

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P2936/2009  
PERMIT APPLICATION NO. P08/3148

**CATCHWORDS**

Mornington Peninsula Planning Scheme, *Section 77 Planning and Environment Act 1987*. Second storey and loft addition to a dwelling, coastal policy, climate change, visual impact from the public realm, and amenity impacts.

**APPLICANT**

Chris Fetterplace

**RESPONSIBLE AUTHORITY**

Mornington Peninsula Shire Council

**RESPONDENTS**

J Wilder, P Heffernan, J & W Mitchell,  
Department of Sustainability and Environment  
and Merricks Beach Foreshore Committee of  
Management.

**SUBJECT LAND**

11 Cliff Road, Balnarring Beach

**WHERE HELD**

Melbourne

**BEFORE**

E Bensch, Presiding Member  
M Read, Member

**HEARING TYPE**

Hearing

**DATE OF HEARING**

31 August 2010

**DATE OF ORDER**

14 September 2010

**CITATION**

Fetterplace v Mornington Peninsula SC [2010]  
VCAT 1549

**ORDER**

- 1 The decision of the Responsible Authority in permit application no. P08/3148 is set aside. A permit is granted in relation to land at 11 Cliff Road, Balnarring Beach. The permit will allow alterations and additions to a dwelling generally in accordance with the endorsed plans and subject to the conditions set out in Appendix 1 of this decision.

Elizabeth Bensch  
**Presiding Member**

Michael Read  
**Member**

## APPEARANCES

For Applicant	Chris Townshend, SC, Barrister briefed by Hoeys Lawyers. He called Mr K. Twite, town planner of SJB Planning, Dr Provis, oceanographer of Cardno and M. McFall, Landscape Architect of Land Danse Memla, landscape architects.
For Responsible Authority	Mr. Geoff Nicol, Town Planner.
For Respondents	Mr. Peter Jewell for J Wilder, and J. & W. Mitchell, and Ms. Meg Paul for Merricks Beach Foreshore Committee of Management Inc.

## INFORMATION

Description of Proposal	To retain, alter and extend the ground for the existing dwelling and construct a second storey addition.
Nature of Application	Section 77 Planning and Environment Act 1987.
Zone and Overlays	Residential 1 Zone. Design and Development Overlay 3 (DDO3) Environmental Significance Overlay Schedule 20 (ESO20) Significant Landscape Overlay Schedule 4 (SLO4) Vegetation Protection Overlay 1 (VPO1)
Reason(s) Permit Required	Clause 32.01 (Development on a Lot < 300m2) Clause 43.02 (Permit under DDO3) Clause 42.01 (Permit under ESO20) Clause 42.03 (Permit under SLO4) Clause 42.02 (Permit under VPO1)

## Land description

The site is immediately adjacent to Balnarring Beach foreshore. The site does not have an effective street frontage but is accessed via a battleaxe driveway that also provides access to adjacent dwellings known as no. 7 and 9 Cliff Road. These three lots, Nos. 7, 9 and 11, were created through the subdivision of a larger lot in the 1970's, with No. 7 placed at the top of a beach-front escarpment and Nos. 9 and 11 effectively located at the rear of the beach and facing eastwards. The subdivision also created an area of common property that contains the shared driveway and accessways to the dwellings, together with a large landscaped area containing the embankment or escarpment proper.

The lot on which the existing dwelling is located has a total area of 193 square metres. The existing dwelling is a single storey brick dwelling with a shallow-pitched, gable-style roof. The building is set back about 3 metres from the foreshore boundary to the east and a single car parking space within a carport is located at the top of the embankment. Metal steps down the embankment provide pedestrian access to the dwelling.

