

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2378/2010
PERMIT APPLICATION NO. 07/0546

CATCHWORDS

Request under section 87A of the *Planning and Environment Act 1987* for **amendment of a permit**. Surf Coast Planning Scheme. Delete shops from tourism related development and replace with additional dwellings. Whether amendment consistent with local policy and strategies for Anglesea. Whether amendments consistent with policy for addressing climate change and associated coastal hazards.

APPLICANT	Kala Developments Pty Ltd
RESPONSIBLE AUTHORITY	Surf Coast Shire Council
RESPONDENTS	Minister for Planning – Department of Planning and Community Development, Noel Fuller & Ors, Peter Judkins, Jim and Irene Stephen, Alister Shenfield, Helen Webb, Christine & Trevor Osbourne, Vic Roads – South West Region.
SUBJECT LAND	137 to 143 Great Ocean Road, Anglesea
WHERE HELD	Melbourne
BEFORE	Ian Potts, Member
HEARING TYPE	Hearing
DATE OF HEARING	17 February 2011
DATE OF ORDER	28 March 2011
CITATION	Kala Developments Pty Ltd v Surf Coast SC [2011] VCAT 513

ORDER

- 1 The application pursuant to section 87A of the *Planning and Environment Act 1987* to amend planning permit No 07/0546 issued by the Responsible Authority on 27 June 2008 in respect of the subject land is granted.
- 2 Pursuant to section 87A of the *Planning and Environment Act 1987*, Planning Permit No. 07/0546 is amended as follows.
- 3 What the permit allows is amended to read as follows:
Use and development of the land for construction of a restaurant and twenty-four dwellings, waiver of part of the parking requirements, construction of a fence, subdivision of the land and buildings, removal

of native vegetation and construction of access to a main road in a category 1 road zone.

4 Conditions in the permit are amended as follows.

(a) Condition 1(a) is amended as follows:

(a) Amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans submitted with the application but modified to show:

- (i) The maximum height of the building located on the Residential 1 Zoned land to be no greater than 7.5 metres above natural ground level.
- (ii) Allocation of the car spaces in the on site car park to the residential units and restaurant
- (iii) Re-design of the onsite car parking so that parking space no.26 can be accessed in accordance with AS 2890.1 – 2004 'Parking Facilities for off street Car Parking'.
- (iv) Re-configuration of the access to 135 Great Ocean Road.
- (v) Amendment to the proposed intersection design to extend the kerb return on the river side of Great Ocean Road shown on TP08 to include the proposed pedestrian crossing.
- (vi) The alignment of the storm water drain through the site and its location on the nearest section through the development.
- (vii) A schedule of external materials finishes and colours incorporating colour samples.
- (viii) Provision of lighting to the under-croft car-parking area so that light will not spill onto the residential properties abutting the site to its west.
- (ix) Amendment to the south-east corner of the development to show a revised restaurant outside seating area and landscaping generally in accordance with plan TP14 dated 06/11/10.
- (x) Plans and elevations to show material and finishes generally in accordance with the document 'Architectural Treatment' by Michael Angus Architect dated 6 October 2010.
- (xi) Glazing on the ground floor south-east corner of the restaurant at a minimum of 2.1m in height and a length of 3m from the south-east corner if the restaurant and glazing

to a minimum of 1.0m along the east wall of the restaurant from the south-east corner.

- (xii) The floor of the restaurant at a minimum height of 2.5 metres Australian Height Datum.
- (xiii) The floors of all residential units at a minimum height of 2.7 metres Australian Height Datum.
- (xiv) The construction of a flood proof external barrier (wall) along the north eastern frontage and north side of the property to a height of at least 3.1m Australian Height Datum with steel picket fence to a height of 1.7m above ground level generally in accord with plans TP03E and TP06C, TP07C and TP08C dated 26/11/10 all to the satisfaction of the Responsible Authority.
- (xv) A crest on the entrance ramp to the basement car park not lower than 3.1 metres Australian Height Datum.
- (xvi) A platform level for the walkway between the restaurant and northern pedestrian access way that crests at a height of not less than 3.1m Australian Height Datum generally in accord with plan TP03E, dated 26/11/10, but modified to have access over the crest by a graded ramp so as to provide disabled access.

(b) Condition 1(b) is amended as follows:

- (b) A streetscape and landscape plan to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plan will be endorsed and will then form part of the permit. The plan must be generally in accordance with the plans submitted with the application but modified to show:
 - (i) Landscaping of the areas adjacent the proposed car parks, bund walls and traffic treatments in Diggers Parade.
 - (ii) A planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, sizes at maturity, and quantities of each plant;
 - (iii) Only the use of plant species indigenous to the locality; and
 - (iv) All specimens to be planted must be to the satisfaction of the responsible authority and at an advanced stage of growth.

