

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. **P3208/2008**  
PERMIT APPLICATION NO. 380/05

<b>APPLICANT</b>	Bernhard Seifert
<b>RESPONSIBLE AUTHORITY</b>	Colac-Otway Shire Council
<b>SUBJECT LAND</b>	255 Great Ocean Road APOLLO BAY VIC 3233
<b>WHERE HELD</b>	55 King Street, Melbourne
<b>BEFORE</b>	Philip Martin, Presiding Member John Quirk, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15 May 2009
<b>DATE OF ORDER</b>	27 July 2009
<b>CITATION</b>	Seifert v Coloc-Otway SC [2009] VCAT 1453

**ORDER**

The decision of the Responsible Authority is set aside. In relation to the land at 255 Great Ocean Road in Apollo Bay, a permit is granted and directed to be issued. The permit shall allow a two lot subdivision, in accordance with the endorsed plans and subject to the permit conditions set out in the Appendix to this decision.

**Philip Martin**  
Presiding Member

**A.J. Quirk**  
Member

**APPEARANCES:**

For the Applicant

Mr Newton-Brown of Counsel, instructed by Simon Nixon lawyers. Mr Newton-Brown called the following expert evidence during the hearing – coastal engineering evidence from Mr Andrew McCowan, together with town planning evidence from Mr Matt Ryan. We have also considered Mr Fairbairn’s report dealing with flooding issues “on the papers”.

For the Responsible Authority

Ms Anne Sorenson (Council planner)

## REASONS

### What does this application involve?

- 1 The property at 255 Great Ocean Road Apollo Bay is situated on the other side of the Great Ocean Road from the foreshore. This is a fairly generous size lot at 1044 square metres, including a 16.76 metre frontage to the Great Ocean Road. The block is also quite deep at about 62 metres. The site is vacant and mostly devoid of vegetation. The section of the site closest to the Great Ocean Road slopes down in the manner of a gully, before then rising up considerably in the middle section of the site, with the balance of the land towards Casino Ave at the rear being fairly flat. The practical result is that the Great Ocean Road in fact sits higher than this gully area in the front section of the site.
- 2 In terms of the main features of the locality, Casino Avenue lies at the rear/uphill of the appeal site. The two abutting side lots are similar size lots which extend from Casino Avenue down to the Great Ocean Road, each containing a single dwelling. The same pattern extends further south. By contrast, the original lots further to the north have a pattern of having been subdivided into two smaller lots with separate frontages on to Great Ocean Road and Casino Avenue respectively. The practical result is that the dwellings on the lots further south are substantially set back from the Great Ocean Road, whereas the dwellings on the lots further north are situated much closer to the Great Ocean Road.
- 3 In this context, the owner of the subject land proposes that there be a two lot subdivision of the appeal site. The proposed new Lot 1 will front Casino Avenue, whereas new Lot 2 will have frontage to the Great Ocean Road. Each new lot will have an area of 522 square metres. The proposed subdivision plan dated 11 April 2007 Ref. 2188 prepared by Tony Jeavons Surveys shows each new lot having a generous sized building envelope for the anticipated new built form. The building envelope for the new lower Lot 2 has a 9 metre setback from the Great Ocean Road.
- 4 This permit application has a very long history. We were told that at an earlier stage, smaller building envelopes were proposed (we were given a copy of same<sup>1</sup>). We were told by Mr Ryan that (as he understands it) the relevant Council planning officer either supported the proposal at this point or was close to this position.
- 5 However for whatever reason this apparent support did not lead to the grant of any permit, and we understand there was then a change of property ownership. The new owner then proposed that substantially larger building envelopes apply, as reflected in the 11 April 2007 plans. Whilst it is a matter of debate between the parties as to who was more responsible for the

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<sup>1</sup> We refer here to the plan of subdivision Ref. 2064 dated 1 February 2006 prepared by Tony Jeavons Surveys.

lack of progress in processing the revised proposal, Council by this stage apparently took the view that the proposal was no longer being seriously pursued and issued a Notice of Refusal to Grant a Permit. The grounds of refusal otherwise focus on neighbourhood character issues and concerns regarding potential flooding/projected sea level rises. This refusal has now been appealed to this Tribunal.

