

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1802/2020  
PERMIT APPLICATION NO. PA2668

### CATCHWORDS

Review of decision to reuse to grant a permit under section 77 of the *Planning & Environment Act 1987*. Hepburn Planning Scheme. Farming Zone. Proposal for a single dwelling on a lot of less than 40ha. Bushfire Management Overlay. Environment Significance Overlay – special water supply catchment. Small lot. Bushland setting.

<b>APPLICANT</b>	Amy James
<b>RESPONSIBLE AUTHORITY</b>	Hepburn Shire Council
<b>RESPONDENTS</b>	Adam Shepherd, Anthony David Jobe, Barry Fredrick Prewett, Clayton Watson, Julia Elizabeth Palfreyman, Loris Marie Duclos, Ruth Linda Jenkins
<b>REFERRAL AUTHORITIES</b>	Country Fire Authority, Goulburn Murray Water
<b>SUBJECT LAND</b>	10 Burma Track EGANSTOWN VIC 3461
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	13 July 2021
<b>DATE OF FURTHER MATERIALS</b>	31 August and 14 September 2021
<b>DATE OF ORDER</b>	16 December 2021
<b>CITATION</b>	James v Hepburn SC [2021] VCAT 1506

### ORDER

- 1 Pursuant to clause 64(2) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, permit application PA2668 is amended by substituting the following plans and documents that have been filed with the Tribunal:

- **Plans:**

Prepared by: Archiscope  
Drawing numbers: James Container Development (10 Sheets)  
Revision K  
Dated: 24 May 2021

- **Documents:**

10 Burma Track Eganstown Vegetation Assessment, Mark Trengove Ecological Services, May 2021

Bushfire Management Statement, 10 Burma Track Eganstown, Regional Planig & Design Pty Ltd, No 18.248 Rev D, 24 May 2021

10 Burma Track Eganstown Land Capability Assessment, Archaeo-Environments Pty Ltd, Rev 1, May 17 2021.

- 2 In application P1802/2020 the decision of the Responsible Authority is affirmed.
- 3 In planning permit application PA2668 no permit is granted.

**Ian Potts**  
**Senior Member**

#### **APPEARANCES**

For Amy James

Mr James Iles, a town planner from iPlanning Pty Ltd.

For Hepburn Shire Council

Ms Nicola McGowan.

For Country Fire Authority

Mr Stephen Foster, a town planner from the Country Fire Authority.

For Adam Shepherd

Mr Adam Shepherd in person.

For Julia Elizabeth Palfreyman

Ms Julia Palfreyman in person.

Anthony David Jobe, Barry Fredrick Prewett, Clayton Watson, Loris Marie Duclos and Ruth Linda Jenkins

Ms Marie Duclos in person.

**INFORMATION**

## Description of proposal

Planning permission is sought for the use and development of the subject land for a dwelling. The dwelling would comprise of one bedroom, kitchen, lounge and meals area housed in one wing, and three bedrooms with access to deck areas, a loungeroom and amenities in another. The ground floor wings would be connected by a glazed passageway. A recreational room, deck and studio, with bathroom at first floor would span across the two wings, beneath which would be a three car space carport. The dwelling is proposed to be constructed using modified shipping containers clad with panel finishes. Upper and lower decks would have a west facing aspect.

Native vegetation would be cleared to provide for access, wastewater disposal areas and defensible space.

## Nature of proceeding

Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.

## Planning scheme

Hepburn Planning Scheme.

## Zone and overlays

Farming Zone (**FZ**) – clause 35.07.

Environmental Significance Overlay – clause 42.01 and schedule 1 (**ESO1**).

Bushfire Management Overlay (**BMO**) – clause 44.06.

## Required planning permissions

Use of the land in a FZ for a dwelling (clauses 35.07-1).

Buildings and works in a FZ (clause 35.07-4) and on land subject to the ESO1 (clause 42.01-1).

Construction of building and works associated with accommodation in a BMO (Clause 44.06-2).

Removal of native vegetation – clause 52.17 unless exempt under clauses 52.17-7 or 52.12-5.

Relevant scheme policies and provisions	<p>Clauses 11.01-1R, 13.02-1S, 14.01-1S, 21.05, 21.08 and 22.04 of the planning policy framework.</p> <p>Clauses 52.12, 52.17 and 53.02 of the specific provisions.</p> <p>Clause 71.02-3.</p>
Land description	<p>The subject land is irregular in shape, with a northern boundary of 79.64 metres, southern boundary of 77.81 metres, eastern boundary to Burma Track of 51.24 metres and a western boundary of 51.44 metre, yielding an area of 4,048m<sup>2</sup>.</p> <p>A concrete slab and a small car port and shed are present on the land with a gravel driveway providing access. A dam is in the south-west corner fed by a shallow swale-like drainage line.</p> <p>The land is covered by a mix of exotic and native ground covers and native trees.</p>
Aboriginal Heritage	<p>A corner of the land lies within an area of Aboriginal Cultural Heritage. The construction of a dwelling on the lot is exempt activity and the use of the lot for a single dwelling is not high impact activity (as defined under regulations 9(1) and 58(3) of the <i>Aboriginal Heritage Regulations 2018</i>). Accordingly, a Cultural Heritage management Plan is not required for this permit application.</p>
Tribunal inspection	<p>An inspection of the review site and its surrounds was made after the hearing and the additional materials were received.</p>

## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Ms James sought a planning permit from the Hepburn Shire Council (the Council) to use and develop her property at 10 Burma Track Eganstown (**review site**) for a dwelling. Planning permission is required to use the land and construct a dwelling because the subject land is zoned Farming Zone (**FZ**) under the Hepburn Planning Scheme (**the planning scheme**). The land is also subject to schedule 1 of the Environmental Significance Overlay (**ESO1**) and Bushfire Management Overlay (**BMO**). Planning permission is required for the building and works under these overlays.
- 2 As I will come to shortly, planning permission is also required for the removal of native vegetation.
- 3 The Council refused to grant a permit for this proposal, concluding that the proposal presents an unacceptable bushfire risk to future occupants of the dwelling.
- 4 Ms James now seeks a review of the Council's decision.<sup>2</sup>

### PRELIMINARY MATTERS ABOUT PLANNING PERMISSIONS THAT ARE REQUIRED

#### Removal of native vegetation and exemptions under clause 52.17

- 5 The proposal is made on the basis that removal of native vegetation will be required to accommodate the dwelling, defensible space for bushfire risk management and wastewater disposal areas. Removal of native vegetation is normally subject to controls and planning permission under clause 52.17 of the planning scheme. The permit application and the assessment of native vegetation impacts had proceeded on the basis that the proposal fell within the site area exemption under clause 52.17-7 for land in contiguous ownership that is less than 0.4ha.
- 6 At the commencement of the hearing, I raised the fact that there was a discrepancy between the area of the review site cited in the permit application and that recorded on the title. Some application material<sup>3</sup> relied on a cadastral plan which recorded an area of 3,921m<sup>2</sup>, and therefore the site area exemption under clause 52.17-7 was said to apply. However, the title plan shows that the subject land has an area of 4,048m<sup>2</sup>. Accordingly, the site area exemption under clause 52.17-7 cannot be relied on.

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<sup>1</sup> 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.

<sup>2</sup> Under section 77 of the *Planning and Environment Act 1987*.

<sup>3</sup> The application material included the Bushfire Management Statement and Vegetation Assessment lodged with the application. The same area was referred to in the amended plans and reports circulated in the course of this application. The planning application reports identified the title based area as did the Council Officer's planning assessment report.

- 7 A proposal to construct a new dwelling in a FZ may also be exempt from permission to clear native vegetation under clause 52.17, but this only applies if certain requirements are met. The requirements are about the area of native vegetation or numbers of trees to be removed or have been removed over a five year period.
- 8 In its submissions the Council acknowledged the discrepancy about the site areas but referred to the exemption for a dwelling in a FZ under clause 52.17-7. The difficulty with relying on this exemption at the time of hearing was that Vegetation Assessment that accompanied the application and the amended plans had failed to identify the area of native vegetation to be removed and/or number of trees. There was therefore no way of understanding:
- Whether the FZ dwelling exemption applied under clause 52.17; or
  - The extent of native vegetation to be cleared for defensible space and the balance sought to be struck under policy at clause 13.02-1S between protection of biodiversity values and bushfire protection measures.
- 9 On the application of Ms James, I granted leave for a further assessment of vegetation impacts, filing of a revised Vegetation Impact Assessment along with a written submission about the removal of native vegetation and the revised Vegetation Impact Assessment. Leave was also granted to the Council and respondents to file a response to this further material. This material, having now been filed (but delayed due to the COVID restrictions that occurred during this period) forms the additional material that I have considered in arriving at my decision.<sup>4</sup>

#### **Exemptions for removal, destruction or lopping of vegetation under clause 52.12**

- 10 Submissions for Ms James refer to the exemption from planning permission for the removal, destruction or lopping of vegetation under clause 52.12. One of the two purposes of this clause is to *‘facilitate the removal of vegetation in specified circumstances to support the protection of human life and property from bushfire’*. The specific circumstances of this application fall under Clause 52.12-5.
- 11 Clause 52.12-5 is headed ‘Exemption to create defensible space for a dwelling under Clause 44.06 of this planning scheme’. A note to this clause sets out the following:

*The effect of clause 52.12-5 is that if an application for building and works is made and all requirements of the clause are met, that*

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<sup>4</sup> I record here that the response from the Department of Environment, Land, Water and Planning identifies the vegetation impacts as falling within the intermediate pathway and so it is not a referral authority under clause 66.02-2 of the planning scheme and section 55 the *Planning and Environment Act 1987*.

