

Gibson v Bass Coast SC - [2015] VCAT 857

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**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST** VCAT REFERENCE NO. P1833  
/2014  
PERMIT APPLICATION NO.  
130182

**CATCHWORDS**

Section 77 of the *Planning and Environment Act 1987*, Bass Coast Planning Scheme. Farming Zone. SLO. EMO. Subdivision of farming land into three 40ha lots. Landscape, Loss of productive farmland. Potential for horticulture on traditional grazing land.

**APPLICANT** Bruce Gibson

**RESPONSIBLE AUTHORITY** Bass Coast Shire Council

**SUBJECT LAND** Lot 8 PS208175V Cape Paterson Road, Inverloch

**WHERE HELD** Melbourne

**BEFORE** Graeme David

**HEARING TYPE** Hearing

DATE OF HEARING 1 May 2015

DATE OF ORDER 12 June 2015

CITATION Gibson v Bass Coast SC [2015] VCAT 857

#### ORDER

1. The decision of the Responsible Authority is affirmed.
2. In permit application 130182 no permit is granted.

Graeme David

Member

#### APPEARANCES

For Applicant Mr John McCaffrey, Consultant Town Planner.

He called the following witnesses:

- Mr John Gallienne, Agricultural Consultant
- Mr Neville Chapman, Lay Witness

For Bass Coast Shire Council Mr Mark Bartley, Solicitor HWL Ebsworth,  
Lawyers.

#### INFORMATION

Description of Proposal Subdivision of Lot 8 LP208175V, Cape Paterson Road Inverloch (194.8ha) into four lots each of 40 hectares, (and consolidation of the residual 34.8ha of land into an adjoining title).

Nature of Proceeding Application under Section 77 of the *Planning and Environment Act 1987* – To review the refusal to grant a permit.

Zone and Overlays	<p><i>Zone:</i> Farming Zone (FZ).</p> <p><i>Overlays:</i></p> <p>Significant Landscape Overlay - Schedule 4 <i>Kilcunda to Inverloch Coast</i> (SLO4);</p> <p>Environmental Significance Overlay – Schedule I <i>Coastal Wetland Areas</i> (ESO1).</p>
Permit Requirements	<p>Clause 35.07-3: To subdivide land in the FZ.</p> <p>Clause 42.01-2: To subdivide land in the ESO</p>
Relevant Scheme, policies and provisions	<p><i>State:</i> Clauses 11.05-3, 11.08, 12, 14.01-1, 17.03, 19.</p> <p><i>Local:</i> Clauses 21.05, 21.06, 21.07, 21.08, 22.01, 22.02.</p> <p><i>Other:</i> 65.</p>
Land Description	<p>The review site is an irregular shaped 194.8ha parcel of cleared undulating and seemingly well-managed grazing land at the coast abutting the north side of the Cape Paterson - Inverloch Road about 3.5km west of Inverloch. The land contains a number of farm dams one of which is used via electric pump to supply reticulated water to stock troughs on the property. Dimensions are roughly 1.3km wide (east-west) by 1.4km deep (north-south) with roughly about a half kilometre frontage to the Cape Paterson – Inverloch Road along the eastern end of the southern frontage.</p> <p>The higher points on the land provide relatively flat views to the ocean across the above-mentioned road. There are also sites on the land that do not provide ocean views due to elevation or aspect.</p> <p>The review land has existing vehicular access from Cape Paterson - Inverloch Road. It also abuts an unused/unmade road reserve along its western boundary (Struan Road) that is unfenced on the side of the review land. The road reserve is occupied under a current 99-year lease by the landowner Mr Gibson (or his management entity) and is not accessible to the public.</p> <p>The land abuts land to the east in the Public Use Zone Schedule 1 (PUZ1) used by the South Gippsland Water Board as the sewerage treatment works for Inverloch. ‘Class C’ treated water is pumped via an underground pipeline through a narrow easement inside the northern boundary of the review land. An existing unused pressurised off-take valve off the pipeline through the review land could provide treated water to the review site under licence.</p>
Tribunal Inspection	<p>26 May 2005. The landowner Mr Bruce Gibson escorted me through the property. No discussion on the merits of the case occurred.</p>

## WHAT IS THIS PROCEEDING ABOUT?

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[1] I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I do not recite or refer to all of the contents of those documents in these reasons.

