

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2000/2020
PERMIT APPLICATION NO. PLN/2020/291

CATCHWORDS

Section 79 of the *Planning and Environment Act 1987*; Multi-lot residential subdivision; Removal of native vegetation; Low Density Residential Zone; Environmental Significance Overlay – Schedule 4; Macedon Ranges Statement of Planning Policy; Application of strategic framework; Response to local character; Access arrangements; Traffic impacts; Characterisation of watercourse; Waterway; Water feature.

APPLICANT	St Leonards Property Holdings Pty Ltd
RESPONSIBLE AUTHORITY	Macedon Ranges Shire Council
RESPONDENTS	Neil Pharaoh, Ruth Williams, Ian Williams & Others
REFERRAL AUTHORITIES	Coliban Water, Country Fire Authority, Department of Environment, Land, Water & Planning, Downer Utilities Australia Pty Ltd, Goulburn Murray Water, and Powercor Australia Ltd
OTHER AUTHORITIES	North Central Catchment Management Authority, Environment Protection Authority
SUBJECT LAND	85 Harpers Lane KYNETON VIC 3444
HEARING TYPE	Hearing
DATES OF HEARING	15 & 16 June 2021, 19, 20 & 21 July 2021 and 26 & 27 July 2021
DATE OF ORDER	12 January 2022
CITATION	St Leonards Property Holdings Pty Ltd v Macedon Ranges SC [2022] VCAT 26

ORDER

Amend application

1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting the following plans and supporting documents filed with the Tribunal for the permit application plans:

- Proposed Subdivision Plan (25247P2, Version 4) dated April 2021 prepared by Millar Merrigan on a standard and aerial base;

- Ambrosia Kyneton Proposed Design Guidelines provided by St Leonards Property Holdings Pty Ltd on 3 May 2021;
- Design Guideline Mandatory Provisions provided by St Leonards Property Holdings Pty Ltd on 3 May 2021;
- Building & Dwelling Exclusion Zones (25247P6_V2, Sheets 1-3) prepared by Millar Merrigan provided by St Leonards Property Holdings Pty Ltd on 3 May 2021;
- Locality Plan and Typical Cross Sections (25247E 00 C1 and C2, Sheets 1-2) dated 26 April 2021 prepared by Millar Merrigan;
- Reserve, Eastern and Western Interface Cross Sections (25247P3_V4, Sheets 1-3) dated April 2021 prepared by Millar Merrigan;
- Pump Station Reserve Layout Plan (25247E 00 C3, Sheet 3 of 4) dated 26 April 2021 prepared by Millar Merrigan;
- Lot Access Plan (Lots 13 and 14) dated 26 April 2021 prepared by Millar Merrigan;
- Landscape Plans dated 3 May 2021 prepared by Weir & Co, comprising:
 - i Landscape Masterplan (WC202007, Sheet 1, Revision E);
 - ii Reserve Landscape Concept (WC202007, Sheet 2, Revision E);
 - iii Road 6 Landscape Concept (WC202007, Sheet 3, Revision E);
 - iv Landscape Concept Plan – Proposed Sewer Pump Station (WC202007, Sheet 4, Revision A);
- Tree Protection Zone Plans – Lots 3, 12 and 56 provided by St Leonards Property Holdings Pty Ltd on 3 May 2021, comprising:
 - i Tree Protection Zone Plan – Lots 3 and 12;
 - ii Tree Protection Zone Plan – Lot 56; and
- Typical Road Cross-section Landscaping Treatment Plans dated 4 May 2021 prepared by Hansen Partnership.

No permit granted

- 2 In application P2000/2020, the decision of the responsible authority is affirmed.
- 3 In planning permit application PLN/2020/291, no permit is granted.

Teresa Bisucci
Deputy President

Mary-Anne Taranto
Member

Claire Bennett
Member

APPEARANCES

For St Leonards Property Holdings Pty Ltd

Christopher Townshend QC assisted by Peter O'Farrell of counsel instructed by Sally Macindoe and Victoria Vilagosh both lawyers of Norton Rose Fulbright.

They relied on the expert evidence of the following witnesses:

- Stuart McGurn, town planner, Urbis Pty Ltd;
- Stephen Schutt, landscape architect, Hansen Partnership Pty Ltd;
- Chris Beardshaw, principal engineer, Afflux Consulting Pty Ltd; and
- Jason Walsh, traffic engineer, Traffix Group Pty Ltd.

For Macedon Ranges Shire Council

Damien Hodgkins, town planner of Macedon Ranges Shire Council (15 & 16 June 2021).

Barnaby McIlrath, lawyer, PE Law (from 19 July 2021 onwards) instructed by Damien Hodgkins.

For Ruth Williams, Ian Williams & Others

Louise Hicks, of counsel, by direct brief.

For Neil Pharaoh

No appearance

For Referral Authorities

No appearance

For Other Authorities

No appearance

INFORMATION

Description of proposal	Subdivision of the land into 87 residential lots in three stages. The lots are to have an average area of 2,114 m ² and are to be connected to reticulated sewerage. The removal of native vegetation, removal of electricity easements and creation of various reserves is also proposed.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. ¹
Planning scheme	Macedon Ranges Planning Scheme
Zone and overlays	Low Density Residential Zone (LDRZ) Environmental Significance Overlay – Schedule 4 (ESO4) The land and surrounding land is also in a Designated Bushfire Prone Area.
Cultural Heritage Sensitivity	The site is not located within an area of cultural heritage sensitivity. ²
Permit requirements	Clause 32.03-3 – Subdivision of land in the LDRZ Clause 42.01-2 – Subdivision of land, construction of a fence, construction of bicycle pathways and trails, and the removal, destruction and lopping of any vegetation including dead vegetation in the ESO4 Clause 52.17 – Removal, destruction and lopping of any vegetation including dead native vegetation Clause 52.02 – Creation of reserves and the removal and creation of easements
Key scheme policies and provisions	Clauses 11, 12, 13, 14, 15, 16, 19, 21, 51.07, 52.02, 52.17, 53.01, 53.10, 56, 65 and 71.02.

¹ Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

² On the basis that the waterway on the land and surrounding land do not meet the definition of a waterway for the purposes of the *Aboriginal Heritage Regulations 2018*.

Land description

The site is located on the eastern side of Harpers Lane approximately 250 metres south of its intersection with Lauriston Reservoir Road. It has a frontage to Harpers Lane of 613 metres, is rectangular in shape and approximately 24 hectares. The site is located 1.3 kilometres south of the Kyneton town centre.

Tribunal inspection

Unaccompanied on 10 November 2021. Our inspection included walking the southern portion of the site, viewing the site from various locations along Harpers Lane, and from neighbouring properties at 1 Wattle Way and 39 and 49 Hill Drive. We also visited the Tilwinda Estate, Botanic Gardens, Kyneton train station and central township areas.³

³ We note that on the day that we conducted our site inspection and whilst we were having lunch in a café on Piper Street, Ms Hicks attended the café with others. At no point did the Tribunal nor Ms Hicks make any contact with one another.

REASONS⁴

WHAT IS THIS PROCEEDING ABOUT?

- 1 St Leonards Property Holdings Pty Ltd (**St Leonards Property**) seeks a review of the failure of the Macedon Ranges Shire Council (**council**) to issue a planning permit within the time prescribed under section 79 of the *Planning and Environment Act 1987 (PE Act)*.
- 2 St Leonards Property seeks a planning permit to subdivide land at 85 Harpers Lane, Kyneton (**site**) into 87 lots with an average area of 2,114 square metres (**m²**). Each lot is proposed to be connected to reticulated sewerage. The proposal also requires the removal of native vegetation, removal of existing electricity easements and creation of various reserves on the site. A drainage reserve and public open space area of 1.7 hectare (**ha**) are proposed on the site with a frontage to Harpers Lane with a second smaller open space reserve to the south. Three trees are proposed for retention within the main public open space area. A further three trees are proposed for retention in Lots 3, 12 and 56. The subdivision is proposed in three stages with public open space to be delivered in Stage 3.
- 3 In support of the application for review, St Leonards Property says that:
 - the site is relatively unconstrained with respect to vegetation removal and environmental features;
 - the proposal responds to the relevant planning framework;
 - the proposal is described as ‘low density’ with an overall density of 3.65 lots per hectare;
 - the proposed building exclusion zones ensure that there is low site coverage per lot;
 - effluent disposal, stormwater and drainage management have all been considered and addressed; and
 - the future development of each lot with dwellings that must comply with ‘development guidelines’ will address landscaping, building setback and heights.
- 4 Following the filing of the application for review with the Tribunal, council resolved that had it been able to do so, it would have refused to issue a planning permit for the proposal because:
 - it is not consistent with the purposes and provisions of the Low Density Residential Zone (**LDRZ**), the character and landscape

⁴ The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

outcomes provided for in the Planning Policy Framework (PPF) and Local Planning Policy Framework (LPPF) of the Macedon Ranges Planning Scheme (**planning scheme**);

- it does not protect and enhance the natural waterway on the site and is thus inconsistent with Environmental Significance Overlay, Schedule 4 (ESO4);
- the removal of remanent native trees is not supported by the purposes of clause 52.17 of the planning scheme;
- the retention of remnant native trees in the subdivision does not adequately ensure the ongoing viability or maintenance of these trees;
- it is inconsistent with Part 3AAB of the PE Act in which the Macedon Ranges has been declared a 'Distinctive Area and Landscape';
- it is inconsistent with Macedon Ranges Statement of Planning Policy (MRSP) and clause 51.07 of the planning scheme; and
- it has failed to consider the heritage values of the bluestone pavement within Harpers Lane.

5 Throughout its submissions council further raises concerns with impacts from increased traffic along Harpers Lane, including the requirement to upgrade Harpers Lane from the southern boundary of the site to the intersection with Lauriston Reservoir Road. Council also says that this intersection is required to be upgraded as a consequence of the proposal.

6 The respondents support council's submissions and raise concerns with the assumptions underlying the stormwater assessment, the lack of the connectivity of the proposed road network and the impacts of the increase in traffic along Harpers Lane.

7 The hearing commenced on 15 June 2021 with the Tribunal being constituted by Members Taranto and Bennett. On the second day of hearing, an application to reconstitute the Tribunal to include a member who is an Australian lawyer was made by St Leonards Property.

8 The Tribunal was reconstituted⁵ and the hearing resumed on 19 July 2021.

WHAT ARE THE KEY ISSUES?

9 The key issues to be considered in this application are:

- i How should the MRSP be applied in this application?
- ii Is the design and layout of the subdivision consistent with the MRSP and planning scheme?
- iii What is the correct characterisation of the water feature on the site?

⁵ See *St Leonards Property Holdings Pty Ltd v Macedon Ranges SC* [2021] VCAT 654.

- iv Is the proposal's management of water related considerations acceptable?
- v Are traffic and access arrangements acceptable?
- vi Are there any unacceptable impacts?

10 Following the conclusion of the hearing, we received correspondence from some of the respondents and Jay Williams⁶. We have not had any regard to this correspondence in determining the application before us as we did not grant leave for any additional information to be provided to us.

WHAT IS THE PHYSICAL CONTEXT?

11 The site is:

- approximately 24 ha in size;
- located on the eastern side of Harpers Lane;
- rectangular in shape with a frontage to Harpers Lane of 613 metres (**m**);
- approximately 250 m south of the intersection of Harpers Lane with Lauriston Reservoir Road; and
- approximately 1.3 kilometres (**km**) south of the Kyneton town centre.



Figure 1 – Aerial photography of site and surrounds⁷

⁶ Who was removed as a party under section 60A of the *Victorian Civil and Administrative Tribunal Act 1998* by order dated 3 May 2021.

⁷ Council, Submissions on behalf of the Responsible Authority, dated 15-18 & 21 June 2021, page 10.

- 12 The site, shown in orange in the figure above, is located amidst an array of differing land uses and development including:
- land to the north at 7 Harpers Lane comprises 8.3 ha and is presently used for grazing and developed with a dwelling and outbuildings;
 - land to the north east at 39 Lauriston Reservoir Road is used for industrial purposes including metal fabrication and a landscaping/gardening supply business;
 - land to the east along Hill Drive is developed for residential purposes with lot sizes ranging between 1.1 and 1.2 ha;
 - land to the south has been subdivided to allow for residential development and at present only one dwelling has been developed at 1 Wattle Way. The subdivision has created lots ranging in size 0.8 to 1.3 ha;
 - land to the immediate west is Harpers Lane and comprises a width of approximately 20 metres and is unsealed directly abutting the site;
 - land across Harpers Lane is developed for rural residential purposes with lot sizes varying between 2.32 to 5.02 ha; and
 - further south and to the east of Harpers Lane is the Tilwinda Estate with varying lot sizes of 0.3 to 0.4 ha.
- 13 The dwellings within the residential properties in the surrounding area proximate to the site are substantial in size. Those dwellings located to the east also contain mature vegetation throughout their spacious gardens. Some properties to the west of Harpers Lane contain mature and substantial vegetation although there is less vegetation observed overall on the western side of Harpers Lane.
- 14 What is apparent throughout the area is the undulating topography and its relationship to the landscape and the surrounding context. This is recognised in the Kyneton Structure Plan (**Structure Plan**) which states:⁸
- The Kyneton Township sits on the crest of a hill and is characterised by undulating rural landscape of the surrounding area and rural view lines
...
- 15 The pattern of development and the varied land uses creates a unique opportunity for development, but such an opportunity is not without its challenges in this location.

⁸ *Kyneton Structure Plan*, prepared by AECOM Australia Pty Ltd dated 14 June 2013, PDF page 31/32.

16 The following plan is the proposed subdivision layout plan:



Figure 2 Proposed Subdivision Plan dated April 2021 prepared by Millar Merrigan

WHAT IS THE RELEVANT PLANNING CONTEXT?

Zone and overlay controls

- 17 The site is within the LDRZ which is within the suite of residential zones in the Victoria Planning Provisions (VPPs). The zoning of surrounding land is varied as illustrated in the following map.

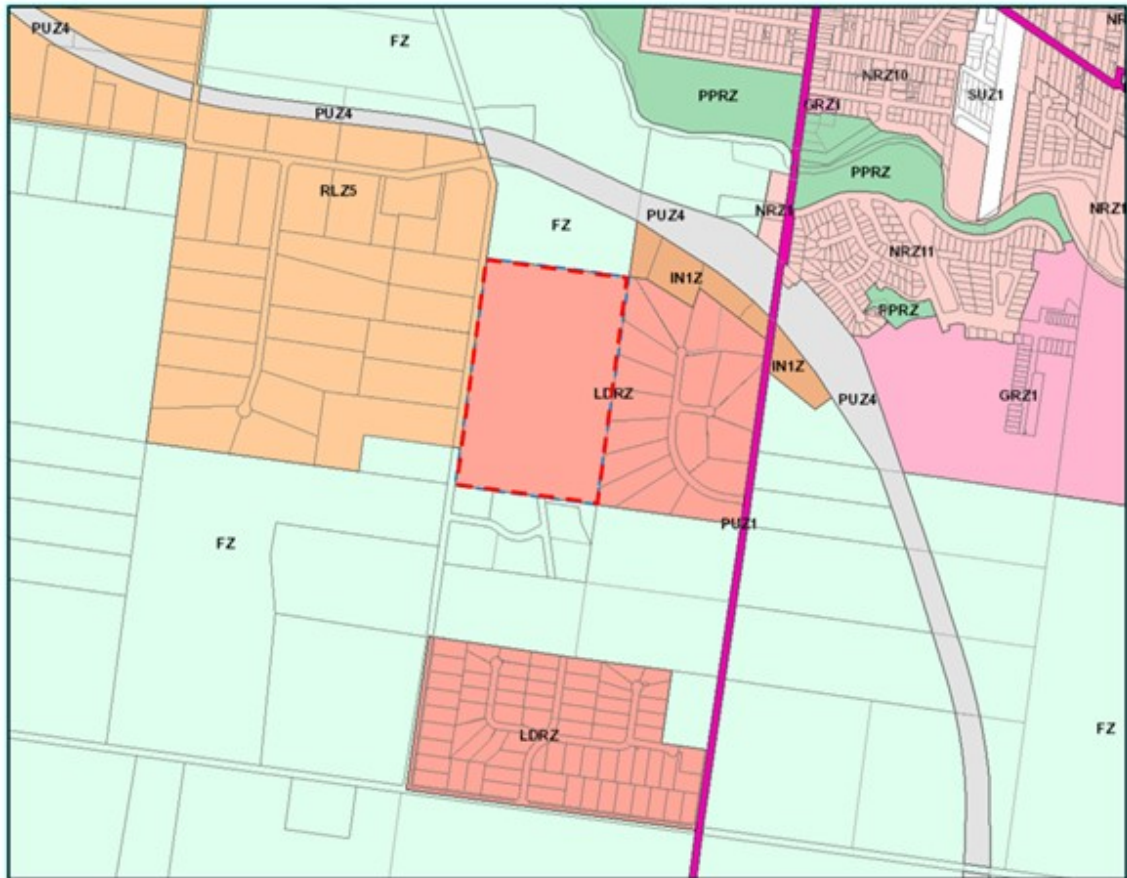


Figure 3 Zones. Source: VicPlan

- 18 More particularly:

- abutting land to the north and south is within the Farming Zone (**FZ**), together with surrounding land to the west, south-west and south-east in which a minimum lot size of 100 ha applies;
- abutting land to the east (in Hill Drive) and further south (the Tilwinda Estate) are within the LDRZ;
- land to the west on the opposite side of Harpers Lane is within the Rural Living Zone – Schedule 5 (**RLZ5**) where a minimum lot size for subdivision of 8 ha applies. Like the FZ, the RLZ is one of six rural zones identified in the VPPs;
- land to the north-east is included in the Industrial 1 Zone (**IN1Z**); and

- the railway corridor to the north is within the Public Use Zone – Schedule 4 (**PUZA**).

19 The site and all surrounding land is affected by ESO4.

Planning permissions

20 Planning permission for subdivision is required in both the LDRZ and ESO4.

21 Other permissions invoked under ESO4 for this proposal include various works for the construction of fences, bicycle pathways and trails.

22 Planning permission is also required for the removal, destruction and lopping of any vegetation including dead vegetation under ESO4 and for native vegetation under clause 52.17. Certain exemptions apply in both ESO4⁹ and clause 52.17.¹⁰ Having considered the effect of these controls and exemptions as relevant to this proposal, planning permission is required for:

- The removal of a large old native tree from proposed Lot 46 (Tree 6);
- The possible removal of a second large old native tree from proposed Lot 56 (Tree 7); and
- The removal of four patches of native grasses and herbs in an area of the Harpers Lane road reserve totalling approximately 100 m² adjacent to the site's frontage.

23 We accept that Tree 2 which was proposed to be retained on Lot 2 has since failed at ground level, having become uprooted during recent severe storms in early June. As this tree is no longer standing, planning permission is not required for this tree's removal under clause 52.17.¹¹

24 However, the same does not apply under ESO4. Clause 42.01-2 of the planning scheme requires a permit to:

Remove, destroy or lop any vegetation, including dead vegetation. This does not apply:

- If a schedule to this overlay specifically states that a permit is not required.
- If the table to Clause 42.01-3 specifically states that a permit is not required.
- To the removal, destruction or lopping of native vegetation in accordance with a native vegetation precinct plan specified in the schedule to Clause 52.16.

25 ESO4 does not specifically exempt the need for a planning permit for the removal of dead vegetation. Further, it does not appear to us that the removal

⁹ Clause 42.01-3.

¹⁰ Clause 52.17-7.

¹¹ Having regard to the exemptions that apply to 'dead native vegetation' in the table of exemptions at clause 52.17-7.

of Tree 2 would fall into the category of exemptions set out in the table to clause 42.01-3.

- 26 Therefore, we conclude that a planning permit is required for the removal of Tree 2 under ESO4.
- 27 The creation of reserves and easements and the removal of two easements along the southern boundary (Easements E-1 and E-4 for electricity and powerlines) also invoke permissions under clause 52.02.
- 28 For the purposes of our assessment, we note that the term 'subdivision' is included in the definition of 'development' under section 3 of the PE Act.
- 29 Having regard to the residential nature of the subdivision, and its likely future use and development for that purpose, it is relevant to note that planning permission is not required to construct one dwelling or to carry out associated works in the LDRZ or ESO4. Up to two dwellings are allowed per lot subject to the grant of a permit in the LDRZ.
- 30 Further, we note that pursuant to clause 53.01 of the planning scheme the subdivision of all land requires a contribution equivalent to 5%, unless exempt.

LDRZ purposes and provisions

- 31 The limited purposes of the LDRZ are twofold:
 - To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - To provide for low-density residential development on lots which, in the absence of reticulated sewerage, can treat and retain all wastewater.
- 32 The permit requirements for subdivision at clause 32.03-2 relevantly are that:

Each lot must be at least the area specified for the land in a schedule to this zone. Any area specified must be at least:

 - 0.4 hectare for each lot where reticulated sewerage is not connected. If no area is specified each lot must be at least 0.4 hectare.
 - 0.2 hectare for each lot with connected reticulated sewerage. If no area is specified each lot must be at least 0.2 hectare.
- 33 As the site is to be connected to reticulated sewerage and no alternative lot area is specified in the zone's schedule, a minimum lot area of 0.2 ha applies.
- 34 Application requirements are specified for subdivision at clause 32.03-5. It is worth reciting these requirements in full:

An application must be accompanied by a site analysis, documenting the site in terms of land form, vegetation coverage and the relationship with surrounding land, and a report explaining how the proposed subdivision has responded to the site analysis. The report must:

- In the absence of reticulated sewerage, include a land assessment which demonstrates that each lot is capable of treating and retaining all wastewater in accordance with the State Environment Protection Policy (Waters of Victoria) under the *Environment Protection Act 1970*.
- Show for each lot:
 - A building envelope and driveway to the envelope.
 - Existing vegetation.
 - In the absence of reticulated sewerage, an effluent disposal area.
- Show how the proposed subdivision relates to the existing or likely use and development of adjoining and nearby land.
- If a staged subdivision, show how the balance of the land may be subdivided.

[Tribunal underlining]

35 Decision guidelines are set out at clause 32.03-6 under the headings of ‘General’ and ‘Subdivision’. They relevantly are:

General

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

- The Municipal Planning Strategy and the Planning Policy Framework.

Subdivision

- The protection and enhancement of the natural environment and character of the area including the retention of vegetation and faunal habitat and the need to plant vegetation along waterways, gullies, ridgelines and property boundaries.
- The availability and provision of utility services, including sewerage, water, drainage, electricity, gas and telecommunications.
- ...
- The relevant standards of Clauses 56.07-1 to 56.07-4.

[Tribunal underlining]

ESO4 purposes and provisions

36 In addition to the implementation of planning scheme policies, the purposes of the ESO are:

To identify areas where the development of land may be affected by environmental constraints.

To ensure that development is compatible with identified environmental values.

