

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P787/2016

IN THE MATTER OF

Yarra Ranges Shire Council v Bibiano

BEFORE

Mark Dwyer, Deputy President

NATURE OF CASE	Whether deposit of clean fill on land in Green Wedge Zone a separate or ancillary use.
LOCATION OF PASSAGE OF INTEREST	Paragraphs [26]-[42]
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
APPLICATION – interesting or unusual use or development; application of policy, provision or principle; or circumstances	Test case run by Council to determine whether the disposal of clean fill of the scale and nature being undertaken on land used for a holiday house and hobby farm is a separate use of land, and one that requires a separate permit for 'use'.
CHANGE TO LEGISLATION OR VPPS - whether change to VPPs or statutory provisions is desirable	Suggestion that it would be desirable for the EPA, Minister for Planning, and metropolitan fringe councils need to formulate a more sophisticated policy response to dealing with the increased disposal of clean fill on rural land in the Green Wedge Zone.

SUMMARY

Approximately 1400 truckloads of clean fill have been deposited on Mr Bibiano's 6.874 ha parcel of land, which is used as a holiday house and hobby farm. The Council sought declarations that the scale and nature of the fill constituted as separate use of land, and one requiring a separate permit for 'use'. The Council indicated it was bringing the proceeding as a test case, given an increasing problem in metropolitan fringe areas in the disposal of clean fill on rural land as a result of increased EPA costs in the disposal of waste and soil to landfill, and attempts by some operators to avoid the levy.

The decision builds upon the decision in *Calleja Properties Pty Ltd v Hume CC (Red Dot)* [2016] VCAT 253. However, on the facts and circumstances of this case, it was found that the deposit of clean fill on the land was ancillary to the dominant use of the land as a holiday house and hobby farm, and did not require a separate 'use' permit.

The decision discusses the principles relevant to whether the use of land for the disposal or deposit of clean fill is ancillary, and indicates that a more sophisticated policy response is desirable from the relevant regulators to address any broader problems in the disposal of clean fill, rather than the use of individual VCAT declaration proceedings.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P787/2016

APPLICANT / RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
RESPONDENTS	Angelo Bibiano Brian Waring Metropolitan Plant Hire Pty Ltd
SUBJECT LAND	189 Belgrave Hallam Road, Belgrave South
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	10 October 2016
DATE OF ORDER	10 November 2016
CITATION	Yarra Ranges SC v Bibiano (Red Dot) [2016] VCAT 1881

ORDER

- 1 The Tribunal finds that:
 - The dominant purpose of the use of the land at 189 Belgrave Hallam Road, Belgrave South is as a dwelling and hobby farm.
 - The additional activity comprised in the disposal of clean fill on the land has since 2014, by reference to the nature and scale of the activity, become a separate use of the land.
 - At the present time, the use of the land for the deposit of clean fill is ancillary to the dominant purpose of use of the land as a dwelling and hobby farm.
 - By reference to clause 64.01 of the Yarra Ranges Planning Scheme, the ancillary use of the land for the deposit of clean fill does not require a separate planning permit for ‘use’.
- 2 Based on these findings, the Tribunal declines to make the declarations sought by the applicant/responsible authority pursuant to s 149A of the *Planning and Environment Act 1987* (Vic), and the application is refused.

- 3 I direct that a copy of this decision be forwarded to the Environment Protection Authority and to the Minister for Planning.
- 4 In relation to the application by the respondent Angelo Bibiano for costs against the applicant/responsible authority:
- **By not later than 4PM on 28 November 2016**, Mr Bibiano’s solicitors must file and serve a brief written submission in support of the application for costs, indicating the quantum of costs sought and the basis for the application.
 - **By not later than 4PM on 12 December 2016**, the applicant/responsible authority must file and serve any written submission in response to the application for costs.
 - Unless either party requests a cost hearing, the Tribunal will determine the application for costs ‘on the papers’ following the receipt of written submissions.

Mark Dwyer
Deputy President

APPEARANCES

For Yarra Ranges SC

Mat Sherwell, solicitor. He called as witnesses:

- Jemma Crawford, EPA officer
- Michael Herbig, Council officer

For Angelo Bibiano

Amanda Johns, solicitor. She called as a witness:

- Dianna Farrell, daughter of Mr Bibiano

For Brian Waring, and
Metropolitan Plant Hire Pty Ltd

Brian Waring, in person

INFORMATION

Nature of proceeding	Application under s 149A of the <i>Planning and Environment Act 1987</i> (Vic) – declarations sought by the responsible authority about whether the land is being ‘used’ for the purpose of the disposal of clean fill, or another non-defined term.
Planning scheme	Yarra Ranges Planning Scheme
Zone and overlays	Green Wedge Zone (Schedule 2) Bushfire Management Overlay
Land description	The land is Lot 1 on LP 091561 (Certificate of Title Volume 08887 Folio 456). The land is an irregular L-shaped lot, 6.874 ha in size.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Yarra Ranges Shire Council (**‘Council’**) is the responsible authority for the administration and enforcement of the Yarra Ranges Planning Scheme.
- 2 Angelo Bibiano and his wife own a 6.874 ha parcel of land at 189 Belgrave Hallam Road, Belgrave South (**‘land’**). Mr Bibiano and his family have used the land for many years as a holiday home and small hobby farm.
- 3 Between 2014 and 2016, a large amount of soil has been deposited on the land. Most of the soil is clean fill deposited on the land by Brian Waring of Metropolitan Plant Hire Pty Ltd. Mr Waring concedes that approximately 1400 truckloads of soil have been deposited on the land.
- 4 The parties are all agreed that the deposit of the soil on the land comprises ‘development’ through the carrying out of ‘works’ on the land, as those terms are defined for planning purposes. There is an ongoing dispute about the lawfulness of these earthworks (to which I will refer below), but that dispute is not the substantive issue in *this* proceeding.
- 5 In addition to the ‘development’ on the land, the Council believes that the scale and nature of the landfilling on the land also constitutes a separate ‘use’ of the land, which requires separate planning permission. The Council thus seeks two declarations from VCAT, namely that:
 - the land is being used for the purpose of land filling (or other non-defined term); and
 - the use of the land for the purpose of land filling (or other non-defined term) requires planning permission.
- 6 This proceeding is therefore primarily concerned with the characterisation of the ‘use’ of the land for planning purposes, and whether the deposit of clean fill on the land is a separate additional use of the land, or ancillary to a dominant use of the land as a dwelling and hobby farm.

USE OF THE PROCEEDING AS A ‘TEST CASE’?

- 7 In *Yarra Ranges SC v Bibiano*,² a decision resulting from a practice day hearing in this proceeding, Deputy President Gibson noted the Council’s comments that the Council is facing an increasing problem in its municipality through the disposal of fill on farm land or other land in its Green Wedge Zone. There has apparently been a surge in this type of activity in the Yarra Ranges (and other fringe metropolitan areas) as a result of increased EPA costs in the disposal of waste and soil to landfill, and

¹ The submissions and evidence of the parties, any supporting material provided 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 [2016] VCAT 1567.

attempts by some operators to avoid the levy. In its written submissions before me, the Council indicated that this situation was extremely prevalent in municipalities such as Hume, Wyndham, Whittlesea, Greater Dandenong, and in Yarra Ranges.

- 8 In *Calleja Properties Pty Ltd v Hume CC (Red Dot) (Calleja)*,³ Senior Member Potts and Member Chuck determined that the deposit of clean fill on land could comprise a separate use of land, having regard to the scale and nature of the activity in the context of a specific parcel of land. In that case, VCAT concluded that the proposed activity required two permissions. One was for an undefined or innominate ‘use’ that the Tribunal characterised as the ‘*disposal of clean fill*’, and the other was for ‘development’ in the nature of ‘*earthworks*’.
- 9 None of the parties challenged the correctness of the decision in *Calleja* (and nor do I). It is nonetheless implicit in *Calleja* that whether the scale and nature of an activity comprises a separate ‘use’ of land will always be a question of fact and degree in the context of a specific parcel of land, involving the proper characterisation of the purpose of the use of that land.
- 10 In *Calleja*, there was an application to place approximately 320,000 m³ of clean fill over a former 10 ha quarry and landfill site that had no other clearly discernible use, compacted into a void space of 230,000 m³ above the existing landfill cap. Here, there is a much lesser amount of fill and a different combination of existing land use.
- 11 Following from this, as again noted by Deputy President Gibson in her practice day decision, the Council says that it wishes to use this proceeding as a test case to establish whether landfilling of the scale and nature being undertaken on Mr Bibiano’s land constitutes a separate use of land, and one that requires a separate ‘use’ permission in the Green Wedge Zone. The Council says that VCAT’s response to the declarations will assist in guiding its future response to this and other similar instances of land fill in the municipality.

BACKGROUND

- 12 The Bibiano land is within a Green Wedge Zone (Schedule 2) (**GWZ-2**) under the Yarra Ranges Planning Scheme.
- 13 In the GWZ-2:
 - the use of land for the disposal of clean fill, or for landfill generally, would (if it is a separate use) comprise an innominate use requiring a planning permit.
 - pursuant to clause 35.04-5, ‘earthworks’ require a planning permit to the extent specified in the schedule. Under the relevant GWZ-2 schedule, earthworks which change the rate of flow or the discharge point of water across the property boundary, or earthworks which

³ [2016] VCAT 253.

increase the discharge of saline groundwater, require a planning permit if the earthworks exceed one metre in height or depth.

- 14 Pursuant to cl 64.01 of the Yarra Ranges Planning Scheme, if land is used for more than one use, and one is not ancillary to the other, each use must comply with the planning scheme. Accordingly, if the use of the land for the disposal of clean fill is a separate and distinct use of the land that is not ancillary to the use of the land as a dwelling and hobby farm, the use of the land for the disposal of clean fill would require a planning permit.
- 15 The background facts are not materially in dispute, and the primary evidence was presented through a Council officer and an EPA officer (for the Council), and by Ms Farrell (one of Mr Bibiano's daughters). Mr Waring also provided additional information via submissions. Given the absence of a factual dispute, it is unnecessary to set out all of the evidence in detail.
- 16 Mr Bibiano and his wife purchased a larger area of land on the Belgrave Hallam Road in 1966, which they subdivided into two lots in 1971. They then sold one of the lots and kept the other 6.874 ha lot for themselves (i.e. the land in this proceeding).
- 17 A house has been erected on the land for more than 40 years, and it was remodelled after the 1982-83 bushfires. The land has been used as a holiday home and hobby farm by Mr Bibiano and his family over the years, although the 'hobby farm' activities have changed from time to time. For example, when Mr Bibiano's three daughters were younger, the land was used primarily for the agistment and riding of their horses. At other times, Mr Bibiano has kept a small number of cattle. There are currently eight cows on the land. Mr Bibiano is now aged 91 and resides in a nursing home. Since December 2015, Mr Bibiano's granddaughter has resided in the house, and she and her partner help to look after the cows and the land.
- 18 As I have indicated, between 2014 and 2016, a large amount of soil has been deposited on the land, particularly in the mid-northern part of the land adjacent to the Belgrave-Hallam Road.
- 19 Most of the soil is clean fill deposited on the land by Mr Waring, under a verbal agreement with Mr Bibiano. According to Mr Waring and Ms Farrell, there has been a long-standing drainage issue on the land, whereby the run-off from the Belgrave Hallam Road or other land to the east of that road is apparently draining through onto the Bibiano land, causing erosion, and creating or exacerbating a drainage line or ravine through the land. This has created difficulties for Mr Bibiano in accessing the northern part of the land. The deposit of fill is said to be needed to facilitate the remediation and reinstatement of a vehicle/tractor track through this area. Mr Waring and Ms Farrell claim that no-one is taking responsibility for the drainage problem or the flow of water onto the Bibiano land.

- 20 Ms Farrell's evidence, reflected also in the Council's written submission, was that:

The main issue of concern for my father in relation to the damage caused to the land has been that a traffic will track to the eastern side of the dam has been destroyed. This is the only access for vehicles to the northern section of the property. Access is required for vehicles for fire prevention works, weed eradication works and the like.

My father sought to rectify the problem by constructing temporary rudimentary structures ... to allow vehicular access, without much success. Eventually, he decided that to reinstate the track, he would see if he could obtain clean fill to fill that section of the land.

- 21 The Bibiano family therefore approached Mr Waring to assist in resolving this drainage issue by bringing clean fill onto the land, rather than Mr Waring approaching them to dispose of fill on behalf of a third-party. Mr Waring says that no money changed hands as between he and Mr Bibiano. Mr Waring and his company Metropolitan Plant Hire Pty Ltd primarily earn their money through the hiring of trucks and equipment to the third-party seeking to dispose of the clean fill.
- 22 It is common ground between the parties that some of the fill has been tipped on the south and north side of the drainage line or ravine. The fill covers a significant area of the land (on one estimate, up to 12,000 m²). The depth of the fill on the land varies (up to 2.1 m in one instance, with fill over one metre in depth at five of 10 test sites).
- 23 As I have indicated, it is conceded that approximately 1400 truckloads of fill have been deposited on the land between 2014 and 2016. The evidence did not disclose the volume of each truck load. I have assumed for general purposes an average truckload of 20 m³ (with 1400 truckloads therefore comprising approximately 28,000 m³ of fill). It would not however change the outcome in this proceeding if the truckloads were smaller, or if the volumes were larger up to a full 'dump truck' size of 30 m³ (with 1400 truckloads therefore comprising up to 42,000 m³ of fill). At the hearing, Mr Waring produced 'Fill Material Acceptance Form' certificates for 33,500 m³ of fill, although he indicated in a written cover note that not all of the fill included on these certificates was taken to the Bibiano land. The overall amount deposited on the Bibiano land by Mr Waring is therefore less than 33,500 m³, and likely within the range of the assumption I have made.
- 24 There has been an ongoing dispute between the Council and the EPA on one side, and the Bibiano family and Mr Waring on the other side, on a number of issues. These include the extent of the soil deposited, the composition of the soil (with some comprising 'industrial waste' for EPA purposes, and some potentially having been dumped illegally by third parties other than Mr Waring). The EPA has issued a clean-up notice, and the parties are working towards a timetable to remove the industrial waste. I also understand that some soil has already been removed from the

northern section of land, and the intention of Mr Bibiano and Mr Waring is to remove excess fill from the remainder of the land and level it back to between 500 mm to 600 mm in depth.

- 25 I mention this ongoing dispute partly by way of background, as the ‘development’ aspects of the dispute (and their ultimate resolution) are not the central issue before me. As I have indicated, this proceeding is concerned with the ‘use’ of the land.

IS THE DEPOSIT OF CLEAN FILL A SEPARATE ‘USE’ OF THE LAND?

- 26 I have mentioned the previous VCAT decision in *Calleja*. With the volume of fill in that case comprising 320,000 m³ compacted in and above a former quarry with no other clearly discernible use, *Calleja* is perhaps towards one end of a continuum in the consideration of the scale and extent of the landfill activity, and whether it comprises a separate use of land. The deposit of clean fill on the Bibiano land is perhaps more towards the other end of that continuum.
- 27 As the Council properly concedes, there is a much lesser amount of fill being deposited on Mr Bibiano’s land than in *Calleja*. Moreover, unlike *Calleja*, Mr Bibiano’s land also has a use as a holiday home and hobby farm. The Council nonetheless still contends that the scale and nature of the fill here comprises a separate additional use of the land. The Council contends that Mr Waring is engaged in a commercial enterprise in the disposal of clean fill for a third party, by whom he is paid, leading to the deposit of 1400 truckloads of soil on Mr Bibiano’s relatively small 6.874 ha site. It considers that the volume of clean fill deposited is excessive. The Council therefore submits that the deposit of the clean fill is not an incidental activity on the land, nor is its purpose ancillary to the use of the land for accommodation or as a hobby farm.
- 28 The key question for me here concerns whether the deposit of the clean fill is ancillary to a dominant purpose of use of the land as a dwelling and hobby farm. In matters such as this, it is useful to resort to general planning principles.
- 29 Some useful principles about ancillary use were summarised by Osborn J. in *Hoe v Manningham CC*,⁴ reflecting and adopting principles established in other oft-quoted cases such as *Shire of Perth v O’Keefe*,⁵ *Cascone v City of Whittlesea*,⁶ *Lizzio v Ryde MC*,⁷ and *Northcote Food Wholesalers Pty Ltd v Northcote CC*.⁸ These principles include the following:
- Clause 64 of the planning scheme should be understood as reflecting or amplifying the concept that it is the real and substantial purpose of

⁴ [2011] VSC 543, [13]–[26].

⁵ (1964) 110 CLR 529.

⁶ (1993) 80 LGERA 367.

⁷ (1983) 155 CLR 211.

⁸ (1994) 84 LGERA 54.

a land use which determines its character for planning purposes. It amplifies that notion by making clear that even when two or more substantial and distinct activities can be identified upon land, an otherwise not permitted ancillary use may be legitimised by a lawful dominant purpose.

- It is thus necessary to properly characterise the use of the land, by ascertaining its real and substantial purpose. This will often involve questions of fact and degree.
- The ascertainment of the purpose of a use may yield the result that more than one separate and distinct purpose is revealed. In this event, the question arises whether one is dominant, and whether the lesser purpose or purposes are ancillary to the dominant purpose.
- The ordinary meaning of ‘ancillary’ is accessory or auxiliary. A use may be ancillary to another if it is a reasonable and necessary adjunct to another use, or if it is subsidiary to that other use.
- There is no single test to determine whether one use is ancillary to another dominant use. Different quantitative and qualitative criteria, themselves not readily susceptible of classification, may be appropriate in the circumstances of each case.

30 Applying these principles, the differences between the decision in *Calleja* and this case become more obvious. In *Calleja*, it appears that the Tribunal quite properly characterised the real and substantial purpose of the use of the land in that case as being for the disposal of landfill. There was no other dominant purpose to which this use was arguably ancillary, and the concept of ‘ancillary’ use was not (and did not need to be) canvassed in that decision.

31 In this case, it is clear from the evidence that the real and substantial purpose of the use of the Bibiano land over many years is as a dwelling and hobby farm. In reaching this initial finding, I agree with Mr Bibiano’s advocate that a rural-residential holiday house or hobby farm should be characterised differently from a pure farming or agricultural enterprise.⁹

32 The ascertainment of the real and substantial purpose of the Bibiano land however reveals that, in more recent times since 2014, a different and additional activity has been undertaken on the land through the deposit of a significant amount of landfill. The question therefore arises as to whether this activity comprises a distinct and separate purpose of use of the land. If this question is answered in the affirmative, a second consequential question arises as to whether this additional purpose through the deposit of clean fill is a lesser purpose that is ancillary to a dominant purpose of use of the land as a dwelling and hobby farm.

⁹ For example, generally following *Parkworth Pty Ltd v Casey CC* [2002] VCAT 1594.

- 33 I consider that the scale of the activity is such that the deposit of fill on the land is no longer merely an ‘incidental activity’ that forms ‘part of’ the ordinary use of the land as a dwelling and hobby farm. An examination of the real and substantial purpose of the use of the land reveals to me that the volume and scale of land fill, and its regular and continuous deposit over a two year period, is such that it has become a distinct use of the land. The second consequential question therefore comes into play. Is this separate or distinct use still ancillary to a dominant purpose of use of the land as a dwelling and hobby farm?
- 34 Here, the range of factors that are relevant to determining the outcome of this question are both quantitative and qualitative. Ultimately, the decision is one of fact and degree.
- 35 The 1400 truckloads of fill deposited on the Bibiano land is a significant quantity, and clearly achieves a benefit for the third party who pays Mr Waring for the disposal of the fill. However, these factors must be balanced alongside the real and substantial purpose that underscores the deposit of the clean fill on the Bibiano land over the past two years. Here, the evidence is that there is a real issue that has arisen for Mr Bibiano in the use and enjoyment of his land, being long-standing drainage issues and erosion. Mr Bibiano has sought to address this and to facilitate the reinstatement of a vehicle/tractor track for access to the northern part of the land for fire protection and weed eradication by means of the fill. Mr Bibiano is not conducting a separate enterprise through the receipt of fill on the land. Rather than there being a ‘disposal’ of clean fill primarily engineered through Mr Waring or a third party disposing of fill on the land, and using the land essentially as part of a landfill operation, the evidence is that the Bibiano family approached Mr Waring to ‘deposit’ clean fill on the land to address the drainage and erosion issues. I find that the deposit of the fill in these circumstances is a reasonable and necessary adjunct to Mr Bibiano’s use of his land as a dwelling and hobby farm.
- 36 To the extent the amount of soil brought onto the land to address Mr Bibiano’s problem might be said to be excessive, that is perhaps a question of fact and degree. A relatively large volume of soil is clearly required on this site to address the drainage and erosion issues, and the Council produced no quantitative evidence to assist in determining whether the amount deposited here is excessive. However, in any event, this is largely a ‘development’ issue rather than one relating to the characterisation of the ‘use’, particularly given the development controls in the GWZ-2 schedule that seek to limit the depth of fill to 1 metre without a permit. Here, the development issue is now being addressed by the parties through the removal of some of the fill and the levelling of the fill to between 500 mm and 600 mm in depth in relevant areas. The fact that an outcome is being negotiated through which the supposedly ‘excess’ fill is being removed in my opinion bolsters the view that the level of fill that will ultimately remain on the land will be proportionate to the drainage and

erosion issues to be addressed, and therefore consistent with the deposit of fill being used primarily for the purpose of addressing that problem.

- 37 Ultimately, having regard to all the material before me, I find that the earthworks are intended to improve and reinstate the land for hobby farming purposes, and are of a nature and scale that is essentially limited to that purpose.
- 38 In my opinion, the use of the land comprised in the deposit of fill should be similarly characterised. Having regard to its nature and scale, I find that it is for a purpose that is of a lesser nature to the primary purpose of use of the land as a dwelling and hobby farm. The deposit of the clean fill on the land, in its current volumes, is a reasonable and necessary adjunct to the use of the land as a dwelling and hobby farm in addressing the drainage and erosion problems on the land. I have ascertained from the evidence that the primary outcome sought to be achieved is the ‘deposit’ of the clean fill to address these problems rather than the ‘disposal’ of clean fill for the benefit of a third party.
- 39 It follows that I find that the use for the deposit of fill on the land in this case is ancillary to the dominant purpose of use of the land as a dwelling and hobby farm, and does not require a separate planning permit.

CONCLUSION

- 40 For the reasons given above, and by reference to the findings I have made, I decline to make the declarations sought by the Council. Here, properly characterised, the deposit of fill on the Bibiano land is ancillary to the dominant purpose of use of the land as a dwelling and hobby farm.
- 41 I am sympathetic to the Council’s difficulties in dealing with the increasing amount of landfill being disposed of on rural land as a means of avoiding the land fill levy, and under the guise of the fill being deposited in association with the use of the land for its rural purpose. It is clearly an issue of some significance for the metropolitan fringe councils, and potentially has broader environmental consequences.
- 42 In circumstances where this is occurring for the primary purpose of the disposal of the fill, and without anything more than a notional connection or association to the ordinary use of the land, it is quite possible that the use of the land for the disposal of fill will comprise a separate ‘use’ for planning purposes. However, that will not always be the situation, as this case demonstrates.
- 43 Given that the matter will invariably be one of fact and degree, it is not easy for a council to properly characterise an offending use that oversteps the mark, or to enforce inappropriate behaviour in the disposal of landfill. However, attempts to characterise *any* use of land for the deposit or disposal of clean fill as a separate and distinct use requiring separate planning permission is not the ‘silver bullet’ solution to this problem.

- 44 In my opinion, if there is a significant problem that stems from the way in which the land fill levy is currently being administered, then the EPA, the Minister for Planning, and affected metropolitan fringe councils need to work together towards a more sophisticated response, rather than relying on individual VCAT proceedings such as the present case.
- 45 Ultimately, however, the appropriate policy setting is a matter for government rather than this Tribunal. I will direct that a copy of this decision be forwarded to the EPA and the Minister for Planning, with particular reference to these comments.

COSTS

- 46 At the conclusion of the hearing, Mr Bibiano's advocate sought costs against the Council, noting that the quantum of costs would likely be quite modest given that legal representation for Mr Bibiano was only arranged very shortly before the hearing. It was contended that Mr Bibiano had been caught up in a proceeding for a broader purpose than the individual circumstances of his case, and that it was unreasonable that he should have to bear the costs of his part in what was essentially a test case — particularly if it was ultimately found (as here) that the deposit of fill on his land did not comprise a separate use requiring a separate planning permit. Moreover, Mr Bibiano's advocate noted that the Council had not ever reached its own view, prior to the issue of this proceeding, on how to classify the use of the Bibiano land, and had instead simply referred the matter directly to VCAT.
- 47 These contentions arguably support a *prima facie* case for an award of costs in favour of Mr Bibiano, although I have not heard the Council's response on these matters, nor reached any concluded view on the ultimate question of costs having regard to the principles and factors in s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. There may be other relevant matters to consider of which I am as yet unaware. If the parties cannot resolve this issue between themselves, my orders provide a short timetable to facilitate a consideration and determination of costs 'on the papers'.

Mark Dwyer
Deputy President

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1025/2015
PERMIT APPLICATION NO. P17801

IN THE MATTER OF

Calleja Properties Pty Ltd v Hume CC

BEFORE

Ian Potts, Senior Member & Alan Chuck,
Member.

NATURE OF CASE	Proposal to place clean fill across a former quarry/landfill site
LOCATION OF PASSAGE OF INTEREST	Paragraphs[52] to [69]
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
PLANNING SCHEME – interpretation or consideration of VPP provision	Characterisation of planning permissions being sought. Original application for development only. Permission characterised as a use and development.
APPLICATION – significant, interesting or unusual use or development; application of policy, provision or principle; or circumstances	Characterisation of the use and development in this proceeding is likely to be relevant and of interest to responsible authorities and parties dealing with similar proposals.

SUMMARY

This proceeding concerned an application to place approximately 320,000 cubic metres of clean fill over a former landfill site; compacted into a void space of 230,000 cubic metres. The original permit application was made on the basis that planning permission was required only for development of the land. At the commencement of the hearing, the Responsible Authority submitted that the planning permission should be amended to include an innominate use as well as development of the land. The Council suggested the use could be characterised as 'use of the land to place clean fill'.

At paragraphs [52] to [69] of the reasons, the Tribunal discusses and considers the nature of the proposed activities and works and defined land use and general terms within the Hume Planning Scheme. The Tribunal concludes that the proposal requires two permissions. One is for use that is innominate and best characterised as '*disposal of clean fill*' and the other is for development by way of '*earthworks*'. This conclusion may be of assistance to responsible authorities dealing with similar applications.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1025/2015
PERMIT APPLICATION NO.P17801

CATCHWORDS

Application made under section 77 of the *Planning and Environment Act 1987*. Review of a decision to refuse a planning permit. Hume Planning Scheme. Green Wedge Zone. Environmental Significance Overlay. Development of the land by filling. Former quarry and landfill site. Question of land use permission required. Amenity impacts from proposed fill operations considered. Landscape values and outcome considered.

APPLICANT	Calleja Properties Pty Ltd
RESPONSIBLE AUTHORITY	Hume City Council
RESPONDENTS	M M & M A Frewen, E Curry, Maria Jankovic, John William Milburn & David George Milburn, Claude & Sandra Ceccomancini, Novak & Milka Jankovic, Robert Wallace, Mervate Caruana and Dorothy & John Milburn
SUBJECT LAND	145 Annandale Road, Keilor
WHERE HELD	Melbourne
BEFORE	Ian Potts, Senior Member Alan Chuck, Member
HEARING TYPE	Hearing
DATE OF HEARING	16 to 20 November and 16 December 2015
DATE OF ORDER	23 February 2016
CITATION	Calleja Properties Pty Ltd v Hume CC (Includes Summary) (Red Dot) [2016] VCAT 253

ORDER

- 1 Pursuant to clause 64(2) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, permit application P17801 is amended by the substitution of plans A2-01, A2-02, A2-03, A2-04 dated 29/9/2015 prepared by DCA Design and C070, C071, C150 and C201 dated 11/7/2014 and C200 dated 15/1/2014 prepared by Meinhardt.

- 2 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act* 1998 the permit application is amended by changing the planning permissions being applied for to the following:
 - Use for the purpose of disposal of clean fill and development of earthworks.
- 3 The decision of the Responsible Authority is affirmed.
- 4 In permit application P17801 no permit is granted.

Ian Potts
Senior Member

Alan Chuck
Member

APPEARANCES

For Calleja Properties Pty Ltd	Mr Andrew Walker of counsel instructed by Jo Merrylees of Merrylees Legal. Mr Walker called the following witnesses: <ul style="list-style-type: none">• Mr Jonathon Howell Meurs, archaeologist from Andrew Long & Associates• Mr Stephen Schutt, landscape architect from Hansen Partnership• Mr Warren Pump, environmental engineer from ERM• Dr Iain Cowan, air quality scientist, from ERM• Mr Jim Antonopoulos, acoustic consultant from SLR Consulting• Mr John Glossop, town planner from Glossop Town Planning• Mr Jason Walsh, traffic engineer from Traffix Group.
For Hume City Council	Ms Mimi Marcus, solicitor of Maddocks Lawyers.
For M M & M A Frewen	Mr Michael Frewen in person.
E Curry	No appearance.
Maria Jankovic	Mrs Maria Jankovic in person.
John William Milburn & David George Milburn	Mr Michael Best, solicitor. He called David Milburn to give lay evidence.
Claude & Sandra Ceccomancini	Mr Michael Frewen appeared on behalf of Claude & Sandra Ceccomancini.
Novak & Milka Jankovic	Mr Novak Jankovic appeared on 18 November 2015 and spoke to a short written submission.
Robert Wallace	Mr Robert Wallace in person.
Mervate Caruana	No appearance.
Dorothy & John Milburn	No appearance.

INFORMATION

Description of Proposal	The placement of clean fill (soil and earth) is proposed in part to remediate an existing landfill cap and in part to re-profile the cap. Fill of up to 9m depth would be placed and compacted over the land, topsoiled and revegetated in accordance with a landscape plan.
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act</i> 1987 – to review the refusal to grant a permit.
Zone and Overlays applying under Hume Planning Scheme	Green Wedge Zone (Clause 35.04). Environmental Significance Overlay (Clause 42.01 and Schedule 1 – Rural Waterways and Environs). Land Subject to Inundation Overlay (Clause 44.04). Melbourne Airport Environs Overlay (Clause 45.08 and Schedules 1 and 2).
Other particular provisions applying under Hume Planning Scheme	Metropolitan Green Wedge Land (Clause 57).
Planning Permissions required under Hume Planning Scheme	Use of the land for an innominate use and earthworks comprising of the receipt and placement of more than 100m ³ of fill (Clauses 35.04-1 and 35.04-5 and Schedule 1). Completion of works (Clauses 42.01-2 and 44.04-1).
Relevant Scheme, policies and provisions of the Hume Planning Scheme	Plan Melbourne, Settlement, Environmental and landscape values, Environmental risks, Natural resource management, Built environment and heritage, economic development and transport (Clauses 9, 11, 12, 13, 14, 15, 17 and 18 of the State Planning Policy Framework). Municipal profile, Economy, Natural environment and built environment, Rural areas, Particular uses and development and Rural land character and urban design (Clauses 21.01, 21.03, 21.05, 21.06-6, 21.08 and 22.02 of the Local Planning Policy Framework).

Land Description

The subject land is irregular in shape with an area of some 10.4 hectares. It lies at the edge of the escarpment to the Maribyrnong River that lies to the south. Arundel Creek passes through the eastern portion of the site, forming a steep sided valley.

A number of dwellings lie to the immediate west of the site.

The site is the location of a former quarry, later used as a landfill.

Tribunal Inspection

An accompanied inspection of the site and surrounding properties was undertaken on the second day of the hearing. The Tribunal separately completed an inspection of the wider area and Annandale and Arundel Roads.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 The applicant, Calleja Properties Pty Ltd, owns a parcel of land that was a former quarry and then a landfill. The landfill operations ceased around 2005 or 2006. The landfill was capped and subsequently the subject of a Pollution Abatement Notice to undertake landfill gas and leachate remedial works and be the subject of an aftercare management plan. Calleja Properties now seeks planning permission to place additional fill, in the form of clean fill over a portion of the site. Calleja says this will assist in repairing the existing landfill cap, which has been subject to erosion and cracking, restore the site to a more natural landform and provide a flatter area at the landform's peak to make the land more suitable for an end use.
- 2 The Hume City Council refused to grant a planning permit for this proposal in March 2015. Calleja Properties now seeks a review of that decision.

