

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P11564/2021 &
P989/2021
PERMIT APPLICATION NO. 1/2021/07P

CATCHWORDS

Use and development of dwelling – amendment to approved building envelope – visual impact – development on ridgeline – bushfire risk – reliance on report by expert – confirmation survey

APPLICANT	Anita Fitzpatrick
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
REFERRAL AUTHORITY	Country Fire Authority
SUBJECT LAND	375 Buttermans Track, ST ANDREWS VIC 3761
HEARING TYPE	Hearing and Practice Day Hearing
DATE OF HEARING	1 February and 7 March 2022
DATE OF ORDER	20 May 2022
DATE OF CORRECTION	10 June 2022
CITATION	Fitzpatrick v Nillumbik SC (Corrected) [2022] VCAT 567

ORDER

Proceeding P11564/2021

- 1 Consent is granted for buildings and works outside an approved building envelope referred to in Instrument AL454388T. All buildings and works must be generally in accordance with endorsed plans in Permit No. 1/2021/07P, or otherwise to the satisfaction of the responsible authority.

Proceeding P989/2021

- 2 In application No. P989/2021, the decision of the responsible authority is set aside. In permit application No. 1/2021/07P, a permit is granted and directed to be issued for the land at 375 Buttermans Track, St Andrews. The permit allows:
 - The use and development of land for a dwelling and associated works.

Dalia Cook
Member



APPEARANCES

For applicant	<p>Ms Anita Fitzpatrick, Town Planning Consultant</p> <p>Ms Fitzpatrick called Mr Cameron Daly and Paul Lee of Premier3D to answer questions from the parties and the Tribunal at the main hearing.</p> <p>Mr Chris Lam answered questions of the Tribunal about the location of markers on the subject land at the accompanied inspection and subsequent Practice Day Hearing.</p>
For responsible authority	Mr Craig Smith, Town Planner
For referral authority	Mr Stephen Foster, CFA officer

INFORMATION

Description of proposal	<p>Use and development of land for a dwelling and alteration to an approved building envelope.</p> <p>The application proposes a large single storey dwelling with a wall height of 2.7 metres and an overall height of approximately 5.7 metres from natural ground level in addition to a 150 square metre shed and substantial above ground water tank. The effluent field would be located north of the proposed dwelling. A swimming pool is currently depicted in outline to be provided by owner after handover.</p> <p>The site plan makes reference to site cut and a batter with a 1:3 gradient around the perimeter of the build area.</p>
Nature of proceeding	<p>Section 79 of the <i>Planning and Environment Act 1987</i> – review of failure to grant a planning permit (P989/2021)</p> <p>Section 149(1)(b) of the <i>Planning and Environment Act 1987</i> – review of refusal to consent to an alternative building envelope under a section 173 agreement (P11564/2021)</p>
Planning scheme	Nillumbik Planning Scheme (planning scheme)



Zone and overlays	Rural Conservation Zone (Schedule 3) Environmental Significance Overlay (Schedule 1) – part of land not included in this application Bushfire Management Overlay (BMO)
Permit requirements	Clause 35.06-1 and 35.06-5 – use and development of land for a dwelling and associated buildings and works Clause 44.06-2 – buildings and works associated with a dwelling
Key scheme policies and provisions	Clauses 02.03-2 (Environmental and landscape values), 02.03-3 (Environmental risks and amenity), 02.03-6 (Housing), 12.05-2L (Rural landscapes in Nillumbik), 13.02 – 1S (Bushfire Planning), 15.01-2S (Building Design), 15.01-6S (Design for rural areas), 16.01-3S (Rural residential development) and Clause 65
Land description	The land is an undulating parcel of approximately 9.5 hectares within a 10 lot subdivision. It has a battle-axe shape, with access from a new driveway off Buttermans Track. The land is undulating and comprises mostly grassland. The land contains an easement for a transmission pipeline but this part of the site would not be affected by the proposal.
Tribunal inspection	I inspected the subject land, broader subdivision and setting with representatives of the parties on 11 February 2022.

REASONS¹

INTRODUCTION

- 1 The land is identified as Lot 6 within a 10 lot subdivision approved in 2012, as shown in the aerial photograph below.



- 2 The applicant sought permission to use and develop the land for a dwelling with associated infrastructure.
- 3 Nillumbik Shire Council (Council) did not take issue with the proposed use of the land for residential purposes.² However, it would have refused to grant a planning permit for the proposed development of the land for a dwelling since:
 1. The location of the dwelling and shed fails to appropriately respond to Clause 22.04 (Siting and Design Policy for Buildings and Works in Non-Urban Areas)³ and Clause 35.06-6 (decision guidelines of the Rural Conservation Zone) in that the proposed dwelling and shed:
 - Are sited on a ridge-line within the site.

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 I was advised that the land originally benefitted from use permission for a dwelling but that this permission has since lapsed.

³ Now superseded by replacement provisions in the Municipal Planning Strategy as outlined below.

