

2010 WL 3439675; [2010] VCAT 1222

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Taip v East Gippsland Shire Council and Others
Potts (Member)

31 May, 1 June, 28 July 2010. Melbourne

Development Consent - Precautionary principle - Construction of eight dwellings - Flood Risk - Climate change and sea level rise - State policy objectives - Site's vulnerability to climate change - Orderly planning - Planning and Environment Act 1987 (Vic), s 82 - East Gippsland Planning Scheme (Vic)

The **East Gippsland Shire Council** (the council) granted a permit for a residential development of eight dwellings in a Business 1 Zone (B1Z) in Lakes Entrance. The proposed development was subject to a Land Subject to Inundation Overlay (an LSIO) and required consent from the East Gippsland Catchment Management Authority (the EGCMA) which did not object to the grant of the permit so long as certain conditions were included in the permit. The EGCMA applied for and was granted leave to be joined as a party to an application for review by the applicant so that it could object to the grant of the permit. The grounds of objection by the EGCMA related to

issues of flood risk and hazard as well as the potential impacts from climate change and sea level rise.

The EGCMA later amended its statement of grounds, deleting references to the effects of climate change and sea level rise.

The council and permit applicants agreed that the level of risk from sea level rise and other effects from climate change was required to be considered as it was relevant under the State Planning Policy Framework (Vic) and the Victorian Coastal Strategy (2008).

Held: (1) There are two parts to the question of flood risk. One is the existing risk under current climate conditions and lake levels. The other, despite the EGCMA's amendment to its grounds, is the level of risk from sea level rise and other effects from climate change. This latter issue, as agreed by the council and permit applicants is required to be considered as it is relevant under the State Planning Policy Framework and the Victorian Coastal Strategy (2008).

(2) In considering the risks and appropriate response to the subject site, whether that site is the subject of a Floodway or LSIO is not of a central concern as both forms of planning control call for a consideration of the risks to life, health and safety associated with the proposed development.

(3) The series of risk factors to be considered are common to both planning controls, as are other relevant decision guidelines.

(4) The risk factors include: 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 subject site or accessway is flooded.

*237 (5) The LSIO does not seek, directly, to control use, as does a zoning instrument. It is an overlay that controls how development may occur for a use that is otherwise permissible under a zone. Ultimately, however the form of develop-

ment may have some influence over the intensity of the use.

(6) The LSIO works to ensure that the intensity of the use, controlled through the form of the development, is appropriate for the subject site's exposure to and risks arising from flood conditions. This is the proper application and outcome sought by the application of an LSIO to flood prone land.

(7) To address the issues of climate change, the proposed design response for the development relies solely on raising the sensitive use areas to be above the combined projections of flood and sea level rise levels.

(8) It is simply not enough to consider that the building itself would be protected or suffer little physical impact from sea level rise and climate change due to it being raised to a certain level. The sweep of policy is sufficiently broad that the other impacts which are relevant need to be taken account of.

(9) It would be unfair to consider that the proponents need to address all of those risks alone or at all in some instances given that they arise from the susceptibility of infrastructure that is beyond their control. Such risks need to be addressed by the council and other relevant authorities and/or service providers.

(10) Approving the subject development would not be an orderly planning outcome. It would pre-empt the development of appropriate strategies to address climate change risks.

(11) The proposal fails to satisfy the purposes of planning for intergenerational equity, sustainable, fair and socially responsible development.

Cases Cited

The following cases are cited in the judgment:

[Taip v East Gippsland Shire Council \[2010\] VCAT 147.](#)

[Gippsland Coastal Board v South Gippsland](#)

[Shire Council \(No 2\) \[2008\] VCAT 1545.](#)

Application

These proceedings concerned whether the precautionary principle should apply to a permit for a residential development of eight dwellings in a Business 1 Zone (B1Z) on a site vulnerable to flooding and to the impacts of climate change, including sea level rise. The facts of the case are set out in the judgment.

J Cicero, for the applicant

T Montebello, for **East Gippsland Shire Council**

A Dunn, for East Gippsland Catchment Management Authority

J Lardner, for the respondents

Cur adv vult

28 July 2010

Potts (Member)

REASONS⁽¹⁾

What is this proceeding about?

1 In November 2008, the **East Gippsland Shire Council** resolved to grant a *238 permit for a residential development of eight dwellings in a Business 1 Zone (B1Z) in Lakes Entrance. Ms **Taip** made an application to the Tribunal to review that decision.

2 The proposed development is subject to a Land Subject to Inundation Overlay (an LSIO). Because of this control, the permit application was referred to the East Gippsland Catchment Management Authority (the EGCMA).⁽²⁾ In 2008, the EGCMA did not object to the grant of the permit so long as certain conditions were included in the permit. Following the application for review by Ms **Taip**, the EGCMA applied for and was granted leave to be joined as a party to the application⁽³⁾ so that it could object to the grant of the permit. The grounds of objection by the EGCMA related to issues of flooding and the potential impacts

from climate change and sea level rise.

3 On 31 August 2009, the EGCMA amended its statement of grounds, deleting references to the affects of climate change and sea level rise. The grounds on which the authority therefore relies, focus on the existing level of flood risk and hazard.

4 The permit applicants have circulated amended plans prior to the hearing. At the commencement of the hearing, Mr Cicero advised that the amended plans were satisfactory to Ms **Taip** and she no longer objected. Mr Cicero sought leave of the Tribunal to make no further appearance, advising that Ms **Taip** would rely on the submissions of the Council, who support the development and who would contest the issue of flooding risk made by the EGCMA.

5 Mr Cicero advised that Ms **Taip** was concerned about the manner by which the flood issues had been raised by the EGCMA's objection, as she is the owner of an adjoining development site. He informed the Tribunal that Ms **Taip** supports the position of the Council in respect to the flood risk issues and having been privy to the submissions to be made for the Council, was content to rely on these submissions.

6 It now falls upon the Tribunal to decide whether this proposed development is acceptable and should be granted a planning permit. As was noted by Mr Montebello in the Council's submission, this application is "stripped" of the usual planning issues. The substantive matter is about the risks posed by flooding of the site and its surrounds.

7 There are two parts to this question of flood risk. One is the existing risk under current climate conditions and lake levels. The other, despite the EGCMA's amendment to its grounds, is the level of risk from sea level rise and other effects from climate change. This latter issue, as agreed by the Council and Permit Applicants is required to be considered as it is relevant under the State Planning Policy Framework⁽⁴⁾ and the Victorian Coastal Strategy (2008).⁽⁵⁾

Summary of Tribunal findings

8 Lakes Entrance is a regional town that has a very high vulnerability to flooding and to the impacts of climate change, including sea level rise. Having *239

considered the submissions of the EGCMA and the basis by which it determined the current level of flood risk and hazard, on balance, I would find such a level of risk and hazard to be acceptable. If this were the only issue to hand, I would direct the grant of a permit for this proposal on this basis.

9 However, perhaps more than any other case that has come before the Tribunal to date, this matter brings into focus how the Victorian planning system seeks to deal with the pressing issues of climate change, rising sea levels and the vulnerability of coastal communities to the associated impacts of these conditions. It is the vulnerability of Lakes Entrance, and in particular the subject site, that raise concerns about this proposal at this time.