WHAT IS PROPOSED?

- 3 Calleja Properties is proposing to import an estimated 320,000m³ of clean fill and place, compact and contour it into a void space of 230,000m³, over an existing landfill cap. We understand that the clean fill would comprise of materials such as waste clay, overburden or other similar soil and rock that will be sourced from development sites or from other off-site activities. To an extent the actual source of such material is not relevant. What is relevant of course is that the material is classified as 'clean fill' within the parameters and meaning of that classification under Environment Protection Authority guidelines.
- 4 The estimate of actual material to be imported is based on an average compaction of loose material. The final volume of what we will call the additional landform, being 230,000m³, has been the constant reference point throughout this proceeding. We have been told by Calleja and by Mr Pump that this volume represents the difference between the present landform surface and the final surface that Calleja seeks to achieve.
- 5 Calleja says that the motivation for and the benefits arising from the works will be:
 - The creation of a larger plateau-like topography at the top of the landform that will provide greater flexibility for a final end land use of the former quarry and landfill.
 - The repair of cracks and other deformations of the landfill cap, thus providing a more secure landfill cap that will lower the risk of landfill

¹ We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons.

gas migration to the surface and risks to groundwater by decreasing the potential for rainfall infiltration and consequential generation of landfill leachate.

- A final landform that will be shaped to reflect a more a natural surface profile and so improve the wider landscape.
- 6 Calleja seeks a period of five years to complete the earthworks. The actual period of the works will depend however on the availability of clean fill. Calleja believes that if sufficient supply is sourced, it may take a shorter period. The five years put forward is, in its opinion, a conservative estimate.
- 7 The works would comprise of the following activities:
- Preparation of existing surfaces prior to placement of the clean fill.
 - Transport of clean fill to the site by truck.
 - Place, grade and compact the clean fill.
 - Topsoiling and revegetation with grasses and selected native trees.
- 8 As we will detail and address later, based on technical advice Calleja proposes to manage these activities to control noise and dust emissions and stormwater runoff to avoid adverse amenity impacts on surrounding dwellings and adverse impacts to the wider environment. The final landform is to include stormwater swale drains connected to an existing detention basin to collect, divert and manage stormwater flows before they enter waterways and prevent undue impact to neighbouring properties.
- 9 A single vehicle access point is proposed. This would be an existing gated access from Annandale Road at the northern end of the property. Improvements to the internal road and access point are proposed. If thought necessary by the Tribunal, Calleja says that removal or trimming of some roadside vegetation can be undertaken to improve sightlines around this access.
- 10 An average of nine deliveries per weekday, generating 18 truck movements, is said to be expected with a maximum of 15 deliveries or 30 movements. The limited work period for Saturdays is expected to generate some 12 truck movements from six deliveries.
- 11 These movement figures are based on a five year completion period at average truckloads of 27m³. We observe and will address later the fact that if, as Calleja has put forward, access to greater volumes of clean fill is available and the works can be completed faster, the 'average' truck movement values could well be higher and approach those of the maximum put forward by Mr Walsh in his evidence.

THE PLANNING SCHEME CONTEXT

- 12 The land is subject to the Green Wedge Zone and a number of overlay controls as detailed in the information table at the head of these reasons. Because it is metropolitan Green Wedge, Clause 57 of the particular provisions of the Hume Planning Scheme applies.
- 13 A permit is required for earthworks under the zone because more than 100m³ of fill is proposed to be received and placed on the land.² The Council has expressed the opinion that a permit is also required for the use of the land. The Council says that this use would be an innominate use to fill the land (i.e. the receipt and placement of fill rather than a landfill) and therefore is a section 2 (permit required) use of the land. It does not consider that other nominated land uses under the zone correctly characterise the use.
- 14 Calleja does not consider that anything material turns on whether the application is for ‘use and development’ or only ‘development’. It submits that the nature of the proposed activities remains the same regardless. It has made application to amend the permit application for use and development of the land.
- 15 We will explain shortly why we have amended the application to include the use of the land.
- 16 Returning to the overview of planning controls and considerations, the purposes of the Green Wedge Zone are:
 - To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
 - To provide for the use of land for agriculture.
 - To recognise, protect and conserve green wedge land for its agricultural, environmental, historic, landscape, recreational and tourism opportunities, and mineral and stone resources.
 - To encourage use and development that is consistent with sustainable land management practices.
 - To encourage sustainable farming activities and provide opportunity for a variety of productive agricultural uses.
 - To protect, conserve and enhance the cultural heritage significance and the character of open rural and scenic non-urban landscapes.
 - To protect and enhance the biodiversity of the area.
- 17 Relevant matters under the Zone’s decision guidelines³ include:
 - The capability of the land to accommodate the proposed use or development.

² Clause 35.04-5 and Schedule 1.

³ Found at clause 35.04-6.

How the use or development relates to rural land use, rural diversification, natural resource management, natural or cultural heritage management, recreation or tourism.

Whether the site is suitable for the use or development and the compatibility of the proposal with adjoining land uses.

....

How the use or development relates to sustainable land management and the need to prepare an integrated land management plan.

- 18 These purposes and the above decision guidelines are relevant to our decision, as we will explain.
- 19 The works require a permit under the Environmental Significance Overlay that applies to the land. A purpose of the ESO is to ‘ensure that development is compatible with identified environmental values’. Schedule 1 of the ESO that applies in this case contains the following statement of environmental significance:
- The rural areas of the municipality contain a number of waterways which are significant visual and geological significant features of the rural landscape and which serve important environmental, drainage and recreation functions. These waterways provide a habitat for a range of flora and fauna species and make a significant visual contribution to the overall character, amenity and identity of the municipality.
- 20 The focus of this statement is waterways. The planning maps show that ESO1 follows and encompasses the Maribyrnong River and its environs. This includes the tributary waterway, Arundel Creek. The escarpment landform to its north and the river’s course are inextricably linked, as highlighted in the values and functions set out in this statement.
- 21 As detailed by the Council, related planning objectives for the ongoing management of land subject to ESO1 are set out in five parts, headed:
- Ecological function;
 - Waterway function;
 - Recreation use;
 - Landscape character; and
 - Heritage.
- 22 While all these matters are of varying relevance, it is the contribution of the subject land to the landscape character that is of prime importance in this proceeding. This is not to diminish the potential for impacts on surrounding waterways and their ecological values as raised by neighbouring land owners. We address all these relevant matters in due course.
- 23 The landscape character objectives include:

To protect and enhance the natural and visual character of waterway corridors, deeply incised valleys and their surrounding environs.

To ensure that the scenic qualities and visual character of waterway corridors, creek valleys and their surrounding environs are not compromised by the inappropriate...placement of fill...or lack of screening vegetation.

To restore those sections of the waterway corridor which have been man modified to create artificial bed, banks and landforms to more natural, visually attractive and ecologically diverse landscapes.

[Our emphasis]

24 We consider that these objectives encapsulate the landscape impact issues raised by Calleja's proposal.

25 In respect to waterway issues raised by the neighbours, the relevant ecological and waterway objectives are:

Ensure the health and vitality of the natural systems of rural waterways and their environs.

....

To protect and enhance the diversity, integrity and health of the local native riparian, escarpment and plains vegetation associated with waterways.

To ensure the suitability of the...escarpment...native vegetation habitat...for local native animals.

To improve the water quality of waterways.

To provide for the....restoration and revegetation of local native plant species.

To improve soil quality to enable the continuation of suitable land use.

26 Mr Frewen and other neighbours agitate for works along the banks of Arundel Creek to restore it to more natural conditions. We note that such works might well align with waterway function objectives under the ESO1. However even if we had found it appropriate to grant a permit, the proposed extent of works by Calleja do not extend to those areas Mr Frewen sought for such works. If there has been a failure to comply with other permit requirements or licence conditions for rehabilitation within these areas that is a matter for other authorities, and not the remit of this Tribunal.

27 While we have proceeded on the understanding that planning permission is not required under the Land Subject to Inundation Overlay,⁴ we observe that the extent of this overlay on the subject land is confined to a very narrow strip of land following Arundel Creek and no works appear to fall

⁴ The original planning application was considered on the basis that the works fell within the area of the LSIO. However Calleja submits and we observe that the works fall outside the limited area of the LSIO that applies to the subject land.

within that area. We are cognizant of the fact that the floodplain manager for this region, Melbourne Water did not object to the proposed works.

28 While the land is also subject to the Melbourne Airport Environs Overlay, no planning permission is required for either the use of the land or its development by the proposed works under this control. The application was referred to the Melbourne Airport lessee who does not object subject to a condition ensuring that emissions from ‘any activity’ on the subject land does not prevent aircraft operations in the ‘prescribed airspace’ around the airport in accordance with Visual Flight Rules.⁵ No concerns were raised that such a condition could not be complied with.

29 Finally, in terms of planning controls, we turn to Clause 57 – Metropolitan Green Wedge Land. The proposed use (and development) is not prohibited under this particular provision. Council has highlighted that purposes of this clause that are relevant include:

To protect metropolitan green wedge land from uses and development that would diminish its agricultural, environmental, cultural heritage, conservation, landscape natural resource or recreation values.

.....

To ensure that the scale of use is compatible with the non-urban character of metropolitan green wedge land.

[Our emphasis]

30 The decision guidelines at Clause 65 are relevant, with the Council drawing particular attention to:

- The orderly planning of the area;
- The effect on the amenity of the area; and
- Whether the proposal would cause or be likely to cause land degradation or reduce water quality.

31 A purpose of the zone, overlays and Clause 57 is to implement State and Local Planning Policy Frameworks. It is not our intention to recite the extensive amount of planning policy that Council has referred us to in its submissions. We have considered the provisions relevant to our decision as set out in the table of information at the start of our reasons.

32 We here record that State planning policy of particular relevance includes:

- Green wedges (Clause 11.04-7) which seeks to prevent inappropriate development of green wedge land in metro Melbourne by amongst other strategies supporting development that provides environmental and social benefits and protection of areas of scenic and landscape values.

⁵ This would require emissions to not reduce visibility to less than 5,000m.

- River corridors (Clause 11.04-9) – which seeks to protect and enhance significant metro Melbourne river corridors, including the Maribyrnong River, by protecting environmental and landscape values and ensuring development along these waterways responds and respect such values.
- Significant environments and landscape (Clause 12.04) – which seeks amongst other outcomes to protect landscapes that contribute to character and identity by improving landscape qualities in green wedge areas, recognise natural landscapes for their aesthetic values as well as other functional values and protect and enhance natural key features.
- The protection of sensitive land uses from noise and of air quality impacts (Clauses 13.04-1 and 13.04-2) – under which there is the well-recognised strategic planning value of ensuring wherever possible to separate conflicting sensitive land uses from those that have the potential to reduce amenity.

- 33 The Municipal Strategic Statement details how the City of Hume contains a diverse range of land uses that include the upper reaches of the Maribyrnong River and its associated areas of environmental, heritage and landscape values. The MSS details how planning for Hume seeks to apply a triple bottom line approach which seeks social equity, economic prosperity and environmental sustainability that preserves natural heritage.
- 34 Perhaps most pertinent in the Local Planning Policy Framework is Clause 22.02, which presents local policy about rural land character. This policy is based on a recognition of the open, often flat sparsely treed landscape which also contains highly visible and largely undeveloped hills and ridges and steep, densely vegetated creek valleys. Developments which are incompatible with these landscape features or highly visible are highlighted as having potential to diminish these landscape values and rural character. Objectives and associated policies are directed to maintaining the rural and landscape character. Relevantly for hilltops, ridgelines and hill slopes, policy seeks to avoid extensive earthworks and substantial alterations to the natural topography so as not to disrupt the flow of landforms and avoid landscape scars.
- 35 In submissions the Council referred to Clause 21.06-6 of the MSS; a provision which deals with rural areas. The Council relies on such policy to support positions made about minimising visual impacts on rural character and avoiding incompatible development. Calleja Properties submits that this particular provision of the MSS is not relevant to the subject land, as references to Keilor are couched in terms of those localities shown in the map attached with this provision. That map does not highlight the rural land area where the site is located.

- 36 While we acknowledge that the strategic overview to this provision does indeed refer to the rural land area of Keilor it is referenced in terms of this locality being shown on the rural areas structure plan. This plan does not highlight the rural (Green Wedge) land of Keilor.
- 37 Having observed such an apparent discrepancy we find little turns on this point. Local policy at Clause 22.02 along with other references throughout the SPPF and LPPF are sufficient to draw attention to and guide decision making about landscape values and potential amenity and environmental risks from inappropriate use and / or development of land.

WHAT ARE THE ISSUES IN THIS PROCEEDING?

Summary of the parties' positions

- 38 The Council pursued the following revised grounds for not supporting the grant of a permit:
- The proposal fails to satisfy the objectives and decision guidelines of the Green Wedge Zone and ESO affecting the land.
 - The proposal fails to satisfy various State and local planning provisions about landscape, use of contaminated land and biodiversity;
 - The proposal would be contrary to the orderly planning of the area because it would result in adverse amenity impacts and poor site access.
- 39 In its original grounds, the Council also considered that there were potential impacts to Aboriginal cultural heritage which had not been adequately addressed. Prior to the hearing however, the Council advised it would not pursue that issue, having been satisfied by additional material from Calleja that a Cultural Heritage Management Plan was not required because the works area had been subject to significant ground disturbance.⁶
- 40 We arrived at the same conclusion as set out in our interim order of 25 November 2015 for the reasons given during the course of the hearing. We rely on those reasons as given.
- 41 In the Council's opinion its grounds distil into two key issues:
- Whether the earthworks are appropriate having regard to the planning and environmental controls and policies applying to the land; and
 - Whether there will be unreasonable adverse amenity impacts on surrounding areas.
- 42 The Council does not oppose some remedial works to re-profile the landfill and deal with cap management issues. Its grounds however go to the scale

⁶ As defined under the *Aboriginal Heritage Regulations* 2007.

of the works, which in the Council's opinion are excessive and not sensitive to the site's setting and the applicable planning controls, particularly ESO1. The Council believes a more sensitive, proportionate and compatible response is needed to rectify the degraded visual and environmental condition of the land while having regard to the environmental and landscape values applicable to the site and of relevance under the applicable planning controls and policy.

- 43 The Council submits that, coupled with its concern about the scale of the works, it has concerns about the number and type of conditions that the acoustic and air quality experts recommend to manage potential adverse amenity impacts. In the Council's opinion the range and nature of the recommended management activities points to the fact that the scale of works introduces too much risk to the amenity of adjoining landholders.
- 44 The Council holds concerns about the proposed access from Annandale Road, more particularly that the sight distances are inadequate for safe entry and egress. It believes that safety will be unreasonably compromised, particularly for the projected peak truck movement estimates.
- 45 A number of landholders, who own and occupy land adjacent to the subject land or within the wider district, are parties to this proceeding. Some of these landholders have lived alongside or in close proximity to the subject land since its earliest use as a quarry and / or landfill operation. They oppose Calleja's proposal and the grant of a permit for a range of reasons, principal among those however is the apprehension of adverse amenity and health impacts from noise and dust. Their concerns also extend to:
- the environmental and nuisance impacts from sediment and runoff from the site entering neighbouring properties and waterways;
 - release and exposure of wastes within the landfill, as well as migration of landfill gases and leachate during works causing off-site impacts and risks to the environment;
 - the impact of an increased thickness in the cap increasing the risk of lateral landfill gas migration toward adjoining properties;
 - traffic conflicts between the increased number of trucks travelling along Arundel and Annandale Roads and motorists, motorcyclists and other road users including cyclists, the latter users said to be attracted to the area because of the windy and hilly road conditions; and
 - the impacts from dust on surrounding market garden activities.
- 46 The propositions for the works put forward by Calleja in support of its proposal are relatively straightforward. It states that the works will repair and provide better management of the landfill cap, create a more natural looking landform in keeping with the landscape setting and enable a range of future uses to occur because of the increased area of a flatter plateau. It submits that because of the relatively short time frame for the works of five

years and the ability to apply appropriate levels of management, amenity impacts can be minimised if not avoided. In response to concerns raised about traffic and access, it maintains that the increased level of traffic will be unnoticeable and can be accommodated by the existing road network and safe access can be provided.

Key issues

- 47 For reasons that we will explain, we agree that the proposal is both a use and a development of the land, as put by the Council and accepted by Calleja. We also think it important to properly characterise this use and the nature of the development within accepted planning terms. We will therefore address this question first.
- 48 In terms of the determinative issues, having considered the various grounds and submissions of the parties and the planning context we have set out above, we consider that the determinative issues are about:
- The scale and extent of the use and the development, i.e. is the final landform an acceptable planning outcome given the purposes and objectives of the planning controls and policy that apply to the land?
 - What are the reasonable amenity expectations for this locality?
 - Are we satisfied that the proposed use and development can be managed to avoid unreasonable amenity impacts as well as environmental impacts?
 - Would the proposed access be safe?
- 49 We recognise that other issues were also raised about stormwater drainage and impacts on waterways and the use of the road network, particularly Arundel Road and western access to and from the Calder Freeway.
- 50 However in light of our findings about the determinative issues set out above, we do not think it necessary to address these additional issues to the fullest extent.
- 51 We here record that in respect to drainage and water quality issues, while not fully satisfied that the proposed scheme of drains and swales would prove effective in controlling and directing runoff into suitable treatment systems, particularly for critical storm events, we are satisfied that an appropriate redesign of such infrastructure could be achieved. Thus, this is a matter that could be dealt with through conditions, or in light of our decision, through a fresh design of any revised proposal. In our opinion any such redesign would need to deal with critical storm events and demonstrate capacity to divert and detain runoff for up to a 100 year ARI⁷ event into a treatment system in order to avoid adverse impacts to adjoining land, Arundel Creek and the Maribyrnong River. We believe such design criteria

⁷ Average recurrence interval.

to be appropriate given the objectives of the ESO-1 and associated planning policy to maintain and wherever possible improve water quality outcomes.

IS THE PROPOSAL A USE OF THE LAND AND IF SO WHAT IS THE PROPER CHARACTERISATION OF THAT USE?

- 52 The Council submits that the proposal amounts to a use of the land, but one that is an innominate use because it does not fit neatly within the table of defined uses of the Green Wedge Zone or in Clause 74 of the Hume Planning Scheme. An appropriate description of the innominate use is suggested to be *'use of the land to place clean fill'*.
- 53 It is put that the permit application should be amended accordingly to include 'use and development of the land' for this purpose, but that this would only be a procedural issue because the substance of the activities involved in the use and development of the land are the same.
- 54 We agree with this last proposition. It is clear enough that the activities necessary to develop the land and any associated issues would be the same for the use, however described, to deliver, place and compact the clean fill in order to develop the final proposed landform. For that reason we do not think it unfair or would disadvantage other parties to amend the application to include use in the permission being sought.
- 55 Our concern however has been in formulating what is the correct description of the use. While perhaps a minor issue, we think it important to properly characterise the use not only for this proceeding but because the Tribunal is aware of an increasing number of applications being dealt with by responsible authorities to undertake similar filling of land using spoil or excess soils (i.e. clean fill) from developments or other sources unrelated to the land proposed to receive the fill.
- 56 The Council submissions dealt with why a number of possible characterisations of land use within the scheme would not be applicable. These were 'materials recycling', 'refuse disposal' and 'transfer station'.
- 57 We agree that the definitions of 'refuse disposal' and 'transfer station' in Clause 74 of the scheme do not properly describe the proposed activities proposed by Calleja. The poor fit with 'transfer station' is one that is obvious given such a land use is intended to encompass use where waste materials are being collected and stored on a temporary basis before 'transfer for disposal elsewhere'.
- 58 The definition of *refuse* within the land use term 'Refuse disposal' we think also discounts this term. An undefined term within the scheme and the *Planning and Environment Act 1987*, it is therefore to be given its common or ordinary meaning. The common or ordinary meaning is more often than not taken to mean domestic or putrescible wastes. What is intended here is to dispose of or re-use clean fill and not putrescible or mixed forms of such waste.

- 59 We are also mindful of the fact that while the activity and end product of a reshaped landform is in part intended to repair and add to an existing cap of a landfill, the works being proposed are not part of that previous landfill's operations. If it were then it would be arguable at least, that the works would fall within the remit of previous permissions for such activity.⁸
- 60 We think the activities in a more general sense could be seen to be a means of re-using or recycling spoil (e.g. soil or overburden earthen materials) that has been classified as clean fill pursuant to the *Environment Protection (Industrial Waste Resource) Regulations 2009*.⁹
- 61 Given this, the nearest possible defined land use would be materials recycling, which is defined as:
- Land used to collect, dismantle, treat, process, store, recycle or sell, used or surplus material.
- 62 This definition however does not sit comfortably with the proposed activities on the land. Activities such as 'collect', 'dismantle' and 'treat' or 'process' do not impart a proper description of this proposal when their common meanings are applied. Potentially the clean fill could be said to be stored on the land, but we agree with the Council that store would have to be read at its widest meaning. The activity of 'Store' is a defined land use term in the scheme and does not include materials such as clean fill. It is limited to the storing of goods, machinery or vehicles. In being nested under warehouse, this land use term suggests a different form of land use to that proposed here. We therefore agree with the Council that 'store' as used in the definition of materials recycling would have to be read very widely and would potentially introduce confusion in understanding the Scheme's intended interpretation of such a term.
- 63 Similarly we do not think that the action of 'recycle' properly describes the proposal. While in one sense excess soil or spoil that is classed as clean fill is being recycled for another use, we do not think the use of this properly describes the intent of the activity.
- 64 We think the intent is clear, and twofold:
- To use the land to accommodate the disposal of clean fill that has been generated from other sites and cannot be accommodated on the source site or otherwise re-used. Put another way, it is use that seeks to place waste on land rather than meet some other form of re-use.
 - To reshape the land, i.e. a form of earthworks.

⁸ We here include in such permissions any planning permit as well as licences and approvals for landfill works under the *Environment Protection Act 1970*.

⁹ Specifically the Industrial Waste Resource Guidelines (IWRG) 621, *Soil Hazard Categorisation and Management*, June 2009.

- 65 That said we do not see the second intention as a use of the land rather it is a consequence of the bringing the clean fill on the land, i.e. it is the consequential development of the use activities.
- 66 We have deliberately chosen to use the terms ‘earthworks’. Earthworks is a defined term under the Scheme:¹⁰
- Land forming, laser grading, levee banks, raised access roads and tracks, building pads, storage embankments, channel banks and drain banks and associated structures
- 67 The placement of clean fill on the site is intended to reform the land, i.e. it is land forming using the form of a storage embankment.
- 68 We think it appropriate to read the definition of ‘land forming’ as contained in the definition of earthworks widely, given that ‘land forming’ is a form of earthworks intended to modify ground level contours (i.e. the land’s surface form) and this is the intention of these works. We recognise that the ordinary agricultural meaning associated with such activity are works such as laser grading or grading. However as laser grading is a separately identified activity in the definition, and grading is but one type of land forming activity, we think that the intention is to give ‘land forming’ a broader sweep to capture a range of works that would modify the topography of the land. We also think the term *storage embankment* can apply when it is understood that an embankment is a soil structure intended for the permanent placement of soil over existing land so as to change or modify its topography. We think this is also a fair description that sits comfortably with the form of earthworks proposed here.
- 69 For these reasons we agree that the use is an innominate one, best described however as ‘disposal of clean fill’ and that the planning permissions being sought are best characterised as:
- Use for the purpose of disposal of clean fill.
 - Development of earthworks

THE TRIBUNAL’S CONSIDERATION OF THE ISSUES

- 70 Whether or not the use and development of the land as proposed by Calleja is appropriate is not a question readily answered in simple terms. It has required us to consider and weigh the benefits that have been put by Calleja and the potential risks of impacts on amenity as well as the final outcome of the use and development on the landscape. The site’s historical and physical context, the objectives and requirements of the relevant planning controls under which planning permission is required and associated planning policies are all relevant factors to take into account and balance.

¹⁰ Clause 72.

- 71 We acknowledge that the subject land is degraded and that maintenance of the cap in its present form has challenges. However for reasons that we will explain, we are not persuaded that the extent of clean fill being proposed is necessary to address these conditions. Nor are we persuaded that it is necessary to support some undefined future use. In respect to the latter matter, there appears to be some conflict as to what that use may be with the Council reporting an application being made for a transfer station while Calleja indicates a possible use being garden supplies. While such uses are permissible in the Green Wedge Zone, they are not as of right and it is not a given that such uses might be approved.
- 72 If the works were necessary to support an intended use then we have a concern that the application borders on being piecemeal. It would be necessary to understand the extent and nature of that use in order to assess whether the extent of this proposal, in particular the extent of the plateau area, is necessary and can be balanced against other findings we make about the appropriateness of such a final landform.
- 73 Putting that concern aside however, we see that more important is the fact that, as argued by Calleja in its submissions about amenity, the purposes of the Green Wedge Zone are directed to supporting agriculture and other non-urban uses and development. These include the protection, conservation and enhancement of the open rural landscape and to encourage use and development that are consistent with sustainable land management.
- 74 Unlike some schedules to the Green Wedge Zone in other municipalities, Hume has included in schedule 1 to this zone a specific trigger for a permit where any more than 100m³ of fill is proposed to be placed on such land. We consider this to be a direct response to the purposes of addressing landscape and environmental values. It signals that any change to landforms in this zone is to be managed in accord with the zone's purposes.
- 75 We have therefore balanced the benefits that have been said to apply to the future management of the landfill against our consideration of these other issues of land use and development, the zone purposes and the objectives of the ESO and planning policy.
- 76 Having considered these matters we find that the proposal is unacceptable for the following principal reasons:
- The extent of the filling would result in an unacceptable landform that would sit at odds with the surrounding landscape and therefore would be contrary to the purposes of the Green Wedge Zone.
 - The extent of the works presents unacceptable risks to the reasonable amenity expectations of local landholders, most particularly for the land at 180 Arundel Road but also other nearby properties.

- We do not have confidence that the proposals put forward to manage amenity impacts are sufficient or workable and so ameliorate the potential impacts.

77 In reaching these findings, we recognise there are environmental benefits for some further filling of the land, principally because additional fill over the existing cap will resolve deterioration in the cap's condition, afford an opportunity to improve the landscape outcome by a more integrated landform that blends with surrounding natural landforms and affords an opportunity to improve stormwater runoff management. However we ascertain from the evidence before us that these outcomes can be achieved with a lesser volume of fill being imported to the site. Proposing additional levels of fill above and beyond these benefits in our view introduces a use and development of the land that carries significant risks to the amenity of the adjoining properties with no offsetting beneficial planning outcomes.

78 The reasons that follow explain why we have arrived at these findings.

The landform and landscape outcomes

79 Calleja submits that as far as landscape values are considered under the relevant provisions of the Hume Scheme:

- The site is not in the heart of the municipality's rural areas or at the edge of same. Rather it is put that it is part of a 'slither of rural land between Melbourne Airport and the Calder Freeway...with residential development to the west of the Calder Freeway'.¹¹
- The site is not in the rural areas described or referred to in the local planning policy framework and rural areas structure plan found under Clause 21.06, nor a significant hilltop referred to under this policy.
- Arundel Creek, while in a steep valley, is not a waterway referred to under the local planning policy framework which refers to the landscape values of specific waterways and their associated steep valleys.
- The site's landscape values are impacted by past uses and is not in its natural form but rather presents a 'highly modified' landscape and further to this, as part of its wider context, is located in a modified landscape due to the landfill operating to the northeast.

80 We find that the subject land lies at the edge of a plateau, the boundary of the broad and relatively flat plain of the Maribyrnong River that has cut its way through a range of geological strata. The higher ground to the north of the Maribyrnong is a dissected plateau of ancient lava flows, which are reminders of relatively recent (in geological terms) volcanic activity that occurred from the western Victorian volcanic plains through to the western

¹¹ At [19.2] of the written submissions.

suburbs of Melbourne. The hills and ridges that mark the boundary or interface between the floodplain and the plateau, are a dissected landform created by drainage from the plateau to the Maribyrnong. Thus the landform provides an interpretation of the location's natural history, reflecting scientific and natural heritage values.

- 81 Another value of the wider locality's landscape is its visual amenity. The rising landform from the Maribyrnong flood plain, through the rolling dissected hills and ridge lines to the plateau presents a dramatic landscape.
- 82 The statement of environmental significance in ESO1 that applies to the Maribyrnong and its surrounds, including the subject land, highlights these values.
- 83 We recognise however that the subject land is not pristine or in its natural condition, as submitted by Calleja. Nor is land to the north-east, which has been the subject of submissions from Calleja and local landholders. Certainly within the wider context of the landscape, there are public realm views that place this location in a peri-urban setting. Notwithstanding these conditions, we agree with submissions that from other key public realm locations, the subject land remains a part of viewsheds that continue to provide the landscape values that the scheme articulates and seeks to 'conserve, protect and enhance'. A very relevant objective under ESO1, which we highlighted earlier and repeat here is:
- To restore those sections of the waterway corridor which have been man modified to create ... landforms to more natural, visually attractive and ecologically diverse landscapes.
- 84 Accordingly and notwithstanding its disturbed state and that of some surrounding land, works that would restore the subject land to a more natural and visually attractive condition would accord with this objective. In this respect the concept of filling and reshaping the present landform of the site has support within the scheme. The broader objectives of the GWZ similarly can be seen to be supportive of the concept.
- 85 In respect to local policy, we agree with the submissions from Calleja that while the Hume Scheme seeks to address the management of rural landscapes and Green Wedge zones through local planning policy and the Municipal Strategic Statement, the subject land and its surrounds seems to be somewhat of an anomaly. The best example of this is at Clause 21.06-6, where reference to rural areas relies on the Rural Area Structure Plan, which as best as we can ascertain stops short of the area that contains the subject land and indeed all the Green Wedge zone south of Melbourne Airport. Notwithstanding this anomaly, we think there is sufficient policy under the local scheme to reinforce the application of state policy to this land and locality's wider landscape values.

- 86 We also agree with submissions that where local policy refers to the impacts from ‘development’ it would seem the meaning of ‘development’ is generally a reference to building form rather than earthworks.
- 87 That said, Clause 22.02 addresses the broader theme of rural land character, of which the Green Wedge Zone is unarguably a part. This policy refers to the ‘open and sparsely treed plains’ as well as the ‘highly visible and largely undeveloped hills and ridges’ and ‘very steep, sloping and densely vegetated creek valleys’ and the influence these features have on the character of the municipality. We think this is a fair summary of the wider context of this site, with the wide, flat open plain of the Maribyrnong River, the treed Maribyrnong River and Arundel Creek waterways, the steeply sloping dissection of the escarpment, of which the subject land is a component, and the flatter plateau that sits to its north are all components of the various viewsheds that encompass this subject land.
- 88 To us, this policy at Clause 22.02 encapsulates and underpins the landscape outcomes sought under the purposes of the Green Wedge Zone and objectives of ESO1. Objectives under this policy include:
- minimising the visual impact of development on and near prominent hilltops, steep slopes and ridgelines; and
 - protecting significant roadside views of hilltops, creek valleys and other important features of landscape interest, from development that is ‘... of an inappropriate scale, height, bulk or appearance’.
- 89 In respect to the latter, the site is clearly visible from the Calder Freeway, Annandale and Arundel Roads. We think the reference by Calleja to the fact that the Calder Freeway is absent from the vicinity of this site under the ‘approach roads plan’, while true, takes a rather black letter law approach to the scheme. It ought be recognised that the section of Calder Freeway from which this site would be most prominent lies within another municipality and its absence from this plan is for this reason and not because it is not visible from this major road. In any event the relevant policy is not that referring to these roads but to policy objectives and outcomes related to minimising the visual impact from development on ‘ridgelines, hilltops and hillsides’ and the landscape values of these features. It follows from this broader objective that key views from a range of public realm locations remain relevant to achieving this policy outcome.
- 90 Further, and as a matter of policy under Clause 22.02, the scheme seeks to avoid extensive earthworks that would disrupt ‘the flow of the landform’.
- 91 Given all of this, we find there is strong support in the Hume Scheme to remediate the site to a more natural landform. It follows that this would require the type of works (and hence use) of the land proposed by Calleja. What flows from this conclusion however is the question of whether the proposal put forward by Calleja will result in a landform that follows ‘the flow’ of the natural landscape and achieves a more natural form. Put

another way, and as is articulated in the purposes of ESO1 when applied to this site, the placement of fill should not compromise the scenic qualities and visual character of the Maribyrnong River and Arundel Creek corridors and the surrounding environs.

