

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P1972/2013 & P2086/2013
PERMIT APPLICATION NO. PL13/029

CATCHWORDS

Sections 80 & 82 of the Planning & Environment Act 1987; Moyne Planning Scheme; Residential 1 Zone; Subdivision into 32 lots;
Predicted coastal inundation; Drainage; Impact on adjoining wetlands and protected migratory shorebird *Latham's Snipe*

APPLICANT (Application No. P1972/2013) Donald Stewart & Jodie Honan

APPLICANT (Application No. P2086/2013) PEMS Pty Ltd

RESPONSIBLE AUTHORITY Moyne Shire Council

REFERRAL AUTHORITY Country Fire Authority

RESPONDENT (Application No. P1972/2013) PEMS Pty Ltd

RESPONDENT (Application No. P2086/2013) Donald Stewart & Judy Honan

SUBJECT LAND Mills Crescent, Port Fairy

WHERE HELD Warrnambool

BEFORE Geoffrey Code, Member (Presiding) & Ian Potts, Member

HEARING TYPE Hearing

DATE OF HEARING 24, 25, 26 & 27 February 2014

DATE OF ORDER 31 March 2014

CITATION Stewart v Moyne SC [2014] VCAT 360

ORDER

- 1 The decision of the Responsible Authority is varied.
- 2 In permit application no. PL13/029 a permit is granted and directed to be issued for the land at Mills Crescent, Port Fairy on the conditions set out in Appendix A. The permit allows—
 - Subdivision

- 3 In accordance with section 85(1A) of the *Planning and Environment Act 1987*, the Tribunal directs that conditions 1 and 3 must not be amended by the Responsible Authority under Division 1A of Part 4 of the *Planning and Environment Act 1987*.

Application no. P2086/2014

- 4 The decision of the Responsible Authority is varied.
- 5 In permit application no. PL13/029 a permit is granted and directed to be issued for the land at Mills Crescent, Port Fairy on the conditions set out in Appendix A.

Geoffrey Code
Member (Presiding)

Ian Potts
Member

APPEARANCES

For Donald Stewart & Judy Honan Ms Jennifer Trewhella of counsel, instructed by the Environment Defenders Office (Victoria) Ltd. She called the following expert witnesses—

- Mr Andrew Prout, hydraulic engineer, Engeny Water Management
- Dr Birgita Hansen, ecologist, Federation University (Mt Helen)

For Moyne Shire Council Mr Greg Tobin, Harwood Andrews Lawyers. He called the following expert witnesses—

- Mr James Carley, hydraulic engineer, Water Research Laboratory, University of New South Wales
- Dr Mark Jempson, hydraulic engineer, Venant Solutions Pty Ltd

For PEMS Pty Ltd

Mr Chris Taylor, Planning & Property Partners, Lawyers & Consultants. He called the following expert witnesses—

- Dr Darren Quin, zoologist, Ecology Australia Pty Ltd
- Mr Warwick Bishop, coastal engineer, Water Technology Pty Ltd
- Mr Arnold Brian, engineer, Brian Consulting Pty Ltd

For Country Fire Authority No appearance

INFORMATION

Brief description of Proposal	Subdivision of the land into 32 lots, comprising 31 residential lots and one large lot to be incorporated into a wetlands reserve on adjoining land
Nature of Proceeding	Applications under sections 80 & 82 of the <i>Planning and Environment Act 1987</i> .
Planning Scheme	Moyne Planning Scheme.
Zone and Overlays	Residential 1 Zone (R1Z) Design & Development Overlay Schedule 18 (DDO18) (South Beach behind Foreshore – Port Fairy Design Guidelines Character Area 11) Design & Development Overlay Schedule 21 (DDO21) (Peripheral Areas - Port Fairy Design Guidelines Character Area 14)
Permit Requirements	Clause 32.01-2 (subdivision of land in R1Z). Clause 43.02-2 (construction of works on land in DDO18 & DDO21). Clause 43.02-3 (subdivision of land in DDO18 & DDO21).
Relevant Scheme policies and provisions	Clauses 10, 11, 12, 13, 15, 16, 18, 19, 21.03, 21.04, 21.05, 21.06, 21.07, 21.08, 22.01, 22.02, 52.01, 56 & 65
Land Description	The land has frontages to Mills Crescent, O'Reilly Street and Powling Street, Port Fairy. It is about 1 km southwest of the central business area of Port Fairy and about 300 m north of the coast at a beach facing the Southern Ocean known as South Beach. It is vacant land adjoining to the south and west part of a residential estate known as the South Beach estate. The land is in three parcels being Lot 1 Title Plan 625145A, Lot 1 Title Plan 201496J & Lot 1 Title Plan 549151D. It has a total area of about 3.8 ha. It adjoins the south side of the Powling Street Wetlands which forms the habitat of the internationally endangered migratory bird Latham's Snipe. The land is about 230m north of Pea Soup Beach and about 1 km west of the Moyne River.
Tribunal Inspection	24 February 2014 (accompanied)

Cases Referred To

South Beach Wetlands & Landcare Group v Moyne
SC [2008] VCAT 2383
South Beach Wetlands & Landcare Group v Moyne
SC [2008] VCAT 2384

REASONS

What is this proceeding about?

- 1 PEMS Pty Ltd (**PEMS**) applied to the Moyne Shire Council for a permit under the *Moyne Planning Scheme* to subdivide land off Mills Crescent in Port Fairy (the **subject land**) into 32 lots (the **proposal**).
- 2 The subject land is located about 230 m north of the Southern Ocean coast at Pea Soup Beach in Port Fairy and adjoins the central part of a wetland known as the Powling Street Wetlands (the **wetlands**).
- 3 Mr Donald Stewart & Ms Jodie Honan are members of an unincorporated local group known as the South Beach Wetlands and Landcare Group. The Group has a particular interest in the wetlands. The wetlands is the habitat of an international migratory shorebird known as Latham's Snipe (*Gallinago hardwickii*). Mr Stewart & Ms Honan objected to the Council against the grant of a permit on grounds relating to impact on Latham's Snipe habitat and other environment grounds.
- 4 Because of the subject land's proximity to the wetland and presence of ephemeral wetlands on the subject land, the proposed subdivision was referred to the Federal Minister for the Environment for determination of whether or not it would be a 'controlled action' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**). A delegate of the Minister decided that the proposal was not a controlled action under the EPBC Act if undertaken in accordance with the plan of subdivision for 32 lots and six conditions.
- 5 The Council subsequently decided to issue a notice of decision to grant a permit generally in accordance with the plan of subdivision referred to in the EPBC Act decision and subject to 32 conditions (the **notice of decision**).
- 6 Mr Stewart & Ms Honan (the **objectors**) have applied to the Tribunal to review the notice of decision. PEMS has also applied to the Tribunal to review specified conditions in the notice of decision.
- 7 The main issues in this proceeding are—
 - Whether the subject land is so affected by coastal inundation under predicted future sea level rise that the proposal is an acceptable planning outcome.
 - Whether the impact on the habitat of Latham's Snipe is such that the proposal is an acceptable planning outcome on ecological grounds.
 - Whether the proposal is an acceptable planning outcome having regard to relevant policies and provisions of the scheme relating to residential subdivision in Port Fairy.

- 8 After considering all the submissions and evidence, and after having inspected the subject land and surrounding land, our main finding is that changes to the proposal (and the conditions in the notice of decision) are needed to make the proposal an acceptable planning outcome.
- 9 The main change is that the lot to be annexed to the wetlands needs to be enlarged and the number of lots correspondingly reduced. This change is needed for drainage, inundation and ecological reasons. In general terms, the extended reserve must include the largest ephemeral wetland and the five lots abutting the reserve. There are a range of consequences of this change. One of them is that a section of Hill Street, about 100 m long between Mills Crescent and lot 7, must be included in the reserve. This means that Hill Street must terminate in a court bowl at lot 7.
- 10 Accordingly, we will vary the Council's decision and issue a permit subject to modified conditions. Our reasons follow.

