach of a registered covenant restriction or agreement?	No
Description of proposal - Describe the use, development or other matter which requires a permit	Use and development of a dwelling
Existing conditions - Describe how the land is used and developed now	Vacant farming zone land
Estimated cost of development. Note: You may be required to verify this estimate	240,000
Title (must have been generated within the past 30 days	Vol8331Fol738.pdf (Attached)
Covenants or Section 173 agreements	No file attached
Site Plan/floor - plan/elevations	18446_Dwelling_Plans.pdf (Attached)
Planning report	18446_Report_D.pdf (Attached)
1. Supporting information/reports	18446_LCA_Report_-_May_2019_-_Primary.pdf (Attached)
2. Supporting information/reports	18446_LCA_-_APPENDIX_A_-_SITE_PLAN_002.pdf (Attached)
3. Supporting information/reports	18446_BMS_D.pdf (Attached)
4. Supporting information/reports	18446_BMP_V1.pdf (Attached)
5. Supporting information/reports	No file attached
6. Supporting information/reports	No file attached
7. Supporting information/reports	No file attached
8. Supporting information/reports	No file attached
I declare that I am the applicant and that all the information in this application is true and correct and the owner (if not myself) has been notified of the permit application.	Yes



LOCALITY PLAN SCALE 1:2500

Note:
Drawings based on available title information and GOOGLE EARTH aerial imaging.
Contours are based on LASSi information.
The image has been selected largely for clarity/quality. Actual tree lines and features may differ.

NOMINATED FLOOR LEVELS ARE INDICATIVE ONLY AND SHALL BE CONFIRMED ON SITE PRIOR TO PREPARATION OF CONSTRUCTION DRAWINGS.



SITE PLAN SCALE 1:1000

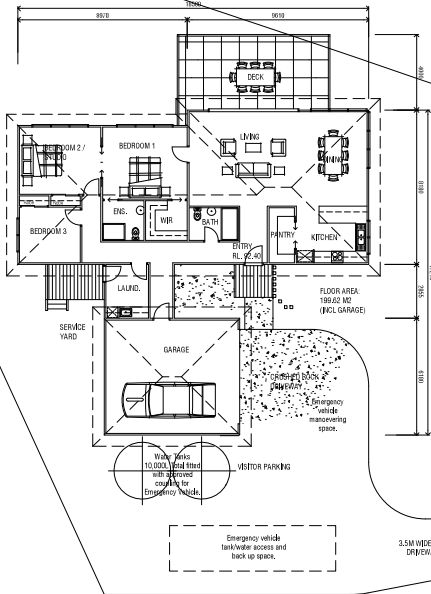
J.R Design
Australia Pty, Ltd
P, 03 5977 7411 E, james@jrdspol.com.au

PROPOSED DWELLING

Use & Development of Land for a Dwelling at 1321 Bullumwaal Road, Mt Taylor.

title	SITE / LOCALITY PLAN	date	23.04.19	job no.	JR1913-01	
rev.	REV A - 10000 PLANNING DEPT 4/10/2019	scale	AS@A1	shl. no.	TP.01A	

NOT FOR CONSTRUCTION



FLOOR PLAN

Materials and Finishes

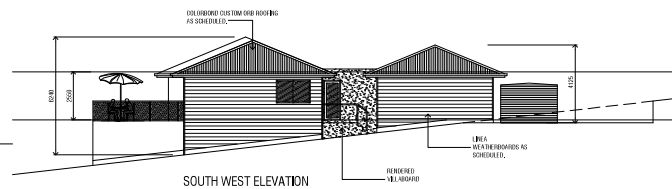
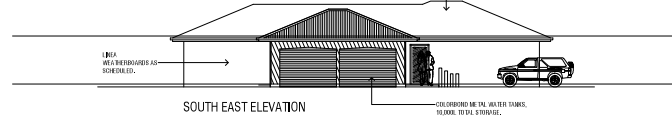
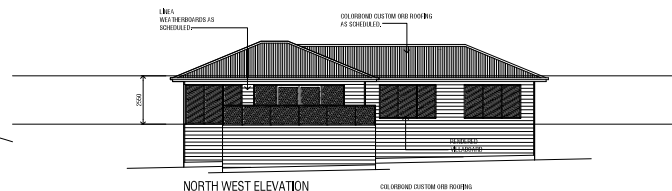
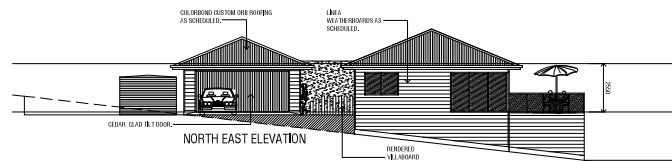
Floors 1	RC slab on ground to Garage
Floors 2	High span joist and timber floors to dwelling
Decks	Timber framed with selected ceramic tiles on approved tanked substrate
Walls 1	100mm Linea weatherboards, Colour Dulux White Clift Star.
Walls 2	Rendered Villaboard, Colour Dulux White Clift Star.
Roofing	Colebrook Corrugated roofing color - Usapet
Windows	Commercial Aluminum sections with wire screens.
Tip Cove	Color dark with only weatherboard.
Paving	Selected 50mm concrete pavers to Patio/Venandahs
Driveways	Selected crushed rock on compacted 150mm road base

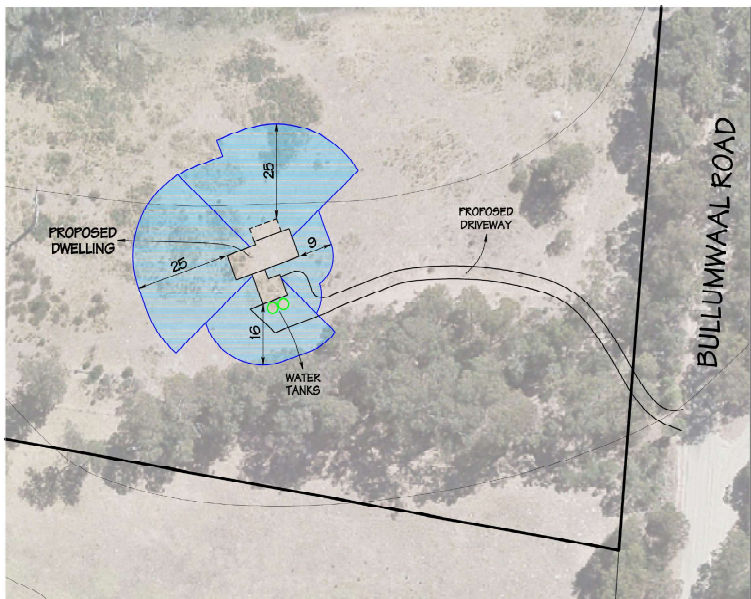
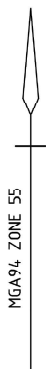
Site Statistics

Site	12,161 Ha
Floor area (incl. Garage)	199.82 m2

Plot Levelings

Proposed building envelope to be bench cut to approx. RL 92.25m. Minimum freeboard to floor/verandah slabs shall be 150.0mm. Site cut shall be battered into existing contours at 30°.





MANAGEMENT OF VEGETATION WITHIN THE AREA OF DEFENDABLE SPACE - SHOWN

VEGETATION (AND OTHER FLAMMABLE MATERIALS) WILL BE MODIFIED AND MANAGED IN ACCORDANCE WITH THE FOLLOWING REQUIREMENTS:

- GRASS MUST BE SHORT CROPPED AND MAINTAINED DURING THE DECLARED FIRE DANGER PERIOD.
- ALL LEAVES AND VEGETATION DEBRIS MUST BE REMOVED AT REGULAR INTERVALS DURING THE DECLARED FIRE DANGER PERIOD.
- WITHIN 10m OF A BUILDING, FLAMMABLE OBJECTS MUST NOT BE LOCATED CLOSE TO THE VULNERABLE PARTS OF THE BUILDING.
- PLANTS GREATER THAN 10 CENTIMETRES IN HEIGHT MUST NOT BE PLACED WITHIN 3m OF A WINDOW OR GLASS FEATURE OF THE BUILDING.
- SHRUBS MUST NOT BE LOCATED UNDER THE CANOPY OF TREES.
- INDIVIDUAL AND CLUMPS OF SHRUBS MUST NOT EXCEED 5m² IN AREA AND MUST BE SEPARATED BY AT LEAST 5m.
- TREES MUST NOT OVERHANG OR TOUCH ANY ELEMENTS OF THE BUILDING.
- THE CANOPY OF TREES MUST BE SEPARATED BY AT LEAST 5m.
- THERE MUST BE A CLEARANCE OF AT LEAST 2m BETWEEN THE LOWEST TREE BRANCHES AND GROUND LEVEL.

VEHICLE ACCESS

VEHICLE ACCESS TO THE DWELLING MUST BE PROVIDED FOR FIRE FIGHTING PURPOSES WHICH MEETS THE FOLLOWING REQUIREMENTS:

- MUST BE CONSTRUCTED SO THAT THEY ARE ACCESSIBLE IN ALL WEATHER CONDITIONS AND CAPABLE OF ACCOMMODATING A VEHICLE OF 15 TONNES FOR THE TRAFFICABLE WIDTH.
- HAVE A MINIMUM TRAFFICABLE WIDTH OF 3.6 METRES OF ALL-WEATHER CONSTRUCTION.
- CURVES MUST HAVE A MINIMUM INNER RADIUS OF 10m.
- THE AVERAGE GRADE MUST BE NO MORE THAN 1 IN 7 (14.4%) (2.5% WITH A MAXIMUM OF NO MORE THAN 1 IN 5 (20%) (11.5%) FOR NO MORE THAN 50m.
- BE CLEAR OF ENCROACHMENTS FOR AT LEAST 0.5m ON EACH SIDE AND 4m ABOVE THE ACCESSWAY.
- DIPS MUST HAVE NO MORE THAN 1 IN 8 (12.5%) (7.1%) ENTRY AND EXIT ANGLE.
- INCORPORATE A TURNING AREA FOR FIRE FIGHTING VEHICLES CLOSE TO THE BUILDING.

WATER SUPPLY

PRIOR TO OCCUPANCY OF A DWELLING, INSTALL 10,000 LITRES OF EFFECTIVE WATER SUPPLY FOR FIRE FIGHTING PURPOSES THAT MUST COMPLY WITH THE FOLLOWING REQUIREMENTS MUST:

- BE STORED IN AN ABOVE GROUND WATER TANK CONSTRUCTED OF CONCRETE OR METAL.
- ALL FIXED ABOVE-GROUND WATER PIPES AND FITTINGS REQUIRED FOR FIRE FIGHTING PURPOSES MUST BE MADE OF CORROSION RESISTANT METAL.
- INCLUDE A SEPARATE OUTLET FOR OCCUPANT USE.
- INCORPORATE A SEPARATE BALL OR GATE VALVE (BRITISH STANDARD PIPE (D3") 60mm) AND COUPLING (64 mm CFA 3 THREAD PER INCH MALE FITTING).
- BE LOCATED WITHIN 60m OF THE OUTER EDGE OF THE APPROVED BUILDING.
- THE OUTLETS OF THE WATER TANK MUST BE WITHIN 4m OF THE ACCESSWAY AND BE UNOBSTRUCTED.
- BE READILY IDENTIFIABLE FROM THE BUILDING OR APPROXIMATE IDENTIFICATION SIGNAGE TO THE SATISFACTION OF CFA MUST BE PROVIDED.
- ANY PIPEWORK AND FITTINGS MUST BE A MINIMUM OF 65 mm (EXCLUDING THE CFA COUPLING).

CONSTRUCTION

THE CONSTRUCTION OF A DWELLING MUST BE DESIGNED & CONSTRUCTED TO A MINIMUM BUSHFIRE ATTACK LEVEL BAL-29 IN ACCORDANCE WITH AS 3959-2009

CHRIS ANDREWS

1321 BULLUMWAAL ROAD, MOUNT TAYLOR

Crowther & Sadler Pty. Ltd.

LICENSED SURVEYORS & TOWN PLANNERS
162 MACLEOD STREET, BARRINDALE, VIC., 3676
P. (03) 5162 0011 E. contact@crowthersadler.com.au

FILENAME: 18446 BMP V1.pro

BUSHFIRE MANAGEMENT PLAN

PARISH OF WY YUNG
CROWN ALLOTMENT 102A

TP263357

PLAN REF.

18446-BMP

VERSION 1 - DRAWN 23/05/2019

SCALE (SHEET SIZE A3)

1 : 1000

REGISTER SEARCH STATEMENT (Title Search) Transfer of Land Act 1958

Page 1 of 1

VOLUME 08331 FOLIO 738

Security no : 124077652922D
Produced 28/05/2019 10:59 AM

CROWN GRANT

LAND DESCRIPTION

Crown Allotment 102A Parish of Wy-Yung.

REGISTERED PROPRIETOR

Estate Fee Simple

Joint Proprietors

CHRISTOPHER JOHN ANDREWS

DEBBIE MAREE ANDREWS both of 1320 BULLUMWAAL ROAD MOUNT TAYLOR VIC 3875

AM309892L 07/11/2015

ENCUMBRANCES, CAVEATS AND NOTICES

MORTGAGE AM309893J 07/11/2015

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD

Any crown grant reservations exceptions conditions limitations and powers
noted on the plan or imaged folio set out under DIAGRAM LOCATION below.

For details of any other encumbrances see the plan or imaged folio set out
under DIAGRAM LOCATION below.

DIAGRAM LOCATION

SEE TP263357Y FOR FURTHER DETAILS AND BOUNDARIES

ACTIVITY IN THE LAST 125 DAYS

NIL

-----END OF REGISTER SEARCH STATEMENT-----

Additional information: (not part of the Register Search Statement)

Street Address: 1321 BULLUMWAAL ROAD MOUNT TAYLOR VIC 3875

ADMINISTRATIVE NOTICES

AQ538978L NOMINATION TO PAPER INST. 11/12/2017

eCT Nominated to Discharge of Mortgage TO AUSTRALIA AND NEW ZEALAND BANKING
GROUP LTD

eCT Control 16165A ANZ RETAIL AND SMALL BUSINESS

Effective from 22/10/2016

DOCUMENT END

TITLE PLAN		EDITION 1		TP 263357Y	
<div>Location of Land</div> <div>Parish: WY-YUNG</div> <div>Township:</div> <div>Section:</div> <div>Crown Allotment: 102A</div> <div>Crown Portion:</div> <div>Last Plan Reference:</div> <div>Derived From: VOL 8331 FOL 738</div> <div>Depth Limitation: 50 FEET</div>			<div>Notations</div> <div>SUBJECT TO THE RESERVATIONS EXCEPTIONS CONDITIONS AND POWERS CONTAINED IN CROWN GRANT VOL. 8331 FOL. 738 AND NOTED ON SHEET 2 OF THIS PLAN</div> <div>ANY REFERENCE TO MAP IN THE TEXT MEANS THE DIAGRAM SHOWN ON THIS TITLE PLAN</div>		
<div>Description of Land / Easement Information</div> <div>COLOUR CODE</div> <div>Y = YELLOW</div>				<div>THIS PLAN HAS BEEN PREPARED FOR THE LAND REGISTRY, LAND VICTORIA, FOR TITLE DIAGRAM PURPOSES AS PART OF THE LAND TITLES AUTOMATION PROJECT</div> <div>COMPILED: 07/01/2000</div> <div>VERIFIED: AA</div>	
LENGTHS ARE IN LINKS		Metres = 0.3048 x Feet		Sheet 1 of 2 sheets	
		Metres = 0.201168 x Links			

TITLE PLAN

TP 263357Y

LAND DESCRIPTION INCLUDING RESERVATIONS EXCEPTIONS CONDITIONS AND POWERS SHOWN ON THE CROWN GRANT

All THAT piece of land in the said State

containing thirty acres and eight perches more or less being Allotment one hundred and two^A in the Parish of Wy-Yung County of Dargo

delimited and colored yellow in the map in the margin hereof TOGETHER with the right to sink wells for water and to the use for all purposes of any wells and springs now or hereafter upon the said land as though this Grant had been made without any limitation as to depth PROVIDED that this Grant is made subject to—

(a) the reservation to Us Our heirs and successors of—

- (i) all gold silver petroleum uranium thorium and minerals within the meaning of the Mines Acts (hereinafter called "the reserved minerals");
- (ii) rights of access for the purpose of searching for and obtaining the reserved minerals in any part of the said land;
- (iii) rights for access and for pipe-lines works and other purposes necessary for obtaining and conveying on and from the said land any of the reserved minerals which is obtained in any part of the said land;

(b) the right to resume the said land for mining purposes pursuant to section 168 of the *Land Act 1928*;

(c) the right of any person being the holder of a miner's right or of a mining lease or mineral lease under the *Mines Act 1928* or any corresponding previous enactment to enter on the said land and to mine for gold or minerals within the meaning of that Act and to erect and occupy mining plant or machinery thereon in the same manner and under the same conditions and provisions as those under which such a person has now the right to mine for gold and silver in and upon Crown lands provided that compensation as prescribed by Part II. of that Act is paid for surface damage to be done to the said land by reason of mining thereon.

LENGTHS ARE IN
LINKS

Metres = 0.3048 x Feet

Metres = 0.201168 x Links

Sheet 2 of 2 sheets

Planning Report

Use & Development of a Dwelling
1321 Bullumwaal Road, Mount Taylor

Reference – 18446

29 May 2019



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8.	Attachments	
	Dwelling Plan Set – JR Design Australia (Rev A)	
	Land Capability Assessment Report – LCA- Gipps (May 2019)	
	Bushfire Hazard Site Assessment Plan (Version 1)	
	Bushfire Management Plan (Version 1)	
	Bushfire Management Statement (Version 1)	
	Copy of Title (CA102A, Parish Wy Yung)	

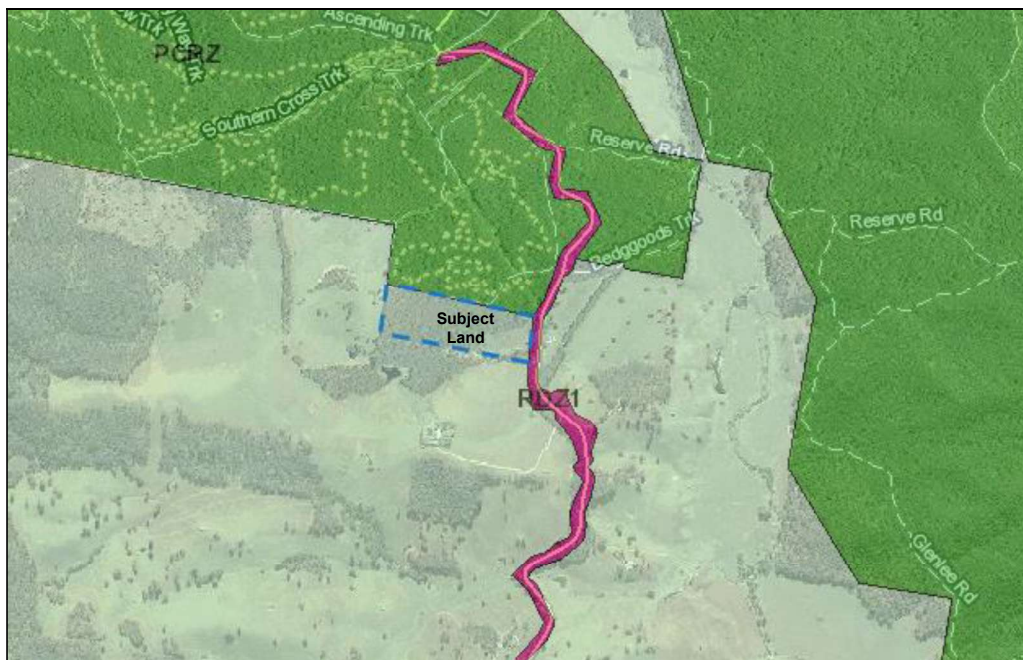
Note: Applicable Planning Application fee is \$1,257.20

1. Introduction

This planning report is prepared in support of proposed use and development of a dwelling at 1321 Bullumwaal Road, Mount Taylor. The report addresses the provisions of the Farming Zone and Bushfire Management Overlay as contained within the *East Gippsland Planning Scheme*.



Aerial view of subject land and surrounds – Source: LASSI SPEAR (DELWP)



Aerial photograph and zone mapping – Source: VicPlan (DELWP)

2. Subject Land & Surrounding Context

The subject land is formally described as Crown Allotment 102A, Parish of Wy Yung and is approximately 11.67ha in area.



View north west across the site from existing gateway

The site has frontage to Bullumwaal Road to the east which is a good quality sealed bitumen road which is mapped as Road Zone, Category 1. An existing gateway and access point are established on the southern section of the road frontage.



View from Bullumwaal Road towards existing site access

An existing access track provides internal access from the gateway entrance along the southern property boundary.



View west along internal vehicle access track

The majority of the subject land is vegetated with well established forest however the eastern portion of the property contains cleared land with some minimal regeneration.

The property is also segmented by an existing watercourse which runs from the north eastern portion of the property via an existing dam diagonally to the south west.



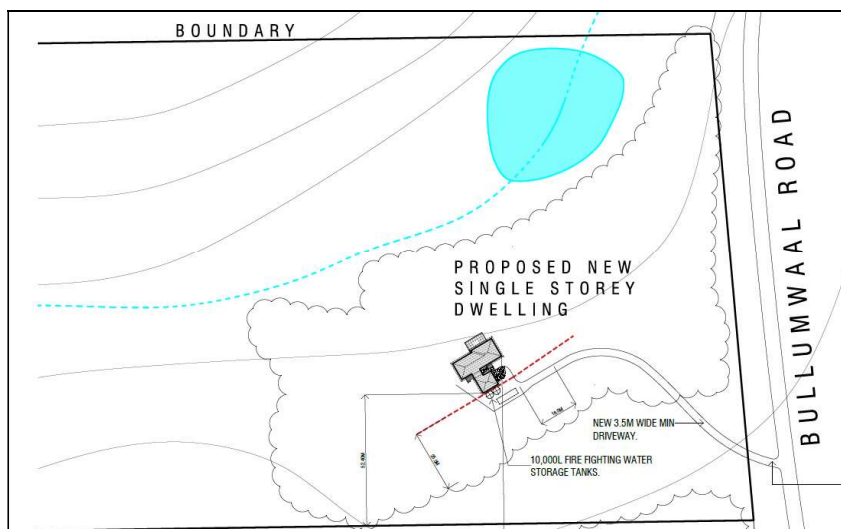
View north west from existing clearing towards the existing watercourse and vegetated portion of the property

The whole of the subject land is mapped as being affected by the provisions of the Farming Zone – Schedule 1, Bushfire Management Overlay and Erosion Management Overlay of the *East Gippsland Planning Scheme*.

3. The Application & Proposal

The Application seeks approval for establishment of a single storey three bedroom dwelling on the eastern portion of the subject land within proximity to Bullumwaal Road.

The proposed dwelling has been setback 100.5 metres from the eastern boundary and 52.4 metres from the southern boundary in an existing cleared portion of the site.



Extract of Site Plan – Source: JR Design Australia

The siting of the dwelling is practical as it is within close proximity to the existing access provisions whilst being adequately offset from the watercourse and can achieve onsite defensible space without incurring any unnecessary vegetation removal.



View east across southern portion of the property at existing site access

The existing access provisions provided from Bullumwaal Road will be upgraded to provide appropriate all-weather access to the proposed dwelling. The driveway will be a minimum of 3.5 metres in width and provided with adequate area to accommodate turning manoeuvres for emergency vehicles.

Two static water supply tanks of 10,000 litres capacity have been nominated on the accompanying Plan Set to accommodate both a domestic water supply and a water supply for fire fighting purposes.

Given the absence of reticulated sewer the proposed dwelling will be reliant upon onsite wastewater disposal techniques. A Land Capability Assessment Report as prepared by *Land Capability Assessments – Gippsland* has therefore been provided in support of the proposal which confirms the sites capacity to treat and retain wastewater onsite.

The subject Application triggers approval at the following Clauses of the *East Gippsland Planning Scheme*:-

- **Clause 35.07-1** for use of the land for the purposes of a dwelling in accordance with Farming Zone provisions;
- **Clause 35.07-4** for Buildings & Works associated with the construction of a dwelling in accordance with Farming Zone provisions;
- **Clause 44.06-2** for Buildings & Works associated with an accommodation use in accordance with the Bushfire Management Overlay provisions.

4. Cultural Heritage

The proposal does not trigger any mandatory requirement to provide a Cultural Heritage Management Plan (CHMP) under the *Aboriginal Heritage Act 2006*.

Pursuant to Regulation 7 of the *Aboriginal Heritage Regulations 2018*, a CHMP is required for an activity if:

- (a) *all or part of the activity area for the activity is in an area of cultural heritage sensitivity; and*
- (b) *all or part of the activity is a high impact activity.*



Cultural Heritage Sensitivity Mapping – Source: Planning Maps Online (DELWP)

The subject land is not mapped as being within an area of cultural heritage sensitivity and a single dwelling is not identified as being a high impact activity under the Regulations (Regulation 48). There is therefore no mandatory requirement to provide a CHMP in support of the Application.

5. Planning Policy

State and Local Planning Policy is addressed below in support of the proposed development.

5.1 Planning Policy Framework

The objective to Clause 12.01-1 relating to *Protection of Biodiversity* seeks to assist the protection and conservation of Victoria's Biodiversity. Strategies to this objective relate to identifying important areas of biodiversity, conservation of biodiversity and ensure that decision making takes into account the land use and development on Victoria's biodiversity. The proposal is considered to respond positively as the dwelling has been sited in an existing clearing where defensible space can be established without incurring the loss of any established intact native vegetation.

Clause 14.01-1S relating to *Protection of Agricultural Land* has the objective to protect the State's agricultural base by preserving productive farmland. The proposal is considered to respond positively to associated strategies:

- In its current format the site does not perform any productive agricultural function as there is simply insufficient cleared area available to accommodate viable grazing or crop raising activities.
- The land does not comprise of high quality or fertile soils given the distance provided from major rivers and associated floodplain areas. The site would therefore be more conducive to grazing activities, if it were to be utilised for agricultural purposes.
- The nomination of a dwelling on the site will not result in the permanent removal of productive agricultural land from the State's agricultural base as the land is simply not performing and has very limited ability to perform a viable rural function, given the largely vegetated context.
- The change in land use in this instance will effectively provide opportunity for some hobby farm style activities to occur through provision of permanent occupancy of the land. It is likely that some minimal grazing style activities would occur in conjunction with the dwelling for management and maintenance purposes.
- Nomination of a dwelling in this location is not out of keeping with the surrounding precinct which accommodates numerous residential properties amongst farming properties which are typically used for grazing activities. The dwelling is not isolated with existing dwellings being present on the adjoining parcels to the south and to the east.
- The land is simply not desirable as traditional agricultural land given its limited capacity for primary productivity due to size and vegetated nature.

Clause 14.01-2S relating to *Sustainable Agricultural Land Use* has the objective to ensure agricultural and productive land use activities are managed to maintain the long-term sustainable use and management of existing natural resources. The proposal responds positively as the dwelling has been positioned in an existing clearing. Providing a dwelling on site will enhance opportunity for some hobby farm style activities to take place on the land for management and maintenance purposes whilst coexisting with the site vegetation.

The objectives of Clause 13.04-2S relating to *Erosion & Landslip* seek to protect areas prone to erosion, landslip and other land degradation processes. Although the subject land is mapped as being affected by the provisions of the Erosion Management Overlay, the establishment of a single dwelling on the land does not result in adverse erosion risk and is exempt from triggering planning approval.

5.2 Local Planning Policy

Consideration has been given to Clause 21.06-1 relating to *Protection of Agricultural Land* the objectives of which relate to ensuring rural land is used and developed to support agricultural production and protect and increase the sustainable productivity of soils in East Gippsland. The proposal responds to the relevant strategies as follows:

- The proposal simply seeks approval to develop the land for the purposes of a dwelling and does not seek to subdivide. The subject land is already less than 40ha in area and considered to be a small Lot.
- The dwelling has been positioned on the existing clearing provided within proximity to the property frontage which will enable the vegetated balance to be managed and maintained without segmentation.
- The land is not identified as being high quality or prime agricultural land at Map 4: *Prime or High Quality Agricultural Land*.

Whilst the Application at hand does not trigger planning approval under the provisions of the Erosion Management Overlay, consideration has been given to Clause 21.05-2 *Erosion* as the site is mapped as being affected by the Overlay.

The proposed dwelling has been designed and sited in a manner which limits the extent of earthworks to less than 1 metre, which severely reduces the erosion risk thereby negating the need to provide a Geotechnical Risk Assessment in support of the proposal.

Clause 21.05-3 relating to Bushfire seeks to ensure land use and development is directed to locations and carried out in ways that minimise its vulnerability to the threat of fire. The associated strategies seek to minimise the vulnerability of people and property to bushfire and improve fire prevention and hazard management.

The proposal is considered to respond favourably as the proposed dwelling has been sited in an existing clear portion of the site and has sufficient area for establishment of defendable space onsite which can achieve requirements for BAL29.

The Policy Guidelines pertaining to Rural Dwellings at Clause 21.08-2 trigger the need for Land Capability Assessment Reports to be provided in support of rural dwelling Applications. A Land Capability Assessment Report has been lodged in support of the Application which demonstrates the ability for onsite wastewater disposal to be achieved.

6. Planning Elements

The planning zone and overlays as affecting the subject land are addressed below.

6.1 Farming Zone

The purpose of the Farming Zone seeks to provide for the use of land for agriculture, encourage retention of productive agricultural land, ensure non-agricultural uses do not adversely affect the use of land for agriculture, encourage retention of employment and population to support rural communities. It also encourages use and development of land based on comprehensive and sustainable land management practices and infrastructure provision and seeks to provide for the use and development of land for the specific purposes identified in a Schedule to the Zone.



Zone Mapping – Source: Planning Maps Online (DELWP)

The subject land is not conducive to viable rural activities given the largely vegetated context and as a result is not currently performing any agricultural use. The introduction of a dwelling onto the property will therefore not result in any loss of productive rural land. If anything, the dwelling will enable some hobby farm style activities to take place on the land that would not otherwise be able to occur.

Planning approval is triggered at Clause 35.07-1 for use of the land for the purposes of a dwelling (Section 2 Use) and Clause 35.07-4 for Buildings & Works associated with the construction of a dwelling in accordance with Farming Zone provisions.

Planning approval is triggered for Buildings & Works associated with the construction of the proposed dwelling as it is listed as a Section 2 Use under Clause 35.07-1 and will be within 100 metres of a waterway.

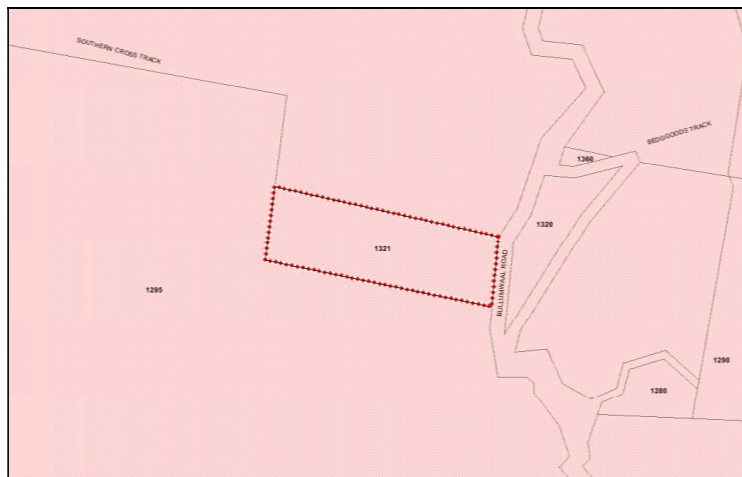
Response to Decision Guidelines

- The subject land in its current format does not perform any agricultural function given the limited area available for any viable rural activities to occur. The size of the property and the well vegetated nature does not make it attractive for farming purposes however the introduction of a dwelling onto the property is likely to result in some hobby farm style activities occurring.
- The proposed dwelling will not remove any land from agricultural production as the land is simply does not perform any rural function and has limited capacity to do so.
- Establishing a dwelling on the site will not limit the operation and expansion of adjoining or nearby agricultural uses, as the vegetated nature of the property does not make the subject land conducive to agricultural production. The environmental value of the existing vegetation is considered to be too high to warrant removal to facilitate agricultural practices.
- The subject land has the capacity to sustain the proposed dwelling as there is the ability to establish adequate defensible space on site and for onsite wastewater treatment to occur.
- The site is not mapped as being high quality or prime agricultural land and does not consist of such traits.
- There is no integrated land management plan for the site.
- The proposed dwelling will not result in the loss or fragmentation of productive agricultural land as the land is not currently performing or able to perform a viable rural function due to the vegetated context.
- The parcel of land directly to the north of the subject land is vegetated Crown Land whilst land to the south and to the east comprises grazing properties containing existing dwellings. The establishment of a dwelling on the land will therefore not be compromised by surrounding farming activities.
- The establishment of a dwelling on the land will not adversely compromise the surrounding rural activities as the precinct accommodates grazing activities, vegetated land and existing dwellings.
- The proposal is not likely to lead to a concentration or proliferation of dwellings in the area as the allotment pattern provides for generally larger rural style allotments. The proposed dwelling will also be difficult to see when being viewed from Bullumwal Road given the presence of the roadside vegetation.
- The proposed dwelling has been sited to ensure that it is sufficiently offset from the watercourse to accommodate onsite wastewater disposal without impacting water quality. The suitability of the siting is confirmed by the accompanying Land Capability Assessment Report.

- The dwelling has also been sited in an existing cleared area which has been previously disturbed. This location is not only practical having regard for the proximity to Bullumwaal Road however ensures that the more established intact site vegetation is not compromised.
- The inclusion of the site within the Bushfire Management Overlay triggers the need to establish defensible space around the proposed dwelling. The dwelling has been sited so as to ensure that the defensible space does not adversely impact on the established site vegetation.
- As demonstrated by the accompanying Land Capability Assessment Report, the land is capable of accommodating wastewater disposal via onsite means.
- Nomination of the proposed dwelling on the eastern portion of the property will not have any adverse impacts on the surrounding agricultural uses or result in the loss of productive agricultural land as the area is conducive to grazing style activities and does not accommodate intensive agricultural uses.
- The proposed dwelling has been limited to single storey and will be setback 100.5 metres from Bullumwaal Road and surrounded by site and roadside vegetation. It will therefore not be intrusive or domineering when being viewed from adjoining properties or the adjoining road network.
- The establishment of a dwelling on site will not have any impact on the appearance of the area given the site vegetation will be retained. The retention of the site and roadside vegetation will also essentially screen the dwelling ensuring the character of the area is not altered.
- The proposed dwelling is expected to be connected to the existing power supply provided within the precinct however will be reliant upon onsite water collection and wastewater management.
- Establishment of a single dwelling on the land will not trigger the need for any traffic management measures to be implemented. Residence and visitors to the site will simply make use of the existing point of access.

6.2 Bushfire Management Overlay

The whole of the subject land is mapped as being affected by the provisions of the Bushfire Management Overlay which triggers planning approval at Clause 44.06-2 for Buildings & Works associated with an accommodation use.



Bushfire Management Overlay Mapping – Source: Planning Maps Online (DELWP)

The purpose of the Bushfire Management Overlay is to ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire, to identify areas where the bushfire hazard warrants bushfire protection measures to be implemented and to ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.

The Application is considered to respond positively to the purpose of the Bushfire Management Overlay as the risk to life and property can be reduced to an acceptable level through implementation of mitigation measures prescribed in Clause 53.02 relating to *Bushfire Planning*.

Application Requirements

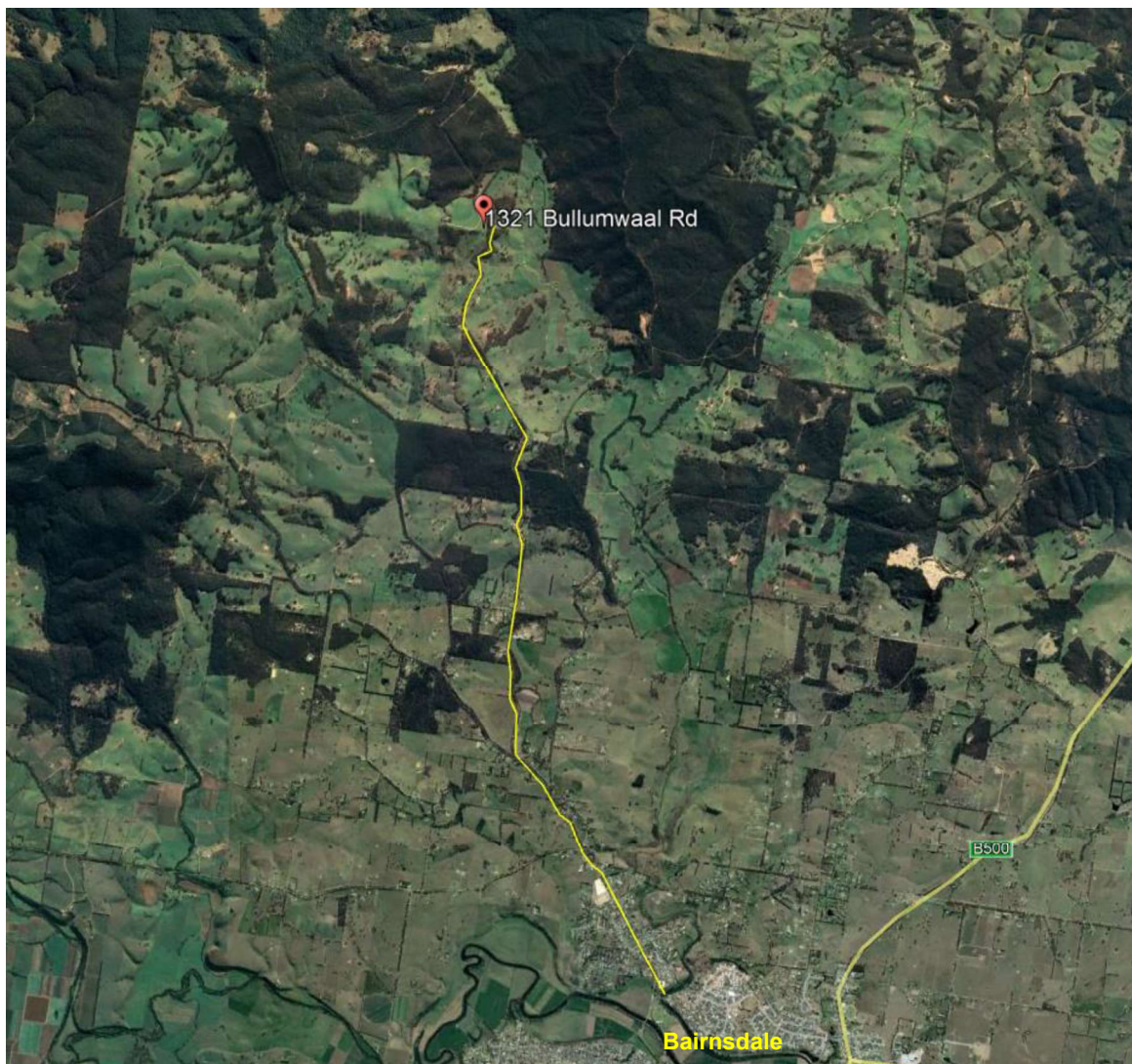
Please find enclosed the following documents that have been prepared to support the proposal and to meet the requirements of Clause 44.06-3 and Clause 53.02.

- Bushfire Hazard Site Assessment Plan;
- Bushfire Management Statement document; &
- Bushfire Management Plan.

The Bushfire Hazard Site Assessment Plan provides detail on the site and immediate surrounds. The landform and vegetation within the surrounding 150 metre assessment area has been utilised to assist in the calculations for establishment of defendable space and associated Bushfire Attack Level (BAL 29).

The subject land is located within the Locality of Mount Taylor which is essentially a rural suburb which is located approximately 12km north of the main township area of Bairnsdale.

The wider locality does provide a risk from bushfire with land to the north of the subject land being generally well vegetated with forest and much more steeper in nature. Land to the south of the site however comprises more sparse vegetation and gentler landform, with the majority of properties being cleared grazing properties many of which comprise of rural residential style development.



Bushfire Hazard Landscape Assessment – Source: Google Earth (2017)

The Bushfire Management Plan nominates a Bushfire Attack Level for construction and defensible space together with detail on the bushfire mitigation measures to be implemented for vegetation management, water supply and vehicle access.

Mandatory Condition

The mandatory Condition at Clause 44.06-5 relating to Buildings & Works is expected to be imposed on Permit which will relate back to the endorsed Bushfire Management Plan. This will ensure that the mitigation measures contained within the endorsed Bushfire Management Plan are implemented on an ongoing basis.

7. Conclusion

The proposed Use and Development of a Dwelling at 1321 Bullumwaal Road, Mount Taylor is considered to accord with all relevant provisions of the Farming Zone and Bushfire Management Overlay of the *East Gippsland Planning Scheme*. The proposal is consistent with Planning Policy Framework and Local Policy and has been designed to complement the adjoining properties.

For these reasons we respectfully request that Council consider the merits of the Application favourably and resolve to issue a Planning Permit.



MICHAEL SADLER
Managing Director

Land Capability Assessment Report

Site Address: 1321 Bullumwal Rd, Mt Taylor
Proposed Development: Use and Development of a Dwelling
Prepared for: Mr Chris Andrews



Prepared by: Andrew Wolstenholme, BSc, BSc (Forestry)
Land Capability Assessments Gippsland
21 The Grange
Lucknow VIC 3875

Telephone: 0466 072 764

Email: lcagippsland@outlook.com

DATE: May 2019

1 Introduction

Land Capability Assessments Gippsland have been engaged to undertake a Land Capability Assessment (LCA) for the use and development of the land for a dwelling. The field investigation and report have been undertaken and prepared by suitably qualified staff.

This report contains site and soil condition assessments which will be used to advise a method of treatment to suitably contain and manage waste water within the allotment boundaries including specifications for a potential Land Application Area (LAA). The assessment will be based on the Municipal Association of Victoria Victorian Land Capability Assessment Framework 2014. The design and specifications will be in accordance with the Code of Practice – Onsite Wastewater Management EPA number 891.4, July 2016 and AS/NZS 1547:2012 for onsite domestic wastewater management.

2 Description of the Development

2.1 Site and Owner Details

Site Address:	1321 Bullumwal Rd, Mt Taylor
Owner/Developer:	Mr Chris Andrews
Postal Address:	150 Mt Lookout Rd, Mount Taylor, Vic 3875
Contact:	0407 335 642
Council Area:	East Gippsland Shire Council
Zoning:	Farming Zone
Planning Overlays Present:	Bushfire Management Overlay Erosion Management Overlay
Land Size	11.7 ha

2.2 Wastewater Load

Table 1: Anticipated waste water load for an assumed 4 bedroom dwelling (calculated using EPA Code of Practice 891.4 table 4)

	Development size (no. of bedrooms)	Potential occupancy (no. of bedrooms + 1)	Waste water load / person (using standard water fixtures) (EPA COP 891.4)	Anticipated waste water load
1321 Bullumwaal Rd	4 (assumed)	5	180 L	900L

2.3 Description of the Proposed Development

It is proposed that a dwelling be developed on the land. The area of the site is 11.7 ha and it is generally rectangular in shape. The access to the site is from Bullumwaal Rd and there is a drainage line that runs diagonally through the property. The property slopes down toward the drainage line. There is a substantial amount of native vegetation on the property however there is a cleared area located on the eastern side. There is no development on the property at present however there is a dwelling located on the opposite side of the road.