- 92 For the most part we largely accept the landscape assessment put forward by Mr Schutt, in so far as it is his evidence that the change in landform as a result of the works would have limited impacts from the locations he has assessed. However it is not the change in the landform that is the underlying question of whether the proposal is acceptable but rather will the change result in or bring the landform closer to a restoration of the natural landscape, as we have set out above. In this respect we find the answer to this question to be no for the following reasons.
- 93 Mr Schutt's landscape analysis draws attention to the mix of landforms that encompasses the plateaus, dissected escarpment, steep valley slopes within the escarpment and river flats. We accept that the final landform of the subject site, being located within the escarpment of this landscape would under natural conditions have steep slopes. However we are not persuaded that a plateau across the top of the site is consistent with this escarpment landform. Rather, such a landform reflects the landscape to the north. As we have observed and the landscape analysis indicates, the subject land is part of the transition from the lower flat flood plains to this plateau. Such a landform has rolling flow with rounded hills and ridge tops.
- 94 We note that in evidence Mr Schutt spoke of how in reviewing the original application plans, he gave advice to address what he considered to be a similar problem, i.e. the extent of the plateau form was too much. We think that the revised form has not gone far enough and should not seek to produce any form of plateau across the site.
- 95 Calleja's submission is that the proposed landform arises from the need to remediate the cap and to produce a landform that would support a future use. The evidence of Mr Pump is that there are diminishing returns to the remediation of the cap and landfill management outcomes after some 3m to 4m of fill depth. Thus the remedial benefits can be achieved with a far lower volume and extent of filling.
- 96 We are also puzzled as to why a plateau surface would facilitate improved management of the underlying landfill, when landfill guidelines seek a final landform that sheds rainfall and stormwater. While we recognise the proposal does not seek a flat finish, it does propose only gentle grades across the plateaus. Further settlement of the underlying fill could, in our view, easily affect such flat grades, affecting the ability to shed water off the landfill cap, thereby negating the very benefit said to arise from the placement of this fill.
- 97 Further we consider that it does not follow that a plateau is necessary to support a future use of the site. While put to us in respect to arguments

about amenity, Calleja has highlighted that Green Wedge Zone land is predominantly an agricultural use zone with other non-urban uses such as stone resource and landfills being permissible. We agree and recognise this, and so what follows is that a range of agricultural uses can be supported on this site under a restored rounded landform. We do not find that propositions put to us about future use of the land support the proposed landform, specifically the need for a flatter form across the top of the ridge.

- 98 We think also that the use of the land as we have characterised it bears on this question. That the use of the land is for the disposal of clean fill generated from other sites does not justify the extent or acceptability of the scale and extent of the proposed landform. In our view the fact that the Hume Scheme seeks through its policy, the application of an ESO that addresses the specific matter about filling land and impacts to landforms and landscape in combination with the very specific control put in place under the schedule to the Green Wedge zone to require permissions for any more than 100m³ of fill sends a clear message that a use for disposal of clean fill needs to have regard to and may well be constrained by other planning outcomes. We find that this is the case here.
- 99 Having made such findings however we recognise the benefit that would arise from some filling of this land to restore it to a more natural condition. We here refer to the fact that south of the present peak lies a plateau or flat spot that then transitions to the slopes. We think that the prospect of placing fill to reshape this area to a more natural rounded finished is what the scheme contemplates as an acceptable planning outcome.
- 100 Thus we do not conclude that no filling should occur on this site. We recognise that there would be environmental benefits in managing the capping of the landfill and in restoring the landform to a more natural condition. What we do conclude however is that this proposal is excessive and would present unacceptable landscape and landform outcomes.

The potential amenity impacts from noise and dust

- 101 Common to the amenity issues is the following site context:
- Mrs Jankovic's is the nearest property, which abuts the subject land with her dwelling being approximately 20m from site boundary;
 - A further three dwellings lie to the west between 110m and 180m of the boundary with the subject land;
 - A market garden operates to the immediate west of the subject land across Arundel Road;
 - Mr Frewen's property lies to the north-east, with his dwelling approximately 160m from the boundary of the subject site.
- 102 More widely, land to the south-west and north is used for agriculture, with market gardening occurring to the south, albeit at what appears to be a

lesser level of activity than in the past. Some rural residential, i.e. dwellings on smaller lots appears to have developed in the southern, river flats.

- 103 Melbourne Airport lies to the north-east while quarry and landfill operations lie to the east on higher ground.
- 104 The evidence from Mr Antonopoulos usefully sets the scene about potential noise and its impacts from the proposed works. Key points from his evidence are that:
- The hours of works would be limited to defined EPA¹² day periods of 7:30am to 4:30pm Monday to Friday and 7:30am to 1pm, Saturdays.
 - Noise sources would be the operation either singly or in combination of: a bulldozer, a compaction unit such as a sheep's foot roller; a water cart and tip trucks making deliveries.
 - In his opinion the nature of the proposal equates to site construction works. Construction works are exempt from assessment and control of the *State Environmental Protection Policy (Control of noise from Commerce, Industry and Trade)* [SEPP N-1] but are addressed in the EPA's *Noise Control Guidelines Publication 1254* (the Noise guidelines).
 - The Noise guidelines do not apply numerical noise limits for works over the day time period, instead recommending management strategies and practices that include amongst other steps:
 - Community consultation;
 - Use of lowest noise emitting/best practice equipment;
 - Noise barriers where practical; and
 - Scheduling of the noisiest works at appropriate periods.
 - NSW guidelines¹³ that are sometimes referred to in Victoria provide indicative target thresholds for day period noise levels that are the equivalent of $L_{90} + 10 \text{ dB}$, which is based on a noise level that may generate some 'community reaction', with a 75dB noise threshold being the level when strong community reaction may occur. These levels are intended to be used as guidance in management of noise impacts rather than clear cut threshold criteria.
 - The ambient noise environment in and around the subject site is 'unique' or unusual in that it is subject to fly over noise from aircraft arriving or departing Melbourne airport. Depending on wind conditions, and therefore the nature of aircraft operations, noise levels

¹² i.e. day time periods as defined in EPA noise policies and guidelines.

¹³ *New South Wales Interim Construction Noise Guideline*, Department of Environment & Climate Change, 2009.

may vary from L_{\max} above 80 dB(A) with an hourly L_{eq} of 60-65 dB(A) (during aircraft departure conditions) to L_{\max} of less than 75 dB(A) and hourly L_{eq} of less than 55dB(A) (during aircraft arrival conditions).

- Depending on the types of operation being conducted on the site,¹⁴ noise levels could range from 75dB(A) L_{eq} to 51dB(A) L_{eq} at distances from 30m to 300m respectively from machinery. Accordingly noise levels at Mrs Jankovic's dwelling could be as high as 70-75dB(A) and at the next nearest dwelling at Lot 1 (a distance of 70m) between 65-69 dB(A). Noise levels from the operation of three mobile plant sources of 55dB(A) L_{eq} could persist for distances up to 300m.

105 Thus L_{eq} noise levels (as opposed to peak machinery noise) may be sufficient to be more powerful than some aircraft noise events and certainly be heard between aircraft movement events during some periods, including day time periods. The impact of such noise therefore is a question of either competing noise sources of different tone and character during some periods and at other times noise filling periods of what would otherwise be times of respite from the aircraft noise. In our view this represents an important and relevant change to the acoustic amenity experienced by residents surrounding the subject site. This includes but is not limited to Mrs Jankovic's dwelling given the possible transmission of noise above 55dB(A) L_{eq} for distances of up to 300m.

106 Mr Antonopoulos addresses these possible noise impacts by modelling various work scenarios including the use of earth mounds for noise mitigation. Based on these assessments, it is his evidence that due to the elevated nature of the work site compared to surrounding properties there is little benefit in constructing such mounds. Indeed he observes that constructing and removing the mounds would be a source of additional, higher noise levels.

107 Further the evidence points to noise being transmitted to Mrs Jankovic's property and others at levels above background conditions, even when allowing for aircraft operations, as noted earlier. As we understand the evidence this is a function of the elevated nature of Calleja's land above these surrounding properties and its proximity to these properties. The impacts will be lowest when works occur on the east side of the works area or near the central, but more distant, existing ridgeline peak.

108 Mr Antonopoulos recommends a noise management plan be applied to undertake works in a staged manner. He nominates a noise activity zone based on a 60m radius from Mrs Jankovic's dwelling, which in practical terms amounts to 40m from the northern boundary and 20m from the eastern boundary. He envisages that Calleja could co-ordinate works in this

¹⁴ Mr Antonopoulos calculated noise levels for one machine operating and for three machines operating.

zone in consultation with Mrs Jankovic to minimise amenity impacts. He suggests this might require:

- A higher intensity level of works to minimise the time period as a trade-off.
- Provision of relief days over the works period.
- Committing to a set number of days to provide certainty about the duration of impacts.
- An overall time period of 52 days to complete works in this zone.

109 Dr Cowan's evidence about dust similarly indicates the potential for adverse amenity and health impacts. He has completed an analysis of dust emissions using dispersion modelling based on standard dust emission rates for earth moving equipment and earth works. These emissions have been applied for works at three different locations across the site.¹⁵ Based on this assessment, it is his evidence that the 24 hour average PM₁₀ and PM_{2.5}¹⁶ standards he adopts¹⁷ may be exceeded where works occur close to or upwind of Mrs Jankovic's dwelling but other nearby dwellings will not be exposed to dust levels above these standards.

110 In respect to Mrs Jankovic's property the modelling indicates the levels of dust would potentially exceed the criteria when:

- Works occur 30m from the northern boundary (Scenario 1) or at 120m from the northern boundary but at more elevated locations (Scenario 2).
- When the wind is from the northern quadrant (north, north-northeast and north-northwest) or the western quadrant and the wind speed is less than 3km/hr (Scenario 1).
- When the wind is from the eastern quadrant at a speed of less than 7 km/hr, while noting that easterly winds are rare.

111 His analysis indicates that works 80m (or more distant) in the south-eastern sector of the subject land can occur under any wind scenarios without off-site exceeding his adopted dust criteria. His evidence is that the main sources of dust are from the works areas, involving the tipping and grading of the clean fill as well as dust generated from truck movements. Wind erosion is not indicated to be a sufficient source of raised dust that would impact on the sensitive receptors.

112 To address these potential dust impacts, Dr Cowan recommends a management approach that:

¹⁵ The details of Dr Cowan's method are set out in his written statement at sections 5 and 6.

¹⁶ Particulate matter with an equivalent aerodynamic diameter of less than 10 microns or 2.5 microns.

¹⁷ Drawn from the *Protocol for Environmental Management for Mining and Extractive Industries*, EPA Publication 1191, December 2007.

- Incorporates his assumptions for haul road watering (of at least 2L/m²/hr;
- Direct filling operations to areas depending on wind (weather) conditions, but specifically avoiding:
 - areas within an arc of 30m of the north of Mrs Jankovic's dwelling when the winds are from the northern and western quadrants¹⁸ listed in his evidence and are less than 3km/hr or from the eastern quadrant¹⁹ when the wind is less than 7 km/hr; and / or
 - areas within an arc of 120m of the north of Mrs Jankovic's dwelling when the wind is from the northern quadrant and is less than 7km/hr.

113 The upshot of this analysis is, in Dr Cowan's opinion, that filling works cannot occur at the locations he has modelled. Rather, he says that days on which works are to occur within 30m north of Mrs Jankovic's property will need to be 'carefully selected' to avoid the wind conditions set out above. The same 'careful' selection of days for works within 120m north of her property would also be required.

114 In addressing the potential impacts to Mrs Jankovic's property, Dr Cowan's evidence is that other properties that are further away will be afforded protection.

115 Dr Cowan explained how using portable dust monitoring equipment with downloadable data and real time reporting via mobile phone links can be used to manage activities in line with the above approach. He recommends a staged level of response based on this real time monitoring. The monitoring would involve calculation of 24hr rolling averages of PM₁₀ dust levels upwind and downwind of the work activity area. When trigger levels he has recommended are encountered dust mitigation actions would be initiated. His recommended actions would be:

- Low (level) actions – comprising of the use of dust suppressing sprays during vehicle unloading and additional watering of working areas to 'dampen' soils before spreading.
- Moderate action – which comprise the low level actions plus a reduction in activity by 25% and a re-evaluation of situation after two hours and if dust concentrations remain at the moderate level, scale the response up to the high (level) action.
- High action – cease placement activities upwind of sensitive receptors and relocate placement perpendicular to the wind direction and sensitive receptors, while relocating the monitoring devices and adopt

¹⁸ i.e. north, north-north-east and north-north-west and west, west-northwest and west-southwest wind sectors respectively.

¹⁹ East, east-north-east and east-southeast wind sectors.

the moderate (level) actions with a re-evaluation of action levels after two hours.

- 116 Calleja relies on the evidence of Mr Antonopoulos and Dr Cowan to advance its case that, while the potential for adverse amenity impacts exists, the managed approach that these experts have recommended can be adopted to address such risks. It is contended that this level of management would be no different to that adopted on development sites, such as subdivisions or large work sites, where extensive earthworks occur and that an experienced site co-ordinator can ensure compliance.

The proposed management of potential amenity impacts

- 117 It is trite, but nevertheless relevant to restate that an important principle in the management of amenity with respect to air quality and noise is to separate sensitive land uses and development from land uses and development that are the potential sources of such impacts.²⁰ In this proposal, for historical reasons, Calleja does not have the benefit of land use separations. In the absence of separations and on the evidence of potential amenity impacts it proposes to manage its proposed activities to mitigate the risks.
- 118 In putting forward a management approach, Calleja also says that the risks also need to be considered in the context of the surrounding dwellings being located in a land use zone that has the primary purpose of supporting agricultural and other non-urban, non-residential uses, such as mineral and stone resources. A number of Tribunal decisions have been referred to in support of the proposition that in this context, expectations of peaceful and dust free conditions and low noise and activity levels are unrealistic. Reference is also made by Calleja to the existing acoustic environment due to the nearby Melbourne Airport flight path and the application of the airport overlay.
- 119 We consider that two questions arise from the positions of the parties. One is what is the appropriate level of amenity that should be afforded the properties surrounding the subject land? The second question is whether we are satisfied that level of amenity can be maintained for the better part of what may be long term use and development of the land.
- 120 In respect to the first question, we accept that a purpose of GWZ land is agriculture and another is to protect land for its stone and mineral resources. As is pointed out in the GWZ planning practice note²¹:

The Green Wedge Zone is appropriate to recognise and protect non-urban land outside the UGB in the metropolitan area for its agricultural, environmental, historic, landscape or recreational values, or mineral and stone resources.

²⁰ Clause 13.04.

²¹ No 62, dated June 2015.

The zone provides opportunity for all agricultural uses and limits non-rural uses to those that either support agriculture or tourism, or that are essential for urban development but cannot locate in urban areas for amenity and other reasons (such as airports, schools, waste treatment plants, land fills and reservoirs). A dwelling requires a permit and is restricted to one dwelling per lot.

- 121 So while we note that the use of Green Wedge Zone land for dwellings is a permissible use, we accept that residents in such areas should not expect the same level of amenity as they would in residential zoned land. Indeed, as we have observed earlier in these reasons, in being located near to Melbourne Airport, the amenity of the residents surrounding the subject land cannot be said to be peaceful. Nor is it akin to a regional rural area. The acoustic environment is one that is impacted in ways that we have described earlier.
- 122 We also accept that given the proximity of market gardens and other land used for agricultural purposes, Mrs Jankovic and other residents would, in all likelihood, be subject to noise and dust associated with such agricultural activities. However these forms of activities are not the same in terms of extent and severity as those that are indicated by the evidence for this proposal. Indeed the example drawn upon to describe and manage the works has not been farming. The example that the experts have relied on is subdivision development.
- 123 We think this example is not a fair one because subdivision developments and their associated earthworks generally are undertaken across an area in a systematic manner and provide a level of certainty about the length of time that adjoining properties (and residents) might be exposed to dust and noise. Further, we see little parallel between the very real risk of exposure to such impacts and the occasional and seasonal exposure to dust or noise from agricultural activities undertaken in the area. Even on the Maribyrnong River flats, the limited extent of horticultural activity and the need to limit dust and other aerosol emissions for product quality reasons, as indicated from Mr Milburn's evidence, gives us reasons to conclude that agriculture would present only limited impacts on amenity.
- 124 Here we have a proposal that may extend from three to five years. The assessments of dust and noise impacts indicate the very real prospect of exposing Mrs Jankovic and other adjoining residents to noise and dust for many days or even weeks in the case of noise, over this period of time.
- 125 We are mindful of the forms of amenity impacts the Jankovic family has described from previous activities on the site due in no small part to the dwelling's proximity to this land. Even allowing for the emotive nature of these submissions, we are not particularly surprised by the accounts of dust and noise impacts from the past use of the site for a quarry and landfill. Such accounts are consistent with why planning and other regulatory jurisdictions seek to separate these uses from dwellings.

- 126 Here we do not have the benefit of such separations. Instead, as per the evidence of the acoustic and air quality witnesses, the Calleja proposal is wholly reliant on a systematic and, to our mind, high level of management to address not only upset conditions but normal operations.
- 127 The Jankovic family's account of past impacts demonstrates why it is necessary to proceed with caution. Whatever may be said by Calleja about the purposes of the Green Wedge Zone and the lack of support for housing, it is nevertheless relevant that in this situation where dwellings are so close to the subject land, a reasonable level of amenity akin to that expected in a rural environment is still a legitimate expectation under the planning scheme. The level of amenity we apply here is one that is consistent with air quality for a working rural environment and in acoustic terms is one that takes account of the impacts from Melbourne Airport's aircraft operations.
- 128 In this instance, we are not persuaded that the management approach put before us would provide the level of amenity appropriate to Mrs Jankovic and surrounding properties. We discern inherent conflicts and tensions between site operational requirements to manage noise and dust emissions while at the same time responding to operational requirements to place and compact incoming loads of fill in a manner that delivers the stated environmental (capping) benefits. We observe that over the five years of climate data in Dr Cowan's assessment, there are a considerable periods of time where works under his scenarios of 30m and 120m north of Mrs Jankovic's property would exceed the PM₁₀ 24 hour criteria. Trying to accommodate such work in with negotiated times for works close to her property or other near boundary locations to avoid or minimise noise impacts introduces the potential for inherent conflicts in operational outcomes for the placement and integration of fill onto the site in a proper and geotechnically sound manner. Here we mean the placement and compaction of the fill to appropriate standards in planned and integrated stages to maintain the integrity of the landfill cap.
- 129 We are further concerned that the full implications of the dust management plan have not been thought through. By this we mean that Dr Cowan's analysis is predicated on only one exposed area of 150m² for filling at any one time. In reality, we anticipate that due to the need for flexibility to address changing wind conditions, two or more fill areas may become active, either on a daily basis or on days when high level action responses are initiated. This adds to the complexity of the site management.
- 130 We bear in mind that Calleja has submitted that the availability of fill will be outside its direct control, hence the possible five year completion scenario. We consider such demand driven availability for fill that will drive the timing and need for activities on the site adds a layer of complexity to the suggested management regimes over and above that of the cited example and general experience of construction or development sites.

- 131 However it is not only the potential dust impacts that are of concern to us. We note that the impacts from noise similarly require a high level of interactive management at the expense of Mrs Jankovic's amenity and potential impositions on her to vacate her dwelling or deal with periods of loud noise. This is clearly acknowledged notwithstanding the exposure to aircraft noise at this location.
- 132 We find this to be a fair acknowledgement of the potential noise impacts given the difference in character, tonality and hence level of annoyance that may be generated between aircraft noise and that of beepers on reversing construction vehicles, accelerating diesel engines and clanging metal tailgates from dump trucks.
- 133 Having considered the evidence of the experts it is apparent that the risk of unreasonable amenity impacts on neighbouring properties, most particularly but not limited to Mrs Jankovic, is high and would be unacceptable. We find that Calleja's proposal is one that represents a change in the amenity due to noise and dust that we consider is not representative of the reasonable expectations that might be held for this Green Wedge location. As we set out earlier, while we accept there would be some benefits for the ongoing management of the cap placed over the historical landfill by some further filling and re-shaping of the landform, the extent of the works beyond these benefits are insufficient to warrant these amenity impacts.

CAN SAFE ACCESS BE ACHIEVED?

- 134 The proposed access to and from the site is from Annandale Road at a location where there is a dog leg bend (approximately 90°). The bend sits at the apex of the road as it descends into and then rises out of the valley formed by Arundel Creek. Consequently, Annandale Road rises to the east and west from the access. The sight line from the western approach is some 230m of straight road. The sight line and therefore the safety of the access from the eastern approach is a matter of contention between the Calleja's witness, Mr Walsh and the Council and respondents.
- 135 More generally we also observe that at this bend the sealed portion of the road has been widened. There are no shoulders to the road in the approaches from the east and west. The edges of the road seal terminate in concrete gutters and either guard rails or, in the case of the western approach, the south side is a retaining wall.
- 136 The eastern approach to the access sits at the end of a series of dog leg bends along Annandale Road, forming an 'S' bend approach as it descends into the Arundel Creek valley. To the east of the proposed access point, on the north side of the road is a line of trees. Because of this road geometry and the trees the line of sight from the eastern approach is less than that from the west. Mr Walsh contends that the line of sight as measured by support personnel is 102m from the access location to the southernmost

tree. The Council has tabled an aerial photographs with a line of sight measurement that scales at 90m to the same point.

- 137 Mr Walsh commissioned tube counts and speed measurements along Annandale Road (and Arundel Road). Based on these measurements, his evidence is that the 85th percentile vehicle speed approaching the access point is 50km/h rather than the posted 60km/h. Using this speed he calculates a Safe Intersection Sight Distance (SISD) in accordance with Austroads²² guidelines to be 97m. At 60km/h it would be 123m.
- 138 The Council contends that the available sight distance is actually 90m because this is the line of sight from the access intersection and the line of trees on the eastern approach. Mr Walsh's response is that the trees allow glimpses towards the access and do not form a complete screen and that his measurement is likely to be more accurate than that from an aerial photograph. Mr Walsh also contends that his calculation is based on public road intersections and not private driveways, but is nevertheless an appropriate approach to adopt.
- 139 Under cross-examination, Mr Walsh reported that the distance he relies on was obtained using a measuring wheel to obtain the distance along the road.
- 140 We observe that from the excerpt tabled with us that the measurement Mr Walsh relies on is the correct distance, with Figure 2.3 indicating the SISD is in fact measured along the carriageway and not the direct line of sight. Figure 3.3 of the guidelines confirms this is the case for curved carriageways.
- 141 Mr Walsh's calculation also had not allowed for the gradient of the road approaches. In oral evidence he indicated that based on the Austroads guidelines for the grades of 4% to 6% 3m to 5m respectively would be added to the SISD derived from Table 3.2 of the Austroads guideline. At a rounded value of 105m (97m plus 5m = 102m rounded up to 105m as per the guideline), the eastern SISD of 102m is only marginally under the rounded value.
- 142 Mr Walsh's evidence is the SISD is based on scenarios where a vehicle might enter an intersection and then stall, thus enabling an approaching vehicle to observe, react and stop before a collision occurs. For the proposed operation, he observes that trucks would either be entering the site or entering Annandale Road then accelerating up the road. In normal operation the SISD provides more than sufficient time for both the truck drivers delivering to the site or departing the site and drivers of vehicles on the road to observe and react to traffic conditions and potential conflict situations.

²² *Guide to Road Design – Part 4A: Unsignalised and signalised intersections*. Austroads 2010. (NB: The Council tabled an extract from the 2009 edition of the guidelines but there are no differences between 2009 and 2010 relevant to this proceeding).

- 143 We accept that this is the basis of the SISD calculated values. However we also observe that the values Mr Walsh relies on are based on those for cars. Table 3.2 of the guidelines provided by the Council indicates that a lower deceleration value would apply for trucks, the influence of which in the calculation of SISD²³ would be to increase the SISD. Mr Walsh has not performed this calculation.
- 144 Given the marginal nature of the eastern SISD when allowance is made for the grade we are concerned about the potential conflict between trucks entering or leaving the site and other truck traffic. While existing truck movements form only a small proportion of current traffic levels there remains nevertheless the potential of conflict between such vehicles, which is relevant to the safety of all road users.
- 145 This potential for conflict is the more so when considered against the fact that Mr Walsh assumed in his estimate of average truck movements to and from the site that the site would operate for five years. Submissions for Calleja in fact seeks a five year permit as a safeguard, with an intention to complete the works within three years if possible. In our view there is a reasonable potential therefore that daily truck movements will be closer to Mr Walsh's peak value of 30 movements per day rather than his lower value of nine. The former would equate to almost four vehicle movements per hour or one every 15 minutes.
- 146 Any revised proposal for this site that intends to use this access would therefore need to address a likely higher rate of truck movements under a three year completion scenario and deal with an appropriate SISD for inter-truck conflicts. We accept however that for potential conflict with cars (with their associated better deceleration) an appropriate level of safety as estimated by the SISD is available.

THIS PROPOSAL AND ONGOING MANAGEMENT OF THE LANDFILL

- 147 Through the course of the hearing we invited submissions about how this proposal and its planning permission might interact with and / or integrate with the ongoing management under the regimes established under the *Environment Protection Act 1970*, more specifically any requirements sought by the EPA and the post-closure management of the landfill. Calleja and the Council have highlighted that, as a referral agency, the EPA has not objected to the proposal or required any particular special conditions on a permit if one were to issue.
- 148 As we understand from these submissions, the landfill is the subject of a post-closure management plan, the carriage of this being overseen by an Environmental Auditor appointed pursuant to part IXD of the EP Act. A condition is proposed requiring final plans and the environmental

²³ Based on equation 2 at page 20 of the guidelines.

management programs to be reviewed by this auditor prior to works commencing.

149 While we accept that the management regime of the landfill is a separate matter dealt with through the EP Act regime, we nevertheless bear in mind that a purpose of the P&E Act and approvals given under it are intended to integrate decision making about the use and development of land across various legislative jurisdictions.²⁴

150 We are not satisfied that the process put to us would produce an orderly planning outcome. While Mr Pump is an experienced environmental engineer and it is his evidence that the proposal was consistent with or at the least would not interfere with the after-care management plan, he is not the person charged with ultimate responsibility for overseeing the post-closure management of the landfill. It seems to us to be counter to an orderly process to advise the environmental auditor at the end of the approval process rather than have that person's sign off that there are no unacceptable risks to the future management of the landfill prior to any design being submitted for planning approval. Our concerns in this regard extend to such issues as:

- Ongoing differential settlement of the landfill material resulting in subsidence and failure of the overlying clean fill material with subsequent loss in the cap's integrity;
- Impacts on current monitoring infrastructure such as leachate and landfill gas monitoring bores;
- Appropriate grades across the top and sides of the fill to avoid ponding and infiltration of rainfall.

151 We would expect any revised proposal to fill this site to consider this process rather than that which has been relied on in this application.

CONCLUSION

152 Amongst other objectives,²⁵ planning in Victoria seeks to:

- provide for the fair and orderly use of land;
- secure a pleasant living environment; and conserve and enhance the areas or places of scientific and aesthetic interest; and
- facilitate development in accordance with these and other objectives.

153 Our findings, as explained in these reasons, lead us to conclude that Calleja's proposed use and development of the subject land fails to achieve these outcomes. When tested against the purposes and objective of the Green Wedge Zone, ESO1 and relevant planning policies, we conclude that,

²⁴ As per s.4(2)(f) of the P&E Act.

²⁵ As per s.4(1) of the P&E Act

while there may be benefits in remediating the cap over the existing landfill, these benefits are not sufficient to outweigh:

- the risks to the amenity of surrounding landholders are neither fair nor orderly and we are not persuaded that the proposed management regime can adequately secure an acceptable amenity; and
- the unacceptable final landform in the context of the wider landscape setting and the purposes and objectives of the Green Wedge Zone, ESO1 and applicable planning policy.

154 On the balance of these and the other considerations we have set out, we conclude that the scale and extent of the proposed use and development of the land to dispose of clean fill is unacceptable.

155 Accordingly, we will affirm the decision of the Responsible Authority and direct that no permit be granted.

Ian Potts
Senior Member

Alan Chuck
Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P702/2016
PERMIT APPLICATION NO. P17604

CATCHWORDS

Hume Planning Scheme; Section 79 of the *Planning and Environment Act 1987*; Green Wedge Zone; Clean Landfill; Impacts on Amenity; Noise; Dust; Drainage and Water Supply; Impacts on Ecological Values; Impact on Landscape Values; Truck Traffic.

APPLICANT

Peter Burns

RESPONSIBLE AUTHORITY

Hume City Council

RESPONDENTS

Shu-Haur Ooi, John Gilfillan & Others, Victor Rudewych, Lizatte Grunewald, Rosemary West and Harry van Moorst for Green Wedges Coalition Inc

SUBJECT LAND

350 Konagaderra Road

OAKLANDS JUNCTION VIC 3063

WHERE HELD

Melbourne

BEFORE

Margaret Baird, Senior Member

Greg Sharpley, Member

HEARING TYPE

Hearing

DATES OF HEARING

6, 7, 8 & 9 December 2016 and 20, 21 & 22 February 2017

DATE OF ORDER

4 April 2017

CITATION

Burns v Hume CC [2017] VCAT 448

ORDER

- 1 Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following person is joined as a party in this proceeding:
Green Wedges Coalition Inc.
- 2 Pursuant to section 127 and clause 64 of schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting the following plans for the permit application plans:
 - Prepared by Keith Altmann and Associates circulated with sections and cross-sections by 3EE Dee Survey Drafting filed with the Victorian Civil and Administrative Tribunal on 20 October 2016.

- 3 In application P702/2016, the decision of the responsible authority is affirmed.
- 4 In planning permit application no. P17604, no permit is granted.

Margaret Baird
Senior Member

Greg Sharpley
Member

APPEARANCES

For Peter Burns

Mr J Cicero, solicitor, Best Hooper. He called the following expert witnesses:

- Mr K Altmann, engineer.
- Mr D Tardio, acoustic engineer.
- Ms C Dunstan, traffic engineer.
- Mr A Wyatt, landscape architect.
- Mr A Brennan, ecologist.
- Mr T Pollock, environmental engineer.

He called the following witness to explain revised plans:

- Mr H Peck, surveyor.

For Hume City Council

Mr J Livingston, town planner.

For John Gilfillan & Others

Ms A Tomkinson, town planner, Tomkinson Group (Days 1-4). Mr L Gilfillan (Days 5 & 6).

For Lizatte Grunewald

Mrs L Grunewald (Days 1-6).

Mr Grunewald appeared for Mrs L Grunewald and Mr J Gilfillan on Day 7.

For Rosemary West and Harry van Moorst for Green Wedges Coalition Inc [GWC]

Mr H van Moorst and Ms R West (on various days).

For Shu-Haur Ooi

Dr Shu-Haur Ooi (Days 1, 4-7).

For Victor Rudewych

Ms N Bannister, solicitor, Hall & Wilcox lawyers (Day 1).

INFORMATION

Description of proposal	It is proposed to use the subject land for the disposal of 263,000m ³ of clean fill. It is also proposed to construct buildings and works including an access track, wetland and sediment ponds, acoustic mounding and fencing, a work compound, fencing of native vegetation and some drainage works. Anticipated completion of filling is over four years.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. ¹
Planning scheme	Hume Planning Scheme [scheme].
Zone and overlays	Green Wedge Zone [GWZ] applies to the whole of the subject land. Environmental Significance Overlay – Schedule 1 Rural Waterways and Environs [ESO1] applies to part of the subject land. Heritage Overlay 267 applies to homestead ruins.
Permit requirements ²	Clause 35.04-1 to use the land for the disposal of clean fill. Clause 35.04-5 for earthworks involving more than 100m ³ of fill and buildings and works for a section 2 use. Clause 42.01 to carry out works.
Relevant scheme policies & provisions ³	Clauses 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 21, 22.02, 35.04, 42.01, 43.01, 57 and 65.
Land description	The subject land is 118.5 hectares and generally described as being on the north-east side of Konagaderra Road. Konagaderra Creek is a tributary of Deep Creek. Konagaderra and Deep Creeks mark the eastern and much of the northern boundaries of the subject land. A relatively narrow access lane of some 650 metres in length leads into the main part of the property. A dwelling is located toward the eastern end of the land. The Oaklands Park Estate, a rural living development with expansive communal open space, is to the south of the subject land.
Tribunal inspection	Day 4 of the hearing (accompanied) including the subject land, walking path associated with common property in the Oaklands Park Estate, and the property at No. 45 The Ridge. A further unaccompanied Tribunal visit occurred on 2 March 2017 when the corrected fill area had been pegged.