Land and surrounds

- 11 As stated in the Information section of these reasons, the land is a substantial parcel of undeveloped land within the Port Fairy town area, about 1 km from the town centre.
- 12 The land is vacant and abuts has access to three constructed roads - Powling Street (to the southwest), O'Reilly Street (to the northeast) and Mills Crescent (to the southeast). The main topographical features of the land are a stony knoll (to the southwest and abutting the wetland) and flatter land to the south and southeast of the knoll that contains three ephemeral wetlands. Other than on the knoll, the grass cover on the land is mown from spring to autumn to reduce bushfire risks. The knoll is covered by long grass, some patches of native vegetation and patches of box thorn.
- 13 The top of the knoll is just over 8.0 m AHD in elevation. North of the knoll, where the land abuts the wetlands, it falls to about 1.3 m AHD. On the east side of the knoll the land falls to a saddle at about 2.8 m AHD, then rises to higher ground to the east. Most of the proposed lots are located on the lower and south side of this saddle and the knoll. On the south side, the land lies between 1.65 m AHD more or less in the central part of the proposed subdivision and between 2.5 m AHD and 3.0 m AHD along the southern and eastern boundaries of the land. The low point is the larger of the three ephemeral wetlands, and straddles what would be the central portion of Hill Street.
- 14 The land adjoins—
 - A large part of a residential estate (known as the South Beach estate) along the Southern Ocean coast (to the south and west of the land). This part of the estate is almost fully developed with a single dwelling on each lot. The estate adjoins the coast on its south side at what is known as Pea Soup Beach.

- The central part of the wetlands (to the north) that is owned and managed by the Council.
- Port Fairy primary school to the northeast beyond an unmade road reserve known as Stawell Street.
- Undeveloped land owned by the Council to the east which itself adjoins a large open space reserve known as the Russell Clark Reserve.

The Proposal

- 15 The proposal is for 31 residential lots ranging in size between 587 sq m and 1,564 sq m and a lot 32 of 12,786 sq m that is described as land 'to be transferred to Moyne Shire Council for annexure to the Wetland'.
- 16 Hill Street and a northerly extension of Mills Crescent are existing 'paper' roads¹ within the South Beach estate. Under the proposed subdivision these roads will be constructed to provide access to the lots. A northeasterly extension to Hill Street beyond Mills Crescent will create a new court within the subdivision for 11 of the lots. A section of Mills Crescent, about 70 m, will be closed to vehicles and be a walking and cycling path between O'Reilly Street and Mills Crescent as a new means of access from within the town to Pea Soup Beach.

Tribunal's previous decision

- 17 This is not PEMS's first attempt to secure a permit to subdivide the land to create residential lots. In 2008, the Tribunal refused to grant a permit to subdivide the subject land into 43 lots.²
- 18 In accordance with established principles, we have had regard to the Tribunal's previous decision.
- 19 The proposal is now different. The 2008 proposal included the subdivision of the stony knoll part of the land for residential lots. The Tribunal's reasons show that it did not support the proposed subdivision of the stony knoll having regard to impacts on Latham's Snipe habitat and the loss of native vegetation. The current proposal has responded positively to that concern by assigning this land for annexure to the wetland.
- 20 It is also relevant to record that the context of planning controls applicable to the subject land has not significantly changed. The 2008 proposal was also an urban infill subdivision that was subject to the same zone and overlays in the scheme.
- 21 In relation to policy, however, there has been a relevant change to the provisions of the *Moyne Planning Scheme*. Following the decision of the

¹ These are roads shown on the original subdivision plan for the South Beach Estate.

² *South Beach Wetlands & Landcare Group v Moyne SC* [2008] VCAT 2383 (21 November 2008).

Tribunal in November 2008, the scheme was amended under Amendment VC71 to include State planning policy about environmental risks, and more precisely policy objectives to plan for and manage the potential coastal impacts of climate change. This was not an issue ventilated before the previous Tribunal.

- 22 Other provisions of the policy framework have also seen some changes, most notably those within the Local Planning Policy Framework. However for the most part these are not germane to our decision. Changes in response to coastal and climate change issues and biodiversity are.
- 23 Apart from the policy changes, other various relevant circumstances that have changed include—
 - Two experts have presented us with new evidence about the impacts of the proposal on Latham's Snipe. As well, the decision under the EPBC Act differs from the decision under the same Act for the 2008 proposal.
 - Five experts have given new evidence about coastal inundation and drainage impacts.
- 24 Ultimately, therefore we have considered the proposal afresh and have been unable to give significant weight to the Tribunal's previous decision.

EPBC Act decision

- 25 PEMS referred the proposal to the Commonwealth because the wetland and the ephemeral wetlands provide known habitat for the EPBC Act listed migratory bird Latham's Snipe.
- 26 Before the Council issued the notice of decision a delegate of the Minister responsible for the EPBC Act decided that the proposal³ was not a controlled action under the EPBC Act if undertaken in accordance with the plan of subdivision now the subject of this proceeding and six conditions.
- 27 The purpose of the conditions is to minimise impacts on Latham's Snipe and its habitat. They require long term protection of the habitat in lot 32, including a restriction on any fire protection slashing or mowing of grass to the periphery of that habitat, constructing a fence around lot 32 and installing a gross pollutant trap.
- 28 The Council's officers recommended the notice of decision include conditions requiring enlargement of lot 32 to include the adjoining area covered by lots 27 to 31. The Council decided to not accept this recommendation and the notice of decision accords with the plan of subdivision approved under the EPBC Act decision and the EPBC Act

³ The proposal considered under the EPBC Act decision was described as a 34-lot subdivision but we are satisfied it is, in effect, the same proposal because the 3 additional lots in O'Reilly Street are shown as outside the subdivision in both relevant plans.

conditions but for fire protection grass mowing or slashing to which we will later refer and the form of fencing around lot 32.

- 29 PEMS submitted that '[w]hilst the Tribunal must satisfy itself of the proposal, the [EPBC Act decision] should be given substantial weight in relation to impacts on Latham's Snipe, including the extent of lot 32'.
- 30 We agree with the views expressed by the Tribunal in 2008 when it was required to consider the effect of an EPBC Act decision about the 2008 proposal. The Tribunal ruled that an EPBC Act decision may be considered by the Tribunal but cannot be binding. The Tribunal must be independently satisfied the proposal is an acceptable planning outcome having regard to the relevant planning considerations, including biodiversity protection in what is now clause 12.01 of the scheme.⁴
- 31 The delegate published his reasons for the EPBC Act decision and this states the evidence or material on which the findings of fact were based. This included a report (the **GHD Report**) commissioned by the Commonwealth.⁵ This report was tendered in this proceeding.
- 32 We have considered the EPBC Act decision and given it appropriate weight in relation to impacts on Latham's Snipe. We have not given it determinative weight because we have to consider the evidence of Dr Hansen and Dr Quinn and the submissions of the parties about these impacts that were not available to the delegate when he made the EPBC Act decision.
- 33 We also consider that a decision under the *Planning and Environment Act 1987* is a broader based decision than that under the EPBC Act. We are required to take into account a wide range of policies and provisions of the scheme relating to the use and development of the land. These include those relating to coastal inundation and drainage to which we will shortly refer.
- 34 Ultimately, we have decided that the protection of a larger area of Latham's Snipe habitat on the subject land is the correct and preferable decision having regard to the evidence and submissions and all the relevant considerations. Although the affect of our decision means modification to the proposal to that in the EPBC Act decision, and therefore would require a referral of the amended proposal, we do not consider that this will be an impediment to acting on the permit.

⁴ *South Beach Wetlands & Landcare Group v Moyne SC* [2008] VCAT 2384.

⁵ GHD Pty Ltd, *Report for Powling Street Wetland, Port Fairy* (February 2012), prepared for the Commonwealth Department of Sustainability, Environment, Water, Population and Communities.

The risks of coastal inundation and drainage

- 35 The undulating nature of the subject land and the low topography of the central area relative to the knoll and rising ground to the west, south and east means that the site has a more or less closed local drainage system. Under natural conditions the land is thus subject to stormwater inundation, with wettest area being the central ephemeral wetland. This is readily demonstrated in Mr Bishop's flood hydraulic assessment and his Figure 9.2.
- 36 The subject land has also been assessed by Mr Carley to be susceptible to coastal inundation under present day conditions for storm surge/tidal events and under future projected sea levels. While Mr Bishop disagrees with some of the assumptions and assessment outcomes of Mr Carley, his assessment also indicates the area to be vulnerable. The difference between these two experts is a matter of degree that we will address shortly.
- 37 The objectors submit that the drainage conditions and the coastal inundation risks make the site unsuitable for development.
- 38 The Council accepts that there are drainage issues and inundation risks but argues that the impacts can be managed by a combination of appropriate drainage design and raising much of the subject land by filling. It proposes permit conditions to require engineering responses that are said to satisfactorily respond to these risks.
- 39 PEMS submits that the drainage can be addressed in the detailed design of the subdivision, relying on evidence by Mr Brian that a likely solution is to contain stormwater in oversized pipes with drainage to the wetland at rates comparable to natural drainage. PEMS resists on-site detention or similar systems, arguing that the capacity of the wetland, an existing grassed swale and litter trap are sufficient to address stormwater treatment and quality objectives for stormwater from the site.
- 40 PEMS agrees that coastal inundation risks are a relevant matter given the outcomes of the coastal hazard assessments by Mr Carley (and other authors) commissioned by the Council as part of the Future Coasts program.⁶ PEMS relies on the evidence of Mr Bishop that the assessment of inundation is very conservative and may well overestimate the depth and extent of inundation and the level of risks of such events occurring.
- 41 In turning first to this issue of inundation and coastal hazard, it is useful to first highlight that there is widespread agreement that under Clause 13.01-1, this issue is relevant to the decision of the Council and now the Tribunal. The objective of this clause is to 'plan for and manage the potential coastal impacts of climate change'. A range of strategies follow to address this objective and relevant policy guidelines are to be referred to. The latter in this case is the *Victorian Coastal Strategy* (2008).