2.4 Locality

Figure 1: Locality Map for 1321 Bullumwaal Road Mt Taylor



3 Site Assessment

Andrew Wolstenholme undertook site investigations on the 19 April 2019.

3.1 Risk Assessment of Site Characteristics

Table 2: Risk Assessment of Site Characteristics			
Characteristic	Description	Level of Constraint	Mitigation Measures
Planning Overlays present	<p>The following overlay is present for this development:</p> <p><i>Bushfire Management Overlay</i></p> <p>The purpose of this overlay is to protect life and property from the impacts of bushfire</p> <p><i>Erosion Management Overlay</i></p> <p>The purpose of this overlay is to protect areas prone to erosion by minimising disturbance and inappropriate development.</p>	Minor	<p><i>Bushfire Management Overlay</i></p> <p>Not required</p> <p><i>Erosion Management Overlay</i></p> <ul style="list-style-type: none"> • Avoid removal of native vegetation to construct the land application area where possible • Limit the area of exposed soil by minimising soil disturbance • Limit the time that soil is exposed • Undertake construction activities in drier periods • Replace the topsoil and grass sods as soon as possible after construction.
Aspect & Exposure	The area where a potential dwelling is likely to go faces north. There is some native vegetation in the area however generally there is adequate exposure to sun and wind.	Minor	Non deciduous trees and large shrubs should not be planted on the north or western edge of the land application area which would prevent sun and wind exposure
Climate (rainfall and evaporation)	Rainfall approximates evaporation in the wettest months. See water balance in Appendix B.	Moderate	Factor water balance into Land Application Area size. See Appendix B.
Erosion and land slip	There is no evidence of erosion on the property.	Moderate	See erosion management overlay
Fill (imported)	No fill recorded.	Minor	Not required.
Flood frequency	Proposed Lots 1 & 2 are not subject to the flood overlay or the land subject to inundation overlay.	Minor	Not required.
Groundwater bores	There are no bores located within setback distance requirements in EPA Code of Practice 891.4.	Minor	Not Required
Land area available for LAA	Available land application area is limited by setback distances required from a waterway and native vegetation.	Moderate	Ensure setback distances of 60m from the waterway are met. Retain native vegetation where possible.

Table 2: Risk Assessment of Site Characteristics

Characteristic	Description	Level of Constraint	Mitigation Measures
Rock outcrops (% of surface)	There are no rock outcrops on site.	Minor	Not required
Slope Form (affects water shedding ability)	The slope form was generally divergent in the area where a dwelling is likely to be built.	Minor	Not required
Soil Drainage (qualitative)	No signs of dampness were observed.	Minor	Not required
Slope gradient (%)	The slope of the site is between 10 and 15%.	Moderate	Erosion management techniques outlined in the erosion management overlay to be put in place.
Stormwater run-on	There is some potential for stormwater runon	Minor	Interceptor bund recommended to divert stormwater around the land application area.
Surface waters - setback distance	There is a mapped waterway to the north of the area where the dwelling is likely to be located.	Moderate	Ensure setback distances are met.
Vegetation coverage over the site	In the cleared area in the eastern section of the property there the vegetation coverage is made up of native and exotic grasses.	Minor	Not required.

3.2 Site Assessment Results

There are several moderate constraints for this site that should be considered for the proposed dwelling. This includes:

- Setback distances from mapped waterways
- Slope of the site (10-15%)
- Land area available for a land application area
- The presence of an erosion management overlay
- Climatic considerations

For each of these constraints mitigation measures have been presented in order to provide a wastewater management solution.

4 Soil Assessment

4.1 Published Soils Information

The soils in this region have been mapped and described in “The Soils and landforms of the Bairnsdale and Dargo regions”. The soils in this region have been mapped as the Stockdale with Munro unit. On the ground the soils more closely resemble the Munro unit.

The soils of the Munro map unit are deep sands generally with very dark grey acidic sand surface soils overlying paler sands at about 50 cm. These sands may mantle mottled clay but if the sand is sufficiently deep, cemented sands known as ‘coffee rock’ occur in the deeper subsoil, generally around 70 to 90 cm. .

4.2 Soil Profiles

Test bores were conducted at two locations (see Appendix A). Test bores 1 & 2 are located on proposed lot 1. The soil profiles of the test bores are detailed below:



Table 3: Proposed Lot 1 Test Bore 1 Profile								
Depth (m)	Horizon	Texture	Emmerson test	Colour	Mottles	Course fragments	Moisture content	Bore 1 photo
0.1	A1	Silty Loam (Cat 3)	-	Red	Nil	5%	Dry	
0.2								
0.3								
0.4								
0.5								
0.6								
0.7								
0.8	A2	Silty Loam (Cat 3)	Slake no dispersion	Red / Pink	Nil	5%	Dry	
0.9								
1.0								

Table 4: Proposed Lot 1 Test Bore 2 Profile

Depth (m)	Horizon	Texture	Emmerson Test	Colour	Mottle	Course fragments	Moisture content	Bore 2
0.1 0.2 0.3 0.4	A1	Sandy Loam (cat 2)	-	Dark Brown	Nil	5%	Dry	
0.5 0.6 0.7	A2	Sandy Loam (cat 2)	-	Choc brown	Nil	2%	Dry	
0.8 0.9 1.0	B1	Sandy Clay Loam (Cat 4)	Slaking no dispersion	Yellow Brown	Nil	5%	Dry	

4.3 Soil Features and Analysis

Table 5: Bore 1, 2 and 3 Soil features – results are collated below

Characteristic	Assessment	Level of Constraint	Mitigation measures
Soil Texture	Bore 1: Silty loam throughout – Category 3 Bore 2: A horizon - Category 2 sandy loam up to 700mm B horizon – Category 4 Clay loam beyond 700mm.	Minor	Not required
(ECe) (dS/m)	NA		
Emerson Aggregate Class	Slaking and but no dispersion was observed in the was observed in the B horizon of bore 2.	Minor	Not required
Mottling and Gleying - soil drainage	No mottling or gleying observed.	Minor	Not required.
pH	Soils tested were slightly acidic (about pH6). This is in a good range for plant growth.	Minor	Not Required
Rock Fragments (size & %)	Approximately 5% 5-10mm stone was found throughout the soil profile	Minor	Not required
Soil Depth to Rock	No impermeable layer was found in any of the soil profiles	Minor	Not required
Watertable Depth (m)	No indications of a water table were found in any of the soil profiles.	Minor	Not required

4.4 Soil Assessment Results

Overall the soil characteristics are assessed as good with no major or moderate constraints limiting the design of the waste water management system.

5 Wastewater Management System - Recommendations

This section provides an overview of the waste water management system suitable to contain and manage wastewater within the boundaries of the allotment. It will include recommendations about system size, siting, design, installation and management. This report does not include an application for a septic tank. Detailed design of the wastewater management system is beyond the scope of this report however a general description will be given below.

5.1 Waste Water Management System Type for the Proposed new lot (Lot 1)

The type of treatment recommended for Lot 1 is primary standard effluent.

Description of the System

It is recommended that the wastewater be dispersed using absorption trenches. This would involve distributing wastewater into a series of trenches approximately 600mm wide spaced at 3 meters apart. The depth of the trenches would be approximately 400mm with at least 150 mm of topsoil placed above a self-supporting arch or on top of aggregate within which a distribution pipe is located.

Sizing of the System

A category 3 soil found throughout the soil profile was used to determine the design loading irrigation rate of 10mm /day for proposed lot 1 (see EPA code of practice 891.4 table 9).

The size of the land application area is based on an assumed new 4-bedroom dwelling using standard water fixtures. For this size dwelling the anticipated wastewater load is 900L/day (see EPA code of practice 891.4 table 4). Using a water balance (see appendix B) and the wastewater load and design irrigation rate outlined above the size of the land application area would be 94 m². This equates to 157 meters of trenches or 6 lengths of 26.5 meters.

Please note that the EPA COP 891.4 also requires a reserve land application area for primary wastewater treatment systems.

Siting of the System

The constraints that will limit the location of a land application area in proposed lot 1 include:

- 60 m setback requirements for mapped waterways
- An area of convergent slopes where there is likely to be more stormwater runoff.
- The existence of a large amount of native vegetation on the property.
- Setback distances of at least 3 meters downslope or 6 metres upslope from the potential dwelling
- Setback distances of at least 3 meters downslope or 6 metres upslope from property boundaries.
- Buffer distances from services will also need to be considered at the building permit stage.

Installation of the System

The installation of the trenches must be carried out by a suitably qualified, licenced plumber.

The absorption trenches should be 600mm wide 400mm deep and be 3 meters apart with 150 mm of topsoil over a self-supporting arch or conventional trench in accordance with AS/NZS 1547:2012. The original grass sods should be replaced to ensure they can quickly re-establish. The area of exposed soil and the time in which it is exposed should be minimised. Trenches should not be constructed in wet weather or when the soil is saturated.

Management of the system

Buildings or impenetrable surfaces must not be constructed on any part of the waste water management system or on the reserve land application area. To prevent compaction of the soil and reduce potential for damage to the system heavy equipment and livestock should not enter the Land Application Area. Non deciduous trees and large shrubs should not be planted on the north or western edge of the irrigation area which would prevent sun and wind exposure. The irrigation area is to be maintained as an area of perennial grasses or small shrubs.

Maintenance of the system

Maintenance of the system should be carried out in accordance with the EPA Certificate of Approval of the system and Council's permit conditions. The installer of the septic tank and waste water treatment system must ensure that the occupiers of the proposed residence understand the responsibilities and maintenance requirements of the system. Biodegradable soaps, detergents that are low in phosphorous and salt sodium and chlorine should be used and use of chemicals such as strong detergents, bleaches and disinfectants should be limited. Paint or any other chemicals may limit the biological functioning of the system and nappies, sanitary napkins or other similar products should not be disposed of into the system. Grass should be harvested and removed to ensure maximum uptake of nutrients and moisture.

6 Conclusions

As a result of site and soil investigations, it has been determined that the overall capability of the site to sustainably contain and manage wastewater within the boundaries of the lot is satisfactory with some moderate constraints. If the appropriate mitigation measures are put in place wastewater can be managed sustainably.

Specific recommendations:

- A primary wastewater treatment system is suitable.
- Absorption trenches should be installed to disperse waste water. The length of 600 mm wide trenches required for a 4 bedroom dwelling is 157 meters which could comprise of 6 lengths of trenches 26.5 meters long.
- The absorption trenches should be 600mm wide 400mm deep and be 3 meters apart
- Trenches must be located at least 60 meters from mapped waterways
- Trenches should be located at least 6 meters up slope or at least 3 meters down slope from a potential dwelling and from property boundaries.
- The surface drainage of the site is variable. Where there is potential for stormwater runoff an interceptor bund and cut off drain must be installed.
- Trenches should not be located within the tree protection zones of native trees
- Ensure that construction of trenches does not occur during wet periods
- The area of soil disturbance and the length of time that it is exposed during construction must be kept to a minimum. The original topsoil and grass sods must be replaced.
- Buildings or impenetrable surfaces should not be built on any part of the wastewater system.
- Do not plant trees or shrubs on the north or western boundary of the land application area.

Please note: The recommendations are based on an assumed four-bedroom dwelling using standard water fixtures. When the details of the development become available the Land Application Area should be recalculated and the site plans should be revised.

7 References

- Environment Protection Authority (2016). Publication 891.4 *Code of Practice for Onsite Wastewater Management*.
- Environmental Protection Authority (2003). Publication 746.1 *Land Capability Assessment for Onsite Domestic Wastewater Management*.
- Municipal Association of Victoria, Department of Environment and Sustainability and EPA Victoria (2014) *Victorian Land Capability Assessment Framework*.
- Standards Australia / Standards New Zealand (2012). AS/NZS 1547:2012 *On-site domestic-wastewater management*.
- Department of Economic Development, Jobs, Transport and Resources (2018). *Soils and Landforms of the Bairnsdale and Dargo Regions – Victorian Resources Online*
- Australian Bureau of Meteorology (2014). *Climate Data Online – Weather Station Directory – Bairnsdale*
- Department of Environment Land Water and Planning (2019). *Planning Schemes Online*
- Federation University Australia (2019) *Visualising Victoria's Groundwater*
- P.E.V Charman and B.W Murphy (2000). *Soils their Properties and Management*, Oxford University Press

SITE FEATURES PLAN (Appendix A)

1321 Bullumwaal Road, Mt Taylor



LEGEND

- Potential Land Application Area
- Native Vegetation
- Ephemeral Stream and Dam

Please note: The client is allowed flexibility in choosing the final location and configuration of the trenches provided they remain in the land application area

Our ref: 18446

Bushfire Management Statement Document

Application for Planning Permit Use & Development of a Dwelling 1321 Bullumwaal Road, Mount Taylor

Response to Objectives and Standards to Clause 53.02

CLAUSE 53.02-4.1 LANDSCAPE, SITING & DESIGN OBJECTIVES

Objective

Development is appropriate having regard to the nature of the bushfire risk arising from the surrounding landscape.

Development is sited to minimise the risk from bushfire.

Development is sited to provide safe access for vehicles, including emergency vehicles.

Building design minimises vulnerability to bushfire attack.

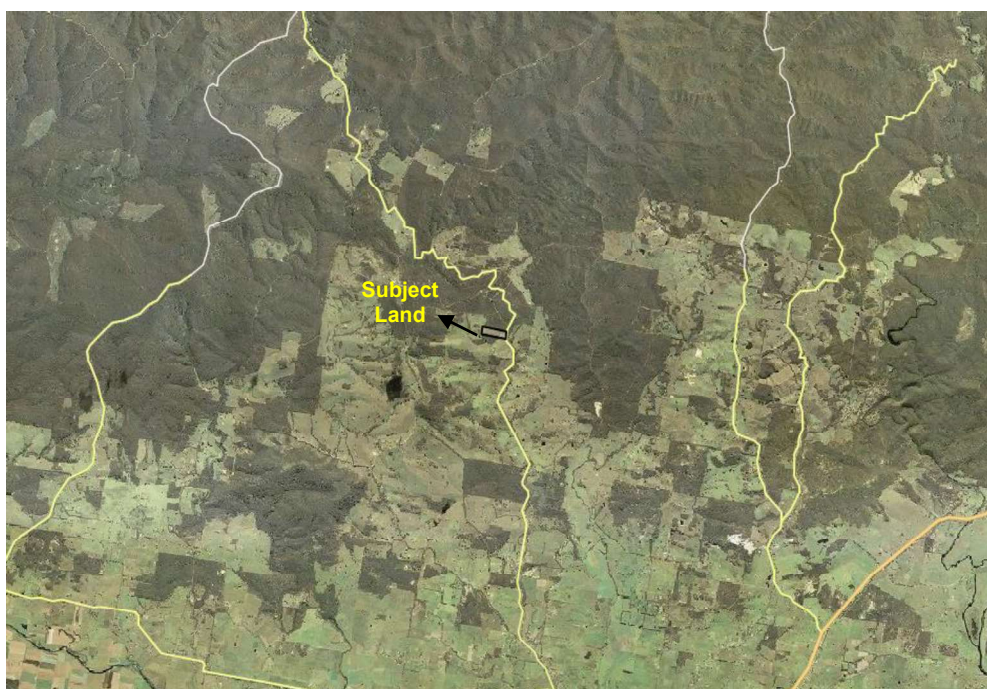
Approved Measures

AM 2.1

The bushfire risk to the development from the landscape beyond the site can be mitigated to an acceptable level.

Response:

The wider precinct does provide a bushfire threat given the presence of heavily forested and steeper sloping land to the north however land to the south is flatter in grade and less vegetated.



Aerial view of the wider precinct – Source: LASSI SPEAR (DELWP)

The vegetation contained within the subject land does have connection with the wider forested areas to the north however adjoining properties to the south are generally cleared paddocks utilised for grazing and rural residential purposes and are not as extensively vegetated.

Whilst a large proportion of the subject land is vegetated the eastern section of the site within proximity to the adjoining road network comprises cleared land. The proposed dwelling has been sited on this cleared section of the property to ensure convenient and safe egress and access can be established from Bullumwaal Road to the east.



View from Bullumwaal Road towards existing access to subject land

Bullumwaal Road is a good quality sealed bitumen road which is mapped as being a Road Zone, Category 1. This road network does not traverse through any extensively vegetated areas and provides access away from the main fire threat provided north of the subject land.

Bullumwaal Road provides access to the nearby township area of Bairnsdale which is approximately 12km to the south and provides safe refuge from bushfire.

AM 2.2

A building is sited to ensure the site best achieves the following:

- The maximum separation distance between the building and the bushfire hazard.
- The building is in close proximity to a public road.
- Access can be provided to the building for emergency service vehicles.

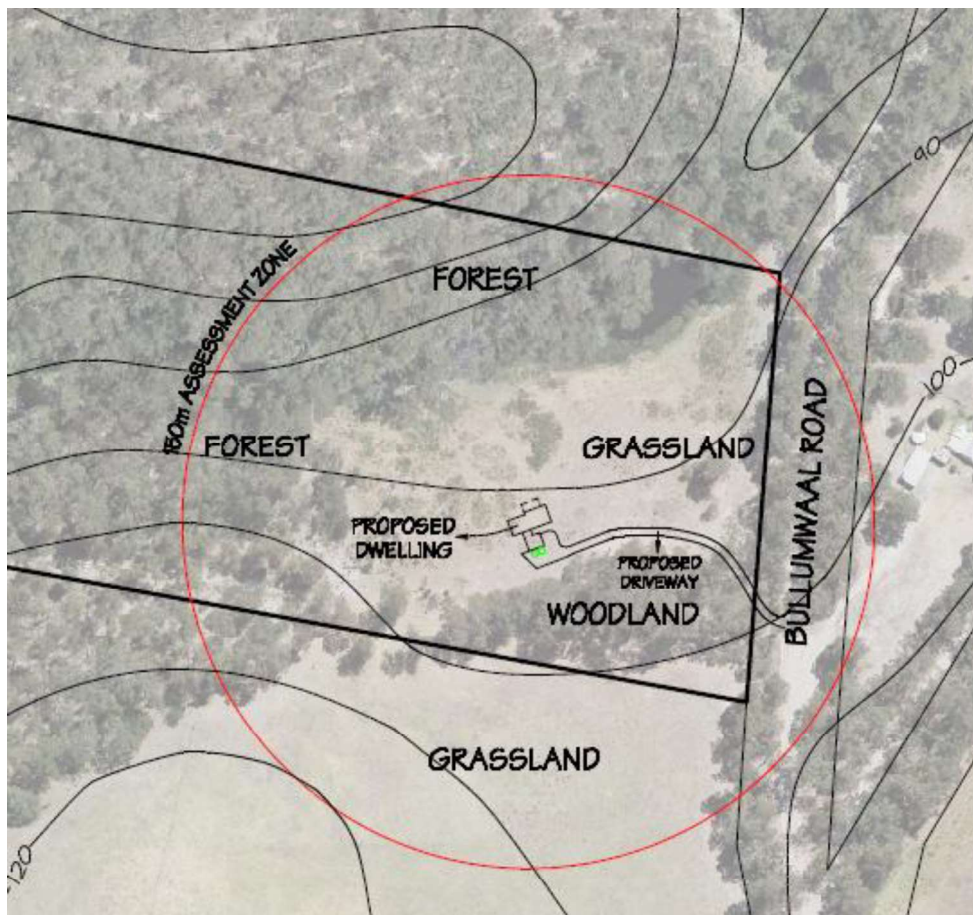
Response:

The proposed dwelling has been sited in an existing clearing which has the capacity to accommodate the associated onsite defendable space whilst remaining clear of the influential site vegetation.



Looking north west over existing clearing towards site vegetation with 'forest' classification

Within the surrounding 150metre assessment area the influential vegetation classes to the north and to the west are 'forest' which is provided on an upslope which therefore triggers defendable space for a distance of 25 metres to be established.



Extract from Bushfire Hazard Site Assessment

There is a smaller patch of vegetation with a 'woodland' classification to the south which is also provided on an upslope and therefore triggers defensible space of 16 metres to be established. The influential vegetation classification to the east is grassland which is provided on flat land resulting in the need for defensible space of 9 metres.



Vegetation on the south eastern portion of the site with 'woodland' classification

The dwelling has been appropriately sited as it is positioned in an existing clearing whilst also being within close proximity to the existing access to Bullumwaal Road. The proposed driveway will be a minimum of 3.5 metres in width and will be all-weather and capable of accommodating emergency vehicles. This will be ensured as vehicle access requirements have been nominated on the Bushfire Management Plan which is expected to be endorsed as part of the planning approval.

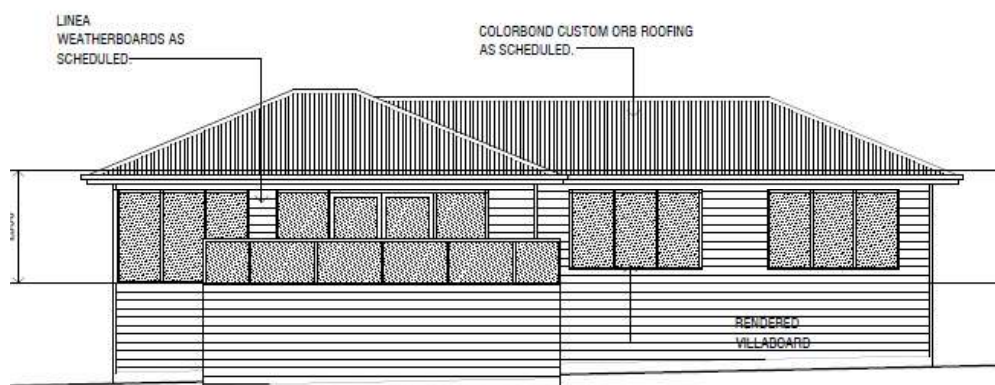
AM 2.3

A building is designed to be responsive to the landscape risk and reduce the impact of bushfire on the building.

Response:

The proposed dwelling is considered to be most responsive to the surrounding landscape risk by being established to BAL29. The subfloor of the dwelling will be enclosed, and a slab footing structure will be used for the garage. The dwelling will be clad with linea weatherboards and Colourbond custom orb roofing.

The roof design is not complex in nature and therefore enhances the buildings resilience to ember attack.



Extract of North West Elevation – Source: JR Design Australia

CLAUSE 53.02-4.2 DEFENDABLE SPACE & CONSTRUCTION OBJECTIVES

Objective

Defendable space and building construction mitigate the effect of flame contact, radiant heat and embers on buildings.

Approved Measures

AM 3.1

A building used for a dwelling (including an extension or alteration to a dwelling), a dependant person's unit, industry, office or retail premises is provided with defendable space in accordance with:

- Table 2 Columns A, B or C and Table 6 to Clause 53.02-5 wholly within the title boundaries of the land; or
- If there are significant siting constraints, Table 2 Column D and Table 6 to Clause 53.02-5.

The building is constructed to the bushfire attack level that corresponds to the defendable space provided in accordance with Table 2 to Clause 53.02-5.

Response:

The proposed dwelling will be constructed and provide with defendable space in accordance with Column C, Table 2 to Clause 53.02-5 ensuring adoption of BAL29. Use of BAL29 responds well to the surrounding landscape risk whilst also being achievable on site.

The proposed dwelling is able to achieve BAL29 as there is ample area to establish the associated defendable space as demonstrated by the accompanying Bushfire Hazard Site Assessment Plan and Bushfire Management Plan.

AM 3.2

A building used for accommodation (other than a dwelling or dependent person's unit), a child care centre, an education centre, a hospital, leisure and recreation or a place of assembly is:

- Provided with defensible space in accordance with Table 3 and Table 6 to Clause 53.02-5 wholly within the title boundaries of the land.
- Constructed to a bushfire attack level of BAL12.5.

Response:

N/A

The proposal seeks approval for the use and development of a dwelling.

CLAUSE 53.02-4.3 WATER SUPPLY & ACCESS OBJECTIVES**Clause 53.02-4.3 Objective**

A static water supply is provided to assist in protecting property.

Vehicle access is designed and constructed to enhance safety in the event of a bushfire

Approved Measures**AM 4.1**

A building used for a dwelling (including an extension or alteration to a dwelling), a dependant person's unit, industry, office or retail premises is provided with:

- A static water supply for fire fighting and property protection purposes specified in Table 4 to Clause 53.02-5.
- Vehicle access that is designed and constructed as specified in Table 5 to Clause 53.02-5.

The water supply may be in the same tank as other water supplies provided that a separate outlet is reserved for fire fighting water supplies.

Response:

As part of the project a static water supply for fire fighting purposes will be established in accordance with Table 4 to Clause 53.02-5. As the subject land is greater than 1,001m² a tank of 10,000 litre capacity with fire authority fittings and access requirements will be provided.

The relevant requirements pertaining to water supply and vehicle access have been nominated on the accompanying Bushfire Management Plan. The Bushfire Management Plan will be endorsed as part of Planning Permit as triggered at Clause 44.06-5 to ensure the requirements relating to water supply and access are upheld on an ongoing basis.

Two water tanks have been nominated on the southern elevation which ensures that they can be easily accessed by emergency vehicles which approach from the internal driveway. The driveway has also been designed to ensure that there is adequate area provided to accommodate turning manoeuvres for emergency vehicles.

AM 4.2

A building used for accommodation (other than a dwelling or dependent person's unit), child care centre, education centre, hospital, leisure and recreation or place of assembly is provided with:

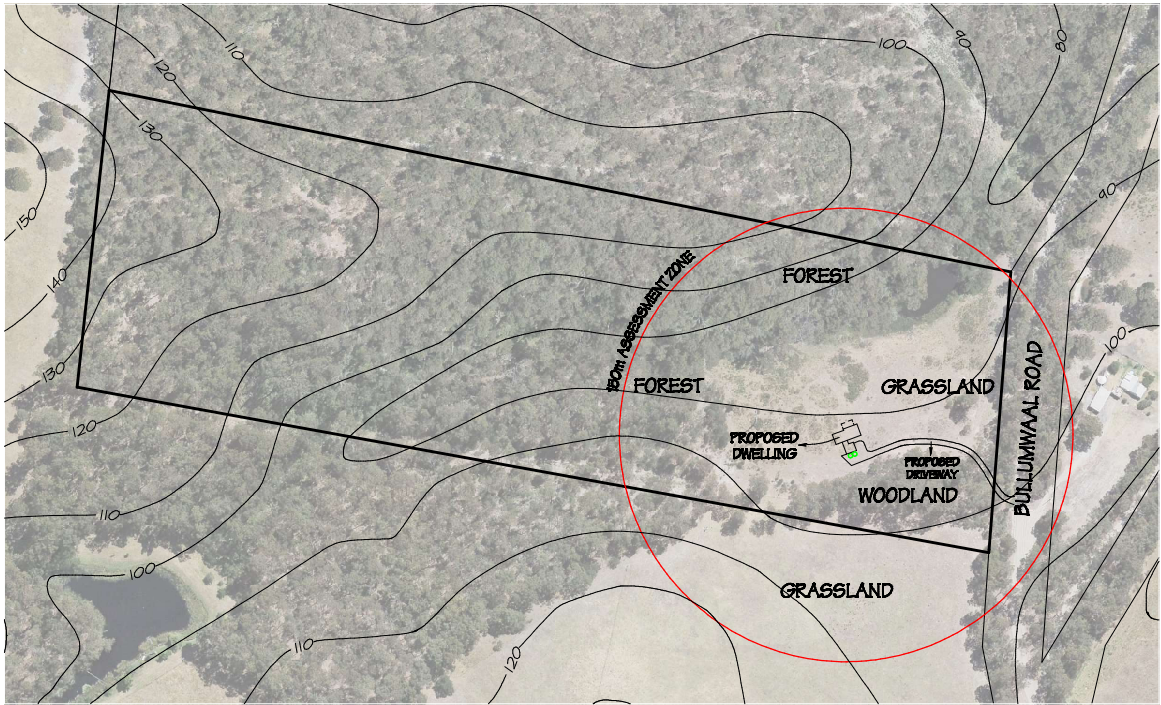
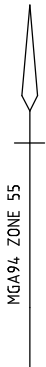
- A static water supply for fire fighting and property protection purposes of 10,000 litres per 1,500 square metres of floor space up to 40,000 litres.
- Vehicle access that is designed and constructed as specified in Table 5 to Clause 53.02-5.
- An integrated approach to risk management that ensures the water supply and access arrangements will be effective based on the characteristics of the likely future occupants including their age, mobility and capacity to evacuate during a bushfire emergency.

The water supply may be in the same tank as other water supplies provided that a separate outlet is reserved for fire-fighting water supplies.

Response:

N/A

The proposal seeks approval for the use and development of a dwelling.



CHRIS ANDREWS

1321 BULLUMWAAL ROAD, MOUNT TAYLOR

Crowtner & Sadler Pty. Ltd.

LICENSED SURVEYORS & TOWN PLANNERS
182 MACLEOD STREET, BARRISDALE, VIC. 3676
P. (03) 5182 8011 E. contact@crowtnerand Sadler.com.au

FILENAME: 18446 BHSA V1.pro

BAL 29	NORTH	EAST	SOUTH	WEST
SLOPE	UPSLOPE	FLAT/ UPSLOPE	UPSLOPE	UPSLOPE
VEG TYPE	FOREST	GRASSLAND	WOODLAND	FOREST
DEFENDABLE SPACE	25m	9m	16m	25m

SCALE (SHEET SIZE A3)	SURVEYORS REF.
1 : 2500	18446
	VERSION 1 - DRAWN 23/05/2019

BUSHFIRE HAZARD
SITE ASSESSMENT

PARISH OF WY YUNG
CROWN ALLOTMENT 102A
TP263357

ATTACHMENT 2

187/2019/P – Assessment of the Proposal Against the East Gippsland Planning Scheme

Planning Policy Framework

Clause 11.01-1S Settlement

This clause of the PPF identifies the following relevant strategies:

Ensure regions and their settlements are planned in accordance with their relevant regional growth plan.

Create and reinforce settlement boundaries.

Encourage a form and density of settlements that supports sustainable transport to reduce greenhouse gas emissions.

Limit urban sprawl and direct growth into existing settlements.

The proposal seeks to create a residential outcome outside of any identified or natural settlement boundary. The proposal would lead to a form of growth (albeit one dwelling) in an area that is not identified for rural lifestyle type outcomes.

The proposal represents an unsustainable and incremental form of growth in an area of agricultural production. The proposal is in direct conflict with the strategy to direct growth to existing settlements.

The proposal is inconsistent with this clause.

Clause 13.02-1S Bushfire Planning

The Planning Policy Framework requires this clause to be considered in this assessment. It reads:

Policy application

This policy must be applied to all planning and decision making under the Planning and Environment Act 1987 relating to land that is:

- *Within a designated bushfire prone area;*
- *Subject to a Bushfire Management Overlay; or*
- *Proposed to be used or developed in a way that may create a bushfire hazard.*

Objective

To strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.

Strategies

Protection of human life

Give priority to the protection of human life by:

- *Prioritising the protection of human life over all other policy considerations.*

- *Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.*
- *Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.*

In this instance, the site-specific characteristics, and the bushfire risk at a neighbourhood, local and landscape level is high. The inherent information available about the land, the vegetation, the typography and the escape route all lead to the conclusion that the risk is too high to warrant an approval. Although the scheme affords discretion to issue a permit, and despite the technical requirements having been met (as established by clause 53.02), the in-principle issue is: that the landscape risk is so high, that the technical requirements would not be sufficient to protect human life in the event of a bushfire.



As shown above, the 1km, 5km and 20km assessments all demonstrate that the land is at a very high risk. As such, the proposed development (i.e. a dwelling and therefore a sensitive use) seeks to place human life and property at a risk that is too high. As a result, the proposal fails to meet the policy direction of clause 13.02.

Clause 14.01-1S Protection of agricultural land

Policy directs that planning outcomes should protect agricultural land from developments that compromise the ongoing productivity of the land.

By virtue of the lack of agricultural justification, the proposed dwelling is inconsistent with Policy as it seeks to build a dwelling not connected to the agricultural use of the land. Policy actually encourages the protection of agricultural land by discouraging rural living outcomes such as the one proposed.

In this instance, the land *in isolation* is limited given the extent of vegetation cover. However, the land still has the potential to be incorporated into a nearby or adjoining operation. The presence of the waterway and the dam lend themselves to the clearing serving a grazing purpose.

The proposal is also a prime candidate to demonstrate how dwellings can artificially inflate land value. When the real estate market is given signals (such as approval in a case like this) that dwellings are likely to be approved, it pushes up the value of land beyond what genuine farmers are able to afford. In turn, this inhibits the expansion of existing operations, as genuine farmers are priced out of the market.

The creation of dwellings that fail to demonstrate an agricultural link can be detrimental to the efficient operation of farming if the dwelling does not relate to a farming activity. In this case, no compelling link has been demonstrated.

Clause 15.02-1S Sustainable Development

15.02-1 Energy and resource efficiency

The application seeks construction of a dwelling that is not located close to services or alternate transport options. As such, the residents of the dwelling will be reliant upon a private vehicle to reach the services they require. As such, the proposal does not meet the strategies of this clause.

Local Planning Policy Framework

Clause 21.05-3 Bushfire

The Local Policy content (specific just to the East Gippsland Planning Scheme) similarly requires land use planning decisions to ensure that human life is protected. It states:

The extent of forested areas and the species composition of forests leads to high risks of bushfire, relative to many other areas of Victoria.

Objective 1

To ensure that land use and development is directed to locations and carried out in ways that minimise its vulnerability to the threat of fire.

Strategy 1.1

Minimise the vulnerability of people and property to bushfire.

Strategy 1.2

Improve fire prevention and hazard management by:

- *Ensuring that adequate separation is maintained between vegetation and powerlines.*
- *Reducing the vulnerability of residences by appropriate preventive measures.*
- *Encouraging good standards of design and operating practices to minimise the occurrence and impact of uncontrolled fire.*
- *Ensure that land identified as being in an area of high fire hazard is covered by the Bushfire Management Overlay.*

For the reasons outlined above against the assessment of clause 13.02 – the bushfire risk is too high to support the application. The proposal is in direct conflict with the local policy.

Clause 21.06 Natural Resource Management

21.06-1 Protection of Agricultural Land

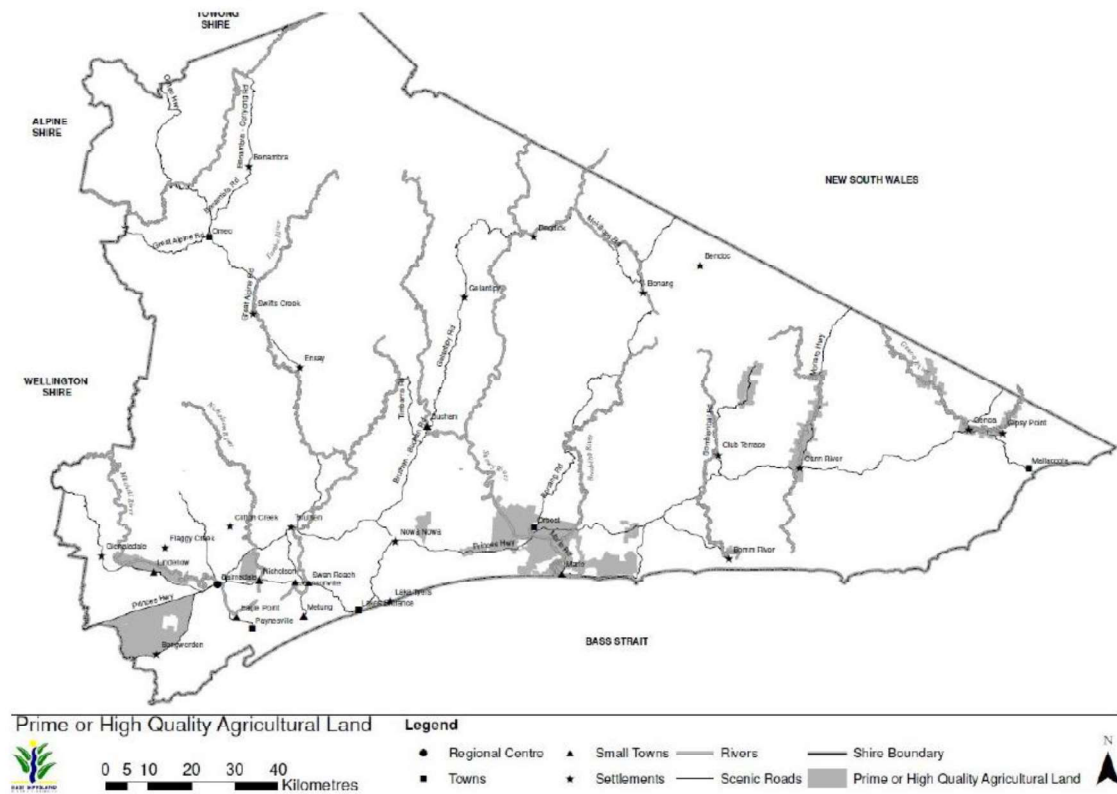
Objective 1

To ensure that rural land is used and developed in a way that will support efficient agricultural production.

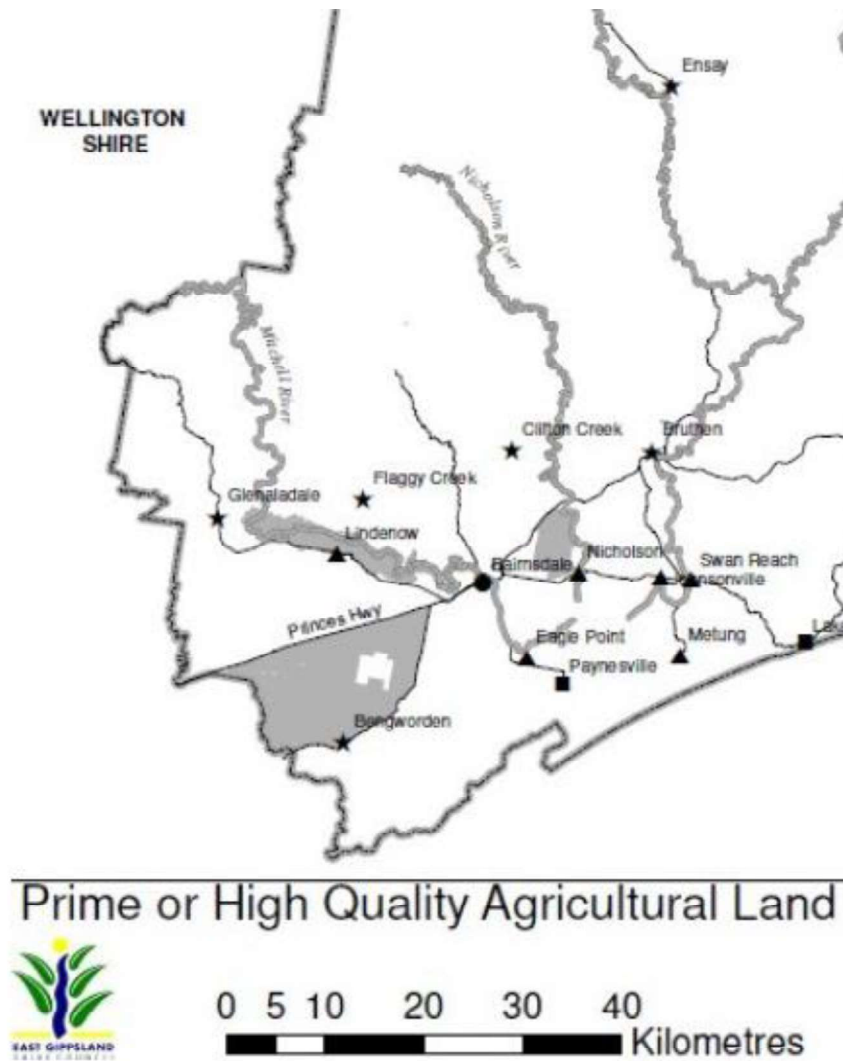
Fig. 1 – “Map 4” which shows the areas of high quality agricultural land. Note that the subject land is nested north east of the Lindenow Flats.

EAST GIPPSLAND PLANNING SCHEME

Map 4. Prime or high quality agricultural land



Map 4 excerpt showing the western part of the Shire.



Clause 21.08 Housing

21.08-2 Rural Living Development

Objective 1

To encourage developments which increase the quality, diversity of types and tenures, and the affordability of housing.

Strategy 1.1

Ensure that areas proposed for future rural living:

- *are in accessible locations;*
- *will not have an adverse effect on agricultural productivity;*

- *are located on land physically and environmentally capable of sustaining development; and*
- *can be serviced effectively and economically.*

The local planning policy framework provides that development should be discouraged where there is no link between the dwelling, and the agricultural use of the land. No demonstration has been made to show that the dwelling will lead to a more efficient agricultural outcome.

The proposal also seeks rural living type outcome in an area that is:

- Part of a productive agricultural area; and
- Not identified for rural living outcomes.

The proposal therefore represents a threat to the agricultural use of the land and the area. The dwelling as proposed would act counter to the ongoing agricultural intent for the area.

As such, the proposal is inherently inconsistent with this clause of the local policy framework.

Clause 21.12 Strategies for sub-regions, towns & localities

21.12-3 Agricultural Hinterland

The locality of Mount Taylor falls under the agricultural hinterland sub-region.

Strategies for the Agricultural Hinterland sub-region are:

- *protecting high quality agricultural land*
- *protecting water quality and quantity, particularly in water catchments used for domestic supply*
- *preparing or upgrading flood and fire management strategies*
- *providing opportunities to add value to both agricultural land and produce and timber products*

Agriculture is nominated as an opportunity for land identified in this area. The proposal before Council involves creating a dwelling with no demonstrated link between it and any agricultural use. As such, the proposal could compromise any future agricultural opportunities and is inconsistent with this clause of local policy.

Although the subject land is not mapped as being 'high or prime' quality agricultural land, it still forms part of the land mass that contributes to the economic activity of the area. If anything, this clause shows that the wider area has a very important role to play in the local economy. The land that sits between two high quality areas is also important and is able to make a contribution.

Not all land can be designated as 'prime' but all rural land has an ability to make a contribution to food and fibre production. In this case, the land can be grazed by sheep and cattle.

Dry land farms are typically not farmed as intensively as those with access to water, however they still have an essential role to play in the farming economy.

The claim of the applicant that the land cannot be farmed is too simplistic, given that the property could easily be incorporated into a nearby or adjoining operation.

These issues combined leads to the conclusion that the proposal is inconsistent with this clause of the LPPF.