- Are poorly sited and designed with respect to distant vistas, roads, and other community locations.
 - Are poorly sited with respect to location of adjoining and surrounding rural residential allotments.
 - Are not screened from other properties, roads and other locations so as to not be prominent in the landscape.
 - Are not located wholly below the alignment of ridgelines.
2. The location of the dwelling and shed fails to have regard to the extensive site history, including the previous VCAT decision relating to the site/area and protection of ridge lines from further development.
 3. Inadequate justification has been provided to depart from policy in relation to the siting of the dwelling and associated structures on a ridge-line.
 4. No evidence has been submitted demonstrating whether the dwelling and shed could not be located at an alternate location on the site that avoids building on a ridgeline.
 5. The proposal is not reflective of an orderly planning outcome.
- 4 A building envelope was imposed on the land under an agreement pursuant section 173 of the *Planning and Environment Act 1987*. The agreement is registered on title to the land and requires all buildings and works (other than a driveway) to be contained within an approved building envelope, except with Council's written consent.
- 5 The owners of the land regarded the approved building envelope as unsuitable, principally given its relationship with two gully lines which are tributaries of the nearby Yow Yow Creek to the north. They sought written consent to amend the location of the building envelope in conjunction with the permit application.
- 6 Council refused to grant consent to vary the approved building envelope under the section 173 agreement. It was not persuaded that the applicants had demonstrated that the original building envelope was unsuitable having regard to the environmental features on the land. Fundamentally, it did not support the relocated building envelope on what it regarded as the part of the site with the highest topography, given the potential for visual impact.
- 7 Ms McLaren submitted a statement of grounds in the proceeding but is not a party. She adopted a similar position to Council, considering that the dwelling would not blend with its hilltop setting and should be wholly located below the ridgeline. She was also concerned that the dwelling proposal would increase bushfire risk.

KEY ISSUES

- 8 The key issues in these proceedings are interrelated, more specifically, is it appropriate to amend the approved building envelope to shift it further



north west? Would the proposed use and development of a dwelling on this part of the site be acceptable?

- 9 A key consideration bearing on the appropriateness of the dwelling design and siting is policy in the Nillumbik Planning Scheme (planning scheme) seeking to avoid development on ridgelines to protect landscape values.

POINTS OF CLARIFICATION IN THE PROCEEDING

- 10 On a number of occasions, Council considered the information provided by the applicant was either unverified, incomplete or should not be relied on by the Tribunal. Mr Smith on behalf of Council expressed the view that it is not the Tribunal's role to assist the applicant to remedy deficiencies in its case, either in respect of evidence or application material.
- 11 I accept that the applicant bears the onus of proving its case and that it is not the role of the Tribunal to provide direct assistance to either party, especially where they are experienced in this forum (such as Council) or professionally represented (such as the permit applicant).
- 12 That said, the Tribunal has a statutory duty to resolve proceedings efficiently having regard to their substantive merits.
- 13 Two principle areas of uncertainty arose in this proceeding. The first was in respect of visual impact evidence prepared by Premier3D on behalf of the applicant.⁴ The second concerned the physical identification of the approved and proposed building envelopes on the land as viewed during the accompanied site inspection.
- 14 One option would have been to remit the application back to Council to obtain additional information and to make a decision. However, given the substantive issues in dispute, I have no doubt this would have resulted in a refusal position that would have been appealed to the Tribunal in any case.
- 15 Instead, I took a practical view, that these issues could and should be clarified to my satisfaction within the scope of the hearing. This was appropriate since they related to:
- the details and format of an expert report which was sought to be relied on, with evidence being a proper matter for the Tribunal to consider in a review proceeding;
 - the reconciliation of various plans and surveys pertaining to approvals for the land; and
 - on-site verification of coordinates (not requested earlier by Council processing the permit application), which arose because of perceived potential discrepancies identified on the accompanied Tribunal site inspection.

⁴ Dated 6 December 2021.



- 16 At every stage, when I sought further clarification, this was subject to providing clear and sufficient opportunities to both Council and the Country Fire Authority (CFA) to respond as a matter of fairness.
- 17 I was requested by Council to disregard final submissions made by the applicant without express leave of the Tribunal (when submitting a verification survey) and have done so accordingly.

Visual impact evidence

- 18 The applicant sought to rely on a visual impact report prepared by a consulting firm, Premier3D, to provide a representation of the proposed building in its particular setting through photo montages. However, when I asked, Ms Fitzpatrick advised that she did not propose to call the authors of this report to appear to give expert evidence at the hearing.
- 19 Mr Smith raised a number of concerns with the substance of this report, including potential inaccuracies about relevant vantage points, site and design levels and renderings of the proposed development in situ. Council considered these deficiencies resulted in the photo montages understating the visual impact of the dwelling and associated works.
- 20 At my request, Mr Cameron and Mr Daly were made available to answer questions from the Tribunal and Council at the hearing about the report at short notice.⁵ They took a number of questions ‘on notice’ and responded to these in writing with leave of the Tribunal in the form of an addendum.
- 21 Council once again reiterated its concerns with the accuracy and reliability of this evidence.
- 22 I feel obliged to comment on the applicant’s approach and to explain my findings about the weight I propose to give to this evidence.
- 23 I have two main concerns – one relating to process, the other relating to substance. This has led to me not placing any substantive reliance on the contents of the report, including the photo montages, other than as identified below.
- 24 The Tribunal is not bound by the rules of evidence and can inform itself as it sees fit, subject to adhering to principles of natural justice.⁶ Notwithstanding, section 102 of the *Victorian Civil and Administrative Tribunal Act 1998* expressly entitles a party to call evidence and other parties to cross examine that expert to test their opinion. This extends to expert evidence. Schedule 3 of the Act provides specific powers in relation to expert witnesses and evidence.

⁵ The hearing was conducted by online platform and they attended from their office in Sydney.

⁶ Section 98 of the VCAT Act.



