

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO.P86/2006  
PERMIT APPLICATION NO.P203 - 0011

**CATCHWORDS**

S77 Planning and Environment Act 1987 – Macedon Ranges Planning Scheme – Rural Conservation Zone – Vegetation Protection Overlay [schedule 9] – Environmental Significance Overlay [schedule 4] - Vegetation Protection Overlay [schedules 2, 6 and 9]- construction of dwellings – 1 dwelling and septic system per lot – appropriateness of the use of small lots for dwellings - consistency with purpose of the zone and policy – impact on water quality in protected catchments - containment of waste water – Interim guideline for planning permit applications in open, potable water supply catchments – application of precautionary principle.

**APPLICANT**

Maurice and Esther Rozen

**RESPONSIBLE AUTHORITY**

Macedon Ranges Shire Council

**RESPONDENTS**

Western Water and Others

**SUBJECT LAND**

CA 111L, CA111L1, CA111Q5 and CA111P  
Parish of Woodend, County of Dalhousie,  
863 Ashbourne Road Woodend

**WHERE HELD**

Melbourne

**BEFORE**

Mr S. R. Cimino, Presiding Member  
Mr Ian Potts, Member.

**HEARING TYPE**

Hearing

**DATE OF HEARING**

14-16 May 2007

**DATE OF ORDER**

24 September 2007

**CITATION**

Rozen v Macedon Ranges SC [2007] VCAT  
1814

**ORDER**

With respect to planning permit application no. P203 – 0011, the responsible authority's decision is set aside. A permit is granted for the use and development of four dwellings and associated works generally in accordance with the endorsed plans at Crown Allotments 111L, 111L1, 111Q5 and 111P, Parish of Woodend, County of Dalhousie, 863 Ashbourne Road Woodend. The permit must contain the following conditions:

- 1 Before commencement of the development allowed by this permit, amended features and levels plans (three copies) to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will form part of this permit. The plans must be generally in accordance with the plans prepared by Tomkinson (Ref: MJ5115 Version: B) but modified to show:
  - (i) Details of the road access to all dwellings to be constructed to the responsible authority's standards.
- 2 Before commencement of the development allowed by this permit, amended site, floor and elevation plans (three copies) to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will form part of this permit. The plans must be generally in accordance with the plans prepared by Billing Design and Drafting dated 23 March 2007 but modified to show:
  - (i) All dimensions.
  - (ii) A detailed schedule of external materials, colours and finishes.
- 3 Before commencement of the development allowed by this permit, an amended landscape plan (three copies) to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the landscape plan will form part of this permit. The landscape plan must be generally in accordance with the 'Landscape: Proposed Revegetation' Plan (Dwg.No.2523/2A) prepared by Carol Frank-Mas, but modified to show:
  - (i) A landscape buffer strip along the Campaspe River that has a width of not less than 30 metres.
  - (ii) The proposed stock fence along the Campaspe River setback at least 30-metres from the top of the river bank.
  - (iii) A notation that only weed control is to be carried out in the area referred to in condition 3(iv) to assist natural regeneration.
  - (iv) Weed control and revegetation to be carried out to improve the roadside link along Ashbourne Rd and the Campaspe River along the northern boundary of the site.
  - (v) The drainage lines between each dam and the Campaspe River be fenced and revegetated, to prevent stock access and aid in water quality improvement.
  - (vi) The provision of additional planting around the dwellings to assist in softening the view toward them.
- 4 The use and development approved by this permit must be in accordance with the plans and documentation endorsed under this permit. The layout, materials and colours of the development shown on the endorsed plans must

not be altered without the prior written consent of the Responsible Authority.

- 5 The owner must enter into an agreement with the Responsible Authority under Section 173 of the *Planning and Environment Act 1987*, to be registered on title. The agreement must provide for:
  - (i) The carrying out of landscaping works in accordance with the approved landscape plan to the satisfaction of the Responsible Authority. The landscaping on a crown allotment must be completed within 3 months of the completion of the dwelling on that crown allotment.
  - (ii) The ongoing protection and maintenance (including replacement of dead or dying vegetation) of landscaping works to the satisfaction of the Responsible Authority.
  - (iii) Weed control to be carried out in accordance with industry accepted methods to the satisfaction of the Responsible Authority.
  - (iv) The completion of all fencing shown on the approved landscape plan to the satisfaction of the Responsible Authority within a timeframe approved by the Responsible Authority.
  - (v) The ongoing maintenance (including replacement where necessary) of the fencing shown on the approved landscape plan to the satisfaction of the Responsible Authority.
  - (vi) The cost of the implementation and maintenance (including replacement) of landscaping works, weed control and fencing to be borne by the owner.
  - (vii) Payment by the owner of the costs of the Responsible Authority incurred in association with the preparation, checking, registration and enforcement of the section 173 agreement (including legal costs).
- 6 Before an occupancy permit is issued for a dwelling, the dwelling must be fitted with a wastewater treatment system in accordance with the recommendations of the Land Capability Assessment undertaken by Paul Williams & Associates, dated 29 January 2007 and condition 10 of this permit (with condition 10 prevailing in the event of inconsistency). The treatment system must be to a design approved by Council and must be operated, maintained and replaced where necessary to the satisfaction of Council.
- 7 Before an occupancy permit is issued for any of the dwellings, any existing vehicle crossing to be used to access a dwelling must be upgraded to a sealed condition in accordance with the Responsible Authority's standards and to the satisfaction of the Responsible Authority.

- 8 All reticulated services must be provided underground to the satisfaction of the Responsible Authority.
- 9 Stormwater runoff from buildings and paved areas must be dissipated as normal unconcentrated overland flow to the satisfaction of the Responsible Authority.

#### Western Water

- 10 Prior to either a building permit or septic tank permit being granted for the development of a dwelling on each lot, the owner of the land must enter into an agreement under Section 173 of the *Planning and Environment Act* with Western Water and Council agreeing that:
  - (a) A wastewater treatment system that produces wastewater to a minimum standard of 20/30/10 (BOD/suspended solids/E.Coli) must be installed and operated and maintained in compliance with the relevant EPA Code of Practice and Certificate of Approval, to the satisfaction of the Responsible Authority and Western Water to treat all sullage and sewerage waste on site. The waste water treatment system must be capable of accommodating surge flows to the satisfaction of Western Water.
  - (b) Wastewater is to be dispersed using methods to the satisfaction of Council's Environmental Health Officer and Western Water that will prevent that waste and treated waste from discharging from the property at all times. The wastewater treatment and disposal systems, cut off drains and pumping system must be installed in accordance with the Land Capability Assessments prepared by Paul Williams dated 29 January 2007 (Report nos. A070104, A070105, A070106 and A070107).
  - (c) The wastewater disposal area on each lot must be located above the 1 in 100 year (or maximum known) flood level of the Campaspe River and at a setback of at least 100m.
  - (d) The effluent system must be maintained annually by a suitability qualified person in accordance with the manufacturers' specifications and EPA requirements. The wastewater effluent being released from the treatment facility must also be monitored annually to ensure compliance with the 20/30/10 standard. Reports on water quality and maintenance must be submitted to the Responsible Authority at the completion of each maintenance period. This report must be made available to Western Water on request.
  - (e) The owner must meet the costs of the inspections and reports referred to in condition 10(d).
  - (f) The owner must carry out such works as are considered necessary by the inspecting Environmental Health Officer to ensure the satisfactory operation of the wastewater treatment and disposal system and ensure

that waste and treated waste is prevented from discharging from the subject land at all times.

- (g) The owner must carry out such works including replacing effluent treatment, storage pumping and disposal systems within the time specified to do so by Council or Western Water to cease and prevent waste from discharging from the subject land.
- (h) If the wastewater program proves to be unsustainable, the land holder must immediately rectify the sewerage disposal system.
- (i) The owner must have the wastewater treatment system desludged at least once every three years and evidence of this fact shall be provided in the annual written report referred to in condition 10(d).
- (j) The primary and reserve effluent disposal envelopes must be protected by being isolated and fenced from any building, driveway, livestock, vehicles or permanent recreational area that could render it unavailable in the future and should be planted with suitable grasses that will aid in moisture removal.
- (k) The subject land must not be further subdivided.
- (l) The existence of this agreement shall not preclude the subject land from being included in a future sewerage scheme for the area.
- (m) Stormwater is to be managed in a way to minimise risk to erosion of the surrounding land. No stormwater should be allowed to move into the disposal fields.
- (n) Sediment control measures as outlined in the EPA's publication No 275 Sediment Pollution Control shall be employed during construction and maintained until the disturbed area has been regenerated.
- (o) The buffer strip of native vegetation as shown on the landscape plan must be maintained along the Campaspe River on each of CA 111L, 111L1 and 111P.
- (p) Dwellings must not contain internal spa baths and external spa pools unless it has its own separate system.
- (q) The obligations under this agreement shall run with the subject land.
- (r) The owner must pay Council's reasonable costs associated with the registration and enforcement of the Section 173 Agreement.

