

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1492/2020
PERMIT APPLICATION NO. --19/0409

CATCHWORDS

Surf Coast Planning Scheme; Section 77 of the Planning and Environment Act 1987; proposal to building a bridge over a section of the Painkalac Creek in Fairhaven for the purpose of the use of a form of road, numerous objections and also some statements of support; Council Notice of Refusal to Grant a Permit; various legal issues; planning merits issues of whether the proposal would be inconsistent with the two primary zones affecting the proposed location of the bridge and whether the proposal would have any unacceptable environmental impact on the relevant water quality and aquatic habitats; permit approved.

APPLICANT	Caroline Wood
RESPONSIBLE AUTHORITY	Surf Coast Shire Council
RESPONDENTS	Aireys Inlet and District Association Inc., Angair, Catherine McNaughton, Ian Thomas Godfrey, Jan Grutzner, Peter Balshaw McPhee, Rodney John Duncan, and Jane Honman & others
REFERRAL AUTHORITIES	Corangamite Catchment Management Authority Department of Environment, Land, Water & Planning
SUBJECT LAND	115 Bimbadeen Drive FAIRHAVEN and 61A, 89A and 95 Bambra Road, AIREYS INLET VIC 3231
HEARING TYPE	Hearing
DATE OF HEARING	30 June and 1 July 2021
DATE OF ORDER	29 October 2021
CITATION	Wood v Surf Coast SC [2021] VCAT 1130

ORDER

- 1 Pursuant to Clause 64 of the Schedule to the *Victorian Civil and Administrative Tribunal Act 1998*, the description of the subject land for this proceeding is corrected to be – ‘115 Bimbadeen Drive, Fairhaven and 61A, 89A and 95 Bambra Road, Aireys Inlet 3231’.
- 2 In application P1492/2020, the decision of the responsible authority is set aside.
- 3 In planning permit application No. 19/0409, a permit is granted and directed to be issued for the land at 115 Bimbadeen Drive, Fairhaven and 61A, 89A and 95 Bambra Road, Fairhaven, in accordance with the endorsed plans and

subject to the permit conditions set out in the Appendix to this decision. The permit shall allow:

- Buildings and works for the construction of a bridge and its use as a road for the management of livestock.
- Vegetation removal.

Philip Martin
Senior Member

Ian Potts
Senior Member

APPEARANCES

For applicant

Ms Caroline Wood appeared in person

For responsible authority

Mr Aaron Shrimpton of Harwood Andrews lawyers

For respondent

Ms Maria Marshall, Maddocks lawyers, for the Aireys Inlet & District Association

The following objectors appeared in person:

Rod Duncan, appearing on his own behalf and for the Honman family

Catherine McNaughton

Peter McPhee

INFORMATION

Description of proposal	Buildings and works for the construction of a bridge and its use as a road for the management of livestock and vegetation removal.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Surf Coast Planning Scheme
Zone and overlays ¹	Rural Conservation Zone (part) Public Conservation and Resource Zone (part) Design and Development Overlay Schedule 11 Environmental Significance Overlay Schedules 1 and 5 Floodway Overlay Land Subject to Inundation Overlay Bushfire Management Overlay

¹ Recognising that the overlays apply differently to the public compared to the private land in question, as explained at [4-5] of the ‘Memorandum of Land and Permit Triggers’ document helpfully prepared by Harwood Andrews.

Permit requirements	<p>Clause 35.06-1: a permit is required for the use of the land for a ‘Road’ pursuant to the RCZ</p> <p>Clause 35.06-5: the RCZ requires a permit for ‘buildings and works’ (fence exempt) for a permissive use and also within five metres of a property boundary</p> <p>Clause 36.03-1: a permit is required for the use of the land for a ‘Road’ pursuant to the PCRZ</p> <p>Clause 36.03-2: a permit is needed for ‘buildings and works’ (fence exempt) pursuant to the PCRZ</p> <p>Clause 43.02-1: ‘buildings and works’ require a permit pursuant to the DDO11</p> <p>Clause 42.01-2: a permit is required for ‘buildings and works’ (fence exempt) and for the removal of vegetation, pursuant to the ESO1 and 5</p> <p>Clause 44.03-2: the FO requires a permit for ‘buildings and works (fence exempt)</p> <p>Clause 44.04-2: a permit is required for ‘buildings and works’ (fence exempt) under the LSIO</p> <p>Clause 52.17: requires a permit for native vegetation removal</p>
Relevant scheme policies and provisions	<p>Clause 02.03, 02.04, 11.01-1L-01, 11.03-5R, 12, 13, 14, 15, 17, 21.03, 21.04, 21.06, 21.12, 22.04, 52.17 and 65</p>
Land description	<p>The location of the proposed bridge is part of an upstream reach of the Painkalac Creek. This area features mostly grazing land with a gentle slope towards the creek, and is referred to as the ‘floor’ of the Painkalak Valley. To the west of the intended bridge location is an existing horse riding facility known as ‘Blazing Saddles’. The creek extends further north and south of this location. The creek becomes narrower and more enclosed by trees and bracken upstream of this location, whereas downstream it is more open and meanders across a flood plain before it discharges to the coast.</p>

REASONS²

WHAT DOES THIS APPLICATION INVOLVE?

Key features of the locality, existing horse riding business and the proposal

- 1 Aireys Inlet and Fairhaven are coastal towns on the Great Ocean Road, which face roughly south towards the coast. A feature of the area is the Painkalac Creek (Creek). As the Creek extends inland from the coast, it initially winds back and forth, then extends for some distance in a roughly northerly direction towards the property at No. 115 Bimbadeen Drive. This section of the Creek extending north up to the northern end of the No. 115 property:
 - Is wider and accessible for swimming, canoeing or other water based recreational activity.
 - Sees the Creek pass through a more open and relatively flat area, particularly to the east of the Creek.
 - Is commonly known as the ‘floor’ of the Painkalac Valley.
- 2 Further to the north again of 115 Bimbadeen Drive, the creek narrows, becomes less sinuous and is more enclosed by trees and shrubby bracken bushland as it extends north up to Old Coach Road. This narrowing of the Creek is evident for example with aerial photos of this location and using the cadastral and GPS mapping images of this location. Also during the Tribunal hearing we were shown a set of photos of this general area, taken by the relevant Council planning officer.
- 3 In relation to the northern end of this wider section of the Creek, some relevant planning permit history is set out below.
- 4 With the aforementioned 115 Bimbadeen Drive which lies on the western side of the Creek, the planning permit 94/5669 authorises the use and development of that site (owned by the applicant Ms Caroline Wood) for a horse riding business, known as ‘Blazing Saddles’. It now features equine, guest amenity and administrative facilities. For convenience, we shall refer to this site as the ‘Wood property’.
- 5 On the eastern side of this section of the Creek, in relation to the land known at that time as 23-79 Bambra Road Aireys Inlet, planning permit 97/7281 was granted at the direction of VCAT for ‘subdivision and realignment of existing lot boundaries and development of one house on each new lot’. The Tribunal decision here is *Allen v Surf Coast CC* [1999] VCAT 125.