*application is not required to be accompanied by a permit application to remove the vegetation covered by this clause.*

- 12 The requirements to be met are as follows:
- a. The subject land is in the Bushfire Management Overlay.
  - b. The subject land is in the General Residential Zone, Residential Growth Zone, Neighbourhood Residential Zone, Urban Growth Zone, Low Density Residential Zone, Township Zone, Rural Living Zone, Farming Zone or Rural Activity Zone. [My emphasis]
  - c. The removal, destruction or lopping of vegetation:
    - i. Does not exceed the distance specified in Table 1 to Clause 53.02-3 [my emphasis] of this planning scheme, based on the bushfire attack level determined by a relevant building surveyor in deciding an application for a building permit under the *Building Act 1993* for a dwelling or alteration or extension to the dwelling; or
    - ii. Is required to be undertaken by a condition in a planning permit issued after 31 July 2014 under Clause 44.06 of this scheme for a dwelling or an alteration or extension to the dwelling.

- 13 In respect to the operation of this clause and meeting this requirement, submissions for Ms James referred to the decision in *Savicky v Mornington Peninsula SC*<sup>5</sup> where I set out the following in respect to the operation of what was then clause 52.48-5:<sup>6</sup>

[10] Amendment VC109 also amended Clause 52.48 such that the creation of defensible space is exempted from planning permissions that may otherwise be required under the scheme in certain circumstances. The circumstances relevant to this proposal are when:

- The land is subject to a BMO;
- The land is zoned for residential use, in this case the General Residential Zone; and
- The ‘removal, destruction or lopping’ of vegetation occurs in one of two possible circumstances. In this proceeding, the relevant circumstance is that a planning permit condition requires the removal, destruction or lopping of vegetation for a dwelling.

[11] While the proposed vegetation removal for the creation of defensible space can qualify for an exemption from any planning permissions required under the scheme, all parties agree that it would be wrong not to consider the consequences of the vegetation removal. The exemption is prospective. It only

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<sup>5</sup> [2014] VCAT 1373.

<sup>6</sup> Ibid, [10] – [11].

applies if a permit is granted, and that permit contains a condition directing or allowing the creation of the defensible space. In being prospective to the granting [of] a permission that will exempt the vegetation removal from planning permission, a responsible authority, or a Tribunal on review, will need to consider the merits of the proposal and decide whether it will result in an acceptable planning outcome. This will require a consideration of relevant planning policies and / or controls that may apply to the management of that vegetation along with the need to manage the bushfire risk.

- 14 Since the decision in *Savicky*, what was clause 52.48-5 has been subject to several amendments and relocation to clause 52.12-5 of the planning scheme.
- 15 Planning Scheme Amendment VC132 amended the terms of the exemption introduced under VC109 from stating that permission to remove, destroy or lop vegetation:

...does not apply to the removal, destruction or lopping of vegetation to *create a defensible space around a dwelling* if all of the following requirements are met...

[my emphasis]

to:

...does not apply to the removal, destruction or lopping of vegetation to *construct a dwelling and create its defensible space* if all of the following requirements are met...

[my emphasis]
- 16 Planning Scheme Amendment VC148 subsequently amended the VPPs to locate the exemption under 52.12-5 without changing the terms introduced by VC132. Amendment VC176 then changed the terms of clause 52.12-5 to the present form, i.e. where a requirement in the planning scheme for a permit to destroy, remove or lop vegetation:

...does not apply to the removal, destruction or lopping of vegetation to *enable the construction of a dwelling, or the alteration or extension of an existing dwelling, and create its defensible space* if all of the following requirements are met...

[My emphasises]
- 17 Amendment VC176 also introduced two purposes to clause 52.12, the one relevant in this decision being set out above and added the note (set out above) to the end of the clause.
- 18 The explanatory memorandum to the VC176 makes it clear the intention of the amendment was to:

...[clarify] that no permit is required to remove vegetation for the construction of a dwelling, and alteration and extension to a dwelling,



or the creation of its defensible space when approved under the Bushfire Management Overlay;

[My emphasis]

- 19 The following relevant points can be made about the operation of clause 52.12-5 in its present form, having regard to these amendments and the circumstances of this application:
- If the three conditions precedent are met, Ms James does not need to obtain a permit application for the removal, destruction or lopping of vegetation to *enable the construction* of the dwelling and its defensible space.
  - Requirement 1 is met, as the land is in the BMO.
  - Requirement 2 is met, as the land is in one of the nominated zones, i.e. the FZ.
  - Requirement 3 is a matter for consideration under clause 44.06, as the defensible space distance specified in Table 1 to Clause 53.02-3 does not apply to this application. [Noting here that Table 1 only applies to dwellings being considered under clause 52.02-3 – Dwellings in existing settlements, which by the operation of clause 52.02-1, does not apply for dwellings in the FZ.] Accordingly, the requirement can only be met if the proposal for the dwelling is deemed acceptable with respect to the purposes of clause 44.06, and the mandatory condition under clause 44.06-5 that requires the creation of defensible space, is included in the permit. The acceptability of the proposal under clause 44.06 requires a decision maker to consider the purposes of this clause, relevant planning policy and the requirements and decision guidelines of clause 53.02.
- 20 It is on this last point that the position that I expressed in *Savicky* about the permit exemption being prospective rests.
- 21 The exemption is prospective, because the decision maker cannot know if the exemption applies until satisfied that the bushfire safety measures under clause 53.02 are sufficiently addressed to grant a permit under clause 44.06, including a condition to create defensible space. This includes the decision maker being satisfied that meeting the overarching policy outcomes of the scheme to protection human life above all other considerations, as set out at clause 13.02-1S, is met.
- 22 However, policy at clause 13.02-1S also requires decision makers to:
- Ensure settlement growth and development approvals can implement bushfire protection measures without unacceptable biodiversity impacts by discouraging settlement growth and development in bushfire affected areas that are important areas of biodiversity.
- 23 Further by way of the operation of decision guidelines under clauses 65 and 65.01 in conjunction with clauses 44.06 and 53.02, the likelihood of native

vegetation's destruction or protection are relevant considerations in balancing the acceptability of the planning outcome.

