

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P3777/2008
PERMIT APPLICATION NO. 347/2008/P

CATCHWORDS

Conditions on a permit, Land subject to inundation, Potential for flooding, Climate change, Extent to which a building may be developed on a site, Liable to flooding

APPLICANT	John Tauschke
RESPONSIBLE AUTHORITY	East Gippsland Shire Council
REFERRAL AUTHORITY	East Gippsland Catchment Management Authority
SUBJECT LAND	36 Metung Road, Metung
WHERE HELD	Melbourne
BEFORE	Peter O'Leary, Member
HEARING TYPE	Merits Review
DATE OF HEARING	1 October 2009
DATE OF ORDER	26 October 2009
CITATION	Tauschke v East Gippsland SC [2009] VCAT 2231

ORDER

- 1 The responsible authority's decision is varied.
- 2 The wording on Condition 4 is deleted and replaced with the following:
 4. Before the plan of subdivision is certified the owner must enter into an agreement with the Responsible Authority and East Gippsland Catchment Management Authority pursuant to s173 of the Planning and Environment Act 1987 which provides for the following to the satisfaction of the Responsible Authority and the East Gippsland Catchment Management Authority:
 - a) a finished floor level of not less than 3.2m AHD for any dwelling on the land;
 - b) a finished floor level of not less than 2.6m AHD for any garage or out-building on the land;

- c) a boardwalk or deck which provides access for occupants of the property to any garage and/or to Metung Road during a 1 in 100 year flood event;
- d) the provision of decks or other structures around the perimeter or parts of the perimeter of any dwelling at a height which would ensure the depth of any floodwaters in the 1 in 100 year AM event do not exceed 0.5m above the relevant deck or structure; and
- e) details of the foundations or footings of the dwelling, decks, revetment walls and/or boardwalk which enables the appropriate passage and storage of floodwaters.

The owner must have the agreement registered on title pursuant to s 181 of the Planning and Environment Act 1987 prior to the release of the title. The owner shall pay the reasonable costs of the Responsible Authority's preparation, execution and registration of the s173 agreement.

Peter O'Leary
Member

INFORMATION

Description of Proposal	Subdivision of land to create two lots.
Nature of Application	Section 80 of the <i>Planning and Environment Act</i> 1987 concerning the wording in Condition 4 of the permit.
Zone and Overlays	Residential 1 Zone. Part Land Subject to Inundation Overlay (LSIO). Design and Development Overlay (DDO1). Relevant decisions guidelines in Clauses 56, 43.02-5 and 44.04-6. A permit application referral to EGCMA is triggered because part of the site is located in the LSIO.
Permit triggers	Cl. 32.01-2 Cl. 43.02-3 Cl. 44.04-2
Land description	The land is located on the eastern side of Metung Road abutting Bancroft Bay in Metung. It is situated on the isthmus between Lake King and Bancroft Bay.

APPEARANCES:

For Applicant	Mr P Bisset, solicitor of Minter Ellison. Mr Bisset called evidence from: <ul style="list-style-type: none">• Dr Mark Jempson, Hydraulic and Hydrology Engineer:• Mr Michael Cawood, Emergency and Flood Risk Management Engineer.
For Responsible Authority	Mr R Hoxley, Town Planner.
For Referral Authority	Mr A Dunn, with Ms P Neumann.

REASONS

What is the dispute about?

- 1 John Tauschke is seeking a review of Condition 4 on Permit No. 347/2008/P relating to a permit for subdivision of land at 36 Metung Road in Metung. East Gippsland Catchment Management Authority (EGCMA) acting in its role as a referral authority for that part of the land contained within a Land Subject to Inundation Overlay directed the placement of Condition 4 which reads:

Before the use and/or development commences the owner/operator/applicant should enter into an agreement with the Responsible Authority and East Gippsland Catchment Management Authority pursuant to Section 173 of the Planning and Environment Act 1987 which provides that the building envelope on lot 1 must not be below the 1.6 metre AHD contour. The owner/operator/applicant shall pay the reasonable costs of the preparation, execution and registration of the Section 173 agreement.
- 2 I appreciate this decision has ramifications for subdivision applications that are subject to scrutiny when considering the potential coastal impacts of Climate Change. I am confined to considering the wording in Condition 4 and not whether the permit should have issued. If the EGCMA has now adopted a different stance to the subdivision there are other measures it can take outside the scope of this review.
- 3 The East Gippsland Catchment Management Authority seeks to minimise the exposure of private assets to flood risk, and to ensure that future landowners are aware of the development limitations of the site. It argued that intensification for residential use is not appropriate at this site and seeks retention of the condition to ensure that all buildings are erected beyond (above) RL1.6 AHD.
- 4 At the time the application was considered by the responsible authority there had been little information provided about site levels or extent of flooding on the subject site. The EGCMA had responded to the available information presented to it and had requested that permit for subdivision contain Condition 4.
- 5 John Tauschke opposes the wording in Condition 4 on the basis that it has the effect of denying the development and infill of a site within Metung in a manner contrary to the broader planning policy matrix. He is not opposed to the placement of a condition on permit requiring a Section 173 Agreement on the title that would restrict the minimum floor level of a dwelling and garage and appropriate provision of foundations or footings that enables the appropriate passage and storage of floodwaters across the site.
- 6 Around the time of lodgement of the Application for Review, Amendment VC52 to the Victorian Planning Provision came into effect that introduced provisions to address managing coastal hazard and the coastal impacts of

climate change. In effect, it introduced Clause 15.08-1 that seeks the planning for sea rise of not less than 0.8 metres by the year 2100 and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Purpose Sought

- 7 It is proposed to subdivide an existing lot into two parcels of land. Lot 1 will be created to have an area of 811 square metres containing a frontage of 17 metres to Metung Road. Lot 2 will be an area of 992 square metres being the balance of the land and containing an existing dwelling, garage and jetty. Access to both lots is provided to Metung Road.
- 8 Documents tabled at the review hearing by Mr Bisset provided information on contours of the site. The documentation also provided notional plans, elevations and cross sections for an elevated dwelling which could be erected with a finished floor level minimum AHD 3.2m in accordance with recommendations of Mr Cawood and Dr Jempson.

Locality

- 9 The subject site is located on the eastern side of Metung Road abutting Bancroft Bay and about 200 metres south of the main activity centre of Metung. The site is located in a picturesque setting along the isthmus of Metung between Lake King and Bancroft Bay. There are various detached and semi-detached dwellings, apartments and tourist complexes along this section of Metung Road extending almost to Shaving Point. There is then a car park, boat ramp and ferry connection to Mosquito Point on the other side of Bancroft Bay.
- 10 Metung Road is a sealed, fully constructed road. There is a recently constructed concrete footpath running along part of its western side. Pedestrian access on the western side is continued by a boardwalk that extends to Shaving Point. The western side of the Metung isthmus is protected from wave and tidal action in Lake King by groins and rock walls. The eastern section is more sheltered and provides extensive boat mooring facilities for tourists and residents in response to its relatively sheltered position. This section of the isthmus is partly vegetated but also has some recently formed 90 degree parking facing Lake King.
- 11 The subject site has a frontage of 40.2 metres to Metung Road and depths varying between 40.8 and 50 metres extending into Lake King (Bancroft Bay). The land itself falls from Metung Road at a level of about RL 2.4 AHD to about 1.0AHD. With the road surface of Metung Road being RL2.9 AHD.