#### North Central Management Authority

- 11 Any proposed dwelling must be sited a minimum of 100m from any waterway.
- 12 The floor level of any dwelling must be a minimum of 2.0m above the top of the river bank at the upstream boundary of the lot.

Permit time limit

- 13 This permit will expire if the use and development hereby permitted is either not commenced within two years, or not completed within four years, from the date of the permit. A written application may be made to the Responsible Authority for the extension of the permit prior to the permit expiring or within three months after the expiry of the permit.

The responsible authority is directed to issue a permit in accordance with this order.

Mr S. R. Cimino  
**Presiding Member**

Mr Ian Potts  
**Member**

**APPEARANCES:**

For Applicant

Mr D Scally, Solicitor, Best Hooper

For Responsible Authority

Ms Y Maglitto , Solicitor, Maddocks

For Western Water  
Objectors

Mr H Jackson, Solicitor, Deacons  
Mr P Griffin in person

## REASONS

### What is this matter about?

- 1 Mr and Mrs Rozen own a site of about 72 hectares comprising 4 adjoining lots on the corner of Ashbourne Road and Chambers Road Woodend. In January 2003, they lodged an application for planning permit with the Macedon Ranges Shire Council seeking permission for the construction of 4 dwellings on the site, that is, 1 on each of the 4 lots.
- 2 In November 2005, nearly 3 years after it was lodged, the council refused the permit application. The reasons for this delay are not particularly relevant to our final decision and we will therefore not set them out<sup>1</sup>. However, based on what we have seen, it would be fair to say that the documentation submitted in support of the proposal was of poor quality.
- 3 Ultimately, the council decided to refuse the permit application on 6 grounds that assert, in summary, the proposal would result in the urbanisation of a rural area and fragmentation of productive agricultural land; it is contrary to the purpose of the zone and planning policy; and an undesirable precedent would be created if it were allowed. Not surprisingly, the council also refused the proposal on the ground that the information supporting the application was unsatisfactory.
- 4 Western Water<sup>2</sup> [WW] and Mr Griffin support the council's refusal.
- 5 Mr and Mrs Rozen have lodged this application seeking the review of the council's decision. They are asking that we set aside the council's decision and direct the grant of a permit.

### The site and context

- 6 The site is located on the southwest corner of Ashbourne Road and Chambers Road. It comprises 4 adjoining crown allotments, 3 of which have frontages to Ashbourne Road, with the other to the west side of Chambers Road. When combined, the 4 lots create a site with an area of about 72 hectares, with frontages of about 1500 metres to Ashbourne Road and 790 metres to Chambers Road.
- 7 The individual lots are irregular in shape, have extensive frontages with their respective areas ranging from 15.45 hectares to 24.08 hectares<sup>3</sup>. The

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<sup>1</sup> Because of the delay in processing the permit application, we considered it appropriate to require notice of the application for review to be given to make sure that potentially affected person who may have moved into the area, like Mr Griffin, were given the opportunity to object and be party to the hearing if they wished.

<sup>2</sup> The permit application was referred to Goulburn-Murray Water [GMW], which the council thought was the relevant Water Supply Authority [WSA] at the time. This was a mistake as GMW is not the relevant WSA. GMW did not object to the proposal. After the council made its decision, the council forwarded the proposal to the correct WSA, Western Water [WW]. WW object to the grant of the permit. Mr Scally did not oppose WW being joined as a party and for it to present its case to the tribunal.

<sup>3</sup> The full details of the lots are set out at page 4 of the council's submission.

irregularity in shape is largely due to the site's abuttal to the Campaspe River which has a meandering alignment.

- 8 All the lots are vacant land and set on mildly sloping terrain. The only development is post and wire fences, a small shed and 2 dams. Reticulated water and sewerage is not available. The lots are largely cleared of vegetation, save for a clump of remnant native trees located toward the northeast corner on Lot C, a smaller clump towards the southeast corner on Lot D and with scattered trees following the river's meandering alignment. The site has been used for grazing purposes. Roadside vegetation is also present along both Ashbourne and Chambers Roads.
- 9 Contextually, the site is set within a "rural" landscape, located within a collection of rural dwellings that comprise the small hamlet known as Ashbourne. Woodend's town centre is located about 7 kilometres away to the northeast. Surrounding lots vary in size from about 7 hectares to 56 hectares and are used for rural as well as rural residential purposes. Grazing appears to be the main rural activity in the area; however, there is also some limited cropping and activity related to the equine industry.
- 10 The site is also located within an area that forms part of the Campaspe River catchment area which is a sub-catchment of the larger Eppalock Water Supply catchment. The latter is known as an open, potable water supply catchment area. The Campaspe River drains into the Campaspe Reservoir which is located downstream from the site. The reservoir supplies the township of Woodend which currently has an estimated population of about 4000. The township is growing with its population expected to rise to about 5200 by 2031<sup>4</sup>.

### **The proposal in more detail**

- 11 The proposal<sup>5</sup>, as amended, involves the construction of a single storey dwelling on each of the 4 lots that comprise the site. The dwellings are designed to have relatively low profiles, with simple hipped and gable roof forms and extensive verandah areas. On site disposal of wastewater is via aerated treatment systems is proposed.
- 12 The details of what is proposed on each lot are as follows.  
Lot A – CA 111L
- 13 This lot is irregular in shape with an overall area of 15.45 hectares and a frontage of about 513 metres to Ashbourne Road. The Campaspe River runs along what could be described as the western and southern boundaries of the lot.

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<sup>4</sup> Figures based on Macedon Ranges Shire Council population projections as set out in Mr Glossop's evidence report based

<sup>5</sup> At the commencement of the hearing, the application was amended by substituting plans circulated by the applicant in March 2007 in accordance with our directions dated 22 February 2007.



- 14 It is proposed to locate a single storey dwelling with an overall floor area of about 234 square metres within an area identified by a 40 metre by 30 metre building envelope. The building envelope is setback 74 metres from Ashbourne Road and 143 metres from the bank of the river. Primary and secondary effluent disposal fields are to be located within a similar sized envelop to the southeast of the dwelling. The effluent field would be at least 165 metres from the river.

Lot B – CA 111L1

- 15 This lot is irregular in shape with an overall area of 16.11 hectares and a frontage of about 453 metres to Ashbourne Road. The Campaspe River runs along what could be described as the southern boundary of the lot.
- 16 It is proposed to locate a single storey dwelling with an overall floor area of about 281 square metres within an area identified by a 40 metre by 30 metre building envelope. The building envelope is setback 58 metres from Ashbourne Road. Primary and secondary effluent disposal fields are to be located within a similar sized envelop to the north of the dwelling. The effluent field would be at least 301 metres from the river.

Lot C – CA 111Q5

- 17 This lot is irregular in shape with an overall area of 16.71 hectares. It is the lot on the corner of Ashbourne and Chambers Road with frontages of about 395 metres and 423 metres respectively. This lot does not have an abuttal with the river.
- 18 It is proposed to locate a single storey dwelling with an overall floor area of about 281 square metres within an area identified by a 40 metre by 30 metre building envelope on a low rising ridgeline traversing the lot. The building envelope is setback 68 metres from Ashbourne Road and 154 metres from Chambers Road. Primary and secondary effluent disposal fields are to be located within a similar sized envelop directly to the south of the dwelling. The effluent field would be about 175 metres from a dam on this lot and over 500 metres from the bank of the river.

Lot D – CA 111P

- 19 This is the largest lot with an area of about 24.08 hectares. It is also irregular in shape with its sole frontage of about 352 metres to the west side of Chambers Road. The Campaspe River runs along what could be described as the west or rear boundary.
- 20 It is proposed to locate a single storey dwelling with an overall floor area of about 234 square metres within an area identified by a 40 metre by 30 metre building envelope on a low rising ridgeline traversing the lot. The building envelope is setback 51 metres from Chambers Road. Primary and secondary effluent disposal fields are to be located within a similar sized envelop to the west or rear of the dwelling. The effluent field would be at least 457 metres from the river.

