

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P743/2023

CATCHWORDS

Section 149(1)(a) of the *Planning and Environment Act 1987* (Vic); Jurisdiction of Tribunal; Casey Planning Scheme; Development Plan Overlay – Schedule 24; Manuka Road Development Plan; Approved development plan; Draft development plan; Retention of trees; Location of drainage; Upgrade of road; Location of defendable space; Drafting of development plan; Decision set aside; No development plan approved.

APPLICANT	Parklea Berwick Pty Ltd
RESPONSIBLE AUTHORITY	Casey City Council
SUBJECT LAND	42-80 Manuka Road BERWICK VIC 3806
HEARING TYPE	Hearing
DATES OF HEARING	6, 9, 10 & 21 November 2023
DATE OF ORDER	28 March 2024
CITATION	Parklea Berwick Pty Ltd v Casey CC [2024] VCAT 287

DETERMINATION OF QUESTION OF LAW

Question of law

Does the Tribunal have jurisdiction to consider the application under Section 149(1)(a) of the *Planning and Environment Act 1987* (Vic) where a responsible authority has expressed satisfaction with a Development Plan?

Answer

Yes.

ORDER

No development plan is approved

- 1 The decision of Casey City Council to approve the Manuka Road Development Plan on 16 May 2023 is set aside.
- 2 No development plan provided to the Tribunal is to the satisfaction of the Tribunal pursuant to clause 43.04-2 of the Casey Planning Scheme.

Teresa Bisucci
Deputy President

Susan Whitney
Member

APPEARANCES

For applicant

Peter O'Farrell, senior counsel with Tara Hooper of counsel, instructed by Ellen Tarasenko, lawyer, Polis Legal.

The applicant called the following expert witnesses:

- Darren Powell, civil engineer, of SMEC;
- Robert Galbraith, arboriculturalist, of Galbraith & Associates;
- Mark Woodland, town planner, of Echelon Planning;
- Hilary Marshall, traffic engineer, of Ratio Consultants Pty Ltd;
- Phil Walton, town planning and bushfire consultant, of Bushfire Planning & Design; and
- Darren Atkinson, landscape architect, of Human Habitats Pty Ltd.

For responsible authority

Terry Montebello, lawyer, Maddocks lawyers

The responsible authority called the following expert witnesses:

- Catherine Clowes, consulting botanist, of Casey City Council; and
- Mark Reynolds, consulting arborist, of Arbor Survey Pty Ltd.

INFORMATION

Description of proposal	Approval of Manuka Road Development Plan
Nature of proceeding	Application under section 149(1)(a) of the <i>Planning and Environment Act 1987 (Vic)</i> – to review the decision of Casey City Council to approve the Manuka Road Development Plan
Planning scheme	Casey Planning Scheme
Land description	The land the subject of this application is known as 42-80 Manuka Road, Berwick ('Land'). It comprises four parcels of land, separately owned and approximately 18.78 hectares ('ha') in area.
Tribunal inspection	Accompanied site inspection that took place on 8 November 2023. The following persons attended the site inspection with the Tribunal: Tara Hooper for the applicant and Rex Zhang and Jason Pullman for council.

REASONS¹

BACKGROUND

- 1 Parklea Berwick Pty Ltd ('applicant') commenced this proceeding under s 149(1)(a) of the *Planning and Environment Act 1987* (Vic) ('PE Act') seeking review of the decision of Casey City Council ('council') to approve the Manuka Road Development Plan ('Approved DP').
- 2 The land in the Approved DP ('Land') is shown highlighted in pink in the following aerial photograph:²



- 3 The Land is located in the Neighbourhood Residential Zone – Schedule 2 ('NRZ2') of the Casey Planning Scheme ('Scheme') and is also subject to the following overlays:
 - a Development Plan Overlay – Schedule 24 ('DPO24');
 - b Bushfire Management Overlay ('BMO') (as to part);
 - c Land Subject to Inundation Overlay ('LSIO');
 - d Significant Landscape Overlay – Schedule 4 ('SLO4'); and
 - e Heritage Overlay – Schedules 49 and 50 ('HO49' and 'HO50').
- 4 The background and process leading to the Approved DP is set out in the table below.

Date	Event
August 2021	Applicant lodges a development plan for council's satisfaction
Post-August 2021	Council amends applicant's proposed development plan to include changes the council wants included but not agreed by the

¹ 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.

² Submission on behalf of the Responsible Authority, 1 November 2023, [10].

	applicant.
7 December 2022 – 29 January 2023	Amended version of development plan placed on public exhibition
27 January 2023	Applicant made submission on exhibited development plan
16 May 2023	Council ‘adopts’ development plan with further amendments and included changes the applicant did not agree with
12 June 2023	Applicant files application for review
11 October 2023	Applicant submits ‘applicant’s proposed DP’ for approval to Tribunal
1 November 2023	Council submits ‘council’s proposed DP’ for approval to Tribunal

- 5 The applicant’s proposed DP consists of the following documents:
- Development plan report dated April 2023;³
 - Local Context and Site Analysis and Landscape Impact Assessment prepared by Veris (2023);
 - Figure 11 Urban Structure Plan prepared by Veris;
 - Figure 12 Landscape Concept Plan prepared by Veris;
 - Servicing Infrastructure Report (2023) prepared by SMEC; and
 - Stormwater Management Plan (2023) prepared by SMEC.
- 6 The council’s proposed DP (‘November Draft’) is based on the applicant’s proposed DP (‘October Draft’) and sets out the changes that council accepts and those that it does not accept.
- 7 At all times since the proceeding was commenced the Tribunal has raised concern with its jurisdiction. The Tribunal’s initiating order scheduled a practice day hearing to consider as follows:⁴
- to clarify the position of the Casey City Council with respect to the application to approve the version of the proposed development plan that was lodged by Parklea Berwick Pty Ltd in August 2021;
 - to consider the status of the development plan adopted by the Casey City Council on 16 May 2023;

³ However, the applicant’s amendments occurred in October 2023.

⁴ See Tribunal order dated 21 June 2023.

• ...

- 8 The Tribunal’s order following the practice day hearing does not indicate whether the above matters were considered.⁵
- 9 The proceeding was the subject of two compulsory conferences in which the following question of law was set out for the Tribunal’s consideration at the hearing:⁶

Does the Tribunal have jurisdiction to consider the application under Section 149(1)(a) of the *Planning and Environment Act 1987* (Vic) where a responsible authority has expressed satisfaction with a Development Plan?

- 10 Having considered the submissions of the parties, we agree that the Tribunal has jurisdiction to consider the application. However, we are not satisfied with any of the development plans provided to us.
- 11 In determining this application for review, we first deal with the question of law as to jurisdiction. We then provide details regarding the physical and planning context of the Land and its surrounds, along with details regarding the Approved DP and the October Draft. Finally, we assess each of the key merits issues before concluding that we will set aside the council’s approval of the Approved DP but will not approve either the October Draft or the November Draft. Our reasons follow.

RELEVANT STATUTORY PROVISIONS

- 12 The applicant brings this application under section 149(1)(a) of the PE Act.
- 13 Section 149 of the PE Act provides as follows:

149 Application for review

- (1) A specified person may apply to the Tribunal for the review of—
- (a) a decision of a specified body in relation to a matter if a planning scheme specifies or a permit contains a condition that the matter must be done to the satisfaction, or must not be done without the consent or approval, of the specified body; or
 - (b) a decision of a specified body in relation to a matter if an agreement under section 173 provides that the matter must be done to the satisfaction, or must not be done without the consent, of the specified body and makes no provision for settling disputes in relation to the matter; or
 - (c) a decision of a specified body or of a person or body specified in an enforcement order in relation to a

⁵ See Tribunal order dated 28 July 2023.

⁶ See Tribunal order dated 7 June 2023.

matter if the order requires that the matter must be done to the satisfaction of that person or body; or

(d) if there is no prescribed time for a decision of a kind referred to in paragraph (a), (b) or (c), a failure of a person or body to make that decision within a reasonable time after the matter is referred to it.

(2) An application for review of a decision referred to in subsection (1)(a), (b) or (c) must be made within 28 days after the day on which the decision is made.

(3) The responsible authority is a party to any proceedings under this section.

14 Section 148 of the PE Act contains definitions of the terms used in section 149 of the PE Act.

15 Section 148 of the PE Act provides:

148 Definitions

In this Division—

specified body means—

- (a) a Minister; or
- (b) the responsible authority; or
- (c) a public authority; or
- (d) a municipal council; or
- (e) a referral authority;

specified person means in relation to a matter—

- (a) the owner, user or developer of the land directly affected by the matter; or
- (b) a specified body; or
- (c) if the matter affects Crown land, the occupier of the Crown land.

QUESTION OF LAW

Position of the parties

16 The applicant and council submit the answer to the question of law is: yes. Council did not provide written submissions addressing the question of law and relied upon the applicant's submissions.

17 We now summarise the applicant's submissions on the question of law.

- 18 The applicant says that applying s 149(1)(a) of the PE Act to the relevant facts in this proceeding, the Tribunal has jurisdiction to hear the proceeding because:⁷
- a The Applicant, as a developer of land directly affected by the matter, is a “specified person”;
 - b Council, acting as a responsible authority, is a “specified body”;
 - c the “decision” of a “specified body” here was the Council decision on 16 May 2023. That is the decision under review.
 - d Clause 43.04-2 states that a permit must not be granted until a development plan has been prepared to the satisfaction of the Responsible Authority.

(footnotes omitted)

- 19 The applicant relies upon three decisions to support its position that the Tribunal has jurisdiction to consider the application. We now summarise each of these decisions.

*Glenavon Pastoral (Vic) Pty Ltd v Golden Plains SC*⁸ (*Glenavon*)

- 20 In *Glenavon*, the Tribunal was considering its jurisdiction in circumstances where the Golden Plains Shire Council had refused to approve a development plan and the applicant in that case had filed an application for review. In the meantime, the Golden Plains Shire Council approved a second development plan. Council argued that once the development plan had been approved, the Tribunal did not have any jurisdiction to consider the application for review. The applicant relies upon the following:

- 4 To facilitate the present hearing, the parties prepared two questions of law for consideration. The principal question was:
- Does the power to approve a development plan pursuant to clause 43.04 include the power to approve an entirely new development plan which supersedes an earlier plan approved to the satisfaction of the responsible authority?

At paragraph 13 the Tribunal stated:

- 13 I now turn to the powers of the tribunal which are relevantly set out in section 149(1) of the *Planning and Environment Act* and in section 51 of the *Victorian Civil and Administrative Tribunal Act*. Section 149 allows the owner of land directly affected by the matter to apply to the tribunal for the review of “a decision” of a responsible authority in relation to “a matter” if a planning scheme specifies that the matter must be done to the satisfaction of the responsible authority. In this case the responsible authority has made a decision in relation to the question of

⁷ See applicant’s submission at [15].

⁸ (Red Dot) [2005] VCAT 1095.

whether it should be satisfied with the first development plan. It is that decision that the applicant for review seeks to have set aside and for which it seeks to have another decision made in lieu. Section 51 of the *VCAT Act* provides that in exercising its review jurisdiction in respect of a decision the tribunal has all the functions of the decision maker. It also provides that in determining a proceeding for review of a decision, the tribunal may by order affirm the decision under review, vary the decision under review or set aside the decision under review and make another decision in substitution for it.

- 21 The Tribunal determined that it did have jurisdiction to consider the council's refusal to approve the first development plan.

*Jocelyn Meadows Pty Ltd v Casey CC*⁹(*Jocelyn Meadows*)

- 22 In *Jocelyn Meadows* the Tribunal had three separate applications before it as follows:

- an application under s 149 of the PE Act to review the decision of the Casey City Council to approve the Fountain Gate Narre Warren CBD Development Plan;
- an application under s 149B of the PE Act seeking a declaration as to the validity of the development plan; and
- an application under s 79 of the PE Act for the failure of the council to grant a planning permit within the prescribed time.

- 23 The Tribunal found that council had validly adopted the Fountain Gate Narre Warren CBD Development Plan. At paragraph 10 the Tribunal said:

10 The Tribunal has jurisdiction to review a development plan adopted under the Development Plan Overlay given that the development plan is required to be *to the satisfaction of the responsible authority*. This gives rise to a right of review under section 149(1)(a) of the Act.

- 24 And, further at paragraph 86:

86 Application P1858/2004 is an application under section 149(1) of the Act to review something that must be done to the satisfaction of the responsible authority, in this case preparation and adoption of the 2004 Development Plan. In exercising its review jurisdiction, the Tribunal must decide if, on the material before the Tribunal, the decision to adopt the 2004 Development Plan was the correct or preferable one. Based on the reasons set out above, we have concluded that it was. We therefore determine that the decision of the responsible authority should be affirmed.

⁹ [2004] VCAT 2627.

*Camberwell Grammar School v Boroondara CC*¹⁰ (*Camberwell Grammar*)

25 In *Camberwell Grammar*, the Tribunal was considering its jurisdiction under s 149 of the PE Act in circumstances where the Boroondara City Council had approved a development plan with a number of notations. At paragraph 10 onwards the Tribunal stated:

10 It is also clear from decisions of the Supreme Court of Victoria and the High Court of Australia¹¹ that in exercising its review function, the Tribunal is not sitting in appeal from the original decision maker and only considering what was before that original decision maker. Rather, the application for review requires the Tribunal to ‘stand in the shoes’ of the original decision maker and make the ‘correct’ and ‘preferable decision’.

11 This being the applicable proposition in law, it follows that the Tribunal has the jurisdiction to consider an application for review seeking the endorsement of a Development Plan without notations. Essentially, the Tribunal is being asked to be satisfied with the Development Plan that was filed without the modification required by the notations. In determining this matter the Tribunal may affirm, vary or set aside the decision of the Council to approve the Development Plan with notations and/or conditions.

12 In *ID-FLK Gisborne Pty Ltd Macedon Ranges SC*¹² Dwyer DP remarked that the Tribunal may endorse a Development Plan subject to ‘conditions precedent’ that is, conditions that are required prior to the decision maker being satisfied about its endorsement. The Tribunal added that ‘conditions precedent’ are different to ‘conditions subsequent’ and that the latter ‘should be avoided’.

13 The issue of whether notations or conditions can be imposed on the Development Plan at all, will be a matter for debate at the substantive hearing of this application.

26 Notably, the *Camberwell Grammar* proceeding resolved at a compulsory conference and it appears the matter of the imposition of notations was never the subject of further debate.

27 The applicant acknowledges that it did not avail itself of the opportunity to file an application for review of council’s failure to approve the development plan it provided to council in August 2021. Further, the applicant says that we are to review whether council’s decision to be satisfied with the Approved DP was the correct or preferable decision on the merits. The applicant says the correct or preferable decision on the merits is the applicant’s proposed development plan i.e. the October Draft.

¹⁰ [2019] VCAT 1449.

¹¹ *Mond v Perkins Architects Pty Ltd* [2013] VSC 455 and *Shi v Migration Agents Registration Authority* [2008] HCA 31.

¹² (Red Dot) [2019] VCAT 1336 at [56].

28 To give effect to that position, the applicant says that s 51 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') provides the statutory mechanism. This provision states:

51 Functions of Tribunal on review

...

- (2) In determining a proceeding for review of a decision the Tribunal may, by order—
- (a) affirm the decision under review; or
 - (b) vary the decision under review; or
 - (c) set aside the decision under review and make another decision in substitution for it; or
 - (d) set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of the Tribunal.

29 Notably, the applicant says that it is not seeking any amendment of the application such as to give rise to consideration of s 127 of the VCAT Act.

30 Having heard the applicant's submissions, council says the issue of the Tribunal's jurisdiction is relatively 'straight forward'. Council highlights there are three decisions that a council can make in respect of a development plan: it can be satisfied of it; it can consent to it; or it can approve it. In addition, a council can be dissatisfied with a development plan such as to refuse it or fail to make a decision within the prescribed time.

31 Presumably what follows from council's submissions is that each of these decisions is capable of being reviewed under s 149 of the PE Act.

Tribunal determination

32 We now set out the relevant parts of the Scheme. Clause 43.04-2 of the Scheme provides:

A permit must not be granted to use or subdivide land, construct a building or construct or carry out works until a development plan has been prepared to the satisfaction of the responsible authority.

This does not apply if a schedule to this overlay specifically states that a permit may be granted before a development plan has been prepared to the satisfaction of the responsible authority.

33 Notably, pursuant to clause 2 of DPO24 a development plan is not required to be prepared to the satisfaction of the council before a permit is granted. Clause 2 of DPO24 provides:

Requirement before a permit is granted

A permit may be granted to use land, construct a building or construct or carry out works before a development plan has been prepared

provided it can be demonstrated that the use or development does not prejudice the future use and development of the land in an integrated manner, as set out in this schedule.

- 34 If, however, a development plan is prepared, it must include the detailed requirements set out at clause 4 of DPO24 for such a plan to be to the ‘satisfaction of the responsible authority’.
- 35 We agree with the observations of the Tribunal in *Glenavon* that although clause 43.04 does not specifically ‘empower a responsible authority to make a statutory instrument stating that it is satisfied with a development plan’, it has that effect. Otherwise, as observed in *Glenavon*, the provisions of the DPO would not work. We must read the provisions of the DPO as empowering a responsible authority ‘to state that it was or was not satisfied’ with a development plan.
- 36 The nature of the Tribunal’s function on review was concisely articulated by the Supreme Court of Victoria (‘SCV’) in *Mond v Perkins Architects Pty Ltd*¹³ (*Mond*) as follows:

9 The first of the categories identified by Mr Mond reflects a misunderstanding of the nature of the review carried out by the Tribunal under the Act. Section 84B(1) of the Act provides that the Tribunal, in determining an application for review, must take account of any matter which the person or body in respect of whose decision the application for review is made (here, the Council) properly took into account or was required to take into account in making its decision.

10 The Tribunal does not sit as an appellate tribunal in judgment on the findings and conclusions reached by the original decision-maker. Its function on a review of an administrative decision is not to sit in appeal from the decision, but to re-exercise the function of the original decision maker. When exercising its review jurisdiction, the Tribunal reviews decisions on the merits. Its task is to ‘stand in the shoes’ of the original decision-maker and make the ‘correct’ or ‘preferable’ decision having regard to the material before it. The Tribunal’s review must take place without any presumption as to the correctness of the decision under review and it must conduct its own independent assessment and determination of the matters necessary to be addressed. While the Tribunal may have to consider the factual findings upon which the decision under review was based in order to decide whether that decision was the correct or preferable one, it must make its own findings of fact and is not bound by the original decision-maker’s findings of fact.

(footnotes omitted)

¹³ [2013] VSC 455.

- 37 The applicant (and council) asks that we vary the decision of council made on 16 May 2023 to approve the Manuka Road Development Plan by reference to either October Draft¹⁴ or November Draft.¹⁵
- 38 In consideration of our jurisdiction, we now turn to s 149(1)(a) of the PE Act. The council has:
- made a ‘decision’ in relation to a ‘matter’;
 - the ‘decision’ is to approve the Manuka Road Development Plan;
 - the ‘matter’ is the Manuka Road Development Plan;
 - the Manuka Road Development Plan must done (or prepared) to council’s satisfaction; and
 - the council was satisfied of the Manuka Road Development Plan and approved it on 16 May 2023.
- 39 For completeness, we accept that council is a ‘responsible authority’ for the Casey Planning Scheme and thus, a ‘specified body’ under s 148 of the PE Act. Further, the applicant is a ‘specified person’ being a developer of the Land affected by the matter (Manuka Road Development Plan) also under s 148 of the PE Act.
- 40 On that basis, the answer to the following question of law is: Yes:
- Does the Tribunal have jurisdiction to consider the application under Section 149(1)(a) of the Planning and Environment Act 1987 (Vic) where a responsible authority has expressed satisfaction with a Development Plan?
- 41 Once jurisdiction is established, it is then at large and notably, s 84B of the PE Act sets out what we must consider in determining the application for review. Section 84B of the PE Act provides:
- 84B Matters for Tribunal to take into account**
- (1) In determining an application for review under this Act, the Tribunal must—
 - (a) take account of any matter which the person or body in respect of whose decision the application for review is made—
 - (i) properly took account of in making its decision; or
 - (ii) was required to take account of in making its decision; and
 - (b) have regard to any matter which the person or body in respect of whose decision the application for review is made—

¹⁴ Applicant’s version.

¹⁵ Council’s version.

