

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2579/2006
PERMIT APPLICATION NO. 060304

CATCHWORDS

Applications under section 82 of the *Planning and Environment Act* 1987; Bass Coast Planning Scheme; Public Park and Recreation Zone; Environmental Significance Overlay; Bunds/Levees to Prevent Flooding Beyond Foreshore; Policy Support; Community Benefit of Proposal; Need for Proposal; Detail of Proposed Works Conceptual and Inadequate; Relevance of Considering Future Works.

APPLICANTS FOR REVIEW Inverloch Residents & Ratepayers Association
and South Gippsland Conservation Society
Ms J McCulloch and others

RESPONSIBLE AUTHORITY Bass Coast Shire Council

RESPONDENT PERMIT APPLICANT SPP No. 2 (Inverloch) Pty Ltd

SUBJECT LAND Foreshore Reserve, The Esplanade, Inverloch

WHERE HELD Wonthaggi (30 January 2007)
Melbourne (31 January 2007)

BEFORE Rachel Naylor, Presiding Member
Ian Potts, Member

HEARING TYPE Hearing

DATES OF HEARING 30 & 31 January 2007

DATE OF ORDER 9 March 2007

CITATION McCulloch v Bass Coast SC [2007] VCAT 363

ORDER

With respect to permit application 060304, the Responsible Authority's decision to grant a permit is set aside.

The Responsible Authority is ordered that no permit be issued pursuant to section 85(1)(a) of the *Planning and Environment Act* 1987.

Rachel Naylor
Presiding Member

Ian Potts
Member

APPEARANCES:

For Applicants for Review

Mr D Sutton appeared for Inverloch Residents & Ratepayers Association

Mr J Gunson appeared for South Gippsland Conservation Society (attended 30/01/07 only)

Ms J McCulloch and Ms S Cuttriss (attended 30/01/07 only) appeared for J McCulloch & others

For Responsible Authority

Ms E Eades, town planner

For Respondent Permit Applicant

Mr I Pitt, SC of Best Hooper

He called the following expert witnesses who presented their evidence-in-chief and were made available for cross-examination:

Dr McCowan and Mr W Bishop, hydrological evidence;

Mr W Savvas, landscape design evidence; and

Mr P Kristic, planning evidence.

REASONS

Nature of Application

- 1 This matter relates to two separate applications by local organisations and residents of Inverloch to review the decision by Bass Coast Shire Council ('the Council') to grant a permit for the development of levees/bunds for the purpose of flood protection along the foreshore reserve adjacent to The Esplanade in Inverloch.
- 2 The Council explained that this permit application arises from a condition on a permit (Permit 04329A) for a new retirement village development that is adjacent to the existing caravan park and foreshore reserve along The Esplanade in Inverloch. This development is on land that is subject to inundation from the north (via stormwater) and from the south (via sea surges or coastal inundation). Because of this susceptibility to flooding, the permit contains a condition requiring the floor level of the buildings in the southern half of the retirement village to be constructed to a height of 2.93 metres AHD¹ (300mm above the nominated flood level) unless flood protection works are constructed where necessary along the foreshore reserve to mitigate against coastal inundation. If a permit can be obtained for these works, the buildings can be constructed to a height of 1.80m AHD.
- 3 The Council approved the permit application that is the subject of this review because it considers the proposed works will result in a public benefit and is supported by the relevant State and local planning policies in the Bass Coast Planning Scheme ('the Planning Scheme'). However, the local organisations and residents disagree and argue the proposal is a private development on public land that does not benefit the public and is not respectful of the values of this coastal environment.

The Hearing

- 4 At the commencement of the hearing, Mr Pitt tabled a set of A3 plans which included modified levee locations sought by the Council in condition 1(b) of its decision to approve this proposal. The modified locations relate to a couple of the levees/bunds in the western car park near the entrance to the caravan park.
- 5 The first day of the hearing was held in the Bass Coast Shire Council Chambers in Wonthaggi, after which we undertook an unaccompanied inspection of the locations of the proposed works along the Inverloch foreshore reserve. The second day of the hearing was held in Melbourne.

