

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
administrative DIVISION

planning and environment LIST

vcat reference No. P2127/2009
Permit Application no. 625/2008/P

CATCHWORDS

Section 77 of the *Planning & Environment Act* 1987. East Gippsland Planning Scheme; Flood Risk. Climate change and sea level rise. Acceptability of design response.

APPLICANT	Mr B D'Abate
RESPONSIBLE AUTHORITY	East Gippsland Shire Council
REFERRAL AUTHORITY	East Gippsland Catchment Management Authority
RESPONDENTS	Rick and Lilla Linklater
SUBJECT LAND	132 Marine Parade Lakes Entrance
WHERE HELD	Melbourne
BEFORE	Ian Potts, Member
HEARING TYPE	Hearing
DATE OF HEARING	31 May and 1 June 2010
DATE OF ORDER	6 August 2010
CITATION	D'Abate v East Gippsland SC & Ors [2010] VCAT 1320

Order

- 1 Pursuant to s.60 of the *Victorian Civil and Administrative Tribunal Act* 1998 Rick and Lilla Linklater are joined as parties to this proceeding.
- 2 The decision of the Responsible Authority is affirmed.
- 3 In permit application 652/2008/ no permit is granted.
- 4 The application for costs by Rick and Lilla Linklater against the Responsible Authority is dismissed.

Ian Potts Member		
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APPEARANCES

For Mr B D'Abate	Ms Watson, a person appointed by Mr D'Abate to represent him.
For East Gippsland Shire Council	Mr Terry Montebello, solicitor from Maddocks Lawyers.
For East Gippsland Catchment Management Authority	Mr Adam Dunn, an engineer from the West Gippsland Catchment Management Authority.
For Rick and Lilla Linklater	Ms Lilla Linklater and Mr Rick Linklater in person.

INFORMATION

Description of Proposal	<p>The development entails subdivision of the land to create a new lot and construction of a new dwelling on that lot.</p> <p>The new dwelling would be located on a new lot of 193sqm. It would be a double storey dwelling, with 1.8m high front fence to a formal outdoor living area.</p> <p>At ground floor would be three bedrooms, laundry and a two car garage. At first floor would be a study, living and kitchen areas and a front deck.</p> <p>The finished floor level of the ground floor would be raised to 300mm above the declared 1% AEP flood level of 1.8m AHD.</p>
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act 1987</i> .
Zone and Overlays applying under the East Gippsland Planning Scheme	<p>Residential 1 Zone (Clause 32.01)</p> <p>Land Subject to Inundation Overlay (Clause 44.04)</p> <p>Adjacent to a Road Zones – Category 1 (Clause 36.04).</p>

<p>Permit requirements applying under the East Gippsland Planning Scheme</p>	<p>Clause 32.01-2 – Subdivision of the land.</p> <p>Clause 32.01-3 Construction of a dwelling on a lot less than 300sqm.</p> <p>Clause 44.04-1 – Buildings and works.</p> <p>Clause 44.04-2 – Subdivision.</p> <p>Clause 52.29 - Subdivide land adjacent to a road in a Road Zone, Category 1.</p>
<p>Relevant Scheme policies and provisions.</p>	<p>Clauses 11, 15.02, 15.08, 16, 21, 22.09, 22.12, 52.26 and 65.</p>
<p>Land Description</p>	<p>The subject land has a frontage to Marine Parade of 25.44m and a depth of 76m, yielding a total area of 1,787sqm. The land contains motel units with a manager’s residence at the front. The motel units and residence have recently been the subject of subdivision action such that each of the units and the residence are contained within eleven separate lots with common property containing an accessway, car parking and a pool.</p> <p>The pool area is the subject land of this application. It is located at the north-west corner of the lot on the Marine Parade frontage. It is bound on the east by the central accessway and opposite, the two storey (former manager’s) residence, to the south by the existing car parking spaces and to the west by a two storey residence.</p> <p>The land is relatively flat and is located in a residential area.</p>
<p>Cases Referred To</p>	<p><i>Taip v East Gippsland SC (includes Summary)</i> (Red Dot) [2010] VCAT 1222.</p>

REASONS

What is this proceeding about?

