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# Victorian Civil and Administrative Tribunal

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## Printz v Glenelg SC [2010] VCAT 1975 (10 December 2010)

# Victorian Civil and Administrative Tribunal

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## Printz v Glenelg SC [2010] VCAT 1975 (10 December 2010)

Last Updated: 20 December 2010

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

**VCAT REFERENCE NO.**

**P721/2010**

**PERMIT APPLICATION NO.**

**P09052**

### **CATCHWORDS**

Application under [section 79](#) of the [Planning and Environment Act 1987](#);  
Glenelg Planning Scheme; Township Zone; Environmental Significance

Overlay Schedule 4; Proposed buildings and works to construct a dwelling; Policy and planning control support for dwelling on this lot; environmental considerations; removal of vegetation and offset; climate change; sea level rise; water way flooding; fire risk to life and property.

<b>APPLICANT</b>	Printz Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Glenelg Shire Council
<b>RESPONDENTS</b>	Country Fire Authority, Friends of the Surry Inc, Historic Buildings Restoration Committee Inc, Mr P Drew, Mr M Boyer, Ms D Burch and Mr J Burch, Mr G Burch, Ms J Lazell, Mr R Martin, Ms J Burch, Mr P Dowsley and Ms D Dowsley, Ms E Boyer, Ms P Aley, and Mr C Aley, Mr R and Mrs M Dunn, Mr D Walter, Ms V Focken and Ms C Templeton
<b>SUBJECT LAND</b>	Lot 18, <a href="#">Section 3A</a> , East Street, Narrawong
<b>WHERE HELD BEFORE</b>	Melbourne Rachel Naylor, Presiding Member Ian Potts, Member
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	25-27 October 2010
<b>DATE OF ORDER</b>	10 December 2010
<b>CITATION</b>	Printz v Glenelg SC <a href="#">[2010] VCAT 1975</a>
<b>ORDER</b>	

1. The decision of the Responsible Authority is affirmed.
2. In permit application P09052 no permit is granted.

Rachel Naylor  
**Presiding Member**

Ian Potts  
**Member**

## APPEARANCES

For Applicant

Mr S Morris, QC and Ms J Forsyth, Barrister instructed by Norton Rose Australia. They called the following witnesses:

For Responsible Authority	<ul style="list-style-type: none"> <li>• Mr B Wilson, the owner of the land;</li> <li>• Mr J Hill, Botanist and Land Manager of EcoPlan;</li> <li>• Dr A McCowan, Hydrological Engineer of Water Technology; and</li> <li>• Mr P Neander, Fire Safety Consultant.</li> </ul>
For Respondents	<p>Mr J Monaghan, Solicitor of Russell Kennedy</p> <p>Mr S Foster, Mr Griffett and Mr Slocombe appeared on behalf of the CFA.</p> <p>Mr R Watters, Barrister instructed by the Environment Defenders Office appeared on behalf of Friends of the Surry Inc.</p> <p>Ms R Fleming appeared on behalf of Historic Buildings Restoration Committee Inc.</p>

## **INFORMATION**

Land Description	<p>The land is 1.037 hectares in area and located on the south west corner of The Esplanade and East Street in Narrawong. It is one of 18 crown allotments between East Street and the Surry River, all owned by the Permit Applicant.</p> <p>The majority of the land is low lying and subject to inundation as it is an area within a known wetland and part of the Surry River estuary. The south boundary abuts the coastal dune separating Narrawong township from the coast.</p>
Description of Proposal	<p>To construct a two storey dwelling located on the south part of the land. It contains a store, rumpus room and garage at ground level and bedrooms and living areas at first floor level. Upper level balconies are also proposed along the entire length of the south side of the dwelling and part of the</p>

Nature of Application	north side. Section 79 <a href="#">Planning and Environment Act 1987[1]</a>
Zone and Overlays	Township Zone (TZ) Environmental Significance Overlay Schedule 4, Coastal and Wetland Areas – Narrawong (ESO4)
Reason(s) Permit Required	Clause 42.01-2 to construct a building or construct or carry out works and to remove, destroy or lop any vegetation, including dead vegetation on land affected by ESO4.
Cases referred to	<i>Rafferty v Wellington SC</i> (Red Dot) <a href="#">[2007]</a> <a href="#">VCAT 1985</a>

## REASONS

### Background

1. This matter concerns an application to review the failure by Glenelg Shire Council ('the Council') to grant a permit within the prescribed time for the construction of a dwelling on Lot 18, [Section 3A](#) of East Street, Narrawong.
2. Under the Township Zone, no planning permit is required to use or develop the land with a dwelling provided certain effluent treatment facilities, potable water and electricity supply requirements can be met. This was the only planning control affecting the land on 27 February 2009 when a building permit was issued for the construction of a two storey dwelling and a garage. The construction commenced in early March 2009 and continued until 25 March 2009.
3. On 13 March 2009, Amendment C45 came into effect in the Glenelg Planning Scheme, which placed an Environmental Significance Overlay Schedule 4 (ESO4) over this land and the other lots in [section 3A](#) (Lots [1](#) to [17](#)). This was a Ministerial Amendment, and ESO4 contains an interim building and works control (until 31 December 2010) that requires planning permission to construct a building or to construct or carry out works on this land. The Council sought and obtained an Order from the Tribunal (dated 19 November 2009),[\[2\]](#) declaring that any further construction of a building or

carrying out of works on this land required a permit pursuant to the requirements of ESO4.