² The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

- 6 For our purposes, some key relevant outcomes of this VCAT-directed planning permit were:
- The creation of the lot known as 95 Bambra Road. This lot involves a large area of the open and relatively flat land on the eastern side of this section of the Creek, extending south from Blazing Saddles towards the coast.
 - The lot known as 89A Bambra Road being vested in Council. This is a very narrow lot which essentially encompasses the eastern bank of this section of the Creek, in the nature of a narrow linear public open space.
 - This vesting was secured by a Section 173 Agreement which encumbers the new 95 Bambra Road lot (being Lot 3 PS431010).
- 7 In relation to the relevant requirements of this Section 173 Agreement, this is helpfully set out at [15] of the Council written submission, as follows:
- Lot 3 PS431010 is subject to a section 173 Agreement X409742J, as amended by instrument AB437838W.
- 15.1. The section 173 Agreement X409742J (amongst other things) prohibits further subdivision or the development of more than 1 dwelling, required an area of public open space along Painkalac Creek, to be vested in Council, establishes a building envelope and maximum building heights, requires landscaping to be established and maintained, prohibits the keeping of dogs and requires all stormwater runoff to be treated prior to discharge into Painkalac Creek.
- 15.2. The deed of amendment recorded in dealing AB437838W inserted an additional obligation, that “the ongoing implementation of the Conservation Management Plan endorsed under Permit 97/7281 shall be undertaken in accordance with the requirements of the Plan”.
- 8 While Ms Wood operates her business from Blazing Saddles property, she has historically agisted and grazed her horses on land at 95 Bambra Road, noting the finite amount of pasture on her own property. She has told us that she has a 100 year lease in this land. Until recently, a key part of the day-to-day operation of the Blazing Saddles horse riding business was being able to cross over an old wooden bridge located a little to the north of her property, pass through privately owned land at 101 Bambra Road, and so gain access to 95 Bambra Road.
- 9 However when the 101 Bambra Road property was recently sold, the new owner did not allow this arrangement to continue.
- 10 It follows that since then, with the day to day operation of her business, Ms Wood has been unable to utilise the existing wooden bridge for her horses to more directly get access to the 95 Bambra Road property. Instead the Blazing Saddles horses have had to be walked in a more divergent manner

around the relevant local street network, to get from the Wood property to the 95 Bambra Road grazing land.

- 11 This in turn has led Ms Wood to lodge a planning permit application for the use and development of a new bridge across the Creek, to enable her horses to directly cross the Creek and gain access from the Wood property to the 95 Bambra Road grazing property and vice-versa.
- 12 The new bridge would be located (from a north-south perspective) at roughly the mid point of the eastern boundary of the Wood property, which interfaces with the Creek.
- 13 We shall for convenience refer to the land and associated airspace where the bridge would be located as the ‘subject land’.
- 14 As it usefully captures some key points about the context and the proposal, we adopt the following text from Ms Wood’s written submission.

3. From around 1995 to 2018 I leased property on the east side of the Painkalac Creek comprising Lots 1, 2 and 3 of plan of subdivision 431010T (107, 101 and 95 Bambra road, Aireys Inlet respectively). These lots are collectively known as the “Painkalac Valley”. I kept my horses for Blazing Saddles on these 3 lots and used a bridge over the Painkalac Creek between 101 Bambra road and the Freehold Property to bring horses across to the Freehold Property where Blazing Saddles is operated and horse rides leave from.
4. In 2018 the landowner of Lots 1, 2 and 3 of plan of subdivision 431010T sold the properties to three separate owners. I subsequently entered into a 100 year lease agreement with the new owner of Lot 3 (95 Bambra road) for a majority part of that property to continue keeping my horses on that land (Leasehold Property). The sale meant that I could no longer use the old bridge. I currently have around 50 horses which reside on the Leasehold Property and have to be walked by myself and staff members along 1.5km of public roads to the Freehold Property.
5. The Application is for the construction and use of a livestock bridge and access ramps across the Painkalac Creek between the Freehold Property and Leasehold Property (Proposed Bridge).
6. The Proposed Bridge would cross Council-managed Crown Land on the west side of the creek (61A Bambra Road – Crown Allotment 15C, Parish of Angahook) and Council freehold land on the east side of the creek (89A Bambra road – Reserve 1 on Plan of Subdivision 431010T)....

- 15 We have set out below a helpful detailed description of the proposed bridge, taken from pages 13-16 of the Council Delegate Report:

The proposed bridge would have a width of 3.4 metres and a length of 21 metres. Access ramps either side of the bridge would give the structure a total span of approximately 30 metres. The bridge would have a steel frame, be surfaced with timber sleepers and have 1 metre

high timber safety rails on either side. The maximum ramp height would be on the western creek bank and be 1.3 metres above natural ground level.

The access either side of the bridge would be 2.8 metres wide and surfaced with a proprietary permeable surface stabilisation system. The track will be constructed 40mm above natural ground level and be surfaced with a 150mm deep layer of mulch. The access will be fenced either side of the bridge up to the Bimbadeen Drive and Bambra Road property boundaries with 1.2 metre high post and strand wire fencing with a 350mm gap below the lowest strand facilitate the movement of fauna. A gate will be provided at each end to restrict use and a 2.8 metre wide gateway provided through each end of the bridge access to maintain public access along both sides of the creek. A 250mm gap will be provided beneath each gate to facilitate the movement of fauna.

The proposed bridge and associated works will not involve the removal of any trees although some native ground flora species will be required to be removed as part of the development.

- 16 When in operation, the gates referred to in the Council's description would be swung open to form chutes that direct the horses onto the bridge. At all other times the gates would be closed and access along the banks of the Creek would be maintained.
- 17 An unusual feature of this permit application is the four different lots involved and the split zoning. To spell this out up-front, the subject land consists of the following lots which are zoned as set out below (moving from west to east across the proposed bridge location):
 - The Wood property at 115 Bimbadeen Drive which is zoned Rural Conservation Zone (RCZ) and extends further west beyond the western bank of the Creek.
 - The western bank of the creek, which is crown land managed by Council. This western bank is known as 61A Bambra Road, being Crown Allotments 15C and 2006 in the Parish of Angahook. This land is zoned Public Conservation and Resource Zone (PCRZ).
 - The eastern bank of the creek in the form of 89A Bambra Road, Aireys Inlet Res 1, PS431010, which is 'reserve' land vested in Council, zoned PCRZ.
 - 95 Bambra Road, Aireys Inlet Lot 3 PS431010, which we understand is privately owned land majority-leased by Ms Wood, zoned RCZ.
- 18 To avoid duplication, the main features of the RCZ are helpfully set out at [46-50] of the Council written submission and likewise with the RCRZ at [51-55]. There are numerous overlays affecting the subject land and they are helpfully discussed at [56-61] of that submission. A key one is the Environmental Significance Overlay Schedule 1. Also see [62-63] of that submission where the relevant Clause 52.17 native vegetation provisions

are explained. The discussion in the Council written submission over [46-63] is also useful in setting out the numerous permit triggers involved. Otherwise we rely on and refer to our summary of the relevant planning framework in the ‘Information’ section of these reasons.

Objections to Council, Council decision and VCAT hearing

- 19 In response to Ms Wood’s permit application, 42 public objections were lodged with Council and 18 statements of support. The objectors include the Airey’s Inlet and District Association (ADIA).
- 20 The application was referred to the Corangamite Catchment Management Authority (CCMA) as a recommending referral authority pursuant to the Environmental Significance Overlay Schedules 1 and 5 that affect the subject land. Likewise with respect to the Department of Environment, Land, Water and Planning (DELWP) as a determining referral authority vis-à-vis the native vegetation removal.
- 21 DEWLP did not object to the proposal, subject to conditions. The CCMA similarly did not object, subject to a permit note being put on any permit issued. The CCMA’s response comments including confirming that the proposed bridge involves a “soffit” (under-deck level) of 3.4 metres ADH (equivalent to the 1% AEP level) and a deck level of 4 metres AHD.
- 22 The permit application was internally referred to Council’s Environment officer, who did not object to the proposal.
- 23 The proposal was supported by the Council Delegate Planner. We are conscious that Mr Duncan’s submission to us included considerable emphasis on what he sees as shortcomings in the Delegate Report. However because this proceeding is a de novo (afresh) planning merits hearing rather than a ‘judicial review’ type of proceeding, our role does not include passing judgment on how well or otherwise the Delegate Planner assessed the proposal.
- 24 Council resolved to issue a Notice of Refusal to Grant a Permit (NOR). The NOR relies on two grounds, the essence of which are:
 - That the proposed use and development would be inconsistent with the purposes of the RCZ and PCRZ .
 - That the proposal would have an unacceptable environmental impact on water quality and aquatic habitats through contamination of the waterway, erosion and sedimentation which is contrary to the objectives of the Environmental Significance Overlay Schedule 1...”.
- 25 Ms Wood has sought the Tribunal’s review of the Council NOR. The hearing of this matter came before us over 30 June – 1 July 2021. In the course of the hearing, we heard submissions from the persons referred to in our table of information.

