IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMNISTRATIVE DIVISION

PLANNING LIST

TRIBUNAL APPLICATION NO. 1998/029932
PERMIT APPLICATION NO. 97/7281

HEARD AT MELBOURNE ON THE 10TH AND 11TH AUGUST 1998

TRIBUNAL

Mrs Julia Bruce	Deputy President
Michael Read	Member

PARTIES

Applicants for review/ permit applicants:	J Allen and Estate of P V Allen
Responsible Authority	Surf Coast Shire
Referral Authorities	Telstra; Powercor; Barwon Water; Country Fire Authority
Objector/respondents:	R Healey; Ms Jane Grant (representing the Aireys Inlet & District Association, an incorporated association); Mr D. Barkley; Jeff Hausler; Ms Kay McCrindle; Ms Reilley.

NATURE OF APPLICATION

This is an application under Section 77 of the Planning and Environment Act 1987 for review of a decision of the Responsible Authority to refuse to grant a permit.

PROPOSAL

"Subdivision involving realignment of existing lot boundaries and development of one house on each lot"

THE LAND

23-79 Bambra Road, Aireys Inlet

PLANNING SCHEME AND PLANNING CONTROLS

Surfcoast Planning Scheme

The subject land is zoned part Rural Natural Features Zone and part Rural Floodland Zone, part reserved for the purposes of Proposed Public Open Space (Foreshore and Streamside Reserve) and part reserved as Existing Public Open Space (Foreshore and Streamside Reserve).

The zoned portion of the land is affected by a Preservation Order Area Overlay.

Surrounding land is zoned Rural Natural Features Zone, Residential A zone, Rural Floodland Zone, Public Open Space (Proposed) and Public Open Space (Existing) and Existing Arterial Road.

APPEARANCES

Mr. John Cicero of Best Hooper, Solicitors, for the Shire of Surfcoast

Mr. Chris Canavan, QC, and J H Gobbo of Counsel, instructed by Allen and Allen Solicitors for J Allen and Estate of P V Allen. Mr. Canavan called, as expert witnesses, Mr. Michael Gerner, of Gerner Consulting Group Pty Ltd, Mr. Andrew Biacsi of Contour Consultants Aust Pty Ltd, Mr. Allan Wyatt of ERM Mitchell McCotter Consultants Pty Ltd, Mr. Rodney Wulff of Tract Consultants Pty Ltd, Mr. Charles Meredith of Biosis Research Pty Ltd and Mr. David Hunter of Coomes Consulting Group.

Ms Jane Grant for the Aireys Inlet and District Association Inc. Ms Grant called Mr. Shayne Linke of Ratio Consultants Pty Ltd to give expert evidence.

Mr Jeff Hausler, Ms Pauline Reilly, and Ms Kay McCrindle appeared on their own behalf.

In addition to the parties who appeared at the hearing, the following parties submitted copies of written submissions. These persons were objectors who have been given notice of the application for review and have given statements of the grounds on which they intend to rely at the hearing. They are parties to the proceeding under Section 83(2) of the Victorian Civil and Administrative Tribunal Act 1998 and their submissions have been read and taken into account by the Tribunal.

Mr R F Bardin	48 Bambra Road, Aireys Inlet
M J Knott	55 Wybellenna Drive, Fairhaven
Mr J Atkinson	84 Bambra Road, Aireys Inlet
Wendy and James Brown	29 Devon Street, Eaglemont
M J Healey	68 Bambra Road, Aireys Inlet
J and S Hartnett	71 Pearse Road, Aireys Inlet
M R Seeger	62 Bambra Road, Aireys Inlet
Mrs M Lawless	74 Bambra Road, Aireys Inlet
Mr and Mrs St John	1 Grace Street, Malvern
N Jane	40 Bambra Road, Aireys Inlet
P&J Watson	34 Anthony Ave, Doncaster
Drs T and R Gibson	23 Balamara St, Bellerive, Tasmania

The parties to the appeal, together with expert witness, submitted written statements, photographs and maps of the site and its surrounds. These have been retained on the Tribunal's file.

The site has been inspected by Mr Michael Read, Member, on the 23rd August 1998 and 7th March 1999.

PRELIMINARY

This application for review was commenced by Notice of Appeal lodged in the Administrative Appeals Tribunal on 20 April 1998. On 1 July 1998, the Victorian Civil and Administrative Tribunal Act 1998 and Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998 came into operation. Section 312 and Clause 9 of Schedule 2 to the Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998 apply to this application.

On 11 August 1998, Mr Canavan applied for amendment of the permit application to include use, and also to specify the number of lots sought to be achieved. No objection was made. The Tribunal amended the application for permit to accord with the Application for Review, to:

> *"The re-subdivision of the land into four lots and the use and development of each lot for the purpose of a detached house."*

Mr Canavan also stated, at the beginning of the hearing, that his clients did not rely on the "adverse possession" land which is included in the application documents. The application will be treated as including only that land which is held by the Applicants in title.

BACKGROUND INFORMATION

Grounds of Refusal

1. The development is contrary to the stated purpose of the Rural Natural Features Zone and Preservation Order Overlay.

2. The development would fail to achieve the strategic policies of the Aireys Inlet to Eastern View Structure Plan and the exhibited Municipal Strategic Statement in so far as they relate to the Painkalac Creek valley.

Grounds of Application

1. The proposal is an appropriate use and development of the land.

2. The proposal will assist the preservation of the Painkalac Creek Valley.

3. The proposal is not contrary to the purpose of the Rural Natural Features Zone and Preservation Order Overlay.

4. The proposal represents a sound and appropriate town planning outcome.

Details of the Proposal

The subject site consists of an irregular area of land of elongated shape. It is bounded along its western side by the Painkalac Creek, on its eastern side by Bambra Road, at its northern end by Boundary Road and at its southern end it terminates at a point opposite the end of Beach Road. Residential areas of Aireys Inlet lie along the eastern side of Bambra Road. West of the Painkalac Creek are further open creek flats border by scattered bush and the rising hills and the low density residential areas of Eastern View. To the south are open creek flats extending beyond the Great Ocean Road.

The site has a total area of 48.35 hectares.

The application provides for the resubdivision of 13 lots into 3 lots of 4 hectares or a little more each, and a fourth lot of about 24 hectares. There is to be a public reserve along the creek of 12 hectares. Each of the four lots is proposed to be developed and used for one dwelling. The plan of subdivision nominates a building development envelope on each of the 4 lots, set 20 metres from Bambra Road. The lots will be provided with reticulated sewerage, and drainage will be directed to two wetlands which would be developed closer to the creek. The three small allotments and all of the building envelopes are to be situated along the northern end of Bambra Road, with the building envelopes extending along a frontage of about 400 metres from the corner of Boundary and Bambra Roads.

The site has been used over recent years for grazing. There are scattered clumps of native trees and shrubs bordering the northern parts of Painkalac Creek and Bambra Road. A stock yard is located midway along the Bambra Road frontage.

Most of the site is subject to flooding, though a small area at the north-eastern, which contains the proposed building envelopes, is claimed by the permit applicant to be above the 1:100 year flood level.

The 13 lots are divided by several road easements shown on the plan of subdivision, though no roads have been constructed. These roads have never been declared or dedicated and remain as private land.

The Site and Its Context

The site's character has been accurately described by Mr Wulff as follows:

> *"The current character of the site is low-lying and open in the south and more enclosed in an amphitheatre type landscape in the north. ….. The landscape is riverine in character with the general level below RL5* (metres) *in the south and above RL 5* (metres) *in the north with the Painkalac Creek forming the western boundary and Bambra Road the eastern boundary. On the eastern boundary are vegetated gentle slopes with scattered development. In the south the area widens into the creek floodplain and* (sic) *tends to be narrow in the north to a more constricted valley with several structures north of Boundary Road. West of Painkalac Creek is a series of houses amongst treed slopes and a horse riding school. The northern boundary (Boundary Road) is approximately 2 Km north of the Great Ocean Road.*
>
> (and)
>
> *In landscape terms, the site falls within several visual character zones. Namely, the riverine zone of Painkalac Creek, the more enclosed "amphitheatre like" and slightly elevated zone with considerable roadside vegetation (between Boundary and Government Roads) and the flat lowlands to the southern boundary (from Government Road to Beach Street area). The area of highest visual significance is the salt marsh, off the site to the south, cut by the Great Ocean Road. The site's landscape has been modified from its natural state and is similar in form to the riverine valleys between Aireys Inlet and Port Campbell.*
>
> *The site is basically cleared of most significant vegetation, although it is understood that the northern section of the site (at least north of Government Road) originally supported trees and shrubs not unlike that east of Bambra Road".*

Planning Policies, Controls and Development History of the Site

The subject site is affected by a number of planning policies which have been designed to guide the development of the creek valley. The subject site has also been subject to a number of development proposals. As the determination of these earlier proposals bears on the interpretation of current planning policy and development entitlements, the previous planning history of the site is set out below.

The site was originally subdivided into 60 lots in 1888. These were purchased and consolidated into 13 lots, and new certificates of title were issued. These were originally in the name of John Allen. Two were transferred in 1978, and are now in the name of the estate of Patricia Valerie Allen. There are conflicting statements about how many titles there are. The Council's submission states that there are 13, but only quotes 8 title numbers for 13 lots. The Applicant's submission states there are 13 titles, without detailing them. The "existing titles" plan prepared by Mr Gerner on behalf of the Applicant shows that several lots are in the same title in at least 3 instances. Mr Gerner's statement indicates 7 titles. However, as the tenement clause which will be referred to below relates to lots rather than to titles, this is of no real significance.

The site was first subjected to planning control under the Geelong Regional Commission's planning scheme and zoned part Rural Landscape, part Rural Floodland and part Existing/Proposed Public Open Space (foreshore and stream side reserve). The minimum lot size in the Rural zone was 10 hectares. In March 1984, that part of the land zoned Rural Landscape was rezoned to Rural Natural Features with a Preservation Order Area Overlay Control. The minimum lot size was 60 hectares. This zone and minimum subdivision size remain in place today.