37 Decision guidelines relevantly require a consideration of:

- The statement of environmental significance and the environmental objective contained in the schedule to this overlay.
 - The need to remove, destroy or lop vegetation to create a defensible space to reduce the risk of bushfire to life and property.
 - Any other matters specified in a schedule to this overlay.
- 38 The statement of environmental significance refers to Lake Eppalock as a major water storage and recreational facility located within the Campaspe River catchment. It is also a major source of water for irrigation, stock and domestic and urban water supplies for towns within the municipality.
- 39 The environmental objective to be achieved 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*.
- 40 Application requirements for the provision of information that may be required relevantly include the following:
A plan of the whole site indicating the location of all water storages, creeks, streams and springs.
A plan indicating the location of existing and proposed buildings and points of vehicle access to the site.
...
A plan indicating the location of native vegetation on site.
- 41 As the site is to be connected to reticulated sewerage, decision guidelines that must be considered as appropriate are:
- Whether the proposed development provides a net benefit to the stability and health of the waterway.
 - The impact of the 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. In particular, the need to maintain and revegetate land within 30 metres of a watercourse.
 - The need to retain vegetation which prevents or limits adverse effects on ground water recharge.
 - The need to address any existing land degradation and prevent further land degradation as a result of the proposal.
 - The need to include litter traps and artificial wetlands in development proposals to improve the quality of discharge from new developments prior to discharge to water courses and to minimise the amount of sediment and litter entering waterways from new development.
 - Any relevant land capability study or relevant Catchment and River Health Strategy for the area.

- Any approved local land care policies and plans.

42 We observe that the ESO4 is primarily directed towards the protection of water quality and catchment related considerations rather than visual, landscape or character protection.

Particular provisions

Clause 51.07 – MRSP

43 Macedon Ranges Shire has been declared a distinctive area and landscape under Part 3AAB – Distinctive areas and landscapes, Section 46AO of the PE Act.¹²

44 Clause 51.07 provides the following purpose:

To ensure that a decision made under this planning scheme by a responsible public entity:

- Is consistent with the parts of the Macedon Ranges Statement of Planning Policy that are binding on the public entity.
- Has regard to the parts of the Macedon Ranges Statement of Planning Policy that are in the nature of recommendations to which the public entity is required to have regard.

45 The MRSP is based around 10 policy domains and it identifies objectives and strategies that seek to protect and conserve the declared area's distinctive attributes. These are said to be formed by a complex interaction of the area's unique geology, ecology, history and land uses. In decision making, the highest priority is given to the significant landscapes that define the declared area as represented in the Landscape domain, the Biodiversity and environment domain, and the Water catchments and supply domain.

46 In addition to being within the declared area:

- Kyneton is identified as a 'Regional centre';¹³
- the site is included in both the 'Protected settlement boundary' and 'Township boundary';¹⁴
- surrounding land to the north, south and south-west in the FZ is identified as a 'Rural Area';¹⁵
- land in the RLZ5 immediately opposite in Harpers Lane is identified as 'Rural Living Zone';¹⁶
- the Melbourne Bendigo railway line is nominated as 'Corridors with significant sequences of views';¹⁷

¹² By order of the Governor in Council published in the Government Gazette on 16 August, 2018.

¹³ See for example Map 3 and Table 1: Projected hierarchy of settlements.

¹⁴ Maps 3 and 6

¹⁵ Map 3

¹⁶ Map 3

- the site is within a Declared Water Supply Catchment;¹⁸
- strategic biodiversity values based on state-wide modelling are said to be ‘low’ with the proviso that on-ground assessment is needed to inform decision making at the property level;¹⁹ and
- investigation areas for long term and medium term growth are located more distant from the site on the east side of Trentham Road.²⁰

47 We note that the site itself and land immediately surrounding it, are not identified as a ‘Significant landscape area’.²¹ That designation applies to features that include Mount Macedon, The Jim Jim, Hanging Rock and their surrounds.

48 However, other landscape areas are said to provide important contrasts to these significant landscapes. The landscape domain explains that the:

‘landscape comprises the natural and built environments that make up the declared area; it is the holistic integration of both of these environments across the region that this Statement of Planning Policy seeks to protect and enhance.’²²

49 Further, according to the vision²³ for the MRSPP, Macedon Ranges:

... is an iconic region of Victoria that is well-understood, appreciated and celebrated for its importance to our First Peoples and valued for its outstanding natural beauty, ecological significance, rural landscape setting and cultural heritage values.

Its diverse natural environment and impressive landforms, combined with the unique rural character of townships comprising heritage architecture and long-established public and private gardens, underscore its special significance to the people of Victoria, making it a popular place to live, work and visit. ...

Agriculture contributes to the declared area’s economic vitality, helping to sustain its valued rural character and highly productive landscapes. ...

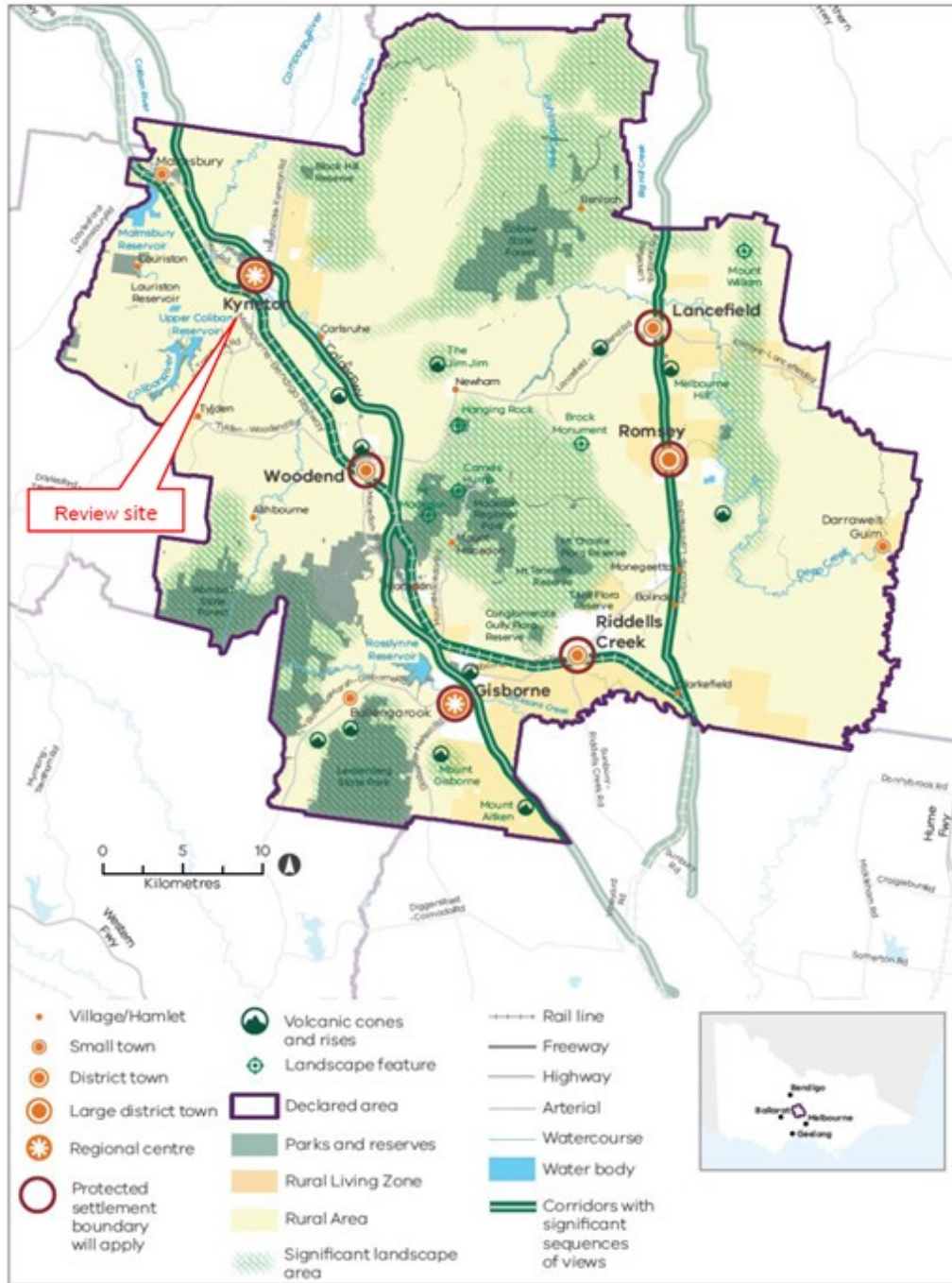
Settlements within the declared area are well connected to local jobs and services, resilient to natural hazards and the effects of climate change and fit in with the most prized rural character and environmental and cultural attributes of the area.

[Tribunal underlining]

50 The Framework Plan for the Shire and Settlement boundary map for Kyneton are reproduced below with our notation showing the site’s location.

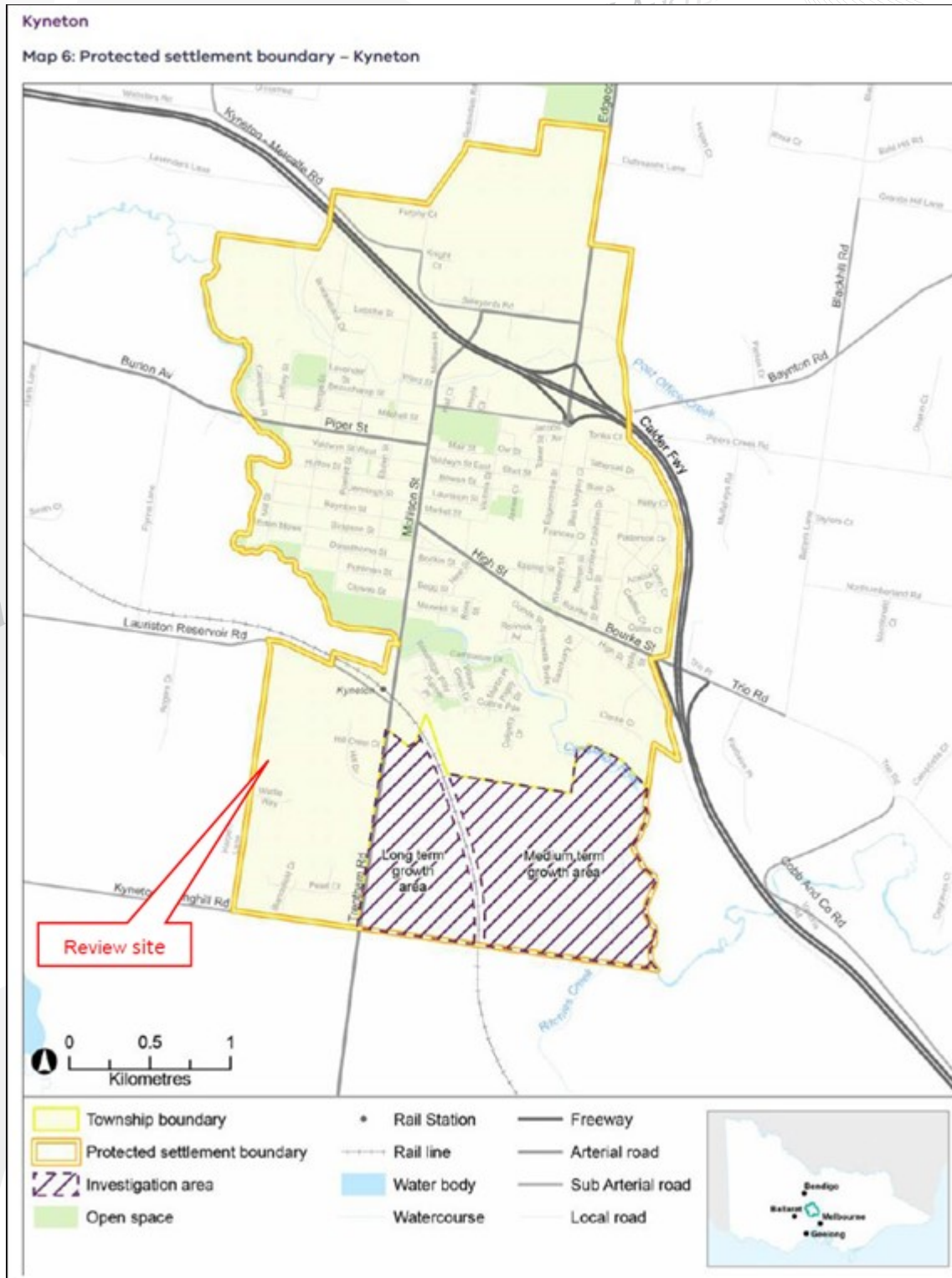
17 Map 3
18 Map 5
19 Map 4
20 Map 6
21 Map 3
22 Page 21.
23 Page 15.

Map 3: Framework plan*



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Clause 52.17 – Native vegetation

- 51 The purposes of this control are to ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. This is achieved by applying the three step approach in accordance with the *Guidelines for the removal, destruction or lopping of native vegetation* (Department of Environment, Land, Water and Planning, 2017) (the *Native Vegetation Guidelines*):

1. Avoid the removal, destruction or lopping of native vegetation.
2. Minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided.
3. Provide an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation.

To manage the removal, destruction or lopping of native vegetation to minimise land and water degradation.

- 52 In addition to the decision guidelines of clause 65, application requirements, decision guidelines and offset requirements, based on the matters set out in the *Native Vegetation Guidelines*, also apply.

Clause 56 – Residential Subdivision

- 53 As outlined in the decision guidelines for the LDRZ above, the consideration of clause 56 is limited to the standards of Clauses 56.07-1 to 56.07-4.

- 54 These standards are grouped under the heading of ‘Integrated water management’ and are accompanied by objectives for ‘drinking water supply’, ‘Re-used and recycled water’, ‘Waste water management’ and ‘Stormwater management’.

- 55 Standards for stormwater management are particularly contentious and we refer to these in more detail later in our decision.

Decision guidelines - Clauses 65.01 and 65.02

- 56 Before deciding on an application, clause 65.01 requires that in addition to the matters set out in section 60 of the PE Act, planning scheme policies, the purpose and any matter required to be considered under the zone, overlay or other provision, the following matters must be considered as appropriate:

- The orderly planning of the area.
- The effect on the amenity of the area.
- The proximity of the land to any public land.
- Factors likely to cause or contribute to land degradation, salinity or reduce water quality.
- Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.
- The extent and character of native vegetation and the likelihood of its destruction.
- Whether native vegetation is to be or can be protected, planted or allowed to regenerate.
- The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.
- ...

57 In addition to the above, clause 65.02 sets out a number of other matters that must also be considered as appropriate before deciding on an application for subdivision:

- The suitability of the land for subdivision.
- The existing use and possible future development of the land and nearby land.
- The availability of subdivided land in the locality, and the need for the creation of further lots.
- The effect of development on the use or development of other land which has a common means of drainage.
- The subdivision pattern having regard to the physical characteristics of the land including existing vegetation.
- The density of the proposed development.
- The area and dimensions of each lot in the subdivision.
- The layout of roads having regard to their function and relationship to existing roads.
- The movement of pedestrians and vehicles throughout the subdivision and the ease of access to all lots.
- The provision and location of reserves for public open space and other community facilities.
- The staging of the subdivision.
- The design and siting of buildings having regard to safety and the risk of spread of fire.
- ...
- ...
- ...
- The availability and provision of utility services, including water, sewerage, drainage, electricity and gas.
- ...
- Whether, in relation to subdivision plans, native vegetation can be protected through subdivision and siting of open space areas.

[Tribunal underlining]

Overview of planning scheme policies

58 In broad terms, planning scheme policies can be characterised as those which provide direction as to *where* new residential growth and development including subdivision is to be located on the one hand, and those which provide guidance on *how* that is to be achieved, on the other.

59 Central to the issues in dispute is this proposal's response to:

- the features of the site itself;

- the character and landscape values of the surrounding area; and
- the possible future use and development of surrounding land.

60 Thus, we are also mindful of the need to consider both the physical and strategic contexts of the site, and its surrounds including features that influence the existing and future character of this area.

61 In doing so, we are also cognisant that the LDRZ is a residential zone, while surrounding land in the FZ and RLZ are rural zones.

62 It is against this backdrop that we have approached our task of reviewing the policy matrix that informs the exercise of our discretion. We have provided a detailed overview of key policies in **Appendix 1** to these reasons that we regard as most relevant to the issues that we need to determine. These are arranged thematically across applicable State, regional and local policies as follows:

- Settlement
- Environmental & Landscape Values
- Environmental Risks & Amenity
- Natural Resource Management
- Infrastructure
- Built Environment & Heritage
- Housing.

63 Below we summarise the key directions that emerge from our synthesis of the planning policy framework.

64 Macedon Ranges Shire is part of the peri-urban region surrounding the built up areas of Melbourne and is also declared as a ‘distinctive area and landscape’.

65 We regard these two strategic attributes as fundamental starting points in understanding the policy framework and how it should be applied in our assessment of this proposal. Combined, we consider that they serve to temper development expectations that might otherwise be regarded as acceptable in a different context.

66 We consider that this is borne out by policies for settlement and peri-urban areas together with the MRSPP. Unlike metropolitan Melbourne and a number of nominated higher order regional *cities*, settlement policies for Kyneton describe it as a *regional centre* where ‘sustainable development’ is supported rather than being the focus for major investment and growth. Being within a peri-urban area and ‘distinctive area and landscape’, policy

objectives seek to manage growth to protect and enhance identified valued attributes.²⁴

67 Further, we note that while the site is within Kyneton's:

- 'township boundary' as depicted in the Kyneton Strategic Framework Map at clause 21.13-2 and Map 6 of the MRSPP; and
- the 'protected settlement boundary' as shown in Map 6 of the MRSPP;

the site is also at the south-western edge of both the township boundary and protected settlement boundary. We regard this spatial relationship as one that is relevant to our consideration of the application.

68 The Kyneton Strategic Framework Plan also identifies 'Views' from south-west portions of the township's edge to the west and south-west across land primarily in the RLZ2, RLZ5 and FZ outside the township boundary.

69 In relation to the surrounding area:

- land on the west side of Harpers Lane is:
 - outside both the township boundary and protected settlement boundary;
 - within the suite of rural zones being either within the FZ or RLZ5;
- land immediately north and south:
 - is identified as 'potential future low density residential areas' both of which are also presently within the FZ and would need to be rezoned to fulfil this strategic outcome;
- abutting land to the east in Hill Drive is within the LDRZ but on larger lots in excess of 1 ha that are not connected to reticulated sewer; and
- land to the east again is variously identified as investigation areas for 'long term growth' and 'medium term growth'.

70 The 'Rural framework plan' indicates that the 'Agricultural Landscapes' and 'Northern Catchments' apply to this part of the Shire in which the site is located. Land use policies support the sustainable use of agricultural land for agricultural purposes and to protect water quality and quantity.

71 The landscape significance of the Shire derives from its unique and important natural features such as Hanging Rock and Mount Macedon and is also:²⁵

... renowned for its rural character, semi-rural lifestyle, landscapes and forests ...

²⁴ Clauses 11.03-3S and 11.03-5S. See also the Introduction at Page 10 of the MRSPP which similarly refers to 'a sustainable approach to planning peri-urban areas' that recognises unique landscape values and asks for development that 'responds appropriately to the values that attract people to these areas'.

²⁵ Clause 21.01

- 72 The area's undulating topography and grassed areas also contribute to its identified character values. Importantly, the contribution that agriculture, comprising open areas of rural land used for grazing and some cropping makes to the aesthetic, rural and landscape character values are recurrent policy themes in addition to its contribution to the Shire's economy. These character features were clearly evident from our inspection of the site and its surrounds.
- 73 Local policies for 'Significant environments and landscapes' at clause 21.05-2, refer to the Shire's 'many and varied rural and township landscapes which are highly valued by residents and visitors'. These include its 'distinctive settlements set within a rural environment'.
- 74 This is underscored by the numerous references to the area's rural character in the vision for Macedon Ranges in the MRSP – a feature which is variously described as 'valued', 'unique' and 'prized'.²⁶
- 75 Policy encouragement for development that respects the distinctive character and defining attributes of each settlement and which is respectful of its context is also sought.²⁷
- 76 Absent an explicit statement of preferred character identified for this particular location, unlike other residentially zoned areas within the Kyneton township, we give primacy to these policy directions. They inform the contextual assessment that we must undertake. We say this, also being mindful of decision guidelines for subdivision in the LDRZ which seek the protection and enhancement of the natural environment and character of the area.²⁸
- 77 In summary:
- the likelihood of change and development to land on the opposite side of Harpers Road is low. This land to the west makes an important contribution to the distinctive rural character of this area on approach to the township and in views from the town's southern edges;
 - the undulating topography of the area similarly makes an important contribution to the area's distinctive and valued character;
 - the dispersed development pattern and larger lots in Hill Drive properties to the east positively contribute to the area's distinctive landscape character;
 - these significant and distinctive landscape values are given elevated importance by policies and the MRSP which seek to recognise, protect and enhance these values; and

²⁶ Page 15.

²⁷ Clause 21.08-3.

²⁸ Clause 32.03-6.

- the extent to which larger lots and the surrounding lot pattern to the north and south will change will be similarly subject to these strategic and contextual influences.

78 It is through this policy lens that residential growth and subdivision within this part of the Kyneton township is to be viewed. We conclude that while the site is one where residential subdivision and housing is expected by policy, a contextually sensitive response to the area's distinctive and valued character and its physical characteristics is warranted.

Other related documents

79 In addition to the MRSPP, a number of other documents were referred to by the parties or their witnesses throughout the hearing. We do not recite them all here but copies of the 'document status table' variously filed by the parties are retained on the Tribunal's file. We have considered submissions made by the parties about these documents. We refer to those where relevant to our findings below and otherwise confirm that in relation to:

- *Draft Framework Plan – Kyneton South Investigation Area (May 2017)* – we give no weight to this document because it has not been adopted by the council.
- *Kyneton Structure Plan (2013)* – This is a reference document in the planning scheme which we have considered.
- *In the Rural Living Zone – Strategic Directions for the Rural Living Zone – September 2015 – Amendment C110 Exhibited Version* – This is a reference document in the planning scheme which we have considered but find that it is of little assistance to the issues in this proceeding. We note that some elements of its recommendations are inconsistent with the MRSPP and planning scheme.²⁹
- *Waterway Determination Guidelines (September 2002)* – a document under section 60(1A)(g) of the PE Act which we have considered.

HOW SHOULD THE MRSPP BE APPLIED IN THIS APPLICATION?

80 The history of the reconstitution of the Tribunal to include a member who is an Australian Lawyer is detailed in *St Leonards Property Holdings Pty Ltd v Macedon Ranges SC*³⁰ and essentially stems from the application of the MRSPP in the assessment of applications for planning permits.

81 Council relies upon the following questions of law:

Question 1:

²⁹ Notably the extent of the proposed RLZ2 for the 'Northern Region Change Area' on the west side of Harpers Lane on land now outside the prescribed protected settlement boundary Page 15 – Figure 3b.

³⁰ [2021] VCAT 654.

Is the proposal to be considered in the proceeding with VCAT Reference No. P2000/2020 contrary to any objective specified in the Macedon Ranges Statement of Planning Policy (MRSPP)?

Question 2:

If the answer to question 1 is yes, is VCAT bound to give effect to the relevant objective(s) in the MRSPP in determining proceeding P2000/2020?

Question 3:

If the answer to question 1 is yes, how does clause 51.07 of the Macedon Ranges Planning Scheme affect the Tribunal's discretion in determining the proceeding?

82 The respondents largely agree with the questions of law as proposed by council.

83 In correspondence of 6 July 2021, St Leonards Property advised that:

We do not seek to add anything further to the correspondence in relation to the questions of law.