¹ Australian Height Datum

The Foreshore Reserve and Surrounds

- 6 The foreshore reserve adjacent to The Esplanade is located at the eastern end of Inverloch township. There is an existing caravan and camping ground that runs along both sides of The Esplanade, to the east of Cuttriss Street (a residential street that is opposite the western end of the section of the foreshore reserve under our consideration).
- 7 The eastern end of The Esplanade terminates at a small car park adjacent to the entrance to the Screw Creek walking track. The entry to the track is marked by a shelter, display boards and an entrance gate. This walking track provides access to a public reserve encompassing portions of Screw Creek, Little Screw Creek and Anderson's Inlet.
- 8 The land to the north of the caravan park and to the west of Screw Creek is currently being developed as a retirement village. It is a reasonably large development that is built adjacent to the existing eastern edge of the Inverloch township. To the north of this development is a stormwater drainage channel that serves the existing township and drains to Little Screw Creek.
- 9 The parties all agree the creek and retirement village land are subject to flooding in heavy rains. Much of the foreshore reserve including the caravan park, together with the retirement village development and other adjacent existing residential dwellings are also subject to flooding from sea surges from the south.
- 10 The Inverloch residents and organisations expressed concerns about the appropriateness of the retirement village development, which was approved through a planning process that did not allow third party review rights to this Tribunal. As we explained during the hearing, the retirement village development is not before us as part of this application for review. Rather, this matter concerns the appropriateness of the proposed levees/bunds along the foreshore reserve.

The Proposal

- 11 Five locations are nominated along the foreshore reserve, between Cuttriss Street and the Screw Creek walking track, where levees/bunds are proposed. The purpose of these levees/bunds is to fill in or otherwise raise existing low points along the foreshore coastal dune system to prevent sea surges reaching the land to the north of the dunes. It was put to us that some of these low points are the result of human activities and that the nature of the works could be considered to be no more than reinstating natural conditions. The length and height of these levees/bunds varies in each location dependent upon the existing natural ground level.

Planning Scheme Controls

- 12 The foreshore reserve is contained within a Public Park and Recreation Zone under the Planning Scheme. The purpose of the zone includes implementing State and local planning policies; recognising areas for public recreation and open space; protecting and conserving areas of significance where appropriate and providing for commercial uses where appropriate.
- 13 A permit is required to construct or carry out works other than (amongst others) pathways, drainage and underground infrastructure, fencing less than a metre high, planting and landscaping. The application must be accompanied by the consent of the public land manager, which is the Department of Sustainability and Environment ('DSE') in this case and consent has been given subject to conditions.
- 14 The foreshore reserve is also affected by an Environmental Significance Overlay, and its purpose includes identifying areas where development may be affected by environmental constraints and ensuring development is compatible with identified environmental values.
- 15 A permit is required to remove, destroy or lop any vegetation and Mr Pitt advised no permission is being sought in this proposal for vegetation removal.
- 16 A permit is required to construct or carry out works unless exempted in the relevant schedule. Schedule 1 applies to coastal areas and there are no permit exemptions for works along a foreshore reserve. The schedule contains a number of objectives to be achieved, including:
 - To ensure that development is compatible with the environmentally sensitive coastal area.
 - To conserve and enhance the environmental quality of the coastal area.
 - To protect and enhance the natural beauty of the coastal landscape.
 - To protect and enhance the visual amenity and landscape of the coastal area.
- 17 The decision guidelines to be considered include:
 - The maintenance and improvement in the stability of coastal dunes and coastlines.
 - The impact of the proposal on coastal processes and the need to protect and enhance environmentally sensitive coastlines.
 - The maintenance and improvement of the visual quality of the coastal landscape.
 - The preservation of views from the waters of Anderson Inlet.
 - The location of public access points to the coastline by boat or road.