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1. The Bass Coast Shire Council (the Council) determined to refuse to grant a permit for the subdivision of 194.8 hectares of land, being Lot 8 LP208175V, Cape Paterson - Inverloch Road, into four Lots each of about 40ha. The remaining 34.8ha area at the north of the site would be consolidated into the adjoining land title to the north, known as Lot A PS119094).
2. The Council broadly considered the proposal to be inconsistent with:
  - the State and Local Planning Policy Frameworks (SPPF and LPPF) in the Bass Coast Planning Scheme, relating to the protection of agricultural land and landscapes (Clauses 14.01, 14.01-2, 21.06-5, and 21.08-1);
  - the purpose and objectives of the Farming Zone (Clause 35.07), the Significant Landscape Overlay (Schedule 4) (Clause 42.03); and
  - orderly and proper planning of the area.
3. The Council's refusal grounds also include that the permit applicant, who is also the Applicant in this case, had not provided adequate justification of the economic merits of '*substantially reducing a broad acreage land holding*'.
4. The four proposed subdivision Lots have differing dimensions. Lot 1 (roughly 600-670m deep by 600m wide), and Lot 2 (approximately 500m-700m deep by 662m wide) are roughly square. They share the front width of the site with frontage to the Cape Paterson-Inverloch Road. Lots 3 and 4 are elongated lots set behind (north) of Lots 1 and 2. Lot 4 is a rectangle (1288m wide by 312m deep). Lot 4 is an irregular shape, 'meat cleaver' shaped lot set sharing the northern boundaries of Lots 1 and 2. Lots 3 and 4 which do not front to the Cape Paterson-Inverloch Road.
5. The undulating review land abuts the northern or inland side of the Cape Paterson - Inverloch Road about 3.5km west of Inverloch, and about 2km east of Cape Paterson. It is cleared of native vegetation and is used for extensive cattle grazing. This appears to have been the use of the review land and of surrounding land for a long period, and there appears to be no other nearby farming use visible on aerial photographs. The southern boundary of the land at Cape Paterson - Inverloch Road is within about 150m from the beachfront and slopes gently upwards to the north away from the road. The vegetation to the south of the road is for want of a more botanical name, low coastal scrub or heathland, such that there is little tall vegetation or other physical screening between the ocean and the review land.

6. The application is for land subdivision only. It does not include any direct proposal or proposals for use or development of the land. The Planning Permit Application is premised on the basis that the proposed subdivision will provide improved flexibility for agriculture. The Planning Report<sup>[2]</sup> accompanying the application states the following:

The proposed subdivision will provide more flexibility in agricultural product (in) that most crop or horticultural products do not require lots above the size proposed to be a sustainable operation. It will also provide for the conduct of separate operations on each site and will enable financing to be dedicated to discrete parcels to assist in a more effective finance structure for the farm operation and to provide the funding for the necessary infrastructure, including irrigation systems.

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<sup>[2]</sup> Application for a planning permit for a subdivision at Cape-Paterson Inverloch Road, Inverloch. Planning Report. Jeff Bennett Planning and Development Services San Remo Victoria. June 2013

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7. This thrust is continued in the Farm Management Plan of December 2013 also submitted with the Permit Application, and in the Expert Report of Mr Gallienne dated 10 April 2015. The FMP also states that in summary that the smaller lots created by the subdivision will be more viable and provide more flexibility for horticultural operations and farming operations in part to be able to respond to the 'potential impacts of climate change'.
8. The notions of protecting agriculture and its economies of scale, and of open scale of rural landscape are prevalent in the State and Local Planning Policy sections of the planning Scheme and in the Farming Zone and the Overlays that cover the review land. I choose not to itemise these in detail but they are largely consolidated into Clause 21.05 which under the objective of 'to retain and protect viable rural holdings', includes the following strategies:
- strongly discouraging the fragmentation of rural land through the creation of small rural lots within the Farming Zone and the Rural Conservation Zone;
  - discouraging small rural lots in the areas of agricultural production;
  - discouraging the boundary realignments in the creation of additional blocks unless they result in a consolidated parcel of land being retained for agricultural use, and it can be demonstrated that there is a clear improvement in farming efficiency;
  - providing opportunities to consolidate or increase the size of land holdings in the FZ and Rural Conservation Zone in order to increased economies of scale and create more viable farming systems; and
  - supporting where appropriate, the creation of small lots as part of the subdivision where it provides for the ongoing protection and viability of agricultural land holding.