¹ The *Victorian Civil and Administrative Tribunal Act 1998* s4(2)(d) states a failure to make a decision is deemed to be a decision to refuse to make the decision.

² The parties agree that clause 43.01 is not triggered.

³ VC134 was gazetted on 31 March 2017. We have not invited further submissions from the parties. The amended policies align with submissions presented to us. There are no changes to the GWZ or ESO1 or other VPP provisions that could overcome the design and siting issues we identify.

REASONS⁴

INTRODUCTION

- 1 Mr Burns applied to the Hume City Council to use and develop the subject land for the disposal of clean fill. Approximately 263,000m³ of clean fill is proposed in multiple pods. The fill will have a depth that will vary between 0.1 and 15.5 metres at its highest point. A 3 metre high acoustic mound on the southern side will attenuate noise. Filling is to be staged, commencing from the east (subject to weather). The fill is surplus from development and particularly subdivisions in the Hume growth corridor.
- 2 The Council opposes the grant of a permit on multiple grounds. These focus on the adequacy of the application material, the extent of fill and mitigation measures that are unacceptable for this site including its landscape and environmental values, the safety of the surrounding road network, and amenity impacts. The applicant submits the proposal results in a net community benefit and its impacts can be appropriately managed. Any local dis-benefits need to be balanced with the community benefits that will arise from the proposal including the need to dispose of clean fill in growth areas and the limited time frame of filling that will see the land return to agricultural use. Respondents in this proceeding agree with the Council's position and raise a wide-range of issues that are addressed in these reasons.
- 3 The Tribunal must decide whether to grant a permit and, if so, what conditions to apply. Based on grounds ventilated by the parties, we consider the following questions in reaching a decision on the merits:
 - Is the use of the subject land for the disposal of clean fill acceptable in the GWZ?
 - Does the proposal adequately address runoff, drainage and water supply having regard to the land's environmental values?
 - Have potential fauna and flora impacts been adequately addressed?
 - Would the proposal have unacceptable outcomes with respect to noise, dust, and visual impact for residents and more broadly with respect to landscape values?
 - Is the use of the road network by trucks acceptable?
 - Do any other matters warrant refusal of the proposal?

⁴ We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons. At the commencement of the hearing the Tribunal made the following declarations:

- Mr Pollock has been appointed as a member of the Tribunal but has not been sworn in.

ADEQUACY OF INFORMATION AND PROCEDURAL MATTERS

The plans

- 4 The substituted plans in this proceeding comprise a 'proposed fill area plan' (or what became known at the hearing as the 'yellow plan' or the 'concept plan') prepared by Mr Altmann with sections and cross-sections of various revision dates prepared by 3EE Dee Survey Drafting.
- 5 On the afternoon of 9 December 2016 we undertook an accompanied inspection of the subject land and the Grunewald property. [We also viewed the surrounds, including The Ridge, and other locations, unaccompanied.] It became apparent to the Tribunal that there are errors on the 'yellow plan' such as notations marking an existing fence as the edge of one of the native vegetation areas. We raised this with the parties. As confirmed by our order of 12 December 2016, we provided an opportunity for the applicant to advise the Tribunal and all parties about matters requiring correction or clarification. We also required the applicant to peg out some edges of the proposed fill area and proposed shallow wetland, with poles, to assist a further site inspection.
- 6 Subsequently, revised plans were filed with the Tribunal and circulated to the parties. These are a set of seven sheets, marked version A, prepared by Survey Management Solutions [SMS plans]. There are apparent differences between the application plans (and specifically the 'yellow plan') and the SMS plans. The applicant called the surveyor, Mr Peck, to explain the differences. He translated the survey and sections from plans as substituted in this proceeding to a plan showing the fill relative to existing fences and title boundaries. Consequently, the location of the fill and associated works including a proposed shallow wetland to the east of the fill are differently positioned when compared with the 'yellow plan'. In addition, the proposed access into the site and associated elements such as a work compound and rumble crossings are shown in a different position. The SMS plans also locate the proposed temporary noise mounds.
- 7 Some of the evidence relies on dimensions and information on the 'yellow plan' while some relies on the survey material aligned to title. Variations between the plans were addressed by the experts in evidence in chief and cross-examination. The differences and inconsistencies in information and assumptions in the permit application and submissions and evidence have complicated our assessment. We have undertaken the hearing in a way that has sought to ensure that all parties, including the permit applicant's witnesses, have had a fair opportunity to clarify and correct inconsistencies and respond to errors through submissions, expert evidence and replies.

-
- The presiding member has no family or other known associations with parties or persons lodging statements of grounds in the names of 'A McLean' and 'D & G Baird', these persons sharing the same married/maiden family surnames.
-

Further, in assessing the proposal, we have taken into account modifications to the plans and mitigation measures identified in expert evidence, such as repositioning the access road further to the west.

Proposed CEMP

- 8 A draft Construction and Environment Management Plan [CEMP] dated 6 September 2016 is part of the application material. It has been prepared by Mr Altmann. Through Mr Altmann's evidence and cross-examination, it is apparent that there are many items that would need to be reviewed or amended from the draft CEMP to address a range of construction and operational matters. Examples are:
- Sediment management and site drainage.
 - Dust management to accord with the expert dust evidence.
 - Noise management to accord with the expert acoustic evidence.
 - Details of the work compound.
 - How rocks would be managed by, for example, being buried or taken off-site (rather than crushing), details of stockpiles and topsoiling, and waste removal.
 - Protection of the native vegetation area which is said to be "*at risk from proximity to the works area and needs protection*",⁵ including management by some grazing.
 - Detailed design for the site access to accord with the expert traffic evidence.
 - The need for a detailed monitoring and compliance regime.
 - Information relating to rehabilitation processes.
- 9 An addendum to Mr Altmann's evidence offered some additional detail on, for example, the bulldozer operation and staging of the fill operation. Mr Altmann also addressed some matters in oral evidence.
- 10 We return to a number of the issues referred to above, below.

Proposed two lot subdivision

- 11 The Tribunal was informed prior to the resumed hearing on 20 February 2017, that a permit application had been lodged with the Hume City Council by Beveridge Williams on behalf of Survey Management Solutions Pty Ltd to subdivide the subject land into two lots. This application was dated 30 January 2017 and appears to have been received by the Council on 7 February 2017. It is proposed to subdivide the land into one lot of 76.08 ha (Lot 1) and one lot of 42.42 ha (Lot 2, containing the existing dwelling on the subject land). The application also proposes an access easement. The landfill in the current proceeding before the Tribunal would be contained within proposed Lot 1.

⁵ Page 4, at section 2.1.9.

- 12 The lodgement of this permit application has raised significant concern for respondent parties in this proceeding. Correspondence to this effect was provided to the Tribunal and other parties. The respondents question both the motives and the pre-emptive nature of this application, particularly as it coincides with a foreshadowed request by the applicant to amend the name of the applicant for review to “Creative Landfill”.
- 13 We have not addressed potential implications arising from the proposed subdivision, should it ultimately be approved, for the permit application we are considering given our conclusion on the application’s merits. We have not been persuaded to adjourn the current proceeding to await the outcome of the subdivision application. We are able to determine this proceeding.

Request to amend the name of the permit applicant

- 14 As alluded to above, between Days 4 and 5 of the hearing, the applicant filed a request to amend the name of the permit applicant to Creative Landfill Pty Ltd, as an associated company has entered into a contract to purchase part of the subject land (being proposed Lot 1 referred to above).
- 15 This amendment request was opposed by some respondent parties who sought to elaborate on its implications for the merits proceeding as well as wider-ranging issues about the operation of clean fill disposal sites. The request was subsequently withdrawn by Mr Cicero. We refer to submissions questioning the suitability of the operator later in these reasons.

Adjournment requests

- 16 At several stages through the proceeding, requests were made for an adjournment. Examples include:
- A request by the respondents represented by Mr Gilfillan and the GWC for an adjournment to provide further information to the Tribunal with respect to the proposed two lot subdivision and the proposed operator and to await the outcome of the two lot subdivision application.
 - A request by the applicant for an adjournment upon discovery of errors in some of the statements of evidence on the basis that the respondents may wish additional time to consider updated material to be relied upon by the witnesses.
- 17 We addressed these requests at the hearing. We record that the opportunity to file written replies after the hearing⁶ has, in our view, provided an adequate opportunity for the parties to properly respond to the case presented by the permit applicant. Moreover, both the responsible authority and respondents present at the hearing indicated their strong wish to proceed with the hearing rather than to adjourn to later hearing days.

⁶ As recorded below.

Clause 60, schedule 1 of the VCAT Act 1998

- 18 Ms Tomkinson and Ms West for the GWC submit that there are grounds for the Tribunal to request the involvement of the Minister for Planning under clause 60 of schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*. Relying on some comments made in *Yarra Ranges SC v Bibiano* (Red Dot) [2016] VCAT 1881 [**Bibiano**], they submit issues relating to the disposal of clean fill in Melbourne's fringe areas warrant State-level consideration. In particular, these are said to include avoidance of the landfill levy, inadequate recognition in the planning scheme for a proper assessment of clean fill site applications, and the relationship with State waste management policies. The Tribunal should invite the Minister for Planning to review whether this land use should be prohibited having regard to the State-level impacts on agricultural land uses, environmental and landscape preservation, State revenues and State waste management policy.
- 19 Clause 60 of schedule 1 applies where the Tribunal considers:
- (a) the proceeding raises a major issue of policy; and
 - (b) in the case of a proceeding for review of a decision under the *Planning and Environment Act 1987*, the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives.
- 20 The matters raised by the respondents may be ones that the State Government wishes to address. But we have not concluded that both of the above criteria are met on the facts of this case. Nor do we exercise powers available to us to invite the Minister for Planning to make a submission or to refer the matter to the Governor in Council with recommendations.

Rights of reply

- 21 The Tribunal allowed written rights of reply at the end of the hearing and comments on 'without prejudice' permit conditions. The Tribunal's order of 23 February 2017 set out this process. The applicant was required to file conditions by 1 March 2017. Comments on these conditions and replies generally were required by 15 March 2017. The applicant then provided a further reply, as allowed for in the Tribunal's order.
- 22 A number of the matters contained in the respondents' reply submissions go well beyond responding to the case presented by the applicant including some seeking to introduce new material. An example is reference to frog recordings in December 2016. Others make personal criticisms that do not assist our consideration.
- 23 Consistent with the principle of procedural fairness, by which we are bound, we have not considered any material that was not properly in reply as other parties have not had the opportunity to address it by submissions or, where appropriate, through evidence.

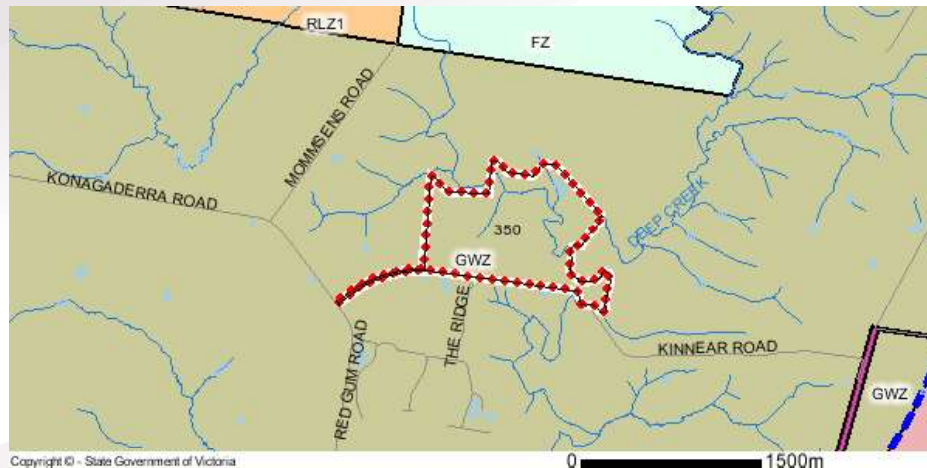
- 24 Further, we do not accept the permit applicant's comment made at the hearing and in its right of reply that the Tribunal does not have the same expertise as many of the experts that appeared before it so as to reject the expert evidence particularly of Ms Dunstan, Mr Pollock, Mr Brennan and Mr Tardio. The Tribunal is a very experienced expert body. We are able to fairly and independently assess the evidence of these and other experts.

PLANNING CONTEXT

Applicable Zone and Overlays

Green Wedge Zone

- 25 The subject site and surrounding land are within the GWZ as shown in the property report extract below. This area is positioned between the Hume and Sunbury growth corridors. The Oaklands Park Estate is a rural living estate to the south of the subject land and proposed fill area.



- 26 It is common ground between the parties that a permit is required to use and develop the land for the disposal of clean fill including earthworks.⁷ We have had regard to the purpose of the GWZ that includes (inter alia):

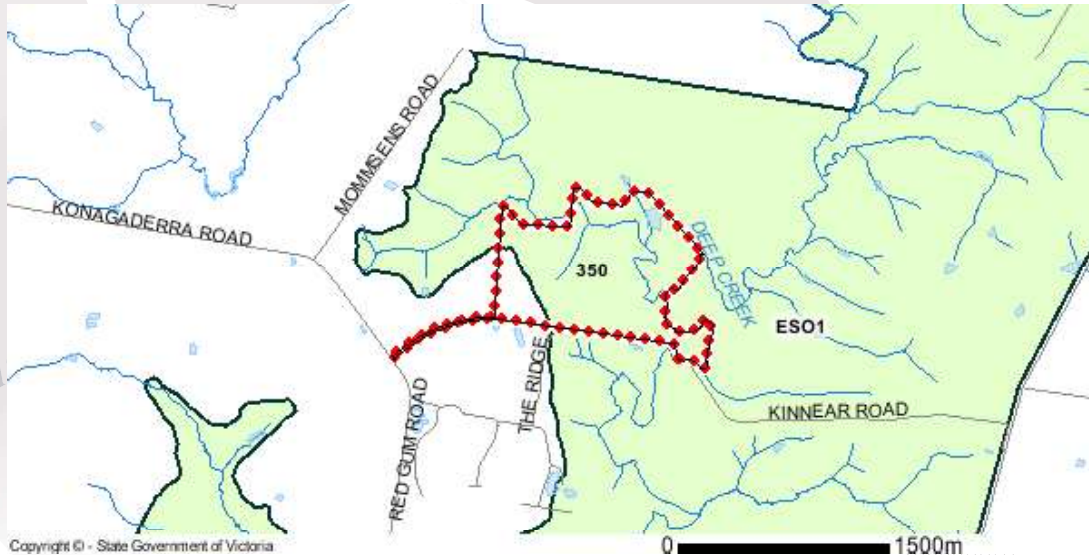
- To provide for the use of land for agriculture.
- To recognise, protect and conserve green wedge land for its agricultural, environmental, historic, landscape, recreational and tourism opportunities, and mineral and stone resources.
- To encourage use and development that is consistent with sustainable land management practices.
- To protect, conserve and enhance the cultural heritage significance and the character of open rural and scenic non-urban landscapes.
- To protect and enhance the biodiversity of the area.

⁷ Consistent with the Tribunal's decision in *Calleja Properties Pty Ltd v Hume CC* (Includes Summary) (Red Dot) [2016] VCAT 253.

- 27 We have had regard to the decision guidelines in clause 35.04-6 particularly under the headings of general issues, rural issues, environmental issues and design and siting issues. We do not recite these here.

Environmental Significance Overlay Schedule 1 Rural Waterways and Environs

- 28 The fill area partly extends over land in ESO1. The overlay area is shown in the property report extract below. A permit is required to carry out works including earthworks in the ESO1 area.



- 29 The statement of environmental significance is:

The rural areas of the municipality contain a number of waterways which are significant visual and geological [sic] significant features of the rural landscape and which serve important environmental, drainage and recreation functions. These waterways provide a habitat for a range of flora and fauna species and make a significant visual contribution to the overall character, amenity and identity of the municipality.

- 30 Environmental objectives to be achieved are listed under the headings of ecological function, waterway function, recreation use, landscape character and heritage. We have fully considered these. There is a focus on the quality of the waterways and their environs, including native escarpment and planes vegetation, habitat for native animals, as well as the open space, landscape and scenic qualities. Under the heading of landscape character is the following environmental objective to be achieved:

To ensure that the scenic qualities and visual character of waterway corridors, creek valleys and their surrounding environs are not compromised by the inappropriate siting of buildings, the placement of fill, the removal of soil, or lack of screening vegetation. [Tribunal emphasis added]

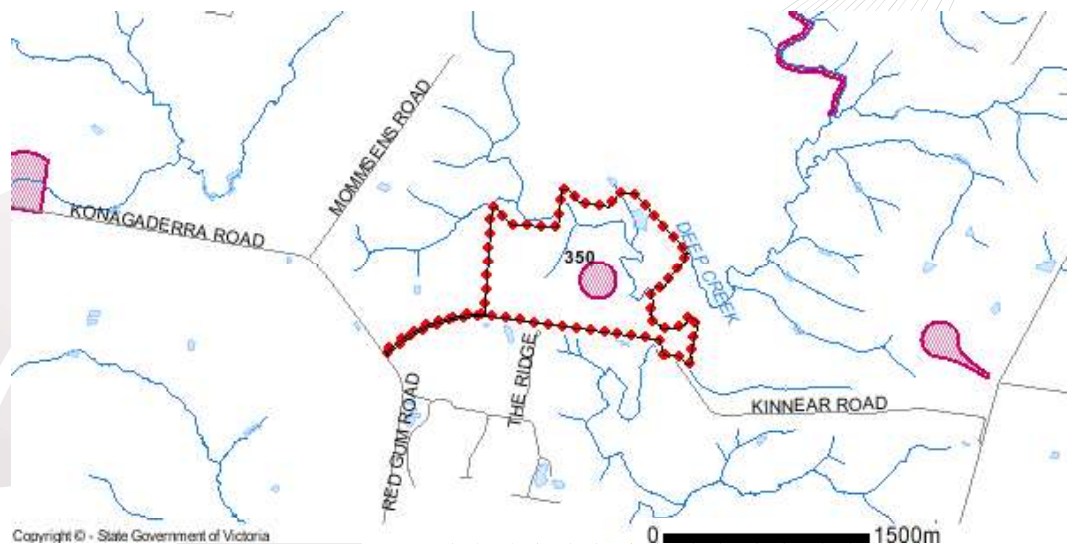
31 Decision guidelines are contained in ESO1 that we have fully considered. They include (inter alia):

- The effect of the height, bulk and general appearance of any proposed buildings and works on the environmental values and visual character of the waterway.
- The need for landscaping or vegetation screening.
- The extent that buildings or works are designed to enhance or promote the environmental values of the waterway and the visual character of the waterway corridor.

32 In *Calleja Properties Pty Ltd v Hume CC* (Includes Summary) (Red Dot) [2016] VCAT 253 [**Calleja**], the Tribunal referred to the provisions of ESO1 requiring a permit where more than 100m³ of fill is proposed as being direct response to the purposes of addressing landscape and environmental values.⁸ The background to the inclusion of the permit trigger is explained in the report of the independent panel considering Amendment C143 to the Hume Planning Scheme.⁹

Heritage Overlay and Aboriginal cultural heritage

33 Heritage Overlay Schedule 267 applies to the site, as shown on the property report extract below. HO267 is the Plover Plains homestead ruins and outbuildings.



34 Plans accompanying the application do not show the location of the ruins. The consultant's report accompanying the permit application states that the ruins are located at a distance of 60 metres from the fill site.

⁸ [74].

⁹ Panel report Hume Planning Scheme Amendment C143 Earthworks dated 29 April 2014, [4 of 19], [6 of 19], [7 of 19].

35 It appears to be common ground between the parties in this proceeding that the proposed fill and associated works area do not affect the ruins, that the actual location of the ruins is different to the mapped area, and that the fill area is not within the mapped HO350.

36 While part of the subject land is within an area of Aboriginal cultural heritage sensitivity, the parties agree that a cultural heritage management plan is not required under the provisions of the *Aboriginal Heritage Act 2006* and *Aboriginal Heritage Regulations 2007* based on the location of the activity area outside the identified area of sensitivity, the location beyond 200 metres from the waterway, and the nature of works. We accept that position following our consideration of the *Aboriginal Heritage Act 2006* and *Aboriginal Heritage Regulations 2007*.

Policy context

37 We have been referred to the Tribunal's findings in *Creative Landfill Pty Ltd v Hume CC* [2016] VCAT 1075 [**Creative Landfill**] with respect to strategic context for land in this area. Its decision is of interest, and is helpful, as the proposal in that case was also for the disposal of clean fill and earthworks in the GWZ involving a site [Mt Ridley Road property] that is several kilometres from the subject land in our proceeding.¹⁰

38 We agree with the Tribunal's comments¹¹ that the purposes of the zone along with the purposes of Metropolitan Green Wedge land (clause 57) indicate land in the GWZ is to be protected from uses and/or development that would diminish, amongst other values, those related to agriculture, the environment and landscape. It is not intended that such land be used for urban purposes that could otherwise be located in urban areas. Rather use and development of the land can include agricultural and rural uses as well as uses and development that might support the use and development of urban areas, but are incompatible with sensitive urban/residential land uses. These are assessed on their merits having regard to policy, the GWZ purpose and relevant decision guidelines.

39 It is clear from the GWZ purpose and statement of environmental significance in ESO1 that biodiversity, landscape and environmental values are to be given weight.¹² That is, there are specific landscape values to be considered in addition to water quality,¹³ biodiversity,¹⁴ and amenity.¹⁵

¹⁰ We note, however, that the strategic context is not identical because, in *Creative Landfill*, although part of the subject land was within ESO1, the fill area and proposed works were outside the ESO area and no permit was triggered under the ESO [paragraph 12].

¹¹ [14].

¹² While these were variously referred to in *Creative Landfill*, in the current proceeding before us, the proposed use, development and works on the subject land must be assessed under the provisions of clause 42.01 and Schedule 1. This was not the situation with respect to the Mt Ridley Road property.

¹³ State policy is also relevant to this matter per clauses 14.02-1, 14.02-2 and 14.02-3. Local policy includes clause 21.05-2.

¹⁴ State policy is also relevant to this matter per clause 12.01.

¹⁵ Amenity is referred to in ESO1. There are wider amenity considerations such as with respect to air and noise through clause 13.04.

- 40 Other parts of the Local Planning Policy Framework provide guidance in our assessment. They include:
- Clause 21.05-4 in relation to landscape. It describes a number of landscape features of value within the municipality such as deeply incised valleys including Deep Creek. Konagaderra Creek is a tributary of Deep Creek. Apart from these valleys and a small number of high points that are valued as scenic lookouts, the remaining area is characterised as flat, sparsely treed expanses of wide open cleared grazing land.
 - Clause 21.06-6 in relation to Rural Areas, includes strategies to:
 - Encourage rural land uses which do not have the potential to cause detriment to the surrounding area to locate at the urban periphery.
 - Ensure that new development is located and designed to have minimal visual impact on the rural character of the area.
 - Encourage the use of rural land for rural purposes and the protection of the rural landscape from incompatible development.
- 41 Clause 22.02 relates to the Rural Land Character and Urban Design Local Policy. This policy applies to land included within the Rural Zone, Environmental Rural Zone or Rural Living Zone and does not apply to the GWZ. We note its objective to “*minimise the visual impact of development on and near prominent hilltops, steep slopes and ridgelines*”. This aligns with the GWZ and ESO1 to which we have referred above but the policy itself is not applicable.
- 42 The Tribunal must decide whether the proposal will produce an acceptable outcome having regard to the relevant policies and provisions in the scheme.
- 43 Net community benefit is central to reaching a conclusion. Clause 10.04 of the scheme requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.

Strategic and land use issues

- 44 The issues ventilated by the parties with respect to the strategic context and acceptability of the land use (in principle) focus on:
- A trend toward the use of land within the GWZ for clean fill to avoid levies associated with designated landfill sites.
 - The principle of using land in the GWZ for fill.
 - The loss of agricultural land.
 - The extent to which agricultural land can be rehabilitated.

Disposal of clean fill in GWZ

- 45 The current case is one of several to come before the Tribunal with respect to the disposal of clean fill on sites within the Green Wedge.¹⁶ Cases where the merits of the permit application have been determined are:¹⁷
- *Calleja* involved a proposal for an estimated 320,000m³ of clean fill at a site in Keilor. The land and environs were in the GWZ and partly within a Public Acquisition Overlay, Land Subject to Inundation Overlay and ESO1 under the Hume Planning Scheme. The Tribunal determined to refuse a permit for reasons that focus on the impact upon the landform and landscape values, impacts upon the amenity of specific nearby properties, and a lack of confidence about the ability to manage amenity impacts based on the proposal advanced.
 - *Creative Landfill* involved an estimated 576,000m³ of clean fill on land in Yuroke [Mt Ridley Road site]. The land and environs were within the GWZ and partly within a Public Acquisition Overlay and ESO1 under the Hume Planning Scheme. No permit was triggered by ESO1. A permit was granted for reasons set out in the decision. The Council supported this proposal based on amended plans.
- 46 Another matter, *Fleming v Moyne SC* [2016] VCAT 643, involved a proposal for the disposal of an estimated 550,000m³ of clean fill within a quarry at Killarney, between Warrnambool and Port Fairy. The land and environs were within the Farming Zone and a Significant Landscape Overlay. The Council's decision was set aside and a permit did not issue primarily because of unacceptable potential amenity impacts with respect to noise and dust. These concerns were not outweighed by potential benefits including restoration of the landscape.
- 47 Ms Tomkinson refers to the cumulative impacts of clean fill activities and precedents for such activities while Mr Livingston submits the planning scheme is relatively silent on how to treat proposals such as this, although he accepts the application must be addressed on its merits. The GWC made wider-ranging submissions that we do not recite. Many of these submissions are not directly relevant to our consideration and assessment.
- 48 Amendment C143 to the Hume Planning Scheme has sought to regulate the disposal of fill to ensure that environmental and other impacts are avoided or mitigated.¹⁸ The Amendment C143 panel did not take the view that clean fill sites are contrary to the purpose of the GWZ, rather, it accepted the Council's submission that regulation was required to ensure environmental and other values of the green wedge were safeguarded.¹⁹

¹⁶ Notably, *Creative Landfill Pty Ltd v Hume CC* [2016] VCAT 1075, *Yarra Ranges SC v Bibiano* (Red Dot) [2016] VCAT 1881, *Fleming v Moyne SC* [2016] VCAT 643.

¹⁷ *Bibiano*, as cited, was a declaration proceeding before DP Dwyer.

¹⁸ Panel report Hume Planning Scheme Amendment C143 Earthworks dated 29 April 2014, [10 of 19], [12 of 19].

¹⁹ *Ibid.*, [12 of 19].

- 49 As already indicated, we are not persuaded to adjourn this proceeding as requested by the GWC. Nor can or would we agree with the GWC and respondents that the Tribunal should essentially (in our words) “take a position” and not determine more clean fill applications pending further consideration at State level. These submissions misunderstand the Tribunal’s powers and obligations. The Tribunal must assess the application before it. The proposed land use is one for which a permit can be granted. We have the information available to enable a decision to be made by the Tribunal.
- 50 The proposed landfill is a temporary operation to support urban development, essentially managing a by-product of development. The current planning scheme provides a framework that enables our consideration of the permit application. More specific guidance, as suggested by the Council and respondents, may be beneficial²⁰ but we are clear on the aims of the GWZ and the strategic and physical contexts within which we must assess the proposal, such as with respect to the values of ESO1 within which the fill area partly falls, and other considerations in the GWZ purpose and decision guidelines.

Loss of agricultural land

- 51 Respondents express concern about the loss of agricultural land as a consequence of the landfill. The subject land is in a degraded state with extensive weed invasion. It is being used for cattle grazing and the intent is for agricultural use to continue outside of the fill area and surrounds. We have not been presented with arguments or material to suggest to us that is not possible, noting an ample water supply is available to the balance of the land. We also have no reason to conclude that the operation of surrounding farms would be adversely affected.
- 52 Once the fill operation is completed (four years), with rehabilitation and re-shaping of the land, the land would continue to be used for farming purposes. The proposed landfill is a temporary operation which does not preclude future agricultural activity, albeit on varied topography, and into the longer term.

Rehabilitation

- 53 There is limited information as to how the fill area would be rehabilitated. We have assumed that this matter can be addressed, including staged landscaping, revegetation and weed management. It would have been useful to be provided with more details about the final fill levels so as to be satisfied that the final landform would be stable and erosion properly addressed. This is related to the next topic for our consideration, the management of stormwater and drainage.

²⁰ Such as occurs with mining applications.

SURFACE WATER, DRAINAGE AND WATER SUPPLY

- 54 Mr Altmann provided an overview of the proposed construction methodology and operating procedures to be used in relation to the landfilling. Subsequent to his evidence and our inspection, as noted earlier, with our leave, a revised set of layout plans were presented by the proponent to accurately define the location of the proposed works. We were advised that the proposed method of operation was not affected by the revised plans. The revised plans are, on Mr Peck's evidence, based on site survey and therefore are the most accurate available to the Tribunal. We note that they have re-positioned the fill compared with the 'yellow' or 'concept' plan.
- 55 Broadly summarised, the applicant submits that there will be no deleterious impact on the creeks, their natural systems or environs, from the proposed landfill relying on the evidence of Mr Brennan and Mr Altmann. This includes with respect to drainage, runoff, and on native flora and fauna. This part of our reasons focuses on drainage, water quality and management. We refer to flora and fauna again later.

Stormwater and drainage

- 56 Overland flow management includes the following key components:
- Both overland flow from the west of the western fill area and from the fill is to be collected in an open drain running north to south along the western side of the fill and then west to east along the southern side of the fill to a proposed shallow wetland approximately 50 metres x 80 metres situated below the toe of the fill slope on the eastern end of the eastern fill area.
 - Overland flow from the dam situated in the south-west corner of the works area is proposed to drain to the proposed shallow wetland via open channel.
 - Overland flow to the north of the western fill area is proposed to drain via an open drain to an existing drainage gully to the north of the fill area. Stormwater passes through a proposed exclusion/protection fence prior to discharge to the gully. The proposed exclusion/protection fence is to be constructed using star pickets with an appropriate filter material connected on the upstream side of the fence. This fence is to be designed to minimise silt leaving the works area.
 - Overflow from the shallow wetland is proposed to discharge via a contour drain constructed along the north-east corner of the eastern fill area. Overflow from the drain would pass through the exclusion/protection fence prior to discharge both downhill and into the native vegetation area.

- All stormwater discharge from the northern and north-eastern side of both the western and eastern fill areas is proposed to travel overland through the exclusion/protection fence prior to discharge into the native vegetation area and associated gully.
- 57 The two gullies mentioned above discharge into a dam situated adjacent to the bottom of the escarpment prior to overflowing into a gully which discharges into Konagaderra Creek.
- 58 We are satisfied that the proposed drainage system on the western and southern sides of the fill area could be designed to intercept silt both from the fill and off-site. Following settlement in the shallow wetland, the discharge of water via the contour drain can be designed to be of a standard suitable for overland discharge into the native vegetation area.
- 59 However, we are not persuaded by the expert evidence that the construction of a star picket and material silt fence on land with an approximately 1:15 cross fall; as close as 5 metres from the base of the fill area with an external slope of 1:6 and a height of up to 15.5 metres²¹, will be able to stop the discharge of silt laden water into the native vegetation area.
- 60 We are concerned that the velocity of stormwater down the external face of the fill, which we were advised is likely to have a very high clay content, will result in both erosion of the outer face of the fill prior to and after the establishment of any grass cover. This will potentially have a significant detrimental impact on the native vegetation area.
- 61 As the silt fence is not designed to be contoured, it is likely to direct silt laden stormwater to the low points with further increased risk of contaminated discharge from the works area due to breaching of the fence under high flows or silt loads.
- 62 Due to the cross fall of the land between the fill area and the silt fence and the narrow area in which to work, we consider that effective maintenance of this area and in particular of the silt fence will be difficult to undertake and monitor, as we discuss below at paragraphs 74 – 75.