- 6 The hearing of this matter occurred before us on 15 May 2009. The Applicant in the lead up to the hearing had lodged and circulated three expert witness reports as per the relevant Practice Note requirements. At the beginning of the hearing, Mr Newton-Brown for the Applicant advised that whereas the other two expert witnesses (Mr Ryan and Mr McCowan) were physically available to be called to give evidence, the third proposed witness (Mr Fairbairn dealing with flooding issues) was that day out of Victoria doing other business.
- 7 It is still not clear to us why this situation was allowed to come about, given that all parties/witnesses should have known about the scheduled hearing date for many weeks prior. Although there was some suggestion from Mr Newton-Brown that Mr Fairbairn might give his evidence by telephone, we ruled that this would procedurally be quite inappropriate, and hence we indicated that we would simply give Mr Fairbairn's written report the weight we consider appropriate "on the papers".
- 8 We then over the balance of the hearing heard submissions from the two advocates listed above, together with the expert evidence from Mr Ryan and from Mr McCowan.
- 9 At the end of the hearing, we made provision for follow up comments on certain outstanding points. We then received a letter dated 29 May 2009 from the Applicant's instructing solicitor, Mr Simon Nixon. This was followed by written comments in response from Council dated 7 July 2009, together with final comments from Mr Nixon dated 15 July 2009. We have taken this further information into account (following the scope of our further enquiries as indicated at the end of the hearing) in making our overall findings below.
- 10 We see the key issues in this hearing as being:
  - Putting to one side flooding and coastal engineering issues, whether there is a reasonable planning case for the proposed two lot subdivision.
  - Assuming the answer is "yes", whether the proposed new upper Lot 1 has any fatal flooding and/or coastal management issues.
  - Likewise, but in relation to the new lower Lot 2.
- 11 Our overall findings are that (putting to one side flooding and coastal engineering issues) we see a straightforward case in favour of approving the proposal. The two lot subdivision will be consistent with the planning

framework and the existing subdivision pattern to the north. The subject land is large enough at over 1000 square metres that each new lot will be of an appropriate size, with the benefit of a separate road frontage for each new lot. We consider that the recent gazettal of the new DDO7 has in itself brought about an adequate resolution of the contested height issues.

- 12 With respect to the higher Lot 1, we are satisfied that this new lot will be elevated high enough that it will not be affected by any flooding and/or coastal engineering problems. In relation to how these issues affect the lower Lot 2, based on the current projections regarding climate change/rising sea levels potentially combined with a peak tide, we do not see this as raising any fatal problems in itself. We rely here on the supportive coastal engineering expert evidence of Mr McCowan and the fact that the Great Ocean Road (at a height of 4-4.5 metres AHD) sits between the foreshore and the subject land. Obviously what is acceptable in this regard may well change over time, as fresh scientific information and analysis of that information comes to hand.
- 13 By contrast, despite the flooding report by Mr Fairbairn which we have taken into account, we have unresolved major concerns with the new lower Lot 2 regarding the potential for flooding/ponding in the front section of this lot. To address this, we have amended the permit conditions to make several modifications to the plan of subdivision, notably that:
  - the new Lot 1 be reduced in size to 451 square metres, with a corresponding increase in the size of the new Lot 2; and
  - the front setback area where a building exclusion zone will operate for the new Lot 2 be increased from 9 metres to 17 metres from the Great Ocean Road boundary, which in practice requires any new dwelling on Lot 2 to be built on higher ground.
- 14 We have also included a new permit condition providing that, prior to the certification of the plan of subdivision, the owner of Lot 2 must prepare and procure the registration of a Section 173 Agreement to the satisfaction of the Responsible Authority. This Section 173 Agreement shall essentially require that, prior to the commencement of development on that lot, the owner of Lot 2 must provide development plans/design information to the satisfaction of the Responsible Authority which demonstrates how the intended form of development will deal with and minimise the risks arising from flooding (notably overland flows).

#### **Other background information**

- 15 We have already set out above the main features of the proposal and site location. As indicated, the plan of subdivision (with the bigger proposed building envelopes compared to the earlier version of the proposal) on which we have based our decision is the one dated 11 April 2007.
- 16 The site is located about 1km from the commercial centre of Apollo Bay. This section of the Great Ocean Road frontage has no footpath or kerb and

channel. Casino Road higher up has a sealed surface with rollover kerbs but no footpaths. All infrastructure services are available at the site.

- 17 In terms of the nature of the surrounding dwellings, they are a mix of single and double storey buildings in a variety of ages and styles. There are modest single storey fibro dwellings located on both adjoining side properties, with both of these dwellings set back about 35 metres from the Great Ocean Road.
- 18 Turning now to the relevant planning framework, the key State planning policies are found at Clauses 14.01, 15.08, 15.12 and 16.01.
- 19 The more relevant MSS and local policy provisions are Clauses 21.04-2, 21.04-10, 22.01 and 22.05.
- 20 There is a useful summary of these various policy provisions at pages 5 to 9 of the Council written submission.
- 21 The site is zoned Residential 1, with a permit being required to subdivide land in this zone pursuant to Clause 32.01-2 of the Planning Scheme. In relation to subdivision proposals, the Design and Development Overlay Schedule 7 which was gazetted since the hearing specifies a minimum lot size for this locality of 450 square metres. The usual Clause 56 provisions apply here, as do the Clause 65 general decision guidelines.
- 22 We were also referred to and have considered the Apollo Bay and Marengo Neighbourhood Character Study Review document. It states as follows under the heading "Issues/Threats".
  - Buildings extending to the street edge.
  - Buildings built too close together.
  - Dwellings that do not reflect the coastal setting.
  - Fences forward of dwellings fronting the Great Ocean Road.

