

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1927/2020  
PERMIT APPLICATION NO. YR-2019/904

### CATCHWORDS

Yarra Ranges Planning Scheme; Section 77 of *Planning and Environment Act 1987*; Commercial 1 Zone; Design and Development Overlay - Schedule 14; Significant Landscape Overlay - Schedule 9; Bushfire Management Overlay; Clause 13.02-1S; Proposal for service station with convenience store; Whether significant social and economic effects; Suitability of location; Bushfire risk; Resilience of settlements and communities; Need; Residential amenity; Vehicle access and traffic.

<b>APPLICANT</b>	Local Fuel Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Yarra Ranges Shire Council
<b>RESPONDENTS</b>	Bill Pizzey; David Chalmers; Jessica Chalmers; Richard Hecker; Jessica Chalmers, Stuart Hergt & Others; Paul Smith, Josephine Horn & Others; Kallista Primary School Council; Emma Johnson; Meredith Anderson; Hilke Wilhelmina & Johanna Hermens; Nena Gilbert; John Gilbert
<b>REFERRAL AUTHORITIES</b>	Country Fire Authority; Head, Transport for Victoria
<b>SUBJECT LAND</b>	80-82 Monbulk Road KALLISTA VIC 3791
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	4 August 2021
<b>DATE OF INTERIM ORDER</b>	9 August 2021
<b>DATE OF ORDER</b>	28 April 2022
<b>CITATION</b>	Local Fuel Pty Ltd v Yarra Ranges SC [2022] VCAT 453

### ORDER

#### No permit granted

- 1 In application P1927/2020 the decision of the responsible authority is affirmed.
- 2 In planning permit application YR-2019/904 no permit is granted.

Mary-Anne Taranto  
Member



## APPEARANCES

For Local Fuel Pty Ltd	Mr Panos Nickas, solicitor of Nickas Legal He called the following witnesses: <ul style="list-style-type: none"><li>• Mr Tim McBride-Burgess, town planner of Contour town planners</li><li>• Mr Michael Willson, traffic engineer of Amber Traffic and Transport Direction</li></ul>
For responsible authority	Mr Gbenga Tokun, Diamatrix planning
For Country Fire Authority	Mr Stephen Foster
For Paul Smith, Josephine Horn and Others	Mr Paul Smith
For Jessica Chalmers, Stuart Hergt and Others; and for Emma Johnson, Meredith Anderson, Hilke Wilhelmina & Johanna Hermens; Nena Gilbert; John Gilbert <sup>1</sup>	Ms Manjusha Pitty, town planner of Divergent planning
For Jessica Chalmers	In person
For David Chalmers	In person
For Kallista Primary School Council	Mr Richard Hecker
For Richard Hecker	In person
For Bill Pizzey	In person

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<sup>1</sup> Who are both joint applicants and separate parties (respondents).

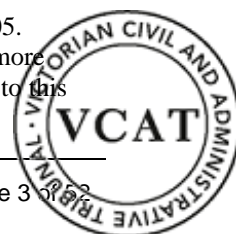


## INFORMATION

Description of proposal	Development and use of a service station (including a convenience store), access alterations and the display of signs. Four bowsers with eight fuel points beneath a canopy structure (222sqm in area) are to be provided. The sale of LPG for refuelling vehicles is not proposed but the sale of portable gas bottles is contemplated. Unusually, proposed hours of operation were not specified with the permit application but the applicant's preference is for 24 hour trading, 7 days a week. It would however accept a permit condition limiting operating hours to 5am to 10pm 7 days a week.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987 (PE Act)</i> – to review the refusal to grant a permit.
Zone and overlays	Commercial 1 Zone ( <b>C1Z</b> ) Significant Landscape Overlay - Schedule 1 – Area 9 ( <b>SLO9</b> ) Design and Development Overlay - Schedule 14 ( <b>DDO14</b> ) Bushfire Management Overlay ( <b>BMO</b> ) The site adjoins a road in a Transport Zone 2 <sup>2</sup> ( <b>TRZ2</b> )
Permit requirements	Clause 34.01-1 – Use of land for service station in C1Z Clause 34.01-4 – Buildings and works in C1Z Clause 42.03-2 – Buildings and works in SLO9 Clause 43.02-2 – Buildings and works in DDO14 Clause 44.06-2 – Buildings and works in BMO Clause 52.05-13 (Category 3 – High amenity areas) – Construction and display of a sign <sup>3</sup> Clause 52.29 – Access alterations to a road in a TRZ2

<sup>2</sup> Formerly known as a Road Zone Category 1 (RDZ1) before the gazettal of amendment VC205.