- 26 Due to the vagaries of Covid lockdown restrictions and associated VCAT restrictions on site inspections, it was impractical for us to carry out any site inspection after the hearing. However we were shown a very detailed range of photos and site materials at the hearing and the Tribunal already is somewhat familiar with this general locality.
- 27 The first part of our Reasons below deals with the legal issues arising, where the legal findings involved are those of SM Martin as a legal member. The balance of these Reasons are our joint findings about the key planning merits issues. Our overall finding is that there are no fatal legal issues for the proposal and that on the planning merits, the proposal is acceptable and deserving of a planning permit issuing.

LEGAL ISSUES

- 28 The following legal findings are made by SM Martin alone.
- 29 The legal issues arising during the hearing were:
- How to correctly apply the ‘table of uses’ in the PCRZ?
 - The correctness or otherwise of Council’s characterisation that the proposed structure would be used for the purpose of a form of ‘road’?
 - Whether the proposal is fatally inconsistent with the requirements of the *Crown Land Reserves Act 1978*?
 - Is there any fatal inconsistency with the Section 173 Agreement X409742J which affects the 95 Bambra Road property?
 - Whether it is legally necessary at this stage in the development process for the permit applicant to obtain ‘works on waterway’ approval from the CCMA?

Applying the table of uses in the PCRZ

- 30 All primary zoning controls in the Victorian Planning Schemes have the following feature – a system of tables showing what uses are as-of-right, permissible and prohibited. That is, the table of Section 1 uses are as-of-right, the table of Section 2 uses are permissible and subject to the grant of a permit, and the table of Section 3 uses are prohibited, wherein no permit could be issued for such a use.
- 31 For our purposes, the main features of this system of Section 1, 2 and 3 uses in the PCRZ are as follows:
- The use of ‘Road’ is a Section 1 use, but subject to a condition that essentially requires that the use must be conducted by or on behalf of a public land manager or equivalent public authority.
 - Also shown in Section 1 is ‘Any other use not in Section 2 or 3’, subject to the same condition as explained in the bullet point above.

- The Section 3 prohibited uses include “The use in Section 1 described as ‘Any other use not in Section 2 or 3’ – if the Section 1 condition is not met”.
- 32 Relying on my points set out below, I find that the correct application of the above provisions in the PCRZ is that:
- Any use shown in the first table as a Section 1 use, where there is an applicable condition which is met, remains a Section 1 use.
 - Any use shown in the first table as a Section 1 use, which does not meet the associated condition, tips over to then becoming a Section 2 permissible use.
 - Any use shown in the second table as a Section 2 use, which does not meet the associated condition, tips over to then become a Section 3 prohibited use.
 - Any use which is not expressly listed/shown in the Section 1, 2 and 3 tables in the PCRZ automatically becomes a prohibited use – if the Section 1 condition is not met.
- 33 This application makes sense and is appropriate for the PCRZ, in giving a public land manager or equivalent public authority a very wide discretion with which uses may potentially be conducted by or on behalf of same, on land zoned PCRZ. This ‘very wide discretion’ includes a public land manager or equivalent body having the capacity to seek permission for a wider range of uses than those expressly nominated in the Section 1, 2 and 3 use tables. This is all consistent with the purposes of the PCRZ.
- 34 It likewise makes sense and is appropriate with the operation of the PCRZ that a person other than a public land manager (or equivalent body), i.e. person acting in a private capacity, can only apply for a much more limited range of uses. Notably, it is logical for land zoned PCRZ that such a privately acting person:
- Who cannot satisfy a Section 1 applicable condition instead tips over to a Section 2 situation, where planning permission is needed for that intended use.
 - Simply cannot apply at all for any use which is not expressly listed in the Section 1, 2 and 3 use tables. That is, given the more sensitive nature of land zoned PCRZ, it is sensible that a privately acting person can only seek to carry out one of the uses expressly envisaged by the three use tables in the PCRZ.
- 35 Two other factors reinforce this finding. It is appropriate that I give some weight to Council supporting this approach. Also the approach I have set out above is the same as was adopted by the Tribunal in *John King & Ors v Colac-Otway SC* [2001] VCAT 2009, where the Tribunal concluded that:
- a. The use of the land for a Camping and caravan park, was a section 2 use in circumstances where the section 1 condition was not met.

- b. The use of land for an innominate use was prohibited as a use “not in section 1 or 2”.³

36 In summary, relying on my points above, I accept that here Council was correct in taking the view that where the associated condition of any Section 1 use in the PCRZ cannot be met by a privately acting person, the use tips over to becoming a Section 2 use.

Characterisation of the proposed bridge

37 It was a matter of dispute from a ‘use’ perspective how the proposed bridge structure should be correctly characterised vis-a-vis the PCRZ. That is, with the land on which the bridge structure would be located and the associated airspace, how should its intended use be properly described?

38 The permit application was put forward and Council assessed it on the basis that, particularly for the purposes of the PCRZ, the use of the intended bridge is properly characterised as a form of ‘Road’. Under the PCRZ this would constitute a Section 2 use, since the associated Section 1 condition cannot be met.

39 By contrast, the objectors argued that:

- The use of the proposed bridge structure cannot be correctly characterised as a form of ‘Road’, but should be seen as the subject land being used as a ‘bridge’.
- The PCRZ does not expressly list a ‘bridge’ as a use which is either a Section 1, 2 or 3 use.
- Accordingly, the proposed bridge for the purposes of the PCRZ constitutes an undefined (innominate) use, which is prohibited.

40 It follows that this is a critical part of the applicant’s whole case, since any finding by the Tribunal that the proposed bridge does not constitute a form of ‘road’ use would be a ‘knock out blow’ for the proposal.

41 There is no definition in the *Planning and Environment Act 1987 (PE Act)* or the Surf Coast Planning Scheme of a ‘bridge’.

42 However a ‘Road’ is defined under the PE Act as follows – “includes highway, street, lane, footway, square, court, alley or right of way, whether a thoroughfare or not and whether accessible to the public generally or not”.

43 For the following reasons, I accept that the proposed bridge is correctly characterised as a use of the subject land and associated airspace for the purpose of a form of ‘Road’.

44 Having made this finding, it follows that I accept that the proposed bridge is a Section 2 use in the PCRZ that Ms Wood can validly seek planning permission for.

³ See the discussion at [94-98].