### **Amendment C55**

- 23 There was considerable discussion at the hearing regarding the proposed Amendment C55, which (amongst other changes) would introduced a new Clause 21.03-3 MSS provision dealing with "Apollo Bay and Marengo" together with a DDO7 which would affect the site.
- 24 C55 was still being considered by the Minister for Planning at the time of the hearing, but the subsequent Council letter of 7 July 2009 confirms that Amendment C55 was gazetted on 18 June 2009. For convenience, we refer to the following paragraphs regarding Amendment C55 from pages 9 and 10 of Council's written submission at the hearing.

A major strategic review of the Colac Otway Planning Scheme has been undertaken, including the MSS, Zones and Overlays. This review incorporates a range of strategic initiatives that have been developed since the scheme was gazetted in August 1999. Some of these strategic initiatives have relevance for this site.

Amendment C55 proposes to substantially change the format and content of the existing scheme by deleting all existing local policies at Clause 22 and implementing the relevant components of those policies via the MSS and application of various overlays, as well as incorporating the strategic directions from the major pieces of strategic work that has been undertaken over the past few years.

Planning Scheme Amendment C55 is currently with the Minister for Planning, awaiting approval. Council considers that the Amendment should be regarded as a "seriously entertained" planning proposal and given the appropriate weight by the Tribunal. Council is applying Amendment C55 consistently in decision making on planning proposals.

While there have been structural changes to Clause 21 and 22, the general intent and direction for the Apollo Bay Township have been maintained and given further weight through the referencing of the Apollo Bay Structure Plan which replaces a number of strategic documents currently referenced in the planning scheme. The objectives and strategies in the existing planning scheme have been further refined, updated and provide clearer policy direction for Apollo Bay. Importantly, the objectives place great emphasis on preserving the seaside village character of Apollo Bay. Importantly, the objectives place great emphasis on preserving the seaside village character of Apollo Bay.

Amendment C55 reinforces the strategies of limiting building heights, ensuring upper levels are recessed and built form is well articulated and respects the character of the area, that provide for a more traditional dwelling density to contribute to a diversity of housing choice.

Amendment C55 implements these objectives and strategies by including the land in the Design and Development Overlay - Schedule 7- Apollo Bay and Marengo - Lower Density Residential Areas.

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Amendment C55 proposes to include the land in the DDO7 - 'Apollo Bay and Marengo - Lower Density Residential Areas' the objectives of which are:

- To limit building heights and ensure that upper levels are well articulated to respect the character of the area.
- To identify a lower density area facilitating a more spacious form of residential development.
- To ensure that development density is consistent with the coastal town character.
- To ensure that permeable space is available between dwellings to sustain vegetation.

- To ensure that new development maintains space between buildings so that views to the surrounding landscape are retained.
- To ensure that Environmentally Sustainable Development practices expressed in the Apollo Bay Structure Plan are incorporated into new developments.
- To ensure that Urban Design principles expressed in the Apollo Bay Structure Plan are incorporated into new developments.

The site falls within Precinct 1 of this overlay, under which a minimum lot size of 450sqm is proposed. The objectives of the overlay seek to limit the height of built form to 8 metres with a front setback at the upper level of 3 metres.

- 25 Having reviewed the gazetted version of the DDO7, we see the final paragraph quoted above as potentially misleading in terms of how the design objectives at Clause 1.0 of the DDO7 deal with height. The relevant objective actually reads as follows:

To limit building heights and ensure that upper levels are well articulated to respect the character of the area.

- 26 Clause 2.0 of the DDO7 applies to any future buildings and works on the appeal site. The key text for our purposes from the as-gazetted Clause 2.0 is set out below.

A permit is not required to construct or extend a dwelling if:

- It is the only dwelling on the lot; and
- It is less than 8 metres in height; and
- The lot is in excess of 300 square metres.

Building and works must not exceed a height of 9 metres.

The above requirements cannot be varied with a permit.

### **Findings of Tribunal**

- 27 We shall now return to the key issues which we identified in the introduction to this decision.

Excluding flooding and coastal engineering issues, does the proposal otherwise constitute a reasonable planning outcome that should be approved?