4. In the meantime, an application for permit was lodged with the Council on 15 April 2009 seeking permission “to complete the construction of a dwelling”. The Council publicly advertised this application and received 39 objections and 136 letters of support, including a petition. The application was also publicly advertised to Aboriginal Affairs Victoria, Department of Primary Industries, Department of Sustainability and Environment (DSE), Glenelg Hopkins Catchment Management Authority (GHCMA), Western Coastal Board and Country Fire Authority.[\[3\]](#)
5. Responses were received from GHCMA, DSE and Western Coastal Board. DSE and the Board raised some concerns and GHCMA requested specific conditions be included in any permit that issued.
6. This application was then lodged with the Tribunal against the Council’s failure to grant a permit within the prescribed time.
7. The permit application was subsequently considered at a Council meeting. The Council officer’s recommendation was to refuse the application, but the Council resolved to adopt the position of approving the application subject to permit conditions.

#### The Issues in this Case

1. The Tribunal has received a number of statements of grounds from residents and others expressing concern about the visual impact of the dwelling; the impact upon native vegetation; the impact of the accessway upon the Surry River floodway; the threat to bird and small mammal species and Aboriginal middens; and the appropriateness of the dwelling having regard to climate change, the Victorian Coastal Strategy (VCS) and Glenelg’s Strategic Futures Plan (SFP).
2. Mr Watters for Friends of the Surry Inc stated another issue associated with this proposal is that the permit application is premature. He suggested the strategic planning process should be completed and any planning scheme amendment implemented, including the implementation of Glenelg’s SFP in respect of coastal erosion and climate change.
3. The subject land is not an area that is affected by the Wildfire Management Overlay, but the CFA advised the land meets the

criteria to be incorporated into a future revision of the WMO. We were advised the CFA anticipates such a revision is likely to be implemented early in 2011. In the CFA's opinion, this land has significant potential for intense wildfire impact. The vegetation immediately adjacent to the site on the coastal reserve is classified by the CFA as shrub and heath as it consists of dense prickly shrubs to approximately 3 metres in height extending between the foreshore and this site. Mr Foster explained fires in scrub and heath vegetation are characterised as fast moving with relatively long flame lengths, even in relatively moderate conditions. Hence, the CFA is intending to place a WMO over the coastal reserve and a buffer distance of 100 metres beyond the edge of the existing vegetation.

4. The house (as currently constructed) falls within this buffer distance. In fact, the CFA advised its WMO modelling shows the flame zone potentially extending up to 21 metres from the edge of the shrub and heath vegetation. This flame zone therefore extends over the house. The CFA objects to the grant of this permit as it considers the construction of a dwelling within the flame zone creates an unacceptable risk to human life.

#### Reasons for Decision

1. Based on the issues identified above, there are a number of matters that we have considered in determining whether a permit should issue for the construction of this house. The first matter that we wish to deal with is the CFA's objection and the subsequent agreement reached between the CFA and the applicant.

#### Fire risk to human life

1. We are persuaded by the CFA's position that this land has significant potential for intense fire impact. We accept the submission that fires in scrub and heath vegetation can be characterised as being fast moving with relatively long flame lengths. Mr Neander is in agreement with such a characterisation. The proximity of this land to the coastal reserve that contains dense shrub and heath is a fire risk. We note the CFA's submission about potential fire scenarios impacting upon this site:
  - A landscape scale major fire impacting from the north and then sweeping through the scrub and heath under the influence of a

south west wind change; or

- A fire caused by human activity in the dune vegetation on a high fire danger day.
2. We accept the CFA's modelling that the flame zone could potentially extend up to 21 metres from the scrub and heath vegetation. This places the house (as constructed thus far) in a dangerous situation where it would be impacted upon not only by flames but also by radiant heat flux at a distance of 50 metres from shrub and heath. At this distance the radiant heat flux would still exceed 40kW/M<sup>2</sup>.
  3. The house, as presently constructed, is setback approximately 9.1 metres from the title boundary, within which there is approximately 7 metres of existing vegetation consistent with the vegetation found within the coastal reserve. We agree with the CFA that the majority of the vegetation beyond the 9 metre setback is not under the control of the permit applicant and hence could not be managed to modify fire behaviour. As such, we agree with the concerns of the CFA and would not support the construction of a house in the present location.
  4. However, the wildfire risk is not a reason why we have refused this application given the applicant has offered to amend the proposal to move the house 21 metres north of the property boundary (approximately 12 metres further north of its present location). It is then at the edge or just beyond the extent of the flame zone based on CFA's modelling.
  5. The CFA has agreed the construction of a house at the revised location is acceptable subject to the provision of a passing bay to allow fire trucks safe access onto and off the property, and a number of other conditions relating to the provision of water supply and the ongoing maintenance of vegetation around the house.
  6. Amended plans have been submitted to the Tribunal to indicate the new location of a house, the height of the house above the natural ground level and the design of the house necessary to achieve a BAL<sup>[4]</sup> of 29 (pursuant to the relevant Australian standard). Accordingly, the remainder of our assessment of the issues in this case has focussed upon the development as proposed in the amended plans given we have already stated we would not approve a house in its present location on this site.