- (i) properly had regard to in making its decision;
or
 - (ii) is required to have regard to in making its decision.
- (2) In determining an application for review under this Act, in addition to the matters referred to in subsection (1), the Tribunal—
 - (a) must take into account any relevant planning scheme;
 - (b) must have regard to the objectives of planning in Victoria;
 - (c) must (where appropriate) take account of the approved regional strategy plan under Part 3A;
 - (d) must (where appropriate) take account of the approved strategy plan under Part 3C;
 - (da) must (where appropriate) take account of the approved strategy plan under Part 3D;
 - (e) must take account of any relevant environment reference standard within the meaning of the Environment Protection Act 2017;
 - (ea) must take account of any Order made by the Governor in Council under section 156 of the Environment Protection Act 2017;
 - (f) must (where appropriate) take account of the extent to which persons residing or owning land in the vicinity of the land which is the subject of the application for review were able to and in fact did participate in the procedures required to be followed under this Act before the responsible authority could make a decision in respect of the application for a permit;
 - (g) must (where appropriate) have regard to any amendment to a planning scheme which has been adopted by the planning authority but not, as at the date on which the application for review is determined, approved by the Minister or the planning authority;
 - (h) must (where appropriate) have regard to any agreement made pursuant to section 173 affecting the land the subject of the application for review;
 - (i) must (where appropriate) have regard to any amendment to the approved regional strategy plan under Part 3A adopted under this Act but not, as at the date on which the application for review is determined, approved by the Minister;

- (j) must (where appropriate) have regard to any amendment to the approved strategy plan under Part 3C adopted under this Act but not, as at the date on which the application for review is determined, approved by the Minister;
 - (ja) must (where appropriate) have regard to any amendment to the approved strategy plan under Part 3D adopted under this Act but not, as at the date on which the application for review is determined, approved by the Minister;
 - (jb) must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect;
 - (k) must take account of any other matter which the Tribunal is required by the provisions of this Act or any other Act to take account of in determining the application for review.
- (3) If an application for review is of a class that is exempted by a planning scheme wholly or in part from the requirements of subsection (2)(b) to (jb), the Tribunal is not required to take into account or have regard to the exempted matters in determining the application.

42 Section 84B of the PE Act and s 51(2) of the VCAT Act operate together to give us our powers of disposition. The parties ask us to vary the decision of council made on 16 May 2023 to approve the Manuka Road Development Plan. However, given the number of changes sought to that document by each party, we need to consider whether we can make orders that set aside council's decision on 16 May 2023 and substitute our own decision, if we are not satisfied that varying the decision is appropriate in the circumstances before us.

43 The reason for our further consideration is the decision of the SCV in *Secretary, Department of Environment, Energy and Climate Action v Hanson Construction Materials Pty Ltd*¹⁶ (*DEECA*) where the SCV stated the following about the Tribunal's review jurisdiction:

37 For the above reasons, VCAT only has jurisdiction to review on its merits the decision that was actually made by the Department Head. That, however, invites attention to what was 'the decision'.

38 Here the 'decision' was the decision made by the Department Head on 7 July 2021 under s 77TD(1)(b) of the MRSD Act to refuse to endorse the variation to an approved work plan. Even in that context, however, the 'decision' may be expressed at different levels of abstraction. It could be said, for example, that

¹⁶ [2023] VSC 353.

the ‘decision’ was the refusal to endorse a variation in the precise terms of the first work plan variation. On that basis, VCAT’s jurisdiction would be limited to reviewing the decision made on that document, and it would not have jurisdiction instead simply to decide whether another variation should be allowed. This could lead to difficulty in the event that minor changes were made to the document sought to be considered by VCAT. Or, it could be said that the ‘decision’ was a decision to refuse to endorse a variation to an approved work plan. On that basis, VCAT would have jurisdiction to review any proposed variation to the approved work plan. Approaching it at that level of abstraction, however, would evade the principle underlying the limit to VCAT’s jurisdiction that it is to operate as a place of review rather than as an original decision-maker.

- 39 I see no option but to express the limits of VCAT’s jurisdiction in somewhat uncertain terms that address the substance, rather than the form, of what is being asked of it: VCAT here had no jurisdiction to decide whether to statutorily endorse a particular work plan variation if the work plan variation it was asked to endorse was sufficiently different to the work plan variation that the Department Head had been asked to endorse such that it may fairly be said that VCAT was not reviewing the decision of the Department Head but was instead being asked to act as an original decision-maker.
- 40 Put another way, there may be changes between the document before the Department Head and the document before VCAT of such a dimension that they do not lead to a conclusion that VCAT, in considering the amended document, is, as a matter of practical reality, doing anything other than reviewing the original decision.
- 41 Whether that is so, in the first instance, is a decision for VCAT to make.
- 42 This approach is not unfamiliar. In *Frugtniet v Australian Securities and Investments Commission*, Kiefel CJ, Keane and Nettle JJ said that:

The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker.

(footnotes omitted)

44 This is supported by *Mond* as follows:

- 14 Again, this misunderstands the nature of the review carried out by the Tribunal. It is well established that when the Tribunal is exercising its review jurisdiction, it is usually not appropriate to speak in terms of onus of proof. In *Transport Accident Commission v Bausch*, the Court of Appeal held that, at least in relation to the jurisdiction of the former AAT to review

decisions of the Transport Accident Commission, the review was not to be treated as an adversarial proceeding. Section 84B of the Act sets out a number of matters that the Tribunal must take into account, whether or not the parties raise or make submissions about these matters. These include the objectives of planning in Victoria and relevant planning scheme, which in this case included policies for allowing non-residential uses in residential areas and specifically for the location of child care centres in the City of Glen Eira. Pursuant to s 98 of the VCAT Act, the Tribunal was not bound by the rules of evidence or any practices or procedures applicable to courts of record and could inform itself on any matter as it saw fit. It is problematic to speak of the imposition of a burden of proof in this context.

45 This position was also articulated in *ID-FLK Gisborne Pty LT v Macedon Ranges SC*¹⁷ (*ID-FLK*)

- 31 Implicit in this review function then is the potential for VCAT to consider a varied or ‘amended’ or substituted version of the Development Plan that it might be independently satisfied with, having regard to the multitude of complex issues and policies inherent in any planning decision. If VCAT has this function in ultimately determining the review proceeding, then common sense would suggest that it has the procedural power to get itself to that point.
- 32 Simply expressed, VCAT has the power to consider an alternative version of a Development Plan in order to properly exercise its functions on review. This means that it can allow, in its discretion, a party to file or produce an alternative version of the Development Plan at any time in the proceeding as part of that process.
- 33 In reality, this does not involve any formal ‘amendment’ of the Development Plan that was before the responsible authority. There is just another version being tabled as part of the review process.
- 34 What I have just said is consistent with s 149 itself. Section 149 refers to the review of a decision in relation to a ‘matter’ where the ‘matter’ must be done to the satisfaction of the responsible authority. The matter in dispute is whether the responsible authority (or VCAT on review) is satisfied with a Development Plan in order to meet the requirements of the Development Plan Overlay. The subject matter of the review is therefore the Development Plan itself. Read in the context of the specific review power in s 149 of the PE Act, and the matters that VCAT must take into account on a review under the PE Act, VCAT’s functions on review under s 51 of the VCAT Act clearly

¹⁷ (Red Dot) [2019] VCAT 1336.

envisage the tabling of a varied or amended or substituted version of a Development Plan for its consideration.

- 35 It will of course be a matter of VCAT discretion as to whether an alternative version can or should be tabled. The exercise of that discretion may involve consideration of the extent or timing of the changes to the Development Plan from the version that was determined by the responsible authority. In particular, there will be a need to ensure, as a matter of procedural fairness, that that the responsible authority has adequate time to consider any alternative Development Plan that an applicant is seeking to have VCAT endorse.
- 36 Lest there be any doubt, I consider that VCAT's general power to receive an alternative version of a Development Plan arises not just in the lead up to a final determination under s 51 of the VCAT Act, but at any time in the proceeding. This includes as part of a compulsory conference process where VCAT is exercising the functions (amongst other things) of promoting a settlement and/or identifying and clarifying the real issues in dispute. There is no reason, in principle, why a party could not file or produce a new version of a Development Plan following a discussion, or partial settlement, or narrowing of the issues in dispute, at a compulsory conference. Indeed, such a course of action ought to be encouraged.
- 37 There is one further issue that I will note for completion. Section 51 of the VCAT Act provides that, in exercising its review jurisdiction, VCAT has all the functions of the decision maker. After reviewing a number of authorities, it was considered in *TC Rice* that this did not mean that VCAT acquires all of the powers of the decision maker in an unlimited way, but only those relevant to the decision under review. The power in s 51(1) is expressly limited to VCAT's exercise of its review functions. It does not therefore include powers and discretions vested in the decision-maker for another purpose. In *TC Rice*, this led the Tribunal to a view that VCAT did not acquire the decision-maker's pre-review powers and discretions under the GR Act in relation to the application for the gaming premise approval.
- 38 As I have indicated earlier, satisfaction about a Development Plan arises through a secondary consent process. VCAT does not need to exercise any pre-review function of the responsible authority under the PE Act in order to consider an alternative version of a Development Plan within a s 149 proceeding. VCAT is not accepting an amended application for primary consent under the PE Act, but is receiving an alternative version of the Development Plan for its consideration. This aspect of *TC Rice* is therefore not relevant to, and does not provide any impediment to, the general procedural power I have outlined.

(footnotes omitted)

- 46 We also note that in *DECCA*, the SCV referred to various Tribunal decisions including *TC Rice Pty Ltd v Cardinia Shire Council*¹⁸ and *ID-FLK* and stated in *obiter*:¹⁹

The reasoning in *ID-FLK Gisborne Pty Ltd v Macedon Ranges Shire Council* is generally supportive of Hanson’s position. It is, of course, distinguishable because in this case there was a sophisticated statutory process for the Department Head to follow in assessing an application. That said, I prefer the analysis in the reasoning in *TC Rice Pty Ltd v Cardinia Shire Council*...

(footnotes omitted)

- 47 Notwithstanding the above, given our ultimate decision we do not need to finally resolve whether the positions advanced by the parties are a ‘variation’ or a ‘substitution’ of the ‘original decision of the council’ made on 16 May 2023.

LAND

Details of the Land

- 48 The Land measures approximately 18.78 hectares.
- 49 The Land is located on the corner of Manuka Road and Allan Street and comprises:
- a 42-52 Manuka Road;20
 - b 54-60 Manuka Road;
 - c part of21 62-70 Manuka Road;22 and
 - d part of²³ 72-80 Manuka Road.²⁴
- 50 The above properties and their surrounds are depicted in the following aerial photograph, noting that the Land is a subset of the properties outlined in red:²⁵

¹⁸ (Red Dot) [2019] VCAT 74.

¹⁹ At [28].

²⁰ Registered proprietor is Geoffrey Francis Brown and Janette Moira Brown and it is Lot 1 on TP951892P, being the land in certificate of title volume 9575 folio 979.

²¹ The other ‘part of’ this property is outside of the DOP24 and therefore is not included in the Approved DP.

²² Registered proprietor is Heather Margaret Tulloch and is Lot 2 on PS305400K, being the land in certificate of title volume 10089 folio 306;

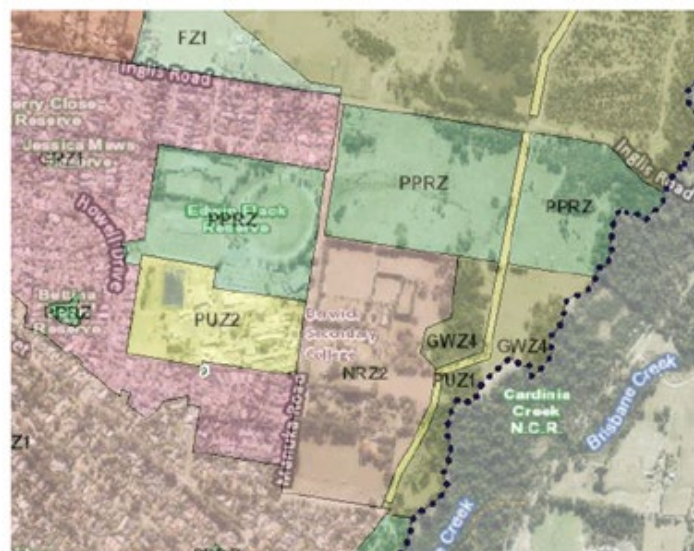
²³ The other ‘part of’ this property is outside of the DOP24 and therefore is not included in the Approved DP.

²⁴ Registered proprietor is Toondana Pty Ltd and is Lot 1 on PS305400K, being the land in certificate of title volume 10089 folio 305.

²⁵ Submission on behalf of the Responsible Authority, 1 November 2023, [10].



51 The zoning context of the Land and its surrounds is shown in the following map.²⁶

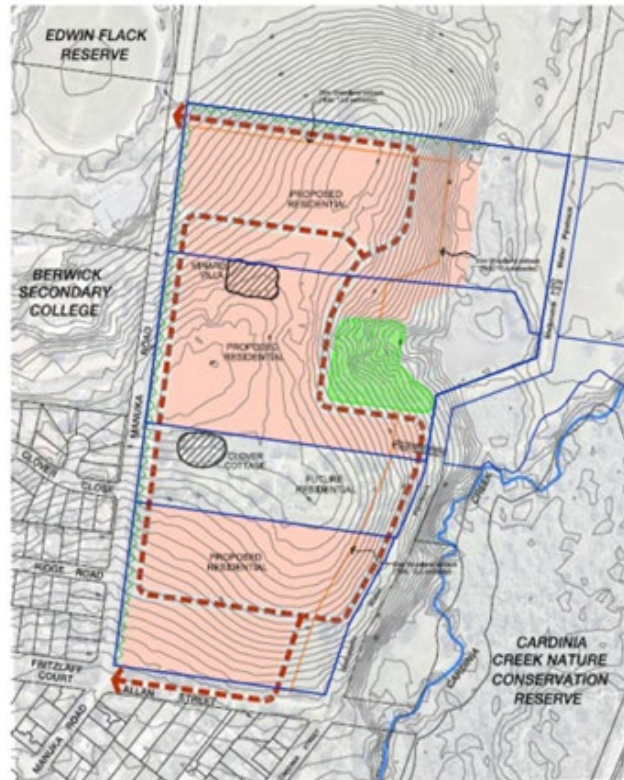


52 In terms of the Heritage Overlay, HO49 pertains to Clover Cottage and is located on the parcel at 54-60 Manuka Road, while HO50 pertains to Minard Villa and is located on the parcel at 62-70 Manuka Road. This is shown in the attached extract of the relevant Scheme map, below.

²⁶ Submission on behalf of the Responsible Authority, 1 November 2023, [24].



- 53 The Land slopes significantly to the north-east and to the east, and also slopes to the north-west and to the south, as shown in the following map:²⁷



Conservation Land

- 54 Two of the four certificates of title are subject to an agreement entered into under section 173 of the PE Act that is contained in instrument AS264318P ('s173 Agreement'). The burdened titles are the two northern properties at

²⁷ Figure 9 of the proposed development plan prepared by the applicant, draft undated but inferred draft date August 2021.

62-70 Manuka Road and 72-80 Manuka Road;²⁸ the two southern properties at 42-52 Manuka Road or 54-60 Manuka Road are not burdened by the s173 Agreement.

- 55 To the immediate east of the Land is land in the Green Wedge Zone – Schedule 4 (‘GWZ4’) that contains the Grasmere Creek, which is a tributary of the Cardinia Creek. Bisecting the GWZ4 land is a Melbourne Water Pipetrack, in the Public Use Zone – Schedule 1 (‘PUZ1’) and shown in yellow in the map above, which provides a public access walking track connecting through to Allan Street.
- 56 The GWZ4 land between the Land and the PUZ1 land is subject to the Vegetation Protection Overlay – Schedule 2 (‘VPO2’).
- 57 The s173 Agreement refers to this part of the Land as being the ‘Conservation Land’.
- 58 The s173 Agreement states that its parties agree that it will only commence when the Minister for Planning approves Amendment C231 to the Scheme.
- 59 The s173 Agreement was entered into in anticipation of the rezoning of part of 62-70 Manuka Road and 72-80 Manuka Road (referred to in the s173 Agreement as the ‘Amendment Land’) from the previous zoning of the Farming Zone to the General Residential Zone.²⁹ We note that the Amendment Land was not rezoned to the General Residential Zone but that instead the NRZ2 was imposed, as well as the DPO being applied and the amendment made to the BMO and the HO.³⁰
- 60 As at the date of the s173 Agreement, the council determined that the Conservation Land had ‘high environmental values’ and requested that the s173 Agreement be entered into in order to provide for ownership of the Conservation Land to be transferred to ‘Public Ownership’,³¹ defined in the s173 Agreement as being ownership by the council or the Department of Environment, Land, Water and Planning or any successor.
- 61 The s173 Agreement imposes obligations upon the owner of the Conservation Land.
- 62 In short, these obligations include requiring the owner to do the following:

²⁸ It is noted that the s173 Agreement defines both the Amendment Land and the Conservation Land as being part of 62-70 Manuka Road and part of 72-80 Manuka Road, and the ‘subject land’ of the s173 Agreement is referred to as part of 62-70 Manuka Road and part of 72-80 Manuka Road. The Annexure 1 Locality Plan to the s173 Agreement shows the ‘Amendment Land’ as being within the area that we now know to be in the DPO24, whereas the ‘Conservation Land’ is in the GWZ4 area that is outside of the DPO24.

²⁹ Recital D of the s173 Agreement.

³⁰ As an aside we observe that what is in effect recital F (being the second recital D in the s173 Agreement) states that the s173 Agreement will only commence if and when the Minister for Planning approves the amendment and the associated Ministerial Notice is published. Whilst C231 case has been approved, it was approved with changes that meant it was in a different form to what is envisaged in the recitals. No party has raised this as an issue.

³¹ Recital E of the s173 Agreement.

- a any plan of subdivision for the Amendment Land must show all or part of the Conservation Land as a lot or reserve, to the council's satisfaction;³²
- b within 60 days of the issue of a statement of compliance for any such plan of subdivision, the owner must transfer the lot or reserve comprising all or part of the Conservation Land to Public Ownership, as defined in the s173 Agreement;³³
- c if the owner transfers only part of the Conservation Land to Public Ownership, then the owner must prepare a 'Conservation Management Plan' for the untransferred part of the Conservation Land and submit to the council for approval;³⁴
- d the Conservation Management Plan must include:
 - i information regarding the current condition of vegetation and habitat including habitat hectares and fauna and flora species present;³⁵ and
 - ii the preparation by the owner of a ten year management plan;³⁶
- e the owner must provide a written report to the Council by 30 June every year that includes, among other things, a log showing what was undertaken and where in relation to the Conservation Management Plan;³⁷
- f the owner must use its best endeavours and must act in good faith to comply with its obligations under the s173 Agreement 'irrespective of whether any planning approvals have been granted for the use and development of any part of the Conservation Land for stormwater drainage purposes, or for any other purposes'.³⁸

63 As at the date of this hearing, the Conservation Land remains part of 62-70 Manuka Road and part of 72-80 Manuka Road.

DPO24

64 The requirements of DPO24 are comprised in both the head clause, being clause 43.04 of the Scheme, and Schedule 24 that applies to the Manuka Road Precinct.

³² Clause 5.1.1 of the s173 Agreement.

³³ Clause 5.1.3 of the s173 Agreement.

³⁴ Clause 5.2.1 of the s173 Agreement.

³⁵ Clause 5.2.2(a) of the s173 Agreement.

³⁶ Clause 5.2.2(b) of the s173 Agreement.

³⁷ Clause 5.2.4 of the s173 Agreement.

³⁸ Clause 5.3 of the s173 Agreement.

Head clause

65 The purpose of the DPO is as follows:

Purpose

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To identify areas which require the form and conditions of future use and development to be shown on a development plan before a permit can be granted to use or develop the land.

To exempt an application from notice and review if a development plan has been prepared to the satisfaction of the responsible authority.

66 The details for the preparation of a development plan are contained in clause 43.04-4 of the Scheme, as follows:

Preparation of the development plan

The development plan may consist of plans or other documents and may, with the agreement of the responsible authority, be prepared and implemented in stages.

A development plan that provides for residential subdivision in the Neighbourhood Residential Zone, General Residential Zone, Residential Growth Zone, Mixed Use Zone, Township Zone, Comprehensive Development Zone and Priority Development Zone must meet the requirements of Clause 56 as specified in the zone.

The development plan must describe:

- The land to which the plan applies.
- The proposed use and development of each part of the land.
- Any other requirements specified for the plan in a schedule to this overlay.

The development plan may be amended to the satisfaction of the responsible authority.

67 As a consequence of preparing a development plan and this being approved by the council, any planning permit granted after the approval of a development plan must be generally in accordance with the development plan and must include any conditions or requirements specified in Schedule 24.³⁹

68 Where a development plan has been prepared to the satisfaction of the council, a permit application made under any provision of the Scheme is exempt from third party notice and review rights.⁴⁰

Schedule 24

69 The objectives of Schedule 24 are contained in clause 1.0 as follows:

Objectives

To ensure that the development of the land establishes high quality housing with density and lot sizes that are generally compatible with the surrounding residential areas, has proper regard to the nearby Cardinia Creek Parklands and provides heritage and environmental conservation outcomes.

To recognise the predominant residential character of surrounding areas that includes tall, mature trees in private gardens and along road reserves.

70 Schedule 24 was introduced into the Scheme by Amendment C231.

71 The applicant was a submitter at the panel hearing for Amendment C231.⁴¹ The applicant's submissions to the panel hearing were critical of the various

³⁹ Clause 43.04-2 of the Scheme.

⁴⁰ Clause 43.04-3 of the Scheme.