- 24 If the operation of clause 52.12-5 were to be enlivened, then by way of relevant policy and decision guidelines, it is open to consider the loss of the native vegetation within the defendable space and whether this results in an acceptable planning outcome notwithstanding the prospect that permission will not be required.
- 25 My assessment of this proposal takes this approach.

### **WHAT IS IN ISSUE?**

- 26 The Council refused to grant a permit on three grounds, all related to the matter of bushfire risks and the protection of human life. Because the land is in a bushfire prone area and subject to the BMO, the Council says its decision has prioritised the protection of human life from bushfire risk in accordance with various provisions of the planning scheme. When read together with the objectives of the FZ that do not prioritise the use of the land for a dwelling, the Council says that the preferable and acceptable planning outcome is to refuse planning permission.
- 27 Neighbouring residents opposed the application for a permit. They are parties to this proceeding and have made submissions that oppose this application. Their grounds support the position of the Council about bushfire risk and raise the following additional concerns about:
- The design of the proposed dwelling. The residents believe that it would have a dominating presence in the neighbourhood, an impact exacerbated by its location close to the southern boundary.
  - Impacts on water quality in the local waterway. This is said to arise from the proposed on-site wastewater system being close to a drainage line.
  - The amount of vegetation that would be lost to accommodate the dwelling, the defendable space, the driveway access and wastewater disposal areas. It is submitted that the loss has not been properly accounted for, with the assessment of the vegetation understating its biodiversity value. It is contended the loss would result in a poor ecological outcome.
- 28 Ms James contests all these grounds.
- 29 Clause 65 of the planning scheme sets out that because a planning permit can be granted does not mean that one should or will be granted. The decision maker must decide whether the proposal will result in an acceptable planning outcome when measured against the clause 65 decision guidelines. Consideration of the Planning Policy Framework (PPF) is required under these decision guidelines and that of the various controls applying to the review site.

30 As often cited, clause 71.02-3 of the planning scheme directs the decision maker to adopt an integrated approach when applying the range of sometimes conflicting planning policies to achieve a net community benefit and sustainable development for the benefit of present and future generations. The one exception to is:

...in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.

31 It is therefore the issue of bushfire safety that I will address first.

### **BUSHFIRE RISK**

32 One purpose of the BMO is to identify areas where the bushfire hazard warrants bushfire protection measures.<sup>7</sup> Other purposes are to:

- implement the relevant planning policy;
- ensure development of land prioritises the protection of human life and strengthens community resilience to bushfire; and
- ensure development is only permitted where the risk to life and property can be reduced to an acceptable level.

33 Clause 44.06-4 requires this application to meet the requirements of clause 53.02.<sup>8</sup> The purposes of clause 53.02 include amongst others to:<sup>9</sup>

...ensure that the location, design and construction of development appropriately responds to the bushfire hazard.

...ensure development is only permitted where the risk to life, property and community infrastructure from bushfire can be reduced to an acceptable level.

34 These purposes are addressed through the application of bushfire protection objectives under clause 53.02-4. The applicable measures in this application are required to address landscape, siting and design objectives, defensible space and construction objectives and water supply and access objectives.<sup>10</sup> In addition to these measures, an application is to be accompanied by an assessment of the bushfire hazard (at a site and landscape level) and a Bushfire Management Statement (**BMS**).<sup>11</sup>

35 The decision guidelines at clause 53.02-4.5 require consideration of amongst other matters:

- The planning policy framework.

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<sup>7</sup> Clause 44.06.

<sup>8</sup> As no schedules under clause 44.06 apply to the circumstances of this application.

<sup>9</sup> Noting that the purposes that address a single dwelling are not applicable for the reasons set out earlier.

<sup>10</sup> Clauses 53.02-4.1, -4.2 and -4.3 respectively.

<sup>11</sup> A responsible authority has discretion to waive, reduce or vary these requirements. This was not the situation in this application.