Planning zone

Clause 35.07 Farming Zone

General issues

- *The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.*
- *Any Regional Catchment Strategy and associated plan applying to the land.*
- *The capability of the land to accommodate the proposed use or development, including the disposal of effluent.*
- *How the use or development relates to sustainable land management.*
- *Whether the site is suitable for the use or development and whether the proposal is compatible with adjoining and nearby land uses.*
- *How the use and development makes use of existing infrastructure and services.*

Agricultural issues and the impacts from non-agricultural uses

- *Whether the use or development will support and enhance agricultural production.*
- *Whether the use or development will adversely affect soil quality or permanently remove land from agricultural production.*
- *The potential for the use or development to limit the operation and expansion of adjoining and nearby agricultural uses.*
- *The capacity of the site to sustain the agricultural use.*
- *The agricultural qualities of the land, such as soil quality, access to water and access to rural infrastructure.*
- *Any integrated land management plan prepared for the site.*

Dwelling issues

- *Whether the dwelling will result in the loss or fragmentation of productive agricultural land.*
- *Whether the dwelling will be adversely affected by agricultural activities on adjacent and nearby land due to dust, noise, odour, use of chemicals and farm machinery, traffic and hours of operation.*
- *Whether the dwelling will adversely affect the operation and expansion of adjoining and nearby agricultural uses.*
- *The potential for the proposal to lead to a concentration or proliferation of dwellings in the area and the impact of this on the use of the land for agriculture.*

Environmental issues

- *The impact of the proposal on the natural physical features and resources of the area, in particular on soil and water quality.*
- *The impact of the use or development on the flora and fauna on the site and its surrounds.*

- *The need to protect and enhance the biodiversity of the area, including the retention of vegetation and faunal habitat and the need to revegetate land including riparian buffers along waterways, gullies, ridgelines, property boundaries and saline discharge and recharge area.*
- *The location of on-site effluent disposal areas to minimise the impact of nutrient loads on waterways and native vegetation.*

Design and siting issues

- *The need to locate buildings in one area to avoid any adverse impacts on surrounding agricultural uses and to minimise the loss of productive agricultural land.*
- *The impact of the siting, design, height, bulk, colours and materials to be used, on the natural environment, major roads, vistas and water features and the measures to be undertaken to minimise any adverse impacts.*
- *The impact on the character and appearance of the area or features of architectural, historic or scientific significance or of natural scenic beauty or importance.*
- *The location and design of existing and proposed infrastructure including roads, gas, water, drainage, telecommunications and sewerage facilities.*
- *Whether the use and development will require traffic management measures.*

The Farming Zone gives primacy to using the land for agricultural purposes. Non-farming dwellings lots can compromise the wider strategic ability for rural land to be used to its best and highest purpose. The proposed dwelling seeks to remove land from the stock of productive land available.

The proposal will create a rural living type dwelling within a broadacre farming area. While the land is north of the area identified as the most significant agricultural land, the area forms part of the rural assets of the Shire as well as part of the agricultural hinterland.

The development of land for a dwelling can potentially restrict the ability to use the land for farming activities and can impact the ability of neighbouring farms to carry out agricultural production activities. This is often due to the different amenity expectations that residential properties have to farming properties.

The use and development of land for a dwelling, have the potential to permanently remove the land from agricultural activity, particularly when the rural residential activity does not relate to a farming enterprise. As is the case in this application.

The use and development of the land for dwellings is not supported where it has the ability to impact on the 'right to farm' existing rural properties or removes land from agricultural production.

The application also fails to provide how the dwelling relates to sustainable land management. No information has been put forward in that regard.

The proposal inherently seeks to create a rural living outcome by constructing a new dwelling. The dwellings to hectares density will exceed 1 dwelling per 40 hectares, which is sought by the Farming Zone. As such, the application currently before Council is viewed as being inconsistent with the Farming Zone for the above reasons.

Planning Overlays

Clause 44.01 – Erosion Management Overlay

The EMO is an overlay that covers most of the rural areas of the East Gippsland Shire.

In this case, there is an exemption that applies which means that there is no permit trigger for the application. Namely:

Buildings and works

No planning permit is required to construct or carry out the following buildings or works:

- *A dwelling, including a replacement dwelling, where it is to be the only dwelling on the lot.*
- And
- *Earthworks where excavations or fill do not exceed one metre (height or depth).*

No assessment against this overlay has been made.

Clause 44.06 – Bushfire Management Overlay

The BMO requires Council to consider the bushfire risk before deciding on an application.

Purpose

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.

To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.

To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.

In this instance, the inherent landscape risk is too high to be counter acted by approved measures (also known as the 'technical requirements'). Also for the reasons mentioned above, the risk is too high to warrant an approval given the high landscape risk. Human life and property will be placed at a level risk that is too high. The proposal is inconsistent with the BMO.

Particular Provisions

Clause 52.29 – Land adjacent to Road Zone Category 1

The application triggers the need for a permit to create access to Bullumwaal Road (RDZ1 road managed by VicRoads). Although there is an existing farm gate and track, the change in the way that the access is used (i.e. intensity of vehicle movements) as well as the physical works required to bring the crossover up to an acceptable standard triggers the need for a permit under this clause.

VicRoads were referred a copy of the application, however no response has been received and more than 28 days has elapsed since the referral was sent.

Conclusion

On balance, the application is inconsistent with the East Gippsland Planning Scheme and should be refused.



Department of Environment, Land, Water & Planning

6 June 2019

Bill Williams
Planning Officer
East Gippsland Shire Council
PO Box 1618
BAIRNSDALE VIC 3875

71 Hotham Street
Traralgon Victoria 3844
Australia
Telephone: +61 3 5172 2111
Facsimile: +61 3 5172 2100
www.delwp.vic.gov.au
DX 219284

Our ref: SP468132
Your ref: 145/2019/P

Dear Bill

**PLANNING PERMIT APPLICATION 145/2019/P
USE AND DEVELOPMENT OF LAND FOR A DWELLING AND CREATION OF ACCESS TO RDZ1
1321 BULLUMWAAL ROAD, MOUNT TAYLOR 3875
CA 102A, PARISH OF WY YUNG**

Thank you for your correspondence dated and received 6 June 2019 in respect of the above-described application.

The Department of Environment, Land, Water and Planning (DELWP) has considered the above application in accordance with section 52 of the *Planning and Environment Act 1987* (Act), with the specific referral trigger being section 52 (1) (a) of the Act.

The application seeks to construct a dwelling on land within the Farming Zone (FZ) and affected by the Bushfire Management Overlay (BMO) and Erosion Management Overlay (EMO).

I wish to advise DELWP has no objection to the granting of a permit for the above application, and recommends the following conditions and permit notes:

Please provide a copy of the permit, if one is granted, or any notice to grant or refusal to grant a permit to the above address.

All written correspondence should be sent electronically to gippsland.planning@delwp.vic.gov.au or mailed to:

Planning Approvals Gippsland
Department of Environment, Land, Water & Planning
71 Hotham Street
TRARALGON VIC 3844

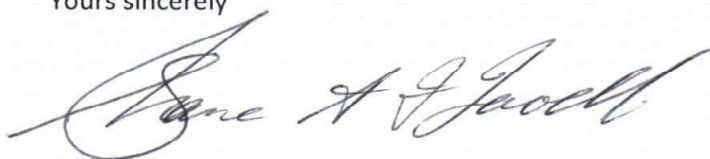
Privacy Statement

Any personal information about you or a third party in your correspondence will be protected under the provisions of the Privacy and Data Protection Act 2014. It will only be used or disclosed to appropriate Ministerial, Statutory Authority, or departmental staff in regard to the purpose for which it was provided, unless required or authorised by law. Enquiries about access to information about you held by the Department should be directed to the Privacy Coordinator, Department of Environment, Land, Water and Planning, PO Box 500, East Melbourne, Victoria 8002



If you have any queries regarding this matter, please contact Planning Approvals - Gippsland at the department's Traralgon office on (03) 5172 2111.

Yours sincerely

A handwritten signature in black ink, appearing to read "Shane A. Lavell". The signature is fluid and cursive, with the first name "Shane" being more prominent and followed by "A." and "Lavell".

Shane Lavell

Planning Approvals Program Officer



CFA Fire Safety
Fire & Emergency Management
Email: firesafetyreferrals@cfa.vic.gov.au
Telephone: 03 9262 8578

Our Ref: 11000-66699-91941
Council Ref: 145/2019/P

25 July 2019

Bill Williams
East Gippsland Shire Council
PO Box 1618
BAIRNSDALE VIC 3875

Dear Bill,

CONDITIONAL CONSENT TO THE GRANT OF A PERMIT

Application No: 145/2019/P
Site address: 1321 Bullumwaal Road, Mount Taylor
Proposal: Use and Development of land for a dwelling

I refer to correspondence dated 3 July 2019 seeking comments on the above application.

CFA acting as a Referral Authority pursuant to Section 55 of the *Planning and Environment Act, 1987* (**Act**) has considered and does not object to the grant of a permit for the above proposal subject to –

- Any mandatory conditions specified within the planning scheme; and
- The following conditions being included on any planning permit that may be issued.

– Start of conditions –

Bushfire Management Plan endorsed

1. The Bushfire Management Plan prepared by Crowther & Sadler (Plan Ref: 18446-BMP, Version 2 – 27/06/2019), must be endorsed to form part of the permit and must not be altered unless otherwise agreed in writing by the CFA and the Responsible Authority.

– End of conditions –

If you wish to discuss this matter in more detail, please do not hesitate to contact the Fire Safety Team on 03 9262 8578.

Yours Sincerely

Peter Rogasch,
Fire Safety Officer
Fire & Emergency Management
Country Fire Authority

cc: Crowther & Sadler Pty Ltd
contact@crowthersadler.com.au

East Gippsland Shire Council
273 Main Street
Bairnsdale VIC 3875
Attention: x

Dear Sir/Madam

PLANNING APPLICATION No.: 145/2019/P
VICROADS REFERENCE NO: 29678/19
PROPERTY ADDRESS: 1321 BULLUMWAAL ROAD, MOUNT TAYLOR VICTORIA
3875

Section 55 – No objection subject to conditions

Thank you for your letter dated 7 June 2019 referring details of the above application to the Roads Corporation (VicRoads) pursuant to Section 55 of the Planning and Environment Act 1987.

The application is for Use and development of land for a dwelling and creation of access to RDZ1.

If Council regards the proposed development favourably, VicRoads would require that the following conditions be included in any Notice of Decision to issue a Planning Permit or Planning Permit:

1. Only one point of access to the Bullumwaal Road will be permitted. This must be as show on J.R Design Australia drawing JR1913-01, dated 23/4/2019. This crossover must form a VicRoads modified Residential rural access drawing SD2066 with a minimum 4.0m wide at the boundary line.
2. If required a minimum 375mm diameter reinforced concrete pipe shall be placed under the crossover, laid on 100mm compacted bedding sand and fitted with drivable endwalls in accordance with VicRoads Standard Drawing SD 1991.
3. Prior to the use of the dwelling, the crossover must be constructed and completed to the satisfaction and approval of VicRoads.
4. Any barrier, gate or similar device controlling vehicular access to the premises must be located a minimum, 25m from the edge of the existing road seal to allow vehicles to store clear of Great Alpine Road pavement.
5. All works associated with the construction of this access are to be completed at no cost to VicRoads, and the road reserve must be left in neat and tidy condition.
6. Driveways must be maintained in a fit and proper state so as not to compromise the ability of vehicles to enter and exit the site in a safe manner or compromise operational efficiency of the road or public safety.

Once Council makes its decision, please forward a copy of the decision to VicRoads as required under Section 66 of the Planning and Environment Act 1987.

Should you have any enquiries regarding this matter, please contact Robert Keating on 5172-2683 or Robert.Keating@roads.vic.gov.au.

Yours sincerely

Robert Keating
PLANNING ENGINEER/OFFICER

Cc contact@crowthersadler.com.au

SY003 EGD 5561

Date 24/9/2019

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..P866/2018
PERMIT APPLICATION NO. YR2017/847

IN THE MATTER OF

Department of Environment, Land, Water and
Planning v Yarra Ranges SC (Red Dot) [2019]
VCAT 323

BEFORE

Helen Gibson AM, Deputy President
Christopher Harty, Member

NATURE OF CASE	Use and development of a dwelling in Rural Conservation Zone
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
APPLICATION – significant, interesting or unusual use or development; application of policy, provision or principle; or circumstances	The reason why this decision is of interest is because of the many planning scheme provisions under which a permit is required (10 in total) in an area of extreme bushfire risk, steep topography and dense vegetation, and the lack of any legal access. The Tribunal concludes that the lack of legal access means that the requirement in clause 35.06-2 for access to the dwelling via an all-weather road cannot be met and the use is prohibited. In addition, permits should not be granted under any of the other planning controls for development because of the unacceptable impacts on the environment and waterways, and the extreme bushfire risk.

SUMMARY

This proceeding was an application for review by the Department of Environment, Land, Water and Planning (DELWP) as an objector under section 82 of the *Planning and Environment Act 1987* against the decision of the responsible authority to grant a permit for use and development of the site for the purpose of a dwelling. DELWP was primarily concerned about the reliance on an access track, which traverses unreserved Crown land, for access to the site, which it considered did not meet the requirements for an all-weather road that can provide access for emergency vehicles under clause 35.06-2 and is in breach of requirements of the Rural Conservation Zone (RCZ) for use of the site for a dwelling.

The planning, environmental and bushfire risk issues associated with using and developing the site for a dwelling are challenging. The access to the site, the steep topography and dense vegetation, coupled with the complex matrix of planning controls and policies, call up a range of varied considerations that need to be satisfied. Ten separate permissions for use, development and vegetation removal are required under the planning scheme.

With respect to the issue of access, the Tribunal found that:

- The access track is not a public road or a public highway.
- The owner of the subject land has no general right of access over the access track for the purpose of providing access to a dwelling on the subject land.
- The access track is not a ‘road’ for the purpose of meeting the requirement in clause 35.06-2 that a lot used for a dwelling must meet the requirement that:

Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.

As the owner of the subject land had no consent from the owner of the access track on Crown Allotment 2005 (the Department) for permanent or ongoing use of Crown Allotment 2005 for the purpose of access to the subject land, the Tribunal concluded that the requirement in clause 35.06-2 cannot be met and use of the land for the purpose of a dwelling is prohibited.

The other particular issue of interest in the decision is the Tribunal’s consideration of bushfire risk and the requirement for the prioritisation of human life in the context of applying the principles of integrated decision-making required by clause 71. 02-3.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P866/2018
PERMIT APPLICATION NO. YR2017/847

CATCHWORDS

Application under Section 82 of the *Planning & Environment Act 1987* to review a notice of decision to grant a permit for a dwelling – Yarra Ranges Planning Scheme; Rural Conservation Zone; Environmental Significance Overlay; Erosion Management Overlay; Bushfire Management Overlay – bushfire risk; waterway impacts and access on Crown land – consideration of requirement in clause 35.06-2 of Rural Conservation Zone that use of land for dwelling must have access via an all-weather road with dimensions adequate to accommodate emergency vehicles – meaning of ‘road’ in clause 35.06-2 – principles of integrated decision-making – prioritisation of human life

APPLICANT	Department of Environment, Land, Water and Planning
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
REFERRAL AUTHORITY	Country Fire Authority
RESPONDENT	James Gray
JOINED PARTY	Melbourne Water
SUBJECT LAND	585 Myers Creek Road, Healesville
WHERE HELD	Melbourne
BEFORE	Helen Gibson AM, Deputy President and Christopher Harty, Member
HEARING TYPE	Hearing
DATES OF HEARING	12, 13, 14, 16 November 2018 and 12 December 2018
DATE OF ORDER	6 March 2019
CITATION	Department of Environment, Land, Water and Planning v Yarra Ranges SC (Red Dot) [2019] VCAT 323

ORDER

- 1 Pursuant to section 127 of the *Victorian Civil and Administrative Tribunal Act 1998*, the statement of grounds filed by the permit applicant is amended by substituting the statement of grounds dated 17 October 2018.

No permit granted

- 2 In application P866/2018 the decision of the responsible authority is set aside.
- 3 In planning permit application YR2017/847 no permit is granted.

Helen Gibson, AM
Deputy President

Christopher Harty
Member

APPEARANCES

For the Department of
Environment, Land, Water and
Planning

Mr Ragu Appudurai, of counsel, instructed by
the Victorian Government Solicitor's Office.
He called the following witnesses:

- Mr Paul Reidy, licensed surveyor from the
Surveyor-General Victoria
- Mr John Carter, roading and planning
officer from the Department of
Environment, Land, Water and Planning
- Mr Scott Welch, GIS officer from the
Department of Environment, Land, Water
and Planning

For Yarra Ranges Shire
Council

Mr Andrew Sherman, solicitor, of Russell
Kennedy Lawyers on 12, 13, 14 November and
12 December 2018

Ms Angelina Bell, solicitor, of Russell
Kennedy Lawyers on 16 November 2018

For Country Fire Authority

Mr Ian Munt of counsel, by direct brief

For Melbourne Water

Ms Stacey Rees, town planner, who attended
on 12 and 13 November 2018 and Mr Digby
Richardson, town planner, who attended on 12
December 2018

For James Gray

Mr James Gray, in person.

He called the following expert witnesses:

- Mr Paul Williams, hydrogeologist & soil scientist, Paul Williams & Associates Pty Ltd
- Mr Russell Brown, structural and civil engineer, R.I. Brown Pty Ltd
- Mr Jeffrey Latter, arborist, Treed Environs
- Mr Hamish Allan, bushfire consultant, Terramatrix Pty Ltd

He called the following lay witnesses:

- Himself (James Gray)
- Mr Mark Veenhuizen
- Ms Deanne Eccles
- Mr Douglas Marriott

The following affidavit evidence was tendered but the authors were not called:

- Mr John Macey, licensed surveyor, John Macey Surveying Pty Ltd
- Mr Tim George, licensed surveyor, Thomas and George Pty Ltd
- Mr Steve Wales
- Mr Ralph Henderson

INFORMATION

Description of proposal	Use and development of a dwelling, outbuilding, swimming pool and vegetation removal
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit
Planning scheme	Yarra Ranges Planning Scheme
Zone and overlays	Rural Conservation Zone Schedule 1 (RCZ1) Environmental Significance Overlay Schedule 1 – <i>Sites of Botanical Significance and Site of Zoological Significance</i> (ESO1 – Z16 and B17) Erosion Management Overlay (EMO) Bushfire Management Overlay (BMO)
Permit requirements	<p>Clauses 35.06-1 to use land for a dwelling in RCZ1</p> <p>Clause 35.06-5 to construct a building or construct or carry out works for a dwelling in RCZ1</p> <p>Clause 42.01-2 to construct a building or construct or carry out works for a dwelling in ESO1</p> <p>Clause 42.01-2 to remove, destroy or lop vegetation in ESO1</p> <p>Clause 44.01-2 to construct a building or construct or carry out works for a dwelling in EMO</p> <p>Clause 44.01-3 to remove, destroy or lop vegetation in EMO</p> <p>Clause 44.06-2 to construct a building or construct or carry out works for a dwelling in BMO</p> <p>Clause 51.03-3 to construct a building or construct or carry out works for a dwelling</p> <p>Clause 51.03-3 to remove, destroy or lop vegetation</p> <p>Clause 52.17-1 to remove, destroy or lop native vegetation</p>

Relevant scheme policies and provisions	Clauses 11, 12, 13, 14, 21.04, 21.06, 21.07, 21.09, 22.05, 35.06, 42.01, 44.01, 44.06, 51.03, 52.17, 53.02, 65 and 71
Land description	<p>The site is located at the base of the Myers Creek Valley with heavily vegetated slopes rising in all directions. Myers Creek flows along the site's eastern boundary and a tributary of the creek flows across the site. The site is located to the west of Myers Creek Road, which runs in a north south direction through dense forested areas. The site is vacant and is generally rectangular in configuration with an area of approximately 3.6 ha.</p> <p>The site is heavily vegetated with native canopy trees and understorey. It was significantly affected by the 2009 Black Saturday bushfires and has now revegetated. There is a small dam on the site and a small cleared and benched area in the site's southwest corner. Apart from the small flat area next to the dam, the site slopes steeply upwards from the alignment of Myers Creek.</p> <p>The site is land locked with the only access to the site from Myers Creek Road being via a 400 metres long access track traversed through unreserved Crown land.</p>
Tribunal inspection	The Tribunal inspected the site and surrounding area on 6 February 2019 unaccompanied.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Yarra Ranges Shire Council (the council) resolved on 16 April 2018 to issue a Notice of Decision to Grant a Permit for the use and development of a dwelling, outbuilding, swimming pool and vegetation removal at 585 Myers Creek Road, Healesville (the site). The Department of Environment, Land, Water and Planning (DELWP) has lodged an application to review the council's decision to the Tribunal.
- 2 DELWP is primarily concerned about the reliance on an access track, which traverses unreserved Crown land, for access to the site. It considers past unauthorised works on the access track are contributing to environmental impacts, particularly to the adjoining Myers Creek waterway. The Department also considers the access track does not meet the requirements for an all-weather road that can provide access for emergency vehicles and is in breach of requirements of the Rural Conservation Zone (RCZ) for use of the site for a dwelling.
- 3 Melbourne Water, which was joined as a party to the proceeding under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, expressed concerns about flooding impacts on access at the entry of the internal driveway due to its close proximity to a waterway and impacts on the waterway from development associated with the internal driveway and earthworks for the dwelling and effluent disposal fields.
- 4 The permit applicant and council both consider the proposal has been sited and designed to address environmental impacts, bushfire risk and, subject to permit conditions, can achieve an acceptable outcome.

WHAT ARE THE KEY ISSUES?

- 5 The planning issues associated with using and developing the site for a dwelling are challenging. The access to the site, the steep topography and dense vegetation, coupled with the complex matrix of planning controls and policies, call up a number of varied considerations that need to be satisfied associated with:
 - The dwelling – bushfire, environmental impact;
 - The access track – legal status, condition of track; and
 - Uncertainty about plans for the siting of the dwelling, effluent disposal fields and internal driveway.
- 6 During the course of the hearing numerous procedural issues were raised by parties concerning Mr Gray's compliance with Tribunal orders, the

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.

introduction of new evidence, objections to the production of documents, challenges to the accuracy of evidence, amendments to the proposal, unauthorised works to the access track alleged to have been undertaken by Mr Gray, and other matters.

- 7 In this decision we have not recorded or explored every issue that arose or contention submitted by every party. Rather, we have focussed on what we consider to be the key issues having regard to the current planning controls and policy framework, our interpretation of the various plans presented, and our findings about the legal status of the access track.

THE SITE AND WHAT IS PROPOSED

The site and surrounds

- 8 The site is a vacant parcel of land that is generally rectangular in shape, heavily vegetated with an area of approximately 3.6 hectares and located to the west of Myers Creek Road approximately 6 kilometres north of Healesville. It has no direct frontage to Myers Creek Road and hence is landlocked.
- 9 The site is located at the base of the Myers Creek valley with heavily vegetated, steep slopes rising in all directions. Myers Creek, which separates the site from Myers Creek Road flows along the site's eastern boundary with a tributary of the creek flowing west to east into and bisecting the south-west corner of the site. A contour plan of the site and surrounding area is included in **Appendix A**.²
- 10 The site is surrounded further afield by the Yarra Ranges National Park to the east and the Toolangi State Forest to the north. Myers Creek Road runs through dense forested areas for up to 4 kilometres in both north and south directions before reaching more open, lower bushfire prone areas.
- 11 Access to the site is via an informal track, 3-4 metres wide, which runs approximately 400 metres from Myers Creek Road along land abutting Myers Creek described as Crown Allotment 2005 Parish of Tarrawarra³ to a partially cleared vehicle turn around area near the south-east corner of the site. In 2017, the permit applicant obtained a licence from DELWP to gain access over the track (2017 Licence). However, DELWP advised us that this licence would be cancelled due to unauthorised works to the track.
- 12 The proposed location of the dwelling in the south-west corner of the site is near a small existing dam that is fed by the tributary with some excavated and benched areas. The location is densely vegetated with native canopy trees that create a healthy and thick canopy and understorey, even though the site was significantly affected in the 2009 Black Saturday fires. The vegetation is now in an advanced state of regeneration.

² This plan was submitted by DELWP Exhibit DELWP-50C

³ Crown folio Volume 11773 Folio 516

- 13 The topography of this part of the site is very steep, with only a small flat area adjacent to the dam. The remainder of the site slopes steeply upwards in a northerly and southerly direction from the creek line.
- 14 The adjoining property to the north, west and south is a 61.1 hectare property, which also appears to be vacant land and is densely vegetated. Further to the north is a 54.9 hectare parcel of land on two titles. This parcel is also densely vegetated in parts, although it has some cleared pasture and a dwelling.
- 15 The allotments on the eastern side of Myers Creek Road vary in size and are predominantly used for rural residential purposes. The land is a mixture of vegetated areas and cleared patches. The surrounding area is substantially vegetated with the exception of a few properties to the immediate north and east.

The proposal

- 16 The proposal is to use and develop the site for a split level, detached dwelling located in the south-west corner at the top of the southern of the two hillsides that form the property. The proposed location of the dwelling is a response to minimising vegetation impacts and reducing bushfire risk. Copies of the site plan and layout plan for the dwelling submitted as part of the permit application are included in **Appendix B** and **Appendix C**.
- 17 The dwelling will be setback a minimum of 25 metres from the southern and western boundaries of the site and will have a building footprint of 19 metres width and 22.85 metres length, together with a 4.7 metre wide swimming pool and water tank on the north-west side of the building and a height of approximately 7.8 metres.
- 18 The dwelling comprises four bedrooms, a rumpus room, cellar, document storage room, bathroom/laundry facilities, two living rooms, dining/kitchen and double garage. An 'outdoor alcove' is also proposed, as well as decking on the north-west and north-east elevations.
- 19 Due to the slope of the land, the proposed dwelling would require cut and fill earthworks of up to 4 metres. The swimming pool will require excavations of approximately 1.5 metres.
- 20 External building materials and finishes for the dwelling comprise rammed earth walls, and a flat roof. The applicant also proposes a sprinkler system with dedicated diesel pump and toughened glass.
- 21 The dwelling is proposed to be accessed from the south-east corner of the site via an internal driveway with a proposed minimum width of 3.5 metres, and length of 105 metres coming off the access track, which runs for about 400 metres over Crown land from Myers Creek Road. The internal driveway will traverse north and then west along the tributary to Myers Creek, past the existing dam. It is proposed to be constructed 'above grade' with fill (quarry waste) placed above the surface level. The fill would be

retained by a combination of retaining walls and gabion walls of up to 2 metres in height. Construction of the driveway will involve earthworks into the upslope hill. A maximum driveway grade of 1:7 is stated on the plans.

- 22 A 10,000 litre water tank is also proposed on the north-west side of the dwelling and a 400 square metre terraced septic irrigation area is proposed on the downslope to the east of the dwelling.
- 23 The proposal identifies that 41 trees⁴ will need to be removed plus an unspecified number of smaller trees. The area of native vegetation proposed to be removed for the dwelling, provision of defensible space and driveway construction is approximately 4,900 square metres⁵. The native vegetation proposed to be removed is classified as Ecological Vegetation Class *EVC 30 - Wet Forest*, which has a Least Concern bioregional conservation status under the Highlands – Southern Fall Bioregion.

PRINCIPLES FOR DETERMINING THIS PROCEEDING

Previous and current proceedings

- 24 This is the third permit application for a dwelling on the site that has been made by Mr Gray. The land is owned by Mr Gray's wife, Fiona McAllister, who purchased it in late 2007.⁶ Each application has been the subject of one or more proceedings at VCAT.
- 25 The first proceeding was *McAllister v Yarra Ranges SC*⁷ in 2009 when Member Rundell refused to grant a permit for a dwelling proposed to be located in the north-west corner of the land at the top of the ridge, which diagonally bisects the site. The Tribunal rejected the permit applicant's application to review the refusal for the following reasons:
 - The proposed dwelling was inconsistent with the Rural Conservation Zone (**RCZ**) and the planning framework.
 - It was located on the crest of a ridge and was an unacceptable wildfire risk.
 - It would cause excessive vegetation removal because of the size of the building footprint and the extent of the 350 metres driveway.
 - The driveway was likely to lead to sediment run off into adjacent bush areas.
 - The site had been fully burnt in the 1939 and February 2009 Black Saturday bushfires.

⁴ Comprising mainly of Narrow-leaved Peppermint (*Eucalyptus radiata*), Mountain Grey Gum (*Eucalyptus cypellocarpa*) and Messmate (*Eucalyptus obliqua*)

⁵ Comprising 4,360 square metres for the dwelling footprint and area of defensible space for bushfire protection and 540 square metres for the internal driveway and turnaround area

⁶ Ms McAllister is a councillor on the Yarra Ranges Shire Council

⁷ [2009] VCAT 946

- 26 The Tribunal suggested that the house site should be shifted from the ridge to the south -east to enable retention of some trees and to shorten the driveway, which would have less impact on the environment. A building site closer to the entrance to the site was preferred by the Tribunal.
- 27 In 2012, Mr Gray made a second permit application to use and develop the subject land for a dwelling. The permit application in this case sited the proposed dwelling in the south-west corner of the site about 30 metres from the site's south and west boundaries.
- 28 This application was subject to requests by the council for further information. There were various requests for, and grants of, an extension of time within which to comply with the request for further information. A dispute arose between the council and Mr Gray about whether the permit application had lapsed because his responses to the request for further information were insufficient and unsatisfactory. This resulted in an application for a declaration under section 149B of the *Planning and Environment Act 1987* by Mr Gray as to whether or not his permit application had lapsed. In *Gray v Yarra Ranges SC*⁸ Deputy President Dwyer made a declaration that the permit application had not lapsed. However, in the course of his decision, Deputy President Dwyer was critical of Mr Gray's conduct of this proceeding, and the adequacy of his responses to the council, saying:
- [20] There is a sense of frustration in the Council's dealings with Mr Gray, in that he responded to the various information requests in a piecemeal and scattergun way, often avoiding direct responses to direct questions. This is concerning, given many of the information requests dealt with important issues such as vegetation removal, earthworks and bushfire management.
- [21] The Tribunal shares the Council's frustration, as Mr Gray treated the VCAT proceeding in much the same way, being largely unprepared, raising several issues not within the scope of a s149B proceeding, and making a number of unsubstantiated assertions without any evidentiary basis to support relevant facts or any authority or path of reasoning to support relevant legal conclusions. This is also concerning, given Mr Gray is apparently legally qualified, and is seeking formal declaratory relief where he largely bears the burden of persuading the Tribunal that his grounds are made out.
- 29 Following the decision in *Gray v Yarra Ranges SC* in 2014, the council went on to decide to grant a permit. An application for review was lodged by an objector.

⁸ [2014] VCAT 848

30 This led to the decision in *McRae v Yarra Ranges SC*⁹ in 2017. Senior Member Hewet set aside the council's decision and refused to grant a permit for the following reasons:

- [9] The development of this site presents a range of challenges. The site is zoned Rural Conservation and is affected by a series of Overlay controls that reflect the environmental characteristics and sensitivities of the site. The steep and undulating topography and extensive vegetation coverage of both the review site and the surrounding area, contribute to the site's classification as an extreme fire risk.
- [10] The acceptability of the permit applicant's response to all of the site's constraints needs to be considered having regard to a balanced application of the applicable policy framework and the consideration of the purpose and decision guidelines of the Rural Conservation Zone. In this respect, it is significant that the site is not zoned for residential use and development. Unlike a Residential zone, there is no presumption in the Rural Conservation Zone that a permit will or should be issued for residential use and development. The purpose of the zone emphasises the conservation and enhancement of the natural environment and landscapes, and the encouragement of sustainable land management practices consistent with the environmental sensitivity of the site and the qualities of the landscape.
- [11] My analysis of the applicable policy framework leads me to conclude that there is limited policy support for the development of this land for residential purposes. This is a significant factor when considering whether to exercise the discretion to grant a permit for a dwelling.
- [12] With respect to the site's extreme fire risk classification, the lack of policy support for the residential development of the land is also relevant to a consideration of measures intended to reduce the fire risk to an acceptable level. In the context of a State Planning Policy Framework that prioritises the protection of human life over other policy considerations in planning and decision-making in areas at risk from bushfire, this proposal is not acceptable.
- [13] With respect to the site's physical characteristics, the fact that it is land locked is also relevant. Vehicular access to the site is problematic because it relies on a narrow, unconstructed logging track external to the site traversing unreserved Crown Land, the use of which may require separate approval. Works that may be required to facilitate the use of the access track for the intended purpose, including the potential for further vegetation removal, is also not resolved to my satisfaction.

⁹ [2017] VCAT 583

[14] The site is not connected to reticulated electricity, water and sewerage and alternatives to reticulated services are required to be provided on site.

[15] Any development of the site will necessitate the removal of vegetation, some of which will be associated with the reduction in fire risk in addition to that associated with the footprint of the building itself, its services and the creation of an internal driveway (and the access track). Whether the level of vegetation removal and the impact of that removal on the environmental qualities of the land is acceptable, is also influenced by the applicable policy framework and the purpose and decision guidelines of the zone and the overlay controls. In this case, the impact of the vegetation removal and other works associated with the construction of the dwelling, are not so great as to warrant a refusal of the application.

31 DELWP was not a party to the *McRae* proceeding in relation to the legal access to the subject site via the access track on unreserved Crown land, although it was given leave by the Tribunal to make submissions about this matter. The Department acknowledged that the access track had been used by the permit applicant to gain access to the land but submitted that access to the site via the track must be formalised through a licence under section 138 of the *Land Act 1958* in circumstances where it is now proposed for the track to be relied on to obtain permanent access to a dwelling.

32 Subsequent to the *McRae* decision, Mr Gray applied for and was granted such licence by the Department (the 2017 Licence). We will consider the nature and status of the 2017 Licence later.

33 In September 2017, Mr Gray made a further application for a planning permit to use and develop the land for a dwelling, which is the subject matter of this proceeding. In submitting this application, Mr Gray stated:

The Council approved a previous application, this was overturned at VCAT due to the access track not being wide enough due to a lack of permission to trim vegetation and maintain the track. Since then the track has been widened and resurfaced and DELWP has granted me a licence to maintain the access track vegetation. Since the previous application I have proposed to shift the start of the driveway on our land further away from the dam on the property.

34 DELWP was an objector to this application in its capacity as an owner of adjoining land, Crown Allotment 2005, which is where the access track is located.

35 The council commissioned Mr Darren Wong, an independent solicitor and town planner, to assess the permit application. The recommendation was that council should resolve to refuse the permit application on the following grounds:

1. The proposal has not adequately responded to the bushfire risk present on the land and the changes introduced into State

Planning Policy by Amendment VC140 to the Yarra Ranges Planning Scheme.

2. The proposal has failed to adequately respond to the concerns held by the Tribunal in *McRae v Yarra Ranges SC* [2017] VCAT 583.
3. The proposed access through Crown Allotment 2005 has not been adequately resolved and any permit application should include this land as part of the proposal.
4. The proposal has not demonstrated that the works undertaken with Crown Allotment 2005 will not cause detrimental impacts to Myers Creek.

36 Notwithstanding the recommendation by Mr Wong, the council resolved to issue a notice of decision to grant a permit (NOD).

37 The present proceeding is an application for review by an objector, DELWP, to review the council's decision to grant a permit.

38 Many of the conditions included in the NOD require very detailed additional plans to be submitted, approved and endorsed prior to commencement of the use or development. They include a fully scaled and dimensioned Earthworks Plan (measured to AHD or RL); a Site Plan(s) that show the entire "Development Footprint"; an amended and consolidated Arborist's Report accurately assessing tree impacts for all elements of the development including earthworks and construction zone impacts for the driveway, Crown land access track, dwelling, effluent envelope and defensible space; a Land Management Plan; an amended Geotechnical Report; a detailed Construction Management Plan; and a Drainage Plan with respect to the access track to the land, from Myers Creek Road. With respect to the access track, condition 18 provides that the owner must:

- a. prior to the commencement of the development obtain any necessary licence or consent from the DEWLP for ongoing access and any necessary works and maintenance of the land.
- b. carry out any necessary work on the access track, and thereafter maintain the access track, to ensure an all-weather road with dimensions adequate to accommodate emergency vehicles, which for the purposes of this permit means a minimum width of 3.5 metres, 500mm clearance on each side for fire vehicle door opening, vertical clearance of 4 metres and (due to the length of the access track) not less than one passing area of at least 6 metres width approximately 200 metres along the access track.

39 Whilst Mr Gray objected to many of the conditions, he did not lodge a separate application under section 80 of the *Planning and Environment Act 1987* to review any of these conditions. He was given leave to do so by the Tribunal's order dated 19 June 2018. The permit applicant failed to comply with this order. Notwithstanding this, at the commencement of the hearing,

the Tribunal permitted the permit applicant to amend his statement of grounds to address the permit conditions in the NOD that he opposes.¹⁰

Integrated decision-making

- 40 In dealing with this proceeding, we acknowledge that it could be classified as a repeat appeal, in terms that the development proposal is essentially the same but details concerning location on the site and access have been changed in an attempt to address the shortcomings identified by the Tribunal in *McAllister* and *McRae*. Particularly with respect to access issues, Mr Gray seems to have taken the view that this was the chief reason why a permit was refused in *McRae* and why the grant of the 2017 Licence and his proposals for widening and improving the access track to a standard that is adequate to accommodate emergency vehicles should result in the grant of a permit.
- 41 In fact, as we read the *McRae* decision, issues about access were but one of many reasons why the Tribunal refused to grant a permit. Likewise, in the present case, there are many reasons why a permit should not be granted – access is just one of them.
- 42 As set out in the information section of this decision, there are 10 separate provisions of the planning scheme under which a permit is required for one or other of the use or development aspects of the proposal. In the case of *Boroondara City Council v 1045 Burke Road Pty Ltd*¹¹ (known as the *1045 Burke Road* case), the Court of Appeal held that:
- A permit must not be granted unless the requirements under each permission are satisfied with or without permit conditions.
 - Where the decision-maker is of the view that no permit should issue under one or more applicable controls, the proposal cannot proceed.
 - Even if requirements under each permission are satisfied, a permit must not be granted unless the proposal would result in an acceptable planning outcome.
- 43 In approaching our task, whilst we have had regard to the previous proceedings, we have considered this permit application *de novo*. In other words, we have gone back to first principles in evaluating each aspect of the proposal for which permission is required having regard to the planning controls and policy framework of the planning scheme as it exists today. In this context, we note that various aspects of the planning scheme and policy framework have changed since both the *McAllister* and *McRae* decisions.

¹⁰ Mr Gray's amended statement of grounds includes the following paragraph:
The Permit Applicant seeks that VCAT varies the proposed permit conditions issued by Yarra Ranges Council by deleting in the conditions all references to the access track. This means the deletion of conditions 1(b), 1(f), 1(i), 1(k), modification of condition 2, and deletion of condition 18.

¹¹ [2015] VSCA 27 (Warren CJ, Santamaria JA & Garde AJA) (10 March 2015).

- 44 In reaching a decision about each of permissions required, we must be guided by the principles of integrated decision-making. They are set out in clause 71.02, in particular clause 71.02-3, which provides:

Integrated decision making

Society has various needs and expectations such as land for settlement, protection of the environment, economic wellbeing, various social needs, proper management of resources and infrastructure. Planning aims to meet these needs and expectations by addressing aspects of economic, environmental and social wellbeing affected by land use and development.

Planning and responsible authorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.

- 45 Having regard to what was said in the *1045 Burke Road* case, what this means in the broad context of integrated decision making is that the full range of relevant policies and objectives under the *Planning and Environment Act 1987* and the planning scheme can be taken into account in making a decision about each applicable control and whether a permit should be granted in respect of that control. The critical question in each case will be what is relevant and then what weight should be given to the various policies and objectives.

The Tribunal's consideration of issues

- 46 We have grouped our consideration of the various permissions required into three categories as follows:

- Permit for use and development in the RCZ;
- Other permits for development and vegetation removal; and
- Bushfire risk – permit for development in the BMO and impact of risk on other permissions.

- 47 However, first we need to consider several additional matters because they impact on our consideration of other issues and whether permits should be granted. They are:

- The status of the access track and the owner's right of access over it.
- Whether this permit application is futile having regard to the refusal by DELWP to grant the owner a right of access over the access track for the purpose of using it as a legal means of access to the site.
- The uncertainties about the adequacy and accuracy of plans relied upon by the permit applicant in support of the permit application.

THE STATUS OF THE ACCESS TRACK

Access track not part of the permit application

- 48 The permit application depends on access to the land over the access track both from a practical perspective and in order to meet the requirements of clause 35.06-2 of the RCZ. Clause 35.06-2 provides that a lot used for a dwelling must meet certain requirements, including that:
- Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.
- 49 The permit applicant therefore needs to be able to demonstrate:
- That he has a right to use the access track; and
 - Whether it meets the requirements of being an all-weather road with dimensions adequate to accommodate emergency vehicles.
- 50 In determining whether there is a right to use the access track, it is necessary to determine its status and the nature of the rights, if any, the owner and any visitors to the subject land may have to use it and for what purposes.
- 51 We note that the permit application does not include the access track. This means there is no permit application to use Crown Allotment 2005 for the purpose of dwelling or access to a dwelling. One consequence of this is, therefore, that no issues arise as part of this proceeding about the need for a cultural heritage management plan (CHMP) under the *Aboriginal Heritage Act 2006* in respect of any works on the access track.¹²
- 52 However, given that the site is landlocked with no frontage to any government road, it is important to establish what rights the owner has to access the land for the purpose of using the land for a dwelling. It is also relevant to consider what rights of access exist in the context of considering the validity of proposed conditions in the NOD relating to the access track, in particular condition 18.
- 53 On 6 June 2018, the Victorian Government Solicitor (VGSO) acting for DELWP wrote to the council expressing concern that a number of conditions in the NOD purport to authorise the use and development of the adjoining unreserved Crown land (CA2005, Parish of Tarrawarra) for which the Department is responsible on behalf of the State and expressing the view that the NOD cannot authorise this without a separate planning permit.
- 54 On 12 June 2018, the council replied suggesting that:
- If the Tribunal decides that a permit should be granted in this case, Council considers that any permit should include the land known as 585 Myers Creek Road and Crown Allotment 2005, Parish of

¹² The situation might be different if there was a permit application to use Crown Allotment 2005 for access.

Tarrawarra. This is because the proposal relies on Crown Allotment 2005 for its sole access. Any permit which is granted should authorise the proposed use and development on both parcels of land.

Council considers that Crown Allotment 2005 should form part of the land subject to the permit application. In accordance with the Council resolution, the NOD should have referenced Crown Allotment 2005 but unfortunately this was inadvertently omitted. This matter can be readily addressed if the Tribunal is persuaded that a planning permit should be issued.

- 55 This proposition was firmly rejected by DELWP. On 14 June 2018, the VGSO responded to the council that:

As set out in our 6 June letter, the Department's policy position is that it is not appropriate to manage risk that arises solely from the proposed use and development of private land through the use and development of Crown land managed by the Department. The Department will not consent to the use and development of the Crown land for the purpose of a private dwelling, as contemplated in the Notice of Decision (NOD), including having regard to the potential to cause environmental damage to Myers Creek.

Access track is unreserved Crown land

- 56 Initially, Mr Gray relied upon evidence by Mr John Macey, a licensed surveyor,¹³ that:

- a. The Crown land straddling either side of Myers (Meyers) Creek abutting 585 Myers Creek Rd is Crown land designated as Road and as such is a public highway.
- b. The property known as 585 Myers Creek Road has a right of access to the road formation of Myers Creek Road.

- 57 However, in response to a report prepared by Mr Paul Reidy, a licensed surveyor with Surveyor-General Victoria, dated 8 June 2018, Mr Macey changed his opinion. In a letter to Mr Gray dated 31 October 2018, which was tendered at the hearing, Mr Macey concedes that the area occupied by the access track and abutting Myers Creek "is not Road as previously advised but is unreserved Crown Land."