9. The review land is in the Farming Zone, which has a conditional minimum lot size of 40ha for land subdivision, and for conditional as-of-right use for a dwelling without the need for a planning permit. The review land is also partially covered by the Environmental Significance Overlay - Schedule 1 (ESO1: *Coastal Wetland Areas*) and the Significant Landscape Overlay - Schedule 4 (SLO4: *Kilcunda to Inverloch Coast*). The Overlays cover all of Lots 1 and 2 in the proposed subdivision, being the southern lots closest to the coast. Lots 3 and 4 are both covered across their eastern portions. A planning permit is required for subdivision under the ESO. A permit would be required for buildings and works on land covered by ESO1 and SLO4. I discuss the significance of the two Overlays later in this decision.
10. The review land is also identified as being of '*Aboriginal Cultural Heritage Sensitivity*'.
11. The purposes of the FZ include: to provide for the use of land for agriculture; to encourage the retention of productive agricultural land; to ensure that non-agricultural uses, including dwellings do not adversely affect the use of land for agriculture; to encourage the retention of employment and population to support rural communities; and to encourage the use and development of land based on comprehensive and sustainable land management practices and infrastructure provision.
12. Under the Victoria Planning Provisions, 'Agriculture' is defined as:

Land used to:

  - a) Propagate, cultivate or harvest plants including cereals, flowers, fruit, seeds, trees, turf, and vegetables;
  - b) Keep, breed, board or train animals, including livestock, and birds; or
  - c) Propagate, cultivate, rear, or harvest living resources of the sea or inland waters.
13. Under the Victoria Planning Provisions, '*Horticulture*' is defined as:

Land used to propagate, cultivate or harvest flowers, fruit, vegetables, vines or the like.
14. As the Victoria Planning Provisions directly link '*Horticulture*' with '*Agriculture*', through the sub-category of '*Crop raising*', horticulture (which generally involves land tillage or other soil disturbance) is a Section 1 Permit not required use in the Farming Zone.
15. The FZ specifies the requirement for a planning permit for the subdivision of land, and each created lot must be at least 40 ha, which is the size of the four subdivision lots sought to be created in this application. While the FZ provides for subdivision into smaller lots, this is subject to provisions that are not applicable to this case. However, before making a decision to subdivide land, and in addition to the Decision Guidelines in Clause 65 of the Bass Coast Planning Scheme, the responsible authority must consider, as appropriate a range of general, agricultural and environmental matters which I identify later.
16. As the land is in the FZ, the use of each lot of 40 ha or more for a dwelling would be as-of-right subject to the proposed dwelling being the only dwelling on the lot, and meeting the requirements of Clause 35.07-2. This sub-clause in turn specifies requirements for all-weather vehicle access capable of accommodating emergency vehicles; adequate water supply provision

and on-site waste management; and power provision. As dwellings are not proposed under this application, I do not consider this matter further in this decision.

17. The ESO in part seeks to ensure that the development of land is compatible with values identified under the Overlay. These include water quality and habitat values in internationally significant wetlands and coastal areas including those in Bunerong Marine and Coastal Park, and the Churchill Marine National Park. The ESO requires a planning permit to subdivide land unless otherwise specified in a schedule to the overlay, which does not occur in the ESOI. It does not require a planning permit for normal farming activities (apart from for timber plantations). I accept that the proposed subdivision per se will not impact on the nominated environmental values, and I do not consider this matter further in this decision.
18. The Significant Landscape Overlay seeks to conserve and enhance the character of identified significant landscapes, in this case, as defined by SLO4, the landscapes associated with the Killkunda to Inverloch Coast. Unless otherwise specified in a Schedule to the Overlay, it does not require a permit for the subdivision of land.
19. The SLO does specify the need for a planning permit to construct a building or construct or carry out works apart from the conduct of agricultural activities including ploughing or fencing (but not the construction of dams or standard farm stock fences). As the current application is for subdivision only, it is not directly implicated by the SLO. However the purposes of the SLO need to be considered in decision making where it is applied. Thus the SLO is indirectly implicated if subdivision can be deemed to have a causal effect on the landscape values sought to be protected, such as through the development of dwellings in inappropriate locations as guided by planning policy. The Council has argued this to be the case through the potential loss of significant views from the Bunurong Coastal Drive.
20. Schedule 4 to the SLO covers the Killkunda to Inverloch Coastline which is regionally significant *'for or its combination of visual landscape qualities including the Powlett River, sand dune systems and dramatic rock formations and cliffs around Cape Paterson itself'*. The Schedule contains 13 landscape character objectives. Those most directly and indirectly relevant to the current application, are identified below (in part and in summary). They explicitly relate to either the coastline itself or its hinterland, which in this case includes the proposed Lots 1 and 2, and parts of Lots 3 and 4 on the review land.
  - To maintain locations of highly scenic and natural vistas along roads.
  - To retain the dominance of the undulating, uncluttered pastoral landscape throughout the hinterland by ensuring that buildings and structures outside settlements sit within rather than dominate the landscape.
  - To protect the undeveloped character of the coastal strip including that between Cape Paterson and Inverloch.
  - To ensure that the open rural character and scenic coastal features of the landscape are not dominated by plantation forestry.
  - To recognise and protect the landscape of the Killkunda to Inverloch Coast as a place of significant Aboriginal cultural heritage value.