We will respond to the matters as put in submissions by the other parties.

84 We note that the parties did not identify any inconsistency between the relevant sections of the MRSPP and the PPF. Nor, from the policy synthesis undertaken above, do we identify any such inconsistency. Therefore, if the proposal is inconsistent with the PPF, it follows that it is also inconsistent with the MRSPP.

85 Given the Tribunal's ultimate determination, it is not necessary to determine the questions of law but given the extent of submissions and the reconstitution of the Tribunal, it is important to acknowledge the issues that have been raised by the parties.

86 The consideration of the questions of law are undertaken pursuant to Clause 66(1)(b) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)* by Deputy President Bisucci being a legal member of the Tribunal constituted for the purposes of the proceeding.

87 Part 3AAB of the PE Act contains the legislative regime for the declaration of Distinctive Areas and Landscapes. The objects for this part of the PE Act are set out at section 46AN and are as follows:

Section 46AN

The objects of this Part are—

to recognise the importance of distinctive areas and landscapes to the people of Victoria and to protect and conserve the unique features and special characteristics of those areas and landscapes; and

to enhance the conservation of the environment in declared areas including the unique habitats, ecosystems and biodiversity of declared areas; and

to enable the integration of policy development, implementation and decision-making for declared areas under Statements of Planning Policy; and

to recognise the connection and stewardship of traditional owners in relation to land in declared areas.

88 Sections 46AO and 46AP of the PE Act provide the process for an area to be declared as ‘distinctive areas and landscapes’. We were told that in 2018 the Macedon Ranges region was declared as the first distinctive area and landscape.³¹

89 The Minister is required to prepare a Statement of Planning Policy (SPP)³² whose purpose is to:

Create a framework for the future use and development of land in the declared area to ensure the protection and conservation of the distinctive attributes of the declared area.

Pursuant to section 46AY of PE Act the in Council may approve a SPP that has been prepared.

90 The contents of a SPP must include the following:³³

- (1) The Statement of Planning Policy for a declared area must—
 - (a) set a vision for a period of at least 50 years that identifies the values, priorities and preferences of the Victorian community in relation to the distinctive attributes of the declared area, including preferences for future land use, protection and development; and
 - (b) set out the long-term needs for the integration of decision-making and planning for the declared area; and
 - (c) state the parts of the Statement that are binding on responsible public entities and the parts that are in the nature of recommendations to which responsible public entities are only required to have regard; and
 - (d) include a declared area framework plan in accordance with subsection (2); and
 - (e) set out Aboriginal tangible and intangible cultural values, and other cultural and heritage values, in relation to the declared area.

³¹ We were not provided with a copy of the said declaration.

³² See section 46AT of the PE Act.

³³ See Section 46AV of the PE Act.

- (2) The declared area framework plan must provide a framework for decision-making in relation to the future use and development of land in the declared area that—
- (a) integrates environmental, social, cultural and economic factors for the benefit of the community and encourages sustainable development and identifies areas for protection and conservation of the distinctive attributes of the declared area; and
 - (b) may specify settlement boundaries in the declared area or designate specific settlement boundaries in the declared area as protected settlement boundaries.

91 I did not receive any submissions about the MRSPP and its compliance with the relevant sections of the PE Act and proceed on the basis that the Macedon Ranges region is an area declared under Part 3AAB of the PE Act, and that the MRSPP is the relevant SPP.

Responsible Public Entity

92 Section 3(1)(b) of the PE Act provides that a Responsible Public Entity (RPE) in Part 3AAB of the PE Act means:

- (b) (i) ...
- ...
- (iii) a municipal council whose municipal district contains land in the declared area.

93 Notably, under section 3 of the PE Act, the Tribunal is not listed as a RPE. Council says that in the review jurisdiction of the Tribunal, where hearings are ‘de novo’, the Tribunal stands in the shoes of the RPE, in its capacity as the responsibility authority and is thus the RPE. However, other than this general statement, council does not provide any authority or further analysis to justify this position.

94 Unhelpfully, neither St Leonards Property nor the respondents make any submissions regarding this issue.

95 Given the ultimate findings of the Tribunal, and the lack of fulsome submissions on this issue, I do not need to determine it in this proceeding, and I simply make the following observations:

- Section 3 of the PE Act, does not include the Tribunal as a RPE;
- Part 3AAB of the PE Act provides a process for the Minister and /or the RPE. The Tribunal does not have any role to play in decisions under Part 3AAB of the PE Act;
- Section 46AZB of the PE Act requires the preparation of an amendment to the planning scheme to give effect to the approved SPP. This appears to have occurred by Amendment VC185 where several clauses in the planning scheme were amended to give effect to the MRSPP;

- Section 46AZK of the PE Act states that the RPE must not act inconsistently with any provision of the Statement of Planning Policy that is expressed to be binding on the *public entity* when performing a function or duty or exercising a power in relation to the declared area. Unfortunately, *public entity* is separately defined under section 3 of the PE Act as: *has the same meaning as in the Public Administration Act 2004*. It is likely that *public entity* refers to RPE in section 46AZK of the PE Act; and
- The choice of the term RPE in clause 51.07 rather than responsible authority is unfortunate and causes confusion. This may raise issues with the applicability of clause 51.07 of the planning scheme in decisions before the Tribunal.

Consistency with the MRSP

- 96 In support of its position, council submits that the proposal is contrary to objectives 2, 3 and 8 of the MRSP which it says are binding on the RPE and thus a planning permit cannot be issued. The respondents adopt the submission of council.
- 97 St Leonards Property disputes that Question 1 is in fact a question of law, and simply says that as part of the assessment of the application, the Tribunal is to identify whether the proposal is contrary to any objective specified in the MRSP.³⁴
- 98 I agree with St Leonards Property that consistency or otherwise of the application with the MRSP is a question of fact. However, what flows from a determination of that issue may be a question of law.
- 99 Given our findings with respect to the proposal, I do not need to address this issue further.

Relevant objectives of the MRSP

- 100 Council has made lengthy submissions to the effect that it would not be lawful to balance the objectives of the MRSP with the policy balancing exercise required by the PPF. It further says that Part 3AAB of the PE Act has the effect of ‘elevating’ the objectives of the MRSP above the objectives of the PPF.
- 101 St Leonards Property simply says that having regard to section 84B of the PE Act, the Tribunal must have regard to the planning scheme (which directly references the MRSP), any other strategic plan or policy statement and any other relevant matter. It accepts that the Tribunal must consider the objectives of the MRSP but does not make any submission regarding the ‘elevation’ of the MRSP.

³⁴ See page 2 of St Leonards Property submissions dated July 2021 at [7].

102 Again, I note the following but do not determine this issue. Nothing in Part 3AAB of the PE Act nor the planning scheme directly supports the position advanced by council. The various sections of the PE Act that require amendments to planning schemes to give effect to the relevant SPP supports a view that the elevation of the SPP is not necessary, as the objectives of the relevant SPP should be integrated into the relevant planning scheme.

Relevance of clause 51.07

103 Council submits:³⁵

... that the appropriate disposition of the Tribunal, in response to the MRSOPP should generally be to determine proceedings so as to give effect to the mandatory objectives of the MRSOPP, and to articulate a clear distinction in decision making between the balancing of policy in the Scheme, and what is required to give effect to the objectives of the MRSOPP for the purposes of clause 51.07.

104 St Leonards Property disagrees with council and says that if the proposal is contrary to any objective specified in the MRSP that would be relevant but not determinative of the application.

105 Council's position is curious because it does not have any regard to the parts of the planning scheme and section 46N(c) of the PE Act that refer to integrated decision making and the MRSP for example, clause 21.02 of the planning scheme which states:

The Statement of Planning Policy reinforces the need for integrated planning and management of land by responsible public entities. It addresses these policy themes: ...

106 It seems to me that if a planning scheme is required to give effect to the SPP and council's position is correct, then what is the purpose of an assessment of an application for planning permit against the provisions and PPF of the relevant planning scheme? It may legitimately be argued that the planning scheme would not have any work to do. Further, if that was the intention of the legislature when considering the inclusion of Part 3AAB into the PE Act, it is likely to have made that intention clear. In any event, I do not determine this issue given our ultimate findings with respect to the application for review.

IS THE DESIGN AND LAYOUT OF THE SUBDIVISION CONSISTENT WITH THE MRSP AND PLANNING SCHEME?

Overview of contentions

107 In-principle, council does not oppose the residential subdivision of the land. We also record that council's submissions on day 1 of the hearing did not raise concerns with the proposal in terms of its visual impacts in longer range

³⁵ See council submission dated 14 July 2021 at [9.12].

views from the southern edges of the township including from the Botanic Gardens and Kyneton train station. However, questions were subsequently put by council to Mr McGurn and Mr Schutt about these matters in cross-examination.

- 108 Council's primary position is that the proposed lot size and layout is problematic being counter to planning scheme policies and the MRSPP objectives. More particularly, it asserts that the subdivision would result in an inappropriately urbanised interface with Harpers Lane instead of providing a transition to the open rural landscape that extends westwards and southwards. It submits that the rural landscape character provides an important setting for the township of Kyneton which policy and the MRSPP seeks to protect and enhance.
- 109 It also submits that the size of lots would not provide for spacious setbacks and a development layout in keeping with the character of other low density residential lots in Hill Drive and further south in the Tilwinda Estate. The lot size and layout are also one that council contends would not provide for the viable long term retention of significant native trees and the configuration of some lots that are battle-axed shaped is said to be too constrained. The sloping topography and likely need for earthworks contribute to the council's concerns with future development impacts on the area's character. It also submits that the proposed treatment of stormwater drainage via a vegetated swale would be inconsistent with water catchment and environmental objectives for this setting and policies that promote open space linkages.
- 110 The respondents largely support these submissions. They too accept that this site is in a location where the planning scheme supports housing growth, but they emphasise the site's location on the edge of the township boundary. This circumstance is one which they say demands a layout with larger lots that is more considerate of this particular contextual setting with its open rural character and undulating topography. The submissions for Ruth Williams and others made by Ms Hicks assert that future development of the lots would, in particular have unacceptable visual impacts when viewed from the properties of nearby residents in Hill Drive, on the opposite side of Harpers Lane and from the abutting dwelling to the south at 1 Wattle Way.
- 111 For the applicant, the site's location within both the settlement and protected settlement boundaries together with Kyneton's designation as a location for growth in Macedon Ranges is emphasised. It is Mr McGurn's town planning evidence that this land is strategically important with its residential zoning underpinned by policy. He asserts that its redevelopment is to be expected and should be optimised given the scarcity of such suitable zoned land, inevitably bringing with it some change to the character in this part of Kyneton including visibility of built form.
- 112 Mr McGurn highlights the proposed provision of reticulated sewerage to service the subdivision. This is described as a positive outcome that is supported by catchment management policies. The size of the lots including

most which are 2,000 m² reflects this intention and is one that is said to be reasonable and clearly envisaged under the provisions of the LDRZ where a minimum lot size of 4,000 m² would otherwise apply to unsewered lots.

- 113 It is Mr McGurn's evidence that the analysis does not start and finish there, notwithstanding the absence of a varied (larger) lot size that could have been included by the council in the schedule to this zone if it was thought necessary. He explains that lots of the size proposed would bring a different market offering for Kyneton, contributing to housing diversity policies in a context where no servicing constraints exist. This, he says would occur in a physical and strategic setting where the site and surrounding land are either identified in the MRSPP as a 'landscape feature' or 'significant landscape area'.
- 114 Neither Mr McGurn nor Mr Schutt consider that larger lots at the site's perimeter are necessary given the site's inclusion in the township boundary, its residential zoning and absence of any explicit planning scheme direction to do so.
- 115 Both witnesses also refer to other features of the proposal that are said to represent a detailed and well-considered approach to this proposal's formulation.
- 116 These include the provision of building exclusion zones nominated for each lot with front street setbacks of 15m from Harpers Lane and 10m from the internal road network, single storey dwelling restrictions on Lots 1-3, 11-14, 45-47, 49-51 and 54-58 as recommended by Mr Schutt, building heights that should not exceed 7.5m, encouragement for metal roofing on buildings (rather than tiles), restrictions on works in Tree Protection Zones around retained trees, and the design and height of fencing (rural style post and wire no greater than 1.3m in height and discouragement of front fences). These restrictions would be implemented via two sets of guidelines enforceable by way of a Memorandum of Common Provisions to which we return later in our reasons.
- 117 Both witnesses also emphasised the proposed retention of all but one living tree and the adequacy of space for landscaping with both native and exotic species. It is asserted that such landscaping within proposed lots and road reserves including along the contentious drainage swale and open space reserves would achieve an acceptable landscape setting for this subdivision that will positively contribute to the landscape character of the area. While there is a ridgeline through the site, Mr Schutt describes this as subtle, and not prominent in nature such as to lead to a different conclusion.
- 118 Mr Schutt confirms that he was engaged to give evidence about landscape architecture rather than to undertake a broader scale visual landscape assessment typically involving the preparation of photomontages and the like. Notwithstanding, during his inspection he visited the Botanic Gardens and Kyneton train station. His opinions are that while future development of lots may have some visibility from these locations, this would be minimal,

acceptable and in relation to arrival by train along the rail corridor, would not unexpectedly signal a visitor's arrival to the Kyneton township. To the extent that the development may be visible from other identified viewsheds from which a view of significance is able to be enjoyed, Mr Schutt opines that future development is unlikely to be barely discernible given substantial distances of between 15 km and 18 km.³⁶

- 119 The layout of lots and their orientation was seen as acceptable by both witnesses. Those fronting Harpers Lane are said to provide a suitable address to this street with larger setbacks of 15 m to buildings that would be an acceptable response to the surrounding character. The proposed siting and provision of the proposed drainage reserve with its substantial frontage to Harpers Lane is also relied upon as a positive feature at the entry to the subdivision.

Tribunal's findings

- 120 We begin with some observations about existing conditions gained from our inspection of the site and surrounds. During our inspection we were able to appreciate views from all directions in Harpers Lane, the backyards of 39 and 49 Hill Drive and 1 Wattle Way towards the site, from public areas in Wattle Way and the Tilwinda Estate and towards the area of the site and its surrounds from the Botanic Gardens and train station environs.
- 121 As we have stated, we found the variable topography of the area including that of the site and the very open rural character on approach to the township along Harpers Road as distinctive features. So too is the presence of vegetation, both native and exotic including mature trees which although variable in cover makes an important contribution to the character of this area. This includes vegetation in the back yards of some Hill Drive lots. We found the presence of land in the IN1Z to exert a negligible influence on the area's character attributes given its location and configuration relative to the site and the screening effect of existing vegetation.
- 122 At the outset, we are satisfied that due to topographical conditions, distances, and the intervening role of existing vegetation and in some cases development, the site is not one that is prominent or overtly discernible from either the environs of the railway station, its corridor or from the Botanic Gardens. We would reasonably expect that its future development would not give rise to unreasonable visual impacts from these locations, from the locations identified in the Kyneton Strategic Framework Plan or from any of the identified features or areas of landscape significance more distant from the site. Thus, we concur with the evidence of St Leonards Property on these matters.
- 123 We find that the acceptability of this proposal hinges on its response to its more immediate physical context.

³⁶ Camels Hump, Major Mitchell Lookout, Mt Macedon Memorial Cross and Hanging Rock Summit.

124 We take no issue with the residential subdivision and subsequent development of this site. The site is located in an area where such an outcome is clearly anticipated by settlement policies. It is *how* this proposal responds to policy directions for residential growth and development that is its key failing, best summed up by the following application requirement in clause 21.13 which asks for demonstration of:

... how the proposal provides for a high quality lot layout, diversity, respects the existing built environment and heritage, and the protection and enhancement of environmental features and natural resources.

[Tribunal underlining]

125 We are not persuaded that this proposal has demonstrated *how* it provides for a high quality lot layout that is respectful and which protects and enhances environmental features. Our reasons for this conclusion follow, adopting the approach we described in our policy synthesis.

126 Before doing so we also observe that while the proposed building exclusion zones assist with understanding the intended location of buildings and space for landscaping that this is a standard application requirement for subdivision in the LDRZ.

Subdivision layout

127 In-principle, we accept that the provision of lots fronting Harpers Lane is the correct and preferable response. It presents greater opportunities for the avoidance of high fencing and for buildings to address this street. We also accept that the proposed subdivision layout will provide acceptable levels of road connectivity and open space linkages to surrounding land. We find that space within road reserves would be sufficient to accommodate the planting of street trees of the various species proposed.

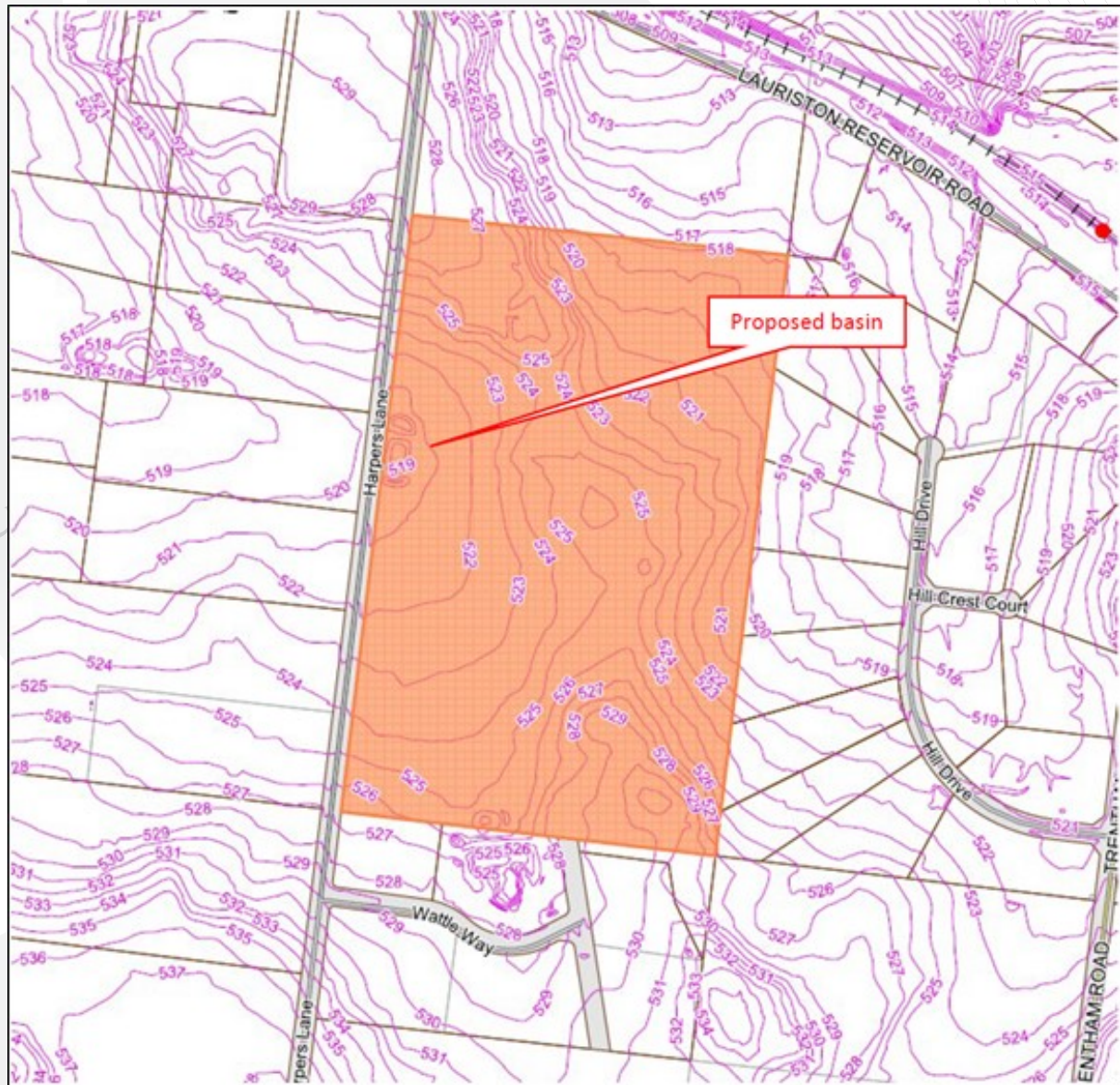
128 To the extent that the provision of a public reserve with a frontage to Harpers Lane has the potential to create a positive entry experience in the landscape, in-principle this concept is sound. We also find that its design would provide an acceptable engineering solution forming part of the proposed management of stormwater flows. We provide further reasons regarding stormwater management later in our decision.

129 However, we have found that the response proposed here is not contextually responsive to either the site's topographical conditions or that of its surrounds.

130 That part of the proposed reserve fronting Harpers Lane, is primarily intended to perform a drainage function as a large drainage basin, essentially covering and extending, the area occupied by the existing dam. On the basis of the preliminary design relied upon by Mr Beardshaw, a considerable amount of filling at the interface with Harpers Lane is proposed to create this basin. The basin spans a distance of about 90m.

131 Having considered the various plans showing contours of the site and surrounds together with the proposed top of basin at RL522.1, filling across

the site's frontage to Harpers Lane would rise to a height of up to 1.5 m above the road level of Harpers Lane and approximately 2 m above the level at the frontage of properties opposite.³⁷



Source: Tribunal Book - A. 3 Cadastre 1-5750 with topography – 1 m contours with our notation showing basin's approximate location.

- 132 However, we are not satisfied on the basis of the information made available to us that this design response, which will necessitate either a retaining wall or earth embankments in this part of Harpers Lane or perhaps both, would be capable of achieving an acceptable visual outcome for this location.
- 133 We consider this kind of cut and fill development, where the retarding basin is optimised to have a minimal footprint and the undulation of the land is filled,

³⁷ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, page 25.

to be more suited to more urban areas but inconsistent with the informal rural character of Harpers Lane and its surrounds.

- 134 We say this being mindful of the high value attributed to this rural character recognised by planning scheme policies which are to be protected, conserved and enhanced.
- 135 Further, the proposed cut and fill diagram shows fill extending beyond the existing high points north and south of the of this proposed retarding basin. This would result in the existing low points to the north and south being filled to the Harpers Road boundary and similarly elevated higher than Harpers Lane with houses atop it. This would have an imposing appearance when travelling along the existing alignment of Harpers Lane and from properties on the opposite side.
- 136 We regard this treatment of the existing landform as one that is not site responsive to its particular topographic attributes. It is a response that would not protect or enhance this valued feature.
- 137 We similarly find that subdivision layout internal to the site responds poorly to the site's topography. We have particular concerns about areas of the site which are proposed to be occupied by lots in Stage 2 especially Lots 49 to 58 and throughout the area extending across the site's higher points and ridge towards the north-west.
- 138 We appreciate that the layout adopts a grid street layout that the council would accept for its beneficial connectivity attributes and its historic use within the main township area of Kyneton.³⁸ We also note policy support for such a layout together with the requirement for substantial street tree planting in new subdivisions.³⁹ However, on balance we consider that there are aspects of this grid typology that is not a contextually acceptable one for this particular site. Indeed while recognising the traditional street grid layout in the town centre, the *Kyneton Structure Plan* explains that:⁴⁰

More recent growth of the town has resulted in more curvilinear street patterns that are based on the topographical nature and environmental features of the landscape and then contemporary subdivision design principles.