10 I have carefully considered this context against the strategies and policies contained within the East Gippsland Planning Scheme, including the Urban Design Framework for Lakes Entrance and the related C68 Planning Scheme Amendment, as well as a number of other relevant strategies, guidelines and materials.

11 It is evident that since the Council set in train processes to manage ongoing development and intensification of land use within the commercial centre of Lakes Entrance, it has failed to respond to changes in state coastal planning policy. These changes arise from a growing recognition of the level of impact from climate change and the corresponding impacts to the Gippsland Lakes and Lakes Entrance.

12 From various studies it is clear that the low lying commercial centre of Lakes Entrance has a very high level of vulnerability to the impacts of not only sea level rise but other effects of climate change, such as an increased frequency of storm surges and wind driven flood events. A cautious approach should be adopted to development until future planning frameworks and response are in place to address and minimise these risks.

13 This application for more intensive development of Lakes Entrance is one that is pre-emptive to the development of appropriate strategies to address climate change risks. This leads me to conclude that the decision to grant a permit would not lead to an orderly planning outcome, as it would fail to satisfy the purposes of planning in Victoria for intergenerational

equity, sustainable, fair and socially responsible development.

The vulnerability of Lakes Entrance to flooding, sea level rise and the impacts of climate change

14 The town of Lakes Entrance lies at the eastern end of the Gippsland Lakes system. The main commercial centre of the town sits on a low-lying spit of land situated between the North and Cunningham Arms of the lakes. This centre comprises of a mix of Business 1, Residential 1 and Business 3 Zones.

15 The Princess Highway crosses the North Arm from the west and extends along the southern side of the spit and Lakes Entrance. Marine Parade, also a main road, extends along the north side of the spit.

16 It is not in contention that because of its low topography this spit of land is at risk from flooding. The issues in this case are about the severity of the risk, the associated hazards to property and life and how best to respond to this context.

17 In addition to the issue of flood risk, the Council and the Permit Applicants accept that the effects of climate change, including sea level rise, are matters required to be considered in this application. This arises from Clause 15.08 of *240 the Planning Scheme and the Victorian Coastal Strategy (2008), a relevant strategy pursuant to section 60(1A)(g) of the Planning and Environment Act.

18 Before turning to these issues, however I will set out the nature of the flood risks and climate change behaviour affecting or expected to affect Lakes Entrance and the subject site.

The nature and behaviour of flood events at Lakes Entrance

19 The subject site comprises of two lots located on the north-west corner of Marine Parade and Laura Street. This is at the western end of the Business 1 Zone and the central commercial area. Tendered plans and the submissions made by the EGCMA indicate that this end of the town has an elevation of around 0.6m to 1m AHD.⁽⁶⁾ It is indicated by the EGCMA that Laura Street sits a little lower than Marine Parade.

20 Under current lake levels and flood regimes, a flood event with a 5% Annual Exceedance Probability (AEP)⁽⁷⁾ (also expressed as the 1 in 20 year AEP) has a peak flood level of approximately 1.4m AHD and therefore peak flood depths of around 0.4m to 0.8m around and over the site. A 1% AEP event (i.e. 1 in 100 year event) will have a peak level of 1.8m AHD and hence generate flood peak depths of approximately 0.8m around and across the site.

21 I have applied the term "peak flood level" deliberately. The material tendered by the EGCMA indicates that actual flood levels will rise and fall due to a number of complex factors. Indeed, the cause of rising lake or flood levels is of some complexity.

22 Such complexity was the subject of the Gippsland Lake Flood Modelling Project report (the CEAH study)⁽⁸⁾ tabled and referred to by Mr Montebello. The aim of this project was to apply leading edge approaches to the assessment of flood levels for the Gippsland Lakes, including at Lakes Entrance. Amongst other findings, the report authors set out that:

"The 1% AEP flood levels are influenced by all three major forcings - wind, ocean level and river floods. In general, a significant level of river flooding is required for extreme Lake [sic] water levels, however relatively frequent river flooding can lead to extreme lake levels when winds are strong and/or ocean levels are high. In particular, strong wester and south-westerly winds cause both 'pile-up' of water towards Lakes Entrance, as well as raising ocean levels in the vicinity of the entrance ...

Tidal effects are critical considerations at Lakes Entrance and towards Metung. The peak levels ... [estimated for 5%, 2% and 1% floods in this study] ... will only occur at high tide. This means that access around the town should be possible, even during rare flood events, albeit intermittently. This sort of information will be important for emer-

gency response and public education. ⁽⁹⁾"

(Tribunal's emphasis added.)

23 The EGCMA's submission contained information on flood levels during the June/July 2007 flood event. This information demonstrated the influence of tides, as highlighted in the CEAH study. Flood levels in this event rose and fell *241 between 0.1m and 0.6m (approximate) over the tidal cycles. The data indicates the water levels rising and falling to their peak over the high tide period of some 4-6 hours.

24 The submissions also gave an example of a combined wind and high tide inundation event that occurred in September 2009. In this event, wind driven piling of lake water toward Lakes Entrance during a high tide resulted in inundation via flow up and out of the town's drainage system. The rise in levels attributed to this effect was of the order of 0.5m above the high tide, resulting in a peak level of 0.9m AHD.⁽¹⁰⁾ The CEAH study indicates such a level to be equivalent to around a 30% AEP event (or approximately between a 1 in 2 year and 1 in 3 year AEP event). However similar to other flood events referred to by Mr Dunn, the peak level did not persist for much more than 12 hours.

25 It is evident from the tabled material and submissions, as summarised above, that Lakes Entrance is subject to inundation from a variety of interrelated and complex events and circumstances. In terms of the application of the estimated peak flood levels however, I concur with the views expressed on behalf of the Council that the revised peak flood levels determined in this project are to be applied judiciously and in the knowledge that such peak levels are not persistent for long periods of time.

26 The implications of these findings I will deal with later in these reasons.

The impacts of sea level rise

27 At the simplest level, and in accordance with the approaches outlined in Clause 15.08-2 of the

Planning Scheme, planning to manage the coastal impacts of climate change should plan for an increase in sea level of not less than 0.8m by the year 2100. At Lakes Entrance the current lake and sea level average is 0.1m AHD. By 2100 this is anticipated to have risen to 0.9m AHD.

28 An increase to this level will cause limited inundation of the lower lying areas of Lakes Entrance. The impacts would in fact be not dissimilar to the 2007 wind driven flood cited by Mr Dunn. The extent of inundation would include Laura Street and parts of Marine Parade in the vicinity of the subject site.

29 Arguably such a level would be of inconvenience but not necessarily fatal to the ongoing use of the site or the main commercial centre of Lakes Entrance. It should be noted however that buried infrastructure in this area would be subject to the impacts of salty inundation. This includes the obvious failure of drainage systems, but also saline intrusion into sewer systems, buried telecommunications and other services. It may also ultimately undermine road and footpath foundations. Thus it remains uncertain how viable this development may remain under such conditions.

Other impacts of climate change

30 Apart from the increase in sea levels, there are other, perhaps just as pressing effects from climate change that are to be given consideration in this matter. These are set out under Clause 15.08-2 and include the effects of tides, storm surges and other local conditions. These effects are to be taken into account "when assessing risks and coastal impacts associated with climate change".

31 *242 Mr Montebello tabled and made reference to the report prepared by the Gippsland Coastal Board on climate change, sea level rise and subsidence prepared in 2008(11) (the Coastal Board study).