Implications on environmental values

- 63 Mr Brennan, a flora and fauna specialist, states that provided the overland flow rates stay similar to at present and the water quality remains the same, native flora will not be impacted. His evidence is based on the assumption that no more than 0.3 ha of exposed soil would occur at any one time; but that a larger exposed area could be addressed in the detailed design phase. Mr Brennan also states that “*fill failure is of great concern*” as it could impact on the flora and fauna to the north. Mr Brennan is satisfied that this could be managed and engineered as part of the detailed design phase by applying best practice design procedures to reduce the potential for silt entering the fenced off native vegetation area.

²¹ The high point is at the north-east end of the western fill, based on the SMS survey-based plans.

- 64 We have not been provided with specific information in relation to the maintenance of flow rates from the site onto the adjacent remnant vegetation area, as we identified at the hearing. We note, however, that the western pods area drains to the north-east into the remnant vegetation area whereas, post construction, the western pods area would drain firstly to the west and south then to the east to discharge into the proposed wetland. We would anticipate that this configuration will potentially increase the volume discharged onto the eastern-most area of remnant vegetation while reducing the volume of water discharged onto the western-most area of remnant vegetation.
- 65 Mr Pollock said that in undertaking the analysis of dust emissions he had identified that an area of up to 1.44 ha would be the erodible surface area of one pod and, as noted in both Mr Pollock's and Mr Tardio's evidence, due to potential issues associated with noise and dust, it would be necessary to have pods open in both the western and eastern areas concurrently.
- 66 In view of the discrepancy, the Tribunal asked Mr Brennan to express an opinion in relation to the impact on the native vegetation if the exposed area was increased to in excess of 2 ha. He says that "*the smaller the exposed area the better*". However, as the existing site could be ploughed, Mr Brennan concludes that there is no increase in potential for adverse impacts on the native flora situated on the immediately adjacent side of the site due to dust.
- 67 Mr Altmann, a soil and pavement specialist who appeared on behalf of the proponent, states that both the proposed fill material and existing material on-site are volcanic clay and are considered to be highly reactive and dispersive. In his opinion, the topsoil once grassed would provide a suitable cover, however, the batter near the native vegetation area would require 'hydro-mulching' (spray sealing) to maintain the surface until a good cover of grass was established. He indicates that for approximately four months of each year the weather conditions would not be suitable to spread topsoil.
- 68 The Tribunal is unsure what the impact of this would be in relation to the requirement to stabilise the north-eastern outer embankment of the western pods if the outer embankment is being constructed over the summer period when construction activity is likely to be higher due to the better weather.
- 69 The construction of a silt dam and associated wetland would be required to maintain water quality prior to contoured discharge from the works area. But, due to the very confined area between the toe of the fill and the silt fence, we do not consider it is feasible to accommodate this design change by a permit condition. There is not enough available space; modifications to the fill area batter and shape cannot simply be made without consideration of impacts on the design. Further, as stated above, we have not been provided with any information in relation to current or predicted flow rates or water quality. We are not satisfied that the proposed works can be constructed to either maintain the current off-site flow rates or water quality to the native vegetation area, similar to at present.

- 70 Melbourne Water as a referral authority, particularly in relation to stormwater discharges to Deep Creek, has not opposed the development on the site subject to a number of conditions. One of these includes the development of a Stormwater Management Plan to the satisfaction of Melbourne Water. We are not persuaded that this condition will resolve our concerns about silt laden water from the works area into the native vegetation area.
- 71 Mr Cicero notes that one of the objectives of the ESO Schedule 1 has “*a considerable emphasis on protecting the health and vitality of the natural waterways and their environs.*” We agree. However, we do not accept his submission that the “*separation distance between the waterways and the subject land is so great that it cannot be said that what is proposed will have any direct impact on those waterways.*” We acknowledge that the Konagaderra Creek is approximately 600 metres from the edge of the fill, but, given the difference in elevation of in excess of 60 metres between the toe of the landfill and the Konagaderra Creek, any failure to maintain sediment on the site following a major storm could result in the very rapid discharge of sediment into the Konagaderra Creek.
- 72 This grade is relevant given that the proposed method to maintain sediment on the site in the vicinity of the head of the major gully entering an area of remnant vegetation prior to discharge into Konagaderra Creek is the construction of a star picket and fabric sediment fence close to the bottom of a fill area with a maximum height of 15.5 metres and an outer slope of 1:6. We are concerned that the proposed star picket and fabric silt fence is more applicable to a temporary construction site silt control than a longer term water quality management system.
- 73 Mr Altmann said that two additional silt fences are proposed to be constructed in the fenced off native vegetation area, part way down the northern gully to further assist in minimising the potential for the discharge of silt to the dam below. No information was provided on the construction and maintenance details of the proposed silt fences apart from the proposed use of star pickets and fabric on the approximately 1:10 slope.
- 74 We are further concerned that any failure of the silt fences could be significant and on-going due to the combination of the following:
- The isolation of the potentially affected area, which is not visible from any public areas, adjacent homes or the works area.
 - The physical difficulties in accessing the area affected by any silt runoff, particularly after a storm event.
 - The potential impact on the remnant vegetation area in order to remove any silt or construct the additional silt fences.
 - The potential impact on the water quality in the dam at the base of the major gully.

- The potential impact on Golden Sun Moths which have been observed immediately adjacent to the gully (as we refer to again below).
- The potential impact on water quality in Konagaderra Creek and therefore Deep Creek.

75 Our concerns are based on the following:

- The substantial height of the outer face of the western fill area.
- The proximity of the fill structure to the adjacent fenced off native vegetation areas.
- The reactive and dispersive nature of the fill material.
- The potential for silt to rapidly enter the Konagaderra Creek in the event of failure of the silt fence.
- The minimal infrastructure proposed to maintain all silt on-site.
- The lack of analysis in relation to off-site water quality and flow rates.
- The potential for impacts on the adjacent native vegetation areas.

76 Neither the application plans nor revised plans, nor the CEMP, adequately address these issues.

77 We are not satisfied that the values identified in ESO1 are acceptably addressed or that the environmental issues cited in clause 35.04-6 have been adequately responded to. Our concerns on these matters cannot be deferred to being addressed by permit conditions.

Security of water supply

78 Over the course of the hearing, various issues and queries arose with respect to the amount of water required to undertake activities such as dust suppression and the security of that water supply. The proposal relies on the very large dam on the land and existing pumping facilities to bring that water to existing tanks on the southern side of the fill area.

79 As alluded to above, we have no water balance and limited information with respect to the actual volumes required (assuming dust suppression occurs in accordance with Mr Pollock's evidence).

80 We were advised that due to the presence of a 114 ML dam on the property owned by Mr Burns and associated pumping facilities, rising main and storage tank, an adequate supply can be provided to ensure that water trucks at the landfill site meet any required watering regime. We accept the applicant's position that water can be secured for the proposed operation using the existing dam for which licences exist.

81 We refer to the water supply to the dam said to house the Growling Grass Frog below.

FAUNA AND FLORA

- 82 The applicant submits the proposal does not involve the removal of native vegetation; all native vegetation and fauna habitat will be fenced, protected and managed; no EPBC-listed species or ecological communities are likely to be directly or indirectly affected; and recommended mitigation measures should minimise potential impacts upon biodiversity and are included in the CEMP.
- 83 The applicant relies on Mr Brennan's evidence in support of submissions that there will be no deleterious impact on flora or fauna. The proposal does not remove native vegetation and existing native vegetation will be protected by fencing. Mr Brennan's evidence is that no EPBC-listed flora or ecological community is likely to be directly or indirectly impacted by the proposal. In addition, his evidence is that the mapped Natural Temperate Grasslands of the Victoria Volcanic Plain will be retained. Mr Brennan recommends mitigation measures that he says should minimise potential impacts on biodiversity and are part of the CEMP.
- 84 The applicant emphasises that the proposal fill area is only partly within ESO1, avoids areas of native vegetation, and is a considerable distance from the Deep Creek or Konagaderra Creek without any identified impacts on those waterways and associated habitat. Further, submissions by respondents alleging the presence of the Growling Grass Frog [GGF] and Golden Sun Moth [GSM] should not be preferred to the expert evidence that has been tested through cross-examination.
- 85 These submissions and the expert evidence respond to the respondents' case that includes the following with respect to EPBC-listed species:
- Currently drainage from the west of the fill site and in particular overflow from the existing dam adjacent to the proposed work compound enters a dam (known as the 'Frog Dam' at the hearing so as to distinguish it from other dams) situated at 310 Konagaderra Road. Respondents say the dam is inhabited by the GGF and sought to submit information verifying their submissions. They believe diversion of the overflow from the dam to the proposed shallow wetlands would impact on the water supply to the dam and therefore may impact on the frog population in the dam. Alternatively, if overflow from the work compound dam was allowed to continue flowing into the Frog Dam, silt or contaminants may affect the frog population.
 - A report prepared for the permit applicant based on an earlier proposal for filling in areas identified individual GSMs but Mr Brennan now states that the GSM is unlikely to be present.
 - Mr Brennan's evidence states the Striped Legless Lizard can be presumed to be present in the area.

86 Mr Brennan does not consider any of these species would be adversely affected. He acknowledges that the GGF had been recorded in a pool in the Konagaderra Creek and that *“the gully would serve as dispersal habitat, only for this species – either moving out of the more permanent part of the drainage system during wet times, or retreating back in dry times. The small dam in the gully below the proposed fill site lacks fringing vegetation, rocks or logs and is considered sub optimal habitat for this frog.”* He also opines that the most likely access to the Frog Dam is via the land to the south-east, rather than across the proposed fill area to the north of the Frog Dam.

87 Mr Brennan’s statement acknowledges a targeted survey in January and February 2013 by Brett Lane and Associates where one GSM was recorded in the vicinity of the study area the subject of that report: but did not specify the exact location. He also notes the 2011 report by Wildlife Profiles Pty Ltd, which recorded 12 to 15 male GSMs in the vicinity of the particular study area in December 2010 but says no formal report confirming this sighting has been seen. Mr Brennan said that a survey in 2012 did not observe the GSM and, in any event, the proposal is unlikely to affect the GSM because of the small fill area exposed at any one time, planned revegetation measures, and the provision of sediment and drainage controls.

88 We further note with respect to Mr Brennan’s evidence that:

- The study area for the 2011 report is based on a proposed landfill location that is not the same as the proposed landfill location in the permit application before us.²²
- The development area upon which Mr Brennan’s evidence is based in the ‘yellow plan’ rather than the revised SMS plan.
- Based on the eastings and northings provided in the Wildlife Profiles report and the map attached to email train from Peter Burns to Keith Altmann dated Thursday, 23 December 2010, the siting of 12 to 15 male GSMs was outside of the proposed fill area in the current application and was adjacent to the gully downstream of the western fill area.

89 We are required to consider the impact of the use or development on the flora and fauna on the site and its surrounds. We must consider the need to protect and enhance the biodiversity of the area, including the retention of vegetation and faunal habitat. We further must address the need to revegetate land including riparian buffers along waterways, gullies, ridgelines, property boundaries and saline discharge and recharge areas.

90 We have considered, and seen, the degraded condition of the subject land.

²² An earlier proposal was identified in 2011 as a controlled action under the EPBC Act.

- 91 We accept the permit application does not seek approval to remove native vegetation and that it is proposed to protect and manage the native vegetation areas.²³
- 92 However, we are persuaded to accept that the GGF and GSM are relevant matters in this case. The environmental values of the land have been known for some years; Mr Altmann refers to an earlier proposal to place fill in the gully that was abandoned because of flora and fauna issues.
- 93 We appreciate that Mr Brennan's is the only expert evidence before us. However, we are not persuaded to accept that there will be, or are unlikely to be, direct or indirect impacts on important environmental values and fauna.
- 94 For reasons that will be apparent from our earlier findings, we have not been persuaded that potential impacts on the GSM of either an accidental silt discharge or the construction and maintenance of the two proposed silt fences part way down the gully in the midst of the fenced off remnant vegetation area have been adequately addressed. We also do not consider there is scope to modify the design to address stormwater runoff and drainage in this sensitive interface location.
- 95 We consider potential impacts on the GGF are under-stated and under-recognised. We believe that the GGF traverses this area, as the expert evidence itself acknowledges, and we do not accept the proposed fill area will not affect dispersal patterns. Further, Mr Brennan did not address the potential impact on the GGF in the event of a silt discharge off the site into the gully and dam below. As already cited, Mr Brennan did, however, note that "*fill failure would be of great concern*" as it could impact on flora and fauna downstream and downslope of the subject land. He is satisfied that this could be adequately dealt with by engineers but is unaware of any particular technical details or measures.
- 96 We do not accept this opinion. Given the EPBC-listed species involved, we do not consider those technical details can be deferred to permit conditions. We are not satisfied about the extent of impacts. Mitigation measures are not adequately identified or resolved.
- 97 We are less concerned about the direction of stormwater drainage in the vicinity of the Frog Dam. We note this dam is outside the ESO1 area but is a relevant matter in the context of the GWZ. The contours presented on the revised site drawings on sheet 1 of 7 indicate that overflow from the existing dam near the work compound could not flow into the Frog Dam.
- 98 For the above reasons, we are not satisfied that the proposal responds in an acceptable manner to the environmental values of the land and environs or that the management regime proposed is sufficiently resolved to give us confidence that those values will not be adversely affected.

²³ Mr Brennan states at page 30 of his statement of evidence that these measures are included in the 2016 CEMP.

AMENITY IMPACTS

Reasonable expectations

- 99 The Oaklands Park Estate contains some 80 dwellings and is located to the south of the subject land and fill area. Another dwelling at 330 Konagaderra Road abuts the access point to the proposed fill site. While it is clear that the GWZ does not promote or encourage rural living per se, the dwellings abutting the subject land are lawfully established. They are entitled to a reasonable level of amenity, with reasonable expectations established by the physical and planning contexts that apply.²⁴ There is also common area comprising a pathway leading into the Deep Creek valley, that abuts part of the southern site boundary and travels downslope east/south-east of the subject land.
- 100 The subject land and wider environs are part of a farming area. It is well understood that living in such an area brings with it noise, dust, odour and other impacts, and amenity expectations cannot be akin to residential areas or rural living areas. The key amenity questions in the current proceeding relate to the degree of impact from noise, dust, and the change in the landscape and outlook from dwellings and common/recreation areas.

Noise

- 101 Residents of the Estate are concerned about the noise impact from the operation of the landfill site. Both Ms Grunewald and Mr Gilfillan say that one of the key reasons for purchasing their properties in the Oaklands Park Estate was for the peace and quiet, with their houses adjacent to grazing land. They submit that the area has a very low background noise level which enables them to readily hear trucks driving along Konagaderra Road. We note an example cited of a recent incident where a water pump one kilometre away on Mr Burns' property had a broken bearing which had disturbed the residents for several nights until fixed.
- 102 Respondents submit that during the operation of the fill site up to 100 loads of material per day would be trucked onto the site, dumped and then spread using a bulldozer for a four-year period. Such a change in noise levels is unacceptable in terms of amenity impacts, particularly given Mr Gilfillan's family circumstances where his son's wellbeing is adversely affected by noise. Recognising that the landfill site is zoned GWZ they expect that it would be ploughed on occasion, however, respondents submit the occasional ploughing of an adjacent paddock bears no relationship to the noise of many trucks arriving at the site on a daily basis over a four-year period. With respect to the expert acoustic evidence, residents oppose the use of average measures rather than peaks which will have greater off-site impacts, as Ms Tomkinson explains in some detail in her submission.

²⁴ The same point is made in *Calleja Properties Pty Ltd v Hume CC* (Red Dot) [2016] VCAT 253.

- 103 Noise emissions may occur from trucks moving to and from the land and the bulldozer and trucks operating within the fill area. There was also some discussion about water pump noise at the hearing, although no new pumps are proposed to augment the existing system.
- 104 The applicant relies on Mr Tardio's evidence in support of its submissions that noise levels will be within acceptable levels for all houses in The Ridge (Oaklands Park Estate). This includes an addendum report based on the corrected location of the fill area. Mr Tardio's evidence also addresses the access route and the varying levels at which trucks would work within the fill pods.
- 105 Mr Tardio's evidence is based on measurements from similar operations and is said to be conservative because (inter alia) it assumes continuous operations at final fill height and downwind conditions in all directions. The closest fill operations will be 198 metres from the nearest house. The modelling identified a requirement that landfilling works be undertaken behind a 3 metre high noise wall/bund to be constructed along the southern side of both the eastern and western fill areas in order to achieve compliance at the adjacent Estate. The maximum noise level emitted from sources such as an excavator, grader or similar machinery are set out in the evidence. Mr Tardio adopts noise limits for residences in The Ridge, as set out in his evidence and addendum report. With respect to the house at 330 Konagaderra Road, located 50 metres from the haulage track, a sealed surface with a low truck speed of approximately 40km/hr is proposed to minimise noise.
- 106 The acoustic evidence is based on the methodology in SEPP N-1 [State Environment Protection Policy (Control of Noise from Commerce Industry and Trade) No. N-1]. We are aware that the evidence is prepared on the basis of averaging and that some noises will, for that reason, be louder. Mr Tardio agrees that will be the case. We further accept levels of conservatism in wind direction, peak numbers of trucks, the dozer operating full time and the landfill being very close to final fill height. At other times, the noise level would be well within SEPP N-1 requirements provided a wheeled bulldozer is used.
- 107 Subject to mitigation measures recommended in the evidence, the modelling shows that the peak noise levels predicted to be experienced at the adjacent residences can operate in accordance with SEPP N-1, with the exception of the operation of a wheeled bulldozer when situated close to the houses and the landfill was nearing completion.
- 108 We understand the sensitivities associated with a change in the noise environment to this community and acknowledge the personal circumstances Mr Gilfillan describes. We do, however, accept that based on the modelling undertaken and subject with appropriate conditions the proposed landfill could operate to an acceptable noise level and in accordance with the standard cited in clause 13.04.

109 Noise emissions may be greater for users of the communal path. We do not consider that requires further mitigation and, given the short term nature of the use, do not find that impact to be unacceptable. We do not consider SEPP N-1 gives an expectation that the noise environment for open space that is within the GWZ should be differently treated.

Dust emissions

110 The two sources of dust of main concern are:

- The works on the site itself, i.e. ground preparation, hauling, placement and compacting of fill and raised dust from exposed surfaces; and
- Truck traffic along the access road into the subject land and water tankers within the subject land.

111 Mr Pollock, a dust expert, appeared on behalf of the proponent. He states that he has undertaken extensive modelling of the proposed operation, based on measurements of equipment commonly in use on similar sites. We note a number of errors in the expert evidence identified by Mr Pollock that we have taken into account.

112 Mr Pollock said that based on the 200 maximum truck movements per day and the use of the wheeled bulldozer to spread the soil once dumped, under the worst atmospheric conditions there is potential for three houses to experience dust levels marginally in excess of 60 micro g/m³ per day, as specified in the State Environmental Protection Policy - Air Quality Management [SEPP AQM].

113 He states that approximately half of the dust generated would be from trucks travelling on the haulage road even with a high level of watering to minimise dust generation. In excess of one third of the dust would be from the operation of the single dozer while spreading and compacting the tipped loads. His opinion is that wind erosion from exposed material comprises a very small percentage of the dust emission and he is therefore not concerned in relation to the size of the tipping area exposed at any one time.

114 Mr Pollock states that because the bulldozer is not required to operate at all times, dust emissions could be controlled to within the allowable limit by ceasing operation of the dozer when adverse wind conditions are experienced on the site. He said that it is possible to have reactive real-time dust management using a portable solar powered laser/light based nephelometer to automatically alarm when a pre-set dust level is experienced. Residents raise concerns in relation to the use of the nephelometer (which requires a mobile phone signal to operate) due to problems with the phone signal and reception in the area. Mr Pollock notes the availability of other triggers, such as flashing lights for alarms.

- 115 The watering requirements for the access road are based on a watering regime of in excess of 2 litres per square metre per hour to give a 75% reduction in dust generation. This figure is based on the *NPI Emission Estimation Technique Manual for Mining*, version 3.1, January 2012. Under cross-examination Mr Pollock concurred that as 2 litres per square metre per hour reduces the dust generation by 50%, to achieve a 75% reduction, it is reasonable to assume that the watering rate must be at least 3 litres per square metre per hour.
- 116 Mr Pollock's evidence is that based on the dust modelling, any dust generated from the filling operation would not impact on water quality of the domestic water tanks associated with the adjacent rural residential development.
- 117 Mr Cicero relies on the Tribunal's decision in *Creative Landfill* at Mt Ridley Road as demonstrating the similarities between these two sites, and submits that should assist to satisfy us that dust can be appropriately managed. Differences between the Mt Ridley Road site, with respect to the location of dwellings, and the subject land have been tested through Mr Pollock's evidence. In addition, the assumptions upon which the evidence is based were tested through cross-examination, including the speed of filling, truck and bulldozer movements and dust from stockpiles. It also emerged that the modelling is based on the centroid of the fill pods, not the closest point to dwellings but assumes the recommended watering regime is in operation. Having said that, it is relevant that the expert evidence relies on a proven management regime to identify and address any excessive dust emissions.
- 118 Over 50% of the dust at the Mt Ridley Road site was generated by the dozer operation and less than one quarter of the dust was due to the haul roads. At this site the ratios are effectively reversed as noted above. Over 50% of the dust is generated by the haul road which requires a very high level of watering to maintain a 75% dust reduction.
- 119 We are concerned that even with cessation of operation of the dozer dust emissions from the access road may exceed allowable levels if the haul road and stockpiles are not properly watered and/or if the watering regime is not closely monitored and maintained. If, as recommended by Mr Pollock, a real time nephelometer and alarm system are implemented, exceeding the set limit could trigger cessation of the operation of the bulldozer and receipt of material on the site. That includes components within any dust plume, such as PM₁₀ particles that were the subject of extensive discussion and some cross-examination.
- 120 We are concerned about the potential for dust to affect the amenity of nearby dwellings but, subject to appropriate conditions, dust from the site should be able to be adequately managed in accordance with clause 13.04 of the scheme. That includes with respect to tank water upon which residents rely.

Visual impacts for the Estate

121 Mr Wyatt gave evidence in response to concerns by the Council and respondents that the proposal would have an unreasonable visual impact on the amenity of existing residents and the recreational and amenity values associated with the pathway leading to the Deep Creek. Mr Wyatt's conclusions include that the visual impact for residences would be "*negligible to nil*". On completion, there would be a gently undulating landform that will not be discernible as being man-made. This will closely resemble the existing landform, Mr Wyatt says.

122 Respondents challenge Mr Wyatt's evidence including the methodology and note the evidence is prepared on incorrect data as to the proximity of the landfill from the closest residential properties and dwellings. They express concern about the introduction of a new ridgeline and submit that there is a lack of analysis from the public walking track.

123 Visual impacts need to be considered during the works i.e. over the life of the permit and after rehabilitation post-filling completion. The context for assessing visual impacts comprises the following:

- Dwellings in the Oaklands Park Estate which include:
 - A significant row of trees around the northern and western sides of property at No. 43 The Ridge that would limit views to the landfill works and bund.
 - The northern and uninterrupted orientation of the house and land at No. 45 The Ridge.
 - The dwelling at No. 46 The Ridge that has some lower and quite dense vegetation around the property, compared with the taller vegetation at No. 43 The Ridge.
 - Other dwellings which, as a consequence of the corrected fill position in the revised plans, are further from the fill than Nos. 45 and 46 The Ridge but would see the works.
- The public realm of Ridge Road which is relatively open to the north.
- The walkway to the north of Ridge Road leading to the Deep Creek which is common property but does not physically prevent public access, and has no screening or other vegetation.

124 Part of the fill area is within ESO1 whereas some dwellings are not. The common access pathway is within ESO1. As we have set out earlier, the ESO1 is ascribed landscape and other values notwithstanding agricultural or other land usage.

125 The evidence appears to assume batters that are shallower and gentler compared with the batters described in other evidence, such as that of Mr Altmann. It assumes the final slopes will be grassed with a gentle gradient.

- 126 Mr Wyatt has not recommended any landscaping along the southern part of the subject land because he likens the appearance of the earthworks to typical agricultural practices such as ploughing.
- 127 We do not accept Mr Wyatt's evidence that the fill would have negligible or nil impact for existing dwellings. Rather, we find the scale and height of the fill area, and its final finish, would be a marked change in the landscape to the detriment of existing residents. There would be expansive views of the fill as it increases in height to the west. In addition to the visual impact of the acoustic mound, the fill would block much of the existing expansive views that form part of the amenity of the dwellings at Nos. 45 and 46 The Ridge in particular.²⁵ For its position in the valley setting and landscape, the works would be an abrupt and intrusive man-made change with steep slopes rather than the moderated form contended by the applicant.

Visual impact of acoustic fencing adjacent to 330 Konagaderra Creek

- 128 The noise mitigation measures include an acoustic fence along one side of this property to contain noise from trucks using the access route. The fence would be 3 metres high and 80 metres long. There is no objection from this property to the permit application and the wall is shown as being backed by existing trees. We find that the introduction of this solid form is an undesirable visual intrusion, albeit of a temporary nature over the course of the works. But we have not refused a permit for this reason.

Overall amenity impacts

- 129 Taken individually, we accept that noise and dust can be managed to acceptable levels subject to management via permit conditions. The visual impact cannot be managed in the same way and planting along the southern boundary would in itself be an impact even though that could occur without any planning permit. We do not, however, under-estimate the combined impact of noise, dust and the change in outlook that would result if the landfill was to proceed, albeit over the truncated period of works' time.

BROADER LANDSCAPE IMPACTS

- 130 The applicant submits the proposal will not prejudice the recreational or other values associated with ESO1 - there is not a visual connection. Mr Cicero submits that the environmental objectives contemplate fill in the waterway corridor and the proposal will not impact on the appreciation of the scenic qualities of the waterways or creek valleys. The change in the landform will not have an impact and, based on Mr Wyatt's evidence, will not have adverse impacts on the character and appearance of the area. Once completed, the gently undulating landform will not be discernible as man-made and will resemble the existing landform.

²⁵ *Tashounidis v Flinders SC* [1987] 1 AATR 116 and *Healy v Surf Coast SC* [2005] VCAT 990.

- 131 We have addressed this in part above in discussing visual impacts in amenity terms. Decision guidelines for the ESO1 area include the extent to which works are designed to enhance or promote the environmental values of the waterway and the visual character of the waterway corridor.
- 132 Unlike the Mt Ridley Road site where the landfill sits on low-lying land, the subject land is high in the landscape and at a similar level as the closest dwellings. From the walkway, looking back to the west, the fill would sit much higher in the landscape although with increasing distance the visual impact will change.
- 133 We cannot accept either outcome (while filling occurs and the final form of the fill area as we understand it) reflect the landform and protect the values of ESO1. We consider the values ascribed to the ESO1 have been underestimated and under-stated by the proponent. From the waterway downslope and north of the subject land, views may be confined. But from the east, from the Creek environs associated with the common property that is also within the ESO1, the works would be a prominent intrusion on the landform and landscape.
- 134 We further do not accept Mr Wyatt's evidence that erosion risks are minimal, for reasons already explained. His evidence appears to proceed on information (such as fill slope grades) that differs to that of other witnesses about the location and height of the works.

TRUCK TRAFFIC AND MOVEMENT

Bardwell Drive

- 135 The Council's concerns in relation to additional truck traffic on Konagaderra Road relate to the use of Bardwell Drive and the increased maintenance requirements on Konagaderra Road due to the large number of trucks. At the commencement of the hearing, the Council advised that because the proponent agrees to a condition specifically prohibiting the use of Bardwell Drive, the Council no longer had any objections based on traffic issues. The outstanding question of maintenance costs is discussed below.
- 136 Ms Dunstan, in presenting evidence for the applicant, agrees that Bardwell Drive is not suitable for the vehicles associated with the proposed use of the subject land. She recommends that an appropriate condition would be to prohibit the use of Bardwell Drive as an access route as part of an Access Management Plan.
- 137 Respondents are sceptical that trucks will comply, however, many land uses relying on large trucks (including supermarkets in some situations) may be obliged to instruct their vehicle fleet to use a designated route. It is a matter for enforcement to address non-compliances.

Increased trucks and safety

- 138 Respondents' objections primarily relate to safety issues in relation to the increased number of trucks and perceived difficulties associated with the gradients and winding nature of sections of the road and a narrow bridge. We do not recite the extensive material and submissions on these matters but have carefully considered them.
- 139 Ms Dunstan presented expert evidence on these matters. [Mr Altmann addressed questions of maintenance to which we refer later.] Ms Dunstan's evidence includes that Konagaderra Road and Craigieburn Road form part of a gazetted and pre-approved VicRoads roads network, are appropriate for use by the vehicles which will access the site. Konagaderra Road is currently designated as a "Collector Road".
- 140 Ms Dunstan notes that the horizontal and vertical alignment of Konagaderra Road between the subject land and Craigieburn Road does not present unusual or unsafe arrangements for the type of vehicles accessing the site. Recent upgrading works on Konagaderra Road, to which the respondents also refer, were resultant from Federal Black Spot funding which the Council had been able to access due to temporarily reduced eligibility criteria. In Ms Dunstan's opinion, the additional works have upgraded the capability of the road to a "Council arterial" standard and are not the result of the small number (three) of accidents that have occurred along the road in the last five years. She notes that none of the accidents involved a truck. Due to the increased height of a truck compared to a car, Ms Dunstan opines that the road interactions between trucks and cars are generally considered safer than between cars alone. She notes that trucks using the land would, in effect, be regular drivers and would be more aware of any sections of the road with an increased potential for accidents.
- 141 Existing traffic volumes along Konagaderra Road are generally between 1,000 to 2,000 vehicles per day which is in accordance with Austroads guidance and VicRoads standards. Based on a maximum level of operation of 100 loads per weekday or an average of 33 truck movements per day, Ms Dunstan states that *"the current condition of Konagaderra road is such that these traffic volumes are within the environmental capacity and as such I'm satisfied that they will be adequately accommodated"*.
- 142 In relation to the site's access, Ms Dunstan assesses that there is adequate sight distance available to the access point and subject to an appropriate upgrade of the entrance, as proposed, it does not present an unsafe entry point. Under cross-examination, Ms Dunstan agrees that placing the entrance gate further into the property to accommodate any waiting trucks prior to the daily opening of the landfill would assist in minimising safety issues associated with trucks potentially parking along Konagaderra Road. Ms Dunstan notes that adequate car parking to accommodate all parking demands associated with the proposed use can be provided on-site.

143 We have set out this evidence in some detail because we have been persuaded to accept it. We give weight to the Council's acceptance of the revised access route requirements and that the increase in truck traffic will not give rise to unreasonable safety impacts for road users, including motorists and cyclists. The road conditions vary along the expected route of truck traffic including the road bridge, bends, grades and the awkward Bardwell Drive/Konagaderra Road intersection. Safety works undertaken, and continuing, will assist to accommodate truck traffic. The sightlines for vehicles turning into and out of the site comply with the relevant standards, based on the expert evidence. This takes account of acoustic fencing proposed abutting No. 330 Konagaderra Road. Ultimately, all road users must take responsibility to drive with care. Resident concerns about distractions cannot defer this responsibility onto others.

144 Dr Ooi refers to issues arising from delays for other road users and the lack of reference to compensation for existing residents as a consequence of additional road works that will be required. Roads are designed to be used and even if there are noticeable delays to existing road users, this is not a matter that warrants compensation. Ms Dunstan has addressed respondents' submissions drawing attention to the extent of roadworks required for the Mt Ridley Road site and submissions arguing for the widening of Konagaderra Road to a width of 7 metres. Ms Dunstan states that bridges of this type along Konagaderra Road do not regularly have shoulders and road widening works are not required as a consequence of this permit application. We agree.