- 28 We are satisfied that the answer to the above question is “yes”, for the following reasons, and with reliance upon the expert planning evidence of Mr Ryan.
- 29 First, we find that the proposal is consistent with the relevant planning framework. The site has the benefit of the highest form of residential zoning, being zoned Residential 1. This is an established residential area with ready access to the centre of the township. Subject to our comments

and provisos below, we are satisfied that the proposal meets the objectives of Clause 56 of the Planning Scheme.

- 30 Allowing this subdivision will contribute to urban consolidation, in terms of better utilising Apollo Bay's existing residential area rather than further urban sprawl occurring at the edge of or beyond the township, which is an objective under Clauses 12, 15.08 and 21.04-02 of the Planning Scheme. The proposal will contribute to there being a diversity of lot sizes in Apollo Bay, being one of the objectives of Clause 16.01 of the Scheme.
- 31 Whilst we acknowledge there is a tension between this proposal and the preference under Clause 22.01 (Main roads/scenic routes) that "A building should not be located closer than 50 metres to the Great Ocean Road", we consider that it would be nonsensical to give priority to this policy preference where the reality is that there is already considerable housing quite close to the Great Ocean Road as one drives north from the appeal site. Common sense suggests that this policy preference more applies to urban fringe or undeveloped sections of the Great Ocean Road.
- 32 In relation to the policy aim under Clause 22.05 of minimising the visual impact of development on scenic coastal areas, we consider that this locality already has a fairly urban character, with the existing built form already being quite visually prominent. However see our comments below regarding our requirement for a greater front setback for the new Lot 2 building envelope. We expect that in practice this will make the anticipated new built form on that lot more recessive when viewed from the Great Ocean Road.
- 33 In relation to the Amendment C55 which has been gazetted since the hearing (thereby creating the new DDO7), we have taken same into account – likewise the new Apollo Bay Structure Plan which is now referenced into the Planning Scheme. We are satisfied that the proposal is consistent with the new DDO7 and this Structure Plan, and that there is no basis for refusing the proposal having regard to these new documents. For example, the parent title is large enough that the new lots (even with our modifications discussed below) can satisfy the new minimum lot size of 450 square metres under Precinct 1 of the DDO7 which applies here.
- 34 There was considerable debate during the hearing whether or not any three-dimensional building envelope should apply. If the answer is "yes", there was a further debate whether the height limit should be 8 or 9 metres. Much of the further written submissions after the hearing addressed this issue.
- 35 Ironically, the gazettal of the DDO7 since the hearing has put in place a new height regime whereby:
  - any new dwelling on either of the new lots can be built up to 8 metres in height without this in itself triggering the need for buildings and

works approval under the DDO7 (subject to certain other requirements also being satisfied); and

- there is an absolute height limit of 9 metres which the DDO7 expressly provides cannot be varied by permit.

36 We are comfortable with this new height regime and are satisfied that we do not need to take this any further. In other words, we are comfortable with the situation where the relevant owner wishing at some future stage to build a dwelling on either new lot can choose at that time whether to keep any new built form below 8 metres, or keep going to 9 metres on the basis that a buildings and works permit trigger then arises under the DDO7. We agree with the Applicant that, beyond the relevant provisions of the new DDO7, it is difficult to see any compelling strategic planning case for a mandatory 8 metre height control. Hence we have not pursued any further Council's submission at the hearing that a three-dimensional building envelope should apply with an 8 metre height limit.

37 Second, the proposal has the benefit that the parent land is generously sized at over 1000 square metres. Hence the two new lots will have a respectable size. The new upper Lot 1 also has the benefit that the side property to the south has its built form located well away from the side boundary. However on the northern side the neighbouring dwelling extends quite close to the side boundary. We are also conscious that while Casino Avenue clearly features many large dwellings, that character generally does not include boundary-to-boundary development facing towards the street. Bearing in mind our finding below that Lot 1 should be reduced in size to 451 square metres, we see the simplest approach as being that the plan of subdivision is modified to include building exclusion zones which cover the area within two metres of the northern boundary of Lot 1, within six metres of the front boundary and within 3 metres of the common boundary with Lot 2. See our findings further below regarding the Lot 2 setbacks.

38 Third, the site is well serviced and within a ready distance to the town centre.

39 Fourth, we see the "height" aspect of any future built form as being assisted by the fact that this is a sloping site, with the land sloping up from the Great Ocean Road. This will assist in softening the view of any new dwellings from the Great Ocean Road – notably in relation to any new building on the new Lot 2 closer to the foreshore.

40 Fifth, to the extent that the Council has relied on the lack of information previously provided by the Applicant, this is now "water under the bridge". We make no finding which party was more at fault with the delays, as our role is simply to assess the proposal now before us.