Basis for Decision

The extent of development allowed in an LSIO

- 12 The principal issue in dispute is whether the development for a dwelling should be allowed on land below the 1.6m AHD level (or effectively about 15% of the site). The difference of approach is that the EGCMA does not wish to see any development on the land that has a level below AHD 1.6m, whereas the applicant in acknowledging potential impact of climate change seeks a modified permit condition that will limit the minimum floor level of any future dwelling on the new lot to RL3.2 AHD.
- 13 The site plan SK01 tabled at the review hearing shows the contours of the site, the line of the current LSIO, and an outline of a schematic dwelling site. The area that is subject to the LSIO covers approximately 50% of the subject site extending outwards to Bancroft Bay. Ordinarily only the area within the LSIO area is affected under the Section 55 referral. Mr Dunn advised that this LSIO had been adopted based on old flood mapping data and based on recent documentation, including that submitted with the witness statement and on the plans submitted at the review hearing the mapping is out of date and needs to be upgraded.
- 14 Mr Dunn was of the view that had the Authority been in possession of all this documentation it would have objected to the application thereby triggering a refusal of the application. However, this is an application concerning a condition on a permit under section 80 of the Act and there has been no attempt to seek cancellation of the permit.
- 15 Based on the tabling of survey documentation the effect of the EGCMA's condition will be to limit all development below the 1.6m AHD contour which effectively means that a dwelling could only be built on the remaining 15% of the western side, or front, of the site abutting Metung Road.
- 16 During the hearing I questioned Mr Dunn about the EGCMA's position towards residential development on land zoned Residential 1 within the Catchment. Mr Dunn was of the view that the Authority would oppose any new dwelling within the "floodway". He advised that the Authority would not be opposed to a replacement of an existing dwelling and that each and every dwelling within an overlay would need to be considered on their merits.
- 17 Mr Bisset on the other hand, argued that the Authority has not demonstrated that there is a risk to life, health and safety associated with the proposed development having regard to the recommendations of Dr Jempson and Mr Cawood. He argued the evidence about the impact on floodplain storage and the free passage of floodwaters will not be affected by a development that would comply with the revised wording in the condition that he suggested.

18 In evidence Mr Cawood advised¹:

It is my opinion that the flood risk associated with Lot 1 can be managed.

In view of the above and in the context of emergency risk management, I am of the opinion that development of Lot 1 at 36 Metung Road, Metung can be achieved without causing an increase in flood risk through the application of appropriate conditions. Key considerations include:

- A very slow rate of rise in flood waters providing the occupier with ample time to progressively implement damage reducing actions on site if required);
- A flood forecast and warning system that will deliver forecast heights and times for Metung and provide the occupier with a degree of confidence in expected flooding conditions;
- The availability of viable egress and access routes and thus connection to medical, shopping, community and social services and facilities within Metung or Bairnsdale;
- No isolation and no need for assistance from emergency services; and
- Likely flood depths and velocities that indicate, on the basis of current best practices and with due consideration for the above, exposure to flood hazard is very low with minimum risk to life, health and safety.

Implied in the above are:

- A minimum floor level that has regard for the declared flood level at Metung as well as for the current best estimate of climate change induced sea level rise within the Gippsland Lakes;
- Incorporation of an elevated access way thereby providing dry, safe and unencumbered egress from and access to the dwelling - building entrance/exit points and their surrounds as well as connecting routes at or above flood level; and
- No requirement to limit the building envelope to a minimum of 1.6 metres AHD.
- Further, it is my opinion that such development would in fact contain future flood risk while also reducing residual risk as there would be:
- No increase in the burden on emergency services;
- No increase in flood damages to public or private assets; and
- No compromise to the safety of individuals visiting or living at the property.

¹ See page 8 and 9 of the witness statement by Michael Cawood

19 Dr Jempson advised²:

In summary the impact of climate change on flood levels in Gippsland Lakes is complex with a number of factors that may cause either an increase or decrease in flood level. Therefore it is recommended that an increase in flood level of 0.8 metres be adopted for the subject site at this point.

20 Dr Jempson also advised³:

The EGCMA in their letter of 22 September 2008 advised that a development application approval would be subject to a condition requiring the finished floor level to be at least 300 mm above the 1% AEP flood level, i.e., at least 2.4 m AHD. This level does not allow for effects of climate change and it is considered that it would be prudent for the long-term viability of the property to adopt a floor level higher than that required by the EGCMA. Based on the discussion presented in Section 3.2 it is considered prudent to adopt a habitable floor level of 3.2 m AHD, i.e., 300 mm above the 1% AEP flood level allowing for climate change, at this point in time. The garage floor level could be set lower than the habitable floor level, but the level it is set at should satisfy egress and hazard requirements.

21 I consider the recommendation by Dr Jempson and Mr Cawood are to be preferred to the EGCMA'S approach because their evidence is based on the most accurate information about site levels and potential flooding of the site and it has followed the thrust of the most recent changes to the planning scheme on climate change.