(c) Condition 1(d) is amended by the addition of the following condition (xii):

- (xii) Measures to assess and monitor the impact of any Acid Sulfate Soils (ASS) found on the site in accordance with EPA Guidelines.

- (d) Condition 2 is amended as follows:
- 2 The fence along the site's western boundary must be designed to provide an acoustic barrier to minimise noise from sources within the under-croft parking area affecting adjoining residents, to the satisfaction of the Responsible Authority.
- (e) Condition 7 (Land Use) is deleted with all subsequent conditions renumbered accordingly.
- (f) Renumbered conditions 9, 11 and 13 (Site Management – Ongoing conditions) are amended as follows:

9 The use of the land may operate only between the following hours:

- a) Restaurant: 7am to 11pm, Sunday to Thursday
7am to 12 midnight Friday to Saturday

Unless otherwise approved in writing by the Responsible Authority.

11 The loading and unloading of goods from vehicles to service the restaurant and apartments must only be carried out from the Diggers Parade service road or from a dedicated loading and delivery bay located to the satisfaction of the responsible authority.

13 All buildings and works must be constructed and maintained to the satisfaction of the Responsible Authority using subdued colours and materials that allow the building to blend with the natural surrounds.

- (g) New conditions 47 and 48 are inserted as follows:

Conditions required by Corangamite CMA

47 Floor coverings in the restaurant must be restricted to tile, vinyl or other water resistant material.

48 All electrical wiring, outlets and switches in the restaurant must be located at or above 3.1 metres Australian Height Datum (AHD). Any wiring, outlets or switches that are installed below 3.1 metres AHD must be suitable for continuous submergence in water.

- (h) Renumbered condition 49 (Expiry of Permit) is amended as follows:

49 In accordance with section 68 of the Planning and Environment Act 1987, this permit will expire if one of the following circumstances applies:

- The development is not started within two years of the date of issue.
- The development is not completed within three years of commencement.
- The use is not started within two years of the completion of the development.

- The plan of subdivision is not certified within two years of the date of issue.
- The registration of the subdivision is not completed within five years of the date of certification of the plan of subdivision.

In accordance with section 69 of the Planning and Environment Act 1987, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within three months afterwards.

- 5 The responsible authority is directed to amend the permit and issue an amended permit to the owner of the subject land pursuant to section 91 of the *Planning and Environment Act* 1987.

Ian Potts
Member

APPEARANCES

For Kala Developments Pty Ltd	Mr James Lofting, a solicitor from Best Hooper. Mr Lofting called Mr Tim Womersley, a coastal engineer from Water Technology to give expert evidence.
For Surf Coast Shire Council	Mr Phillip Rosevear, a town planner from Surf Coast Shire Council
For Minister for Planning	No appearance.
For VicRoads – South Western Region	No appearance.
For Noel Fuller & others and Peter Judkins	Mr David Merret, a town planner from Isis Planning.
For Jim & Irene Stephen	No appearance.
For Alister Shenfield	No appearance.
For Helen Webb	Ms Helen Webb in person.
For Christine & Trevor Osbourne	Ms Christine Osbourne in persons.

INFORMATION

Description of Proposal	<p>Amend the approved development and use of the land to delete five retail premises at ground floor level and replace them with six ground floor dwellings and an increased area allocated to a restaurant. The overall development would contain 24 dwellings.</p> <p>Other amendments to the development would include changes to detail and facades and some building form, including a reduced maximum building height and changes to building setbacks. The overall development would be contained within the existing approved building envelope and the number of car parking spaces and access would remain unchanged from the approved development.</p> <p>The development is to be subdivided.</p>
Nature of Application	Section 87A <i>Planning and Environment Act</i> 1987.

Zone and Overlays applying under the Surf Coast Planning Scheme

Part Special Use Zone Schedule 5 to the zone - Tourism Development Precincts (Clause 37.01).

Part Residential 1 Zone (Clause 32.01).

Part Salinity Management Overlay (Clause 44.02).

That part covered by R1Z also covered by Significant Landscape Overlay Schedule 3 (Clause 42.03).

Planning permissions required under the Surf Coast Planning Scheme (as limited to the amendments being sought)¹

Use of the land in SUZ5 for dwellings (Clause 37.01-1 and Schedule 5).

Building and works in SUZ5 (Clause 37.01-4 and Schedule 5).

Building, works and subdivision in a salinity management overlay (Clause 44.02-1 and 44.02-2).

Land description

The site comprises of four lots with a combined total area of 3203sqm. The site has a frontage to the Great Ocean Road (Diggers Parade service road) of 74m and backs onto a right of way at the rear which leads to Tonge Street to the west.