Fairness

1. The Council and the applicant highlighted that a primary objective of the [Planning and Environment Act 1987](#) is to provide for the **fair**, orderly, economic and sustainable use and development of land. These objectives are also articulated in Clause 10.01 of the State Planning Policy Framework. Mr Morris submitted that the reference to “fair” is not just about procedure or process but rather is an issue of substance, particularly in this case.
2. The Council submitted approval of this proposal produces a fair and equitable outcome as the applicant commenced construction legitimately under the Township Zone and incurred expenditures before the need for a planning permit arose. However, the Council subsequently stated its submission regarding fairness carries less weight in light of the proposal to amend the location of the house. The proposal is now essentially to construct a new house from scratch in a revised location.
3. As we are not prepared to approve the house in its current location due to the issue of fire risk to life, we are no longer dealing with a house that has been partially constructed in accordance with the planning scheme at a particular point in time. Rather, what we now have before us is a new design for a house in a different location with modifications to the location of vegetation around the site and modifications to the access (including a passing bay) to the site. Accordingly, we agree with the Council that the submission regarding fairness now carries less weight. This means, for example, if the balancing of all of the other issues were weighing on the negative side, we would not be persuaded to grant planning permission based on a fairness argument given that the proposal is no longer for the existing partially built house.

#### Planning History and Current Controls

1. It was submitted that the Township zoning of this land is inappropriate and approval of the application is contrary to Glenelg’s SFP and is premature as strategic planning for this area is not yet complete.

#### Planning History

1. Ms Fleming submitted [section 3](#) of Narrawong was created when the township was mapped in 1856 by the Surveyor General’s office

Melbourne. It was at this time that the 18 lots between the coastal dune reserve and the floodway of the Surry River were created. Ms Fleming submitted this site and the other 17 lots were automatically transferred into the Township Zone as part of the creation of the new format Glenelg Planning Scheme with no thought being given as to the appropriateness of this zoning to these lots. Her argument is one that essentially puts the zoning as an artefact of history and that under more modern planning approaches this land would not be considered suitable for township purposes.

### Township Zone

1. We are not aware of the actual history of the zoning of this land other than that these lots and the balance of the Narrawong Township are contained within a Township Zone. We find the inclusion of the Surry River floodplain and wetland in a road reserve at least three times the width of the Princes Highway when a road (the Esplanade) is already constructed on the north side of floodplain curious. However, it is not our role to pass judgment upon the appropriateness of this zoning or subdivision layout as we are standing in the shoes of the Responsible Authority, not the Planning Authority<sup>[5]</sup>.
2. The strategies to achieve the Coastal Settlement State planning policy include identifying a clear settlement boundary around coastal settlements to ensure growth in coastal areas is planned and coastal values protected. Where no settlement boundary is identified, a coastal settlement is defined by the extent of existing urban zoned land and any other land identified in the planning scheme for future urban settlement.
3. We agree with Mr Morris that there is no settlement boundary identified for Narrawong, hence the extent of the existing coastal settlement is defined by the extent of the existing urban zoned land, which in this case is the Township Zone. As such, under the Coastal Settlement State planning policy, these lots are contained within an existing coastal settlement having regard to the zoning of the land.
4. Under the Township Zone, no planning permit is required to use land for the purpose of a dwelling so long as the requirements of clause 32.05-2 are met. These requirements are that a dwelling must be connected to an appropriate wastewater system; have a potable water supply with appropriate storage capacity; and have a reticulated or an

alternative electricity supply. There was no dispute amongst the parties that these requirements can be met, hence no planning permission is required to undertake buildings and works associated with a dwelling on this site under the zoning.

5. The Council, acting in its role as the Planning Authority, has the power to review not only the appropriateness of the zoning of this site and the other 17 lots but also the appropriateness of the Surry River floodplain and wetland being part of the Esplanade road reserve<sup>[6]</sup>. In light of the ESO4 provisions, the State planning policies, the Victorian Coastal Strategy and the Coastal Action Plans, it would appear there is some strategic justification for the role and the extent of the Narrawong Township to be reviewed.

#### Environmental Significance Overlay

1. The Environmental Significance Overlay (ESO) applies to this site and the other 17 lots. This overlay does not control land use, only development. The purpose of the overarching ESO is to implement State and local planning policies; identify areas where development of land may be affected by environmental constraints; and to ensure development is compatible with the identified environmental values. A permit is required to remove vegetation and to construct a building or carry out works unless the applicable schedule says otherwise.
2. The schedule that applies to this site and the other 17 lots is ESO4. During the hearing, this schedule was discussed in a manner that may have led some parties to the view that this is a temporary planning control. However, we note there is only one aspect of it that is temporary – the permit requirement to construct a building or carry out works, which expires on 31 December 2010. Hence, in this case, planning permission will continue to be required to remove vegetation in 2011.
3. At present, ESO4 requires the development of this site to obtain planning permission to construct and carry out works on the land, to construct the house and to remove vegetation between the house and the coastal reserve in the primary dune system. The matters to be considered in the decision guidelines include the objectives of ESO4, climate change and sea level rise, flood risk and the impacts on flora, fauna, landscape, wetlands, waterways and the dune system.