⁴¹ Casey Planning Scheme Amendment C231, Manuka Road, Berwick, Panel Report, 28 May 2018.

requirements in Schedule 24 being ‘overly prescriptive’ and matters ‘that should be required during the detailed design phase’.⁴² Notwithstanding, these submissions, the panel recommended that Schedule 24 be introduced in effectively the form that was proposed by the council, which is in essence what is now contained in Schedule 24.

72 Clause 4.0 contains the ‘Requirements for development plan’. These requirements are detailed and deal with the following aspects of design and development:

- a That there be only one development plan for the Land;
- b A local context and site analysis that shows various things including: topography and natural features; a bushfire report; an Aboriginal cultural heritage assessment or archaeological survey; a heritage report; a flora and fauna assessment; a landscape impact assessment;
- c An urban structure plan that responds to the local context and site analysis and identifies various things including: lot layout and dimensions consistent with the existing subdivision pattern of the surrounding area and the preferred neighbourhood character including building materials, articulation and heights;
- d A traffic impact assessment report that addresses various things including the upgrade of Allan Street to urban standards;
- e A landscape concept plan that includes various things such as the identification of vegetation to be retained and removed;
- f A servicing report that includes drainage and servicing assessment; and
- g A development staging plan.

73 Clause 3.0 contains the ‘Conditions and requirements for permits’. Again, these conditions and requirements are detailed; they address the following:

- a General issues regarding design and development;
- b Stormwater management;
- c Water infrastructure;
- d Road design and construction standards;
- e Bicycle and pedestrian paths; and
- f Bushfire management.

74 Schedule 24 is extracted in full in Appendix A to these reasons.

⁴² Ibid, [6.2(i)].

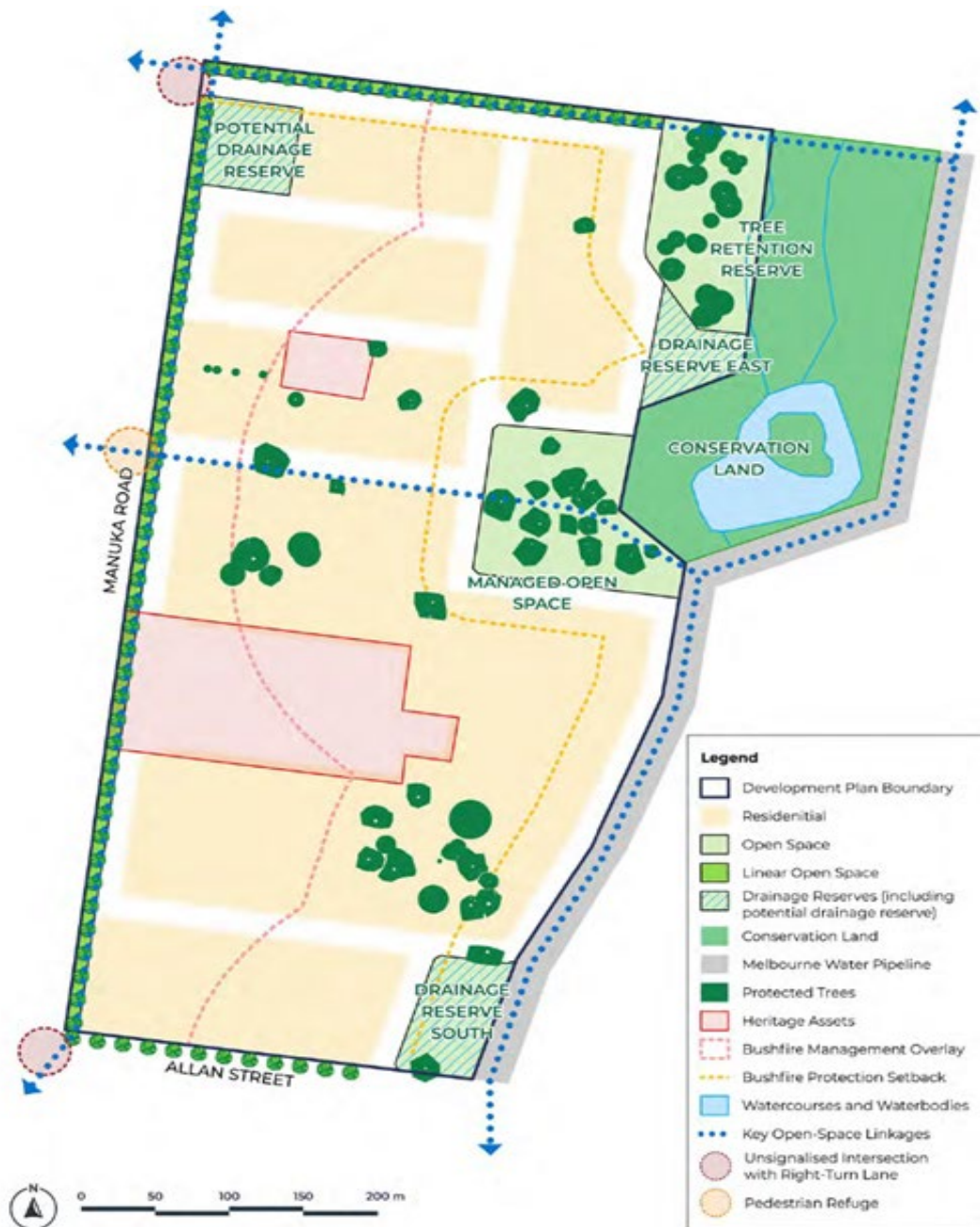
APPROVED DP

- 75 It is the Approved DP that is the subject of this review proceeding, given that this is the ‘decision’ of the council that is the source of our jurisdiction.
- 76 The Approved DP is comprised in the single multi-page document that was approved by the council on 16 May 2023.
- 77 The Approved DP identifies that it was ‘informed and guided by various specialist background assessments’ prepared by the applicant and the council that are separate to the Approved DP but are ‘background documents’ to its preparation. These are listed as follows:

Document Name	Author
Arboricultural Assessment, 2021	Greenwood Consulting
Bushfire Assessment, 2022	XWB Consulting
Aboriginal Cultural Heritage Assessment, 2016	Andrew Long & Associates
Review of HO49 & HO50 Manuka Road, 2017	Context
Servicing Infrastructure Report, 2022	SMEC
Stormwater Management Plan, 2022	SMEC
Flora and Fauna Assessment, 2022	Nature Advisory
Traffic Impact Assessment, 2022	Traffix Group
Landscape Impact Assessment, 2021	Veris
Site Analysis Plan, 2021	Veris

- 78 The Approved DP includes the following pictorial plan,⁴³ being the Future Urban Structure Plan.

⁴³ Approved DP, Figure 13, 36.



- 79 This plan shows key constraints for the Land including the heritage assets in HO49 and HO50 and the bushfire protection setback, along with the:
- a intended internal road layout;
 - b residential block layout;
 - c drainage reserves;
 - d open space areas;
 - e protected trees; and
 - f key open-space linkages.

- 80 The Approved DP contains several other pictorial plans and these are accompanied by text that contains the following components:⁴⁴

Objectives: describe the desired outcome to be achieved. Objectives must be met.

Strategies (i.e. Requirements and Guidelines): specify how the objectives are to be achieved:

» Requirements must be met.

» Guidelines should be met.

Where a requirement is listed, no alternative shall be considered.

Where guidelines are listed, an application for an alternative design solution or outcome envisaged by the guideline which meets the objectives, may be considered to the satisfaction of the responsible authority.

Application requirements: specify additional information which must be provided to the responsible authority with planning permit applications.

Conditions: specify conditions which must be met as part of the planning permit application.

This approach ensures that a robust framework can be applied that will achieve future development outcomes.

- 81 Section 4 ‘Framework Plan’ of the Approved DP specifies 40 requirements and 14 guidelines organised under the following themes and objectives:

- a Character;
- b Development layout;
- c Built form and heritage;
- d Landscaping;
- e Environmentally sustainable development;
- f Transport and movement;
- g Bushfire management
- h Drainage and stormwater management; and
- i Utilities.

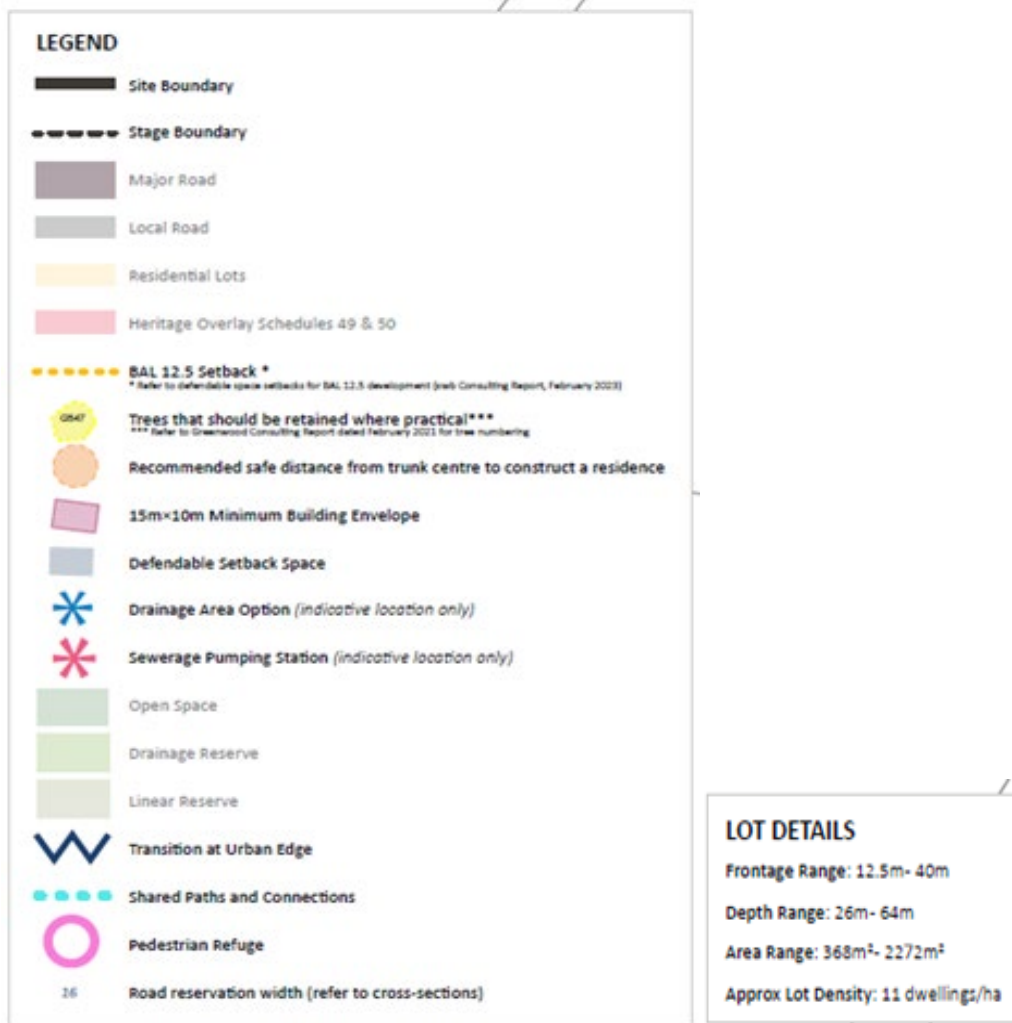
- 82 Section 5 ‘Implementation’ supports the implementation of the infrastructure and services to meet the needs of future residential development of the Land. This section includes details for planning permit application requirements and conditions to be imposed on subdivision permits.

⁴⁴ Approved DP, 17

APPLICANT'S OCTOBER DRAFT

83 The applicant's October Draft is a marked-up version of the Approved DP, showing the changes that it is seeking to be made to the Approved DP. Included in the changes is the applicant's version of the Urban Structure Plan, as follows:





- 84 Among the differences between the Approved DP Future Urban Structure Plan and the October Draft Urban Structure Plan are the following:
- a indicative drainage scheme and its location, including in the Conservation Land;
 - b road layout;
 - c pedestrian connectivity;
 - d lot layout is specified; and
 - e building envelopes are shown on certain lots.

KEY ISSUES

Overview

- 85 According to the council, the following issues are where the council and the applicant disagree:
- a the number of trees to be retained on the Land;
 - b the drainage scheme for the Land;
 - c the extent (length) of upgrade construction of Allan Street; and

- d the location of defensible space for bushfire management purposes being located on the Conservation Land and on part of the Land that will become a council public open space managed reserve.
- 86 According to the applicant, in addition to these issues the following are not agreed:
- a the drafting of the Approved DP;
 - b the provision of indented car parking on the northern perimeter road; and
 - c environmentally sustainable development ('ESD') requirements.
- 87 Given it is the Approved DP that is the decision that is under review, what is before us is whether we are satisfied that the Approved DP is the correct or preferable response to the DPO24. What that means is that we might have additional concerns with the Approved DP that have not been raised by the parties or are matters of agreement between the parties. During the hearing we raised concerns that we had with respect to the Approved DP, including, for instance, that it does not specify lot layout and dimensions notwithstanding this being a requirement of the DPO24.
- 88 We also note that at the hearing the council submitted that the Tribunal should approve the November Draft, being the council's marked-up version of the October Draft, which itself was the applicant's marked-up version of the Approved DP. That is, the council does not pursue an order for its decision on 16 May 2023 to be affirmed but rather submits that a changed version of the Approved DP (i.e. the November Draft) should be found to be to the Tribunal's satisfaction.
- 89 The November Draft and October Draft still contain numerous areas of disagreement between the parties.
- 90 We directed the parties to prepare a table comparing the provisions of the Approved DP with those of the October Draft and the November Draft, to assist us in understanding the extent of difference between the documents.
- 91 To reiterate, given it is the Approved DP that is the decision under review, appropriately we must start our decision-making process by considering what the Approved DP contains with respect to the elements of the DPO24 that are required to be addressed.
- 92 Where we are not satisfied with what is contained in the Approved DP with respect to a certain topic or requirement, it is then appropriate for us to consider what has been advanced by the applicant through the October Draft. In assessing what the applicant proposes in relation to such topics, we then turn our mind to whether the council agrees with what the applicant has said, as evidenced by the November Draft; not because it is determinative but because the 'agreed' position needs to satisfy us as the decision-maker in this review proceeding.

- 93 We address each of the issues raised by the parties in turn, below. We also address the Tribunal’s key issues with the Approved DP and, to the extent relevant, with the October Draft.
- 94 We start by addressing the concerns regarding the drafting of the Approved DP, given this broadly refers to the whole of the document. We then address the remaining issues, as follows:
- Drafting of Approved DP;
 - Tree retention;
 - Landscaping;
 - Bushfire management;
 - Drainage Scheme;
 - Allan Street upgrade;
 - Indented parking on northern perimeter road;
 - Lot layout and other requirements of the urban structure plan; and
 - ESD requirements.
- 95 We directed the parties to prepare a document identifying all of the variations sought to the Approved DP by both the applicant and the council.⁴⁵ This document was discussed during the hearing.
- 96 This document identified 77 variations to the Approved DP and the position of the applicant and the council with respect to each variation. We required the preparation of this document because we found it difficult to identify all of the proposed changes to the Approved DP and the variations between the parties’ positions with respect to these changes just from reviewing the October Draft and the November Draft. We observe that whilst the preparation of the marked-up October Draft and November Draft was no doubt well-intentioned, the presentation of the variations to the Approved DP in this format, without an accompanying statement of changes or the like, has unnecessarily complicated the task of analysis for the Tribunal, especially in light of the number of variations sought.
- 97 In large part, the variations sought to the Approved DP come within the issues that are addressed in the following sections. Given our findings with respect to those issues, and the way in which we have determined to proceed, as set out below, we have not undertaken an analysis of each individual variation identified.

⁴⁵ List of variations sought to adopted Development Plan, 16 November 2023.

Drafting of Approved DP

What does the DPO24 require?

- 98 As stated in ‘DPO24’ above, clause 43.04-4 of the Scheme provides that the development plan:
- a may consist of plans or other documents;
 - b must describe:
 - i the land to which the plan applies;
 - ii the proposed use and development of each part of the land; and
 - iii any other requirements specified for the plan in Schedule 24.

Submissions and evidence

- 99 The Approved DP contains a structure/architecture that was introduced by the council when it amended the applicant’s August 2021 proposed development plan. This structure/architecture comprises objectives, strategies (being ‘requirements’ and ‘guidelines’), application requirements and conditions, organised under various topic themes.
- 100 According to the council’s system:
- a ‘requirements’ must be met whereas ‘guidelines’ should be met;
 - b where a requirement is listed no alternative shall be considered; and
 - c where guidelines are listed, an application for an alternative design solution or outcome envisaged by the guideline which meets the objectives may be considered to the satisfaction of the responsible authority.
- 101 The applicant relies on the town planning evidence of Mr Woodland.
- 102 Broadly, it was Mr Woodland’s evidence that both the Approved DP and the October Draft will achieve the two objectives of DPO24.⁴⁶
- 103 Mr Woodland is also of the opinion that both of these documents generally satisfy the requirements of DPO24 although he considered that the Approved DP did not satisfy the following requirements:⁴⁷

⁴⁶ Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [10].

⁴⁷ Ibid [11].

- It does not contain a landscape concept plan that matters specified in this clause.
- It does not contain a development staging plan addressing matters specified in this clause.
- It is not supported by a stormwater management report which sets out the technical basis for the stormwater layout proposed within the DP.
- It does not show the proposed lot layout, or building envelopes relating to matters such as tree protection and defensible space.

104 With reference to this drafting issue, Mr Woodland’s verbal evidence in response to cross-examination from the council was, in essence, as follows:

- a He agreed in principle with the concept of having objectives within a development plan;
- b There are differences between how a development plan works compared with a precinct structure plan, with a development plan being less about ‘must’ and ‘should’ and more about performance criteria;
- c The reference to a ‘requirement’ in clause 4.0 of Schedule 24 is in reference to the requirements for the content of the development plan i.e. the development plan is to include those things. He thinks it is conflating the language to say that the ‘requirements’ are to be requirements imposed by the development plan;
- d As to whether specifying in a development plan that there are things that must and should be done is a reasonable way of approaching its drafting, whilst there might be other development plans that contain examples of ‘must’ and ‘should’, Mr Woodland’s opinion is that ‘must’ and ‘should’ or requirements or guidelines need to be viewed as matters to which the responsible authority can exercise its discretion. In this regard, Mr Woodland referred to PPN23 and its reference to objectives and performance criteria;
- e He agreed that there were generally clear concepts that had developed as to what is meant by a permit needing to be ‘generally in accordance with’ an approved development plan and it was important to keep these in mind when drafting a development plan. He agreed that submitting a permit application that is generally in accordance with an approved development plan is a powerful factor suggesting the approval of that permit application; and
- f In terms of the example of tree retention, if a development plan shows certain trees are required to be retained, the requirement should contemplate the responsible authority being able to allow the removal of those trees if certain things are met. In this respect, whilst Mr Woodland has not himself attempted to draft the development plan provisions, he endorses the wording in the October Draft.

105 The applicant acknowledges that there are aspects of the DPO24 that are not addressed in the October Draft. However, the applicant reasons that

because the October Draft provides for these issues to be dealt with in a future planning permit, this is an acceptable response to the DPO24.

106 For example, the DPO24 requires:

- A heritage report prepared by a suitably qualified person that includes the future urban design treatment of the residential interface with identified heritage elements.

107 The October Draft proposes to address this by including the following ‘application requirement’ in section 4.2 Development Layout:

An application to use and / or develop land (including subdivision) that has a residential interface with identified heritage elements must be accompanied by a heritage report prepared by a suitably qualified person that includes the future urban design treatment of the residential interface with those identified heritage elements.

108 This was described by the applicant as, in effect, ‘kicking the can down the road’.

109 The Council did not take issue with this approach, noting that the Approved DP did not address all of the requirements of the DPO24.

110 Another issue discussed was what constitutes the development plan, noting that the DPO24 provides that a development plan must include requirements such as the following:

- A bushfire report prepared by a suitably qualified person that:
 - Identifies the areas of bushfire hazard within 150 metres of the site, including classifiable vegetation and the slope, under AS 3959-2018 *Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2018).
 - Shows the required setbacks to building envelopes from any area of bushfire hazard to ensure a construction standard of BAL 12.5 can be met.
 - Shows the required areas of defensible space on private and public land.
 - Identifies the vegetation management requirements for areas of defensible space generally in accordance with Table 6 of Clause 53.02, with the exception of canopy tree separation that can be reduced to two metres.
 - Shows the location of public open space.
 - Shows the road layout and provision of a perimeter road on the northern and eastern boundaries.
- An Aboriginal cultural heritage assessment or archaeological survey of the land prepared by a suitably qualified person.
- A heritage report prepared by a suitably qualified person that includes the future urban design treatment of the residential interface with identified heritage elements.

111 The question was: should the development plan comprise these reports and documents or are they background documents to the development plan.

112 Both the Approved DP and two drafts (October Draft and November Draft) include section 2.3 Additional Background Documents, which contains ‘Table 1: Background documents’ that lists various documents such as the Bushfire Assessment by XWB Consulting and the Aboriginal Cultural Heritage Assessment by Andrew Long & Associates. These documents are not expressed to be *part* of the development plan but rather are background documents to the preparation of the development plan.