- 25 The Tribunal has well established procedures for expert evidence, guided by Practice Note PNVCAT2.⁷ Fundamentally, it confirms the expert's requirement to be independent, with a paramount duty to the Tribunal.
- 26 The practice note addresses a number of considerations pertaining to fairness, including the qualifications and experience of the witness, giving advance written notice of opinions to be expressed, the basis on which those opinions are formed and the like.
- 27 In terms of process, I appreciate that an applicant may choose how to run its case. Decisions that influence the running of a proceeding are often influenced by cost, time and witness availability. Case management options during COVID-19 related lockdowns added another level of complexity.
- 28 Visual impact evidence is a specific type of expert evidence prepared for Planning and Environment Division matters.
- 29 In this instance, the expertise is potentially central to the underlying issue of the visual impact of the dwelling and associated buildings and works in its physical setting. This is particularly pertinent given strong policy directives seeking to protect natural landscapes and to avoid development on prominent ridgelines as outlined below.
- 30 Premier3D purported to provide an accurate computer rendering of the proposed dwelling in its specific setting on the land, viewed from two different vantage points. This was prepared from on site photographs, survey data and CAD drawings of the development, amongst other inputs.
- 31 This type of evidence requires particular precision and has been the subject of detailed case law principles, including in *Austcorp Group Limited v Monash City Council*.⁸ These principles were designed to set standards for accuracy, transparency and reliability.
- 32 In my opinion, the applicant cannot fairly seek to place any reliance on this expert report without being prepared to call the expert/s to the hearing to explain their opinions and to have their evidence tested by the Tribunal and parties.
- 33 One method I used to clarify the content of the evidence was to require the authors to attend to answer questions at the hearing, but this was only a partial 'fix' to what should have been expert evidence filed, served and tested within the normal expectations of PNVCAT2.
- 34 Another substantial concern I have is that the authors did not directly control all inputs into the evidence. In response to questions, Mr Cameron and Mr Daly conceded that they had not visited the site itself because of Covid-19 travel restrictions and their location in Sydney. Therefore, they

⁷ Approved by the Rules Committee pursuant to section 158 of the VCAT Act.

⁸ [2006] VCAT 692.



were provided with site photographs from their client which formed the basis of their evidence, without an opportunity to verify this data first hand.

- 35 I accept that the authors of the report used survey points and other information to generate the 3D mesh model. Notwithstanding, I find their lack of direct site attendance especially problematic as the basis for visual impact evidence, which relies on a series of accurate inputs for technical production as well as ‘ground truthing’ what a real person can see in the actual setting.
- 36 This confirms my concerns with the accuracy of the evidence as identified by Council, including:
- an inaccurate location of the proposed dwelling on the aerial photograph in the report introduction;
 - although a statement of process was included in the report, together with the camera specifications and settings, the authors of the report were unable to directly verify the original photograph locations or view angles;
 - it appears that the camera positions and distances were not surveyed;
 - there was a lack of independent evaluation as to whether there may be additional or more appropriate vantage points warranting visualisation;
 - there was a lack of accounting for necessary site works, including any site cut or fill; and
 - the photograph locations and photomontage locations do not correlate – A becomes B and B becomes A (conceded as an error in the addendum).
- 37 While I can understand that the authors of the report and their photographers could not travel interstate because of COVID-19 restrictions, in my opinion, this should have led to them declining the brief altogether given the precise nature of such evidence.
- 38 The nature of this visual impact evidence is such that if there is a reasonable doubt about the program inputs, there is inherent uncertainty about the extent to which the photo montages can be taken as accurate in their setting.
- 39 For these reasons, I am not persuaded that I should place any reliance on the evidence of Premier3D beyond visualising the dwelling form as a three dimensional object.
- 40 Instead, I have relied on my own experience in visualising proposals in their physical setting, assisted by the substantial inputs provided to me including plans, survey and topographic data, drone footage and a detailed site inspection.



Verification survey

- 41 At the site inspection, Council's representative Mr Hasanoff expressed some doubt about whether the pegs that had been installed by the applicant's client, Mr Lam, correctly identified the approved and proposed building envelopes.
- 42 I conducted a further hearing to consider whether any other empirical confirmation was required.
- 43 Ultimately, I directed the applicant to obtain an additional site survey to confirm the location of the approved and proposed building envelopes. I provided brief written reasons for this request.
- 44 This survey data was provided on 4 April 2022 and the survey plan below (not reproduced to scale) depicts the approved building envelope and proposed building envelope in black (with the approved building envelope further south east). It compares this to the pegged locations on site marked in red. It is useful to understand the extent of the change in location proposed on site as part of the general review application.





- 45 In my opinion, the survey confirmed that the pegs were generally in the correct locations and of suitable dimensions, with some variation necessary (more specifically rotation and straightening) to reflect the building envelopes on both the approved subdivision plan and proposed plan.
- 46 I have used this information as part of my analysis of the proposed visual impact of the amended proposal, including submissions made by Council about the difference in topography between the two building envelopes.

CONSIDERATION OF KEY ISSUES

Policy provisions

- 47 There are strong layered policy objectives seeking to protect rural landscapes in Nillumbik, which represent a valued character element. This is outlined in Clause 02.03-2 amongst other provisions.



- 48 Identified threats include locating dwellings on hilltops and ridgelines since poorly designed and sited structures have the potential to compromise the integrity of valued landscapes.
- 49 Policy at Clause 12.05-2L seeks to encourage uses, buildings and works to maintain or enhance the landscape character of the locality, including any significant views to the site. Detailed strategies include:
- Locate buildings wholly below the alignment of ridgelines so that buildings:
 - Avoid forming a silhouette against the skyline.
 - Blend into the natural landscape with the elevated ridgeline as the backdrop.
 - Avoid the siting of buildings on hill-tops and ridge-lines, unless they can be sited and designed to not dominate or otherwise appear prominent in the landscape and be screened from the view of other properties and roads.
 - Discourage development in highly visible locations that rely on vegetation screening to minimise its visual prominence in the landscape, especially where the use of vegetation screening is not an existing characteristic of the area.
 - Avoid the use of reflective building materials, such as zincalume, where the building would be clearly visible from other properties or roads.
 - Encourage the use of landscaping with indigenous species to screen buildings.
 - Design the building profile and form to respond to the topography on which the building is sited to minimise the need for cut and fill.
 - Locate buildings, earthworks (including internal roads and dams) and utility services to ensure minimal impact on the topography of the area.
- 50 Building design is also addressed in Clauses 15.01-2S and 15.01-6S, which seek to minimise the impact of development on neighbouring properties, the public realm and natural environment. Development should be designed to protect and enhance rural character and valued views and vistas. The form, scale and appearance of development should enhance the function and amenity of the public realm.
- 51 A relevant strategy in Clause 15.01-6S is to:
- Site and design development to minimise visual impacts on surrounding natural scenery and landscape features including ridgelines, hill tops, waterways, lakes and wetlands.