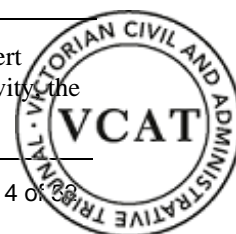
<sup>3</sup> Arising from the requirement for signs under clause 43.02-4 and clause 6.0 of DDO14. This more restrictive requirement applies despite the requirements of clause 34.01-9 (C1Z) which refers to this zone as one that falls within Category 1 at clause 52.05-11.



Key scheme policies and provisions	Clauses 11, 12, 13, 15, 17, 18, 21, 22.04, 51.03, 52.05, 52.06, 52.29, 53.02, 65 and 71.02.
Land description	<p>This irregular shaped 917sqm site comprising two lots has a frontage of 44.4m to Monbulk Road, a secondary frontage of 30.79m to Church Street on its east side and a depth ranging from 16.18m and 40.35m on its north and south sides respectively. The site falls in a north-westerly direction towards Monbulk Road by approximately 2.2m. Some levelling of the site has occurred in the past with a retaining wall evident along the south boundary such that relative to its Church Street abuttal, it is cut in by about 0.6m. At the time of the hearing the site was unsewered but reticulated sewerage is being installed in the area to which this site will ultimately connect some time in mid to late 2022.</p> <p>The site is vacant with and contains an exotic tree (<i>Fraxinus oxycarpa</i> also known as a ‘Raywood Ash’ and ‘Caucasian Ash’) in the south-west portion of the site. The site was previously used and developed as a service station. A building permit for its demolition was issued in September 2007.<sup>4</sup> The site has largely remained vacant since that time.</p>
Tribunal inspection	Unaccompanied subsequent to the hearing including a view of the grounds and multi-purpose room at Kallista primary school.

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<sup>4</sup> See Statement by Noah Tyler of Archaeology at Tardis Pty Ltd dated 29 May 2020 to Mr Robert Williams of Human Habitats. While the site is partly within an area of cultural heritage sensitivity the statement concludes that a Cultural Heritage Management Plan is not required.



# REASONS<sup>5</sup>

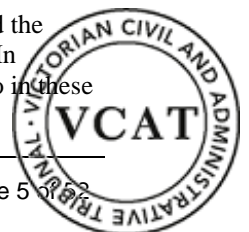
## BACKGROUND

### Introduction

- 1 Local Fuel Pty Ltd (the **applicant**) is seeking a review of the Yarra Ranges Shire Council's decision to refuse a permit for a service station.
- 2 In bringing this review, the applicant relies on amended plans which I substituted at the start of the hearing. These amended plans replace those considered by the council when it decided to refuse a permit. Amongst other things, the amended plans change the design of the fuel canopy and convenience store façade, increase an area for landscaping, introduce fencing and screens, and rationalise the size of signs and their colour to include more muted tones.
- 3 While the amended proposal addresses Council's concerns in relation to off-site noise impacts and signage, it remains opposed to the grant of a permit. The Council's concerns primarily relate to the design and location of the proposal including its compatibility with the character and type of other uses in the surrounding township area, and that the proposal has not satisfactorily demonstrated its acceptability in terms of bushfire risk. The proposal is also said to give rise to broader undesirable social effects.
- 4 The respondent objectors who include local traders, residents and members of the school community support these submissions to a greater or lesser degree. They also variously raise concerns with the proposal's impacts on traffic, parking and pedestrians and question the need for the proposal. The health impacts associated with fumes and vapours generated by the use, noise and lighting impacts and the effects of controlled and uncontrolled stormwater run-off from the site upon nearby waterways and the environment are cited as other concerns.
- 5 The Country Fire Authority (**CFA**), to whom the permit application was referred because of the site's location in a Bushfire Management Overlay (**BMO**), does not oppose the grant of a permit subject to the inclusion of permit conditions. These include conditions that would reference a Bushfire Management Plan that forms part of the *Bushfire Management Statement (12 March 2020)* by Terramatrix (the ***Terramatrix Report***) commissioned by the applicant.
- 6 The applicant, through its submissions and planning evidence by Mr McBride-Burgess and traffic evidence by Mr Willson, refutes the concerns raised by the Council and respondents. The site's commercial zoning, its location in an activity centre with main road access and former use as a service station are

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<sup>5</sup> The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



said to be contextual features that weigh in favour of this proposal. The simple, low scale design and siting of buildings, and their colour and materials, are also said to be compatible with the character of the surrounding area, responding positively to planning scheme policies and overlay controls. On bushfire risk, the applicant relies on the *Terramatrix Report*, a peer review and opinions about the operation of planning scheme policies and controls on bushfire matters by Nexus Planning<sup>6</sup> (the *Nexus opinion*) and the position of the CFA to support its position that the level of bushfire risk associated with this proposal is acceptable.