- 1 Mr D'Abate has sought planning permission to subdivide his land and construct a new, two storey dwelling on the newly created lot. His application for a planning permit for this development has been refused by the East Gippsland Shire Council because the East Gippsland Catchment Management Authority (the EGCMA) objects. The EGCMA is a referral agency under section 52 of the Planning and Environment Act 1987, and because of its objection the Council is obliged to refuse the grant of the permit. The Council in fact holds the position that if it were not for the EGCMA's objection it would have granted a permit for the development.
- 2 The EGCMA maintains that the proposal is unacceptable because the subdivision and construction of the dwelling is an intensification of residential use in a floodway. This intensification is said to be unacceptable because the assessed the level of hazard under a 1 in 100 year or 1% AEP flood event is too high.
- 3 Mr and Mrs Linklater are the owners of a two storey dwelling next to the proposed development site. Their main concern is that the proposed upper level balcony of would intrude into the views from their dwelling. While they object to the granting of a permit on this basis, they have indicated that they would accept a redesign to reduce the alleged intrusion.
- 4 While I have given consideration to the submissions of Mr and Mrs Linklater, the issues they have raised are not the determinative to this application. Indeed, I concur with the position of the Council that the design responds satisfactorily to those matters relevant under Clause 54 of the Planning Scheme. Further, there is no particular policy reference or other planning requirement under the East Gippsland planning scheme that I was taken to that seeks to protect the private views of other residents. Accordingly I have not found it necessary, in light of the more substantive issues, to deal with this issue in any further in these reasons.
- 5 The substantive issue in this matter is about the risk of the flooding and the associated level of hazard. However, these risks are not confined to the present day flood risks. State policy directs that a consideration of the potential impacts from sea level rise of not less than 0.8m by 2100 and other climate change impacts be considered for a site such as this. It is these issues that have lead me to conclude that a permit should not be granted.

contextural background

- 6 This application was heard in conjunction with another application for development in Lakes Entrance, a multi storey, multi unit development on

the corner of Marine Parade and Laura Street (the Laura Street site). While heard concurrently, the decision for the Laura Street site has been determined separately. The reason for hearing the two applications together was because of the common issues not only about current flooding risks but also about the risks from sea level rise and climate change impacts.

- 7 The reasons given in the Laura Street site set out the nature of the flood and climate change risks for Lakes Entrance. All that which has been said in those reasons about the physical exposure to flood risks, climate change impacts and policy context applies to this site and this application because of the similar low lying condition of the land and the exposure to these risks. It is not intended in these reasons to repeat those matters again in detail. Instead, reference will be made to the Laura Street decision and where necessary elaboration made to give context to this decision.

The flood risk issues

- 8 The Marine Parade site is subject to a 1 in 100 year or 1% AEP peak flood level of 1.8m AHD. This estimated peak flood level includes the combined effects of tide, storm surge and wind effects. Because of the influence of these factors, the actual flood level the subject land would experience will cycle between peak and lower levels. The material tabled by the EGCMA indicated that the difference in flood level could be as much as 0.5m or more.
- 9 Flood events that can generate severe impacts, such as flooding of roads and other support infrastructure can occur also without high river flows. These occur because of coastal storm surge or strong winds, typically from the south-west, over the long fetch of the lake system.
- 10 The EGCMA argues that under the 1% flood event peak level, the depth of flood water will be in excess of 0.7m around the site. It is submitted that this depth will make access unacceptably hazardous and be a danger to residents and emergency personnel. The degree of hazard was determined in accordance with the *Floodplain Management in Australia – Best Practice Principles and Guidelines* SCARM Report 73 (the SCARM report).
- 11 The central issue for the EGCMA is the intensification of the land use that the subdivision and construction of an additional dwelling poses in an area said to be subject to hazardous flood conditions. Having regard to state planning policy under Clause 15.02 of the East Gippsland Planning Scheme and the purposes of the Land Subject to Inundation Overlay, the EGCMA considers that approval of the proposed intensification of land use is unacceptable.
- 12 I find that there are flaws in the EGCMA's position that lead me to conclude that the flood hazard level is not so serious as to warrant refusal of the

development on this basis.

- 13 The purposes of the LSIO seek amongst other outcomes:

To ensure that development maintains the free passage and temporary storage of floodwaters, minimises flood damage, is compatible with the flood hazard and local drainage conditions and will not cause any significant rise in flood level or flow velocity.