#### Strategic Planning

1. The objectors' opposition to this proposal placed weight upon the Council's strategic planning document Glenelg's SFP with Mr Watters submitting that approval of this proposal is premature because the strategic planning process for this area is incomplete. We are unable to agree with these submissions.
2. Glenelg's SFP is a Council adopted document and, whilst we can give it some consideration, at the end of the day it cannot be afforded the same level of weight as the existing planning controls that apply to the land or the planning policies in the planning scheme itself. In addition, having reviewed the section on Narrawong, we have given it little weight for the following reasons:
  - It acknowledges the pressure for development on the periphery of towns;
  - It acknowledges the need to determine the future role of many smaller townships so growth is directed to appropriate locations;
  - It states a housing strategy is required to identify where residential growth is to be directed;
  - It acknowledges there are significant areas of flood prone land that should be recognised through appropriate zones and overlay controls; and
  - The only recommendations for Narrawong are to recognise the coastal and Mount Clay landscape and the flood prone land in the planning scheme.
3. In other words, it appears there are no recommendations about the role of Narrawong and whether it is an appropriate location for future growth. There are also no recommended changes under Glenelg's SFP about the extent of the existing Narrawong township or the application of the Township Zone.
4. We note Narrawong is nominated as a current village in the Coastal Spaces 2006 Settlement Framework referenced in the Victorian Coastal Strategy (VCS). A village is described as having a moderate population level, limited services and various forms of accommodation. It notes a settlement plan is being developed/ revised for Narrawong through Glenelg's SFP, but based upon our analysis in the previous paragraphs it appears to us this is not the case.
5. Narrawong is not noted on the coastal settlement framework special growth management plans at figures 12A and 12B of the VCS. In

fact there are no townships nominated between Portland and Port Fairy. Rather, there is comment at the bottom of these figures that there are a variety of areas which include subdivisions and clusters of housing in rural areas that do not formally constitute a settlement and the objective is to manage these in relation to environmental impacts within existing limits of current development. Hence, we find there is no clear direction as to what the future holds for Narrawong township under the Coastal Spaces 2006 Settlement Framework or VCS. At most, it could be said that the town has little role to play in the strategic direction of accommodating growth, with settlement and development to be contained within the existing limit of urban zoned land.

6. The lack of a clear strategic and policy direction for Narrawong does not in turn mean that because this lot and the other 17 lots are contained within urban zoned land there is an automatic right to develop land. There are other development controls and policies that need to be considered, such as in this case where an Environmental Significance Overlay (ESO) applies.

#### Weight to be Given to Planning Policy

1. Friends of the Surry Inc placed significant weight upon the planning policies in the planning scheme, including State and local policies relating to biodiversity, climate change and coastal development. Whilst we agree with Mr Watters the decision guidelines of the overarching Environmental Significance Overlay requires consideration of the planning policies in the planning scheme, it must be remembered they must be policies directly relevant to the exercise of discretion afforded by the ESO. To illustrate this using an example, we adopt the findings of Deputy President Gibson in a case along the Ninety Mile Beach:
  1. The council has relied upon the policy in clause 15.08 about providing clear settlement boundaries around coastal settlements and avoiding linear urban sprawl along the coastal edge and ribbon development within rural landscapes, to justify rejecting a permit for development under the Environmental Significance Overlay. The policies relied upon are policies relating to settlement and use of land for residential purposes. They are not policies directly relevant to the exercise of

discretion under the Environmental Significance Overlay, which are concerned with the siting and design of specific development on specific land and ensuring that the development is compatible with the environmental objectives set out in ESO1. In my view, to rely upon such policy relating to settlement and residential use generally would be to exercise a discretion conferred by ESO1 for a purpose other than that for which the discretion was conferred. This would be an error of law.[\[7\]](#)

2. Since this decision in 2007, the State planning policies have changed and this, in turn, has changed the policies that are now relevant to the exercise of our discretion. For example, there are aspects of the Coastal Settlement, Appropriate Development of Coastal Areas and Coastal Crown Land State planning policies that are relevant in this case because they relate to the discretion to undertake development. Hence, our consideration of the merits of this proposal has focused upon the decision guidelines of the ESO, particularly ESO4; and, where relevant, the State and local planning policies that assist in considering the discretion conferred by ESO4.
3. Before turning to this, there is one more matter we wish to comment upon. Mr Morris submitted some of the State planning policy is directed to planning authorities (who can amend planning schemes) rather than responsible authorities (who apply the content of planning schemes). We note DP Gibson held a similar view in *Rafferty* that the policies in the Coastal State policy are directed at planning by planning authorities[\[8\]](#). We generally agree with this point but note, however, the State policies do not distinguish how they should be applied and hence we find some policies may be directly relevant to both planning and responsible authorities. To use an example, it is our opinion in this case that the following strategies for coastal settlement in clause 11.05-5 of the planning scheme would be relevant to both:

Avoid development on ridgelines, primary dune systems and low lying coastal areas.

Encourage opportunities to restructure old and inappropriate subdivisions to reduce development impacts on the environment.