The purpose of the Rural Natural Features zone (Clause 42) is *"to protect land which has particular qualities relating to either natural features, significant landscape, habitat or a particular rural environment"*. A Detached house is as-of-right in this zone, subject to certain conditions (Clause 42-1.1). These are a minimum allotment size of 60 hectares, and a series of alternatives including a tenement clause condition. A permit is required for a detached house that does not meet the conditions of Clause 42-1.1. Further clauses require permits to construct buildings and works, to remove, destroy or lop native vegetation (with some exemptions) or to remove, deface or destroy rock formations or natural objects (Clause 42-3). A permit is also required to subdivide land (Clause 42-2).

The permit which is the subject of this review is sought under the provisions of Clause 42-2.3:

> *"A permit may be granted for a subdivision which realigns the boundary between lots provided no additional lots are created and the number of detached houses the existing lots could be used for is not increased."*

The purpose of the Area of Interest or Landscape Value - Preservation Order Area overlay control, contained in Clause 71, is:

> *"to provide for the conservation, maintenance and enhancement of trees and significant landscape features which are either of scientific importance or of natural beauty or interest or of importance and which therefore form an essential component of the heritage and character of the area"*.

The clause contains an additional permit requirement for buildings, works, and removal or destruction of vegetation, rock formations and natural objects.

Guidelines for permits (Clause 71-2) include:

* *The preservation of the natural environment including any important landscape or conservation characteristics of the area and the suitability of the proposed development.*
* *The necessity of retaining a buffer strip of vegetation in the vicinity of water courses, roads and property boundaries.*
* *The need to control the siting, shape and height of any buildings or extensions.*
* *The need to protect the general environs of any natural objects or features from development which would detract from their setting.*

In late 1984, an application for a permit for a house on each of two parcels, of 4.3 and 5.5 hectares respectively, each of which was made up of several separate lots at the northern end of the site was refused on appeal: Allen v Shire of Barrabool, a decision of the Planning Appeals Board in Appeals nos. X81/0938A, 0939A, 0692, 0693 and 0929. The Board found that it was clear from the evidence that the appeal sites were contained within an area which has significant landscape features including a noteworthy landscape quality. The Board concluded that the rezoning of the land to Rural Natural Features, with the increase in the basic subdivisional minimum, supported the argument that the degree of development in the area should be rigidly controlled. It went on (at p.14):

> *"Having regard to this conclusion, and to the scenic quality and tranquil environment which characterises the area, the Board considers that these elements would be placed at serious threat if the valley was to become a de facto rural-residential zone."*

The Board adopted a passage from Zerbe & Starks v City of Doncaster and Templestowe (1984) 2 PABR 101 at 116, on the setting of undesirable precedents, and concluded:

> *"….the Board is of the view that the grant of permits in the present instance would create an undesirable precedent, making it difficult in the extreme for planning authorities to resist future applications for further development at similar density. This, in turn, would jeopardise the stated objectives of the planning scheme to protect the significant qualities to which we have previously adverted."*

In 1990, a proposal was prepared for a 102 lot residential subdivision of the area. This was rejected by the *Painkalac Creek Wetlands Floodplain Environment Study (March 1990)*.

The owner of the land then sought a rezoning of part of the site to Residential A zone, part to Public Open Space (Existing) (Amendment RL43). The residential rezoning was designed to provide for 21 lots at the northern end of the site (1 lot of 7,000 m^2, the balance being between 1,200 and 3,000 m^2. The Panel that considered submissions to this amendment recommended (July 1997) that that part of the amendment relating to this site be abandoned. This part of the recommendation was accepted by Council.

Concurrent with the present application, the applicant had also sought a planning permit to use the northern part of the site for a caravan park. This application was refused by Council and the subsequent application for review of that decision has been withdrawn.

There are a number of recent studies and policy statements that have relevance to the site:

> State policies of relevance include: Subdivision (Cl. 3-5); Retention and Re-Establishment of Native Vegetation (Cl. 3-8) and Productive Agricultural Land (Cl.

3-11). Regional policies relate to the pattern of future development and heritage conservation in the area.

The *Painkalac Creek Wetlands Floodplain Environment Study* (March 1990:1): provides a detailed examination of the natural values of the Painkalac Creek and its environs and includes a visual analysis and assessment of the environmental impacts of development. The study concluded that, in part, the *"Painkalac Creek valley is a highly significant landscape within the Aireys Inlet locality. Its scenic qualities are important elements in the identify and amenity of both townships* (Aireys Inlet and Fairhaven) *and contribute to the beauty and diversity of this section of the Otways coast. ……. Surrounding forested hills are an important contributor to the quality of this landscape"*.

The *Aireys Inlet to Eastern View Structure Plan* (adopted February 1993): adopted by the Geelong Regional Commission after consideration of the Painkalac Creek Wetlands and Floodplain Environmental Study. This Structure Plan referred to the Painkalac Creek as follows*:*

> *"5.2 Residential Development*
>
> *Goal - to ensure the opportunities for residential development are utilised while maintaining the settlements' bush village atmosphere*
>
> *Policies*
>
> - *The present boundaries of the residential zones of Aireys Inlet, Fairhaven and Moggs Creek remain unaltered other than as determined by the negotiations regarding the Wybellena/Painkalac Creek Valley land referred to below.*
>
> - *A negotiated settlement with the owners of the 8.9 hectare lot to the north of Wybellena Drive to the east of Bimbadeen Drive and a second parcel of land on the eastern side of the Painkalac Creek Valley (approximately 48 hectares) shall be considered. Such a settlement will involve the transfer of land into public ownership in return for a limited subdivision.*
>
> - *Any proposal will be conditional upon the provision of a reticulated sewerage system by the AIWB and the provision of a sealed road network which will permit ease of access in and out of the area in bushfire conditions"*

Victorian Coastal Strategy (1997): applicable in part to *"private land adjacent to and within the critical viewshed of the foreshore"*(p3). While the strategy is pitched at a broad level and is not directly applicable to this development, its guidelines (pp 34-35) identify a number of relevant principles:

> *"The density and size of lots of subdivision close to coastal settlements should recognise the needs of the population and provide a variety of housing and living opportunities for future urban use.*
>
> *Planning for rural areas between townships should seek to retain open or wooded landscapes to provide a variety of coastal experiences. Good design of development along the coast should aim to minimise adverse visual impacts on significant viewscapes, particularly along major routes.*

> *Some localities within defined settlements such as dunes, estuaries and wetlands are generally not appropriate for development in a conventional urban form.*
>
> *Current restructuring of old and inappropriate subdivisions should continue and if further inappropriate subdivisions are identified, restructuring should be encouraged where this will result in a better outcome".*

"Siting and Design Guidelines for Structures on the Victorian Coast" (May 1998); *"Landscape Setting Types for the Victorian Coast"* (May 1998). These two documents assist with implementation of the *"Victorian Coastal Strategy"*. They set out siting and design guidelines for new development along or close to the coast, including such matters as built form, colour and texture of materials, views, landscape design, utility services and other site planning, visual landscape and ecological factors.

Proposed New Format Surfcoast Planning Scheme
The Municipal Strategic Statement (MSS) and Local Planning Policy Framework (LPPF), which form part of the new format planning scheme, address a range of environmental considerations. The MSS incorporates parts of the *Aireys Inlet to Eastern View Structure Plan* and an accompanying Framework Plan, which identifies the intent to retain the *"open valley landscape"* of the Painkalac Creek valley.

> *"The Painkalac Creek …. is held to be of considerable environmental significance. Accordingly ongoing management of the valley is of concern to both residents and conservation groups and will be protected by:*
>
> - *refusing any applications for inappropriate development*
> - *ensuring any development will not result in a significant change to its present rural and landscape character*
> - *protecting views of the valley from external viewing points through siting and design controls outside the residential zones*
> - *…..*
> - *….*
> - *…."*

We were informed that the Applicants have made a submission to the new format (VPP) planning scheme in relation to these provisions on the grounds that *"The combined effect of the provisions of the zone and the Municipal Strategic Statement will be to sterilise the land and to inhibit the use and development for any viable purpose".*

Under the exhibited new format planning scheme, the subject land would be placed in the Environmental Rural zone (Clause 35.02) and be partially affected by two overlay controls: the "Environmental Significance Overlay 1 - Wetland and Dryland Habitat", and "Land Subject to Inundation". The proposed Environmental Rural zone has a 60 ha minimum subdivision control. Smaller lots may be created under Clause 35.02-4 if the subdivision is a resubdivision of existing lots; but the number of lots must not be increased and all lots must be at least 0.4 hectares. Under this clause, an agreement must be entered into to ensure that the land is not further subdivided and the number of lots is not further increased.

The use of an existing lot for the purpose of a house requires a permit, and must also satisfy the requirements of Clause 35.02-2, dealing with supply of certain services (the applicant asserts that these requirements can be satisfied in this particular case). A number of issues are identified in the Decision Guidelines, including such matters as *"Whether the*

dwelling is reasonably required for the operation of the environmental rural activity conducted on the land", "The impact of the use or development on the flora, fauna and landscape features of the locality", and *"The impact on the character and appearance of the area or features …. of natural scenic beauty or importance."*

Clause 22 of the LPPF sets out a Rural Land Development Policy that will apply to land in the Environmental Rural zone. This policy contains provisions relating to approval of dwellings on existing allotments and the requirement that, where an allotment is smaller in size than the specified minimum for the zone, approval may be given *"only if the land comprised a separate tenement on the exhibition date of the scheme"* (together with a number of other conditions relating to this matter).