[Tribunal's emphasis added]

- 14 The EGCMA does not take issue with impacts to the passage, storage of velocity of floodwaters. It is the compatibility of the development with the flood hazard that is at issue. In this respect I have had regard to the decision guidelines, specifically those that call for consideration of:

The frequency, duration, extent, depth and velocity of flooding of the site and accessway.

The flood warning time available.

The danger to the occupants of the development, other floodplain residents and emergency personnel if the site or accessway is flooded.

- 15 In considering these factors it is relevant that the actual peak flood levels are not persistent, but cycle with the tide, as set out earlier. The more persistent and lower levels are not so deep as to present a high hazard for access to or from the site or to emergency personnel. Sufficient material was submitted to satisfy me that established flood warning and response programs for Lakes Entrance are in place to facilitate early responses or evacuation during the lower flood levels. I find that the level of hazard to residents and emergency personnel is moderated by these factors.
- 16 Thus while the high hazard conditions suggested by the EGCMA may occur for short periods, they are not sufficiently persistent as to present an unacceptable hazard.
- 17 I have also considered the wider purpose of the LSIO, which is to constrain development and hence, ultimately the intensity of land use to fit within the level of flood risk and hazard. This I dealt with in more detail in the reasons for the Laura Street site.
- 18 This proposal is for subdivision of an existing land in common property to eleven other dwellings to provide for one new lot and one new dwelling. Such a development is at the lower end of intensity. In real terms, the incremental increase of one new dwelling is not so significant as to raise real concerns of increased risk of harm or hazard from flooding.
- 19 For these reasons, I conclude that in principle the subdivision of this land and the construction of one additional dwelling would be an acceptable outcome when having regard to the purposes of the LSIO and the issues of

present day flood risk and hazard.

Climate change impacts

- 20 Clause 15.08-2 requires responsible authorities to take account of a minimum sea level rise of 0.8m by the year 2100. The combined effects of ‘tides, storm surges, coastal processes and local conditions’ are also to be taken into account when ‘assessing risks and coastal impacts associated with climate change’. There is clear policy direction that:

...new development is located and designed to take account of the impacts of climate change....

and

Ensure that land subject to coastal hazards [is] ... appropriately managed to ensure that future development is not at risk.

- 21 In the reasons for the Laura Street site I set out the relevant considerations of sea level rise and climate change impacts. All that was said in those reasons about this context is applicable here, with the subject site similarly being within 1m of current mean sea level and proximate to the northern arm of the lake system. In short, the site is vulnerable to the impacts of sea level rise of at least a rise of 0.8m by 2100 that is required by state policy to be applied as well as the other potential impacts from climate change. The work of the Gippsland Coastal Board indicates these climate change impacts to include increases in the strength and occurrence of south-westerly winds, storms and storm surges.
- 22 There is no argument from the Council or EGCMA that the impacts of sea level rise and climate change would affect this site. And so give rise to more frequent and greater depths of flooding than those historically experienced by Lakes Entrance.
- 23 Given these conditions and the guidance of State policy I have set out earlier, it falls on the Tribunal to decide whether or not this development should be permitted.
- 24 Policy guidance raises two questions in relation to this proceeding. One is whether or not the location is acceptable given the level of risk to climate change impacts.
- 25 Clearly, this is a location with a very high level of risk to climate change impacts. It is a level of risk which the Council and the EGCMA have yet to address and respond to through planning and other mechanisms. Indeed, as has been set out in the Laura Street decision, the Council has deferred the development of any such responses to a State lead processes, stating that it cannot ‘go it alone’. Until such responses are developed, it is the Council’s view that development should continue in accord with the recent Planning Scheme Amendment C68, which seek to implement amongst other

strategies, the Lakes Entrance Urban Design Framework.