- 113 In Mr Woodland’s opinion, some reports (e.g. services report) could be endorsed as part of the development plan and others could be exploratory and analytical and inform the content of the development plan but not themselves form part of the development plan i.e. be background documents. It is Mr Woodland’s opinion that it is better if a background document contains an ambit of options that can be contemplated in the development plan.
- 114 Next, submissions were made as to whether a plan required by the DPO24 needs to be a pictorial plan or could be a text plan. One example of this is the landscape concept plan, that is required to address the following:
- A landscape concept plan that includes:
 - Design principles and a proposed species palette to complement existing landscaping in the surrounding area.
 - Landscaping concepts for public areas.
 - The identification of vegetation to be retained and removed based on an arborist’s report and bushfire management requirements.
 - The designation of appropriate tree protection zones of trees to be retained.
 - limited understorey planting along road frontages to improve visual surveillance.
 - The retention of existing avenues of trees, where possible, to frame view lines.
 - A demonstration of how tree planting zones are to be established and managed on new residential lots, including details of species to be used, envelope requirements that enable viable setbacks from buildings, services and roads, and timing of tree planting and their ongoing management.
 - Demonstration how vegetation will be planted to minimise bushfire risk and create a low threat bushfire landscape in sympathy with defensible space principles.
- 115 Both the Approved DP and the October Draft contain text and either one pictorial plan (Approved DP) or two pictorial plans (October Draft) in section 4.4 Landscaping. The landscape concept plan in the Approved DP is less detailed than the landscape concept plan in the October Draft.
- 116 Mr Woodland’s evidence is that he would start from the assumption that a landscape plan comprises a pictorial plan/drawing.
- 117 Finally, the applicant also takes issue with the utilisation of ‘standard’ headings in the Approved DP that do not align with the requirements of the DPO24 but instead appear to be driven by the council wanting to standardise the format of development plans across the municipality.

Tribunal’s findings

- 118 Nowhere in the DPO24 does it refer to the imposition of guidelines.
- 119 Nowhere in the DPO24 does it state that the ‘requirements’ that must be included in a development plan are things that ‘must’ be met.
- 120 Nowhere in Planning Practice Note 23 ‘Applying the Incorporation Plan and Development Plan Overlays’⁴⁸ (‘PPN23’) does it refer to guidelines

⁴⁸ The State of Victoria Department of Environment, Land, Water and Planning, September 2022.

being imposed in a development plan, nor does it contain the structure/architecture imposed by the council in the Approved DP.

121 PPN23 acknowledges that there are no statutory requirements that govern the form of a plan. PPN23 recommends that a plan include the following elements:

Objectives

- The plan should set out objectives for the land. If necessary, these should refer to the map.
- The objectives should underpin any use, development or staging provisions set out in the rest of the plan.
- In any case of dispute about the meaning of the plan, the objectives must be clear that they are to be read as providing the key to the meaning of all other plan provisions.

Criteria or performance measures

- The plan can include criteria or performance measures to assist the responsible authority to determine whether the objectives have been met.

...

Buildings and works provisions

- The plan will also need to set out the types of buildings and works that are generally in accordance with it.
- The starting point should always be the permit requirement for buildings and works in the zone and in any other overlays.
- Buildings and works provisions may be expressed as conditions in a plan table of uses. Alternatively, they may be expressed in a table of buildings and works.
- Buildings and works provisions should normally be drafted inclusively, to ensure that proposals not considered in the plan drafting process can still obtain a planning permit if warranted.
- If the plan does not intend to affect the consideration of permits for buildings and works, the table or ordinance should make this clear.

122 PPN23 is not binding on the Tribunal but provides guidance as to how the DPO should be applied and utilised.

123 We observe that notwithstanding the terminology adopted, some of the ‘requirements’ in the Approved DP are expressed in a mandatory form while others are expressed as something that should or should not occur. For example, in section 4.3 Built Form and Heritage, requirements R4, R5 and R7 are expressed using mandatory language whereas requirement R6 refers to the fencing that corner lots ‘should not’ use:

Requirements	
R4	Lots that share an interface with heritage properties must include a buffer area of 2 metres from a heritage property.
R5	Outbuildings must be offset by a minimum of 2 metres from secondary frontages if located on corner lot.
R6	Residential corner lots should not use side fencing on secondary street frontages except when adjacent to secluded private open space.
R7	Buildings interfacing the perimeter road must provide an active frontage in the front façade.

- 124 We also observe that within the ‘requirements’ in the Approved DP, some of these are objectively measurable, and as such, have less flexibility, whereas others are more subjective in nature and may then have more in-built flexibility. For example, compare requirement R4 with requirement R7 (above).
- 125 To the extent that the ‘requirements’ and ‘guidelines’ constitute performance measures to assist the council in determining if a future permit application meets the objectives relevant to a particular theme or topic, they are of assistance in decision-making for a planning permit.
- 126 But the structure imposed by the council and its adherence to a system of requirements that must be met and there being no allowance for consideration of alternatives unless a guideline is included departs from the usual format of a development plan. Rather, it seeks to impose a different decision-making system through the Approved DP that is more akin to a planning permit application being made under, for instance, clause 55 of the Scheme.
- 127 Given that clause 43.04-2 of the DPO requires a planning permit to be ‘generally in accordance with’ an approved development plan, it is difficult to reconcile the council’s structure with the operation of this principle. That is, by the council requiring certain things to be achieved in a planning permit, this removes the discretion inherent in the notion of a planning permit application being ‘generally in accordance with’ a development plan.
- 128 We acknowledge the long-established principle that the more detailed a development plan, the less room for flexibility there is for a subsequent planning permit to seek something different. However, even in a detailed development plan, a discretion still exists.
- 129 By contrast, where a development plan provides that things must be done in a subsequent planning permit, there is no flexibility or discretion to vary this requirement unless the development plan itself is varied to change the requirement.

- 130 In accordance with the evidence of Mr Woodland, there is a difference between precinct structure plans and development plans and importantly for development plans, the performance criteria contained within (however termed) need to retain discretion for the responsible authority to make a decision.
- 131 We find that the council’s drafting structure of the Approved DP exceeds the control that a development plan should have, seemingly seeking to control the outcome of the planning permit application process.
- 132 For instance, through requirement R8 stating:

R8 The subdivision layout and building envelopes must ensure the retention of Protected Trees as shown in Figure 15.

this removes the ability for the responsible authority to allow removal of one of those trees under the SLO4, if it was considered appropriate at the time of the permit application. In effect, this fetters the responsible authority’s discretion entirely. Whilst we accept that the need for a planning permit to be generally in accordance with an approved development plan operates to fetter or confine discretion, it is not absolute; there remains some discretion for the decision-maker.

- 133 In terms of the contents of the development plan as compared to what the DPO24 requires the development plan to include, we find that the development plan should include the information that the DPO24 specifies rather than ‘kicking the can down the road’ and requiring this to be provided at the planning permit application stage. We say this because the DPO24 is clearly directing that this information be provided at this early stage, with respect to the whole of the estate, rather than in a piecemeal fashion when planning permits are sought.
- 134 For example, the urban structure plan requires the following:

- An urban structure plan that responds to the local context and site analysis and identifies:
- ...
- The preferred neighbourhood character, including building materials, articulation and heights.

- 135 As an example, the Approved DP does not appear to deal with preferred neighbourhood character at all, with section 4.3 Built Form and Heritage being silent as to built form requirements such as building materials, articulation and height.
- 136 The October Draft includes an application requirement to address this in the future, as follows:

A32

Details of proposed preferred Neighbourhood Character Design Guidelines for building materials, articulation and heights of buildings and the proposed treatment of site boundary interfaces, including the presentation of development to Manuka Road.

- 137 However, that application requirement does not provide the detail of building materials, articulation and height in the development plan.
- 138 Again, we observe that there is a level of detail required by the DPO24 that is unusual for a development plan, however, this is what the DPO24 contains. In circumstances where the DPO24 directs that certain information be provided in the development plan, we find that the information *should* be provided in the development plan and it is not appropriate for that information to be provided, and assessed by the responsible authority, at the planning permit application stage.
- 139 We acknowledge the applicant's preparation of a table that provides references to where in the applicant's material the applicant submits each requirement of clause 4.0 of the DPO24 is satisfied. However, for the reasons set out above, we find that through the approach adopted by both the council and the applicant to deferring matters to the permit application stage, certain requirements of the DPO24 have not been met.
- 140 In terms of the DPO24 stating that the development plan must include the requirements of, for instance, a bushfire report or an aboriginal cultural heritage assessment, we find that it is sufficient for these reports to be included as part of the development plan in the form of referenced background documents that informed the content of the development plan, so long as the development plan itself actually incorporates the findings or conditions or recommendations of all of the 'background documents'. This is as opposed to those documents needing to be actually included, in their entirety, in the development plan itself. Where there are no findings or conditions or recommendations in a 'background document', this should be recorded or acknowledged in any approved development plan.
- 141 We find that none of the development plans actually incorporate the findings or conditions or recommendations of all of the 'background documents'.
- 142 We do not support the use of standardised headings in so far as they depart from the requirement 'headings' used in the DPO24. By this we mean the requirement category 'headings', such as the inclusion of a local context and site analysis, or, an urban structure plan, in respect of which certain information is required to be provided. We say this because it is confusing to use a set of standardised headings that do not cross-reference with the DPO24. This is particularly so in circumstances where DPO24 is highly specific.

Summary of Tribunal's findings

- 143 We do not support the drafting structure of the Approved DP and its utilisation of requirements and guidelines.
- 144 To the extent that the October Draft and the November Draft retain the drafting structure of the Approved DP, we also do not support the October Draft or the November Draft.
- 145 We do not support the Approved DP or the October Draft to the extent that neither document addresses all of the requirements of the DPO24 and, in various respects, seeks for requirements to be met through directing information to be provided at a later, planning permit application stage.
- 146 This is problematic because we find that none of the versions – the Approved DP, the October Draft or the November Draft – contain all of the information required by the DPO24. In the absence of the provision of that information, we find it impossible to approve any version of the development plan. This is because, for instance, we have no way of stating what the preferred neighbourhood character is, for the purposes of the urban structure plan requirements.
- 147 We are not concerned about the utilisation of a table listing the required reports and assessment as ‘background documents’ so long as the content of these reports is incorporated into the development plan. All versions of the development plan adopt this approach, however, no version of the development plan actually incorporates the findings or conditions or recommendations of all of the ‘background documents’.
- 148 We do not support the use of standardised headings that do not reflect the headings in the DPO24 because of the precise and detailed nature of this particular schedule to the DPO.

Tree retention

What does the DPO24 require?

- 149 Clause 4 of the DPO24 states that a development plan must include the following requirements with respect to landscaping:
- A landscape concept plan that includes:
...
 - The designation of appropriate tree protection zones of trees to be retained.

Submissions and evidence

- 150 In addition to the vegetation to be retained in the Tree Reserve and the Managed Open Space, the Approved DP requires 40 trees to be retained in the developable area.
- 151 Council and the applicant disagree about the number of trees to be retained in this developable area.

152 A Preliminary Arboricultural Assessment of the vegetation on the Land was undertaken by Greenwood Consulting Pty Ltd⁴⁹ ('Greenwood Report'). This report assessed the Retention Value ('RV') of the 40 trees shown for retention on the Approved DP. Council's arboricultural evidence of Mark Reynolds ('Mr Reynolds') is that Trees 109, 160, 163 and 165 should be assessed as high or very high RV rather than moderate RV.⁵⁰ Further, council's evidence supports the retention of 32 of 40 trees within the developable area.

153 In summary, in the table below:

- The rows highlighted in blue are trees that both parties agree can be removed;
- The rows highlighted in green are tree that both parties agree can be retained; and
- The rows in grey and white are the trees where there is no agreement about the retention or removal, with the grey indicating council's position and the white indicating the applicant's position.

154 The applicant's arboricultural evidence from Robert Galbraith ('Mr Galbraith') does not make any recommendations with respect to the retention or removal of the trees. It simply assesses some of the 40 trees for their worthiness of retention.

Table 1: Summary of information regarding trees in the developable area.

Tree Number	Greenwood assessment - RV	Applicant's position: Assessment	TPZ – Arbor Survey (m)	TPZ or Safe distance from trunk centre to residence (m) by Galbraith & Associates
118	Very high	Retain	15	15
200	Very high	Retain	15	16
553	Very high	Remove	15	Not defined
602	Very high	Moderate Remove	4.9	TPZ 6
685	Very high	Moderate Remove	7.1	10
958	Very high	Remove	8.5	Not defined

⁴⁹ Dated 3 February 2021.

⁵⁰ Highlighted with an asterisk in the table.

1	High	Retain	10.7	12
5	High	Moderate Remove	15	14
80	High	Retain	12.2	12
92	High	Retain	11.6	12
101	High	Moderate Remove	12.4	15
113	High	Retain	9.8	12
125	High	Low Remove	4.4	(TPZ 4.8)
131	High	Retain	12.5	13
164	High	Moderate Remove	4.9	(TPZ 5.3)
170	High	Moderate Remove	10.2	10
194	High	Moderate Remove	5.4	(TPZ 5.4)
224	High	Retain	15	15
233	High	Moderate Remove	5.9	10
252	High	Moderate Remove	9.5	20
435	High	Moderate Remove	14.2	15
528	High	Remove	7	(TPZ 7.3)
547	High	Retain	5.6	11
579	High	Retain	5.2	10
587	High	Remove	4.4	Not defined
597	High	Low Remove	3.8	Assessed as group 597-606, as well as some being assessed individually
597	High	Remove	3.8	TPZ4.8
600	High	Moderate	3.7	4

		Remove		
603	High	Moderate Remove	2.5	2.5
678	High	Retain	7.7	9
963	High	Moderate Remove	9.4	TPZ 8.8
88	Moderate	Remove	6.4	TPZ 6
109	Moderate*	High Remove	8.6	15M
111	Moderate	Remove	10	12
160	Moderate*	Remove	11.3	15
163	Moderate*	Low Remove	5.2	TPZ 5.2
165	Moderate*	Remove	3.6	TPZ 3.8
255	Moderate	Remove	3.4	TPZ 8.4
264	Moderate	Remove	4.2	Not defined
269	Moderate	Remove	6.7	Not defined
295	Moderate	Remove	4.3	TPZ 5

(Trees in red said not to be in Approved DP)

155 The length of time granted to Mr Reynolds to inspect the Land seemed to impact the extent of the analysis he could undertake. After some submissions about the length of time the council's arboricultural expert was permitted on the Land, it seems to us the process of requesting an inspection and its length could have been better managed by the parties. In any event, Mr Reynold's evidence is that 16 of the 40 trees were properly inspected including by the taking of measurements. These trees are numbered:

- 5, 101, 111, 113, 118, 125, 160, 170, 194, 200, 224, 233, 435, 547, 553 and 678.

156 Mr Reynold's evidence is that the information he collected correlated well with the information contained in the Greenwood Report.

157 Notably, Mr Galbraith was not asked to provide evidence about the retention of the trees in the developable area. To that end, we do not have any evidence before us from the applicant about which trees (if any) should be retained or removed. Rather, Mr Galbraith has used a 'worthiness of retention' ('WOR') assessment which includes consideration of the following factors:

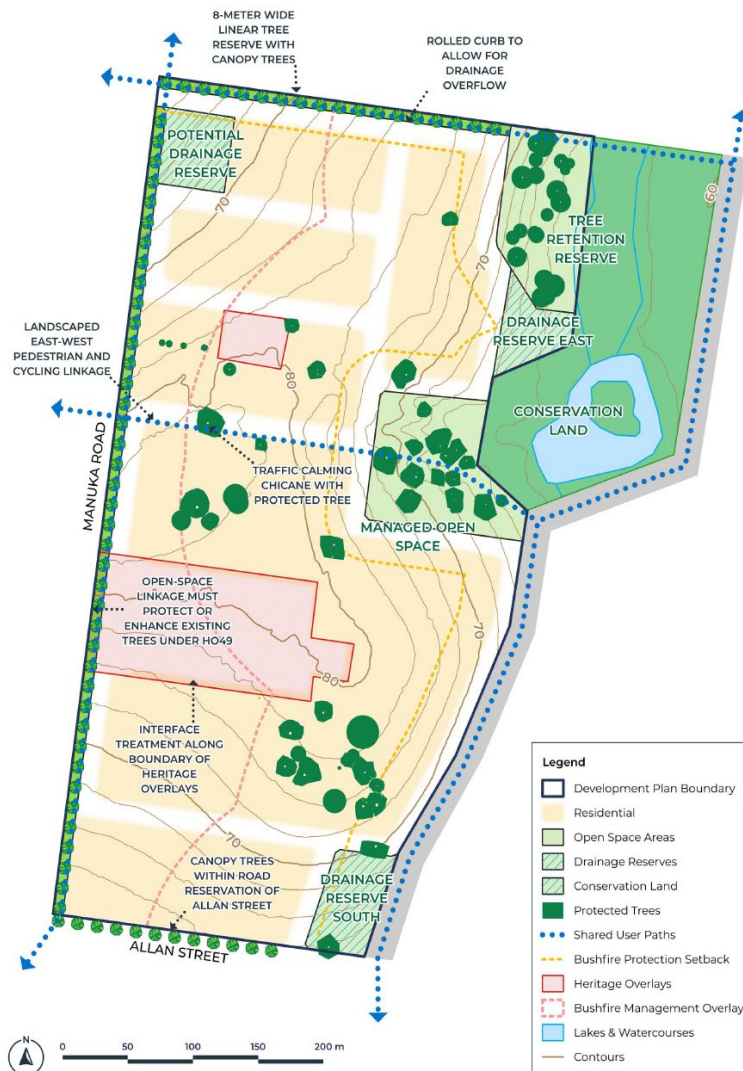
- i structure, health, form and safe useful life expectancy;

- ii size, prominence in the landscape;
- iii species rarity;
- iv whether indigenous;
- v whether an environmental weed;
- vi importance for habitat of native wildlife; and
- vii whether of historical or cultural interest.

158 Notably, this WOR is based on the assumption the Land is to be redeveloped and there is opportunity for new landscaping of the Land.

159 On that basis, we are required to review the Greenwood Report, and the reports of the experts before us to determine which trees located in the developable area are to be shown to be retained. The Approved DP contains a ‘landscape plan’ at Figure 15 which is extracted below:

Figure 15: Landscape Plan



160 It is noted that the landscape plan does not identify the trees for retention with any specificity or precision. Further, the Approved DP sets out a

number of ‘requirements’ and ‘guidelines’ with respect to landscaping as follows:

Requirements		Requirements	
R8	The subdivision layout and building envelopes must ensure the retention of Protected Trees as shown in Figure 15.		Each residential lot must feature:
R9	Open spaces must retain existing vegetation of high retention value as shown by the <i>Arboricultural Assessment</i> , except where its retention compromises adequate bushfire management measures or reasonable service access.	R14	» A minimum of one deep soil zone and at least one canopy tree within the front setback. Canopy trees are required to have a height of at least 8 metres and canopy width of 5 metres at maturity.
R10	Streetscape planting must complement and integrate with adjoining parkland design.		» Landscaped front yards with a minimum 30% area planted with suitable trees, shrubs and groundcovers.
R11	Lots adjacent to existing parkland and conservation land must be landscaped with indigenous trees and indigenous or native shrubs and ground covers.	Guidelines	
R12	Provide an 8-metre-wide linear tree reserve with canopy trees along the Precinct’s northern and western boundaries to the satisfaction of the responsible authority.	G3	Encourage the retention of significant trees and incorporate existing vegetation in both public and private realms. A mixture of indigenous, native and exotic species with demonstrated sustainability for the area may be used on lots which are not adjacent to existing parkland and conservation land, to the satisfaction of the responsible authority.
R13	Canopy trees must be planted adjacent to the southern boundary of the Precinct, within the road reservation of Allan Street from Manuka Road to the southern access point to the precinct.	G4	Encourage the provision of space for gardens within residential front or side setbacks.

161 Mr Reynolds’ evidence helpfully includes a map that locates the trees for retention and removal in the developable area which cross references the tree numbers originally used in the Greenwood Report.