Earlier Tribunal decision

52 The Tribunal decision of *Masten Bennett & Associates v Nillumbik SC*⁹ provides context for considering these applications. It concerned a proposed 16 lot subdivision of the parent parcel containing the subject land. The Tribunal observed that:

We are not persuaded the layout of this proposed subdivision has taken its lead from the environmental values of the site. Rather, the proposed layout appears to have taken its lead from the minimum lot size contained in RCZ3.

53 The Tribunal refused to grant a permit since it considered that a restriction in the number and presence of buildings was required given the ecological significance of the land and the need to protect its waterways. It was also not persuaded that bushfire risk would be managed appropriately.

54 It held that it was not appropriate to site building envelopes on ridgelines in ‘prominent’ locations. I note that many of these appear to be in the area of current lot 10, on the higher parts of the land to the north east.¹⁰

55 The Tribunal considered that the valued rural landscape should take precedence over ‘opportunistic’ house sites. Relevantly, it explained that a ‘rethink’ of the subdivision should involve:

- The configuration of lots with building envelope areas which avoid buildings being located on or near ridge tops and on slopes that are most susceptible to wildfire risk.

56 The current 10 lot subdivision and associated building envelopes were approved by Council via a subsequent permit application.

Is it appropriate for the land to be used for a dwelling?

57 Council explained that each lot in the approved subdivision was permitted to be used as a dwelling, but this has since lapsed for the subject land.

58 Relevant purposes of the Rural Conservation Zone include, in addition to implementing policy:

- To protect and enhance the natural environment and natural processes for their historic, archaeological and scientific interest, landscape, faunal habitat and cultural values.
- To protect and enhance natural resources and the biodiversity of the area.
- To encourage development and use of land which is consistent with sustainable land management and land capability practices, and which takes into account the conservation values and environmental sensitivity of the locality.

⁹ [2010] VCAT 900.

¹⁰ Noting that current Lot 10 is an amalgam of 5 lots in the earlier application.



- To conserve and enhance the cultural significance and character of open rural and scenic non-urban landscapes.
- 59 Schedule 3 provides a specific conservation value:
- To ensure land use changes do not have an adverse impact on the landscape or strategic environmental values of the land.
- 60 Decision guidelines are provided in Clause 35.06-6 and include policy; land capability and land use compatibility; impacts on environmental and landscape qualities of the site and surrounds; design and siting issues to minimise visual impact.
- 61 The land forms part of a subdivision which contemplated residential land use. Residential approvals are now being granted and implemented for other lots within the subdivision. The land also forms part of an established rural residential enclave with lots of various sizes.
- 62 I find that the size, location and characteristics of this land make it suitable for residential development.¹¹
- 63 Significantly, the land can be used sustainably in line with the Land Management Plan and the land is likely to be more actively managed when occupied. Environmental values will be protected through requirements for suitable drainage and effluent treatment systems.
- 64 The appropriateness of the residential land use will also depend on the suitability of siting and design. The dwelling needs to be appropriately designed and sited to protect valued landscape values of this setting. I address this issue next.

Is the proposed development appropriate?

- 65 The amended application plans overlaid the proposed development against fine grain survey contours. The dwelling would be located at 247.60-247.73 AHD, with the shed approximately 1 metre lower in elevation.
- 66 There is no dispute that the proposal can meet relevant servicing and environmental infrastructure requirements, as evidenced by reports submitted to Council with the application. No native vegetation removal is proposed. The section 173 agreement requires compliance with an approved Land Management Plan.
- 67 To this extent, the proposal would be consistent with the purpose of the Rural Conservation Zone and relevant policy.
- 68 The dwelling is also not anticipated to have any adverse effect on surrounding land uses.

¹¹ I was provided with various assessments forming part of the application material, including a Land Capability Assessment.



- 69 The key issue in dispute is the acceptability of the design and siting of the dwelling on this part of the site in light of policies seeking to protect landscape and scenic values.
- 70 Council was concerned that the proposed dwelling would be located on a ‘prominent ridgeline’ rather than within a ‘topographic saddle’. It considered that, from some vantage points, the dwelling would be silhouetted against background vegetation at a higher elevation – being part of the scenic backdrop sought to be protected by planning policy.
- 71 Council expressed the view that the application would increase the prominence of the proposed dwelling when viewed from neighbouring lots. It emphasised there is limited capacity to provide screening vegetation to mitigate its prominence in the landscape given the need to manage bushfire risk.
- 72 Mr Smith sought to emphasise that all dwellings (and approved building envelopes) in the immediate vicinity were located off ridgelines, with the exception of the lot containing the existing farmhouse (Lot 7).
- 73 I accept that there are strong policies seeking to protect rural landscapes such as this. One way of achieving this policy is to avoid development on ridgelines. This policy has particular resonance in the Shire of Nillumbik.
- 74 However, each application needs to be considered on its merits having regard to its particular setting. No two sites will be the same.
- 75 The test is whether the proposal would result in an *acceptable* outcome, not necessarily an ideal one.¹²
- 76 While I strongly endorse the protection of these landscapes, it is inherent in allowing a new residential subdivision such as this that new dwellings will be visible from some vantage points.
- 77 The starting point in this case is that a permit for subdivision has been issued that contemplates residential development of this site and surrounding land. A building envelope has been approved for a dwelling and associated works which, in my view, would not result in the dwelling being wholly below the alignment of the ridgeline on this property (as sought by policy). This is an existing entitlement that could be acted on by the owner of the land.
- 78 Therefore, my consideration of the issues in this case are more limited than in cases where there may be a fundamental issue about the appropriateness of residential use and development in principle, or where siting of a dwelling is being considered without any existing parameters.
- 79 In this instance, the effects of the proposed *change* in location is relevant, integrated with the particular siting and design. The particular setting is highly relevant.