- 26 I addressed this response from the Council in the Laura Street matter. I adopt those same reasons here and form the same conclusion that little weight can be given to the urban design outcomes under Amendment C68 in respect to climate change impacts. In my view this planning scheme amendment did not address in any serious manner the issues and impacts of climate change that are required to be considered under current state planning policy.
- 27 Further, in line with the reasons given in the Laura Street decision, not only is this dwelling site vulnerable to flooding from climate change impacts, the supporting infrastructure, such as roads, water and power, are also vulnerable. Without further consideration and strategies being implemented to protect these supporting infrastructures, the site remains vulnerable to more than just mere flooding.
- 28 The other question raised in policy that is to be addressed is whether or not the design response is appropriate for the climate change impacts. In this respect, the EGCMA recommends that the floor levels of the development be raised a further 0.8m above the current peak flood level to address the 2100 projections.
- 29 Like the Council, I find this to be unacceptable. As a basic design response raising the floor levels would consequentially raise wall levels along the boundary of the Linklater's property to 4.3m above ground level. While this interface is to the Linklater's driveway, it is also would face toward ground floor windows and an upper level balcony. Such a proposed wall height would in my view, have a poor amenity outcome.
- 30 Further to that, raising the dwelling leads to potential neighbourhood character conflicts due to the increased height and consequential change in the rhythm of built form.
- 31 What is warranted is not a mere lifting of floor levels. What is warranted is an overall strategy for this site and surrounding area for protection from the impacts of climate change. Any new dwelling proposed for this site can then respond within that context with an appropriate level of built form.

Conclusions and determination

- 32 I set out in the reasons for the Laura Street site that after having regard to the matters set out about policy and planning context that:

While it is recognised that the Council has gone to considerable lengths to develop a planning framework for the future urban development of Lakes Entrance (and other settlements in the shire) it has done so in the face of shifting policy imperatives driven by an increasing understanding of the vulnerability of Lakes Entrance to

climate change impacts. It has failed to take account of these shifts. The development of this urban design framework has been overtaken by events that will have major influences on future development of Lakes Entrance and more widely the current and future community. The Council has chosen to ignore these events and defer decision making that it is charged by the State to undertake.

Such decision making is difficult. Being difficult is not a sufficient reason to defer it. There are severe and long term consequences from the impacts of climate changes that are required to be addressed now. State planning policy directs planning and responsible authorities to do so. The Council however is not required to 'go it alone'. The Water Minister's direction to the CMA similarly directs it to assess and respond to planning decisions now. The Council and the CMA are to work together to address these issues now and eventually no doubt integrate with whatever statewide responses develop in the not too distant future.

The decision to grant a permit for this proposal would be to ignore these imperatives and fail to address the level of long term impact and poor planning outcomes that will arise from its vulnerability to the sea level rise and climate change impacts.

- 33 This summary of the planning context applies equally here. It leads to the conclusion that approval of this development in this location is one that is pre-emptive of a proper consideration of how climate change impacts are to be addressed in the low lying areas of Lakes Entrance. Until such time as this is completed and a framework prepared, it would be inappropriate and a disorderly planning outcome to grant this application a permit.
- 34 Accordingly, I will affirm the decision of the Responsible Authority, albeit for different reasons, and direct that no permit issue.

The costs issue

- 35 Mr and Mrs Linklater submit that they have incurred legal and other professional costs in reviewing the development plans submitted by Mr D'Abate and in seeking to achieve mediated redesign with Mr D'Abate. They seek relief from these costs through the Council because they contend that they felt obliged to undertake these steps because it they believed that the Council did not perform as they expected it to.
- 36 The power to award costs falls within the ambit of Division 8 of the *Victorian Civil and Administrative Tribunal Act 1989* (the VCAT Act). Section 109 under that subject to Division 8, parties are to bear their own costs in a proceeding. The power to award costs incurred during the conduct of a proceeding can nevertheless be made by the Tribunal. The power to do so however is limited by those matters set out under section 109(3). These matters relate to the conduct of a party during the proceeding

and consideration as to whether the award of costs is fair.

- 37 The costs incurred Mr and Mrs Linklater arise from their feelings of being frustrated by and dissatisfied with the advice from a Council officer and from protracted communications with the permit applicant about amending the plans. I find there is nothing in their claims that indicates that the Council had taken any purposeful approach to unfairly disadvantaging Mr and Mrs Linklater in this proceeding or for the proceeding to take any thing other than the normal course. They were able to freely seek and engage in the review process and had an opportunity to have their grievances heard in the normal course of this review application.
- 38 It is not unusual for a party in a review application to take a different view to that of a council officer or a Council. Seeking professional advice at their own cost may also be a step a party may take when they have such a disagreement. All of these things are part of the normal process.
- 39 Thus I find that the claims made by Mr and Mrs Linklater do not give rise to reasons why costs should be awarded against the Council when compared against those matters set out under section 109(3) of the VCAT Act. I therefore will make no order for costs against the Council.

Ian Potts Member		
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