### Landscaping and tree protection

- 21 The proposal incorporates plans and strategies, as developed by Ms Frank – Mas [a landscape architect called as an expert witness for the Rozens] to facilitate improving the physical and environmental condition of the site.
- 22 In summary, the proposed works include:
- Weed control and revegetation along the river bank and provision for new fencing to prevent stock from entering this area;
  - The provision of fencing around the 2 clumps of remnant trees on lots C and D to prevent access by grazing stock;
  - The provision of new landscaping at various positions to achieve an increase of about 3.7 hectares of site area planted with indigenous vegetation;
  - General weed eradication and control.
- 23 New vehicle access is required to service each lot. It is not envisaged that there would be a need to remove roadside vegetation to achieve this.

### **Planning scheme provisions**

- 24 Under the Macedon Ranges Planning Scheme, the site is zoned “Rural Conservation” with the provisions set out in schedule 1 being applicable. The purpose of the zone is:
- To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
  - To conserve the values specified in the schedule to this zone.
  - To protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values.
  - To protect and enhance natural resources and the biodiversity of the area.
  - To encourage development and use of land which is consistent with sustainable land management and land capability practices, and which takes into account the conservation values and environmental sensitivity of the locality.
  - To provide for agricultural use consistent with the conservation of environmental and landscape values of the area.
  - To conserve and enhance the cultural significance and character of open rural and scenic non urban landscapes.
- 25 Under the zone control, “dwelling” is a section 2 or permit required use provided that there is no more than 1 dwelling on a lot and the requirements of clause 35.06-2 are met with respect to the provision of suitable access, wastewater disposal, the provision of water and electricity. A permit is also

required under the zone control for the construction of buildings and works associated with a Section 2 use.

- 26 Clause 35.06-6 also sets out various matters to be considered. These include planning policy, any regional catchment strategy, the land's capability to accommodate the proposed use and development; environmental impacts and the compatibility of what is proposed with the surrounding area. In addition consideration needs to be given to a range of rural and environmental as well as design and siting issues.
- 27 The decision guidelines also require consideration be given to how the use and/or development conserves the values identified for the land as set out in the schedule. The conservation values of the area covered by schedule 1 to the zone are:

To ensure that the existing forest mosaic is protected and that any development does not compromise native vegetation, but provides for its enhancement.

To ensure that land use within water supply catchments, most particularly proclaimed catchments, will not compromise water quality.

To protect the unique flora, fauna and landscapes that are fundamental to the character and biodiversity of the area from inappropriate land use and development.

To protect the conservation and landscape values of adjoining public land.

To ensure that the character and landscape values of the area are protected.

To achieve sustainable agricultural practice.

- 28 The site is also affected by a number of overlay controls.
- 29 The Environmental Significance Overlay – schedule 4 [EAO4] applies to the site. The provisions of schedule 4 relates to the “Eppalock Proclaimed Catchment”. The statement of environmental significance for this area says:

Lake Eppalock is a major water storage and recreational facility located within the Campaspe River catchment. It is a major source of water for irrigation, stock and domestic and urban water supplies for towns within the municipality.

- 30 The environmental objective to be achieved in this area is:

To ensure the protection and maintenance of water quality and water yield within the Eppalock Water Supply Catchment Area as listed under Section 5 of the Catchment and Land Protection Act 1994.

- 31 A permit is required for buildings and works under this overlay because the proposed dwellings are not to be connected to reticulated sewerage system. Relevant matters to be considered under the decision guidelines in the schedule include:

- The impact of the use and development on the water catchment.
  - The need to protect vegetation and habitat and the role these attributes play in improving and assisting in the maintenance of water quality.
  - The need to retain vegetation which prevents or limits adverse effects on ground water recharge.
- 32 The Vegetation Protection Overlay [VPO] also applies to the site. The provisions set out in schedule 9 which relate to the “Living Forest” applicable. A permit is needed to remove native vegetation. However, it is not proposed that any be removed in this case. Accordingly, no permit is required under this overlay.
- 33 Under the provisions of clause 66.04, an application for the use and development of land that is within 100 metres of the Campaspe River must be referred to the relevant water supply authority, in this case WW.
- 34 There is a raft of planning policies applicable to the consideration of the proposal. The list of policies, in both the State and Local Planning Policy Frameworks, and relevant extracts were set out comprehensively in the submissions presented on behalf of the council as well as the evidence report of Mr John Glossop, a town planning consultant called by WW.
- 35 In coming to our conclusions we have had regard to the full suite of policies that are applicable. However, without reciting them in detail, it is appropriate to say that they fall into 3 broad groups. The first group are those policies directed toward the orderly and proper development of rural land, and in particular, the provision of housing within rural areas. The second group relate to facilitating use and development that brings about environmentally sustainable outcomes in terms of preserving and enhancing natural features such as landscapes, vegetation and water courses. The third group of policies are those directed toward the protection of catchment areas with the aim of ensuring that water quality is not compromised by possible contamination.
- 36 In addition to the policies in the scheme, we were also referred to the *Interim Guideline for planning permit applications in open, potable water supply catchment areas*<sup>6</sup> (the Interim Guidelines).
- 37 We will refer to the applicable policies and guideline as appropriate later in these reasons.

### **Consideration of the issues**

- 38 After having considered the submissions, evidence, relevant matters under the planning scheme and legislation against the details of the proposal and visited the site area, it is clear that the 2 key issues are:

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<sup>6</sup> Department of Infrastructure August 2000.

- Does the use and development of the site for dwellings accord with orderly and proper planning having regard to the purpose of the zone and the planning scheme's policies?
- Would the proposed use and development result in an unacceptable risk to water quality?

39 In dealing with these issues we recognise that there is some overlap between them, particularly with respect to reaching a conclusion as to the whether the risks of environmental impacts are acceptable. However, given the extensive time and effort devoted to the water quality issue, we propose to deal with it as a separate matter.

Does the use and development of the site for dwellings accord with orderly and proper planning having regard to the purpose of the zone and the planning scheme's policies?

40 The context of the site is rural. The site has been used for a rural purpose, that is, the grazing of stock. To that extent, it can be said that the site comprises rural land that has been used for a form of agricultural use.

41 In principle, the planning scheme's policies provide strong support for the protection of productive agricultural land. In this regard, the objective at clause 17.05-1 of the scheme is:

To ensure that the State's agricultural base is protected from the unplanned loss of productive agricultural land due to permanent changes of land use and to enable protection of productive farmland which is of strategic significance in the local or regional context.

42 The need to protect agricultural land is also acknowledged in the council's MSS. At clause 21.03, the MSS states:

Agricultural land in the shire is an economically viable resource that needs to be protected. Agriculture as a land use also is an important component of the character of the shire and is a fundamental component of the shire's unique and valued landscapes. In the past, rural residential type of subdivision at inappropriate locations has taken land out of agricultural production.

43 In this case, the 4 lots create a site with an overall area of 72 hectares. It is not a small landholding; however, it is also clear from the evidence of Mr Phillips<sup>7</sup>, that it is not large enough to be an economically viable farm in its own right. Mr Phillips agreed that at best, the whole of the site would need to be improved to serve as a useful "adjunct" to a viable agricultural venture.

44 However, even though a particular site is not large enough to be viable for agriculture in its own right, this does not mean that it is not valuable or

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<sup>7</sup> Mr Phillips was called as an expert agricultural land use witness by WW.

productive land. In this regard we note the comments of Senior Member Byard in Parkworth Pty Ltd and Keska Management Pty Ltd v Casey CC<sup>8</sup>:

There are some old and fallacious “chestnuts” frequently trotted out in relation to the discussion of such issues. One of the oldest of such fallacies is to say that a piece of farming land has to be a sustainable and viable farming unit, standing on its own and alone from other land, before it can be considered as useful farming land worth preserving from the harmful effects of the proliferation of rural houses and the fragmentation of farming land into small pieces.....

However, the sleight of hand involved is to suggest that all of the viable farm undertakings has to be in one piece. Many viable farming undertakings involve more than one piece of farmland, not necessarily contiguous one with another. If this allotment is not a viable farm standing alone, it does not follow that it is not a useful and valuable piece of farming land capable of being a useful and valuable adjunct to a farming undertaking on other land.