22 The most relevant purpose in Clause 15.08 in this instance is:

To plan for and manage the potential coastal impacts of Climate change.

23 The strategies in Clause 15.08-2 are divided in two parts:

- Integrated planning for the future, and
- Managing coastal hazards and coastal impacts of climate change.

24 The clause then directs a responsible authority to apply the hierarchy of principles for costal planning as set out in the Victorian Coastal Strategy 2008 which are to:

1. Provide for the protection of significant environmental and cultural values.
2. Undertake integrated planning and provide clear direction for the future.
3. Ensure the sustainable use of natural coastal resources.

When the above principles have been considered and addressed:

² See page 3-2 of the witness statement by Dr Mark Jempson

³ See page 3-2 of the witness statement by Dr Mark Jempson

4. **Ensure development on the coast is located within existing modified and resilient environments where the demand for development is evident and the impact can be managed.**

(Tribunal emphasis)

25 Under the second section of the provision the Clause then directs:

Planning to manage coastal hazards and the coastal impacts of climate change should:

- Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.
- Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.
- Ensure that new development is located and designed to take account of the Impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.
- Ensure that land subject to coastal hazards are identified and appropriately managed do ensure that future development is not at risk.
- Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

26 I consider the revised wording of Condition 4 tabled by Mr Bisset is an appropriate response to the climate change provisions in Clause 15.08-1. It incorporates the most up to date information about existing flooding conditions and it applies a responsible degree of precaution to anticipated rise in sea level and other events such as storm tides in this particular location in accordance with clause 15.08-1. The plans and elevations tabled depicting a dwelling clearly indicate a design that would elevate a dwelling with a minimum floor level of RL3.2mAHD with a garage (minimum RL2.6mAHD) with direct connection to Metung Road that has a level of RL2.9AHD. This is to be preferred to the earlier nominated figure of RL 1.6m AHD.

27 The nominated level of RL1.6 AHD was, understandably imposed by the EGCMA at a time when the amount of information in this subdivision was vague and predated the introduction of Clause 15.08-1. I acknowledge the EGCMA claim it would have objected to the application on the basis of the information supplied in the hearing and referenced in the witness reports. However, there is no information in either the Victorian Coastal Strategy or Clause 15.08-1 that specifically prohibits the development of a dwelling on land that is partially subject to flooding in a low velocity flow scenario. Rather the relevant directions are to plan for and manage potential coastal impacts.

- 28 I have some concern about retaining the original wording of the condition because practical difficulties may arise applying it and then dealing with a separate planning permit application later for a dwelling only under the DDO. Under the scenario put forward by EGCMA an applicant for a dwelling permit could potentially avoid a referral normally applicable in the LSIO because the dwelling would be outside the current boundary of the LSIO. In many respects this could potentially leave a dwelling at any level so long as it was beyond the 1.6m AHD level but then experience flooding when sea level rises above that level. By contrast, the recommendations of Dr Jempson and Mr Cawood provide a comprehensive response to the potential coastal impacts of Climate change.

The application of the LSIO

- 29 The relevant Decision Guidelines in Clause 44.04-6, in addition to those in Clause 65.02, direct a responsible authority to consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- Any local floodplain development plan.
- Any comments from the relevant floodplain management authority.
- The existing use and development of the land.
- Whether the proposed use of development could be located on flood-free land or land with a lesser flood hazard outside this overlay.
- The susceptibility of the development to flooding and flood damage.
- The potential flood risk to life, health and safety associated with the development.
- Flood risk factors to consider include:
 - The frequency, duration, extent, depth and velocity of flooding of the site and accessway.
 - The flood warning time available.
 - The danger to the occupants of the development, other floodplain residents and emergency personnel if the site or accessway is flooded.
- The effect of the development on redirecting or obstructing floodwater, stormwater or drainage water and the effect of the development on reducing flood storage and increasing flood levels and flow velocities.
- The effect of the development on environmental values such as natural habitat, stream stability, erosion, water quality and sites of scientific significance.