¹² *Rozen v Macedon Ranges Shire Council & Anor* [2010] VSC 583.



- 80 The survey indicates a distance of approximately 18 metres between the northern edge of the approved building envelope and the south east corner of the proposed dwelling.
- 81 The applicant sought to emphasise that Council has approved other nearby dwellings at higher elevations, including double storey dwellings for Lot 1, closer to the roadway.
- 82 I accept Council's submission that a ridgeline can be broadly characterised for the purpose of policy, essentially including any linear land form that is elevated above surrounding local topography.
- 83 In reality, I find this site and surrounds is comprised of numerous ridgelines, with a noticeable foreground, midground and background landscape. It is true that the new dwelling would be located on a relative high point in the midground landscape.
- 84 However, I do not regard this particular ridgeline as needing to remain free from residential development in order to protect landscape values since:
- a. the views along Buttermans Track and from many private properties within this setting are expansive of which the dwelling will form a confined part, rather than confined to a narrow aperture;
 - b. Council's proposition that the dwelling would 'clearly project above the contours of the landscape' is a relative concept. I find that the ridgeline in question is more in the nature of a local hilltop - of which there are many. It is not what I would regard as a prominent ridgeline which is a defining factor of this landscape;
 - c. it is evident from local topography that the dwelling will not be silhouetted against the sky behind;
 - d. a relevant policy directs buildings to 'blend into the natural landscape with the elevated ridgeline as the backdrop'. From most vantage points, the dwelling will be viewed with a backdrop of an existing dwelling at a higher elevation, within a tiered landscape of rising hills and vegetation beyond. For example, the land to the north/north east rises to 260 AHD and 300 AHD. I do not consider it would meaningfully detract from a viewer's appreciation of this setting or would be overly prominent;
 - e. the dwelling will be viewed from a localised roadway and nearby properties and not from a highway or a higher order tourist or scenic road. Buttermans Track is generally at a level such that upward viewlines to the dwelling will be confined and views to the dwelling are approximately 520 metres distant;
 - f. views to the south (over Buttermans Track) are to steeply rising topography including established dwellings;
 - g. Council's suggestion that the approved building envelope would be within a topographic saddle is overstated given the site topography.



– in reality, the existing location would only be marginally off the high point on the site in a slight depression in the ridgeline. The proposed dwelling location is also substantially set back from all building envelope boundaries. In the context of this overall landscape setting, I do not regard this differential as material in terms of the potential visual impact of a structure of the same proposed design;

- h. the dwelling will be well removed from other dwellings on adjacent properties and will not be overbearing within viewlines from these other dwellings. For example, the closest dwelling under construction (Lot 3) is orientated to the north west and effectively turns its back on this site. From many other vantage points, the dwelling is likely to be concealed at least in part behind localised hills or will be obscured by future dwellings (such as on Lot 5 in closer viewlines¹³);
- i. the structure would be a single storey building of traditional residential form. Its external colours could be varied to a more muted tone to better blend within the landscape by way of permit conditions. If this was done, I consider that policy aspirations in Clause 12.05-2L would be met suitably; and
- j. although associated structures are proposed, including a large above ground water tank and shed together with driveway and hard stand areas, they will be well represented in this emerging rural residential context and are of relatively limited scale compared with the vast openness of the landscape within which they will be viewed.

85 For these reasons, I do not consider that the proposed dwelling would be overly dominant or prominent in its landscape setting, especially by comparison with the expectation of a similar dwelling to be constructed within the approved building envelope.

86 I contrast the particular setting of this land from that in *Copper Lake Pty Ltd v Nillumbik SC*.¹⁴ In that case, the Tribunal refused to grant permission for a shed on a ridgeline since it would be inconsistent with the character of the area and would be overly prominent in its landscape setting.

87 No two settings or proposals are the same. One notable difference between the current application and the Tribunal decision in *Copper Lake* is that in the latter, the structure was regarded as an ‘uncharacteristic intrusion’ in a rural area (a 648 square metre shed, compared with a total dwelling and alfresco area footprint of some 338 square metres in the current proposal).

¹³ With its building envelope at approximately 245-250 AHD.

¹⁴ [2019] VCAT 2056.