Tribunal’s findings

162 We agree with the submissions and evidence of the parties that the following trees should be retained:

Tree Number	Tribunal determination	Reason
118 Bunya Bunya Pine	Retain	RV - very high WOR – 9 very good example of this specimen Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens.
200 English Oak	Retain	RV – very high WOR – 9 Consistent with objective at clause 1 of DPO24, to recognise tall, mature

		trees in private gardens.
1 English Oak	Retain	RV – high WOR – 8 Consistent with objective at clause 1 of DPO24, recognise tall, mature trees in private gardens. Located in the southeast corner of the Land opposite existing dwellings.
80 Deodar Cedar	Retain	RV – High WOR – 7 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
92 English Oak	Retain	RV – High WOR – 8 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
113 English Oak	Retain	RV – High WOR – 7 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
131 English Oak	Retain	RV – High WOR – 8 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
224 English Oak	Retain	RV – High WOR – 9 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
547 Golden Elm	Retain	RV – High WOR – 7 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens
579 Golden Elm	Retain	RV – High WOR - 7 Consistent with objective at clause 1 of DPO24, to recognise tall, mature

		trees in private gardens
678	English Oak	RV – High WOR -7 Consistent with objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens

- 163 Council’s arboricultural evidence is that trees 5, 252, 255 and 435 are within the proposed road network and should be removed. The applicant’s evidence agrees that these trees should be removed.
- 164 We accept the evidence regarding the removal of trees 5, 252, 255 and 435 for the following reasons:
- a the structure of trees 252 and 255;
 - b the risk of limb shed for tree 5 and upper crown die back;
 - c the necessity to provide a functional road layout; and
 - d the removal of these trees will have less of an impact on the landscape character because they are located within close proximity of tree retention areas.
- 165 Tree 125, is a Desert Ash⁵¹ and a weed and is located within a number of trees that will be retained and thus we agree this tree can be removed.
- 166 Tree 587 is a Lemon Scented Gum⁵² located on or close to the boundary of Minard Villa. Its removal is supported by council’s arboricultural evidence although the explanation for this is unclear to us. Given its location and our findings on trees 600, 602 and 603 we consider this tree should be retained.
- 167 Tree 111 is a Deodar Cedar⁵³ that is located amongst a number of other trees including trees 113 and 118. Given the retention of trees in the immediate vicinity of tree 111, we consider its removal to be acceptable.
- 168 Tree 264 is a Liquid Amber⁵⁴ located close to tree 269, a Deciduous Pin Oak.⁵⁵ Given we consider tree 269 should be retained, on balance we find it acceptable for tree 264 to be removed.
- 169 We now consider the trees whose retention is a matter of contention between the parties. We highlight that seven trees were not labelled as ‘protected trees’ in Figure 13 of the Approved DP. These trees are numbered: 553, 958, 113, 579, 587, 264 and 269. We note that both parties agree that trees numbered 113 and 579 should be retained and we agree as set out above notwithstanding they were not identified as trees to be protected in Figure 13 of the Approved DP.

⁵¹ *Fraxinus angustifolia*

⁵² *Corymbia citriodora*.

⁵³ *Cedrus deodara*.

⁵⁴ *Liquidambar styraciflua*.

⁵⁵ *Ulmus glabra*.

170 The following table contains our findings and reasons for the remaining trees in contention:

Tree Number	Tribunal determination	Reason
553 Wych Elm	Retain	<p>Its RV in the Greenwood Report and by Mr Reynolds is very high. The applicant's witness has not assessed this tree.</p> <p>We understand the retention of this tree will reduce the potential lot yield however, it is a tree that is consistent with the objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens. Further, few trees are sought to be retained in the general vicinity of this tree and thus, its retention will contribute to the overall amenity provided by mature landscaping in this area.</p>
602 Lemon Scented Gum	Retain	<p>Its RV in the Greenwood Report and by Mr Reynolds is very high. The applicant's WOR is 5 but we note that the tree was at a height of 18 metres with a canopy spread of 12 metres and thus contributes to the landscape outcome sought by DPO24. We also note that the applicant's evidence is that the tree is in fair to good condition.</p> <p>We have concluded that this tree is to be retained because of our findings that trees in its vicinity (597, 600 and 603) can be removed.</p>
685	Retain	<p>Its RV in the Greenwood Report and by Mr Reynolds is very high. The applicant's evidence is that this tree is of good health for its age.</p> <p>We understand the retention of this tree may reduce the potential</p>

		lot yield however, it is a tree that is consistent with the objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens. Further, few trees are sought to be retained in the general vicinity of this tree and thus, its retention will contribute to the overall amenity provided by mature landscaping in this area.
958 River Red Gum	Retain	Its RV in the Greenwood Report and by Mr Reynolds is very high. The applicant's evidence does not assess this tree. Its retention is consistent with the objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens. Further, few trees are sought to be retained in the general vicinity of this tree and thus, its retention will contribute to the overall amenity provided by mature landscaping in this area.
101 Pin Oak	Retain	This tree has a high RV as assessed in the Greenwood Report and by Mr Reynolds. The applicant's evidence says the structure of the tree is 'lopsided' however, that is not immediately evident from the photographs in the Greenwood Report. In any event, given a height of 20 metres and spread 27 metres its retention is consistent with the objectives of DPO24 to recognise tall, mature trees in private gardens.
164 Liquid Ambar	Remove	Whilst the RV for this tree is high in the Greenwood report and by Mr Reynolds, we note that there is a low retention priority for this tree. The applicant's evidence is that it is

		lopsided to the south-west. We consider the removal of this tree to be acceptable because it is located in an area where there are several trees that are to be retained.
170 Pin Oak	Retain	This tree has a high RV as assessed in the Greenwood Report and by Mr Reynolds. The applicant's evidence says the structure of the tree is 'heavily lopped' with a poor structure. We do not agree and in any event with a height of 18 metres and a spread of 20 metres its retention is consistent with the objectives of DPO24.
194 Dutch Elm	Remove	Whilst this tree is assessed as having a high RV, it is located in close proximity to tree 200 which is to be retained. Thus, the contribution of tree 194 to the objectives of DPO24 is diminished, and its removal is recommended.
233 Atlas Cedar	Remove	Whilst this tree is assessed as having a high RV, it is located in close proximity to tree 200 which is to be retained. Thus, the contribution of tree 233 to the objectives of DPO24 is diminished, and its removal is recommended.
528 Pin Oak	Retain	This tree is located to the north-east of Minard Villa and has a high RV as assessed in the Greenwood Report and by Mr Reynolds. The applicant's evidence says the structure of the tree has an acute split prone pressure fork between the two main trunks. We consider the retention of this tree is consistent with the objective at clause 1 of

		DPO24, to recognise tall, mature trees in private gardens. Further, there are no trees identified for retention to the north of this tree and thus its retention value is increased as a consequence.
597 Lemon Scented Gum	Remove	Whilst the RV for this tree is high in the Greenwood report and by Mr Reynolds, we note that there is a low retention priority for this tree. The applicant's evidence is that the structure of the tree has acute split prone pressure at 3 metres and that its canopy is 7 metres that is, much smaller than the canopy spread of tree 602. Given that, and the other trees remaining in this area in addition to proposed planting along the western boundary of the land, the removal of this tree is acceptable.
600 Lemon Scented Gum	Remove	Whilst the RV for this tree is high in the Greenwood report and by Mr Reynolds, we note that there is a low retention priority for this tree. The applicant's evidence is that the structure of the tree is lopsided with a smaller canopy spread when compared to tree 602. Given that, and the other trees remaining in this area in addition to the proposed planting along the western boundary of the land, the removal of this tree is acceptable.
603 Lemon Scented Gum	Remove	Whilst the RV for this tree is high in the Greenwood report and by Mr Reynolds, we note that there is a low retention priority for this tree. The applicant's evidence is that the structure of the tree is lopsided

		with a smaller canopy spread when compared to tree 602. Given that, and the other trees remaining in this area in addition to the proposed planting along the western boundary of the land, the removal of this tree is acceptable.
963 Narrow leaf Peppermint	Retain	The tree is assessed as having a high RV in the Greenwood Report and by Mr Reynolds. The applicant's evidence says the structure is poor. However, there are no trees identified for retention generally in the location of this tree and we consider its retention consistent with objective at clause 1 of DPO24 to recognise tall, mature trees in private gardens.
88 Golden Ash	Remove	Whilst the RV for this tree is high in the Greenwood report and by Mr Reynolds, we note that there is a low retention priority for this tree. The applicant's evidence is that the structure of the tree is 'blown out'. Given the number of trees to be retained in the vicinity of this tree, its removal does not compromise the objectives of DPO24.
109 Pin Oak	Retain	This tree has been assessed as having a moderate RV in the Greenwood Report. Whilst the applicant's evidence is that the tree is 'rangy' and in need of crown reduction, we note that its WOR is 7. In addition, it has a height of 22 metres and spread of 27 metres. This makes a contribution to the landscape. As such it is to be retained.
160	Retain	This tree has a moderate RV as

Lemon Scented Gum		assessed in the Greenwood Report. The applicant's evidence is that the tree is a large healthy specimen. This tree contributes to the landscape objectives of DPO24 and should be retained. We note that it has a height of 22 metres with a spread of 25 metres. And thus its retention is consistent with the objectives of DPO24. The retention of this tree has considered the removal of trees 163 and 165.
163 Golden Ash	Remove	Whilst the RV for this tree is moderate in the Greenwood report, we note that there is a low retention priority for this tree. The applicant's evidence is that half of the crown is dead. The height is 10 metres with a spread of 11 metres. Given the applicant's evidence and that tree 160 is being retained, tree 163 can be removed.
165 Colarado Spruce	Remove	Whilst the RV for this tree is moderate in the Greenwood report, we note that there is a high retention priority for this tree. The applicant's evidence is that the tree is in good condition. It is 11 metres high with a spread of 7 metres. Whilst we consider the tree to be an attractive specimen its retention does not substantially advance either of the objectives of DPO24 in light of the retention of other trees in its vicinity.
269 Pin Oak	Retain	Whilst the RV for this tree is moderate in the Greenwood report, we note that there is a high retention priority for this tree. The applicant's evidence does not assess this tree. Its

		retention is consistent with the objective at clause 1 of DPO24, to recognise tall, mature trees in private gardens. Further, few trees are sought to be retained in the general vicinity of this tree and thus, its retention will contribute to the overall amenity provided by mature landscaping in this area.
295 Narrow Leaf Peppermint	Remove	Whilst the RV for this tree is moderate in the Greenwood report, we note that there is a low retention priority for this tree. The applicant's evidence is that it is a young specimen that is 'self-sown'. Whilst there are no trees for retention in the general vicinity of this tree, its retention does not contribute to the objectives of DPO24 because it is a young narrow tree.

Summary of Tribunal's findings

171 In summary, our determination with respect to each tree is as follows:

Tree Number	Tribunal determination
118	Retain
200	Retain
553	Retain
602	Retain
685	Retain
958	Retain
1	Retain
5	Remove
80	Retain
92	Retain
101	Retain

113	Retain
125	Remove
131	Retain
164	Remove
170	Retain
194	Remove
224	Retain
233	Remove
252	Remove
435	Remove
528	Retain
547	Retain
579	Retain
587	Retain
597	Remove
600	Remove
603	Remove
678	Retain
963	Retain
88	Remove
109	Retain
111	Remove
160	Retain
163	Remove
165	Remove
255	Remove
264	Remove
269	Retain
295	Remove

Landscape Concept Plan:

172 None of the versions of the development plan entirely aligns with our determination with respect to the trees to be retained and removed.

173 As such, we do not support the Approved DP, the October Draft or the November Draft in terms of tree retention.

Landscaping

What does the DPO24 require?

174 Clause 4 of DPO24 states that a development plan must include the following requirements with respect to landscaping:

- A landscape concept plan that includes:
 - Design principles and a proposed species palette to complement existing landscaped areas.
 - Landscaping concepts for public areas.
 - The identification of vegetation to be retained and removed based on an arborist's requirements.
 - The designation of appropriate tree protection zones of trees to be retained.
- limited understorey planting along road frontages to improve visual surveillance.
- The retention of existing avenues of trees, where possible, to frame view lines.
- A demonstration of how tree planting zones are to be established and managed including details of species to be used, envelope requirements that enable viable setbacks from buildings and timing of tree planting and their ongoing management.
- Demonstration how vegetation will be planted to minimise bushfire risk and create a landscape in sympathy with defensible space principles.

Submissions and evidence

175 The applicant relies upon the landscape evidence of Darren Atkinson which contains the following

- acknowledges bushfire risk and maintenance of planting to ensure risk is minimised.

Tribunal's findings

177 The Landscape Concept Plan does not provide a demonstration of how tree planting zones are to be established and managed on new residential lots, including details of species to be used, envelope requirements that enable viable setbacks from buildings, services and roads, and timing of tree planting and their ongoing management.

178 We acknowledge that the Approved DP requires each residential lot to feature planting as follows, and that this requirement is retained in the October Draft:

Each residential lot must feature:

- R14
- » A minimum of one deep soil zone and at least one canopy tree within the front setback. Canopy trees are required to have a height of at least 8 metres and canopy width of 5 metres at maturity.
 - » Landscaped front yards with a minimum 30% area planted with suitable trees, shrubs and groundcovers.

179 However, we find that this does not address all of the landscape concept requirements of the DPO24.

180 We observe that the requirements for the landscape concept plan are not expressed to be optional: 'where possible'. Rather, the development plan must include this information. Given that this requirement seeks a *demonstration of how* tree planting zones are to be *established* and *managed* on new residential lots, and asks for information including details of species to be used, envelope requirements that enable viable setbacks from buildings, services and roads, and timing of tree planting and their ongoing management, this is suggestive of seeking an explanation of those matters. The absence of this detail and demonstration is significant. We have not been provided with any evidence as to how the tree planting zones are to be established and managed on the new residential lots, nor any of the information specified as needing to be included. This is not a criticism of the expert evidence, merely an observation of what is before us. In the absence of such information, it is unclear how this requirement *could* be met by the development plan. We do accept there is a 'general note' in the Landscape Concept Plan that is extracted in the October Draft that requires any permit application to demonstrate how tree planting zones on new residential lots will be dealt with however, that is not sufficient to satisfy the requirement in the DPO24.

181 We observe that, in our experience, this level of detail being required in relation to the landscaping of residential lots is unusual in a development

plan. However, it is this level of detail that *is* required in the development plan pursuant to the DPO24.

182 We observe the Landscape Concept Plan is superior in terms of the detail when compared with Figure 15 of the Approved DP. For example, it provides for landscaping of public areas and road reserves whereas the Approved DP does not provide such detail. Accordingly, the Approved DP also fails to address the landscaping requirements of the DPO24.

Summary of Tribunal's findings

183 We do not support the Approved DP, the October Draft or the November Draft to the extent that none of these documents contains all of the landscape concept plan requirements of the DPO24.

Bushfire management

What does the DPO24 require?

184 DPO24 requires a bushfire report that:

- A bushfire report prepared by a suitably qualified person that:
 - Identifies the areas of bushfire hazard within 150 metres of the site, including classifiable vegetation and the slope, under AS 3959-2018 *Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2018).
 - Shows the required setbacks to building envelopes from any area of bushfire hazard to ensure a construction standard of BAL 12.5 can be met.
 - Shows the required areas of defensible space on private and public land.
 - Identifies the vegetation management requirements for areas of defensible space generally in accordance with Table 6 of Clause 53.02, with the exception of canopy tree separation that can be reduced to two metres.
 - Shows the location of public open space.
 - Shows the road layout and provision of a perimeter road on the northern and eastern boundaries.

Submissions and evidence

185 The Approved DP contains Figure 20 that identifies the areas of bushfire hazard within 150 metres of the land in addition to providing the following requirements:

R24	<p>Requirements</p> <p>All lots within the BMO must either include a building envelope capable of achieving a setback from a bushfire hazard to enable construction standard of BAL 12.5, or be located a sufficient distance from the hazard vegetation that a building may be sited anywhere on the lot to achieve compliance with a BAL 12.5 construction standard.</p>	R26	<p>Requirements</p> <p>A perimeter road must be provided adjoining the woodland areas the east of the Precinct to support firefighting. Where a road forms part of the nominated defensible space area, it must be designed, landscaped, and managed for the purpose of providing defensible space.</p>
R25	<p>All lots within the Bushfire Management Overlay must provide defensible space between the outer face of the dwelling and lot boundary in accordance with the requirements of Table 6 to Clause 53.02 of the Casey Planning Scheme, except that the minimum canopy separation required between trees can be reduced to 2 metres.</p>	R27	<p>The managed open space must be maintained as grass understorey.</p>
		R28	<p>The perimeter road and open space areas within the Precinct must form part of the defensible space and are to be landscaped and managed through appropriate bushfire mitigation measures.</p>
		R29	<p>Operable hydrants must be provided in accordance with the requirements of the relevant fire authority.</p>

186 Further, Figure 13 of the Approved DP highlights a Bushfire Protection Setback. This figure is extracted below for convenience.

Figure 13: Future Urban Structure Map



187 The applicant relies upon the evidence of Philip Walton in respect of bushfire who says as follows:

- Figure 13 of the Approved DP is confusing as it shows a ‘bushfire protection setback’ in an orange dashed line extending into the residential area.
- Figure 13 does not identify the location of the bushfire hazard from which the setback should be measured. The orange dashed line should be deleted as Requirement 24 addresses the setback.

- a revised Urban Structure Map should be adopted that provides for:
 - a 33 metre bushfire setback from the tree retention reserve comprising 13 metres building setback and 20 metre road reserve;
 - a 33 metre bushfire setback from the Conservation Land that comprises a 7 metre building setback on the residential lots with a 16 metres wide road reserve and a 10 metre strip in the Conservation Land; and
 - a 33 metres bushfire setback from the managed open space comprising a 4-7 metre building setback on the residential lot, a 16 metre wide road reserve and a 10-13 metre strip in the managed open space.

Summary of Tribunal's findings

188 We do not support the evidence because it results in the management of the Conservation Land, tree reserve and open space by future entities or bodies. We are not satisfied that the management of these areas to address bushfire risk should be directed to the downstream owners or managers of these areas.

189 We accept that defendable space can exist on public land because of DPO24. However, in the absence of information regarding who will manage the defendable space to ensure general accordance with the relevant table at clause 53.02 of the Scheme, building setbacks should be shown that avoid management of vegetation on public areas.

Drainage Scheme

What does the DPO24 require?

190 The DPO24 states that a development plan must include the following requirements with respect to drainage:

- A servicing report that includes:
 - A drainage and servicing assessment indicating how all relevant flooding, drainage and water quality issues are to be addressed .
 - A report that details infrastructure that is to be provided as part of the development, including timing triggers, standards and funding.
 - Water sensitive urban design measures to improve the quality of water discharged into existing waterways.

191 We observe that these requirements are not to be met in isolation but rather should be addressed in the context of what is shown in other parts of any development plan prepared pursuant to the DPO24. Accordingly, matters such as, for instance, the 'identification of any areas of environmental significance' should also be taken into account in devising, and in the approval of, a drainage scheme for the Land.

Submissions and evidence

Comparison of proposed development plans

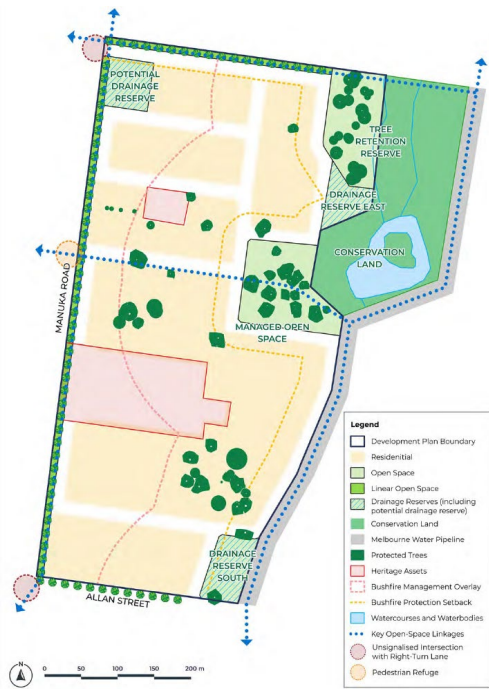
- 192 As stated in the Approved DP, the Land is located between Melbourne Water's Manuka Road Drainage Servicing Scheme and Cardinia Creek and is not currently serviced by a drainage scheme. As such, the residential development of the Land will need to be designed to meet best practice by treating stormwater before discharging to receiving waterways.⁵⁷
- 193 The following discussion refers to the content of:
- a the applicant's proposed August 2021 development plan, which was supported by a Stormwater Management Plan prepared by SMEC in 2020⁵⁸ ('2020 SMP');
 - b the Approved DP; and
 - c the October Draft.
- 194 The Approved DP identifies three areas on the Land that are to be set aside for drainage purposes, in the north-western corner, north-eastern area and south-eastern corner.
- 195 By contrast, in the proposed August 2021 development plan the applicant identified two areas for drainage – one on the Land and one located on the Conservation Land.
- 196 The image reproduced below left is from the Approved DP,⁵⁹ the image reproduced below right is from the proposed August 2021 development plan.⁶⁰

⁵⁷ Approved DP, section 4.8, 52.

⁵⁸ Stormwater Management Plan, SMEC, 15 October 2020.

⁵⁹ Approved DP, Figure 13, 36.

⁶⁰ August 2021 proposed development plan, Figure 13 Drainage Plan, 37.