- 45 In principle we agree with these views.
- 46 The gradual incremental creep of rural residential development into rural areas is a threat to the continued availability and usefulness of productive agricultural land. This is a problem for two reasons. First, the progressive conversion of productive land for “lifestyle” purposes eats away at the agricultural land base. Second, land use conflict can be created when rural lifestyle properties, commonly referred to as hobby farms, are interspersed with genuine farming properties. The potential for these conflicts mainly arises from the potential for activities associated with farming interfering with the “residential” amenity that lifestyle property residents are seeking and the lack of proper farmland management practices that are not uncommon amongst hobby farmers.
- 47 A further factor to take into account in this case is the purpose of the zone and the conservation values set out in the schedule. On reviewing these, it seems fairly clear that they do not encourage or support the use of land for rural residential purposes in any specific way. Rather the purpose of the zone is clearly geared toward the conservation and enhancement of the natural and environmental values of the area, which include the landscape and water quality.
- 48 All of the above would suggest that, in principle, the use and development of these sites for what will essentially be rural lifestyle properties is not appropriate. However, like all cases, it is necessary to examine the specific circumstances at hand to arrive at what is an acceptable outcome under the planning scheme. It is appropriate that this be undertaken. The provisions of the scheme do not prohibit the use and development of these properties as proposed. Discretion exists for a permit to be granted and this necessitates the examination of the specific circumstances at hand.

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<sup>8</sup> [2002] VCAT 1594

- 49 Although the purpose of the zone does not specifically contemplate residential use, it is also fair to say that support for agricultural use is somewhat “qualified”. As an activity, agriculture is supported by the purpose of the zone; however, such use needs to be “*consistent with the conservation of environmental and landscape values of the area*”.<sup>9</sup> In this regard it is relevant to note the guidance given by the VPP Practice Note issued by the DSE in March 2007<sup>10</sup> that says with respect to the Rural Conservation Zone that “.....*All uses are subordinate to the environmental values of the land*”. On reviewing the provisions for the zone, it can be reasonably concluded that the emphasis is on the conservation and protection of the environmental values. Agriculture as an activity can be allowed, but based on the purpose of the zone and the explanation given in the practice note, it can be concluded that the zone provisions are principally directed toward the conservation and enhancement of environmental values which would include the vegetation, the landscape and water quality.
- 50 In this case, we consider it relevant to note that the council and WW do not hold the position that there should be no residential use and development on the site. At the very least, it seems to us that both these authorities would be content to allow at least 1 dwelling on the site. Indeed, in his report Mr Glossop went as far as suggesting that up to 2 dwellings might be acceptable. These views were held despite submissions put forward that the use and development of additional dwellings would not be appropriate.
- 51 We acknowledge that the construction of 1 or 2 dwellings would constitute a less intense use and development of the site compared to what is proposed. However, we think that the reality of the situation is that even if 1 dwelling is developed on the “site”, this would effectively give the property over to a form of rural residential use, albeit on a parcel of land that is probably larger than surrounding lifestyle properties.
- 52 We have come to this view for a number of reasons.
- 53 First, the site is too small to be viable as a farm in its own right. The construction of a dwelling on it would reduce the chances of it being affordable as farm land.
- 54 Second, a dwelling is unlikely to be essential for any rural use that land of this size and quality can be put to.
- 55 Third, with the construction of just one dwelling, a 72 hectare site can still appeal to people seeking a rural lifestyle opportunity in proximity to Melbourne.
- 56 Fourth, Mr Phillips evidence supports the view that the land requires significant improvement for it to be viable for grazing associated with a larger farming venture. The works include the removal and regrowth

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<sup>9</sup> Clause 35.06.

<sup>10</sup> Dept of Sustainability and Environment VPP Practice Note [March 2007] “Applying the rural zones”

control of woody weeds such as gorse and blackberry; control of other weeds and pests; the establishment (and maintenance) of perennial pastures that can support grazing; establishment of a permanent water supply; as well as modifications to the layout of fences to protect vegetated areas on the site. These are considerable and costly works when considered in the context of what is a small parcel of rural land.

- 57 The council and the witnesses for WW criticise the proposal on the basis that it lead to the site being given over to rural lifestyle use. We conclude that this would be so even if 1 or 2 dwellings are developed. The construction of 2 dwellings would not change this nor would it with the 4 dwellings proposed in this case.
- 58 Further, the construction of dwellings on sites in this location is not totally at odds with policy and the purpose of the zone. Indeed there is some policy support for this type of use and development found in the MSS.
- 59 Clause 21.07-2 deals with the protection of the Environment and Landscape within the shire which includes areas of national and state significance. Under the “Rural land Use Strategy Plan” the shire is divided into 3 areas: the Agricultural Landscapes; Environmental Living; and Rural Living Areas. Importantly, broad acre farming is the “vision” for the “Agricultural Landscapes” because of the high quality of the soils, large productive properties and important rural landscapes.
- 60 The site is not located the “Agricultural Landscapes” area. It is centrally located within the “Environmental Living” area the vision for which is to achieve “environmental enhancement”. “*Limited development*” is supported, “.....*subject to positive environmental outcomes.*”<sup>11</sup> Further, it is relevant to note that the MSS states:

Moreover, it is considered that the development of an “environmental lifestyle” market is central to asserting the significance of natural resource management and ensuring ongoing investment capacity in environmental benefits.

.....

Construction of dwellings will be permitted in these areas subject to it not compromising the vision for the area. Dwelling development, in fact, will be used as a tool to achieve these environmental goals for the area. The vision for the southern catchments area is protection of water quality. Dwelling development will be permitted on some properties subject to meeting requirements imposed to protect the integrity of the catchment.

- 61 In our view, the above statement gives some legitimacy to the response presented by the applicants in this case.
- 62 The proposal has been put forward on the basis that the proposed use and development will achieve an appropriate outcome having regard to the

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<sup>11</sup> Clause 21.07-3.



environmental values of the area within which the land lies. The environmental values generally relate to the landscape, land management and water quality. In this part of our reasons we will deal with the visual or landscape impacts. We will set out our conclusions with respect to water quality under our separate discussion of this second key issue.

- 63 There is no doubt that the land is degraded; whether because of the drought conditions that are currently being experienced and/or the lack of maintenance and management by the current owners. It is likely to be a combination of both. Mr Phillips has acknowledged that the quality of the pasture is poor. There is weed infestation. The river and its riparian zone have not been protected from stock grazing on the land. Neither have the copses of native vegetation.
- 64 The program of works set out in Ms Frank-Mas's plan will deliver environmental benefits. These include weed eradication and control. The existing copses of vegetation, located toward the northeast and southeast corners of the site are to be protected. Additional planting is proposed along the river and on the individual lots. An additional 3.7 hectares of indigenous tree planting is proposed. The river bank is to be protected from grazing stock by new fences. Further, none of the existing vegetation along the road side is to be removed. We accept that these are environmental and landscape benefits to be delivered by this proposal.
- 65 It could be said that the construction of new dwellings will be detrimental to the landscape values of the area. We would make three observations about this.
- 66 First, the design of the proposed dwelling has been refined in the current plans. There was no criticism of them in the submissions and evidence in terms of their design, materials, finishes colours etc.
- 67 Second, local policy discourages dwellings from being located on ridgelines. Although some of the proposed dwellings are to be located on ridgelines, Mr Glossop conceded that the ridgelines are not prominent; the dwellings have a relatively low profile and will not form a silhouette to the horizon. Mr Glossop did not see the siting of the dwellings as a problem in this regard.
- 68 Third, there was criticism of the impact that the proposed dwellings would have on the landscape. It was asserted, particularly by Mr Griffin, that the proposed dwellings would interfere with the outlook from his property and his enjoyment of the rural landscape.
- 69 We accept that the proposed development would be a visible addition to the appearance of the site; however, after having inspected the site and the area, we are unable to conclude that the visual impact would lead to an outcome that is inconsistent with the existing landscape character of the area.
- 70 It was apparent to us that the site is located in area where considerable dwelling development has been allowed both along Ashbourne Road and

the area to the south of the river. Consistent with Ms Frank-Mas' observation, the density of dwellings is much less in the general area north of Ashbourne Road. Mr Glossop's evidence that dwelling densities in the vicinity of the site range from 1:13.6 hectares to 1:24.1 hectares supports the view that what is proposed is not inconsistent with the dwelling density south of Ashbourne Road. Further, on our inspection we were able to observe a number of dwellings within the landscape at any one time. We do not consider that this proposal would bring about an outcome that is inconsistent with what has already been allowed on other properties fronting the south side of Ashbourne Road and the area further south.