41 Sixth, in relation to neighbourhood character issues, we may have regarded the proposal less sympathetically if the existing lot layout character in this area was one of consistently large lots extending from Casino Avenue down

to the Great Ocean Road, with a single dwelling on each lot set well back from the Great Ocean Road. However the reality is that further north from the appeal site there is already a pattern of smaller lots, with separate frontages to Casino Avenue and the Great Ocean Road, and dwellings relatively close to the Great Ocean Road. We are struggling to see how Council can seriously urge us to reject the proposal on neighbourhood character grounds when the proposal essentially mimics the existing pattern of residential development further north.

- 42 Lastly, we have carefully considered Council's submission that it would be an inappropriate planning outcome to allow the two lot subdivision in the absence of accompanying development plans. In relation to the higher Lot 1, we see this as a fairly straight forward development opportunity and hence regard Council's concerns as carrying little weight for that lot. In relation to Lot 2, we consider the gazettal of the DDO7 to itself provide additional constraints on the form of any future development, in terms of "neighbourhood character" issues. For the reasons set out below, and subject to a new setback to the Great Ocean Road of 17 metres, we see an acceptable outcome in relation to rising sea levels/peak tide issues. However we accept that there are unresolved significant flooding issues that require additional information – see our comments below on this issue.

#### Flooding and Coastal Engineering Issues – new upper Lot 1

- 43 The appeal site has the important benefit that there rear section of the site substantially slopes upwards from the Great Ocean Road and the coast. The contour plans provided to us indicate that Lot 1 should have a minimum height of about 6.5 AHD. Hence we are satisfied that the whole of Lot 1 will be located high enough to be essentially unaffected by the flooding and coastal engineering issues raised by Council. However see our comments below regarding reducing the size of the new Lot 1 to 451 square metres, with a corresponding increase to the size of the new Lot 2.

#### Flooding and Coastal Engineering Issues – new lower Lot 2

- 44 We understand that it is common ground between the parties that there are significant challenges in terms of the potential development of the proposed new lower Lot 2, given that it:

- fronts on to the Great Ocean Road, in the situation where the foreshore lies directly on the other side of that road;
- does not yet have an established 1:100 flood level<sup>2</sup>;
- features a gully-like area closest to the road, where the land in fact slopes downwards, before then extending back up towards Casino Avenue. Hence Council submitted (and it was not disputed at the hearing) that the relevant survey plan shows that the lowest section of

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<sup>2</sup> See the letter from the Corangamite Catchment Management Authority dated 30 May 2007.

the site near the Great Ocean Road has a height of 3 metres AHD, whereas the height of this section of the Great Ocean Road is in the order of 4-4.5 metres AHD. By way of example, during the hearing we were shown a dramatic photo of substantial flooding/ponding of the lower/front section of the subject land during the last year or two, following a major storm event;

- has to be considered in light of the Corangamite Catchment Management Authority (“CCMA”) having prepared the Barham River Flood Study, which assumes a potential sea level height of up to 2.6 metres if one factors in both a 800 mm future sea level rise plus the estimated 1:100 ARI peak tide. Similarly, we understand that at a broader level the Victorian Coastal Strategy 2008 assumes a sea level rise by 2100 of 800 mm;
- also has to be assessed taking into account the principles set out in the landmark decision of *Gippsland Coastal Board v South Gippsland SC & Ors (No. 2)* [2008] VCAT 1545. This case involved proposed residential development in an area zoned Farm Zone and clearly flood prone. In rejecting the proposal, the Tribunal accepted that the risk of sea level rise and potential consequential coastal inundation was a valid consideration. The Tribunal also discussed and applied the “precautionary principle”, commenting that:

The precautionary principle requires, amongst other things, a gauging of the consequences and extent of intergenerational liability arising from a development or proposal and if found to be warranted, appropriate courses of action to be adopted to manage severe or irreversible harm.<sup>3</sup>

- 45 The Delegate Report for this proposal at pages 4-5 indicates that the proposal was referred to the CCMA, which responded that it has limited information regarding drainage on the property, and could not confirm the extent or cause of flooding<sup>4</sup>. However the CCMA did make the following written statement:

Flooding on the property may be associated with overland flow from the developed land to the west of the property....Part of this overland flow is expected to flow towards the subject land and pond in the low lying land on the subject land along the Great Ocean Road frontage. Ponding depths up to 500 mm could be expected on the land up to a distance of 25 to 30 metres from the Great Ocean Road property boundary...This ponding may come from storm water runoff and/or from groundwater discharge suggesting that this section of land may be unsuitable for building development.<sup>5</sup>

<sup>3</sup> See paragraph 41.

<sup>4</sup> As confirmed by the CCMA letter to Council of 30 May 2007.

<sup>5</sup> See the CCMA letter to Matt Ryan of 15 November 2006.