- 45 In assessing how to correctly characterise a disputed use, *Cascone & Mario Vella v Whittlesea CC* (1994) 11 AATR 175 is authority that you assess the ‘real and substantial purpose’ of that use.
- 46 Also relevant is Section 23 of the *Interpretation of Legislation Act 1984*, which provides that (unless a contrary intention appears) a term used in a subordinate instrument (e.g. a Planning Scheme) has the same meaning as in the enabling enactment (e.g. the PE Act).
- 47 Adopting this approach, more in first principles, the following factors tell us that the use of ‘Road’ should for our purposes be given a wider interpretation, rather than a narrower one:
- The wording of the definition of ‘Road’ in the PE Act is inclusive, rather than exclusive.
 - That definition provides that a track or route can still constitute a ‘Road’, even if it not a thoroughfare and/or not generally accessible to the public.
- 48 At a more specific level, I rely on the following factors in finding that the real and substantial purpose of the proposed bridge would be its use as a form of ‘Road’:
- Bridges are a very common and important aspect of road systems.
 - Where a road needs to span an obstacle such as a creek or river, then the typical way to achieve this is with a road bridge.
 - Road systems are from time to time used in rural areas for animals to pass over them e.g. sheep being mustered along a country road or needing to cross a road to get to a new paddock.
 - The average person motoring along a road surely would in practice see him or herself as still ‘driving on the road’, when his or her car drives across a limited size bridge on that road. For example, if someone rang you in your car (hands-free) when you are driving across a bridge such as this on a road, surely you would respond ‘I am on the road’ (rather than ‘I am on the bridge’).
- 49 In terms of the intended use of the road by Blazing Saddles for horse riding, it is inconsequential that the bridge would be merely used intermittently during the day rather than used more continuously, given the broad definition of ‘Road’⁴. I also see it as unremarkable that the bridge would be primarily used for horses to be walked over it – the definition of ‘Road’ does not specify distinguish between human versus non-human use of ‘roads’.
- 50 It also reinforces the characterisation of ‘Road’ that there would be formal tracks and access ramps leading up to either side of the proposed bridge. It

⁴ Noting that the definition of ‘Road’ provides that it does not need to be a throughfare, nor does it have to be accessible to the general public.

is not as if there would be some vague, unmade track on either side of the intended bridge. Compare this to the Tribunal’s finding in *DELWP v Yarra Ranges SC (Red Dot)* [2019] VCAT 323 that the vehicle access route which the permit applicant sought to rely upon did not constitute a ‘road’, because such access over crown land would be unlawful. This DELWP decision went on to be upheld by the Victorian Supreme Court and then Court of Appeal – see *Gray v Minister for Energy, Environment & Climate Change* [2020] VSCA 121.

Is the proposal inconsistent with the Section 173 Agreement?

51 As helpfully summarised at page 9 of the Council Delegate Report, in relation to the land at 95 Bambra Road on the eastern side of the Creek, the abovementioned Section 173 Agreement requires:

- That no more than one dwelling be constructed on each relevant lot.
- That no further subdivision occur.
- That no building occur outside of the approved building envelopes.

52 With this last bullet point, more particularly, Clause 4.5 of the Section 173 Agreement states that “No building shall be constructed outside the building envelope”.

53 There was some debate at the hearing whether the proposed post and wire fencing/gate on the eastern side of the intended bridge (falling within the 95 Bembra Road lot) would breach this third ‘no building outside of the approved building envelope’ requirement.

54 For the following reasons, with the intended construction of the eastern side of the bridge, I find the proposed installation of the relevant post and wire fencing and gate within the 95 Bambra Road lot to be consistent with the Section 173 Agreement. Accordingly, I am satisfied that the existence of the Section 173 Agreement (affecting the 95 Bambra Road lot) is no bar to the potential grant of a permit for the intended bridge.

55 On first principles, I note that the Supreme Court decision of *Sixty-Fifth Eternity Pty Ltd v Boroondara CC* (VCAT Ref. P2265/2007) is authority that a permit can still strictly speaking be issued, despite the permit clearly being in breach of a Section 173 Agreement⁵. However that decision also indicates that Section 173 Agreements are there for a reason and that real caution should be exercised by the planning decision maker, before approving a permit at odds with a Section 173 Agreement.

56 Also on first principles, it is self-evident that features like a gate or fence are much more discrete and transparent, compared to what the ordinary person would regard as a ‘building’. On this basis alone, I consider that it was not the intent of the draftspersons of Clause 4.5 of the Section 173

⁵ See [21-22] of that decision.

Agreement that the term ‘building’ be interpreted so broadly as to affect mere ‘post and wire fencing’ and/or ‘gates’.

- 57 However even if I was shown to have erred with my conclusion just set out, I make the following point in the alternative.
- 58 If I was to accept the submissions of the objectors in a literal way, then with any subdivision permit across Victorian which features a building envelope, it would be unlawful for the permit holder to construct for example a fence, gate or a letter box outside of the building envelope. This is clearly a nonsensical proposition, which flies in the face of the practical reality that lots with building envelopes typically still feature boundary fencing for demarcation and security reasons. Likewise with gates and post boxes on their front boundaries.
- 59 For the removal of any doubt, it is significant with this ‘Section 173 Agreement’ issue that the proposed eastern access ramp would not extend into the 95 Bambra Road land. Rather, the application plans make it clear that the only proposed 95 Bambra Road works are ‘post and wire’ style fencing and a gate.
- 60 Also for the removal of any doubt, I consider the post and wire fencing and gate proposed on the 95 Bambra Road lot to be consistent with the (as amended) Section 173 Agreement ongoing requirement to implement the Conservation Management Plan. The Conservation Management Plan requires and calls for the construction of both temporary and permanent fences outside the building envelopes. It would seem contrary to the intent of implementing this plan if the Section 173 agreement in respect to ‘buildings’ was to prevent such implementation.
- 61 Further I note that the construction of the bridge would not involve any tree removal- simply the very limited disturbance of petite existing vegetation. The intended ‘post and wire’ fencing/gate will create minimal disturbance to the local environment and provides at least 250mm ground level clearance for fauna to pass underneath.
- 62 In summary, where the objectors were urging me to find that the proposed fencing would breach the Section 173 Agreement, I consider this submission to be flawed and unconvincing.

Is the CCMA ‘works on water’ approval or any Council ‘land manager/owner’ approval a pre-condition to a planning permit issuing for the proposal?

- 63 By way of context, the CCMA has confirmed in writing that it has no objection to this planning permit application. However the CCMA has not at this stage itself granted any ‘works on waterway’ approval and the objectors argued this was a bar to any planning permit issuing.
- 64 I consider this line of objection to be an over-reach and unpersuasive. With the operation of the Victorian planning system, it is very common for

planning permits to issue, on the basis that the relevant project will still need permissions from other authorities or under other approval regimes. An obvious one is that many projects given a planning permit will then need a building permit to be obtained.

- 65 With one proviso, it would be unworkable and our planning system would ‘grind to a halt’ if every single associated permission needed to be obtained, as a condition-precedent to the granting of a planning permit. All things being equal, it is usually reasonable for planning permit applicants to be able to obtain their necessary planning permit, before going to the frequently substantial time and expense of obtaining any other related/necessary approvals from other authorities.
- 66 I have further below dealt with the same type of issue, in terms of the proposal needing a lease or licence from Surf Coast SC in its capacity as manager of the relevant crown land, for the purposes of the *Crown Land Reserves Act 1978* (CLR Act). Suffice to say that in this discussion below, I likewise find that it is not a pre-condition to the grant of a planning permit for such a lease or licence to be granted under that Act.
- 67 I would also make the same finding:
- Where Council has had the title of the 89A Bambra Road, Aireys Inlet property vested in it and hence Council (in its capacity as the owner of this land) needs to provide ‘landlord consent’ for the proposed construction of the bridge. That is, such ‘landlord approval’ is not a condition-precedent to the granting of a planning permit.
 - If it was another statutory authority again, rather than Council, that was required to grant either ‘landlord’ approval or a lease or licence under the CLR Act.
- 68 The abovementioned proviso is that I acknowledge there to be a line of Tribunal and Court decisions about the concept of ‘futility’, where the planning merits of a project are opposed on the basis that the prospects of obtaining a necessary associated permission from an authority or third party is improbable. However there is no evidence before me that the CCMA has any strong bias or disinclination against later potentially granting a ‘works on waterway’ approval for the proposed bridge – this is simply speculation at this stage. I would make the same comment about Surf Coast SC in its capacity as title owner of any relevant land or as manager of crown land under the CLR Act.