- 71 On being developed, the proposed dwellings will be prominent during the early stages of establishment. However, we consider that it is appropriate to require additional landscaping around them to help soften their appearance and better integrate into the landscape. This can be required by permit condition.
- 72 The conclusion we have reached is that the development of 4 dwellings on the site generally as proposed would not be an unacceptable landscape outcome. Although the proposal involves the use and development of the site for 4 dwellings, even if limited to the construction of 1 or 2 dwellings, the land would still be given over to rural lifestyle use. The proposal brings about environmental benefits of the type supported by the zone's purpose and values set out in the schedule. The riparian area will be enhanced and protected as will vegetation on other parts of the site. New vegetation that will make a positive contribution to the landscape is proposed. No vegetation is to be removed. We see these outcomes as being consistent with the purpose of the zone and those aspects of policy relating to the impact on the landscape.
- 73 We do not think that the visual outcome is out of keeping with the landscape character of the area given that it already includes rural residential type development. The impact on the outlook from neighbouring properties is therefore not unreasonable.
- 74 Of course the above conclusions do not complete the whole picture with respect to the environmental impacts of this proposal. There is still the issue of the potential impact on water quality within the catchment. It is to this important issue that we now turn our attention.

Would the proposed use and development result in an unacceptable risk to water quality?

- 75 At clause 35.06-2, it is a requirement that:

The dwelling must be connected to a reticulated sewerage system or if not available, the waste water must be treated and retained on-site in accordance with the State Environment Protection Policy (Waters of Victoria) under the Environment Protection Act 1970.

- 76 WW's grounds for objection to the development set out in correspondence of 27 April 2007 make reference to the following specific matters of water quality:

The land is within the proclaimed catchment of the Campaspe Reservoir, which supplies drinking water to the Woodend township.

The proposed development provides for onsite wastewater treatment plants.

Onsite wastewater treatment plants pose a risk to water quality.

The greater the density of dwellings (and associated wastewater treatment plants) the greater risk to drinking water quality.

The dwelling density within the catchment already exceeds the benchmark of 1 dwelling per 40 hectares. Western Water opposes the further increase in dwelling density within the catchment of the Campaspe Reservoir.

The proposal is contrary to the policies and procedures of the Macedon Ranges Planning Scheme which specifically provide for the protection of proclaimed catchments.

- 77 Dr O'Connor's evidence further elaborates on WW's objections to the granting of a permit:

Due to the proximity of the proposed on-site systems and their disposal fields to the [Campaspe] river, Western Water believes that the risk of contamination of the river is significant. Western Water accepts that the physical characteristics of each lot in the subdivision, renders them reasonably capable of treating and retaining all wastewater on site, however, Western Water considers that there is a direct link between increased dwelling density and a reduction in water quality. Specifically, risks to water quality posed by septic tanks and on site system such as poor maintenance, design, installation, operator error or plant malfunction are increased with an increase in dwelling density.<sup>12</sup>

- 78 Dr O'Connor provides a substantial amount of information and discussion on the need to protect water quality, particularly with respect to human pathogens. The essence of his evidence is that:

- The Australian Drinking Water Guidelines<sup>13</sup> (ADWG) set out a holistic approach to water quality management that includes providing multiple barriers to risks to water quality. WW has adopted this approach to manage water supply quality. There is a reliance on the management of catchment land uses as part of this multi-barrier management approach.

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<sup>12</sup> Page 4 of Dr O'Connor's statement of evidence dated February 2007.

<sup>13</sup> National Health and Medical Research Council and Natural Resource Management Ministerial Council, 2004.

- Management of the land uses includes a reliance on an acceptable level of dwelling densities (and hence septic tank systems) as part of this multi-barrier management approach. WW relies on guideline 1 of the *Interim Guidelines for Planning Permit Applications in Open Potable Water Supply Catchment Areas, August 2000* (the Interim Guidelines) which recommend a density of one dwelling per 40 hectares of land, as part of the multi-barrier approach in this water supply catchment.
- The proposed dwellings will increase the density of dwellings beyond the current density of 1:15-1:30<sup>14</sup> and well above the 1:40ha density. The increase in dwelling density increases the risk to water quality.
- The risk presented by dwellings within this (or any other) catchment is further exacerbated by *poor maintenance, design, installation, operator error or plant malfunction* of septic tanks systems.
- It is accepted that under dry weather / baseline runoff conditions the risk of impact to the Campaspe River is acceptable. It is the extreme events (of rainfall and runoff generation) that present an unacceptably high risk.

79 It is Dr O'Connor's evidence that an increase of dwelling density over the preferred 1:40 hectare density as a result of this development "...*could increase the risk of contamination of water draining to the reservoir*".<sup>15</sup> Accordingly Dr O'Connor expressed the view that the risk is unacceptable and inconsistent with the precautionary principle. He suggests that *the precautionary principle dictates that protection of the water supply should take precedence over non-beneficial uses*.<sup>16</sup>

80 In turn Mr Scally submits that:

... the primary focus...is and should rightfully be, to achieve best practice outcome for the water quality of the [L]ake Eppalock catchment. How then is this best to be achieved?

81 In response Mr Scally goes on to consider that WW will accept 2 dwellings but not 4, which will still result in a dwelling density over the preferred 1:40 hectare density. He submits that WW does so despite accepting the evidence of the land capability assessments (LCA's) and satisfactory nature of the proposed septic tank systems. The reluctance for 4 dwellings is based, in Mr Scally's submission, on the conservative application of the precautionary principle to the Interim Guidelines.

82 Conversely Ms Maglitto, argues that

..although the subject land may accommodate onsite effluent disposal, it does not necessarily follow that on-site wastewater treatment is appropriate in the circumstances (specifically in the context of the

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<sup>14</sup> Presented in Mr Glossop's evidence.

<sup>15</sup> Page 32 of Dr O'Connor's written expert evidence dated February 2007.

<sup>16</sup> Ibid at page 21.

water supply catchment). There are broader issues relating to water quality and health risk that need to be considered.

83 Ms Maglitto relies on the expert evidence of Dr O'Connor that:

The need to control the density of unsewered developments arise from the fact that the cumulative risks of many systems in close proximity to water supply streams increases the likelihood that a failure could occur in the area simply because there are more systems that could potentially fail<sup>17</sup>.

84 It is common ground that the LCA undertaken by Mr Williams is not under dispute. WW and Council accept that it is possible to locate the wastewater treatment and disposal systems more than 100m from the waterway<sup>18</sup> and that under normal operating conditions, the septic tank systems are appropriate; and the land available for disposal of the treated wastewater is sufficient.

85 What is disputed between the parties is the degree of risk that the addition of 4 septic tank systems present to the water quality of the catchment and the potable water supplies reliant on this water.

#### Statutory and Policy Considerations

86 The regulation of septic tanks systems<sup>19</sup> falls within the ambit of the *Environment Protection Act 1970* (the *EP Act*). The *EP Act* set out that:

The municipal council may refuse to issue a permit if the municipal council considers that—

- (a) the site of the proposed septic tank system is unsuitable; or
- (b) the area available for the treatment or disposal of the effluent is not sufficient.<sup>20</sup>

In addition:

The municipal council must refuse to issue a permit if the proposed septic tank system—

...

(b) is contrary to any State environment protection policy or waste management policy;<sup>21</sup> ....

87 The State Environment Protection Policy (Waters of Victoria) – (the Water SEPP) - is relevant and sets out policy for the management of on-site

<sup>17</sup> Page 31 of Dr O'Connor's written evidence.

<sup>18</sup> The amended applications indicate the septic tank disposal fields to be located variously from 165m to 550m from the Campaspe River, in excess of 100m from farm dams and from swales / depression lines.

<sup>19</sup> A septic tank system is defined in the *EP Act* to be a system for the bacterial, biological, chemical or physical treatment of sewage, and includes all tanks, beds, sewers, drains, pipes, fittings, appliances and land used in connection with the system. It is an all encompassing definition and we use it here in preference to the term on-site wastewater treatment plant/system.

<sup>20</sup> Section 53M of the *EP Act*.