- 58 Mr Reidy gave evidence on behalf of DELWP at the hearing. We accept the evidence of Mr Reidy that Crown Allotment 2005 Parish of Tarrawarra is unreserved Crown land and is not a Government Road, and that this is in accordance with its Crown land status in Crown folio Volume 11773 Folio 516. It is what is sometimes referred to as water frontage land.

¹³ Affidavit of John Macey dated 14 June 2018

Licences over Crown Allotment 2005

Agricultural Licence

- 59 In 1996¹⁴ an Agricultural Licence under section 130 of the *Land Act 1958* was issued to a previous owner of the subject land. The specified purpose of the licence was for grazing. The licensed land described was, in effect, the whole of the land now described as Crown Allotment 2005. A condition of the licence was that:

The Licensee ... acknowledges that, pursuant to Section 401A of the *Land Act 1958* any person may enter and remain on the licenced land for recreational purposes (except camping) and the Licensee must not do anything to suggest or convey to any person that he or she may not enter the licenced land for this purpose.

- 60 On 12 March 2013¹⁵ an Agricultural Licence under section 130 of the *Land Act 1958* was issued to James Donald Gray and Fiona Kay McAllister for all that land being:

Municipality of Yarra Ranges
Water frontage to Myers Creek being part of Crown Allotment 2005
abutting Lot 1 on TP387387
Parish of Tarrawarra

- 61 The license in effect only covered the portion of Crown Allotment 2005 immediately abutting the subject land. It did not cover the balance of Crown Allotment 2005 between the subject land and the intersection of the access track with Myers Creek Road. The specified purpose of the licence was for grazing. It was subject to the same conditions as the previous Agricultural Licence. The licence was renewed for a 5 year term from 1 October 2014 (expiring in 2019).

2017 Licence

- 62 On 18 September 2017, a further licence was issued under section 138 of the *Land Act 1958* to Mr Gray and Ms McAllister, this time for that part of Crown Allotment 2005 abutting the subject land and extending to the intersection with Myers Creek Road. The specified purpose of the licence was for “access, maintenance and NVR” (native vegetation removal). The licence was subject to a number of special conditions, including:

1. Other than to maintain a space 4.5m wide and 4m high around the existing track, native vegetation on the Crown land must not be removed, lopped or destroyed without the prior written consent of the Department. Any proposed vegetation removal may require the submission of relevant ecological reports and relevant biodiversity offsets as part of any further approvals.

2. No structures or works, including earthworks and the laying of road base or similar must be undertaken on the Crown land without prior

¹⁴ Although with a commencement date of 1 October 1994 for a term of 5 years

¹⁵ Although with a commencement date of 1 October 2009 for a term of 5 years

written consent of the Department. Any proposed works may require the submission of a survey plan and detailed engineering construction and stormwater management plans as part of any further approvals.

- 63 The commencement date of the licence was 1 July 2017 for an annual term. However, on 8 June 2018 DELWP wrote to Mr Gray regarding works he had undertaken on the access track the subject of the licence without the consent of the Department. These are works that Mr Gray acknowledged and detailed in his permit application to the council and in correspondence to DELWP. The Department requested Mr Gray to provide evidence of the legal basis on which he undertook these works to Crown land. On 1 November 2018, DELWP wrote to Mr Gray and Ms McAllister purporting to terminate the licence effective from 14 February 2019. The reasons for terminating the licence were said to relate to:

The grading and compacting of 130 tonnes (or 100 Tonnes) of crushed rock, filling holes, scraping of soil, installing drainage and the associated works undertaken by you to the Crown land, [which] were undertaken without the approval of the Department.

- 64 At the hearing, Mr Gray objected to production of this letter and said that he was going to appeal against the termination of the 2017 Licence. We ruled that the letter was relevant to the question of the status of access to the land and could be admitted. Any challenge to the validity of the termination of the licence and the substance of the reasons underlying it would need to be resolved elsewhere. For our purposes, we would accept the letter at face value as being a termination of the licence coming into effect on 14 February 2019 (a date that has now passed).

What rights of access arise under the licences?

- 65 We find that the owner of the subject land has no general right of access over the access track on Crown Allotment 2005 for the purpose of providing access to a dwelling on the subject land.
- 66 No right of access is given under the Agricultural Licence, whose purpose is only for grazing and which, in any event, only covers the land immediately abutting the subject land between it and Myers Creek. We reject any suggestion by Mr Gray that traditionally such licences have been granted as a means of providing access.
- 67 Whilst the purpose of the 2017 Licence was for the purpose of access and covered the relevant length of the access track between the subject land and Myers Creek Road, this licence has been terminated and cannot now be relied upon for this purpose.
- 68 It is questionable in any event whether such a licence, renewable on an annual basis and at the discretion of the Department, could be relied upon as providing the necessary degree of certainty of access that would meet the criteria required by clause 35.06-2 of being “an all-weather road with dimensions adequate to accommodate emergency vehicles”.

- 69 Mr Gray was focussed on convincing us that the dimensions of the access track either met, or could be made to meet, appropriate dimensions adequate to accommodate emergency vehicles.¹⁶ The works he has admitted to undertaking on the access track, which led to DELWP deciding to terminate the 2017 Licence, had this objective in mind. Likewise, the evidence he called from various people about the adequacy of the access track to accommodate emergency vehicles and the provision of passing bays had this in mind also. However, in our view, this focus misses the mark. The critical issue in clause 35.06-2 in the context of this proceeding is what is meant by the term “road”.
- 70 It is relevant to note that in Table 5 to clause 53.02-5, which sets out vehicle access design and construction requirements for an application in the BMO, the access requirements relate to access that is not on a public road. The note to Table 5 provides that:
- The length of access should be measured from a public road to either the building or the water supply outlet, whichever is longer.*
- 71 We note that in the *Road Management Act 2004*, **public road** means a public road within the meaning of section 17.¹⁷ Having regard to this section, we find that the access track is not a public road within the meaning of section 17 of the *Road Management Act 2004*.
- 72 The type of road referred to in clause 35.06-2 is not specified as needing to be a public road. It may be a public highway, which is defined in the *Road Management Act 2004* as any area of land that is a highway for the purposes of the common law. The legal status of roads that are public roads or public highways involve technical and complex concepts. But in our view, in a planning context, the essential element that a road must possess, which could be said to meet the requirements of clause 35.06-2, is that it is available for general use by the public and the public has a right to use it as a road. This is distinct from, say, an easement of carriageway that is only accessible to limited persons having the benefit of the easement. Likewise, as we discuss later, just because members of the public may use a track, such as the access track in this case, does not necessarily mean that it is a road for the purpose of clause 35.06-2. It all depends on the rights pursuant to which the public use the track.

¹⁶ See Table 5 Clause 53.02-5

¹⁷ Section 17(1) of the *Road Management Act 2004* provides as follows:

- (1) A road is a public road if it is—
- (a) a freeway; or
 - (b) an arterial road; or
 - (c) declared under section 204(1) of the **Local Government Act 1989**; or
 - (d) declared under section 61 or 93H of the **Melbourne City Link Act 1995**; or
 - (da) declared under section 143 of the **EastLink Project Act 2004**; or
 - (db) the Peninsula Link Freeway; or
 - (e) a road to which subsection (3) applies; or
 - (f) a non-arterial State road declared under section 14(1); or
 - (g) a municipal road declared under section 14(1).

- 73 There was evidence given by various witnesses called by Mr Gray (in person and by affidavit) that the access track has been used by members of the public over many years, but it seems they often do so for the purpose of fishing, hunting or picnicking, all of which are recreational purposes.
- 74 In our view, the access track along Crown Allotment 2005, which we have found to be unreserved Crown land, does not constitute a road for the purpose of meeting the requirement in clause 35.06-2 even if it did have dimensions adequate to accommodate emergency vehicles and even if it was trafficable in all weather. We find that, as unreserved Crown land, there is no general right of access along Crown Allotment 2005 for the public. The public may have a right to access this land for recreational purposes pursuant to section 401A of the *Land Act 1958*¹⁸, but that is something different to a general right of access by the public to use the land as a road.
- 75 Even if Mr Gray still had access under the 2017 Licence, this is a right of access exclusive to the holders of the licence. It is not a right of access given to the general public. This licence would give the licence holder a right of access over Crown Allotment 2005, but it would not suffice to make the access track a road for the purpose of clause 35.06-2. Rather, it would be the type of access to which Table 5 of clause 53.02-5 applies and hence would need to meet the requirements of Table 5. These requirements would depend on the length of the internal driveway (on the site) plus the length of the access track measured to Myers Creek Road, which is the closest public road.

Is the access track a public highway?

- 76 One of Mr Gray's submissions on the subject of access and the status of the access track was that it is a public highway both within the terms of the *Local Government Act 1989* and at common law
- 77 The following is the definition of public highway under the *Local Government Act 1989*:

public highway is a road which is open to the public for traffic as a right, irrespective of whether the road is in fact open to traffic, and includes a road—

- (a) declared to be a public highway under section 204(1) or under any other Act;
- (b) which becomes a public highway under section 24(2)(c) of the **Subdivision Act 1988**;
- (c) which is a public road under the **Road Management Act 2004**;

¹⁸ As acknowledged in the Agricultural Licence

- 78 We have previously referred to the *Road Management Act 2004* which includes the definition of public highway as “any area of land that is a highway for the purposes of the common law.”
- 79 The access track does not fall within any of sub-paragraphs (a), (b) or (c) of the definition in the *Local Government Act 1989*. We accept that this is an inclusive definition, so this is not fatal. However, in order to be a road which is open to the public for traffic as a right where the road does not fall within these sub-paragraphs, in our view means that the road would need to be a public highway at common law.
- 80 The law relating to public highways is complex. The council and DELWP made comprehensive submissions about this issue. We do not intend to repeat them all.
- 81 In summary, a public highway is created at common law when two requirements are satisfied. First, a competent landowner must have manifested an intention to dedicate the land as a public highway, and secondly, there must be an acceptance by the public of that dedication. In this context, ‘dedication’ means that the owner of the land intends to divest himself of any beneficial ownership of the soil, and to give the land to the public for the purpose of a highway.¹⁹
- 82 We do not consider that either of these requirements have been satisfied in the present circumstances regarding the access track.
- 83 We agree with the council and DELWP that, on balance, the access track is not a public highway at common law because of the ability of the Crown to issue licences to use the land. Granting licences for the use of the Crown land suggests that the Crown (as the owner) has not dedicated the Crown land as a way. The granting of permission such as a licence is the antithesis of the principle of dedication. This is because such permission or licence is the antithesis of the public’s right to enter which is the hallmark of a public highway.²⁰
- 84 A secondary reason is that the basis of the water frontage land (which is what the unreserved Crown land comprised in Crown Allotment 2005 is), is to access the water (Myers Creek) for recreational use and not for a right to pass and repass over the Crown land *per se*.
- 85 In addition, we note that care should be taken to distinguish evidence of user, from which dedication can properly be inferred, from mere evidence of continual use, even for a very long period.²¹ Therefore we place no weight on the evidence previously referred to, that the access track has been used by members of the public for many years for recreational purposes. Just because the access track has been used by members of the public does not make it a public highway.

¹⁹ *Anderson v City of Stonnington* [2017] VSCA 229 at [40]

²⁰ *Anderson v City of Stonnington* [2017] VSCA 229

²¹ *Newington v Windeyer* (1985) 3 NSWLR 555

86 For these reasons, we are not prepared to make a finding or a declaration (as requested by Mr Gray) that the access track is a public highway.

Futility

87 If the access track on Crown Allotment 2005 is not a public road or a public highway, then the permit applicant must be able to establish that he has a right to use the access track for the purpose of access to a dwelling on the subject land. We are not persuaded that the 2017 Licence could be characterised as conferring a right of access for this purpose, even if it had not been terminated. In our view, in order to use Crown Allotment 2005 for this purpose, two things would be required:

- Permission from the Department (as owner or custodian of the land) to use Crown Allotment 2005 for the purpose of permanent access to the dwelling; and
- A planning permit for Crown Allotment 2005 authorising use of this land for the purpose of access to the dwelling.

88 DELWP says that neither of these requirements can be met. It says that it will never give consent to use Crown Allotment 2005 for the purpose of permanent access to the dwelling. The Department's policy position is that it is not appropriate to manage risk that arises solely from the proposed use and development of private land through the use and development of Crown land managed by the Department. It also says that the Department will not consent to the grant of a planning permit for use and development of the Crown land for the purpose of a private dwelling.

89 We have already noted that the permit application did not include Crown Allotment 2005: nor does the NOD include Crown Allotment 2005 as land to which the permit applies. Therefore, even if a permit was granted to use and develop the subject land for the purpose of a dwelling, a separate permit would be required to use and develop Crown Allotment 2005. Whilst any person can apply for a permit over any land, even if the land owner does not consent (so long as the land owner is advised of the permit application)²², DELWP submitted it would be futile for Mr Gray to make such an application because the Department would never give consent to use or develop the Crown land for this purpose.

90 In *Port Phillip City Council v Hickey*²³, Smith J observed that:

[26] I have great difficulty understanding how the owner's refusal to give consent and the owner's views can be said to be irrelevant to a planning permit application. It is implicit in the legislation that the position of the owner and his or her views may be relevant. In addition, to take an extreme case, if the owner of the property refuses to give consent, it would be highly relevant for the authority and, subsequently the Tribunal, to know

²² See section 48(1) of the *Planning and Environment Act 1987*

²³ [2001] VSC 129

whether there was any realistic prospect of such consent being given. If not, it could be highly relevant to the authority and the Tribunal in deciding whether to reject the application as futile. It should be borne in mind that while a permit may be given a lengthy duration, in the absence of express provision, the permit lasts for two years. An application in those circumstances may well be futile. Councils and VCAT ought to be able to deal summarily with futile applications.

- 91 On the other hand, many Tribunals have taken the view that notwithstanding a lack of consent by the relevant land owner at the time a permit application is made, this is not necessarily fatal to the grant of a permit because there is always a chance that the situation may change in the future and that consent may be forthcoming. The Tribunal has taken the view that in circumstances where implementing a use or development may require multiple consents from different persons or bodies, the grant of a planning permit does not obviate the need to obtain each consent required. However, the need to obtain other permissions should not be a bar to the grant of a planning permit.
- 92 The issue of futility was considered by Deputy President Byard in *Dove v Yarra Ranges SC*²⁴ who said:
- [83] The question of futility is not a question of law but rather one of fact. There is no mandatory legal result from a finding adverse to an application on such a point. It becomes a matter of discretion for the Tribunal as to whether or not it will allow the case to go on to a full merits hearing.
- 93 In the present case, we determined to proceed with the hearing on its merits rather than make a ruling that the application was futile, as submitted by DELWP, and should be struck out or dismissed. In our view, this proceeding should be determined on its merits having regard to all the permissions required under the planning scheme, rather than being rejected on the single ground of futility.
- 94 Nevertheless, the lack of consent by the Department for the Crown land to be used for the purpose of access to a dwelling on the subject land is relevant to the question of whether it is possible for the proposal to meet the requirements of clause 35.06-2 in terms of access to the dwelling and hence whether it is possible to grant a permit for use of the land for a dwelling in the RCZ1.

Conclusion about access

- 95 With respect to the status of the access track and the owner's right of access over it, we make the following findings:
- The status of Crown Allotment 2005 on which the access track is located is unreserved Crown land.

²⁴ [2012] VCAT 760

- The access track is not a public road or a public highway.
- The owner of the subject land has no general right of access over the access track on Crown Allotment 2005 for the purpose of providing access to a dwelling on the subject land.
- The access track is not a ‘road’ for the purpose of meeting the requirement in clause 35.06-2 that a lot used for a dwelling must meet the requirement that:

Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.

- The closest road that meets this requirement of clause 35.06-2 is Myers Creek Road.

96 The consequence of these findings is that the subject land is landlocked and has no legal right of access. Obtaining access over Crown Allotment 2005 for the purpose of using the access track as permanent access to a dwelling on the subject land will depend on consent being given for this purpose by DELWP and obtaining a planning permit for the use and development of Crown Allotment 2005 for this purpose. Other consents may also be required, such as from Melbourne Water under section 194 of the *Water Act 1989*.

ADEQUACY AND ACCURACY OF PLANS

97 According to Mr Gray, he has personally been mainly responsible for preparing the plans used in the application, which have then been refined for submission by a draftsman “friend of a friend”. Some of the plans produced by his experts, such as by Mr Williams and Mr Brown, have been prepared with substantial input and direction by Mr Gray.

98 The Tribunal’s assessment of this permit application has been hampered by the inadequacy and questionable accuracy of the permit application plans. Unfortunately, the issues highlighted by the Tribunal in *Gray v Yarra Ranges SC* find a reflection in the present proceeding, particularly with respect to the quality of plans and other information accompanying the permit application.

99 For example, a major shortcoming with the adequacy of the information accompanying the permit application was the lack of a comprehensive survey plan showing contours for the whole of the site and its context with the surrounding area. The plans in Appendices B and C were the plans submitted with and forming part of the permit application. They show only a portion of the site and, in our view, are inadequate for the purpose of accurately assessing the impact of the proposal. As the production of subsequent plans demonstrated, they are inaccurate in terms of the location of the dam on the site, the location of the tributary and consequently the extent of the 30 metre buffer zone from the watercourse, and the location of the internal driveway in relation to the watercourse and the buffer.

- 100 In response to questions by the Tribunal during the hearing about the accuracy of the plans being relied on by Mr Gray and his challenges to certain plans produced by Melbourne Water, DELWP produced a series of plans showing contours of the site and surrounding area and an overlay of the site plan submitted with the permit application (Appendix C) superimposed over contour and cadastral map data. We have included one of the contour plans in Appendix A and the site overlay plan in **Appendix D**.
- 101 During the course of the hearing Mr Gray produced a series of additional plans and diagrams. For example, on the last day of hearing, Mr Gray produced a partial title re-establishment survey and a partial site plan for the south-eastern corner of the site prepared by Mr Timothy George, a licensed surveyor. What they demonstrated was that the actual title boundaries of this portion of the site do not coincide with the Vicmap Digital Cadastral Map Base (DCMB) property parcellation.
- 102 DELWP accepted this survey information and produced a final plan for the benefit of the Tribunal, which has been included in **Appendix E**. This plan is an amalgam of the plans produced by Mr George, by Mr Williams (one of the permit application plans – see Appendix C), and DELWP (see Appendix D). The resultant plan is quite ‘messy’, in terms of the amount of detail included, but it reveals several important features:
- It most accurately depicts the location of the dam and the watercourse on the site, and the 30 metre buffer zone from the watercourse.
 - It shows that the internal access driveway goes through the middle of the dam, traverses the watercourse, and is located almost entirely within the 30 metre buffer zone.
 - Considerable earthworks associated with the effluent irrigation area will be located within the 30 metre buffer zone.
 - The title boundary established by Mr George’s survey does not intersect with the access track. As a result, earthworks within Crown Allotment 2005 would be required to connect the access track to the start of the internal access driveway.
- 103 We have relied upon the plan in Appendix E in undertaking our assessment of this proposal because we consider it contains the most accurate information that we were presented with.

PERMIT FOR USE AND DEVELOPMENT IN THE RURAL CONSERVATION ZONE

Purpose and policy framework

- 104 The site and surrounding area are in the Rural Conservation Zone (RCZ1). The purposes of the RCZ are:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To conserve the values specified in a schedule to this zone.

To protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values.

To protect and enhance natural resources and the biodiversity of the area.

To encourage development and use of land which is consistent with sustainable land management and land capability practices, and which takes into account the conservation values and environmental sensitivity of the locality.

To provide for agricultural use consistent with the conservation of environmental and landscape values of the area.

To conserve and enhance the cultural significance and character of open rural and scenic non urban landscapes.

105 The specific conservation values listed under Schedule 1 to the RCZ include:

To retain and protect the scenic landscapes, rural character and special environmental features of the Shire.

To provide long term protection of the environmental and conservation values of those areas of private rural land which contain remnant bushland, wetlands and areas of landscape significance.

106 A dwelling is a section 2, permit required, use in the RCZ, provided it is the only dwelling on the lot. The requirements of clause 35.06-2 must also be met. These requirements are:

A lot used for a dwelling must meet the following requirements:

- Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.
- The dwelling must be connected to a reticulated sewerage system or if not available, the waste water must be treated and retained on-site in accordance with the State Environment Protection Policy (Waters of Victoria) under the *Environment Protection Act 1970*.
- The dwelling must be connected to a reticulated potable water supply or have an alternative potable water supply with adequate storage for domestic use as well as for fire fighting purposes.
- The dwelling must be connected to a reticulated electricity supply or have an alternative energy source.

These requirements also apply to a dependent person's unit.

- 107 In addition to a permit being required for the use of the land, a permit is required for buildings and works for all section 2 uses and for a building within 100 metres of a waterway.
- 108 Before deciding on an application to use or develop land, decision guidelines at clause 35.06-6 require consideration of a range of matters, in addition to the decision guidelines in clause 65. These matters are listed under the headings of General issues, Rural issues, Environmental issues, Dwelling issues, and Design and siting issues. The guidelines under the General issues require consideration of:
- The policy framework.
 - Land capability and ability to accommodate the proposed use or development.
 - How the use or development conserves the values identified for the land in a schedule.
 - Whether the use or development protects and enhances the environmental and landscape qualities of the site and its surrounds.
 - Whether the site is suitable for the use or development and its compatibility with adjoining land uses.
- 109 The more detailed decision guidelines address specific matters under each of the headings.
- 110 Similar to the *McRae* case, the Council reiterated that appropriate residential development in the RCZ is clearly contemplated. It submitted that a dwelling in the RCZ is not prohibited but is a use that is discretionary giving rise to legitimate expectations that residential use is acceptable in the zone provided that conservation values and environmental sensitivities are addressed.
- 111 The council acknowledges that the physical characteristics of the site, including its steep topography, environmental values and bushfire risks create a set of challenges for the development of the site. However, it submitted that, despite these challenges, the relevant overlay controls provide a mechanism by which the proposed use and development can be assessed and, with appropriate conditions can be acceptably achieved.
- 112 The council further submitted that:
- Unfortunately if the site is not to be available for a residential use (under strict conditions) then this parcel and others like it are sterilised and valueless, effectively through the planning controls, with no compensation. One might say bad luck however it is a very drastic consequence.
- 113 We note and agree with the Tribunal's comment in the *McRae* case on how the planning scheme informs expectations about the acceptability of discretionary use and development.

[40] The relevant provisions of the planning scheme must inform any expectation that the residential use of the land is acceptable. The fact that a permit may be granted for that use does not convey an expectation that a permit will be granted.

114 Clause 71.03-2 of the Yarra Ranges Planning Scheme states that in relation to making decisions about section 2 uses:

Because a use in Section 2 does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the Municipal Planning Strategy, the Planning Policy Framework, the purpose and decision guidelines of the zone and any of the other decision guidelines in Clause 65.

115 Both the Tribunal in the *McRae* case and council in its submission to us appropriately summarised the relevant policy framework, which despite amendments that have occurred to the Yarra Ranges Planning Scheme since 2017, remain generally relevant to the proposal:

- Ensure that residential development (if permitted) in RCZ addresses bushfire risk, conservation values and environmental sensitivities.
- Mitigate (not remove) the risk to life, property and the environment from bushfire, to acceptable levels.
- Minimise (not eliminate) and offset the removal of native vegetation.
- Ensure that development does not compromise the landscape and environmental qualities of the site and surrounding areas.
- Ensure that development is located and designed to minimise the impacts on water courses and landslips.

116 We note the Tribunal's commentary on the broader policy framework implication for the proposal in the *McRae* case:

[42] The planning scheme's broader policies and provisions relating to settlement, environment, landscape and residential use and development are also relevant to the consideration of whether residential use and development on this site is to be permitted. In this respect, there is an emphasis in the policy framework on the protection and conservation of the environmental characteristics of the Shire, especially in those areas outside urban settlements. The containment of residential use and development within urban settlement boundaries is one of a series of implementation mechanisms aimed at protecting areas that have environmental or landscape sensitivities. The application of the RCZ is identified as a mechanism by which to achieve these objectives. While the applicable policies appropriately recognises the circumstances in which the residential use of environmentally sensitive land for residential purposes may be contemplated, minimising residential

development in the first instance in areas subject to environmental constraints is a clearly expressed strategic direction in this planning scheme.

[footnotes omitted]

- 117 We find that the above commentary in the *McRae* case remains relevant to the proposal now before us, which is almost identical in terms of use and development siting and layout.
- 118 We acknowledge that the RCZ is a zone in the Victoria Planning Provisions (VPPs) that, according to *Planning Practice Note 42 – Applying the Rural Zones, June 2015* (PPN42) is primarily concerned with protecting and conserving rural land for its environmental features and attributes. The Planning Practice Note describes that land uses in the RCZ are subordinate to the environmental values of the land and that land use and development is controlled to safeguard the natural environment and conserve the identified environmental qualities of the land. In general, there is an expectation that a proposal will only be permitted if it conserves the values identified for the land, the site is environmentally capable of sustaining the proposal, and it is compatible with surrounding land uses.
- 119 PPN42 states that the RCZ is designed to be applied to rural areas where:
- The protection of the environmental features of the land is of primary strategic importance including, for example, native vegetation, flora and fauna, significant habitats, or they could relate to the visual qualities of the land.
 - The environmental features of the land are scarce and strict controls are required to prevent the further loss or decline of those features.
 - Land use and development could directly or indirectly threaten the environmental values of the land and strict controls are required to manage this.
- 120 We also note and agree with the Tribunal’s following commentary in *McRae* regarding the significance of what the planning scheme identifies with respect to residential use in the RCZ:

[43] There is also some significance in the fact that the planning scheme identifies areas in which low density residential development is to be encouraged, and these areas are zoned accordingly²⁵. The RCZ is not a zone that has been used by this Council to identify areas in which rural residential or low-density residential development is encouraged²⁶. The RCZ in the Yarra Ranges Planning Scheme has been typically applied as part of the range of statutory tools aimed at achieving specific

²⁵ Clause 21.04-1 and the associated Residential Framework Map

²⁶ This contrasts with other planning schemes where schedules to the RCZ have been used in this manner. See for example Schedules 1, 2 and 3 of the RCZ in the Nillumbik Planning Scheme.

environmental objectives by constraining residential use and development in areas of environmental sensitivity²⁷.

121 We further note and adopt the Tribunal's finding in this regard:

[45] My findings on these matters are relevant to the consideration of the other aspects of the proposal, because the consideration of acceptability of the bushfire risk and the environmental impacts is undertaken in the context that the residential use of this land is not an outcome that finds any particular support in the planning scheme.

122 For the same reasons, we find that the present proposal fails to achieve an acceptable outcome in regard to the purpose and decision guidelines of the RCZ and the relevant policy framework.

123 The proposal for a dwelling relates to use and development. To use land for the purposes of a dwelling is a change of use that has permanent ramifications. We consider the RCZ is a zone that does not support the use of land for a dwelling unless the impacts from an environmental perspective are minimal and the use is subservient to the zone's purpose, which is to protect and enhance environmental values. In this case, we consider the proposed use of the site for residential use is not sufficiently subservient to the environmental values of the site. In other words, the proposal requires too much from the site in terms of change to its environmental condition to accommodate a dwelling and associated infrastructure and fails to protect or enhance the environmental values.

124 Our view in this regard is reinforced by the changes to policy that have occurred with both environmental issues under clause 12.01-1S – *Protection of biodiversity* and clause 12.03-1 – *River corridors, waterways, lakes and wetlands* and with respect to bushfire risk under clause 13.02-1S – *Bushfire planning*²⁸. The changes to these policies have, if anything, heightened the need for the proposal to address, to an acceptable level, their outcomes. We consider this has not been satisfactorily achieved in this instance.

Is use for a dwelling prohibited in the circumstances of this case?

125 Dwelling is a section 2, permit required, use in the RCZ subject to the condition that it must meet the requirements of clause 35.06-2. Clause 71.02-3 provides that:

²⁷ At Clause 21.05 Objective 4 Rural Townships it is stated the RCZ is applied to areas of non-urban use between established towns. At Clause 21.07 Landscape – Objectives, Strategies and Implementation it is stated that the RCZ is applied to areas of predominantly privately owned rural and green wedge land which contains extensive areas of remnant vegetation. At Clause 21.09 Environment – Objectives, Strategies and Implementation it is stated that privately owned rural and green wedge land that retains extensive areas of remnant vegetation is included within the Rural Conservation Zone within which the specified environmental outcome is to provide for the long term protection of remnant vegetation and other environmental values.

²⁸ These State policies have changed as a result of Amendments VC138, VC140 or VC148 since December 2017

A use in Section 2 requires a permit. Any condition opposite the use must be met. If the condition is not met, the use is prohibited.

- 126 The requirement in clause 35.06-2 that access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles is a condition relating to use, which means that if it is not met use of the subject land for the purpose of a dwelling is prohibited.
- 127 The only access to the subject land from Myers Creek Road is via the 400 metres long access track on Crown Allotment 2005, which is unreserved Crown land. There is no doubt that Myers Creek Road meets the criterion of being an all-weather road with dimensions adequate to accommodate emergency vehicles. But unless it can be established that the access track either meets the same criterion of being an all-weather road with dimensions adequate to accommodate emergency vehicles or the subject land has an ongoing right of legal access over the access track, the requirement for access in clause 35.06-2 will not be met and consequently the use of the subject land for a dwelling is prohibited.
- 128 In our consideration of issues relating to the status of the access track, we concluded that:
- The access track is not a public road or a public highway.
 - The owner of the subject land has no general right of access over the access track on Crown Allotment 2005 for the purpose of providing access to a dwelling on the subject land.
 - The access track is not a 'road' for the purpose of meeting the requirement in clause 35.06-2 that a lot used for a dwelling must meet the requirement that:
 - Access to the dwelling must be provided via an all-weather road with dimensions adequate to accommodate emergency vehicles.
- 129 At present, the owner of the subject land has no consent from the owner of Crown Allotment 2005 (the Department) for permanent or ongoing use of Crown Allotment 2005 for the purpose of access to the subject land. In this context, whilst we note that the 2017 Licence for access has been terminated, even if this had not occurred, we do not consider that an annual licence subject to the potential for unilateral cancellation or non-renewal by the Department, does not constitute a permanent or ongoing legal right of access for the purpose of accessing a dwelling on the subject land. The mere ability to physically access the land via the access track does not constitute a legal right of access.
- 130 For these reasons we conclude that the lack of a legal right of permanent or ongoing access to the subject land means that the requirement in clause 35.06-2 cannot be met and use of the land for the purpose of a dwelling is prohibited.

Conclusion about use and development in the RCZ

- 131 For these reasons, we therefore conclude that no permit can legally, or should on the merits, be granted for use or development of the site for the purpose of a dwelling under the RCZ1.

OTHER PERMITS FOR DEVELOPMENT AND VEGETATION REMOVAL

Environmental issues

- 132 The environmental sensitivity of the site and the issues associated with the proposal are reflected not just in the zoning of the site, but also the application of the ESO1, the EMO and the BMO. Permits are required for buildings and works under the ESO1, EMO and clause 51.03 – *Upper Yarra Valley and Dandenong Ranges Regional Strategy Plan*, and for vegetation removal under the ESO, EMO and clauses 51.03 and 52.17 – *Native Vegetation* of the Yarra Ranges Planning Scheme.
- 133 The environmental issues of most relevance relate to the impacts on biodiversity from the loss of native vegetation, impacts from erosion risk arising from the extent of earthworks and ground disturbance from construction activity, and impacts on waterway, namely the tributary of Myers Creek on the site, and also on Myers Creek itself.
- 134 Council and the permit applicant have formed the view that although the proposal will have environmental impacts, they can be appropriately managed through permit conditions. They consider their views are supported by the findings of the Tribunal in the *McRae* case that; “The nature of the vegetation removal associated with the proposal, and the other associated environmental impacts, are not so great as to warrant refusal of the application on that basis alone.”²⁹
- 135 We note, however, that the Tribunal in the *McRae* case commented³⁰ that its findings were made with some discomfort about the quality, comprehensiveness, and level of detail of the information presented in that case, acknowledging that such gaps in information could be addressed with permit conditions.
- 136 Our view regarding the acceptability of environmental impacts associated with the proposal before us diverges from that of the Tribunal in the *McRae* case. Whilst the findings of the Tribunal in that matter may have been open to it based on the facts and policy framework then in place, or with how they were derived, the policy position has now changed, making the earlier Tribunal’s views somewhat out-dated. Our role is to consider the current proposal afresh and to conduct our assessment against the planning scheme and policy framework as it stands today.
- 137 Our position is reached as a result of the implications arising from a combination of factors. Together they lead us to the view that, although

²⁹ [2017] VCAT 583 at [83]

³⁰ [2017] VCAT 583 at [85]

individually considered and in isolation, the impacts on the environment may be ameliorated, cumulatively they result in an unacceptable outcome to both biodiversity values and waterway function.

138 The factors include:

- The biodiversity value of the native vegetation proposed to be removed.
- Changes to biodiversity policy.
- Uncertainties about the site plan, particularly in relation to the proximity of the tributary of Myers Creek to the location of the dwelling, effluent disposal fields, areas required for provision of defensible space and the location of the internal driveway.
- Impacts on waterway function and protection.

Native vegetation

139 We find the proposal necessarily results in the removal of native vegetation. This is because the site is heavily vegetated making vegetation removal unavoidable.

140 We note that the application comes under the transitional provisions of clause 52.17-6 in that the application was lodged before changes to clause 52.17 were made under Amendment VC138 in December 2017³¹. Hence, we are required to consider the previous *Permitted Clearing of Native Vegetation Biodiversity Assessment Guidelines, 2013* (the 2013 Guidelines).

141 Under the 2013 Guidelines, the removal of 0.4 hectares of native vegetation in a low risk location of the State means the application is determined to be a low risk pathway for removing remnant patches of native vegetation. Accordingly, under the 2013 Guidelines, the proposal is satisfactory in so far as clause 52.17 is concerned where an appropriate offset can be provided to achieve a no net loss of the contribution to Victoria's biodiversity from the loss of native vegetation under the proposal. Both Council and the permit applicant consider this to be the case.

142 We note that in Mr Latter's evidence, his *Biodiversity Assessment Report* dated 23 December 2016 refers to the native vegetation proposed to be removed having a Strategic Biodiversity Score (SBS) of 0.412. In this instance, it is a modelled measure of the native vegetation's importance to Victoria's biodiversity, relative to other locations across the landscape.

143 A SBS of 0.4 out of 1 reflects a value that is close to the mid-range value. Hence, it can be assumed that the biodiversity value of the native vegetation proposed to be removed is of a moderate value and certainly not valueless.

³¹ Amendment VC138 introduced a new assessment regime for native vegetation regulation including change to State policy, clause 52.17 and a new incorporated document called *Guidelines for the removal, destruction or lopping of native vegetation, 2017*.

- 144 Irrespective of the above, consideration of the effects on biodiversity remains relevant under policy in clauses 12.01-1S and 12.01-2S. Despite the transitional provisions under clause 52.17, a consideration of biodiversity impacts still needs to be determined under the broader policy framework. This is necessary because biodiversity assessment can risk becoming a somewhat automated process. Biodiversity policy requires an assessment of vegetation that is more than applying a ‘tick the box’ approach and requires regard to be given to the quality and habitat value of native vegetation proposed to be removed both on the site and in regard to its surrounds.
- 145 Policy under clause 12.01-1S – *Protection of biodiversity*, now seeks; *To assist the protection and conservation of Victoria’s biodiversity*. It is no longer confined just to or contains any reference to important habitat for Victoria's flora and fauna and other strategically valuable biodiversity sites. This significantly broadens the basis of protecting and conserving the State's biodiversity irrespective of any value that the native vegetation may contribute to biodiversity across the State. It is also policy to relevantly have regard to the cumulative impacts of land use and development on biodiversity.
- 146 Clause 12.01-2S - *Native vegetation management* refers to ensuring decisions involving the removal, destruction or lopping of native vegetation, apply the three step approach of avoiding the removal of native vegetation, minimising impacts from removal of native vegetation that cannot be avoided, and providing an offset to compensate for the biodiversity impact from the removal of native vegetation.
- 147 The above changes to policy, compared to 2017, place greater emphasis on avoidance of clearing and, where it cannot be avoided, to minimise impacts and to provide offsets that compensate the impacts on biodiversity from the removal of that native vegetation.
- 148 In considering the above, we have been provided with no comfort from the permit applicant or Mr Latter’s evidence about these issues because they have not made an assessment of the proposal against current policy. Council has also made only a limited assessment. Current State policy on biodiversity has been dismissed on the basis of relying on the Tribunal’s findings in the *McRae* case and the Biodiversity Assessment Report prepared under the 2013 Guidelines. This is an over-sight that is concerning because a reliance on the 2013 Guidelines and offsets alone fails to consider State policy, as well as the ESO1 and the upper Yarra and Dandenong Ranges Regional Strategy Plan (Regional Strategy Plan) regarding the local inherent value of native vegetation to biodiversity and cumulative impacts from land use and development.
- 149 Impacts on biodiversity are not solely about the loss of 41 large canopy trees (or an aboricultural assessment of trees only) and a patch of *Least Concern* native vegetation linked to the proposed development footprint,

which effectively was the focus of Mr Latter's evidence. Our inspection confirmed the steeply sloping nature of the site and the presence of forest vegetation including understorey vegetation. Construction on such steep slopes will make removal of native vegetation beyond the development footprint difficult to avoid. We found it difficult to traverse the site due to the slope without having to hang on to vegetation to prevent slippage. Our observations confirmed the concerns expressed by Melbourne Water, for example, that the extent of earthworks for construction will potentially have greater impacts on vegetation, and consequently biodiversity values, then merely within the development footprint.

- 150 Our assessment is based on the current policy framework. We note the planning scheme places significant emphasis on protecting the environment. Clause 21.09 – *Environment – Objectives, Strategies and Implementation* recognises key issues including:

The Shire's prime objective is protection and enhancement of its rich biodiversity.

Remnant vegetation is one of the most significant natural resources of the Shire.

- 151 The above is further reiterated under clause 22.05 – *Vegetation Protection*.
- 152 These policies identify the importance of ensuring vegetation removal is kept to a minimum, particularly in areas with steep slopes and affected by the EMO.
- 153 State policy under clause 12.01-1S also requires that decision making take account of impacts of land use and development on Victoria's biodiversity including consideration of cumulative impacts.
- 154 The SBS of 0.4 and an area of impact of 4,900 square metres involving native vegetation that is in close proximity to a waterway means the level of impact is not insignificant.
- 155 The site is affected by the ESO1, which identifies the site to be within:
- Site of Botanical Significance B17 – *Lowes Road*. The ESO1 mapping for B17 includes land either side of Lowes Road including across to Myers Creek Road and which includes the site. It is identified in the Regional Strategy Plan as Site 77 and described as "extensive intact stands of a distinctive floristic variant of Sclerophyll Woodland".
 - Site of Zoological Significance Z16 - *New Chum Creek, Blue Mount and Myers Creek*. The ESO1 mapping for Z16 includes the section of Myers Creek adjacent to the site and is identified in the Regional Strategy Plan as Site 10 having Regional Significance.
- 156 In addition to the limited policy assessment of biodiversity impacts, we find there is a similar attitude also reflected by the dismissive response of the permit applicant to the ESO1. Mr Gray submitted the ESO1 is an anomaly

given Schedule 1 to the ESO refers to two sites of botanical and zoological significance that he regards as having no locational relationship with the site. Accordingly, he considers the ESO1 has little or no relevance to the consideration of environmental impacts of the proposal.

- 157 We do not agree. Reference to the Yarra Ranges Planning Scheme maps for the ESO clearly demonstrates that the site falls within a limited area mapped under B17 and Z16. This mapping relates to the nature of the vegetated forest within which the site and its surrounds are located and its relationship with the Myers Creek waterway. The ESO1 drills down to the environmental significance at a local level.
- 158 We also note that the Statement of environmental significance in ESO1 refers to these various sites of botanical and zoological significance in the following terms:

The Shire contains extensive areas of remnant bushland which are an intrinsic part of the Shire's unique landscape and environmental character.

Sites of botanical and zoological significance also play an important role in contributing to the ecological processes and biodiversity of the region by forming core habitat areas within a complex network of wildlife corridors along roadsides and watercourses. Development within and around these sites needs to be appropriately managed to ensure the long term protection and sustainability of these ecological processes.

- 159 Clearly ESO1 has a relationship to not only the respective named sites of botanical and zoological significance, but also to adjoining areas, particularly if they are connected by vegetation coverage. This is the situation with respect to the site and its location along the Myers Creek valley. The reference to core habitat areas is reinforced in the objectives of Schedule 1 and the decision guidelines note the need to avoid clearing on steep slopes (greater than 20%) or within 30 metres of a watercourse.
- 160 We consider the proposal to clear the extent of native vegetation (and potentially more given our concerns regarding the land slope) will have unacceptable environmental impacts. These include the loss of large canopy trees and associated understorey vegetation (nearly half a hectare); clearing of vegetation on land slopes well in excess of 20% (potentially greater than half a hectare); fragmentation of part of the landscape within close proximity (less than 30 metres from the Myers Creek tributary and Myers Creek itself with the works that have occurred on the access track); and detrimental impacts on the riparian environment of the waterways.
- 161 We say the clearing and development works are too close (within 30 metres) to a tributary of Myers Creek, together with construction works on steeply sloping land that exceeds 20% and the works that have occurred to the access track which runs adjacent to Myers Creek. These factors combine to create an impact that is not consistent with the policy directions

for biodiversity and the ESO1, and in turn the Regional Strategy Plan, which seeks to ensure the long term protection and conservation of all remaining areas of remnant native vegetation and wildlife habitat, including that on land designated as a Site of Botanical and Zoological Significance.

- 162 We conclude that, in combination with the EMO and policies for protection of waterways and associated water quality (e.g. clauses 12.03-1S – 14.02-1S and 14.02-2S), the uncertainty associated with the internal driveway and the works required for its construction, and the potential for direct impacts on the tributary of Myers Creek, the resulting likelihood of detrimental impacts on the environment are unacceptable in terms of what the Yarra Ranges Planning Scheme is seeking.

Waterway function and the EMO

- 163 The site is steeply sloping and the proposed location of the dwelling, effluent disposal fields and internal driveway are in close proximity to an existing tributary of Myers Creek. Melbourne Water expressed concern that the proposal would result in detrimental impacts on the waterway function of the tributary.
- 164 Melbourne Water submitted that the tributary, which forms part of Myers Creek, is a designated waterway under the *Water Act 1989*. Melbourne Water's *Healthy Waterways Strategy* is a reference document in the Yarra Ranges Planning Scheme under clause 12.03-1S and the Strategy identifies Myers Creek and the tributary as a priority area for conserving environmental values of the waterway.
- 165 Melbourne Water considers the location of the beginning of the internal driveway is too close to the existing dam and tributary, if not actually located over it based on the mapping evidence of Mr Welch. One of the strategies in clause 14.02-1S for catchment planning and management is to retain natural drainage corridors with vegetated buffer zones at least 30 metres wide along each side of a waterway.³² Melbourne Water submits that the location, the extent of earthworks for the driveway and for terracing the effluent disposal fields, means that a 30 metre natural vegetated buffer to the waterway cannot be achieved.
- 166 We accept the concerns of Melbourne Water in this regard. We find that achieving a 30 metre natural vegetated buffer to the tributary would not be possible due to the close proximity of the internal driveway. Having regard to the composite plan in Appendix E prepared by DELWP, the proposed internal driveway appears to run through the existing dam and part of the tributary of Myers Creek. If this is not meant to be the case, our inspection

³² Retain natural drainage corridors with vegetated buffer zones at least 30 metres wide along each side of a waterway to:

- Maintain the natural drainage function, stream habitat and wildlife corridors and landscape values,
- Minimise erosion of stream banks and verges, and
- Reduce polluted surface runoff from adjacent land uses.

identified that construction of the internal driveway to avoid the dam and tributary would need to punch through part of a steep escarpment on the access track on the unreserved Crown land and then travel along a steeply sloping face of the hillside clearly within 30 metres of the tributary. We consider this imposes an unacceptable risk to the waterway.