The frontage to Diggers Parade has an elevation of approximately 2m Australian Height Datum (AHD) and rises over a length of approximately 43m to around 3m AHD.

The land abuts a three storey retail and apartment development to the south and lies to the north and west of the Anglesea foreshore reserve and Anglesea River estuary respectively.

Cases referred to

Shenfield v Surf Coast SC [2008] VCAT 1141; *Rozen v Macedon Ranges Shire Council & Anor* [2010] VSC 583; *Taip v East Gippsland SC* (includes summary)(Red Dot) [2010] VCAT 1222.

¹ Other planning permissions required for the development were dealt with under the original grant of the permit and relate to the development and use of the land in a Residential 1 Zone,

REASONS

INTRODUCTION

- 1 On 27 June 2008, Surf Coast Shire Council issued permit P160/2008 at the direction of the Victorian Civil and Administrative Tribunal.² This permit allows the development of the land at 137-143 Great Ocean Road, Anglesea for five shops, a restaurant and 18 dwellings. The site of this development is located close to the Anglesea River estuary and main Anglesea surf beach
- 2 Kala Developments seek amendments to the planning permit. The amendments would see the five ground floor shops reconfigured into six ground floor dwellings thereby providing a total of 24 dwellings across the site. Additionally a ground floor restaurant would be reconfigured to increase its floor area from approximately 100sqm to approximately 286sqm. Under-croft car parking will be retained as would the approved access arrangements and car parking to the front of the development.
- 3 The Council does not oppose these amendments subject to conditions that address a variety of matters including possible impacts from projected rising sea levels and the associated risks of inundation. The conditions that are acceptable to the Council have been developed over the course of mediation and other meetings between the Council, Kala Developments and the Corangamite Catchment Management Authority.
- 4 Mr Fuller and other respondents oppose the amendments. They assert that the amendments do not meet the strategic planning outcomes sought for this site and that the proposed measures to address climate change impacts are inadequate. It is submitted that the amendments would not see the best possible outcome for this site.

THE NATURE OF THE AMENDMENTS AND THE SUBSTANTIVE ISSUES

- 5 The requested amendments applied for by Kala Developments are in three parts:
 - A change in a substantive use of the development, with the deletion of the retail component of the development that lies within the special use zone and a corresponding increase in the residential / accommodation use;
 - Minor modifications to the design and detailing of the development to accommodate the increased number of dwellings; and
 - Modifications to the design to address projected risks of coastal inundation under current climate change and sea level rise scenarios.
- 6 The proposed amendments do not seek to significantly change the height of the approved development or make any substantive changes to the overall development envelope. No changes are proposed to vehicle access points,

² *Shenfield v Surf Coast SC* [2008] VCAT 1141 (18 June 2008).

vehicle parking arrangements, which remain as allocated to an undercroft area and to the front of the development.

- 7 As I have noted earlier much of the objectors case about these amendments is based on their view that the changes do meet the best possible outcomes formulated for this site in respect to its zoning and are not ideal given the projected risks of inundation under climate change/sea level rise scenarios.
- 8 An important point to note at this juncture then is that whether the amendments are ideal or the best possible outcomes is not the test under the planning scheme. As was noted by His Honour, Osborne J in *Rozen v Macedon Ranges Shire Council & Anor*,³ ‘...the test that the Planning Scheme requires to be applied is one of acceptable and not ideal outcomes’.
- 9 With that point in mind, the extent of my consideration of the request for the amendments and the extent of the objectors’ concerns are limited to determining whether:
- The change in uses from retail to dwellings is acceptable; and
 - The amendments to the design are an acceptable response to the identified coastal hazards.

IS THE CHANGE IN USES ACCEPTABLE UNDER THE SPECIAL USE ZONE?

- 10 On behalf of Mr Fuller and other objectors, Mr Merret submits that the proposed change in use of the land within the Special Use Zone (Schedule 5) from retail to residential, is an inferior strategic planning outcome. Mr Merret highlights the purposes of this zone, as it applies to Anglesea and the Four Kings Precinct and the reliance that the previous Tribunal placed on these purposes in arriving at a decision to grant the permit. It is argued that if the amended proposal is approved the development will essentially become a residential development with a restaurant ‘tacked on’. This is what is said to be an inferior strategic response to the purposes of the zone.
- 11 Special Use Zone 5 is headed ‘Tourism Development Precincts’.⁴ It has been applied to six precincts of the shire to identify land within urban townships that are considered to be ‘specifically suitable for more intensive tourism development’.⁵ Two precincts are in Anglesea, the Diggers Parade Precinct to the north of the subject site and the Four Kings Precinct in which the site partly lies.⁶
- 12 The purposes of the SUZ5 include:⁷
- To encourage tourism development in the ... high profile precincts...

³ [2010] VSC 583 at [175].