## The Appropriateness of this Proposal

### The Primary Dune System

1. It follows from what we have thus set out that the State Planning policy for coastal settlements seeks to avoid developments on primary dune systems is relevant to the decision making of responsible authorities and is not just a strategic planning issue.
2. Mr Morris made submissions that the width and form of the dune on which the dwelling is to be located is such that the land form should not be considered to be a primary dune. He acknowledged however that it may be thought of as being part of a primary dune system.
3. Our inspection of the site confirms that which was evident from the various photographs tabled in the hearing, the evidence of Dr McCowan and the submissions of Mr Morris. The various rises and falls and extent of the dune ridge line leads us to agree with Mr Morris that the site is not located on a primary dune per se. It is our view that the correct characterisation is that the site is part of a dune system that forms the primary barrier to the coast. It is thus part of a primary dune system, as is referred to in policy.
4. We therefore proceed in our determination of this application on the basis that the location is to be characterised in this way, i.e. as a site that is located on the slope of a primary dune system and that it is a location that State planning policy would generally seek to avoid development on.

### The House Design

1. The proposed ground floor level of the house is 5.95m RL adjacent to spot levels on its northern side of 4.65m RL and 5.03m RL. Based on the elevations, this means the north side of the ground floor is sitting between 0.8 and 1.0 metre above the natural ground level. This in turn means the overall height is in the order of 6.4-6.9 metres (based on our scaling of the plans provided). We acknowledge the height is not specifically nominated on the plans, and we note the submission on behalf of the Friends of the Surry Inc after the circulation of the amended plans that, despite the house being located on lower land, the overall height appears the same.
2. The amended location of the house means that it sits at the edge of land that slopes sharply down into the floodplain of Surry River,

which will be a fairly extensive wetland area for much of the year. The height of the coastal vegetation on the dune system is of low to medium scale (about 3 metres in height based on our earlier findings in regard to the fire risk), which means the height of the proposed house will see the upper portion sitting at or above the backdrop of coastal dune vegetation.

3. Ms Fleming described the original design of the house as a typical residential dwelling of the 1960s and 1970s and submitted it is not sensitively designed. Having inspected the township generally, there are many examples of what we would describe as typical residential dwellings but this is appropriate in what is a more typical urban residential style of neighbourhood setting. This is not the way we would describe this site or the other 17 lots along the back of this primary dune system. The setting could be described as both rural and coastal, which is in direct contrast to the more urban setting of the north side of the Esplanade.
4. The amended design of the house (its north elevation) features concrete blockwork parapet walls at ground level, horizontal colorbond sheeting for about two thirds of the first floor level, aluminium doors and windows, and a skillion roof with a 5 degree pitch towards the north. The colours are not specified. Whilst the design has changed, in our opinion the changes are not significant. We agree with Ms Fleming's submission that the siting, form and design of the dwelling do not sensitively respond to the setting. It does not maintain or enhance the coastal landscape character of this area as suggested should be the design response in the Siting and Design Guidelines for Structures on the Victorian Coast (1998).
5. Ms Fleming and Mr Watters referred to the Siting and Design Guidelines in their submissions but we note that it appears not be a document referred to in the State Planning Policy Framework. It is a document that is referred to in the Victorian Coastal Strategy, but that means it is effectively two steps removed from the planning scheme itself. Nevertheless it is a document that can be considered pursuant to [s84B](#) of the [Planning and Environment Act 1987](#). The Guidelines are well known and can sometimes be found as a reference document in the Local Planning Policy Framework of a planning scheme. We see no reason why this document should not be referred to in the State Planning Policies, such as under Appropriate

development of coastal areas at cl 12.02-2 and Coastal tourism at cl 12.02-4.

## The Wastewater Treatment System

1. A wastewater treatment system will be provided with an effluent disposal field of a minimum area of 241 square metres. It is situated on the east side of the house, adjacent to the southeast corner of the lot and near the coastal dune system.
2. The location of the disposal field on the amended plans and use of an onsite wastewater system are consistent with a Domestic Wastewater Permit that had been issued by the Council in December 2008. This permit has since expired. In correspondence of November 2009, the Council declined to extend this permit while the permit application was the subject of VCAT proceedings.
3. Mr Monaghan informed us that the Council's assessment of the acceptability of the on-site wastewater disposal was based on a shire wide review of domestic wastewater management<sup>[9]</sup>. This review includes an assessment of the suitability, constraints and capacity for the use of on-site wastewater management for Narrawong. The study is said to indicate that the subject site is capable of retaining and treating domestic wastewater on site from a three or four bedroom dwelling.
4. While we acknowledge the nature of these studies and the detail down to the lot level, we are nevertheless concerned about the approach adopted by the Council to rely solely on this study and not require a site specific land capability assessment to confirm the site's specific conditions. We are particularly concerned about the constraints that may arise from the site's proximity to the wetland area or floodplain and depth to groundwater beneath the site. In other evidence Dr McGowan acknowledges that future sea level rise may result in rises in groundwater levels. At this point we have no information as to where that level is and therefore how much it may rise and bring it within proximity of the disposal field. Further there is no field evidence as to the site's subsoil conditions and whether it accords with that assumed in the Narrawong town study referred to earlier. Variations may mean that the proposed system could overload the soil's capacity for absorption or result in perching and seepage toward the wetland.