21. Vegetation removal requires a permit under both the SLO and the ESO, but that is not relevant in the current matter.
22. The Council argues that the subdivision layout primarily appears to provide for the division of the land into 40 ha lots, rather than to address the productivity of the land. The Council considers that this will in turn lead to an expectation of housing on the lots, and that this again in turn is contrary to orderly planning under the Bass Coast Planning Scheme, for the reasons identified above.
23. The Applicant contested all of the Council's grounds of refusal. In particular, the following arguments were put in support of the proposed subdivision:
  - It will provide smaller more viable lots for (unspecified) horticultural operations, and while smaller lots would be preferred for this, 40ha is the minimum area permitted by the Planning Scheme.
  - Creation of the lots will provide the flexibility for smaller parcels to be readily available for horticultural operations thus avoiding lengthy delays of 9 to 12 months in obtaining permits on a case by case basis.
  - Creation of separate lots will facilitate debt financing of necessary start up infrastructure for horticultural operations and the balance of the farm will not need to be encumbered.
  - The creation of smaller lots will provide more flexibility in farming operations to be able to respond to potential impacts of climate change, by using treated waste water for alternative crops. (no support provided for this statement and CSIRO stated that climate change is not to be significant for this area)
  - The proposed subdivision will provide the basis for more productive agricultural use of the land.
24. In arguing this position, the Applicant through Mr McCaffrey drew upon the expertise of Mr Gallienne and agricultural expert and Mr Newville Chapman a lay witness who is the President of the local branch of the Victorian Farmers Federation. Mr Gallienne had prepared a Farm Management Plan (FMP) that was submitted within the permit application documentation. The primary structure of the FMP included the following:
  - *Current Farm Productivity and Infrastructure* (Stock numbers, Stocking rate, Feedbase, (Pasture renovation, Weed management, Fertiliser application), Farm infrastructure, Farm Labour.
  - *Soils, Land/agricultural quality.*
  - *Climate*
  - *Farm trees and revegetation*
  - *Potential for Irrigation* including potential for irrigation use of Class 3 treated water from the Inverloch Water Treatment facility.

- *Implications of the proposed development*

25. Relevant to the current matter the FMP concludes in summary that:

- The review land in Agricultural Quality Class 3a under the categorisation in the document titled *Assessment of Agricultural Quality of Land in Gippsland* by Swan and Volum<sup>[3]</sup>.
- Continued farm development could increase grazing stocking rate by 12% in four years.
- The potential for future intensive irrigation production will improve the productivity and profitability of the land and provide local employment opportunities.
- Because of the intensity of such activities, *'the smaller land titles proposed would make any future development more desirable for people intensively using the land for horticultural activities as well as organisations providing support to this type of project'* <sup>[4]</sup>.
- The land and future farming practices discussed are sustainable and will not have negative environmental impacts on the property or the district.

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<sup>[3]</sup> Swan I. and Volum A. (1984) *Assessmsnt of Agricultural Quality of Land in Gippsland* Research Project Series No. 134. Department of Agriculture, Victoria

<sup>[4]</sup> Page 15, Farm Management Plan B and A Gibson T/A Bunerong Pastoral, Cape Paterson Inverloch Road Inverloch. John Gallienne and Co Pty Ltd. December 2013.

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26. The Swan and Volum report is widely used in Gippsland as a strategic level guide. I discuss the relevance of this below.