32 The Coastal Board study highlights that apart from sea level rise, climate change(12) will affect the degree of flood/inundation risk to communities along the Gippsland coast due to:

- Increases in the "predominance of south-westerly frontal weather patterns";
- Increases in wind speed;
- Increases in storm surge heights, by up to 10%; and
- Increases in the frequency and intensity of extreme events "by approximately 10%".

33 When these factors are considered in the light of the nature of flooding events identified and taken into account in the CEAH study, it is evident that more frequent weather extremes (such as strong winds from the south-west) will result in more frequent inundation events.

34 Coupled with gradually increasing sea and lake levels, it is reasonable to conclude that storm and wind surges will not only increase in frequency but have a greater impact due to the higher water levels. That is to say for example, that the impact of the current 1 in 2 year AEP event (a 50% AEP), such as the wind driven inundation of 2007, will occur or have the probability of occurring, more frequently.

35 To put it plainly, the combined impacts of sea level rise and changes in climate are expected to result in more frequent and more intense weather events that will lead to more frequent and greater levels of inundation of Lakes Entrance. It is in this context and not just the rise of 0.8m in sea level by 2100 that future development in Lakes Entrance needs to be considered.

The flood risks and hazards

36 There is disagreement between the Council and the EGCMA as to the level of risk arising from the current estimates of flood levels. This is largely due to a difference in view as to how to apply and consider the risks of the peak flood levels as well as the status of the risk assessment approach adopted by the EGCMA.

37 Based on the updated flood levels estimated in the CEAH study, EGCMA, through its powers under the Water Act 1989 (Vic), declared revised flood levels in

2006. The declared flood level for Lakes Entrance for a 1% AEP is 1.8m AHD. Using these revised flood levels, the EGCMA has revised plans for the extent of inundation as well as the Gippsland Lakes Floodway, the latter includes all land that has a depth of 0.5m or more of flood waters over in a 1% AEP event.

38 Having regard to the ground levels in and around the subject site, EGCMA *243 submits that with flood depths of approximately 0.8m the site should more correctly be considered to be in a Floodway rather than land subject to inundation.

39 Accordingly EGCMA is of the view that the current overlay controls are out of date and that pursuant to Clause 65 of the Planning Scheme the level of risk should be more correctly considered under the "most up to date" flood levels and associated level of risk.

The risk factors and level of risk

40 In considering the risks and appropriate response to this site, whether the site is the subject of a Floodway or Land Subject to Inundation Overlay is not of a central concern as both forms of planning control call for a consideration of the risks to life, health and safety associated with the development. The series of risk factors to be considered are common to both planning controls, as are other relevant decision guidelines.

41 The risk factors include:

"The frequency, duration, extent, depth and velocity of flooding of the site and access-way.

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."

Other decision guidelines call for a consideration of the impact on obstructing floodwater, reduction in the flood storage function of the land and possible changes to flood levels and / or flood flow velocities.

42 Mr Dunn concedes that while the peak depth of flooding is greater than 0.5m, the velocities and impacts to storage or impedance to flow are low and for this site, are not a factor in the EGCMA's assessment of risk. The main concern is that the depth of flooding would present a high hazard in accessing the site by walking or vehicle and by emergency services.

43 At 0.8m depth, it is considered by the EGCMA that the depth prevents ambulatory and even four wheel drive access in accordance with the Floodplain Management in Australia - Best Practice Principles and Guidelines SCARM Report 73(13) (the SCARM report). The EGCMA has also assessed the risk against other criteria found in SCARM report and submits that it has found the degree of hazard to be high.(14)

44 Many of the high risk ratings said by EGCMA to apply under these criteria, and as explained by Mr Dunn, relate to the estimated peak depth of the flood levels.

45 It may well be that if these peak levels were to persist across the site and Lakes Entrance commercial centre more widely, then the high level of hazard assessed by the EGCMA would be appropriate. However, as Mr Dunn concedes, these levels do not persist but are cyclical, as I have set out earlier. The examples cited by Mr Dunn and the CEAH report indicate decreases in water levels to approximately 0.5m or more below peak levels. Accordingly for periods of time, the subject site and its surrounds would be subject to flood *244 depths as low as 0.3m and sometimes less. Such periods are of sufficient length to allow vehicle and emergency access to the site under low risk conditions under the criteria relied on by the EGCMA.

46 The Council and Permit Applicants challenge the manner in which the EGCMA have rated many of these flood risks. They assert that the process cannot be properly tested through EGCMA's submissions at this hearing, as it is not being put as expert evidence that could be cross-examined.

47 In my view, the EGCMA is the acknowledged authority under the Planning Scheme with the

expertise to advise on flood issues. The EGCMA has the capacity to develop and apply the hazard assessment methods as set out under the SCARM report as it sees fit. However, I acknowledge that it is also fair that such an assessment be tested as to its merits. I am satisfied that this "testing of merit" was achieved through the clarifications provided by Mr Dunn as to the risk assessment process that were made during the hearing.

The design response to the flood risk

48 The amended proposal raises the dwellings above the declared 1% flood level. At 2.6m AHD the ground floor level, where the use is confined to car parking and a rather utilitarian entry foyer, (15) is well above flood levels expected under current conditions.

49 In respect to the flood risk and the issues required to be considered under the LSIO I find that the elevation of the dwellings is a generally acceptable response. It would raise sensitive uses above the existing flood levels and minimising the exposure of occupants to hazards. Given the cyclical nature of peak flood levels and opportunities for access at lower flood levels, I am also satisfied that safe passage to or from the site could be maintained, if only for these lower flood level periods.

50 It is also evident from the material tabled on behalf of the Permit Applicants and the Council that Lakes Entrance has in place flood warning and management regimes that address these relatively frequent events including the early warning systems and appropriate levels of response.

Conclusions as to risk levels from existing flood conditions

51 In the circumstances that I have set out in respect to the nature of the flood risk, the cycle of peak flood levels and after considering the basis of the EGCMA's risk assessment I conclude that the current risks and level of flooding hazards are not sufficient to conclude that a permit should be refused on this basis.

52 However this is not the only context which

applies to the flood risk at Lakes Entrance. As has been acknowledged, there are two parts to this risk: The current level of risk and the future risk under climate change scenarios..

53 Before addressing the latter issue however I will make one final point in relation to the current flood risks and the application of the LSIO. It is *245 submitted on behalf of the Permit Applicants that an LSIO does not operate to control land use or the intensity of land use. Several previous tribunal decisions have been referred to in support of this contention.

54 With respect, I differ from such a view. The LSIO is not an instrument that directly seeks to control use, as does a zone. It is an overlay that controls how development may occur for a use that is otherwise permissible under a zone. Ultimately, however the form of development may have some influence over the intensity of the use. For example, one can imagine a scenario where a larger, multi-dwelling development will have more impacts on flood storage or flow velocity than a single smaller dwelling. The latter may therefore be preferable in such a situation. Both uses would achieve the purpose of the zone, but only one meets the constraints imposed on that use by the overlay by means of the scale and intensity of the development.