Contribution to road works

145 The Council and permit applicant agree that a contribution to road maintenance is required given the additional trucks could cause deterioration in the road surface. At the commencement of the hearing, an appropriate contribution for road works and maintenance in the event that a permit issues had not been agreed. By the end of the hearing, the Council and permit applicant had reached an in-principle agreement in relation to the apportionment of costs which could be included as a condition if a permit issues.

OTHER MATTERS

146 This section of our reasons addresses a range of other matters raised in submissions and statements of grounds.

Independence of expert evidence

147 Mr Livingston has questioned the independence of Mr Altmann, given his role in the permit application including as an advocate for the proposal. Mr Cicero accepts that this affects the weight of his evidence but submits his involvement and expertise assists the Tribunal.

148 Mr Altmann has had a strong involvement in the proposal including preparing the 'yellow plan' and other documentation. His evidence cannot be accepted as that of an independent expert witness but it has been helpful to us in understanding the proposed site operations and in responding to our questions about matters that were unclear with respect to the proposal.

Details of the operator

149 Early in the proceeding, criticisms were raised by the respondents about the lack of a professional operator for the proposed landfill. Indeed, the potential for the subject land to be operated by the permit applicant and/or his family was contrasted with Creative Landfill as a subsidiary of the Winslow Group with several decades of civil contracting experience.

150 However, once it later became apparent that Creative Landfill might be involved, concern was raised about its operations including unsubstantiated allegations about breaches of permit conditions at the Mt Ridley Road site.

151 A planning permit runs with the land. A permit holder is required to abide by permit conditions and decisions of the type we are considering in this case typically proceed on a presumption of compliance. If a permit issued in this case, we would not personalise the permit to a particular operator.

Potential non-compliance with proposed mitigation measures

152 Some parties question the likelihood that the operator will comply with noise and dust mitigation measures. As we have already said, our decision proceeds on a presumption of compliance noting that enforcement action can be initiated by a responsible authority or other persons. Non-compliance with conditions is a serious matter and cancellation of a permit is possible.

Contaminated fill

153 Respondents refer to concerns about the potential for the fill to be contaminated by industrial and other waste with environmental consequences. We agree with the findings made in *Creative Landfill*,²⁶ where the Tribunal said:

Similarly, in respect to chemical contamination concerns, the quality of the fill is subject to controls under the *Environment Protection Act* 1970. We proceed on the basis that these controls will apply and that ultimately the importation and placement of contaminated soil is an offence. These are all matters regulated by the Environment Protection Authority under a separate regulatory regime. This regime and a clear permit condition that all fill must meet the regulatory requirements for classification as fill are sufficient to manage a satisfactory outcome.

Impacts on livestock from noise

154 This matter was raised in one submission but is not supported by any material to persuade us of any material impact on livestock on the subject land or abutting and nearby land.

Illegal dumping of fill

155 Respondents refer to the potential for the illegal dumping of fill, as they claim has occurred elsewhere. As we have already said, illegal activities or non-compliances are enforcement matters.

Mobile phone services

156 Respondents refer to the unreliability of mobile telephone services, as relevant to the proposed technology for dust monitoring. We appreciate this circumstance and note alternatives to manage dust monitoring suggested in Mr Pollock's evidence.

Lack of a business case

157 The lack of a business case, or submission of a business case, are referred to in Dr Ooi's submissions. These are not matters into which we have enquired as they are not relevant to an assessment under the provisions of the planning scheme.

Property values

158 Statements of grounds filed by objectors to the permit application describe their concern that the proposal will adversely affect property values.

159 Various Tribunal decisions identify that the relevance of economic impacts in planning matters relates to the contended effects on the community, not individuals and their private financial interests.²⁷ The effects must be demonstrable,²⁸ and the effects must be 'significant', consistent with the wording in the *Planning and Environment Act 1987*. There is no valuation evidence or specific evidence in support of the grounds advanced upon which we could conclude that the alleged economic impacts are demonstrated or significant.

CONCLUSION

160 We have considered the benefits ascribed to the proposal by the permit applicant, including that the use supports urban development and that urban growth has strong strategic support.

161 We have reviewed the operation and works and have found aspects of the proposal to be acceptable or able to be managed subject to permit conditions.

²⁶ *Creative Landfill Pty Ltd v Hume CC* [2016] VCAT 1075, [72].

²⁷ *Boydell Pty Ltd v Yarra CC & Ors* [1998] VCAT 564.

²⁸ *Minawood Pty Ltd v Bayside CC* [2009] VCAT 440 [39].

162 However, we are not persuaded that the use of the subject land for clean fill, as proposed in this application, responds in an acceptable way to the site's physical circumstances and context. That is particularly with respect to drainage and surface water flows, potential risks to native fauna and flora, and the potential for adverse amenity impacts including the manner in which the proposal would detract from the land's environmental and landscape values.

163 For the above reasons, we will affirm the responsible authority's decision.

Margaret Baird
Senior Member

Greg Sharpley
Member

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P893/2015
PERMIT APPLICATION NO. P18003

CATCHWORDS

Application to review a failure to make a decision within the prescribed time under s79 of the *Planning & Environment Act 1987*. Hume Planning Scheme. Green Wedge Zone. Permission sought to fill land with clean fill. Fill sourced from residential subdivisions. Impacts to landscape, agricultural and environmental values considered along with impacts on the amenity of local properties.

APPLICANT	Creative Landfill Pty Ltd
RESPONSIBLE AUTHORITY	Hume City Council
RESPONDENTS	Vicki Maree Taylor & Gregory John Taylor, Gary Lewis Jungwirth & Elizabeth Anne Jungwirth and Michael Mackinnon
SUBJECT LAND	765-785 Mt Ridley Road, Yuroke
WHERE HELD	Melbourne
BEFORE	Ian Potts, Senior Member Alan Chuck, Member
HEARING TYPE	Hearing
DATE OF HEARING	11 – 13 April 2016
DATE OF ORDER	28 June 2016
CITATION	Creative Landfill Pty Ltd v Hume CC [2016] VCAT 1075

ORDER

Granting New Permit (section 77 or 79)

- 1 The decision of the Responsible Authority is set aside.
- 2 In permit application P18003 a permit is granted and directed to be issued for the land at 765-785 Mt Ridley Road, Yuroke in accordance with the endorsed plans and on the conditions set out in Appendix A. The permit allows:
 - Use and development of the land for disposal of clean fill and earthworks (clean fill)

Ian Potts
Senior Member

Alan Chuck
Member

APPEARANCES

For Creative Landfill Pty
Ltd

Mr John Cicero, a solicitor from Best Hooper. He called the following witnesses:

- David Crowder, a town planner from Ratio Consultants Pty Ltd.
- Jason Walsh, a traffic engineer from TraffixGroup.
- Barry Cook, a Meteorologist from GHD.
- Mr Darren Tardio, an acoustic consultant from Renzo Tonin & Associates.
- Allan Wyatt, a landscape architect from XURBAN.

An expert witness statement prepared by Pablo Toro that addresses structural upgrades to Mount Ridley Road was tabled but Mr Toro was not called to provide further evidence in chief or be subject to cross examination. Mr Toro is a geotechnical engineer from Site Geotechnical Pty Ltd.

For Hume City Council

Mr Matthew Beazley, a solicitor from Russell Kennedy.

For Vicki Maree Taylor &
Gregory John Taylor

Mr Gregory Taylor in person.

For Gary Lewis Jungwirth
& Elizabeth Anne
Jungwirth

Mr Jungwirth appeared on his own and Elizabeth Jungwirth's behalf for part of 13 April 2016.

For Michael Mackinnon

No appearance.

INFORMATION

Description of Proposal	Place clean fill generated from subdivision and land development works on the subject land.
Nature of Proceeding	Application under Section 79 of the <i>Planning and Environment Act</i> 1987 – to review the failure to grant a permit within the prescribed time ¹ .
Zone and Overlays applying under Hume Planning Scheme	Green Wedge Zone – (Clause 35.04) applies to all of the land. Environmental Significance Overlay (Clause 42.01 and Schedule 1) applies to part of the land. Public Acquisition Overlay (Clause 45.01 and Schedule 3) applies to part of the land.
Relevant particular provisions of the Hume Planning Scheme	Car parking (Clause 52.06), Loading and unloading of vehicles (Clause 52.07), Native Vegetation (Clause 52.17), Land adjacent to a Road Zone Category 1 or a Public Acquisition Overlay for a Category 1 Road (Clause 52.29), Metropolitan green wedge land (Clause 57) and decision making guidelines (Clause 65).
Planning Permissions required under Hume Planning Scheme	Use of the land for disposal clean fill as an innominate use of the land (Clause 35.04-1). Building and works for an innominate, section 2 permit required use and earthworks involving more than 100m ³ of fill (Clauses 35.04-5 and 35.04-4 respectively)
Relevant Scheme, policies and provisions of the Hume Planning Scheme	Clauses 10.04 (Integrated decision making), 11.04-7 (Green Wedges), 11.05-3 (Rural productivity), 12.01-1 (Protection of biodiversity), 12.04-2 (Landscapes), 13.04-1 (Noise abatement), 13.04-2 (Air quality), 14.01 (Agriculture), 14.02-1 (Catchment planning and management, 14.02-2 (Water quality) and 18 (Transport) of the State Planning Policy Framework. Clauses 12.01, 21.03, 21.04, 21.05-1, 21.05-2, 21.05-4, 21.06-2, 21.06-6, 21.08 and 22.02 of the Local Planning Policy Framework.

¹ Section 4(2)(d) of the *Victorian Civil & Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

Land Description

The subject land is a trapezoidal shaped lot having an area of approximately 103 hectares. Its northern boundary is to Mount Ridley Road, while the remaining boundaries are with adjoining rural landholdings. North of Mount Ridley Road is a more intensively settled area of smaller rural residential lots generally of 6 hectares in area.

The site is vacant rural land with the only development a small dam at the southern end. It contains scattered native trees and some areas of native grasslands in the southern area. The land is used for grazing.

The land has a fall of some 10m from north to south. A side slope from east to west steepens near the western boundary as the landform transitions to the deeply incised valley of Deep Creek.

Tribunal Inspection

The Tribunal completed an unaccompanied inspection of the subject land and surrounds after the hearing.

Cases Referred To

Calleja Properties v Hume CC (includes summary) (Red Dot) [2016] VCAT 253.

REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 This proceeding deals with an application by Creative Landfill for a planning permit to dispose of clean fill on rural land at Yuroke. A permit is required for this activity because the land is subject to Green Wedge Zone under the Hume Planning Scheme.
- 2 The application has a somewhat protracted history and has been subject to a variety of amendments and challenges. However this proceeding arises from Creative Landfill's application for review when the Hume City Council failed to make a decision about the permit application within the prescribed time.
- 3 Since the original permit application was advertised during that permit application process, Creative Landfill has put forward amended plans: Version L, dated 10 February 2016. In April 2016 the Tribunal directed the substitution of these plans as the application plans. On the basis of these plans the volume and area of landfill has been reduced. What is now before us is a proposal to import 576,000m³ of clean fill for spreading and compaction over the north east corner of the property. The final landform volume would some 360,000m³ over a footprint of 219,000m².
- 4 On the basis of the amended plans, the Council has advised that it now supports the granting of a permit subject to conditions. Creative Landfill opposes some of these conditions.
- 5 The respondents to this application are landholders whose properties are in the vicinity of the subject land. They object to the proposal being granted a planning permit. Collectively their grounds can be summarised to be about the impact of the proposal on the environment, including landscape values, soil quality and water quality, their rural amenity through the generation of noise and dust and traffic hazard and safety issues. They believe that these impacts and the final outcome of filling the land will be contrary to the purposes of the Green Wedge Zone and relevant state and local planning policies.
- 6 We have considered these objections and the issues raised by the respondent land owners along with the reasons why the Council supports the proposal, the response of Creative Landfill and the expert witnesses called to address particular issues raised in the objectors' grounds. Our reasons explain the findings we have arrived at in respect to the substantive issues and why we have concluded that a permit that is subject to a range of conditions should be granted.

² We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons.

DETAILS OF THE PROPOSAL AND THE SUBSTANTIVE ISSUES

- 7 As all parties have acknowledged, this proposal has a somewhat protracted history. The original planning permit application was made in June 2014. That application sought planning permission for ‘earthworks associated with an access track and pasture improvement for the purpose of cattle grazing’. In accompanying material the proposal details described how it was intended that some 500,000m³ of fill would be imported and placed across an area of the land, generally to the east of a Public Acquisition Overlay that runs diagonally from south to north through the property.
- 8 Some of the residents raised this description of the proposal as an issue in their grounds, stating it to be a proxy for landfill works. This issue is somewhat negated by the fact that the Creative Landfill, has, in light of a recent Tribunal decision,³ amended the description of the proposal as follows:
- Disposal of clean fill and earthworks (clean fill) in accordance with endorsed plans.
- 9 Along with this description the proposal was amended to reduce the extent of fill being imported to the site and the area over which it would be placed.
- 10 These amendments were substituted into the planning permit application during the course of a practice day hearing of 1 April 2016.

The proposal as amended

- 11 To be clear then, what is now before the Tribunal is a proposal to use and develop the land for the ‘disposal of clean fill’ as set out in the proposal plans with associated ‘earthworks’ that will involve ground preparation, drainage and other works and the placing and compacting of the imported clean fill. The essential details of the proposal encompass:
- A finished volume of fill (i.e. after compaction) of approximately 360,115m³, covering an area of 218,910m² (the fill footprint) with an average height (above existing natural ground level) of 1.65m and a maximum height of 3.72m. The total volume of fill to be imported, allowing for standard compaction rates, is estimated to be 576,000m³.
 - The placement of fill would be in four stages (reduced from 8), with stage 1 nearest to Mt Ridley Road to occur along with construction of an acoustic earthen berm along the northern interface.
 - Each stage of filling to incorporate a 100mm thick layer of topsoil over the landform.
 - A 5m wide landscaped strip along the eastern boundary and boundary to Mt Ridley Road.

³ *Calleja Properties v Hume CC (includes summary) (Red Dot)* [2016] VCAT 253.

- Finished slopes not exceeding grades of 1:15 with grades ranging from 1:15 to 1:60.
- Three metre wide drainage swales constructed around the fill discharging along the southern and south western margins of the fill using graded swales to evenly disperse the flow.
- The fill shaped and placed to avoid a scattered group of remnant native trees in the central area of the property and one remnant tree in the north-east sector. No filling is proposed over remnant native vegetation patches located around and down slope of an existing dam in the southern sector of the property.
- Hours of operation from 7:30am to 4pm Monday to Friday and to 1pm pm on Saturdays (revised from 7am to 5pm) with a maximum estimated number of truck movements of 200 per day (equivalent to 100 truckloads entering the site).
- Access onto the subject land at the western end of the works area, away from private residential driveways. The access will connect to a haul road along the western margin of the proposed fill areas. A site office, weighbridge and rumble grid (for departing trucks) would be located along the access/haul road.

Applicable planning controls and policy framework

- 12 We do not intend to repeat all of the applicable provisions of the Hume Planning Scheme in detail here. When necessary we will discuss the necessary detail in dealing with particular issues. We here set out that as the area of the works has been confined to the east of a Public Acquisition Overlay and Environmental Sensitivity Overlay that apply to parts of the land, no planning permissions are required under these controls.
- 13 The subject land (and the surrounds) are subject to the Green Wedge Zone. Planning permission is required under this zone as the works involve earthworks of more than 100m³ and the use of the land for disposal of clean fill is a section 2, permit required innominate use. Accordingly, the proposal must respond acceptably to the purposes of this zone. The respondents maintain that the proposal does not, a matter we address later in these reasons.
- 14 Like all planning zones, a purpose of the Green Wedge is to implement State and Local Planning Policy Frameworks as relevant to that zone and the proposed use and development. The purposes of the zone along with the purposes of Metropolitan Green Wedge land (found in Clause 57 of the scheme) indicate that when so zoned, the land is to be protected from uses and / or development that would diminish, amongst other values, those related to agriculture, the environment and landscape. It is however necessary to understand that purposes of the Green Wedge Zone are not

intended to lock land up. The purposes include uses such as agriculture and use and development of mineral and stone resources. Section two, permit required uses, include dwellings, cattle feedlots and other intensive animal husbandry, refuse disposal and so on. As per clause 57, it is not intended that such land be used for urban purposes that could otherwise be located in urban areas. Rather use and development of the land can include rural uses as well as uses and development that might support the use and development of urban areas, but are incompatible with sensitive urban/residential land uses.

- 15 We recognise that there are a mixed range of uses that may be possible on this land given the purposes of the zone and provisions of clause 57. The grounds of the respondent neighbours raise a number of issues about landscape and environmental values. This is appropriate and so in terms relevant to the implementation of policy, we have considered and assessed this proposal against relevant State and local planning policies that address and provide guidance on the issues. We do not intend to repeat all these relevant provisions here however. As can be seen from the table of information that precedes these reasons, the list is extensive. We will refer to and address these relevant points when we turn to the detail of our reasons.

The issues

- 16 What flows from the nature of the proposal, the purposes of the zone and provisions about metropolitan green wedge land, and relevant planning policy, when considered in conjunction with the grounds of all parties is that the following are determinative questions in our decision:
- Will the final finished landform and wider proposal have an adverse impact on landscape values?
 - Will the range of activities result in adverse impacts on amenity, the quality and agricultural condition of the land, stability of the land and water quality?
 - Will there be unacceptable impacts on native vegetation?
 - Will the use of Mt Ridley Road and the access point by the volume of trucks degrade the road and present a safety hazard to other road users and pedestrians?
 - In light of the above issues and the nature of the use being proposed, is the proposal acceptable when assessed against the purposes of the Green Wedge Zone and relevant planning policies?

LANDSCAPE VALUES

- 17 Along with the purposes of the Green Wedge Zone, Clause 12 of the Hume scheme sets out that planning should protect sites and features of landscape

value. The Municipal Strategic Statement of the scheme describes a number of landscape features of value within the municipality. These include deeply incised valleys including that associated with Deep Creek. Apart from these valleys and a small number of high points that have high value as scenic lookouts, the remaining area is characterised as flat, sparsely treed expanses of wide open cleared grazing land.

- 18 Strategically, the subject site sits in rural land to the west of land designated for urban development and to the east of the conservation areas associated with Deep Creek.⁴ Protection of the landscape character of this rural land from inappropriate development is sought.
- 19 The evidence of Mr Wyatt is that the area is as described in local policy, open rural land with scattered trees. His evidence is that such a landscape is subject to constant change due to rural activities such as ploughing, tree planting, establishment and maintenance of boundary and internal fences and the like. He also states that while the area appears flat it is in fact generally bound visually by rising ground to the north, a low north-south ridgeline lying between the site and Mickleham Road that more or less follows Parkland Crescent and the edge of the Deep Creek escarpment to the west. It is only from the higher ground of these features or within this view-shed that views across the site are available.
- 20 Our inspection of the site and surrounds confirmed these conditions. Accordingly, we accept Mr Wyatt's assessment of landscape impacts from his key view points, as it also confirms that all dwellings on the properties that have a direct interface with the subject land are well screened from views across the site by a combination of vegetation planted around these dwelling and / or not being directly orientated to views across the site. This is particularly applicable to the dwellings at No's 770 and 750 Mt Ridley Road and 1805 Mickleham Road that are nearest the site's northern and eastern boundary. Similarly the dwelling at No 780 Mt Ridley Road has the added benefit of being located below the line of the escarpment such that the rising ground to its south screens all views of the site.
- 21 In combination with this limited view of the site from surrounding dwellings, we observe that the grades at which the fill will be placed do not introduce sharp changes. The final landform being proposed will instead introduce gentle grade changes across the land. We agree with Mr Wyatt's evidence that the final landform will blend with the surrounding character of undulating land.
- 22 We also accept his assessment of visual impact from the three view-points he selected. Due to the termination of Mt Ridley Road at the western end of the property, there will be limited traffic and number of people looking across the site. While this lowers its sensitivity, what is more persuasive is

⁴ See the Strategic Framework Plan 2 in Clause 21.01 –and the Rural Areas structure Plan in Clause 21.06.

the nature of how the fill above current land levels will blend with the site's generally undulating nature.

- 23 We agree that the proposal for a 5m wide landscaping strip along the northern and eastern property boundaries will reflect existing planting of boundary line trees. We agree it is not necessary to fully screen views of the fill but rather to blend the overall landscaping with the existing character.
- 24 Thus we conclude the site has limited prominence in the landscape but makes a general contribution to the broader open, undulating rural landscape of the municipality. We do not find that the final landform being proposed or the landscape impacts from the fill will be out of place or incongruous with this character. While the landscape is valued by the local community, we find there are no particular values ascribed to it under the Hume Scheme (by way of an overlay or in policy). While the landform will change, the outcome will not be out of character with the existing character and hence have minimal impact on the local values. The addition of boundary plantings of trees will assist in filtering views of the site. We do not find it is necessary to fully screen such views in light of our findings about the change in landform. Rather we conclude the proposed planting within a 5m wide strip will complement the existing character of the area.

ENVIRONMENTAL AND AMENITY MATTERS

- 25 The respondent neighbours express concern about the potential for impacts on their rural lifestyle amenity from dust and noise. Their grounds of objection also express concern about the quality control over the clean fill. They are concerned that importing contaminated fill onto the site may occur resulting in health and environmental risks. Equally it is suggested that bringing fill from other localities will introduce weed species onto the land and contaminate adjoining land.
- 26 It is suggested by some that the new landform and the fill will be subject to erosion or other mass movement and so contaminate runoff and local waterways with sediment.

The potential for unacceptable dust impacts

- 27 The two sources of dust of main concern are those that arise from
- The works on the site itself, i.e. ground preparation, hauling, placement and compacting of fill and raised dust from exposed surfaces; and
 - Truck traffic along Mt Ridley Road having to use gravel shoulders and leaving behind tracked dirt.
- 28 Mr Cook was called to give evidence, having assessed the potential for dust impacts from the works and developed responses. His assessment is based

on modelling of site activities and vehicle movements under meteorological conditions indicated from a meteorological station at Melbourne Airport, some 12km from the site. To reflect conservative, worst case scenarios Mr Cook has assumed 200 truck movements per day (the maximum proposed) with 20 truck movements in an hour with an average weight of 34 tonnes and load of 22m³.⁵

- 29 Mr Cook's assessment demonstrates the potential for off-site dust impacts during stages 1, 3 and 4 of the proposed works on dwellings to the north of the subject land if dust controls are not put in place. The impacts, demonstrated by dust concentrations above criteria adopted from the Protocol for Environmental Management for Mining and Extractive Industries (the PEM)⁶ are due largely to the proposed dozer operations for spreading and compacting the fill. Mr Cook's assessment indicates this operation accounts for some 50% of the generated dust. The other dust sources, dumping/tipping of soil, operation of the trucks on the haul road and wind raised dust, more or less contribute equally to the remaining 50% of predicted dust levels. His assessment thus indicates that by controlling these sources, particularly the dozer operations, airborne dust emissions can be controlled to acceptable levels.
- 30 Mr Cook's evidence requires us to accept firstly that his adopted criteria are acceptable, that his modelling is representative of potential impacts and his assumptions and conclusions about dust control measures are practical and workable solutions. For the following reasons we are satisfied about all of these points.
- 31 Planning policy seeks to protect and improve air quality. Such a policy works in conjunction with the requirements of the State Environmental Protection Policy - Air Quality Management (the SEPP AQM). It is under this statutory policy that the PEM has been developed. The PEM therefore carries significant weight in establishing what may be acceptable levels of impact in order to meet the SEPP AQM objectives and hence objectives for air quality in Victoria. In the absence of specific criteria for construction industry activities we accept that the PEM provides suitable criteria by which to quantitatively assess potential dust impacts.
- 32 We find that Mr Cook's assessment has considered the most significant dust emissions and so potential risks to air quality. His assessment uses an appropriate dispersion model, AUSPLUME, which until recently was the regulatory standard. However the differences between the more recent regulatory standard and AUSPLUME are negligible in view of the scenario before us which is to test impacts on a local air-shed scale, rather than broader regional scale meteorological and air quality conditions.

⁵ For modelling purposes he adopts an average truck weight of 34 tonnes. These figures are drawn from section 1.3 of his evidence report of March 2016.

⁶ Environment Protection Authority Publication 1191, December 2007.

- 33 Quite apart from a quantitative assessment of dust levels against criteria, Mr Cook's assessment provides an indication of what are the worst sources of dust and hence an indication of what may be done to minimise them. The proposed operation of a bulldozer is by far the largest single source. Further it indicates that its operation will only be of concern during particular wind directions at certain wind speeds.
- 34 In response to the potential dust impacts Mr Cook recommends a dust management plan that amongst other outcomes should establish conditions or triggers for when the dozer should cease operations. As part of this plan Mr Cook recommends real time monitoring downwind of the work area using an automated station which can be used to manage operations as well. In terms of other activities Mr Cook recommends that haul roads be watered. However it is his evidence that watering of stockpiles will have little meaningful effect because they are a limited source of raised dust and once watered form a crust over their surface so there is little benefit in further watering. He also says that spraying water onto soil as it is dumped from the trucks is of limited value, given this is also proportionally a lesser source of dust emissions.
- 35 We find that this evidence proposes workable management options. There are no particular conflicts between dust management options and other operational needs that might give us cause to consider the dust management plan would be unworkable. For example, the management of dust and / or noise will not require redirection of operations to another part of the site, thereby introducing the risk of multiple, open, bare soil surfaces. If the dozer cannot operate, Mr Cook's assessment indicates that stockpiling of material on the site presents a very limited risk for raised dust. Importantly, while his opinion is that watering stockpiles has limited value, it also indicates to us that dust from the stockpiles can be readily managed by a once off event of watering, unless hot, dry and windy conditions prevail, where more watering may be required. Thus the management of dust does not curtail all of the operations, rather it requires responsive management that is commonly employed on construction sites.
- 36 Given our findings we are satisfied that a workable approach to dust management can be set in place to minimise the risk of dust emissions and achieve planning policy objectives for air quality.
- 37 We note that Mr Cook's assessment did not include trucks generating dust from the use of gravel shoulders along Mt Ridley Road. This is because Creative Landfill accepts conditions to upgrade this road with a wider seal and formed shoulders. The proposal provides for a rumble strip to reduce the level of tracked dirt, which may also be a source of dust. We are satisfied that these features will minimise dust emissions from road sources. Further we expect transport of the clean fill to comply with environmental regulations to cover loads to minimise dust emissions and road spill.

Noise

- 38 The respondent land owners raise concerns about noise from truck traffic travelling along Mt Ridley Rd and from the site operations. The objective of Clause 13.04-1 of the Hume Scheme is for planning to assist in the control of noise effects on sensitive land uses. To achieve planning is to ensure that community amenity is not reduced by noise emissions using a range of approaches appropriate to the land use functions and character of an area. State environmental protection policies about noise are to be considered where relevant.
- 39 In his assessment of potential noise impacts Mr Tardio has applied SEPP N-1 (Control of noise from commerce, industry and trade in metropolitan Melbourne). He has done so because it is his opinion that Creative Landfill's proposal sits in a grey area of the regulatory framework. His opinion is that it is not an industry but neither is it a temporary form of construction activity to which the EPA's Noise Control Guidelines⁷ might apply. In his opinion the latter is not helpful because it applies 'best practice' noise reduction methods to what are considered to be temporary noise sources. It does not prescribe numerical noise limits. Because the operations are planned for a period of three years, presenting a potential for unacceptable noise emissions for an extended period, it is his opinion that it is appropriate to provide 'certainty about noise impacts and their relationship to reasonable amenity'⁸ of the surrounding areas through the application of SEPP N-1.
- 40 We agree with this evidence. Clause 9 of SEPP N-1 establishes that it does not apply to noise arising from 'construction or demolition activities on building sites'. Strictly, this does not characterise the proposal before us. It is an innominate use within the planning regulatory framework, being a form of commercial use of land and a form of industry, being disposal of waste or excess fill earth materials. Similarly the activity has many characteristics of extractive industry, albeit with the reverse of placing material over the land rather than extracting it from the land. The movement of trucks, the hauling of and dumping of earth materials, use of rumble strips and the operation of large earth moving equipment such as a bulldozer all have parallels with extractive industry. Accordingly we think that the nature of the activities and their longer term time frames for operation are most appropriately assessed the higher degree of certainty provided for by the quantitative framework of SEPP N-1.
- 41 In arriving at this conclusion we keep in mind the fact that SEPP N-1 allows some incidences of noise above criteria during the establishment phase of operations. Mr Tardio's evidence is that this is appropriate to allow construction of noise mitigating berms along sensitive interfaces. We

⁷ EPA Publication 1254, October 2008.

⁸ At paragraph 12 of his statement of evidence.

accept this evidence, given the longer term benefit to the amenity of surrounding residences from the construction of noise attenuation berms.

- 42 The sources of noise that Mr Tardio has addressed, which we concur are appropriate, are:
- The dumping, spreading and compacting of earth and other operations on the site; and
 - Truck travel along Mt Ridley Road.
- 43 His assessment is based on sound power levels generated from plant used on Creative Landfills' operations at another location. He has used these sound power levels to model the noise levels that would be heard during each stage of the proposed filling operations. Truck sound power levels have also been applied to their movement along Mt Ridley Road.
- 44 This assessment identifies that for day time⁹ operations, achieving a noise level of 47dB(A) outside local residences will be protective of reasonable amenity expectations in this rural environment. His evidence is that this level is similar to that heard in an office. Having regard to the acoustic context of the area around the subject land, which while being open and rural is also subject to noise from farm operations, fly over of aircraft to Melbourne airport and faint traffic noise from the east (Mickleham Road and encroaching urban areas) we accept this criterion. It provides for an un-intrusive level of noise for the outside environment around dwellings, as it is not a strong enough noise level to dominate above the background. Allowing for a further 10 dB(A) reduction for transmission into dwellings, through open windows or doors, the criterion also establishes a level that is not intrusive to habitable rooms. It is akin to maintaining a suitably quiet environment.
- 45 When assessed against this criterion, Mr Tardio identified the tracked dozer operations during stage 1 to present the potential for noise levels above his adopted criterion. Operations during stage 4 have the potential to generate noise up to the limit of this criterion. Accordingly he recommends the use of a wheeled dozer rather than one which operates on tracks during stage 1 operations. This is because he identifies from previous testing that the movement of tracks is a significant noise source.
- 46 He also recommends the construction of a 3m high earth berm along the northern boundary. While the construction of the berm would be a noisy activity, its longer term benefit is to protect those properties beyond, notably that at No 750 Mt Ridley Rd, from operations in Stage 1.
- 47 Creative Landfill advises that stripped topsoil from the works area, which has to be stored somewhere on the site, can be used to construct such a berm. Similarly excess spoil can be used with its final spreading occurring at the end of stage 1.

⁹ i.e. from 7am to 5pm on Mondays to Fridays and 7am to 1pm Saturdays as defined under SEPP N-1.

- 48 During the course of Mr Tardio's evidence, it became apparent that operations during Stages 2 and 3 have the potential to emit noise that may reach a dwelling to the east (No 1805 Mickleham Road) at levels approaching that of the adopted day time criteria. Mr Tardio's response that an earthen berm like that on the northern boundary may be the most pragmatic approach to managing this potential for noise intrusion. He also indicates that further assessment of activity during Stages 2 and 3 with a focus on assessing impacts in this direction is possible to ascertain the potential for impacts and an appropriate response like that in Stage 1.
- 49 Conversely, under cross-examination, Mr Tardio indicated that his assessment shows that truck movements along Mt Ridley Road will not generate noise at levels above the criteria at those dwellings facing this road. Their respective setbacks are sufficient to attenuate the noise emitted from these vehicles to levels below the criteria.
- 50 Based on his assessment Mr Tardio recommends that no work occur outside the normal work hour, daylight periods. Accordingly we adopt this approach, applying daytime limits to operations.
- 51 It follows that we find that when managed in accordance with Mr Tardio's evidence, the proposed operations can be managed so that there will not be unacceptable adverse amenity impact on surrounding rural residences due to noise.