- The bushfire hazard landscape and bushfire hazards site assessment and the bushfire management statement.
  - Whether the proposal meets the objectives of clause 53.02-4, regardless of other measures that may be available.
  - Whether the proposed measures can be practically implemented and maintained.
  - If one or more of the objectives in clause 53.02-4 cannot be achieved, whether the development will reduce the bushfire risk to a level that warrants proceeding or put another way, can the risk be reduced to an acceptable level even if one or more objectives cannot be met.
  - Whether the broader landscape bushfire risk can be mitigated to an acceptable level.
- 36 The Country Fire Authority (CFA) advises that the review site is in a 'Landscape Type 3' Bushfire risk landscape.<sup>12</sup> Particular characteristics of such a landscape include:
- The type and extent of vegetation located more than 150 metres from the site may result in neighbourhood scale destruction.
  - Bushfire can approach from more than one aspect.
  - The site is in an area that is not managed to minimum fuel condition.
  - Access to an appropriate place that provides shelter from bushfire is not certain.
- 37 The CFA agrees with the assessment in the BMS that there is potential for long run fires from north-west and south-west, through forested areas that can impact the review site. These directions align with directions of greatest risk in Victoria.<sup>13</sup>
- 38 It is the CFA's advice that:
- The most likely forms of bushfire threat are from ember attack and surface based fire through the north, west and southern forested areas.
  - There is a significant bushfire history for this landscape location.
  - It agrees with the BMS that the intensity of any bushfire would be reduced through fuel reduction burns and management of the landscape through programmed Fire Operation Plans by public authorities in the local area.
  - At a local scale, the review site and neighbouring land while comprising of forest vegetation, has managed understory and ground fuels. So, while the vegetation within 150 metres of the review site is

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<sup>12</sup> As defined in the *Technical Guide Planning Permit Applications Bushfire Management Overlay* (DELWP September 2017).

<sup>13</sup> Paragraph 21, CFA written submissions.

assessed as 'Forest', the fuel loads within the private properties are expected to be lower than assumed under the BMO bushfire attack level methodology. The CFA therefore accepts an assessment of the fuel loads for classified vegetation within 150 metres of the review site to be modified vegetation.

- The expected fire behaviour in the area is rated as a high bushfire risk, but the anticipated wider landscape bushfire behaviour is not expected to exceed the assumed model fire that determines the defensible space and construction standards for the development.
- Evacuation is possible to designated Neighbourhood Safer Places (NSP) at Daylesford CBD - 6 kilometres by road - and the Hepburn Recreation Reserve, approximately 7.5 kilometres by road. However, residents would need to leave early in the event of a fire approaching and evacuate on days of extreme or code red ratings.<sup>14</sup>

39 The presence of modified vegetation and access to places of shelter are said to distinguish the review site from all the characteristics of a 'Landscape Type 3'.

40 The CFA submissions set out an assessment of the proposed bushfire mitigation measures in the application against the measures and objectives of relevant clause 53.02-4 provisions. I do not intend to set out these in detail but refer here to matters of material concern.

41 The CFA's assessment of the risk and acceptability of the proposal is based on applying requirements for modified vegetation, said to arise from modified fuel load conditions. The BMS applies these modified conditions to the properties on the immediate northern and southern boundary. The CFA says that the forest conditions on the other two boundaries have lesser fuel loads than assumed for in the bushfire modelling. Notwithstanding the classification as Forest vegetation in the BMS to these boundaries, the CFA says that modified vegetation requirements can be applied to these boundaries as well.

42 The BMS identifies that the public forested land to the north-west, west and southwest of the review site as mapped as an Asset Protection Zone for the purposes of bushfire fuel management. Under the Forest Fire Management Program for Victoria, this means the land will be managed to reduce fuel loads by fuel reduction burns and mechanical means. Further west of the review site, the public land is subject to a Bushfire Moderation Zone, where less frequent fuel reduction burns are intended to control fuel load. A Landscape Management Zone lies to the south.<sup>15</sup>

43 I accept therefore that within the vicinity (i.e. local area) of the review site, management of fuel loads in the surrounding public land is intended.

<sup>14</sup> Written submissions at [31], [41] to [42] and in oral submissions.

<sup>15</sup> Fire management zones are described at pp18 and 19 of the *Code of Practice for Bushfire management on Public Land*, Department of Sustainability and Environment, June 2012.

However, none of these management zones apply to the pine plantation areas to the immediate south or east and none apply to private land to the north. I conclude that the reliance of modified vegetation is not without merit, however I remain concerned about reliance on modified fuel conditions applying to private land, notably larger lots of bushland to the north and pine plantation areas to the east and south/southwest. Given such conditions the review site appears vulnerable to long run fire attack from these critical directions.