55 The LSIO works to ensure that the intensity of the use, controlled through the form of the development, is appropriate for the site's exposure to and risks arising from flood conditions. This I consider to be the proper application and outcome sought by the application of an LSIO to flood prone land. (16)

The issues of sea level rise and climate change impacts

The Submissions of the Council and Permit Applicants

56 The Council submits that when a balanced consideration of a range of relevant policies, strategies and planning materials is taken into account, there is to be no halt to development in existing coastal urban areas because of climate change and sea level rise risks. The Council submits that while a cautious approach may be

warranted, there remains sufficient time before the full impacts of climate change are realised for properly considered policy responses to be developed to guide future planning outcomes. It is submitted that there is sufficient time for the economic life of this development to be realised.

57 In the face of evolving and yet to be resolved policy and strategies to address climate change impacts in Victoria and Lakes Entrance, the Council considers that development, as supported through the Urban Design Framework and Planning Scheme Amendment C68 should proceed. The Council considers that a refusal of a permit on matters related to sea level rise and climate change would be tantamount to an imposed, unsupported strategy for "coastal retreat" for Lakes Entrance.

58 The Council's submissions are supported by the Permit Applicants.

59 These submissions address a number of policy and design response issues and how this proposal is said to respond to these. The main issues can be conveniently set out as follows:

- The design responds to the forecast 2100 sea levels and so the impacts on the development are mitigated to an acceptable extent;
- The issue of sea level rise was considered by the C68 Planning Panel and was found not to be a reason why the Urban Design Framework and the corresponding intensification of land use in Lakes Entrance should not proceed;
- The fact that the Minister not only authorised the preparation of Amendment C68 but gave the Council the authority to approve and *246 amend the East Gippsland Planning Scheme through this amendment should provide confidence to the Tribunal that the State accepts that intensification of land use in Lakes Entrance is supported notwithstanding the possible impacts from climate change;
- Future development of strategies on a state

wide and then locality basis will address the climate change impacts and most appropriate response including a response for Lakes Entrance. This state and local town approach is to be supported, rather than a site by site analysis of coastal hazards; and

- There is sufficient time for such strategies to be developed and responded to before the impacts of climate change, including sea level rise, will materially affect Lakes Entrance. Thus while policy and other practice material advocates adopting a cautious approach (either a precautionary approach or applying the precautionary principle to planning) there is no reason to be so overly cautious as to stymie development in Lakes Entrance.

The Tribunal's findings

60 Having considered the policy and strategy context in which my decision is to be read,⁽¹⁷⁾ I now turn to the substantive issues raised though the Council's and Permit Applicant's submissions. In doing so I set out here that my decision rests on the following findings:

- It is not sufficient to rely simply on raising a building above the projected water levels expected under climate change in order to acceptably address the totality of climate change impacts;
- The approval to proceed with and authorise Amendment C68 should not be taken as an acknowledgement by the Minister for Planning that intensifying development in Lakes Entrance is appropriate notwithstanding the recognised vulnerability of the town to climate change impacts;
- The purported ability of the development to achieve its economic life is not an argument that has planning merit; and
- Approving this development would not be an orderly planning outcome or satisfactorily address the purposes of planning in Victoria.

Why is the design response insufficient?

61 To address the issues of climate change the proposed design response for this development relies solely on raising the sensitive use areas to be above the combined projections of flood and sea level rise levels. I find the reliance on this response to be a simplistic and ultimately a misguided approach. In short it is insufficient to address the broader issues raised in this matter and the issues of intensification of the land use that would result from the development.

62 There is no disputing that the design would indeed meet one limb of the policy requirement, responding to the 0.8m rise in water level. However this is not the end of this matter. The development will contain eight dwellings, all dependant on access to and from the site by motorised vehicle or pedestrian movement. Such access will be vulnerable to the gradually increasing flood levels, and ultimately a level that will be not less than 0.8m higher than the current peak and lower flood levels set out earlier.

63 *247 While I have found that the current flood levels do not present an unacceptable level of risk, it is also clear from the materials tabled from the EGCMA, that increasing depths of flooding will. The Phase 2 CSIRO assessment of climate change vulnerability also indicates that these levels will occur more frequently.

64 Thus with the increases in the depth of flooding and more frequent flood events, there will be a corresponding increase in the hazard to residents and emergency personnel.

65 The development will be supported by reticulated sewer, water, power and telecommunications services. Such services rely on either below ground infrastructure or assets that are otherwise susceptible to flooding under current lake levels, let alone future raised levels.⁽¹⁸⁾ The protection of these infrastructure assets is not assured from future, more frequent flood events. Further it is apparent from the Phase 2 studies that even a general increase in lake levels under climate change may well result in inundation of underground assets, such as sewers, that will inhibit their proper function. There is therefore a fore-

seeable risk to the failure of these service with consequential risks of harm to residents, e.g. lack of sanitary services, clean drinking water and power, all basic essentials to sustain urban development.

66 Not only are these impacts foreseeable and projected as real possibilities, the anticipated changes in climate conditions set out earlier indicate that they are expected to occur more frequently.

67 These combined conditions and Lakes Entrance's acknowledged vulnerability to these impacts raises real concerns as to whether an intensification of the land use by eight dwellings on this site can be supported in the face of such impacts.

68 Arguably some of these infrastructure issues could be addressed in future strategies, a matter that I will return to later in these reasons. However policy at Clause 15.08-2 requires that a decision maker not only consider the response to the 0.8m rise in water levels, but also consider the affects of climate change impacts, such as storm surges on local conditions when assessing the risks and coastal impacts. The location and its susceptibility to impacts of climate change are also required to be considered and that future development should not be at risk. Quite pointedly, State policy seeks to avoid development in areas identified as susceptible to inundation.

69 For these reasons I find that it is simply not enough to consider that the building itself that will be protected or suffer little physical impact from sea level rise and climate change due to it being raised to a certain level. The sweep of policy is sufficiently broad that the other impacts which are relevant need to be taken account of.

70 I find that the design response is insufficient in addressing these wider risks. However it would be unfair to consider that the proponents would need to address all of those risks alone or at all in some instances given that they arise from the susceptibility of infrastructure that is beyond their control. Such risks need to be addressed by the Council and other relevant authorities and / or service providers. I was presented with no evi-

dence that these risks are being actively addressed.

71 Indeed the position adopted by the Council in this proceeding and in its *248 response to the recommendations of the Panel to Amendment C68 has been to shy away from the hard decision making and planning required to address these future risks. Its preference is to wait for others to lead the way.

72 The position of the EGCMA in this proceeding is not much better, failing to address the Tribunal directly on this issue and indeed amending its grounds of objection in an attempt to take the issue off the agenda.

Planning Scheme Amendment C68 and the Urban Design Framework

73 The purpose of Amendment C68 is to introduce design and landscape guidance for the future development in various coastal communities, including Lakes Entrance, through the Local Planning Policy Framework and introduction of various overlay controls. The Council was authorised to prepare and approve this amendment by the Minister for Planning in June 2008.[\(19\)](#)

74 Council adopted Amendment C68 on 1 September 2009, and has sought certification from the Secretary to the Minister for Planning[\(20\)](#) in May 2010 prior to approving this amendment. That final certification is yet to occur.[\(21\)](#)

75 It is submitted by the Council that the Planning Panel assessment of Amendment C68 was supportive of the amendment while recommending a number of additional changes.[\(22\)](#) Of relevance here is that the Panel recognised Amendment C68 as an opportunity to deal, at least in a preliminary way, with climate change issues and coastal hazards. Changes recommended to the Council were made on this basis. These recommendations and changes have, for the most part, not been adopted by the Council.