- The likelihood of problems arising from land fill in areas subject to tidal inundation.
 - The extent of any proposed removal of native vegetation.
 - The location, dimension and level of any excavation or alteration to the natural surface including works to stabilise buffers in areas of fill or excavation.
- 18 The State planning policy relating to coastal areas seeks to ensure the sustainable use of natural coastal resources; achieve development that provides an environmental, social and economic balance; and recognise and enhance the community's value of the coast.²
- 19 The State policy goes on to outline what planning for coastal areas should include, such as³:
- Ensure development respects the character of coastal settlements.
 - Ensure development is sensitively sited and designed.
 - Identify and avoid development in areas susceptible to flooding (both river and coastal inundation), landslip, erosion, coastal acid sulfate soils, wildfire or geotechnical risk.
 - Avoid development within the primary sand dunes and in low lying coastal areas.
- 20 The policy requires decision making to be consistent with the Victorian Coastal Strategy and any approved relevant coastal action plan or management plan.

Victorian Coastal Strategy (2002)

- 21 This Strategy makes no specific reference to the provision or nature of flood protection works along the coast. That is not to say the Strategy does not envisage such works, rather it means there are no specific guidelines for such works. Instead the Strategy talks broadly about development and coastal infrastructure, acknowledging that they can have impacts on coastal landscape, environmental and sustainability values⁴. The objectives of the Strategy include improving design outcomes for buildings and structures (including infrastructure) in foreshore and coastal areas. The actions to achieve this include ongoing prioritisation of improvements, removal or relocation of infrastructure to less physically and visually sensitive inland sites as the opportunity arises and implementation of management plans⁵.

² The *Planning and Environment Act* 1987 states that a permit must not be granted unless consent has been given under the Coastal Management Act 1995, and consent for this proposal (subject to conditions) has been obtained.

³ Refer to clause 15.08-2

⁴ Refer to page 38 of the Victorian Coastal Strategy

⁵ Refer to objective 5.3 and action 5.3.4 of the Victorian Coastal Strategy

- 22 The Strategy talks about using overlay controls in planning schemes to address significant environmental issues. It also highlights the role of Coastal Action Plans and management plans to provide a greater level of detail about the management of particular coastal environs. There is no coastal action plan for this area (although we note there is a draft coastal action plan mentioned on the West Gippsland Catchment Management Authority's website), so we have had regard to the Inverloch Foreshore Reserve and Anderson Inlet Management Plan.

Inverloch Foreshore Reserve and Anderson Inlet Management Plan

- 23 This plan sets out a range of values and actions to be undertaken, primarily to manage the recreational use of the foreshore reserve and more widely, Anderson Inlet. The locations of the proposed levees/bunds lie within zones designated in the plan for intensive recreation, namely the caravan park area and what is referred to as 'the toys backwater area' (for a portion of the westernmost proposed works). The intensive recreation zones are defined as "environments with moderate conservation values and a visitor use focus".
- 24 This plan sets out the following relevant considerations:
- Revegetation and protection of vegetation is required to maintain dune stability.
 - Anderson Inlet is a large estuary and there are numerous references to the mobility of the sand delta and channels within it and naturally occurring erosion.
 - Toys backwater area is to be protected from future land fill, dredging or human alteration and allow natural processes to occur.
 - A range of general management actions are set out to address foreshore and dune instability throughout the reserve arising from human activities.

Reasons for Decision

Consideration of Planning Controls, Planning Policies and other relevant documents

- 25 Planning permission is required to construct the levees/bunds under both the zone and overlay provisions. Having regard to the zone provisions, Mr Pitt suggested such works would normally be anticipated to fall within the ambit of the relevant public land manager, in which case it is likely no planning permission would be required. This is not a matter which we need to consider in any detail as, in this case, the works are proposed by a private company involved in the development of the retirement village to the north and, hence, planning permission is required under the zone provisions. The question that then arises is what are the relevant planning considerations to be assessed as part of the merits of this proposal?