- 46 On this basis, it is clear that the new Lot 2 has some real difficulties in terms of the location and functioning of any future dwelling on that lot. Whilst on the one hand the application before us has no “development” aspect, equally the general decision making guidelines under Clause 65 of the Planning Scheme make it clear that we are entitled to take into account the future implications of the potential approval of this subdivision proposal.
- 47 If the hearing had proceeded without the Applicant presenting us with suitable expert evidence, or of the whole of Lot 2 was affected by the gully-like area, there seems little doubt that either of these complications would have led us in quick time to a refusal of the proposal.
- 48 However, only part of Lot 2 is affected by the gully-like area, plus we have had the benefit of the three expert evidence reports provided by the Applicant (notably the flooding and coastal engineering report). It is true that of these two experts, only Mr McCowan presented at the hearing and had his evidence tested. But we nevertheless consider that Mr Fairbairn’s flooding report which we have considered “on the papers” should be given some weight.
- 49 Turning now to our own findings, we adopt the same approach as taken by the Tribunal in the *Gippsland Coastal Board* decision referred to above. In particular, we are applying the precautionary principle and are very mindful of the anticipated 800 mm rise in sea levels and resulting potential for coastal inundation, particularly in combination with a 1:100 ARI peak tide. Common sense tells us that, following this approach, the Tribunal should not approve coastal developments that are likely to be unduly threatened by future flooding and/or coastal inundation, creating a mess to be dealt with by future generations.
- 50 In all the circumstances, we see an appropriate and reasonable outcome as being that:
- the new Lot 1 has its area reduced to 451 square metres, which still complies with the new DDO7. In addition, Mr Nixon’s letter on behalf of the Applicant dated 29 May 2009 indicated that the Applicant would not object to this modification if the Tribunal was minded to increase the front setback of Lot 2 building envelope;
  - the area of the new Lot 2 is increased correspondingly;
  - the existing proposed Lot 1 building envelope be deleted. Instead there shall be building exclusion zones in relation to that part of the smaller Lot 1 within 6 rather than 8 metres of the front Casino Drive boundary, 2 metres of the northern boundary and 3.0 metres of the rear boundary;
  - likewise the proposed Lot 2 building envelope shall be deleted and instead there shall be a building exclusion zone within 3 metres of the northern boundary, 2.5 rather than 3.6 metres of the common

boundary with Lot 1 and 17 rather than 9 metres of the boundary to the Great Ocean Road. From our analysis of the survey plans, we believe that this new 17 metres setback should largely ensure that any new building on Lot 2 sits on land no lower than 3.5 metres AHD and largely avoids the more obvious potential for ponding below this height.

- 51 Dealing first with the rising sea levels/peak tide risks, the situation may well have been different if we did not have the benefit of Mr McCowan's evidence, and/or if the subject land backed directly onto the foreshore. However the appeal site does have the benefit that the Great Ocean Road (with a height of 4-4.5 AHD) lies between the site and the foreshore. On the one hand, we see enough residual "coastal inundation" risk (despite the role of the Great Ocean Road) that this close proximity of the foreshore causes us real concern regarding potential development in the gully-like area of Lot 2. However subject to the building area for Lot 2 extending no closer than 17 metres to the Great Ocean Road boundary of Lot 2, thereby largely restricting future development to land at least 3.5 metres AHD, we are satisfied with Mr McCowan's evidence and see no fatal problems on this point alone.
- 52 We turn now to what we see as the key single issue in this proceeding, being whether the proposal has unacceptable flooding risks. Despite the evidence of Mr Fairbairn, we remain unconvinced that it would be a sensible result to allow any new dwelling to be built in the gully-like area in the front section of Lot 2 which is clearly prone to the ponding of water from major flood events.
- 53 The proposal assumes the Lot 2 building envelope is set back 9 metres from the Great Ocean Road boundary. The survey plan dated 2 June 2006 prepared by Jeavons & Tomkinson surveyors indicates that the height at this 9 metre line is about 3 metres AHD to the south and roughly 3.3 metres AHD to the north.
- 54 Contrast this with Mr Fairbairn's key findings in relation to the likely flooding risks, particularly with overland flows. In the context of there being no established flood levels for the site, at Section 4.3 of his report Mr Fairbairn considers the likely flooding of the lower part of the subject land in a 1:100 situation based on "whole catchment with overland flows". It goes strongly against the proposed 9 metre setback to the Great Ocean Road that Mr Fairbairn concludes that in this context the likely flood result would be:
- a flood level of 3.4 metres AHD; and
  - ponding of up to 500 mm.
- 55 In other words, we are struggling to see how the Applicant can credibly ask us to potentially approve a 9 metre setback to the Great Ocean Road (involving a height at this point of between 3 and 3.3 metres AHD) when its

own flooding expert is predicting likely flood levels for overland flows of 3.4 metres and ponding up to 500 mm.