76 The Panel's commentary in relation to climate change issues runs for some nineteen pages.[\(23\)](#)

It is not necessary to repeat all that the Panel considered and made recommendations on in respect to this issue. Suffice to say that this commentary and other commentary in the Panel report indicates that:

"• The preparation and completion of the UDF (and landscape studies) that form the basis of Amendment C68 commenced at a time when climate change impacts were not a major policy consideration;[\(24\)](#)

• Subsequent events during and after preparation of Amendment C68 has seen considerable strengthening of State policy and strategies about the need to respond to climate change and sea level rise;

• The Amendment was found wanting in respect to dealing with the shift in emphasis on climate change issues. Amongst other things this was evidenced by the references to coastal hazards studies by CSIRO being in the Phase 1 stage, when in fact these studies had moved past the Phase 2 stage. That stage has produced a clearer understanding of the vulnerability of coastal settlements, such as Lakes Entrance.

• The Panel considered it to be of sufficient gravity to specifically request the Planning Authority (the Council) and other relevant parties, such as the Gippsland Coastal Board, provide submissions on the adequacy of Amendment C68's response to climate change issues.

• *249 In its response, the Council acknowledged that ... almost all of the coastal towns included in the Amendment are 'hot spots' ... as almost all of the East Gippsland coast, including the Gippsland Lakes, is highly vulnerable to inundation, storm surges and coastal

erosion.[\(25\)](#)

- Notwithstanding the Council's acknowledgement of the issues, it was resistant to adopt anything more than changes to the general commentary in policy about climate change issues.

- Ultimately, after considering the submissions, the Panel elected to make various recommendations to the Council to modify Amendment C68 to strengthen the way in which coastal hazards from climate change impacts should be considered and addressed."

77 Setting aside the mechanics of how the Panel suggested the Council may address climate change issues through permit requirements and other amendments to the C68, it is clear from the Panel's reporting of the Council's submissions that the Council resisted any moves for it to deal directly with this issue.

78 The stance adopted by the Council, which is as advanced in this proceeding is perhaps best summed up by the following commentary in the Panel report:

"... the Planning Authority [the Council] said that it would be premature and inappropriate for a local council to introduce statutory requirements in its scheme dealing with this matter, before clearer response policies and statutory tools were developed by the State government."

The Council also expressed a concern to the Panel, and again it is a point pressed in this proceeding that while it acknowledged that:

"... the work of the Gippsland Coastal Board has provided more information for Gippsland than in other regions about the impact of climate change and rising sea levels, but said that there has as yet been no assessment of the economic and social impacts of those changes nor of the planning response that are

or might be available.[\(26\)](#)"

79 A final point that I should also note in respect to the Council's approach to this issue is the Council's response to the policy statements under Clause 15.08. The Council is reported as stating that:

"... so far as the policy directive to "plan for" a sea level rise of 0.8 metres is concerned, ... the Amendment proposed that there would be reference to this in the MSS at Clause 21.02. So far as the directive to ensure new development is located and designed so that it can be properly protected from climate change-induced coastal hazards, [the Council] submitted that criteria for assessing the level of risk had not yet been developed and:

... other than a predicted sea level rise, the specific impacts of storm tides, landslide, coastal erosion and sand drift have not been assessed for specific locations. There is little further guidance that can be included in the Planning Scheme to support this policy [at Clause 15.08] at this stage."

80 The position maintained by the Council in the Panel Hearing, and one relied on this proceeding, is that the Council does not consider it appropriate to "go it alone". It does not consider that there has been sufficient work undertaken to identify the extent of impacts or the social and economic impacts that may arise from responding to climate change impacts. The Council considers that to go it *250 alone would be premature and inappropriate. It considers that it will be more in keeping with orderly planning to await a state-wide set of guidelines and statutory responses so that it can fit into those frameworks.

81 The Panel concludes as follows:

"We do agree with the Council submission that the State has primary responsibility for dealing with the issue of sea level rise and providing planning guidance. This is recognised in State policy. Should, however, the local Council wait for further State ad-

vancement on the matter of policy and statutory responses to the issue, or should it initiate some action itself?

While in some measure our view turns on the nature of the Amendment to hand, it is our view that the Council should not wait for further State action on this matter. In our view, the statutory documents released in December 2008, clearly direct planning authorities "to plan for and manage the potential coastal impacts of climate change" and "ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards..." They require consideration of the new Victorian Coastal Strategy in which a clear State policy is - to "plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change". While the documents do speak of further work they do not preclude a planning authority taking responsible steps now.

We strongly recommend that the Planning Authority should take more definitive action on this matter for a number of reasons.

To begin, while on one view the matter is not urgent because the coastal hazards will become apparent only gradually, the consequences of the change are expected to be severe in the long term - in physical, social and economic terms - and difficult to manage. Also, permit applications are being made today for uses and developments which are proposed to be in situ in the longer term. It is therefore imperative that planning management

be brought into play as soon as is practicable. It is not clear how long it might be before new State-recommended statutory tools will become available. In our view whatever appropriate mechanisms as are now available should be brought into play immediately - though this would need to be done recognising that the tools adopted to manage coastal hazards might be need to be changed if other State offerings become available.[\(27\)](#)"

82 This summary speaks for itself and expresses a concluding recommendation for the Council to take action now to address the long term impacts of climate change. After considering all the materials and matters put in this proceeding, I agree.

83 In view of the Panel's assessment of Amendment C68 in respect to climate change issues and the failure to more fully address the issues of coastal hazards, I am cautious of giving this amendment the weight that Council has pressed me to. I find that Amendment C68 and the supporting UDF reports and recommendations have proceeded on the basis that climate change is not an issue to address now, whereas the Panel recommended otherwise. The risks and hazards identified in this proceeding highlight the need for these issues to be dealt with now.

84 Accordingly, I give little weight to the urging of Council that I should accept the Minister's authorisation to proceed and adopt the amendments under C68 as evidence that:

- ***251** the intensification of development in Lakes Entrance is a form of tacit approval that climate change impacts have been adequately considered, or
- that there is an implied approval of the Council's approach to defer climate change responses to a later time.

The economic life of buildings

85 The Council and Permit Applicants submit that

given the long lead time of eventual climate change impacts, their focus being on the 0.8m sea level rise, there is time to implement appropriate policies, strategies and actions to address these impacts. Given such long lead times, it is submitted that the development will achieve its useful 30 year economic life and the benefits for the well recognised fishing and tourism town of Lakes Entrance can be achieved.

86 The proposition is a simple one. If this development can achieve its designed purpose for its purported economic life then why be concerned about future events that lie beyond that life?

87 I reject such a proposition. I do so because such a proposition ignores the purposes of State policy at Clause 15.08 to plan for and manage "the potential coastal impacts of climate change" now and not defer that responsibility to future generations.

88 Clause 11 reminds responsible authorities that decision-making is to take account of and give effect to such a policy. Where there is a conflict between such a policy and other policies, in this case those cited in relation to settlement and economic development, a balance is to be struck. It is not a net economic benefit that is to be balanced. It is a balance that reflects the purposes of planning in Victoria, that is to achieve net community benefit and sustainable use and development of land.