- 167 Given the uncertainty with the site plan, we also find there are issues with the effluent disposal fields, parts of which are within the 30 metre buffer zone to the tributary. As we saw on the last day of the hearing, any attempt by Mr Gray to seek to amend the site plan to move the internal driveway and effluent disposal fields is fraught with problems due to an absence of any updated assessment as to the suitability, or indeed possibility, of any such changes.
- 168 The outcome of the above factors is a high level of uncertainty. We do not support this proposal because of such uncertainty. We also find the proposal is inappropriate because it fails to satisfy policy for the protection of the waterway function and the provision of a buffer, which given the steeply sloping nature of the site further heightens the need to satisfactorily demonstrate compliance with the planning scheme.
- 169 Regarding the EMO, it seeks to manage the risk of landslip and to ensure development does not adversely increase risk to life and property. Of relevance, the EMO requires development on steep slopes above 30% to assess the tolerable risk of landslip. Slopes on the site overall are close to 35% (20 degrees) with slopes in the vicinity of the proposed dwelling envelope less than 40% (22 degrees)³³. Such slopes trigger a landslip assessment under the EMO.
- 170 The Geotechnical and Risk Assessment Report prepared for Mr Gray by A.S. James Pty Ltd in 2013 concluded that the tolerable risk to property is low and the risk to life is acceptable. However, this was a preliminary investigation due to restricted access for appropriate drilling and, although considered by the authors to be sufficient for assessing landslide risk, was subject to further testing to confirm subsurface soil and rock profiles, foundation depths and excavation conditions across the site.
- 171 We also note the evidence of Mr Williams that the proposed treatment and disposal of wastewater is acceptable based on the terracing of sub-surface irrigation of effluent and regular soil maintenance to ensure efficient and effective functioning of soil treatment of wastewater effluent. Mr Williams was confident that any pollution risk to the tributary and to Myers Creek would be minimal.
- 172 We do not accept this evidence. Although the area for effluent irrigation appears adequate, the establishment of terraced areas to accommodate the irrigation fields would result in significant ground disturbance on land

³³ Based on a *Preliminary Geotechnical Investigation & Risk Assessment prepared by A.S. James Pty Ltd, dated 17 September 2013.*

slopes that exceed 20%. We find that the extent of works required for the combination of dwelling construction, terracing of ground for the effluent disposal fields and for the construction of the internal driveway, including retaining walls and gabion walls, create concerns for us that the proposal is simply asking too much from this site.

- 173 We are not persuaded that the environmental impacts are minor and that they can be appropriately mitigated by either design or permit conditions. In addition, we have no confidence in the permit applicant that such permit conditions would be complied with, particularly given the unauthorised works that have occurred on the access track over the unreserved Crown land.
- 174 The provision of evidence that dates back to the *McRae* case and the failure to update these reports to respond to the current policy framework and provisions of the planning scheme mean that the material presented in this matter has been both piecemeal and inadequate. This has made it difficult for us to determine the efficacy and relevance of material supporting the proposal. What has also made it challenging is the low level of accuracy of material, which has been demonstrated by the submissions from DELWP and Melbourne Water.
- 175 The issues regarding the adequacy and accuracy of plans previously discussed means we lack confidence in the plans presented on behalf of Mr Gray. In particular, the engineering solutions presented regarding construction techniques for the driveway (above ground on imported fill) and the use of gabion and retaining walls associated with the cut and fill for the internal driveway and the house site (involving heights of up to 3 and potentially 4 metres) are no more than diagrammatic and would require far more detailed engineering designs based on actual topographic and geotechnical information to be acceptable. This is reflected in the extent of detail specified in condition 1 required to be shown in a detailed Earthworks Plan and Site Plan.

Conclusion about development and vegetation removal permits

- 176 Given these findings, we conclude that we are unable to support the proposal on environmental grounds because of the cumulative impacts on the environment and biodiversity, and because of significant uncertainties regarding the siting of various components of the proposed development on the site and the amount of earthworks required.
- 177 Accordingly, we determine that no permit should be granted for buildings or works, or to remove, destroy or lop vegetation under ESO1, EMO, clause 51.03 or clause 52.17.

BUSHFIRE RISK

Requirements of Bushfire Management Overlay (BMO)

- 178 The site is affected by the BMO. The purpose of the BMO is:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.

To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.

To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.

- 179 Under clause 44.06-2 of the BMO, a permit is required to construct buildings and works associated with accommodation, which includes a dwelling. An application must be accompanied by a bushfire hazard site assessment and bushfire hazard landscape assessment, both of which focus on the bushfire hazard of the general locality 150 metres around the site, and a bushfire management statement (BMS).
- 180 Under clause 44.06-4 an application must meet the requirements of clause 53.02 relating to bushfire planning.

Parties' views and evidence

- 181 The permit application utilised documentation from the previous *McRae* case to address bushfire risks including a BMS prepared by Terramatrix Pty Ltd dated August 2015. The BMS was supported by expert evidence from Mr Allan on the last day of the hearing.
- 182 The CFA also responded to the referral of the application. The CFA neither supported nor objected to the application and suggested conditions should a permit be granted.
- 183 The permit applicant considered the key issue with respect to bushfire risk is the access track on unreserved Crown land and the need to provide an all-weather road appropriate for use by emergency vehicles. Mr Gray considered the fact that he has grazing and access licences over the access track and that he considers the track to be a public highway because it is available for public use, provides him with an appropriate means of safe access to and from the site to Myers Creek Road.
- 184 However, that was not the view of his own witness, Mr Allan, who said in cross-examination that access factors are not the key factors when assessing risk in an extreme risk landscape. Over and above access are the landscape scale and factors that will drive fire behaviour. In Mr Allen's view, landscape factors were more important than site factors. When pressed, he would not say he was comfortable to endorse this site for development. He would not say that this was a development that 'appropriately' protects human life. He noted that he had recommended features and measures that should be implemented and there was not much more that could be thrown at the site to mitigate risk or make it safer unless one was to take out all the trees and alter landscape factors. It is because of the extreme risk location that the sole focus was on development within the site. He agreed that

without access to Myers Creek Road (as a public road), he would not support the proposal.

- 185 The council considers the dwelling siting, design and site layout, together with the BMS and its acceptance by the CFA to be an appropriate response to mitigate bushfire risk to an acceptable level. It considers that the policy framework and bushfire planning controls under the BMO and clause 53.02 do not require that the site be completely free of bushfire risk. The complete elimination of bushfire risk is not necessary. Rather, it is necessary to demonstrate that the bushfire risk has been managed to an acceptable level.
- 186 The parties agreed the site presents an extreme bushfire risk. This is a reflection of its heavily vegetated condition and steeply undulating hillside topography as well as the location within a broader forested landscape.
- 187 The CFA also recognised the site is in an area that has the potential for extreme landscape bushfire behaviour. Bushfire risk is possible from all directions of the site. The CFA recognise that the site has limited access and egress options and a bushfire could present as a rapid onset fire event. The CFA's view was informed by the following matters:
- The long run landscape fires in the area have the potential to develop powerful convection columns and highly damaging winds, well beyond the design fire parameters of *AS 3959-2009 – Construction in Bushfire Prone Areas* (Standards Australia, 2009).
 - The revised BMS submitted acknowledges that landscape fire risks accord with Landscape Type 4 set out under *Technical Guide – Planning Permit Applications Bushfire Management Overlay, September 2017*. Under this landscape type the broader landscape presents an extreme risk. Fires have hours or days to grow and develop before impacting and evacuation options are limited or not available.
- 188 Council considered the proposal appropriately addresses bushfire risk through the following design elements:
- Siting the dwelling towards the bottom of the valley in an area with least vegetation coverage near the confluence of Myers Creek and the tributary and using the wet gully associated with the east-west tributary to act as a buffer from any fire approaching from the north and north-west. Any bushfire approach will be upslope of the dwelling, i.e. the fire will be travelling downhill, resulting in a slower and potentially cooler burn.
 - Constructing the dwelling to a Bushfire Attack Level rating 40 (BAL 40), together with provision of defendable space to a BAL 29 standard. This requires a 25 metre wide area of defendable space based on the classification of the surrounding landscape as forest vegetation. The BMS identified that bushfire modelling identifies that a bushfire of the scale and intensity anticipated under the BMO would

result in a flame length of 23.7 metres, which should protect the dwelling from direct flame contact and sufficiently deal with estimated radiant heat flux.

- Construction with non-combustible external walls with cement stabilised rammed earth, with steel window frames and 6mm toughened glass.
- Designing the dwelling with two levels terraced into the slope to ensure a low profile to present a small target for any approaching fire front, with a flat roof made of steel to minimise exposure to radiant heat and minimise the entrapment of debris or embers.
- Providing a ring of protective sprinklers around the dwelling and a high pressure hose that can be directed from the roof.
- Providing a 28,000 litre water supply for fire-fighting and the sprinkler system, with connectivity to an additional 65,000 litres of water from the proposed swimming pool as back-up supply.
- Providing a permanent diesel fire-fighting pump connected to the sprinkler system and hose reels.
- Constructing an internal driveway in compliance with Table 5 of clause 53.02-5 with all-weather construction, curves, grades and width that can accommodate a 15 tonne load capacity vehicle.
- Providing a private bushfire shelter.
- Preparing a bushfire survival plan that includes a requirement to evacuate the site on Code Red days and the provision of personal protective equipment.

189 On behalf of council, Mr Sherman submitted the above measures exceed the requirements of clause 53.02 and respond to the BMO and policy under clause 13.02. Mr Sherman advised that:

There is not much more that the Permit Applicant could possibly do to further mitigate bushfire risks.

Tribunal's consideration

190 We note the BMS is focussed on bushfire risk associated with the site and does not address the access track on unreserved Crown land. Access to the site was a contributing factor in the *McRae* case for the Tribunal to not support the grant of a permit for a dwelling.

191 The site does not have direct access to Myers Creek Road and relies on an access track that runs through unreserved Crown land. The permit applicant had a licence over the access track for access purposes. However, DELWP has cancelled this licence. Conditions on the licence appear to have been breached by works undertaken on the access track to increase its width and provide for passing bays and vegetation clearance to achieve an

all-weather condition and the access requirements of clause 53.02 for emergency vehicle use, all of which DELWP advise have not been authorised.

- 192 The outcome of the above is uncertainty. This is an issue that the Tribunal in the *McRae* case grappled with and is now an issue that haunts us in our deliberations in this matter.
- 193 The access track runs for a length of 400 metres. It is bordered by vegetation and the banks of Myers Creek. The use of this access relies on consent by another authority and hence the permit applicant does not have sole control over access along this track. Indeed, as we have found, the permit applicant has no legal right of access on a permanent or ongoing basis along the track. This is a significant impediment, but it also highlights the risk in terms of bushfire regarding safe access to and from the site.
- 194 Similar to the risks associated with access to the site, is the risk associated with bushfire in the context of the broader landscape.
- 195 The permit applicant and the BMS propose siting and design elements that are claimed to be in excess of the requirements set out under clause 53.02. However, they all relate to the site and what the permit applicant can control or influence. The broader landscape response with regards to bushfire behaviour is something the permit applicant cannot influence. Yet it is risk from the broader landscape that is referred to (in part) in clause 53.02-4.1 – *Landscape, siting and design objectives* where, amongst other objectives, it requires development to be appropriate having regard to the nature of the bushfire risk arising from the surrounding landscape. Approved Measure 2.1 (AM 2.1) includes the following requirement;
- The bushfire risk to the development from the landscape beyond the site can be mitigated to an acceptable level.
- 196 In this case, the ability to mitigate the bushfire risk to an acceptable level from the landscape beyond the site is largely ineffectual and limited to what can be provided on the site as part of the proposed development. The additional elements that are proposed do not, in our view, address the broader landscape bushfire risk. The site and surrounding area is heavily vegetated. Management of fuels in the surrounding forested areas is not comprehensive and no evidence was provided to describe how surrounding bushland areas can or could be managed to reduce fire fuels.
- 197 Mr Allan admitted under questioning that the ability to manage the surrounding bush is problematic.
- 198 Guidance about how the broader landscape bushfire risk is considered is relevant when regard is had to the policy under Clause 13.02. Amendment VC140 introduced changes to bushfire planning policy in December 2017. Clause 13.02 addresses bushfire risk. In addition, the BMO provisions at clause 44.06 and the Bushfire Planning provisions at clause 53.02 are relevant.

- 199 We have considered the policy and controls, to the extent they are relevant to the matters involved with the proposal.
- 200 Clause 13.02-1S - *Bushfire planning* has the overall objective to strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life. Supporting this objective, the policy includes strategies relating to protection of human life, bushfire hazard identification and assessment, settlement planning, areas of biodiversity conservation value and use and development in a Bushfire Prone Area.
- 201 The concept of protecting human life as a policy priority is also given imperative under the policy requirement for *Integrated decision making* in clause 71.02-3 of the planning scheme. This principle sits alongside the other key integrated decision making principles of net community benefit and sustainable development as overarching principles in planning decision making.
- 202 Policy under clause 13.02-1S is to be applied to all planning and decision making under the Act where it relates to land in a Bushfire Prone Area, the BMO or where a proposed use or development may create a bushfire hazard. This gives the policy direct application to decision making associated with a range of matters including this proposal.
- 203 Under *Protection of human life*, the policy includes the following strategies:
- Give priority to the protection of human life by:
- Prioritising the protection of human life over all other policy considerations.
 - Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.
 - Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.
- 204 These strategies reflect on the damage and destruction that a bushfire can have, including loss of life. It reinforces the priority to protect human life from bushfire. One only has to consider the devastation following bushfires such as Black Saturday (2009), Ash Wednesday (1983) and Black Friday (1939), to name a few, which have wreaked havoc with loss of life, property, infrastructure and biodiversity.
- 205 We note that these strategies relate to the overall aim of prioritising the protection of human life and the need to do so on a broad level for decision making at all stages of the planning process, which includes both strategic and statutory planning. In particular, the strategies support directing development to low risk locations and ensuring availability of safe access to areas away from bushfire threats.

- 206 The policy requires identification of bushfire hazard and appropriate risk assessment. This is done by, amongst other means:
- Applying best science to identify vegetation, topographic and climatic conditions that create bushfire hazards
 - Applying the BMO where the extent of vegetation can create an extreme hazard
 - Considering bushfire hazards on the basis of:
 - landscape conditions within 20 kilometres and up to 75 kilometres of a site;
 - local conditions within 1 kilometre of a site;
 - neighbourhood conditions within 400 metres of a site; and
 - the site for development.
 - Consulting with emergency management agencies and fire authority
 - Ensuring planning permit applications, amongst others, properly assess bushfire risks and include appropriate bushfire protection measures
 - Not approve development where an applicant or proponent has not satisfactorily addressed the bushfire policies and controls and demonstrated that bushfire protection measures can be adequately implemented.
- 207 These strategies seek to ensure that risk from bushfires is considered not solely from a site or immediate local perspective, but also from a wider landscape perspective, where often management of bushfire risk falls outside of the direct control of individual landowners. It relates to the nature, location and extent of vegetation (whether trees or grasses) and their influence on fires runs and the relationship between fire fronts forming in the landscape as well as fire speed and behaviour with respect to generation of ember attack and radiant heat formation and exposure.
- 208 The policy includes the following strategies relating to *Settlement planning*:
- Plan to strengthen the resilience of settlements and communities and prioritise protection of human life by:
- Directing population growth and development to low risk locations, being those locations assessed as having a radiant heat flux of less than 12.5 kilowatts/square metre under *AS 3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009).
 - Ensuring the availability of, and safe access to, areas assessed as a BAL-LOW rating under *AS 3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009) where human life can be better protected from the effects of bushfire.

- Ensuring the bushfire risk to existing and future residents, property and community infrastructure will not increase as a result of future land use and development.
- Achieving no net increase in risk to existing and future residents, property and community infrastructure, through the implementation of bushfire protection measures and where possible reducing bushfire risk overall.
- Assessing and addressing the bushfire hazard posed to the settlement and the likely bushfire behaviour it will produce at a landscape, settlement, local, neighbourhood and site scale, including the potential for neighbourhood-scale destruction.
- Assessing alternative low risk locations for settlement growth on a regional, municipal, settlement, local and neighbourhood basis.
- Not approving any strategic planning document, local planning policy, or planning scheme amendment that will result in the introduction or intensification of development in an area that has, or will on completion have, more than a BAL-12.5 rating under *AS3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009).

- 209 These strategies are more specific to settlement planning. They continue to prioritise protection of human life. However, in their implementation, there is an emphasis on directing population growth to areas of low risk, which are identified as areas that have a radiant heat flux less than 12.5 kilowatts per square metre or Bushfire Attack Level of 12.5 (BAL 12.5), based on the Australian Standard *AS3959-2009 - Construction of Buildings in Bushfire-prone Areas*. Similarly, amendments should not be approved where they result in intensification of development in locations which have more than BAL 12.5.
- 210 Other strategies also seek to ensure safe access to BAL-LOW areas or safe havens where life can be protected from bushfires and ensuring that there are no increases in risk exposure from bushfires for existing and future residents, property and communities.
- 211 Despite the proposal for creation of on-site defensible space equivalent to a BAL 29 rating in combination with the other bushfire mitigation measures, we do not accept that these measures produce an acceptable outcome with regards to bushfire risk and the protection of human life. The local area is a forest environment with a single point of access, which we have concluded is not a legal form of access and which is itself lined with vegetation. The site is not what the policy describes as a low risk location. It is quite the opposite, as demonstrated by past fire history.
- 212 The facts are clear in terms of the past impacts on the site from bushfire. We are also mindful of the 'game changing' nature of the events of Black Saturday. The loss of life and the damage left behind from that event

should not be forgotten and despite the heartache, orderly planning should not be compromised by a continuance of poor planning decision making.

- 213 We find there is a combination of elements that, together, lead us to conclude the proposal is not appropriate with regards to bushfire risk and does not result in an acceptable outcome. Rather, by locating a new dwelling in an area of such high risk, we consider that risk to future residents will increase, which is contrary to the strategies of the planning scheme.
- 214 The provisions under clause 53.02 outline a rather automated approach to decision making that runs a risk of not appropriately considering the overall consequence of a decision to permit the use and development of the site for the purposes of a dwelling. Similar to biodiversity, planning for bushfire is not a 'tick the box' approach. Certainly, achieving compliance with the approved measures meets objectives under the clause and is very helpful in decision making, however any proposed use and development must also satisfy the policy framework, which guides decision making.
- 215 In this case, we find that the policy under clause 13.02-1S is unequivocal when it includes the strategy under *Protection of human life*, to direct development to low risk locations. The site is not a low risk location given the evidence and the commentary from the CFA regarding extreme bushfire risk. We consider attempts to offset the extreme risk of the site by providing a bushfire shelter and evacuating the site on Code Red days are not enough to reduce the extreme risk of bushfire that may occur and that did occur on Black Saturday, in an environment such as this.
- 216 Similarly, the same strategy also requires ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire. The uncertainty about the access track over unreserved Crown land compounds a failure to satisfy this policy strategy.

Conclusion about bushfire risk

- 217 The site is vacant, and it appears it has not been used for residential purposes for many decades. Allowing a dwelling on a site that is heavily vegetated and surrounded by forested areas, with reliance on a 400 metre long single lane track over Crown land for primary access (although there is no legal right of access by the owner or others), and with a permit applicant who has demonstrated a degree of non-compliance with an existing access licence, means that granting a permit is not appropriate.
- 218 Accordingly, we determine that no permit should be granted under the BMO.

Integrated decision making in the context of bushfire risk

- 219 Whilst these findings are sufficient to set aside the council's decision, we wish to make some final observations about the application of the principles

of integrated decision making set out in clause 71.02-3 to the circumstances of this case in the context of bushfire risk.

- 220 This is a bushfire affected area where the protection of human life must be prioritised over other policy considerations. What is required to protect human life takes priority over protection of biodiversity or conservation. However, this does not mean that you can ignore all these other policy objectives.
- 221 The measures proposed by the permit applicant in his attempts to maximise bushfire protection, in terms of the amount of clearing round the dwelling and the amount of earthworks required for the swimming pool and water tanks, will be contrary to many of the policy objectives relating to the environment, biodiversity and water quality. We do not accept that the requirement to prioritise the protection of human life provides a justification for ignoring these objectives or nullifying them.
- 222 This is made clear in clause 13.02-1S, which provides as follows:

Areas of biodiversity conservation value

Ensure settlement growth and development approvals can implement bushfire protection measures **without unacceptable biodiversity impacts** by discouraging settlement growth and development in bushfire affected areas that are important areas of biodiversity.

Use and development control in a Bushfire Prone Area

When assessing a planning permit application for [accommodation]:

- Consider the risk of bushfire to people, property and community infrastructure.
- Require the implementation of appropriate bushfire protection measures to address the identified bushfire risk.
- Ensure new development can implement bushfire protection measures **without unacceptable biodiversity impacts**.

[Tribunal emphasis]

- 223 In other words, a balance is required. Whilst it is recognised that bushfire protection measures may impact on biodiversity, the impacts must be acceptable.
- 224 If the Tribunal takes the view, as Senior Member Hewet did in the *McRae* case, that this proposal is antithetical to prioritising human life, this is a sufficient reason in itself to refuse to grant a planning permit. However, in applying the principles of integrated decision making set out in clause 71.02-3, we reach the conclusion that the proposal also fails to achieve the objectives of net community benefit and sustainable development for the benefit of present and future generations. This is in addition to our finding that it would not, in this bushfire affected area, where planning and responsible authorities must prioritise the protection of human life over all other policy considerations, achieve this objective either. Rather, to grant a

permit in this case would prioritise residential development at the expense of the protection of human life.

CONCLUSION

Requirement for consent to all planning permit triggers

225 We have previously set out the principles we must follow in determining whether to grant a permit for this proposal. Those principles were summarised in the *1045 Burke Road* case as follows:

- A permit must not be granted unless the requirements under each permission are satisfied with or without permit conditions.
- Where the decision-maker is of the view that no permit should issue under one or more applicable controls, the proposal cannot proceed.
- Even if requirements under each permission are satisfied, a permit must not be granted unless the proposal would result in an acceptable planning outcome.

226 We have determined that no permit should be granted in respect of any of the development permissions required under the planning scheme. In addition, we have found that the grant of a permit for the use proposed for a dwelling is prohibited under the RCZ provisions.

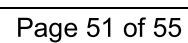
227 Accordingly, a permit must not be granted for this proposal.

228 For all of these reasons, the decision of the responsible authority is set aside. No permit is granted.

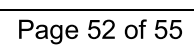
Helen Gibson, AM
Deputy President

Christopher Harty
Member

Contour plan of site and surrounding area – produced by DELWP

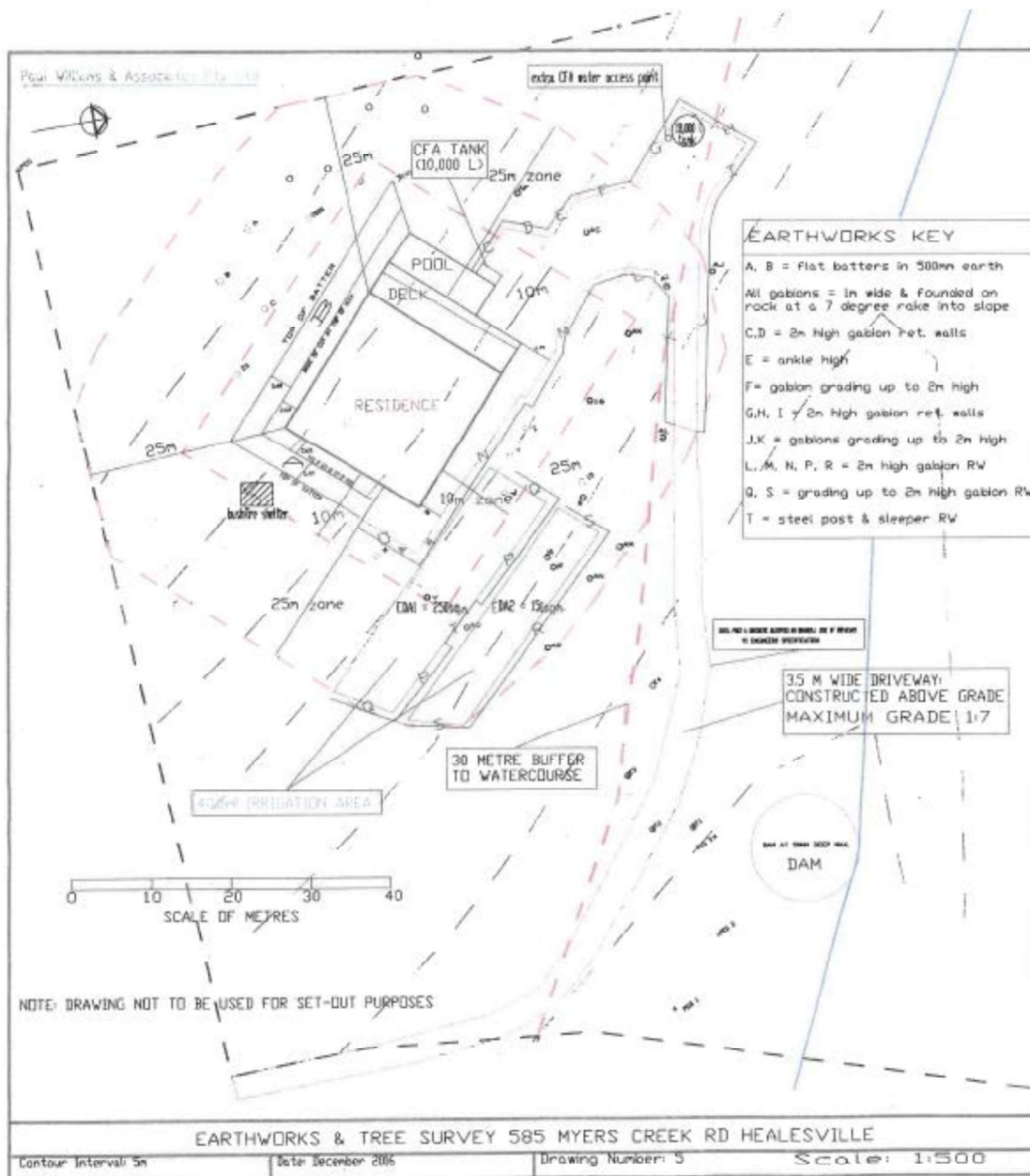


Copy of site plan submitted with permit application

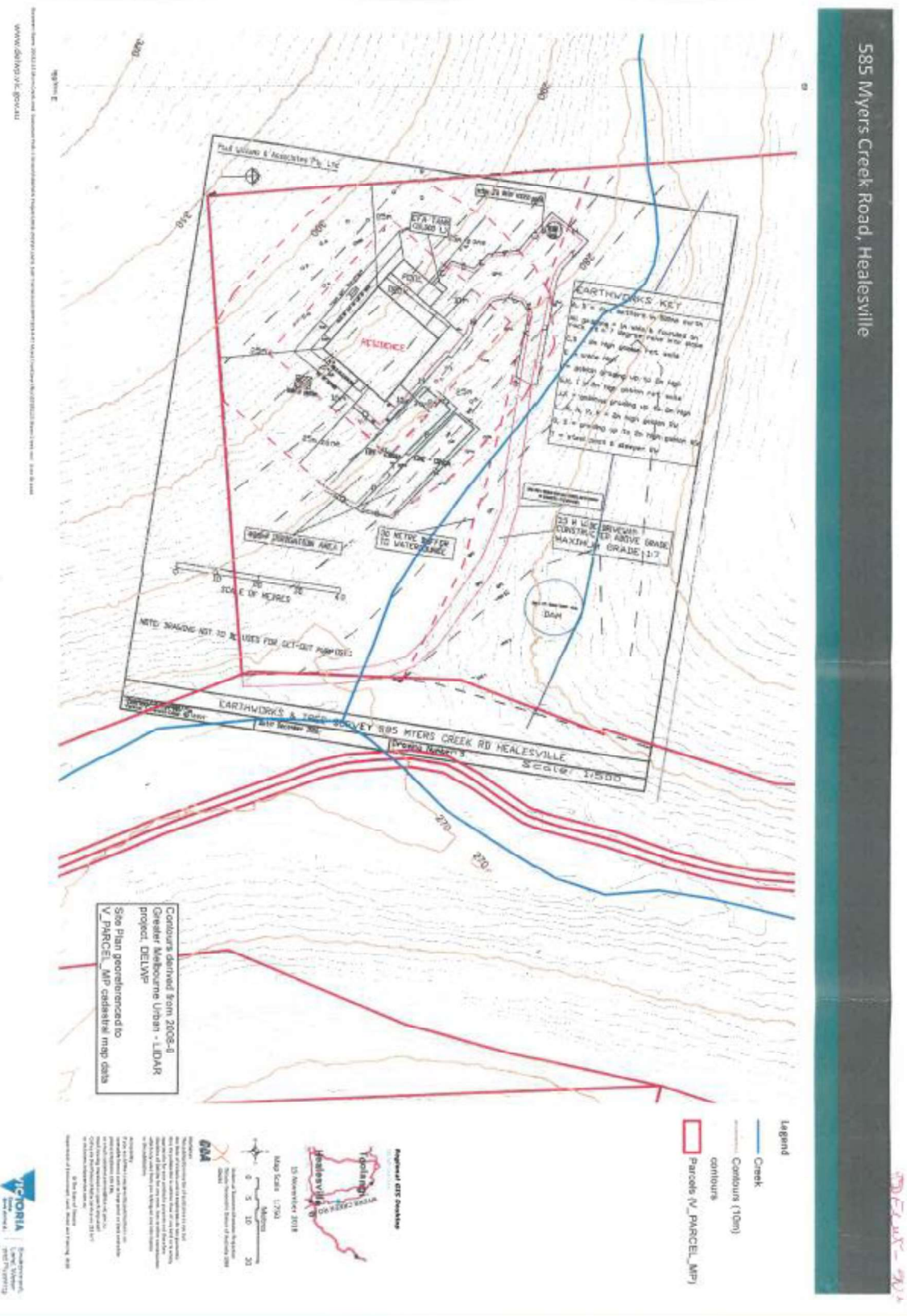


APPENDIX C

Copy of layout plan for dwelling submitted with permit application

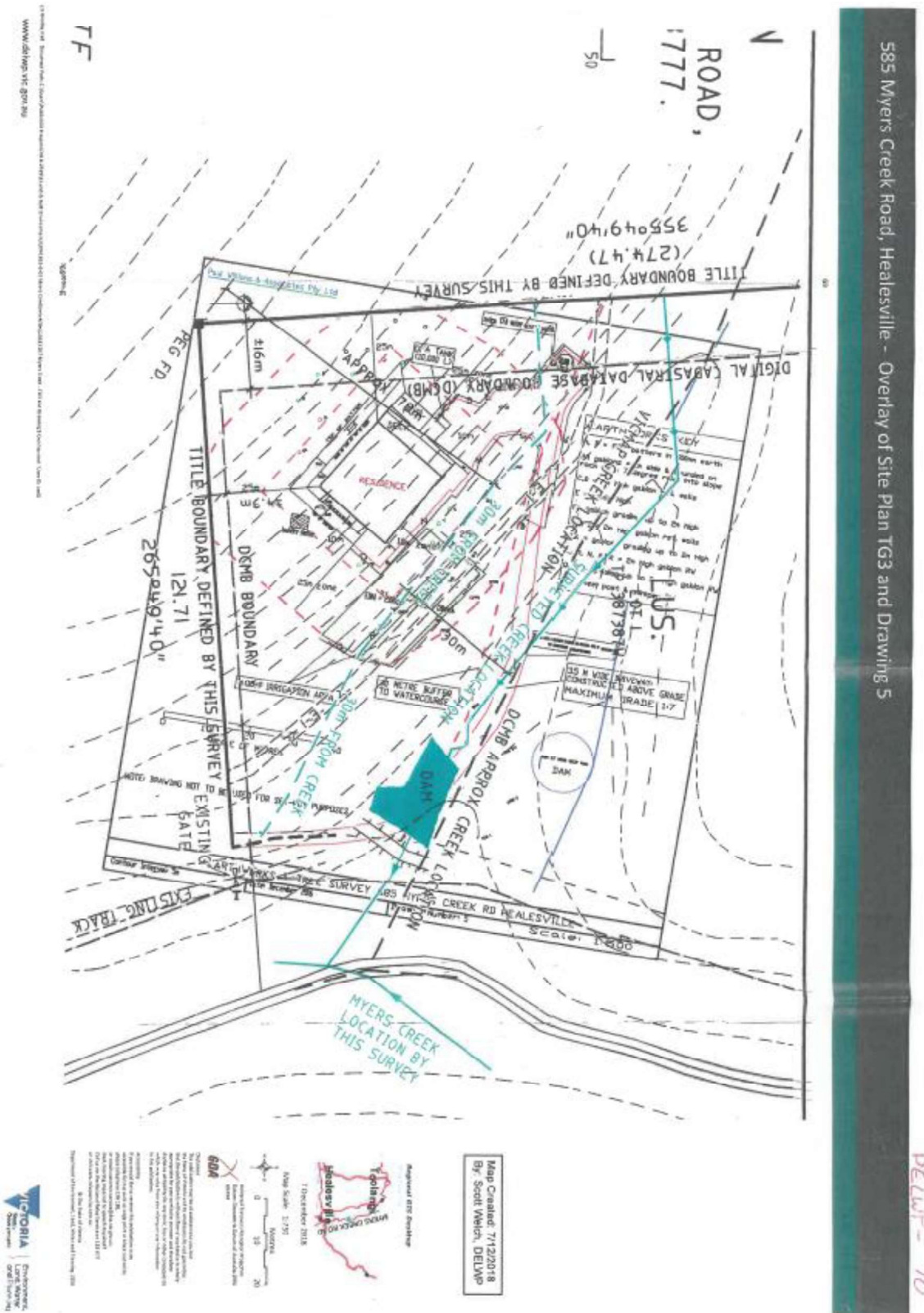


**Copy of layout plan for dwelling submitted with permit application
overlayed onto contour plan submitted by DELWP**



APPENDIX E

Copy of overlay of site plan TG3 and drawing 5 produced by DELWP



VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1992/2018
PERMIT APPLICATION NO. 5.2017.149.1

CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Alpine Planning Scheme; Low Density Residential Zone; Bushfire Management Overlay; Subdivision; Bushfire Risk.

APPLICANT

Alpine Valley Developments Pty Ltd

RESPONSIBLE AUTHORITY

Alpine Shire Council

REFERRAL AUTHORITIES

Country Fire Authority, Department of Environment, Land, Water and Planning

SUBJECT LAND

1 Bakers Gully Road, Bright

WHERE HELD

Melbourne

BEFORE

Bill Sibonis, Member

HEARING TYPE

Hearing

DATE OF HEARING

7 May, 2019

DATE OF ORDER

14 June, 2019

CITATION

Alpine Valley Developments Pty Ltd v Alpine SC [2019] VCAT 835

ORDER

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: Tomkinson Group
 - Drawing numbers: W1013-CP01/03, W1013-CP02/03, W1013-CP03/03
 - Revision: B
 - Dated: 12/03/19
- 2 In application P1992/2018 the decision of the responsible authority is affirmed.
- 3 In planning permit application 5.2017.149.1 no permit is granted.

Bill Sibonis
Member

APPEARANCES

For Alpine Valley
Developments Pty Ltd

Ms J Sharp of Counsel instructed by Norton
Rose Fulbright Australia. She called evidence
from:

- Mr M Looby, Senior Ecologist, Biosis Pty
Ltd
- Mr H Allan, Manager Bushfire Planning
and Design, Terramatrix Pty Ltd

For Alpine Shire Council

Mr P Newman, Town Planner of PLN Planning
Pty Ltd

For Country Fire Authority

Mr S Foster, Land Use Planning Program
Leader and Mr G Cockram, Fire Safety
Coordinator

INFORMATION

Description of proposal	A six-lot subdivision and removal of native vegetation.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Alpine Planning Scheme
Zone and overlays	Low Density Residential Zone (LDRZ) Bushfire Management Overlay (BMO)
Permit requirements	Cl. 32.03-3 (subdivision of land in LDRZ) Cl. 44.06-2 (subdivision of land in BMO) Cl. 52.17 (removal of native vegetation)
Relevant scheme policies and provisions	Cl. 12.01, 13.02, 21, 22.01, 32.03, 44.06, 53.02 and 65
Land description	The review site is located on the western side of Bakers Gully Road, approximately 1.2 - 1.5 kilometres south of the Bright township. It is an irregular lot with a frontage of 75 metres, a maximum depth of 305 metres and an area of some 2.878 hectares. With the exception of a stand of native vegetation at its western end, the land is largely cleared. The property has a slope from west to east. To the north is a nine-lot subdivision, forming part of an estate known as Faulkner Rise. At present, eight dwellings have been, or are in the process of being, constructed. These lots are substantially cleared of vegetation. To the east is forest surrounding Bakers Gully Creek. To the west and south is Crown Land which comprises large, managed plantations which display varying rates of growth.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 This proceeding concerns the refusal of the Alpine Shire Council (**Council**) to grant a planning permit for the subdivision of the land at 1 Bakers Gully Road in Bright (**review site**) into six lots and for the removal of native vegetation. The grounds of refusal refer to a failure to address bushfire risk; and the inconsistency of the proposal with clause 52.17, native vegetation. These grounds arise from referral comments received from the Country Fire Authority (**CFA**) and the Department of Environment, Land, Water and Planning (**DELWP**) during the Council's assessment of the planning application.
- 2 Prior to the hearing, having reviewed the further information provided in Mr Looby's evidence statements,² DELWP advised that it does not object to the grant of a permit, subject to conditions. On this basis, the Council did not pursue the related ground of refusal. Consequently, the Council confined its concerns to bushfire-related matters.
- 3 The key issue in this proceeding is whether the proposal is an acceptable planning outcome having regard to bushfire considerations.
- 4 Having considered the submissions and evidence, with regard to the relevant planning policies and provisions of the Alpine Planning Scheme (**Planning Scheme**), I have determined to affirm the Council's decision. My reasons follow.

WHAT IS THE RELEVANT HISTORY OF THE REVIEW SITE?

- 5 The review site is Lot 10 in the Faulkner Rise subdivision, with the remaining nine lots of this estate being to the north. The application which resulted in the grant of a planning permit for this subdivision was lodged with the Council in 2010. In its original form, the application proposed 13 lots. According to the Council's submission, the CFA consented to the subdivision on the basis of a Wildfire Management Statement prepared by Terramatrix Pty Ltd, which concluded that the necessary level of fire safety would be met if a vegetation management regime was in place and future dwellings were built to a construction standard of BAL³ 29. A planning permit (No. 2010.120.1) was subsequently issued by the Council and authorised a 13 lot subdivision, removal of native vegetation and the creation of an easement. The CFA conditions addressing the provision of hydrants, access, vegetation management and building envelopes were

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 The Flora and Fauna Assessment dated 18 April 2019 and the Expert Evidence Statement dated 22 April, 2019.

³ Bushfire Attack Level.

included. Conditions included a requirement that the owner enter into an agreement with the Council pursuant to section 173 of the *Planning and Environment Act 1987 (Act)*. That agreement is dated 2 October 2012 and details the following ‘covenants of the owner’:

- that the owner will notify all future owners that the surrounding land is used for plantation forestry which may generate noise, dust, truck movements and loss of visual amenity from time to time
- that the owner will maintain the vegetation on the land to the following standard during the declared fire danger period each year to the satisfaction of the responsible authority:
 - grass must be no more than 100mm in height
 - leaf litter must be less than 20mm deep
 - there must be no elevated fuel on at least 50% of the area
 - clumps of dry native shrubs must be isolated from one another by at least 10 metres.

6 In 2014 an application was made to amend the permit. The amendment reduced the number of lots from 13 to 10, with the review site being Lot 10 in that subdivision. Lot 10 was retained as a large lot at the southern end of the subdivision, with the building envelope and defensible space at the eastern end and existing native vegetation at the western end. The application was accompanied by a Bushfire Hazard Landscape Assessment, Bushfire Management Plan, Bushfire Management Statement and Native Vegetation Assessment.

7 The Council’s submission details the outcome of that amendment application as follows:

The CFA’s position in relation to the amended plan of subdivision was that it neither consented to nor opposed the proposed subdivision, but highlighted the significant fire risk to the subject site and suggested measures be taken to increase “building resilience” including requiring certain elements of future buildings to be designed to a BAL-29 construction standard.

On the basis of the CFA’s advice, Council amended the permit conditions relating to the required Section 173 Agreement to require (amongst other things) that the entirety of all buildings were to be built to a BAL 29 standard. The placement of stricter bushfire conditions on the permit to increase future dwellings’ resilience to bushfire was considered an acceptable outcome.

8 The amended plan was endorsed on 7 November 2014 and the section 173 Agreement was entered into on 3 December 2015.⁴ Lots 1 to 9 have been

⁴ The parties submitted that, on the basis of the Section 173 Agreement, a permit is not required pursuant to the provisions of the BMO to construct one dwelling on the land. The Agreement, in part, states “...the Section 173 Agreement has been prepared for the purposes of an exemption from a Planning Permit under clause 44.06-1 of the Alpine Planning Scheme”.

sold and, as indicated earlier have been, or are in the process of being, developed for single dwellings.

- 9 A planning application to subdivide the review site (Lot 10) into 10 lots and to remove vegetation was lodged with the Council in September 2017. The Council described the proposal as follows:

The proposal would have seen the entire site subdivided, including the vegetated land in the western portion of the site. A perimeter access road was to have been built around the south and west sides of the lot to provide access whilst at the same time providing an additional separation between the forested areas to the south and west and the subdivision.

- 10 Subsequent to the giving of notice, the proposal was amended to a six-lot subdivision, now being the subject of this review application. Lots 1, 2, 4 and 5 range in size between 2019 square metres and 2393 square metres; Lot 3 is 3614 square metres; and Lot 6 has an area of 10,231 square metres as it retains the stand of native vegetation at the western end of the site. The proposed subdivision and the need to satisfy defensible space requirements will necessitate the removal of 1.382 hectares of native vegetation.
- 11 As required by the provisions of clause 44.06-6, the application was referred to the Country Fire Authority⁵ for comment. The CFA provided the following response:

Given the amount and extent of surrounding vegetation, bushfires in the broader landscape are likely to be of a large scale, difficult to extinguish and spread rapidly and likely to impact the site with significant intensity.