- 44 The CFA's advice in respect to the risk to human life is that residents/occupants should leave early and preferably leave on extreme fire danger or code red rated days. Further while the CFA acknowledges the dwelling would be close to Burma Track and the track is accessible for emergency vehicles, the CFA also acknowledges that Burma Track has fringing forest vegetation that presents safety risks from such conditions (smoke, poor road conditions and risk of falling timber blocking egress). It also notes that the surrounding alternative routes from the review site (largely to the south) are similarly lined with fringing vegetation and have 'poor driving conditions'. The CFA submits that these are reasons late evacuation should be avoided.
- 45 The CFA submissions about the poor condition of the access, with Burma Track being single lane with limited verge for vehicles to pass and fringing forest vegetation with canopy overhangs is material to understanding the level of bushfire safety. Evacuation under threatening conditions, which as noted by the CFA can involve thick smoke and fire spotting well in advance of the main fire front, present significant danger to human life during evacuation.
- 46 My inspection confirms the advice of the CFA and the submissions from the Council about site access. Access to Daylesford (and thence Hepburn) involves traversing the narrow Burma Track and the slightly wider Cemetery Road in a northward direction for a total distance of around 1.2 kilometres. The alternative Champagne Track/Bells Reed Road evacuation route in a north-east direction, is a narrow, unsealed track through forest and pine plantations. Evacuation on either of these routes would expose evacuees to fire advancing from the main long-run fire directions identified by the CFA and exposed to risks from the narrow roads and potential forward spotting of a fire and blocked access from falling trees.
- 47 Further, while the final access leg into Daylesford (or Hepburn) is via the Midland Highway, a two lane, sealed major road, it includes steep and sinuous sections and for the most part is verged by the thick forested Hepburn Regional Park. This route is exposed to similar risks and directions of long-run bushfire as the review site, exposing evacuees to similar risks.
- 48 The BMS nominates possible evacuation to the west, to open grassland area and Blampied or beyond. Evacuation in this direction is faced with similar

access issue for the Burma Track and the connecting tracks to the north-west.

49 Notwithstanding technical compliance with onsite defensible space and other measure, the decision guidelines set out above call for an overall view of the risks to human life and property, including whether the broader landscape risks can be mitigated to an acceptable level. Factors that weigh against a conclusion that this would be the case for the review site and the present proposal are:

- The vulnerability of the site to risks of unmodified fuel conditions from the surrounding pine plantation areas and bushland conditions on private land to the north.
- The vulnerability of occupants on the review site unless early evacuation is undertaken on extreme risk and Code Red days.

50 I am therefore not persuaded that the use of the land for a residential purpose is consistent with policy at clause 13.02-1S to:

- Direct development to low risk locations; and
- Ensure safe access to areas where human life can be better protected from the effects of bushfire.

51 Overall, I find that the review site's landscape, local and access conditions present a high risk to property and human life. I therefore agree with the Council's position. To allow the use of the review site for a dwelling and expose future occupants to that level of risk would be contrary to the policy outcomes sought under the planning scheme to prioritise the protection of human life and property and direct development to low risk locations.

## IMPACTS ON NATIVE VEGETATION AND BIODIVERSITY

52 While the above may be sufficient to refuse this proposal, for sake of completeness I shall address issues raised by the respondents about the impact on vegetation said to arise from the need to create bushfire defensible space.

53 Leave was given to file an amended assessment of vegetation management requirements as set out earlier. A Vegetation Assessment and Native Vegetation Removal Report, dated August 2022 (**vegetation assessment**) has been received, as has various responses from all parties.

54 I first note that notwithstanding the opportunity to revise this vegetation assessment, the assessment continues to refer to and rely on the *Native Vegetation Permitted Clearing Regulations*. These regulations were replaced in 2017 by the *Guidelines for the removal, destruction or lopping of native vegetation*<sup>16</sup> (**the Guidelines**). The Guidelines were introduced concurrent with the State's policy document *Protecting Victoria's*

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<sup>16</sup> Department of Environment, Land, Water and Planning, 2017.

*Environment – Biodiversity 2037*,<sup>17</sup> a reference policy under clause 12.01-1S. Clause 52.17 reflects the policy aims at clause 12.01-2S of ensuring no nett loss to biodiversity by avoiding removal of native vegetation at first instance, or minimising losses that cannot be avoided and offsetting such losses. The previous regulations sought to avoid the removal of native vegetation ‘*that made a significant contribution to Victoria’s biodiversity*’.<sup>18</sup> These are different strategies, and the present Guidelines imbues decision making with a wider remit to consider the loss of *all* native vegetation and not just that which would make a significant contribution to Victoria’s biodiversity.

- 55 That said the vegetation assessment correctly applies the intermediate pathway process for assessment of habitat values and offsets under the present assessment system.
- 56 In respect to the habitat hectare vegetation loss assessment, I accept that an intermediate risk pathway is appropriate. I also accept that offsets as calculated under this process have been demonstrated to be available. That however is not the end of the assessment process.
- 57 When considering the loss of native vegetation, apart from considering whether the three-step process has been applied, particularly avoidance or minimising losses, the Guidelines contain decision guidelines for consideration under an intermediate pathway.<sup>19</sup> These include:
- .... the impacts on biodiversity based on the following values of the native vegetation to be removed:
    - The extent.
    - The condition score.
    - The strategic biodiversity value score.
    - The number and circumference of any large trees.
    - Whether it includes an endangered Ecological Vegetation Class.
    - Whether it includes sensitive wetlands or coastal areas.
- 58 In respect to minimising the vegetation losses, the vegetation assessment focuses on the fact that the dwelling footprint is located on an existing cleared area of the review site.<sup>20</sup> This is true, however the assessment goes on to detail how over 90% of the existing vegetation would be removed to meet defensible space requirements under clause 53.02. This includes intact mature and immature Eucalypts, middle storey and understorey vegetation across 5 patches totalling 0.368 hectares of the review site. Only 12 trees would be retained and a further 2 might be retained of the 226 trees

<sup>17</sup> Department of Environment, Land, Water and Planning, 2017.