Is the proposal prohibited due to its inconsistency with the purpose of the reservation of the relevant crown land?

Crown land reservation documents and *Royal Park* decision

- 69 It is common ground that the western creek bank area that the proposed bridge crosses over is crown land, where Surf Coast Shire Council is the designated manager of same (as discussed above).

- 70 The Delegate Report at pages 14 makes the statement that “None of the Crown Land is designated as a ‘Reserve’, so the use is not considered to be inconsistent with the Crown Land Reserves Act”.
- 71 However in his written submission at [9.2], Mr Duncan states that “The “Painkalac Creek Water Frontage” reserve on the west side of the creek appears to be a permanent reserve under the Crown Lands (Reserves) Act that was Gazetted in 1981 (Gaz. 88-1981). Referral correspondence from DELWP (29/4/20) refers to “the ‘public purposes’ reservation of the land” apparently confirming this status.
- 72 On this basis, the objectors urged the Tribunal to find that the granting of a permit for the proposed bridge would be unlawful, as this would be contrary to the requirements of the CLR Act.
- 73 Given the on-going uncertainty about this issue even by the end of the hearing, I granted leave for follow up written submissions to be made on it and I have taken all of same into account. Notably I have reviewed the follow up submission by Mr Duncan, plus the follow up letter dated 6 July 2021 by the Council advocate Mr Shrimpton that provided important background information.
- 74 I shall first provide some context on this issue, such as the leading *Royal Park* decision, then set out my findings.
- 75 The starting point is Section 46 of the PE Act, which relevantly provides as follows:
- (1) Without limiting the operation of section 6, a planning scheme may regulate or prohibit the use or development of land which is permanently or temporarily reserved for any purpose under the *Crown Land (Reserves) Act 1978*.
 - (2) If a provision of a planning scheme is expressed or purports to deal with land that has been permanently reserved for any purpose under the *Crown Land (Reserves) Act 1978* or any part of that land in a manner which is inconsistent with the purpose of the reservation, the provision does not take effect until the reservation of that land or part is revoked by or pursuant to an Act of Parliament.
- 76 At a glance, one might distinguish Section 46 from the facts in question here, as the Tribunal here needs to determine whether or not to grant a planning permit (rather than whether or not to approve a planning scheme provision).
- 77 However, on a broader view, a planning permit can only issue when there are relevant planning scheme provisions which facilitate this i.e. there is still a nexus. Following this broader view, a planning permit can only issue if the use approved by that permit is consistent with the ‘purpose of the reservation’ of any relevant crown land which has been formally reserved under the CLR Act.

- 78 This broader view was adopted by the Victorian Supreme Court in *Royal Park Protection Group Inc v Urban Camp Melbourne Co-operative Ltd* [1998] VSC 161. As usefully summarised at [16] of Mr Shrimpton’s 16 July 2021 letter, this Royal Park decision can be summarised as establishing the following principles:
- 16.1 A permit purporting to authorise a use inconsistent with the Crown reservation has no effect unless accompanied by an approval of use under the Crown Land Reserves (Act) 1978.
 - 16.2 The responsible authority (or on review, the Tribunal) does not have power to grant a planning permit to authorise a use inconsistent with the purpose of a Crown reservation.
 - 16.3 The question whether the use for which the permit is sought is consistent with the purpose of the reservation is a question of fact.
- 79 The facts of the *Royal Park* case are interesting – the purpose of the reservation of the subject crown land was for ‘public park and offices and conveniences connected to such park’. The proposed use was described by the Court as an ‘overnight hostel’.
- 80 At [62] of the decision, the Court well captures the point in question as follows – “What was in dispute was whether a use which amounted to a hostel, in which people could sleep overnight, had no or insufficient connection to the public park so as to meet the description of the use in the crown reservation”.
- 81 The advocate for the Royal Park Protection Group Inc argued that the use of hostel accommodation could not be seen as ancillary to Royal Park, with that advocate innovatively contending that “Sleeping of its nature prevents the very purposes of which the Park is reserved”.
- 82 The Court ultimately at [69-74] upheld the Tribunal’s earlier finding that the use of hostel accommodation was ‘ancillary’ to the aforementioned purpose of the particular crown reservation for Royal Park. At [69] the Court indicated that in terms of how to best describe the necessary link between the use being approved by the permit and the purpose of the crown reservation, it preferred the term ‘connected’ to ‘ancillary’.

Finding of Tribunal

- 83 Returning to the facts in question here, some basic facts set out at page 2 of the 16 July 2021 letter are straightforward:
- The relevant Government Gazette is the Gazette of 16 June 1888 – credit to Mr Shrimpton that he sourced and provided us with a copy of same.
 - The relevant more current document is the ‘Department of Sustainability and Environment, Committee of Management – Painkalac Creek

Frontage Reserve, 27.8.09), DES File Ref:0512152 (Rs5369), otherwise known as the ‘SCS COM Appointment Certificate’.

- That Appointment Certificate confirms the role of Surf Coast SC as the Committee of Management for the reserved crown shown in ‘red’ on the attached plan LEGL./04-248, where this plan (with my emphasis) includes the following explanatory words for that ‘red shaded area’ – TOTAL AREA OF PAINKALAC CREEK 12.2 ha INCLUDES C.A. 2 OF A, C.A. 2004 (SEE GP 1568-A) & C.A. 2006 (SEE GP 1568) AND C.A.’s 15B & 15C PERMANENTLY RESERVED FOR PUBLIC PURPOSES Gaz 1888 Page 1981’.
- The text which I have underlined matches up with the description of the crown land for the western bank of the creek on the subject land i.e. the land known as 61A Bambra Road.

84 Applying these key aspects of the case before me to the legal principles coming out of the *Royal Park* decision, we come down to the following points:

- We know that the Painkalac Creek area as shown red on the accompanying plan in the SCS COM Appointment Certificate is reserved crown land under the CLR Act (including the western bank area).
- With reference to that Appointment Certificate and the Government Gazette of 16 June 1888, the purpose of the reservation is ‘for public purposes’.
- The ‘sixty four dollar question’ then becomes (as a finding of fact) whether there is a sufficient connection between this reserved purpose of ‘for public purposes’ and the potential granting of a planning permit for the use of a form of ‘road’ on the subject land.

85 As a preliminary finding, I endorse the submission at [20.2] of the Harwood Andrews 16 July 2021 letter that the *Royal Park* decision is authority that a more liberal (rather than a strict) approach should be taken to assessing whether a proposed planning use has sufficient connection to the purpose of the reservation. That is, it is self-evident that the Court took a more liberal approach to this assessment exercise in finding that the use of an ‘overnight hostel’ had a sufficient connection to the purpose for the Royal Park reservation of ‘public park and offices and conveniences connected to such park’.

86 Utilising this more liberal approach, I find that there is a sufficient connection between the potential use of a ‘road’ on the subject land and the purpose of this reservation of “for public purposes”.