89 Even if I were to entertain such a proposition further, as I have already set out the impact of climate change is not limited to the projected sea level rise of 0.8m by 2100. There will be gradual increases in water levels. There will be increases in the frequency of storm and tidal surges. There will be consequential impacts to infrastructure. Because of these impacts it should not be simply assumed that the so called economic life of this development would be achieved.

90 The proposition is little more than a spurious argument to defer proper and balanced decision making and focuses only on the short term economic benefits. Even from an economic perspective it avoids the longer term impacts. It is clear

enough from the current understanding of the impacts to Lakes Entrance that without intervention, the development will be subject to conditions that may well lead to it being unviable for occupation. The resultant economic cost would be to those future owners and quite possibly the wider community. It is hardly fair or equitable to see this as a balanced outcome for intergenerational equity.

91 I find the proposition is one that is contrary to the wider objectives of planning in Victoria to provide for intergenerational equity, fair and orderly planning, sustainable development, and to balance the interests of current and future Victorians.[\(28\)](#)

92 Further, the application of this proposition to any development would, if taken to its logical extension, suggest that all buildings would be removed at the end of their economic life. This is not a certainty. For the most part it would be ***252** fair to say that people do not buy properties on such a basis. Many buildings are utilised well beyond this concept of an "economic life". The presence and the refurbishment of many older, in some cases historic buildings are testament to the longevity society generally ascribes to our urban buildings.

93 The proposition disregards the benefits of sustainably utilising available resources for the longest possible time. To simply write off the materials, energy and other resources necessary to develop this site over what in reality would be a relatively short time span is counter to the concepts of sustainable development espoused in state planning policy and a primary objective of planning.

94 Finally I note that the position also fails to address the position of the State Government as expressed in the Minister for Water's advice to the CMA (as set out in Appendix A to these reasons) to adopt a position for long term protection of coastal communities by adopting decisive directions now.

95 For these reasons, I reject this proposition as a basis for permitting this development.

Orderly planning and the precautionary principle

96 Many of the issues and propositions put by the Council and Permit Applicants in support of this development go to the issue of whether or not a decision to allow this development amounts to an orderly planning outcome. The submissions about achieving an economic life, the Council not "going it alone" in response to climate change impacts, and supporting the development through Amendment C68 all relate to the principle of an orderly planning process and outcome.

97 I consider that approving this development would not be an orderly planning outcome.

98 It is not contested that Lakes Entrance is vulnerable to coastal hazards expected from climate change and current projections of sea level rise. In this hearing and as evident from the Amendment C68 Panel report, the Council has not sought to deny this vulnerability.

99 It is submitted that a decision to refuse the development on the basis of climate change would be pre-emptive of any staged and managed approach, would lead to uncertainty and the curtailment of economic development in Lakes Entrance and all the consequential impacts that would flow from this.

100 The Council and Permit Applicants have made submissions about applying the precautionary principle or a precautionary approach to this matter to support their position. These submissions amount to the following points:

- The application of a precautionary approach or the precautionary principle does not advocate a no risk outcome, but rather a recognition of the risks of serious or irreversible harm and appropriate management responses to be developed to minimise those risks; and
- Uncertainty is not a reason to postpone appropriate management responses being developed and implemented.

101 It is argued that there will be future opportu-

nities to develop and implement mitigation or management strategies for Lakes Entrance with respect to climate change impacts. This development along with any other existing or new developments in Lakes Entrance will be captured within the sweep of such responses. Accordingly it is submitted that a precautionary approach is achieved.

102 *253 Both parties also question the application of the precautionary principle per se, as it is said that this principle specifically addresses the issues of environmental degradation arising from a development rather than the environment impacting on the development. The Council favours what it terms a "cautious approach" rather than a strict application of the precautionary principle.

103 The objectives of planning in Victoria as set out under section 4(1) of the Planning and Environment Act include, but are not limited to:

- Providing for the "fair, orderly, economic and sustainable use, and development of land";
- Securing a pleasant and safe working and living environment; and
- Balancing the interests of present and future Victorians.

Such objectives seek to achieve development that provides amongst other things intergenerational equity, sustainable use of resources and "safe" and "pleasant" living conditions in an orderly fashion. Orderly here would seem to mean well planned and co-ordinated.

104 The State Planning Policy Framework includes amongst its primary purposes that responsible authorities should take into account and give effect to achieving the objectives of planning, including orderly planning.⁽²⁹⁾ This may entail a balancing of conflicting objectives "in favour of net community benefit and sustainable development" as I have set out earlier. It is not about net economic benefit, but a bundling of all costs or benefits to the community to achieve an overall net benefit in a sustainable way.

105 When so read, it is evident that the weighting of policy must favour a decision that achieves the purposes of planning in Victoria. Having regard to the facts and policy outcomes relevant to this matter, I am not persuaded by the submissions of the parties that this development would constitute an orderly planning outcome because:

"• While the achievement of the economic life of this development is one aspect of potentially meeting the objectives of planning in Victoria, I have found that there is no merit to this argument in this application.

• Policy at Clause 15.08-2 directs that the Council, as a planning or a responsible authority, should take account of climate change impacts and risks to:

• Ensure that new development is sited and designed to take account of the impacts of climate change on coastal hazards

...

• Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.

• Avoid development in identified coastal hazard areas susceptible to inundation ...

There is a planning policy imperative to act now rather than later.

• Deferring these issues from current decision making is at odds with the State's desire for planning and responsible authorities

to address them now. Not to take account of such policy leads to a disorderly rather than orderly planning outcome.

• The intensification of development in Lakes Entrance as promulgated under Amendment C68 and the UDF has failed to take account of the current understanding of climate change *254 impacts, including sea level rise to Lakes Entrance. It has also failed to take account of the shift in coastal planning policy during the preparation of the supporting studies and the amendment. Its failure to address these issues head on, even when recommended by the Panel, leads to a disorderly rather than an orderly planning outcome."

106 Further, it is my opinion that approval of the development, and the implied weight that some might read into the support for intensification of development (and hence land use) in the part of Lakes Entrance would lead to an inequitable, unfair and unsustainable planning outcome for future Victorians. I can hardly find this to be an orderly planning outcome.

107 In response to the issue of applying the precautionary principle made by the Council and the Permit Applicants, I note that the application of this principle arises from the direction in Clause 15.08-2. It is a specific state planning policy direction to manage coastal hazards and impacts of climate change by, amongst other steps applying:

"... the precautionary principle to planning and management decision-making when considering the risks associated with climate change."

108 Reference to the application of the precautionary principle has arisen in other tribunal proceedings related to the climate change impacts.⁽³⁰⁾ The Council and Permit Applicant submissions have responded to this by suggesting that the Tribunal should "be cautious but not to the extent of refusing all development within existing urban areas of a township". It is put that the decision of the tribunal should not seek to avoid all risks but have regard to the potential future management approaches that may be available to address climate change impacts and risks.

109 I have no issue with these submission as to how one may approach the policy direction to apply the precautionary principle to planning decision making in the context of climate change risks. It is consistent with the understood application of this principle, albeit in a different context where it is the environment that is the source of the potential adverse impacts and risks to the development and not the other way around.

110 In response to the Council's suggestion of taking a "cautious approach" rather than a literal application of the precautionary principle, I recognise that the Practice Note adopts a slightly different approach to that of the state policy, advocating for a "precautionary approach" rather than an application of the "precautionary principle" per se. However, I do not consider this difference is significant or changes the outcome.