### Key issues

- 7 Many issues were raised in this case. In many ways, these reflect the complexity of the planning scheme policies and controls and their interplay with the site's physical features, its context and the nature of this proposal. These all require consideration in an integrated fashion when deciding whether an acceptable outcome will be achieved in favour of net community benefit and sustainable development for the benefit of present and future generations. In summary, the issues can be distilled to the following:
- Will the proposal give rise to significant social effects?
  - How should the issue of need be approached in this proceeding?
  - Is this a suitable location for this proposal within this part of the Kallista township?
  - Is the proposal acceptable having regard to bushfire risk?
  - Can the proposal acceptably manage off-site impacts?

### Summary of findings

- 8 In reaching my findings, I have been assisted by my site inspections and have carefully considered the many documents, extensive oral and written submissions, expert evidence and other Tribunal decisions. This includes submissions and various documents responding to my interim order. It is not necessary for me to recite all of this material other than to refer to relevant extracts in my reasons as relevant to the determinative issues.
- 9 I have concluded that while the proposal would not give rise to significant social effects, the proposal is not an acceptable one and a permit must not be granted. This is primarily due to the particular operating and development features of this vehicle based use and its intensity, which in this location would not complement the role, function and appearance of this centre. Further, this proposal for service station has inherently hazardous features whose acceptability has not been demonstrated in terms of its potential effects upon, and response to risk from bushfires. Nor has it demonstrated that its demands on emergency resources will not be detrimental to the surrounding community and its infrastructure. My detailed reasons follow.

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<sup>6</sup> Letter dated 21 June 2021 to Panos Nickas.





## THE PHYSICAL CONTEXT

- 10 The site and its surrounds in its immediate and broader contexts are shown in the images below.



Source: Nearmap Image captured 28 November 2021.

- 11 As is evident from these images, in its immediate context, the site sits at the northern entry to a small collection of commercial premises which straddle Monbulk Road north of the roundabout. Existing uses include a fresh produce store and a small restaurant immediately south; a café, nursery, gallery and Chinese medicine practice; a general store and other specialty retailing. The abutting site to the north is a 2-storey commercial building which is either solely or partly occupied as a dwelling.





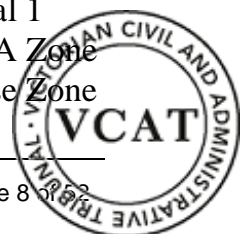
Source: Nearmap Image captured 28 November 2021.

- 12 Surrounding land immediately opposite the site in Monbulk Road and Church Street include dwellings generally set within large heavily vegetated lots. Various community facilities are located nearby including a community centre, public hall, CFA brigade, kindergarten and Kallista primary school to the south-east. Public land about 110m to the south forms part of the Dandenong Ranges National Park (Sherbrooke Forest) with popular picnic areas and walking tracks set amongst various creeks, Mountain Ash forest and fern gullies. Further north is the Sassafras Creek Nature Conservation reserve.
- 13 Monbulk Road contains a single through lane in each direction with kerbside parking on each side of the road.

**THE PLANNING AND STRATEGIC CONTEXTS**

**Zone and overlay controls**

- 14 As the image below shows, the review site is included in the Commercial 1 Zone (C1Z). Surrounding (residential) land is within the Green Wedge A Zone – Schedule 1 (GWAZ1) while community uses are within the Public Use Zone





(**PUZ1**, **PUZ2** and **PUZ3**). The National Park is within the Public Conservation and Resource Zone (**PCRZ**). Monbulk Road is in a Transport Zone 2 (**TRZ2**).