197 The 2020 SMP identified four catchments onsite, flowing to the north-west, north-east, south-west and south-east corners. The drainage for each of these catchments was proposed as follows:

- a north-west catchment: flows will be conveyed overland and in pipework towards the north-western corner of the Land. Gap flows greater than predeveloped (in addition to the piped flows) will discharge into a proposed swale which will run northward along Manuka Road and discharge into the existing swale asset. The existing swale connects to Grasmere Creek upstream of the proposed retarding basin/wetland;⁶¹
- b south-west catchment: drainage was intended to be collected via a pipe and directed eastwards along Allan Street towards Cardinia Creek, with the pipe being sized to ensure the gap flow for this catchment will be discharged into the public drainage system and will not exceed the predeveloped flows for the site thus minimising offsite flooding impacts;⁶² and
- c north-east and south-east catchments: the retarding basin in the Conservation Land (for the north-east catchment) and on the Land (for the south-east catchment) are intended to retard the 1% AEP flow back to predeveloped flows prior to discharge into Cardinia Creek.⁶³ The retarding basin outlets were to be designed to retard the 2 year flows to help prevent erosion of downstream waterways.⁶⁴

61 Ibid, [3.4.1].

62 Ibid, [3.4.3].

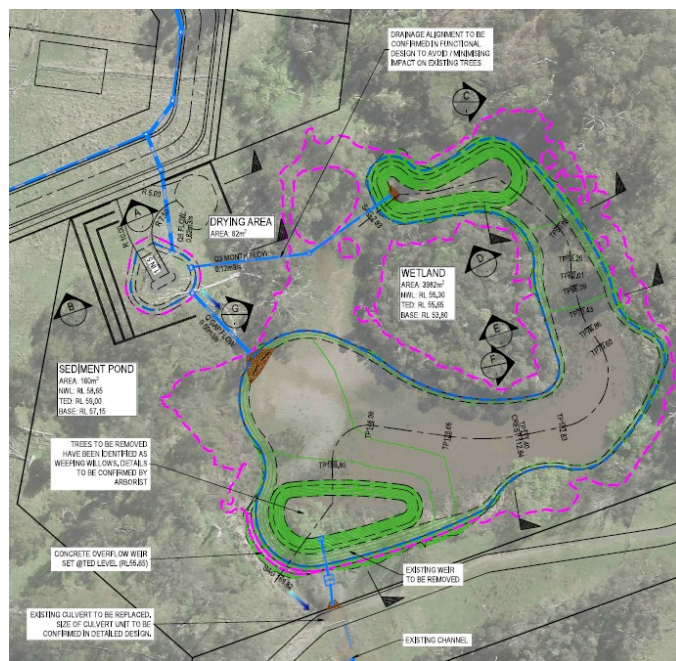
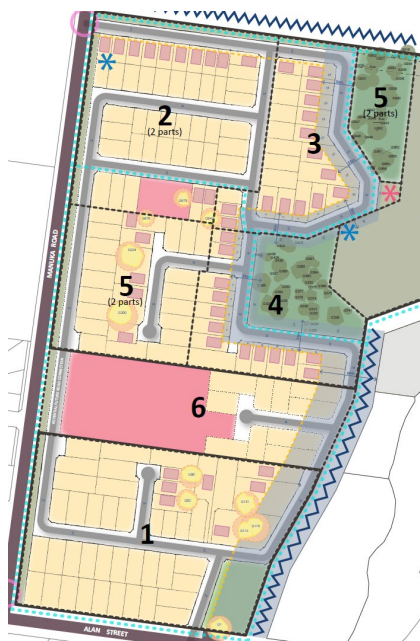
63 Ibid, [3.4.2].

64 Ibid.

- 198 The council did not support the drainage scheme contained in the proposed August 2021 development plan and the 2020 SMP.
- 199 The council stated that its drainage concept, as contained in the Approved DP, was devised by council officers after having informal conversations with internal drainage engineers. At the hearing, the council was unable to provide any explanation as to why it has identified the locations it has, whether these areas will be sufficient or how exactly stormwater will be managed and treated in those reserves.
- 200 The applicant now seeks the drainage scheme as contained in the October Draft. This is depicted in the Urban Structure Plan, extracted below in paragraph 205, which identifies:
- a two areas – one in the north-western corner of the Land and one in the Conservation Land – with a blue asterisk as ‘Drainage Area Option (*indicative location only*)’; and
 - b a drainage reserve in the south-eastern corner (green area).

Darren Powell – civil engineering evidence

- 201 The applicant relies on the civil engineering evidence of Mr Powell of SMEC, noting that this is the firm that prepared the 2020 SMP.
- 202 Mr Powell has also, himself, prepared a subsequent Stormwater Management Plan dated 11 October 2023 (‘2023 SMP’).
- 203 The 2023 SMP contains retarding system plans.
- 204 The image below left is from the Urban Structure Plan, the image below right is from the 2023 SMP, depicting what is intended to be located on the Conservation Land.



205 In summary, Mr Powell's evidence is:⁶⁵

The site is broken up into 3 catchments due to the topography and a range of treatments are proposed responding to the site constraints.

The southern area is to utilise a storage tank for retardation and bio retention to treat flows to best practice. The use of the storage tank is due to the slope of the site and to minimise the risk to the public if a retarding basin was to be used as battering would not be practical due to excessive slope and wall failure.

The northern area has a ridge running north south that means the flows head to either to the north western corner or to the east. Refer to Figure 1 below.

The proposal is to send the flows from the north west to the existing waterway being Grasmere Creek that then flows around and back onto the site to the eastern side where it enters the proposed wetland. It maybe practical to also provide a gross pollutant trap at the limit of the site before the flows are discharged to the creek. Flows heading east will be treated in a sediment pond and then the wetland. This wetland will utilise and improve the existing dam on the site. I have walked the site and viewed a number of issues with the existing dam that need to be addressed. The existing spillway is being undermined and there are a number of trees (willows) growing on the dam wall that could lead to failure if not removed.

206 It was Mr Powell's evidence that:

- a the locations identified for drainage in the October Draft are the most practical locations for these assets based on the catchments, levels and slope but acknowledges that further studies and approvals including any necessary environmental approvals will be required to inform detailed design and construction;⁶⁶
- b the drainage area option in the north-west corner would not be required if the 2023 SMP is adopted, although there might be a need for a gross pollutant trap in this location, which could be considered at the detailed design phase;⁶⁷
- c for flows heading to the east, all drainage assets will be located on the Conservation Land i.e. the sediment pond, the drying area and the wetland/retardation basin;
- d ultimately, all stormwater from the northern catchments will move into the Conservation Land;
- e the Conservation Land is currently providing drainage, as Grasmere Creek and all the flows within the existing gullies already cross the Conservation Land;
- f the existing concrete weir to the south of the dam on the Conservation Land is not functioning well, and is leading to water leaking out onto the Melbourne Water Pipetrack and into the Grasmere Creek. As such, this weir has a current potential for failure;
- g the alternative option advanced by the council of constructing infrastructure in the Cardinia Creek parkland area to the north of the Land was rejected by Parks Victoria⁶⁸ who manages that land, and nor

⁶⁵ Expert Witness Statement of Darren Powell, 25 October 2023, Section 3.1, (omitting Figure 1).

⁶⁶ Ibid, Section 3.3, 6.

⁶⁷ Ibid.

⁶⁸ Letter from Parks Victoria to council dated 4 October 2022 stating that land manager consent would not be provided by Parks Victoria.

does Melbourne Water have any plans for a wetland in that location. Other than these observations, Mr Powell has not assessed whether this would be a sensible way forward;

- h the area (size) of the southern drainage reserve in the Approved DP could be reduced;
- i he has not examined other drainage options for the north-eastern catchment but focused on the utilisation of the Conservation Land because it contains the existing wetland/dam;
- j whilst it is not Melbourne Water's first preference for a wetland to be designed within a waterway,⁶⁹ there are numerous examples of online wetland systems in Melbourne Water catchments – the important thing is to manage any potential downstream impacts;
- k whilst the 2023 SMP shows one track that could be used to access the southern deep pond, there is no access track shown to the macrophyte zone⁷⁰ – this would need to be identified and located mindful of the presence of vegetation in the Conservation Land; and
- l Melbourne Water would need to provide its consent to the intended utilisation of the Conservation Land;

207 In terms of the north-eastern drainage reserve depicted in the Approved DP, it is Mr Powell's evidence that this area is of insufficient size to locate the required assets, the steep gradient presents a challenge for locating a wetland in this area, and so the existing wetland on the Conservation Land would still need to be utilised in the process:⁷¹

It also will not be possible to treat all of the stormwater to best practice as a considerable proportion of the site falls to the east. The area allocated within the DP for drainage reservation to the east would only be sufficient for the sediment control and still require the existing dam to be improved as a wetland for retardation and water quality.

To construct a wetland within the drainage area allocated as shown in the adopted DP will still drain to the creek and into the existing dam. Therefore, even under this scenario, the existing dam will need to be improved considering the current condition.

Mark Woodland – town planning evidence

208 The applicant also relies on the evidence of Mr Woodland.

209 Mr Woodland defers to the expertise of others in terms of stormwater treatment, waterway design and ecology but supports the exploration of opportunities to integrate stormwater storage and treatment assets in the Conservation Land, 'particularly if restoration works are likely to be needed within the reserve in any case'.⁷²

210 Mr Woodland's support is conditional upon:

⁶⁹ Constructed Wetlands Design Manual, Melbourne Water, Part A3: Design Considerations for Wetlands, December 2020, section 3.4, page 7.

⁷⁰ Ibid, Table 3, 11.

⁷¹ Ibid, Section 3.4, 7.

⁷² Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [232].

- a confirmation from others with relevant expertise that there is a reasonable conceptual basis to contemplate undertaking stormwater works within the Conservation Land; and,
- b the development plan stating that if further analysis and design completed at the functional design and detail design phases fails to satisfy the responsible authority that these works can be undertaken in a way which is complimentary to the conservation values of the Conservation Land, then the drainage works would need to be located outside of the Conservation Land.⁷³

Catherine Clowes – botany evidence

- 211 Whilst the council holds concerns that drainage to the north-west corner might not eventuate, the council accepts that showing the north-western drainage area as a ‘potential drainage area’ is satisfactory.⁷⁴
- 212 Of most concern to the council is the applicant’s intention to use the Conservation Land for flood retention and stormwater treatment. The council’s concerns in this respect are based on the Conservation Land being an area of biodiversity significance that supports endangered species and ecological fauna habitat.
- 213 To this end, the council relies on the botany evidence of Dr Clowes of the council.
- 214 In summary, Dr Clowes’ evidence is:
- a the northern deep pool in the Conservation Land is surrounded by three patches of native vegetation, being:⁷⁵
 - i HZG: Swampy Riparian Woodland (EVC 83) described in the Flora and Fauna Assessment⁷⁶ as “of high to very high quality”;
 - ii HZH: Swampy Riparian Woodland (EVC 83) described in the Flora and Fauna Assessment as “of high to very high quality”;
 - and
 - iii HZF: Swamp Scrub (EVC 53) described in the Flora and Fauna Assessment as dominated by *Melaleuca ericifolia* Swamp Paperbark;
 - b the proposed sediment pond/drying area is located:⁷⁷
 - i west of HZH; and
 - ii south of HZD, which is described in the Flora and Fauna Assessment as Swampy Riparian Woodland (EVC 83) with a

⁷³ Ibid, [233].

⁷⁴ Submission on behalf of the Responsible Authority, 1 November 2023, [68], [70].

⁷⁵ Expert Report by Catherine Clowes, 24 October 2023, [22].

⁷⁶ Manuka Road Flora and Fauna Assessment, Nature Advisory, December 2019.

⁷⁷ Expert Report by Catherine Clowes, 24 October 2023, [23].

canopy of *Eucalyptus viminalis* Manna Gum and understorey dominated by invasive grasses and woody weeds. Typically, Dr Clowes would describe native vegetation dominated by Manna Gum and located in a hilly area, adjacent to a watercourse as Riparian Forest (EVC 18);

- c no information has been provided about the proposed locations of drainage pipes and weir upgrade in the Conservation Land, nor access to the northern deep pool;
- d based on the SMEC documents that she has seen, the weir upgrade includes a height increase of 350mm, which she understands will flood the native vegetation present in the centre of the wetland mapped as HZF.⁷⁸ Dr Clowes is concerned that this will lead to vegetation die-off;
- e in order to allow for direct removal and assumed losses of native vegetation in applications under clause 52.17 of the Scheme, buffer widths are provided around proposed works. Dr Clowes has allowed 10-metre buffers around the northern and southern deep pools and the proposed sediment pond. The buffer measurement of 10 metres was chosen by Dr Clowes ‘arbitrarily’ and she accepted that it was an estimate of direct and indirect impacts;
- f when the above is taken into account, there will be an estimated loss of native vegetation that exceeds 0.2ha;
- g Dr Clowes acknowledged that no planning permits were being sought in this application, including to remove native vegetation, however she found it difficult to disconnect the proposed development plan with the impacts of future works associated with the development plan;
- h Dr Clowes acknowledged that future permit applications would contain information and design details that are not currently available and that she is not in a position to accurately assess the impacts of future detailed design;
- i according to the Flora and Fauna Assessment, there are 140 identified Dwarf Galaxias *Galaxiella pusilla* recorded in the search area and the Cardinia Creek meta-population (Cardinia and Grasmere Creek) is identified as an important Dwarf Galaxias population according to the Dwarf Galaxias Action Statement No. 258.⁷⁹ Dwarf Galaxias are listed as endangered under the *Flora and Fauna Guarantee Act 1988* (Vic) and vulnerable under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Key threats to Dwarf

⁷⁸ Ibid, [16].

⁷⁹ Ibid, [33].

Galaxias include habitat degradation and loss and alteration to flow regimes;⁸⁰

- j in Dr Clowes' opinion, all native vegetation (Swampy Riparian Woodland) that surrounds Grasmere Creek, including the existing wetland, should be conserved;
- k Dr Clowes does not agree that the applicant's proposed drainage scheme works in the Conservation Land will have an outright environmental benefit; and
- l Dr Clowes agrees that deep ponds presently exist in the wetland area of the Conservation Land but says that these will be changed as a consequence of the drainage scheme being put in this area.

Tribunal's findings

- 215 The evolution of the preparation of the development plan means that there was an engineering basis for the notion of locating stormwater drainage reserves and associated assets in the north-western and south-eastern corners of the Land. To this extent, the council's retention of these areas as potential drainage reserves in the Approved DP has an engineering justification. Whether they will ultimately be required for this purpose, along with the detailed design of any associated infrastructure, is something that can reasonably be assessed at a later time i.e. when a planning permit application is lodged.
- 216 By contrast, the council's proposal to locate a drainage reserve in the north-east of the Land between the tree retention reserve and the managed open space is, seemingly, without any engineering reasoning or justification as none has been disclosed to us. In light of the topography of the Land in this location and the concerns expressed by Mr Powell as to locating a drainage reserve in this area, there is no evidence upon which we could conclude that there is an engineering basis or justification for the location of the drainage reserve east on the Land.
- 217 As such, we look to the alternative proposal, this being the utilisation of the Conservation Land.
- 218 The current proposal for use of the Conservation Land is contained in the October Draft and is supported by the 2023 SMP and the evidence of Mr Powell.
- 219 We accept Mr Powell's engineering evidence in support of utilising the Conservation Land, notwithstanding that it is an online system of Grasmere Creek. We observe that although Melbourne Water expresses a preference in its Constructed Wetlands Design Manual to not have online wetlands, this is an existing situation; the applicant will not be creating a new wetlands, it will be utilising an existing one. Further, Melbourne Water

⁸⁰ Ibid, [35].

indicates in that manual that an online wetland might be acceptable subject to there being acceptable downstream impacts. These will need to be assessed at the detailed design stage.

- 220 To this end, we acknowledge that there will need to be further functional design detail provided when a planning permit application is lodged. However, at this stage we have enough material before us to conclude that this could be a viable option from an engineering standpoint.
- 221 We note that from a town planning perspective, Mr Woodland also has provided conditional support of this proposal, contingent upon, among other things, that if the functional design plans fail to satisfy the responsible authority that these works can be undertaken in a way which is complimentary to the conservation values of the Conservation Land, then the drainage works would need to be located outside of the Conservation Land.
- 222 In this respect, we acknowledge and accept the ecological evidence of Dr Clowes, to the extent that it identifies the vegetation present in the Conservation Land and which might, depending on the detailed design of the drainage scheme, require removal. The appropriateness, or lack thereof, of removing such vegetation will need to be assessed when a permit application is lodged. If a planning permit is not granted for any necessary vegetation removal, this might itself necessitate an amendment to the development plan to locate the required drainage system on the Land. However, this is not something that we can determine now based on the material before us.
- 223 Similarly, at the functional design and planning permit stage, if potential impacts on the Dwarf Galaxias result in the utilisation of the Conservation Land becoming unviable, the applicant might need to reconsider use of the Land.
- 224 We agree that to the extent the utilisation of the existing dam/wetland results in improvement of this area and of the weir, this is a positive outcome, given the observations of the weir's current potential for failure. In saying this, this is not the reason that we support use of the Conservation Land; it is just a potential benefit of utilising this area.
- 225 At this point in time, the Conservation Land remains in private ownership. The obligations in the s173 Agreement mean that when the Amendment Land is subdivided, the Conservation Land will either wholly or in part be transferred to the council or the relevant government department as a lot or reserve. A conservation management plan must be prepared for any untransferred portion in accordance with the requirements of the s173 Agreement. It might be that the council might not want to take ownership of the drainage infrastructure in the Conservation Land, however, as stated there is already existing drainage infrastructure in the Conservation Land and in any event, the council can consider the extent to which it is willing to

assume ownership of the area at the time that the Land is sought to be subdivided.

226 In this respect we also note clause 3.0 of DPO24 containing the conditions and requirements for permits includes the following:

Stormwater management

- Land required for drainage purposes must be transferred to the drainage authority or municipal council at no cost, such land not to be credited as public open space.
- All land transferred to or vested in the municipal council under this requirement must be developed and landscaped in accordance with any approved landscape plan to the satisfaction of the responsible authority.

227 We note that clause 5.3 of the s173 Agreement provides that irrespective of whether any planning approvals have been granted for the use and development of any part of the Conservation Land for stormwater drainage purposes, or for any other purposes, the owner's obligations under the s173 Agreement are to be met; that is, they are in addition to any planning permit conditions.

228 Ultimately, given the Conservation Land is not included in the DPO24, the drainage scheme proposed by the applicant on the Conservation Land should not form part of the development plan approved under the DPO24.

229 This is because whilst a development plan can refer to land outside of the DPO in explaining context and conditions, as well as how the proposed development will integrate with its surrounds, it cannot regulate the use and development of land outside of the DPO.

230 Accordingly, any benefit gained from having an approved development plan will not extend to the Conservation Land; i.e. third party notice and review exemptions do not apply to any planning permit required for use and development in the Conservation Land, nor could there be any notional advantage for such planning permit application on the basis that it is 'generally in accordance with' the development plan.

231 What this means is that to the extent that the use and development of the Conservation Land requires planning permission under, for instance, the GWZ4 or the VPO2, such application will be subject to the usual assessment and potential review processes, which might impact upon the intended development of the Land. However, this is not before us and is a matter for the applicant at the relevant time.

232 In conclusion, the evidence before us supports there being potential drainage reserves in the north-western and south-eastern corners of the Land as depicted in the Approved DP but does not support the proposed drainage reserve east shown in the Future Urban Structure Plan of the Approved DP.

233 As such, we find that the drainage reserve east should be removed from the Future Urban Structure Plan and agree with the related text changes sought by the applicant in the October Draft, as follows:⁸¹

~~There is existing Council and Melbourne Water managed drainage infrastructure in the surrounding area, which has limited capacity to service the Precinct, thereby requiring on-site retention and stormwater treatment within the Precinct. An existing wetland system is located close to the junction of Grasmere Creek and Cardinia Creek and could be enhanced to provide stormwater management for the northern part of the Precinct (subject to further assessment and approval). This system is encumbered by the LSIO, SLO and VPO2, and is adjacent to significant native vegetation and wildlife habitats. While the wetland can provide passive treatment as a point of discharge, expansion of this existing system would introduce adverse effects on the surrounding environment.~~

Summary of Tribunal's findings

234 We do not support the Approved DP because, on the evidence before us, there is no justification for requiring the drainage reserve east to be included on the Land.

235 We do support the drainage scheme contained in the October Draft.

Allan Street upgrade

What does the DPO24 require?

236 The DPO24 states that a development plan must include the following requirements with respect to traffic impacts:

- A traffic impact assessment report prepared by a suitably qualified person that includes:
 - A detailed assessment of the expected traffic generation and traffic impacts associated with the development on the internal and external road network and any recommended works or measures within and external to the site.
 - An internal road layout and external road access.
 - Any recommendations of an independent traffic safety audit.
 - Details of road widths to ensure that all streets are designed to allow for service and emergency vehicles to appropriately manoeuvre.
 - Typical cross sections of internal roads indicating provision for pedestrians, tree planting and car parking.
 - An internal perimeter road along the northern and eastern boundaries and an internal loop along the western boundary with appropriate reserves for landscaping.
 - A cross section of the perimeter road to allow for appropriate parallel or indented parking adjacent to public open space.
 - The intersection treatment at Manuka Road, having regard to access to the school and community facilities on the western side of Manuka Road.
 - The intersection treatment at Allan Street/Manuka Road.
 - The upgrade of Allan Street to urban standards, to the satisfaction of the responsible authority.
 - The location of all pedestrian crossings on Manuka Road and Allan Street.
 - The proposed internal cycle and pedestrian path network and connection to the Casey Trail Network (shared user path and equestrian trails), including public access through the site.
 - The identification of visitor car parking within the proposed street network.

237 As can be seen, the DPO24 specifically contemplates the upgrade of Allan Street to urban standards, to the satisfaction of the responsible authority.

