

IN THE MATTER OF 811 Bridge Inn Road, Doreen and s149(1)(a) of the Planning & Environment Act 1987

## APPLICATION FOR REVIEW

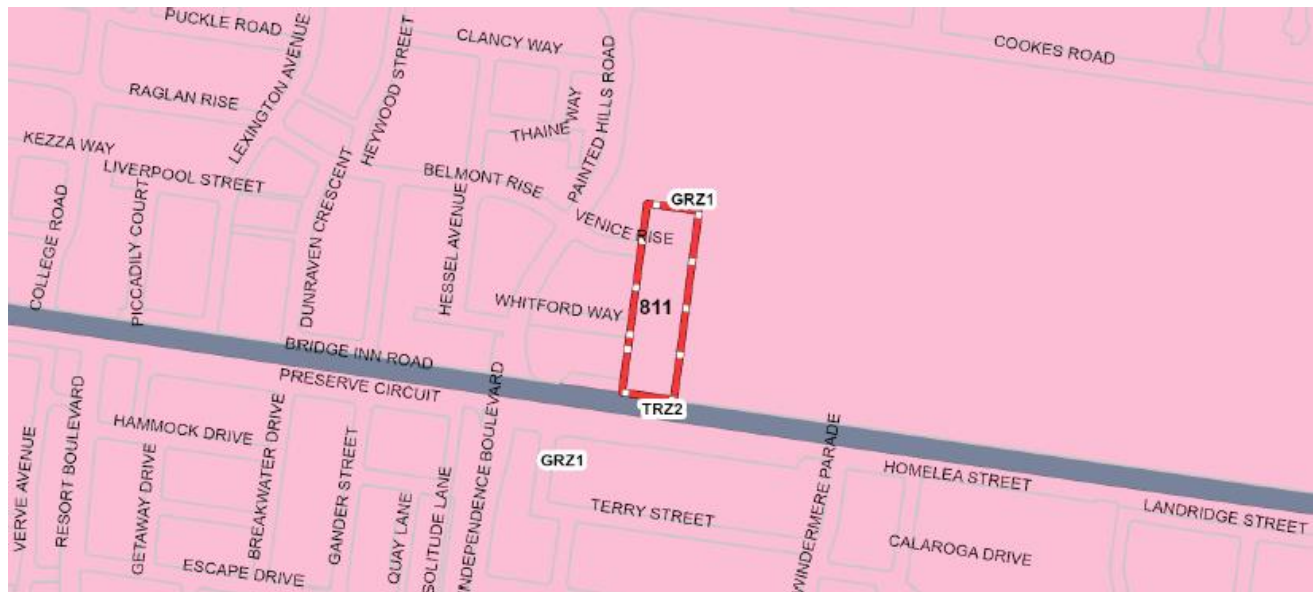
### LAND

1. M Hodges Investments Pty Ltd is the registered proprietor of 811 Bridge Inn Road, Doreen, otherwise known as:
  - a) Lot 1 on Plan of Subdivision 71327; or the land more particularly described in
  - b) Certificate of Title Volume 8709 Folio 101 –

**(Land)**
2. The Land is regularly shaped, approximately 10,181m<sup>2</sup> in area, and is presently developed with a single dwelling and outbuilding:



3. The Land is subject to the Whittlesea Planning Scheme (**Planning Scheme**) and is zoned General Residential (Schedule 1):



4. The Land is subject to the following overlays:
  - a) Development Contributions Plan Overlay (Schedule 5);
  - b) Development Plan Overlay (Schedule 5);
  - c) Incorporated Plan Overlay (Schedule 1); and
  - d) Vegetation Protection Overlay (Schedule 1).

## **BACKGROUND**

### **The Development Plan was submitted to Council in February 2020**

5. In February 2021, the Association submitted the Development Plan to Council for approval pursuant to Schedule 5 of the Development Plan Overlay at clause 43.04 of the Planning Scheme.

### **The Development Plan was informally exhibited in April and May 2023**

6. In April and May 2023, the Development Plan was informally exhibited, and Council received 23 submissions.
7. During the approval process, there have been a significant number of changes made to the Development Plan.

**S&K wrote to Council on behalf of the Association in May 2024, outlining outstanding matters with the Development Plan**

8. On or around 20 May 2024, S&K Planning Lawyers, on behalf of the Association, wrote to Council seeking resolution of four outstanding matters regarding the Development Plan:

The application for approval of the Development Plan was first lodged in February 2021. Since that time, the Development Plan has been through a number of iterations before, and after, informal exhibition.

Based on Council's email dated 6 May 2024 there are four remaining matters to be resolved. We understand from that email that, subject to the resolution of those matters, planning officers will be in a position to write a report supporting the approval of the Development Plan for presentation to the Council at its meeting scheduled for 20 August 2024.

BCLGI is eager to work with Council to resolve these outstanding matters so that the lengthy Development Plan process can be concluded, and a critical source of housing can be unlocked within Mernda.