[Tribunal underlining]

- 139 We consider that together with the size and shape of lots proposed – an issue to which we return in more detail shortly – future built form will be sited in the landscape that would present with a density and unacceptable level of prominence in this localised context rather than being submissive to the

³⁸ See for example *Kyneton Structure Plan* Pages 6 and 8.

³⁹ Clause 21.13-2.

⁴⁰ Page 8. See also *Urban Design Guidelines for Victoria (Department of Environment, Land, Water and Planning, 2017)* which is a policy document under clause 15.01-1S and 15.01-3S. Refer in particular to urban structure principles 1.12b which adopts a similar concept but in the context of providing flatter travel paths.

environment. While we consider that restricting building heights and limiting development to single storey forms on lots proposed on higher ground is a step in the right direction, we are not persuaded that on balance, these measures overcome the fundamental concern that we have with the subdivision layout and its response to the topography of the site and features of the surrounding area.

- 140 We also anticipate that the subdivision and lot layout proposed will manifest in the need for extensive earthworks associated with usual residential purposes for driveways, outbuildings, recreational areas and the like. We have particular concerns about the future development within the layout proposed when viewed from surrounding land to the south and from properties to the east in Hill Drive where the landform is lower and continues to fall eastwards.
- 141 In terms of the subdivision layout and its response to existing native trees, we find that in-principle, the retention strategy for the tree group within the main open space reserve is acceptable and we do not oppose the removal of the now fallen Tree 2. We similarly accept that because of its senescent condition, we would not insist upon the retention of Tree 7.⁴¹
- 142 We otherwise consider that the subdivision layout adopted for Tree 1 is not acceptable and invites disturbance to it by future development. We also consider that the provision of a suitable landscape setting that is naturalistic and rural in character around this tree is warranted having regard to the contribution this tree makes to the area and the rural character of the surrounding area. The configuration of Lot 3, the amount of space for driveway access arrangements to its developable area at the rear and spatial relationship with Lot 4 is too constrained having regard to the size of its canopy and Tree Protection Zone (TPZ). We consider that the prospects of its long-term retention would be vulnerable to the effects of future development and its landscape contribution too compromised by future works and development. We acknowledge that the reconfigured lot layout shown in the Version 6 plans⁴² tabled during the hearing is an improvement. However, we are not satisfied that the proposed size of the building exclusion zone⁴³ around the perimeter of its TPZ is capable of providing the amount of space required to achieve an appropriate naturalistic landscape setting that we regard is necessary.

Lot size, shape and density

- 143 We agree with Mr McGurn's evidence that lots that are 2,000 m² in area will offer something different for Kyneton and will assist in meeting *broader* policy objectives for housing choice and diversity. We should add that we do

⁴¹ Having regard to the advice contained in the letter dated 22 July 2021 by Mr Grant Harris of Ironbark Environmental Arboriculture to Ms Victoria Vilagosh of Norton Rose Fulbright.

⁴² Proposed Subdivision Plan 25247P2 Version 6 Sheet 1 of 1 prepared by Millar Merrigan dated July 2021 circulated by the applicant on 25 July 2021.

⁴³ Building exclusion zones' 25247P6_V5 (Sheets 1 to 3) prepared by Millar Merrigan circulated by the applicant with the Version 6 plan on 25 July 2021.

not consider that this is the location where policy expects the more specific direction for diverse housing to cater for the town's changing demographics to be met. Planning for that outcome is primarily directed to the two investigation areas to the south and south-east of the township.⁴⁴

144 In any event, there is nothing in applicable planning scheme policies, planning scheme controls and provisions or in the MRSP that leads us to conclude that the provision of lot diversity and housing choice is to be pursued at the expense of the area's distinctive and valued character attributes. These character attributes are strongly influenced by its topography and interfaces with rurally zoned land. Indeed, from our reading of the policy framework and MRSP, their recognition, protection and enhancement is to be given primacy. This is despite the site's location within the township boundary.

145 We are also mindful of the decision guidelines under clause 65.02 for subdivision which requires us to consider:

- The existing use and possible future development of the land and nearby land noting that a similar application requirement exists in the LDRZ;
- The subdivision pattern having regard to the physical characteristics of the land including existing vegetation; and
- The density of the proposed subdivision.

146 Further, the decision guidelines for subdivision under the LDRZ relevantly require a consideration of:

The protection and enhancement of the natural environment and character of the area including the retention of vegetation and faunal habitat and the need to plant vegetation along waterways, gullies, ridgelines and property boundaries.

147 With these considerations in mind and those that we have summarised in our policy synthesis, we reject the position of St Leonards Property that in this edge of settlement and township location, the proposed lots do not need to respond to the larger lot and density conditions that prevail in the surrounding area.

148 We therefore find that:

- the density of the proposed subdivision is too intense for this context given our analysis of lot sizes in the surrounding area and the degree of change arising from strategic directions of the planning scheme and the MRSP;
- larger lots should be provided at its perimeter particularly at the interface with Harpers Lane and to the south and east so as to better

⁴⁴ See Strategy 1.5 at clause 21.13-2.

reflect the open rural feel that is integral to this area's character and to better respect the larger lot pattern of the Hill Drive properties;

- the layout, amount of land required for driveway access and resultant area suitable for buildings on lots 13, 14, 52 and 54 are poor;
- land internal to the site where topographical conditions allow and subject to our preceding findings about the subdivision layout and its response to topographical features, may be suitable for appropriately configured smaller lots with a minimum area of 2,000 m²; and
- proposed space around building exclusion zones for the planting of vegetation between lots within the subdivision and to neighbouring land is in many instances insufficient and a product of the inadequate size and in some cases, configuration of lots; and
- integration of vegetation management requirements to address the site's location within a bushfire prone area and the consequential implications for the achievement of an acceptable landscaping response has not been adequately resolved. On this we also note the comments provided by the Department of Environment, Land, Water and Planning who does not object to the grant of a planning permit but otherwise opposes the use of the Harpers Lane road reserve for defensible space if that is intended.⁴⁵

149 We have considered the alternative lot layout tabled during the hearing⁴⁶ including the proposed modifications to the building exclusion zones. While the changes proposed, particularly the larger size of lots fronting Harpers Lane is a step in the right direction, we are not persuaded that the suggested changes are capable of overcoming the shortcomings that we have identified.

150 We conclude that the proposed subdivision layout, lot size and density is not contextually responsive to the features of the site or its rural character context.

WHAT IS THE CORRECT CHARACTERISATION OF THE WATER FEATURE ON THE SITE?

How did we arrive at this issue?

151 The concern with the water feature on the site arises because there is conjecture amongst the parties as to its correct characterisation. This leads to a dispute amongst the parties about the applicability of the ESO4 and the relevant planning scheme provisions.

152 Notably, a 'water course' is shown on the Planning Property Report on the site.

153 Council raises concern with overland flows because of the proposal and says that it:

⁴⁵ Letter dated 8 September 2020 to Macedon Ranges Shire Council from Ms Amanda Johnson.

⁴⁶ Proposed Subdivision Plan 25247P2 Version 6 Sheet 1 of 1 prepared by Millar Merrigan dated July 2021.

- fails to provide adequate protection of the waterway;
- seeks to remove rather than protect and enhance the existing natural watercourse; and
- removes the natural waterway.

154 Council acknowledged initial concerns raised in objections relating to the increased flood risk to adjacent roads and nearby properties.

155 Goulburn Murray Water (**GMW**) (a determining referral authority)⁴⁷ lodged a statement of grounds with the Tribunal. However, the Tribunal required GMW to provide responses to the following questions:

- a. Does the ‘water feature’ that traverses the subject land meet the definition of ‘waterway’ under section 3 of the *Water Act 1989* (**Water Act**)?
- b. What are the reasons for GMW’s conclusion to the above question?

156 The parties were also provided an opportunity to file submissions addressing the characterisation of the water feature.

157 In response to the questions of the Tribunal, GMW provided the following response:

- (a) **Does the ‘water feature’ that traverses the subject land meet the definition of a ‘waterway’ under s.3 of the Water Act 1989?**

If the definition in s.3 of the Water Act 1989 (the Act) was applied without consideration of any other considerations, then the ‘water feature’ may well be deemed a waterway; however the definition on its own does not constitute the feature being considered a waterway. GMW applies the Waterway Determination Guidelines implemented by the Minister for Environment and Conservation in 2002. These guidelines were developed to help water authorities assess features to determine the presence of a waterway.....as per page 4 “The purpose of these guidelines is to establish a uniform process for making waterway determinations and to minimise subjective judgments.”

- (b) **What are the reasons for GMW’s conclusions to the above question?**

In establishing the presence of a waterway at any particular site GMW assesses the presence of the features described in s.3 of the Act, as well as takes into account the catchment area servicing the feature, and the presence of (or lack of) spring activity. If the features described in s.3(b) are present, GMW undertakes a calculation of the catchment area servicing the feature. If the calculated catchment area is =>60 hectares, then a waterway is

⁴⁷ See clause 66.02-5 Use and development referrals (Special Water Supply Catchment).

deemed to be present at that point. The catchment area can be less than 60 hectares if the catchment yield is supplemented by spring activity. In these instances a waterway would be deemed to be present. The site was assessed in accordance with the Waterway Determination Decision Process as described on page 8 of the attached guideline document. The property does not appear to have a river, creek stream or watercourse present; however it may well have had features described in s.3(b). A catchment assessment appears to have been calculated as part of the inspecting officers assessment and it was determined that the catchment area servicing the property was 28.85ha. There must have also been an absence of spring activity and contributing flow for this decision to be made.

- 158 A copy of the Waterway Determination Guidelines was appended to GMW's response.

What do the parties say?

Council

- 159 Council submits that reliance upon the Water Act for guidance as to the definition of watercourse is unhelpful because the purpose of ESO4 and the Water Act are entirely different.
- 160 Council says that the decision to protect a riparian zone arising under ESO4 and the planning scheme relies on the role of the depression or drainage line in the planning of the area. Thus, the question before us is whether the proposal responds to the natural features of the site and provides a connection to the watercourse that exists on the west of Harpers Lane.
- 161 To support this proposition council relies upon the ordinary meaning of watercourse as follows:⁴⁸
1. A stream of water, as a river or brook.
 2. The bed of such a stream: * *But if he stays until it rains – and this may mean years – he will see that these dry watercourses at least have a function – Harold Lewis, 1973*
 3. A natural channel conveying water.
 4. A channel or canal made for the conveyance of water.
- 162 Council says that the water feature on the site is a 'watercourse' because of the ordinary meaning of this word and hence if 'water can be observed flowing along a defined course, at times of rain, then that will be the best indicator of a watercourse'.

Respondents

- 163 Similar to council, the respondents say that relying on the Water Act for a definition is unhelpful and that we should consider ESO4 which required the protection of the quality of water. The respondents rely upon the Kyneton/Carlsruhe flood map that shows either a river/creek or a creek/stream

⁴⁸ *Macquarie Dictionary* (5th Edition).

on the site and their own observations of such during certain times throughout the year and particularly in August and September.

- 164 Thus, the proposal will remove a natural watercourse from the site rather than retaining and enhancing this element as a natural feature in the landscape.

St Leonards Property

- 165 St Leonards Property agrees with GMW that the water feature is not properly characterised as a waterway, notwithstanding that it is arguable that it falls within the definition of waterway set out in the Water Act.

- 166 St Leonards Property submits that the correct characterisation of the water feature is as a drainage line for the purposes of the planning scheme. It says that the water feature is not recognised in the MRSPP, Kyneton Strategic Framework Map and the Kyneton Character Precinct Map as a watercourse, significant water feature, waterbody or key waterway.

- 167 Further, it is said that the Waterway Determination Guidelines provide the common law definition of a watercourse which is:⁴⁹

Under common law, a watercourse is required to have a channel bed, banks, which are the steeper sides of a channel, and a flow of water, which must be regular but not necessarily continuous. The flow must emanate from a source other than immediate rainfall, for example from springs, soaks or water percolating from soil.

- 168 In summary, St Leonards Property accepts that the water feature is relevant to the matters pertaining to site layout but is not a watercourse or waterway such as to require specific consideration under ESO4 or the planning scheme.

What material does the Tribunal have to assist with the characterisation of the water feature?

Planning scheme

- 169 The planning scheme considers water features in multiple ways. In order to determine which (if any) parts of the planning scheme apply to this subdivision, we consider two things:

- i the definition of the different terms used for overland flow in the planning scheme; and
- ii the characterisation of the overland flows for the site.

Definition of overland flow terms

- 170 Clause 73 of the planning scheme states:

A term used in this planning scheme has its ordinary meaning unless that term is defined:

⁴⁹ Garbutt, *Waterway Determination Guidelines*, 2002, "Other details", page 10 and Section 2.2.1, page 5 and Section 2.2.1, page 6.

- In this planning scheme; or
- In the *Planning and Environment Act 1987* or the *Interpretation of Legislation Act 1984*, in which case the term has the meaning given to it in those Acts unless it is defined differently in this scheme.

171 The overland flow terms used in the planning scheme, include; watercourse; waterway; natural drainage corridor; natural drainage functions; drainage lines; and drainage, are not defined in the planning scheme, or the relevant legislation.

Mapping

172 The Planning Property Report denotes a 'water course' that runs from the southern boundary of the site to the western boundary of the site (Harpers Lane).

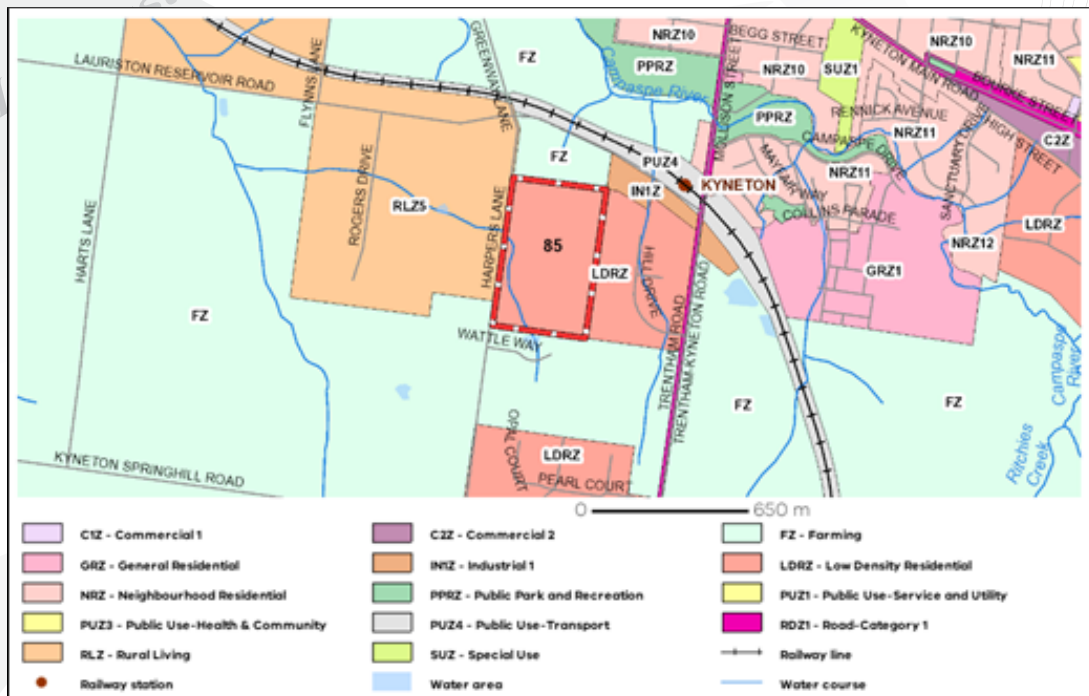


Figure 4 – Planning Property Report

173 The *Flood Zone Map Kyneton-and-Carllsruhe* denotes a 'Creek/Stream' in the same location. We note that this is a map jointly labelled by the NCCMA and council, and which is understood, from oral submissions by Ms Hicks⁵⁰ to have originated from the *Kyneton Flood Study Consultation Draft – June 2019*, produced by the *North Central Catchment Management Authority*. St Leonards Property submitted a Document Status Table that summarised statutory weight of this document as a 'consultation draft' and as such it has 'nil relevance'. Further, they add that, on page 116 of the study, the site is marked as Residential – low density and the 'Water feature' is not shown as a

⁵⁰ Made at the hearing on 15 June 2021.

waterway.⁵¹ The council made no further comments regarding the status of this document in their marked-up version of the Document Status Table.⁵²

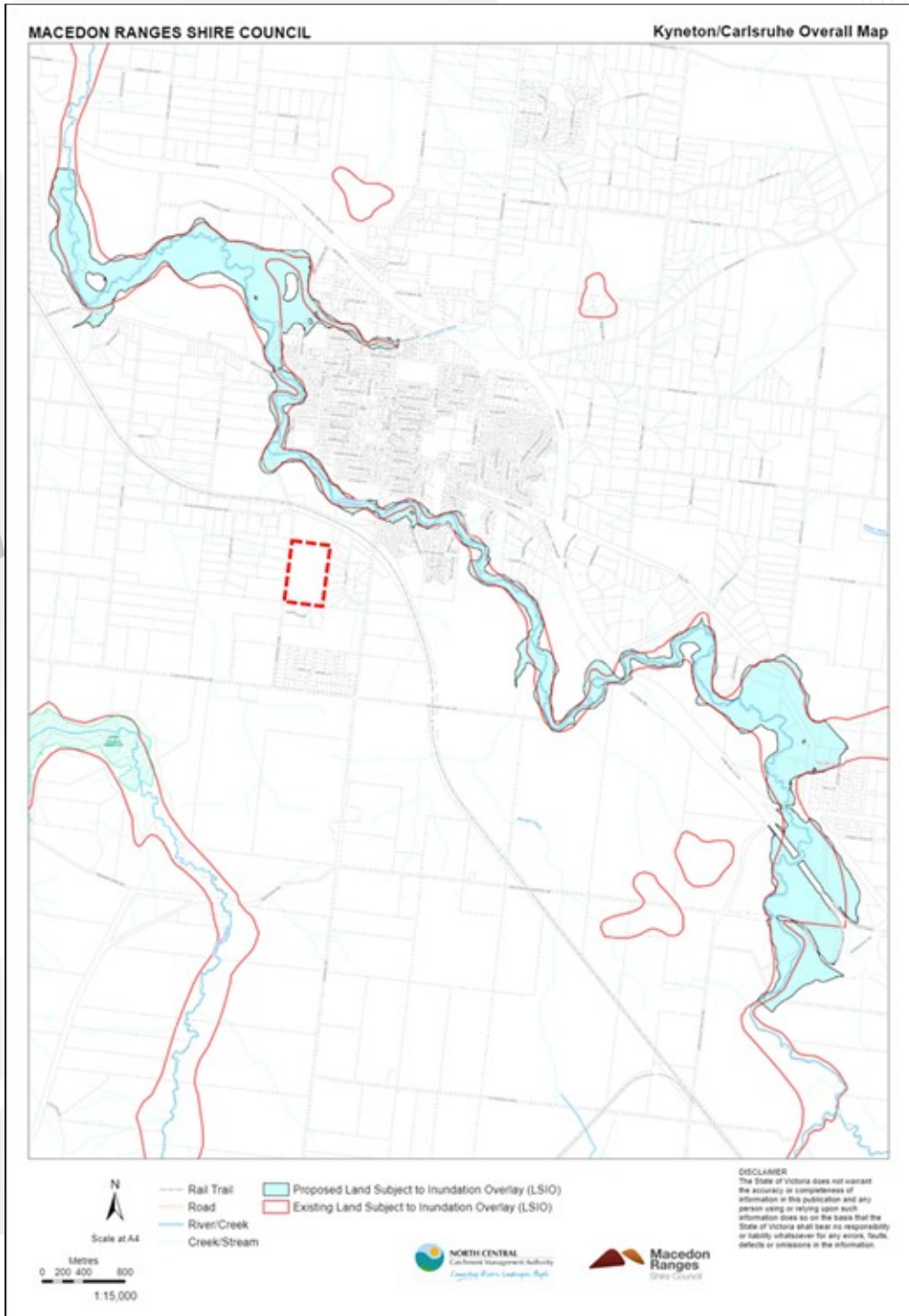


Figure 5 – Flood Zone Map Kyneton-and-Carlsruhe

⁵¹ St Leonards Property, Document status table – Applicant – 25 July 2021.

⁵² Council, Document status table – RA – 27 July 2021.

Evidence

174 Mr Beardshaw's *Stormwater Management Plan* refers to the overland flow in the following ways:⁵³

- “As defined by the NCCMA there is no existing waterway on site that is required for retention”;
- a blue line denoted as a “watercourse” on Figures 2-1, 3-1 and 4-5;
- “overland flow path through the site”;
- “otherwise unrecognised waterway”; and
- “Formalisation of a constructed vegetated swale has the potential to rejuvenate and improve this overland flow path from its current agriculturally degraded state.”

⁵³ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf pages 3/57, 10/57, 15/57, 20/57, 15/57, 51/57, 52/57.

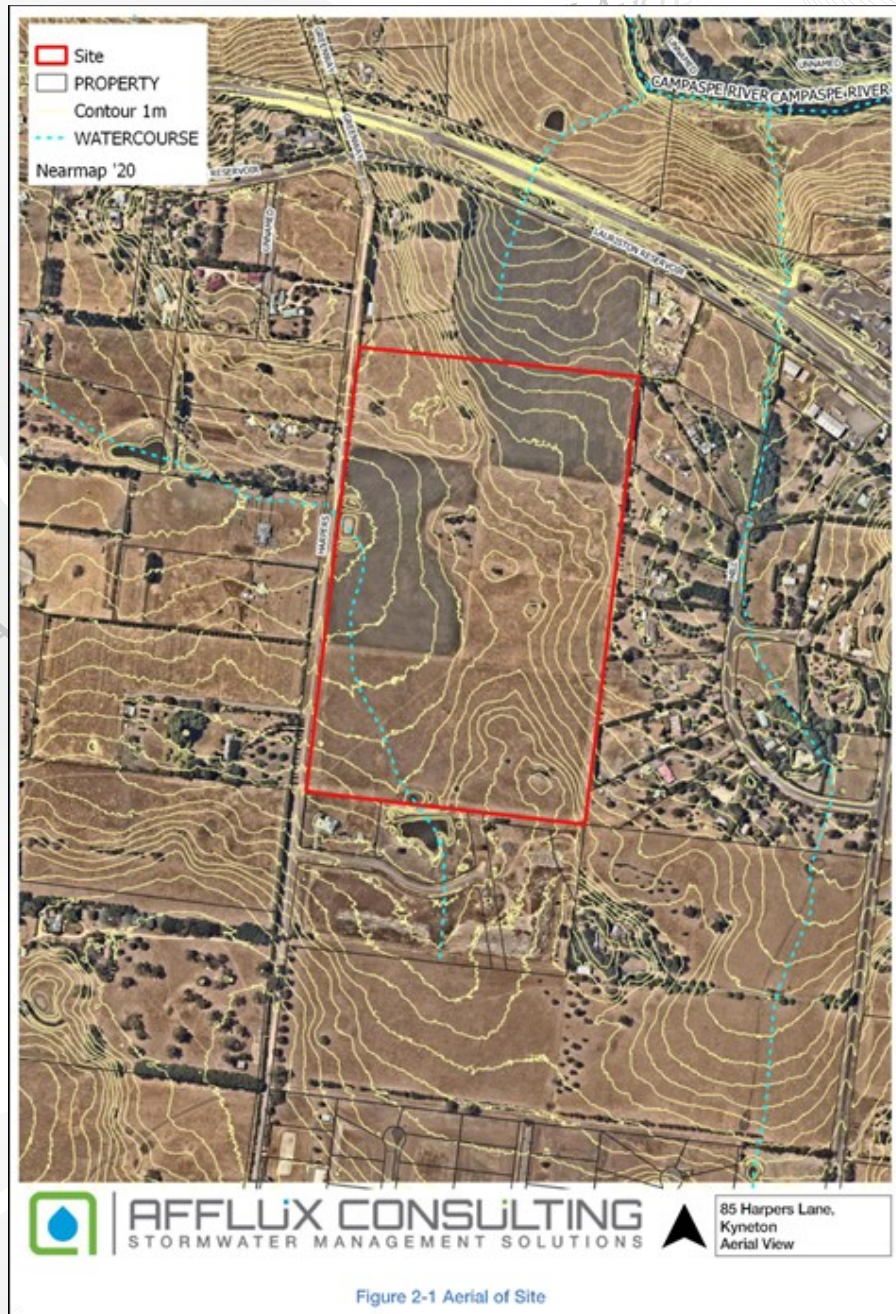


Figure 6 – Afflux Consulting report dated 9 July 2020.