REASONS

Issues

Mr Canavan opened with the statement that it was common ground that the subject land has high landscape value; and it is clear that it is not suitable for conventional subdivision or even low density residential subdivision.

On the basis of our review of the various submissions and our considerations of the matter, we agree with the proposition put to us by Mr Canavan, namely that the intention of the planning controls is not to sterilise the land from any development and that as a consequence, *"the real issue in this case is about the appropriate degree of development"*.

In this light, we consider that the important issues which must be addressed in this review are:

- the intentions of the various current and proposed planning policies relating to the subject site and its locality, together with previous analyses by panels and planning appeal tribunals
- the particular aspects of the site's significance in relation to this subdivision and development proposal
- impacts of the proposed use and development on the environmental values of the site
- future land management requirements for the site in any circumstances
- the visual intrusion of the proposed development
- the effect of flooding on the proposed development
- the existing entitlements of the applicant to the use and development of the subject land
- other matters raised by the applicant.

Existing Entitlements to the Use and Development of the Site

This question was given prominence by both Council and Mr Canavan. We will address it first, as it was the first issue raised by the Applicants, and the Applicants' case was argued from a background assumption that some as-of-right use houses would be derived from the relevant provisions, to which the present proposal should be compared.

The argument arises under the "tenement clause", which forms a condition on the as-of-right use of land for the purpose of a detached house under Clause 42-1.1 of the Planning Scheme, and also applies in the Rural Floodland zone: Clause 45-1.1. This clause also has a consequential effect on the application for subdivision by way of boundary realignment.

House as of right

A house "entitlement" exists under Clauses 42-1.1 and 45-1.1, where "the site" is less than 60 hectares, if the site is :

> *"A separate tenement as at 17 December 1975 and has since continued as a separate tenement, whether or not under the controls of this scheme land has been added to or subtracted from the tenement."*

"Separate tenement" is defined to mean:

> "Land comprising, either –
>
> * one lot not in the same ownership as any adjoining land;
> * two or more adjoining lots in the same ownership, but not in the same ownership as any adjoining land."

"The site" is not defined. For present purposes, we take it to mean the area of land identified in the permit application as the site for a house. Under the separate tenement condition, the site has to be the tenement relied on to allow the house without a permit on an area of less than 60 hectares.

On 17 December 1975 (the "tenement date"), all 13 lots were in the same ownership. Two have since been transferred to a different ownership. But the original 13 were not a continuous area in terms of title; there were subdivisional "paper" roads –

* between lots 2 and 3;
* between lots 3 and 4, and the cluster formed by lots 5, 6, 8, 9,and 11-13; and
* between that cluster of lots and lots 7 and 10.

Copies of the titles to the roads were not produced.

The two lots transferred to the ownership of P V Allen further separated the lots remaining in the ownership of J Allen. The transfer of lot 2 separated lot 1 from lots 3 and 4 (irrespective of the road that also "separated" these lots). The transfer of lot 9 separated lots 12 and 13 from lot 8 (which forms a cluster with lots 5 and 6).

In Council's submission, a permit would be required for the construction of a house in any event, even if it could be established that the use was as of right by virtue of the tenement clause, in the case of one or more parts of the original holding. This is clearly correct, and was not denied; however, it was argued for the Applicants that there was a prima facie case for the grant of a permit for development for the purpose of an as-of-right use if the tenement clause applied.

A permit for subdivision does not, by itself, create an entitlement as of right for a house on each lot. The Applicants rely on a "boundary realignment", which would carry a house entitlement under another of the detached house conditions in Clause 42-1.1, so long as the lot was created under the realignment, and –

> *"The land prior to the realignment must have complied with one of the conditions for a detached house in this Section."*

An equivalent provision applies in the Rural Floodland zone for boundary realignment and for house entitlements following realignment: Clauses 45-3.3 and 45-1.1.

House by permit

If the conditions in Clause 42-1.1 are not met, a permit could be obtained, so long as one of the conditions in Clause 42-1.2 was met. Once again, subdivision does not, by itself, create a potential house lot. The conditions for a detached house permit are independent of subdivision permits. This is hardly surprising, as Clause 42-2.1 does not allow subdivision into lots of less than 60 hectares unless common property is involved. The conditions to be met under Clause 42-2.1 all deal with circumstances in which the 60 hectare minimum is mitigated.

There is a second "tenement clause" in the provisions governing uses for which a permit may be required. This is found in Clause 42-1.2 and the equivalent clause in the Rural Floodland zone. In this case, the tenement clause operates as a condition which must be met in order for a permit to be granted on a "site" which -

> *"exceeds 4 hectares and is part of a separate tenement existing on 17 December 1975. If the site comprises more than 1 lot the lots must be consolidated."*

When the Applicants amended the permit application so as to include the element of use, they departed from the original position that no permit for use was required, and acknowledged that it is on this Clause, or on the next clause in Clause 42-1.2, that they rely. The application is now for a permit for use of the subject land for four houses, each on a part of the original tenement that exceeds 4 hectares in area (as well as for subdivision and development).

This head is available to the Applicants if the subject land is a single separate tenement. Each of the four lots identified in the plan of resubdivision would be a part of that tenement, and each exceeds 4 hectares. If the subject land were four separate tenements, it would not be necessary to rely on this head, because the house use on each tenement would be as of right under Cause 42-1.1.

The alternative head of power under which the Applicants pursued their application for a permit to use the subject land, as resubdivided, for four houses, exists where the site:

* *Exceeds 4 hectares and is suitable for the use of agriculture or animal husbandry or any other use related to the keeping of animals or birds"*:

The requirement for use of the site for "agricultural or animal husbandry" indicates that the use of the house on the lots created by resubdivision would be in support of the agricultural or animal husbandry activity, eg. a house attached to a market garden. The examples of agricultural use or animal husbandry that were put to us (eg. running a few horses or cows) seemed merely designed to demonstrate the technical possibility that some livestock could be kept on the lots, not that someone who was genuinely interested in agriculture would "deem" these allotments suitable for such use, or that the likely purchasers would see this as an important use of these lots. Given the nature of the overlay controls, the desirability of intensive agricultural or animal husbandry is of course questionable in any event. Any serious

prospect for this kind of activity would also seem to be inconsistent with the kinds of landscape development that were proposed by the applicant's landscape consultants.

On the basis of all the information that was put to the Tribunal, we do not accept that the intention of this subdivision is to create lots suitable for agriculture - with the possible exception of proposed allotment 4, which is substantially larger than the others. In respect to the three 4-hectare allotments, we find that these allotments are destined for residential use as the principal use, with any "agricultural or animal husbandry-type" activities being ancillary to the dwelling. The suggestion that these four hectare allotments could be used for agricultural or animal husbandry seems to be highly contrived.

Further, the Applicants have rejected Council's proposed condition that, in part, *"the boundary between the land shown on the plan of subdivision as vesting in the Responsible Authority and the balance of the land shall be fenced at the cost of the owner ….. ".* Rejection of not just the requirement that the owner bear the whole cost of the fencing, but also of any requirement at all for fencing, tends to support the view that the land is not being subdivided for *"agriculture or animal husbandry or any other similar use related to the keeping of animals or birds".*

The only lot that we consider could potentially be suitable for *"agricultural or animal husbandry or …. similar use …."* and thus eligible for a house permit under this clause is proposed lot 4, which is of 24 hectares.

Subdivision (boundary realignment)

Although the Application for Review states that the application is for "resubdivision" rather than "realignment", there is no power in the relevant zones for subdivision other than through realignment of existing lots, in the sizes proposed by the Applicants, without common property being included in the subdivision (which is not the case here). The relevant clause makes it clear that realignment is a form of subdivision. Ordinarily, we would regard "realignment" as a concept more limited than "resudivision". But the Council has accepted that what is proposed is a "realignment". No other party has objected to the proposed consolidation and resubdivision on the basis of lack of power under the provisions of the relevant zones. We are accepting the assumption of the parties, in this context, that "resubdivision" and "realignment" (both of which terms have been used by the parties and witnesses), mean the same.

Boundary realignment may be permitted, under Clause 42-2.3, as follows:

> *"A permit may be granted for a subdivision which realigns the boundary between lots provided no additional lots are created and the number of detached houses the existing lots could be used for is not increased."*

There is no minimum lot size requirement in the case of realignment.

Under Clause 42-2.3, the number of houses that may be obtained governs the decision on a permit for realignment as well as the future use of any lot produced. The Applicant argues that the resubdivision does not increase the entitlement; but if anything, it would reduce it.

In order to get the benefit of an entitlement, as of right or by permit, to a house on each lot produced by the realignment (if permitted), the Applicants have to establish either entitlement to four houses as of right on four tenements, or that a permit should be issued for the houses in the circumstances encompassed by one or more of the conditions on the use "Detached house" in Clause 42-1.2. In using the expression "a permit should be issued", we intend to

distinguish between an application where a resubdivision is sought on the basis that at some future time a house permit *could* perhaps be granted, and a case such as the present where a permit will be issued at the same time as the resubdivision which creates the lots on which the houses will be located. We doubt whether there is power to resubdivide in the former case.

In accepting that it is possible to resubdivide into four lots even if there are less than 4 tenements, the Council has assumed that the issue of the permit for a house under Clause 42-1.2 is accompanied by the power to permit a lot for the permitted house by way of resubdivision, even though until the house permit is issued, simultaneously with the permit for resubdivision, there was no entitlement for that house. The Council does not argue that the reference in Clause 42-2.3 to "the number of detached houses the existing lots could be used for" is meant to deal only with as-of-right entitlements to houses. We accept that it follows that if we direct the issue of a permit for a house in the circumstances allowed under Clause 42-1.2, we can simultaneously permit resubdivision so as to create the same number of lots as houses (but no greater number of lots than houses).