9. Relevantly, the Association did not agree with Council's request to include a tree reserve on the Land:

- 1.3 The final matter to be resolved is the tree reserve which Council would like located on parcel 45 at 811 Bridge Inn Road. This is discussed further below.

**S&K advised Council that the Association did not support the location of a tree reserve on the Land**

10. S&K Planning Lawyers advised Council that the Association did not support the location of a tree reserve or open space on the Land because:

- a) there were no trees on the Land that required protection pursuant to the Mernda Strategy Plan:

The Mernda Strategy Plan (**Strategy Plan**) requires the preservation of native vegetation through the use of tree-reservations, pocket parks, widened nature strips, or larger residential lots with appropriate building envelopes (section 3.3.1 of the Strategy Plan). There are no trees on that parcel requiring protection through the provision of any of these treatments.

- b) trees previously located on the Land were removed to provide servicing to the land within the Development Plan:

The trees previously located on that parcel would have been required to be removed to provide servicing to the land within the Development Plan.

- c) there was no basis for the Land to be set aside for open space:

The Strategy Plan is clear in distinguishing between credited open space and provision of tree reservations for the protection and enhancement of environmental values. Council has confirmed its position in its email dated 15 November 2023 that the only open space which is to be credited is that identified in the Open Space Network Plan within the Strategy Plan and, as result, there is no basis for land within that parcel to be set aside for open space.

11. S&K Planning Lawyers also advised Council that the Association had expanded tree reserves within the Development Plan in order to address Council’s concerns in relation to the matter, including an increase in the size of tree reserves for trees 452, 420 and 425:

2.4 We are instructed that our client has expanded tree reserves within the Development Plan in order to address Council’s concerns in relation to this matter. This includes an increase in the size of the tree reserve for trees 452, 420 and 425.

12. To resolve the matter, the Association requested that Council recommended approval of the Development Plan with provision for larger sized tree reserves around trees 452, 420 and 425 as a compromise for removal of the tree reserve from the Land:

Our client requests that Council officers recommend the approval of the Development Plan including the provision of the larger sized reserve around trees 452, 420 and 425 as a reasonable compromise to resolve the remaining outstanding matter in this process.

## **MERENDA STRATEGY PLAN**

13. The Development Plan Overlay (Schedule 5) sets out the requirements for any development plan to be approved under the overlay.
14. Among other matters, the Schedule requires that a development plan must be generally in accordance with the Mernda Strategy Plan (**MSP**) and associated Precinct Plans:

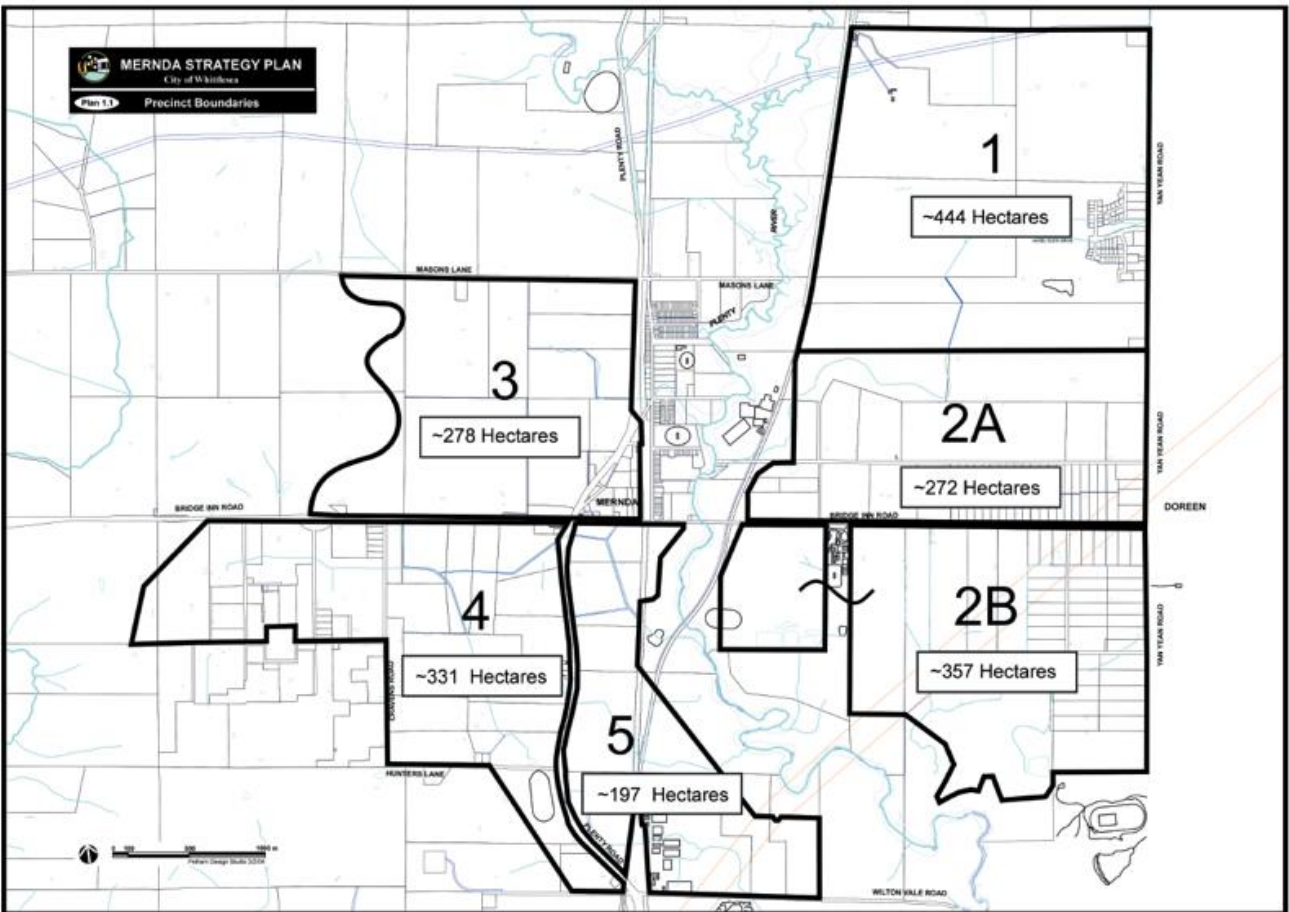
### **Requirements for development plan**