- 26 The purpose of both the zone and overlay require the implementation of the relevant State and local planning policies. Having considered the content of the Planning Scheme, the Victorian Coastal Strategy ('the VCS') and the relevant management plan, we find there is a lack of any specific policy direction relevant to coastal inundation protection works.
- 27 The general principles that influence good decision making in land use and development planning in the State planning policies include the following relevant passages:
- Planning is to assist in the conservation and wise use of natural resources....to support both environmental quality and sustainable development over the long term through judicious decisions on the location, pattern and timing of development.⁶
- Planning for development of urban physical and community infrastructure should enable it to be provided in a way that is efficient, equitable, accessible and timely. Growth and redevelopment of settlements should be planned in a manner that allows for logical and efficient provision and maintenance of infrastructure.⁷ (underlining is our emphasis)
- 28 These passages encourage infrastructure planning to consider whether the location and nature of the works are appropriate to their setting having regard to a number of factors including environmental quality and sustainability, efficiency and equity. Similar considerations are contained in clause 15.08-2, particularly the sustainable use of natural coastal resources.
- 29 We are of the opinion the objectives and decision guidelines in the Environmental Significance Overlay Schedule 1 ('ESO1') provide a good articulation of the more detailed issues associated with works in coastal areas. In particular the decision guidelines set out the need to consider as part of the works maintaining or improving the stability of coastal dunes and coastlines; the impact of works on coastal processes; the extent of excavation, fill and native vegetation removal; and the likelihood of problems arising from land fill in areas subject to tidal inundation.
- 30 We find these detailed issues are of particular relevance to this proposal and are the types of issues that should be considered when works are proposed within a primary dune system. These detailed considerations are not specifically articulated in the State planning policies, the VCS or the management plan. The Council advised us it is intended to delete this overlay from various 'public' zones including the Public Park and Recreation Zone as part of Amendment C46 (Part 1) to the Planning Scheme. However, at this time, the objectives and decision guidelines of ESO1 remain part of the relevant planning controls in the Planning Scheme and we have given them consideration.

⁶ Clause 11.03-3

⁷ Clause 11.03-4

The Community Benefit of the Proposed Works

- 31 The Planning Scheme endeavours to integrate the range of policies relevant to the issues to be determined; and to balance conflicting objectives in favour of net community benefit and sustainable development. While recognising the primary benefit to the retirement village, Mr Pitt placed significant emphasis upon the broader public benefit to be gained from the proposed works. He noted that the levees/bunds will provide protection from coastal inundation to the caravan park, existing residential properties to the north of The Esplanade as well as the retirement village development (which is the impetus behind this proposal).
- 32 The local organisations and residents disagreed with this submission, arguing the levees/bunds are private works on public land providing a private benefit to the retirement village. We feel this argument is simplistic and fails to recognise that, if the levees/bunds successfully perform the role they are intended for, land (both publicly and privately owned) other than the retirement village would benefit from protection from coastal inundation. Subject to the levees/bunds successful performance, we agree with Mr Pitt that a broader public benefit would accrue from the proposed works.

The Need for the Proposed Works

- 33 The analysis and evidence of Dr McCowan and Mr Bishop is that the caravan park, a large area of existing residential properties to the north of The Esplanade and the retirement village are all subject to flooding from the north during heavy rains, and flooding from the south due to sea surges (coastal inundation). We note this flooding potential is not recognised in the Planning Scheme through the use of planning controls such as the Land Subject to Inundation Overlay or the Special Building Overlay. This is despite the strategies in the Coastal Areas State planning policy⁸ to:
- Avoid development within the primary sand dunes and in low lying areas.
 - Identify and avoid development in areas susceptible to flooding (both river and coastal inundation), landslip, erosion, coastal acid sulphate soils, wildfire or geotechnical risk.
- 34 During the hearing, the local organisations and residents questioned the appropriateness of the retirement village development in an area subject to stormwater, river and coastal inundation. We reiterate the comments we made during the hearing – that the retirement village development is not a matter before us, hence the merits of its location is not a matter we can consider as part of this proposal. However, it is a fact that this planning application now before us arises specifically from the permit conditions for the retirement village development. In granting approval for the retirement village development, the Council has clearly recognised the potential for

⁸ Refer to clause 15.08-2

inundation and imposed permit conditions requiring either raised floor levels or levee works in the foreshore reserve (condition 9 of Permit 040329A) and ongoing 5 year modelling of the coastal levees to ensure they adequately protect the locality from inundation in a 1 in 100 year storm (condition 5 of Permit 040329A).