<sup>18</sup> Permitted clearing of native vegetation biodiversity assessment guidelines, DEPI, 2013, section 2.1, p 5.

<sup>19</sup> See section 7 of the Guidelines and clause 52.17-4 of the planning scheme.

<sup>20</sup> Section 2.4 of the Vegetation Assessment Report, August 2021.



counted on the review site. The losses include three large native trees. The extent of the losses would be a direct result of the dwelling being located on a small lot and highlights that the losses cannot be minimised on this property in order to address defensible space requirements. Approval of the dwelling and in turn creation of defensible space must therefore be based on the consequential losses being an acceptable planning outcome.

- 59 In terms of biodiversity values, the vegetation assessment identifies that the review site contains a larger expanse of Valley Grassy Forest (EVC 47) than the DELWP mapping. Regionally, Valley Grassy Forest has a status of vulnerable i.e. only 10-30% of pre-European settlement modelled extent remains intact. The vegetation assessment assigns a condition score of 0.44 to the native vegetation and a strategic biodiversity score of 0.566. These scores correspond to intermediate range values. The site is therefore not one where the native vegetation and biodiversity is highly degraded, but neither is it at the higher value ranges. Nevertheless, the degree of loss weighs against approval when measured against planning policy outcomes for protecting and conserving biodiversity at clause 12.01-1S and other policies that I address later in these reasons.

#### ONSITE WASTEWATER MANAGEMENT

- 60 The proposed dwelling would rely on on-site management of wastewater. Relevant to this fact is that the review site is subject to ESO1, an overlay that is applied to land within proclaimed open drinking water supply catchments and intended to deal with risks arising from on-site wastewater management. Relevant objectives of the ESO include:
- ...[protecting] the quality of domestic water supplies within the Shire and the broader region.
  - ...[maintaining] and where practicable [enhancing] the quality and quantity of water within watercourses.
- 61 The review site is within the proclaimed Cairn Curran Water Supply Catchment. A drainage swale or drainage line crosses the western side of the review site draining from north to south. A small dam constructed in the south-west corner beyond this dam the drainage line feeds to McLachlan Creek, a tributary of the Loddon River which feeds the Cairn Curran reservoir.
- 62 The Land Capability Assessment (**LCA**) that accompanied the application refers to the western drainage line as an 'intermittent drainage line'. There is some debate about whether the drainage line constitutes a waterway for the purposes of setback requirements under the *Code of practice - on-site wastewater management*<sup>21</sup> (**the Code**). The Code has application to this proposal by way of clause 35.07-2 and the need to comply with regulations under the *Environment Protection Act 2017*. It is understood that the Code represents the accepted 'state of knowledge' in respect to accepted practice

<sup>21</sup> Publication 849.4, Environment Protection Authority, July 2016.

for the installation and operation of the on-site wastewater management systems.

- 63 The Code establishes various setbacks to manage risks to the environment and human health. This includes setbacks from waterways, where the definition of a waterway under the *Water Act 1989* is adopted. That definition includes ‘*a natural channel in which water regularly flows, whether or not the flow is continuous*’.<sup>22</sup> Under the Code a 100 metre setback from a waterway within a declared catchment is sought.
- 64 Submissions for Ms James question whether the swale is in fact a waterway for the purposes of the Code and its definition of waterways.
- 65 Having regard to the table of setbacks contained in the Code, I observe that footnote 17 sets out that:
- Where an intermittent stream on a topographic or orthographic map is found through ground-truthing to be a drainage line (drainage depression) with no defined banks and the bed is not incised, the setback distance is 40 m...
- 66 The condition of this drainage line has been inspected in the course of the LCA in accordance with this footnote and I concur from my inspection that it is a shallow drainage depression. Accordingly, I accept that the 40 metre setback can apply to his drainage line. However this setback applies to the on-site wastewater system and not just the disposal area for treated wastewater as measured in the LCA. Under the Code the definition of an on-site wastewater system includes the treatment plant, pipes, fittings, and land used in connection with the treatment plant including the disposal areas.<sup>23</sup>
- 67 Applying the 40 metre setback to this proposal, the disposal beds, as indicated on the plans would be acceptable. However no location is shown for the plant while it is apparent that the fitting and pipes leading from the proposed dwelling’s toilet and wet areas fall within 40 metres of the drainage line.
- 68 Finally, I note that in respect to the disposal field areas, these are based on a three bedroom dwelling. However the proposal is for five bedrooms, though when the first floor studio is accounted for, especially with the additional bathroom, the dwelling may contain up to 6 bedrooms. The proposal for 400m<sup>2</sup> is therefore not sufficient and the plans do not account for the increased area that would be required or whether the 40 metre setback from the drainage lane can be maintained.
- 69 In addition to the Code, because the review site lies in a declared open water supply catchment the *Minister’s Guidelines for Development in Open*

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<sup>22</sup> See the glossary in the Code, p65.

<sup>23</sup> See the definition under the Code and the definition under the recently gazetted *Environment Protection Regulations 2021*.