The site is likely to be subjected to mass ignition from embers (leading to firestorm conditions) that will create an area of fire that potentially exposes the development to high levels of radiant heat and direct flame contact.

The application for an additional six (6) lots will add a significant number of additional people into a landscape that gives rise to a very high bushfire risk. Access to an area of relative safety (Bright Township) is also poor.

WHAT IS THE RELEVANT PLANNING CONTEXT?

- 12 The Planning Scheme provides a comprehensive framework comprising policies, provisions and decision guidelines which require the consideration of bushfire hazard in the assessment and determination of applications, where such a hazard is relevant, as is the case here given the site is located in a Bushfire Prone Area (**BPA**) and a BMO. Underpinning these is the Planning Scheme imperative that the protection of human life must be prioritised.

⁵ Pursuant to clause 66.03, the CFA is a recommending referral authority.

- 13 In this section, I set out the relevant parts of the Planning Scheme as a basis for the assessment of the application which follows later in these reasons.

Planning Policy Framework

- 14 The Planning Policy Framework addresses bushfire planning at clause 13.02-1S. The policy applies to all planning and decision making under the Act relating to land which is within a designated BPA, subject to a BMO, or proposed to be used or developed in a way that may create a bushfire hazard. The review site is within both a BMO and a designated BPA.
- 15 The objective of clause 13.02-1S is:
- To strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.
- 16 The related strategies are set out under five headings, namely 'Protection of human life', 'Bushfire hazard identification and assessment', 'Settlement planning', 'Areas of biodiversity conservation value' and 'Use and development control in Bushfire Prone Area'.
- 17 The first of these strategies reads:

Protection of human life

Give priority to the protection of human life by:

- Prioritising the protection of human life over all other policy considerations.
 - Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.
 - Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.
- 18 The second strategy is:
- Identify bushfire hazard and undertake appropriate risk assessment by:
- Applying the best available science to identify vegetation, topographic and climatic conditions that create a bushfire hazard.
 - Considering the best available information about bushfire hazard including the map of designated bushfire prone areas prepared under the *Building Act 1993* or regulations made under that Act.
 - Applying the Bushfire Management Overlay to areas where the extent of vegetation can create an extreme bushfire hazard.
 - Considering and assessing the bushfire hazard on the basis of:
 - Landscape conditions - meaning conditions in the landscape within 20 kilometres (and potentially up to 75 kilometres) of a site;

- Local conditions - meaning conditions in the area within approximately 1 kilometre of a site;
- Neighbourhood conditions - meaning conditions in the area within 400 metres of a site; and
- The site for the development.
- Consulting with emergency management agencies and the relevant fire authority early in the process to receive their recommendations and implement appropriate bushfire protection measures.
- Ensuring that strategic planning documents, planning scheme amendments, planning permit applications and development plan approvals properly assess bushfire risk and include appropriate bushfire protection measures.
- Not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measures can be adequately implemented.

Municipal Strategic Statement

19 Within the Municipal Strategic Statement (**MSS**), objectives and strategies in respect of environmental risks are detailed at clause 21.04-4. Here, the MSS recognises that bushfire hazard is a significant issue in many parts of the Shire, with large sections affected by the BMO. It identifies that the bushfire risks are largely due to the dense vegetation cover, difficulty of access for emergency vehicles and the exposure of development at the rural/urban interface. Objectives include:

- managing risks, including bushfire, flooding and land slip to avoid adverse consequences on the natural and man-made environment
- ensuring that land use and development addresses relevant site context and natural features, including the potential for bushfire, flooding and land slip risk
- facilitating a risk-based approach to land use planning in areas subject to environmental risk
- implement bushfire risk assessment and mitigation in land use planning.

20 Relevant strategies are:

- ensure that environmental risks, constraints and hazards are fully considered in proposals for the use and development of land
- ensure that decisions on strategic and settlement planning prioritise the protection of human life over other policy considerations and apply the precautionary principle when assessing the risk to life, property and community infrastructure from bushfire

- strengthen community resilience to bushfire by ensuring that bushfire protection measures are considered and given effect to in decision making
- implement bushfire risk assessment and mitigation measures to:
 - reduce the overall bushfire risk to communities
 - minimise risk to life and property from bushfire through the appropriate location, design and management of uses and developments
 - ensure that bushfire protection measures are implemented for uses and developments to ensure an acceptable bushfire risk level to life and property
 - integrate bushfire risk management and protection of human life in the consideration of land use and development.

21 Implementation measures include:

- all applications for development or land use will be required to consider factors such as proximity to any areas posing a potential environmental risk and the need for appropriate buffers between those areas of risk and development
- ensure that residential development is not located on land considered a bushfire risk environment where residential development and use of land will intensify the risk and/or require a Bushfire Attack Level rating in excess of 29.

Bushfire Management Overlay

22 In addition to implementing the Planning Policy Framework and the Municipal Planning Strategy, the purpose of the BMO is:

To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.

To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.

To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.

23 The application requirements set out at clause 44.06-3 are:

- A **bushfire hazard site** assessment including a plan that describes the bushfire hazard within 150 metres of the proposed development. The description of the hazard must be prepared in accordance with Sections 2.2.3 to 2.2.5 of AS3959:2009 Construction of buildings in bushfire prone areas (Standards Australia) excluding paragraph (a) of section 2.2.3.2. Photographs or other techniques may be used to assist in describing the bushfire hazard.

- A **bushfire hazard landscape assessment** including a plan that describes the bushfire hazard of the general locality more than 150 metres from the site. Photographs or other techniques may be used to assist in describing the bushfire hazard. This requirement does not apply to a dwelling that includes all of the approved measures specified in Clause 53.02-3.
- A **bushfire management statement** describing how the proposed development responds to the requirements in this clause and Clause 53.02. If the application proposes an alternative measure, the bushfire management statement must explain how the alternative measure meets the relevant objective.

24 Pursuant to clause 44.06-4, an application must meet the requirements of clause 53.02, Bushfire Planning. Clause 44.06-5 details the mandatory conditions which must be included in a permit.

Clause 53.02, Bushfire Planning

25 The purpose of clause 53.02, in addition to implementing the Planning Policy Framework and the Municipal Planning Strategy is:

To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.

To ensure that the location, design and construction of development appropriately responds to the bushfire hazard.

To ensure development is only permitted where the risk to life, property and community infrastructure from bushfire can be reduced to an acceptable level.

To specify location, design and construction measures for a single dwelling that reduces the bushfire risk to life and property to an acceptable level.

26 The subdivision objectives are detailed at clause 53.02-4 and are:

To provide lots that are capable of being developed in accordance with the objectives of Clause 53.02.

To specify at the subdivision stage bushfire protection measures to develop a lot with a single dwelling on land zoned for residential or rural residential purposes.

27 A series of Approved Measures, being measures which satisfy the objectives, is provided.

28 The decision guidelines, which must be considered in addition to those at clause 65 before deciding on an application are set out at clause 53.02-4.5 as follows:

- The Municipal Planning Strategy and the Planning Policy Framework. [sic]

- The bushfire hazard landscape assessment, the bushfire hazard site assessment and the bushfire management statement submitted with the application.
- The impact of any State, regional or local bushfire management and prevention actions occurring around the site and in the wider area on the bushfire hazard and the level of risk to the proposed development.
- Whether the proposed development meets the objectives of Clause 53.02-4 regardless of other measures which may be available, including private bushfire shelters, community shelters and the presence of places of last resort.
- Whether the proposed measures can be practically implemented and maintained in conjunction with the ongoing use of the land.
- Whether the use of an alternative measure meets the relevant objective having regard to the bushfire hazard and the nature of any constraint that prevents the applicable approved measure from being implemented.
- If one or more of the objectives in Clause 53.02-4 will not be achieved in the completed development, whether the development will, taking all relevant factors into account, reduce the bushfire risk to a level that warrants it proceeding.
- Whether the risk arising from the broader landscape can be mitigated to an acceptable level or warrants the development not proceeding.

WHAT IS THE BUSHFIRE RISK IN THIS LOCATION?

- 29 As provided in clause 44.06-3, the consideration of bushfire risk involves two assessments: a Bushfire Hazard Site Assessment and a Bushfire Landscape Assessment.

Bushfire Hazard Landscape Assessment

- 30 The Bushfire Landscape Assessment describes the bushfire hazard of the general locality more than 150 metres from the site. In undertaking this assessment, both the CFA and Mr Allan referred to the DELWP Technical Guide *Planning Permit Applications Bushfire Management Overlay (BMO Technical Guide)*.
- 31 The BMO Technical Guide describes four broader landscape types, which are intended to streamline decision making and support more consistent decision making based on the risk from the landscape beyond the site. These four landscape types are summarised in the table below:

Type 1	Type 2	Type 3	Type 4
<p>There is little vegetation beyond 150 metres of the site (except grasslands and low threat vegetation).</p> <p>Extreme bushfire behaviour is not possible.</p> <p>The type and extent of vegetation is unlikely to result in neighbourhood-scale destruction of property.</p> <p>Immediate access is available to a place that provides shelter from bushfire.</p>	<p>The type and extent of vegetation located more than 150 metres from the site may result in neighbourhood-scale destruction as it interacts with the bushfire hazard on and close to a site.</p> <p>Bushfire can only approach from one aspect and the site is located in a suburban, township or urban area managed in a minimum fuel condition.</p> <p>Access is readily available to a place that provides shelter from bushfire. This will often be the surrounding developed area.</p>	<p>The type and extent of vegetation located more than 150 metres from the site may result in neighbourhood-scale destruction as it interacts with the bushfire hazard on and close to a site.</p> <p>Bushfire can approach from more than one aspect.</p> <p>The site is located in an area that is not managed in a minimum fuel condition.</p> <p>Access to an appropriate place that provides shelter from bushfire is not certain.</p>	<p>The broader landscape presents an extreme risk.</p> <p>Fires have hours or days to grow and develop before impacting.</p> <p>Evacuation options are limited or not available.</p>

32 The CFA and Mr Allan agree that the landscape surrounding the review site best accords with Landscape Types 3 and 4. The CFA submitted that the landscape has the following characteristics:

- the broader landscape presents an extreme risk
- fires have hours or days to grow and develop before impacting
- bushfires can approach from more than one aspect
- the site is located in an area that is not managed in a minimum fuel condition

- access to an appropriate place that provides shelter from bushfire is not certain.

33 The CFA submitted that the site is located in a landscape of extreme bushfire risk with almost unbroken, steeply dissected terrain containing significant forest fuels in all directions. It observed that such terrain exists in excess of 100 kilometres to the south and south-west, submitting that very long fire runs of up to 30 kilometres could potentially impact the site. The CFA further observed that such topography exists to the north and north-west and while acknowledging that the valley floors largely comprise lower fuels in the form of cropped and grazing land and townships, a large landscape fire in extreme wind conditions may blow embers and cause spot fires kilometres from the bushfire front.

34 In respect of this issue, Mr Allan's evidence is:

The site is relatively close to the Bright [sic] and therefore reasonable access to the relatively lesser risk location of the township is available. At the broader landscape scale, to the north and, to a lesser extent, the northwest, which are directions typically associated with severe or higher fire weather (and therefore, arguably the directions of highest risk), the site is buffered somewhat by the cleared land that extends along the western side of Bakers Gully Road, and further north and northwest by the township itself.

However, on three sides the site abuts forest that extends for many kilometres in the wider landscape, often on steep and variable terrain. Large landscape fires could have a long time to develop and could build to a significant intensity with fire behaviour above and beyond the default assumptions that underpin the BMO-AS 3959 model. The extensive BMO coverage of the surrounding landscape is indicative of the high risk landscape.

Bushfire Hazard Site Assessment

35 According to the BMO Technical Guide, the Bushfire Hazard Site Assessment documents the fire hazard on or near a site, within 150 metres. It provides factual information on the bushfire hazard (vegetation type and slope); informs defensible space and building requirements; and is informed by the methodology contained in AS3595:2009 *Construction of buildings in bushfire prone areas* (AS3595:2009).

36 The CFA submitted that the highest threat vegetation within the 150 metre local assessment area is *forest* comprising the pine plantations and the native vegetation, located to the west, south and east. To the north is the Faulkner Rise subdivision which is classified as low threat, and modified forest vegetation further north. The CFA considered that the local scale bushfire threat is diminished to a degree by the upslope of the terrain to the north, south and west, and the presence of fuel reduced areas like the adjoining subdivision. The CFA maintained that the local factors which

diminish risk are substantially exceeded by the extreme risk posed by the wider landscape.

37 Mr Allan's assessment may be summarised as follows:

Areas of tree and shrub vegetation to the west, east and south of the review site are classified as *forest*.

- Vegetation immediately to the south (and to a lesser extent to the west) is largely modified vegetation due to the general lack of tree cover in the land between the edge of the plantations. The presence of modified vegetation is not an influence on the BAL construction standard and defensible space due to the proximity of the higher hazard forest vegetation.
- It is reasonable to assume that the land in the subdivision to the north will comprise low threat vegetation.
- The topography within 150 metres is relatively benign, being upslope⁶ or flat, except for a downslope to the east. The topography in the wider landscape is significant and a likely contributor to intense fire behaviour.

With respect to Fire Management Zones:

- large areas of forest more than 1 kilometre to the south are managed as an Asset Protection Zone, which aims to provide the highest level of localise protection to human life and property. The goal of fuel treatment in this zone is to reduce radiant heat and ember attack in the event of a bushfire, and involves a combination of planned burning and other methods such as mowing, slashing or vegetation removal
- two areas to the south of Bright and to the north-east and north-west are in a Bushfire Moderation Zone. This zone aims to reduce the speed and intensity of bushfires. The use of planned burning in this zone is designed to protect nearby assets, particularly from ember spotting during a bushfire
- to the immediate east of the site, land is in a Landscape Management Zone, where planned burning is used to reduce the overall fuel and bushfire hazard; achieve ecological resilience; and manage land for particular values, including forest regeneration and protection of water catchments at a landscape level.

38 The information contained in the evidence shows that within a one-kilometre radius of the site, sections of land to the north-west and north-east are in a Bushfire Moderation Zone, while the land to the immediate east is in a Landscape Management Zone. The remaining land within the one-kilometre radius is not shown as being in a Fire Management Zone.

⁶ According to the evidence, fires burning on an upslope (downhill) will generally be moving more slowly with a reduced intensity.

Bushfire Management Statement

39 Having undertaken a Bushfire Hazard Landscape Assessment and a Bushfire Hazard Site Assessment, Mr Allan prepared a Bushfire Management Statement (**BMS**) which forms part of this evidence. The BMS is said to identify how the proposed development responds to the bushfire risk and the BMO provisions at clause 44.06 and clause 53.02. The BMS states:

...the landscape is one of significant bushfire risk where bushfire behaviour may exceed BMO expectations and design parameters. Accordingly, additional protection measures are proposed to mitigate the risk, based on a higher construction standard for all dwellings (and other buildings requiring a BAL), with increased defensible space to maximise the setbacks from hazardous vegetation, and hence to reduce radiant heat to acceptable limits and eliminate the possibility of flame contact.

40 According to the evidence, this approach is appropriately precautionary as espoused in local policy and is in accordance with the CFA guidance for development proposals in higher risk landscapes, with reference being made to the guidance provided in the CFA guideline *Applying the Bushfire Management Overlay* with respect to development proposals in higher risk landscapes. This includes increasing the level of defensible space, enhancing the level of construction, enhancing the building's resistance to strong winds, building to a higher BAL and determining flame length to avoid direct flame contact.

41 The BMS states that whilst large and intense landscape fires could develop and impact the site, occupants will in all likelihood have significant advance warning of such a fire to enable early evacuation from the site, and notes that the site is not considered remote from the main township area.

42 The BMS refers to the following:

- siting which exceeds the default BMO setback requirements for defensible space. Additional defensible space is proposed by applying enhanced design fire conditions
- building envelopes that are close to the road, and access and egress can comply with the requirements for emergency vehicles
- proposed defensible space distances which eliminate the potential for flame contact by ensuring that dwellings will be set back well beyond the flame length calculated for both the default and the more precautionary design fire conditions. The increased defensible space results in a reduced radiant heat flux that the buildings would be exposed to
- all lots will need to be provided with a 10,000 litre static water supply within 60 metres of the dwelling with CFA compliant access and fittings
- compliant driveways will need to be provided.

IS THE PROPOSED SUBDIVISION ACCEPTABLE WITHIN THE SITE'S CONTEXT?

- 43 As confirmed in the submissions and evidence, the site is located in an area of high bushfire risk. The evidence describes the risk as 'significant'. The CFA describes it as 'extreme'. This risk arises from the surrounding landscape, characterised by heavily vegetated forest, within a steep and variable terrain.
- 44 The CFA identified the two most recent landscape-scale bushfires to involve the alpine region within proximity to Bright as being:
- 2003 Eastern Victorian (Alpine) fires on 8 January. It was the largest fire in Victoria since the 1939 Black Friday fires that burnt for 59 days before being contained. It burnt 1.3 million hectares, 41 dwellings and more than 9000 livestock. Part of that fire affected Bright among a number of other townships in the alpine region.
 - 2013 bushfire affected the nearby townships of Harrietville, running for 55 days and burnt 37,000 hectares.
- 45 The aerial photography tendered by the CFA demonstrates that the landscape comprises forest ridges and valleys with minimal cleared areas. Within this context, large landscape fires may have a long time to develop and build to a significant intensity. As submitted by the CFA, such fires can develop strong convective energy and winds (even up to cyclonic strength) which are well beyond the assumptions of AS3959. Indeed, according to the CFA, the funnelling effect of the valley increases the momentum of the fire and associated winds to a level that can remove roofs and smash windows.
- 46 Although the CFA acknowledges the bushfire mitigation measures proposed in Mr Allan's evidence may address the local and neighbourhood conditions, it maintains that they do not adequately address the extreme broader landscape risk.
- 47 Policy at clause 13.02 confirms that the landscape is relevant in the consideration and assessment of bushfire hazard. As observed by the Tribunal in the matter of *Department of Environment, Land, Water and Planning v Yarra Ranges SC*:⁷
- 200 Clause 13.02-1S - *Bushfire planning* has the overall objective to strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life. Supporting this objective, the policy includes strategies relating to protection of human life, bushfire hazard identification and assessment, settlement planning, areas of biodiversity conservation value and use and development in a Bushfire Prone Area.

⁷

(Red Dot) [2019] VCAT 323

201 The concept of protecting human life as a policy priority is also given imperative under the policy requirement for *Integrated decision making* in clause 71.02-3 of the planning scheme. This principle sits alongside the other key integrated decision making principles of net community benefit and sustainable development as overarching principles in planning decision making.

202 Policy under clause 13.02-1S is to be applied to all planning and decision making under the Act where it relates to land in a Bushfire Prone Area, the BMO or where a proposed use or development may create a bushfire hazard. This gives the policy direct application to decision making associated with a range of matters including this proposal.

203 Under *Protection of human life*, the policy includes the following strategies:

Give priority to the protection of human life by:

- Prioritising the protection of human life over all other policy considerations.
- Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.
- Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.

204 These strategies reflect on the damage and destruction that a bushfire can have, including loss of life. It reinforces the priority to protect human life from bushfire. One only has to consider the devastation following bushfires such as Black Saturday (2009), Ash Wednesday (1983) and Black Friday (1939), to name a few, which have wreaked havoc with loss of life, property, infrastructure and biodiversity.

205 We note that these strategies relate to the overall aim of prioritising the protection of human life and the need to do so on a broad level for decision making at all stages of the planning process, which includes both strategic and statutory planning. In particular, the strategies support directing development to low risk locations and ensuring availability of safe access to areas away from bushfire threats.

206 The policy requires identification of bushfire hazard and appropriate risk assessment. This is done by, amongst other means:

- Applying best science to identify vegetation, topographic and climatic conditions that create bushfire hazards

- Applying the BMO where the extent of vegetation can create an extreme hazard
- Considering bushfire hazards on the basis of
 - landscape conditions within 20 kilometres and up to 75 kilometres of a site;
 - local conditions within 1 kilometre of a site;
 - neighbourhood conditions within 400 metres of a site; and
 - the site for development.
- Consulting with emergency management agencies and fire authority
- Ensuring planning permit applications, amongst others, properly assess bushfire risks and include appropriate bushfire protection measures
- Not approve development where an applicant or proponent has not satisfactorily addressed the bushfire policies and controls and demonstrated that bushfire protection measures can be adequately implemented.

207 These strategies seek to ensure that risk from bushfires is considered not solely from a site or immediate local perspective, but also from a wider landscape perspective, where often management of bushfire risk falls outside of the direct control of individual landowners. It relates to the nature, location and extent of vegetation (whether trees or grasses) and their influence on fires runs and the relationship between fire fronts forming in the landscape as well as fire speed and behaviour with respect to generation of ember attack and radiant heat formation and exposure.

- 48 The objective of clause 13.02-1S is to strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life. One of the strategies is to give priority to the protection of human life by (amongst others) directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire. This proposal does the opposite. There is no dispute between the parties that this locality is one of significant bushfire risk arising from the heavily vegetated and undulating topography, characterised by steep terrain. It is not a location to which population growth and development should be directed.
- 49 The applicant has sought to respond to this risk through the adoption of specific measures, such as increased defendable space. The evidence further suggested that construction to BAL40 could be achieved to provide greater resilience. Mr Allan acknowledged that increasing the number of

people could increase the risk, but said that this was true of any site affected by the BMO or is in a BPA. He went on to say what must be considered is the risk and the vulnerability, with an assessment being made to determine whether the proposed measures are adequate to mitigate the risk.

- 50 The mitigation measures, by their very nature, are confined to the review site itself. This is all that is in the applicant's control. The applicant has no control over the broader landscape and the management which may or may not be required to mitigate the risk. The CFA's submission included descriptions of catastrophic bushfire conditions which can emerge in a landscape such as this, as shown in the following extracts:

50. The proposed subdivision will further extend the existing rural residential development of Bright into the 'head' of the valley it is situated [sic] exposing future inhabitants to significant risks on a bad bushfire weather day. The worst scenario would be strong winds and a fire storm impacting the site from the south or north-west, with its momentum intensified through the funnelling of the wind and embers into the valley.

51. As mentioned earlier in this submission, the nature of the mountainous terrain in the landscape, combined with potentially cyclonic winds as witnessed on Black Saturday, can also increase the unpredictability of a bushfire.

- 51 The effect of a large-scale landscape bushfire would not be mitigated by the measures proposed. As Mr Allan stated in response to questioning, if such a bushfire event were to materialise, occupants would need to evacuate. He considers that occupants would in all likelihood have significant advance warning of a large and intense bushfire to enable early evacuation of the site. The CFA does not agree, stating:

54. ... in the case of a large, fast moving fire some residents may not receive sufficient warning of its approach, and some may desire to stay and defend their property, however change their minds late for a number of reasons. Caution should be applied when relying on the logic of human behaviour to evacuate early, in extreme bushfire and storm conditions.

55. Prior to the arrival of a fire front, the area may be exposed to very strong winds, laden with debris and lighted materials, with visibility low due to smoke. If occupants of this and other subdivisions along Bakers Gully are attempting to evacuate at the same time in that environment (especially late leavers), then the seemingly short trip into the centre of town bordered partly by forest, could be an extremely hazardous journey. History is a sad testament to the significant number of people that have perished in cars, fleeing a bushfire too late.

- 52 The applicant submitted that the site is not remote from the Bright township, access is via a single road which is flanked by high-fuel forest on its eastern side. The submissions and evidence did not identify an

alternative access route to the township, and the nearest place of relative safety.

- 53 The CFA noted the proximity to Bakers Gully Road but emphasised:
- A late evacuation by residents into the Bright township along that road, partly fringed by vegetation, may be perilous due to the speed and intensity of a landscape scale bushfire, combined with firestorm conditions, catching them on the road.
 - Due to the location of the site approximately 1.5 km from the centre of Bright, within a valley fringed by significant vegetation, there is no guarantee that fire appliance personnel would be able to attend and defend the subdivision, if impacted by a bushfire, having regard to their own safety.
- 54 While noting that the road is bituminised, in good condition and level, Mr Allan stated that roads are not designed to be used 'last minute' and that it would not be safe to evacuate late or during a bushfire. Further, while observing that fires from the east are not associated with high-risk days, he acknowledged that a tree could fall across the road at any time. In the event that Bakers Gully Road was obstructed, such as by a fallen tree, there is no alternative access which could be utilised by occupants seeking to evacuate to Bright.
- 55 I agree with the CFA. The sole means of access to the township is along a relatively narrow road which traverses partly forested areas. Given the potential for this access to be obstructed during a bushfire event by fallen trees or the like, access to a place of relative safety is not certain. The lack of certainty that fire-fighting personnel will attempt to access the subdivision in such an event adds to the unacceptability of the outcome.
- 56 Planning policy in respect of bushfire planning is clear and unambiguous. In addition to the detailed policy at clause 13.01-1S, supplemented by objectives and strategies within the MSS, clause 71.02-3 contains the imperative that in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.
- 57 I am persuaded by the CFA's submissions, supported by the material and information provided at the hearing, that the site is located in an area of extreme bushfire risk. Policy directs population growth and development away from such areas. While it is true that the actual risk must be considered in the specific context of the review site and the assessment is to have regard to the proposed mitigation measures responding to the risk, I am not persuaded that these considerations justify the grant of a permit in the circumstances of this case.
- 58 The potential, and nature, of a catastrophic bushfire event impacting this site due to the characteristics of the surrounding landscape were detailed in the submissions of the Council and CFA. The evidence did not discount that such events may eventuate, notwithstanding the reference to the risk as

‘significant’ rather than ‘extreme’. In the scenario of such an event occurring, the evidence is that residents would need to evacuate. The enhanced mitigation measures would be ineffectual to withstand a large-scale landscape bushfire, having regard to the significant ember attack, powerful convective forces and potentially cyclonic winds that would emerge in firestorm conditions. The funnelling effect of the valley, adding momentum to these forces, is a significant contributor. The reliance on evacuation, of itself an insufficient reason to allow development in a high-risk area, is compromised by the existence of a solitary means of access to the Bright township via a narrow road through a partly forested environment, where the potential for fallen trees and debris to obstruct passage exists. There is no alternative access.

- 59 The reliance on early warnings, and the expectation of residents heeding these warnings (noting that human behaviour in such catastrophic events may not always be rational), is not a reason to allow an outcome which fails to comply with the clear and well-articulated policy which prioritises the protection of human life. The proposed subdivision would increase the number of people within an area of extreme bushfire risk, where the proposed mitigation measures would not provide the necessary resilience or protection in the circumstance of a large-scale landscape fire, and where access to a place of relative safety is not certain.
- 60 When assessed against the relevant policies of the Planning Scheme, and having regard to the submissions and the evidence, the proposal fails:
- to ensure that the development of the review site prioritises the protection of human life and strengthens community resilience to bushfire
 - to reduce the risk to life and property from a landscape-scale bushfire to an acceptable level
 - to prioritise the protection of human life and strengthen community resilience to bushfire
 - to ensure development is only permitted where the risk to life, property and community infrastructure from bushfire can be reduced to an acceptable level.
- 61 The proposal is not an acceptable planning outcome and will, therefore, not be approved.

CONCLUSION

- 62 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Bill Sibonis
Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2339/2018
PERMIT APPLICATION NO. YR-2017/891

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*; Review the refusal to grant a permit; Yarra Ranges Planning Scheme; Clause 32.03 Low Density Residential Zone (LDRZ); Clause 42.03 Significant Landscape Overlay – Schedule 22 (SLO22); Clause 44.06 Bushfire Management Overlay (BMO); Clause 13.02 – Bushfire; Clause 71.02-3 – Integrated decision making; Prioritisation of the protection of human life; Private bushfire shelter.

APPLICANT	Alexander Levin
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
REFERRAL AUTHORITY	Country Fire Authority
SUBJECT LAND	28 Pheasant Parade WARBURTON VIC
WHERE HELD	Melbourne
BEFORE	Sarah McDonald, Member
HEARING TYPE	Hearing
DATE OF HEARING	4 June 2019
DATE OF ORDER	14 August 2019
CITATION	Levin v Yarra Ranges SC [2019] VCAT 1231

ORDER

Amend permit application

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: Swenrick Construction (Vic) Pty Ltd.
 - Drawing numbers: 01 – 07.
 - Dated: 08/04/2019

No permit granted

- 2 In application P2339/2018 the decision of the responsible authority is affirmed.
- 3 In planning permit application YR-2017/891 no permit is granted.

Sarah McDonald
Member

APPEARANCES

For Alexander Levin

David Vorchheimer, town planner and solicitor, HWL Ebsworth.

He called the following witness:

- Hamish Allan, Manager Bushfire Planning and Design, Terramatrix Pty Ltd.

For Yarra Ranges Shire Council

Viesha Berzkalns, town planner, Yarra Ranges Shire Council.

For Country Fire Authority

Len Leslie, Manager Natural Environment and Bushfire Safety, Country Fire Authority.

INFORMATION

Description of proposal	<p>It is proposed to remove vegetation and construct one dwelling and associated buildings and works on the subject land.</p> <p>The proposal includes the installation of a private bushfire shelter, a 10,000 litre water tank, and an effluent disposal area.</p> <p>It is also proposed to remove exiting vegetation (canopy trees) from the land.</p>
Nature of proceeding	<p>Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.</p>
Planning scheme	<p>Yarra Ranges Planning Scheme.</p>
Zone and overlays	<p>Low Density Residential Zone (LDRZ);</p> <p>Significant Landscape Overlay – Schedule 22 (SLO22);</p> <p>Bushfire Management Overlay (BMO).</p>
Permit requirements	<p>Clause 42.03-2:</p> <ul style="list-style-type: none">• to construct a building and carry out works, and• to remove or destroy vegetation (substantial trees), <p>in the SLO22.</p> <p>Clause 44.06-2: To construct a building and construct and carry out works associated with an accommodation use (dwelling) in the BMO.</p>
Relevant scheme policies and provisions	<p>Clauses 11, 12, 13, 14, 15, 16, 21.04, 21.06, 21.09, 22.05, 44.06, 52.06, 52.12, 53.02, 65, and 71.</p>

Land description

The subject land is located on the northern side of Pheasant Parade, at its eastern end. The land is rectangular, with a width of 20.28 metres, a depth of 86.1 metres, and an area of 1,757 square metres. The land rises (approximately 22 metres) from the south-west to the north-east.

Except for a small shed located generally centrally on the site, the subject land is vacant.

Native and exotic vegetation, including 33 trees, covers the land.

Tribunal inspection

An unaccompanied inspection of the subject land and surrounding area was undertaken after the hearing. During my inspection I took some time walking over the entirety of the subject land to observe its immediate context and interfaces, the slope of the land, and the existing vegetation on the subject land and adjoining properties. I also walked along the east/west length of Pheasant Parade, observing the adjacent properties, and travelled along the route between the subject land and the commercial area of Warburton township.

Tribunal cases referred to:

Department of Environment, Land, Water and Planning v Yarra Ranges SC (Red Dot) [2019] VCAT323;

O'Toole v Yarra Ranges SC [2019] VCAT 810;

Meredith-Aubrey Pty Ltd v South Gippsland SC [2019] VCAT 726;

McMullin v Nillumbik SC [2019] VCAT 635.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Mr Levin (**applicant**) is seeking this review of the decision of the Yarra Ranges Shire Council (**responsible authority**) to refuse to grant a planning permit for buildings and works to construct a dwelling and associated vegetation removal at the property at 28 Pheasant Street, Warburton (**subject land**).
- 2 The use and development of a dwelling does not require a planning permit under the Low Density Residential Zone (**LDRZ**)² that applies to the subject land under the Yarra Ranges Planning Scheme (**planning scheme**).
- 3 A planning permit is required under both the Significant Landscape Overlay – Schedule 22 (**SLO22**) and the Bushfire Management Overlay (**BMO**), that apply to the land. The subject land is also in a designated Bushfire Prone Area.³
- 4 The responsible authority refused to grant the planning permit on grounds relating to the bushfire risk of the location and the failure of the proposal to meet the requirements and satisfactorily address the relevant policies and provisions of the planning scheme relating to bushfire risk and planning.⁴
- 5 Before the hearing the applicant circulated amended plans⁵ of the proposal and sought an amendment to the permit application to substitute these plans for the permit application plans. It is on these plans that this decision is based.
- 6 Despite the amendments to the plans the responsible authority maintains its opposition to the proposal.
- 7 The applicant submits that the development can satisfy the relevant provisions of the planning scheme and that it can be demonstrated that the bushfire risk can be mitigated to an acceptable level. The applicant relies on the expert evidence of Hamish Allan of Terramatrix Pty Ltd.
- 8 The Country Fire Authority (**CFA**) is a ‘recommending’ referral authority under the planning scheme.⁶ It provided advice to the responsible authority during the planning permit application process and made a submission at the Tribunal hearing. While the CFA has not objected to the proposal it submits that the site is in a Bushfire Prone Area, an area of significant

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 Clause 32.03.

³ In accordance with the *Building Regulations 2018*

⁴ The grounds of refusal cite clauses 13.05 (Bushfire) [now clause 13.02], 44.06 (Bushfire Management Overlay), and 53.02 (Bushfire planning).

⁵ Dated 08/04/2019.

⁶ Clauses 44.06-6 (Referral of applications) and 66.03 (Referral of permit applications under other state standard provisions).

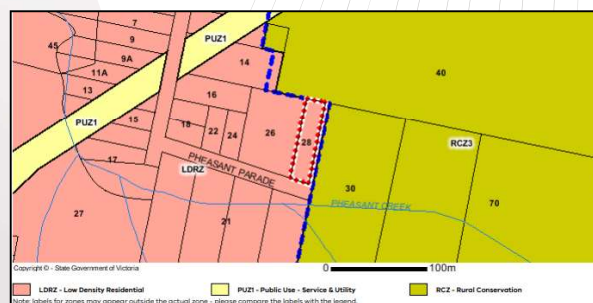
bushfire risk, and that the Tribunal must apply a precautionary approach to new development in such areas and properly consider how the proposal addresses specified provisions of the planning scheme.⁷

- 9 The Tribunal must decide whether a permit should be granted, and if so, what conditions should be applied.
- 10 There is no dispute that the subject land is in an area of significant/extreme bushfire risk, and that the key issues relate to bushfire risk, particularly the policies and provisions of clauses 13.02 and 53.02. Based on the submissions I consider that the key issues to be determined are:
 - Does the proposal provide an acceptable response to the planning policies and provisions that seek to prioritise the protection of human life?
 - Is the removal of the canopy trees acceptable?
- 11 Having considered the submissions and statements of grounds, having regard to the relevant policies and provisions of the planning scheme, and having undertaken an inspection of the subject land and surrounding area, I have decided to affirm the decision of the Responsible Authority to refuse to grant a planning permit. My reasons follow.

WHAT IS THE CONTEXT OF THE SUBJECT LAND?

- 12 The subject land is located at the eastern edge of the Warburton township, approximately 1 kilometre (as the crow flies) to the north-west of the commercial area of the township.
- 13 Pheasant Parade is a no-through road that terminates immediately to the east of the subject land.
- 14 The subject land is within the Urban Growth Boundary (UGB) surrounding the township, with the northern and eastern boundaries of the subject land abutting land that is outside the UGB⁸ (See Figure 1).

Figure 1: Zoning & Urban Growth Boundary⁹



- ⁷ The CFA cites clauses 13.02 (Bushfire), 44.06 (Bushfire Management Overlay), 53.02 (Bushfire planning), and 71.02-3 (Integrated decision making).
- ⁸ A road reserve extends between the subject land's eastern boundary and the UGB; the road does not exist, with this land being heavily vegetated.
- ⁹ Source: Planning Property Report, Department of Environment, Land, Water and Planning Victoria State Government (Printed 6 August 2019). The subject land is identified by a red dotted line and the Urban Growth Boundary is shown as a dashed blue line.

- 15 Surrounding land to the west and south-west is within the LDRZ, with properties occupied by detached houses surrounded by varying degrees of remnant and exotic vegetation. Surrounding land to the north and west is Rural Conservation Zone – Schedule 3 (**RCZ3**) comprising large, heavily vegetated properties, some with detached dwellings.
- 16 The different zoning of the surrounding land is generally reflected in the extent and density of vegetation, as shown in Figures 2 and 3.

Figure 2: Subject land & adjacent properties¹⁰



Figure 3: Site context¹¹



- 17 The submissions of the CFA and evidence of Mr Allan concur that the surrounding landscape accords with landscape Types 3 and 4 under the *Australian Standard 3959-2018 Construction of buildings in bushfire prone areas* (**AS 3959**) model.
- 18 In his written evidence¹² Mr Allan describes the vegetation in the surrounding area as follows:

Areas of tree and shrub vegetation to the north, east and south of the site ... are classified as the Open Forest or Tall Open Forest

¹⁰ Source: VicPlan, Department of Environment, Land, Water and Planning, Victoria State Government (Printed 6 August 2019). The subject land is identified by a blue dashed line

¹¹ Ibid.

¹² Bushfire Management Statement as Expert Evidence, Terramatrix, May 2019 (**Terramatrix report**), at sections 4.1.1 (Forest) and 4.1.2 (Modified vegetation).

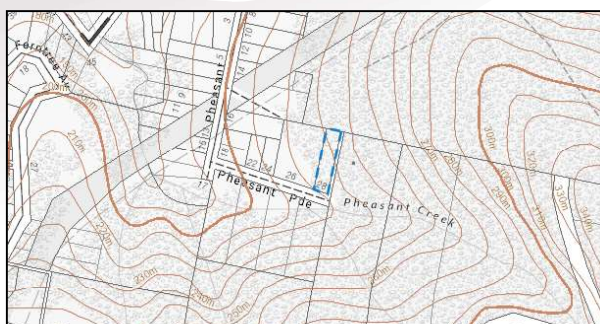
vegetation types, in the Forest group of AS3959. This type of vegetation comprises trees 30 m high or taller at maturity, 30% – 70% foliage cover with an understory of sclerophyllous low trees, tree ferns or shrubs (Standards Australia, 2018).

and

...neighbouring properties generally to the southwest and west of the site, contain areas of modified vegetation, due to the relatively dense but variable extent of shrub cover and in places an often unmanaged or only partially managed understorey...

- 19 The surrounding land to the north and east slopes upwards. To the south, on the opposite side of Pheasant Parade, the land slopes down to narrow gully along which Pheasant Creek runs, then slopes upwards on the southern side of the creek. The land to the west slopes downwards into the urban area of Warburton. (See Figure 4)

Figure 4: Slope of surrounding area¹³



WHAT IS PROPOSED?

- 20 The proposed dwelling is to be constructed on the southern (front) half of the subject land, set back from the front boundary approximately 20.8 metres. The dwelling is arranged in two halves along a north-west/south-east axis creating a split level building that steps down the slope of the land. Each half of the dwelling is two storeys in height with angled roofs (of 7.5 degree pitch), and a maximum height of 7.9 metres.¹⁴
- 21 The dwelling comprises three bedrooms, an open plan kitchen, meals, and lounge area, two additional separate living areas, two bathrooms, two separate toilets, two decks and a balcony. Access between the two halves of the dwelling is at the front entry on the lower level; there is no access between the two halves at their upper levels, with separate staircases servicing each half of the dwelling.
- 22 An open carport is located at the front of the dwelling and is to be accessed via a new, curved driveway extending from centrally along the front property boundary.

¹³ Source: VicPlan, Department of Environment, Land, Water and Planning, Victoria State Government (Printed 6 August 2019). The subject land is identified by a blue dashed line

¹⁴ As shown on plan sheet 03.

- 23 The dwelling is to be clad in a combination of colorbond corrugated iron, and Hardies Axon and Scyon Linea cladding.
- 24 A private bushfire shelter is to be installed centrally within the front setback area, 10 metres forward of the dwelling and to the west of the driveway. The applicant states that "the proposed bushfire shelter can accommodate 6 people, and is to be 2.0 metres wide, 2.6 metres long and 2.1 metres high".¹⁵
- 25 A 10,000 litre water tank is to be located adjacent to the front property boundary, to the west of the driveway. It is to provide a static water supply for fire-fighting purposes.
- 26 A 522 square metre effluent disposal area is to be located on the northern (rear) half of the land, commencing approximately 10 metres back from the rear of the dwelling and extending to 1.5 metres from the rear property boundary.
- 27 The application proposes the removal of 28 of the 33 existing trees from the subject land, with four trees¹⁶ at the southern end of the effluent area and one tree¹⁷ on the western boundary to be retained. At the hearing various submissions were made in relation to the extent of the defensible space and the effluent disposal area to the north of the dwelling, and the potential need to remove trees that were proposed to be retained and the opportunity to retain trees that were proposed to be removed.

WHAT ARE THE KEY PLANNING POLICIES AND PROVISIONS?

Low Density Residential Zone (clause 32.03)

- 28 The local residential land use strategic statement at clause 21.04-1 seeks to ensure that land in the LDRZ remains committed to low density, single dwelling residential use as the primary function of the area.
- 29 The LDRZ provides for low-density residential development on lots which, in the absence of reticulated sewerage, can treat and retain all wastewater.¹⁸ The use and development of land for one dwelling on a lot does not require a planning permit in the LDRZ. However, the use of land for a dwelling must meet the requirements of clause 32.03-2 (Use for one or two dwellings or a dependent person's unit), which relate to sewerage, potable water, and electricity. The responsible authority does not raise any issue with the proposal's ability to comply with the requirements of clause 32.03-2.

Significant Landscape Overlay (clause 42.03)

- 30 The purpose of the Significant Landscape Overlay (SLO) includes to implement the Municipal Planning Strategy and Planning Policy

¹⁵ Written submission of HWL Ebsworth Lawyers (4 June 2019) for the applicant, at [5.4].

¹⁶ Trees numbered 30, 33, 34 and 38 on plan sheet 06.

¹⁷ Tree number 48 on plan sheet 06.

¹⁸ Clause 32.03 (Low Density Residential Zone); Purpose.

Framework, identify significant landscapes, and to conserve and enhance the character of significant landscapes.¹⁹

- 31 Schedule 22 of the SLO (**SLO22**) applies to the 'Foothills and rural townships' area. The key elements of the SLO22 include, among other things:
- A visual dominance of the vegetation including large mature native and indigenous trees and garden planting of both native and exotic plants.
 - The majority of development sits within the landscape with minimal excavation and dwellings are partly obscured from view.
 - Hillsides appear to be covered with trees, even when developed with house.
- 32 The proposal requires a planning permit to construct a building and carry out works in the SLO22. The responsible authority raises no issue with the impact of the proposed buildings and works on the landscape.
- 33 The removal, destruction and lopping of indigenous vegetation or substantial trees²⁰ also requires a planning permit in the SLO22. However, the provisions of clause 52.12-5 (Exemption to create defensible space for a dwelling approved under clause 44.06 of this planning scheme) exempt the requirement for a planning permit to remove, destroy or lop vegetation in specified circumstances. The effect of that clause on this proposal is discussed further below.
- 34 The responsible authority does not take issue with the removal of the trees, acknowledging the exemptions under the planning scheme for their removal to create a defensible space.

Bushfire Management Overlay (clause 44.06)

- 35 A planning permit is required in the Bushfire Management Overlay (**BMO**) to construct a building and construct and carry out works associated with an accommodation use, which includes a dwelling.
- 36 The purpose of the BMO is:
- To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.
 - To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.

¹⁹ Clause 42.03 (Significant Landscape Overlay); Purpose.