Coastal Inundation and Flooding Assessment

- 35 Dr McCowan and Mr Bishop's evidence explained the process they undertook in arriving at the design level for the proposed bunds/levees. This assessment took account of tidal surges, storm driven wave heights, tide levels and possible sea level rises due to climate change. Taking these factors into account they arrived at a design level of 2.63m AHD. This evidence was not disputed by the other parties, other than in regard to the impact of climate change on rising sea levels (a matter which we will comment on later). We have concluded Dr McCowan and Mr Bishop's assessment presents what appears to be a reasonable estimate of the height to which the works are required in order to address the risk of coastal inundation on the retirement village as well as other private housing and the caravan park.
- 36 Earlier we agreed with Mr Pitt that a broader public benefit would accrue from the proposed works if the levees/bunds successfully perform the role they are intended for. We deliberately used these words because it appears from the evidence presented that these works do not guarantee long term protection from coastal inundation. The evidence and cross-examination indicates that the proposed works will address the risk of coastal inundation as assessed now with the dune system in its current condition. Dr McCowan acknowledged future high tides and other natural events could undercut or otherwise erode the dune system in other areas thereby presenting opportunities for overtopping of the dune system at locations other than the sites of the proposed works. In other words, the proposal presented to us is a static set of flood level heights and works to address what is fundamentally a dynamic system. This dynamic system can reasonably be expected to change the conditions and assumptions upon which the modelling of Dr McCowan and Mr Bishop is based. The works may therefore address the inundation risk as it currently exists but may not do so in the future.
- 37 Not only do the dunes, foreshore and inlet form a dynamic system, but the assumptions in the modelling may also change for other reasons. For example, Dr McCowan, with the apparent agreement of the West Gippsland Catchment Management Authority and the Department of Sustainability and Environment, adopted a value for sea level rise as a result of climate change of 0.4m by 2100. There is no guarantee that this value is the correct one. Dr McCowan's evidence was that this was the generally agreed value arising from a range of values estimated for global sea level rise and that this value had been adopted in other (unspecified) situations along the

Victorian coast. Nevertheless, he acknowledged there are a wide range of possible levels depending on the future climate conditions and scenarios.

- 38 What is of concern to us is that sea level rise is an acknowledged process that should be accounted for and the question is whether the proposed works are appropriate having regard to the level of uncertainty as to what the sea level rise will be in the future. No doubt this is the reason why the permit conditions for the retirement village development require ongoing modelling every five years to ensure the proposed levee/bund works will adequately protect the locality from inundation. A consequence that follows from this is that if it is found they are not adequate, further works in the form of new levees/bunds or increases in the height and/or length of these proposed levees/bunds may be required in the future.
- 39 To this end it was Dr McCowan who noted that not only the proposed works but the entire dune system would need to be inspected (possibly annually) and when appropriate, re-surveyed to assess the risk and need for further levee/bund works in addition to assessing the effectiveness of the levees/bunds proposed in this application.
- 40 It was suggested to us during the hearing that such works may require separate planning approval, but it was also pointed out that this planning permit (if granted) and the Coastal Management Act consent conditions of approval allow for modifications to be approved under these existing approvals.
- 41 Based on the evidence presented as to the dynamic nature of coastal environments and the uncertainty surrounding rising sea levels and climate change, there will remain an ongoing risk for coastal inundation despite the proposed works. We are unable to conclude these works could be considered by any means to be finite. The evidence suggests further works are likely to be required in the future to address the potential for other incursions of coastal inundation along this foreshore reserve. The extent and hence the environmental impacts of such works are unknown at this time.
- 42 This brings into question the merit of these proposed works acknowledging that, as part of their approval, there is an ongoing necessity for maintenance of the works; there is an ongoing necessity for modelling of the sea levels and review of the effectiveness of the works; and the likelihood that further undefined works will be required in the future.

The Merits of the Proposed Works

- 43 We will firstly deal with the detail of the proposed works themselves, and their appropriateness in light of the planning policy framework and the objectives/decision guidelines of 'ESO1'.
- 44 The Coastal Management Act consent and the Council's approval of this proposal appear to be predicated on the basis of the detail in the permit application plans, namely that the levees/bunds will generally have a

maximum height of 300-400mm, with the highest section shown to be in the order of 600mm high. As mentioned earlier, Mr Pitt advised us that this proposal does not seek any planning permission for vegetation removal under ESO1.