⁴ Clause 32.07 of the Surf Coast Planning Scheme.

⁵ Clause 21.04-3 of the Municipal Strategic Statement.

⁶ The remaining portion of the development lies in a Residential 1 Zone. The use of dwellings in this portion of the development is not in contention in this proceeding.

⁷ Other purposes relate to land use in Torquay and the use of the ‘Surf Coast Style principles’ which I am informed the Council no longer relies on in planning permit applications.

...

To encourage a range of tourism related land uses, including:

- diverse forms of medium density tourist accommodation;
- tourist activities and attractions; and
- limited tourism-related retailing in appropriate locations.

To promote a mix of tourism related uses, with tourist-related retail and restaurants predominantly at ground floor level, and accommodation and offices predominantly at upper floor levels.

- 13 The Council accepts that the sweep of purposes is broad and lacks a more refined approach for specific sites. Perhaps not surprisingly, I was informed that the Council is undertaking a review of this schedule, although this review is in its formative stages and is not of weight in this proceeding.
- 14 It is apparent that in being so broad it could hardly be expected that all the precincts or any one development in a precinct could or should deliver on all of the zone purposes. It is necessary to weigh up from the guidance available from the zone and other provisions of the Surf Coast Planning Scheme as to what will constitute an acceptable outcome. To this end it is instructive to consider the range of uses contemplated for this zone, the application requirements and the decision guidelines.

The table of uses for SUZ5 – dwelling versus shops

- 15 The table of uses under SUZ5 sets out that dwellings are a section 2 use conditional on either:
- Housing (dwellings) in the Four Kings Precinct being medium density; or
 - the site containing another section 1 or 2 use.⁸
- 16 Thus a medium density dwelling development, whether for residential purposes or tourist accommodation, is permissible. The formulation of this condition to the use of the land for a dwelling must lead to the conclusion that the such a development within the SUZ5 meets the purposes of the zone. If it were not it would either have more conditional restrictions in place or the use would be prohibited.
- 17 The other means for dwellings to be permissible, not just by being a medium density development, is by including another permissible use, i.e. one and possibly more, section 1 or 2 uses.
- 18 The amended design includes a restaurant. A restaurant is a section 2 use in this precinct.⁹ It is therefore another section 1 or 2 use in association with the dwelling use. This meets the table of uses condition.

⁸ See the Tables of Use under section 1 of Clause 32.07.

⁹ Under the Table of Uses to Schedule 5, Restaurants are a section 1 use conditional on their location being in precincts T1, T2 and T3 associated with Torquay. If not so located, a restaurant becomes a section 2, permit required use.

- 19 The proposed amendment therefore contains two forms of uses that are permissible and so must be taken to be acceptable means by which to meet the purposes of the zone. While the objectors are critical that the only other use within the development is a restaurant, suggesting that his use is token, a medium density dwelling development of its own would be acceptable in the context of the table of uses.
- 20 A further point to note in respect to the table of uses is that accommodation, including group accommodation, is treated as a section 2 use, quite separate from the dwelling use. The drafting of the table of uses would appear to making a clear distinction between a dwelling use and accommodation use.
- 21 The distinctions between the conditional dwelling and unconditional accommodation uses leads to a conclusion that in preparing this schedule, the use for medium density dwellings (i.e. residential use) is one that has been specifically contemplated as being acceptable for land in the Four Kings Precinct.
- 22 A further point to the objectors case is that the dwellings are to be located in the ground floor. It is submitted that this is contrary to the purposes of the zone, specifically the purposes that refers to retail and restaurants predominating at the ground floor level.
- 23 It is true that there is a specified purpose in the zone that is framed in this way. In line with that specific purpose the table of uses specifies a condition that for two precincts at Torquay¹⁰ the ground level frontage of any dwelling is restricted to 2m. However no such condition applies to dwelling developments in the Four Kings Precinct. If it was considered necessary to do so to achieve the purposes of this zone at this precinct, such a condition could have been put in place. None has been.
- 24 I conclude from the absence of such a condition in the table of uses that a medium density dwelling development at ground floor level is a form of use that can be taken to be acceptable in this precinct.

Application requirements and decision guidelines under SUZ5

- 25 The application requirements specified for land uses under the SUZ5 provides further direction as to how one may interpret what is intended by the application of this zone. Relevant to the matters in dispute in this proceeding, the requirements in respect to accommodation uses, which include dwellings, set out that:

An application to use land for any use within the Accommodation group must be accompanied by a report which demonstrates that the proposal is consistent with the tourism emphasis of the schedule. In this regard:

¹⁰ Precincts T2 and T3.