<sup>21</sup> Ibid.

domestic wastewater. The Water SEPP requires that *[o]n-site domestic wastewater needs to be managed to prevent the transport of nutrients, pathogens and other pollutants to surface waters and to prevent any impacts on groundwater beneficial uses*<sup>22</sup>. This requirement is further expressed in the Water SEPP to mean that wastewater must not be discharged beyond the allotment boundary<sup>23</sup>. The Water SEPP requires owners to manage septic tank systems in accordance with the Septic Tank Code of Practice<sup>24</sup> (the Code of Practice). Councils are obliged under the Water SEPP (and the *EP Act*) to ensure such compliance.

88 The Code of Practice is:

...intended to ensure that onsite wastewater treatment systems, used to treat domestic wastewater in areas not served by a centralised sewerage system, protect public health and the environment now and into the future.

.....

The code describes measures to ensure onsite wastewater treatment [sic] systems sustainably manage wastewater, while minimising health and environmental risks. In order to achieve this, the code sets out requirements for:

- integrating consideration of onsite wastewater management with the land development process;
- designing onsite wastewater treatment systems;
- installing onsite wastewater treatment systems; and
- operating and maintaining onsite wastewater systems.<sup>25</sup>

.....

The code adopts a whole of life-cycle approach.<sup>26</sup>

89 Addressing the matters raised in respect to responsible operation of the wastewater treatment systems, the Code of Practice sets out that:

Persons operating onsite wastewater treatment systems have responsibilities under the Environment Protection Act 1970. Typically, this will be the property owner.

....

The key obligation of a person responsible for an onsite system is to address and comply with the septic tank permit, and the Certificate of Approval requirements. A person who fails to comply with permit conditions could be subject to enforcement action.

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<sup>22</sup> Clause 32 of the *State environmental protection policy (Waters of Victoria)*.

<sup>23</sup> Section 32(2) (i) of the *State environmental protection policy (Waters of Victoria)*.

<sup>24</sup> EPA Publication 891 *Septic Tank Code of Practice*. Environment Protection Authority, March 2003.

<sup>25</sup> Section 1.1 Purpose of the Code, page 1.

<sup>26</sup> Section 1.2 Scope, page 2

These responsibilities may include monitoring of discharge quality from the system, and the routine re-assessment of reuse areas, to ensure they continue to operate efficiently and effectively.<sup>27</sup>

- 90 With respect to the philosophy of on-site wastewater management, the Code of Practice sets out that:

On-site effluent disposal is based upon a risk minimisation approach. Under favourable circumstances and with proper management, land application of effluent can be sustainable. Most problems associated with effluent application are due to malfunctions or breakdowns of the processing plant, or from inadequate initial planning and on-going maintenance of a proper land application area.<sup>28</sup>

- 91 The Code of Practice in part relies on the use of set back buffer distances:

Even with every effort there are circumstances where wastewater has the potential to pollute. The consequences and impact of such pollution will depend upon the particular situation and the beneficial use affected.

The setbacks listed [in the Code of Practice] are default minimum values for separation buffer distances between the wastewater disposal field (where treated effluent is applied) and other specific sites and sensitive features. The buffer distances are independent of other setbacks that may apply to the development.

The objective of a setback distance is to protect human health and the beneficial uses of the environment by setting adequate control separation distances between land receiving effluent and sensitive features and sites. These setbacks assume there is no short-circuiting of water within this setback.<sup>29</sup> [Tribunal's emphasis]

- 92 The Code of Practice contemplates increases in buffer distances “.....when there are particularly high risks associated with a development.”<sup>30</sup>

- 93 Consistent with a whole of program management approach the Code of Practice sets out that:

The management program describes the actions that can be carried out to address the development site's intrinsic land limitations. Although a proponent may develop a program in good faith, the council must judge the feasibility of the program, that is, it should be practicable.

Ongoing maintenance and monitoring should be integral parts of the program. The council will have to assess whether current and future owners of the onsite wastewater systems could implement the program.<sup>31</sup> Some owners may be quite skilled in carrying out specific management programs that may be beyond the capacity of others. In

<sup>27</sup> Section.3.5 People Operating Onsite Wastewater Systems at page 12.

<sup>28</sup> Section.4.4.3, at page20.

<sup>29</sup> Section 4.9 Setback distances.

<sup>30</sup> Ibid.

<sup>31</sup> Tribunal's emphasis

some instances a S173 Agreement... may have to be set in place so that future owners are made aware of their obligations.<sup>32</sup>

- 94 The Code of Practice recognises that septic tank systems not only require correct location with respect to land capability requirements, but be correctly operated. These two requirements are the first tier in the risk management process. The adoption of set back buffer distances forms a second tier of risk management in the event of breakdown in the first tier.
- 95 The Interim Guidelines set out five guidelines in assessing planning permit applications for use and development in open potable water supply catchments<sup>33</sup>. Amongst other matters, the guidelines recommend a dwelling density of no greater than one dwelling per 40 hectare<sup>34</sup>. The guidelines also require consideration of the land capability assessment of the site and its ability to meet the requirements of the [Septic Tank] Code of Practice.
- 96 Departure from the recommended dwelling density can be applied where:
- a catchment management plan or similar project addressing land use planning issues has been prepared for the catchment, and the objectives, strategies and requirements of the plan or project have been included in the planning scheme; and
  - a land capability assessment for the on-site management of domestic wastewater has been completed which shows that a greater or lesser minimum subdivision area and density of development is appropriate.<sup>35</sup>
- 97 The Interim Guidelines go on to refer to the land capability assessment being undertaken in accordance with the requirements of 1996 Code of Practice (since amended in March 2003 and now incorporating the land capability assessment procedures set out in EPA Publication 746.1, March 2003).
- 98 The guidelines also require issue of permits for the septic tank systems and adherence to maintenance programs. Setback distances (drawn from the Code of Practice) are also adopted for the location of septic tank systems.
- 99 Various water authorities have relied upon the guideline of a 1:40ha dwellings density in a number of previous hearings. In *LW Properties v Moorabool SC*<sup>36</sup> Senior Member Marsden and Member Taranto reflected on the fact that:

...CHW [Central Highlands Water] had adopted a benchmark dwelling density of 1:40 hectares in drinking-water catchments, a benchmark supported in previous Tribunal decisions. If the four dwellings were permitted, a dwelling density of 1:26 (ha) would

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<sup>32</sup> Section 5.5 Management Program Development.

<sup>33</sup> Potable water supply catchments declared as special water supply catchment areas under Division 2 of Part 4 of the *Catchment and Land Protection Act* 1994.

<sup>34</sup> A minimum lot size of 40 ha is also to be adopted for subdivision applications.

<sup>35</sup> Refer Guideline 1 at page 2 of the guidelines.

<sup>36</sup> [2005] VCAT 2806



result, an outcome Mr Glossop described as ‘particularly incongruous’.

In a far ranging submission, Mr Glossop pointed to the heavy public cost involved in treating water emanating from open catchments, emphasising the need to adopt a cautionary approach to the potential health hazards that may result if potable water became contaminated.<sup>37</sup>

100 This is similar to the case put by WW and Dr O’Connor. Further similarity can be found with this matter in that:

... it is noteworthy that Mr Glossop did not challenge the land capability assessments or the proposition that, individually, each allotment was capable of having its effluent treated and contained within the curtilage of the property<sup>38</sup>.

101 This Tribunal then went on to state:

All parties tabled and relied upon previous decisions of the Tribunal. ....Insofar as the[se] cases relate to general planning principles, we agree with the following propositions:

- it is appropriate to apply a cautionary approach when considering development applications within proclaimed water catchments; ...<sup>39</sup>

102 In its reasons however, the Tribunal concluded that:

... the density control upon which CHW relies is something of a blunt instrument, a guideline which is indicative rather than regulatory. We accept the land capability evidence provided by the permit applicant and the proposition that each lot individually can treat and contain its own effluent. We are however concerned as to the cumulative impact of four dwellings and the dramatic increase that would result (75%) in the density recommendations contained in the document ‘Water Catchment Protection Policy’ (8 July 2003).

While we have some concern regarding the ‘density’ question we would not, having regard to the history of this matter, be prepared to refuse these applications purely on the basis of the water quality issues.<sup>40</sup>

103 We not only agree with this latter comment of Members Marsden and Taranto we re-affirm the view that the 1:40 ha density guideline is a *blunt instrument*. It is evident that the guideline is no more than that, as it holds no statutory import<sup>41</sup>. However, we do not dismiss the Interim Guideline. The weight we give to it is that ‘guideline 1’ provides a trigger that requires

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<sup>37</sup> Ibid at [17] and [18]

<sup>38</sup> Ibid at [23].