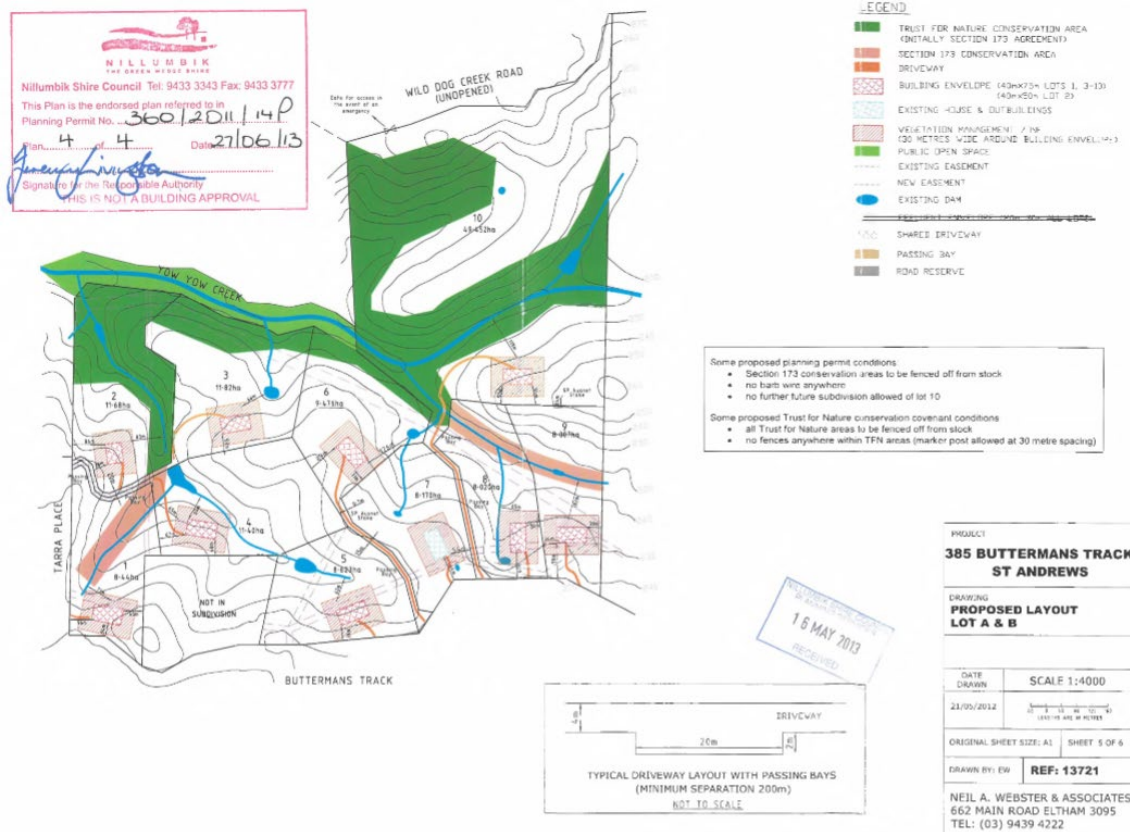
How should the swimming pool be addressed?

- 88 Mr Smith submitted that the swimming pool did not form part of the permit application and should be deleted from the plans for endorsement if a permit was to issue. He considered this structure was exempt from the need for planning permission under the provisions of the planning scheme.
- 89 It appears that Council had a fundamental concern with this structure, to the extent it appeared to require significant earthworks that may conflict with remaining aspects of the plans to be endorsed. It also appears that associated works are proposed outside the buffer area, which would not be permitted under the requirements of the building envelope.
- 90 Even though it appears that these works formed part of the advertised plans, I agree that this structure does not require planning permission. It may be confusing to include associated works in the plans to be endorsed under the current planning permit.
- 91 Therefore, it is preferable for relevant permission to be provided separately, such as under relevant building regulations. I note that in any event, the proposed works (batter) will need to be pared back to be entirely located within the approved building envelope even if the only permission required is under the building regulations.

Is it appropriate to approve an alternative building envelope?

- 92 I have already indicated the reasons why I support the current proposal for development of a dwelling. It follows that I support the alternative building envelope but I explain my reasons for this in greater detail.
- 93 The approved building envelope derives from plans endorsed under the subdivision permit. The building envelope for Lot 6 is seen below in the context of key site contours and remaining lots within the subdivision (not reproduced to scale).





94 Council emphasised that the approved building envelope is located within a ‘topographic saddle’ on the land. By comparison, it considered that the proposed building envelope would be located on the highest ridgeline which would have unacceptable visual impacts.

95 The building envelope was imposed through a condition of the original permit for the subdivision of the broader parcel of land. The condition required section 173 agreements to be entered into to:

- ensure all buildings and works (other than a driveway) are contained within an approved building envelope;
- prevent further subdivision of the land;
- require the implementation of a Land Management Plan and an easement of carriageway (for the benefit of lots 2, 3 and 4); and
- provide for a Conservation Covenant to be established on title within 12 months of the transfer of ownership.

96 Given the history of earlier approvals and the particular setting, I accept it is likely that the main underlying purpose of approved building envelopes was threefold:

- to ensure resultant dwellings could meet the requirements of the Bushfire Management Overlay including defensible space, water supply and access and construction standards;



- to demonstrate that development could be undertaken in a way that would minimise impacts on native vegetation and habitat; and
 - to manage or minimise the effect of development on ridgelines.
- 97 The approved building envelope is rectangular and measures 40 metres x 75 metres, with a combined area of 3,000 square metres.
- 98 The agreement provides an express opportunity for Council as responsible authority to consent to an alternative building envelope, with the only associated requirement that such permission be in writing.
- 99 This is different from the scenario where there may be preconditions to varying the building envelope specified in the section 173 agreement or through a condition of the planning scheme.
- 100 Mr Smith submitted that further evidence should have been provided by the applicant as to the lack of suitability of the approved building envelope to counter the strong policy directive against locating buildings on ridgelines.
- 101 The applicant submitted that surface water features and shallow soils represent a ‘significant constraint’ to residential development within the approved building envelope, with the building envelope effectively at the head of a watercourse.
- 102 It relied on a letter of support from a zoologist and botanist at Abzeco, to the effect that the alternative location proposed would result in a similar response to biodiversity and CFA requirements while providing for improved siting and design opportunities.¹⁵
- 103 However, I accept that this applicant has not provided verifiable evidence from an engineer, environmental scientist or similar that there are environmental risks of the approved location that cannot be reasonably overcome by environmental engineering.
- 104 While Ms Fitzpatrick submitted that elements of the amended proposal would improve environmental performance, such as by improved solar orientation, avoiding any impacts on the local watercourse and minimising earthworks and erosion, I am not persuaded this has been made out in the proceeding. Consequently, I do not attribute weight to these claimed advantages.
- 105 That said, there is no requirement in the section 173 agreement or the planning scheme for the applicant to demonstrate empirically that the currently approved building envelope is unachievable.
- 106 It seems highly likely that building on the approved building envelope would be more challenging than on the amended envelope having regard to

¹⁵ Dated 12 May 2021.