- Medium density housing must demonstrate high quality design that integrates with the tourist emphasis of the locality and may include other uses in Section 1 or 2.
- 26 The decision guidelines are also of some assistance in understanding the purposes of the zone. These relevantly include that:

Before deciding on an application to use land the responsible authority must consider, as appropriate:

....

- The need to protect the core retail and service functions of the ... Camp Road Shopping Centre in Anglesea.

....

- Whether a mix of land uses within each precinct (except T4) is provided, with tourist related retail and restaurants predominantly at ground floor level, and accommodation and offices at upper floor levels.¹¹

27 There is no argument between the parties that the presence of tourist related retail at the Four Kings Precinct would be a risk to the core retail and service functions of the Camp Road shopping centre. In fact it is argued by the Kala Developments that the Camp Road shopping centre is the dominant focus of retail activity in Anglesea. The proposed amendments to the use are said to arise from the fact that with this dominance it will be difficult to establish tourist related retail at the Four Kings Precinct. It is also said that this has been demonstrated by the reported slow take up and performance of retail premises provided for in another development in this precinct.

28 The guidelines also indicate a preference for a mix of land uses within each precinct rather than for each development within a precinct. In this respect, when considering the precinct as a whole, it is apparent that there is a mix of land uses, with the adjoining development mentioned above having a mix of retail and other service facilities at ground level. It is a valid argument to therefore consider that such a mix between the developments has achieved the purposes of the zone.

Is there other relevant policy direction?

- 29 Having reviewed State and Local Planning Policy Frameworks contained within the Surf Coast Planning Scheme, it is evident that there are two statements of strategic policy relevant to the question about the use of this land.
- 30 Clause 21.04 of the Municipal Strategic Statement (the MSS) is said to present the Council's local response to state policy on tourism development. While this strategy is at a shire wide level, a number of issues, opportunities

¹¹ Guidance as to what is meant by tourist related retail is set out under the application requirements of SUZ5.

and strategies are relevant to the issues raised by the objectors. Relevant strategic outcomes that are sought include locating:

... high profile, high volume tourism development in appropriate urban areas where their impacts and infrastructure requirements can best be accommodated.

and encouraging:

...the development of a diverse range of quality tourist accommodation and facilities to meet changing visitor needs.

- 31 The application of the SUZ5 to the Four Kings Precinct is one outcome of implementing these and other tourism related strategies. While notionally this development is for residential purposes, it was not disputed that the accommodation would not or could not be used for tourism accommodation. Indeed it is evident that a reasonable proportion of tourism accommodation is provided through privately owned dwellings, many of which are single dwellings on lots dispersed throughout the town.
- 32 The Anglesea Strategy at Clause 21.11 of the Planning Scheme identifies that amongst other issues there is limited diversity of accommodation in the 'tourism nodes'. Strategies to address this issue include supporting 'higher densities of development at Four Kings'.¹²
- 33 This proposal therefore addresses these two aspects of policy, providing a consolidated form of accommodation for tourism in an urban environment and diversifying the form of available accommodation.

Conclusions

- 34 It is useful to recall that 'because a permit can be granted does not imply that a permit should or will be granted'.¹³ The same could be said of this amendment to the permit. Just because medium density development can be permitted at the ground floor level does not mean that a permit amendment to allow such development should be permitted.
- 35 The objectors contend that the replacement of ground floor shops with dwellings will deliver a strategically inferior outcome. As I have set out, what is required to be addressed is whether the amended proposal is acceptable rather than whether one outcome is superior to another. That said after considering the purposes of the SUZ5, the relevant applicant requirements, decision making guidelines and the strategic planning context, I am not persuaded that the amendment is inferior.
- 36 It is apparent that a range of outcomes are sought under SUZ5 that will support tourism. For the reasons I have outlined above, medium density dwellings, even at the ground floor level in this precinct, is one of a variety of such uses that meets these outcomes. Strategically it will contribute to the overall achievement of the SUZ5 purposes and address the lack of

¹² Clause 21.11.

¹³ Clause 65.

diversified housing/accommodation that has been identified as an issue for Anglesea. In fact, I find that this proposal appropriately addresses a number of strategic outcomes sought under the MSS.

- 37 However whether inferior or not, I conclude that amendments are acceptable in respect to the purposes of the SUZ5 and wider policy context.

IS THE DESIGN RESPONSE TO COASTAL HAZARDS ACCEPTABLE?

- 38 At the time of the original granting of a permit for development of this site, the potential impacts of inundation from projected sea level rise were not a planning consideration. Subsequent to that time, the State Planning Policy Framework was amended to give effect to the *Victorian Coastal Strategy 2008* by providing policy direction to address the impacts of climate change along Victoria's coast.¹⁴

- 39 The State Policy objective, now found at Clause 13.01-1 of the planning scheme is to 'plan for and manage the potential coastal impacts of climate change'. Strategies to address this objective are to:

Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.

Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.

Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.

Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

- 40 A General Practice Note¹⁵ has also been prepared by the Department of Planning and Community services to assist in these matters. At the present time, there are no other planning scheme provisions, such as zonings or overlays that apply to this matter in respect to coastal inundation hazards.

- 41 I concur with submissions made by Mr Merret that a consideration of the above strategies and the associated practice note leads one to the conclusion that strategic land use responses are preferable to site by site engineering or design responses.

¹⁴ Planning Scheme Amendment VC52 amended Clause 15.08 in December 2008.

¹⁵ *Managing coastal hazards and the coastal impacts of climate change*. General Practice Note Department of Planning and Community Development, December 2008.

42 In this application however there is not the luxury of such a 'land use' approach as such. As has been stated earlier this proceeding is about a request to amend an existing approved development. Accordingly there is no question that some form of development must be assumed to be proceeding. It is a matter of what, on balance, will be the preferable and acceptable outcome of any such development.

43 Accordingly I have considered the following questions:

- What are the projected coastal hazards and levels of risk;
- Are the proposed amendments acceptable given these hazards and levels of risk?

The coastal hazard assessment

44 The practice note sets out that in situations where a significant change in built form or where land use will intensify on land close to the coast, completion of a coastal hazard vulnerability assessment will assist in the decision making process. Such an assessment should 'determine the potential exposure and development suitability of the land to evaluate risks' and provide where possible 'coastal engineering, design or setback responses necessary to demonstrate [that] assessed risks can be effectively and sustainably managed'. A precautionary approach is also called for in the decision making process, which is a matter I will return to later in these reasons.

45 Kala Developments commissioned a coastal hazard vulnerability assessment¹⁶ and Mr Womersley, the principal author of that assessment was called to give evidence.

46 I will not set out all of the detail of this assessment here. It is sufficient for the purposes of these reasons to highlight the key points and outcomes from the assessment and Mr Womersley's evidence. In doing so I note that like the objectors, I find the assessment lacked a high degree of rigour in some areas. In particular, I am critical of the fact that the assessment appears to have relied on poor information about the extent of the site and the purported ground levels, as presented in Figures 1-1, 1-2 and 4-4 of the assessment report.

47 I am also mindful of the fact that the assessment of inundation from catchment and other estuary flood flows is at best, a first pass assessment, based on conservative i.e. worst case scenarios, and that further detailed work would be required to firm up this component of the assessment.

48 However, I am satisfied that these and other short comings have been sufficiently addressed through Mr Womersley's evidence in chief and through cross examination. I have also had regard to the extraneous

¹⁶ *137-143 Great Ocean Road, Anglesea Coastal Hazards Vulnerability Assessment*. Prepared by Water Technology, October 2010.

materials tabled in the hearing, such as the Corangamite Catchment Management Authority's contour and inundation plans.

49 To summarise then, I accept that the assessment has properly characterised the coastal erosion processes and vulnerability to short and long term coastal recession. Mr Womersley has identified that the overall vulnerability to coastal recession is low. The factors that lead to this conclusion are that:

- Under the projected sea level rise of 0.8m, the current processes of sand accumulation to the lee side of a basalt reef extending out from the coast are likely to continue.
- The continuation of these processes in combination with the stable and deep dune system behind the active beach zone should provide protection to this site at least until the policy planning horizon to the year 2100
- the surrounding cliff faces either side of the beach, while vulnerable to some erosion, are not so soft as to be susceptible to rapid recession and their erosion will provide material for ongoing accumulation of material along the beach.

50 Given the above, I accept that the risks to this site are confined to inundation from changes to water levels in the Anglesea River estuary.

51 Mr Womersley's assessment identifies that inundation may occur because of:

- Storm tides causing inundation from higher levels in the estuary (coastal flooding).
- Increasing sea levels causing catchment driven flood waters in the estuary to rise higher and spread out further than currently occur (catchment generated flooding); or
- An increase in the height of the berm that lies across the Anglesea Estuary mouth due to rising sea levels causing a back up of flow within the estuary and flooding of surrounding land (dry weather nuisance flooding).

52 Adopting projected sea levels for the years 2030, 2070 and 2100, and projected storm tide levels determined by the CSIRO, Mr Womersley assessment adopts the following levels for future storm tides:

	Baseline (current levels) (m AHD)	2030 High (m AHD)	2070 High (m AHD)	2100 High (m AHD)
Projected mean sea level rise		0.15	0.47	0.82
10% AEP ¹⁷	1.32	1.52	1.94	2.42
1% AEP	1.69	1.91	2.33	2.79

[Reproduced from Table 3-3 of Mr Womersley's report at Page 4.]