The Applicants argue that there were four separate tenements on the tenement date; so that they have an entitlement to four houses, and four lots may be produced by boundary realignment under Clause 42-2.3. Further, up to six parcels might comply with the first condition in Clause 42-1.2, enabling applications to be made for permits for six houses as parts of a tenement. It is not necessary for us to consider any possible number of lots greater than four.

If we were wrong about the power to resubdivide into four lots unless a house permit is granted for each lot, we would refuse to permit a fourth lot on the merits. Altering the lot boundaries does not alter the number of tenements, but if it were not carefully done, it may increase the number of sites for which a permit for a house could be sought, by creating remnant lots of over 4 hectares, which would be parts of a tenement. In our view, it would be poor planning to have 4 hectare lots for which houses had already been refused, as there is no real alternative use other than residential for lots that size.

In permitting any resubdivision, we are dealing with the subject land as a whole, and consider consolidation of the balance of the entire site as an essential element of the outcome.

The tenement

Council analysed the "tenement clause" argument. It submitted that there are a number of alternative possibilities. The two major alternatives depend on the effect of the word "adjoining" on the definition. Either the roads divide the tenement; or the existence of a "paper" road on title does not prevent all the lots from being "adjoining land" within the definition of "tenement clause".

The clause uses the word "adjoining" rather than "contiguous".

If the paper roads do not operate, on the proper construction of the tenement clause, to prevent the whole 13 lots from being "adjoining land", then there is one tenement.

If the roads prevent all lots in the ownership of Mr Allen forming part of a single tenement at the "tenement date", then there were 4 tenements, as follows:

- A existing lots 1 and 2
- B existing lots 3 and 4

- C existing lots 5, 6, 8, 9 11-13
- D existing lots 7 and 10.

The impact (if any) of the transfers in 1978, after the "tenement date", also needs to be considered.

Council submitted that whichever interpretation was correct, the use of the subject land for two houses as-of-right was the maximum that could result.

Taking into account the transfers of two lots after the tenement date, Council argued that if the effect of the roads had created four tenements as at the "tenement date", as set out above, then the transfers of lots 2 and 9 would mean tenements A and C no longer continued as separate tenements, leaving two tenements.

If the roads did not separate the tenement, the Council argued that the effect of the transfer of lots 2 and 9 was to prevent the tenement from "continuing" as a separate tenement, so that it no longer kept any entitlement to the use of a house.

Mr Canavan submitted that there were four tenements even after the transfers. The existing planning scheme makes provision for a change in the size of a separate tenement without negating it, because the tenement clause applies:

> *"….whether or not under the controls of this scheme land has been added to or subtracted from the tenement."*

Thus if there were 4 tenements, the transfers did not change the number of tenements; they only reduced the size of two of them. We accept that if there were indeed four tenements, this would be the effect of the two transfers.

If there was a single tenement on the 17th December, it would continue to exist as a separate tenement for the purposes of the planning scheme, with one entitlement to the use of a house on the lots remaining in Mr Allen's ownership, even if two lots have been transferred out.

No one argued that the land transferred to Mrs Allen would have any tenement entitlements.

If a permit is granted for four houses, there is power under Clause 42-2.3 and its equivalent, Clause 45-3.3, to permit resubdivision so as to produce four lots.

Mr Canavan submitted that proper weight should be given to the tenement clauses, and the intent that should be gleaned from them. These clauses must be seen in the context of the previous Planning Scheme provisions. They should be interpreted as a statement that, prima facie, it is appropriate to have four houses on four tenements; and the other provisions (i.e. the overlay controls and the development provisions in the zones) should not outweigh that unless, for example, the land in question was underwater.

The same considerations would apply, Mr Canavan submitted, with respect to the future Planning Scheme provisions; save that under the VPP model scheme as exhibited, he argued that five tenements could be identified.

We do not propose to look at the new VPP scheme for that purpose. There is no point in knowing that more than four tenements could be produced under it, because we are only required to consider a resubdivision of the entire holding into four lots, and a maximum of four proposed houses as defined in the application. If in the future, the Applicants find the new

Planning Scheme more beneficial once it is in operation, they can take whatever steps then seem appropriate. We have, however, had regard to the new scheme for other purposes relating to policy.

We accept that there is an element of "equity" in a tenement clause, as (among other things) it provides an as-of-right house use to the owner of land as at the date a set of new and more restrictive controls came into operation over the property. The rights relate to the holding as it then existed. But if a permit is required for a use or development on the tenement, the considerations that we must apply are those set out in Section 84B of the Act, so that there is only a limited role for an equity consideration to play if the subject of it is contrary to planning policy and the other matters to which we are required to have regard.

If it is necessary to call equity in aid, it is because the proposed house is not seen as acceptable under current planning policies and controls. That does not mean that it is not important to give due weight to the circumstances of a long history of ownership – since 1973 - during which controls have become more restrictive; but it cannot be a decisive factor irrespective of planning policy considerations, especially where the subject land has the high values that are identified and protected by overlay controls.

This argument also fails to recognise that in the case of the tenement clause in Clause 42-1.2, where the tenement clause appears as one of the requirements to be met before a permit can be granted for a house on a sub-standard site, it has no greater priority accorded to it than any of the other requirements set out in the Clause.

A similarly defined "tenement", but one without the reference to land being added to or subtracted from the tenement, was considered in Molan v City of Doncaster and Templestowe (1993) 11 AATR 157. The Tribunal held that the clear intention of the zone provisions was to control density in accordance with the purposes of the zone. It was considered to be contrary to that intent to give a liberal construction to the exception created by the tenement clause. At the relevant date, the subject land had been a part of the tenement, but there had since been a subdivision, and the subject land was now a separate lot. It had therefore not continued to be a separate tenement; as a result, the proposal was prohibited.

This would appear to be the kind of harsh result that the addition of a reference to land being added to or subtracted from the tenement avoids. In the Surf Coast Planning Scheme, there is in any event the further possibility of the grant of a permit as long as the 4 hectare minimum size can be met in a part of the tenement. However, the principle that a tenement clause should not be liberally construed is if anything supported by the inclusion of express mitigating provisions made for specified circumstances in this Scheme.

In the context of the present cases, the Molan decision confirms that the nature of a tenement clause is no indicator of intention that houses should be allowed at increased densities on a tenement; and also confirms that once the two lots had been transferred out of the holding, the tenement would have ceased to exist but for the express words of the clause by which the tenement continues to be effective even though land has been subtracted from it.

Mr Canavan stated that he did not seek to argue exhaustively about the tenement rights; he sought to have the matter decided on the landscape values. However, Mr Cicero resists any houses at all; so that we cannot altogether avoid expressing an opinion about the tenement.

We only have power to issue a permit for the house use under Clauses 41-1.2 and 42.1-2 (because if no permit is needed under Section 1, we cannot direct that a permit be issued); and as we only consider one of the proposed lots as a potential site for agriculture or animal

husbandry, the power to issue a permit for the other three houses sought must derive from the fact that the lots to be created form parts of a larger tenement, rather than being separate tenements in their own right. It can therefore be said that the single separate tenement is conceded for the purpose of the application.

It will be clear from what we have said that in our view, there are either four tenements or one, the other alternatives offered by the Council not being sustainable.

We have had little assistance from the parties in the proper interpretation of the separate tenement provisions, other than the descriptions of the lots and ownership pattern. There are, however, any number of decisions, dealing with the meaning of the word "adjoining", on which the construction of the tenement clause depends. As the parties did not see fit to enter into this area, it would be inappropriate for us to do so. We will proceed on the basis that a permit is needed for all four houses for which application is made.

We believe it is proper for us to take this approach because on the basis of the limited information provided to us, having regard to the fact that, as far as we were made aware, the roads between the lots were never in the occupation of any person other than the owner of the subject land (from time to time), and never fenced off from the balance of the Applicants' holding. We see no reason to treat the roads as severing the tenement.

The proposed plan of resubdivision includes the "paper" roads as parts of lots. It can be assumed from this that the Applicants are confident of acquiring ownership of the land in the roads (and adding them to the tenement under Clause 42-1.1), if they do not already own them, or the subdivision would be unable to be registered. Adding the land in the roads to the tenement would not stop the tenement being a "separate tenement", any more than the two transfers to Mrs Allen did. Addition and subtraction of land are dealt in the same way.

Irrespective of the ownership of the land in the roads, the fact that private roads separate lots does not necessarily mean that the holding is not a single separate tenement. We need not finally decide this issue in the context of the present application.

The new tenement clause which Council has included in its Local Planning Policy Framework, as exhibited as part of the VPP model scheme, proposes that a separate tenement for the purpose of the Rural Land Development Policy in Clause 22.03 will be ascertained at the exhibition date of the Planning Scheme (18/12/98). As Mr Cicero points out, the State general definition of "tenement" includes lots in the same ownership which adjoin each other, but also states:

> *"Lots are considered to adjoin each other if they are separated only by a stream, stream reserve, or unmade or unused government road or rail reserve."*

This simply raises more questions where the *unmade or unused* roads in question are not government roads. The present definition, where the meaning of "adjoining" can be argued without the added complication of the helpful (but not exhaustive) addition to this definition, may prove to have been easier to construe.

Even assuming that it could be established that there were four separate tenements where a detached house was an as-of-right use, it appears to us, given the nature of the evidence presented to us on flood levels, that it would be proper to refuse an application to construct a dwelling on either of the alleged tenements C and D, for reasons that will become apparent. (Note that we are referring here to the tenements as they are illustrated on Mr Gerner's plan of tenement sizes, not the proposed resubdivision plan.)

On the basis of evidence about flooding (and leaving aside our expressed concerns about the reliability of that evidence - see later) only two of the alleged tenements, A and B, appear to have any areas clear of flooding as defined by Mr. Hunter so as to be suitable for use for a dwelling.