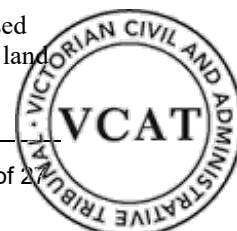


the natural assets of the land – including the more variable topography and specifically, two gully lines which converge in this location.¹⁶

- 107 As explained, I find that the test is one of acceptability of the alternative siting. Relevant considerations overlap with those guiding the acceptability of the use and development application, including an application of policy to the characteristics of this physical setting.
- 108 In my opinion, this process is not dissimilar to the Tribunal’s assessment of a request to amend a permit, where it compares the proposed changes against the of current approval, rather than approaching all issues from first principles.
- 109 The starting point is to compare the siting of the proposed building envelope against the siting of the approved building envelope, noting that the approved building envelope is 3,000sqm and the proposed building envelope is 4,4425sqm (equating to 4.4% of the lot). Council did not expressly take issue with the proposed increase in size, instead focusing on concerns about its location.
- 110 Ms Fitzpatrick emphasised that there is a height differential of 1.2 metres between the northern perimeter of the approved building envelope and the revised dwelling location. This was confirmed by survey at 1 metre (ie higher) when comparing the highest level of the approved building envelope (246.8 AHD at the north western boundary) compared with the finished floor level of the proposed dwelling at 247.8 AHD.
- 111 By contrast, Mr Smith emphasised that the height differential was in the order of 3.8 metres. This was calculated on the basis that the most representative site level for the approved building envelope was arguably 244 AHD (ie between 240 and 246.6 AHD), compared with the proposed building envelope at the ‘absolute peak’ of the land, between the contours of 247.6 and 247.8 AHD. He sought to contrast existing approvals for nearby dwellings within approved building envelopes which were said to be generally below ridgelines.
- 112 Without approved development plans for the original location, there is some variability with respect to original expectations.
- 113 In my opinion, given the size of the proposed dwelling and associated works, compared with the size and orientation of the existing building envelope, it is likely that a dwelling on the approved envelope would have spanned contours in the mid 244’s up to low-mid 246’s.¹⁷ It is not necessarily reasonable to assume it would have been confined to the midpoint contour of 244 as suggested by Council.

¹⁶ Although I accept that a Land Capability Assessment was prepared in November 2020 indicating that the original building envelope was capable of managing effluent.

¹⁷ Although the original building envelope included land at a lower elevation, it would have raised engineering and construction challenges if the building was sited on the more steeply sloping land towards the creekline (with a gradient of approximately 1:4 to 1:5).



- 114 Therefore, in practice, I consider the likely height differential between a dwelling in the two locations to be more in the order of 1-2 metres.
- 115 Fundamentally, I agree with the applicant that, on the whole, the change proposed represents a repositioning of the building envelope along the same ridgeline.
- 116 I further accept that the difference between the approved and proposed building envelope is not material when considering relevant setbacks from local roads and neighbouring properties. A dwelling on either location will still be visible from relevant vantage points but will not dominate the landscape for the reasons I outlined above.
- 117 While I respect the intent of the Tribunal in *Masten's case*, I do not consider this confined change in dwelling location - representing a differential in elevation of some 1 metre to 3.8 metres - would have an unreasonable impact on the character of this rural residential subdivision.
- 118 I also find it unlikely that the alternative siting will generate different or increased impacts on amenity.
- 119 It is also relevant that the CFA does not oppose the alternative building envelope and considers that bushfire risk associated with a dwelling could be suitably managed in either location, including defensible space.
- 120 In line with my findings above, I find that either building envelope location is acceptable on its merits. This is sufficient to justify approval of the current request.

What is an appropriate mechanism for such approval?

- 121 As I explained at the hearing, the agreement expressly provides an option for an alternative approved building envelope. The only requirement is that relevant approval be in writing.
- 122 In my view, this does not necessarily need to be appended to the section 173 agreement as registered on title.
- 123 The building envelope is defined as designated on the endorsed plans, which are expressly referable to plans endorsed under the subdivision and development permit (360/2011/14P).
- 124 At the hearing, I canvassed whether the site plan to be endorsed under the current planning permit for the use and development of this land would suffice as alternative approval. However, on reflection, I consider this is precluded by the definitions in the agreement.
- 125 While I had contemplated whether the subdivision permit was 'spent' upon creation of titles, I have since realised that the permit is ongoing to the effect that it allowed the use of various lots as a dwelling and amended plans can validly be endorsed under it.
- 126 Consequently, I have directed the approval of an amended plan under the subdivision permit as an outcome of this proceeding.



Can bushfire risk be managed acceptably?