- 53 The 1% AEP catchment flood levels are reported by the Corangamite CMA to currently be at 2.1m AHD.¹⁸ Mr Womersley has adopted a conservative approach to the assessment of catchment driven flooding by applying a 0.8m rise to this level. He therefore estimates a catchment flood level of 2.9m AHD by 2100. He cautions that this is conservative i.e. it is a worst case estimate, as the estuary has a large storage volume and so the effects of higher sea levels would be unlikely to have a 1:1 relationship inside the estuary. Such factors may reduce the projected catchment flood levels. He acknowledges that more detailed modelling of the catchment response is required to derive estimates of catchment driven flood levels with more confidence.
- 54 For the purposes of this application, I accept that the 2.9m AHD estimate is the 'best guess' of the worst case scenario.
- 55 So called dry weather flooding, caused by the back up of river flow behind the beach berm that blocks the estuary is assessed by Mr Womersley to reach around 2.5m AHD. This value is based on the height that the berm could rise to with projected sea level rise. Again, Mr Womersley notes that this is a worst case situation and that in the normal course the risk of nuisance flooding from back up of estuary flows can be readily addressed by breaching the berm to allow flow out to sea.
- 56 Applying these various flood levels to an elevation range across the site of approximately 2m AHD to 4m AHD, Mr Womersley assesses the inundation risks to the site to be:
- low under current conditions and those that are projected to exist up to the year 2030;
 - medium by 2070, with inundation of the site possible with moderate consequences.
 - high by 2100 with inundation likely with major consequences arising from the depth of flooding.

¹⁷ Annual exceedance probability. This is the probability of an event of a given size occurring in any one year. Mr Womersley used the AEP to express a 1 in 10 year event (10% AEP) and 1 in 100 year event (1% AEP).

¹⁸ Letter of advice dated 11 October 2011.

- 57 Mr Womersley concedes that his assessment was based on a cross section of the site that may be in error. He accepts that much of the site falls between 2m AHD (the eastern third frontage of the site) and 3m AHD at the western boundary of the site. He maintains however that his assessment of the inundation hazards and the level of risk would remain largely unchanged.
- 58 Given this more limited range of levels across the site and the proposed floor levels of the ground floor dwellings and under-croft car park it is useful to reconsider the depth and extent of inundation across the site.
- 59 A comparison of the projected flood water levels for the various scenarios put forward by Mr Womersley against the ground and development plan floor levels indicates that:
- Approaching and beyond the year 2070, inundation caused through rising storm tide levels would not impact on the dwellings up to and including flooding a 1% AEP event.
 - Egress from the site via the Great Ocean Road¹⁹ and access from the under-croft car park would be inhibited by inundation under 2070 storm tide 1% and 10% AEP events and would become hazardous under 2100 events.
 - By 2100, the inundation risk to the dwelling is greatest under the 1% AEP 2100 storm tide event, with a depth of inundation being approximately 0.1m above the dwelling ground floor level.
 - The 2100 catchment flooding levels, at 2.9m AHD would have similar impacts to the 1% AEP storm tide levels set out above with the depth of inundation being approximately 0.2m above the dwelling ground floor level.
 - Dry weather flooding would not inundate the dwellings within the development itself, but would potentially cut off egress along the Great Ocean Road. Inundation of the under-croft car park could occur to a depth of 0.7m
- 60 The coastal hazard assessment thus indicates there is potential for levels of inundation that present a hazard to potential residents/occupants of the dwellings.

The design response

- 61 In response to these projected risks, Kala Developments has negotiated with the Council and the Corangamite CMA to retain the building form, including the lowered under-croft parking area by incorporating into the design a system of barriers to prevent inundation of the dwellings and the under-croft car park. These barriers take the form of a wall around the residential dwellings to a height of 0.3m above the projected 1% AEP flood

¹⁹ Taken to have level of around 2m AHD in front of and to the north of the site.

level by 2100 (i.e. a height of 3.1m AHD), and raised levels to the basement car park entrance and a pedestrian walk way to give a similar freeboard.