175 The ‘blue line’ indication of water features is understood to have been derived from Vicmap 1:25,000 topographical mapping⁵⁴ and is designed to provide initial information about waterways that may be present on land and need further consideration.

Water Referral Authorities

176 The application was referred under Section 55 of the PE Act to:

⁵⁴ Garbutt, *Waterway Determination Guidelines*, 2002, “Other details” page 10.

- Coliban Water as a determining referral authority under Clause 66.01 – Subdivision Referrals (for the relevant water, drainage or sewerage authority).
- GMW as a determining referral authority under Clause 66.02-5 – Use and development referrals (Special Water Supply Catchment).

177 GMW's referral response states that:⁵⁵

A water feature traverses the south western section of the site, GWM has undertaken an assessment and determined that this water feature is not a **waterway** in accordance with the Water Act 1989.

[Tribunal emphasis added]

178 As set out earlier, we sought further clarification from GMW.

179 The term waterway has a very broad definition under Section 3 of the Water Act, as follows:

waterway means —

- (a) a river, creek, stream or watercourse; or
- (b) a natural channel in which water regularly flows, whether or not the flow is continuous; or
- (c) a channel formed wholly or partly by the alteration or relocation of a waterway as described in paragraph (a) or (b); or
- (d) a lake, lagoon, swamp or marsh, being—
 - (i) a natural collection of water (other than water collected and contained in a private dam or a natural depression on private land) into or through or out of which a current that forms the whole or part of the flow of a river, creek, stream or watercourse passes, whether or not the flow is continuous; or
 - (ii) a collection of water (other than water collected and contained in a private dam or a natural depression on private land) that the Governor in Council declares under section 4(1) to be a lake, lagoon, swamp or marsh; or
- (e) land on which, as a result of works constructed on a waterway as described in paragraph (a), (b) or (c), water collects regularly, whether or not the collection is continuous; or
- (f) land which is regularly covered by water from a waterway as described in paragraph (a), (b), (c), (d) or (e) but does not include any artificial channel or work which diverts water away from such a waterway; or
- (g) if any land described in paragraph (f) forms part of a slope rising from the waterway to a definite lip, the land up to that lip;

[Footnotes omitted]

⁵⁵ GMW, letter dated 19 February 2020 (*sic.*) [emphasis added].

180 The Waterway Determination Guidelines⁵⁶ consider the following for the determination of a waterway:

- Local information (including upstream and downstream of the site)
- Sources of water (including springs, soaks, rainfall, snow melt, convergence of overland flows)
- Occurrence of springs
- Flow of water (not just continuous)
- Size of catchment.

181 GMW gave the following reasons for their conclusion, which imply that they completed an assessment using the *Model Waterway Determination Report* template:⁵⁷

In establishing the presence of a waterway at any particular site GMW assesses the presence of the features described in s.3 of the Act, as well as takes into account the catchment area servicing the feature, and the presence of (or lack of) spring activity.

If the features described in s.3(b) are present, GMW undertakes a calculation of the catchment area servicing the feature. If the calculated catchment area is ≥ 60 hectares, then a waterway is deemed to be present at that point.

The catchment area can be less than 60 hectares if the catchment yield is supplemented by spring activity. In these instances a waterway would be deemed to be present.

The site was assessed in accordance with the Waterway Determination Decision Process as described on page 8 of the attached guideline document.

The property does not appear to have a river, creek stream or watercourse present; however it may well have had features described in s.3(b). A catchment assessment appears to have been calculated as part of the inspecting officers assessment and it was determined that the catchment area servicing the property was 28.85ha. There must have also been an absence of spring activity and contributing flow for this decision to be made.

182 Notice was also given under Section 52 of the PE Act⁵⁸ to North Central Catchment Management Authority (NCCMA), relevant because of the Special Water Supply Catchment Area listed in Schedule 5 of the *Catchment and Land Protection Act 1994*.

183 The referral authorities did not attend the hearing.

⁵⁶ Garbutt, *Waterway Determination Guidelines*, 2002.

⁵⁷ Garbutt, *Waterway Determination Guidelines*, 2002, Appendix, page 8.

⁵⁸ In accordance with the Statement of Obligations for Catchment Management Authorities, and pursuant to section 186(A) and Part 6A of the *Water Act 1989*, this site is in the waterway management district of the NCCMA.

Tribunal determination

Does a *watercourse* exist at the site?

184 It was the expert evidence of Mr Beardshaw that there is no watercourse present at the site and hence the following Decision Guideline set out in ESO4 does not apply:

The need to protect vegetation and habitat and the role these attributes play in improving and assisting in the maintenance of water quality. In particular, the need to maintain and revegetate land within 30 metres of a watercourse.

185 We disagree with council that the water feature is a watercourse because of its ordinary meaning as we did not observe a stream of water or stream beds during our site inspection. Further, we find that there is no natural channel present, and we address this below.

186 We also accept the evidence of Mr Beardshaw that a watercourse does not exist on the site principally because the water feature does not meet the common law criteria of a watercourse set out in the Waterway Determination Guidelines. This was confirmed during our site inspection as we did not observe any banks or channel beds.

187 Having regard to the ordinary meaning of watercourse, observations during our site inspection, the evidence, and the common law criteria set out in the Waterway Determination Guidelines, we conclude that there is no watercourse at the site and thus, there is no need to maintain or revegetate land within 30 metres of the water feature.

Does a *waterway* exist at the site?

188 The *Macquarie Dictionary* defines ‘waterway’ as⁵⁹:

waterway

1. a river, canal, or other body of water as a route or way of travel or transport.
2. a channel for vessels, especially a fairway in a harbour, etc.

189 During our site inspection we did not observe a defined bed and/or banks nor did we observe a defined route or any spring or absorbent soil. Thus, having regard to its ordinary meaning, a ‘waterway’ does not exist on the site.

190 Thus, we concur with the evidence and the common law criteria set out in the Waterway Determination Guidelines, that there is no waterway at the site. Since there is no waterway at the site, the following clauses of the planning scheme do not apply:

- Clause 12.03-1S objective “To protect and enhance river corridors, **waterways**, lakes and wetlands.”

⁵⁹ Online at 7 January 2022.

- Clause 14.02-1S strategy to “Retain the natural drainage corridor with vegetated buffer zones at least 30 metres wide along each side of a waterway...”

Does a natural channel exist at the site?

191 GMW appears to have approached the characterisation of the overlands flows at this site as a natural channel. It appears it must have, perhaps inadvertently, considered that a natural channel existed at the site. i.e. they completed “Decision 3 – Testing whether a natural channel where water regularly flows exists at the site” and found the answer to “Is there a natural channel present” was “Yes” (because they then looked at catchment area and spring presence).⁶⁰

192 The Waterway Determination Guidelines provide the following guidance for defining natural channels:⁶¹

To clarify what may be classified as a natural channel, the legal case Barwick C.J. in *Knezovic v. Shire of Swan Guildford* (1968) 118 CLR 468, states that a drainage depression, without defined bed and banks, “can be called a defined channel”. Based on the Knezovic’s case a “channel” must be considered to be a fold in the contours of the land where water generally collects and flows as compared to a sheet flow of water across or along the contours which has no particular defined point which collects water.

In this definition the notion of continuity of flow, for whatever period, is expressly disavowed as an essential element. A flow may be regular, whether or not it continues for any particular period.

A “natural channel” does not need to have eroded bed and banks. It is sufficient that when water flows it does so in a confined and regular way.

193 It is the expert evidence of Mr Beardshaw that this is the correct way to determine if a natural channel is present, and that, despite the way GMW appears to have completed its assessment, he considers there to be no “fold in the contours of the land where water generally collects” and therefore no natural channel is present at the site. Instead, he considers the overland flow to be sheet flow of water across or along the contours.⁶²

194 It is his evidence that the aerial photographs showing a path or faint line of darker growth generally along the path of the “water course” line shown on the Planning Property Report, was likely to be a stock route between water and feed.

195 We note that, when contour lines cross a natural channel, they bend forming a V-shape. The points in these V’s always point upstream, or opposite the

⁶⁰ Garbutt, *Waterway Determination Guidelines*, 2002, Decision 3, page 8.

⁶¹ Garbutt, *Waterway Determination Guidelines*, 2002, Section 2.1.2, page 5.

⁶² Oral evidence of Beardshaw, 26 July 2021.

direction of the overland flow. The Feature and Level Plan prepared by Millar Merrigan and dated 28 February 2020, shown below, shows contour lines, at 0.5 m vertical intervals, between the dam at the southern boundary of the property and the dam at the western boundary of the property. Some of these contours (mostly in the southern portion) bend forming a V-shape in the location of the “water course” line shown on the Planning Property Report. The northern portion of the contour lines do not clearly show such bends forming a V-shape.



Figure 7 – Feature and Level Plan prepared by Millar Merrigan and dated 28 February 2020.

- 196 From our site inspection we note that, whilst the ground had been recently disturbed by a plough, a southern portion of that same alignment was wet underfoot in comparison to the surrounding land. We recognise that there have been hydrological changes upstream and this may be the result of the location of the existing dam outlet. We also add that we were only able to traverse the southern half of the alignment due to vegetation growth on the northern half of the alignment.
- 197 From our analysis of the contour information available and our site inspection, it might be said that a limited southern portion of the alignment could be considered to have a fold in the contours of the land where water generally collects. We also acknowledge that the fold in contours may be a result of a stock route.
- 198 However, more than half of the northern portion of the alignment appears to exhibit sheet flow of water across or along the contours which has no defined point which collects water. For these reasons, we agree on balance, with the expert evidence of Mr Beardshaw, that the overland flow between the dam at the southern boundary of the site and the dam at the western boundary of the site is properly considered as a sheet flow of water across or along the contours.
- 199 Since there are no consistent folds in the contours of the land where water generally collects, we consider that there is no natural channel present. This also means that, for the purposes of the ordinary meaning of watercourse (i.e. a natural channel conveying water), the overland flows are also not a watercourse.

Does a designated waterway exist at the site?

200 For completeness we note that the term ‘designated waterway’ does not occur in the planning scheme, however, the NCCMA provided advice that used the term, so we deal with it here for completeness.

201 The NCCMA provided the following advice to Mr Beardshaw:⁶³

...does not have a **designated waterway** through it and therefore the **drainage** requirements should be discussed with Macedon Ranges Shire Council. [Tribunal emphasis added]

202 Further, in a response to the Section 55 referral from council, their response to flooding and drainage is as follows:⁶⁴

Information available at North Central CMA indicates that the location described above is not subject to flooding from any designated waterway based on a flood level that has a probability of occurrence of 1% in any one year. It would be in your best interest to contact the relevant Local Council regarding the impact of **overland flows** associated with the **local drainage system**. [Tribunal emphasis added]

⁶³ Email from NCCMA to Beardshaw dated 30 March 2020.

⁶⁴ NCCMA, letter to council dated 28 August 20.

203 The term ‘**designated waterway**’ has a specific definition under Section 3 of the Water Act, as follows, and may require a Works on Waterways Permit.⁶⁵

designated waterway means a waterway that—

- (a) in relation to an Authority, other than Melbourne Water Corporation, is declared under section 188 as a designated waterway; and
- (b) in relation to Melbourne Water Corporation, is a designated waterway under section 188A;

204 The Tribunal understands the NCCMA’s position that the overland flow is not a ‘**designated waterway**’ and therefore does not require a Works on Waterways Permit.⁶⁶

205 NCCMA did not advise whether the site was a **waterway**.

206 We understand council’s submissions that reference to the Water Act are not necessarily helpful in the context of the planning scheme. The term ‘designated waterway’ is not used in the planning scheme however it was used by the NCCMA. The *Macquarie Dictionary*⁶⁷ defines ‘designate’ and ‘waterway’ as:

designate

verb (t) (designated, designating) **1.** to mark or point out; indicate; show; specify. **2.** to name; entitle; style. **3.** to nominate or select for a duty, office, purpose, etc.; appoint; assign.

waterway

noun **1.** a river, canal, or other body of water as a route or way of travel or transport. **2.** a channel for vessels, especially a fairway in a harbour, etc.

207 It is clear from the ordinary definition that the water feature on the site is not a waterway.

208 With respect to ‘designated’ this raises the query: designated by whom? Logically if one is considering a water feature on land and its characterisation, it is helpful to have regard to the Water Act because that is the legislative regime under which waterways are ‘designated’. Of course, we accept that the Water Act is not referred to in clause 73 of the planning scheme.

⁶⁵ Works and activities in, under, on or over the bed and banks of Designated Waterways in Victoria require a Works on Waterways Permit from the relevant Catchment Management Authority as per the NCCMA advice for their waterway management district: <http://www.nccma.vic.gov.au/development-advice>

⁶⁶ Works and activities in, under, on or over the bed and banks of Designated Waterways in Victoria require a Works on Waterways Permit from the relevant Catchment Management Authority as per the NCCMA advice for their waterway management district: <http://www.nccma.vic.gov.au/development-advice>

⁶⁷ Online at 7 January 2022.

209 Thus, having regard to the ordinary meaning of 'designated' and 'waterway' we conclude that the water feature on the site is not designated in the planning scheme (nor under the Water Act) nor is it a waterway.

Characterisation of the overland flows

210 We conclude the following in relation to the characterisation of the overland flow at the site:

- it is marked on a Vicmap 1:25,000 topographical map;
- there is no river, stream or creek at the site;
- there are no defined bed and banks at the site;
- there are no consistent folds in the contours of the land where water generally collects;
- there is sheet flow of water across or along the contours;
- the catchment area is less than 60 hectares; and
- there is no spring or absorbent soil.

211 We agree with NCCMA, GMW and the expert evidence of Mr Beardshaw that the application of the Water Act definitions and the Waterway Determination Guidelines are useful. However, they are not determinative as we have had regard to the ordinary definitions of the relevant terms and relied upon our own observations as an expert Tribunal.

212 Further, we conclude that there is no watercourse, designated waterway, or waterway at the site.

213 We find that there are no consistent folds in the contours of the land where water generally collects, therefore there is no natural channel present. As such, we agree with Mr Beardshaw's characterisation of the overland flows at the site – that it is sheet flow of water across or along the contours.

214 Either way, whether there be a natural channel or sheet flow of water across or along the contours, the planning scheme considers them in the same way. For the purposes of the planning scheme, and understanding the required design response for overland flow at this site, we consider the relevant terms in the planning scheme to be: natural drainage functions; natural drainage corridor, drainage lines; and drainage.

IS THE PROPOSAL'S MANAGEMENT OF WATER RELATED CONSIDERATIONS ACCEPTABLE?

Statements of grounds

215 The respondents amended joint statement of grounds raises environmental concerns including the following relating to drainage:⁶⁸

Does not adequately address or resolve environmental issues including drainage, the impact of the watercourse and surrounding seasonal flooding on the development, and the impact of the development on those matters, and impacts on native flora and particularly fauna.

216 The respondents raise concerns with the underlying assumptions in the stormwater assessment⁶⁹ and support council's request for retention of the purported waterway on the site, as outlined in the delegates report as follows:⁷⁰

The waterway within the site although not being a formed channel with continuous flow is nonetheless a natural ephemeral stream that flows at times of rainfall events. The history of this land for farming has resulted in native vegetation being removed. The LDRZ decision guidelines promote the protection and enhancement of environmental features including the need to planting vegetation along waterways. The proposal seeks to engineer the waterway into an underground stormwater drainage system other than the large retention basin and a smaller drainage reserve rather than retaining and enhancing this waterway as a natural feature. The proposal would remove an environmental feature of the land that should be retained as natural waterway system that would also be in keeping with the semi-rural character of this area of Kyneton South along with large mature trees and spacious development layout.

217 Mr Pharaoh also supports council's position and goes further in his submissions by stating that 'there is no public policy position ever by council or for this area, which support the engineering of a waterway into an underground stormwater drain.'⁷¹

218 St Leonards Property refer to the waterway as a 'purported waterway'.⁷² They say there is no waterway through the site and this has been confirmed with detailed site survey that shows no depression in the topography.

219 Further, St Leonards Property say that the Afflux drainage report confirms that there is no reserve required for any drainage functions and that there is no environmental reason for this reserve to preserve any significant vegetation. Pedestrians moving through the site from Harpers Lane to the south can utilise the footpath network contained within the proposed road reserves.

⁶⁸ Williams & Others, Amended Joint Statement of Grounds, received on 12/02/2021.

⁶⁹ Williams & Others, Submissions on behalf of Ruth Williams & Others, dated 8 June 2021.

⁷⁰ Council, Delegates Report, dated 24 February 2021, page 38.

⁷¹ Pharaoh, Submissions on behalf of Neil Pharaoh, dated 8 June 2021, para 15.

⁷² Millar Merrigan, letter dated 28 September 2020 re *Staged subdivision, removal of easements (E1 & E4) and native vegetation removal*.

What is required?

- 220 The planning scheme considers drainage lines and natural drainage functions and natural drainage corridors in the following sections:
- Clause 19.02-6S Open Space – Strategy “Ensure that open space networks:... Incorporate, where possible, links between major parks and activity areas, along waterways and **natural drainage corridors**, connecting places of natural and cultural interest...”
 - Clause 19.03-3S Integrated Water Management –
 - Strategy “Plan and coordinate integrated water management, bringing together stormwater, wastewater, **drainage**, water supply, water treatment and re-use, to:... Protect downstream environments, waterways and bays.”
 - Strategy “Protect significant water, sewerage and **drainage assets** from encroaching sensitive and incompatible uses.
 - Clause 21.06-4 Flooding – Strategy 2.1 “Ensure the **natural drainage functions** are retained in the development of land for residential purposes.”
 - Clause 21.07-3 Water – Strategy 1.6 “Encourage larger lots where there are **drainage lines**, waterways and steep slopes.”
 - Clause 21.07-3 Water – Strategy 1.8 “Ensure the **natural drainage functions** are retained in the development of land for residential purposes.”
- 221 The planning scheme considers water quality in the following sections:
- Clause 56.07-4 Stormwater management objectives, including references to *Urban Stormwater - Best Practice Environmental Management Guidelines (BEPM)*⁷³
 - Clause 65.01 Consideration “Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.”

The overland flow design response

- 222 We agree with Mr Beardshaw that the provision of a “vegetated swale”, “sediment pond”/“retarding basin” and “wetland” along the path of the drainage line, as set out in the proposed subdivision plans, is an appropriate design response, for this site, for the management of overland flow as set out in the planning scheme.
- 223 Mr Beardshaw refers to “a number of catchment specific challenges that have presented themselves in the review of the site” and says that his design

⁷³ Victorian Stormwater Committee, *Urban Stormwater - Best Practice Environmental Management Guidelines*, 1999.

approach is “limiting hydrological changes and works extents”. He notes that this is achieved by keeping the vegetated swale in the approximate alignment of the existing drainage line and that this accords with best practice.

224 Overall, we agree with Mr Beardshaw that the design response for overland flow of a vegetated swale, sediment pond/retarding basin and wetland is appropriate because “the construction of the vegetated swale (alongside the recommended stormwater re-use, sediment basins and wetlands presented within this report) result in an improvement to an otherwise unrecognised waterway.”⁷⁴

The water quality design response

225 The planning scheme considers water quality in:

- Clause 56.07-4 Stormwater management objectives, including the requirement to meet the current best practice performance objectives for stormwater quality as contained in the *Urban Stormwater - Best Practice Environmental Management Guidelines (Stormwater BEPM)*⁷⁵; and
- Clause 65.01, including whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.

226 The site is divided into two major catchments, as shown in the figure below:

- the **Western catchment** is 29.8 ha and outlets to Harpers Lane where it joins into the Campaspe River, some 5 km further downstream of that point, at the Kyneton Streamside Reserve (a section of the Campaspe River which has a Waterway Condition Index of “Very Poor”); and
- the **Northern catchment** is 18.8 ha and outlets to the property to the north where it joins the Campaspe River approximately 500 m from the northern boundary of the site, at the Kyneton Botanic Gardens (a section of the Campaspe River which has a Waterway Condition Index of “Moderate”).

227 The upstream catchment, south of the site, is estimated to be 16.2 ha.

⁷⁴ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 51/57.

⁷⁵ Victorian Stormwater Committee, *Urban Stormwater - Best Practice Environmental Management Guidelines*, 1999.



Figure 8 – Existing catchment areas contributing to site discharge points⁷⁶

228 In order to achieve the water quality objectives, a number of treatment elements are proposed for this site. There are two proposed mitigation scenarios for this site – an interim mitigation scenario and an ultimate mitigation scenario. The following development scenarios are proposed:

- i Interim Mitigation Scenario⁷⁷
 - o Western catchment directed to:

⁷⁶ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 17/57.

⁷⁷ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf pages 27, 32 & 33/57.

- the Western “Harpers Lane” **Retarding Basin** (12,000 m³, 375 mm RCP outlet) with a **wetland** (5,200 m² surface area) and **sediment basin** (400 m² surface area)
- Northern catchment directed to:
 - the northern property as temporary increase in flows (by 400 L/s); or
 - Northern “Temporary North” **Retarding Basin** (700 m³, 4x450 mm outlet) located in one of the northern lots within the site. This basin would serve a dual purpose as an interim sediment basin (500 m² surface area) until the downstream development and asset are completed.
- ii Ultimate Mitigation Scenario⁷⁸
 - Western catchment directed to:
 - the Western “Harpers Lane” **Retarding Basin** (12,000 m³, 375 mm RCP outlet) with a **wetland** (5,200 m² surface area) and **sediment basin** (400 m² surface area)⁷⁹
 - Northern catchment directed to:
 - the Northern “Lauriston Reservoir Road” **Retarding Basin** (8,000 m³, 300 RCP outlet) – which would be designed to accommodate both sites and to relieve flooding at Lauriston Reservoir Road.

229 The drainage concept layout is shown in the figure below.

⁷⁸ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf pages 20 & 33/57.

⁷⁹ Refer pdf page 33/57



Figure 9 – Drainage concept layout⁸⁰

- 230 In his report, Mr Beardshaw states that the site will discharge into the Campaspe River system, and as such a particular focus on site derived nutrients should be given particularly to phosphorous for freshwater systems.⁸¹ Mr Beardshaw further states that the MUSIC modelling results indicate that best practice objectives can be met or exceeded in all categories, with the western wetland providing ‘over treatment’ of nitrogen to compensate for the northern catchment.⁸²

⁸⁰ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 17/57.