5. Thus while we recognise that the town based study may assist in assessing cumulative risk issues and give broad indications of site suitability, this is not a substitute for a site specific land capability assessment as required under the Code of Practice – Onsite Wastewater Management[\[10\]](#) to satisfy the requirements of the SEPP Waters of Victoria.
6. Accordingly we are not persuaded to accept that the site's capacity for on-site containment of domestic wastewater has been satisfactorily demonstrated. In light of our decision to not grant a permit on other grounds, we have not pursued this issue further. We record here however that the unsatisfactory nature of the approach adopted by the Council weighs against this proposal. We would not have been persuaded to grant a permit in the absence of more thorough, site specific assessment of land capability.

#### The Access to the House

1. Access to the house requires an elevated roadway constructed to a finished level of 2.8 metres AHD[\[11\]](#) with culvert(s) to maintain the wetland, flood storage and drainage functions of the waterway. This elevated roadway is necessary to provide access that responds to future sea level rise and flooding of the Surry River.
2. Whilst the Glenelg Hopkins Catchment Management Authority is agreeable to this arrangement, we are of the opinion this is a poor design outcome, particularly in light of State and local policies and the coastal reference documents[\[12\]](#). For example, we find this access design is not consistent with the following:
  - Maintaining natural drainage patterns and biodiversity within and adjacent to coastal estuaries, wetlands and waterways (cl 12.02-2);
  - Improving management of natural resources so there is no immediate or long term lessening of the environmental qualities of the area (cl 21.07); and
  - Protecting and conserving the Shire's biodiversity in terms of maintaining a diversity of habitats (cl 21.08); and
  - Setting back development from low lying areas to respond to significant landscapes, features and values as well as to accommodate vegetation and climate change risks and impacts (Victorian Coastal Strategy).

3. On the actual site itself, a 3.5 metre wide driveway and turning area is proposed from the house for a length of about 50 metres following by a wider (6 metres) passing bay area of 20 metres in length to satisfy CFA requirements.
4. Having inspected the site after some of the significant rain that Victoria has experienced in the months around the time of this hearing, it is evident that the site, even when not in flood is subject to wetting and inundation. As such it is correctly characterised as a wetland area. This area includes the more defined flow channel in the lower portion of the floodplain, but also extends more widely to the break in slopes to the north and south. This includes the land immediately adjacent to the proposed new dwelling location.
5. Much of the alignment and extent of the proposed access area, including the passing area, is over the land that is part of this wetland area. The access will have to be built up to provide all weather access now and under future flooding regimes including allowances for predicted sea level rise.
6. We understand that the form of the access will involve construction of earthen embankments with culverts to provide passing water flows, whether flood or other flows.
7. We accept that the use of culverts can provide for the drainage function of this low lying wetland area. However the form of the access and the use of culverts does not address the wide spread nature of inundation across the wetland and the ecological and biodiversity values that this regime supports. Indeed the reliance on an embankment gives us cause to be concerned about:
  - how changes in flows from a widespread sheet flow to a directed flow through culverts will change the hydrological regime of the wetland up and downstream of the embankment; and
  - how this change may then impact on biodiversity values that are reliant on the existing flow regimes.
8. We are unconvinced that the approach submitted to us of simply placing 'some gravel' on the existing surface to form the embankment foundations will be the extent of the necessary civil works for this access. The wet conditions and necessity to provide all weather access for emergency vehicles, including CFA trucks, indicates to us that more extensive foundation works will be required along with a properly engineered embankment, involving extensive

movement of construction vehicles and equipment. The form and extent of such works leads us to conclude the access will be a source of significant disturbance to the wetland.

9. Thus the combination of its extent, possible disturbance to the hydrological regime and disturbance from construction present levels of change to this wetland area that we find are unacceptable when having regard to the statement of environmental significance and objectives of ESO4.
10. Further the height and lateral extent of the access embankment leads us to conclude that it would be a substantive intrusion in the landscape, one which we have set out already presents as a natural break between the existing urban area of the town and the estuary and coastal dunes environs to its south.

#### Vegetation Removal and Landscaping Opportunities

1. The only reason the existing coastal vegetation on the back of the dune between the southern property boundary of this site and the proposed house needs to be removed is to ensure the house is not within the flame zone of a fire in the coastal reserve. In other words, if this land is not developed with a house, this vegetation does not need to be removed. The environmental objectives of ESO4 include ensuring the long term protection of coastal ecosystems and preventing inappropriate development that is likely to prejudice the long term environmental values of the coastal dune. We are of the view the removal of this vegetation is a poor design outcome that detrimentally impacts upon the coastal dune and its landscape features, and does not achieve these objectives.
2. In addition, there are limited landscaping opportunities on this site because of the fire risk. The proposal initially included new landscaping on the north side of the house, which would in part provide for a replacement (or offset) for the vegetation that needs to be removed from the south side of the site, adjacent to the coastal reserve of the primary dune system. During the course of the hearing, the applicant and the CFA agreed that any new native vegetation provided as a replacement/offset for the removed vegetation should be located off-site on one of the other 17 lots (possibly one that has limited development capacity for other reasons).
3. The result of the limited landscaping opportunities is the inability to

provide any effective landscaped screening of the proposed house. Due to the topography of the land, the slope of the primary dune system that contains this site and the other 17 lots is visible from the established township and currently forms part of the landscaped foreground of the wetlands, coastal dune and the more distant views of the ocean/coast. In our opinion, placing a dwelling in this setting (whether it is in its original location or the amended location) will introduce a foreign built form element into a coastal foreshore setting that cannot blend into the landscape.