Drainage and water quality

- 52 The respondent neighbours submit that the works will alter natural drainage patterns which will have downstream and upstream effects on stormwater drainage over their properties. Exposed areas of fill are also said to present risks to water quality due to erosion and carriage of sediment into the local waterway.
- 53 Some neighbours consider that the fill will be prone to landslip and erosion risks or add to existing such risks. They assert that soil movements from the loose fill will affect stock and wildlife in the area.
- 54 Under existing conditions stormwater follows the grade of the land from north to south with a cross fall to the west. It is undeniable that the placement of fill over the north-east corner of this lot will therefore affect these flows. The question is whether these affects are acceptable when giving due consideration to the objectives of planning. In this respect, the purposes of the metropolitan green wedge land, associated decision guidelines and the general planning decision guidelines call for due consideration to be given to whether the development and use will diminish the natural resource and environmental values of the land and the surrounds, represents sustainable land management as well as orderly

planning, degrade the land, lead to reduced water quality and or increased erosion hazards.¹⁰

- 55 To address these issues, the proposed works incorporate graded swale drains around the base of the fill, to capture and divert runoff upstream of the site as well as runoff being shed from the fill. These swales are located along the northern boundary and a length of the southern proposed landform. They will be set back inside the property down gradient of the 5m wide buffer that is to provide space for screening tree planting.
- 56 The swales are also designed to disperse flows across and over undeveloped land along slopes upstream of the existing patch of native grassland.
- 57 Where overland flows off the fill will be consistent with existing surface hydrology, i.e. the water will run in the same direction, no swales are proposed. Notably, slopes where stormwater runoff from the fill will flow toward the retained patch of native trees will allow this run-on of stormwater from the fill areas onto this area.
- 58 Silt fences are to be constructed along the toes of the fill areas. These will treat overland flow from the fill areas during and after construction. Beyond this overland flows will pass over existing, pastured paddocks before crossing property boundaries and entering the drainage lines.
- 59 While we do not have precise details of these swales, standard industry practices are that swales are vegetated and are graded at slopes that reduce erosion risks. The plans accompanying this application indicate swales will have grades of 1% to 2%, reflecting similar grades to the local topography. These grades are acceptable for minimising erosion risk under concentrated flows.
- 60 We are satisfied that the proposed means of diverting and integration of swales into the landform will not affect upstream properties. At 3m width and setback some 5m from the boundaries, flow into the site will not be impeded. Similarly flow over downstream boundaries will follow existing conditions. The works will therefore not change overall runoff conditions over property boundaries.
- 61 It is evident that until vegetation is re-established across fill areas, there remains a risk of sediment becoming entrained in stormwater runoff. However we are satisfied that use of swales, silt fences and downstream buffers will provide sufficient treatment of stormwater over these interim periods. As a matter of permit conditions, Creative Landfill will be required to progressively revegetate filled areas, which ultimately will reduce the risk of erosion and sediment impacts.
- 62 The final grades of the fill landform will generally be at grades of 1:20 or 5% and no more than 1:15 (6.7%). While at the maximum generally designed for to minimise soil erosion, they are nevertheless acceptable.

¹⁰ Clauses 35.04-6, 57 and 65.

- 63 We find that the combination of compacted fill, over dressing of topsoil to reinstate vegetation, proposed slopes and swale drains address the potential for erosion and impacts on water quality.
- 64 While risks of slope failure and mass movement of soils has been raised by some neighbours, we note that the proposed areas of fill are well removed from the steep escarpment areas. Existing ground and proposed slopes are not sufficient in our view to be a concern for mass failures of the fill.

Agricultural land use impacts

- 65 A key purpose of the zone and its decision guidelines is to protect the agricultural value of the land. These purposes are supported by local and State planning policy we have set out earlier.
- 66 Clearly the areas that will be subject to landfilling will be unavailable for agricultural uses during the proposed operations. We accept the submissions of the applicant however that this is short term impact and should be balanced against other planning outcomes of:
- In the longer term (post the three year operation), the land will return to agricultural use therefore the longer term strategies and purposes of the zone and rural land use for the municipality will be achieved.
 - A purpose of the Green Wedge Zone is to accommodate land uses and development that support urban land uses but cannot be located in urban areas. The filling of land, even though an innominate use, is one that supports urban land development by providing a location to dispose of excess fill being generated by such development.
 - The generation of fill arises from urban development that itself is satisfying other strategic planning outcomes that are strongly supported by State and local planning policies.
- 67 While we acknowledge that the purposes of the zone support agricultural land uses, we agree with submissions for Creative Landfill that this is not the only purpose of such land. While it is true that using the land to dispose of fill generated from other sites is an innominate use, it is not a prohibited use. We agree with the applicant that the longer term agricultural use will not be affected for this land, having regard to the nature of the works. Further, the extent of works is limited to one area with remaining land within the lot remaining available for ongoing agricultural use.
- 68 The planning scheme does assign this land a particular strategic value for agricultural productivity. Indeed it is zoned Green Wedge rather than Farming. While identified in the local planning policy framework as a rural area where farming is to be supported, to the north is a rural residential style use of land. To the east of Mickleham Road land is being developed for urban residential use and the property is subject to an acquisition overlay that is intended to support a future arterial road. The particular values for

this rural land, as discussed earlier lie in its rural landscape and environmental values and possible future support of urban infrastructure. When considered in this context we do not find that the proposed works will prevent opportunities for future productive agricultural use of this land.

- 69 At a more site specific level, local neighbours express concern that fill will be chemically contaminated and / or result in the importation of weeds.
- 70 While our decision about land use and development is required to consider current and future land management impacts, including soil quality and protection of native vegetation and agricultural productivity, and at a practical level we accept that the management of farming land includes the issue of weeds, nothing in the scheme requires us to address this specific issue. Indeed the management of weeds and weed seeds falls within the jurisdiction of the *Catchment and Land Protection Act 1984*, where in the legal obligations of all land owners to manage (declared noxious) weeds are set out.
- 71 Even if it were relevant to our decision we have no expert evidence to indicate that the impact from weeds or seeds carried in the fill will be any more of a problem than current levels of impact that may arise from wind borne seeds or movement of vehicles between properties. In any event, permit conditions will require ongoing management of the revegetation of the fill areas and landscaping for a limited time period. As a matter of course this will involve management of invasive weeds species. Ongoing management thereafter will fall on the landowner. We are satisfied that this is sufficient and appropriate to deal with this issue under the planning jurisdiction.
- 72 Similarly, in respect to chemical contamination concerns, the quality of the fill is subject to controls under the *Environment Protection Act 1970*. We proceed on the basis that these controls will apply and that ultimately the importation and placement of contaminated soil is an offence. These are all matters regulated by the Environment Protection Authority under a separate regulatory regime. This regime and a clear permit condition that all fill must meet the regulatory requirements for classification as fill are sufficient to manage a satisfactory outcome.

MT RIDLEY ROAD AND TRAFFIC ISSUES

- 73 The Council submits that the current form and condition of Mt Ridley Road, from the intersection with Mickleham Road through to the proposed access for the work site, is not suitable for the proposed volume of heavy vehicle traffic. In response to these concerns Creative Landfill commissioned an assessment of the road pavement conditions and upgrade requirements. A traffic engineering assessment has been undertaken as well. The outcomes of these assessments have been tabled as evidence during the course of the hearing. The road pavement assessment was not in

contention and so Mr Toro was not called to give oral evidence. Mr Walsh was called to give further oral evidence and be questioned about some aspects of the traffic engineering assessment.

- 74 In respect to the road pavement conditions, Mr Toro's assessment indicates that the existing road sections that provide access from Mickleham Road will require upgrading to support the proposed traffic loading. This includes the first 200m from the intersection with Mickleham Road. Recommended upgrades include partial reconstruction with base and wearing course. Weak sub-base conditions will also require treatment. The recommended upgrade includes widening and treatment of road shoulders. These recommendations are to be implemented in accordance with proposed permit conditions.
- 75 While we have accepted this evidence unchallenged, we note that Mr Toro included a number of options. This includes the option for the granular overlay for the section from 200m to 850m from Mickleham Road to be 100mm rather than the design minimum of 50mm. The increase is suggested for practical constructability reasons. Mr Toro also recommends that a section of road that was limited to visual inspection only from 850m to 1010m from Mickleham Road, be subject to the same reconstruction standard as the first 200m of road.¹¹
- 76 We think it appropriate to provide certainty about the extent and nature of the upgrades required under the conditions. We think that Mr Toro's recommendations are sound and should be adopted. To ensure this is the case, we have amended the proposed conditions to ensure these recommendations are specifically addressed. Other recommendations about side drainage and roadside vegetation management should also be implemented.
- 77 The actual width of the upgraded road section is in some contention between Creative Landfill and the neighbouring land owners. Mr Walsh recommends an upgrade to 6.2m wide seal, to provide for two 3.1m sealed lanes with 1.5m wide gravel shoulders to either side. He acknowledged that design guidelines recommended either slightly wider shoulders and or wider sealed lanes for the maximum volume of truck traffic. His evidence is however that the maximum number of truck movements is not going to occur every day and that post the operations, the truck and overall traffic numbers will fall significantly. Under low traffic volumes, the design accorded with that now required for present day traffic volumes.
- 78 Mr Walsh also stated that the width of the sealed lanes would be sufficient for two trucks to pass each other at low speeds. While the posted speed limit along Mt Ridley Road is 100 km/hr, he noted that trucks would be unlikely to travel at this speed given the length of road between the site access and Mickleham Road, where they will have to decelerate to turn into

¹¹ His section "A" from chainage 0m to 200m from Mickleham Road.

or stop to turn onto. Drivers would also slow if they observed a conflict from oncoming traffic.

- 79 We consider that overall Mr Walsh's evidence supports the widening and reconstruction of the road to this two lane width of 6.2m seal with 1.5m shoulders. We agree that the low traffic volumes, particularly beyond Parkway Crescent do not support a full upgrade to the width of 7m as suggested by Mr Taylor. In conjunction with these proposed widths we note that the existing conditions near the Mickleham Road intersection include a seal to 6.4m. This entry section of road seal and foundations along Mt Ridley Road would be upgraded in accordance with Mr Toro's recommendations.
- 80 Mr Walsh was also questioned at some length about the functionality and safety of truck movements, with a particular focus on the intersection at Mickleham Road. We observe that Mr Walsh's assessment of the intersection function was based on an even split of truck movements from the north, south and east. However further information from Creative Landfill indicates that a combination of its current and future operations would see one site to the immediate east that would use the west-bound cross over, up to four sites to the north, using the southbound Mickleham Road approach and four sites to the south, using the northbound approach. We conclude that Mr Walsh's split of traffic flow to and from the subject site may therefore not reflect day to day conditions.
- 81 That said, Mr Walsh's assessment of traffic flow and conditions at this intersection indicates to us that:
- The intersection does not suffer from congestion and the addition of even peak truck movements of some 20 per hour in and out of the site will not cause unacceptable disruption to traffic flow.
 - The approaches to the intersection from all directions have acceptable line of sight.
 - There are existing turning lanes to service traffic flow from the north and south approaches of Mickleham Road which are adequate in accommodating truck movements.
 - The offset of the Mt Ridley Road east and west approaches to the intersection assist in slowing traffic and adding to safe conditions.
- 82 We have also had regard to the fact as the relevant authority managing Mickleham Road, VicRoads does not object to the proposal's level of traffic generation or reliance on this intersection. It has not required any upgrading of the turning configurations or other conditions.
- 83 We are therefore satisfied that the proposed access is acceptable subject to the upgrade works proposed for Mt Ridley Road.

NATIVE VEGETATION

- 84 Three areas have been identified on the property that contain remnant native vegetation patches. These are located around and downslope of existing dams at the southern end of the property. The proposed stages of filling avoid these areas. Survey of the works areas indicates that some scattered species of native grasses are present, however not in sufficient numbers or coverage to meet guideline thresholds to qualify as remnant patches. This is due to the dominance of introduced pasture species across these areas.
- 85 Similarly all but one remnant River Red Gums that are present on the site lie outside the fill area. The one tree that sits within the proposed fill area is to be protected by avoiding fill within a designated tree protection zone.
- 86 Given the above, and our findings about drainage and water quality made earlier, we are satisfied that appropriate steps are proposed to protect the native vegetation present on the site and possible associated habitat values.

CONSISTENCY WITH THE GWZ AND PLANNING POLICY FRAMEWORK

- 87 For the reasons explained above, we find that proposed use and development of the land for disposal of clean fill will not result in adverse amenity, landscape or environmental outcomes. It is an innominate use of land in the Green Wedge Zone. However it follows from our conclusions that it is not a use or development that results in outcomes contrary to the purposes of the zone or associated planning policy. We give some weight to the fact that it is a use that supports urban development that itself has strategic support within the planning scheme. This does not wholly justify the proposed use but adds to the conclusion that if not offensive to the purposes of the zone and associated policy, then other planning benefits add to its being supported.
- 88 While there will be temporary loss of the land from agricultural use that use can re-establish after completion of the filling. The use and development will also not prevent remaining land from ongoing agricultural use, nor prevent or impact on adjoining agricultural activity.
- 89 For these reasons we conclude that it is appropriate to direct the grant of a permit.

WHAT CONDITIONS ARE APPROPRIATE?

- 90 Without prejudice submissions were made about permit conditions as per the normal course of a planning permit hearing. These submissions were made on the basis of permit conditions contained in the motion of the Council made to support the permit application and a revision of such conditions put forward by Creative Landfill. All parties contributed submission variously supporting, opposing or suggesting modifications to these two versions.

91 We have considered these submissions along with the findings we have made about related planning and technical matters. We here set out an explanation of the final permit conditions we have arrived at only in respect of key matters.

- **Dust and noise management and amenity:** A number of conditions were contained in the proposed conditions to deal with dust, either under general amenity provisions or specific to dust management. We have retained the general amenity condition at condition 4 for a belt and braces approach and have consolidated other amenity conditions as follows:
 - Condition 7 limits fill operations to EPA specific daytime hours to address the management of noise.
 - Condition 31 requires a Dust Management Plan to be prepared in general accordance with Mr Cook's evidence, however we have set out minimum requirements that follow from our reasons and consideration of this evidence to provide clarity as to what is required and how dust management is to be implemented. The plan is required to include real time dust monitoring and specify management responses that are satisfactory to the Council. Condition 32 requires this approved plan to be implemented.
 - Conditions 33 through to 36 require Stage 1 noise treatment measures to be implemented in accordance with the evidence of Mr Tardio and our findings. Again we have made clear these requirements and expanded the terms of the proposed condition to ensure all earth moving equipment are captured by this condition given the identification of tracked vehicle noise as a key source of noise. We have also made clear the requirement to assess potential impacts to the residences to the east of the site during stages 2 and 3 and implementation of any measures as necessary to address these impacts, if any are identified.
- **Landscaping:** The Council proposed a condition requiring a s173 agreement to be entered into requiring the implementation of a landscape plan and provision of a geotechnical assessment of the fill's stability as measured against 'relevant geotechnical standards'. We agree with Creative Landfill that as the permissions being sought are for use and development of the land, permit conditions are sufficient to ensure enforceable landscape conditions (including maintenance). We also agree that it is sufficient to specify that the fill must be completed to a standard that satisfies the Council the final landform is stable and erosion and other geotechnical risks are addressed. It is up to the Council to ascertain what is acceptable. Conditions 6, 25 and 26 are worded accordingly.

- **Roads and traffic:** We have prepared conditions (29 and 30) that require a road design in accordance with our findings to be first submitted for approval by the Council and then constructed prior to the filling activity commencing. This is intentional in its wording as it allows some preparatory works before the road works are completed, in light of the fact that the issue for road infrastructure and impacts is directed toward the volume of trucks delivering fill. Truck traffic is required to not exceed the maximum put forward by Creative Landfill, which was the subject of the traffic evidence and our conclusions.
- **Environmental conditions:** A number of conditions are included to ensure drainage is managed to avoid impact to neighbours and follows on from our findings about the proposed swales and diversions. Landscaping conditions include revegetation of the fill on a stage by stage basis with weed management and maintenance for a period of two years from the completion of each stage. Further conditions have been framed to ensure no chemically contaminated soils or materials are imported to the site and the condition of existing fill on the site is tested and retained only if acceptable. Our wording of these conditions reflects these intentions.
- **Record keeping and reporting:** While some of the record keeping and reporting conditions proposed by the Council were resisted by Creative Landfill we do not consider them to be onerous as was asserted as these records are of an operational nature that the operator is likely to maintain for other reasons. Importantly however we find that these records will be useful, providing an ability to cross check and ensure compliance with permit conditions and the basis on which we have found this proposal to be acceptable.
- **Expiry of permit:** We have substantially reworded the form of the permit expiry. The Council set out a simple requirement for the permit to expire after three years from the date of issue. Creative Landfill sought an end date of three years from the date of fill commencing with additional time being required for preparatory works. We are concerned that there may be uncertainty as to when the Council and Creative Landfill may agree 'filling' has commenced and bear in mind that the permit is for use and development of the land. Our condition thus provides for the use and development to commence within two years and provides three years for the development (i.e. the landform) to be completed within three years of commencement of the use. While this may still be uncertain, at the very least the adaption of standard permit expiry times provides for the permit holder to apply for extensions if necessary under the normal course of the *Planning and Environment Act 1987* and if there is a dispute about such an extension, clear opportunity to make an application to the Tribunal for resolution of any dispute over these matters.

Ian Potts
Senior Member

Alan Chuck
Member

APPENDIX A

PERMIT APPLICATION NO:	P18003
LAND:	765-785 Mt Ridley Road, Yuroke
WHAT THE PERMIT ALLOWS:	
<ul style="list-style-type: none"> • Use and development of the land for disposal of clean fill and earthworks (clean fill) <p>in accordance with the endorsed plans and the permit conditions.</p>	

CONDITIONS

- 1 Before the development permitted by this permit 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 the permit. The plans must be generally in accordance with the substituted plans submitted (Sheets 1 to 7 Version L Dated 10 Feb 2016) with the application but modified to show:
 - (a) Deletion of the words 'proposed' where relevant.
 - (b) Deletion of the words 'Captured water to discharge evenly to imitate current flow of water across the site' from the Survey Plan.
 - (c) Protection fencing must be shown and noted around the tree located closest to the north-eastern boundary fence.
 - (d) Increase vegetation avoidance zone to include all areas outside of the proposed fill area.
- 2 The layout of the site and the extent of earthworks as shown on the endorsed plans must not be altered or modified without the written consent of the Responsible Authority.
- 3 No fill is to be placed beyond the areas as shown on the endorsed plans.
- 4 The amenity of the locality must not be adversely affected by:
 - (a) the activity on the site or related to the site,
 - (b) the appearance of any buildings,
 - (c) works or materials,
 - (d) emissions from the site, or
 - (e) in any other way

all to the satisfaction of the Responsible Authority.
- 5 Once the works permitted by this permit have commenced, the works must be continued and completed in accordance with the endorsed plans with all

areas of fill stabilised and revegetated to minimise erosion, prevent mass land movements and sediment laden runoff, all to the satisfaction of the Responsible Authority.

- 6 No additional fill material other than that permitted in accordance this permit is to be brought onto the site unless with the prior written consent of the Responsible Authority.
- 7 Except with the prior written consent of the Responsible Authority, the approved earthworks approved by this permit shall only be undertaken between the following hours:
 - (a) Monday to Friday 7.30 a.m. - 4.00 p.m.
 - (b) Saturday 7.30am- 1.00pm.
- 8 Except with the prior written consent of the Responsible Authority, no more than 200 truck movements (noting that a truck that enters and exits the site equates to 2 truck movements) can occur on each day from Monday to Friday excluding public holidays and no more than 100 truck movements on Saturday.
- 9 Trucks associated with the earthworks approved by this permit must not use Parkland Crescent when entering or egressing the site.
- 10 The earthworks operator must keep a written summary of daily truck movements to and from the site and a tally of fill volumes transported onto the site. Unless otherwise advised in writing by the Responsible Authority, these summaries shall be provided on a quarterly basis after the commencement of the use.
- 11 The operation must not track dirt, sediment or fill or cause overspill of earthworks materials onto Mt Ridley Road.
- 12 Existing fill that has been imported onto the land as identified on the plans to be endorsed under this permit:
 - (a) Must be tested by a consultant whose qualifications are acceptable to the Responsible Authority. The testing must be consistent with the *Industrial Waste Resource Guidelines – Soil Sampling - no. 702* as amended from time to time.
 - (b) Must be removed from the site and disposed of to an appropriately licensed landfill if the fill does not meet the required fill material standard specified within the *Industrial Waste Resource Guidelines - Soil Hazard Categorisation and Management no. 621* as amended from time to time prior to the importation and placement of any new material to the satisfaction of the responsible authority and the Environment Protection Authority.
- 13 Upon completion of the works, the permit applicant must submit a survey plan by a qualified licensed surveyor confirming the finished levels on the

- site are compliant with the endorsed plans to the satisfaction of the responsible authority.
- 14 Written records must be maintained to show that all fill brought onto the site is natural soil and earth material generated through the excavation of greenfield subdivisions and has been sampled and classified as clean fill in accordance with Industrial Waste Resource Guideline 621 *Soil Hazard Categorisation and Management*. These records shall be provided to the Responsible Authority when requested. No industrial waste or contaminated soil is to be brought onto the site.
 - 15 Prior to commencement of works, a Construction Site Environmental Management Plan (CSEMP), must be submitted to the satisfaction of and approved by the Responsible Authority to address the potential impacts of construction works. The CSEMP must be generally in accordance with *'doing it right on subdivision'* (Environment Protection Authority, 2004) and address methods for noise, dust, erosion and sediment control, waste and chemical management, flora/fauna protection, weed control, appropriate fencing for stock control and archaeological/heritage impacts.
 - 16 Prior to commencement of works, all personnel on site must be inducted into the CSEMP and all flora and fauna conservation requirements.
 - 17 The approved CSEMP must be implemented to the satisfaction of the Responsible Authority.
 - 18 No earthworks, compaction or modification of existing drainage patterns may be undertaken which present a risk to any remnant trees, understorey, or revegetation areas without the written consent of the responsible authority.
 - 19 Prior to the commencement of works the boundary of the works area must be fenced with secure and obvious temporary fencing to the satisfaction of the Responsible Authority. The fence must remain secure and not be moved during the entire development project unless with the written consent of the Responsible Authority.
 - 20 Prior to the commencement of works, all trees on the site must be temporarily fenced off with secure and obvious fencing in accordance with Australian Standard (AS4970-2009). Fencing must be signposted as "tree protection zone". The tree protection fence must remain in place until the works are completed. Fill, machinery and building materials must not be placed, even for a short time, within the tree protection zone.
 - 21 Following the commencement of works and at the completion of works, nothing, including vehicles, is to be stored under the canopy of any existing remnant trees.
 - 22 Works must be restricted to the area of development shown on the endorsed plans.

- 23 Prior to commencement of works, a landscape plan generally in accordance with the descriptions and recommendations of Mr Allan Wyatt contained in his Section 3 of Expert Statement of Evidence filed in VCAT Proceeding P893/2015 (dated March 2016). The landscape plan must provide for but is not limited to:
- (a) boundary planting along a 5m width using a mix of indigenous native trees;
 - (b) revegetation of all disturbed and fill areas on completion of each stage of the fill works hereby permitted using a mix of grasses or pasture species;
 - (c) an outline of the means proposed to protect planted trees from vermin and grazing impacts; and
 - (d) weed management.

The landscape plan must be to the satisfaction of and approved by the Responsible Authority.

- 24 Prior to the commencement of the works or at such other time as may be approved in writing by the Responsible Authority, the landscape plan must be implemented to the satisfaction of the Responsible Authority. The landscaping, including the staged revegetation of the filled areas, must be maintained by the landfill operator to the satisfaction of the Responsible Authority for a period of two years following completion of each stage.
- 25 The operator shall ensure that an experienced and trained site manager is present at all times the site is open to receive clean fill, together with a sufficient number of staff to ensure the satisfactory operation of the site. Entry to the site shall at all times be controlled to ensure that only clean fill authorised by this permit is received.
- 26 There must be no discharge of wastewater, contaminated stormwater or sediment-laden runoff beyond the boundary of the site or directly or indirectly into Council's drains or into watercourse, all to the satisfaction of the Responsible Authority.
- 27 There must be no discharge of nuisance dust beyond the boundary of the site to the satisfaction of the Responsible Authority.
- 28 If requested by the Responsible Authority, every six (6) months from the commencement of the use and development hereby permitted until cessation of the use, written notification to the Responsible Authority must be provided about the quantity of fill received on site, the sources of the fill material and the projected timeframes for completion.
- 29 Prior to the commencement of the use and development approved by this permit, the permit applicant must prepare plans and specifications to the satisfaction and approval of the Responsible Authority for the upgrade of Mt Ridley Road. The design of the upgrade works must provide for the re-

construction of the existing road to a two-lane sealed road (one lane in each direction) generally in accordance with the recommendations of Mr Pablo Toro as set out in his Expert Statement of Evidence filed in VCAT Proceeding P893/2015 (dated 22 March 2016) with lanes of not less than 3.1m width (a minimum of 6.2m total width of sealed road) and 1.5m shoulders to each lane along with all other necessary engineering and road works. The upgrade of Mt Ridley Road must extend from the intersection of Mickleham Road to the end of the final entry or access point into the works area hereby approved.

- 30 Prior to the delivery of fill to the site commencing, the works operator/permit applicant must complete the upgrade of Mt Ridley Road in accordance with the approved design of the upgrade works at no cost to the Responsible or any other relevant road authority (i.e. at the works operator/permit applicant's full cost).
- 31 Prior to the delivery of fill to the site commencing, the works operator/permit applicant shall submit to the satisfaction and approval of the Responsible Authority a Dust Management Plan which shall generally be in accordance with the recommendations of Mr Barry Cook as set out in his Expert Statement of Evidence filed in VCAT Proceeding P893/2015 (dated 22 March 2016) and which must include, but is not limited to:
 - (a) Setting out conditions or triggers for when the operation of specified plant should cease. These plant and operations include but are not limited to any bulldozer, trucks transporting fill and or fill stockpile operations.
 - (b) Details in the use and management of real time monitoring downwind of work area(s) using an automated monitoring station, including applicable response trigger levels.
 - (c) The watering or other treatments of haul roads.
 - (d) The watering of or other treatment of stockpiles at placement and under specified works and/or weather conditions when raised dust may be generated.
 - (e) Cleaning and maintenance of rumble strips.
 - (f) Management actions to reduce and remove tracked dirt, sediment or fill from access roads (e.g. Mt Ridley Road).
 - (g) Clear identification for responsibilities of site personnel and the site manager.
 - (h) Clear identification of actions or responses when specified trigger levels or conditions occur.
- 32 The dust management plan must be implemented to the satisfaction of the Responsible Authority.

- 33 Prior to the delivery of fill to the site commencing, the permit applicant/works operator must, to the satisfaction of the Responsible Authority, complete the construction of an earth berm (acoustic berm) in accordance with the recommendations of Mr Darren Tardio in his Statement of Evidence filed in VCAT Proceeding P893/2015 (dated 21 March 2016) found at paragraph 21(c) of this statement, and sections 5.2 and 6 and sheet 1 of the technical report attached as appendix B of the Statement.
- 34 Any bulldozer (or similar tracked machinery equivalent) used on the site during Stage 1 of the use and development must be of wheel operated and not a tracked type machine.
- 35 Prior to the commencement of fill being delivered for disposal under Stages 2 or 3 of the use and development hereby permitted, the permit applicant/works operator must provide to the satisfaction and approval of the Responsible Authority an acoustic assessment report that evaluates and sets out as necessary noise reduction measures required to bring noise levels at any sensitive receptor to the east of the subject site into compliance with State Environmental Protection Policy – (Noise from Industry, Commerce and Trade) No N-1 (the SEPP N-1).
- 36 Prior to the spreading of fill under Stages 2 or 3 of the use and development hereby permitted, the permit applicant/works operator must, to the satisfaction of the Responsible Authority, implement any noise reduction measures in accordance with the requirements set out in the acoustic assessment approved by the Responsible Authority under condition 35 of this permit.
- 37 This permit will expire if one of the following circumstances applies:
 - (a) The use and / or development is not started within two years of the issued date of this permit.
 - (b) The development is not completed within three years of the use commencing.

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 ---

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1314/2015
PERMIT APPLICATION NO. PL14/208

CATCHWORDS

Objection to a Notice of Decision to grant a permit. Section 82 of the *Planning and Environment Act 1987*. Moyne Planning Scheme. Use and development of land to dispose of clean fill, alter access onto a Road Zone Category 1 and display of a sign. Farming Zone. Amenity impacts on nearby use of land for a dwelling.

APPLICANT	Matthew Fleming & Kate Lloyd
RESPONSIBLE AUTHORITY	Moyne Shire council
RESPONDENT	Rodger Constructions Pty Ltd
SUBJECT LAND	Part of Lot 80, Parish of Yangery, Certificate of Title Volume 7893, Folio 024 Princess Highway, Killarney
WHERE HELD	Melbourne
BEFORE	Ian Potts, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	29 January 2016
DATE OF ORDER	27 April 2016
CITATION	Fleming v Moyne SC [2016] VCAT 643

ORDER

- 1 The decision of the Responsible Authority is set aside.
- 2 In permit application PL14/208 no permit is granted.

Ian Potts
Senior Member

APPEARANCES

For Matthew Fleming & Kate Lloyd	Ms Kate Lloyd and Mr Matthew Fleming in person.
For Moyne Shire Council	Mr Greg Tobin, solicitor of Harwood Andrews.
For Rodger Constructions Pty Ltd	Mr David King, solicitor of King Lawyers.

INFORMATION

Description of Proposal	It is proposed to dispose of clean fill in a disused quarry pit.
Nature of Proceeding	Application under Section 82 of the <i>Planning and Environment Act</i> 1987 – to review the decision to grant a permit.
Zone and Overlays applying under Moyne Planning Scheme	Farming Zone (Clause 35.07) Significant Landscape Overlay (Clause 42.03 and Schedule 6)
Other particular provisions applying under Moyne Planning Scheme	Land adjacent to a Road Zone Category 1 (Clause 52.29)
Planning Permissions required under Moyne Planning Scheme	Innominate use of the land and works in a Farming Zone (Clauses 35.07-1 and 35.07-4) Works on land subject to a Significant Landscape Overlay (Clause 42.03-2 and Schedule 6) Alterations to access a road in a Road Zone Category 1 (Clause 52.29)
Relevant Scheme, policies and provisions of the Moyne Planning Scheme	Settlement (Clause 11), Landscapes (Clause 12.04-2), Environmental risks (Clause 13) and Natural resource management (Clause 14) of the State Planning Policy Framework. Municipal overview (Clause 21.02) Environment – Tower Hill and environs (Clause 21.06) of the Local Planning Policy Framework.

Land Description

The subject land is an elongated lot of 1.98 hectares that extends some 480m to 500m east to west (its length) and 30m to 60m from north to south (its width). The land was used as a quarry with the pit extending for almost the entire length of the lot and across its width. The pit has reportedly been subject to some infill/rehabilitation however the north face of the pit is some 10m above the present floor level at its highest point.

The land is primarily covered with exotic grasses, with some low shrubs scattered within the pit, along the pit walls and the southern boundary line.

The pit is located on the south side of Tower Hill, a volcanic crater that is a significant landscape feature in the region.

Cases Referred To

Calleja Properties v Hume City Council (Includes Summary) (Red Dot) [2016] VCAT 253; *Ravenhard Pty Ltd v Moyne SC* [2006] VCAT 2272.

REASONS

WHAT IS THIS PROCEEDING ABOUT?

- 1 Mr Rodger operates a construction company, Rodger Constructions Pty Ltd. From time to time this company handles large quantities of fill generated from land development works. In the past, some of this fill has been placed in an old quarry pit known as Browns Quarry, located just below the southern rim of Tower Hill. Rodger Constructions has now applied for a planning permit to regularise these activities.
- 2 The Council has decided to grant a permit for the disposal of the fill, with the operation subject to a number of conditions said by the Council to address concerns about potential environmental impacts as well as potential amenity impacts to two nearby rural residences.
- 3 Mr Fleming and Ms Lloyd are the owners and occupiers of one of these residences. Their property and dwelling are to the immediate southwest of the old quarry. They disagree with the Council's decision and seek a review by the Tribunal on the basis that the activities will adversely and unreasonably impact on their amenity.
- 4 The Council and Rodger Constructions believe that the risk of potential amenity impact is overstated as the potential sources of noise and dust can be managed to a level commensurate with what should be the reasonable expectations of people living in an active agricultural setting.
- 5 The heart of this proceeding thus lies in what are reasonable amenity conditions for Mr Fleming and Ms Lloyd, living as they do in a working agricultural environment and can these conditions be sustained during the course of filling activities proposed by Rodger Constructions.