Implications of Planning Policies

From our review of the planning policies that have been applied to this site for at least the last 15 years, it is clear that the landscape of this area has been identified as highly valued and worthy of protection (eg. *"The Painkalac Creek Wetlands Floodplain Environment Study",* March 1990). There was no argument against assessment of the valley's significance. Referring to the purpose of the Area of Interest or Landscape Value zone, together with the various descriptions of this site, we find that the operative words of the zone's purpose are, in relation to the valley of the Painkalac Creek, *"to provide for the conservation, maintenance and enhancement of …. significant landscape features … of …. importance and which form an essential component of the heritage and character of the area".*

The applicant drew attention to references in the *"Aireys Inlet to Eastern View Structure Plan",* specifically the reference to implication that that plan's policies included acceptance of some residential development on this site *("A negotiated settlement with the owners of the 8.9 hectare lot to the north of Wybellena Drive to the east of Bimbadeen Drive and a second parcel of land on the eastern side of the Painkalac Creek Valley (approximately 48 hectares) shall be considered. Such a settlement will involve the transfer of land into public ownership in return for a limited subdivision").* However, the policy statement is quite unclear as to where the *"limited subdivision"* should take place - whether this meant the Wybellena Drive site or the Painkalac Creek valley site. We see no particular reason to assume that the latter was intended and, logically, this policy could be more readily interpreted as supporting limited subdivision of the Wybellena Drive site in return for the transfer to public ownership of land on the Painkalac Creek site.

The Victorian Coastal Strategy has a number of relevant principles: retention of "open or wooded landscapes to provide a variety of coastal experiences"; to "recognise the needs (for) ….. housing opportunities …."; to "minimise adverse visual impacts on significant viewscapes, particularly along major routes". Although this development will increase housing opportunities, this does not appear to be significant in the scale of things. The important issue, discussed further below, is whether the proposal will conflict with the requirement to maintain a variety of coastal experiences or intrude into significant views.

Significant Aspects of the Subject Site

In making our assessment of the significant characteristics of the subject site, as well as the various planning policies, planning appeal determinations and panel recommendations to which we were referred by the parties, we have had regard to the extensive photographs and plans tendered, together with Mr Read's inspections of the subject land and its locality.

From these sources, we have reached the following conclusions.

- The open pasture land of the valley floor (or river flats), which we take to be the area that must largely coincide with the floodplain of the Painkalac Creek, is very much a cultural landscape, reflective of European land management practices and very different from the bushland that originally covered this area. We were advised that this landscape has resulted from clearing of the original vegetation to allow first vegetable farming, and then grazing.

- The site's social value lies in the pleasure the community derives from the visual contrast between the valley's open pastures and the bush clad hillsides of Aireys Inlet and Fairhaven, to either side. The open pastures provide the benefit of views of this bushland that would not otherwise be available.

- Although the hillsides to either side of the Painkalac Creek flats contain low density residential areas, this housing is not dominant and, in respect to views from the south, is largely concealed within the remnant vegetation. In fact, from the southern sections of the valley (the Great Ocean Road and the more southerly sections of Bambra Road), the bushland of the hillsides to the north appears devoid of intrusive structures.

- The open valley's eastern edge is effectively defined by Bambra Road, which generally coincides with the eastern boundary of the river flats and the extent of clearing of vegetation. However, the important exception to this is where Bambra Road (presumably having been defined by a land surveyor) cuts directly across the toe of a ridge line running in a south-westerly line down towards the Painkalac Creek between Luggs Road and Boundary Road.

- The most important views of this valley, in terms of the public's ability to enjoy the contrast described above, are from the southern areas. There are some views available from the Great Ocean Road, though from only a limited length of road, and views to the north from various points along Bambra Road and the roads running down to it, together with views from River Road and the hillside above. Generally, views into the valley and the northern end of the subject land from the Fairhaven hillside are screened by vegetation on the hillside. Views are not available from the Split Point Lighthouse, although there was some suggestion that they were.

- The valley is recognised as an important element in the identity and amenity of the townships of Aireys Inlet and Fairhaven, which are separated by it. The view into the valley should continue to reflect the separation of the two towns.

- We also conclude that, while views into the valley floor are important for the landscape's appreciation, people will be likely to gain pleasure from continual glimpses of the landscape from different points, and through this, a general awareness of this landscape. For many people, for much of the time, it will simply be important for their enjoyment of the landscape to know that it is there, in the form which they know and enjoy. We accept that this landscape, and its assured continuity, is important to the way people conceive of their surroundings, which in turn explains the strong submissions made by AIDA and other community organisations and individuals.

On this basis, we consider that implementation of the planning policies relating to the landscape values of the Painkalac Creek requires, as key outcomes:

* maintenance of the southerly views of the Painkalac Creek flats, or apparent floodplain, as open pasture land; and

* avoidance of any intrusion of built form into the more distant views.

We conclude that introduction of native vegetation outside the area of the river flats, ie. on the toe of the ridge line referred to above, would not conflict unduly with the landscape values of the valley.

While the objectors/respondents argued against any development and valued the visual character of the creek valley as seen from every point along Bambra Road, we consider that

the most valuable points of view are from areas to the south and that it is less critical to protect close views into the northern head of the valley from nearby sections of Bambra Road. That does not mean that the less critical views do not merit reasonable protection.

It is with considerable reluctance that we depart from the consistent patterns of refusal of any residential development on the subject land that has until now resulted from every firm development application. However, those previous refusals have not resulted in an ultimate planning solution for the valley.

We believe that the policy context in which we must decide this application is a mature expression of planning strategy for the area; and that the decision to which we have come will implement that policy, through both protecting the true value of the protected landscape as we have identified it, providing for ongoing management of the landscape and conservation values, and also providing for the future public use of the creek environs.

We do not consider that the houses which we are permitting will have any precedent value. As far as the subject land is concerned, the requirement for consolidation will mean that there will be no remaining substandard lots that can be sold separately, or form the basis of future arguments about "separate tenements", without resubdivision. No more boundary realignments into sub-standard lots will be possible under Clause 42-2.3, because the number of lots will be tied down at three.

As far as any other property may be concerned, we have tried to describe clearly the area which we identify as that part of the valley landscape which is the objective of the preservation controls. This decision therefore follows the precedent that there should not be any rural residential development in that area which is valued for its significant landscape features.

Visual Intrusion of the Proposed Development

The development proposed as part of this application for subdivision consists of four dwelling envelopes set 20 metres from Bambra Road. The proposed allotments will be landscaped with native vegetation - denser towards Bambra Road, more scattered to the west and south. The new dwellings' residents will have views to the south. The suggested landscaping, as illustrated on the drawings provided by Mr. Wyatt, would lead the most southerly of the proposed new dwellings relatively unscreened from views from the south, and is also likely to reveal some of the other dwellings to various viewpoints.

Mr Wulff was called by Mr Canavan to provide an independent review of the subdivision proposal prepared by Mr. Gerner and the landscape and dwelling siting proposed by Mr. Wyatt. Mr. Wulff posed three ways of treating the development within the landscape:

- *"Highlight the development, eg. an architectural location where the structures dominate or relate to a historical icon (eg. a lighthouse)*
- *merge the development into the landscape where it is partially visible/transparent but relates to the surrounding development or landscape in a manner that is visible but in harmony with its setting, eg. reflective of landform, vegetation or other cognitive structures*
- *To disguise the development where it is virtually screened from all views except those immediately adjacent to the development".*

Mr Wulff concluded that it was most appropriate to adopt the 'merge' solution in this case, though the only reasons he gave were:

> *"Furthermore, this treatment is (sic) very much the character with that developed around the northern section of the site. The southern section of the site should be left open to relate to the salt marsh area further to the south"; and*
>
> His assessment that the landscape was able to visually absorb the development, with appropriate visual and landscape treatment.

We consider that Mr Wulff's logic is flawed. While it is true that dwellings along the northern section of Bambra Road can be seen through the trees from nearby points in Bambra Road, this situation is not equivalent to the viewpoints that are important in the case of the subject land. The important views are from more distant points to the south. In these views, the dwellings along Bambra Road are effectively invisible, whereas some of the proposed dwellings would be highly visible, particularly the most southerly dwelling.

There is an existing holiday chalet development to the north of the subject land, parts of which are visible from points along the northern end of Bambra Road. However, it is completely invisible from the Great Ocean Road, consistently with the preservation of the significant views north into the valley.

If the development proceeded in the form which Mr Wulff considers appropriate, it would introduce a new element into the southern view of the northern amphitheatre of the valley - one or more clearly visible dwellings. While Mr Wulff considered that this would reflect the current character of the area, we find that it would introduce a quite new element into the more important views of the site. Even accepting a requirement for the use of muted colours in walls and roofs, the existence of window glazing, fencing and the other accoutrements of dwellings would be likely to render this development clearly visible.

The introduction of structures at the head of the valley which are clearly visible from the major viewing points to the south would conflict with both the Victorian Coastal Strategy and the purpose of the Rural Natural Features zone. Mr. Wulff appears to have reached his assessment of the appropriate choice of treating buildings in this landscape without direct reference to these policies.

However, if the southern-most dwelling is excluded and more extensive vegetation is established down to the visual edge of the flood plain and across the toe of the slope extending across Bambra Road, then it would be feasible to conceal the balance of the housing while still maintaining a northwards view along the creek line and creating a natural extension of the vegetated slopes.

Mr Wyatt considered the visual intrusion of the four proposed dwellings into the westerly view from Bambra Road. For this purpose he used a computer simulation of the view of each dwelling from a point directly opposite on Bambra Road, taking account of the level of the building relative to the road and the natural ground level at the top of the ridge opposite (ignoring the effect vegetation would have on raising the ridge skyline further). Mr Wyatt concluded that, in order to ensure that any dwellings not intrude above the skyline as seen from Bambra Road, they should be restricted to a single storey and set back 40 metres from Bambra Road. Mr Wyatt proposed that the visual intrusion of buildings be minimised by landscaping the site with indigenous eucalyptus species. Mr Wulff assumed in his statement that the 40 metres setback would be applied.