27. The Council commissioned a peer review report to be prepared on the FMP. This was prepared by the RMG Consultants. The 3-page RMG report provides the following main conclusions:

- Neither of the two main soil types likely to be present on the site are considered 'ideal' for horticulture which requires freely draining soils The two main soil types are mapped at the strategic level in the document Swan and Volum report. These contain light to very sandy upper profiles to up to about 80 cm, with sharp 'duplex' interfaces over medium to heavy clays.
- The land is in Agricultural Quality *Class 4a* as described by Swan and Volum. Such land has limited versatility and low inherent productivity but *'is suitable for intensive market gardening but supplementary irrigation, high levels of fertiliser and erosion prevention measures are necessary'*.

28. Mr Gallienne's evidence in turn challenged the validity of the Peer Review report, in part due to it being a desk report only. Mr Gallienne reasserted that the review land is in Agricultural *Class 3a*,

not *Class 4a* as proposed in the Peer Report. This has implications regarding the type and intensity of agriculture, and hence the investment needed to support sustainable agricultural land management. This is in turn important in underpinning the conclusions of the two abovementioned reports, and I discuss this below.

29. From the above content I consider the key issues for consideration in determining this matter are:

- Will the proposed subdivision provide support and enhancement of agricultural production in the area, or present the potential for fragmentation of productive agricultural land?
- Would the proposed subdivision provide for sustainable or more efficient land management?
- Would the proposed subdivision provide for more efficient agriculture?
- Would the proposed subdivision be compatible with adjoining and nearby land uses?

These matters relate directly to the matter of whether or not the proposal is compatible with State and Local planning policies, including whether the proposal presents a fair and orderly planning outcome.

30. The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions presented against the policies and provisions of the Bass Coast Planning Scheme, I have decided to affirm the decision of the Responsible Authority.

31. My decision is made on balance. I accept that the creation of four lots each of 40 ha is provided for under the planning Scheme as the minimum subdivision in the Farming Zone and that the current permit application is for subdivision only. However, the application is predicated on the basis that the land is suitable for and most likely to be used for horticultural production, which would lead to more efficient and higher production levels than is achieved under the current grazing regime. I find that this assertion is not substantiated, I agree that inadequate justification has been provided to support the substantial reduction of the broad acreage land holding in the face of State and Local policy that favours consolidation rather than fragmentation of agricultural land in the Farming Zone. I consider that on balance on the information available to me, the proposed subdivision is likely to diminish agriculture locally.

## DISCUSSION

### Preliminary matters

32. The subdivision of rural agricultural land is a serious matter. Substantial areas of Victoria, particularly within around 150 km of Melbourne have been subdivided into small lots and developed with housing such that agricultural land and agriculture in those areas have been fragmented. It is a reasonable assumption that agricultural production has all but ceased on much such land. This may often have occurred simply for the reason than owners have sought more 'space' at the expense of agricultural production. It has also become increasingly more difficult for some traditional forms of agriculture or primary production to expand or find a base for relocation due to objection from non-agricultural users of land, and for rural landscapes to be substantially impacted upon.

33. My considerations in this decision do not take into account that the proposed subdivision would generate capital to fund infrastructure improvements, including for horticultural operations on the retained portion of the Applicant's property. This is not a planning matter under the *Planning and Environment Act 1987*.

**Will the proposed subdivision support and enhance agricultural production?**

34. I am not satisfied that the review land is likely to be used for horticulture if subdivided as proposed. I am also not prepared to impose such use through the conditional requirement (as proposed by the Council and opposed by the Applicant) of a Section 173 Agreement to specify horticultural use of the proposed subdivision lots with or without individual Farm Management Plans. My reasons for this follow.
35. The following two primary land type and soil study reports quoted to me in documentation are mapped at broad strategic scale levels of 1:100,000 to 1:200,000. They are not intended to, and cannot to be used to replace the need for property-specific investigations in assessing or presenting land capability or suitability of the land for specific uses.
- Agriculture Victoria Services Pty Ltd (June 2002). *Bass Coast Environmental Planning Study: Technical Report*. Bass Coast Shire. Victoria.
  - Swan I. and Volum A (1984). *Assessment of Agricultural Quality of Land in Gippsland* Research Project Series No. 134. Department of Agriculture, Victoria
36. The matters of soil type and land suitability classification are important in underpinning the conclusions of the two above-mentioned reports.
- Agricultural Quality *Class 3a* identified for the review site by Mr Gallienne in the FMP is defined as follows, in part within the broader context of Agricultural Quality *Class 3*. The use of *italics* is my emphasis on the sub-classes of land (*3a* and *4a*) variously used to categorise the review land.  
  