A Development Plan must be prepared for each Precinct Plan forming part of the Mernda Strategy Plan or part thereof affected by this overlay. The responsible authority may consider a Development Plan based on a land unit smaller than a precinct provided that the land unit (or part thereof affected by this overlay) is generally no smaller than the land units identified in the plan forming part of this schedule having regard to the intent that Development Plans should encompass larger land parcels rather than individual landholdings.

A Development Plan must be informed by a detailed site analysis of the natural, cultural and strategic context of the site and show, or include, the following matters to the satisfaction of the responsible authority:

- Generally in accordance with the Mernda Strategy Plan and associated Precinct Plans. A written report must be submitted addressing how the Development Plan responds to and applies the design principles and key objectives of the relevant plans.

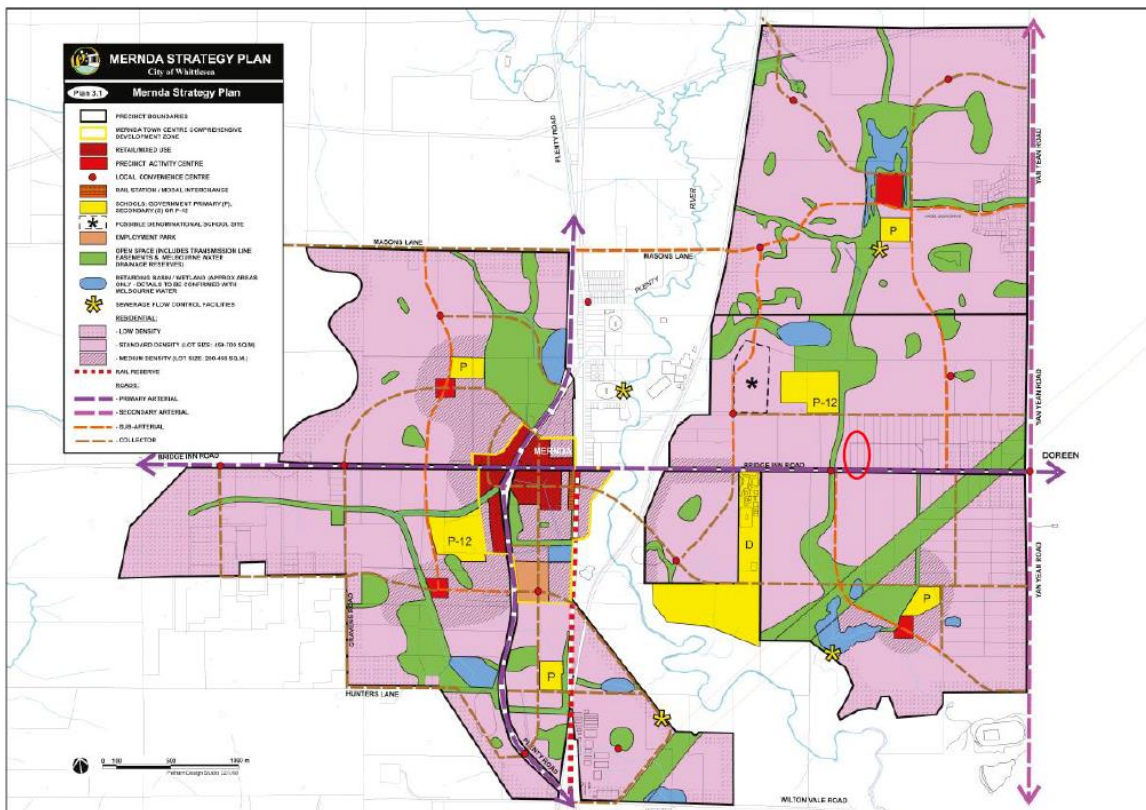
15. The MSP divided the development plan area contained in DPO5 into 5 precincts. The Land is included in Precinct 2A as shown in the below plan:



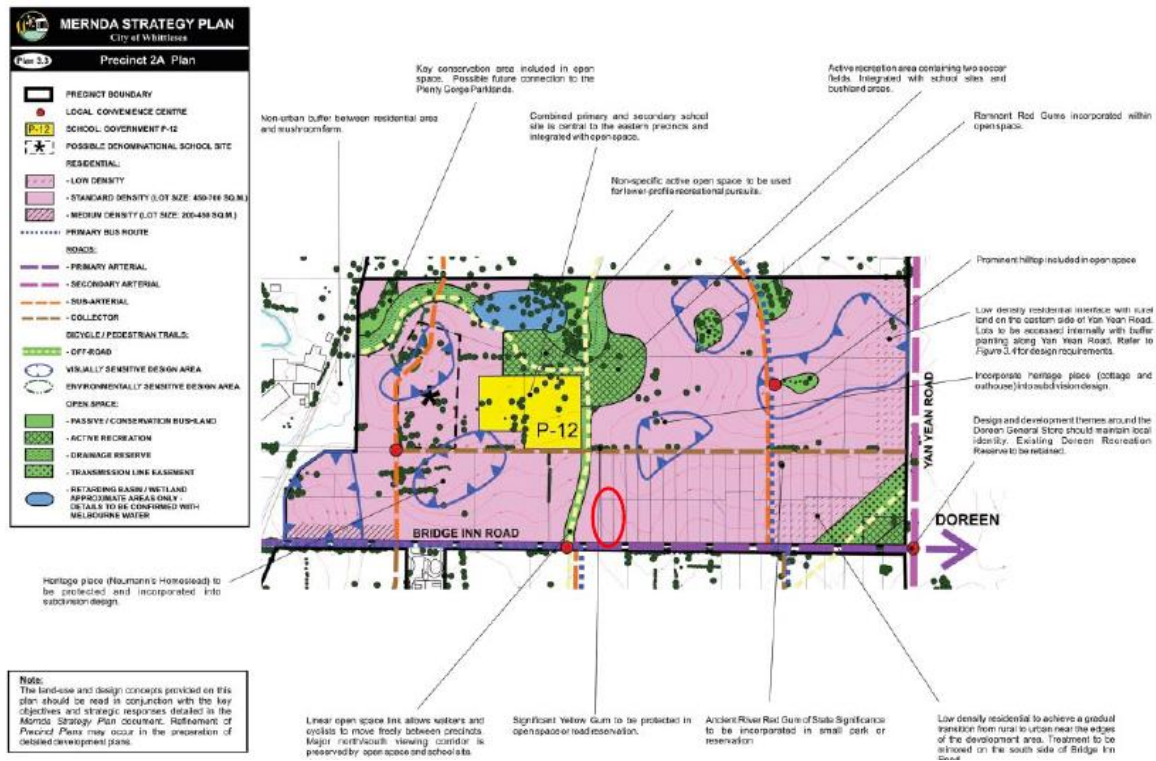
16. As can be seen in the following ariel photograph, much of Mernda has been developed, except for the land within Precinct 2A:



17. The future urban structure for the MSP is set out below, with the Land circled in red:

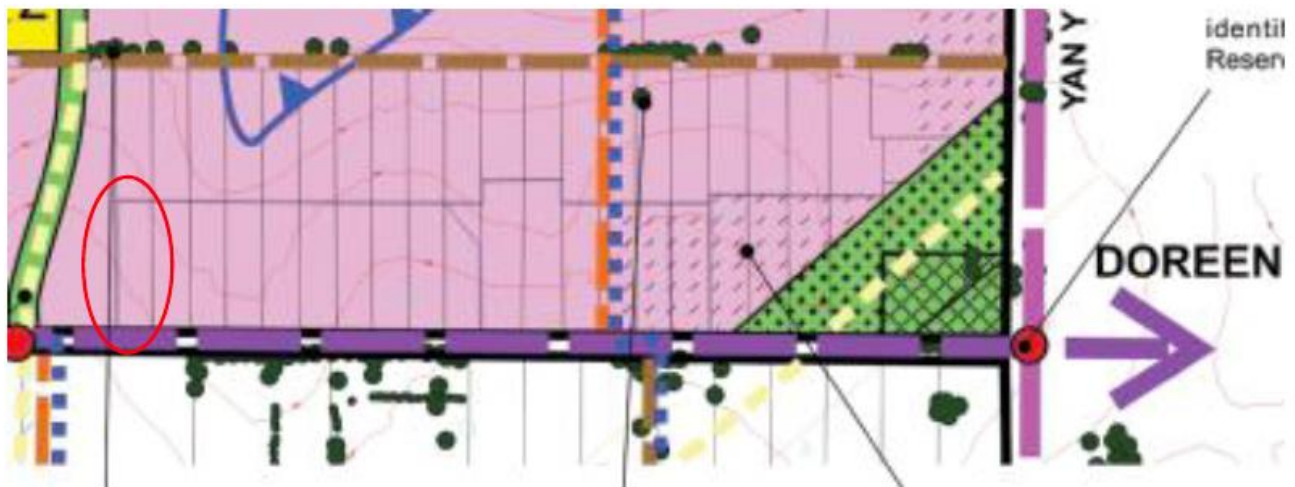


18. The Precinct 2A Plan is shown below, with the Land circled in red:



19. The snapshot of Precinct 2A below shows that the land within the precinct is intended for both standard (areas in pink) and low density residential use (areas in pink with diagonal dash), including the provision of open space within the transmission easement to the east.

20. The black dots denote the location of significant trees (both yellow gums and river red gums) which are to be incorporated into small parks or road reservations:



21. Section 3.3 of the MSP addresses 'Environmental Conservation'. The key objective is:

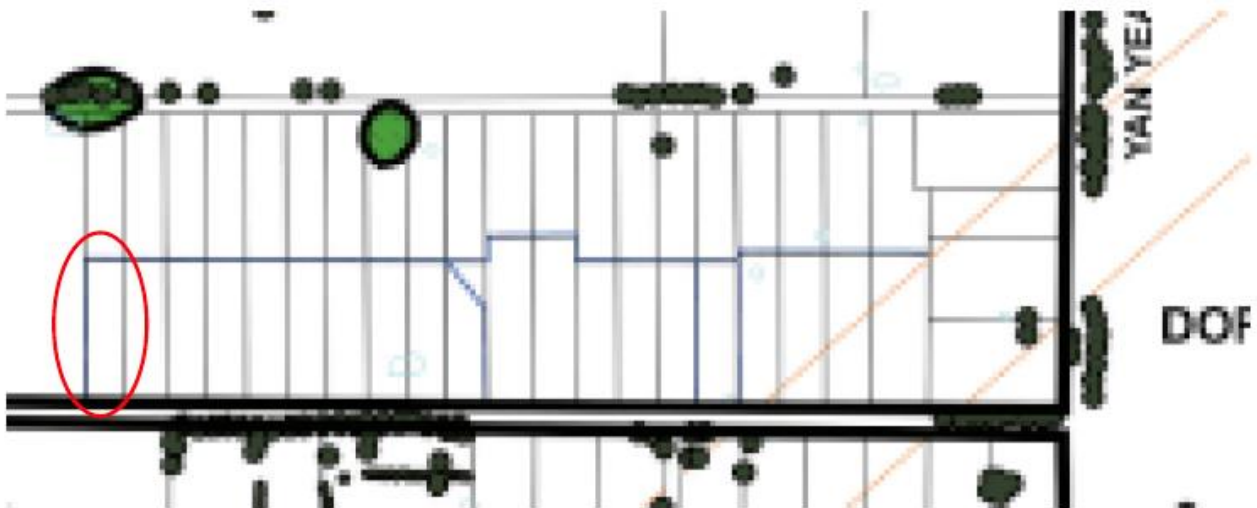
to protect and enhance environmental values by applying the principles of ecologically sustainable design to the designation of open space and the construction of urban areas.

22. Section 3.3.1 'Native Vegetation and Habitat Management' states as follows:

The open space network has been configured to encompass most sites supporting significant patches of remnant vegetation. The design has been informed by the environmental assessment undertaken by TBLD (2000).

Where remnant vegetation falls outside the designated open space network, it should be preserved through the use of tree-reservations, pocket parks, widened nature strips, or larger residential lots with appropriate building envelopes. The removal of native vegetation should only occur as an absolute last resort.

23. The areas of environmental significance are shown in the MSP in green (with the Land circled red) as follows:



#### DEVELOPMENT PLAN OVERLAY (SCHEDULE 5)

24. In addition to requiring a development plan to be generally in accordance with the MSP, Development Plan Overlay (Schedule 5) includes other requirements which relate to the matters in dispute, including the following:

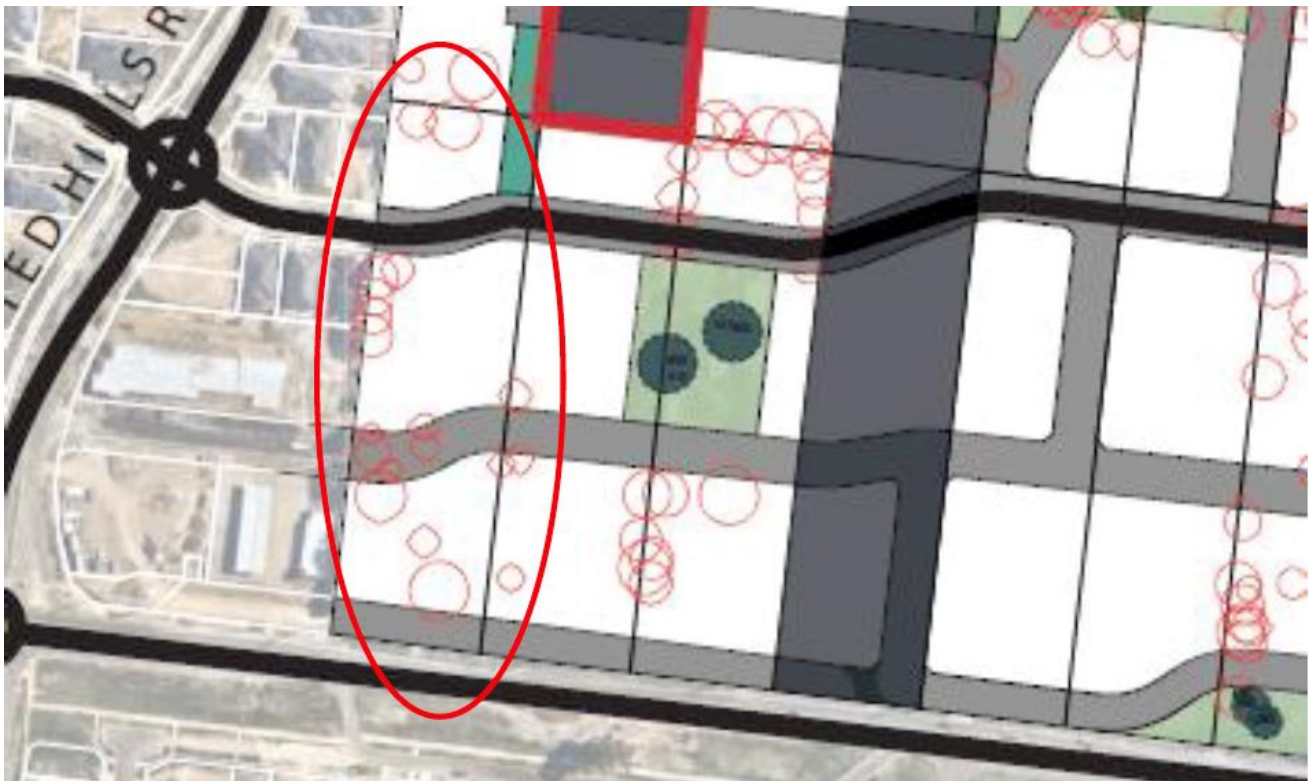
- a) protection and enhancement of identified conservation areas:
- Protection and enhancement of identified conservation areas. An environmental assessment of the flora, fauna and habitat significance of the land must be submitted which includes recommended actions for management, revegetation and restoration of conservation and vegetation protection areas and the links between such areas. The assessment should be guided by the broader environmental assessment recommendations completed as part of the Mernda Strategy Plan.



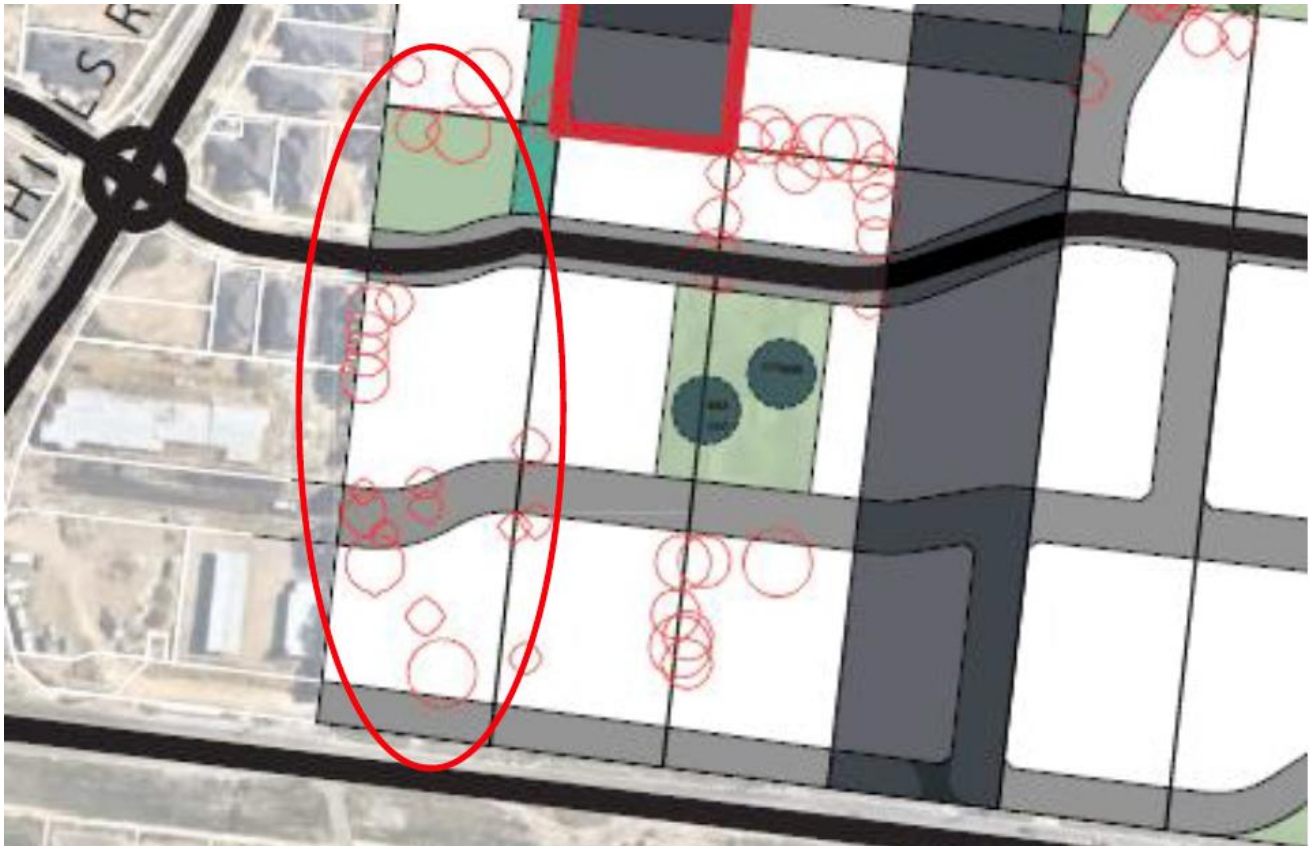
- b) retention and integration of individual and stands of mature trees:
- Retention and integration of individual and stands of mature trees, particularly indigenous River Red Gums. An arboricultural survey of all existing trees on the land and their condition, health and integrity must be submitted including appropriate measures for the long term preservation of the tree(s) having regard to their proposed open space or development context. A tree protection strategy must also be submitted to ensure that trees (including canopy and root system) are not damaged during subdivision construction.
- c) a 'net gain' assessment of any native vegetation to be removed:
- A 'Net Gain' assessment of any native vegetation to be removed having regard to the background document Victoria's Native Vegetation Management - A Framework for Action including the location of any necessary offsets.