Source: VicPlan

- 15 Multiple overlay controls affect the site and surrounding land. They comprise:
- Bushfire Management Overlay (**BMO**).
  - Design and Development Overlay – Schedule 14 (**DDO14**) which applies to ‘Town Centres – Kallista, Mount Dandenong, Olinda, Sassafra and Tecoma’.
  - Significant Landscape Overlay – Schedule 1 – Area 9 (**SLO9**) which applies to ‘Main Ridge – Dandenong Ranges’.
- 16 I return to the relevant provisions of these zone and overlay controls in more detail later in these reasons.
- 17 Heritage Overlay controls also apply to:
- 85 Monbulk Road (**HO185**) opposite the site – Kallista general store; and
  - Monbulk Road (**HO186**) – Kallista Main Street Oak Trees

## Planning permissions

- 18 The proposal is for a service station which is defined in the planning scheme at clause 73.03 as:

Land used to sell motor vehicle fuel from bowsers, and lubricants. It may include the:

- a) selling of motor vehicle accessories or parts;
  - b) selling of food, drinks and other convenience goods;
  - c) hiring of trailers;
  - d) servicing or washing of motor vehicles; and
  - e) installing of motor vehicle accessories or parts.
- 19 In the C1Z, a permit is required for a service station use and for associated buildings and works.
- 20 Permission for buildings and works is also required in SLO9 and DDO14.
- 21 In the BMO, a permit is required for buildings and works associated with a service station.
- 22 The provisions of clause 53.02 – Bushfire Planning are also invoked due to the site’s location within a BMO. The requirements of clause 53.02 must be met.
- 23 Planning permission is required to alter access to Monbulk Road which is a road in a TRZ2.

## Other strategic influences

- 24 In addition to the zoning and overlay controls that shape land use and development outcomes envisaged by the planning scheme for this site and the surrounding area, the following features of the strategic context are also influential.

### Site is outside the Urban Growth Boundary

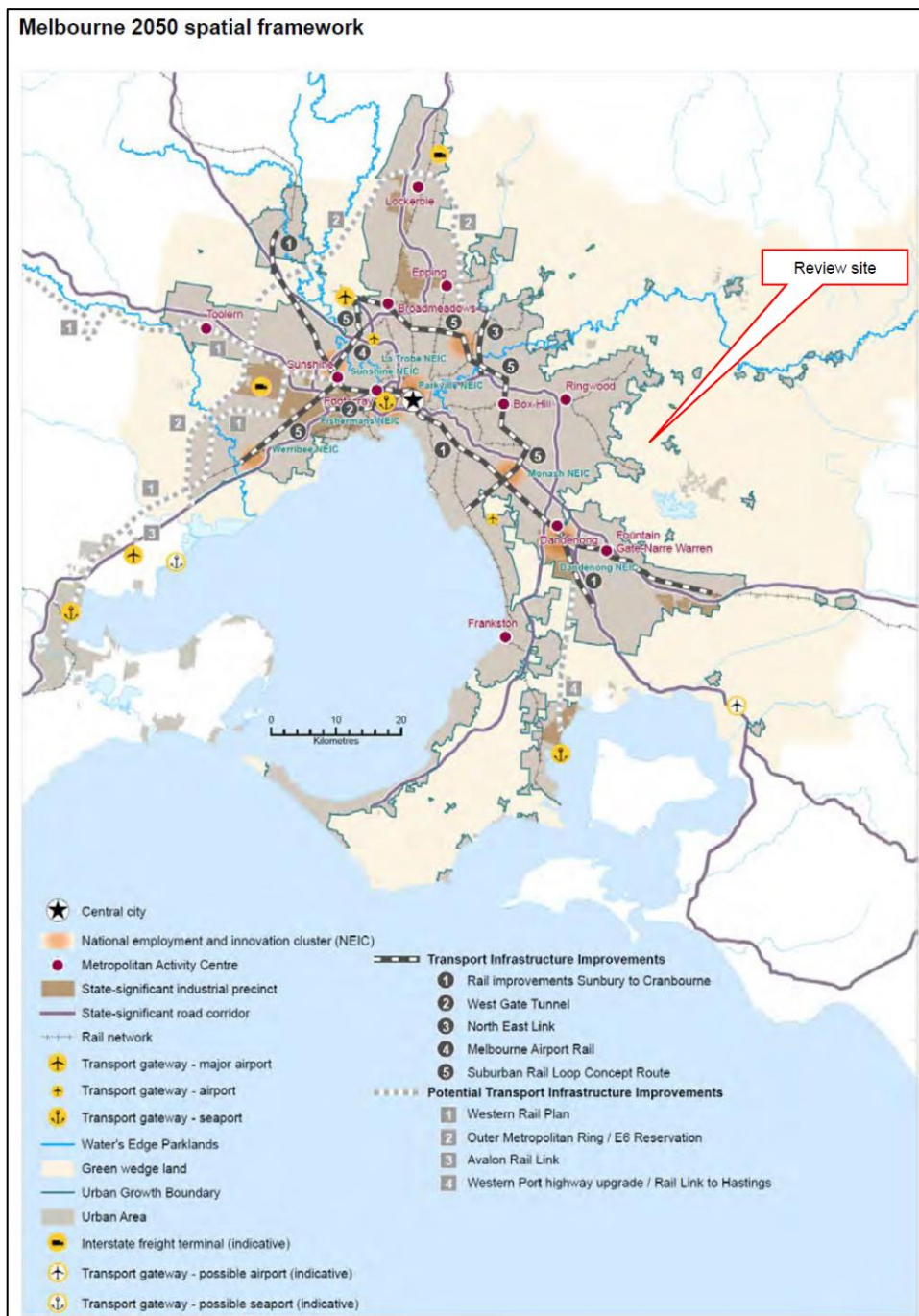
- 25 The site is located outside the Urban Growth Boundary (**UGB**) as shown in spatial framework plan reproduced below that accompanies Settlement policies for Metropolitan Melbourne at clause 11.01-1R of the planning scheme.