- 56 In relation to the dramatic photo tendered at the hearing of the relatively recent major flooding of this gully area after a major storm event, we consider that it speaks for itself.
- 57 We acknowledge that Council's case at its highest is that Lot 2 should not be allowed at all until detailed development plans/design information is provided, to indicate how the proposed form of development and construction techniques will address and minimise the risks associated with not only typical stormwater runoff but also major storm events and overland flooding. However we see a fair compromise in this regard as being that we approve the proposal but subject to revised conditions which include:
- not only the 17 metre setback of any new development on Lot 2 from the Great Ocean Road boundary (which is supported by Mr Fairbairn's conclusions in Section 4.3 of his report as discussed above); but also
  - the requirement for a new Section 173 Agreement for the owner to enter into and have registered prior to the certification of the plan of subdivision. This Section 173 Agreement must provide that prior to the commencement of any development of Lot 2, the owner of Lot 2 must provide development plans/design information to the satisfaction of the Responsible Authority that demonstrates how the intended form of development will deal with and minimise the risks for Lot 2 and neighbouring properties arising from not only typical stormwater runoff but also major flood events and overland flows.
- 58 We note that the quote we have set out above from the CCMA is more pessimistic in relation to the anticipated potential ponding area. That is, the CCMA view seems to be that most of Lot 2 would be prone to up to 500 mm of ponding. While it was not the primary reason why we have put in place the new Section 173 Agreement arrangements, we see these arrangements as also being a fair way of dealing with the CCMA concerns, keeping in mind that the CCMA was not a party involved in the hearing.
- 59 If through this further information the owner of Lot 2 can demonstrate to the satisfaction of the Responsible Authority that the relevant area of Lot 2 beyond 17 metres from the Great Ocean Road boundary can still be developed in a manner that deals reasonably with any major flood events, then this seems a reasonable planning outcome. It would appear from Mr Fairbairn's report that overland flows are the biggest concern here. Alternatively, if this further information gathering suggests that the more pessimistic CCMA view about ponding is largely correct, then there are no guarantees that Lot 2 can in practice be developed. If the parties cannot agree on the analysis and conclusions to be drawn from the further information, it is always open to the Lot 2 owner at that time to bring the matter back to the Tribunal for resolution.

60 We acknowledge that the modifications to the proposed plan of subdivision which we have required may well lead to greater “cut and fill” for any new dwelling on Lot 2, and that the site is not affected by any Special Building Overlay or Land Subject to Inundation Overlay. However we see the flooding and rising sea levels/peak tide risks for the front section of Lot 2 as so self-evident and serious as to justify these modifications. If this also means that:

- any new dwellings on Lots 1 and 2 end up being closer together than envisaged by the proposal before us; and/or
- the future dwellings on the two new lots might need to have a smaller footprint than the Applicant might ideally seek

we see these as acceptable trade-offs in the circumstances.

### **Conclusion**

61 For the reasons set out above, we have approved the proposal, but subject to certain modifications to the proposed plan of subdivision to address our outstanding concerns.

62 With respect to the *Myers v South Gippsland SC* [2009] VCAT 1022 decision which Council copied to us after the hearing, we consider that (apart from the fact that it was handed down after our hearing) it is of no particular relevance to this proceeding. We say this because whereas on our reading of *Myers* the key single concern of that Member was the absence of any coastal hazard vulnerability assessment or like expert report in the hearing before her, we have had the benefit of the two expert reports procured by the Applicant dealing with flooding and coastal engineering issues.

63 With respect to the flooding report by Mr Fairbairn, we note that he makes some recommendations regarding follow up investigations at section 4.4 of this report. It would seem a good idea for these recommendations to be factored into any development plans/design information provided to Council in future for Lot 2 pursuant to the Section 173 Agreement requirements which we have inserted.