²⁰ A substantial tree is defined in clause 3.0 (Permit requirement) of the SLO22 schedule as having a diameter at breast height (DBH) greater than 0.16 metres 1.3 metres above the ground (equivalent to a circumference of 0.5 metres at breast height).

- To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.

37 Key provisions of the BMO relevant to this proposal include:

- A bushfire hazard site assessment, a bushfire hazard landscape assessment, and a bushfire management statement must accompany an application.²¹
- An application must meet the requirements of clause 53.02 (Bushfire planning).²²
- A permit to construct a building or construct or carry out works must include the mandatory conditions at clause 44.06-5.
- The application was required to be referred to the Country Fire Authority.²³
- Before deciding on an application, in addition to the decision guidelines in clauses 53.02 (Bushfire planning) and 65 (Decision guidelines), the responsible authority must consider the Municipal Planning Strategy and the Planning Policy Framework.²⁴
- There is no schedule to the BMO that applies to the subject land.

Planning policy framework

38 The State Bushfire policy at clause 13.02-1S applies to the subject land as it is within a designated Bushfire Prone Area and subject to a BMO. The policy objective is:

To strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.

39 The policy includes strategies relating to protection of human life, bushfire hazard identification and assessment, settlement planning, areas of biodiversity conservation value, and use and development control in Bushfire Prone Areas.

40 The strategies for the protection of human life are:

Give priority to the protection of human life by:

- Prioritising the protection of human life over all other policy considerations.
- Directing population growth and development to low risk locations and ensuring the availability of, and safe access to,

²¹ Clause 44.06-3 (Application requirements).

²² Clause 44.06-5 (Requirements of clause 53.02).

²³ Clause 44.06-6 (Referral of applications) and clause 66.03 (Referral of permit applications under other state standard provisions).

²⁴ Clause 44.06-8 (Decision guidelines).

areas where human life can be better protected from the effects of bushfire.

- Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.

41 The strategies for bushfire hazard identification and assessment are:

Identify bushfire hazard and undertake appropriate risk assessment by:

- Applying the best available science to identify vegetation, topographic and climatic conditions that create a bushfire hazard.
- Considering the best available information about bushfire hazard including the map of designated bushfire prone areas prepared under the *Building Act 1993* or regulations made under that Act.
- Applying the Bushfire Management Overlay to areas where the extent of vegetation can create an extreme bushfire hazard.
- Considering and assessing the bushfire hazard on the basis of:
 - Landscape conditions - meaning conditions in the landscape within 20 kilometres (and potentially up to 75 kilometres) of a site;
 - Local conditions - meaning conditions in the area within approximately 1 kilometre of a site;
 - Neighbourhood conditions - meaning conditions in the area within 400 metres of a site; and
 - The site for the development.
- Consulting with emergency management agencies and the relevant fire authority early in the process to receive their recommendations and implement appropriate bushfire protection measures.
- Ensuring that strategic planning documents, planning scheme amendments, planning permit applications and development plan approvals properly assess bushfire risk and include appropriate bushfire protection measures.
- Not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measure can be adequately implemented.

42 The strategies for settlement planning are to plan to strengthen the resilience of settlements and communities and prioritise protection of human life by, among other things:

- Directing population growth and development to low risk locations, being those locations assessed as having a radiant heat flux of less than 12.5 kilowatts/square metre under *AS 3959*-

2009 Construction of Buildings in Bushfire-prone Areas (Standards Australia, 2009).

- Ensuring the availability of, and safe access to, areas assessed as a BAL-LOW rating under *AS 3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009) where human life can be better protected from the effects of bushfire.
- 43 The strategies for use and development control in a Bushfire Prone Area require consideration of the bushfire risk when assessing planning applications for accommodation uses, and when assessing a planning permit application for such use and development, to:
- Consider the risk of bushfire to people, property and community infrastructure.
 - Require the implementation of appropriate bushfire protection measures to address the identified bushfire risk.
 - Ensure new development can implement bushfire protection measures without unacceptable biodiversity impacts.
- 44 This State Bushfire policy is supported by the local environmental hazards strategic statement at clause 21.09-2 that seeks:
- To ensure that the use of land and development takes account of physical development constraints such as flood, fire and landslip and to control development in these areas.
- 45 The supporting strategies relating to fire include, among other things:
- Encourage people to adopt principles and practices in the planning and development of their land which minimise the risks from wildfires.
 - Limit development in areas prone to intense wildfire behaviour and provide township protection features.
 - Promote safety of people and property.
 - Ensure the community is aware of the risks of landslide, wildfire hazards, flooding (in specific areas) and the need to limit, and even prevent, development where there are problems or to apply special development criteria.

Bushfire planning provisions (clause 53.02)

- 46 The purposes of the bushfire planning provisions at clause 53.02 are:
- To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.
 - To ensure that the location, design and construction of development appropriately responds to the bushfire hazard.

- To ensure development is only permitted where the risk to life, property and community infrastructure from bushfire can be reduced to an acceptable level.
 - To specify location, design and construction measures for a single dwelling that reduces the bushfire risk to life and property to an acceptable level.
- 47 The parties agree that the provisions of clause 53.02-3 (Dwellings in existing settlements – Bushfire protection objective), commonly referred to as ‘pathway 1’, apply. The objective of this provision is:
- To specify bushfire design and construction measures for a single dwelling or alteration and extension to an existing dwelling that reduces the risk to life and property to an acceptable level.
- 48 The three ‘approved measures’ (AM) contained in clause 53.02-3 are:
- AM 1.1, which relates to building siting and access;
 - AM 1.2, which relates to defendable space and building construction in relation to the bushfire attack level; and
 - AM 1.3, which relates to water supply and vehicle access.
- 49 The decision guidelines that must be considered are:
- The Municipal Planning Strategy and the Planning Policy Framework.
 - The bushfire hazard site assessment and the bushfire management statement submitted with the application.
 - Whether all of the approved measures have been incorporated into the application.

Bushfire protection exemptions (clause 52.12)

- 50 The provisions of clause 52.12-5 (Exemption to create defendable space for a dwelling approved under clause 44.06 of this planning scheme), as applicable to this proposal, exempt the need for a planning permit to remove, destroy or lop vegetation to construct the proposed dwelling and create its defendable space as the land is in the BMO and the LDRZ.
- 51 The exemption applies to the removal, destruction or lopping of vegetation if it:
- Does not exceed the distance specified in Table 1 to Clause 53.02-3 of this planning scheme, based on the bushfire attack level determined by a relevant building surveyor in deciding an application for a building permit under the *Building Act 1993* for a dwelling or alteration or extension to the dwelling; or
 - Is required to be undertaken by a condition in a planning permit issued after 31 July 2014 under Clause 44.06 of this scheme for a dwelling or an alteration or extension to the dwelling.

- 52 Of the 33 existing trees on the subject land, 28 trees are proposed to be removed, and of those 20 trees²⁵ are described to be within the defensible space.
- 53 The responsible authority submits that of the five trees that are proposed to be retained,²⁶ four of these trees²⁷ are within the defensible space required for the dwelling and therefore removal of these trees will also be required. The removal or destruction of these trees will therefore be exempt from the permit requirements under the SLO22.

Decision guidelines and operational provisions

- 54 The decision guidelines at clause 65 require me to consider whether the proposal will produce 'acceptable outcomes' in terms of the decision guidelines of this clause. These decision guidelines include, among other things, the Municipal Planning Strategy and the Planning Policy Framework, the purpose of and any matter required to be considered in the zone, overlay or other provision, the orderly planning of the area, and the effect on the amenity of the area.
- 55 Clause 71.02-3 (Integrated decision making) sets out the principles of integrated decision-making that apply when making planning decisions. These include:

Planning and responsible authorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations. [Emphasis added]

WHAT ARE THE SUBMISSIONS AND EVIDENCE OF THE PARTIES?

Responsible authority's submissions

- 56 The responsible authority submits that the proposal fails to have sufficient regard for the bushfire hazard of the subject land and the risk to life, and fails to satisfy clauses 13.02, 21.09-2, 44.06, 53.02 and 71.02-3.
- 57 The responsible authority relies on the advice of the CFA for deciding the application. Among other things, the responsible authority says, in written submissions:
101. The CFA has highlighted that the site is in a bushfire risk landscape Type 3 or 4 which are the most extreme bushfire risk landscape typology. Due to its location, the site could be subjected to extreme bushfire behaviour predicated by the

²⁵ Trees 3, 4, 6-11, 15-17, 19-25, 28, and 29 on plan sheet 06.

²⁶ Trees 30, 33, 34, 38 and 48 on plan sheet 06.

²⁷ Trees 30, 33, 34, and 38 on plan sheet 06.

potential for the fire to grow and develop over an extended period prior to impacting the site.

102. As defined in Bushfire Hazard Landscape Assessment of Practice Note 65, Landscape Type 3 is defined as:

- The type and extent of vegetation located more than 150 metres from the site may result in neighbourhood-scale destruction as it interacts with the bushfire hazard on and close to a site.
- Bushfire can approach from more than one aspect.
- The site is located in an area that is not managed in a minimum fuel condition.
- Access to an appropriate place that provides shelter from bushfire is not certain.

Landscape Type 4 is defined as:

- The broader landscape presents an extreme risk.
- Evacuation options are limited or not available.

103. The bushfire would occur through uninterrupted forest fuels and mountainous topography and under significant fire weather conditions development on this site will be subject to direct flame impact from a fire front. Furthermore, this has potential for extreme ember attack and thus fire can approach from any direction. This will not only increase the risk to structures but will start spot fires in the surrounding area long before the fire front arrives.

104. Agreeing with CFA's comments mentioned above, the objectives under Clause 13.02 cannot be achieved for this dwelling as the proposed location is within a Landscape Type 3 or 4 which presents extreme bushfire risk. Basically, the wider area is extensively forested and thus the site could be subjected to extreme bushfire behaviour predicated by the potential for the fire to grow and develop over an extended period prior to impacting the site. Thus, a major concern is the significant and extreme landscape risk from bushfire.

58 The responsible authority says that the subject land is an isolated site on the outskirts of Warburton. It also submits that, in this instance, the bushfire risk arising from the broader landscape cannot be mitigated to an acceptable level, and therefore warrants the development not proceeding.

Country Fire Authority's submissions

59 The CFA submits that the proposal satisfies 'pathway 1' of clause 53.02, and that "the proposal incorporates additional bushfire protection measures that more than satisfy the requirements of clause 53.02".²⁸

²⁸ Written submission of the CFA, at [1.3].

60 However, the CFA submits that there is an inherent tension between clause 53.02 and the policy at clause 13.02. It says that although the proposal meets everything in clause 53.02, and exceeds it, because of the policy tension with clause 13.02 “it needs to go a bit further”.

61 The CFA’s written submission includes:

15. The surrounding landscape is assessed as being extreme on the bushfire risk spectrum.
16. At the landscape level the site could be subject to extreme bushfire behaviours with the potential for fire to grow and develop over many hours before impacting the site. Such a bushfire would occur through uninterrupted forest fuels and mountainous terrain.
17. The combination of these factors gives rise to a landscape with potential for a bushfire to build momentum and to an intensity that produces destructive bushfire behaviour which generates strong convective winds. These convective winds can damage structures and emanate from any direction, increasing the unpredictability of the fire. Accordingly, in such conditions, a bushfire front could advance from any aspect, and not necessarily from the north-westerly to south-westerly direction of the typical Victorian prevailing summer weather conditions.
18. These landscape factors also have the potential to produce extreme ember attack that not only increase the risk to structures but will start spot fires in the surrounding area long before the fire front arrives. The coalescing of these spot fires as they grow in size further enhances the bushfire behaviour, adding to the threat at site and the overall energy driving the fire.

and

24. Overall, the expected fire behaviour in this area is rated at presenting an extreme bushfire risk. The anticipated wider landscape bushfire behaviour would be moderated to a negligible extent by the modified vegetation and Warburton urban area to the west.

62 The CFA acknowledges that Pheasant Parade is a made road providing direct access into the urban area of Warburton and therefore access and egress to/from the site is accommodated for attending fire appliances or evacuating residents.

63 The CFA’s written submission also includes:

34. In the event of a landscape scale bushfire, there should be sufficient warning available for residents to evacuate safely.

and

37. CFA considers that the proposal will be designed to the highest bushfire protection level if constructed to the BAL-FZ.

38. In addition to exceeding the applicable BAL construction requirements, the proposal also includes a private bushfire shelter, which could be utilised as a refuge of last resort.
39. In the event of a local scale bushfire, the design and construction of the proposed dwelling to BAL-FZ standard would provide appropriate protection of life.
40. Accordingly, from the view of construction design and siting, not much more can be provided over and above what is proposed.
- 64 The CFA's oral submissions include that, among other things and in summary:
- Previous decisions of the Tribunal have found that a potential 'landscape' scale fire must be considered even if the requirements of clause 53.02 are met.
 - The issue with clause 53.02 is that it is predicated on the basis that the zoning of land is a proxy for fire risk.
 - A landscape scale fire that could occur could go well beyond the bushfire attack level of the 'designed' fire of the Australian Standard.
 - The applicant can't diminish the landscape fire risk from around it but can respond to it and they have done about all that they can do.
 - The BAL-FZ house design provides a much higher ability for the house to survive, but it is not a safe house and is still a place of some risk. It will be problematic if people get caught in the house, and if they don't use the bushfire shelter properly.
 - Life safety should be adequately taken care of but there are still risks, including— Do people get to bushfire shelter? And, do they get into the shelter before it is compromised by carbon monoxide?
 - The bushfire shelter has the ability to provide tenable shelter, and the duration for which it is tenable is related to the number of people occupying it.
- 65 The CFA says its advice for any high risk location is not to be there.

Applicant's submissions

- 66 The applicant submits that the proposal satisfies the requirements of clauses 13.02, 44.06 and 53.02, and appropriately addresses all the bushfire requirements of the planning scheme and has implemented additional measures to address the risk to human life beyond what is required.²⁹
- 67 The applicant says that the context of the land needs to be put in perspective, as does the context of the various decisions of the Tribunal

²⁹ Written submission of HWL Ebsworth Lawyers (4 June 2019) for the applicant, at [1.7].

relating to clause 13.02, and that the approach to the 'precautionary principle' as it relates to this site is not being interpreted as it ought to be.

68 The oral submissions of the applicant include, among other things and in summary:

- The CFA does not object to this proposal.
- There is no question that the design and siting of the dwelling provides for localised fire events.
- In relation to a landscape scale fire there would be a pre-warning of days or at least 3–4 hours, and the site is not remote, with a refuge point 1.3 kilometres away.
- The risks particular to this site can be managed.
- No one is going to put a guarantee on this being a safe house, however the design includes construction to BAL-FZ, wind load rating to a higher standard and a private bushfire shelter.
- This will be the safest structure in the street.
- This proposal does not put someone in harm's way where the protection of life is not managed.

69 The applicant's written submissions include:

3.2 It is submitted that the proposal is appropriate having regard to broader landscape and site specific considerations. The Proposal has been designed to the highest bushfire level and exceeds the applicable BAL requirements, as well as providing additional safety measures such as a bushfire safety shelter, which is not a requirement under the Scheme.

3.3 Additionally, it is noted that the proposed dwelling is in an area zoned for residential purposes, it is already developed with dwellings. The area is not remote or secluded, is accessible by sealed roads, and is in close proximity to the township, allowing for easy access to refuge in the event of a bushfire.

70 The applicant also submits:

5.10 Further, the Proposal has been carefully amended to respond to the grounds of refusal. In particular, the Amended Plans have changed the dwelling construction to a BAL-FZ, and the design and construction has been upgraded to a higher wind load rating, as well as, showing defensible space, vegetation removal, the water tank and access arrangements.

71 The applicant relies on the evidence of Mr Allan, and says that:

10.2 As outlined in Mr Allan's evidence it is submitted that the Proposal provides a comprehensive and considered response to the bushfire management requirements as set out in Clause 13.02, the BMO and Clause 53.02 and seeks to develop the Subject Land in a manner that prioritises the protection of

human life through mitigating the bushfire risk to an appropriate level. In this sense it is noted the level of bushfire protection proposed exceeds applicable standards and that a 'belt and braces' approach has been taken just to be sure.

Evidence of Mr Allan for the applicant

72 Mr Allan's written evidence (**Terramatrix Report**) for the applicant comprises a bushfire management statement that includes a bushfire hazard site assessment, a bushfire hazard landscape assessment, and a bushfire management plan.

73 His evidence includes:

This report demonstrates that the risk has been appropriately considered at the broader, local, neighbourhood and site scale, as stipulated in Clause 13.02 and Clause 44.06.the site is in a significant bushfire risk location and without appropriate mitigation measures the development could be exposed to significant levels of radiant heat, flame contact, ember attack, smoke and wind. However, mitigation measures that exceed the approved measures for BMO compliance have been proposed, and can be implemented, to reduce these potential impacts to a level deemed acceptable by the approved measure in Clause 53.02...³⁰

74 The evidence of Mr Allan in relation to the objective and approved measures at clause 53.02-3 includes that, in summary:

- i The CFA letter of advice confirms that the application meets all the requirements and approved measures specified at clause 53.02-3 (CFA, 2018).³¹
- ii In relation to AM1.1:
 - o The siting and layout maximise the setback from the hazardous forest area to the south, west, and north as far as practicable.
 - o The proposed development is close to the road and access and egress can comply with the requirements for emergency vehicles.³²
- iii In relation to AM 1.2:
 - o To the east and west, BAL-40 defendable space cannot be achieved entirely within the property boundaries.
 - o There is no assurance that the overlap beyond the site (to the west in particular) will be managed as defendable space at the standards specified in Table 6 to clause 43.02-5.
 - o Accordingly, BAL-FZ³³ construction is proposed.

³⁰ Terramatrix Report; section 3.2 (Clause 13.02 Bushfire).

³¹ Ibid; at section 6.1.

³² Ibid; at section 6.6.1.

³³ Bushfire Attack Level – Flame Zone.

- The proposed defensible space within the site will extend to all property boundaries,³⁴ providing approximately 46 metres to the north, 21 metres to the south, and 2–3 metres to the east and west.³⁵
- iv In relation to AM 1.3:
 - The building will be provided with a minimum 10,000 litre capacity static water supply.
 - The water tank will be within 60 metres of the outer edge of the building and will be provided with a CFA compliant outlet.
 - The driveway will be less than 30 metres long, and no specific design and construction requirements apply.
 - Access to the water outlet will meet the specifications provided in Table 5 to clause 53.02-5 (Vehicle access design and construction).

75 In relation to the Bushfire policy at clause 13.02, Mr Allan's evidence is that it is inappropriate for this clause to be used to refuse an application that is fully compliant with clause 53.02-1, when the planning provisions explicitly enable BAL-FZ development in existing settlements.³⁶ He says that while a landscape assessment is not technically required, because of clause 13.02 it is appropriate to look at the broader landscape.

76 Mr Allan's bushfire hazard site assessment includes, among other things and in summary:

- Areas of tree and shrub vegetation to the north, east and south of the site are classified as the Open Forest or Tall Open Forest vegetation types.
- Neighbouring properties generally to the southwest and west of the site contain areas of modified vegetation.
- The presence of modified vegetation is not an influence on the BAL construction standard due to the proximity of the higher hazard Forest vegetation.
- All vegetation that is within the defensible space, which extends to all property boundaries will need to be managed as low threat vegetation in accordance with the specifications for defensible space stipulated in Table 6 to clause 53.02.
- The topography within the 150 metre assessment zone is relatively benign, being all upslope or flat.
- The topography in the broader landscape is more significant however, and a likely contributor to intense fire behaviour.

³⁴ Noting that in response to modified vegetation, Table 1 to clause 53.02-5 requires defensible space extending for 50 metres or to the property boundary, whichever is the lesser distance.

³⁵ Terramatrix report; at section 6.6.2.

³⁶ Ibid; at section 6.3 (Response to the Reasons for Refusal).

77 Mr Allan's bushfire hazard landscape assessment³⁷ includes, among other things and in summary:

- To the northwest and west, and to a lesser extent the north, which are directions typically most associated with severe fire weather, are the established residential and commercial area of the town, however they are interspersed with generally narrow patches of remnant vegetation.
- To the south and east, neighbouring private properties comprise limited areas of non-vegetated land, modified vegetation, and larger areas of forest which are contiguous with extensive tracts of forested public land that extend further south and east.
- The site is close to the central townships area (approximately 2.3 kilometre away by road) and therefore reasonable access to the relatively lesser risk location of the township is available.
- The designated Neighbourhood Safer Place³⁸ 'place of last resort' for Warburton, is close, approximately 1.5 kilometres away.

78 Mr Allan says:

At the broader landscape scale, the town and hence the site is surrounded by tall, high fuel Forest that extends for many kilometres, on steep and variable terrain. Large fires could have a long time to develop and build to a significant intensity, with fire behaviour above and beyond the default assumptions that underpin the BMO-AS 3959 model. The generally extensive BMO coverage of the surrounding landscape is indicative of the high hazard.³⁹

79 Mr Allan's evidence includes that three Fire Management Zones (**FMZ**) are within 3 kilometres of the subject land, including a Bushfire Moderation Zone (**BMZ**)⁴⁰ in large areas of public forest to the south of Warburton. He says, "the large FMZs around the township may assist to moderate the landscape risk to the site but they cannot be relied upon to alter conditions at the site or enable reduced bushfire protection measures".⁴¹

80 In relation to additional bushfire protection measures Mr Allan's evidence⁴² includes:

...the landscape is one of significant bushfire risk, where bushfire behaviour may exceed BMO expectations and design parameters.

Accordingly, additional protection measures are proposed to mitigate the risk, based on the highest possible BAL-FZ construction standard

³⁷ Ibid; section 5.

³⁸ The Neighbourhood Safer Place is shown to be at the Warburton Recreation Reserve on Map 2 – Local Bushfire Hazard Landscape Assessment Plan of the Terramatrix Report.

³⁹ Terramatrix Report; section 5.2 (Landscape risk).

⁴⁰ Mr Allan's evidence describes the BMZ as a zone that aims to reduce the speed and intensity of bushfire, with the use of planned burning in the BMZ designed to protect nearby assets, particularly from ember spotting during a bushfire.

⁴¹ Terramatrix Report; section 5.3 (Fire Management Zones).

⁴² Ibid; section 6.2 (Additional bushfire protection measures).

with maximum amount of defensible space achievable, extending to all property boundaries, to maximise setback from hazardous vegetation.

Additionally, the dwelling will be designed and constructed to a higher wind loading rating...to provide greater resistance to strong winds that may be experienced in a bushfire.

As the dwelling cannot provide enough defensible space to the east and west to avoid flame contact, in addition to BAL-FZ construction, an accredited private bushfire shelter will be installed and maintained to ensure a shelter-in-place option is available that can ensure life safety in a bushfire emergency where evacuation is not possible. Consistent with CFA messaging however, the first option will be to not occupy the site on days of higher risk i.e. leave the site prior to 10am on days when the forecast fire danger rating is extreme or code red. This should be implemented by the proponent developing a Bushfire Survival Plan using CFA templates.

It is noted that whilst large and intense 'landscape-scale' fires could develop and impact the site, occupants would in all likelihood have significant advance warning of such a large fire, to enable early evacuation from the site. Additionally, the site is not remote and access to safer locations is available.

The approach to providing additional protection is in accordance with CFA guidance for development proposals in higher risk landscapes...⁴³

- 81 Mr Allan says that there is nothing else in terms of protection measures that this application could "throw at it". As to whether the proposed dwelling is safe enough in relation to the policy at clause 13.02, Mr Allan says that he thinks it is, and that while it is "at the nasty end of risk", he has seen worse.⁴⁴ He says that, on balance, he believes the proposal does protect human life.
- 82 Mr Allan says that, for him, the bushfire shelter is the key measure that satisfies the policy at clause 13.02 regarding the protection of human life. He says the bushfire shelter needs to be there otherwise the only option is to leave, and that the shelter is 'option B'.
- 83 Mr Allan's evidence includes that the State government and the CFA are facilitating dwellings with BAL-FZ and BAL-40 with a private bushfire shelter in similar high risk locations such as on the edge of the settlements of Wye River and Separation Creek.
- 84 In response to questions about bushfire survival plans, Mr Allan says:
 - people behave in different ways and can become blasé, but they should have a bushfire survival plan;

⁴³ Ibid; section 6.2 (Additional bushfire protection measures).

⁴⁴ Mr Allan cites Wye River and Separation Creek as examples.

- subsequent owners may not know of the need for a bushfire survival plan;
- there is no real mechanism to ensure a bushfire survival plan is ongoing;
- while he hasn't heard of a requirement for a bushfire survival plan being part of a planning permit condition it would be a good thing if it was; and
- adherence to bushfire safety becomes a risk if the property changes hands and the new owners don't know that they are doing.

85 Despite this, Mr Allan also says that while it is prudent to have a bushfire survival plan, he thinks it is still acceptable if there is no such plan.

WHAT ARE MY FINDINGS?

What is the relevance of previous decisions of the Tribunal?

- 86 I have had regard to previous decisions of the Tribunal cited by the parties that address the matter of bushfire risk. These decisions are listed in the information section of this decision.
- 87 As these decisions relate to matters with differing circumstances regarding the proposals, properties, contexts, and applicable planning framework (such as the zoning of the land), they do not directly influence my decision in this matter. However, there are some principles in these previous decisions that are relevant to my findings, as discussed below.

Does the proposal provide an acceptable response to the planning policies and provisions that seek to prioritise the protection of human life?

- 88 Although the grounds of refusal include that the proposal does not satisfactorily address the provisions of clause 53.02, there appears to be no dispute by the CFA or Mr Allan's evidence that the proposal does satisfy the applicable approved measures of clause 53.02-3.
- 89 I am therefore satisfied that the proposal provides an acceptable response to the objective and approved measures of clause 53.02-3.
- 90 Rather, the key issue with this proposal relates to whether the proposal provides an acceptable response to the policy at clause 13.02-1S and the provisions of clause 71.02-3 to prioritise the protection of human life, and the need for a landscape scale fire to be considered even where the proposal meets the provisions of clause 53.02.
- 91 I accept the submissions of the applicant and evidence of Mr Allan, that the proposal has done everything it can to address and minimise the bushfire risk, and that the CFA acknowledges this.
- 92 However, I find that, in the circumstances of the subject land and this proposal, the proposal does not provide an acceptable response to the

prioritisation of the protection of human life. I say this for the following reasons.

93 Firstly, I am not persuaded that because the proposal satisfies the provisions of clause 53.02 it is consistent with the policy at clause 13.02-1 and the provisions of clause 71.02-3 to prioritise the protection of human life.

94 In this regard I adopt the findings of the Tribunal in *Department of Environment, Land, Water and Planning v Yarra Ranges SC*⁴⁵ that:

214 The provisions under clause 53.02 outline a rather automated approach to decision making that runs a risk of not appropriately considering the overall consequence of a decision to permit the use and development of the site for the purposes of a dwelling. Similar to biodiversity, planning for bushfire is not a 'tick the box' approach. Certainly, achieving compliance with the approved measures meets objectives under the clause and is very helpful in decision making, however any proposed use and development must also satisfy the policy framework, which guides decision making.

95 The policy at clause 13.02-1S and the principles for integrated decision making at clause 71.02-3 must still be considered, irrespective of the proposal's satisfaction of the approved measures at clause 53.02.

96 This is reinforced by Mr Allan's evidence that the nature of the surrounding landscape is one of significant bushfire risk where bushfire behaviour may exceed the expectations and design parameters of the BMO.⁴⁶ This confirms for me that the bushfire risk of the surrounding landscape is not necessarily accounted for by the provisions of the BMO at clause 53.02. I therefore am not satisfied that compliance with the approved measures at clause 53.02-3 can be accepted as addressing the bushfire risk of this location and providing acceptable protection of human life.

97 Secondly, I am not satisfied that the subject land is a low risk location and therefore the proposal is not consistent with the strategy for protection of human life at clause 13.02-1S that seeks for development to be directed to low risk locations.

98 Although the subject land is within the LDRZ and the UGB of the Warburton township this does not persuade me that the bushfire risk to the land is somehow minimised or offset. In the context of the submissions and evidence that the subject land is in an area of significant/extreme bushfire risk, I do not accept that the zoning of the land is a proxy for the bushfire risk. I regard the application of the BMO to the subject land and surrounding area and the bushfire management statement prepared by Mr Allan as the relevant indicators of the bushfire risk to the land, rather than the zoning of the land.

⁴⁵ (Red Dot) [2019] VCAT 323.

⁴⁶ Terramatrix Report, at section 6.2 (Additional bushfire protection measures).

- 99 Although Mr Allan's evidence is that, based on the defensible space to be provided, the site is almost a BAL-12.5 to the north,⁴⁷ his evidence and the CFA's submissions are that the surrounding landscape to the north, east and south of the subject land is one of significant/extreme bushfire risk. Both Mr Allan and the CFA say that the dwelling may be subject to direct flame immersion, although Mr Allan qualifies that only the east elevation is exposed to the flame zone.
- 100 The risk posed by the forest vegetation landscape to the east of the subject land is not minimised or mitigated by the defensible space along this interface, with the proposed dwelling having a minimal building setback and defensible space of only 2.7 metres along this side. As such the proposal is within the BAL-FZ under the provisions of clause 53.02-5, rather than the BAL-12.5 which would require a defensible space of 48 metres from the building facade. This reinforces to me that the subject land's eastern interface is a high risk location rather than a low risk.
- 101 Permitting a dwelling in such a high risk location is inconsistent with the strategy for settlement planning at clause 13.0-1S that seeks to plan to strengthen the resilience of settlements and communities and prioritise protection of human life by, among other things, directing population growth and development to low risk locations, being those locations assessed as having a radiant heat flux of less than 12.5 kilowatts/square metre under *AS 3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009).
- 102 While the proposal includes additional measures beyond that required by the approved measures under clause 53.02-3, such as the installation of a private bushfire shelter and construction to a higher wind load rating, these measures are proposed to offset the risk rather than reducing the overall risk level of the subject land's location.
- 103 Although the applicant submits that the proposal will manage the bushfire risk to an acceptable level, that is a different outcome to that sought by the policy at clause 13.02-1S which clearly seeks for development to be directed to low risk locations.
- 104 My findings in this regard are consistent with that of the Tribunal in *Department of Environment, Land, Water and Planning v Yarra Ranges SC* as follows:

215 In this case, we find that the policy under clause 13.02-1S is unequivocal when it includes the strategy under Protection of human life, to direct development to low risk locations. The site is not a low risk location given the evidence and the commentary from the CFA regarding extreme bushfire risk. We

⁴⁷ Under the provisions of clause 53.02-5, where the land is all upslopes and flat land, areas of forest vegetation can be constructed to BAL-12.5 where the defensible space is 48 metres from the building facade; the proposed dwelling is set back approximately 46 metres from the northern property boundary.

consider attempts to offset the extreme risk of the site by providing a bushfire shelter and evacuating the site on Code Red days are not enough to reduce the extreme risk of bushfire that may occur and that did occur on Black Saturday, in an environment such as this.

- 105 Thirdly, I am not persuaded by the applicant's submissions or Mr Allan's evidence that the State government's facilitation of the development of dwellings in BAL-FZ and BAL-40 contexts with a private bushfire shelter in similar high risk locations justifies this proposal. I have not been presented with detailed information or evidence as to the planning framework that applies to such other land, or the bushfire hazard site assessments, the bushfire hazard landscape assessments, or the bushfire management plans for such land to demonstrate that these circumstances are the same as the subject land and this proposal. I do note however that Mr Allan states that the Government's facilitation of the redevelopment of Wye River and Separation Creek predates the current clause 13.02-1S.
- 106 Fourthly, I am not satisfied that the subject land and proposal provides safe access to areas where human life can be better protected from the effects of bushfire, as sought by the strategies for protection of human life at clause 13.02-1S.
- 107 I am not satisfied that the subject land's location near the Warburton town centre and 'neighbourhood safer place' necessarily equates to 'safe' access. While the subject land is only a relatively short distance from the town centre and 'neighbourhood safer place' the access is via a single route out of Pheasant Parade,⁴⁸ which is a relatively narrow road and includes sharp turns. I am not satisfied that in an active bushfire scenario, and in circumstances where occupants of the proposed dwelling have not left the premises early, that there is safe access to the 'neighbourhood safer place'.
- 108 Nor am I satisfied that the provision of a private bushfire shelter on the subject land necessarily ensures safe access to an area where human life can be better protected from the effects of bushfire. I have not been provided with information or evidence specific to this proposal to satisfy me that the siting of the bushfire shelter and the access route from the dwelling or elsewhere on the subject land to the shelter provide for safe access, particularly in an active bushfire scenario.
- 109 Fifthly, I am not satisfied that the bushfire protection measures can be adequately implemented, as sought by the strategies at clause 13.02-1S.⁴⁹
- 110 This proposal ultimately relies on the awareness and behaviour of any occupants of the dwelling to properly implement the bushfire protection measures. In relation to the bushfire management plan this includes

⁴⁸ Due to Pheasant Road being a no through road.

⁴⁹ The bushfire hazard identification and assessment strategies at clause 13.02-1S include "not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measures can be adequately implemented".

awareness and behaviour in relation the existence and importance of this plan and the need to manage the dwelling and land in accordance with it, including maintaining the defensible space, the water supply for fire-fighting purposes, and the private bushfire shelter.

- 111 The role and functioning of the private bushfire shelter are particularly important. Based on the submissions of the CFA and Mr Allan's evidence as outlined above, it is the private bushfire shelter that is critical to this proposal being considered acceptable. Having regard to the CFA's submissions that the bushfire shelter should be the place of last resort, and that while life safety should be adequately taken care of there are still risks, including whether people get to the bushfire shelter and whether they get into the shelter before it is compromised by carbon monoxide, I find that the correct use and operation of the bushfire shelter is critical to prioritising the protection of human life.
- 112 I am not persuaded that in the circumstances of this land and proposal, reliance on the awareness and behaviour of the future occupants of the dwelling, is conducive to the prioritisation of the protection of human life. While the applicant is aware of the bushfire risk and the bushfire protection measures to minimise and mitigate this risk, my considerations are not limited to only the applicant and current owner. As commented on by the Tribunal in *O'Toole v Yarra Ranges SC*⁵⁰:

11. ... In response to the applicant's query about which lives are to be protected, I note that the lives to be protected are not just those of the applicant and others who may reside in the dwelling with him. It is also the lives of emergency service personal [sic] who may be called upon to defend the dwelling in the event of a bushfire, and, as planning permission runs with the land, it is also the lives of other future owners and occupiers of the proposed dwelling.

- 113 None of the parties have suggested that the bushfire risk of the subject land is likely to change over time. With the land to the north and east being in a RCZ and outside of the township UGB, I find that there is nothing to indicate that the bushfire risk to the land will reduce over time. As such, the proposed dwelling will continue to rely on the awareness and behaviour of future occupants to ensure the bushfire risk is managed and responded to in accordance with the bushfire management plan.
- 114 There is no assurance that future occupants will be aware of the bushfire risk and the bushfire protection measures to minimise and mitigate this risk, or that the current or future owners or occupants will be vigilant in implementing and maintaining the bushfire management plan over time. Mr Allan's comments that people behave in different ways and can become blasé underpins my findings in this regard.

⁵⁰ [2019] VCAT 810.

- 115 While many uses and developments rely on the behaviour of occupants to ensure that they are managed in accordance with their planning permits and remain acceptable, I am not persuaded that this is acceptable in circumstances where behaviour is critical to the protection of human life.
- 116 Even if the bushfire management plan were endorsed as part of a planning permit,⁵¹ and the owner of the land entered into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987 (PE Act)* requiring that the occupation of the dwelling be subject to the dwelling and land being managed and maintained in accordance with the bushfire management plan,⁵² I am not persuaded that this is enough to ensure the prioritisation of the protection of human life. This is because the proposal also relies on the awareness of future occupants that the first and best option is not to be on the land on days of extreme fire danger or 'code red' days, that the dwelling is still a risk despite its BAL-FZ construction, and that the private bushfire shelter is the 'option B' place of last resort. None of this information is in the bushfire management plan.⁵³
- 117 I acknowledge that these are matters that could reasonably be addressed in a bushfire survival plan, which both Mr Allan and the CFA say should be prepared for the land and dwelling. However, there is nothing in the bushfire management plan that requires the preparation of a bushfire survival plan, nor is it included in the draft planning permit conditions proposed by the responsible authority.
- 118 While the applicant says they would accept a planning permit condition requiring the proposed agreement under section 173 of the PE Act to include a requirement for a bushfire survival plan, the responsible authority does not support this. It says it could not enforce the requirement for such a plan, that it would be impossible to audit, and that it could not check individual sites to ensure that they are being evacuated in accordance with such a plan.
- 119 Based on the submissions, my understanding is that bushfire survival plans are developed on an individual basis according to the circumstances of individual properties and their occupants, that the plans may change over time as these circumstances change, and while the CFA provides templates for such plans these plans do not require the approval of the CFA, the responsible authority, or any other authority or agency. In this context I am persuaded by the responsible authority that it is not reasonable to require the preparation of a bushfire survival plan through the planning permit conditions or an agreement under section 173 of the PE Act.

⁵¹ The draft planning permit conditions provided by the responsible authority on a 'without prejudice' basis require an amended bushfire management plan to be submitted to and approved by the responsible authority and when approved to be endorsed and form part of the permit. The applicant does not oppose this proposed condition.

⁵² Such a requirement was not included within the draft planning permit conditions provided by the responsible authority but was discussed at the hearing.

⁵³ Terramatrix Report; Map 4.

- 120 I am not persuaded by Mr Allan's evidence that, even in the absence of a bushfire survival plan, the proposal is acceptable. Given the high risk of the broader landscape, particularly the forest vegetation to the east, and the minimal defendable space along the eastern setback of the dwelling, I am not satisfied that in the absence of such a plan future occupants will have appropriate information to ensure they make informed choices and behave in a way that prioritises the protection of human life. Based on the evidence of Mr Allan and the submissions of the CFA, the first and preferred option is for occupants to evacuate the land early on days of extreme fire danger or 'code red' days, without a bushfire survival plan there will be nothing to alert occupants to this.
- 121 I acknowledge that during bushfire season and in periods of high bushfire risk the relevant authorities undertake public awareness campaigns alerting people to prepare and implement bushfire survival plans and to evacuate areas at risk. However, given the circumstances of the subject land and this proposal, I am not persuaded that it is acceptable to rely on such general awareness campaigns to ensure occupants of the subject land make informed choices and behave in a way that prioritises the protection of human life.
- 122 Sixthly, I am not persuaded by the submissions of the applicant and the evidence of Mr Allan that if this proposal is not permitted that the land is effectively sterilised and that this justifies approving the proposal. While this may be the case with the current proposal in the context of the current planning framework and the bushfire risk of the subject land and surrounding area, the policy at clause 13.02-1S clearly seeks for development not to be approved where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measure satisfied, or bushfire protection measures can be adequately implemented. I adopt the position of the Tribunal in *Department of Environment, Land, Water and Planning v Yarra Ranges SC* that "orderly planning should not be compromised by a continuance of poor planning decision making".
- 123 Finally, based on these findings, I find that the proposal is inconsistent with the strategy for protection of human life at clause 13.02-1S and the principles for integrated decision making at clause 71.02-3 that seek to prioritise the protection of human life over all other policy considerations. Rather, I find that the proposed protection measures to mitigate the risk posed by the surrounding landscape seek to prioritise the construction of the dwelling rather than the protection of human life.

CONCLUSION

- 124 In having found that the proposal does not provide an acceptable response to the planning policies and provisions that seek to prioritise the protection of human life I find that no permit should be granted for this proposal. It is

therefore unnecessary for me to determine whether the removal of the canopy trees is acceptable.

- 125 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Sarah McDonald
Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1231/2017
PERMIT APPLICATION NO. 376/2016/14P

CATCHWORDS

Application under Section 77 of the *Planning & Environment Act 1987* to review the refusal to grant a permit; Nillumbik Planning Scheme; Rural Conservation Zone Schedule 3; Bushfire Management Overlay; two lot subdivision; consent to re-build two dwellings destroyed in the Black Saturday bushfires and bushfire risk

APPLICANT

Robert Kenneth Marshall

RESPONSIBLE AUTHORITY

Nillumbik Shire Council

REFERRAL AUTHORITY

Country Fire Authority

SUBJECT LAND

30 Yow Yow Rising, St. Andrews

WHERE HELD

Melbourne

BEFORE

Christopher Harty, Member

HEARING TYPE

Hearing

DATE OF HEARING

1 December 2017

DATE OF ORDER

2 February 2018

CITATION

Marshall v Nillumbik SC [2018] VCAT 159

ORDER

No permit granted

- 1 In application P1231/2017 the decision of the responsible authority is affirmed.
- 2 In planning permit application 376/2016/14P no permit is granted.

Christopher Harty
Member

APPEARANCES

For Robert Kenneth Marshall	Mr Robert Marshall, in person. He called the following witness: Mr Richard Francis, Ecologist and Bushfire Consultant from Abzeco Pty Ltd.
For Nillumbik Shire Council	Ms Karen McPherson, Town Planner
For Country Fire Authority	Mr Mark Holland, Fire Safety Officer

INFORMATION

Description of proposal	Two (2) lot subdivision of land at 30 Yow Yow Rising, St. Andrews comprising proposed Lot 1 with an area of 16.35 hectares and proposed Lot 2 with an area of 8.23 hectares. Access to both lots is via an existing carriageway easement and private tracks from Yow Yow Rising.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Nillumbik Planning Scheme
Zone and overlays	Rural Conservation Zone (RCZ3) Bushfire Management Overlay (BMO)
Permit requirements	Clause 35.06-3 to subdivide land into two (2) lots. Clause 44.06-2 to subdivide land into two (2) lots.
Relevant scheme policies and provisions	Clauses 10, 11, 13, 16, 21.05, 22.13, 35.06, 44.06, 52.39, 52.47, 57 and 65.

Land description

The subject land is a single lot (Lot 1 PS 345553G) with an overall area of 24.58 hectares. It is located at the northern end of an existing carriageway easement (gravel track) accessed from Yow Yow Rising which ultimately connects to Buttermans Track.

The slope of the land falls gently from the north to south-west by a maximum of 50 metres and is dissected by a number of waterways and drainage lines in a north-east to south-west direction including the Yow Yow Creek. The areas contain remnant vegetation interspersed by cleared grassland paddocks hence creating a mosaic of cleared and vegetated areas across the subject land.

The subject land has Bushfire Consent 488/2013/21P pursuant to Clause 52.39 to rebuild two dwellings on the existing lot. The proposed subdivision would result in a dwelling on each lot.

Land surrounding the subject site to the east and north forms part of the Kinglake National Park and is heavily timbered. Land to the south is an existing winery. To the west the land is also steeply undulating but generally open in character and lightly treed with small groups of trees. This land has been granted approval for a four lot subdivision and much of the surrounding area has been developed for rural residential and hobby farming lots of varying size from two (2) hectares upwards.