### Site is within Green Wedge Land

- 26 While the site is within metropolitan Melbourne, the site’s location outside the UGB and thus the urban area of Melbourne means that the site is also subject to Metropolitan green wedge protection under Part 3AA of the *PE Act*. Further:
- the Yarra Ranges planning scheme is a metropolitan fringe planning scheme for the purposes of s. 46AA of the *PE Act*; and
  - the site is included in green wedge land as defined under s. 46AC of the *PE Act*:



For the purposes of this Part, green wedge land is land that is described in a metropolitan fringe planning scheme as being outside an urban growth boundary.



## Yarra Ranges Localised Planning Statement

27 The *Yarra Ranges Localised Planning Statement* (the **Localised Planning Statement**) has been adopted by the Minister for Planning. This is a policy document under State policy for Distinctive areas and landscapes at clause 11.03-5S.





28 It's vision includes<sup>7</sup> that:

Yarra Ranges will exemplify how evolving needs of a growing community can be balanced, without compromising the quality of its natural assets in perpetuity.

The natural environment will continue to be the primary defining factor of the area. ...

Yarra Ranges' role will be clearly distinct and complementary to metropolitan Melbourne and designated growth areas. Its natural attractions will be promoted for tourism and leisure activities that contribute to, rather than detract from, these assets. ...

Yarra Ranges' urban areas, contained townships and rural settlements will continue to provide opportunities for a variety of lifestyles and engender healthy, cohesive communities, supported by infrastructure and services.

Opportunities for new and innovative employment will be promoted.

Future development will be guided by planning that acknowledges climate change and the associated increased risk of natural hazards particularly the high risk of bushfire in the area.

Planning will strive to ensure the ongoing safety of residents and visitors to assist to build community resilience to hazards including bushfire, flood and landslip.

#### Clause 51.03 and Upper Yarra Valley and Dandenong Ranges Regional Strategy Plan

29 The *Upper Yarra Valley and Dandenong Ranges Regional Strategy Plan* (the ***Regional Strategy Plan***) was prepared to enable increased protection for the special features and character of the region including the former shires of Healesville, Lilydale, Sherbrooke and Upper Yarra.

30 Policy at clause 21.01 summarises key policy directions of the Regional Strategy Plan to include:

- No net increase in residential development;
- Development be contained to ensure that it does not prejudice the conservation of natural resources and the amenity of those who live there and those who visit the area for recreation;
- Planning that seeks to minimise fire risk;
- Planning for recreation that seeks to minimise any adverse effect of tourism and day-tripping on residents, existing land use and the environment.

31 Clause 51.03 applies uniquely to the Yarra Ranges Planning Scheme. This clause applies to all land covered by the *Regional Strategy Plan*. Its purpose is to ensure consistency between this planning scheme and the *Regional Strategy Plan* pursuant to the requirements of Part 3A of the *PE Act 1987*.

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<sup>7</sup> Page 6.