87 I rely here on the inherently broad nature of the words ‘for public purposes’ and on the wider employment and tourism benefits of the Blazing Saddles horse riding business in very tourism-focused coastal towns like Aireys

Inlet and Fairhaven. On this latter point, I accept the submissions of Ms Wood that her business generates local employment opportunities and provides another holiday activity for families holidaying in this coastal area. Ms Wood's written submission confirms that she has operated her business for about 30 years and currently her business runs about 50 horses. Not just Ms Wood but members of the public who have paid for a Blazing Saddles horse ride will benefit from the use of the proposed form of road on the subject land. The ability to use the proposed form of road to cross the creek, rather than horses needing to be walked in a divergent route along the local road network, also has road safety benefits for riders and members of the public driving on these local roads. These are tangible broader benefits of a more public nature.

- 88 By way of contrast, it would have been a quite different assessment exercise if for example the use of a road was proposed on this crown land purely for the benefit of a private residential landowner. I acknowledge in this scenario that it would be much more challenging to see a 'public purpose' connection and benefit, although ultimately each case turns on its own facts.
- 89 My findings in the two paragraphs above are consistent with the following aspects of the Creek. The photos shown to the Tribunal and associated discussion make it clear that further downstream along the Creek, there are private jetties and (at least pre Covid) a canoe hire business operating from the side of the Creek. These jetties/this business are presumably subject to the same CLR Act controls, yet the reality is that they are there. This reflects the situation where this section of the Creek runs through the edge of an established coastal urban area, not pristine isolated wilderness⁶.
- 90 In summary, with reference to the relevant crown reservation documents and the *Royal Park* decision, I am satisfied that the proposed use of a form of 'road' is consistent with the 'for public purposes' designated purpose of the reservation of the Creek crown land.
- 91 For the removal of any doubt, I confirm that:
- it has been part of my role to resolve whether a planning permit could validly issue for the proposal; but
 - it is outside of the scope of these planning proceedings for the Tribunal to be considering whether Surf Coast SC in its capacity as manager of the crown land in question can and/or should be granting a lease or licence to Ms Wood under the CLR Act. That is a separate issue, more in the nature of a property management situation, to be resolved on another day.
- 92 Where Mr Duncan in his follow up written submission seeks to inter-twine the 'planning merits' of the proposal and the merits of whether any lease or

⁶ Such as say the upstream Gordon River in Tasmania, which is part of a World Heritage Area.

licence can and/or should be granted under the CLR Act, with respect, I consider that:

- Such inter-twining is an over-reach and mis-guided.
- It is a legitimate and valid approach for the necessary planning approval to potentially be granted for the proposal, on the basis that any necessary CLR Act lease or licence can be dealt with at a later time.

93 In summary, having made the finding that I have summarised three paragraphs above, I am clear that the CLR Act does not impose any prohibition on the Tribunal potentially granting planning permission for the proposal, with any on-going issues under that Act to be separately resolved on another day. I note that this was likewise the position that Council took at the hearing i.e. that there was no CLR Act impediment to a planning permit issuing.

PLANNING MERITS FINDINGS

94 With SM Martin having found that there is no legal impediment to our potentially approving the proposal, we now turn to our findings on the planning merits. We see three key planning merits issues to be addressed, being:

- Whether the proposal involves any fatal inconsistency with the purposes of the RCZ and PCRZ.
- Whether the proposal would have any unacceptable environmental impact on water quality and aquatic habitats e.g. through contamination of the waterway, erosion and sedimentation?
- Whether the proposal has any fatal flaws when assessed against the relevant overlay controls and any other concerns of the objectors?

95 We shall now tackle each of these three key issues.

Tribunal's findings on RCA and PCRZ

96 The Council's first ground of refusal relates to the purposes of the PCRZ and the RCZ, most particularly those of the PCRZ about:

- Protecting and conserving the natural environment and natural processes; and
- Providing facilities which assist in public education and interpretation of the natural environment with minimal degradation of the natural environment or natural processes.

97 The purposes of the RCZ relied on by the Council are similarly expressed, though as the Council notes, the RCA calls for an enhancement of the natural environment not just its conservation as well as referring to fauna habitat.

- 98 While noting such purposes, ultimately the Council’s first ground of refusal is directed to what it says will be an unacceptable impact on the natural values of the landscape. The Council contends that the bridge will ‘represent a break in the landscape – a metal dash across the creek’. It is submitted that the elevation of a metal structure will be pronounced because:
- Of the elevated ramps at each end; and
 - Introduces a raised structure in what is a relatively flat and open part of the landscape.
- 99 It is contended that lowering the bridge is not possible given its base is already at the 1% AEP flood level, as advised by the CMMA.
- 100 Submissions for the various respondents raise similar reasons as to why they say the bridge should not be permitted. It is contended that while the bridge would have a visually unacceptable elevation, its proposed height was nevertheless too low and would interfere with the enjoyment of recreational paddlers on the Creek. They contend such interference on the use of the Creek, as well as a potential future walking trail along its bank would be counter to the purposes of the PRCZ.
- 101 In respect to impacts on the natural environment, whilst Council acknowledges that the bridge has been located to minimise native vegetation losses, it is critical of the fact that some sub-storey vegetation will be lost.
- 102 Finally, the Council asserts that the bridge would serve no public education or interpretation function. It says that its purpose is one of ‘logistical convenience’, an ‘agricultural structure’ that would facilitate movement of horses between paddocks.
- 103 Again, we note that the respondents refer to similar grounds.
- 104 For the following reasons, we are not persuaded that these grounds can be sustained or that the proposed bridge is contrary to the relevant purposes of the PCRZ or RCZ.
- 105 We agree with the Council submissions, citing the Practitioners Guide to Victorian Planning Schemes at paragraph 101 of its written submissions that:
- Zones are the primary tool for guiding the fair and orderly use and development of land. A zone sets expectations about what land use and development activity is or may be acceptable.
- [Our emphasis]
- 106 It is apparent to us that the main purposes of the application of the PCRZ here are directed to the Creek and its environment. This is apparent from the fact that the extent of this zone follows the water course and not the wider land. In respect to the purposes of the PCRZ we observe that:

- The landscape values in and around the banks and immediate environs of the Creek are of open, undulating paddocks that are clearly the flood plain of the Creek that have for some time been used for agricultural purposes.
- Apart from the Creek environs, public views of the Creek are limited to glimpses from Bambra Road to the east. The nearest such vista (around the intersection of McConachy Road) is some 300 metres from the eastern end of the bridge. At this distance and angle a full view of the bridge's span would not be possible and its perspective in the landscape considerably reduced by the distance and the fact that the visible elements of the bridge would in fact be wood and not the underlying metal substructure. As viewed against the backdrop of rising wooded hills to the west, views of the bridge from along Bambra Road would be of limited perspective and not impact on an appreciation of the open farm like paddocks or the wooded hills behind.
- In any event, what views may be gained of the bridge would be seen in the context not of some pristine floodplain environment. Rather the bridge would sit within the immediate context of paddocks and clearly agricultural uses. As a working element of a farming landscape, the bridge would not look out of place.
- For similar reasons, we do not accept that there will be any unreasonably jarring views of the bridge within the environs of the Creek, be it from some future walking trail said by the respondents to be under consideration, or from recreational paddlers on the Creek itself. One the west bank of the Creek will be riparian vegetation through which one can see paddocks and houses. On the east bank is the open paddocks of the Creeks flood plain. While visible from the Creek, neither of these views will unduly interfered or prevent an appreciation of the wider landscape values attributed to the Painkalac Valley.
- As Ms Wood has highlighted in her submissions, the bridge's super structure (i.e. floor, rails and posts) will be constructed from recycled timber. Its is only the substructure that is metal. To contend that this is a metal bridge is in our view a mis-apprehension of its design and composition. We agree with Ms Wood that such a composition will blend into its immediate environment as well as the wider landscape, the more so when proposed revegetation around the bridge matures.