Although we found this graphic presentation somewhat simplistic, we accept Mr Wyatt's opinion that, if any dwellings be permitted (and subject to more detailed review of specific proposals) the 20 metre setback of the zone control should be increased to 40 metres and buildings restricted to single storey height. Mr Canavan adopted these recommendations.

Issues of Flooding

Part of the subject land has long been included in a Rural Floodland Zone, which has the purpose *"To ensure buildings and works take into account the hazards of the land which is liable to significant inundation"* While this zone affects a large portion of the land at its southern end, it does not approach the area of the proposed building envelopes.

Council has not undertaken any studies of flood levels or flood frequencies for the Painkalac Creek. Various residents made submissions to us, based on their own observations, that areas at substantially higher levels than the lower dwelling envelopes were, on occasions, subject to flooding or inundation, though it is not clear whether the water flows that the residents observed were due to flood waters from the creek or overland flows from other sources.

We were provided with drawings purporting to show the levels of the subject land and were advised that these were in Australian Height Datum (AHD). However, we were not provided with any survey plan and the height contours varied substantially between documents, eg. the 7 metre contour on a drawing provided by Mr Gerner (Figure 5 in Mr. Gerner's Statement of Evidence) roughly approximated the 10 metre contour on the large scale drawings provided by Mr Wyatt). As a consequence, we do not have great confidence about the exact level of any part of the site, particularly the lower lying building envelopes, where building levels in relation to likely flood levels are more critical.

Mr David Hunter's evidence included the calculation of the 1:100 year flood levels for the portions of the land which were to be affected by the building envelopes, there being no observed levels for the subject land. Mr Hunter's assumptions include:

- The 1:100 year flood level near River Road could be established from the fact that Council had issued a building permit for a dwelling (presently under construction) which had a floor level of about 4.0 metres (Mr. Hunt's estimate from contour information available to him) and that it was reasonable to assume that Council had established the 1:100 year flood level at this point and set the dwelling's floor level 300 mm higher, so that the 1:100 year flood level could be assumed to be 3.7 m AHD.

- The main road bridge over the Painkalac Creek would withstand a 1:100 year flood and would therefore be the determining choke point for any flooding upstream of the road.

- Given the wide floodplain of the Painkalac Creek, a flood gradient of 1:700 would be reasonable, which would establish a flood level of approximately 4.5 metres at the subject site.

One conclusion from Mr. Hunter's evidence is that the Rural Floodland Zone which forms part of the existing Planning Scheme is substantially less, in both the northern and southern sections of the subject land, than the likely extent of 1:100 year flood levels in the Painkalac Creek valley. The same conclusion could be drawn with respect to the proposed Land Subject to Inundation Overlay area, illustrated in Mr Linke's report, which appears to be very slightly different from the existing zone over the subject land. We were not provided with any information as to the basis for either planning scheme's definition of the flood-prone area.

Regarding the flooding that had been observed across the subject land by Mrs McCrindle, during 16 years living in a house on the corner of Bambra and Lugg Roads, Mr Hunter offered the opinion that there are two distinct gullies running from Government Road and Lugg Road across Bambra Road into the subject land, without anything much by way of table drains. These would flood across the site, including flooding the proposed house sites. To overcome this flooding, drainage works need to be done by Council in the roads external to the site.

Assuming Mr Hunter is right about the source of the flood water in this section of the subject land, there is no indication that Council proposes to do work of this kind in order to protect the subject land from flooding.

Subsequent to the hearing, Jane Grant, on behalf of AIDA Inc, wrote to the Tribunal drawing our attention to local press reports of flooding in the lower reaches of the Painkalac Creek about the 13th November 1998. The Tribunal caused a letter to be written to Council, seeking further information on this occurrence and any information that would throw further light on the flood proneness of the subject land. Mr John Wilkin, Council's Acting Chief Executive Officer, responded by letter dated 24th December, with the following information (partly quoted, partly summarised from Council's letter, copies of which were sent to the Applicant's solicitors and Ms Grant):

- The flooding was not *"as the result of normal flooding processes ….. but rather … as a result of a build up of the sandbar at the river mouth …."*.

- "*This is a regular cyclic process which is necessary for the continued health of the wetlands area within the Painkalac Creek. It has been acknowledged that if the continuing impoundment of water is not controlled, then properties particularly within the River Road area will ultimately be placed at risk of some limited inundation".*

- A protocol has been established between Council, the Department of Environment and Natural Resources and local conservation groups which involves an agreement to break the sand bar when impounded creek waters reach a height determined by a mark on the Lorne Pier of the road bridge over the Painkalac Creek, this mark being 800 mm above the existing water level as of the date of the letter (23rd December).

- The flooding in November resulted from the failure of Council staff to observe the protocol (due in part to internal management failures) and Council has now undertaken management actions designed to prevent a recurrence of such failure.

- The appropriate maximum flood levels on the subject land can be determined by *"transferring the level of the mark on the bridge pier to the subject land and adding 300 mm to that level (the specified inundation clearance)."*

- Council also expressed the view that the key determinant of flood levels on the subject site is the height of the impounded flood waters and that *"traditional methods of establishing the 1% flood line would not be applicable in the Painkalac Creek"*. Council also stipulated that this information had been prepared without the writer having examined the report by Mr David Hunter.

We consider the above assessments of the flood liability of the subject land to be inadequate, and we have no confidence that we have any useful information about the flood liability of the greater part of the subject land. Council's letter of the 24th December provided no base information about the levels referred to (ie. the mark on the bridge pier) and its logic in applying a flat level to the flood waters of the Painkalac Creek appears contrary to that of Mr. Hunt. Mr. Hunt's worst case assumption - that of an extreme tide holding back the flood waters - appears to be a generally equivalent situation to the closure of the sand bar, yet Mr. Hunt considered it appropriate to include a flood gradient.

If the protocol for opening the bar in flood situations can fail once, as it has, it can presumably fail again and this should be taken into account in any risk assessment. While this protocol appears necessary to protect existing low level buildings, its application as a basis to allow

new dwellings to be built to equally low levels has not been justified and appears to us to be highly questionable in situations where the problem can be avoided in the first place.

The assumption by Mr Wilkin that only the safety of property need be assured by the setting of a flood level overlooks the need of people to be able to move safely to and from their homes. There does not appear to be any provision for access and egress across flooded areas if the solution of adopting a floor level 300 mm above the line on the pier is adopted, unless we can be confident that the height of the line on the pier will not be exceeded in the 1:100 flood in the area designated for building envelopes, and access to them, on the subject land. Access, safety and services to the building, should the lot be flooded, are to be taken into account by the Council in determining whether to consent to construction of a house in an area liable to flooding, under Regulation 6.2 of the Building Regulations 1994, as well as floor level.

Mr. Hunter adopted a 1:700 flood gradient to arrive at his conclusion. His reason for doing so was an estimate derived only from the fact that the floodwater plain is very wide. The southernmost dwelling site on the subject site is about 1.5 km from the Great Ocean Road, measured along the creek valley (calculated by scaling off the 1:2,500 Aireys Inlet locality plan provided by Mr. Biasci). The creek valley varies in width and narrows substantially in parts, particularly in the vicinity of the Great Ocean Road bridge and along the length of the subject site itself.

If Mr Hunter is overly optimistic, and the gradient is say 1:600 instead of 1:700, this conclusion on the flood level at the subject land would be seriously in error.

In the above discussion, we have not questioned Mr Hunt's simple justification for using 3.7 metres for the maximum flood level at the bridge. However, it seems contradictory for Mr Hunter to acknowledge that Council has undertaken no proper flood level studies, while at the same time assuming that Council has a sound basis for setting the floor level of the new dwelling in River Street, this being the dwelling which Mr. Hunter used as a bench mark for his calculations of flood levels. In conclusion, we have serious reservations about a number of the assumptions used in the flood level calculations.

From Mr Read's inspection of the subject site, the southernmost dwelling envelope is situated in an area which appears to be a part of the floodplain rather than part of the adjoining hill slopes. This suggests that caution should be used in assessing the flood liability of the southern dwelling site. In contrast, the other three dwelling envelopes are situated well above the visual limits of the flood plain.

In summary, substantial parts of the subject site are liable to flooding, but we have no reliable evidence as to the boundaries of the flood plain on the subject land to enable us to assess the hazard caused by flooding from the creek. Mrs McCrindle's evidence of her observations, Ms Grant's video of the subject land in flood conditions, and Mr Hunter's acknowledgment that flooding from the roads uphill from Bambra Road affects the subject land, indicate another source of flooding. The flooding caused by buildup of the sandbar requires management that does not always operate in a timely fashion. The visual boundary of the flood plain indicates to us that a conservative approach is appropriate in the area of the southern building envelope. This requires us to conclude that we are not satisfied that the area proposed for the southern dwelling is not liable to flooding.

Taken with the visual intrusion that this house would create, in our view it should not be permitted.

Effect on Flora and Fauna

A number of objectors raised concerns that the site makes an important contribution to local fauna and that the development would be detrimental to a continuation of this valued role. In particular, Mrs Riley has undertaken extensive studies of native bird life on the more southerly flood plain areas nearer the Great Ocean Road and the coastal estuary.

Dr Charles Meredith, of Biosis Research, gave evidence to the Tribunal as to the research that, with Mr. Andrew Hill, he undertook into the flora and fauna significance of the site.

With respect to significant flora, Dr Meredith also drew on recent research he has undertaken into the Painkalac Creek area for the Painkalac Creek Valley Steering Committee in 1990. On the above basis, Dr Meredith concluded that *"the vegetation of the grazing land on the floodplain, the study site, (has) no botanical significance".* This research, together with other reference texts dealing with the locality, identified a number of significant species which would be likely to inhabit the study area. However, none is a threatened species and all are likely to be transient to this area.