- 32 The schedule to clause 51.03 sets out certain requirements including provisions relating to buildings and works, vegetation protection, subdivision and certain uses. These requirements prevail over any other clause or provision in the planning scheme if there is an inconsistency between the two.
- 33 Clause 1.0 in the schedule to clause 51.03 sets out the aims of the *Regional Strategy Plan*. These include to:
- Contain urban development to a level compatible with conservation of the Region's rich environmental features and with its high standards of amenity.
  - Define, in a positive manner, boundaries and principles upon which containment is to be handled, including specific policies which deal with the transition between the Region and metropolitan Melbourne.
  - Establish policies to promote a sustainable community in economic, social and environmental terms.
  - ...
  - Achieve a balance between protection of natural environmental values and amenity, while developing a comprehensive economic and social infrastructure to adequately meet the current and future needs of residents and visitors.
- 34 Clause 4.0 confirms that a permit is not required to remove, destroy or lop any vegetation if, amongst other things, it is listed as an environmental weed in clause 22.05 – Vegetation. The existing tree on the land proposed for removal (*Fraxinus oxycarpa*) is listed as an environmental weed in clause 22.05.

### **Key planning scheme policies**

- 35 There are a large number of planning scheme policies that are relevant to the issues in this proceeding. They broadly fall into the following themes:
- Settlement and green wedges
  - Bushfire planning and environmental risks
  - Design, built form and landscapes
  - Employment and commercial activity
  - Transport and movement
- 36 I provide a brief overview for each of these before returning to policies in more detail later as relevant to the determinative issues.

### **Settlement and green wedges**

- 37 Key State and regional policies including those at clauses 11, 11.01-1S and 11.01-1R seek to create a more consolidated, sustainable city while protecting non-urban land and green wedges of Metropolitan Melbourne from inappropriate development. The key features and values of each green wedge are to be promoted and encouraged – an outcome also sought by policy for



distinctive areas and landscapes at clause 11.03-5S. This policy also seeks to protect and enhance these valued features which are identified as important in Victoria as a tourist destination.

- 38 Local policies for Yarra Ranges including those at clauses 21.03-1 recognise the Shire's high quality environmental setting and character of individual areas. In terms of the type and intensity of land use and development outcomes, policies seek to differentiate between the Shire's Metropolitan Areas, Foothills of the Dandenongs, Rural Townships and Rural/green wedge areas. The strategic framework map indicates that Kallista is within the Rural/green wedge area.

#### Bushfire planning and environmental risks

- 39 Policies at clauses 13 (Environmental Risks and amenity), 13.01-1S (Natural hazards and climate change) and 13.02-1S (Bushfire planning) are key State policies that are relevant to a consideration of bushfire risk.
- 40 They are directed at strengthening the resilience and safety of communities by adopting a best practice environmental management and risk management approach and prioritising human life over all other policy considerations.
- 41 These are supported by local policies at clause 21.09 and the *Localised planning statement* and *Regional Strategy Plan*.

#### Design, built form and landscapes

- 42 State, metropolitan and local policies for neighbourhood character, urban design and built form including those at clauses 15, 15.01-2S, 15.01-5S, 21.05, 21.06 and 21.07 support contextually responsive design. Development should contribute positively to the built form, landscape, cultural and strategic features of its more immediate and broader contexts while minimising detrimental impact of development on neighbouring properties, the public realm and the natural environment. Policy at clause 15 (Built environment and heritage) states that planning 'should promote excellence in the built environment and create places that are enjoyable, engaging and comfortable to be in'.
- 43 These policies variously provide for the following:
- Ensure development responds to and reinforces a sense of place and the valued features and characteristics of the local environment and place by respecting the:
    - Pattern of local urban structure and subdivision.
    - Underlying natural landscape character and significant vegetation.
    - Neighbourhood character values.
    - Form, scale, and appearance of development so that it enhances the function and amenity of the public realm.
- 44 Urban design policy at clause 15.01-1S seeks to ensure that:





... the interface between the private and public realm protects and enhances personal safety.

... development supports public realm amenity and safe access to walking and cycling environments and public transport.

... the design and location of publicly accessible private spaces, including car parking areas, forecourts and walkways, is of a high standard, creates a safe environment for users and enables easy and efficient use.

- 45 Consistent with the above, local policy such as clause 21.06 (and design objectives in DDO14) also focus on the enhancement of the pedestrian realm and creation of a sense of place that reflects and enhances the established character of distinctive features of townships in the Shire.