4. We find this is contrary to ESO4 as it will have a detrimental impact upon the existing landscape features and it is contrary to State policy as:

- The development is on a primary coastal dune system and adjacent to a low lying coastal area (cl 11.05-5);
- The development cannot be sensitively sited and designed to respect the existing character of this coastal settlement (cl 12.02-2);
- The existing largely cleared land on the slope of the dune system cannot be revegetated due to the fire risk associated with the construction of a house (cl 12.02-2); and
- This development is adjacent to coastal foreshore Crown Land and cannot demonstrate a need or coastal dependency, and is not within a defined activity or recreation node<sup>[13]</sup> (cl 12.02-3).

#### Climate Change and Sea Level Rise

1. Clause 13.01-1 is another State Planning Policy that we view as applying equally to Planning and Responsible Authorities. This policy calls for these authorities to ‘plan for and manage the potential coastal impacts of climate change’. Strategies to address this objective include:

Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.

Ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift.

.....

Avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

1. The decision guidelines of ESO4 also call for a similar consideration of the impacts of sea level rise and climate change.
2. In response to these planning requirements, we have been provided with a substantial volume of evidence from Dr McCowan and submissions from Mr Morris to support the contention that the subject site is not at an unacceptable level of risk from coastal hazards and sea level rise.
3. We here summarise the key parts of Dr McCowan's assessment about the site conditions, impacts from sea level rise by 2100 and coastal hazards, which are:
  - The dwelling would be located on the landward side of a high and laterally extensive dune system, as we have set out earlier;
  - The beach and dune system have a modern history over the last 50 plus years of stability with no indications of long term depletion or accretion of the beach;
  - Geomorphological analysis of the estuary and dune system suggests longer term geological stability, including over other periods of sea level rise and fall;
  - Sea level rise will lead to eventual inundation of the wetland and estuary, but not to a height that would inundate the dwelling. Access to the dwelling would however be required to be raised to an elevation of 2.8m AHD to maintain all weather access; and
  - The combined effects of sea level rise of 0.8m by 2100, storm surges and an increase in the frequency of the storm surges is not expected to undermine the sand reserves of the dune system to the extent that the dwelling would be subject to coastal inundation.

4. For these and other reasons, Dr McCowan advises that the coastal hazard, inundation and sea level rise risks to the dwelling are low (to the planning timeframe of 2100) while there is a medium risk from inundation from the estuary.
5. On the basis of Dr McCowan's risk assessment it is submitted that the development will not be subject to unacceptable levels of risk. In response to the precautionary principle, which is to be adopted in decision making about this issue, Mr Morris made extensive submissions about what a cautious approach entails and how we should apply the principle in this situation.
6. We do not take issue with what Mr Morris urged on us about the application of the precautionary principle. We will however address some aspects of his submission which he made about applying a sea level rise of 0.8m out to the year 2100.
7. Mr Morris presented background material from the IPCC and from scientific papers as to the derivation of the 0.8m level that has been adopted in the VCS and subsequently in the State Planning Policy. On the basis of this material he contends that the value of 0.8m has a high level of precaution already built in. Thus he suggests that the application of the 0.8m level by 2100 effectively provides a response to the precautionary principle approach. Indeed he submits that there is so much conservatism in this level, he suggests that caution upon caution is being applied.
8. Mr Morris suggests that part of that caution arises from the adoption of the upper range of levels estimated from thermal expansion of the ocean from more or less worst case scenarios of carbon emissions and climate change impacts. The 0.8m level also incorporates the upper range of estimates for contribution from continental sheet ice melt. Mr Morris argues that there is a degree of scientific uncertainty about these scenarios and whether they will eventuate in the manner currently predicted. While some analysis of current trends appear to show these upper ranges in impacts are occurring, he cites other analysis that suggest that this may be an artefact of monitoring. In particular, Mr Morris makes much about the uncertainty associated with predictions of continental sheet ice melt contributions.
9. Given these uncertainties, the adoption of the higher end, seemingly worst case scenario level of 0.8m rise in sea level by 2100, and the 'abundance of caution' said to be associated with that value, Mr

Morris urges us to conclude that Dr McCowan's assessment will have effectively applied a cautious approach. We should therefore accept the low level of risk determined under his assessment and have no need of applying any further measure to address the potential risks, given the low level said to be present.

10. It is not our intention to consider whether or not the 0.8m sea level rise criteria adopted for the year 2100 in the VCS and State Planning Policy is one that is appropriate or not. However we are not persuaded by Mr Morris's submissions and the materials he has relied on to be satisfied that this may always be the case at some future point. It is evident that there is a growing body of credible scientific data gathering and assessment that suggests an unexpectedly higher rate of continental sheet ice contribution to sea level rise, as well as carbon dioxide contributions and atmospheric temperature rises, that are reflecting the upper ranges of various forecasting models adopted by the IPCC in 2007.
11. Further we note that both the VCS and State Planning Policy use the term "not less than 0.8 metres". We interpret such an expressed term to mean that the door has been left open for the consideration of a sea level rise greater than 0.8 metres. The State planning policy refers to both not less than 0.8 metres and applying the precautionary principle. Again, this suggests the door has been left open for consideration of a sea level rise greater than 0.8 metres. Whether that is appropriate will depend upon the circumstances of the particular site, the nature of the proposal and the scientific information available at the time.
12. With respect to this application, we find that the risk assessment of Dr McCowan and the current scientific assessment about rates of sea level rise that underpin his assessment currently point to a rise of not more than 0.8m above current levels by 2100. On this basis we accept Dr McCowan's assessment that the site is at a low risk of coastal impacts through to the year 2100.
13. Notwithstanding such a finding, we note that the policies contained in the VCS call for caution in allowing development in coastal spaces, in part so that the future ability to apply adaptation strategies are not compromised and in part so that planning can respond to the best available and emerging science and monitoring about climate change impacts. In short, if development can be avoided in areas that

are vulnerable, this is a more orderly planning outcome.