- 45 It was Dr McCowan's evidence that the levees/bunds must be constructed to a height of 2.63m AHD, but he and Mr Bishop advised they had not actually reviewed the permit application plans and sections to ascertain whether that was, in fact, what was proposed.
- 46 It was evident to us during our site inspection⁹ that there were a number of inconsistencies between the permit application plans and the site conditions. Of particular concern was the indicated "maximum" depth of fill in the sections at 300mm, 400mm or 600mm being contrary to the actual natural ground levels, and the likely need to remove vegetation in at least two of the locations (CP2 and CP4).
- 47 We brought these inconsistencies to Mr Pitt's attention at the commencement of the second day of the hearing and this was then dealt with as part of the evidence given by Mr Savvas, the 'author' of the permit application plans. To our surprise, the explanation provided by Mr Savvas in his oral evidence was that these plans were conceptual in nature only. We do not agree with the opinion expressed by Mr Savvas that the permit application plans need only present a concept of the proposed works rather than the actual extent of the location and height of the works, including the need for any vegetation removal (particularly as planning permission is required under ESO1 for vegetation removal). One need only have regard to the decision guidelines for ESO1 that the responsible authority, and upon review this Tribunal, must consider:

The location, dimension and level of any excavation or alteration to the natural surface including works to stabilise buffers in areas of fill or excavation.

- 48 In short the somewhat 'glib' response of Mr Savvas was akin to an attitude of "she'll be right mate", and this is unsatisfactory. The lack of detail on the plans clearly does not accord with the requirements of the decision guideline and is certainly less than a reasonable standard one would expect in any planning permit application.
- 49 The lack of detail has raised many questions in our minds about the actual extent of works that will be required. It was clear from Mr Savvas' responses to our questions about a number of detailed matters that the plans had failed to present a true outline of the degree of works in respect of the depth of fill necessary to achieve Dr McCowan's design level of 2.63m AHD at locations CP1 and CP4 (at the very least) and the likely vertical and lateral extent of fill at locations CP4 and CP5. We provide the following

⁹ The site inspection was undertaken at the end of the first day of the hearing

observations to illustrate the level of concern that we have with the detail of this proposal:

- We observed depressions and other ground levels in the requested new locations at CP1 that require greater fill than that shown on the plans.
- The Council has requested the CP1 locations be changed from adjacent to The Esplanade to adjacent to the beach and an old sea wall and there is no environmental analysis of the impact of such changes (as the new locations are directly adjacent to a dynamic dune system), nor has DSE consent been obtained for such changes.
- There is evidence of significant erosion on the beach side of the coastal track at CP2 and we are not satisfied from the plans how the works to reinstate the track on the beach side and increase its height will not also be eroded over time.
- CP3 is an existing depression that is covered with vegetation, some of which will need to be removed and there is no analysis of the type and value of the vegetation. Given the extensive vegetation cover and the lack of detail on the plans, it is unclear how large this depression is in width and depth and how much fill will be required. Similarly, there are no details as to how this work will be carried out so as not to impact on the surrounding dunes and vegetation.
- CP4 is a long bund wrapping around the southern end of the existing small car park adjacent to the entrance to the Screw Creek walking track. It appears to encroach into the existing car parking area, thereby reducing the number of available car spaces. Mr Savvas indicated that some vegetation removal/tree branch lopping may be required. The section of these works shows a maximum height of 600mm; however due to the contours of the land, it appears the western section of the works will reach a height of at least 1 metre. Under cross-examination and with the benefit of more detailed contours on his copy of the application plans, Mr Savvas also conceded that the extent of the bunds in this location would need to be greater than that shown on the application plans.
- CP5 affects the entry to the Screw Creek walking track and part of the track itself. There is an existing shelter, display boards and a gated entrance and Mr Savvas was unable to advise what changes in levels would be required in this area and what impact this may have on the existing entry infrastructure.

50 At the end of the hearing, we requested a copy of the survey plan information used to analyse the coastal dune system and a copy of the permit application plans that included the surveyed contours (as relied on by Mr Savvas in his evidence). We have reviewed these plans and note there are discrepancies between the two – for example, a depression at CP1 is shown in the survey plan but not the application plans, and the survey

plan is unclear as to whether the low points at CP2 and CP3 need to be filled. Why these discrepancies exist is not apparent to us. That they exist is yet another concern to us about the lack of attention applied in determining the extent of flood protection works required and their possible impacts. In short, it further adds to our concern that the nature of the proposed works has not been properly thought through.