#### Employment and commercial activity

- 46 State policies such as those at clauses 11.03-1S and 17.01-1S support the consolidation and strengthening of activity centres as the focus for economic growth, jobs and commercial activity commensurate with each centre's role and function. Commercial facilities are also to be aggregated and provide net community benefit in relation to their viability, accessibility and efficient use of infrastructure.
- 47 Local policies including those at clause 21.04-2 recognise that commercial centres are important to local communities and there is a need to consolidate commercial uses in these areas. Tourism also contributes significantly to the Shire's economy with a challenge being 'to achieve (and maintain) a delicate balance between tourism, the environment and protecting the amenity of the existing residents'. Low impact tourist facilities which complement the distinctive rural and green wedge character and natural features of the shire is an objective.

#### Transport and movement

- 48 Policies for transport, land use and transport integration, sustainable and safe transport and walking include those at clause 18, 18.01-2S, 18.01-3S and 18.02-1S. They variously seek to facilitate access to social, cultural and economic opportunities by effectively integrating land use and transport, promoting sustainable modes of transport and ensuring that the needs of all road users including pedestrians are met. Efficient and safe walking networks are promoted to increase the proportion of trips made by walking.
- 49 Local policies including clause 21.06 promote the creation of attractive streets and places that are safe and encourage pedestrian activity particularly in town centres.

#### **Other key documents**

- 50 Key background documents referred to in the planning scheme which I may consider but am not required to give effect to<sup>8</sup> are:

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<sup>8</sup> Having regard to the operation provisions at clause 71.02-2 of the planning scheme.



- *Vision 2020 By Design (2008)*<sup>9</sup>; and
- *Plan Melbourne 2017-2050: Metropolitan Planning Strategy (2017) and Addendum (2019)*<sup>10</sup> (**Plan Melbourne**).

- 51 *Vision 2020 By Design* provides an assessment of the Shire’s built environment across different character types including its towns and villages. It identifies a number of distinct urban and rural types and presents guidelines for each. These guidelines informed the preparation of controls now appearing in DDO14.
- 52 Kallista is within the ‘Centres of Green Wedge Settlement Types’ and within the lowest order of three centre types being in a ‘Dandenong Ranges Hamlet Centre’ – as distinct from ‘Large Rural Township Centres’ and ‘Smaller Rural Settlement Centres’.
- 53 The Dandenong Ranges Hamlet Centres are said to be ‘distinct but irregular concentrations of shops and other community buildings typically strung along a ridge top roadway or cross road, hemmed in by tall forest surrounds’.
- 54 *Plan Melbourne* underpins State and Regional planning scheme policies.
- 55 Direction 4.5<sup>11</sup> relates to planning for Melbourne’s green wedges and peri-urban areas. The protection of Melbourne’s green wedges is required to protect their valued assets including biodiversity assets such as national and state parks, tourism, water catchments and to provide a recreational resource, which contributes to public health outcomes for all Victorians.
- 56 Further, Direction 4.5 states that ‘these valued features, assets and industries should be prioritised before other land uses’.
- 57 Policy 4.5.2<sup>12</sup> titled ‘Protect and enhance valued attributes of distinctive areas and landscapes’ refers to localised planning statements and the need to identify valued attributes of these areas as summarised by reference to ‘desired planning outcomes for green wedge areas’. This policy seeks to ensure that these areas are protected and enhanced for ongoing use by present and future generations.
- 58 Desired planning outcomes for green wedge areas<sup>13</sup> relevantly include the following:<sup>14</sup>

Natural hazards

Avoid development in areas that are subject to high risk from bushfire ... so as to minimise potential risk to life, property and the environment.

Recognise, understand and prepare for the projected impacts of climate change ... .

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<sup>9</sup> Planisphere.

<sup>10</sup> Department of Environment, Land, Water and Planning, 2017.

<sup>11</sup> Page 87.

<sup>12</sup> Page 89.

<sup>13</sup> And peri-urban areas.

<sup>14</sup> Pages 90 and 91.



## Tourism

Facilitate sustainable year round tourism, and new tourism development (including diverse attractions, accommodation and eating establishments) that maintains the integrity of the natural environment, provides social benefits for communities and visitors and contributes to local economies.

## Economy

Maintain a strong, dynamic economy and employment base by building on the comparative advantages in ... tourism ... the service industry and commerce.

## Population, settlements and local infrastructure

Manage the growth and sustainable development of green wedge townships and settlements, having regard for their distinct character and environmental and servicing constraints.

Create socially sustainable communities and support an active community working towards reducing greenhouse gases and responding to climate change.

Protect and enhance the existing character, presentation and form of towns, including their main road entrances.