**Philip Martin**  
**Presiding Member**

**AJ Quirk**  
**Member**

## APPENDIX – PERMIT CONDITIONS

- 1 Before the plan of subdivision can be 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 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 of subdivision dated 11 April 2007 Ref. 2188 prepared by Tony Jeavons Surveys but modified as follows to the satisfaction of the Responsible Authority:-
  - (a) On sheet 3 of 3, reduce the size of the new Lot 1 to 451 square metres, and increase the size of the new Lot 2 accordingly;
  - (b) On sheet 3 of 3, delete the building envelope shown for the new Lot 1 and substitute a building exclusion zone (shown with hatching) in relation to those parts of Lot 1 within:
    - six metres of the front Casino Avenue boundary;
    - three metres of the rear boundary of that lot; and
    - two metres of the northern boundary of that lot.
  - (c) On sheet 3 of 3, delete the building envelope shown for the new Lot 2 and substitute a building exclusion zone (shown with hatching) in relation to those parts of Lot 2 within:
    - three metres of the northern boundary;
    - 2.5 metres of the common boundary with Lot 1; and
    - 17 metres from the boundary to the Great Ocean Road.
  - (d) On sheets 2 and 3 of 3, insert a new notation confirming the width of the Easement E-1.
  - (e) On sheet 3 of 3, add suitable new notations next to the hatched areas to confirm that the hatched areas are “Building exclusion zones”.
  - (f) On sheet 3 of 3, under the heading “Creation of Restriction”, amend the final paragraph to read as follows – “Description of restriction: no building(s) apart from ancillary outbuildings shall be built in the “building exclusion zones” shown hatched on this Sheet 3, without the prior written approval of the Responsible Authority”.
- 2 The subdivision as shown on the endorsed plan must not be altered save, with the written consent of the Responsible Authority.
- 3 Prior to the certification of the plan of subdivision permitted by this permit, the owner of the land must prepare and procure the registration of a Section 173 Agreement to the satisfaction of the Responsible Authority. This

Section 173 Agreement must require the owner to the satisfaction of the Responsible Authority to:

- provide that Authority with suitable development plans/design information dealing with storm water runoff/flooding issues in relation to Lot 2, prior to the commencement of any development of that lot;
- following the approval of the relevant plans/design information, then construct any development of Lot 2 generally in accordance with these approved plans/design information, unless otherwise permitted in writing by the Responsible Authority;
- not build any basement style car parking area on Lot 2 without the prior written approval of the Responsible Authority.

The development plans/design information provided to the Responsible Authority must explain:

- the form of development proposed for Lot 2;
- the relevant AHD contours for Lot 2;
- any confirmed 1:100 flood level for Lot 2 by that point in time;
- the height of the proposed floor levels of any new building;
- the proposed car parking arrangements;
- the proposed driveway and associated culvert/drainage arrangements providing vehicle access to Lot 2 off the Great Ocean Road, whilst still allowing for overland flows, and
- generally how the proposed design and building construction techniques will deal with and minimise any risks for Lot 2 and neighbouring properties arising from not only typical stormwater runoff but also potential major flooding events with particular reference to overland flows.

The owner shall be responsible for the Responsible Authority's reasonable legal costs for the preparation, approval and registration of this Section 173 Agreement.

- 4 Plans submitted for certification must meet the requirements of the Subdivision Act 1988, as amended.
- 5 The Statement of Compliance will not be issued prior to all conditions in relation to subdivision on the subject Planning Permit being complied with to the satisfaction of the Responsible Authority.
- 6 The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity, gas, and telecommunication services to each lot shown on the endorsed plan in accordance with the authority's requirements and relevant legislation at the time.

- 7 All existing and proposed easements and sites for existing or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
- 8 The plan of subdivision submitted for certification under the Subdivision Act 1988 must be referred to the Relevant Authority in accordance with Section 8 of that Act.
- 9 The developer must mark street numbers for all lots in the subdivision in accordance with the Shire's street numbering scheme to the satisfaction of the Responsible Authority.
- 10 Individual access must be provided onto each lot created and the subject access must be constructed to the satisfaction of VicRoads and the Responsible Authority.
- 11 Vehicular crossings must be constructed to the road to suit the proposed driveways to the satisfaction of the Responsible Authority.
- 12 The driveways must enter the roadway perpendicular to the roads centre line and be in a safe location for users, pedestrians, cyclists and motorists by consideration of both vertical and horizontal sight distance to the satisfaction of the Responsible Authority.

**Conditions required by VicRoads:**

- 13 No more than a single point of vehicular access shall be provided from the subject land to the Great Ocean Road.
- 14 The access driveway for Lot 2 shall be constructed in accordance with the design for a typical driveway as shown on the attached drawing (Fig. 3.11.2(a)). The driveway culvert shall be fitted with driveable endwalls (as shown on Standard Drawing SD1991 attached). The driveway shall be sealed for a minimum distance of 6 metres from the edge of the bitumen towards the property boundary. Any redundant part of the existing driveway or gateway must be removed.
- 15 All work must be carried out to VicRoads' satisfaction and VicRoads' approval must be obtained prior to carrying out any work within the Great Ocean Road reserve.
- 16 The applicant or the applicant's contractor must contact the Manager Program Delivery — VicRoads' South Western Region (telephone 5225 2525) at least 14 working days prior to commencing work within the Great Ocean Road reserve to discuss construction standards and traffic management arrangements.
- 17 This permit will expire if one of the following circumstances apply:
  - (a) The plan of subdivision is not certified within two (2) years of the date of issue of the permit;

- (b) The Plan of Subdivision is not registered within five (5) years of the date of issue of the permit.

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.