<sup>39</sup> Ibid at [27].

<sup>40</sup> Ibid at [35-36].

<sup>41</sup> The Interim Guideline is not a reference document in the Macedon Ranges Planning Scheme or other relevant acts or statutes.

water quality issues to be examined more critically where the proposal results in a density of more than one dwelling per 40 hectares<sup>42</sup>.

- 104 In triggering the need to more carefully consider the potential water quality impacts the guideline allows for consideration of what other policy and strategies are in place to protect water quality and the ability for a development to demonstrate that a greater density of dwellings can be accommodated<sup>43</sup>.
- 105 Local policy at Clause 22.03 refers to a number of catchment plans and strategies that are targeted at management of the catchment and specifically address water quality<sup>44</sup>. This policy has objectives to:
- To protect and enhance water quality, both surface and ground water.
  - To discourage land use and development that would undermine water quality.
  - To improve catchment management practices in the Shire, especially the management of proclaimed catchments and areas with Land Use Determinations.
  - To apply the regional catchment strategy as adopted by the relevant regional Catchment Management Authority.
  - To ensure that development which cannot be serviced by a reticulated sewerage system is designed, sited, maintained and managed to prevent the contamination of water supplies in the catchment.
  - To ensure that the design of effluent disposal systems is suitable to the soil type and topography of the site.
  - To encourage the re-vegetation of catchments and protect watercourses from degradation and erosion.
  - To actively discourage land use and development that will undermine water quality in the potable water catchment will not be supported and will be actively discouraged.
- 106 Similar water quality protection objectives are also to be found at Clause 22.19 (Northern Catchments).
- 107 In both clauses, policy relies on the assessment of the land's capacity to provide for containment of wastewater within the site, i.e. a land capability

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<sup>42</sup> We consider the failure to explain how a 1:40 ha density should be determined to be a flaw in these guidelines. While Mr Glossop and others have adopted a 1km radius around the location of a dwelling<sup>42</sup>, we note that such an approach could easily include a dwelling up to a 1,000m from a waterway. We find that such an approach seems to be at odds with the Code of Practice, which highlights that a buffer distance of 100m is appropriate for potable water supply waterways. To extend the density calculation beyond this buffer seems to capture dwellings that, by import of the Code of Practice, are not considered to be presenting a risk.

<sup>43</sup> Refer to Guideline 1 of the Interim Guidelines.

<sup>44</sup> North Central Regional Catchment Strategy, North Central Catchment & Land Protection Board, 1997. Regional Catchment Strategies for the Port Phillip & Western Port Region, Port Phillip Regional Catchment & Land Protection Board, 1997. Septic Tank Code of Practice, Environment Protection Authority, 1996. Campaspe Water Quality Strategy, Campaspe Water Quality Committee, 1997. Western Water Catchment Policy, Macedon Regional Water Authority, 1994.

assessment, consistent with the Code of Practice and the Water SEPP. It is useful at this juncture to consider the definition of a land capability assessment as set out under the Macedon Ranges planning scheme. It is:

The assessment of the physical ability of the land to sustain specific uses having regard to its management, and without long term on-site detriment to the environment.<sup>45</sup> [Tribunal emphasis]

- 108 It follows that a land capability assessment is a beast of two parts. One part is to consider the physical capability of the land to sustain a use. The second is to have regard to the management of the use. These two parts then form a consideration of the capacity to undertake a use without *long term on-site detriment to the environment*.
- 109 Land capability assessments have been undertaken for each dwelling that demonstrate an ability for septic tank systems to be accommodated on the site in accordance with the Code of Practice (the latter also being referenced in policy at Clauses 22.03 and 22.19). These assessments were not challenged by the Council or WW. The assessments conclude that there is sufficient area available to accommodate the Code of Practice recommended buffer distances from the Campaspe River, other water bodies and swales. The assessments recommend the use of aerated wastewater treatment systems to improve the quality of wastewater being discharged to the effluent fields as an added precaution. Management of the effluent disposal fields (including sub-surface and surface diversion of runoff and perched groundwater) are recommended.
- 110 Having regard to the policy requirements as set out in Clauses 22.03 and 22.19, we find that the land capability assessments satisfactorily address the issues of locating these septic tank systems in a potable water supply catchment.
- 111 The land capability assessments demonstrate a capacity to meet the Code of Practice requirements. When considered in conjunction with the articulation of local policy relevant to water quality derived from catchment wide strategies, it follows that the conditional requirements set out in the Interim Guidelines to allow for an increase in dwelling density above the 1:40ha guideline have, in our opinion, been satisfactorily addressed. We therefore dismiss the conservative application of the 1:40ha density by WW and are satisfied that the land is capable, under appropriate management, to contain domestic wastewater such that the risk presented to human health and the environment is not so high as to warrant refusal of the proposal.
- 112 Importantly it is also our view that while guideline 1 of the Interim Guidelines has been satisfied, the land capability assessments demonstrate the ability to contain wastewater within the subject land in a practical and workable manner. When having regard to local and state policy, it is our

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<sup>45</sup> Clause 72.

view that this carries the greater weight over a steadfast adherence to the 1:40ha dwelling density.

#### The risk of poor design and management

113 The second thread of Dr O'Connor's evidence is that WW cannot rely on the design and management of the septic tank systems. He cites the research of the Cooperative Centre for Water Quality and Treatment<sup>46</sup> in supporting his contention that septic tanks systems are often poorly managed and present human health risks due to high pathogen levels in discharges that enter waterways.

114 We are concerned that in considering the risk of septic tanks systems, apples are being compared to pears. Much of the data cited by Dr O'Connor refers to septic tank-soil adsorption systems (SAS), which many may recognise as the older style system of primary treatment to remove/digest solids and dispersal of untreated fluid into the ground. The aerated wastewater treatment systems that are proposed in this application add a higher degree of treatment, reducing biological and solid loads as well as providing for some reduction in pathogens. This is commonly referred to as the 20/30 standard, meeting the target concentrations of 20 mg/L of Biological Oxygen Demand, 30 mg/L Suspended Solids and 10 mg/L<sup>47</sup> as required by the EPA when certifying the systems for use in Victoria.

115 We give weight to the improved quality of discharged water from the proposal to use aerated wastewater treatment systems on this site as opposed to the conventional SAS systems. All septic tank systems to be used in Victoria have to satisfy the EPA that the 20/30 water qualities standard can be achieved via a certification process<sup>48</sup>. Specifically we note that in certifying systems for use in Victoria:

EPA's role is to examine how effectively a proposed system would treat and dispose of or reuse wastewater, and determine whether it would protect public health and the environment. EPA approves systems that are capable of providing a high level of protection – it issues 'Certificates of Approval' for these systems<sup>49</sup>. [Tribunal's emphasis]

116 The certification process also takes account of what ongoing management inputs are required by the landowner.<sup>50</sup>

117 While WW points to a failure of management of these systems, we say that those who seek to reside in rural areas must accept as part of their choice of lifestyle that they take on a responsibility to manage these systems. This is in the same vein as those who chose to live in a rural environment must also

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<sup>46</sup> Refer to section 7.3) pages 23 to 27) of Dr O'Connor's expert statement.

<sup>47</sup> A higher standard for surface irrigated wastewater requires that in addition to the above standard faecal coliform as measured by *E Coli* must not be greater than 10 org/100ml.

<sup>48</sup> The certification process is set out in EPA Publications 748 undated.

<sup>49</sup> EPA Publications 748 undated.

<sup>50</sup> Ibid.

accept the demands of managing their own water supply (typically rainwater runoff) and accepting unusual amenity impacts (e.g. animal odours, farm machinery noise and the like).

- 118 Regulatory enforcement is available to back up management requirements.
- 119 We find that a reliance on the premise that an owner may not manage the systems appropriately is not a valid basis for refusing a permit. This is particularly so when no evidence has been provided to back up the assertion. The conditions of the permit set out the requirements to be met. It is reasonable to expect compliance just as it is reasonable for us to expect that the council and WW will also carry out their respective inspection and enforcement functions.