⁸¹ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 14/57.

⁸² Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 36/57.

- 231 We do not agree with Mr Beardshaw because, as seen in Figure 6, the northern catchment has a more direct route to the Campaspe River which is approximately 500 m from the northern boundary of the site (and has a Waterway Condition Index of “Moderate” in this location). The western catchment outlet is via a different drainage line which joins into the Campaspe River, some 5 km further downstream of that point (and has a Waterway Condition Index of “Very Poor” in this location).
- 232 Given the relatively better condition of the Campaspe River at the northern catchments outlet versus the western catchments outlet, we do not consider it appropriate for the western wetland to provide over treatment of nitrogen to compensate for the northern catchment in this situation.
- 233 Nonetheless, Mr Beardshaw considers that it is acceptable because the overall water quality discharging from this site will be improved by this proposal, when compared to the existing state of the site which is agriculturally degraded.^{83, 84}
- 234 Mr Beardshaw also notes that the development of this site has some reliance on the development of adjacent parcels including the ‘Temporary North’ Retarding Basin and ultimate downstream asset ‘Lauriston Reservoir Road’ Retarding Basin.
- 235 The retarding basin shown on the plans below, does not appear to be either of these as it is located immediately north of the site (not on the site and not at the existing 300mm RCP culvert under Lauriston Reservoir Road).

⁸³ St Leonards Property Holdings, Speaking Notes for Closing Submissions, dated 25 July 2021.
⁸⁴ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 52/57.



Figure 10 – Landscape Masterplan showing retarding basins and wetlands⁸⁵

- 236 We understand from St Leonards Property's submission and Mr Beardshaw's evidence that the Northern "Temporary North" Retarding Basin is proposed to be located in one of the northern lots within the site, if an agreement cannot be reached to temporarily increase flows to the northern property.
- 237 In response to a question about the location of the Northern "Temporary North" Retarding Basin and whether it could be located on the subject site, Mr Beardshaw advises that a basin of that size could easily be accommodated on one of the northern lots within the site. However, there is no such proposal before us.
- 238 In terms of treatment, he concedes that treatment of the Northern catchment could also be achieved within the site (instead of relying on 'overcompensating' from the western catchment), by using a rain garden at the edge of the development or using chemical processes. The challenge with

⁸⁵ Amended Plans, *I. Landscape Plans*, Tribunal Book Document 33.

this approach he says is that raingardens require more maintenance and often fail.

239 It is for this reason that he considers the best stormwater for this site, and the surrounding area, would be the implementation of the 'Ultimate Mitigation Scenario'. With the Northern catchment directed to the Northern "Lauriston Reservoir Road" Retarding Basin (located on the property to the north at the existing 300mm RCP culvert under Lauriston Reservoir Road), which would be designed to accommodate both sites and to relieve flooding at Lauriston Reservoir Road. He reasons that this is considered a best practice approach because it would optimise the system, minimise the number of stormwater management features for the area and also be the most resilient and least maintenance option.

240 We accept the assessment of the stormwater flows and find the proposed retarding basins to be an acceptable approach for managing flows and reducing flood risk downstream of Harpers Lane. Impacts to the quantity of stormwater flows or flood risk are not central to our reasons for refusal.

241 As for the future water quality considerations, we are left with several questions about the development. In our view the following needs to be resolved:

- given that no development contribution plan exists for drainage, is it appropriate to rely on the future downstream development (which the planning evidence says has no guarantee of being developed) when the Campaspe River is less than 500 m downstream?
- if we were to approve this application, we would be approving a Stormwater Management Plan that is not complete because it does not include the works on the property to the north; and
- is it appropriate for us to approve the proposed "temporary increase in flows to the adjacent northern property predicated on written advice from the owner"?⁸⁶ How would an agreement like this be achieved?

242 Ultimately, we are not satisfied that the Interim Mitigation Scenario is appropriate as it requires land to the north that is not in the ownership or possession of St Leonards Property. Further, we do not consider it appropriate for the western wetland to provide over treatment of nitrogen to compensate for the northern catchment in this situation.

ARE TRAFFIC AND ACCESS ARRANGEMENTS ACCEPTABLE?

243 The proposal for subdivision of the site gives rise to assessment of the following impacts:

⁸⁶ Chris Beardshaw, Afflux Consulting Stormwater Management Solutions, *Stormwater Management Plan*, 25 September 2020, Tribunal Book Document 37, pdf page 27/57.

- the strategic consideration of traffic and pedestrian connectivity within Kyneton;
- the impact of traffic on local traffic and the provision of infrastructure; and
- access arrangements.

244 Council's concerns regarding traffic impacts were detailed in the Officer's Report as follows:

The proposed road network would not provide for adequate internal traffic or pedestrian connectivity and would not suitably interface with adjacent roads and public reserves.⁸⁷

...

Proposal inconsistent with the Kyneton South Framework Plan in not addressing rural interface, poor integration with anticipated road network and development layout of Framework Plan area, lack of open space corridor along waterway, cul de sacs proposed rather than connected road network, etc.

[Tribunal underlining]

Detrimental impacts from increased traffic including safety particularly at the intersection of Harpers Lane and Lauriston Reservoir Road but also at Trentham Road intersections, and from noise, dust, etc. Alternative new road access suggested.

Safety risk to pedestrians and cyclists along Harpers Lane and nearby roads with no footpaths including accessing to the station and town centre.

Amenity impacts from urbanisation of locality with increased traffic and activity in a rural locality and from loss of privacy/overlooking, as well as from construction activity during subdivision and subsequent residential development period.

245 Clause 21.11 Transport relates to transport links within the Shire including road, public transport and pedestrian movement. Council considers that:⁸⁸

Subject to road upgrades, the site is adequately accessed by road with Harpers Lane to be utilised as the primary access for the time being until adjacent properties to the north and south are developed which would provide for additional road connections to dilute traffic movements away from Harpers Lane. Futureproofing the proposed subdivision to interface with surrounding properties to ensure that an integrated road network is viable in the future for this purpose as well as providing for pedestrian movement connecting this land with the Kyneton railway station and township beyond are important matters that this policy promotes. The lack of connected road network within the proposed subdivision along

⁸⁷ Council Officer's Report dated 24 February 2021, Tribunal Book Document 22, at page 29.

⁸⁸ Council Officers Report, dated 24 February 2021, Tribunal Book Document 22, page 36.

with lack of interface with adjacent land including a Council reserve to the south-east of the site, and the removal of the waterway which could otherwise be utilised for a linear reserve incorporating pedestrian pathways is contrary to this policy.

Road network

246 The locality map below shows the site in relation to the wider traffic and road network, including:

- **Kyneton township**, to the north;
- **Kyneton Station** and Bendigo Line, to the north;
- **Calder Freeway**, to the east;
- **Lauriston Reservoir Road**, to the north;
 - part of the rural road network with a rural arterial function
 - a Council road providing an east-west connection between Kyneton and Lauriston
 - the prevailing posted speed limit is 80 km/h reducing to 60 km/h to the east on approach to Kyneton
- **Kyneton-Springhill Road**, to the south;
 - part of the rural road network with a rural arterial function
- **Harpers Lane**, along the western boundary of the site; and
 - a local rural road with a default speed limit of 100 km/h
 - an existing road reserve of approximately 20 m
 - has a central gravel carriageway with a varying width (generally 4.5 m in the southern section, widening to 5.5 m in the northern section)
 - central section is an ‘unsealed collector’ with a typical daily volume of 200 - 500 vehicles per day
 - northern and southern sections are ‘sealed access’ with a typical daily volume of 500 - 1000 vehicles per day
- **Wattle Way**, to the south of the site.
 - a local rural road
 - the unmade road reservation at the eastern end would ultimately provide a north-south connection to the site’s southern boundary

247 We note that the Department of Transport’s Crash statistics database for the last five years of available data shows no crashes along Harpers Lane or at its intersections with Lauriston Reservoir Road and Kyneton-Springhill Road. Mr Walsh was satisfied that there were no existing crash patterns on the nearby road network.



Figure 11 – Locality Map⁸⁹

248 The subdivision plan below shows the internal road network, with the following external vehicle connections:

- Two local **access road** connections with Harpers Lane – Roads 4 and 5.
- A **connector road** connection to a road reserve at the southern boundary of the site that is to provide a future route to/from Wattle Way – Road 1.
- Allowance for a future **connector road** connection at the northern boundary of the site when adjacent land develops – Road 1.

249 The lots fronting Harpers Lane (Lots 1-5 and Lots 81-87) are proposed to have direct access to Harpers Lane via new crossovers.

⁸⁹ Jason Walsh, Traffic Group Pty Ltd, *Expert Witness Statement*, Tribunal Book Document 38, page 7.

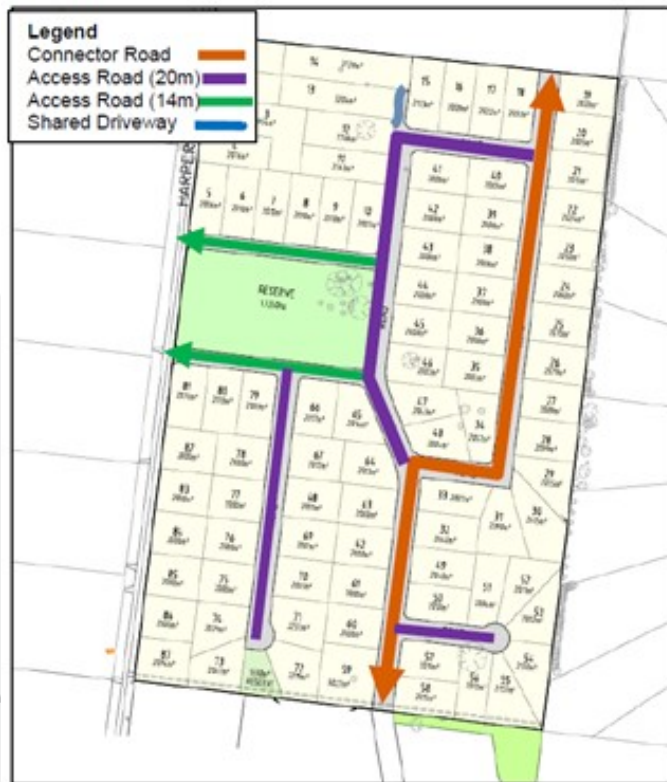


Figure 12 – Internal Road Layout – Road Types⁹⁰

Strategic setting

250 Harpers Lane is the designated western boundary for the township in the Kyneton Strategic Framework Map at clause 21.13 of the planning scheme.

251 Mr Walsh refers to the Draft Framework Plan which provides a high-level understanding of connections and infrastructure that may be required to support the Kyneton community, and provides a potential street network. An excerpt of this plan is provided in Mr Walsh's expert evidence and is shown below.

⁹⁰ Cardno, *Traffic and Transport Assessment*, dated 22 July 2020, Tribunal Book Document 19, page 18.

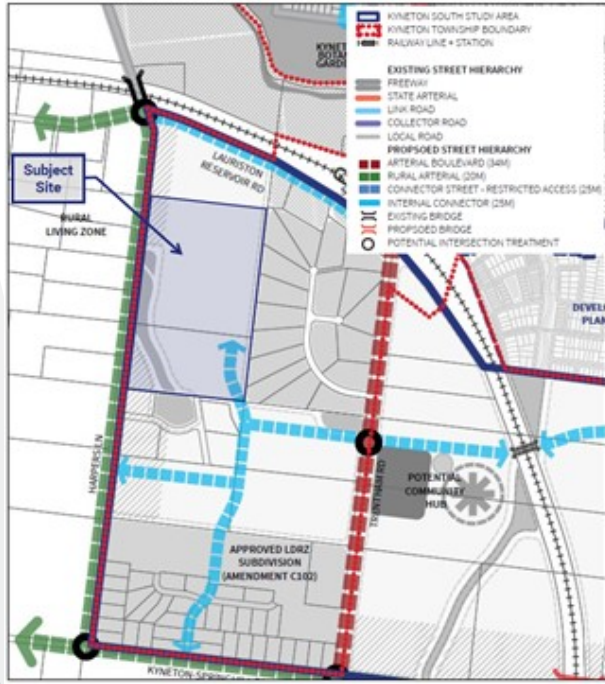


Figure 13 – Draft Framework Plan – Potential Street Network⁹¹

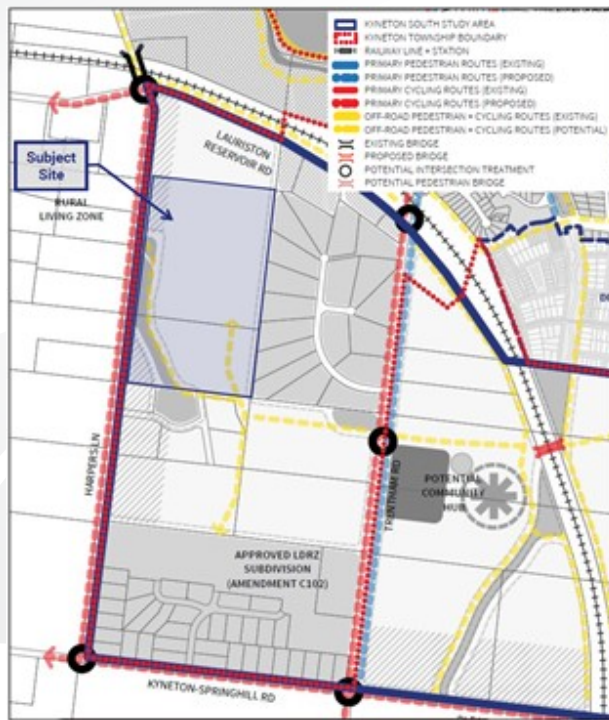


Figure 14 – Draft Framework Plan – Potential Cycle and Pedestrian Network⁹²

⁹¹ Jason Walsh, Traffic Group Pty Ltd, *Expert Witness Statement*, Tribunal Book Document 38, page 10.

⁹² Jason Walsh, Traffic Group Pty Ltd, *Expert Witness Statement*, Tribunal Book Document 38, page 11.

Traffic generation

- 252 The effect of any additional demand on the existing rural road network is considered under clause 21.11 of the planning scheme, as well as whether there is any need for the proposal to provide access from a road of a higher standard than that currently provided. This is in addition to the broader decision guidelines in clause 65, which relate to any associated amenity, traffic flow and road safety impacts.
- 253 The parties generally agree with the traffic generation figures provided by Mr Walsh in his expert evidence,⁹³ that the proposal will generate 609 and 261 movements on a daily basis to the north and south respectively (a distribution of 70% to the north and 30% to the south).
- 254 These traffic generation figures are based on the adopted traffic generation rate of 10 movements per dwelling per day, inclusive of 1 movement per dwelling in peak hours. In rural areas, given the locality of the site and limited public transport accessibility, the adoption of 10 movements per dwelling is typical.
- 255 The projected distribution of these traffic volumes on Harpers Lane is summarised below.

Table 1 - Harpers Lane Traffic Generation⁹⁴

	Existing Movements	Development Movements	Total
North (70%)	200	609	809
South (30%)	200	261	461
Total	200-500	870	

- 256 This means the expected daily two-way volume on Harpers Lane will not exceed 1,000 vehicles at its northern end, and a lesser volume at its southern end.

Traffic Impact

Internal road layout assessment

- 257 Clause 56.06 of the planning scheme sets out objectives in relation to the street network design for subdivisions. In particular, clause 56.06-4 has an objective;

to provide for direct, safe and easy movement through and between neighbourhoods for pedestrians, cyclists, public transport and other motor vehicles using the neighbourhood street network.

⁹³ Jason Walsh, Traffic Group Pty Ltd, *Expert Witness Statement*, Tribunal Book Document 38, page 14.

⁹⁴ Oral evidence of Walsh, 19 July 2021.

- 258 Council is concerned that the proposed road network will not provide for adequate internal traffic or pedestrian connectivity and will not suitably interface with adjacent roads and public reserves.
- 259 Mr Walsh's evidence is that the proposed road network provides a connective network, with two accesses to Harpers Lane and future connections to the north and south. He adds that there is no connection to the east as the site abuts established residential lots.
- 260 Further, he says that the proposed road network is consistent with the intent of the Draft Framework Plan and seeks to provide for permeable neighbourhoods and connectivity. We note that St Leonards Property submitted a Document Status Table that summarised statutory weight of this document as 'draft' and as such it has 'nil relevance'. However, it adds that it **is** relevant to the question of reasonableness of council's condition requiring works at the intersection. Further, it says that, as shown by Mr Walsh, the works are identified in the Draft Framework Plan and do not emerge from an assessment of the proposal.⁹⁵ Council disagrees with this and in its marked-up version of the Document Status Table, council says that no weight should be given to the document. Council also says that this document is **not** relevant to the question of reasonableness of Council's condition requiring works at the intersection and, as shown by Mr Walsh, the intersection site distances do not meet acceptable standards.⁹⁶
- 261 Mr Walsh also says that, whilst it is important that there is a level of connectivity, Harpers Lane should remain the main thoroughfare for people travelling north/south. He points to the provision of 'turns' in Road 1 as a way of making that north/south route through the development less attractive than the straight Harpers Lane, thereby discouraging non-local though traffic.
- 262 We note that some lots only have a road abuttal to Harpers Lane and accordingly will have direct access. Given the function of Harpers Lane and approved residential subdivision to the south which also has lots with direct access, Mr Walsh stated that he is comfortable with that arrangement.
- 263 The typical cross sections for Roads 4 and 5, adjacent to the reserve, have road reserves of 14 m rather than the typical 20 m referenced in the Infrastructure Design Manual (IDM) 2019 which has been adopted by Council.⁹⁷ In response to questions about the 20 m set out in the IDM, Mr Walsh says that he does not know why this width is set out. However, he says that he is confident that 14 m is sufficient in the circumstances principally because of the presence of the adjacent reserve.

⁹⁵ St Leonards Property, *Document status table – Applicant – 25 July 2021*.

⁹⁶ Council, *Document status table – RA – 27 July 2021*.

⁹⁷ Council, Submissions on behalf of the Responsible Authority, dated 15-18 & 21 June 2021, para 218, page 60.

Access for service and emergency vehicles

- 264 Mr Walsh's evidence is that the internal layout can provide for suitable accessibility for emergency and waste collection vehicles, and the proposed dead-end turning treatments provide for an acceptable access outcome.
- 265 This was not challenged by the other parties.

Pedestrian and cycling access

- 266 Mr Walsh says that, given the projected internal traffic volumes, it is not necessary that separate provision be made for bicycles within the proposed road network.
- 267 Nonetheless, the application provides for bicycles through the provision of a 2.5 m shared path on Roads 1 and 6, and on both sides of the reserve (Roads 4 and 5).
- 268 To supplement the shared paths, pedestrians are accommodated by a 1.5 m footpath on Roads 2, 3, 4 and 5. He also says there is a small discontinuance along Road 2 and that the shared path should be extended for that part of Road 2 between the eastern part of Road 1 and Road 4.
- 269 Mr Walsh concludes that the proposal will adequately service pedestrians and cyclists.
- 270 This was not challenged by the other parties.

Treatment of Harpers Lane

- 271 Given the increased traffic movements on Harpers Lane associated with the proposal, St Leonards Property proposes to widen and seal Harpers Lane to a width of 6.6 m and add a footpath along the length of its frontage to Harpers Lane.
- 272 North of the site to the existing sealed section on the approach to Lauriston Reservoir Road, St Leonards Property proposes to widen the existing gravel formation of Harpers Lane to a width of 6.6 m. Council seeks for this section of Harpers Lane to also be sealed to a width of 6.6 m. Council says that this will make a seamless transition from the development to the Harpers Lane / Lauriston Reservoir Road intersection.
- 273 Mr Walsh considers that unnecessary as the approach proposed by St Leonards Property already exceeds the IDM minimum seal specified for this road type (a low density residential access road with an indicative maximum daily volume of 1,000 vehicles) and will provide for appropriate access to and from the site in addition to and allow connectivity to Lauriston Reservoir Road.
- 274 He considers that Harpers Lane will function as a low density residential access road, delivering traffic to / from the rural road network of Lauriston Reservoir Road and Kyneton-Springhill Road, and should not be upgraded beyond that requirement.

- 275 Since Harpers Lane is the designated western boundary for the township in the Kyneton Strategic Framework Map, it is Mr Walsh's evidence that there will not be significant growth in traffic on this road, beyond development of this site and the other undeveloped land on the eastern side of Harpers Lane. He does however add one provision – that is, unless council proceeds with the suggested rural arterial function to facilitate a more strategic role for Harpers Lane. In that case, he considers that there would need to be separate upgrade works undertaken on Harpers Lane to align with that strategic role.
- 276 When questioned about why there was a shared path on Road 5 but not a dedicated bike lane, Mr Walsh responded that Table C1 'Design of roads and neighbourhood streets' in clause 56 dictates which roads require a dedicated bike lane, based on the traffic volume.
- 277 We agree with Mr Walsh that, whilst council may have aspirations for Harpers Lane to serve a more strategic role, it is not the responsibility of St Leonards Property to upgrade the road to a standard beyond what is necessary for this development.

Harpers Lane / Lauriston Reservoir Road Intersection

- 278 The existing Harpers Lane / Lauriston Reservoir Road intersection is a controlled cross intersection with priority afforded to Lauriston Reservoir Road. The existing intersection has limited sight distance to the east primarily from the horizontal curvature of Lauriston Reservoir Road, and, to some extent, existing roadside vegetation.
- 279 Whilst there are no reported accidents at this intersection, given the existing limited sight distance and the expected increase in traffic movements, it is the evidence of Mr Walsh that it would be prudent for council to apply to reduce the speed limit on Lauriston Reservoir Road to 60 km/h. He says this simply requires an extension of the existing 60 km/h speed limit further to the east.
- 280 Council considers that, given the sight distance does not presently meet the Austroad standards, it implies that the intersection is not safe and an intersection treatment such as a roundabout may be required. However, Mr Walsh's evidence is that the intersection has been in operation for some time with no issues and, whilst it is his preference to have the speed limit reduced, he does not consider it necessary for the safe operation of this intersection post development.
- 281 Mr Walsh says requiring St Leonards Property to pay for an intersection upgrade to a roundabout is inequitable.

Traffic conclusion

- 282 The site's proximity to Calder Freeway, Kyneton Railway Station, and the Kyneton township provides ready access to multiple transport modes for occupants of the new development travelling to and from Kyneton and Melbourne.