⁶ Specifically this is a reference to the *Future Coasts - Port Fairy Coastal Hazard Assessment April 2013*, prepared by Water Research Laboratory of which Mr Carley was a co-author.

- 42 PEMS and the Council submit that the proposed development is urban infill. We agree. PEMS submits that this being the case, the appropriate strategy to apply under the state policy is an increase 'of 0.2 metres over current 1 in 100 year flood levels by 2040'. It is acknowledged that the *Victorian Coastal Strategy* requires the application of the 'precautionary principle' and a sea level rise of not less than 0.8 metres to the year 2100. PEMS highlights however that the draft (September 2013) *Victorian Coastal Strategy* refers to urban infill in the same way as present day State planning policy.
- 43 Various submissions have been put to us about what level of sea level rise and flood levels might apply under the State planning policy and the level of discretion the policy strategy imports by indicating that 'an increase of 0.2 metres ... may be used ... by 2040' (our emphasis) in respect to urban infill.
- 44 In response to such submissions we note that the increase of 0.2 m is to apply to current 1 in 100 year flood levels as a response to sea level rise by 2040. We agree that the strategy does import that this application may be discretionary given that it 'may be used'. We understand that such discretion would be on the basis that one would apply this value in the absence of more site specific information or assessment. Further we note that this additional 0.2m applies to present day 1 in 100 year flood levels, rather than representing the magnitude of sea level rise.
- 45 We note that the strategy for planning for a possible sea level rise of 0.8 m by 2100 also calls for consideration of further effects from a range of influences such as tides, storm surges, local conditions and the like. Thus the actual impact may not be a mere rise of 0.8m but some other value once such matters are considered further.
- 46 The Port Fairy Coastal Hazard study (the **coastal hazard study**) relies on a sea level rise projection of 1.2 m by 2100 rather than 0.8 m referred to in policy and the *Victorian Coastal Strategy*. The study has also assessed the likely impacts under the 2040 scenario, which were found to be similar to the risk from present day 1 in 50 year inundation events.
- 47 Notwithstanding Mr Bishop's concern about the coastal hazard study applying a 1.2 m sea level rise by 2100 and 0.4 m by 2050, we are comfortable with the adoption of these levels by Mr Carley in this matter. As he has explained the study applies levels that have been determined specifically for this section of the Victorian coast line. Further as Mr Carley explained, the scenarios assessed in the coastal hazard study represent those that are most pertinent to the future planning of coastal issues for the shire. Having identified such scenarios we would think it poor planning to set them aside for more generic discretionary levels.

- 48 In any event, as we have noted earlier, the assessments by Mr Carley and Mr Bishop both indicate the site to be susceptible to coastal inundation. The difference between the two is one of degree of impact.
- 49 Both experts agree that there is little risk from coastal erosion. We accept this evidence. The risk of inundation will arise from the overtopping of coastal dunes along South Beach Drive. Topographic maps indicate two low points where overtopping waves could generate overland flow that ultimately would drain to and pool within the subject land. The extent of this inundation varies depending on the various scenarios and modelling techniques.
- 50 Mr Carley and Mr Bishop have applied a 'bathtub' approach ie treat the inundation level as a plane which shows areas that lie below this level to be inundated. Such an approach does not account of connections or flow paths. Mr Carley and Mr Bishop agree that this method is indicative of the risks. The bathtub assessments under the coastal hazard study and by Mr Bishop indicate the subject land would be inundated ie would lie at levels below combined sea, tidal and storm surge levels for the 1 in 50 year event adopted as indicative of 2040 conditions, 1 in 100 year events by 2050 and 1 in 100 year events by 2100. The extent of inundation progressively increasing with each scenario from localised flooding within the central ephemeral wetland up to the 2100 scenario where most of the Hill Street lots would be inundated.
- 51 The second method, which was also undertaken by Mr Carley in the coastal hazard study, is one that takes account of dynamic sea conditions ie it includes sea level, wave setup and wave run up, takes account of peak wave heights and takes account of topography and flow paths connections. Mr Bishop's main criticism of this assessment is that it has failed to take proper account of an outer reef feature and consequential dissipation of wave/storm surge energy. Mr Bishop believes that because of this, the coastal hazard study is likely to have overestimated the degree of inundation.
- 52 We have given careful consideration to these and the other technical aspects of each of the experts. We accept that the bathtub modelling is indicative of the risk, given some short comings that both experts identify. We are also mindful of Mr Carley's acknowledge that the coastal hazard study was necessarily broad to assess risks along the entire coastline and that site specific assessments may be necessary to address specific issues. That said however, this study usefully assessed the risk of inundation along two sections, South Beach and Pea Soup Beach, that encompass the coastal area most relevant to the subject land. We consider the coastal hazard study therefore to be of assistance in understanding the level of risk and potential impact at the subject land.
- 53 Further we observe that Mr Bishop's assessment of inundation ultimately indicates similar levels of impact at least in the near term. We are persuaded that the most appropriate approach is to take account of the fact

that the Council is moving toward adaptive approaches. The commissioning of the coastal hazard study is one such step that demonstrates its pro-active approach. However we are not persuaded that, in the short term, we can rely on all the necessary adaptive steps being adopted before some risk of inundation is realised. Mr Carley's assessment indicates there are present day risks, with the magnitude of impact carrying through to at least 2040 before becoming more severe in 2050 and beyond.

- 54 The bathtub modelling indicates possible inundation to levels of 2.3 m AHD to 2.4 m AHD within this time frame. His plots of inundation indicate that at these levels, surge flow through the existing drainage system can inundate a low point in Powling Street with subsequent inundation along Singleton Street, a portion of Mills Crescent and subsequently the subject land, principally the area of the central ephemeral wetland. While it may be possible to deal with surge flows by various valves and upgrades to pumping stations, we are, as we have noted earlier, not persuaded that we can rely on these adaptations at least for the near future. We accept that in this urban environment longer term adaption that addresses all of the South Beach estate will in all likelihood address the subject land as well.
- 55 We consider that some caution needs to be applied. There is a risk of inundation to the site in the near term planning horizon. We consider that the extent of inundation is that defined by levels of 2.3 m AHD to 2.4 m AHD, levels that coincide with Mr Carley's assessment from present day to 2040 and consistent with Mr Bishop's own bathtub assessment of around 2.2 m AHD. When so applies this indicates that the area of the central ephemeral wetland would be inundated to depths of more than 0.3 m and extend over lots in Hill Street and lots along Mills Crescent.
- 56 An assessment of stormwater inundation by Mr Bishop shows that under present conditions, critical storm events would generate local inundation of the three ephemeral wetlands within the subject land, with no outflow to the wetland to the north. Under a developed scenario flooding would be limited to Hill Street and the frontages to lots along this street. This is on the basis of drainage via a reticulated service to the wetland. The increase in the wetlands flooding is projected to be minimal when the pump station is operating ie the system has sufficient capacity to deal with the additional flow.
- 57 There was much examination of the impact if the Powling Street pump station that services the wetland overflow were to fail. We are satisfied from the assessment by Mr Bishop and Mr Brian that in the impact of such an event is minimal and could be addressed by additional bunding around the outer perimeter of the wetland reserve.
- 58 We do not consider the issue of the impact to wetland water levels to be determinative of the issues about stormwater (and coastal inundation). The central issue is finding the appropriate response within the site to address

the stormwater flows and risks of coastal inundation ie how can future impacts and risks to future residential develop be minimised.