- 30 The application of the LSIO over part of the site is not necessarily intended to prevent or prohibit development. Rather, the LSIO :

....is used for both urban and rural environments to identify land with lower potential flood risk or as an interim measure, areas where accurate flood mapping to identify the flooding is yet to be carried out. The LSIO only requires a permit for buildings and works and does not prohibit either use or development.⁴

- 31 Dr Jempson's evidence was not challenged on issues relating to risk to life and safety having regard to his recommendations that emanated from Clause 15.08.
- 32 I may have taken a different view if the site was subject to high velocity flooding and /or the site was remote from urban infrastructure or did not have good pedestrian and vehicle access in times of potential flooding. However Metung Road is above the flood line and even with a storm surge the opportunity for escape is relatively safe for vehicles and pedestrians. Whilst there was some part of Metung Road in the business area that may experience minor flooding under the 2100 flood scenario modelling there are other escape routes, such as along Beach Road.

General approach to subdivision

- 33 Clause 65.02 requires a responsible authority to consider, amongst other things:

- The suitability of the land for subdivision.
- **The existing use and possible future development of the land and nearby land.**
- The effect of development on the use or development of other land which has a common means of drainage.
- The subdivision pattern.
- **The design and siting of buildings having regard to safety and the risk of spread of fire.**

(Tribunal emphasis)

- 34 Having viewed the form of development along Metung Road where there is a combination of single and two storey dwellings, some of which are elevated, the proposed subdivision will create a lot that can accommodate development commensurate with that found in the neighbourhood. Whilst other nearby dwellings are elevated to take advantage of views over Lake King and Bancroft Bay a future dwelling on Lot 1 would not look much different to the type of dwellings found in the neighbourhood, even though it has been elevated to achieve a more noble planning outcome.

⁴ See page 2 of applying of VPP Practice Note Applying Flood Provisions in Planning Schemes August 2000.

- 35 Clause 11 of the planning scheme requires planning authorities and responsible authorities to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development. In this case there are State and Local planning policies that include the encouragement of consolidation of existing urban areas. The responsible authority outlined how the subdivision met various other State planning policies but conceded it relied on the EGCMA for input on the flooding issue.

Level of detail for and application in a LSIO

- 36 With the introduction of Clause 15.08 there is a much higher planning imperative to address potential coastal hazard and impacts of climate change.
- 37 The applicant has now submitted detailed contour information of the site and detailed reports on potential coastal hazard and impacts of climate change affecting the subject land and provided recommendations to address the potential hazard in response to Clause 15.08.
- 38 It is now much clearer that the standard of information that must be submitted with a planning application in a Land Subject to Inundation Overlay (or a Floodway Overlay) is much greater than the information normally provided to a Council for a relatively conventional infill subdivision that is not encumbered by such overlays.
- 39 I suggest that it would be prudent for the Responsible Authority and the EGCMA to insist on information commensurate with that provided at the review hearing when dealing in the future with climate change issues on land affected by the LSIO and/or a Floodway Overlay.

Process issues

- 40 Whilst the EGCMA advised that if it was in possession of the information submitted in evidence and at the hearing it would have objected to the application. This would have triggered a refusal.
- 41 There is no provision or policy in the Planning Scheme that prohibits infill subdivision that is intended for a single dwelling on land in a Residential 1 Zone and the VPP practice notes reinforces this observation. Instead applications are individually assessed on the merits and circumstances of their particular case.
- 42 If the EGCMA seeks a broad prohibition of residential development and subdivision in a Residential 1 Zone in its catchments it should consider using a more appropriate mechanism to restrict development. One approach may be to as seek an Urban Floodway Zone⁵ in a planning scheme amendment process, where all affected parties can have an opportunity to

⁵ No Urban Floodway Zone exists in the East Gippsland PS but Cardinia and Latrobe Planning Schemes do contain one in Clause 37.03

fully debate the implications of this approach in an open and transparent forum before an independent body. To apply a de-facto prohibition on development in a planning permit condition on an ad hoc basis may lead to uncertainty in the application of planning provisions as they currently exist in the East Gippsland Planning Scheme.

Conclusion

- 43 For the abovementioned reasons the responsible authority's decision is varied. I have adopted the suggested wording tabled by Mr Bisset that reflects the recommendations of both Mr Cawood and Dr Jempson.

Peter O'Leary
Member