111 Having taken all the policies and practice note materials into consideration⁽³¹⁾ it is apparent that the overall approach in applying the precautionary principle is to ensure that:

- The planning decision about this development is made in the face of acknowledged climate change impacts and should not be deferred;
- The decision assesses how the risks from climate change can be minimised to an acceptable level; and
- *255 Any uncertainty surrounding the potential impacts from climate change should not be a reason to defer decision making.

112 When so considered I find that:

- There are acknowledged and accepted risks to this development from coastal climate change impacts;
- For the reasons I have set out earlier not all these risks have been properly considered and sought to be minimised; and
- The council has in effect deferred the difficult decisions as to how the risks of climate change impacts in Lakes Entrance can be addressed and minimised.

113 When so considered I find that the development application is unsatisfactory. Further consideration of how the risks from climate change can be minimised is required. The Council, as a planning and responsible authority, needs to take a lead role on this issue. Until such a response can be devised it is inappropriate to allow this development to proceed.

Conclusions

114 This development would intensify the land use of this site and introduce a higher level of hazard and risks to future users of the site and emergency personnel. This is not an orderly planning outcome.

115 It is a premature development that has been made without a full and proper consideration of the risks and hazards from sea level rise and other climate change impacts and how those risks and hazards are to be addressed. This also is not an orderly planning outcome.

116 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.

117 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.

118 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.

119 I conclude that a permit should not issue. Accordingly I will direct that the Responsible Authority's decision be set aside and no permit will be granted.

Appendix A - Policy, Strategies and Other Materials

*256

Climate change policies and strategies in Victoria

1 The Local Planning Policy Framework of the East Gippsland Planning Scheme provides little specific guidance on the issue of climate change. Reference is simply made under Clause 21.05-3 to the need to "take into account the effects of anticipated climate change, including increased storm events and sea-level rise, in coastal planning". Accordingly what follows relies largely on a consideration of the State Planning Policy Framework and other planning and related materials relevant to my decision.

2 First and foremost, Clause 15.08 has as one objective to "plan for and manage the potential coastal impacts of climate change". Strategies to address this objective direct responsible and planning authorities to:

"Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.

Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.

...

Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion ..."

(Tribunal's emphasis added.)

3 I recognise that this objective and strategies are not the only matters dealt with under this policy. Other objectives that are relevant and underscore the basis of submissions put by the Council and Permit Applicants seek to ensure sustainable and integrated development along the coast to:

"... protect and enhance the natural ecosystems and landscapes of the coastal estuarine and marine environment."

and

"... achieve development that provides an environmental, social and economic balance."

4 Amongst other requirements, it is state policy

that responsible authorities should apply "the hierarchy of principles for coastal planning and management as set out in the Victorian Coastal Strategy 2008". These principles ultimately direct urban development to existing activity nodes (i.e. existing town or urbanised areas).

5 Strategies within State policy similarly direct new development, urban renewal and redevelopment to be within existing settlement boundaries in order to reduce urban sprawl pressures on the coastal environment. The caveat to this strategy is that such development should only be considered where it can be accommodated.

6 *257 It is apparent that these latter strategies essentially underscore the response of the Council to concerns expressed about climate change and sea level rise. It is submitted that local policy and the forthcoming Amendment C68 that will incorporate the Urban Design Framework(32) (UDF) into the planning scheme are on point with these strategies to encourage development within the existing urban (hence modified) environment of Lakes Entrance.

7 More broadly it is submitted that while the Council recognises that climate change impacts are to be taken into account, it would be unfair to do so on a site by site basis. Rather what is required is a response for all of Lakes Entrance. In this respect the Council submits that it cannot "go it alone" and prepare a stand alone approach. Instead, the Council is waiting on a state wide, whole of government approach for this and other vulnerable land.

8 I acknowledge that an outcome of state policy and the Coastal Strategy is to focus development (or redevelopment as in this case) to existing urban/settlement areas to mitigate the impacts of development on the coastal environment. However this is not the only outcome sought.

9 It is apparent in this case that there is tension between these two aspects of the one policy. Notwithstanding that this is an existing settlement area where the focus of future development is in accord with coastal strategies and state policy, the location is recognised as being highly vulnerable to sea level rise and other climate change impacts.

10 The question therefore arises whether in the face of such tension and the high vulnerability of Lakes Entrance to climate change impacts it is proper and orderly planning to proceed with this development.

The general practice note: Managing coastal hazards and sea level rise

11 Amongst the various materials relevant to this matter is the General Practice Note "Managing coastal hazards and the coastal impacts of climate change"(33) (the Practice Note). Amongst other things, this Practice Note sets out three guiding principles for the decision making process about climate change and coastal hazard impacts:(34)

"• Risk Avoidance - to be achieved by siting and designing new development to reduce the exposure of future communities and assets to unnecessary coastal hazard risks over the intended lifespan of that development;

• Integrated coastal planning - requiring an assessment of the future impacts of coastal hazards and risk on the economic, social and environmental wellbeing of people and communities; and

• Application of a precautionary approach. This appears to be an adaptation of the precautionary principle wherein decision making should act on the best available science, knowledge and understanding of the consequences of decisions in the context of increasing uncertainty. The Practice note advocates that under a precautionary approach a decision should minimise adverse impacts on current and future generations and the environment."

12 *258 Council's submissions have sought to address these principles. It is submitted that the

risk to the community, and in particular any residents of the development, have been addressed by providing sufficient height above future projected flood levels over the expected life of the building.

13 The principle of integrated coastal planning has been addressed, as set out earlier by this development occurring within an existing settlement/commercial centre where any future climate change response would need to occur in view of the high level of community and private infrastructure. What ever that response may be, be it protection, accommodation or retreat, any future response for Lakes Entrance would capture this site. Again, reference is made to the belief that in the interim the economic life of this private asset would be achieved at no imposition on, or increased risk to, the community.

14 The Council argues that the precautionary approach is about safeguarding the environment and not private property assets. The Council is not dismissive of being cautious, but consider that care needs to be taken in applying these principles to a planning decision. The submissions made by the Council essentially intimate that the design response has addressed the risk, i.e. achieved risk minimisation, in accord with a precautionary approach by adopting finished floor levels that account for the 0.8m rise in sea and lake levels.

15 The practice note also advises that:

- Intensification of development in areas likely to be impacts by climate changes and sea level rise be avoided;
- Larger scale developments, i.e. not minor building or works, may require coastal hazard vulnerability assessments.

16 In response it is submitted by the Council that the a coastal hazard vulnerability assessment is unnecessary and inappropriate for an individual site within Lakes Entrance, given the vulnerable nature of the whole town and the unfair impost on individual proponents if each development application were to be considered repetitiously. The Council cautions against applying the practice note as a set or rules rather than as a guide.

The Minister for Water's Preliminary Guidelines

17 On 17 December 2009, the Minister for Water issued preliminary guidelines to coastal catchment management authorities and Melbourne Water. These preliminary guidelines have been provided to these authorities to assist in them in their role under section 202 of the Water Act, i.e. their role as floodplain managers and provision of advice to local government authorities and other bodies. I consider that these guidelines fall within the ambit of matters to be considered under section 84B of the Planning and Environment Act and should be taken into account.

18 Amongst other matters, the Minister sets out that the State Government recognises that "flood risk will increase significantly in coastal areas currently subject to flooding as sea level rises" and "sea level rise will expose new areas to flood risk".