In assessing the potential impacts of the proposed development on existing flora and fauna, Dr Meredith concluded that *"there are no significant flora or fauna species that are likely to be lost from the site through subdivision or the development of houses and associated outbuildings within the building envelopes, although some individuals of some regionally significant plants may be lost locally".*

Dr Meredith also concluded that the most significant parts of the valley, with respect to retention of existing fauna species, are the more southerly wetland areas.

Mrs Reilly is a well-known and respected ornithologist who has been observing in this area for many years. She was one of the authors of the Bird Atlas to which Mr Meredith referred, and is the author of "Waterbirds on a Small Estuarine Wetland – A Six Year Study", dated 25/7/96. The area on which she based her statistical work was actually the Mellors Swamp, south of the Great Ocean Road; but she stated that when the wetlands flood, the birds go up the flood plain into the Allen land. There is no detailed observation record of fauna in relation to the subject land. Dr Meredith's study was necessarily limited.

Mrs Reilly also pointed to the existence of a bird hide to the north of the subject land in the Angahook State Park. This was also mentioned by other residents. It was built with the assistance of ANGAIR, and is used (among other things) for the eduction of children. Strong objection was taken to the development of the subject land because of the impact it would have on the hide and people using it; but much of the opposition was directed to alternative development proposals that have not proceeded. It is difficult to see why three houses on the west side of Bambra Road should interfere with the hide any more than the houses on the east side do.

Dr Meredith also made recommendations with respect to the future management of the site if the proposed development were to be permitted. These actions included:

- a conservation management plan to be developed for areas of habitat value, being the existing mature trees and the ephemeral wetlands areas, which should be retained, dealing with such issues as retention of mature trees with suitable nesting hollows.
- remnant trees and vegetation to be protected with sign posting and fencing.
- retention of remnant roadside vegetation outside the site's eastern boundary, along Bambra Road, wherever possible.

Dr Meredith regarded the Applicants' proposal to develop wetlands for disposal of drainage from the housing areas as minimal, with the main aspect of the design being the plant species within it. However, Mr Hunter indicated that no special treatment was needed for the stormwater drainage of only four houses (from which we conclude it is needed still less for three), and the wetlands proposal has not been pursued by way of conditions tendered by the Council.

Ongoing Management of the Site

Various submissions dealt with implications of ongoing management of the site, either with the present use or with the proposed use and development.

Under questioning by objectors and the Tribunal, Dr Meredith stated that cessation of stock grazing to the creek line would result in the fairly rapid re-establishment of native vegetation. This in turn would impede southerly views of this cultural landscape, which conflicts with some of the objectives of the Planning Scheme. However, it is not unusual to find incompatible objectives arising from different controls. If grazing along the creek stops, there would be opportunities for improved management of the creek and banks. Retention of a buffer strip of vegetation along the creek also accords with the permit guidelines in Clause 71-2. These are also important objectives, and we are not prepared to find that the Council is wrong in placing the emphasis on the stability of the banks and in habitat values along the creek.

Mr Wyatt proposed that the area along the creek could be planted with Swamp and Manna gums, with the intention that these would help define the creek, as well as augment the existing planting. Definition of the creek through planting of further trees would not be inconsistent with landscape objectives.

Concerns were expressed about the impact of the development on the flora and fauna values of the site. However, Dr Meredith's evidence clearly established that impacts to flora and fauna overall are expected to be minor, due to the relatively low habitat values of the area. The higher values accrue largely to the southern part of the site, and the development is not likely to have any significant impacts on these matters, provided arrangements are made for ongoing management.

Mr Wyatt proposed that, in the event that a permit was granted, landscaping should be established well before development commenced. He suggested that native vegetation would be well established within 4 years and that it would be reasonable to allow development to proceed within 2 years. In our view, after only 2 years of growth, even rapidly growing native vegetation will offer relatively little concealment of new houses.

It also seem to us that an obvious requirement of any permit for development is that native vegetation be established in association with that development, given the wide agreement on the visual importance of views into the site. Some attempt to establish screening vegetation could well have been made before an application for development permissions was attempted.

Other Considerations

The proposition has been put that the effect of refusing any opportunities for houses on the subject land would be to *"sterilise the land and to inhibit the use and development for any viable purpose".* The land is not sterilised. It is presently used for grazing. It must be remembered, in considering the potential of the subject land for other uses, that the subdivisional lot size applicable in the two relevant zones is 60 hectares, and the subject land is substandard.

The vesting of the land described as being between the title boundaries and the creek in Council to form a sort of creek reserve has been proposed. We were not informed how the Applicants are to arrange for land that is not in their titles to be vested through them in some else. It may mean a delay while the Applicants acquire title to the area.

We were advised by Mr. Hunter, and accept, that the land can be readily provided with all necessary engineering services at the cost of the developer and at no cost to nearby neighbours, with the exception of flood protection works to cater for the floodwaters crossing Bambra Road and entering the subject land as described.

Overall Assessment of the Proposal

Our overall assessment is as follows:

- we will assume, without having to decide, that there is an existing entitlement to use the subject land for a detached house. The location of a house within the tenement would be a matter for the development permit. Because we are not called upon to decide the tenement entitlement in the amended form of the application, our decision will relate to permits for all houses we consider appropriate.

- Houses on Lots 1 and 2 must depend on being "parts of a separate tenement existing on" the tenement date, Clause 42-1.2.

- there is power under Clause 42-1.2 to permit the houses sought on the proposed Lots 3 and 4 ; but as we do not accept that proposed Lot 4 is suitable as a house site on its merits, Lot 3 must be combined with Lot 4. The combined lot may be permitted as being *"suitable for agriculture or animal husbandry or any other use related to the keeping of animals or birds"*, without having to rely on its status under the tenement clause.

- We are not satisfied that sufficient information is available to identify the 1:100 flood level in relation to the proposed building envelope on lot 4. This is a serious issue, and we must have refused a permit for a house on Lot 4 on this ground in any event.

- However, we find that the proposed location of a detached house on lot 4, together with the proposed landscaping, would create an unacceptable degree of visual intrusion into a significant landscape. We therefore decline to grant a permit for this house, irrespective of the site's liability to flood.

- It is reasonable to allow three carefully sited houses on restrictive conditions on the sloping land that clearly forms the lower part of the range to the east of the subject land, notwithstanding that this slope extends somewhat beyond the northern section of Bambra Road. It is the toe of the range that forms the relevant boundary for the purpose of the valley views.

- new housing on proposed lots 1 - 3 should be required to be concealed from views into the site from roads and other public areas by establishing the dwellings' surrounds with indigenous vegetation, planted to simulate its natural woodland character. This vegetation can be allowed to extend down to the visual edge of the Painkalac Creek floodplain.

On this basis, we conclude that it would be reasonable to allow a subdivision of the land, but of three rather than the proposed four lots. The subdivision layout should be in accordance with the submitted plans, but with proposed lots 3 and 4 combined. Building envelopes for

these three lots would be those as proposed for lots 1 - 3 in Mr Wyatt's landscape plan, with the dwellings set a minimum of 40 metres from Bambra Road.

The use and development of the land should be subject to a number of conditions designed to minimise visual the intrusion of the new development. In this respect, we consider that some provision should be allowed for the maturing of landscaping prior to commencement of development. We do not see this as an unreasonable burden on the applicant, given the community's concern with the maintenance of high landscape values on the subject land.

Following the end of the hearing, the Council undertook to provide draft conditions to the Applicant within 14 days, after which the Applicant was to rely with agreement, or identification of areas of disagreement, in another 7 days. After discussion, this version was then to be circulated to Miss Grant, as representative of the other parties, and the Tribunal.

The parties asked for further time in which to continue negotiations. The final versions, received at the end of October 1998, has disagreement on substantial issues.

With regard to these disputed issues, we have generally considered it more appropriate to accept the more conservative requirements of Council, given the landscape sensitivity of the site.

First, it is necessary for an amended plan to be submitted for endorsement, because of the need to consolidate proposed Lots 3 and 4. A condition to this effect has been inserted; and because a change to the layout is necessary, we have also included changes to the layout that are required by the proposed Section 173 agreement, but should also be shown on the endorsed plan. This includes the building envelopes and setbacks offered by the Applicants at the hearing.

We have also added that the land to the east of the creek which is proposed to become public open space should be shown on the endorsed plan. It appears the parties had discussed a layout between themselves, but no plan illustrating it was forwarded to us by either the Council or the Applicants. We have therefore merely described the minimum width of this area. We agree with Council that a 2 metre wide public open space strip along the creek would be totally inadequate. It would not even protect the banks. Ten metres is a more reasonable minimum width. In stating this minimum width, we have regard to the fact that Applicants offered an area that was not within their titles as the original "creek reserve". Additional land to take the minimum width of the reserve up to 10 metres, where the land originally proposed already exceeds this minimum at most points, is therefore not such an onerous requirement on the owners, and will benefit the public by creating a usable width through the entire length of the property.

We have also accepted the Council's argument about the specification of a maximum wall height as well as an overall building height. We do not think it would be appropriate to enable walls in excess of 3 metres, possibly on a large scale and with a flat roof, to be built on the subject land.

We believe it necessary to include a requirement in the Section 173 Agreement that planting be carried out and maintained to the satisfaction of the Responsible Authority so as to remove any doubt about the landscaping permit surviving following completion of subdivision and development, and to ensure the future purchasers of the subject land are aware of their ongoing obligation to keep the landscaping as envisaged in the decision to issue a permit for three houses.

While we note that other property owners in the area may have dogs, we do not consider that this means dogs should be allowed on the subject land. Dr Meredith expressed concern about the impact of dogs on specific species in the area. Our concern for the protection of habitat remnants, and the ongoing habitat value of the creek and wetlands, lead us to conclude that whatever we can do by way of minimising further hazard to surviving fauna in these areas should be done.