## THE DEVELOPMENT PLAN

25. The only matter of the Development Plan in dispute is Council's insertion of a tree reserve on the Land. The version of the Development Plan submitted by the Association did not show a tree reserve on the Land, as shown in the plan below (with the Land circled in red):



26. The version of the Development Plan approved by Council inserted a tree reserve on the Land, shown in the plan below (with the Land circled in red):



27. In its delegate's report, Council summarised its approach to the insertion of a tree reserve on the Land as follows:
- a) Council's change to the tree reserve on the Land was not supported by the proponent:

One of the requested changes was not made. This was the identification of a tree reserve in the area north of the extension of Venice Rise on 811 Bridge Inn Road. The requested tree reserve was to protect six existing trees including two medium and large (respectively) River Red Gums of moderate arboricultural value.
  - b) the owner of the Land, following Council's request for the trees to be retained in a tree reserve on the Land, removed the trees:

Following Council's request for these trees to be retained in a tree reserve, the landowner, a member of the consortia, removed the trees.
  - c) subsequent to the removal of these trees, the owner of the Land submitted reports suggesting that the trees did not require a permit for removal and were required to be removed to service development. Council reviewed these reports and concluded that removal of the trees should have been avoided:

They subsequently presented reports suggesting the trees did not require a permit for removal and needed to be removed to service the development.

Planning and development teams from across Council reviewed these reports and agreed that the removal of the trees could and should have been avoided.

- d) Council Officers made changes to the Development Plan to show a reserve of approximately 1,500sqm on the Land:

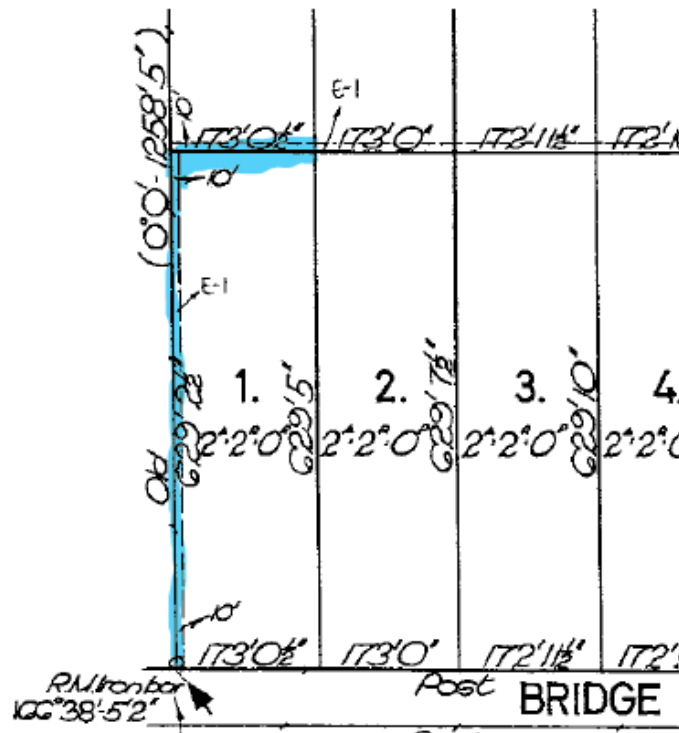
Council Officers have made changes to the submitted Development Plan to show a tree reserve of approximately 1,500sqm as requested, with a note that this area is to be revegetated. It should be noted, that the proponent does not support this change. With this change and all other requested changes made, Council Officers consider the Development Plan at Attachment 2 satisfactorily responds to submissions received during exhibition and complies with planning provisions and policy.