*Water Supply Catchments*<sup>24</sup> (**Minister's Guidelines**) applies. No reference is made to the Minister's Guideline in the LCA, and a key aspect of the Minister's Guideline about dwelling density and incremental risk to water quality is not addressed.

- 70 The LCA does refer to the fact that the subject land is near the headwaters of the catchment. It is the assessor's advice that because the review site is distant from Cairn Curran reservoir its location presents a low risk for water quality impact. This does not account for instream impacts within the catchment and upstream of Cairn Curran reservoir, or the impacts another dwelling development in this catchment may have because of an incremental increase in dwelling densities and on-site wastewater treatment systems.
- 71 At best the LCA demonstrates a potential to treat and contain wastewater on-site. However, I have identified a number of shortcomings in the LCA and inconsistencies between the LCA and the proposal. I am therefore not satisfied that the proposal has demonstrated that wastewater can be treated and contained on site with an acceptably low risk to water quality in the catchment. To grant a permit in these circumstances would therefore be contract to the environmental objectives of the ESO1.

#### **FARMING ZONE**

- 72 The purposes of the FZ are directed to supporting agricultural and associated rural uses land. The purposes include:
- ensuring that non-agricultural uses, *'including dwellings, do not adversely affect the use of land'*;
  - encouraging the *'retention of employment and population to support rural communities'*; and
  - using land based on *'comprehensive and sustainable land management practices and infrastructure provision'*.
- 73 The use of the land for a dwelling requires a permit and is subject to the mandatory requirements for provision of services under clause 35.07-2. A permit is also required for the development (works) because it is associated with a section 2 use and in this application, because the dwelling would be within 5 metres of a side boundary and within 100 metres the two dwellings to the north and south.
- 74 Having regard to the purposes of the FZ, it is argued for Ms James that:
- ... due to the size of the lot, the surrounding pattern of development and non-agricultural uses, its low land capability and sustainability and retention of existing vegetation, the Land has limited agricultural potential and is best suited for the proposed use and development

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<sup>24</sup> Department of Sustainability and Environment, November 2012.

- 75 It is also submitted that the planning officer assessing the application essentially agreed that the land had no agricultural potential and that a dwelling in the site's context would be an acceptable land use.
- 76 The Council accepts that the review site is too small for productive agricultural use. It observes however that a preferable outcome is that small lots such as this are better consolidated into larger holdings, where such a use may be possible. While this may be preferred by the Council no steps have been taken under the planning scheme, such as the application of a restructure overlay, to direct this outcome.
- 77 I must take the applied zone as it is. Broadly it may be said that the FZ does not support the use of the land for the purposes of a dwelling except under the conditional circumstances set out under the purposes of the zone, clause 35.07-2 and the decision guidelines. It is true that the use of this land would have little if any impact on traditional agricultural use if the land or adjoining land, given the bushland conditions of the surrounding land and review site. However there are other considerations under the FZ beyond impacts to agricultural use.
- 78 One purpose of the FZ relied on by Ms James is about supporting and retaining rural populations and communities. This however is not a purpose that overrides policy to direct population growth and development toward low-risk locations to better protect human life from bushfire risk. Such growth, whether an incremental increase by one dwelling, or more substantive development should be consistent with this and other state and local policy.
- 79 Local policy at clause 22.04 provides conditional support for proposals where the land is of low agricultural value on subdivisions created prior to the introduction of the scheme. However, that same policy also requires consideration of impacts to water quality, landscape values and character of the area, and the suitability of the site for on-site wastewater treatment and disposal. Policy at clause 22.01 requires consideration of matters about catchment and land protection, including biodiversity and habitat impacts, and soil and water quality impacts. These local policies reflect state wide policies under clauses 12.01, 14.01 and 14.02.
- 80 A proposal for a dwelling may support population retention, but the consequences of that development must also be weighed against these other policy objectives.
- 81 For reasons I have already set out, I am not persuaded the bushfire risks future occupants of the proposed dwelling would be exposed to is acceptable. In respect to landscape values and character of the area, I find the degree of vegetation removal would sit in contrast to the surrounding developments and landscape conditions. A direct result of this proposal would be a significant loss of vegetation that at other locations filters or screens views of dwellings. The loss of vegetation would be in stark

contrast to the surrounding bushland setting. These would be inconsistent with the outcomes sought under the policy and zone.

- 82 As I have set out earlier, the impacts on the biodiversity values also weighs against this proposal.

### **FINDINGS AND CONCLUSIONS**

- 83 It follows from the above reasons that I find a proposal for a dwelling on the review site would be contrary to the purposes of the FZ, inconsistent with the purposes of the BMO and very strong policy guidance to prioritise the protection of human life from bushfires and reduce the bushfire risks to acceptable levels.
- 84 These findings arise from the fact that the proposal seeks to accommodate a dwelling on what is very small bushland lot in a high risk bushfire landscape.
- 85 Further, serious questions remain about whether the environmental objectives of the ESO1 can be met by the proposal.
- 86 It follows that I will affirm the decision of the Responsible Authority and direct that no permit be granted.

**Ian Potts**  
**Senior Member**