## Cases referred to

Mitpan Investments Pty Ltd v Mornington Peninsula SC [2010] VCAT 1059

Taip v East Gippsland SC (includes summary) (red dot) [2010] VCAT 1222

Myers v South Gippsland SC (No. 2) (includes summary) (red dot) [2009] VCAT 2414

## REASONS

### What is this review about?

- 1 Chris Fetterplace applied to Mornington Peninsula Shire Council to undertake alterations and additions to her dwelling at 11 Cliff Road. The council advertised the proposal and a number of objections were received from the adjoining property owners. Council resolved to refuse the application on a range of grounds that included: the design not satisfying the objectives of DDO3, the design being inconsistent with the Victorian Coastal Strategy 2008, the design being incompatible with the siting and design guidelines for structures on Victorian coast and, lastly, the design not complying with clause 54 of the planning scheme (ResCode).
- 2 Having viewed the site and heard the submissions put to us at the hearing we consider that the issues set out below are relevant, with the first two of these incorporating our consideration of relevant coastal policies relating to visual impacts and climate change:
  - Vulnerability to climate change
  - Visual impact of the development from the public realm
  - Use of the foreshore
  - Amenity impacts on neighbours.

### Vulnerability to climate change

- 3 Clause 15.08 of the Mornington Peninsula Shire scheme relates to the coastal areas and requires that the responsible authority must plan to manage coastal hazards and coastal impacts of climate change by:
  - planning 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 impact associated with climate change;
  - applying the precautionary principle to planning management decision making when considering the risks associated with climate change;
  - ensuring 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; and
  - avoiding development in identified coastal hazard areas acceptable to inundation (both river and coastal, erosion, land slip/land slide, acid sulphate soils, wildfire and geotechnical risk)
- 4 In response to this requirement, the permit applicant presented evidence by Dr. Provis, who undertook a coastal vulnerability assessment of the property.

- 5 Dr. Provis indicated that the land elevation for the site is at 3.6 metres AHD and the house has a floor level of 4.03 metres AHD. He further concluded that the beach in front of the site is accreting and in good condition, with a steady supply of sand from longshore transport, and that the rock platform in front of the site limits the wave energy reaching the site.
- 6 In his vulnerability analysis Dr. Provis assessed the site under a number of headings – the likelihood of inundation, its sensitivity to potential impact, its capacity to adapt and its vulnerability – and then applied these parameters to the site and reached the following conclusions:
  - The likelihood of the site being affected by coastal flood events as a result of storm-tide levels is rare until 2070, increasing to unlikely by 2100
  - The overall vulnerability of the site to coastal flooding is insignificant for the entire projection until 2100 when it rises to low
  - The vulnerability of the site to coastal erosion is insignificant until 2030, rising to low by 2070 and remaining at this level until 2100
  - The proposed construction is unlikely to be effected by the current predicted sea level changes within this century
  - The effects of climate change may increase or decrease with time from current predictions.
- 7 Council did not support its grounds of refusal with its own expert evidence and this was acknowledged by Mr. Nicol who, in his submission, stated:

This is understood to mean that the site is not thought to be at risk of inundation by rising sea levels for the foreseeable future. Council has not been able to independently verify the evidence but on face value, it appears to be what is being said by the expert witness.
- 8 The Merricks Beach Coastal Foreshore Reserve Committee of Management Inc challenged Dr Provis on a number of these points and produced extensive photographs and anecdotal evidence regarding flooding from severe storm and loss of sand in the area. We conclude, however, that placing too much reliance on past storm events may not be an indicator of future risk and prefers Dr. Provis' analysis of future risk. We also accept Dr. Provis' opinion that one cannot reliably extrapolate observations about events at one part of the Balnarring foreshore to another; there can be too many relevant factors that vary between the two locations.
- 9 A site inspection and Dr Provis's response to these concerns dealt with this issue to our satisfaction, in that the site is on the protected northeastern corner of Balnarring Beach. We concur with Dr. Provis' observation that the site is protected by the headland. We therefore conclude, based on the evidence provided by Dr. Provis, that given the level of the building above the predicted storm surge levels which would be, at their worse case

scenario about 1 metre to the seaward side of the property fence would not cause serious concern and the proposal cannot be refused on this basis.