- 51 The submission by the Council, DSE's Coastal Management Act consent and associated report of assessment, and even Mr Kristic's evidence have relied not only on the need to achieve 2.63m AHD high flood protection works, but also the fact that the submitted plans (which do not state "conceptual" on any page or any section) involve filling to a height of not more than 400-600mm across each of the various locations (as was indicated by the plans and sections clearly marked "Max Fill" heights).
- 52 It was also evident to us during the hearing that Mr Pitt and others had relied on indications from the plans that no vegetation required removal, yet our own inspection and the evidence of Mr Savvas confirmed some removal of grasses, low shrubs and possible lopping of tree branches were likely to be required in more than one location.
- 53 An application for a permit for works in a primary coastal dune system such as this should have clearly detailed plans and elevations/sections that articulate the nature and extent of the works required. At the very least, this is required to enable consideration of the merits of the proposal in light of the relevant planning policies and controls.
- 54 A further concern in this respect is, as has already been mentioned, an assessment of vegetation removal required under ESO1 as part of the approval process. This proposal is clearly inadequate in this respect. While Mr Savvas alluded to a belief that an ecological assessment of part of the foreshore area existed (but not necessarily at the locations of the proposed works), no details were submitted with the application or provided to us during the hearing. The expert evidence given by Mr Savvas and Mr Kristic about these matters have led us to conclude insufficient regard has been given to the importance of providing detailed information as part of the planning process and this review process.
- 55 We also asked a number of questions in regard to the rigour of the designs of the levees/bunds and their adequacy to withstand the coastal processes they will be subject to in light of the dynamic nature of Anderson Inlet and the foreshore coastal dune system. We are not persuaded by Mr Savvas' general responses, particularly given the level of erosion we observed for existing dune stabilisation works along this foreshore reserve. It is also of concern to us that Mr Savvas lacks experience in designing levees and bunds in foreshore coastal dune systems.
- 56 Mr Pitt submitted any deficiencies that we perceived in the detail of the plans could be dealt with through permit conditions and a further approval process through DSE. However, we are of the view that there is insufficient

detail regarding the existing conditions of the coastal dune system, including existing vegetation to be removed or lopped; and any changes required to the plans are likely to be significant and cannot be considered minor modifications that merely “tweak at the edges” of the proposed design. As such, we are not prepared to approve this proposal subject to the provision of modified plans that show more detail as to the length, height or other extent of the levees/bunds and the extent of vegetation removal that would require a separate planning application to be lodged.

- 57 It follows that we are not satisfied with the level of detail contained in this permit application and we are not satisfied that the planning policy framework and the objectives of ESO1 have been met given the level of works required is clearly more extensive than what is shown in the permit application documentation.

Considering Future Works

- 58 Planning applications must be considered on their individual merits and it is not common practice to consider the future. It is a well established planning principle that the Tribunal is not bound by earlier decisions:

This Board is not a Board of precedent. What might be decided in respect of one parcel of land in relation to a particular development is not necessarily applicable to an adjoining parcel or parcels, even though they may possess similar characteristics. Each matter must be determined on its merits.¹⁰

- 59 However, this does not mean that it will always be the case that the future is not a relevant consideration:

There are isolated occasions where decisions of the Board clearly have ramifications for surrounding land. For example, the determination of the Board in *Swan v Shire of Phillip Island* (1983) 1 PABR 236 to refuse a permit for the erection of a detached house in an ‘old and inappropriate’ subdivision had obvious consequences for future development within that subdivision. Such instances are, however, rare.¹¹

- 60 We are of the opinion this is one such instance where a decision to grant this permit will have consequences for the future that are relevant for consideration as part of this proposal. As explained previously, the impetus for this planning application arises out of a condition imposed in the retirement village permit. If the levees/bunds are approved, the buildings can be built at a floor level of 1.80m AHD rather than 2.93m AHD, which is quite a significant difference in levels. If these buildings are built with 1.80m AHD floor levels, the need to continue to provide effective coastal inundation mitigation works becomes paramount. In a planning sense, we question how any subsequent planning decision could then be made not to

¹⁰ *Director of Conservation v City of Warrnambool* (1983) 8 APA 17 at 28

¹¹ *Aiello v City of Melbourne* (1985) 3 PABR 339 at 342

allow future levee/bund work throughout the dune system as the paramount need to protect the lives of residents (the community benefit) would surely weigh heavily against any environmental impacts.