238 We also observe that clause 3.0 of DPO24 containing the conditions and requirements for permits includes the following:

⁸¹ October Draft, Section 4.7, 51.

Road design and construction standards

...

- An upgrade of Allan Street to urban standards must be provided to the satisfaction of the responsible authority.

239 Whilst a planning permit is not being sought at this stage, the conditions and requirements of clause 3.0 are instructive as to what will be required at the planning permit application stage.

Submissions and evidence

Background

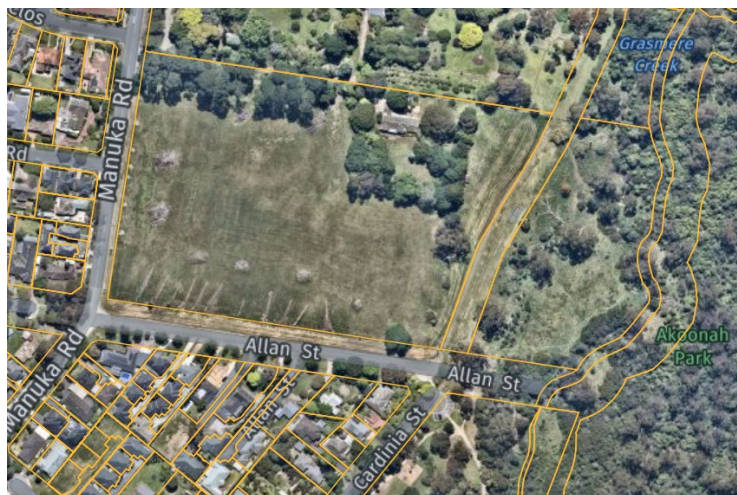
240 Through requirement R17 the council seeks:

R17 Upgrade of Allan Street to urban standard, including the preservation of the existing vehicular barrier between Allan Street and Cardinia Street, to the satisfaction of the responsible authority.

241 The council’s position is that this upgrade should occur to the entire existing length of Allan Street, including the ‘court bowl’ turning area at the end of Allan Street.

242 Allan Street is a local road under council management with a default speed limit of 50 km/hr.⁸² Its road reserve is approximately 30 metres wide and it contains an unsealed carriageway of approximately 5.8 metres.⁸³ Allan Street accommodates two-way traffic and a swale drain on both sides of the carriageway.⁸⁴ There are no pedestrian paths provided on Allan Street.⁸⁵

243 Allan Street currently⁸⁶ appears as follows:



⁸² Transport Expert Witness report of Hilary Marshall for Manuka Road Development Plan, 25 October 2023, [41], [43].

⁸³ Ibid, [42].

⁸⁴ Ibid.

⁸⁵ Ibid, [43].

⁸⁶ Nearmap image as at 29 October 2023.

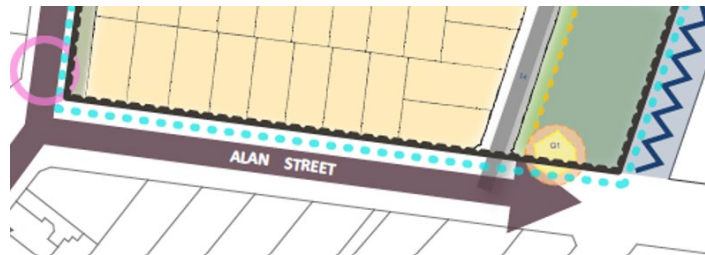


244 The council did not call any expert evidence in support of its position that the upgrade should include the entire length of Allan Street.

Hilary Marshall

245 The applicant relies on the traffic engineering evidence of Ms Marshall.

246 It is Ms Marshall's evidence that Allan Street should only be upgraded from Mauka Road to the eastern edge of the new access road to Allan Street.⁸⁷ That is, Allan Street should only be upgraded to the eastern edge of the connection to Allan Street by the internal road. The extract of the Urban Structure Plan from the October Draft, below, shows the eastern edge of this internal road



247 Ms Marshall's opinion is that Allan Street should not be required to be upgraded to the edge of the Land, which includes the southern reserve area shown above.

248 Ms Marshall's reasoning is as follows:⁸⁸

74. I agree with the requirement to upgrade Allan Street, however the extent of that upgrade is not specified, and as such I provide the following opinion.
75. In my opinion, the entire length of Allan Street should have been partially upgraded to an urban standard in conjunction with subdivision of the land on the southern side of Allan Street which extends from Manuka Road to its eastern end. Although residential lots do not abut the informal courtbowl at the eastern end, it is reasonable to assume that it was created to allow waste collection vehicles to turn around to service the residents on the southern side of Allan Street.

⁸⁷ Ibid, [Table 6-1, row 10].

⁸⁸ Ibid, [74]-[81].

76. It is noted that further subdivision of lots has occurred on the southern side of Allan Street since the original subdivision, with no requirement to upgrade Allan Street.
77. Partial upgrade works typically require a developer to formalise to an ultimate standard the verge adjacent any residential development and include a sealed road pavement facilitating two way traffic. Typically, the opposite side of the road (in this case the subject site) would not be included in the upgrade as the location of driveways, new roads, services etc are unknown. On that basis, the subject site would have been responsible for effectively finishing off the urbanisation of Allan Street, which would primarily be formalising the northern verge and tidying up the edge of the sealed pavement as necessary.
78. Partial upgrade of Allan Street should also have included crossovers to each property on the southern side and a sealed road pavement of at least 5.5 metres.
79. Given that the above works did not occur during development of land to the south, I consider it reasonable that Allan Street is upgraded to an appropriate standard to support the proposed development on the northern side of Allan Street.
80. The extent of works should include a sealed road pavement up to the eastern edge of the proposed access to the subject site, noting that Allan Street is a dead-end and the site will not add any additional vehicle movements east of its access to Allan Street.
81. Typically, an upgrade such as this would include kerb and channel, drainage and footpaths, however, I consider there is a reasonable precedent in the area to justify providing a more rural residential cross-section.

249 In cross-examination, Ms Marshall maintained that Allan Street should have already been upgraded notwithstanding that when residential development occurred on the southern side of Allan Street the Land was still in the Farming Zone of the Scheme; i.e. it did not matter to her that Allan Street was at the interface between a residential and rural zone.

250 Ms Marshall disagreed that this was an unusual opinion for a traffic engineer to hold, stating that her opinion was based on need, nexus and equity: the development of the Land will not contribute any additional traffic movements on Allan Street east of the proposed access street to the Land.⁸⁹ Ms Marshall observes that the council seems to have been happy with Allan Street being unsealed to date.

251 Ms Marshall states that the extent of works should include Allan Street from Manuka Road (including the intersection works) to the eastern extent of the new access road.⁹⁰

Mark Woodland

252 The applicant also relies on the evidence of Mr Woodland in this respect. In Mr Woodland's opinion, from a broader planning perspective, the extent of works that the applicant is required to deliver pursuant to a development plan under the DPO24 should be proportionate to the need that the development generates.⁹¹ According to Mr Woodland, requiring the applicant to construct the full length of Allan Street to an urban standard would not be proportionate to the need that the development generates.

⁸⁹ Ibid, [114].

⁹⁰ Ibid [125].

⁹¹ Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [31].

253 From a planning perspective, Mr Woodland supports the construction of Allan Street with a bitumen surface and kerb and channel on the north side of Allan Street.

What the applicant seeks

254 Given the above, the applicant seeks changes to be made to requirement R17.

255 Below we extract the version of the requirement contained in the November Draft, which shows the applicant's mark-ups and the council's highlighting to indicate its position⁹² on those changes.

R1417 Upgrade of the northern side of Allan Street (including carriageway) from Manuka Road to the southern access point to the Precinct to urban a standard consistent with the surrounding local streets, including the preservation of the existing vehicular barrier between Allan Street and Cardinia Street, to the satisfaction of the responsible authority.

Tribunal's findings

256 We have considered the evidence and submissions before us with respect to this issue.

257 We agree with Ms Marshall that the DPO24 does not specify the length of the upgrade to Allan Street that is required.

258 There is no evidence upon which we could conclude that there is a traffic engineering or planning justification for requiring the upgrading of Allan Street for its full length, as is sought by the council.

259 Rather, the evidence that is before us supports the upgrading of a more limited extent of Allan Street, up to the point at which access is to be gained to the Land from Allan Street.

260 In light of the expected traffic movements to and from the Land via Allan Street, there is no basis upon which we could conclude that there will be a need to upgrade the entirety of Allan Street as a consequence of development of the Land in accordance with the road layout shown in either the Approved DP or the October Draft.

261 Rather, we find that the expected traffic movements will be left into the Land from Allan Street and right out of the Land into Allan Street.

262 Accordingly, the need to upgrade Allan Street in association with the expected increase in traffic movements due to the development of the Land will arise between the access point to the Land from Allan Street and the intersection of Manuka Road and Allan Street.

⁹² Green highlighting means the council accepts the proposed change, red highlighting means the council does not.

- 263 As such, it is only this portion of Allan Street that should be upgraded pursuant to the development plan approved under the DPO24.
- 264 We agree with the content of the October Draft in this respect, and that requirement R17 should be amended as sought by the applicant.

Summary of Tribunal's findings

- 265 We do not support the Approved DP because, on the evidence before us, there is no justification for requiring the upgrade of Allan Street to the extent sought by the council.
- 266 We do support the October Draft in so far as it only requires the part of Allan Street between the intersection of Manuka Road and Allan Street and the entry to the Land to be upgraded.

Indented parking on northern perimeter road

What does the DPO24 require?

- 267 We have extracted the part of the DPO24 that specifically deals with traffic impacts in the 'Allan Street upgrade' section, above.
- 268 As can be seen, the DPO24 specifically contemplates the traffic impact assessment report including:
- a an internal perimeter road along the northern and eastern boundaries and an internal loop along the western boundary with appropriate reserves for landscaping; and
 - b a cross section of the perimeter road to allow for appropriate parallel or indented parking adjacent to public open space.
- 269 We also observe that clause 3.0 of the DPO24 containing the conditions and requirements for permits includes the following:

Road design and construction standards

...

- An internal perimeter road must be provided along the northern and eastern boundaries, and internal loop roads along Manuka Road and Allan Street, with appropriate reserves for landscaping and visitor parking adjacent to public open space.

- 270 Whilst a planning permit is not being sought at this stage, the conditions and requirements of clause 3.0 are instructive as to what will be required at the planning permit application stage.

Submissions and evidence

Council

271 The internal perimeter road along the northern and eastern boundaries is the white area shown in the extract from the Urban Form Plan⁹³ in the Approved DP, as follows:



272 Through requirement R21 the council seeks:

R21 Provide parallel or indented parking along the northern boundary adjacent to the Cardinia Creek Parklands.

273 Notwithstanding the wording of requirement R21, the council's position is that indented parking, rather than parallel parking, should be provided because this northern internal perimeter road is likely to be an area where vehicles will regularly park to access the parkland to the north and the Conservation Land.

274 The council relied on the referral comments provided by Parks Victoria with respect to the interface with the parklands. The Parks Victoria comments were as follows:⁹⁴

Interface with Parklands

DPO24 requires a cross section of the perimeter road to allow for appropriate parallel or indented parking adjacent to public open space.

As previously noted, it would be useful for cross sections of perimeter roads to be included in the DP to provide clarity. For example, it is unclear if the SUP is to be located in the 8m wide tree reserve or within the 14m wide perimeter road.

In light of the Council led lookout project proposed within the CCP, indented parking adjacent to the northern boundary should be considered. Discussions with Council's Principal Recreation and Open Space Planner have indicated that all ability pedestrian access (including an access point and a car parking space) may be possible from the DP land to the lookout.

[‘SUP’ is ‘Shared User Path’; ‘CCP’ is ‘Cardinia Creek Parkland’]

⁹³ Fig 16 of the Approved DP.

⁹⁴ Letter from the Department of Energy, Environment and Climate Action to the council dated 6 February 2023, 2-3.

- 275 As can be seen, the Parks Victoria letter refers to:
- a the ‘Council led lookout project proposed’ within the Cardinia Creek Parkland;
 - b discussions with council’s Principal Recreation and Open Space Planner indicating that all ability pedestrian access (including an access point and a car parking space) may be possible from the Land to the lookout; and
 - c that indented parking adjacent to the northern boundary should be considered.
- 276 The council did not call any expert evidence in support of the provision of parallel or indented parking in this location on the Land.

Hilary Marshall

277 The applicant relies on the evidence of Ms Marshall.

278 Ms Marshall’s evidence in this respect is as follows:⁹⁵

- 117. As detailed in Section 10, the provision of indented parking along the northern boundary is considered undesirable and unnecessary. The proposed road pavement width of 7.3m comfortably accommodates car parking on-street on both sides of the road.
- 118. However, regardless of the actual parking provision within the Development Plan area, the proposed local street network should not form part of the parking provision for the parklands to the north.
- 119. Parking for the recreational facility should be provided as a consolidated resource convenient to the attractions within the parklands, supported by clear wayfinding signage on Manuka Road.
- 120. Parking along the northern east west road will be screened from the parklands by the proposed landscape strip, with no path connections proposed, other than at the eastern and western extents of the site, such that parking in this location will not provide convenient access to the parklands.
- 121. If parking is encouraged on site by the provision of signage to that effect, it is likely to increase traffic volumes within the subject site and potentially result in excessive parking overflowing into the estate.
- 122. If no signage is provided, which is the preferred scenario, then it is considered unlikely that visitors of the parklands would identify the northern road as a desirable place to park and as such would be an unused parking resource.
- ...
- 125. My opinions in regards to the transport related matters yet to be resolved are as follows:
 - ...
 - Parking on Northern East West Road**
 - ...

⁹⁵ Transport Expert Witness report of Hilary Marshall for Manuka Road Development Plan, 25 October 2023, [117]-[122], [125].

- It is noted that the road typology of a 7.3m wide pavement, will provide parallel parking on both sides of the road in this location. Therefore, the disputed issue is whether the parking is indented or not on the northern side of the road.
- I am of the view that provision of parking within the Development Plan area to supplement the parking provision within the parklands area is inappropriate and undesirable.
- The parking provision for the parklands land should be contained as far as practical on its own land to reduce unnecessary traffic movements through the residential local roads and ensuring that the parking for the parklands is convenient and easily found through clear wayfinding signage for people wishing to visit the parklands area.
- From a traffic engineering perspective, indented parking is likely to decrease the actual number of car spaces along the northern kerb as it typically requires outstands at regular intervals to break up the parking.
- Indented parking facilitates two way traffic rather than the typical residential road that requires oncoming traffic to give way when vehicles are parked on both sides of the road. Slowing vehicle movements through residential estates is a key design criteria and considered highly desirable.
- In summary, the indenting of car parking in this location does not increase car parking supply, has implications for increasing vehicle speeds and reduces the land available for the landscape buffer.

Mark Woodland

279 The applicant also relies on the evidence of Mr Woodland, who observes that:

- a the DPO24 refers to ‘parallel or indented parking’ being provided in this location;⁹⁶
- b the Approved DP included a cross-section for the Local Access Streets showing parallel parking on both sides of the road;⁹⁷
- c the October Draft seeks to delete requirement R21;⁹⁸ and
- d as a cross-section has been provided showing parallel parking, it is considered that R21 is not required and is therefore unnecessary.⁹⁹

280 Mr Woodland notes that he is not qualified to comment on the appropriateness of parallel compared with indented parking in this location, however, given both options are provided in the DPO24, he supports the October Draft in proposing to remove requirement R21.

Tribunal’s findings

281 We agree with Mr Woodland the DPO24 provides the option for the cross-section of the perimeter road to allow for appropriate parallel or indented parking adjacent to public open space.

282 There is no evidence upon which we could conclude that there is a traffic engineering or planning justification for requiring the provision of indented

⁹⁶ Ibid, [209].

⁹⁷ Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [210].

⁹⁸ Ibid, [211].

⁹⁹ Ibid, [212].

parking rather than parallel parking on this northern perimeter road, as is sought by the council.

283 Rather, the traffic engineering evidence before us is that indented parking will likely:

- a decrease the parking capacity of the perimeter road;
- b increase vehicle speeds;
- c increase vehicle movements through what will be a residential area, through the movement of vehicles associated with the Cardinia parklands; and
- d lessen the area available for landscaping.

284 In any event, given the DPO24 envisages either parallel or indented parking being provided, and the perimeter road width is sufficient to provide parallel parking, the requirements of the DPO24 are met.

285 In these circumstances, we find that there is no warrant to require indented parking on this northern perimeter road. Given the perimeter road is sufficient width to provide parallel parking, we agree with the applicant's proposed deletion of requirement R21.

Summary of Tribunal's findings

286 We do not support the Approved DP because, on the evidence before us, there is no justification for requiring indented parking on this northern perimeter road.

287 We do support the October Draft in so far as it shows that parallel parking can be provided on the northern perimeter road.

Lot layout and other requirements of the urban structure plan

What does the DPO24 require?

288 The DPO24 states that a development plan must include the following requirements with respect to lot layout:

- An urban structure plan that responds to the local context and site analysis and identifies:
 - ...
 - Lot layout and dimensions consistent with the existing subdivision pattern of the surrounding area and appropriate as transition lots on the urban edge.
 - The proposed lot layout, size and density, including building envelopes where appropriate.
 - The orientation of lots to maximise solar access.

289 Clause 3.0 of DPO24 then contains the following condition/requirement for planning permits:

General

- The subdivision layout and building envelopes must ensure that residential lots front public land. For the purpose of this requirement, public land includes all existing and proposed roads (including arterial roads), parkland, drainage reserves, and any easements that are available for public use (including the Melbourne Water pipetrack).

290 The remaining requirements of the DPO24 for the urban structure plan are:

- An urban structure plan that responds to the local context and site analysis and identifies:
- The key planning and design principles and infrastructure components of the development.
- ...
- Entrance features, where appropriate.
- Shared path (pedestrians and cyclists) connections to adjacent community, recreational and educational facilities.
- The preferred neighbourhood character, including building materials, articulation and heights.
- The proposed treatment of site boundary interfaces, including the presentation of development to Manuka Road.
- A centrally located passive open space reserve.
- Strategies and permit requirements in response to areas identified in the bushfire report.

Submissions and evidence

Council

291 Notwithstanding the requirements of the DPO24, the Approved DP does not identify individual lots or specify lot dimensions.

292 Rather, it shows internal streets and ‘blocks’ and in text states that there will be ‘up to 150 to 165 lots’.¹⁰⁰

293 The text also states that ‘[T]he lot sizes are to be informed by the unique Neighbourhood Residential Zone landscape characteristics of the precinct and this may result in larger lots in some areas to accommodate these characteristics’.¹⁰¹

294 The council does not agree with the lot layout contained in the October Draft, preferring to leave some flexibility for the final design of lots.

295 The council submits that by providing the road and block layout and the estimated number of lots, there is then a role for the planning permit to address the final design.

Applicant

296 The applicant objects to the reference to there being ‘up to’ a certain number of lots because this effectively puts a cap on lot yield.

297 It was Mr Woodland’s evidence that the October Draft contains too much detail regarding lot layout, notwithstanding the DPO24 requirements in this respect.

298 However, Mr Woodland did not support there being a cap on the total number of lots, as contained in the Approved DP.

299 This was on the basis that the zone and overlay controls and the policies of the Scheme provide a comprehensive framework for achieving residential development that achieve a balance between the efficient use of urban

¹⁰⁰ Approved DP, Section 3.2, 37.

¹⁰¹ Ibid.

zoned land for housing purposes, and responding to the relevant local landscape and urban character context. Accordingly, having a cap on lots does not serve any practical purpose,¹⁰² that is, what is an appropriate number of lots will be determined having regard to the provisions of the Scheme when a permit application is made.

300 In saying this, Mr Woodland's evidence was that a development plan showing roads and blocks is a reasonable way of responding to the DPO24, although he observed that the language in the DPO24 suggests more detail is required.

301 Mr Woodland is not convinced of the need to include a lot range.

302 In addition, Ms Marshall's evidence is that there is no traffic engineering reason for there to be a lot cap of up to 150 to 165 lots.

303 Mr Woodland's evidence is that both the Approved DP and the October Draft:

- a address the key planning and design principles and infrastructure components of the development;
- b include 'a level of detail in plan and text form that broadly satisfies the requirement that the lot layout and dimensions will be consistent with the existing subdivision pattern of the surrounding area taking into account the precinct's location on the urban edge of Berwick';¹⁰³ and
- c identify a centrally located passive open space.

304 Mr Woodland is of the opinion that the October Draft shows shared path connections to adjacent community, recreation and education facilities. Mr Woodland states that 'the main east-west shared path on the north boundary shown in the [October Draft] is consistent with both the requirements of DPO24 and the Casey Paths and Trails Strategy'.¹⁰⁴ Mr Woodland also observes that the shared user path shown in the October Draft would provide a 'direct and legible link for pedestrians and cyclists', as compared with the Approved DP, which proposes a link via a 'relatively steep vegetated gully, which would be a more challenging terrain in which to provide cycling links than the link shown in the [October Draft]'.¹⁰⁵

305 In Mr Woodland's opinion, neither the Approved DP nor the October Draft include guidance on building materials, articulation and heights, as required by the DPO24. However, because the October Draft contains an application requirement that these details be provided as part of any future permit application, he considers that this is an appropriate response to this requirement.