Tribunal inspection

10 January 2018

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Mr Robert Marshall (the applicant) seeks approval to subdivide his land at 30 Yow Yow Rising, St. Andrews (the site) into two (2) lots. Proposed Lot 1 would be an irregularly shaped allotment with an area of 16.35 hectares located on the eastern portion of the site and Lot 2 would equally comprise an irregular shaped allotment that would be much narrower with an area of 8.23 hectares on the western portion of the site.
- 2 Both lots would be accessed via a carriageway easement approximately 900 metres in length running south beside the Kinglake National Park to the end of Yow Yow Rising. Yow Yow Rising is a two way gravel road which runs approximately 500 metres to Buttermans Track, which is a two-way bitumen sealed road that provides access either to St. Andrews generally to the west or Yarra Glen generally to the south-east.
- 3 The applicant has had aspirations of subdividing his original area of land (33.46 hectares) into potentially three lots since the late 1970s. In short, creation of two lots as an initial step towards this aspiration occurred around 2006/07. However the devastation of the Black Saturday bushfires in 2009 effectively derailed the process for the applicant.
- 4 Two dwellings and numerous outbuildings located in the north-east corner of the site (proposed Lot 1) were destroyed as a result of the bushfire and due to a combination of financial and emotional stress arising from this event, was forced to complete a two lot subdivision, creating the current 24.58 hectare site and an 8.88 hectare lot to the south which has since been completed and sold. The ability for the applicant to pursue his three lot subdivision at the time (2012/13) was made more difficult by changes to the Nillumbik Planning Scheme in response to bushfire risk and lack of support from the Country Fire Authority (CFA) at the time.
- 5 In 2011, the applicant obtained Bushfire Consent pursuant to Clause 52.39 - *2009 Bushfire-Replacement Buildings* of the Nillumbik Planning Scheme to re-build the two dwellings destroyed in the Black Saturday bushfire. The purpose of Clause 52.39 is:

To support the rebuilding of dwellings, dependent persons' units and buildings used for agriculture damaged or destroyed by the 2009 Victorian bushfires.
- 6 Initially, the approval was to replace the two dwellings in the same location (both generally in the north-east corner of the site). However in 2014, consent was granted by Nillumbik Shire Council, under the same provision, to move one of the approved dwelling re-build sites to a building envelope

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.

located on a cleared area of the site approximately 400 metres to the south-west, which would be on proposed Lot 2.

- 7 Hence, the context of the site and the proposed subdivision is that, approval is in place to re-build two dwellings; one in an original location in the north-east of the site and on proposed Lot 1 and the second, in a new location to the south-west and on proposed Lot 2. Effectively, the proposed subdivision now seeks to create two new lots that would each contain a current approved location for a dwelling.
- 8 The application for subdivision was referred to the CFA and as a recommending referral authority, they objected to the application on grounds of unacceptable bushfire risk. Council agreed with the CFA's position and subsequently determined to refuse to grant a permit. Council also expressed concerns over the appropriateness of the subdivision in terms of the purposes of the Rural Conservation Zone Schedule 3 (RCZ3) its effects on the agriculture use of the site.
- 9 The applicant considers the proposed two lot subdivision is appropriate and does not increase bushfire risk. Approval is already in place for re-building two dwellings on the site and hence human habitation is currently permitted. The carriageway easement also currently exists and can be upgraded in accordance with required CFA standards. Given these elements, the applicant considers the proposed subdivision merely reflects placing a subdivision line on the map between two dwellings and that of the existing approvals and conditions. The subdivision does not present, by itself, a bushfire risk or a conflict with policy relating to bushfire hazard.

WHAT ARE THE KEY ISSUES?

- 10 I must decide whether or not a permit should be granted and, if so, what conditions should be applied. I believe that the key issues for consideration in this case are as follows:
 - Will the subdivision result in an acceptable outcome in terms of the purposes of the Rural Conservation Zone?
 - Whether the subdivision is an acceptable outcome regarding bushfire risk?
- 11 Having considered all submissions, the applicable policies and provisions of the Nillumbik Planning Scheme and inspected the site and surrounding area, I have decided that a permit should not be granted. My reasons follow.

PROCEDURAL ISSUES

- 12 Two procedural issues have arisen in this matter.
- 13 The first relates to the jurisdiction of what is before the Tribunal, raised by the applicant during the hearing.
- 14 At around the same time that the proposed subdivision was being determined by Council, the applicant also sought an amendment to the

Bushfire Consent issued under Clause 52.39 for re-building the two dwellings destroyed on Black Saturday. The requested amendment sought to shift the location of the approved dwelling re-build in the north-eastern corner of the site, on proposed Lot 1, to another location within proposed Lot 1 in order to reduce the level of bushfire risk and the Bushfire Attack Level (BAL) for the dwelling. Council determined to refuse to allow the amendment to the Bushfire Consent based on the concerns expressed by the CFA regarding bushfire risk. The applicant requested whether the refusal by Council to grant an amendment to the Bushfire Consent could be considered as part of the review application before me.

- 15 The review application before me is for a review of Council's decision to refuse to grant a permit for a two (2) lot subdivision. It is a review made pursuant to section 77 of the *Planning and Environment Act 1987* (P&E Act). I note that the application for planning permit (Permit Application No. 376/2016/14P) was made out for a two lot subdivision with no reference to seeking approval for bushfire consent to construct a dwelling on Lot 1 or for an amendment of any approved building envelopes or dwelling re-builds.
- 16 The applicant submitted that the Bushfire Management Statement (BMS) prepared to support the permit application for subdivision had focussed extensively on the approved building envelopes and the benefit of amending the location of one of the approved dwelling re-builds to reduce its bushfire risk.
- 17 The confusion between subdivision of land and demonstration of how safe the siting and design of a dwelling and its defendable space on proposed lots can often be confusing in terms of what is the primary form of development for which permission is sought. In this case, the permission sought and the discretion before me relates only to subdivision.
- 18 The Council requested further information which, amongst other matters, sought an amended plan detailing the location of the building envelope for Lot 2 and buildings on Lot 1 that were approved under the Bushfire Consent in relation to the proposed property boundaries for Lots 1 and 2. It is clear that this information was to support consideration of the subdivision proposal and not in relation to any changes proposed to the Bushfire Consent.
- 19 The decision made by Council to refuse to amend the Bushfire Consent is one that requires a separate application for review to be made to the Tribunal pursuant to section 149 of the P&E Act. No such application was made with the Tribunal and my jurisdiction is limited to that of the proposed two lot subdivision.
- 20 The second procedural issue relates to Amendment VC140² to the Nillumbik Planning Scheme, which made changes to planning policy at

² Amendment VC140 was gazetted after the hearing on 12 December 2017.

Clause 10.04 – *Integrated decision making* and Clause 13.05-1 – *Bushfire planning*. I provided the opportunity for parties to make written submissions to the Tribunal on the implications of the changes to bushfire policy.³ Submissions were received from Council, the CFA and on behalf of the applicant from Best Hooper Lawyers and Mr Francis and have been considered as part of my deliberations.

WILL THE SUBDIVISION RESULT IN AN ACCEPTABLE OUTCOME IN TERMS OF THE PURPOSES OF THE RURAL CONSERVATION ZONE?

- 21 The site is in the Rural Conservation Zone Schedule 3 (RCZ3). Council expressed concern that the proposed subdivision does not support the purposes of the RCZ3.
- 22 The purposes of the RCZ relevant to the subdivision include:
- To conserve the values specified in a schedule to this zone.
 - To protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values.
 - To protect and enhance natural resources and the biodiversity of the area.
 - To encourage development and use of land which is consistent with sustainable land management and land capability practices, and which takes into account the conservation values and environmental sensitivity of the locality.
 - To provide for agricultural use consistent with the conservation of environmental and landscape values of the area.
 - To conserve and enhance the cultural significance and character of open rural and scenic non urban landscapes.
- 23 The Conservation value specified in Schedule 3 to the RCZ is:
- To ensure land use changes do not have an adverse impact on the landscape or strategic environmental values of the land.
- 24 The decision guidelines for the RCZ⁴ includes reference to how development (which includes subdivision) conserves the values identified for the land in the Schedule and protects and enhances the environmental, agricultural and landscape qualities of the site and its surrounds. There is also reference to the use of a land management plan that can integrate development with sustainable land management and address the protection and enhancement of native vegetation and waterways, stabilisation of soil and pest plant and animal control.
- 25 The RCZ3 calls for land uses including that of dwellings and agricultural activity to be subservient to the environment and conservation values of the land. This is reflected by both agriculture and a dwelling requiring a

³ By Order dated 19 December 2017.

⁴ Found at Clause 35.06-6.

permit, with a dwelling subject to the condition for only one dwelling on a lot. Schedule 3 to the RCZ also includes an 8 hectare minimum subdivision area.

- 26 Prior to the hearing, the applicant had foreshadowed a request to amend the subdivision layout, which would have had the result of more evenly balancing the area of each lot by locating the internal lot boundaries to follow existing waterways and areas of remnant vegetation. The outcome of the change would have been to place those parts of the site with cleared pasture for agricultural use into a single lot and move away from having this area dissected by lot boundaries.
- 27 At the commencement of the hearing, the applicant withdrew this request and opted to pursue the current plan of subdivision layout.
- 28 Council's submission was basically that the foreshadowed change to the internal lot boundaries represented a more considered design response. It avoided splitting a large cleared area that could be retained for agricultural purposes, whilst better recognising waterways and remnant areas of vegetation on the site. Ms McPherson considered the current layout design was not as positive in retaining the ability to use cleared land areas for agricultural purposes whilst protecting conservation values associated with remnant vegetation, waterways and drainage lines dissecting the site.
- 29 Ms McPherson acknowledged that whilst there is already a strong presence of rural residential land use in the locality, the planning scheme recognises the location as part of the Shire's green wedge. There is a strong emphasis on conservation of environmental and landscape values of the area under the RCZ.
- 30 I note that the applicant has a conservation covenant on the title of the site and has undertaken much effort through internal fencing of remnant vegetation in retaining and enhancing those remnants as well as waterways and drainage lines that run through the site. This was readily apparent from my inspection of the site.
- 31 However, a shortcoming of the proposal is the lack of a land management plan that could have better portrayed how the purposes of the RCZ3 would be integrated into both the design response of the proposed subdivision and ongoing commitment to conserving and managing the environmental values of the site. This is not a shortcoming that I consider alone is fatal to the proposal, but I do consider it represents a cumulative element of failure with what is proposed.
- 32 I also consider the proposed layout is a poor response to the existing conditions of the site. The internal boundary dissecting a large cleared area of pasture in the western half of the site is a poor outcome with respect to any potential ability to conduct agricultural pursuits. It is clear from the design of the lot layout pattern that it is designed primarily to encompass the approved amended building envelope location, which sits on a high

point on the site with commanding views over the adjoining vineyards and surrounding countryside.

- 33 I find the consideration of the relationship between the subdivision and the purposes of the RCZ3 inadequate and that the emphasis on the presence of the conservation covenant and the past efforts of the applicant, although of good intent, of little comfort given the outcome of the subdivision is to introduce new landowners in the locality who would have little guidance put in place on land management and conservation of the site's values as a result of the proposed subdivision.

WHETHER THE SUBDIVISION IS AN ACCEPTABLE OUTCOME REGARDING BUSHFIRE RISK?

- 34 Bushfire risk is a prominent issue given the site is affected by the Bushfire Management Overlay (BMO). This is recognised under the revised policy at Clause 13.05-1 – *Bushfire planning* where it now specifically requires the policy to be applied to all planning and decision making under the P&E Act in relation to land which is subject to the BMO. It is further reinforced by the fact that the site was impacted by the Black Saturday bushfires which promulgated the introduction of the BMO and the policy framework around bushfire risk and planning.
- 35 The applicant submitted a BMS to support the application for subdivision. The BMS classified the landscape type and vegetation type, upon which defendable slope and BAL designation have been identified for both the approved building site and approved building envelope for each proposed lot.
- 36 The CFA have objected to the proposal and disagrees with the identification of both landscape and vegetation types in the BMS. The applicant and Mr Francis identified the site within landscape type 3, which has the following characteristics:
- An area where the type and extent of vegetation located more than 150 metres from the site may result in neighbourhood-scale destruction as it interacts with the bushfire hazard on and close to a site.
 - Bushfire can approach from more than one aspect.
 - The site is in a location that is not managed in a minimum fuel condition.
 - Access to an appropriate place for shelter is not certain.
- 37 The CFA considers landscape type 4 is a more relevant description of the area around within which the site is located, which includes the following characteristics:
- A more extreme fire risk.
 - Fires have more time to grow and develop before impacting.

- Evacuation options are limited or not available.

- 38 The difference in landscape types is also reflected in the classification of vegetation types with the applicant and Mr Francis suggesting woodland type vegetation whilst the CFA consider forest is more accurate with greater extents of understorey vegetation. I consider this a reflection of the difference between areas in the Kinglake National Park compared to areas of remnant vegetation found outside of the National Park that comprise patches of vegetation that are much closer to and on the site.
- 39 There is general recognition that the presence of the Kinglake National Park and the dense vegetation in the Park presents a high fire risk from the north and east and that a mix of pasture grassland, remnant woodland and vineyards present a risk from the west.
- 40 The primary view of the CFA is that the site is at unacceptable bushfire risk due to the landscape fire behaviour having the potential to significantly impact proposed Lot 1. It appears proposed Lot 2 and the approved building envelope on that proposed lot does not engender as much concern, however, I note that it too would be a lot that is as exposed to the level of risk as that of Lot 1.
- 41 The difference in landscape type and vegetation type classifications between the applicant and the CFA means that the proposed subdivision and the approved building site on proposed Lot 1 is at an unacceptable risk from bushfire and the potential for loss of life and property.
- 42 Mr Holland considered that, given the forest vegetation classification, the approved dwelling re-build in the north-east part of the site (on proposed Lot 1) would have an insufficient defendable space area and that, based on fire modelling, would be immersed in flames from a passing fire front. This presents a considerable risk, particularly in the context of the fire behaviour likely in the broader landscape. In terms of the proposed subdivision, he considered its design fails to take account of the wider landscape bushfire effects and has been limited to local bushfire risk.
- 43 The applicant argues that given the approval for re-building the dwelling in the same location as that destroyed on Black Saturday (located on proposed Lot 1) and the approved new location for the building envelope that would be on proposed Lot 2, the subdivision creates little increase in risk from bushfire. Hence, from a bushfire hazard perspective, the subdivision has little impact and should be approved. The applicant considers that because the application is limited to a subdivision and no dwelling is proposed under the application, there is no effect on the risk to human life. This policy is, in effect, not relevant.
- 44 I do not agree with the above sentiment. Among the changes from Amendment VC140 was the inclusion in Clause 10.04, which relates to integrating conflicting policies in favour of net community benefit and sustainable development for the benefit of present and future generations,

the prioritisation, in bushfire affected areas, the protection of human life over all other policy considerations. A permit is required for subdivision under both the RCZ and BMO. Consideration of the permit application calls up the purposes of the RCZ3 and BMO and relevant policy including that of Clause 10.04. The BMO under Clause 44.06-4 calls up the requirements of Clause 52.47 – *Planning for Bushfire* and that an application must meet the requirements of that clause.

- 45 What the applicant does have approval for is the re-building of two dwellings and a number of outbuildings that were destroyed on Black Saturday. This represents the outcome of two dwellings on a single titled parcel of land. The proposed two lot subdivision is a new form of development that requires permission and hence opens the ambit for consideration of a range of policies and provisions relevant to a proposal to subdivide land. Hence, Clause 10.04 as it now exists is applicable, as is Clause 13.05, Clause 44.06 (BMO) and Clause 52.47. I do not consider it appropriate to disconnect the consideration of relevant policy and provisions of the planning scheme relating to bushfire risk because of the current approval for two dwellings and their associated human habitation on the site.
- 46 The proposal before me is to subdivide the site into two lots. The term ‘lot’ is defined in Clause 72 of the Nillumbik Planning Scheme as; a part (consisting of one or more pieces) of any land (except a road, a reserve, or common property) shown on a plan, which can be disposed of separately.
- 47 The effect of the subdivision is to create two new lots or to create a new lot in addition to the lot that exists. The proposed permit application seeks to change the current approved outcome of two dwellings on a single lot to one whereby the outcome would be two lots each with an approved dwelling. The effect of the subdivision is to reinforce the separation of the two dwellings by way of creation of a lot which can each be disposed of separately. In terms of bushfire risk, such an outcome is an increase in the level of risk due to the potential future presence of two separate landowners, and reinforcement of two dwellings being constructed and separately occupied.
- 48 Amendment VC140 also changed policy at Clause 13.05-1. The policy objective is:

To strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.
- 49 The policy requires that it must be applied to all planning and decision making under the P&E Act relating to land, which is relevant to the permit trigger under the BMO.
- 50 Among the policies’ strategies are those relating to *Protection of human life*:

Give priority to the protection of human life by:

- Prioritising the protection of human life over all other policy considerations.
- Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.
- Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision-making at all stages of the planning process

51 Under the strategy *Bushfire hazard identification and assessment*, are references, amongst others to:

Considering and assessing the bushfire hazard on the basis of:

- Landscape conditions - meaning the conditions in the landscape within 20 kilometres and potentially up to 75 kilometres from a site;
- Local conditions - meaning conditions in the area within approximately 1 kilometre from a site;
- Neighbourhood conditions - meaning conditions in the area within 400 metres of a site; and,
- The site for the development.

Consulting with emergency management agencies and the relevant fire authority early in the process to receive their recommendations and implement appropriate bushfire protection measures.

Not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measures can be adequately implemented.

52 The CFA considers these policies have not been satisfied. The applicant has not satisfactorily demonstrated adequate mitigation of bushfire risk at the landscape level. The CFA believe the proposed subdivision, its layout design and approved building site on proposed Lot 1 all fail to be in a low risk location and which does not have a safe access to an area where human life can be better protected from the effects of bushfire.

53 I agree. Mr Holland demonstrated that the site is located in a landscape that can be subject to extreme fire behaviour. There is potential for fire to grow and develop over many hours through uninterrupted forest fuels and undulating terrain with slopes of up to 20 degrees. There are numerous valleys and ridges that have a north-west to south-east alignment that matches hot and dry summer north-westerly wind patterns that can channel and increase fire behaviour close to the site.

54 Mr Holland stated:

The combination of these factors gives rise to a landscape with potential for a bushfire to build momentum and to an intensity that produces destructive bushfire behaviour which generates strong convective winds. These convective winds can damage structures and emanate from any direction, increasing the unpredictability of the fire. Accordingly, in such conditions, a bushfire front could advance from any aspect, and not necessarily from the north-westerly to south-westerly direction of the typical Victorian prevailing summer weather conditions.

- 55 Mr Holland considered these landscape fire factors have the potential to produce extreme ember attacks and fire spotting that can coalesce into major new fire fronts. The combination of unmodified vegetation, change in topography and remnant areas of protected vegetation all contribute to an extreme risk. This has already been demonstrated on the site with the events of Black Saturday. The most significant fire risk to the site is from the north and west, of which the vegetation type identified by the CFA is forest⁵ to the south-west, north to south-east of the site. The bushfire risk from the landscape to the site is further heightened by the long access to a bitumen road for evacuation purposes.
- 56 Both the BMO and Clause 52.47 seek to ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level. It also requires development to be located and designed to appropriately respond to bushfire hazard. Clause 52.47-2.4 – *Subdivision objectives* looks to provide lots that are capable of being developed in accordance with the objectives of the Clause. Approved Measure AM5.1 requires an application to subdivide land to demonstrate that each proposed lot is capable of meeting defendable space requirements and approved measures in Clauses 52.47-2.1 and 52.47-2.3.
- 57 Approved Measure AM2.1 requires that bushfire risk to development from the landscape beyond the site can be mitigated to an acceptable level. The subdivision layout and the location of the approved dwelling re-build on proposed Lot 1 (in the north-eastern part of the site) is a concern to the CFA due to the close proximity of forest type vegetation (as apart from the woodland vegetation classification provided by the applicant and Mr Francis). It is clear that the applicant's attempt to shift the location of the approved dwelling re-build on proposed Lot 1 was in recognition of the failure of the location to appropriately account for bushfire risk. The extent of risk now of concern to the CFA and Council. I agree that, although the location of the dwelling re-build exists, its location does not assist in demonstrating confidence that approving the subdivision would mitigate that risk and that it would enhance this dwelling becoming a place where human life and property is subject to unacceptable bushfire attack.

⁵ The September 2017 Technical Guide published by the Department of Environment, Land, Water and Planning on Planning Permit Applications in the BMO advises that vegetation type should always be classified on the basis of what it will be at maturity or in its long term condition. Hence, vegetation following a bushfire should be classified according to what it will be once regenerated.

- 58 This proposal is unique given the circumstances with the current approved locations for dwelling re-builds and the requirement for permission to subdivide the site that creates a lot for each dwelling. The applicability of Clause 52.47-2.4 is somewhat confused because the application is effectively a subdivision of approved development. The applicant considers this situation makes consideration of the subdivision clear cut.
- 59 Despite these views, and as I have mentioned earlier, a separate permit is required to subdivide land. The same policy framework is applicable given the zoning and overlay coverage. Overall guidance is provided by integrating policies and provisions for net community benefit and sustainable development but with the added consideration of protecting human life and property in areas affected by bushfire risk.
- 60 In regard to this, I am not convinced that the subdivision of the site is an acceptable outcome. The facts are clear in terms of the past impacts on the site from bushfire. I am also mindful of the 'game changing' nature of the events of Black Saturday. The loss of life and the damage left behind from that event should not be forgotten and despite the heartache, orderly planning should not be compromised by continuance of past planning decision making and by what has occurred in the past.
- 61 I also consider the lack of support from the CFA to be a telling element that 'raises the bar' in terms of how a proposed development including subdivision needs to demonstrate that risk from the effects of bushfire can be reduced to an acceptable level. Mr Holland's submission presented a foreboding description of the extreme bushfire risk in this area, which the applicant was unable to dissuade otherwise.
- 62 I also found the evidence of Mr Francis was partisan, had 'missed the mark', and of little weight in my considerations. In circumstances, such as this, it would be of more benefit to the Tribunal for evidence in relation to bushfire risk to have been more independent and perhaps more of a peer review form.

CONCLUSION

- 63 For the reasons given above, I am unable to support the proposed two lot subdivision and the decision of the responsible authority is affirmed. No permit is granted.

Christopher Harty
Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2106/2018
PERMIT APPLICATION NO. YR-2018/394

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987 (Vic)*; Yarra Ranges Planning Scheme; Green Wedge Zone, Schedule 5; Bushfire Management Overlay; Bushfire risk.

APPLICANT

Alexander Philip O'Toole/Stephen Boyd-Squires

RESPONSIBLE AUTHORITY

Yarra Ranges Shire Council

REFERRAL AUTHORITY

Country Fire Authority - Headquarters;
VicRoads – Metropolitan South East Region

SUBJECT LAND

1854 Warburton-Woods Point Road,
MCMAHONS CREEK VIC 3799

WHERE HELD

Melbourne

BEFORE

Michelle Blackburn, Member

HEARING TYPE

Hearing

DATE OF HEARING

10 May 2019

DATE OF ORDER

31 May 2019

CITATION

O'Toole v Yarra Ranges SC [2019] VCAT
810

ORDER

No permit granted

- 1 In application P2106/2018 the decision of the responsible authority is affirmed.
- 2 In planning permit application YR-2018/394 no permit is granted.

Michelle Blackburn
Member

APPEARANCES

For applicant

Mr O'Toole (also known as Mr Boyd-Squires),
in person

He called the following lay witness:

- Mr Ian Brownlie

For responsible authority

Ms S Brooker, town planner, of Brooker
Planning

For Country Fire Authority

Mr Stephen Foster, assisted by Mr Andrew
Ganey, of the CFA

For VicRoads

No appearance

INFORMATION

Description of proposal	Use and development of the site for a dwelling, outbuilding and wind turbine.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Yarra Ranges Planning Scheme
Zone and overlays	Green Wedge Zone, Schedule 5 Bushfire Management Overlay Restructure Overlay, Schedule 91
Permit requirements	Clause 35.04-1 Use of land for the purposes of a dwelling. Clause 35.04-5 Buildings and works associated with a Section 2 use, within 100 metres of a Road Zone Category 1, within 5 metres of a boundary and within 100 metres of a dwelling not in the same ownership. Clause 44.06-2 Construct a building or construct or carry out works associated with the use of land for the purposes of accommodation. Clause 45.05-2 Construct or extend a dwelling or other building.
Land description	<p>The site is located on the eastern side of Warburton-Woods Point Road. It is irregular in shape. The widest point of the site is its street frontage of 24.43 metres. It narrows along its length to a width of 16.586 metres along its rear boundary. It has a depth (southern side boundary) of 52.31 metres and an area of around 1,092.7 square metres.</p> <p>The site is currently developed with two outbuildings and contains three large Eucalyptus trees across its frontage, with the balance of the land being cleared of vegetation.</p> <p>It takes access of Warburton-Woods Point Road via an informal gravel cross-over located in the north-western corner of the frontage.</p>

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 The applicant wants to build a dwelling on a site in McMahons Creek and has applied for a planning permit to enable him to do so.
- 2 McMahons Creek is a small cluster of houses surrounded by bushland. The applicant's site abuts the northern edge of that bushland.
- 3 Both the Country Fire Authority (**CFA**) and the bushfire consultant engaged by the applicant have categorised the bushland as posing an extreme bushfire risk. The CFA say the bushland contains extreme amounts of fuel across significant distance and on complex mountainous topography.
- 4 The site is subject to a Bushfire Management Overlay (**BMO**) under the Yarra Ranges Planning Scheme (**scheme**). This overlay requires a permit for the development of the proposed dwelling and consideration of bushfire risk is a key matter relevant in deciding whether to grant that permit.
- 5 A permit is also required for the use and development of the site for a dwelling under the Green Wedge Zone, Schedule 5 (**GWZ5**). The purpose of the GWZ5 is focused upon agricultural not residential purposes. While, the site is not in a zone which town planning recognises as being primarily for residential or township purposes, use of land for a dwelling is not prohibited in the GWZ5 and I am able to consider the application.
- 6 The CFA are a determining referral authority for decisions under the BMO and objected to the grant of a permit on the basis of bushfire risk. Accordingly, Council refused to grant a permit for the proposed dwelling. The applicant has sought review of this decision with this Tribunal.
- 7 The applicant says that a permit for the use and development of the site for a dwelling should be granted and that bushfire risk can be managed, including by relying on a firebreak located at edge of the bushland along the boundary of his site. The firebreak is on Crown land.
- 8 For the reasons I explain below, I am not satisfied that the proposal appropriately protects human life or manages bushfire risk. For these reasons, I have decided that a permit should not be granted for the use and development of the site for the proposed dwelling.

WHAT ARE THE KEY ISSUES?

- 9 As I have explained, a key consideration as to whether to grant a permit for the proposal under the BMO is the response of the proposal to bushfire risk.

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.

The proposal must meet certain requirements of the scheme relating to bushfire planning for a permit to be granted under the BMO.

- 10 There are a broader range of matters relevant to my decision as to whether to grant a permit for the proposal under the GWZ5. However, the response of the proposal to general policies of the scheme relating to bushfire (e.g. clause 13.02-1S) is also a key factor in this decision. This is made clear by clause 71.02-3 of the scheme. This clause says that while town planning decisions are generally to be made in an integrated manner by balancing conflicting objectives in favour of net community benefit and sustainable development, the situation is different in bushfire affected areas. In respect of bushfire affected areas, clause 71.02-3 says:

However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.

- 11 This means that even if there were other considerations weighing in favour of granting a permit under the GWZ5, it is the protection of human life from bushfire which I must prioritise in reaching my decision on the applicant's permit application. In response to the applicant's query about which lives are to be protected, I note that the lives to be protected are not just those of the applicant and others who may reside in the dwelling with him. It is also the lives of emergency service personnel who may be called upon to defend the dwelling in the event of a bushfire, and, as planning permission runs with the land, it is also the lives of other future owners and occupiers of the proposed dwelling.
- 12 It follows from the above that the way in which the proposal addresses bushfire risk is a threshold issue in this case. If the proposal is not an acceptable response to the bushfire risks associated with the site, then this will lead to me refusing to grant a permit for the proposal, irrespective of other town planning considerations.
- 13 If, however, I do find the proposal to be acceptable in respect of its response to the bushfire risks of the site, then I must consider whether to grant a permit for the proposal having regard to the broader town planning matters relevant to any decision under the GWZ5 and also under the Restructure Overlay applying to the site.

DOES THE PROPOSAL APPROPRIATELY ADDRESS BUSHFIRE RISK?

Overall conclusion

- 14 The BMO requires the proposal to meet the requirements of clause 53.02. Clause 53.02 sets out objectives which must be met by the proposal. As the site is not in any of the zones listed in clause 53.02-1, the objectives which must be met by the proposal are those contained in clause 53.02-4, namely the:

- Landscape siting and design objective;

- Defendable space and construction objective
 - Water supply and access objective
- 15 Clause 53.02 sets out approved measures for each objective. If these approved measures are achieved then the objectives are met. If the approved measures are not achieved, then consideration needs to be given as to whether the objective is met by an alternative measure. Some alternative measures are set out in clause 53.02 but unspecified alternative measures may also be found to meet the relevant objective.
- 16 Decision guidelines of clause 53.02 require consideration of a range of matters, including
- The bushfire hazard landscape assessment, the bushfire hazard site assessment and the bushfire management statement submitted with the application.
 - The impact of any State, regional or local bushfire management and prevention actions occurring around the site and in the wider area on the bushfire hazard and the level of risk to the proposed development.
 - Whether the proposed development meets the objectives of Clause 53.02-4 regardless of other measures which may be available, including private bushfire shelters, community shelters and the presence of places of last resort.
 - Whether the proposed measures can be practically implemented and maintained in conjunction with the ongoing use of the land.
 - Whether the use of an alternative measure meets the relevant objective having regard to the bushfire hazard and the nature of any constraint that prevents the applicable approved measure from being implemented.
 - If one or more of the objectives in Clause 53.02-4 will not be achieved in the completed development, whether the development will, taking all relevant factors into account, reduce the bushfire risk to a level that warrants it proceeding.
 - Whether the risk arising from the broader landscape can be mitigated to an acceptable level or warrants the development not proceeding.
- 17 The CFA says that the proposal does not include approved or alternative measures which are appropriate to meet two of the objectives of clause 53.02-4. For the reasons I explain below, I agree with the CFA.
- 18 While the applicant pointed to other measures available off-site, including the local CFA station and the potential to take shelter in a culvert under a road, I am not satisfied that these are sufficient measures to mitigate the risk of bushfire. Furthermore, the decision guidelines of clause 53.02 make it clear that I am to consider whether the objectives of clause 53.02-4 are met irrespective of such potential shelters.

- 19 In accordance with the decision guidelines, I have also considered whether the development will nonetheless reduce the bushfire risk to a level that warrants it proceeding. For the reasons I explain below, I do not consider the proposal to reduce bushfire risk.
- 20 It follows from the above, that as I have found that the proposal does not meet the objectives of clause 53.02 or otherwise reduce bushfire risks, I have decided that a permit should not be granted for the proposal under the BMO.
- 21 As I explained above, bushfire risk is also a key issue in my decision as to whether to grant permission for the use and development of the site under the GWZ5. I find the failure of the proposal to appropriately address the requirements of the BMO means it also fails to be an acceptable response to broader planning policies of the scheme calling for the prioritisation of the protection of human life from bushfire risk. As this is a matter I must prioritise over all other planning considerations, the failure of the proposed use and development of the site to result in an acceptable level of bushfire risk for future occupants and other persons has led me to decide to refuse to grant a permit for the proposal under the GWZ5.

Landscape siting and design objective

- 22 Clause 53.02-4.1 sets out the following landscape siting and design objectives which must be met by the proposal:
- Development is appropriate having regard to the nature of the bushfire risk arising from the surrounding landscape.
 - Development is sited to minimise the risk from bushfire.
 - Development is sited to provide safe access for vehicles, including emergency vehicles.
 - Building design minimises vulnerability to bushfire attack.
- 23 The following Approved Measures (**AM 2.1, AM 2.2 and AM 2.3**), if achieved, mean the above landscape siting and design objectives are met:
- AM 2.1 The bushfire risk to the development from the landscape beyond the site can be mitigated to an acceptable level.
- AM 2.2 A building is sited to ensure the site best achieves the following:
- The maximum separation distance between the building and the bushfire hazard.
 - The building is in close proximity to a public road.
 - Access can be provided to the building for emergency service vehicles.
- AM 2.3 A building is designed to be responsive to the landscape risk and reduce the impact of bushfire on the building

- 24 The CFA conceded that the modest size and simple design of the building meet the design objective of AM 2.3. However, it says that the proposal fails to meet AM 2.1 and AM 2.2 and therefore fails to meet the landscape and siting objectives of clause 53.02-4.
- 25 I agree with the CFA that the proposal fails to meet AM 2.1 and 2.2 as:
- The absence of sufficient defensible space on the property means that bushfire risks cannot be mitigated to a degree which would allow a Bushfire Attack Level 40 (**BAL 40**) construction standard. I have explained why I consider this to be the case in the below section discussing the defensible space objectives of the BMO. No measures have been proposed which would mitigate such a high level of bushfire risk to an acceptable level and, having regard to the risk posed by the broader landscape, this may not be possible. This is contrary to AM 2.1. The bushfire management statement filed with the application (**the Terramatrix Report**)² says that given the site is narrow and runs parallel to the adjacent bushland, that any alternative siting options will not appreciably influence the risk. In my view, this supports the position of the CFA that it may not be possible to mitigate bushfire risk to acceptable levels on this site.
 - The dwelling is proposed to be located at the rear of the property and only around 1.4 metres from the boundary closest to the adjoining bushland (the northern boundary). This is contrary to AM 2.2. The Terramatrix Report suggested that the landscape risk could also be reduced by the implementation of other BMO requirements, including BAL construction standard. However, this suggestion is made on the basis of Terramatrix's assessment that sufficient defensible space is provided for BAL 40 construction standards to be utilised. As I explain below, I do not agree with this assessment.
- 26 There was some discussion at the hearing about the potential for a permit condition to require relocation of the proposed dwelling. Putting aside the significant change to the proposal that this would entail which may require re-advertising and reassessment of the proposal against broader town planning policies, I do not consider relocation of the proposal capable of resolving bushfire risks. While, it may be theoretically possible for the proposal to be relocated on the site so as to achieve AM 2.2, as I explain further below relocation would not assist the proposal to meet the BMO objective relating to defensible space as there is no place on the site where the proposed dwelling could be re-located so as to achieve the necessary defensible space. Indeed, in addition with the overall landscape hazard risks, it may be that it is not possible to mitigate bushfire risk to an acceptable level on this site.

² This report was prepared by Terramatrix, also contained a landscape and site hazard assessment and was dated November 2018.

- 27 Furthermore, the applicant explained that relocating the proposal toward the front of the site would create difficulties for the functioning of a septic waste system.
- 28 There were no other alternative measures put forward by the applicant which were appropriate to meet the objectives of clause 53.02-4.1.
- 29 It follows from the above the proposal does not achieve the approved measures or any appropriate alternative measures and therefore, does not meet the landscape siting and design objective of clause 53.02-4.1.

Defendable space and construction objective

- 30 Clause 53.02-4.2 sets out the following defendable space and construction objective which must be met by the proposal.
- Defendable space and building construction mitigate the effect of flame contact, radiant heat and embers on buildings.
- 31 The following Approved Measure (**AM 3.1**) specified in clause 53.02-4.2 is relevant to the proposed dwelling and if achieved, means the above defendable space and construction objective is met:
- AM 3.1 A building used for a dwelling (including an extension or alteration to a dwelling), a dependent person's unit, industry, office or retail premises is provided with defendable space in accordance with:
- Table 2 Columns A, B or C and Table 6 to Clause 53.02-5 wholly within the title boundaries of the land; or
 - If there are significant siting constraints, Table 2 Column D and Table 6 to Clause 53.02-5.
- The building is constructed to the bushfire attack level that corresponds to the defendable space provided in accordance with Table 2 to Clause 53.02-5.
- 32 Table 2 of clause 53.02 sets out the defendable space area (measured in distance from the building façade) that must be provided. This varies depending on the slope and vegetation coverage of the surrounding land. The CFA agreed with the categorisation used in the Terramatrix Report of the relevant slope class as 'Downslope >0 to 5 degrees' and the vegetation classification as 'forest'. There is also no dispute that there are siting constraints which make it appropriate to apply Column D of Table 2.
- 33 Applying all of the above, Table 2, Column D, requires 24 metres of defendable space around the proposed dwelling to be provided and BAL 40 construction standards being adopted for the proposed dwelling.
- 34 The site is 24.435 metres wide at its widest point. It is therefore not possible for a dwelling to be located anywhere on the site so as to enable a 24 metre wide defendable space area around the dwelling to be provided within the title boundaries of the site.

35 Therefore, the proposal would need to rely upon surrounding land to the north, south and east for the provision of its defensible space. Its location to the rear of the site means that it can provide 24 metres of on-site defensible space to the west of the dwelling, as the site length is over 50 metres.

36 There is an alternative measure specified in clause 53.02-4.2 (i.e. Alternative Measure 3.3) which contemplates defensible space being provided on adjoining land. It says:

Adjoining land may be included as defensible space where there is a reasonable assurance that the land will remain or continue to be managed in that condition as part of the defensible space.

37 This alternative measure makes it clear that the key issue in the provision of off-site defensible space is considering whether it will continue to be managed as defensible space.

38 The ongoing management requirements for defensible space are set out in Table 6 of clause 53.0-2, and are:

- Grass must be short cropped and maintained during the declared fire danger period.
- All leaves and vegetation debris must be removed at regular intervals during the declared fire danger period.
- Within 10 metres of a building, flammable objects must not be located close to the vulnerable parts of the building.
- Plants greater than 10 centimetres in height must not be placed within 3 metres of a window or glass feature of the building.
- Shrubs must not be located under the canopy of trees.
- Individual and clumps of shrubs must not exceed 5 square metres in area and must be separated by at least 5 metres.
- Trees must not overhang or touch any elements of the building.
- The canopy of trees must be separated by at least 5 metres.
- There must be a clearance of at least 2 metres between the lowest tree branches and ground level.

Unless specified in a schedule or otherwise agreed in writing to the satisfaction of the relevant fire authority.

39 The CFA has not raised concerns about these vegetation requirements being met on land to the south or east of the site. I understand this is on the basis that land to the south and east are developed with dwellings and consequently that land already must be managed in accordance with the above vegetation requirements.

40 However, land to the north of the site is bushland. This bushland is owned by the Crown and managed by the Department of Environment, Land,

Water and Planning (**DELWP**). There is a strip of this Crown land immediately abutting the site boundary which is largely cleared of vegetation.

- 41 Three letters from DELWP (and predecessors) were provided to me by the applicant setting out information about the way in this bushland is managed. The first of these was from 2009 and indicated that the cleared section of the bushland immediately abutting the site was managed as a firebreak. However, given this letter is 10 years old, it does not assist me with what I need to understand, which is whether the firebreak is will be managed as defendable space (i.e. consistent with the requirements of Table 6 of clause 53.02) now and in the future.
- 42 The next two letters were sent in October 2018 and February 2019. They both provide a similar account of the way in which the bushland (including the firebreak) is managed, confirming that:
- Regular fuel reduction burns are carried out on this land (with a general frequency of 7 to 10 years); and
 - Annual slashing is carried out on the firebreak.
- 43 The letters also confirm that this management regime is intended to be maintained into the foreseeable future.
- 44 The applicant also confirmed that in his experience the current extent of vegetation management carried out by DEWLP within the firebreak was annual slashing.
- 45 While these measures are relevant to my understanding of the broader landscape risk to the proposal, annual slashing is not sufficient to meet the defendable space management requirements of Table 6, such as the requirements for short cropped grass and regular removal of leaves and vegetation debris throughout the declared fire danger period.
- 46 The fact that DELWP do not maintain the firebreak as defendable space in accordance with Table 6 requirements appears to be confirmed in its most recent letter which states that:
- ...any defendable space required to manage fire risk cannot be established and maintained in a way that the Department can guarantee.
- 47 In that same letter DELWP also states that it does not consider it appropriate to manage risk created on private land using Crown land for defendable space.
- 48 All of this means that I am not satisfied that there is any prospect of the firebreak being managed as defendable space in accordance with the requirements of Table 6. The firebreak therefore cannot be relied upon as part of the defendable space for the proposed dwelling.
- 49 I note that that there was also a dispute between the parties as to whether the firebreak was wide enough to provide defendable space. It is not

necessary for me to consider this issue. This is because, even if it was wide enough, I have found that the firebreak cannot be relied upon as part of the defensible space for the dwelling.

- 50 The applicant also indicated that he carried out his own maintenance of the firebreak, in addition to that carried out by DELWP. However, in response to my questions, the applicant confirmed that he had no documented right to do this into the future. Therefore, I cannot rely on his management of the firebreak as defensible space. As indicated in the correspondence from DELWP outlined above, the focus of management for this land is for the benefit of the public as a whole, not for the benefit of a particular individual.
- 51 It follows from the above that I find that the defensible space required by AM 3.1 is not achieved by the proposal on the site. Nor is it able to be achieved off-site. This is irrespective of the siting of the proposed dwelling, as the width of the site means that there is no place on the site where a dwelling could be located so as to provide sufficient defensible space to its north.
- 52 There were no other alternative measures put forward by the applicant which were appropriate to meet the defensible space and construction objective of clause 53.02-4.2.
- 53 Therefore, I conclude that the defensible space and construction objective of clause 53.02-4.2 is not met by the proposal.

Does the proposal otherwise reduce bushfire risk?

- 54 The Terramatrix Report concludes that the proposal results in an overall reduction in fire risk. It appears to reach this conclusion on the basis that the land is already used as a dwelling.
- 55 There is no dwelling constructed on the site. The applicant says that he nonetheless uses the site for residential purposes, living in a tent-like shelter on the land. He says that he is able to do so pursuant to existing use rights confirmed by the Council in 2006.
- 56 In support of this submission, the applicant handed up a letter from the Council dated 30 November 2006. This letter said that the applicant had provided Council with information 'of a poor standard of proof to establish an existing use right'. However, the letter went on to say that that given the 'balance of probabilities and the factual merits of the case', Council would not proceed with any planning enforcement action against the applicant.
- 57 Councils have a discretion as to whether they pursue enforcement action in respect of a potential contravention of planning requirements. A decision of a Council not to pursue a potential planning contravention because of potential existing use rights, is not the same as a positive confirmation of

existing use rights. The 2006 letter does not confirm that the applicant has existing use rights to use the site for the purposes of a dwelling.

- 58 The mechanisms for confirming existing use rights are by either obtaining a declaration of this Tribunal or by obtaining a certificate of compliance issued under section 97O of the *Planning and Environment Act 1987*. No declaration or certificate of compliance has been obtained by the applicant.
- 59 Furthermore, even if there were existing use rights in 2006, there is the potential that they could have been lost since that time (noting that a house that was partly on the site and partly on Crown land at that time was demolished in around 2006).
- 60 The applicant has not asked me to make a declaration as to any existing use rights as part of this proceeding and, in any event, has not provided me with evidence aimed toward establishing any existing use rights.
- 61 All of this means that I do not accept the conclusion of the Terramatrix Report that there will be an overall reduction in bushfire risk as a result of the proposal. I am not satisfied that there is a legitimate use of the land which will benefit from the proposal in terms of reduced bushfire risk. On the contrary, in my view the grant of a permit which allowed the use and development of the site for a dwelling would increase bushfire risks.

CONCLUSION

- 62 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Michelle Blackburn
Member