61 The following general principle has been established by the Tribunal:

There is no doubt that, as a matter of principle, the Board should have regard to whether its decision would create an undesirable precedent as previous planning decisions are clearly relevant to the exercise of discretion. However, for a precedent to be created in any particular case there must be scope for this to occur. Moreover, for the Board to decide against a development through a fear of creating a precedent, the Board must also find that the subsequent development would be undesirable. In other words, it is not enough to demonstrate that a particular decision will create a precedent. It must also be shown that it will be a bad precedent.¹²

62 The strategies in the Coastal Areas State planning policy encourage avoidance of development within primary sand dunes, low lying areas, and areas susceptible to flooding from coastal inundation and erosion. The coastal dune system along this section of the Inverloch foreshore has all of these characteristics. It is dynamic. It is an environmental asset of the environs of the foreshore and Anderson Inlet. The retirement village permit recognises the need to protect the future residents by requiring ongoing modelling of the coastal inundation potential every 5 years. The evidence before us suggests further works can reasonably be expected or, at the very least, are anticipated in the future to address the potential for new incursions of coastal inundation along this foreshore reserve. These works may include increasing the height/width of the proposed levees/bunds; incorporating new levees/bunds or other mitigation works throughout the dune system as new low points below the nominated flood level are created by climate conditions, changes in the environment or human activity. As such, we find the approval of this proposal will result in future reliance on similar works if they are to remain effective in providing inundation protection. As a result there is a reasonable likelihood of consequential environmental impacts associated with ongoing levee/bund work within this coastal dune system.

Conclusion

63 We are not persuaded the nominated flood protection level determined by Dr McCowan and Mr Bishop has been successfully translated into a sufficiently comprehensive or well thought through proposal for works with a suitable ongoing management program to achieve the aim of protecting the retirement village and other nearby urban land from coastal inundation. The dynamic nature and interaction of sea levels and the coastal dune system are likely to result in ongoing management and works. At best this will involve annual monitoring of the existing dune system, maintenance

¹² *Zerbe v City of Doncaster and Templestowe* (1984) 2 PABR 101 at 116

works and five yearly modelling of the sea level. There remains a likelihood of future modifications to the extent of inundation protection works along this foreshore reserve in order to maintain the necessary degree of flood protection.

- 64 Neither are we persuaded that the plans on which we, the Council and DSE have relied present sufficient detail about the extent of works required to achieve the nominated flood level and hence the degree of protection necessary.
- 65 Hence, our decision to refuse this proposal is twofold. The detail is insufficient to persuade us that the environmental impacts upon the dune system, both now and in the future, have been adequately considered. In considering the balance between community benefit and sustainable development, we have serious concerns that the benefits to be gained by the works are outweighed by the impact of the works upon the primary dune coastal environment. Secondly, based on the expert evidence presented there will remain a risk of possible coastal inundation due to the dynamic nature of the systems and, consequently, there is a necessity for ongoing monitoring, maintenance, further modelling of such risks and further works if the buildings in the retirement village are constructed at a lower floor level.
- 66 As such, we are not persuaded the community or public benefit outweighs the poorly evaluated extent of works and the ill defined environmental impacts associated with the works within the existing coastal dune system both now and in the future.
- 67 We note the permit conditions on the retirement village development include an alternative to this proposal, and that is to ensure the development occurs above the flood protection level nominated by Dr McCowan. Given our concerns about the proposed works, we suggest this option will need to be pursued as part of the retirement village development.

DECISION

For the above reasons, the decision of the Responsible Authority to grant a permit is set aside. It is ordered that no permit be issued.

Rachel Naylor
Presiding Member

Ian Potts
Member