107 In respect to the contentions about environmental impacts, as raised in respect to the zone purposes, we observe that:

- The bridge's location has been selected to avoid the loss of scattered trees, which of themselves contribute to the landscape values but are also valuable habitat.

- The loss of some native sub-storey and grasses in the area of the ramps also includes weed species and requires a very modest 0.0138 habitat hectares and requires a similarly modest 0.004 general habit units for offset. Ms Wood has also noted the intention to replant and improve riparian flora around the bridge, as she has completed elsewhere on her property (and as demonstrated by the photographs tendered in the course of the hearing).

108 Further and to be clear to all, we also note the CCMA raises no objection to the bridge. It notes that the bridge levels are clear of the 1% AEP flood level, and neither the ramps or bridge structure will interfere with flow or of the natural functions of the Creek which the CCMA is charged with managing.

109 For these reasons, we conclude that the proposed bridge is not inconsistent with those purposes of the PCRA and RCZ that seek to protect, conserve or enhance the environmental, landscape or natural processes or functions of the subject land.

Tribunal's findings on 'environmental impacts of proposal'

110 The Council's second ground of refusal relates to the EOS1, particularly about water contamination (principally entry of horse or manure), erosion and sedimentation risks, and the associated impacts on water quality and aquatic habitats. It submits that the bridge would be inconsistent with the objectives of ESO1 that seek to:

- Protect terrestrial and aquatic habitat for native flora and fauna; [minimal footprint of the approach pads and very limited impact from the additional fencing, all of which is designed to be fauna friendly consistent with the ESOs]
- Protect water quality, including the prevention of water pollution, accelerated erosion, and siltation or sedimentation;
- Protect and enhance native vegetation within riparian zones;
- Facilitate weed eradication; and
- Filtering of nutrients and other pollutants.

111 The reasons for this inconsistency are said by the Council to be because:

- There will be some loss of riparian vegetation, albeit as conceded only a small amount, in circumstances where an alternative arrangement of walking the horses around the public roads can equally be used to transfer them to the paddock at 109 Bambra Road.
- The works for footing and filling to form the ramps will occur within 30 metres of the Creek, where the ESO1 calls for adequate buffers to be retained from, works causing soil disturbance in order to protect water quality and habitat.

- The filling and works may result in erosion, siltation and sedimentation that will impact on the Creek's water quality.
- Excrement from horses crossing the bridge (whether on the bridge or on the approach track) will be a nutrient load on the Creek.
- The movement of horses may also encourage the movement of weeds into and across the Creek reserve as opposed to the current conditions where horses are fenced off from this environment.

112 The respondents raise similar grounds in their response to environmental concerns raised against the bridge. They also contend that the bridge will disrupt aquatic and terrestrial fauna movement along the Creek corridor, referring to policies that seek to avoid fragmentation of habitat at clause 12.01-1S amongst others. It is asserted that:

...the proposal has the potential to sever the wildlife corridor along the Painkalac Creek which accommodates movement of both the Rufous Bristlebird and Swamp Antechinus [the latter asserted to have been found on the subject land] which are species under the *Flora and Fauna Guarantee Act 1988*.

113 The basis for such claims appears to be the area of disturbance to form the ramps to the bridge as well as the fact that during transfer of the horses, swing gates will be used to form a chute to direct the horses onto the bridge and so close of access along the banks of the Creek.

114 The respondents also submit that Ms Wood has not provided any credible evidence that the proposal will not have an adverse impacts on the health of the Creek. The same can equally be said of the respondents and for that matter, the Council's own grounds. We have before us assertions and expressions of concerns about a range of environmental impacts and though genuinely held, they remain thus.

115 Some we have dealt with earlier and we rely on those findings. Ms Wood's response is that:

- The gates for the bridge will only be open during the passage of horses and at all other times would be closed.
- All the fencing is fauna habitat friendly and in fact complies with exemptions provided for same under the ESO1 and EOS5.
- As a general rule, horses do not defecate while walking but in the event that manure falls onto the bridge or approaches, it can be cleaned up.
- The ramps and surrounding areas of works will be revegetated with native species.
- The bridge footings have been designed to be low impact and minimise the disturbance of soil.

- 116 We accept these responses as reasonable reasons to conclude that the construction and use of the bridge can be managed to have minimal impact if any on the Creek's water quality and habitat values.
- 117 Further, we accept Ms Wood's observations that the ability to transfer horses and graze on a larger property will assist her to maintain ground cover on the Blazing Saddles land as well as the leased land. The ability to manage ground cover with feeding needs is a well recognised approach to increasing the capacity of pasture to capture and use nutrients before they enter waterways. In our view the benefit of facilitating such pasture management far outweighs any purported risk for release of manure into the Creek from the bridge.
- 118 Some respondents believe the shadow cast from the bridge may change water temperatures and shadowing of waters may impact aquatic fauna behaviour. We find such potential impacts from the bridge difficult to accept when one considers that riparian vegetation along the west bank of the Creek would have similar over shadowing and cooling affects. It is well recognised that slow moving water bodies such as the Creek,⁷ are subject to vertical stratification and lateral variations of temperature and quality metrics such as oxygen, salinity and nutrient concentrations. In any event such assertions were not founded on any evidence or fact.
- 119 We conclude that the design of the bridge and its proposed construction using low impacts techniques, avoidance of significant native vegetation and use of low impact fauna friendly fencing, when coupled with appropriate management, does not present a material let alone a serious risk of harm to the environmental, the Creeks water quality, riparian and habitat values. Permitting the bridge would therefore not be contrary to the purposes of the ESO 1 and 5.

Tribunal's findings on other relevant issues

- 120 In addition to the above matters, AIDA submits that:

The Painkalac creek (*sic*) is known to be commonly used by kayakers and paddle boarders, as well as being enjoyed by those walking along its banks. Contrary to Council's assessment, AIDA submits that the height of the bridge at 1.63m will not provide sufficient clearance for both kayakers and paddle boarders to easily pass under safely. Further, the proposed length of the bridge at approximately 30m impedes access along the banks of the creek utilised by walkers.

....

.... the proposal will compromise free public enjoyment of the Painkalac Creek and its environs by obstructing access through and around the waterway. In doing so it is inconsistent with the purposes

⁷ A feature of the Creek referred to by the respondents, particularly when the waterway mouth is closed by sandbanks at Aireys Inlet.

for which the Municipal Reserve has been vested in Council and with key provisions [of the PCRZ and clause 02.03-3]

- 121 For reasons that we have set out already, we do not accept these submissions and agree with Council's view. To reiterate, the manner of the bridges construction and its proposed operation will not prevent public access along the banks of the Creek - if such access is to be provided by future trails. The short time for transfer of the horses may be perceived as a possible inconvenience by some but others may well enjoy the interaction. Regardless the use of the bridge is for very short periods is not a fetter on public use.
- 122 As to the matter of the clearance under the bridge by recreational paddlers, it would be our observation that the plans show sufficient clearance for kayakers and for those who may be using stand-up paddle boards. That some may have their skills tested by the need to kneel to pass below for taller paddlers is not so insurmountable as to be put forward as unacceptably compromising free public enjoyment of the Creek. In our view, such a conclusion is an overreach of the extent of any perceived impact on the enjoyment of those undertaking such activity on the Creek.