- 59 The Council and PEMS submit that engineering responses can be incorporated into the subdivision to remediate the risks or impacts of inundation from coastal as well as stormwater events. The Council's approach is to fill the site to 2.7 m AHD, evaluate flooding impacts and design a drainage system accordingly. Dr Jempson's evidence is that appropriate stormwater detention and treatment systems could be incorporated into the layout of the subdivision.
- 60 Mr Prout's evidence is that on site treatment should be undertaken, principally on the basis that the wetlands should be seen as the receiving waters and not as part of the treatment system.
- 61 PEMS resists the extent of filling and incorporation of detention and treatment systems within the subject land. PEMS submits that a system of drainage can be incorporated into the scheme to relieve the site of inundation. Mr Brian's evidence is that such a system could be like others he has designed that detains flood water in oversized pipes before discharging at rates equivalent to natural runoff volumes. His opinion is that treatment of stormwater will be achieved by the existing grass swale and gross pollutant trap.
- 62 We agree that the extent of filling that would be required to address the degree of inundation would be excessive. Raising the level of the site to the degree sought by the Council indicates a *prima facie* case that the site is unsuitable for residential development.
- 63 We do not consider the extent of stormwater inundation or near future coastal risks warrant this response.
- 64 However we are not satisfied by Mr Brian's approach to the issue either. We remain unpersuaded that the topography of the subject land and surrounds lends itself to a scheme of buried, over sized pipes. We are mindful of the fact that there is no natural overland drainage from the subject land into the wetland, hence why there are ephemeral wetlands within the site.
- 65 On the issues of stormwater management, coastal inundation and ecological outcomes, we consider that an integrated approach can be achieved that provides an acceptably balanced outcome. While we note PEMS's resistance to on site detention that will mean the loss of some lots, this approach would see land within the central ephemeral wetland retained to achieve the complementary functions of providing stormwater retention, avoiding development in an area that is subject to short term risks of coastal inundation and provide habitat support to the Latham's Snipe. This approach recognises that some informal drainage of this central area appears to be occurring, though the circumstances of how this has occurred at not clear to us. We anticipate that in performing a drainage retention

function this drainage arrangement would be formalised and would take account of the dual function for stormwater/inundation management and habitat for the Latham's Snipe.

- 66 Before elaborating on this approach further, we turn to and address these habitat matters.

Latham's Snipe habitat values

- 67 Our decision to grant a permit, but on a reduced number of lots arises in part from our consideration of the evidence about the Latham's Snipe population that frequents the subject land and the wetlands.
- 68 The Council's planning officers had recommended the deletion of the lots along the eastern edge of the stony knoll because of concerns about the impact on the Latham's Snipe habitat.⁷ The Council and PEMS rely on the EPBC Act decision to support their view that the objective of the State Planning Policy Framework to protect biodiversity will be satisfied and that there is no need to delete these lots. We deal with this buffer issues later in these reasons, focussing here on the wider issue about the overall habitat value of the subject land to the Latham's Snipe.
- 69 PEMS relies on the evidence of Dr Quin who was commissioned following the 2008 Tribunal decision to undertake further assessment of the habitat value of the subject land to the Latham's Snipe. Dr Quin's evidence draws on bird surveys of the wetland and subject land over the course of November and December 2008, November 2009 and October 2013.
- 70 In evaluating the differing evidence of Dr Quin and Dr Hansen, we give more weight to Dr Hansen's opinion of potential impacts to the snipe's habitat for two main reasons.
- 71 First, Dr Quin is not expert in Latham's Snipe or migratory shorebird behaviour more generally. It seems to us that his assessment of the impacts gives greatest weight to the statistical assessment about proportional bird movements across the immediate landscape of the subject land, the wetlands and Russell Clarke wetlands and less weight to overall snipe behaviour and support derived from a mix of habitat within the landscape and the impact from incremental habitat loss. These are matters that we consider are relevant and fall within the overall consideration of habitat impact.
- 72 Second, we have some concern about the independence of Dr Quin and therefore his conclusions as to the importance of the habitat that occurs on the subject land. Our concern arises from the fact that Dr Quin had an active role in advising and supporting previous applications made by PEMS for a number of earlier versions of subdivision plans that were more

⁷ The plan considered by the Council's officers contained four lots, being lots 28 to 31 whereas the plan in the EPBC Act decision set out five lots, namely lots 27 to 31.

extensive than the current proposal before us. Further Dr Quin acknowledged that he accompanied PEMS to a meeting with Commonwealth officials to support the EPBC Act application. Dr Quin also prepared a report supporting the proposal when PEMS made its permit application to the Council.

- 73 We do not say that Dr Quin has in anyway sought to mislead us or for that matter the decision under the EPBC Act. However we are not fully satisfied that Dr Quin has maintained a suitable degree of independence from the overall carriage of the application under that process nor in this permit application sufficient to say that he has an independent detachment from the outcome.
- 74 Dr Quin's evidence is that the provision of lot 32 is sufficient to assist to maintain the snipe's habitat for roosting and foraging within the Powling Street wetlands. In his opinion, the ephemeral wetlands on the subject land are not significant because they provide only opportunistic foraging habitat that is not integral to the snipe population's habitation in the area. He points to the low number of birds observed using these areas of land during the course of his assessments and from other records. His opinion is that these low numbers point to a low level of dependence and that the birds will continue to rely on other wetland and other foraging habitat in the wider landscape. It is also his opinion that as the bird's use of the ephemeral wetlands is opportunistic it does not contribute to the underlying value of the wetlands as habitat.
- 75 This then is the central issue for the habitat value of the subject land. How important are the three ephemeral wetland areas to the snipe's habitation of the wetland?
- 76 Our consideration of this question draws on the evidence of Dr Hansen, Dr Quin and the GHD report.
- 77 Dr Hansen's evidence sets out the following about Latham's Snipe that is consistent with the evidence of Dr Quin and the GHD assessment:
- The Latham's Snipe is a migratory 'shorebird (more precisely it is a wader) that breeds in the northern hemisphere over the Australian winter and migrates to Australia for the non-breeding season. The birds can be expected to occupy the wetlands from late August to early April.
 - This species disperses widely over eastern Australia in small numbers, rather than flocking in large groups like most of the other 35 migratory shorebird species. The current best estimate of the migratory population is around 37,000 birds, with some 15,000 estimated to make their way into south-east Australia.

- Latham's Snipe have a cryptic nature, making actual numbers difficult to determine as well as fully assess its migratory, foraging and roosting behaviour within Australia.
- The number of snipes that habituate the Powling Street wetland makes this location important habitat under the relevant EPBC Act guideline⁸ and more recent means of defining important habitat on the basis of percentage of total bird numbers populating the location.⁹
- Loss and degradation of habitat is a global phenomena, with evidence of declining shorebird populations. Various experts draw a relationship between the loss and decline in population.
- Latham's Snipe prefer open freshwater or brackish wetlands with nearby cover, with a particular preference for areas of wet tussock grassland and other dense ground cover vegetation. The birds for the most part roost in the day time and conduct their main foraging at night. Opportunistic foraging may occur in the day period.
- Preferred roosting habitat is long grass that is proximate to water. Feeding occurs across the landscape with the birds dispersing unknown distances to feed in wet paddocks, ditches and other 'open flooded areas'. The birds do not forage in deep water, generally limiting foraging to shallow water where macro-invertebrates, worms and other food are at or close to the surface in soft media (soils / mud etc).
- During the course of surveys of the wetland and subject land, the majority of birds disturbed on the subject land (either the ephemeral wetlands or knoll) flew to the wetland.

78 These points have assisted us in understanding the relevant importance of the ephemeral wetlands located on the subject land.

79 As we have noted, Dr Quin's opinion draws on the percentage of the bird population procedure of the EPBC Act guideline to assess habitat importance of the ephemeral wetlands by similarly assessing the percentage of birds that utilise these areas. We find such an approach misapplies the EPBC Act guidelines.

80 Dr Hansen observes that the guidelines for assessing the area of important habitat under the EPBC Act distinguish a difference between habitat for the Latham's Snipe and the other 35 migratory species. For the snipe, important habitat is said to be where sites have been either previously identified as internationally important for this species or where a site:

- supports at least 18 individuals; and

⁸ Commonwealth Department of the Environment, Water, Heritage and the Arts (2009) *Draft EPBC Act Policy Statement 3.21 – Significant Impact Guidelines for 36 Migratory Shorebird Species*.

⁹ Dr Hansen's evidence highlights past estimate of 10% to current thresholds of 0.1% of flyaway populations; equivalent to 360 or 36 birds for the Latham's Snipe.

- is a naturally occurring open freshwater wetland with vegetation cover nearby, for example tussock grasslands, sedges, lignum or reeds within 100m of the wetland.

81 The definition of a 'site' under the EPBC Act guidelines is:

The entire (discrete) area of contiguous habitat used by the same group of migratory shorebird, which may include multiple roosts and feeding areas.

82 The definition of 'support' distinguishes between permanent and ephemeral habitat. For permanent wetlands 'support' is defined as:

... migratory shorebirds are recorded during surveys and/or known to have occurred at the site in the previous five years.

83 The definition for ephemeral wetlands is:

... habitat that migratory shorebirds have ever been recorded in, and where that habitat has not been lost permanently due to previous actions.