In view of the evidence of Mrs McCrindle, and the acceptance by Mr Hunter that water drains in some volume across the subject land from Bambra Road, draining the high land behind it, the creation of easements of drainage appears justifiable. Future purchasers of these lots should be aware of the flow path of stormwater across the land, and there has been no attempt to justify any interference with the continuance of the flow path.

With respect to the proposed condition requiring fencing of the creek open space reserve boundary, we do not see any need for this unless the occupiers of the subject land run stock on it. However, as the application for house permit was supported by reference to the power to grant a permit if the land is suitable for the use of agriculture or animal husbandry, and this has been found to be credible in relation to the lot that will be the combined Lots 3 and 4 as shown in the application plan, we see no practical option but to make the requirement. It would be undesirable for livestock to have continued access to the creek once the area on its eastern side has become a reserve for public open space. Although the same consideration does not apply to Lots 1 and 2, it would be impractical to require the balance of the reserve (creek) boundary to be fenced, but not the boundary shared with these lots.

However, we are mindful that native animals, which are presently sharing the subject land with the stock grazing there, may need to move to and from the creek. Dr Meredith has stated that standard farm post and wire fencing allows for the movement of large native animals. This type of fencing would be satisfactory.

The draft conditions submitted by the parties do not include the management plan requirement recommended by Dr Meredith. We are accordingly inserting a condition to this effect.

With respect to the final landscape plan, we consider that it is desirable that the outer edges of planted areas should simulate a natural character, adopting some irregularities of edge planting, rather than using a clean edge as with a plantation. It is also desirable that there be sufficient density of vegetation to entirely conceal the buildings from views from the south and to largely conceal them from views from Bambra Road. This would require Mr Wyatt's landscape proposal to be reworked to achieve a somewhat greater vegetation density, though the layout should still be designed to achieve a general character-type (vegetation types, mix and dispersal/density of plants) rather than specifying the precise location of specific trees.

We have adopted the Applicants' suggestion that new planting should be given two years to become established and make growth before development commences. The proposed condition to this effect is not disputed by the Council. It is noted that the supply of water that Mr Hunter has identifies as the future source of supply to the subject land is a main to be extended and capable of providing adequate water in the year 2001, so that the two-year period will coincide with the availability of water.

ORDER

The decision of the Tribunal is that the Application for Review is allowed in part.

A permit is granted for the resubdivision of the subject land into three lots, and for the development and use of each lot for the purpose of a dwelling, subject to the following conditions:

1. Prior to the commencement of any development under this permit, an amended plan of the resubdivision, to the satisfaction of the Responsible Authority, shall be submitted. This plan shall be generally in accordance with the plan submitted with the permit application, but shall show:

   (a) the proposed lots 3 and 4 consolidated into a single lot; and

   (b) the land set aside to be vested in the Council for the purpose of public open space, to a width necessary to ensure a minimum width of 10 metres along the Painkalac Creek.

2. Prior to the certification of any Plan of Subdivision for the land and prior to commencement of any development on the land the owners shall execute an agreement with the Responsible Authority under Section 173 of the Planning and Environment Act 1987, which shall contain the following covenants:

   (a) That none of the lots created on the plan of subdivision shall be further subdivided and not more than one dwelling will be constructed on each lot.

   (b) The setting aside as an area of public open space to vest in the Council upon registration of the plan of resubdivision of such land as may be necessary to ensure a minimum width of public open space of 10 metres along the Painkalac Creek.

   (c) Creation of building envelopes set back a minimum of 40 metres from Bambra Road, having an area not greater than 500m^2, and otherwise sited to the satisfaction of the Responsible Authority on each of the three permitted lots.

   (d) No buildings to be constructed outside the building envelopes.

   (e) No buildings to exceed a maximum wall height of 3 metres and an overall height of 5 metres above natural ground level.

   (f) That no development commence on any of the lots unless the planting as shown on the landscape plan endorsed to this permit ("the endorsed landscaping plan") has been established for a period of at least two years prior to the commencement of any development.

   (g) That the planting on the endorsed landscaping plan to be carried out and maintained to the satisfaction of the Council.

   (h) That, save for the establishment of garden beds within a 10 metre radius of any buildings, no plantings shall be undertaken on the subject land other than in accordance with the endorsed landscaping plan, without the written consent of the council.

   (i) That no dogs shall be kept on the land.

   (j) That all stormwater run-off from any buildings and any hard surfaces shall be treated to the satisfaction of the Council prior to discharge into the creek.

(k) To pay the Council's reasonable legal costs associated with the negotiation, preparation, execution and registration of the Agreement.

3. Easements for drainage in favour of the Surf Coast Shire must be created on the plan to the satisfaction of the responsible authority.

Conditions required by referral authorities

4. *Powercor*

The Applicant shall:

1. Enter into an agreement with Powercor Australia Limited for the supply of electricity to each lot and for the extension, augmentation or re-arrangement of any existing electricity supply system, as required by Powercor Australia Limited. (A payment to cover the cost of such work will be required). In the event that a supply cannot be provided the Applicants shall provide a written undertaking to Powercor Australia Limited that prospective purchasers will be so informed;

2. Re-arrange, to the satisfaction of Powercor Australia Limited, any existing private electric lines that cross boundaries or the proposed lots to supply existing installations. Such lines shall be constructed with underground cables;

3. Provide to Powercor Australia Limited, a copy of the version of the Plan of Subdivision submitted for certification, which shows any amendments which have been required,.

Note: It is recommended that, at an early date, the Applicant commences negotiations with Powercor Australia Limited, for supply of electricity in order that supply arrangements can be worked out in detail, so prescribed information can be issued without delay (the release to the municipality enabling a Statement of Compliance with the conditions to be issued.

Arrangements for supply will be subject to obtaining the agreement of other Authorities and any landowners affected by routes of the electric lines required to supply the lots, and planning permits for any tree clearing.

Prospective purchasers of lots in this subdivision should contact Powercor Australia Limited to determine the availability of a supply of electricity. Financial contributions may be required.

Barwon Water

5. Prior to the issuing of a Statement of Compliance the Owner must pay the Barwon Water Authority's Water Supply Headworks Levies and a Contribution towards existing Water Mains.

Prior to the issue of a Statement of Compliance, the existing water supply to the consolidated Lots 3 and 4 must be contained within the Lot.

6. Prior to the issue of a Statement of Compliance each Lot must be connected to a reticulated sewerage system.

7. This permit shall expire if one of the following circumstances applies:

   (a) The subdivision is not started within two years of the date of this permit;

   (b) The subdivision is not completed within five years of the date of starting.

Development

8. The development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.

   Note: Any plan approved under the Building Act and Regulations must not differ from the endorsed plan forming part of this Permit.

9. Prior to the construction of any building on any of the three permitted lots, 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 show:

   (a) siting and design of buildings;

   (b) details of all external materials, finishes and colours to the satisfaction of the Responsible Authority. All buildings and works must be constructed and maintained in materials and colours which blend with the natural environment to preserve the aesthetic amenity of the area to the satisfaction of the Responsible Authority.

   Note: The Shire's Subdued Colours Policy specifies a range of colours which are deemed to comply with this condition.

10. A landscaping plan must be prepared for the subject land and be submitted to the Responsible Authority for its approval. This plan must be generally in accordance with the landscaping shown on the plan prepared by ERM Mitchell McCotter (Drawing no.LS2, Project no.698213, August 1998), but modified to implement the following objectives:

    * when the specified vegetation reaches maturity, it will –

      - provide effective screening of buildings from views from the south of the subject land;

      - provide substantially screened views of buildings from viewpoints on Bambra Road.

    * Inclusion of a mix of native vegetation species including trees and shrubs which are native to the hill slopes to the east and west of the subject land.

    * Planting of vegetation is to occur at densities and with a distribution reflecting naturally occurring vegetation in the area.

Once approved, this plan shall become "the endorsed landscaping plan" to this permit.

11. A conservation management plan must be prepared to the satisfaction of the Responsible Authority for the protection of remnant native vegetation on the southern areas of the subject land. This plan will show:

- management proposals for areas of habitat value, being the existing mature trees and the ephemeral wetlands areas, which should be retained;
- retention of mature trees with suitable nesting hollows;
- protection of remnant trees and vegetation with sign posting and fencing by standard post and wire fencing; and.
- retention of remnant roadside vegetation outside the eastern boundary of the subject land , along Bambra Road, wherever practicable.

Once approved, this plan shall become "the endorsed conservation management plan" to this permit.

12. Prior to the occupation of any dwelling on the land, the boundary between the land shown on the plan of subdivision as vesting in the Responsible Authority and the balance of the land shall be fenced at the cost of the owner to the satisfaction of the Responsible Authority.

13. This permit, insofar as it permits the construction of a dwelling on each of the lots to be created by the subdivision also hereby permitted, will expire if either of the following circumstances applies:-

(a) The construction of the dwelling is not started within 6 years of the date of issue of the permit.

(b) The construction of the dwelling is not completed within 2 years of the date of commencement of construction.

The Responsible Authority is directed to issue a permit in accordance with this Order, pursuant to the provisions of section 85(1)(b) of the *Planning & Environment Act 1987*.

DATED

JULIA BRUCE
DEPUTY PRESIDENT

MICHAEL READ
MEMBER

Offcut: Michael's drainage calculation.

Assuming that nearest subject dwelling site is 1.5 Km from the bridge, then by our calculation the flood level at the southernmost dwelling site would be 5.7 m (3.7 m at the Great Ocean Road plus 1,500/700 = 5.85 m). If Mr. Hunt were to be overly optimistic and the worst case flood gradient were to be 1:600 instead of 1:700, say, then the flood level at the southernmost dwelling would be 3.7 m plus 2.5 m = 6.2 metres.