SOME RELEVANT BACKGROUND

- 6 By way of background it is perhaps appropriate to observe that from time to time the Tribunal has to deal with situations that have evolved from past decision making that now produces a potential conflict between land uses. This is such a case here. While making such an observation it is not intended to be critical, as this would be an unfair application of hindsight. The potential conflict between land uses is one that contemporary planning seeks to avoid at first instance, usually at the strategic level by separating such uses from each other.
- 7 Submissions for Rodger Constructions have explained that Mr Rodger was not the operator of Browns Quarry. He acquired it after extraction ceased and he has been placing fill in the pit with a view to rehabilitating the site to its original land form while disposing of excess material from development sites. He submits that the permit application has been made in good faith, i.e. he has not pursued any question of existing use rights given this past

activity, but rather following meetings with the Council and other parties he has sought to regularise the use and development of the land within the present planning scheme.

- 8 In part, Mr Rodger's response to the grounds raised by Ms Lloyd and Mr Fleming take issue with the fact that they have constructed a dwelling in a rural area, close to his land where the use for disposing of fill is said to have been occurring from some time. The clear implication is that the applicants for review are the agent of change and in being close to the quarry, have left themselves open to a source of possible future amenity impact.
- 9 I think this position is somewhat unfair when viewed in light of the submissions from Ms Lloyd about the history of their property. The Lloyd/Fleming property was the subject of Amendment L3 of the (previous) Belfast Planning Scheme. Amendment L3 came into effect on 21 August 1997 and provided for the construction of one house within a designated building envelope.¹ A planning permit was subsequently issued for 'the construction of a house'² on 15 July 1998, with subsequent extensions being made in August 2000 and December 2004. That permit was set to expire on 15 July 2007.
- 10 In March 2007 Mr Fleming and Ms Lloyd applied for a new permit, PL07/099, to construct the dwelling that now occupies their land. Amongst other matters the delegates report of this permit application records that:
 - The location of the dwelling was limited to and sits within the designated building envelope of Amendment L3, the latter having its northern boundary 50m from the common boundary with the quarry.
 - The Council considered that the use of the land for a dwelling had already been established by Amendment L3 and the consequential issue of a permit for the use and development of a dwelling on that land.
 - At the time of the Fleming/Lloyd permit application the quarry was considered to be no longer in use.
 - The quarry's shear surface (the northern face) was a prominent landmark and educational resource notwithstanding 'its destructive origin' from the past quarrying activity. No indications of rehabilitation work was recorded as being undertaken or would be required.
 - Notice of the permit application was given to neighbouring property owners and advertising was completed in local newspapers. No objections were received from adjoining property owners.

¹ This amendment also imposed other design requirements such as building heights but these are not relevant to this proceeding.

² Quoted from the delegates report prepared for PL07/099, the relevant permit application for the Lloyd/Fleming dwelling.

- 11 Thus the use of the land for a dwelling was not considered in the grant of the permit PL07/099 and in any event no activity was thought to be occurring on the quarry site. The PL07/099 planning report also records that the location of the building envelope was an 'unfortunate relic' of Amendment L3, due to its proximity to the prominent ridge of Tower Hill and the landscape impacts rather than the location being close to the former quarry.
- 12 So, whatever the 'arguable merits' or otherwise of the past decision making over land use and development of the subject land and surrounds, the assumptions made about the disused status of the quarry and the sequence of planning decisions has set the scene for a potential land use conflict. A decision is now required about whether this proposal to now use the quarry pit for disposal of clean fill is, on the balance of matters before me, an acceptable planning outcome given this potential conflict.

DETAILS OF THE PROPOSED FILLING

- 13 The actual proposal put forward by Rodger Constructions is relatively straightforward. It seeks to transport, deposit, spread and compact clean fill within the quarry. In the course of the hearing it has been clarified that the filling would continue until the land form was restored to what is thought to be its natural condition. This condition was not immediately obvious from the application plans but was clarified by Rodger Constructions to mean that the fill would be formed so that the finished surface would slope northward from the southern edge or lip of the quarry up to the top of the northern face of the pit. Rodger Constructions contends that this final landform reflects the surrounding landform conditions.
- 14 The pit extends some 250m in an east-west orientation. Currently the shear face of the northern pit wall extends some 5m to 6m above the southern lip of the pit at its highest point. This results in the very exposed face of volcanic deposits which has been referred to in various documents and submissions as being somewhat of a landmark. It is also considered to have educational values in exposing the nature of Tower Hill's geological origins.
- 15 Figure 1 (below) shows the present ground level contours with cross sections that reflect the extent of filling that would be required to achieve this finished form. Figure 2 reflects the proposed finished level and landform of the filling.

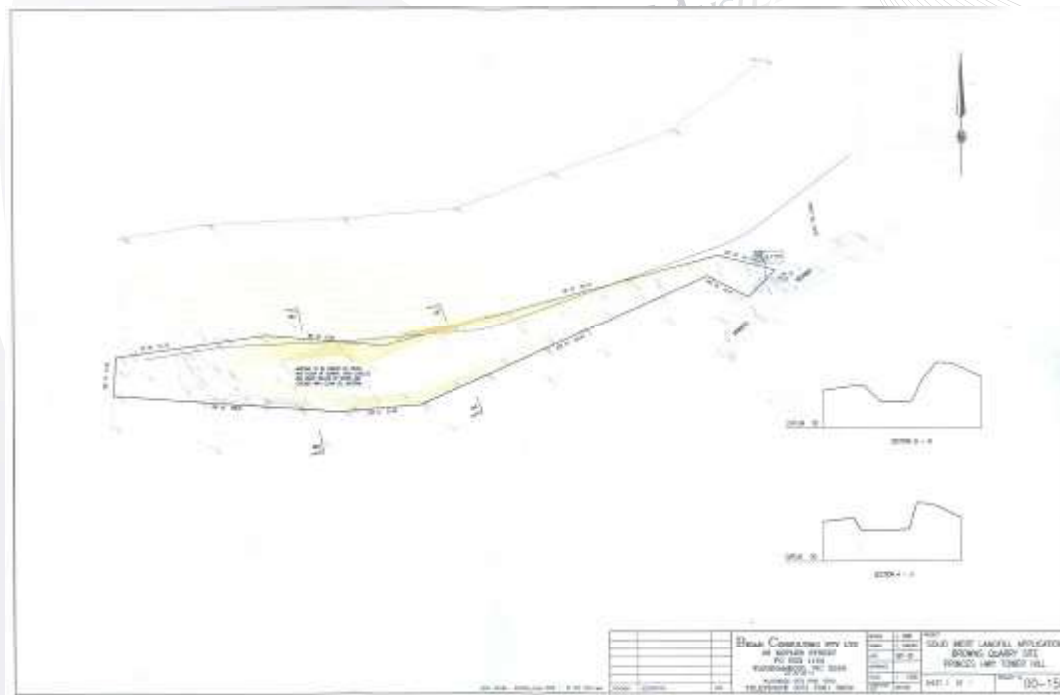


Figure 1: Contour plan and typical cross sections



Figure 2: Final landform and rehabilitation plan

- 16 Rodger Constructions estimates that some 550,000m³ of fill will be required to achieve the proposed finished landform. This volume of fill would be provided on a project by project basis, based on the construction activities the company would be involved with. Neither the Council nor Rodger Constructions could offer an estimate of how long the overall works would take.

- 17 It has been put between them that there may be four to five events per year. Each event would involve truckloads of fill being delivered onto the pit floor, with material being spread and compacted. Each event may extend from a few days up to a few weeks. On a project basis, Rodger Constructions believes that there could be up to, but no more than, 30 deliveries of fill per day. The actual number of movements would be dependant on the size and intensity of the project generating the fill.
- 18 It is fair to say that the application materials accompanying the permit application provided the barest of details about the proposed activities involved in the filling of this quarry. Through oral and written submissions the company has sought to clarify the details further. Thus I have drawn from this information that a typical day of operations would see trucks entering the site from the (uncontroversial) redesigned entry from the Princess Highway. The trucks would typically reverse into the active tipping area and then deposit the load of fill directly onto the quarry floor. Operation of reversing beepers would operate for a period of 30-60 seconds. Depositing the fill would result in tail gates opening and closing, with a banging noise. When sufficient fill is placed on the quarry floor a dozer or grader towing a non-vibrating sheep's-foot roller would be used to spread and compact the fill.
- 19 All of these aspects were confirmed by Rodger Constructions.
- 20 There is some equivocation as to whether stockpiling of fill would occur and how soon material would be spread and compacted. While I was told there would be no stockpiling, written and oral submissions indicate that while tipping would occur on a daily basis the actual spreading and compaction would occur on an 'as needs basis'.³
- 21 Although not specified in the application material, Rodger Constructions now indicates that watering of the fill would also be performed as necessary for dust control and to obtain appropriate levels of moisture to achieve compaction. The company also emphasises that no plant, equipment or buildings would be stored on the site. Any plant or equipment would be mobilised to the site when needed to support each filling event.
- 22 The company also sought to emphasise that the number of truck movements would be irregular, based on contracted construction events, rather than there being continuous truck movements in and out of the site over an extended period. Deliveries and compaction would occur between the hours of 8am and 5pm over week days. It is submitted that there would be periods of days to weeks where nothing occurred on the site.
- 23 This proposal clearly presents a benefit to Rodger Constructions in the management of excess fill material from its work sites. However Rodger Constructions and the Council emphasise the benefit of the fill in

³ For example at [13] of the written submissions for Rodger Constructions.

rehabilitating the site. This benefit is said to be two fold. The first and primary benefit is based on the opinion that the shear face of the pit is unstable and so presents a risk of the upper rim of Tower Hill failing and eroding. It is said that filling the pit will remove this risk. The second benefit will be the rehabilitation of the land to as near to its original landform and so remove the blight of the pit from the well-recognised and important landscape values of Tower Hill.

PLANNING CONSIDERATIONS AND THE SITE CONTEXT

Characterisation of the use

24 Under the processing of the original permit application, the proposal was characterised as:

Use and development for the purpose of refuse disposal (clean fill).

25 The Council and Rodger Constructions now agree that the primary permission being sought is for placement of the (clean) fill constituting a use and development of the land that is an innominate use under the scheme. The council puts forward the proposition that the use can be characterised as: *filling of land*⁴ and not refuse disposal.

26 The matter of characterising the use of the land for placing of clean fill arose recently in *Calleja Properties v Hume City Council*⁵. Having regard to the reasons put forward by Council about its revised position, most particularly the poor fit against the definition of *refuse disposal* under the scheme⁶ and adopting the reasons set out in the *Calleja Properties* decision,⁷ I agree that the proper characterisation of the proposal aligns with that put forward by the Council, save for the fact that the use is just not for filling of the land but is an action involving the disposal of fill, i.e. disposal of clean fill by filling of the land.

27 While seemingly a somewhat semantic point, the characterisation of the use as disposal of clean fill and not refuse disposal deals with some of the concerns raised by Ms Lloyd and Mr Fleming about potential issues of contamination, odour and other impacts associated with disposal of putrescible waste in refuse disposal activities. It is clear from the information relied upon by Roger Constructions and from the agreed characterisation that the scope of the use and development is confined to disposal of clean fill and hence relatively inert materials. But for issues largely about noise and dust impacts, the use and development in this application, would be relatively benign.

⁴ Other permissions being sought for altering access to a Road Zone Category 1 and the display of signage were not matters of contention and I do not address them in these reasons.

⁵ (Includes Summary) (Red Dot) [2016] VCAT 253

⁶ At Clause 74.

⁷ [2016] VCAT 253 at [52] to [69].

The substantive issues

- 28 What is central to the resolution of this review application is how the proposed use and associated development, when properly characterised, responds to the applicable provisions of the scheme and the *Planning and Environment Act 1987* that seek, amongst other things, an orderly planning outcome. On the one hand, as put forward by the Council and Rodger Constructions, is the purported landscape and environmental benefits of putting a waste (i.e. excess soil and rock) to good use by rehabilitating a former quarry site. On the other are the apprehended adverse impacts on amenity articulated by Ms Lloyd and Mr Fleming. This question of amenity impacts raises the further question about what should be the test of reasonable amenity expectations in the context of a rural dwelling located in a working agricultural environment.
- 29 Thus for the purposes of these reasons, I have sought to address these issues.
- 30 In focussing on these issues I recognise that Ms Lloyd and Mr Fleming expressed concerns about the potential for importing material other than clean fill and the consequential impacts on groundwater quality, odour and other environmental impacts. I am satisfied however that appropriate controls could be applied through permit conditions to deal with such matters. Accordingly, these environmental concerns would not have given rise to reasons to refuse this proposal a permit.

THE QUESTION OF AMENITY AND THE CONFLICT BETWEEN THE LAND USES

- 31 The Council and Rodger Constructions submit that the amenity impacts on the Lloyd/Fleming property would be no more than might be reasonably expected on a dwelling located in a working agricultural environment that is subject to the Farming Zone. It is acknowledged in submissions for Rodger Constructions that because the Farming Zone applies to this land and its surrounds, it does not mean the adjoining property can be unreasonably affected. What is argued is that the Farming Zone and the working agricultural environment of the surrounding landscape mean that those living in such areas will be subject from time to time to 'noise, dust, visual intrusion and nuisance' by the operation of machinery such as tractors, ploughs, seed drills and fertiliser spreaders. As well there are the other typical rural impacts from animal husbandry and spread of weeds between properties.
- 32 In addressing the question of 'reasonable amenity', I have considered the planning and land use context of the locality. The Farming Zone applies to the quarry site, the Lloyd/Fleming property and to surrounding land to the south, east and west. To the north and the area encompassing Tower Hill Lake, the land is subject to the Public Conservation and Resource Zone (PCRZ).

- 33 I agree with submissions that in combination, the purposes and decision guidelines of the Farming Zone and the State and local planning policy frameworks give strong emphasis to planning outcomes that support the ongoing agricultural use of such land. Use of the land for rural lifestyle and residential purposes are not supported or encouraged because of the conflict that arises between agricultural activity and the amenity expectations associated with these uses. One need only look as far as the purposes of the Farming Zone, the associated decision guidelines under clause 35.07-6 and relevant State and Local Planning Policy Frameworks⁸ to conclude that this is the case. It is also fair to say that many Tribunal decisions have confirmed this overall planning direction for farming zoned land, as was emphasised by the Council.⁹ Nothing in this matter persuades me that I should adopt a different approach.
- 34 Thus I agree with the Council and Rodger Constructions that the expectation of the applicants of an amenity founded on a tranquil rural lifestyle being enjoyed 100% of the time is not realistic. Notwithstanding previous decision making to allow a residence to be constructed and used on their land, the amenity expectations under the present planning scheme need to be considered in light of the land's principle strategic purpose which is to support agriculture.
- 35 That said, I think it is necessary to carefully consider what this means in respect to what is an acceptable level of amenity in the context of this location. Submissions for both the Council and Rodger Constructions acknowledge that being in a Farming Zone is not open slather on generating potential nuisance amenity conditions. I concur. What is required rather is consideration of the types of rural activities and hence amenity impacts that could be expected in this locality. Further while these submissions focussed on the Farming Zone setting, it should not be forgotten that to the north is a park area and limited agricultural activity such as grazing is likely on the quarry site.

Rural amenity and the potential conflicts

- 36 In this proceeding, the predominant activities immediately to the east, west and south of the Lloyd/Fleming property appear to be grazing and fodder production. More widely, similar activities along with cropping occur on and about the foot-slopes of Tower Hill and the coastal plain to the south. Local planning policy introduced in January 2016 recognises the particular agricultural values of the Killarney Area (which is also known as the

⁸ Clauses 14.01, 21.05 and 22.01-8 are particularly relevant.

⁹ The council relied upon *Ravenhard Pty Ltd v Moyne SC* [2006] VCAT 2272 wherein Member Cimino cited refers to and relied on the decision of *Tylden Nominees Pty Ltd and Anor v Greater Dandenong City Council and Ors* [2001] VCAT 2239.

Belfast Rural Area),¹⁰ and highlights the particularly high fertility soils and the historical focus on potato farming.

- 37 It follows that in this locality there will be noise and dust from animal grazing, seasonal working of soils for potato and other crop production (ploughing, spraying) fertiliser spreading and the like, as has been suggested in submissions. Such activity is however seasonal and occurs over a limited time period. Thus, exposure to and the degree of impacts on amenity from farming activities would be more than likely limited in both time and degree.
- 38 As noted, potential amenity impacts from land uses to the north are even more limited. There is limited if any opportunity for farming of the quarry site. Beyond the quarry and to the north-west and east of the Fleming/Lloyd property, is the park and reserve of Tower Hill Lake. As a reserve this site is largely utilised for passive recreational activity.
- 39 In contrast to the local farming activity, filling events proposed by Rodger Constructions will be of an unspecified length of time and frequency. This is not a criticism, but a recognition of the mode of operation proposed by this company and an artefact of the fact that disposal of fill will be driven by the size and the timing of a particular project that will be the source of the fill.
- 40 Further, the extent of activity and the sources of noise and dust are a stark contrast to the local reserve and park like environment of Tower Hill Lake reserve. This park environment will contribute to the amenity values of the area, including the Fleming/Lloyd dwelling.
- 41 What I have found lacking in this proposal by Rodger Constructions is a recognition of this context, the potential issues raised by the proposed filling activity and a properly presented management regime to deal with such issues. As I will address in the following reasons, the potential exists for noise and dust impacts because of the limited distances between the former quarry site and the applicants' dwelling, the sources and character of this noise and the sources of dust. What the proposal by Rodger Constructions has failed to deliver is a means to deal with these in a structured way that satisfies me that the risk of these potential impacts can be adequately managed to reduce the impacts to a satisfactory level.
- 42 That said, while the applicants have raised the issue of machinery being visually intrusive, I agree with Rodger Constructions that, of itself, any views of machinery operating across its land would not be so intrusive as to be detrimental to the general enjoyment of the applicants' dwelling or surrounding property. I have focussed instead on the issues of dust and noise which I consider to be the substantive potential sources of amenity impact.

¹⁰ Clause 22.01-8.

Noise

- 43 I have earlier set out the potential sources of noise. I agree with the applicants that repeated exposure over many days or weeks to such noise, when above background levels and of sufficient strength to be heard inside the dwelling, could be intrusive even in an agricultural locality. The character of the noise, such as banging tailgates and reversing beepers is as much relevant to the question of amenity as is the time of such exposure.
- 44 The operation of diesel powered machinery and trucks would also be a source of noise, which while not as foreign in character in an agricultural environment, has the potential to persist for longer periods than the type of agricultural activity occurring in this area. Given the proximity of the activity I agree with the applicants that the character of the dumping and reversing noises as well as the operation of machinery has the potential to be intrusive and hence detrimental to their amenity.
- 45 In the absence of an assessment of noise impacts, it is difficult to make a judgment on whether the sources I have identified will in fact be of sufficient strength to be so intrusive as to have an adverse amenity impact. However I observe that the applicants' dwelling has a northern orientation for all indoor and outdoor living areas and the quarry's location is elevated above that of the dwelling. But for one aspect of the proposal which I will address, there is little by way of intervening ground levels or other features that would reduce noise generated from the site, save for separation distances.
- 46 Further the land use context immediately around the dwelling that I have set out earlier is one which on balance I accept presents a low level of intrusive noise to the rural ambience. The forms of noise to be generated during the course of the filling would on balance be a potential source of intrusion into this amenity.
- 47 That said, the one aspect of the proposal that may assist in mitigating these noise impacts is the fact that part the filling activity will occur within a pit below surrounding ground levels.
- 48 I recognise that until the filling of the pit floor level approaches that of the quarry's southern lip, noise sources will to varying degrees be screened from the direct line of acoustic transmission to the dwelling. As such some reduction in noise levels between the site operations and the Lloyd/Fleming dwelling is likely. This is no more likely evidenced than the apparent situation where some filling has occurred in the past without notice or detriment to the amenity of the applicants.
- 49 However, there is no such benefit of noise attenuation once operations approach and/or occur above this level, as the benefit of the pit wall shielding is lost. Thus future operations close to and above the southern lip would result in direct transmission of noise from elevated levels (i.e.

upslope) of the applicants' dwelling. Only distance would therefore attenuate the noise levels.

- 50 For reasons that I will come to, the distances between the quarry and the dwelling appear inadequate for the types and levels of noise likely to be generated from the filling operations.

Dust

- 51 I have considered sources of dust, such as the unloading of the trucks and the spreading activities of the dozer that are said to be only momentary events, generating 'small puffs of dust'. Dust generation from the movement of trucks is also said to be 'unlikely' because of the low speed working environment within the pit and disposal areas.¹¹ These are the opinions of Rodger Constructions and are not supported by any expert assessment. They are also couched in terms of possibilities.
- 52 That said, in response to questions it was acknowledged that water carting and sprays could be used to manage these dust emissions. It is expected that these would be incorporated into a Site Management Plan required under the proposed permit conditions that would include a subsidiary dust management program. I accept that a properly prepared and implemented dust management program would be sufficient to deal with these sources of potential amenity impact.
- 53 There remains however one potential source of dust that is of concern. This is the source of dust from interim fill surfaces under strong wind conditions.
- 54 While Rodger Constructions suggests that the predominant wind direction for this area is from the south-west and so there is less risk of windborne dust impacting the applicants' dwelling, I am not persuaded that this is sufficient to address this risk. This is because the material tendered to support this proposition were afternoon wind direction rose where coastal sea breezes from the south and south-west are likely to dominate these periods. A more substantive assessment of meteorological conditions, including morning conditions and atmospheric stability would be necessary to persuade me that the overall prevailing conditions lessen the dust impact risks.
- 55 That said, like the noise impacts, I am less concerned about wind uplifted dust during the process of filling below the level of the southern pit lip. I recognise that from a practical point of view, the interim compacted surfaces within the pit can be expected to benefit from sheltered conditions. However when the fill approaches or occurs above the surrounding ground levels, there will be more exposure to prevailing winds, presenting a greater risk of raised dust being generated and transported toward the applicants' dwelling.

¹¹ At [31] page 8 of the written submissions for Rodger Constructions.

- 56 As far as can be ascertained from the material before me, each stage of interim filling would leave a bare and exposed surface that *may* revegetate and stabilise if there is sufficient time between filling events. However, until the final fill event and final surface is achieved there appears to be no form of ongoing interim management of exposed bare soil surfaces being proposed by Rodger Constructions to control dust.¹²
- 57 In my view this source of dust has not been considered or addressed satisfactorily by Rodger Constructions. I am not persuaded that it is sufficient to rely merely on a yet to be formulated dust management plan to address this and other dust sources generated by the proposal in view of the level of risk to the applicants' amenity.

A question about separation distances

- 58 As part of the consideration between the potential sources of amenity impact and the risks of impact Ms Lloyd and Mr Fleming point to the extent of buffers required for landfill and other similar work activities recommended in EPA guidelines. They suggest that at times the works will be some 50m from their dwelling, well within such recommended buffer distances.
- 59 Rodger Constructions points to the fact that there are no buffer requirements for the use and development that it proposes. It indicates that the distance to the dwelling which it estimates as 75m, is sufficient when considered within the context of an agricultural zone and likely levels of noise and dust emissions.
- 60 Having regard to the various plans and aerial photographs it appears that the distance to the dwelling from the full extent of the former quarry area ranges from 65m through to some 400m. The main pit area is generally in the order of 65m to 250m from the north façade of the dwelling.¹³ The question remains however whether these distances are sufficient to mitigate the impacts of dust and noise I am concerned about.
- 61 In so far as guidelines for the proposed activity, Rodger Constructions is correct in submitting that its proposed activities (as characterised) are not directly and specifically addressed by guidelines or policies under the regulatory regimes of the *Planning and Environment Act 1987* or *Environment Protect Act 1970*. Correspondence from the EPA to the Council during the permit application process acknowledges as much.¹⁴

¹² It is also apparent from the proposed finished surface contours that it would be intended to slope the final landform from north to south. I note in passing, though this was not raised in submissions, that any interim sloping surfaces before the completion of the filling activity would need to address potential for erosion from rainfall runoff.

¹³ There has been some disagreement between the parties as to these distances. I have ascertained this range from a review of scaled plans and tabled aerial photographs.

¹⁴ Letter dated 16 December 2014.

- 62 That correspondence also records that the EPA would not be concerned if a planning permit were to issue, however recommends that in the absence of details provided in the permit application material, the Council should satisfy itself that noise and dust can be managed to ensure no offsite impacts to sensitive receptors. It is commonly known that in various EPA guidelines a sensitive receptor includes a dwelling regardless of what planning zone applies to the dwelling's locality.
- 63 In my view, the fact that there are no guidelines directly applicable to the proposed filling activities arises more from the fact that disposing of clean fill appears to be an emerging land use and development activity rather than the fact that regulators do not perceive a risk. As the correspondence from the EPA advises the Council, I too need to be satisfied that the risks of adverse amenity impacts is acceptable. While the management aspects and amenity expectations I have considered earlier are two aspects of this risk, the ability to separate the activity by buffers to mitigate impacts from routine and upset conditions is another important consideration. As I have set out earlier, contemporary planning strategies seek to separate conflicting land uses as much as possible.
- 64 I agree with Ms Lloyd and Mr Fleming that while there are no direct guidelines about buffer distances for the filling activities, the guidelines they refer to for landfills and separation distances present comparable activities.
- 65 Guidance from the Landfill policy¹⁵ adopts a 200m buffer distance from buildings and structures for Type 3 Landfills that are designed to accept inert wastes.¹⁶ These distances are set on the basis of protection from amenity impacts as well as landfill gas migration and safety. The guideline also allows for a lesser distance subject to a satisfactory risk assessment. As I set out above, I am not satisfied that the risks of impact from noise and dust have been sufficiently considered.
- 66 The EPA guidelines for *Recommended separation distances for industrial residual air emissions*¹⁷ sets a distance of 250m for a quarry where no blasting occurs. All parties made comparisons between this proposal and quarry operations. While this proposal is the reverse, i.e. placing material in a pit rather than extracting it, I accept that some of the activities such as handling earth materials and the operation of machinery, are comparable. The 250m is designed to deal with fugitive emissions of noise and dust, i.e. those emissions arising after the application of best practice and that may arise from incidents and upset conditions.
- 67 Though I recognise that these guidelines are not directly applicable, they do indicate the scale of separation distance typically applied to protect a

¹⁵ *Siting, design, operation and rehabilitation of landfills*, EPA Publication 788.3 August, 2015.

¹⁶ *Ibid* at Table 5.2 and section 5.1.3.

¹⁷ Publication number 1518 March 2013.

sensitive use from the operations involving the movement of inert, earth materials on a regular basis. This scale is of the order of several hundred metres, not the distance of 65 to 200m between the main areas of works on the subject land and the applicants' dwelling.

- 68 I am not persuaded on the basis of material before me that even when allowing for the rural/agricultural context of their dwelling, the limited separation distance is sufficient to maintain a reasonable level of amenity during routine or upset conditions.

Conclusions about amenity impacts

- 69 My findings about the insufficient nature of the buffer between this proposal and the Lloyd/Fleming dwelling in combination with the risks of impacts from noise and dust leads me to conclude that this proposal presents a credible risk to their amenity. The permit application material in my view failed to sufficiently address these issues and the submissions and other information provided by the Council and Rodger Constructions does not persuade me to set aside these concerns. Further, given the potential for such impacts I am not persuaded that it is appropriate to leave such matters to permit conditions. To proceed in an orderly manner in this particular situation, it is appropriate to be satisfied that the risk of exposure to dust and noise levels can be managed prior to the grant of a permit and apply permit conditions that require to implement that management regime.
- 70 In arriving at this conclusion I acknowledge that my findings identify the greatest risks would be associated with filling as it approaches and passes above the level of the southern lip of the quarry. It occurs to me that a resolution of the issues may be that the filling is limited to the southern lip level or a specified distance below it. However further assessment of this limit would need to demonstrate that it will provide a satisfactory level of amenity protection to the Lloyd/Fleming dwelling.
- 71 But for the proposition put to me about a matter of balance between these risks and that of the beneficial outcomes of the proposed filling activity, my conclusions about the amenity risks would be sufficient to refuse the grant of a permit. It is appropriate however to consider and respond to the submissions in the context of my findings about the risk of amenity impacts.

THE BENEFITS TO THE LANDSCAPE AND REHABILITATION OF THE QUARRY SITE

- 72 I recognise that at face value, the filling of the quarry pit can be seen to have several benefits as put forward by Council and Rodger Constructions:
- It has the potential to restore the landscape on the edge of the Tower Hill Lake and thus improve landscape values consistent with various planning policy and the objectives of SLO-6.

- It could restore the land so it can be used for agricultural purposes as per its zoning.
- The use fill in a beneficial manner that achieves the above outcomes is to be preferred over disposal to a landfill.

73 However a deeper assessment of the first two of these benefits is necessary.

74 It is put by Rodger Constructions and accepted by the Council that quarry is a scar on the landscape. There is however a recognition, at least by the council officers, that the high northern wall of the pit, in being visible from the surrounding land and Princess Highway, has become somewhat of a landscape feature associated with Tower Hill. Thus while it is a remnant of past activity and intrudes into the natural landscape, the northern wall of the pit has developed its own particular value.

75 Rodger Constructions does not support this position and says the northern face is unstable and if it collapses, will cause erosion of part of the Tower Hill rim with consequential impacts on the landscape values.

76 In my view insufficient material has been presented to indicate that the northern face is in danger of collapse or presents a serious and detrimental risk to the integrity of the Tower Hill rim and surrounding landscape. The submissions and photographs relied on by Rodger Constructions is limited to a relatively recent rock-fall. Apart from this event, there is little else to indicate the wall is becoming unstable or presents a threat to the integrity of the landform of the rim.

77 Further, when questioned about what formed the basis of the final finished landform of the filling, the response was that levels were based on a continuation of surrounding natural ground levels.

78 It may be that these were the original landform conditions. It may also be that the quarry activity occurred on the subject land because the natural landform conditions provided an accessible point to access shallow rock material, i.e. there was already some form of depression or steeper section of rim wall.

79 No historical material was produced to indicate one way or the other what the pre-quarrying condition of the land was like.

80 Like the Council officers who evaluated this proposal, I am not persuaded that it is necessary to fully restore this former quarry to its original land form condition, whatever form that may have been. At most a partial restoration to the southern lip may be supported, as per my findings about the amenity impacts, but there is no driving imperative to fill in the pit completely so as to remove the northern face from public view. In fact, like the Council officer's conclusion, there may be some value in maintaining this northern wall, at least in part. For better or worse, it represents the past activity associated with settlement on and around Tower Hill and adds some

interest and educational value to the landscape due to its exposure of the underlying geological material.

- 81 Rodger Constructions and the Council also rely on the benefit of restoring the land so it is suitable for agricultural use. My question is however that being such a small lot of land well separated from the more intensive agricultural activity on the lower slopes and plains, what form of agricultural use would be made of this parcel? In my view the answer to this question is that the agricultural use would be somewhat limited given its small area, the fact the soils would be of a different quality to that of the surrounding land and the finished slopes would provide limited support of such activities like the higher value cropping activities in the wider area. In my view these facts point to a limited agricultural benefit.
- 82 Thus, while I agree that rehabilitation of the quarry would be consistent with the scheme, I conclude that there is no overriding imperative to rehabilitate this quarry pit, at least not to the extent proposed by Rodger Constructions, and which would give me cause to set aside the amenity risks to the Fleming/Lloyd dwelling that I have identified.

CONCLUSION

- 83 It follows from the findings I have reached that the proposal by Rodger Constructions does achieve a balanced outcome between the amenity risks to the Lloyd/Fleming dwelling that I have identified and restoration of the landscape. As such an acceptable and orderly planning outcome would not be achieved by granting planning permission for this proposal.
- 84 Given such findings and this conclusion, I will set aside the decision of the Responsible Authority and direct that no permit is to issue.

Ian Potts
Senior Member