[Our emphasis]

84 The evidence from the surveys conducted by the South Beach Wetlands Landcare Group, Dr Quinn and GHD confirm that the Latham's Snipe has been recorded on the knoll and within the wider PEMS land for roosting and when wet, for foraging. The PEMS land in its present condition, and not withstanding regular mowing and the more recent installation of a drain to the central ephemeral wetland thus supports the Latham's Snipe. Further, the observations made of birds in flight moving between the wetland, knoll and ephemeral wetlands indicates that at least to the snipe, the overall landscape is one contiguous site.

85 We therefore find the subject land (the PEMS land) and the wetlands therefore fall within the definition of a 'site' ie the entire area of contiguous habitat used by the same group (of birds) that includes multiple feeding and roosting areas.

86 We are not persuaded that the opportunistic use of the ephemeral wetlands diminishes the value or importance of this area to the overall site. Such opportunistic use aligns with the overall behaviour and use of habits of this species we have noted above. It is readily apparent that the value of this area is seasonally dependant. It is thus not surprising that in drier years less birds are seen on the PEMS land. Further the continual mowing of this land will also diminish its roosting value. That said, we are satisfied from the material before us, i.e. the undisputed observations by the Landcare Group, Dr Quin's surveys and GHD's surveys that the bird continues to utilise the resources available to it from the subject land.

87 Dr Hansen's evidence points to the loyalty of migratory shorebirds to particular sites, returning to them on repeated migrations. Thus disturbance

to or impacts on an important site can adversely affect the migratory cycle of these birds leading to a non-proportional decline in their numbers.

- 88 While there are seasonal variations of bird numbers, the continued presence points to this site being one that provides substantive support to this species. The acknowledged large numbers that have been observed from time to time (from 100 to 400 birds) points to the relatively high importance of this site in Victoria. It ranks as one of the few that can support such numbers.
- 89 We are satisfied from the number and contiguous use of birds observed across the wetland and the subject land and the dependence of the Latham's Snipe on both roosting and foraging habitat to maintain its migratory cycle (of resting and building up energy stores) that this site is 'important habitat' within the meaning of the EPBC Act guidelines.
- 90 Bearing this in mind, State planning policy¹⁰ seeks to assist the protection and conservation of Victoria's biodiversity including strategically valuable sites of biodiversity. Policy requires that decision making take into account the impacts of land use and development on high value biodiversity. Consistent with strategic planning strategies, high value biodiversity sites include those that are utilised by species designated under the JAMBA and CAMBA agreements, which includes the Latham's Snipe. It follows from our conclusions about the importance of the wetland-subject land complex as 'an important site' under the EPBC Act, correspondingly is worthy of the protection and conservation afforded by policy as a high value biodiversity site. Thus planning should avoid or at least minimise significant impacts, including cumulative impacts from land use and development.
- 91 It is clear to us that disturbance of the ephemeral wetlands on the subject land, while seemingly small in Dr Quin's evidence, would represent an incremental contribution to the cumulative loss of important habitat for the Latham's Snipe.
- 92 In light of these findings, how then have we arrived at our decision to allow for subdivision, albeit at a lesser number of lots across the site? For the reasons we now explain, our decision has sought to balance competing policy needs and integrate the findings we have made about the drainage and risks about future coastal inundation.

Integrated response to the proposal

- 93 In maintaining the integrity of the subject land and wetland as a habitat site for the Latham's Snipe, two themes emerge from the expert evidence. One is the susceptibility of this species to disturbance, the other and related theme is the ongoing support of roosting and foraging values that the subject land contributes.

¹⁰ The scheme cl 12.01-1.

- 94 We recognise that the annexation to the wetlands of lot 32 that contains the stony knoll is a positive step in the subdivision design that it is to be acknowledged. However it follows from our reasons that we are not persuaded by Dr Quin's evidence or the submissions made by PEMS that this is sufficient. Nor do we find that the EPBC approval is sufficient comfort. In our view, and given other issues, more positive outcomes can be achieved.
- 95 We have two principle concerns:
- the loss of the ephemeral wetlands as foraging and roosting support; and
 - the incursion of mown grass buffers for lots across the eastern end of the knoll will degrade and disturb the roosting habits of the snipe in this area.
- 96 The various surveys of bird activity indicate to us that all of the knoll forms contiguous habitat for roosting purposes. The incursion of a once per year 20 m wide buffer and continual 10 m mown buffers coincident with the snipe's presence would be have the affect of significantly reducing the habitation of this land by the snipe. Thus rather than retaining its roosting value, the development and use of the five lots along this end of the knoll will result in reduced habitat value. As has been observed by Dr Hansen, and supported by the GHD assessment, undisturbed roosting of the snipe is an important part of the overall migratory cycle, as it supports the birds build up of energy reserves for its return migration to the northern hemisphere breeding grounds.
- 97 We are however not persuaded that this species of snipe is so sensitive to various activities that the value of its roosting habitats and susceptibility to disturbance supports a case for no development of this land. As acknowledged by Dr Hansen, the use of this wetland has continued not withstanding its urban setting and with the use of the PEMS land by local residents walking or moving across the landscape. We also observe from the video prepared by the Landcare Group and tendered by Ms Trehwella that the bird is not always disturbed by movement of cars or other typical urban noises. It seems to us that while described as cryptic, in terms of being secretive, its behaviour does not seem to be nervously flighty.
- 98 We are concerned however that the loss of roosting habitat from the eastern end of the knoll by the required land forming necessary to gain access for slashing the long grass along with the seasonal slashing for fire buffer purposes coincident with roosting periods will create too much disturbance to the value of the knoll. Along with the susceptibility of lot 31 to inundation, we conclude that it is appropriate to direct the deletion of lots 27 to 31 to remove the need for this disturbance of the habitat. In doing so we recognise that some mowing of grass will still be required for the management of fire risks to the lots on Reilly Street and those new lots on

the extension of Mills Crescent. We anticipate that the extent of mowing and buffers will not extend beyond that presently required and thus the level of disturbance will be minimised.

99 Our reasons for requiring the deletion of the central lots along Hill Street ie lots 8, 9 and 10 is based on:

- The need to balance the intended planning purposes of residential zoned land, policy support for infill development in coastal towns to reduce pressure from developments along coastal strip and rural land.
- Our findings about the susceptibility of this land to future inundation scenarios, stormwater management and its habitat value to Latham's Snipe.

100 Our findings about the inadequacy of filling land, proposed drainage design and risks of inundation lead us to conclude that the appropriate response is to not allow development of this central ephemeral wetland for residential land use. Rather it is more appropriate to provide this land for drainage purposes, which if managed appropriately can also support the ongoing habitat value of this land for roosting and opportunistic foraging by the Latham's Snipe.

101 We recognise that our findings about the habitat value of the subject land supports a view that all of the land should be considered as a significant site. Nevertheless it is apparent to us that while there are two small ephemeral wetland areas at the eastern and western ends of the subject land, the observed behaviour of the snipe indicates primary use and movement between the wetland, knoll and central ephemeral wetland.

102 Planning requires us to balance sometimes competing needs. In this instance we give weight to the fact that this land, for whatever reasons remains zoned for residential purposes. Its development accords with this purpose and is supported by a number of State and local planning policies that direct development of such land within existing urban nodes in order to reduce pressure on expansion beyond present coastal urban boundaries. The balance then is while some Latham's Snipe habitat would be lost, this can be balanced by retention of key habitat and reduced development pressure on nearby rural land that also plays a clear role in supporting this important bird species. We thus view the loss of the two ephemeral wetlands as an acceptable planning balance between competing outcomes.

103 It is for these reasons along with those we have set out about the risks of inundation and drainage that we have elected to not refuse the application for development, but rather to identify what we see as an acceptable, balanced planning outcome with an integrated response to all three issues.

Other subdivision design matters

- 104 The proposal is a 'residential subdivision' and must meet all the objectives for such development in clause 56 of the scheme. Largely, the proposal's compliance with those objectives was not in dispute.
- 105 In Mr Prout's opinion, the proposal fails to meet urban run-off management objectives.¹¹ This is mainly because stormwater treatment is required on site before discharge to the 'receiving waters' being the wetlands. We have dealt with this issue earlier in these reasons.
- 106 Another objective is the need to be consistent with and implement any policy for the area in the scheme.¹² For the reasons we have already given, the proposal is not consistent with or does not satisfactorily implement coastal inundation and biodiversity policies.
- 107 Finally, PEMS has applied to review some of the conditions in the notice of decision that relate to particular residential subdivision standards. We deal with those matters in the next section of these reasons.