- 127 The land is included in the BMO. Objectives of the overlay include to ensure development prioritises the protection of human life. In line with policy (including Clause 13.02), development should only be permitted where the risk to life and property can be reduced to an acceptable level.
- 128 The land is located within an area of high bushfire risk.¹⁸ The surrounding landscape has a well-known and unfortunate history of bushfire, the most recent and serious being Black Saturday in 2009. This impacted the northern margins of the appeal site and reaffirms the need for caution when assessing this application.
- 129 The applicant and its consulting team worked with the CFA to prepare a Bushfire Management Statement and Land Management Plan.
- 130 The CFA submitted that the proposed development was capable of addressing the bushfire risk to a suitable level subject to specified bushfire protection measures (defendable space, access, water supply and bushfire construction standards). It confirmed:
- vegetation will be suitably managed for a distance of 28 metres around the proposed dwelling and 10 metres around the proposed shed, providing suitable defendable space on site.¹⁹ The area within 150 metres of the dwelling will be maintained as grassland with tree canopies limited to 10%;
 - the dwelling would be constructed to BAL-19 to respond to the landscape risk. This would provide satisfactory resistance to ember attack and the effects of radiant heat;
 - the land would have a static water supply with suitable access for fire fighting purposes; and
 - the dwelling would have access to a public road via an accessway approximately 500m long, providing suitable opportunities for emergency vehicles.
- 131 The CFA did not object to siting the dwelling in an alternative location to the approved building envelope since it retained a generally central location and would satisfy Approved Measure 2.2 in Clause 53.02-4.1 of the planning scheme. It considered there was only a 'fractional' difference in location which did not have any real bearing on bushfire safety given the measures outlined above.
- 132 I accept the CFA's position that the dwelling proposal, including the amended building envelope, has been designed and sited with suitable mitigation measures to reduce the effects of bushfire.

¹⁸ More specifically identified best as Landscape Type Three of the DELWP Technical Guide *Planning Permit Applications Bushfire Management Overlay* (September 2017).

¹⁹ Meeting the requirements of Table 6 to Clause 53.02-5.



133 Given the high level of landscape bushfire risk, no doubt future residents will still need to be extremely vigilant with their maintenance of the property. This will be secured through ongoing conditions of the planning and building permit. Like those within the remainder of the subdivision and the broader enclave, they will also need to make educated, early decisions on days of high fire risk.

CONCLUSION

134 For the reasons outlined above, the proposal to use and develop the subject land for a dwelling is acceptable in its physical and policy context.

135 Likewise, it is appropriate to approve an alternative building envelope for the land pursuant to the registered section 173 agreement.

Dalia Cook
Member



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO:	1/2021/07P
LAND:	375 Buttermans Track, ST ANDREWS VIC 3761

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Use and development of a dwelling and associated works.

CONDITIONS:

- 1 Before the development and/or use commences, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of this permit. The plans must be generally in accordance with the plans substituted at VCAT but modified to show:
 - (a) Deletion of the proposed building envelope.
 - (b) Deletion of the swimming pool and associated works.
 - (c) A schedule of external colours and materials to be of muted tones to the satisfaction of the responsible authority, with all external walls of the dwelling to be modified to a darker muted tone.
 - (d) Plans and elevations of the shed to the satisfaction of the responsible authority.
- 2 The use and development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 3 The materials to be used in the construction of the buildings and works hereby permitted shall be of non-reflective type and with muted tones, to the satisfaction of the Responsible Authority.
- 4 All sewage and sullage waters must be treated in accordance with the requirements of the *Environment Protection Act 1970*. All wastewater must be disposed of within the curtilage of the land and sufficient area must be kept available for the purpose of wastewater disposal to the satisfaction of the Responsible Authority. No wastewater may drain directly or indirectly onto an adjoining property, street or any watercourse or drain, to the satisfaction of the Responsible Authority.
- 5 All wastewater must be disposed of to the satisfaction of the Responsible Authority subject to appropriate consents being granted.



- 6 Secondary treatment of wastewater followed by sub-surface irrigation must be installed within the designated effluent envelope to the satisfaction of the Responsible Authority.
- 7 The permit holder must ensure that a current maintenance agreement is in place for the septic tank system. Servicing must be completed by a competently trained person or servicing agent to the satisfaction of the Responsible Authority, with a copy of the report sent to the Council (Environmental Health) on request.
- 8 The vehicular driveway must be properly formed and constructed to such levels to ensure that it can be utilised at all times. The maximum allowable unsealed driveway grade is to be 1 in 5. The stormwater from the driveway must not cause any nuisance or loss of amenity in any adjacent or nearby land by reason of the discharge of stormwater. All works must be carried out to the satisfaction of the Responsible Authority.
- 9 The development, including any new paved areas, must be drained so as to prevent the uncontrolled discharge of stormwater from the subject site across any road or footpath or onto any adjoining land. Stormwater must not cause any nuisance or loss of amenity in any adjacent or nearby land by reason of the discharge of stormwater.

Stormwater from the roof of building must be directed to a holding tank for storage and detention purpose and absorbed on-site to the satisfaction of the Responsible Authority.

All works must be carried out to the satisfaction of the Responsible Authority.

Water in the holding tank storage area may be used for one or more of the following purposes: toilet flushing; property irrigation; vehicle washing and any other purpose approved by the Responsible Authority.

- 10 No polluted, effluent and/or sediment laden runoff from the development site is to be discharged directly or indirectly into Council's drains, Melbourne Water's drains or watercourses or adjoining private property during the construction of the development.

Sediment fencing and/or pollution/litter traps must be installed on site during construction and serviced accordingly, all to the satisfaction of the Responsible Authority.

Mandatory Bushfire Condition

- 11 The bushfire mitigation measures forming part of this permit or shown on the endorsed plans, including those relating to construction standards, defensible space, water supply and access, must be maintained to the satisfaction of the responsible authority and the relevant fire authority on a continuing basis. This condition continues to have force and effect after the development authorised by this permit has been completed.



CFA Condition

- 12 The Bushfire Management Plan prepared by Abzeco Consulting, version 1.5 and dated 9 November 2021 must be endorsed to form part of the permit and must not be altered unless otherwise agreed in writing by the CFA and Responsible Authority.

Expiry

- 13 This permit will expire if:
- (a) the development is not commenced within two years of the date of this permit;
 - (b) the development is not completed within four years of the date of this permit; or
 - (c) the use is not commenced within five years of the date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

- End of conditions -