#### Consideration of the precautionary principle and the level of risk

- 120 Mr Scally submitted that the link drawn by Dr O'Connor and WW between the potential risk and the precautionary principle is not the correct approach.
- 121 In support of his contention, Mr Scally relies on the consideration of the precautionary principle in *De Brett Investments Pty Ltd & Another v Australian Fisheries Management Authority & another*<sup>51</sup> (*De Brett Investments*). In *De Brett Investments* the Administrative Appeals Tribunal<sup>52</sup> (the AAT) considered the application of the precautionary principle as set out in the Intergovernmental Agreement on the Environment as entered into by the Commonwealth of Australia, the State and Territories in May 1992, which states:

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- (ii) an assessment of the risk-weighted consequences of various options.

- 122 The AAT considered a wide range of cases that had previously considered the application of the precautionary principle.
- 123 The wording of the precautionary principle in the *Environment Protection Act 1970* and Water SEPP is slightly different but nevertheless conveys the same principle.
- 124 Mr Scally relies on the assessment of this principle by the AAT to assert that the precautionary principle:

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<sup>51</sup> [2004] AATA 704.

<sup>52</sup> Comprising Deputy President Forgie and Member McLean.

....is not concerned with 'bare possibilities' of serious or irreversible environmental damage....; nor is...[it]. required to prove the complete absence of any likely future environmental harm ..... These cases and many others establish that where the precautionary principle is applied, it is not necessary .... to prove with scientific certainty the absence of any possibility of serious environmental harm in the future.

125 Mr Scally contends that Dr O'Connor's evidence is that *he fears* that the cumulative risks of many systems in proximity to water supply streams will increase the risk of a system failing and therefore impact surface water and the drinking supply quality. He submits that this fear does not translate to there being a risk of serious or irreversible damage to the environment.

126 We agree with Mr Scally for the following reasons.

127 Having regard to the matters considered by the AAT and the manner by which the precautionary principle is espoused in the relevant statutes, we consider that the proper application of the precautionary principle requires proportionate addressing of identified risks even if those risks are not fully defined. The principle addresses risks that are of a *serious or irreversible environmental damage*. This is an important point and implies that the risk of environmental damage is to be so severe as to impose some long term liability to future generations (i.e. it draws in the principle of intergenerational equity).

128 It is apparent to us that the evidence of Dr O'Connor is about the balance of probabilities of a number of factors coming together to cause an impact but from his evidence, one that is not an irreversible environmental impact or long term liability with no immediately available recourse or redress. What Dr O'Connor speaks of is the possibility of an event that requires a higher level of management input by the water authority and may result in some public health issues over the short term. This is not to discount the seriousness of an outbreak of some contagious disease. Rather in the event of specific septic tanks being the culprit of poor water quality, we envisage that immediate and readily applicable processes can be set in place to address the situation. Water will be treated, drinking water may have to be boiled, systems will be flushed and people will receive medical attention. The consequence of such an event is not however, one of *irreversible environmental damage* in the context of the precautionary principle.

129 To support his contention Dr O'Connor suggests that the additional impost of cost and management input required because of increasing numbers of septic tank system in open catchments demonstrates the inequity of, and therefore seriousness of the matter. The underlying tenant is that by not allowing the septic tank systems, this inequity will not arise.

130 We accept the position of WW, that in having to cope with water derived from open water supply catchments, the reduction or other management of risks from within the catchment is one of many actions that can be

undertaken in the delivery acceptable water quality.<sup>53</sup> Nevertheless, it is a fact that open water catchments present a challenge that demands a range of management / treatment activities in addition to the management of land use within the catchment. It is clear to us that even if residential dwellings were not present at densities greater than 1:40ha, the presence of roads, farming activities, other human activities (even sewerred urban areas) also present risks to water quality.<sup>54</sup>

131 However we do not accept the implication that septic tank systems are the sole culprit driving water treatment regimes undertaken by the likes of WW. Some form water treatment (and its inherent cost) will always form part of the overall management regime of potable water supply. Indeed, drinking water for Melbourne (widely held to have a naturally high quality due to its system of closed catchments) is subject to disinfection and other treatments.<sup>55</sup> Within the risk management regime available to water supply authorities, water quality testing and treatment will always be required in an open catchment.

132 We do not think that it was Dr O'Connor's intention to lead us to believe that if septic tanks remained at a 1:40ha density within the catchment that no treatment or a lesser degree of vigilance or treatment would be required by WW. Rather, it was his evidence that any increase in risk to water quality results in an unacceptable impost on WW due to an increase in the level of vigilance (and possibly treatment).

133 Given our reasons above, we do not believe that this conclusion stands up to scrutiny against the proper consideration of the precautionary principle. It is not a matter of any risk. It is a matter of the gravity of the risk. Consideration of the proposed septic tank systems against the Code of Practice, Interim Guidelines and other applicable policies indicates that with proper management (e.g. locating disposal fields well above the minimum buffer distances, use of aerated systems that discharge a higher quality of treated wastewater, regular maintenance etc) the risks are minimised to an acceptable level. The possible chain of events that would lead to impacts to water quality from this development as put forward by Dr O'Connor are essentially speculation on his part as to the consequences of extreme events and casual links. We do not accept that this is either a proper consideration of the risks or application of the precautionary principle.

<sup>53</sup> The tiered model of risk management (multiple barriers) is set out in Part I of the Australian Drinking Water Guidelines (National Health and Medical Research Council and the Natural Resource Management Ministerial, 2004).

<sup>54</sup> Refer for example to the Interim Guidelines where it is stated that *[r]esidential development and agriculture particularly have the potential to impact adversely on water quality through the discharge of contaminated run-off and wastes, nutrient contributions or sediment to waterways. Three key sources of these pollutants; septic tank systems, agricultural practices and buildings and works are the focus of this interim guideline.*

<sup>55</sup> *Essential Facts – Our precious drinking water.* Melbourne Water, May 2006.

- 134 We would however wish to add a note of caution here. Our findings must not be read as open slather for increasing densities of dwellings and septic tanks in open water supply catchments. While we have serious reservations as to the *blunt instrument* approach of the interim guidelines of adopting a 1:40 ha density, we acknowledge that there is sufficient weight of evidence within the water industry that at some point, an increase in dwelling density, and more specifically septic tanks systems, can increase the risk of water contamination to an unacceptable level. The question remains as to what this level may be.
- 135 We are of the opinion that there is not a “one size fits all” answer to this question. Each application must be considered on its merit. The practice and science of catchment management and water quality protection is sufficiently understood to be applied judiciously to arrive at a fair, equitable outcome that responds to the *principle of integration of economic, social and environmental considerations* as set out in s.1B of the *EP Act*.<sup>56</sup>
- 136 As a starting point if an application can meet with the requirements of the Septic Tank Code of Practice to contain all wastewater on site such that it cannot be detected beyond the boundary then we consider this to be an appropriate basis for the assessment of risks. Such an assessment requires consideration of the appropriate factors (e.g. physical and chemical soil conditions, capacity for dispersal of wastewater, climatic factors etc) as well as the nature of the system to be used and its capacity to treat water to an appropriate level. A rigorous application of this approach should provide the appropriate levels of safety consistent with the expectations of the precautionary principle.
- 137 Further, we do not consider that the interim guidelines should be read as limiting dwellings to the 1:40ha density. Rather we see that such a guideline is a flag to ensure that water quality issues are examined more critically when dwelling densities will be more than 1:40ha. Such a critical examination should include a rigorous application of the Code of Practice as well as other relevant catchment management policies and guidelines.
- 138 We note that the Interim Guidelines also provide guidance on other land uses considered to address threats to water quality that extend beyond septic tank systems. The guidelines do not prohibit or advise against such land uses (or the use of septic systems) but rather highlight the sensitivity of the open potable water supply catchment and recommend management actions in association with such uses in recognition of this sensitivity.

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<sup>56</sup> These principles are:

- (1) Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.
- (2) This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.
- (3) The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.



- 139 The proposed revegetation, fencing and exclusion of stock from the riparian areas of the Campaspe River are in line with these recommended actions.
- 140 It follows that we find the proposed septic tank systems for wastewater management to be acceptable and do not form a basis for refusal of the permit.

### **Conclusion**

- 141 For the reasons we have set out above, we find that the proposal is acceptable. The use and development of the land for 4 dwellings is supported by those aspects of the purpose of the zone and planning policy that seek to bring about environmental benefits. We are satisfied that the proposal will bring about those benefits. We are also satisfied that the proposal will not present a level of risk to water quality to justify its refusal.
- 142 The council's decision is set aside. A permit is granted. The conditions have been settled having regard to the merits of the matter and the submissions presented by the parties during the hearing.

Mr S. R. Cimino  
**Presiding Member**

Mr Ian Potts  
**Member**