- 62 Because of the lower floor levels, the restaurant would remain susceptible to flooding, but would be finished with more robust floor coverings and have raised electrical wiring.
- 63 Mr Merret submits that the application of the precautionary principle, as called for by the state policy, means an ‘avoid, minimise then mitigate’ approach. In line with this view, the objectors are critical of the design response because it is said to ‘engineer away the risks’ rather than providing land use response that avoids or minimises the risk. The objectors say that to propose a sub-basement car park ‘further exacerbates the risk’.
- 64 What is argued to be preferable is a design response that avoids or minimises the risk by avoiding development within areas of the site that are susceptible to inundation. This is submitted to be best achieved by amending the development footprint to avoid the lower areas of the site subject that will be subject to inundation risks. What flows from such submissions is that a less intensive development of the land should be preferable over an engineering solution.
- 65 I respectfully disagree with Mr Merret’s submission about the application of the precautionary. The application of this principle or, as is called for under the practice note, a precautionary approach has been addressed in the *Taip*²⁰ decision and more widely in matters such the *Rozen*²¹ proceedings. It is sufficient here to summarise that the application of the precautionary principle does not require an ‘avoid, minimise or mitigate approach’. What is required is to not defer decision making to address identified risks of (environmental) impact due to scientific uncertainty about those impacts. Decisions are required to be made to mitigate the level of risk in what ever way may be appropriate. I do agree, as I set out earlier, that a land use approach is one way to address the level of risk and that such an approach is certainly advocated for under the practice note and through the strategies set out under state policy. However preferable such an approach is however, other options are recognised under the practice note as being acceptable.
- 66 In this application we have varying levels of risk projections about inundation of the site and the possible impacts to the development. It is sufficient to take a precautionary approach by assessing these levels of risks and preparing an appropriate level of response. It may be that an engineering response for site specific impacts may be appropriate. To be acceptable means the response would need to satisfactorily reduce the risks to acceptable levels. More widely, the response would also have to be acceptable to other planning outcomes, such as the urban design response. For example, a raised building that would be out of context with the

²⁰ *Taip v East Gippsland SC* (includes summary)(Red Dot) [2010] VCAT 1222 at [109] to [111].

²¹ *Rozen v Macedon Ranges Shire Council & Anor* [2010] VSC 583 at [44] to [46].

neighbouring built form may not be an acceptable planning outcome even if it reduced the inundation risks.

- 67 It may be that the extent of the impacts and level or risk is too broad for a site specific or design response, because egress from the site is too hazardous or the extent of frequent and long term inundation may make conditions within a dwelling uninhabitable. In the latter case, a site engineering response may therefore not be sufficient to address the hazards.
- 68 Thus relevant factors in determining the acceptability of a site specific response to the level of risk will include the frequency, duration, extent and depth of flooding over the site as well as the wider neighbourhood.
- 69 I have considered these factors in relation to the proposed design response, along with the risks of inundation and levels of impact to and beyond the site. As is set out in these reasons earlier, the risk of the site being inundated to a level that presents significant hazards is low until 2070 and beyond. Impacts that present unacceptable levels of hazard to on-site occupants are then possible under 1% AEP events but not 10% AEP events.
- 70 The extent of inundation from around 2070 also impacts on the ability to egress the site along the Great Ocean Road. However the extent of this inundation does not extend to the more elevated land to the west of the site, and in particular the right of way to the rear of the site that leads to Tonge Street. Under the proposed design response that would be maintained.
- 71 The design response will also protect all the residential components of the development from inundation projected under the 1% AEP 2100 scenarios.

Conclusions

- 72 I find that the proposed barrier system is satisfactory in addressing the levels of risk assessed for this site. I accept that by introducing an engineering response, there remains a risk if that system failed. However, given the nature of the proposed barrier system and the depth of inundation which it is to prevent, the risk of such failure appears to be acceptably low.
- 73 I conclude that the level of risk and exposure to the inundation hazards arising from projected sea level rise scenarios can be acceptably mitigated by the use of the proposed flood barrier system.
- 74 In terms of other urban design outcomes, the Council provides a somewhat cautious approval of the barrier system, with a particular concern about the height of the barrier walls and the diminution of an active street frontage.
- 75 While noting such reasons for the caution, I am of the view that the design is acceptable. It integrates the barrier into development by way of its form as masonry fence around the dwellings while the raised levels in the access way will be more subtle. I will required however that the raised berm for the pedestrian walkway be achieved by a ramp rather than by stairs so that disabled access to the rear entries of the dwellings is maintained. In urban design terms the outcome may not be ideal, and will no doubt provide for a

less open frontage to the development but the response will provide an acceptable integrated outcome.

CONCLUSIONS AND ORDER

- 76 The respondents in this matter have raised two objections to the proposed amendments to this permitted development. Both grounds of objections essentially seek to argue that more ideal outcomes could be achieved over that which has been proposed. For the reasons I have set out the achievement of the best or most ideal outcomes is not the test under the planning scheme. What is required is outcomes that are acceptable.
- 77 Having regard to the relevant matters required to be considered under the planning scheme, I have found that the amendments to convert the ground floor retail components to residential dwellings to be acceptable both in respect to the context of the site's special use zoning and in respect to the level of risks from coastal hazards. I will therefore direct the permit to be amended in the manner sought and agreed to between the Council, Kala Developments and the Corangamite CMA, save for one further amendment to the arrangement of the crest in the pedestrian access as I have set out earlier in these reasons.

Ian Potts
Member