Class 3 land generally is of limited versatility but is very good dairying and grazing land. It is sometimes suitable for orchards and extensive area cropping but not suitable for intensive uses such as vegetable growing. *Sub-class 3a is suitable for more intensive uses providing particular care is taken to prevent soil erosion, or supplementary irrigation overcomes moisture limitations in the summer. The growing season is at least 10 months or 9 months with readily utilised underground water.*
  - Agricultural Quality *Class 4a* identified for the site by RMCG is described by Swan and Volum as follows:  
  
Class 4 land is capable of extensive grazing, but generally unsuitable for cropping. *Sub-class 4a is suitable for intensive market gardening, but supplementary irrigation, high levels of fertiliser and erosion measures are necessary. The growing season is at least 9 months or 8 months with readily utilised underground water.*
37. The differences between the Soil Quality *Classes 3a* and *4a*, infer substantial differences in resources input and management practices to sustain production and land stability. This could have substantial implications on capital and recurrent investment required for the conduct of viable horticultural enterprise.

38. My own review of Swan and Volum mapping of the Agricultural Land Classes does appear to place the land in the *Soil Class 4a* at the strategic level. This is disputed by Mr Gallienne. The classification system takes account of soil type and other environmental criteria (including slope aspect and climatic particulars) that can impact on agricultural and more general land sustainability. The Tribunal cannot determine the accuracy of the mapping at the individual property level, nor which Soil Class interpretation is correct. More prescriptive site-specific soil and land analysis is required. In addition, the clay bases underlying light soil and sand upper profiles of the two soil types identified at the strategic level by Swan and Volum indicate the potential to restrict plant root penetration and vertical draining into the soil at depth, which is likely to adversely implicate the suitability of the site, say for tree-based or other deep rooted horticultural production.

39. I also note the following statement in the Executive Summary of the *Bass Coast Environmental Planning Study*:

Recommendations are to enhance the capacity of strategic planning, and aid decision making with a strategic framework that complements the environmental planning study.

40. This 'strategic level' application of the above report is reinforced through the chapter descriptions and maps for various uses. The review land appears to be mapped as '*Complex Soil Unit*' being beside '*Public Land*' (the land on the coastal side of the Cape Paterson - Inverloch Road). The section 2.2 statement for Peas for example, includes the following paragraph.

The area identified as 'Complex Soil Unit' covers the coastal area around Cape Paterson, moving inland to Wonthaggi. The sand plain unit is comprised of low sand dunes (rises), sandy plains and broad clayey swales (depressions) that have at the regional (1:100000) level been grouped together. For this reason, the unit has been identified as complex, and different soils within the unit have a higher or lower suitability for agriculture depending on the soil type and their inherent properties. Sandy soils on the dunes will have more potential for vegetable cropping than the clayey soils in the swales which are prone to waterlogging in the winter months. Nonetheless (*ie: for peas*) the sandy dune soils will require management to increase their productivity, including irrigation, maintaining high levels of organic matter, the addition of fertilisers and sub surface drainage if water movement is restricted at depth.

The same and similar descriptions are used in most other horticulture and forestry chapters. This reinforces that planning decisions for individual properties need to be based on more site-specific information.

41. Mr Gallienne's FMP does not focus on the management needs of individual subdivision lots, but in part includes content on the need for an additional dwelling on the larger property for Mr Tom Gibson via another earlier planning permit application. I consider that mixed messages are portrayed through the FMP. On the one hand the earlier planning permit application apparently proposed the need for an additional dwelling on the property due to its large size to enhance management, while the size of the holding is now sought to be diminished by about 30% through the subdivision and sale of 160ha in four new created 40 ha lots.

42. The review site is exposed to coastal and potentially salt laden winds, hot winds from the north and north west, and changing climatic conditions. Mr Gallienne's FMP states the following:

Wind has an influence on plant production; in particular hot north and north westerly winds in summer have damaging effect on plants through drying out and /or removing soils moisture.

Mr Gallienne also identified the probable need for either vegetative or other forms of wind breaks on the site.