Conditions

- 108 PEMS has applied to review a number of conditions in the notice of decision.
- 109 Condition 1(b) in the notice of decision requires the unnamed court serving lots 20 to 24¹³ to be widened by about 0.7 m to a minimum of 16 m to essentially accommodate verges and a 2.5 m shared footpath. The small number of lots does not warrant any need for the court to have this width or a path of this width. Condition 1 (b) will be deleted.
- 110 Condition 1(c) also requires Mills Crescent to be widened also by about 0.7 m for the same reason adjoining lots 14 to 16. The Council expects that Mills Crescent will become a pedestrian and cycling connection between O'Reilly Street and Pea Soup Beach. The connection will be enhanced by constructing a path about 50 m long in a section of road reserve between the O'Reilly Street courtbowl and the intersection of Mills Crescent and Hill Street that will be closed to traffic. In view of our decision to delete lots along the western side of this reserve we are not persuaded that the widening is warranted because the development of a complete connection can be established within the Mills Crescent road reserve that remains at about 15.3 m wide. Condition 1(c) will be deleted.
- 111 Condition 3(b)(v) requires levelling of the eastern end of the stony knoll to provide for a 20 m wide fire break for fire protection. This condition will be deleted because the proposed fire break adjoins lots 27 to 31 and we have

¹¹ The scheme cl 56.07-4.

¹² The scheme cl 56.02.

¹³ Condition 5(a)(iii) infers that lots 16 to 19, 25 & 26 front Hill Street rather than the unnamed court.

- decide those lots must be deleted under proposed condition 1(a). The condition is not longer relevant.
- 112 We will amend 4(a) in the notice of decision so that prohibition of vehicular access to the relevant lots adjoining the path in the closed section of road is confined to lot 26. There is no need to also refer to lots 29 & 30 because those lots are to be deleted.
- 113 Condition 4(b) requires narrowing of lots 22, 23 & 24 (sic 21, 22 & 23) to provide a narrow tree reserve adjoining the unconstructed Stawell Street road reserve. The objective is to prevent vehicle and pedestrian access to that road reserve from the three lots. We consider a tree reserve unnecessary. The objective can be met by amendment of the condition. The obligation will bind future owners because it will be contained in a registered agreement under condition 4.
- 114 Condition 4(d) requires a fence between lots 27, 28, 29 & 31 and the wetlands extension (lot 32). This condition will be deleted because we have decided those lots must be deleted.
- 115 Condition 4(e) requires a continuous fence around the southern boundary of proposed wetlands extension (ie lot 32) to prevent public and dog entry. The condition will be amended because it needs to apply to the enlarged wetlands extension and needs to be less prescriptive to comply with condition 5 of the EPBC Act decision. We note condition 5 of the EPBC Act decision only applies to lot 32 but the standard of fencing the decision mandates must apply to the enlarged wetlands extension.
- 116 Condition 4(g) requires covenants on all lots requiring external lighting to be baffled to minimise light spill on Latham's Snipe habitat. As the evidence is that the birds leave the wetlands between dusk and dawn to forage, the condition is unnecessary and will be deleted.
- 117 Condition 5(a)(i) requires Hill Street to be renamed Mills Crescent. We will delete this condition because Hill Street will become a court and not part of Mills Crescent. We will leave it to the Council to specify a new name for the court if it does not prefer Hill Court. Condition 1(d) will be correspondingly deleted.
- 118 Condition 5(a)(ii) requires Hill Street to have a minimum pavement width of 7 m with a 2.5 m shared pathway on the south side and a 5.4 m verge on the north side. This condition will be deleted because Hill Street will not longer be accessible between Powling Street and Mills Crescent due to the enlarged wetlands extension.
- 119 Condition 5(a)(iii) requires the section of Hill Street (east of Mills Crescent) at the entrance to the unnamed court to have a 16 m wide road reserve. For the reasons set out in relation to condition 1(b), this condition will be deleted.

- 120 Condition 5(a)(iv) requires the unnamed court to have a minimum 7 m wide pavement, a 2.5 m shared path, a 4.5 m wide verge, a 9 m courtbowl radius. Consistent with our views about condition 1(b), this condition will be amended.
- 121 Condition 5(a)(v) requires Mills Crescent (south) to have a minimum 7 m wide pavement and a 2.5 m shared path on the east side. We will amend this condition consistent with other conditions.
- 122 Condition 5(a)(vi) requires amendment to only refer to lot 26, consistent with our views about condition 4(a).
- 123 Condition 5(a)(viii) requires specified fencing along the southern boundary of the wetlands extension (ie lot 32) with Hill Street. We will amend this condition consistent with our views about condition 4(e).
- 124 Condition 6 requires amending in light of our findings. Based on our adoption of near term inundation risks and our rejection of filling to 2.7m AHD, remaining lots should be filled to a level of 2.4m AHD. This will enable dwellings to be constructed on footings to levels of 300mm to 400mm above the flood level and maintain access from this land at safe levels. Conditions 6(c) through to 6(h) remain appropriate.
- 125 Condition 7 requires street lighting to be suitable baffled and downcast. We will amend the condition to remove this requirement consistent with our views about condition 4(g).
- 126 Condition 23 requires construction of dwellings and associated works on lots 27, 28 & 29 to be confined to between 31 March and 1 September, when Latham's Snipe have migrated from the area. PEMS sought amendment so that it related to subdivision works (including clearing, excavation, ground breaking or provision of infrastructure) in accordance with condition 3 of the EPBC Act decision.
- 127 Condition 23 does not need to refer to those three lots because they are to be deleted under proposed condition 1(a). However, the condition needs to refer to lots 11, 12 & 7 because those lots will have a common rear or side boundary with the wetlands extension. We will amend the condition in three ways. First, it will refer to the three different lots. Second, it will refer only to the activities identified by the EPBC Act decision because there was no evidence that dwelling construction would unreasonably disturb the birds. Third, we will extend the no-construction period so that it begins on 1 August, consistent with the opinion of Dr Hansen. Condition 20(f) will be amended for consistency.
- 128 Having regard to the significance of the changes to the proposal that we have found are needed to be consistent with and implement State and local policies for coastal inundation and protected habitat, we will direct that conditions 1 and 3 must not be amended by the Council under Division 1A of Part 4 of the *Planning and Environment Act 1987*.

Conclusion

129 For the above reasons, the decision of the Council will be varied and a permit granted subject to modified conditions.

Geoffrey Code
Member (Presiding)

Ian Potts
Member

APPENDIX A

PERMIT APPLICATION NO:	PL13/029
LAND:	Mills Crescent, Port Fairy
WHAT THE PERMIT ALLOWS:	Subdivision

CONDITIONS

Amended plans

1. Before the plan of subdivision is certified, 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 plan prepared by PEMS Pty Ltd entitled *35 Lot Subdivision Hill Street & Mills Crescent Port Fairy for PEMS Pty Ltd* Sheet 1 of 1 dated 7 December 2012 but modified to show:
 - a) The deletion of lots 8, 9, 10, 27, 28, 29, 30 & 31 and the area those lots occupy to be marked as 'To be transferred to Moyne Shire Council for annexure to Wetland', and lot numbers for remaining lots amended accordingly.
 - b) The closure of Hill Street between a point no further east than a line extending north from the northeast east corner of lot 7 and no further west than a line extending south from the southeast corner of lot 30 to the northeast corner of lot 11 and that section of Hill Street of about 100 m marked as 'For annexure to Wetland'.
 - c) The provision of a court bowl in Hill Street at its eastern end, where it joins the land to be annexed to the Wetland referred to in paragraph (b), to serve lots 1 to 7, and minor changes to the boundaries of lots 6 & 7 as may be required by the Responsible Authority to accommodate a court bowl. The court bowl must be designed to the satisfaction of the Country Fire Authority.
 - d) The stages under which the subdivision will proceed.

Direction under section 85(1A) of the Planning and Environment Act 1987

By order dated 31 March 20-14, the Victorian Civil and Administrative Tribunal in Proceeding nos. P1972/2013 and P2086/2013 has directed that this condition

must not be amended by the Responsible Authority under Division 1A of Part 4 of the *Planning and Environment Act 1987*.

Layout not altered

2. After approval of the amended plan required by condition 1, the layout of the subdivision as shown on the endorsed plan must not be altered or modified without the prior written consent of the Responsible Authority.

Latham's Snipe habitat

3. Unless lot 32 and the lots referred to in condition 1(a) have already been transferred to the Responsible Authority, before Moyne Shire Council issues a statement of compliance for stage 1 of the plan of subdivision, the owner of the land must enter into and execute an agreement with the Responsible Authority, pursuant to section 173 of the *Planning and Environment Act 1987*. This agreement must provide for:
 - a) The protection of lot 32 and the lots referred to in condition 1(a) by all those lots being gifted to Moyne Shire Council on a specified date to the Council's satisfaction in perpetuity to minimise impacts to the Latham's Snipe and its habitat.
 - b) The remediation of lot 32 and the lots referred to in condition 1(a) by the owner before the transfer of ownership to Moyne Shire Council to the satisfaction of the Responsible Authority, including the following measures:
 - (i) The removal of all pest plant outbreaks, having regard to requirements under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
 - (ii) The removal of any refuse/litter.
 - (iii) The cessation of mowing.
 - (iv) The construction of all fencing including lockable gates in accordance with condition 7.
 - c) The environmental condition lot 32 and the lots referred to in condition 1(a) being to the satisfaction of Moyne Shire Council before it accepts the title to that land being gifted and transferred to its ownership.