¹⁰² Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [239].

¹⁰³ Ibid, [126].

¹⁰⁴ Ibid, [195].

¹⁰⁵ Ibid, [198].

306 Overall, it was Mr Woodland's evidence that the Approved DP partially but not wholly addresses the requirements for the urban structure plan, whereas the October Draft 'more comprehensively'¹⁰⁶ addresses these requirements.

Tribunal's findings

307 The wording of the DPO24 requirements with respect to lot layout is clear: the DPO24 seeks that a development plan identifies:

- a proposed lot layout, size and density;
- b lot layout and dimensions that are consistent with the existing subdivision pattern of the surrounding area and appropriate as transition lots on the urban edge; and
- c the orientation of lots to maximise solar access.

308 Whilst we observe, again, that in our experience this level of detail in a development plan is unusual, nevertheless, it is what the DPO24 requires.

309 The Approved DP does not show proposed lot layout, size and density: showing blocks of 'residential' land and specifying a total number of lots is not equivalent to providing a proposed lot layout and specifying lot size and density.

310 Further, given the Approved DP does not show the roads within each block of 'residential' land, there is no way to ascertain what the lot layout and lot size in each section will be.

311 Accordingly, we find that the Approved DP does not meet the requirements of the DPO24 with respect to lot layout.

312 Notwithstanding Mr Woodland's evidence that the October Draft contains too much detail regarding lot layout, as he acknowledged, detail is what is required by the DPO24.

313 The Urban Structure Plan contained in the October Draft identifies:

- a proposed lot layout;
- b building envelopes on some proposed lots; and
- c in the 'Lot details' summary that accompanies the Urban Structure Plan, information is given about the 'Frontage Range', 'Depth Range', 'Area Range' and 'Approx Lot Density'.

314 The accompanying text in the October Draft then provides some further information, albeit minimal.

315 It was Mr Woodland's evidence that the October Draft broadly satisfies the requirement that the lot layout and dimensions be consistent with the existing subdivision pattern of the surrounding area and appropriate as transition lots on the urban edge.

¹⁰⁶ Ibid, [131].

- 316 Mr Woodland was silent on the requirement to orient lots to maximise solar access. It is unclear whether this requirement is met.
- 317 Mr Woodland opines that the October Draft ‘more comprehensively’ addresses the requirements of the DPO24 than the Approved DP does.
- 318 Given the Urban Structure Plan and the October Draft contain details required by the DPO24 that are not provided in the Approved DP, we find that the October Draft is the preferable response to the urban structure plan requirements of the DPO24.
- 319 However, in saying this, not all of the urban structure plan requirements of the DPO24 are met by the October Draft. Mr Woodland was satisfied that even though the October Draft does not include guidance on building materials, articulation and heights, as required by the DPO24, this is met by the October Draft containing an application requirement that these details be provided as part of any future permit application. However, as discussed in a previous section, we do not support ‘kicking the can down the road’ and leaving this information to be provided at the planning permit application stage as we do not consider this approach to be consistent with what is required by the DPO24.

Summary of Tribunal's findings

- 320 We do not support the Approved DP in terms of lot layout and other requirements of the urban structure plan because the Approved DP does not contain the information required by the DPO24.
- 321 We do not support the October Draft in terms of lot layout and other requirements of the urban structure plan because we find that the October Draft similarly does not contain the information required by the DPO24.

ESD requirements

What does the DPO24 require?

- 322 The DPO24 does not require ESD to be addressed in any resulting development plan.

Submissions and evidence

- 323 The Approved DP includes section 4.5 ‘Environmentally Sustainable Development’.
- 324 The applicant objects to the inclusion of ESD requirements in the Approved DP given this is not required to be addressed pursuant to clause 4.0 of the DPO24.
- 325 Mr Woodland also does not support the inclusion of ESD requirements in any resultant development plan because this is not required by the DPO24.

326 In addition, Mr Woodland observes that the ESD requirements and guidelines seek to deal with things that either do not require planning permission or are addressed elsewhere in the development plan:¹⁰⁷

The proposed requirements and guidelines largely deal with matters of dwelling design and homeowner choices regarding of transport and energy systems (noting that no permit is required to construct a single dwelling on a large lot under the NRZ, and gas connections are no longer permitted) or broader subdivision issues (such as stormwater) that are dealt with in other parts of the DP.

Tribunal's findings

327 We agree with the applicant that as the DPO24 does not require ESD to be addressed in a development plan, there is no warrant for mandating the inclusion of this information in circumstances where the applicant is not electing to provide that detail.

Summary of Tribunal's findings

328 We do not support the Approved DP in terms of ESD requirements because the DPO24 does not require this matter to be addressed and the applicant resists its inclusion.

329 We support the October Draft in this respect because it does not address ESD requirements.

Summary of findings on key issues

330 With respect to the key issues, in summary we find as follows:

- a Drafting of Approved DP:
 - i We disagree with the drafting approach in the Approved DP, finding that it is not reflective of what is required by the DPO24 and, in effect, overreaches into seeking to control matters that should be left to the discretion of the responsible authority when a future planning permit application is lodged;
 - ii We find that no version of the development plan – the Approved DP, the October Draft or the November Draft – contains all of the information required by the DPO24. In the absence of the provision of that information, we find it impossible to approve any version of the development plan;
 - iii We are not concerned about the utilisation of a table listing the required reports and assessment as ‘background documents’ so long as the conditions content of these reports is incorporated into the development plan. All versions of the development plan adopt this approach, however, no version incorporates all findings or conditions or recommendations of each of the ‘background documents’ or states that there are no findings or conditions or recommendations in such document;

¹⁰⁷ Manuka Road Development Plan, Expert Evidence – Mark Woodland, October 2023, [259].

- iv We do not support the use of standardised headings that do not reflect the headings in the DPO24. To this end, we disagree with the drafting in the Approved DP and support the October Draft, to the extent that it reflects the requirements as headings in the DPO24, as discussed earlier;
- b Tree retention:
 - i We disagree with the tree retention shown in the Approved DP;
 - ii We also do not support the October Draft as it does not reflect our findings as to the trees to be retained and removed;
- c Landscaping:
 - i We do not support the Approved DP, the October Draft or the November Draft as none contain the relevant landscaping requirements set out in DPO24;
- d Bushfire management;
 - i we do not agree with the October Draft as it defers management of the defendable space in the Conservation Land, tree management reserve and the managed open space area to future owners or entities;
- e Drainage Scheme:
 - i We disagree with the drainage scheme in the Approved DP;
 - ii We support the drainage scheme as shown in the plan and text of the October Draft but observe that this will result in some of the drainage being provided on land that is not the subject of the DPO24 and, subsequently, the development plan;
- f Allan Street upgrade:
 - i We disagree with the Approved DP in so far as it requires the upgrade of the full length of Allan Street;
 - ii We support the upgrade to Allan Street to the extent shown in the October Draft;
- g Indented parking on northern perimeter road:
 - i Requirement R21 of the Approved DP reflects the options available in the DPO24;
 - ii Based on the material before us, we agree that requirement R21 can be removed, with the effect that parallel parking will be available on the perimeter road shown on the plan, based on the width of the perimeter road. As such, we support the October Draft in this respect;
- h Lot layout and other requirements of the urban structure plan:

- i The level of detail in the Approved DP is deficient to address these requirements;
- ii Whilst the October Draft provides more detail, it still does not address all of the requirements adequately; and
- i ESD requirements:
 - iii As the DPO24 does not require this to be addressed, and the applicant resists providing this information, there is no warrant for requiring its inclusion in a development plan prepared under the DPO24.

331 As stated above, given the document that is the source of our jurisdiction is the Approved DP, that is our starting point in terms of assessment of this proceeding.

332 Having regard to the above, we are not prepared to support approval of the Approved DP given the number of ways in which we have found that it does not meet the requirements of the DPO24. This finding should not be of concern to either party given that:

- a the Approved DP was not prepared by the applicant, is not supported by the applicant and never has been; and
- b the council, who prepared the Approved DP, no longer stands behind it and instead seeks for us to approve the November Draft.

333 Although we find the October Draft to be a better response to the DPO24, we are not satisfied with the October Draft in its present form because we are not persuaded that it meets all of the requirements of the DPO24.

334 We are cognisant that in this application brought under section 149(1)(a) of the PE Act we are in review jurisdiction and not original jurisdiction. As such, it is not for us to be acting in the capacity of original decision maker with respect to a document; rather, we are reviewing the Approved DP and if we do not support it, we are considering whether any of the alternative documents presented are sufficiently similar to the Approved DP that our consideration of them does not lead to us stepping outside of our review function and into original decision-making function.

335 Given that we do not support the Approved DP, it goes without saying that we are not prepared to affirm the decision under review i.e. the council's decision to approve the Approved DP, pursuant to section 51(2)(a) of the VCAT Act.

336 Whilst we have found that the October Draft is a better response to the DPO24 than the Approved DP, it still does not meet all of the requirements of the DPO24. Accordingly, even if we were of the view that the October Draft is sufficiently similar to the Approved DP for us to consider it in this review proceeding, we are not prepared to make an order pursuant to section 51(2)(c) of the VCAT Act to set aside the council's decision to

approve the Approved DP and approve the October Draft in substitution for it.

- 337 The November Draft is similarly not acceptable because it contains the deficiencies of the other two documents and also does not address all the aspects of the DPO24.
- 338 We considered varying the decision under review through the modification of the Approved DP to address those aspect of the Approved DP that we consider to be unsatisfactory. However, in light of:
- a the extent of changes required to be made to the Approved DP and these not being fully shown in either the October Draft or the November Draft; and
 - b the additional deficiencies that we have identified and that would require the consideration of information that we do not have
- means that we are neither in a position to undertake the task of varying the Approved DP nor is it appropriate for us to do so in the circumstances.
- 339 We consider this to be as a direct consequence of the sheer number of requirements and the specific detail in the requirements in DPO24.
- 340 Consequently, for the reasons set out above, pursuant to section 51(2)(c) of the VCAT Act we are setting aside the council’s decision to approve the Approved DP and further, we are not satisfied with either the October Draft or the November Draft. As such, no development plan is approved by the Tribunal.

CONCLUSION

- 341 For the reasons given above, the decision of the responsible authority is set aside, and no development plan is to our satisfaction.

Teresa Bisucci
Deputy President

Susan Whitney
Member

APPENDIX A

DEVELOPMENT PLAN OVERLAY – SCHEDULE 24

20/05/2021
C231case

SCHEDULE 24 TO CLAUSE 43.04 DEVELOPMENT PLAN OVERLAY

Shown on the planning scheme map as DPO24 .

MANUKA ROAD, PRECINCT

1.0

20/05/2021
C231case

Objectives

To ensure that the development of the land establishes high quality housing with density and lot sizes that are generally compatible with the surrounding residential areas, has proper regard to the nearby Cardinia Creek Parklands and provides heritage and environmental conservation outcomes.

To recognise the predominant residential character of surrounding areas that includes tall, mature trees in private gardens and along road reserves.

2.0

20/05/2021
C231case

Requirement before a permit is granted

A permit may be granted to use land, construct a building or construct or carry out works before a development plan has been prepared provided it can be demonstrated that the use or development does not prejudice the future use and development of the land in an integrated manner, as set out in this schedule.

3.0

20/05/2021
C231case

Conditions and requirements for permits

The following conditions and/or requirements apply to permits:

General

- The subdivision layout and building envelopes must ensure that residential lots front public land. For the purpose of this requirement, public land includes all existing and proposed roads (including arterial roads), parkland, drainage reserves, and any easements that are available for public use (including the Melbourne Water pipetrack).
- Pedestrian and vehicular connectivity must be legible and permeable throughout the site and with external linkages.
- Areas of identified environmental and heritage significance must be protected and managed, including during the construction phase to the satisfaction of the responsible authority.
- Existing indigenous trees and shrubs must be retained, where possible, and incorporated into public open space.
- Existing trees of high arboricultural and/or ecological value should be retained where practical.
- New buildings and works must be designed to ensure they do not dominate the treed landscape character of the area.
- New development must provide opportunities for additional trees and screen planting to enhance the treed character of the area.
- During construction, clean imported fill and topsoil must be used to avoid encroachment of weeds into retained areas of native vegetation.
- Appropriate public access throughout the site must be provided to avoid a 'gated' residential area.
- New points of road access must be restricted to one access point on Manuka Road and one access point on Allan Street. Any other access point to the land must be removed upon development of the site, unless otherwise agreed by the responsible authority or required for fire access purposes.
- A centrally located passive open space reserve must be provided.
- Lots that share an interface with a heritage site (HO49 and HO50), where not separated by a road, must provide semi-permeable fencing (minimum 50 per cent permeability) or demonstrate other means, including vegetation, that will be implemented to retain a visual connection to the heritage place from the public realm.
- Any other matters set out in the approved development plan.

Stormwater management

- Land required for drainage purposes must be transferred to the drainage authority or municipal council at no cost,

such land not to be credited as public open space.

- All land transferred to or vested in the municipal council under this requirement must be developed and landscaped in accordance with any approved landscape plan to the satisfaction of the responsible authority.

Water infrastructure

- Operable hydrants must be provided in accordance with the requirements of the relevant fire authority and Clause 56.09-3 of this scheme.
- If recycled water has been, or is to be, made available to the land, the owner must enter into an agreement with the relevant water authority requiring the subdivision to be reticulated/serviced with a 'third-pipe system' for the supply of treated waste water to all new lots and public open space (to enable the irrigation of parkland) from the Eastern Irrigation Scheme, or similar scheme.

Road design and construction standards

- All public roads (including upgrades of any existing roads) must be provided and designed to the satisfaction of the responsible authority.
- Variations to the standards may be considered only to the extent that they can incorporate water sensitive urban design initiatives to the satisfaction of the responsible authority.
- Slow points must be installed on the local road network, which can be intersection treatments, deflection points, or other treatments or visual elements that indicate to motorists they are in a low-speed environment. The treatments will be determined by the responsible authority after consideration of the recommendations of an independent road safety audit.
- An internal perimeter road must be provided along the northern and eastern boundaries, and internal loop roads along Manuka Road and Allan Street, with appropriate reserves for landscaping and visitor parking adjacent to public open space.
- Appropriate intersection treatment must be provided for the new Manuka Road access road to the satisfaction of the responsible authority.
- Appropriate intersection treatment must be provided for the Manuka Road/Allan Street intersection to the satisfaction of the responsible authority.
- An upgrade of Allan Street to urban standards must be provided to the satisfaction of the responsible authority.

Bicycle and pedestrian paths

- Footpaths and shared use paths (for bicycles and pedestrians) must be provided, prior to the issue of a Statement of Compliance for any further subdivision of the land:
 - Of concrete with a minimum width of 2.5 metres.
 - The length of all linear public open space and key 'desire lines' through non-linear open space, also providing reasonable connections from the path to the surrounding streets and development.
 - Along the length of the site's frontage to external roads.
 - To connect externally to the other development in the area to avoid paths being isolated.
- Additional concrete and non-concrete footpaths and shared use paths may be approved in circumstances where a specific design objective warrants such provision.
- Footpaths on public land (including any laneway) must be provided, prior to the issue of a statement of compliance.

Bushfire management

Any subdivision creating a residential lot must meet the following requirements:

- All new lots must either include a building envelope that is capable of achieving a setback from a bushfire hazard to enable construction standard of BAL 12.5 (equivalent to a radiant heat exposure of 12.kilowatts/square metre) under AS 3959-2018 *Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2018) or be located a

sufficient distance from the hazard vegetation that a building may be sited anywhere on the lot to achieve compliance with a BAL 12.5 construction standard.

- Any vegetation located in the setback between a future dwelling and a bushfire hazard must be managed in accordance with defensible space standards as per Table 6 of Clause 53.02.
- A perimeter road must be incorporated along the northern and eastern boundaries.
- Where a road forms part of the nominated defensible space area, it must be designed, landscaped and managed for the purpose of providing defensible space.
- Areas of public open space must provide a buffer between the identified bushfire hazard and any residential lots. The public open space must be shown on a landscape plan that is submitted to and approved by the responsible authority and the relevant fire authority prior to the issue of a statement of compliance. The plan must:
 - Demonstrate how the public open space will be designed for the purpose of providing defensible space (and may include shared paths and occasional park furniture).
 - Demonstrate how the open space will be managed and maintained for the purpose of providing defensible open space.
 - Be incorporated directly or indirectly into the council's *Municipal Fire Prevention Plan*.

When approved the plan will be endorsed and then form part of the permit.

The bushfire report prepared under section 4.0 of the schedule must be endorsed and form part of the permit.

4.0 Requirements for development plan

20/05/2021
C231case

A development plan must include the following following requirements:

- Only one development plan for the entire area covered by this schedule.
- A local context and site analysis that shows:
 - Topography, vegetation and natural features.
 - Identification of any areas of environmental significance.
 - Existing easements including electricity transmission lines.
 - Adjacent land use and development patterns.
 - Existing and proposed open space, road, bicycle and pedestrian networks.
 - Areas that may be subject to contamination.
- A bushfire report prepared by a suitably qualified person that:
 - Identifies the areas of bushfire hazard within 150 metres of the site, including classifiable vegetation and the slope, under AS 3959-2018 *Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2018).
 - Shows the required setbacks to building envelopes from any area of bushfire hazard to ensure a construction standard of BAL 12.5 can be met.
 - Shows the required areas of defensible space on private and public land.
 - Identifies the vegetation management requirements for areas of defensible space generally in accordance with Table 6 of Clause 53.02, with the exception of canopy tree separation that can be reduced to two metres.
 - Shows the location of public open space.
 - Shows the road layout and provision of a perimeter road on the northern and eastern boundaries.
- An Aboriginal cultural heritage assessment or archaeological survey of the land prepared by a suitably qualified person.
- A heritage report prepared by a suitably qualified person that includes the future urban design treatment of the residential interface with identified heritage elements.

- A flora and fauna assessment prepared by a suitably qualified person;
- A landscape impact assessment to identify sensitive views to and from the land and interfaces with public parklands.
- An urban structure plan that responds to the local context and site analysis and identifies:
 - The key planning and design principles and infrastructure components of the development.
 - Lot layout and dimensions consistent with the existing subdivision pattern of the surrounding area and appropriate as transition lots on the urban edge.
 - The proposed lot layout, size and density, including building envelopes where appropriate.
 - The orientation of lots to maximise solar access.
 - Entrance features, where appropriate.
 - Shared path (pedestrians and cyclists) connections to adjacent community, recreational and educational facilities.
 - The preferred neighbourhood character, including building materials, articulation and heights.
 - The proposed treatment of site boundary interfaces, including the presentation of development to Manuka Road.
 - A centrally located passive open space reserve.
 - Strategies and permit requirements in response to areas identified in the bushfire report.
- A traffic impact assessment report prepared by a suitably qualified person that includes:
 - A detailed assessment of the expected traffic generation and traffic impacts associated with the development on the internal and external road network and any recommended works or measures within and external to the site.
 - An internal road layout and external road access.
 - Any recommendations of an independent traffic safety audit.
 - Details of road widths to ensure that all streets are designed to allow for service and emergency vehicles to appropriately manoeuvre.
 - Typical cross sections of internal roads indicating provision for pedestrians, tree planting and car parking.
 - An internal perimeter road along the northern and eastern boundaries and an internal loop along the western boundary with appropriate reserves for landscaping.
 - A cross section of the perimeter road to allow for appropriate parallel or indented parking adjacent to public open space.
 - The intersection treatment at Manuka Road, having regard to access to the school and community facilities on the western side of Manuka Road.
 - The intersection treatment at Allan Street/Manuka Road.
 - The upgrade of Allan Street to urban standards, to the satisfaction of the responsible authority.
 - The location of all pedestrian crossings on Manuka Road and Allan Street.
 - The proposed internal cycle and pedestrian path network and connection to the Casey Trail Network (shared user path and equestrian trails), including public access through the site.
 - The identification of visitor car parking within the proposed street network.
- A landscape concept plan that includes:
 - Design principles and a proposed species palette to complement existing landscaping in the surrounding area.
 - Landscaping concepts for public areas.
 - The identification of vegetation to be retained and removed based on an arborist's report and bushfire management requirements.
 - The designation of appropriate tree protection zones of trees to be retained.

- limited understorey planting along road frontages to improve visual surveillance.
- The retention of existing avenues of trees, where possible, to frame view lines.
- A demonstration of how tree planting zones are to be established and managed on new residential lots, including details of species to be used, envelope requirements that enable viable setbacks from buildings, services and roads, and timing of tree planting and their ongoing management.
- Demonstration how vegetation will be planted to minimise bushfire risk and create a low threat bushfire landscape in sympathy with defensible space principles.
- A servicing report that includes:
 - A drainage and servicing assessment indicating how all relevant flooding, drainage and water quality issues are to be addressed .
 - A report that details infrastructure that is to be provided as part of the development, including timing triggers, standards and funding.
 - Water sensitive urban design measures to improve the quality of water discharged into existing waterways.
- A development staging plan that identifies:
 - The stages, if any, in which the land is to be subdivided and developed.
 - A land use and public open space budget for each stage.
 - Dwelling density calculations for each stage.