Notwithstanding Dr McCowan's assessment of a low risk to the actual site, the primary dune system and the estuary are vulnerable to the impacts of climate change. Further it is also evident that these geomorphological features provide a buffer to the established urban developed area of Narrawong, although this buffering will be reduced as the estuary becomes progressively more inundated.

14. We do not consider it would be a fair and orderly planning outcome for the wider Narrawong community to allow a development of one dwelling to:
  - occupy what is currently an effective buffer space with capacity to protect the town within the foreseeable planning timeframe; or
  - allow development which is protected from coastal inundation, but which will become isolated from the remaining town area by inland inundation, save for a man-made causeway access, a causeway which we have found to be unacceptable.

## Conclusion

1. Despite the fact this site is included in the existing urban zoned land and is therefore part of an existing coastal settlement<sup>[14]</sup>, the development is proposed on a primary coastal dune system and adjacent to a low lying coastal area, being the floodway of the Surry River. We are cognisant of the submission that this lot dates back to 1856 and arguably could be described as old and/or inappropriate. There appears to have been no investigation by any authority or board as to the appropriateness of this lot for development having regard to potential impacts upon the environment and the constraints imposed from its physical location and ecological values. Rather, it could be said that the introduction of ESO4 has been an attempt to address the potential impacts of development of these lots upon the surrounding environment. We reiterate that the ESO4 will remain on this land in 2011, it is only the permit trigger for building and works that lapses.
2. We find the proposal is not sensitively designed and does not maintain or enhance the coastal landscape character of this area. The proposed elevated access over the road reserve, which is in reality a floodplain, wetland and waterway, is a poor design outcome in light of relevant planning policies and reference documents. The on-site

access is also poor as its construction may impact upon the natural drainage patterns and will impact upon the biodiversity of this site on the back of the primary dune system and its landscape character. The removal of vegetation adjacent to the coastal reserve to accommodate the dwelling is a poor design outcome that detrimentally impacts upon the coastal dune and its landscape features. It does not achieve the objectives of ESO4. There are limited landscaping opportunities on this site because of the fire risk, and this creates an inability to provide any effective landscaped screening of the proposed house. In our opinion, placing a dwelling in this setting (whether it is in its original location or the amended location) will introduce a foreign built form element into a coastal foreshore setting that cannot blend into the landscape. We find this is contrary to ESO4 as it will have a detrimental impact upon the existing landscape features of this coastal area.

3. We also conclude that location of the dwelling, while at low risk from coastal hazard, would compromise other climate change policy outcomes sought in relation to maintaining capacity for adaptation strategies for Narrawong.
4. For these reasons, we have decided to order that no permit be issued.

Rachel Naylor

**Presiding Member**

Ian Potts

**Member**

[1] Pursuant to [s 4\(2\)\(d\)](#) of the [Victorian Civil and Administrative Tribunal Act 1998](#) a failure to determine by the Responsible Authority is deemed to be a refusal to make a decision, hence our order is to affirm that refusal despite the Council's subsequent decision to approve the proposal.

[2] [Glenelg SC v Printz Pty Ltd \(includes Summary\) \(Red Dot\) \[2009\] VCAT 2477](#).

[3] They were publicly notified of the application as there are no [section 55](#) referral requirements in the planning scheme relating to this property.

[4] Bushfire Attack Level (BAL)

[5] In very simple terms, a Planning Authority can amend a planning scheme including the zoning of the land whereas a Responsible Authority assesses individual planning applications.

[6] For example, the Road Closure Overlay could be applied.

[7] [Rafferty v Wellington SC \(Red Dot\) \[2007\] VCAT 1985](#)

[8] Refer to paragraph 31 of *Rafferty*

[9] A review of Domestic Wastewater Management in the Shire of Glenelg. Prepared by Robert Van de Graaf & Associates and Geocode. March 2009.

[10] EPA Publication 891.2. December 2008

[11] We note DSE and the Glenelg Hopkins CMA supported the application with an access track height of 2.5m AHD, but Dr McCowan's evidence and the suggested permit conditions tabled by Ms Forsyth are that the maximum height to accommodate sea level rise, a raised berm and river flooding is 2.8m AHD.

[12] Such as the VCS and the CAPs

[13] The VCS suggests activity and recreation nodes will be identified in a Coastal Action Plan and Management Plan, but there are no identified activity nodes or recreation nodes in either of the CAPs, the Estuary Management Plan or Glenelg's SFP.

[14] Pursuant to the strategies to achieve the Coastal Settlement State policy objective of planning for sustainable coastal development in clause 11.05-5