This agreement must be prepared and executed at the owner's expense. The owner must meet the Responsible Authority's reasonable costs in executing the agreement. The agreement must be registered no later than 3 months after the date subdivision construction starts.

Direction under section 85(1A) of the Planning and Environment Act 1987

By order dated 31 March 20-14, the Victorian Civil and Administrative Tribunal in Proceeding nos. P1972/2013 and P2086/2013 has directed that this condition must not be amended by the Responsible Authority under Division 1A of Part 4 of the *Planning and Environment Act 1987*.

Vehicular access restrictions

4. Before Moyne Shire Council issues a statement of compliance for the first stage of subdivision, the owner of the land must enter into and execute an agreement with the Responsible Authority, pursuant to section 173 of the *Planning and Environment Act 1987*. This Agreement must provide for:
 - a) No vehicular access for lot 26 being permitted to be constructed from the road reserve (extension of Mills Crescent), which is only for pedestrian/cyclist access on the shared pathway.
 - b) No vehicular and pedestrian access being permitted or provided to lots 21, 22 & 23 from Stawell Street to the north.
 - c) No vehicular access to lot 1 being permitted from Powling Street.
 - d) The area to be transferred to Moyne Shire Council and annexed to the Powling Street Wetland (being lots lot 32 and the lots referred to in condition 1(a)) and the section of Hill Street referred to in condition 1(b), being fenced in accordance with condition 7.

This agreement must be prepared and executed at the owner's expense. The owner must meet the Responsible Authority's reasonable costs in executing the agreement.

Engineering design

5. Before subdivision works start, an engineering design must be submitted to and approved by the Responsible Authority. The design must show:
 - a) All roads, footpaths, shared pathways and other design treatments, submitted to the satisfaction of the Responsible Authority, including the following:
 - (i) The pavement width within the unnamed court to be a minimum of 7.0 metres in width, with a 1.5 metre wide shared footway on the north side and a minimum 4.5 metre verge on the south side. There must be a minimum 9.0 metre radius court bowl (including concrete kerb), with a minimum 4.5 metre verge and a 1.5 metre wide footpath around the court bowl.
 - (ii) Mills Crescent (south) pavement to be minimum of 7.0 metres in width (including concrete kerbs), with a 1.5m wide concrete footpath on the east side.
 - (iii) A shared 2.5 metre wide concrete footway and appropriate car barriers provided between O'Reilly Street and Mills Crescent. Lot 26 will only have vehicle access from Hill Street and the unnamed court.
 - (iv) Kerb and channel returns provided from the court referred to in condition 1(c) into Powling Street.
 - (v) The area referred to in condition 4(d) being fenced in accordance with condition 7.

- (vi) The design must include concrete crossovers to all lots and approved disabled compliant kerb crossings to all footpaths to the requirements of Council.
6. Before Moyne Shire Council certifies a plan of subdivision for the first stage of the subdivision, the owner must submit:
- a. A scaled contour plan prepared by a registered land surveyor depicting all current levels on the land, the surrounding Powling Street reserve, Avery Street, O'Reilly Street and Singleton Street.
 - b. A scaled cut and fill plan depicting all changes to the surface topography and the final proposed subdivision contours adopting a minimum finishing fill level of 2.4 metres AHD.
 - c. A detailed catchment analysis and accurate assessment of the 1 in 100 ARI flood levels on the subject land and in the surrounding area.
 - d. A description of the impacts, if any, of the projected 1 in 100 ARI flood levels on surrounding properties.
 - e. Reference to any mitigation measures required to preclude impact on adjoining properties.
 - f. An engineering drainage design for the subdivision to cater for a 1 in 10 year ARI and a 1 in 100 year ARI storm and subsequent overland flow paths through the subdivision and neighbouring properties and assess its subsequent impact on the wetland and existing adjoining properties with the objective of precluding any adverse impacts.
 - g. The approved final drainage design must incorporate water sensitive urban design measures and piped drainage connecting into the existing systems and all water entering the protected wetland shall as a minimum pass through a Gross Pollutant Trap approved by the Responsible Authority. The design must be to the satisfaction of the Responsible Authority.
 - h. A scaled cut and fill plan depicting final levels throughout the subdivision and surrounding area.

Fencing of Latham's Snipe habitat area

7. Before Moyne Shire Council issues a statement of compliance for the first stage, a continuous fence must be constructed along:
- (a) the southern boundary of lot 32 between Powling Street and the court bowl referred to in condition 1(b),
 - (b) the eastern side of the court bowl in Hill Street referred to in condition 1(c),
 - (c) the eastern boundary of lot 7,
 - (d) the southern boundary of lots 8, 9 & 10, being lots to be marked as 'To be transferred to Moyne Shire Council for annexure to Wetland' under condition 1(a),
 - (e) the eastern boundary of lot 10, being a lot to be marked as 'To be transferred to Moyne Shire Council for annexure to Wetland' under condition 1(a),

- (f) the northern boundary of lot 11,
- (g) the western side of the intersection of Hill Street and Mills Crescent, referred to in condition 1(b), and
- (h) the eastern boundary of lots 27, 28, 29 & 30, being lots to be marked as 'To be transferred to Moyne Shire Council for annexure to Wetland' under condition 1(a).

The fence must prevent access by vehicles (other than those carrying persons authorized by Moyne Shire Council for maintenance or other purposes), machinery, materials, pedestrians and dogs. The fence must be constructed to the satisfaction of the Responsible Authority and be consistent with requirements of condition 5 of the referral decision under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) dated 29 January 2013.

Street lighting

- 8. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, a design plan to Australian Standards for street lighting and intersection lighting incorporating approved standard lighting poles with energy efficient luminaires must be submitted for approval to the satisfaction of the Responsible Authority. All street and intersection lighting must be constructed in accordance with the approved plans.

Signage etc

- 9. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, details of miscellaneous items including signage, Permanent Survey Marks and name plates, must be submitted to the satisfaction of and approved by the Responsible Authority. All such items must be installed in accordance with the approval.

Road construction

- 10. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, roads created by the proposed subdivision and/or as shown on the endorsed plan must be constructed to a full construction standard in accordance with plans and specifications approved by the Responsible Authority and in satisfying the Responsible Authority of this condition a post subdivision construction assessment of land levels must be provided.

Footpaths

- 11. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, footpaths must be constructed in all residential streets and courts in accordance with plans and specifications approved by the Responsible Authority.

Stormwater

- 12. The subdivision is to comply with the principles of Water Sensitive Urban Design and must be designed and constructed, in accordance with WSUD Engineering Procedures' published by Melbourne Water, 'Urban Stormwater Best Practice Environmental Management Guidelines', published by the CSIRO 1999 and

Australian Standard AS3500.3 Stormwater Drainage, to the satisfaction of the Responsible Authority.

Drainage

13. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, drainage infrastructure created by the proposed subdivision must be constructed in accordance with plans and specifications approved by the Responsible Authority.

Storage of materials or earth

14. No construction materials or earth must be placed or stored outside the site area or on adjoining road reserves or on lot 32 or on the area referred to in conditions 1(a) and 1(b). This does not apply to road or footpath construction works on adjoining roads required as part of this permit.

Plan checking fees

15. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, plan checking fees of 0.75% of civil construction costs (excluding GST), and site supervision fees of 2.5% of the civil construction costs (excluding GST) must be paid to the Responsible Authority.

Construction drawings

16. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, as constructed drawings must be submitted for civil construction works in hard copy and electronic copies compatible with the Council's AutoCAD drawing package in DWG or DXF and PDF format.

Protection of existing infrastructure

17. Care must be taken to preserve the condition of existing infrastructure adjacent to the site. If any damage to existing infrastructure occurs as a result of this development, the affected infrastructure must be replaced by the owner, at the owner's cost to the specification and satisfaction of the Responsible Authority.

Maintenance

18. The owner must maintain and keep in good repair (making the necessary reinstatement's) all road, drainage and landscape works for a period of 12 months from the date Moyne Shire Council issues a statement of compliance. In this regard, a bond/bank guarantee of 5% value of the land or such other amount as agreed with and to the satisfaction of the Responsible Authority must be given to Moyne Shire Council before it issues a statement of compliance.