43. The review land and surrounding farmland has traditionally been used for cattle grazing. There is no local horticultural production, and no indication was provided to the Tribunal of external interest in the review land for horticultural use (such as potential purchase enquiries). Further, while it was stated that 40 ha will support viable horticultural enterprise and will be a favoured size for this, that was anecdotal only, including in Mr Gallienne's evidence. That said, I acknowledge that very different interests, management skills, and investment levels are required for different forms of agricultural enterprise. I therefore do not infer that if the review land is indeed more economically suited to horticulture than grazing, that such change could be expected to have occurred prior to now.
44. The type or types of horticulture likely to be most appropriate for the site has not been identified. Relevant to this it has been identified that treated water from the Inverloch Water Treatment facility is 'Class C' water. However, no information is before me on the suitability of such water for horticulture generally, or for specific horticultural production types. The most information provided are single sentence statements relating to the irrigation potential use of the water for 'pasture and crops', and for stock related use. This includes that a neighbour is using the water for stock fodder irrigation. Vegetable varieties for example have different and generally more sensitive tolerances to water quality, and *Class C* water may or may not be appropriate for vegetable crops at this site.
45. During the Hearing I requested through Mr Gallienne, information on coastal areas where horticulture is practiced. A written list of 11 Gippsland sites and one Western Victoria site were subsequently provided on 8 May 2015 that I have reviewed visually via online aerial photography. However, I am unable to draw comparative conclusions across the sites, due to potentially different soils, climate, exposure and other environmental variables.
46. I am unable to place weight on Mr Gallienne's statement that changing land use to horticulture would improve flexibility for agricultural production to adapt to climate change. While page 11 of Mr Gallienne's FMP contained a section titled Climatic Conditions Summary based on data attributed to the CSIRO's *Climate Change in Australian Dairy Regions* [5] it concluded with the following statement.

Climate change is real and underway, however from the predictions provided above it is unlikely to have a significant negative impact on pasture production in this region or on this property.

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[5] *Climate Change in Australian Dairy Regions*. Hennesy K.J. CSIRO. 2007

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47. No indication was provided to the Tribunal that grazing enterprise on the review property is neither a sustainable form of land use or profitable, either on its own or relative to 'horticulture', albeit that profitability is not a direct planning consideration per se.

48. No substantive evidence was put to the Tribunal that the creation smaller lot sizes will improve farm economics and viability. The notion contrasts with the usual situation of farm consolidation rather than fragmentation across agricultural sectors, which is supported by State Government Policy. This is quite the case in dairying and horticulture with major structural changes having occurred in the traditional intensive production areas. Also, subdivision of land into separate titles is not a prerequisite for the establishment of more intensive agricultural enterprise.
49. Imposition of Section 173 Agreements that tie land use to horticulture would be counter productive, based on the information at hand. It may also stifle potential for production innovation.
50. For the above reasons I am unable to have confidence that land use on the proposed subdivision lots is likely to convert to horticulture under changed ownership. As a primary rationale put to me on behalf of the permit applicant is that a shift to horticulture will increase the agricultural intensity, viability and employment, I am also unable to have confidence that the proposed subdivision will enhance agricultural production.

**Would the proposed subdivision provide for sustainable land management?**

51. There is no basis to find that the proposed subdivision per se would result in more or less sustainable land management. The minimum 40ha subdivision size in the FZ is primarily used because it is of a size that most forms of agricultural use can occur at some level of intensity without detrimentally impacting on land condition. While the review land is undulating and in very sound physical condition that is a credit to its owners, grazing could be continued on the proposed subdivision lots without causing any change to the condition of the land. This is a different matter to whether or not agricultural production will be enhanced or be more efficient by change.

**Would agriculture be more efficient if the proposed subdivision occurs?**

52. There can be no basis for belief that the proposed subdivision will result in more efficient agriculture. Various scenarios could emerge for use of the subdivision lots including for example (but not limited to), absentee ownership with leased grazing or share farming agreements, or passive recreational use.
53. I accept that the creation of smaller lots of 40 ha on which dwellings are permitted as of right will increase the value of the land. This can render it more difficult for bona fide farmers wishing to relocate or expand their holdings, where the land is also attractive to other potential non-farming purchasers. Where agriculture is out competed due to land prices, this can contribute to 'death by a thousand cuts' to the local or regional scale and efficiency of agriculture. This is a contributing factor in my decision, where other information discussed is lacking.