CONCLUSION

- 123 For the reasons set out above, we have set aside Council's Notice of Refusal to Grant a Permit and made orders above directing that a permit issue for the proposal, subject to the final version of the permit conditions set out in the Appendix to this decision.
- 124 To avoid any doubt as to our directions for the permit conditions, we record here that the draft 'without prejudice' conditions from the Council included a requirement to obtain additional approvals before the works and development commence. These encompass:
- A licence/lease agreement for the proposal over Council managed Crown Land and Council Reserve from the responsible authority.
 - A works on waterways permit from the Corangamite Catchment Management Authority under the *Water Act 1989*.
 - Approval or exemption from the Federal Government under the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.
- 125 We do not dispute that these additional permissions are required for the works, development and indeed the use - or a determination that permission is not required in the case of the EPBC Act. It self-evident that these jurisdictions may be in play and the permissions required under the different legislative regimes may be required before commencement of any such works. However in the absence of an express provision or requirement to do so, we think it wrong to tie these approvals into a planning permit and confuse the jurisdiction of the planning permission

with these additional requirements. We therefore have not included them as a permit condition. They can be drawn to the permit holder's attention through a note to the permit, which the Tribunal as a matter of practice does not set out.

- 126 Other than this matter, we have imposed conditions that generally accord with those provided in the draft from the Council and with our assessment of this proposal and associated findings.

Philip Martin
Senior Member

Ian Potts
Senior Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO:	19/0409
LAND:	115 Bimbadeen Drive FAIRHAVEN and 61A, 89A and 95 Bambra Road, AIREYS INLET 3231

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Buildings and works for the construction of a bridge and its use as a road for the management of livestock.
- Vegetation removal.

CONDITIONS:

Amended plans required for endorsement

- 1 Before the commencement of the development, amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans submitted with the application but modified to show:
 - (a) a schedule of external materials, finishes and colours incorporating colour samples. External colours should be natural and earthy to assist in visually blending the bridge with the surrounding natural landscape;
 - (b) details of the dimensions, colours, content and durable finish of signage to be placed adjacent to the access gates to the river bank to identify public access;
 - (c) details of the engineering or vegetation treatment of the sides of the compacted backfill of the bridge access ramps to ensure that these areas are effectively stabilised;
 - (d) A panel or guard on each edge of the bridge, with the aim of minimising any horse manure falling into the creek below;
 - (e) An accompanying basic 'Bridge manure management plan', dealing with how any horse manure dropped on the bridge will be dealt with.

Restriction of access

- 2 The livestock, pedestrians and maintenance vehicles associated with the trail riding use at 115 Bimbadeen Drive and grazing land at 95 Bambra

Road must not enter any Council managed Crown Land or Council Reserve beyond the designated area shown on the endorsed plan unless otherwise consented to by the responsible authority and to the satisfaction of the responsible authority.

- 3 The bridge access gates must remain in a closed position as shown on the endorsed plans at all times except when the bridge is being actively used for the purpose of the movement of livestock, pedestrians, farm or maintenance vehicles to the satisfaction of the responsible authority.
- 4 Public access to the reserve track must be maintained at all other times to provide public access along the Council managed Crown Land or Council Reserve to the satisfaction of the responsible authority.

Maintenance of fencing

- 5 All fencing of the bridge access is to be maintained in a livestock proof condition that does not restrict native fauna access in accordance with the endorsed plans to the satisfaction of the responsible authority.

Maintenance of access

- 6 The soil compaction and erosion measures on the bridge access as shown on the endorsed plans shall be maintained to the satisfaction of the responsible authority.
- 7 The bridge access is to be maintained in a weed free condition to the satisfaction of the responsible authority.

DEPARTMENT OF ENVIRONMENT LAND WATER AND PLANNING

Notification of permit conditions

- 8 Before works start, the permit holder must advise all persons undertaking the vegetation removal or works on site of all relevant permit conditions and associated statutory requirements or approvals.

Construction management and amended plans

- 9 Before works start, a plan to the satisfaction of the responsible authority identifying the environmental management measures to be implemented during works must be submitted to and approved by the responsible authority and the Department of Environment, Land, Water and Planning. When approved, the plan will be endorsed and will form part of this permit. All works constructed or carried out must be in accordance with the endorsed plan. The plan must include:
 - (a) an amended site plan, drawn to scale with dimensions and geo-references (such as VicGrid94 co-ordinates), that clearly shows:
 - i the location and identification of the land affected by this permit, including standard parcel identifiers for freehold land.

- ii construction vehicle and machinery access points, and the location of any necessary material laydown areas or stockpile sites.
- (b) a detailed description of the measures to be implemented to protect the native vegetation to be retained during construction works, and the person/s responsible for implementation and compliance. These measures must include the erection of a native vegetation protection fence around all native vegetation to be retained on site, to the satisfaction of the responsible authority, including the tree protection zones of all native trees to be retained. All tree protection zones must comply with AS 4970-2009 Protection of Trees on Development Sites, to the satisfaction of the responsible authority.

Protection of retained vegetation

- 10 Except with the written consent of the responsible authority, within the area of native vegetation to be retained and any tree or vegetation protection zone associated with the permitted use and development, the following is prohibited:
- (a) vehicular or pedestrian access
 - (b) trenching or soil excavation
 - (c) storage or dumping of any soils, materials, equipment, vehicles, machinery or waste products
 - (d) any other actions or activities that may result in adverse impacts to retained native vegetation.
- 11 To protect the environmental values adjacent to the works area, at the completion of works the applicant must establish a vegetated buffer of native species at least ten (10) metres wide, along each side of the fenced access path where it traverses the Environmental Significance Overlays. The revegetation is to be dominated by ground cover and 'filtering' species such as native tussock grasses. Species must be indigenous to the relevant Ecological Vegetation Class. Species selection and establishment of the buffer must be to the satisfaction of the public land manager.
- 12 Any fill material brought to and used at the site must be certified free of weed seeds and pathogens.

Native vegetation removal and offsets

- 13 The native vegetation permitted to be removed, destroyed or lopped under this permit is 0.0138 hectares of native vegetation described in Native Vegetation Removal Report ID: 365-20200428-004.
- 14 No native trees are to be removed or damaged as part of the works.
- 15 To offset the removal of 0.0138 hectares of native vegetation, the permit holder must secure the following native vegetation offset in accordance

with Guidelines for the removal, destruction or lopping of native vegetation (DELWP 2017):

- (a) A general offset of 0.004 general habitat units:
 - i located within the Corangamite Catchment Management boundary or Surf Coast Shire Council municipal area
 - ii with a minimum strategic biodiversity value of at least 0.368.
- 16 Before any native vegetation is removed, evidence that the required offset has been secured must be provided to the satisfaction of the responsible authority. This evidence must be one or both of the following:
 - (a) an established first party offset site including a security agreement signed by both parties, and a management plan detailing the 10-year management actions and ongoing management of the site, and/or
 - (b) credit extract(s) allocated to the permit from the Native Vegetation Credit Register.
- 17 A copy of the offset evidence will be endorsed by the responsible authority and form part of this permit. Within 30 days of endorsement of the offset evidence, the permit holder must provide a copy of the endorsed offset evidence to the Department of Environment, land, Water and Planning.
- 18 Where the offset includes a first party offset(s), the permit holder must provide an annual offset site report to the responsible authority by the anniversary date of the execution of the offset security agreement, for a period of 10 consecutive years. After the tenth year, the landowner must provide a report at the reasonable request of a statutory authority.

Use and Development

- 19 This permit will expire if one of the following circumstances applies:
 - (a) The development is not started within two years of the date of this permit
 - (b) The development is not completed within four years of the date of this permit
 - (c) The use is not started within two years after the completion of the development
 - (d) The use is discontinued for a period of two years.

The Responsible Authority may extend the periods referred to if a request is made in writing in accordance with Section 69 of the Planning and Environment Act 1987.

- End of conditions -