- 283 We agree with council that the Harpers Lane / Lauriston Reservoir Road intersection may well be suited to a more rural arterial function. However, in the absence of any direction within the planning scheme for that outcome, we consider the treatment of Harpers Lane proposed by St Leonards Property to be an acceptable and equitable outcome for this proposal. We say this because the Draft Framework Plan does not have any status in the planning scheme.
- 284 Whilst there was no evidence before us to verify the existing traffic movements on Harpers Lane, we consider the application of the typical daily volumes of 200-500 vehicles per day for an unsealed collector road to be appropriate in the circumstances.
- 285 Further, we consider the adoption of expected post-development traffic movements of 10 movements per dwelling per day (at the top end of the typical rates of 3 to 10 movements per day) to be appropriately conservative in a rural area where occupants may be more likely to use their car for trips to and from Kyneton and Melbourne (as opposed to walking or cycling).
- 286 With the application of these post-development traffic movements, the expected daily two-way volume on Harpers Lane will not exceed 1,000 vehicles at its northern end, and a lesser volume at its southern end. Which we consider appropriate for a sealed access, which is nominated with a typical daily volume of 500 – 1,000 vehicles per day.
- 287 It is for these reasons that we consider the treatment of Harpers Lane will adequately accommodate the projected levels of traffic.
- 288 Further, these movements will occur when the prevailing speed limit for Harpers Lane will be reduced to 60 km/h.
- 289 We consider the proposed internal road network provides for a connective network as there are two accesses to Harpers Lane and future connections to the north and south. Further, the proposed typical road cross sections, with a sealed road width of 6.2 or 7.0 m, satisfy the IDM specification.
- 290 Further, we consider that the subdivision appropriately provides for pedestrians and cyclists with the provision of 2.5 m shared paths on Road 1 and Road 6 and on both sides of the reserve. Further, we agree with Mr Walsh's recommendation that the shared path should be extended along Road 2 between the eastern part of Road 1 and Road 4, to ensure continuity of the internal shared paths.
- 291 We accept that the widths of Road 4 and Road 5 are acceptable for this proposal, given the layout shown on the landscaping cross section and the provision of a footpath within the drainage reserve and public open space area.
- 292 We accept the provided assessment of the traffic impacts and agree that there is capacity for the additional traffic movements created by this development at the Harpers Lane / Lauriston Reservoir Road intersection and consider the treatment of Harpers Lane appropriate.

293 Impacts to traffic are not central to our reasons for refusal.

OTHER IMPACTS

Heritage

294 Council and the respondents submit that the proposal has failed to consider the heritage values of the bluestone pavement purported to be located underneath the gravel surface on Harpers Lane.

295 The respondents say that heritage is related to access because the proposal seeks access from Harpers Lane. Further, it is said that an understanding of the potential heritage values of Harpers Lane provides a contextual understanding of what attributes are valued in the area.

296 We are told that the detailed material relating to heritage that forms part of the respondents' submissions was submitted to Heritage Victoria and that it has formed the view that there is no basis for Harpers Lane to be included in the State Heritage Register.

297 We accept that Ms Ruth Williams has undertaken extensive research to aid the preparation of the respondents' submissions. However, we observe the following:

- there is no heritage overlay or interim heritage overlay affecting Harpers Lane;
- the planning scheme does not make any reference to the heritage value of Harpers Lane; and
- there is no reference in the planning scheme to existence of any bluestone paving underneath the surface of Harpers Lane.

298 In such circumstances, the consideration by this Tribunal of the potential heritage value of bluestone paving in Harpers Lane would lead to an error of law. Therefore, we reject any submission that this proposal should have considered the potential heritage values of Harpers Lane.

299 The fact that Harpers Lane is a rural road coupled with the existence of the existing uses and development are relevant matters and these have been considered by us.

Design Guidelines

300 The amended plans that have been substituted by us include the following:

- Ambrosia Kyneton Proposed Design Guidelines (**Design Guidelines**); and
- Design Guideline Mandatory Provisions (**Mandatory Provisions**).

301 Neither of these documents were provided to council with the application for planning permit.

302 The Design Guidelines are proposed to be implemented either as restrictions on the plan of subdivision or as a memorandum of common provisions on the certificates of title or by a section 173 agreement.⁹⁸ The Design Guidelines include a process for the approval of building designs by a ‘developers review consultant’ in this case, Shelton Finnis Architecture, prior to any approval for a building permit.

303 Twenty-six mandatory provisions are set out including the requirement for building designs to be approved by the review consultant prior to any approval for a building permit; dwelling size, siting, height; and location of garages.⁹⁹

304 We accept that St Leonards Property has turned its mind to the future development of the lots created by the proposal and seeks to provide a process that controls development of each lot.

305 The matters set out in the Mandatory Provisions are important considerations for the future development of the proposed lots.

306 Given our findings, we do not need to finally determine what mechanism is appropriate to control ultimate development of each lot. However, we make the following comments:

- The review consultant appears to comprise a firm of architects, what is to occur if the firm ceases to undertake this review or ceases to exist at all?
- If the Design Guidelines or Mandatory Provisions are proposed as restrictions on certificates of title, what is the form of restriction proposed? We say this because the Tribunal is reviewing a proposal for subdivision, which if approved, would result in new titles being issued. A decision maker should be provided with this information rather than leaving it to some later process.

Landscaping

307 Council seeks native and indigenous species for street trees both on the site and within the Harpers Lane road reserve.¹⁰⁰ St Leonards Property prefers a mix of species be utilised in any planting schedule.

308 We cannot identify any direct requirement in the planning scheme that requires the planting of native and indigenous species for street trees. Whilst we accept that the planting of such species is consistent with general replanting ideologically, we did not observe such planting in either the public or private realms during our site inspection. Thus, the use of a mix of species in any landscaping proposal would have been appropriate.

98 See Ambrosia Kyneton Proposed Design Guidelines provided by St Leonards Property Holdings Pty Ltd on 3 May 2021.

99 In addition to other matters set out in the Mandatory Provisions.

100 The site description does not include Harpers Lane.

Removal of native vegetation within Harpers Road

309 The proposal seeks the removal of four patches of native grasses and herbs in an area of the Harpers Lane road reserve totalling approximately 100 m² adjacent to the site's frontage.

310 The application for planning permit does not include the Harpers Lane road reserve as part of the land for which a planning permit is sought. Whilst not integral to our decision, it is worth noting that when planning permission is required on land beyond the boundaries of the primary site, that land should be included as part of the description of the site.

311 We understand that it is common for plans to be endorsed under a planning permit that may depict works beyond the boundaries of the land. However, when primary planning permission is sought, it is appropriate for the land description to include any additional land.

CONCLUSION

312 In summary, we conclude the following:

- a. The design and layout of the proposed subdivision is not consistent with the relevant provisions of the planning scheme and MRSPP because:
 - i. the lot size and density are not contextually responsive to the features of the site, including its topography or its rural character context;
 - ii. larger lots need to be provided at the perimeter of the site, including at the interface with Harpers Lane; and
 - iii. the proposed space around building exclusion zones is not sufficient for planting of vegetation between proposed lots and neighbouring land.
- b. There is no watercourse, waterway or natural channel on the site and the overland flows are sheet flow of water across or along the contours.
- c. The provision of vegetated swales, sediment ponds/retarding basins and wetland is an appropriate design response for the management of overland flow, as it maintains and improves the existing flow conditions.
- d. The Interim Mitigation Scenario, with respect to water quality, is inconsistent with clause 65.01 of the planning scheme as it requires infrastructure on the land to the north that is not in the possession or control of St Leonards Property. Further, in this Interim Mitigation Scenario, it is not appropriate for the western wetland to provide over treatment of nitrogen to compensate for the northern catchment.

- e. There are no unacceptable traffic impacts, and the proposed treatment of Harpers Lane will adequately accommodate the projected levels of traffic.
- f. The proposed internal road configuration is acceptable as it provides a connective network that adequately caters for vehicles, pedestrians and cyclists.
- g. No works are required to the existing Harpers Lane / Lauriston Reservoir Road intersection, as a consequence of this proposal.
- h. There are no heritage related issues.

313 For the reasons given above, the decision of the responsible authority is affirmed, and no permit is granted.

Teresa Bisucci
Deputy President

Mary-Anne Taranto
Member

Claire Bennett
Member

APPENDIX 1

KEY POLICIES

State and Regional policy context

Settlement

- 1 Settlement policies nominate Kyneton and Gisborne as *regional centres* in which to 'promote growth' and to 'support sustainable development' (clause 11.01-1S).
- 2 This is different to settlement policies for places of state significance in Metropolitan Melbourne and in nominated major *regional cities* such as Bendigo, Ballarat and Geelong which are to be the focus for investment and 'major growth'.
- 3 While settlement boundaries are to be created and reinforced in which growth is to be directed and to limit urban sprawl, the structure, functioning and character of each settlement is to consider 'municipal and regional contexts and frameworks' and regional growth plans.
- 4 In peri-urban areas, the objective of policy at clause 11.03-3S is:

'To manage growth ... and to protect and enhance their identified valued attributes.'
- 5 Strategies seek to 'identify and protect areas' that amongst other things, 'are strategically important' for their environment, landscape, agriculture, recreation, tourism, environment, cultural heritage and other natural resources.
- 6 Peri-urban policies for established settlements with capacity for growth including Kyneton is to be provided for:

... having regard to complex ecosystems, landscapes, agricultural and recreational activities ...
- 7 Growth boundaries are also to be established for peri-urban towns to avoid urban sprawl and dispersed settlement and to protect agricultural land and environmental assets together with the following strategy:

Enhance the character, identity, attractiveness and amenity of peri-urban towns.
- 8 Having been declared a 'distinctive area and landscape', the policy of the same name under clause 11.03-5S applies. Its objective is:

To recognise the importance of distinctive areas and landscapes to the people of Victoria and protect and enhance the valued attributes of identified or declared distinctive areas and landscapes.
- 9 This objective is reinforced by various strategies that seek to recognise and protect the unique features and special characteristics of these areas and landscapes; integrate policy development and decision making and to 'support

use and development where it enhances the valued characteristics of these areas’.

- 10 The MRSPP is a policy document that must be considered as relevant under clause 11.03-5S.¹⁰¹ Its Framework Plans confirm Kyneton’s status as a ‘Regional centre’. The site is located within, but at the south-western edge of both the Township boundary and Protected Settlement boundary. Abutting land to the north and south in the FZ is similarly included within the boundaries of these two areas. Ten policy domains are identified in the MRSPP and these include Landscape, Biodiversity and environment, Agriculture and natural resources, and Settlements.

Environmental and Landscape Values

- 11 State policy for native vegetation management at clause 12.01-2S has the objective of no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. Strategies refer to the three step approach of avoid, minimise and provide offsets.
- 12 Landscapes policy at clause 12.05-2S has the objective:
To protect and enhance significant landscapes and open spaces that contribute to character, identity and sustainable environments.
- 13 In addition to protecting significant landscapes, corresponding strategies seek to ensure that development does not detract from its natural qualities; landscape qualities are improved; important natural features are protected and enhanced and the natural landscape is recognised ‘for its aesthetic value and as a fully functioning system’.

Environmental Risks and Amenity

- 14 The site is within a designated Bushfire Prone Area (**BPA**) and policy for bushfire planning at clause 13.02-1S applies. Its objective seeks to strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.

Natural Resource Management

- 15 While the site itself is presently used for agricultural purposes it is within the LDRZ. However, as we indicated above, it is contextually relevant to our assessment that surrounding land is in part, within the FZ. The protection of the state’s agricultural base by preserving productive farmland is the sole objective at clause 14.01-1S (Protection of agricultural land). Land use activities that maintain the long term sustainable use and management of existing natural resources including adaptation and diversification is encouraged by policy at clause 14.01-2S (Sustainable agricultural land use).

¹⁰¹ We note that the MRSPP is not listed in the Schedule to Clause 72.04 for incorporated documents under the planning scheme.

- 16 Catchment planning and management policy at clause 14.02-1S has an objective that aims to assist the protection and restoration of catchments, waterways and other water features. The protection of water quality is another objective at clause 14.02-2S (Water quality).
- 17 Strategies, amongst others at clause 14.02-1S, require a consideration of catchment management impacts on downstream water quality, sediment and waste control and measures to minimise the quantity and flow of stormwater. The following strategy appears:

Retain natural drainage corridors with vegetated buffer zones at least 30 metres wide along each side of a waterway to:

- Maintain the natural drainage function, stream habitat and wildlife corridors and landscape values,
- Minimise erosion of stream banks and verges, and
- Reduce polluted surface runoff from adjacent land uses.

Infrastructure

- 18 The objective for 'Infrastructure design and provision at clause 19.03-2S is to provide the timely, efficient and cost-effective development infrastructure that meets community needs. Strategies seek to both integrate developments with infrastructure and services and to:

Provide an integrated approach to the planning and engineering design of new subdivision and development.

- 19 Infrastructure policies at clause 19.03-3S also support an integrated and co-ordinated approach to water management. Strategies, amongst others seek to ensure that development protects and improves the health of water bodies including rivers by managing the discharge of stormwater quality and quantity from sites and 'to minimise the potential impacts of water, sewerage and drainage assets on the environment'.
- 20 Open space policy at clause 19.02-6S has an objective that seeks to establish, manage and improve a diverse and integrated network of public open space that meets community needs. Consistent with strategies at clause 12.05-2S, the provision of open space networks with linkages and integration with open space from abutting subdivisions is sought.

Built Environment and Heritage

- 21 Policies for the Built environment and heritage include guidance for Urban design (Clause 15.01-1S), Subdivision design (clause 15.01-3S) and Healthy neighbourhoods (Clause 15.01-4S). These policies variously provide for the following strategies:

- requiring development to respond to its context in terms of character, cultural identity, natural features, surrounding landscape and climate;

- landscaping that supports the amenity, attractiveness and safety of the public realm;
- ensuring development minimises detrimental impacts on amenity, on the natural and built environment and on the safety and efficiency of roads;
- providing a range of lot sizes to suit a variety of dwelling and household types to meet the needs and aspirations of different groups of people;
- designing neighbourhoods to promote community interaction and make it easy for people of all ages and abilities to live healthy lifestyles and engage in regular physical activity by providing connected, safe, pleasant and attractive walking and cycling networks that enable and promote walking and cycling as a part of daily life; and
- providing streets for direct, safe and convenient access to destinations and conveniently located public spaces for active recreation and leisure.

22 Neighbourhood character policy at clause 15.01-5S has the objective:

To recognise, support and protect neighbourhood character, cultural identity, and sense of place.

23 Relevant strategies are as follows:

Ensure development responds to its context and reinforces a sense of place and the valued features and characteristics of the local environment and place by respecting the:

- Pattern of local urban structure and subdivision.
- Underlying natural landscape character and significant vegetation.
- Neighbourhood character values and built form that reflect community identity.

24 Policies at clause 15.01-6S (Design for rural areas) has the objective of ensuring that 'development respects valued areas of rural character'. Its strategies are as follows:

Ensure that the siting, scale and appearance of development protects and enhances rural character.

Protect the visual amenity of valued rural landscapes and character areas along township approaches and sensitive tourist routes by ensuring new development is sympathetically located.

Site and design development to minimise visual impacts on surrounding natural scenery and landscape features including ridgelines, hill tops, waterways, lakes and wetlands.

[Tribunal underlining]

Housing

25 The objective for Housing supply policy at clause 16.01-1S is to facilitate well-located, integrated and diverse housing that meets community needs. A relevant strategy is to:

Increase the proportion of housing in designated locations in established urban areas (including under-utilised urban land) and reduce the share of new dwellings in greenfield, fringe and dispersed development areas.

Local policies

- 26 Local policies give effect to and support State and regional policies. The following local policies offer the most applicable guidance to the issues we need to determine.
- 27 At clause 21.01, the Municipal profile confirms the Shire's location within the peri-urban area. In terms of settlement, modest growth has historically occurred in Kyneton while both Gisborne and Kyneton continue to be the major population and employment centres. The Shire's rural areas are said to 'provide important buffers between urban areas and the Melbourne metropolitan area'.
- 28 In addition to its unique natural features such as Hanging Rock and Mount Macedon, the Shire is also said to be:
... renowned for its rural character, semi-rural lifestyle, landscapes and forests ...
[Tribunal underlining]
- 29 The character and heritage of the local townships is also described as 'renowned'. The high quality country lifestyle and towns with their own distinctive character are key attributes.
- 30 In relation to housing, 95% of dwellings are detached houses, yet 54% of households contain just one or two persons (ABS Census 2011).
- 31 Key influences for settlement at clause 21.02-1 refer to the natural beauty of the environment and proximity to Melbourne which is said to make the Shire increasingly attractive for both urban and rural living development, which in turn presents challenges for managing growth. Maintaining a non-urban buffer at the edge of Metropolitan Melbourne is another settlement related influence.
- 32 Key influences for Environment and Landscape Values at clause 21.02-2 include:
The undulating topography, geological and geomorphological features and private and public forested and grassed areas [which] contribute to the significant landscapes within the municipality.
[Tribunal underlining]
- 33 In relation to bushfire risk, Built Environment and Heritage policy at clause 21.02-4 refers to the land use and development planning that must minimise the level of fire risk and level of development in areas of fire risk.
- 34 Key policy influences for the Built Environment and Heritage include:
Consideration of the relationship between infrastructure provision and development needs.

Significant and highly valued characteristics of each township area.

There are significant heritage assets and buildings within the Shire. The community aspiration is that a village atmosphere within the Shire is retained and that individual settlements maintain their distinctive identity.

Increasing development will place added pressure on the Shires [sic.] heritage buildings and streetscapes.

[Tribunal underlining]

35 For Housing at clause 21.02-5, key influences include:

- ... enhanced housing diversity, affordability and proximity to town centres.
- Respect for landscape values, such that housing is submissive to the environment.
- Sustainable development encompassing water and energy use minimisation, as well as proximity to existing infrastructure and services.
- Small household size (one or two people) is a large and growing proportion of all households in the Shire. Nearly half the Shire's 13,596 households were small households at the 2006 Census and this is expected to rise in the future as the population ages, people delay childbirth, form partnerships later in life, or divorce.

[Tribunal underlining]

36 Community development and infrastructure influences include a doubling in the number of people aged over 64 by 2026, with particularly strong growth in the 70+ age group, many of whom currently live in the Shire's rural parts.

37 The provision of reticulated town water, gas and sewerage will provide increased opportunities for urban development while services, facilities and housing diversity is said to be important to improving community health and wellbeing.

38 According to the Land use vision for Macedon Ranges at clause 21.03-2, development and land use will be guided by the following vision:

- The Shire remains predominantly rural, with a hierarchy of settlements set in an attractive and productive rural environment.
- Agriculture remains an important part of the character and economy of the Shire, especially the high quality soils in the east of the Shire and in the north where there has been less land fragmentation ...
- Protection of water quality, especially potable water supply, is fundamental.
- Native vegetation is retained and enhanced, balanced with fire protection considerations. Native vegetation is vital for the

environmental health of the Shire and is a significant component of the Shire's character.

- Development complements the nature and character of the rural landscapes of the Shire. Landscapes, in particular the landscapes around Mount Macedon, Woodend and the nationally iconic Hanging Rock, are highly valued by residents and visitors and facilitate tourism which plays a key economic role in the Shire.
- Development occurs in an orderly and sustainable manner, maintaining clear distinctions and separations between settlements. A diverse range of residential and commercial opportunities are provided in appropriate locations, including appropriately zoned and serviced land to meet the needs of the Shire's changing demographic. Growth is generally directed to the transport corridors, in-line with infrastructure provision and cognisant of constraints.

[Tribunal underlining]

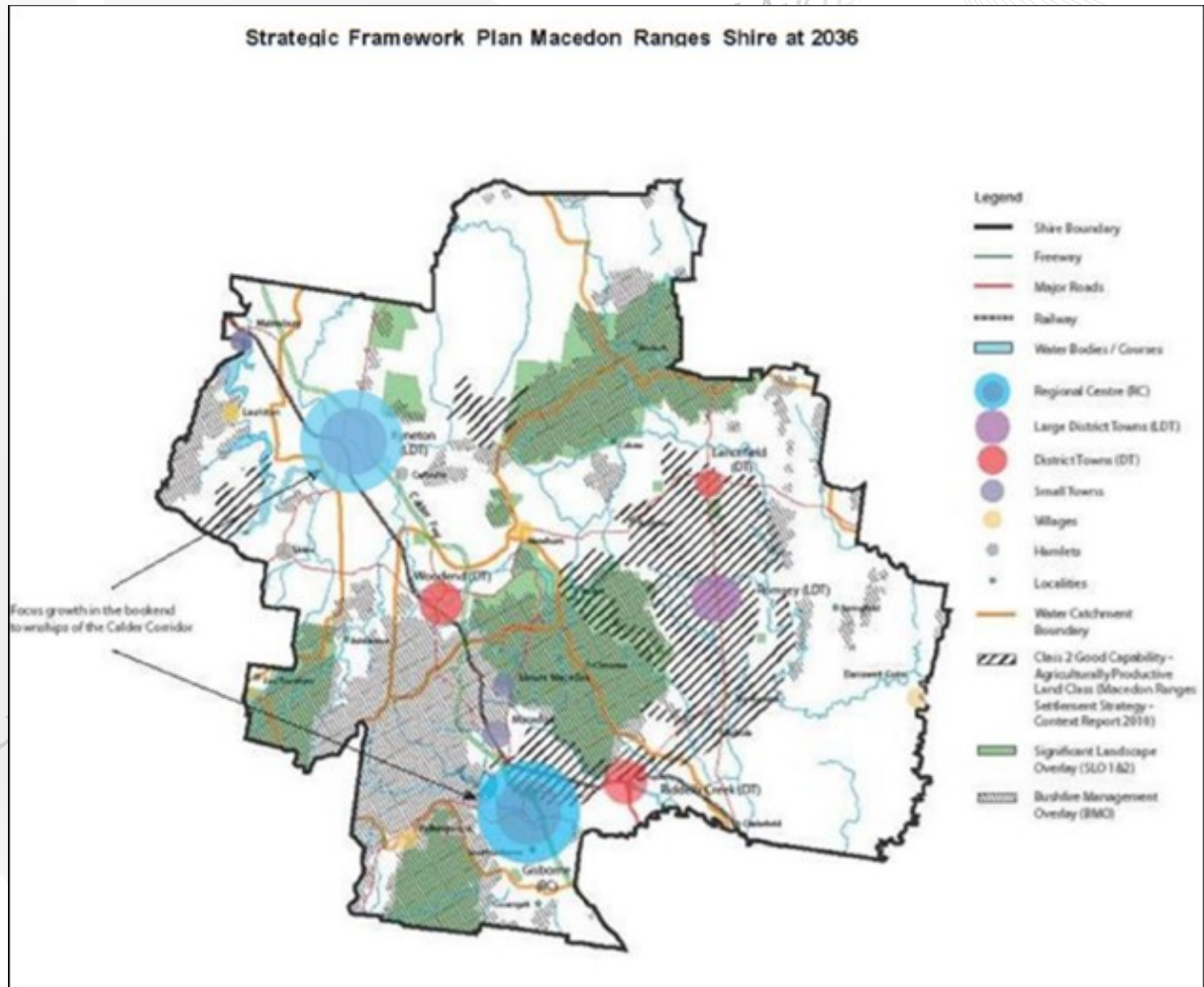
39 The strategic framework plan at clause 21.03-3 is said to interpret the land use vision and identify the vision's key elements influencing land use planning to 2036 and that:

This plan indicates the high quality agricultural land, key transport infrastructure, significant landscapes; land at risk of bushfire as well as water courses and the regional centre, large district towns and district towns.