- 28. However, the owner of the Land did not remove the trees in response to Council's advice that they should be retained in a tree reserve, but did so on the understanding that:
  - a) the removal of the trees did not require a planning permit;
  - b) the trees were located within an existing easement; and
  - c) the trees would be required to be removed to facilitate the future development of the land.

#### **Advice on the easement burdening the Land**

- 29. In September 2023, the owner of the Land obtained advice from Breese Pitt Dixon that:
  - a) sewerage to the development would be delivered within the existing easement adjacent to the northern boundary; and
  - b) a portion of the developable land will drain towards the west requiring drainage infrastructure to be installed within the existing easement; and
  - c) trees along the western and northern boundary of the Land would require removal in order to deliver the drainage and sewer mains that will facilitate the development.

30. The easement on the Land is shown below:



**Advice on the removal of trees on the Land**

31. In October 2023, the owner of the Land received advice from ‘Tree logic’ that it did not require a permit to remove the trees on the Land:

Inspection of historical imagery shows bare farmland in the location in 1976 and two small canopies in the locations of the two River Red Gums (Trees 420 & 425) in 1981. It is clear from these aerial images that the trees have been planted in a row between 1976 & 1981 which makes them approximately 40 years in age. Canopies of the other trees don’t appear in historical imagery until after 1989, meaning the other trees are less than 30 years of age. It is clear from the aerial imagery that the two River Red Gums are not ‘indigenous’ as outlined in the 2020 Tree logic report (i.e. naturally occurring, remnant trees); instead, they should be categorised as ‘planted indigenous’. See Figures 2-4.

In terms of permit requirements, the site is covered by a Vegetation Protection Overlay (VPO1) which requires that permits are attained prior to removing, destroying or lopping native vegetation. Under the table of exemptions, any tree that has been planted or grown as a result of direct seeding is exempt from permit requirement. As such, all of the trees growing in this group, including the two River Red Gums, are exempt from permit requirement under VPO1.

32. No enforcement action has been taken to date by Council in respect of the removal of the trees.

## APPLICATION UNDER S149(1)(A) OF THE PLANNING & ENVIRONMENT ACT 1987 (ACT)

33. The application for review is brought under section 149(1)(a) of the Act on the basis that:
- a) the Applicant is a 'specified person' within the meaning of section 148 of the Act as it is the owner of the Land; and
  - b) Council is a 'specified body' within the meaning of section 148 of the Act.
34. In relation to section 149(1)(a) of the Act:
- a) Council made a 'decision in relation to a 'matter';
  - b) the 'decision' is to approve the Development Plan;
  - c) the 'matter' is the Development Plan';
  - d) the Development Plan must be done (or prepared) to Council's satisfaction under clause 43.04-2 of the Whittlesea Planning Scheme; and
  - e) Council was satisfied with the Development Plan and approved it on 16 July 2024.
35. This is supported by the Tribunal's decision in *Parklea Berwick Pty Ltd v Casey CC* [2024] VCAT 287 that the Tribunal has jurisdiction to consider an application under section 149(1)(a) of the Act where a responsible authority has expressed satisfaction with a development plan.

## GROUND S

36. The Applicant relies on the following grounds:
- a) there is no basis to include a tree reserve on Parcel 45 because:
    - i) there are no trees within the Parcel of a size, age or species which require protection;
    - ii) the tree reserve proposed by Council:
      - a) is located within an existing drainage easement;
      - b) is located in an area where trees would be required to be removed to facilitate the future development of the land within the Development Plan; and

- c) would compromise the delivery of drainage and sewerage services to development within the Development Plan.
- b) the Development Plan dated 20 May 2024, which does not include a tree reserve on Parcel 45, ought to be approved on the basis that it:
  - i) is consistent with Schedule 5 to clause 43.04 of the Development Plan Overlay;
  - ii) meets the requirements of clause 4 to Schedule 5 of the Development Plan Overlay;
  - iii) is generally in accordance with the Mernda Strategy Plan; and
  - iv) is consistent with orderly and proper planning.

### **ORDERS SOUGHT**

37. That the Development Plan dated 20 May 2024, which does not include a tree reserve on Parcel 45, is to the satisfaction of the Tribunal pursuant to clause 43.04-2 of the Whittlesea Planning Scheme.

38. That the Responsible Authority pay the Applicant's costs of the Proceeding.

13 August 2024

**S&K Planning Lawyers**