Bollards

19. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, suitable bollards must be placed at the north-western and south-eastern ends of the road reserve marked on the plan as 'Park with Walking and Cycling Path' to prevent vehicular access along this shared pathway to the satisfaction of the Responsible Authority.

Construction/Environmental Management Plan

20. Before subdivision works start, a Construction/Environmental Management Plan for the management and operation of subdivision works must be submitted to and approved by the Responsible Authority. When approved, the Plan will be endorsed and will then form part of the permit and must be implemented to the satisfaction of the Responsible Authority. The Construction/Environmental Management Plan must be reviewed and submitted to the satisfaction of the Responsible Authority for further approval on an annual basis. The Construction/Environmental Management Plan must include:
- a) All works to be undertaken for remediation of the site and particularly on the lot 32 and on the area referred to in conditions 1(a) and 1(b) including but not limited to the following:
 - (i) The control of pest plants and animals.
 - (ii) The removal of litter.
 - (iii) No mowing.
 - (iv) The construction of fencing required under condition 7.
 - b) Measures to be taken to ensure that no significant adverse amenity and environmental impacts occur to the Powling Street wetland area and the adjoining properties as a result of the works associated with each stage of the subdivision.
 - c) All construction surface runoff must be managed according to Best Practice guidelines in order to prevent surface runoff carrying construction sediment and pollution from the site in rainfall events.
 - d) All works must be undertaken in a manner that minimises soil erosion, and any exposed areas of soil must be stabilised to prevent soil erosion.
 - e) All works required including the type of fencing and timing of construction to protect lot 32 and the area referred to in conditions 1(a) and 1(b) to prevent all forms of access to the adjacent to the Powling Street wetland area.
 - f) Any works associated with the subdivision, including any preparatory works required to be undertaken such as clearing vegetation, excavation or the use of heavy equipment for the purpose of breaking the ground for buildings or infrastructure (excluding fencing) must not occur on lots 7, 11 & 12 between 1 August and 31 March inclusive.
 - g) All measures taken must be implemented and reviewed on an annual basis to the satisfaction of the Responsible Authority.

Easements

21. All existing and proposed easements and sites for existing and required utility services and roads must be set aside in favour of the relevant authority for which the easement or site is to be created on the plan of subdivision submitted for certification.

Other roadworks

22. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, the roadworks previously associated with and approved by Planning Permit PL10/223 must be constructed and completed to the satisfaction of the Responsible Authority.

Construction period

23. Any works associated with the subdivision, including any preparatory works required to be undertaken such as clearing vegetation, excavation or the use of heavy equipment for the purpose of breaking the ground for buildings or infrastructure (excluding fencing) must not occur on lots 7, 11 & 12 between 1 August and 31 March inclusive.

Electricity

24. The plan of subdivision submitted for certification under the Subdivision Act 1988 must be referred to Powercor Australia Ltd in accordance with Section 8 of that Act.
25. The owner must provide an electricity supply to all lots in the subdivision in accordance with Powercor's requirements and standards, including the extension, augmentation or re-arrangement of any existing electricity supply system, as required by Powercor. The owner must make a payment to Powercor to cover the cost of such work. If supply is not provided the owner must provide a written undertaking to Powercor Australia Ltd that prospective purchasers will be so informed.
26. If buildings or other installations exist on the land to be subdivided and are connected to the electricity supply, they shall be brought into compliance with the Service and Installation Rules issued by the Victorian Electricity Supply Industry. The owner must arrange compliance through a Registered Electrical Contractor.
27. Any buildings must comply with the clearances required by the Electricity Safety (Network Assets) Regulations.
28. Any construction work must comply with Energy Safe Victoria's "No Go Zone" rules.
29. The owner must set aside on the plan of subdivision for the use of Powercor Australia Ltd reserves and/or easements satisfactory to Powercor Australia Ltd if any electric substation (other than a pole mounted type) is required to service the subdivision. Alternatively, at the discretion of Powercor Australia Ltd, a lease(s) of the site(s) and for easements for associated powerlines, cables and access ways must be provided. Such a lease must be for a period of 30 years at a nominal rental with a right to extend the lease for a further 30 years. Powercor Australia Ltd will register such leases on the title by way of a caveat prior to the registration of the plan of subdivision.
30. The owner must provide easements satisfactory to Powercor Australia Ltd, where easements have not been otherwise provided, for all existing Powercor Australia Ltd electric lines on the land and for any new powerlines required to service the lots and adjoining land, save for lines located, or to be located, on public roads set out on the plan. These easements shall show on the plan an easement(s) in favour of "Powercor Australia Ltd" for "Powerline Purposes" pursuant to Section 88 of the Electricity Industry Act 2000.

31. The owner must obtain for the use of Powercor Australia Ltd any other easement external to the subdivision required to service the lots.
32. The owner must adjust the position of any existing easement(s) for powerlines to accord with the position of the line(s) as determined by survey.
33. The owner must obtain Powercor Australia Ltd's approval for lot boundaries within any area affected by an easement for a powerline and for the construction of any works in such an area.
34. The owner must provide to Powercor Australia Ltd, a copy of the version of the plan of subdivision submitted for certification, which shows any amendments which have been required.

Water & sewerage

35. The owner must provide, at its cost, the required water supply works necessary to serve each of the lots created by the Plan of Subdivision. The works must be constructed and acceptance tested under the supervision of a consulting engineer in accordance with the plans and specifications approved by Wannon Water.
36. The owner must provide, at its cost, the required sewerage works necessary to serve each of the lots created by the subdivision. The works must be constructed and acceptance tested under the supervision of a consulting engineer in accordance with the plans and specifications approved by Wannon Water.
37. The owner must enter into an agreement with Wannon Water for payment of the new customer contributions and subdivision fees applicable to the lots created. Easements and/or other notations must be shown on the endorsed plan to the satisfaction of Wannon Water for the provision of both existing and proposed water and/or sewerage services.
38. The plan of Subdivision submitted for certification must be referred to Wannon Water in accordance with Section 8 of the Subdivision Act 1988.

Gas

39. The plan of subdivision submitted for certification must be referred to SP AusNet (Gas) in accordance with Section 8 of the Subdivision Act 1988.

Telecommunications

40. The owner of the land must enter into an agreement with:
 - a) a telecommunications network or service provider for the provision of telecommunication services to each lot shown on the endorsed plan in accordance with the provider's requirements and relevant legislation at the time; and
 - b) a suitably qualified person for the provision of fibre ready telecommunication facilities to each lot shown on the endorsed plan in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.

41. Before Moyne Shire Council issues a statement of compliance for a stage of the subdivision, the owner of the land must provide written confirmation from:
 - a) a telecommunications network or service provider that all lots are connected to or are ready for connection to telecommunications services in accordance with the provider's requirements and relevant legislation at the time; and
 - b) a suitably qualified person that fibre ready telecommunication facilities have been provided in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.

Fire protection

42. The subdivision as shown on the endorsed plans must not be altered without the consent of the Country Fire Authority.
43. Operable hydrants, above or below ground must be provided to the satisfaction of the Country Fire Authority.
44. The maximum distance between these hydrants and the rear of all lots must be 120 metres and must be no more than 200 metres apart.
45. Hydrants must be identified as specified in 'Identification of Street Hydrants for Firefighting purposes' available under publications on the Country Fire Authority website (www.cfa.vic.gov.au).
46. Constructed roads must be a minimum of 5.5 metres in trafficable width.
47. There must be no fixed obstructions within one metre of the formed edge of the road width and a four (4) metre vertical clearance over the trafficable width to allow access by a fire truck.
48. Roads must be constructed to a standard so that they are accessible in all weather conditions and capable of accommodating a vehicle of 15 tonnes for the trafficable road width.
49. The average grade must be no more than 1 in 7 (14.4%) (8.1 degrees) with a maximum of no more than 1 in 5 (20%) (11.3 degrees) for no more than 50 metres. Dips must have no more than a 1 in 8 (12%) (7.1 degree) entry and exit angle.
50. The dead end road shown on the plan of subdivision is more than sixty (60) metres in length from the nearest intersection and must have a turning circle with a minimum radius of eight (8) metres, including roll over curbs if provided.

Expiry

51. This permit will expire if one of the following circumstances applies:
 - a) The plan of subdivision is not certified within two years of the date of this permit.
 - b) The statement of compliance for Stage 1 is not issued within five years of the date of certification of the plan of subdivision.

- c) The statement of compliance for Stage 2 is not issued within seven years of the date of certification of the plan of subdivision
- d) The statement of compliance for Stage 3 is not issued within nine years of the date of certification of the plan of subdivision.

The Responsible Authority may extend the periods referred to if a request is made in writing before the permit expires or within three months afterwards.

--- End of Conditions ---