54. Following paragraph cited by:

*Plenty Investments Pty Ltd v Macedon Ranges SC* (26 May 2016) (Christopher Harty)

24. Given the premise of the proposed subdivision is to bring in new owners to drive investment to retain productive agriculture on smaller lots that would

become more cost effective to carry on farming, the result of the subdivision would see the extent of available land for such purposes reduce. This effect is described by Member David in *Gibson v Bass Coast SC* [2015] VCAT 857 at paragraph 54 where he recognises that new owners could inject more inputs into the land because smaller lots have been created but identifies that, despite this:

There is also potential however for the agricultural production and efficiency of production to diminish due to a range of factors. These could indicatively include the land areas converted to non-productive use (e.g. sites for housing and associated infrastructure including sheds, internal roading), and potentially reduced interest in farming.

I have already found that it cannot be assured that land use would change to horticulture. It has also not been proposed, and there is no basis for finding, that the grazing stocking rate would be enhanced, merely through the creation and sale of smaller lots. Increased inputs (as fertiliser, imported feed, and labour inputs) would be required for this to occur. It does not necessarily follow, but it could follow, that new owners would inject more inputs into the land because smaller lots have been created. There is also potential however for the agricultural production and efficiency of production to diminish due to a range of factors. These could indicatively include the land areas converted to non-productive use (eg: sites for housing and associated infrastructure including sheds, internal roading), and potentially reduced interest in farming.

#### Would the proposed subdivision be compatible with adjoining and nearby land uses?

55. Land use to the east is wastewater treatment. No information was provided to the Tribunal on whether or not this is associated with odour generation at the review land. It is conceivable that this could occur particularly under easterly wind conditions.
56. The proposed subdivision per se would not be incompatible with the uses of the coastal public land south of the abutting Cape Paterson - Inverloch Road
57. There is no basis for finding that the subdivision would create compatibility issues with the grazing land to the north. Any such impact would be associated with the northern Lot 4.

#### What would be the landscape impact of the proposed subdivision?

58. No landscape analysis has been provided to verify if dwellings could be located on Lots 1 and 2 in particular, that are fully covered by the SLO and the ESO. Both lots do provide vistas to the ocean. It is also conceivable that building envelopes could be sited to minimise interface with the coastal public realm to satisfy the objectives of the SLO. However, I am not prepared to rely on my site visit observations as verification of this.
59. I accept that the proposed subdivision if approved would be associated with the expectation of dwellings on each lot. Given the full and partial coverage of the SLO over the Lots, and the significance of the open coastal values sought to be protected, I find that any subdivision lots on the review land should contain dwelling/development envelopes derived from a landscape analysis that satisfy the objectives of the SLO. While this could be achieved via permit condition,



it is clearly preferable that this information should be available within subdivision permit application material to confirm that such objectives can in fact be achieved.

#### Other matters

60. I have not given detailed attention to access provision as I have found against the application for other reasons. However, if the proposed subdivision lots were to be used for horticulture as proposed by the Applicant, it can be expected that this would be associated with frequent use of heavy produce vehicles on Struan Road. Also it is unlikely that Struan Road would experience much other traffic not directly associated with the subdivision lots. Under these circumstances I consider that it would not be reasonable to expect the general ratepayer to provide for the maintenance of Struan Road. It would therefore be appropriate for Struan Road to either be sealed as an all-weather road or be subject to a legal agreement committing the landowners to maintaining the road in an appropriate all weather condition.

#### CONCLUSION

61. For the reasons explained above and on balance across required considerations, the decision of the Responsible Authority is affirmed. No permit is to issue.

Graeme David

Member

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#### Cited by:

[Plenty Investments Pty Ltd v Macedon Ranges SC \[2016\] VCAT 864 \(26 May 2016\) \(Christopher Harty\)](#)

24. Given the premise of the proposed subdivision is to bring in new owners to drive investment to retain productive agriculture on smaller lots that would become more cost effective to carry on farming, the result of the subdivision would see the extent of available land for such purposes reduce. This effect is described by Member David in [Gibson v Bass Coast SC \[2015\] VCAT 857](#) at paragraph 54 where he recognises that new owners could inject more inputs into the land because smaller lots have been created but identifies that, despite this:

There is also potential however for the agricultural production and efficiency of production to diminish due to a range of factors. These could indicatively include the land areas converted to non-productive use (e.g. sites for housing and associated infrastructure including sheds, internal roading), and potentially reduced interest in farming.