### **Use of the foreshore**

- 10 The other main concern of the Merricks Beach Coastal Foreshore Reserve Committee of Management Inc. related to potential use of the foreshore area to gain access to the subject site, particularly during the construction phase, and damage that might thereby be caused by vehicular movement and storage of building materials/rubbish on the beach. How the building of the proposed extension is to be achieved in compliance with conditions that prohibit use of the foreshore is a matter for the permit applicant. Council's draft permit conditions deal with this issue to our satisfaction (see later discussion).

### **Visual impact of the development from the public realm**

- 11 Council and respondents submitted that the proposal would unreasonably impact on the coastal scene, thereby being in conflict with a range of coastal policies and specific planning controls designed to protect this coastal quality. We have concluded that the enlargement of the existing building, being one of a cluster of buildings that already intrude onto the coastal scene, will bring about only a marginal and acceptable change.
- 12 The parties referred us to a number of planning controls that apply to the site [Local Policy Clause 21.07, DDO3, SLO20, the *Victorian Coastal Strategy* and *Siting and Design Guidelines for Structures on the Victoria Coast* (1998), in particular]. We acknowledge that a range of policy and planning controls have been established to identify the importance of Victoria's coastal landscapes and to seek to protect them from further intrusive structures.
- 13 In submissions and cross-examination, objectors sought to make much of the increased visibility of the extended building because of its increased size and the loss of some views of the vegetated embankment to its rear. Generally, no regard was given to the substitution of muted colours for the present, rather garish white.
- 14 However, we conclude that Mr. McFall provided the most useful approach to analysing the section of coastal landscape that contains the subject building. Mr. McFall used a structured form of analysis (an approach we welcome and would like to see more often) to analyse the proposal in terms of the three elements of scale, extent and value. Using the photo-montages, Mr. McFall concluded that
  - In term of scale (how great will be the impact on the existing view?) – the impact of the proposal would be “low to moderate”
  - In terms of extent (who would see it) – the impact of the proposal would be “high”, in that all users of the beach would see it

- In terms of value, (how would those affected perceive the change?) – the quality of the visual experience would not change.

15 As Mr. McFall put it, and we accept,

The existing view is of a beach side residential area. The additional level adds a further building to this view but does not clutter it ... Much of the sloping land behind (would now be) occupied by the upper level in the view; however, there is still visual separation to the upper level. It is (his) opinion that such addition would not be seen as adverse, particularly given the low-key nature of the architectural design.

16 As we would put the matter, the immediate locality of the subject site is best characterised as a cluster of very visible buildings facing the beach. The houses at the top of the escarpment are quite dominating in comparison to either the existing subject building or its extended form, and are of a style that Mr. McFall characterised, somewhat unkindly but not, in our view, unfairly as “look-at-me architecture”. In the context of this section of coastal landscape, we conclude the proposed extension with its proposed muted colour scheme would not bring about any great or detrimental visual change and is therefore acceptable.

#### **Amenity impacts on neighbours**

17 Protection of shared views is one of the requirements of the Mornington Peninsular Planning Scheme, however various Tribunal decisions have confirmed that there is no legal right to a view, but the potential for loss of views from existing dwellings needs to be considered.

18 Mr Twite in his evidence produced a series of view analyses and discussion of this issue for the three dwellings up hill from the subject site Nos 3, 11 and 13 Cliff Road.

19 Our site inspection indicated that as the existing dwelling is at a much lower level than the other existing dwellings, (apart from No. 9) the construction of a second level will impact on a small section of the immediate beach in front of the subject site but would have no impact on water views. For the upper dwellings, there would be minimal impact on the wider more distant views of Western Port Bay due to their elevated location.

20 We conclude that there will be minor reduction in views for the properties up hill of the subject site, but the wider more expansive views obtainable from these dwellings will remain substantially intact and that their amenity will not be reduced.