19 The Minister goes on to state that:

"... decisive direction is required to manage the long-term exposure of coastal communities to coastal flooding. As new information emerges there will be a need to review flood information and integrate coastal vulnerability assessment information to support informed decision making. The vulnerability of coastal communities is a paramount and overriding consideration that must focus on minimising the future flood risk based on best available information."

(Tribunal's emphasis added.)

20 *259 The Minister sets out a series of preliminary guidelines which the authorities are directed to apply until the Department of Sustainability and Environment finalise interim guidelines. Of the five guidelines set out, the following have direct application to this proceeding:

"If the flood risk is significant as a result of sea level rise, consideration must be given to the nature of the proposal and how the risk can be mitigated. If the risk cannot be miti-

gated to the satisfaction of the CMA or [Melbourne Water], the proposal should be refused.

Development proposal that significantly increase the density of residential or commercial occupation, or the footprint of long-lived assets, will require careful consideration, having regard for the existing and future flood risk. These may include substantial commercial or residential expansions that replace less intense forms of development."

21 Two important points arise from the Minister's issuing of these preliminary guidelines. One is the fact that once in receipt of these guidelines and the Minister's direction to apply them, EGCAM did not seek to pursue the issue of climate change impacts and future flood risks. It had opportunity to do so and in fact the original grounds of objection raised these very issues. It would seem that the EGCMA's position is somewhat confusing and relied too heavily on the current level of risk it assessed and did not properly apply the Minister's direction as it could have once these had been issued.

22 The second point to note is that the Minister's guidelines, and the reasoning behind the need for these guidelines are directed at addressing long term impacts to coastal communities. The Minister's guidance recognises that this may mean some difficult and possible unpopular decision may need to be made now in order to provide this long term protection.

Other Planning and Guidance Materials

23 The Council and Permit Applicants addressed a number of other policy and strategic studies currently underway that are relevant to the issue of climate change, sea level rise and the issues arising in this application. These included the Coastal Advisory Note(35) and the interim report prepared by the Victorian Coastal Climate Change Advisory Committee (the Victorian CCAC).

24 The Coastal advisory note essentially reflects

the approach outlined in the Practice Note discussed earlier and I need not repeat its details here.

25 In respect to the Victorian CCAC interim report, it is apparent that this committee has received and addressed submissions that would suggest that there may be opportunities to address climate change impacts using *260 existing and some new planning controls, such as coastal zones and overlays. There is little to be gleaned from this interim report in respect to the issues raised in this proceeding other than to note its final conclusions and recommendations are not expected until 2011.

26 Reference has also been made to the Victorian Future Coasts Program, a program assessing the hazards of sea level rise and climate change impacts on the Victorian coast line and coastal communities. Amongst other outcomes, this program is tasked with delivering an assessment of impacts and responses by the end of 2010. The program is to deliver a set of planning guidelines, the Victorian Coastal Climate Change Hazard Guidelines, as foreshadowed in the Minister for Water's advice set out earlier. These guidelines are intended to enable a consistent decision making framework about coastal hazards. These guidelines are also due to be finalised in late 2010.

So ordered

Solicitors for the applicant: Best Hooper

Solicitors for the **East Gippsland Shire Council**: Maddocks Lawyers

Solicitors for the respondents: Norton Rose

J Veneziano

FN(1) I have considered all submissions presented by the parties although I do not recite all of the contents in these reasons.

FN(2) In accord with Clause 44.04-5 of the Planning Scheme and s 55 of the Planning and Environment Act 1987 (Vic).

FN(3) This application was made in June 2009 and leave was granted to be joined under s 60 of the Planning and Environment Act in a directions hearing on 29 January 2010: [Taip v East Gippsland Shire Council \[2010\] VCAT 147](#).

FN(4) Clause 15.08.

FN(5) The Victorian Coastal Strategy is a relevant strategic plan by way of section 60(1A)(g) of the Planning and Environment Act.

FN(6) AHD = Australian Height Datum.

FN(7) A 5% Annual Exceedance Probability for this flood level means that there is a 5% probability of this event/level being exceeded in any one year period.

FN(8) Gippsland Lake Flood Modelling Project Final Report. Centre for Environmental Applied Hydrology (CEAH) Report 01/04 June 2004 by Rodger Grayson and others.

FN(9) Ibid at page 26.

FN(10) Other examples of flood events in 1998 and 2007 were also cited by Mr Dunn to demonstrate the extent of flooding experienced by lakes Entrance that are consistent with a 5% ARI event.

FN(11) Climate Change, Sea Level Rise and Coastal Subsidence along the Gippsland Coast. Gippsland Coastal Board, Final Report, Phase 2 of the Gippsland Climate Change Study July 2008.

FN(12) This study also considered the impacts of coastal subsidence arising from groundwater extractions, mine dewatering and oil and gas extractions in the region. However the study identifies a reasonable degree of uncertainty about this impact and I have not considered or given this impact any weight in my reasons.

FN(13) Agricultural and Resource Management Council of Australia and New Zealand, Standing Committee on Agriculture and Resource Management, CSIRO Publishing, 2000.

FN(14) Factors set out in Appendix J of the SCRAM report were applied.

FN(15) The fact that the ground floor does not propose an active street frontage or commercial use in line with the Business 1 Zone is a matter of some concern. If I were to conclude that a permit were to issue, I would address this issue more fully. It is sufficient to note here, that while not determinative to the issues to hand, the response to the flood and sea level rise projections results in a ground floor design that raises issues of street frontage activity and urban interface design outcomes that would not generally be in line with outcomes sought in a B1Z or for that matter, under the Council's adopted Urban Design Framework.

FN(16) In arriving at this view I have considered the august 2000 guide for councils, Applying the Flood Provisions in Planning Schemes.

FN(17) These considerations are set out in detail in Appendix A to these reasons.

FN(18) Although self evident this is also evident from the flood emergency management materials and climate change strategy documents tabled with the Council's materials.

FN(19) In accordance with sections 9 and 11 of the Planning and Environment Act.

FN(20) In accordance with section 35A of the Planning and Environment Act.

FN(21) As of the date of these reasons.

FN(22) A copy of the Panel Report being tabled by Mr Montebello in the Council's Court Book.

FN(23) Section 6 of the Panel report is devoted to this issue.

FN(24) See section 64 at page 88 introductory comments. The Panel did recognise that the Municipal Strategic Statement at Clause 21.05-3 has "provided for some time" a statement about the issue of climate change in coastal planning at section 6.2, page 80 of the Panel report.

FN(25) Submissions of the Council in the Panel's report at page 85.

FN(26) Panel report at page 84.

FN(27) At page 90 of the Panel report.

FN(28) Section 4(1) of the Planning and Environment Act.

FN(29) Clause 11.01 and section 4(2) of the Planning and Environment Act.

FN(30) Here Mr Montebello referred to [Gippsland Coastal Board v South Gippsland Shire Council \(No 2\) \[2008\] VCAT 1545](#), specifically at [41].

FN(31) As set out under Appendix A of these reasons.

FN(32) Lakes Entrance Urban Design Framework. Coastal Towns Design Framework Volume 3. March 2007.

FN(33) Department of Planning and Community Development, December 2008.

FN(34) Ibid at page 3.

FN(35) Department of Sustainability and Environment. Last update April 2010.

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