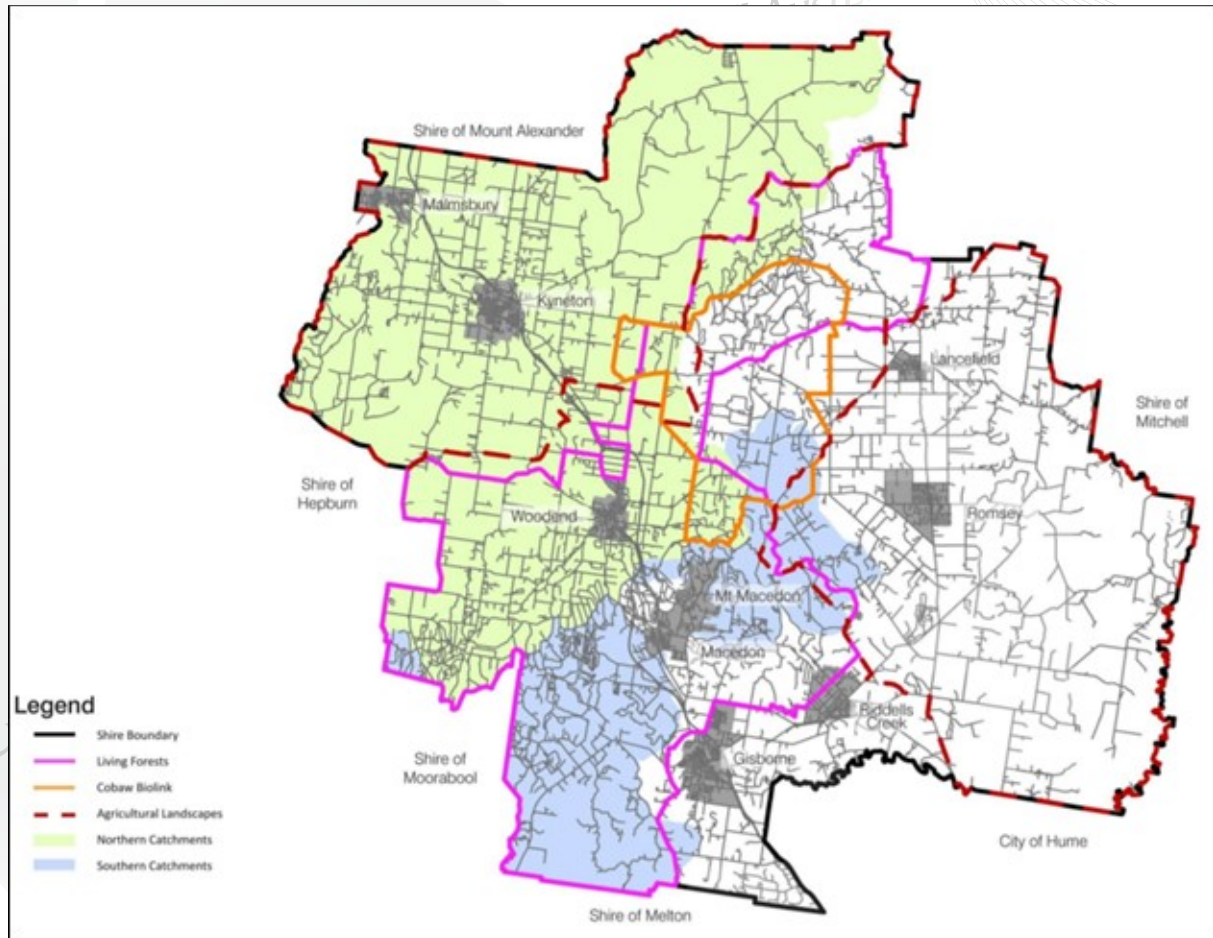
40 The hierarchy of settlements describes Regional centres (Kyneton and Gisborne) in the table to this clause as follows:

Settlement type	Settlement hierarchy definitions
Regional centre	A centre with a large, diverse population (10,000 plus), employment and housing base. All essential services are connected and higher order goods and services are provided. All levels of education are offered and access to large hospitals and numerous medical facilities is generally provided. Regional centres have strong relationships with surrounding settlements of all types.
Large district town	A town with a substantial and diverse population base (6,000 to 10,000) and a dominant business district with a moderate employment base. All essential services

41 The Strategic Framework Plan is extracted below.



- 42 A Rural framework plan is also provided whose vision and strategic directions for identified rural area types is shown accompanied by descriptive text for five different elements; Agricultural landscapes, Living forests, Cobaw biolink, Northern and southern catchments and Rural living area.
- 43 The legend indicates that the ‘Agricultural Landscapes’ and ‘Northern Catchments’ apply to this part of the Shire in which the site is located. The grey shaded area appears to include the site, opposite land to the west in the RLZ5 and land to the north in the FZ. However, this grey shaded area does not have a discrete description in this plan’s legend.
- 44 We also note that while descriptive text is also provided for the ‘Rural living area’ the location of this area is not explicitly referenced or distinguished from other shaded areas in this map’s legend.
- 45 The descriptive text also indicates that ‘These areas are not mutually exclusive and overlap; where conflicts are present, the catchment provisions prevail’.



- 46 The descriptive text for Agricultural landscapes and Northern and southern catchments is as follows:

Agricultural landscapes: Continue to use agricultural landscapes for stock raising (including sheep, cattle and horses) and intensive and extensive cropping. Development should not prejudice these agricultural activities because they contribute to the character and economy of the Shire.

Northern and southern catchments: Protect water quality and quantity, agricultural productivity in the northern catchment and encourage rural residential only in the more fragmented southern catchment where detailed land capability studies demonstrate there is no negative impact on water quality or agricultural uses.

[Tribunal underlining]

- 47 Policies for natural resource management at clause 21.06-1 seek to protect agricultural land within the Northern catchments and Agricultural landscapes areas in the Rural Framework Plan and to discourage land use and development that is contrary to the vision for these areas.
- 48 In relation to Water policy at clause 21.07-3, Objective 1 seeks to retain and improve water quality and yield. Strategies include the following:

Strategy 1.6 Encourage larger lots where there are drainage lines, waterways and steep slopes.

Strategy 1.7 Require on site property works that enhance water quality. These works may include fencing of gullies and waterways and revegetation of gullies and waterways.

Strategy 1.8 Ensure the natural drainage functions are retained in the development of land for residential purposes.

49 Settlement policies at clause 21.04 identify that levels of development will be 'consistent with the role of towns in the settlement hierarchy and will depend on infrastructure provision and environmental constraints'. A strategy is that development is to be focused within Kyneton and Gisborne by facilitating a large and diverse employment and housing base in both centres.¹⁰²

50 The existing fixed supply of land in the rural living areas is intended to meet ongoing requirements for rural living opportunities to protect land in the FZ from fragmentation.

51 Objective 2 of this policy seeks to provide for development that maximises the benefits of established and proposed urban infrastructure. This is supported by strategies 2.1 and 2.2 that seek to ensure urban development is located within the township boundaries identified on plans in clause 21.13 and where adequate services are available. It is further stated that 'some areas within the defined township boundaries may not be suitable for urban development'.

52 Application requirements are specified and this includes the provision of a report:

... to demonstrate how the proposal provides for a high quality lot layout, diversity, respects the existing built environment and heritage, and the protection and enhancement of environmental features and natural resources.

[Tribunal underlining]

53 On the theme of Environment and Landscape Values, which supports clause 12 of the PPF:

The Macedon Ranges and its surrounds are acknowledged as an area of both state and national environmental and conservation significance. The preservation and enhancement of its natural environment is fundamental to the Shire's attractiveness as a residential living area and tourist destination.

[Tribunal underlining]

54 Management of biodiversity and native vegetation includes an objective to protect, enhance, manage and restore indigenous vegetation and fauna habitat. Strategies include the following:

¹⁰² Strategies 1.1 and 1.6.

Strategy 1.1 Avoid removal of remnant vegetation with high ecological values. ...

Strategy 1.3 Ensure applications for permits demonstrate existing native vegetation will not be compromised.

Strategy 1.4 Protect and facilitate appropriate management of indigenous vegetation on privately owned land to ensure its biodiversity values, including indigenous fauna values, continue into the future.

55 Under the policy headed 'Significant environments and landscapes' at clause 21.05-2, the overview refers to the Shire's 'many and varied rural and township landscapes which are highly valued by residents and visitors'. Important landscapes include the Macedon Ranges and the Cobaws which are part of the Great Dividing Range. These provide topographic variety and relief, contrasted with deeply dissected river and creek valleys of the eastern volcanic plains. Further:

Open areas of rural land used for grazing and some cropping activities make up the remaining areas of the municipality.

56 In addition to heritage gardens of various types, according to this policy, landscape character within Macedon Ranges Shire is also defined by:

- Significant views and vistas from and to the undulating wooded hills, which also form major visual edges to the Shire.
- Distinctive settlements set within a rural environment.

[Tribunal underlining]

57 Key issues identified for this growing municipality on the fringe of Melbourne, is that 'these landscapes face many challenges and threats which could have a detrimental effect on the Shire's visual and landscape qualities'.

58 Objective 3 of this policy is:

To protect and enhance the farming character of the Agricultural Landscapes area identified in the Rural Framework Plan in Clause 21.03-3.

59 The accompanying strategy is to:

Discourage new buildings from siting proximate to prominent ridgelines and landscape features and ensure appropriate siting and design of buildings and works.

60 The overview for Built environment policies at clause 21.08-3 refers to the Shire's high landscape qualities and the built form of its towns which it says:

... must be appropriately controlled to ensure development is sustainable and respects character.

61 Objective 1 seeks to promote development that respects the rural character and high landscape values of the municipality. The corresponding strategy is to direct population and development to settlements where scenic landscapes will not be jeopardised.

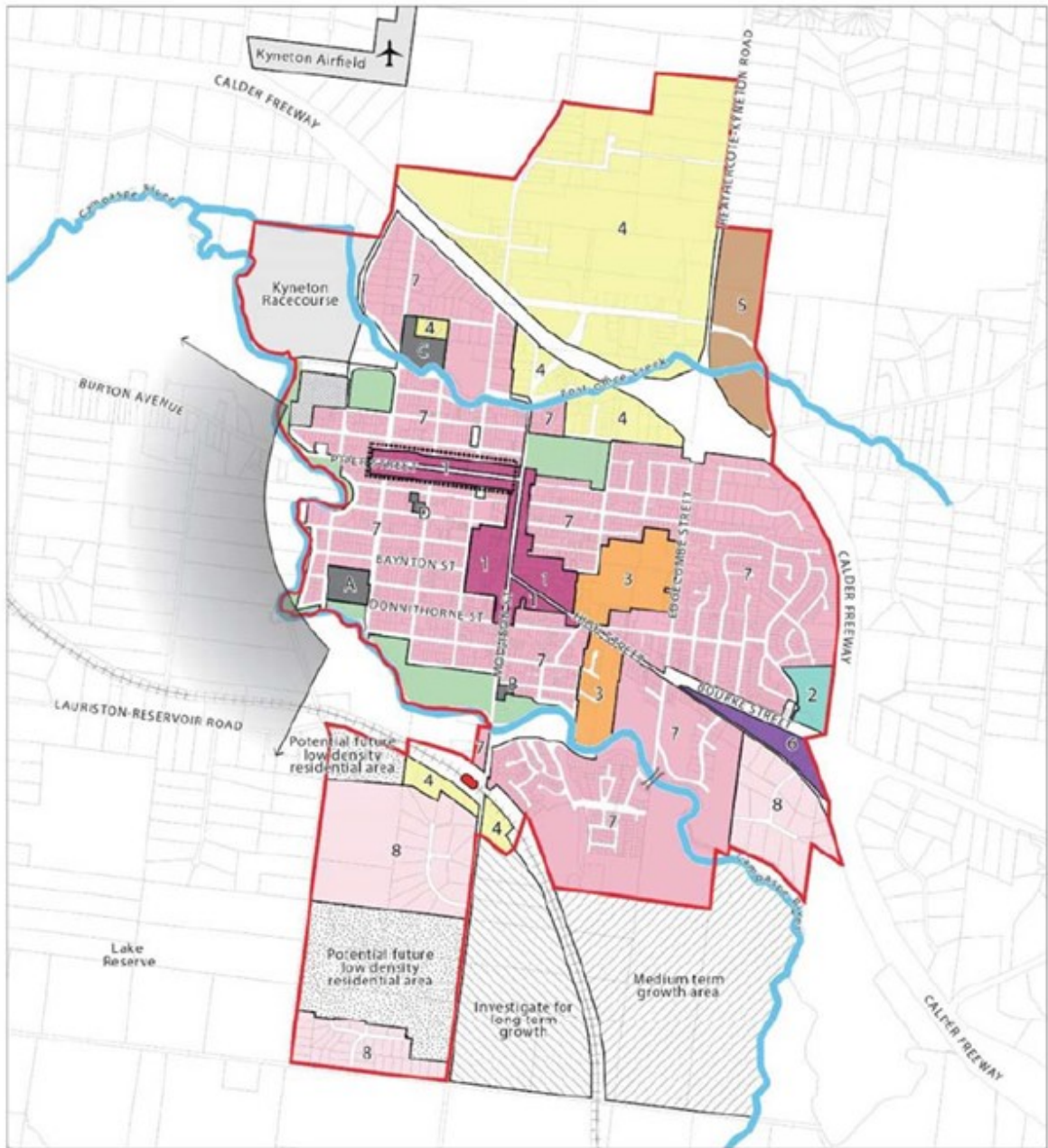
- 62 Further, objective 2 seeks:
To protect and enhance the existing character and form of the Shire's towns.
- 63 We regard the following strategies as particularly relevant to this proceeding:
Strategy 2.1 Encourage new extensions to residential areas to reflect existing street patterns and sub-division layouts and to harmonise with the surrounding environment.
Strategy 2.2 Encourage development that respects the distinctive character and defining attributes of each settlement.
Strategy 2.3 Ensure development in sensitive areas respects its context and the preferred character of the area.
Strategy 2.4 Identify appropriate locations for higher density urban development in town centre structure plans and outline development plans that do not detrimentally affect the heritage values, preferred neighbourhood character or landscape character of the Shire's towns.
Strategy 2.5 Ensure the planning density and design of new residential development recognises the environmental and infrastructure constraints and preserves the distinctive characters of the Shires [sic.] various communities and individual towns and settlements.
- 64 Housing policy at Clause 21.09 supports clause 16. Objective 1 for housing in towns seeks to provide for responsive and affordable housing and a diversity of lot sizes and styles to meet the requirements of all age groups, household types, lifestyles and preference.
- 65 Relevant strategies encourage a diversity of housing in appropriate locations and also seek to:
Encourage the provision of smaller housing forms, including townhouses and units, around town centres to cater for the changing demographics of the Shire.
Promote a range of housing options to improve housing affordability in the larger towns, with a particular focus on Kyneton.
Facilitate a range of single and double storey dwellings to improve housing accessibility
Encourage the provision of a range of lot sizes in plans for new development
- 66 A further objective is:
To ensure housing development is considerate of its environment and local servicing capacities.
- 67 Strategies 2.3 and 2.4 respectively seek to:
Ensure housing in sensitive areas respects its context and the preferred character of the area.
Ensure the planning density and design of new residential development recognises the environmental and infrastructure constraints.

- 68 Policy at clause 21.13 refers to Local areas and small settlements including Kyneton and supports policy at clause 11. It provides specific objectives and strategies for each of the Shire's townships. Importantly an integrated policy approach is sought:

These settlements should not be viewed in isolation but in relation to the overall structure and vision for the Shire.

- 69 More specific policy guidance for Kyneton is provided at clause 21.13-2. The Strategic Framework Plan for Kyneton is shown below.

Kyneton Strategic Framework Map



KYNETON STRATEGIC FRAMEWORK MAP

LEGEND

- Township Boundary
- Property Boundaries
- Open Space
- Railway
- Water Course

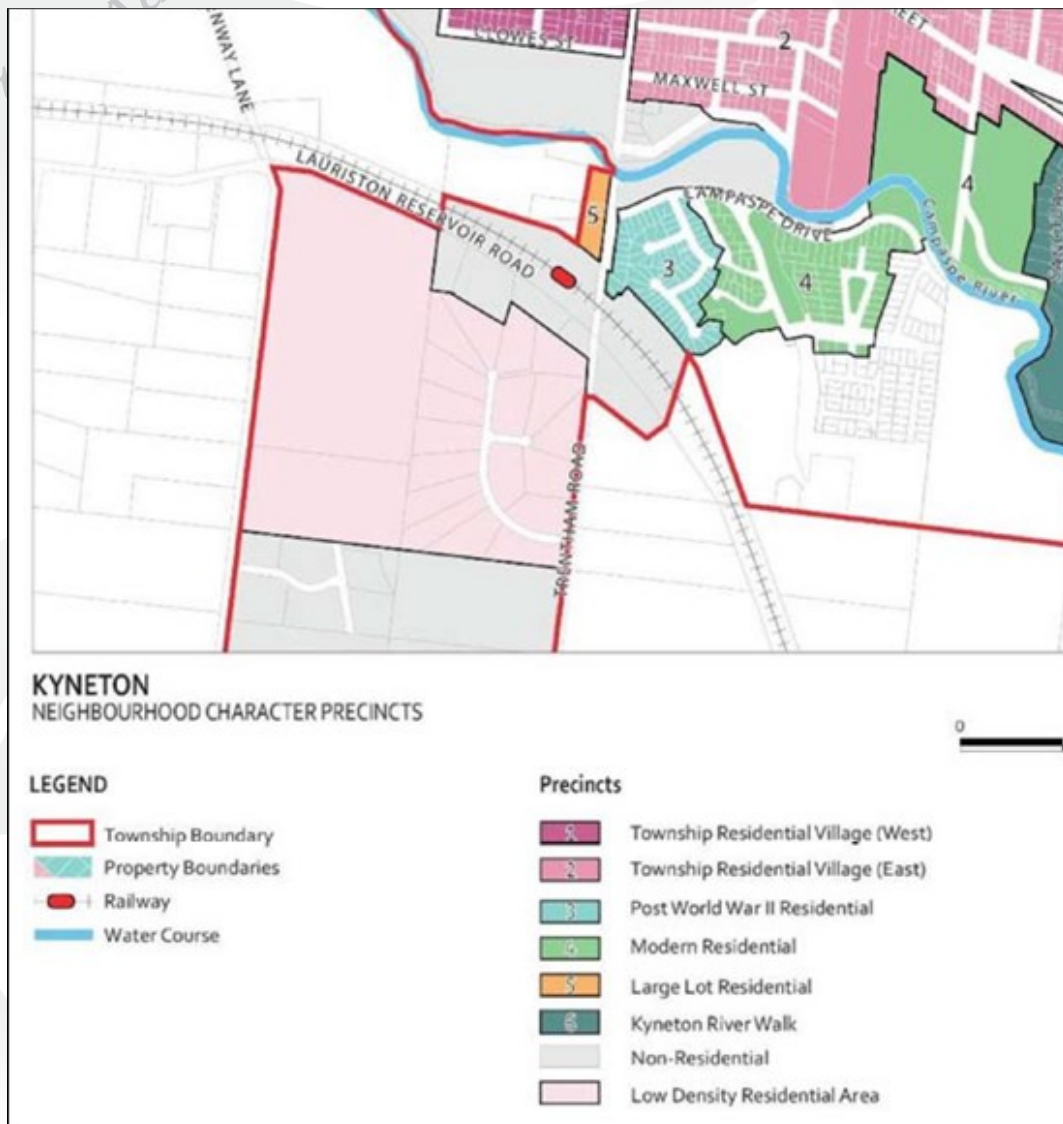
- 1 Town Centre
- 2 Health and Wellbeing Precinct
- 3 Education Precinct
- 4 Industrial Precinct
- 5 Industry and Trade Related Services
- 6 Bulky Goods and Showrooms
- 7 Residential Areas
- 8 Low Density Residential Area
- Retail Tourism Precinct

Features

- Views
- Proposed Bridge
- Horse Training and Equine Services
- Strategic Sites
- A Former Kyneton Hospital
- B Former Kyneton Pool
- C Latrobe St/Wedge St Industrial Area
- D Bus Depot



- 70 Eight neighbourhood character precincts are identified and the site located in Precinct 8 – ‘Low Density Residential Area’.
- 71 Abutting land to the east (Hill Drive) and the southern portion of the Tilwinda Estate further south is designated similarly. Abutting land to the north and south in the FZ and northern portions of the Tilwinda Estate within the LDRZ are in an area described as ‘Potential future low density residential area’. All rurally zoned land on the west side of Harpers Lane in the FZ and RLZ5 opposite the site are outside the township boundary.
- 72 The Framework Plan identifies ‘Views’ from south-west portions of the township’s edge to the west and south-west across land primarily in the RLZ2, RLZ5 and FZ.
- 73 This Framework Plan is accompanied by the ‘Kyneton Neighbourhood Character Precinct Map’. An extract of this second map as relevant to this area is shown below.



- 74 Returning to the text of policy at clause 21.13-2, the overview for Kyneton refers to its expected growth from a 'large district town' to become a 'regional centre' by 2036 with growth contained within a long-term protected settlement boundary in the MRSPP. This includes a further 2,900 people over a 30 year period between 2006 and 2036 some of which can be accommodated within existing residential zoned land through infill development.
- 75 Two areas south of the township in the FZ (east of the site) are identified to the west and east of the railway line notated as 'Investigate for long term growth' and 'Medium term growth' respectively.
- 76 Kyneton's character is said to be derived from a number of features, including its compact grid based town centre, significant heritage buildings and precincts including the Botanical Gardens, mature exotic trees in older precincts, attractive setting from the Campaspe River and diversity of residential character precincts reflecting different eras of development.
- 77 In relation to the location of growth, Objective 1 seeks:
- To provide for managed growth of Kyneton by prioritising growth within the identified town boundary and managing staged greenfield growth to the south and southeast of town.
- 78 Strategies include the following:
- 1.1 Support a grid-based layout and require substantial street tree planting in new residential subdivisions
 - 1.4 Support infill development within existing residential zoned land consistent with the identified neighbourhood character objectives for each residential neighbourhood character precinct shown in the Kyneton Neighbourhood Character Precinct Map.
- 79 In relation to the two potential growth areas further east of the site, which are also described as 'Investigation areas' in the MRSPP,¹⁰³ the following strategy is relevant:
- 1.5 Plan for future greenfield growth to maintain a 15 year residential land supply by investigating areas south of the township, focusing initially on the southeast (east of the railway line and towards the Campaspe River). This area presents an opportunity for contemporary development of more diverse housing to cater for the town's changing demographics, incorporating active transport principles and open spaces including the river corridor.
- [Tribunal underlining]
- 80 Objective 3 for housing seeks:
- To increase the range of housing options available to cater for the longer term needs of all members of the Kyneton community.

¹⁰³ See page 34 and Page 38 Map 6: Protected settlement boundary – Kyneton.

- 81 Corresponding strategies refer to support for multi-dwelling development where this can be achieved without compromising heritage values, neighbourhood character or residential amenity. A further strategy is to:
- 3.2 Support the provision of a diversity of lot sizes and housing types in the Kyneton South growth area.
- 82 Objective 4 which relates to ‘built environment and heritage’ seeks:
- To encourage development that respects Kyneton’s distinctive character and defining attributes such as its heritage buildings and features.
- 83 A final objective seeks to encourage infill and new development in Kyneton that achieves the preferred character of each precinct.
- 84 Unlike Precincts 1 to 7 for which more specific guidance is provided, including a preferred character and strategies, no parallel guidance is provided for Precinct 8.

---- End of Appendix 1 ----