21 In other respects, we conclude that it is not appropriate to assess the proposal against the standards of Clause 54. The particular characteristics of this ‘cluster’ subdivision, with its extensive area of common property, create a situation that is in most respects anomalous to that for which these standards were envisaged.

- 22 The introduction of two timber decks, one at ground level and one at first floor which is angled with a clear balustrade, we acknowledge will intrude into the limited front setback from the foreshore of the dwelling and this issue was of concern to Council and the Merricks Beach Foreshore Committee of Management Inc. Mr Twite concluded that the decks would add visual interest to the elevation. We agree with this assessment and conclude that the angled deck (a lightweight structure suitable in a foreshore location) and the recessive setback to the first floor assists in providing depth to the building and it will not dominate the foreshore in this location. The muted colour scheme will further assist.

### **Conclusion**

- 23 The site for this development is unusual, however it is zoned Residential 1 Zone that creates an expectation that the land can potentially be developed. We consider that the proposal is respectful of its unique location and provides a satisfactory solution to a difficult and constrained site and can be approved subject to suitable conditions.

Elizabeth Benz  
**Presiding Member**

Michael Read  
**Member**

## APPENDIX 1

- 1 Prior to the commencement of buildings and works, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans submitted with the application but be amended to show:
  - a A schedule of external building materials;
  - b The provision of an external colour palate consisting of muted and non-reflective tones;
  - c Planting of indigenous vegetation in the area adjacent to the coastal reserve;
  - d Necessary changes in response to any recommendations identified in the site specific geotechnical hazard and risk assessment report required below.
- 2 Prior to the commencement of buildings and works, a geotechnical investigation including landslip risk assessment is to be undertaken to the satisfaction of the Responsible Authority.
- 3 The layout of the land, the size and type of the proposed buildings and works, including the materials of construction, on the endorsed plan must not be altered or modified without the consent of the Responsible Authority.
- 4 The materials and colour of the exterior finish of the building must be in accordance with the endorsed plans unless with the further permission of the Responsible Authority.
- 5 All disturbed surfaces on the land resulting from the development must be revegetated and stabilised to the satisfaction of the Responsible Authority.
- 6 The stormwater from the impervious areas of the proposed building works must be managed and the stormwater discharged to a lawful point of discharge to the satisfaction of the Responsible Authority.
- 7 Prior to the occupation of the dwelling, all screening devices must be installed/erected and thereafter maintained to the satisfaction of the Responsible Authority.
- 8 Unless with the further written consent of the Responsible Authority, prior to the occupation of the dwelling all planting must be maintained in a healthy condition to the satisfaction of the Responsible Authority. Any dead or diseased trees or shrubs must be replaced as soon as possible.

- 9 This permit will expire if the development is not completed within three years of the date of this permit. The Responsible Authority may extend this period if a request is made in writing before the permit expires or within the following three months.

**Department of Sustainability and Environment**

- 10 No access to or egress from the subject land is permitted via the adjoining Foreshore Reserve. Vehicular access to and egress from the freehold property must only be via the legal access point to the satisfaction of the Responsible Authority.
- 11 No building materials, debris or litter shall be permitted to be placed the Foreshore Reserve.
- 12 All works must be contained within the freehold land. The adjoining Foreshore Reserve must not be used for truck turning areas, entry points, parking areas, wash down areas or temporary stack sites during construction of buildings and works.
- 13 No polluted and/or sediment laden run-off or other concentrated flow of water is to be discharged directly or indirectly into the adjoining Foreshore Reserve.
- 14 Encroachment into the adjoining Crown Land must not occur as a result of the development.
- 15 There must be no removal of any native vegetation associated with the use and development from the adjoining Foreshore Reserve.
- 16 Landscaping must not include the planting of environmental weeds.
- 17 All earthworks are to be designed and constructed to avoid soil erosion. All fill is to be compacted, batters are to be topsoiled and revegetated in accordance with Construction Techniques for Sediment Pollution Control, (Environment Protection Authority: 1991) to the satisfaction of the Responsible Authority.