## **WILL THE PROPOSAL GIVE RISE TO SIGNIFICANT SOCIAL EFFECTS?**

- 59 For the Council's part, it submits that the proposal would cause significant social effects because it will lead to permanent change in the function and character of the town centre. Reference was made to the 145 objections lodged in relation to the permit application which it is said indicates a 'significant community response' giving rise to the provisions under sections 60(1)(f) and 60(1B) of the *Planning and Environment Act 1987*.
- 60 These submissions are supported by Ms Chalmers. She also relies on a number of adverse impacts generated by this proposal that are also said to constitute significant social effects. In turn, these are said to be intertwined with and would give rise to significant economic effects. In summary, the effects cited are:
- vapours and fumes from petroleum products that would be detrimental to:
    - the health of children at the nearby primary school and kindergarten;
    - the amenity and enjoyment of the township's nearby facilities and services by locals and visitors such as outdoor dining areas;
    - the integrity of organic produce sold at the adjoining biodynamic grocery store and thus the ongoing viability of this business;
  - additional traffic and associated noise;
  - polluted storm water runoff into the local open drainage network and ultimately nearby creeks affecting water health and the surrounding environment including public land with walking trails;





- the economic viability of the general store on the opposite side of the street; and
- and the overall ‘appeal’ of the township for visitors.

61 Sections 60(1)(f) and 60(1B) of the *Planning and Environment Act 1987* are as follows:

(1) Before deciding on an application, the responsible authority must consider—

...

(f) any significant social effects and economic effects which the responsible authority considers the use or development may have

...

(1B) For the purposes of subsection (1)(f), the responsible authority must (where appropriate) have regard to the number of objectors in considering whether the use or development may have a significant social effect.

62 Consideration of these matters by the Tribunal standing in the shoes of the responsible authority is invoked under section 84B of the *Planning and Environment Act 1987*.

63 I have ultimately found that the proposal would not produce an acceptable planning outcome and no permit should be granted having considered various matters that are relevant to the exercise of my discretion. This includes my assessment of the reasons relied upon by the Council and Ms Chalmers that I have summarised above which are all validly before me. However, on the basis of the material before me, and for the reasons advanced, I cannot conclude that this proposal would give rise to significant social and economic effects – whether those reasons are taken individually or together.

64 I say this having considered and tested this proposal against the six matters set out in the lead decision on in the matter of *Rutherford & Ors v Hume CC* (Includes Summary)(Red Dot) [2014] VCAT 786<sup>15</sup>.

65 While the number of objections to this permit application is relatively large, that in itself is not indicative of a significant social and economic effect. Importantly, there is no evidentiary basis or empirical analysis demonstrating the alleged social and economic effects and their probability of occurring.

66 Further, had the alleged significant social and economic effects been proven to be adverse by way of a proper evidentiary basis or empirical analysis, these need to be balanced with any other significant social and economic effects that may lead to an alternative conclusion. Absent that evidentiary proof or empirical analysis, I am unable to undertake that balancing exercise with the level of rigour required to conclusively form a view that significant social and economic effects will occur as a consequence of granting a permit for this proposal.

<sup>15</sup> [49] – [55]



67 I conclude that to the extent that this proposal fails on its merits for reasons that I set out below, it does not do so on the basis that it would cause significant social effects in the context of sections 60(1)(f) and 60(1B) of the *Planning and Environment Act 1987*.

## HOW SHOULD THE ISSUE OF NEED BE APPROACHED?

### Overview of contentions

- 68 The Council and a number of respondent parties<sup>16</sup> opposed to the proposal submitted that there is no overriding need for a service station in this location. This is due to the presence of four other service stations nearby – two within a 5km radius of Kallista and two others within 6.7km.
- 69 Trends towards electric vehicles rather than those powered by fossil fuel, increased costs of fossil fuels, and home based work in the wake of the COVID-19 pandemic were amongst other reasons variously cited by respondents for the lack of need for this proposal.
- 70 The applicant does not rely on the proposal's need as a factor that may outweigh other considerations adverse to the proposal but submits that the use could be the community's 'best friend' in times of disaster (such as severe storms) due to the types of goods and services it would offer and convenience role.

### Tribunal's findings

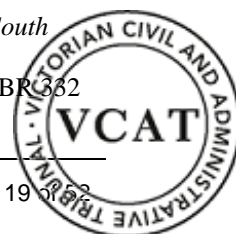
- 71 It is a long established planning principle that the lack of need for a proposal, will rarely, if ever be a ground for refusing the grant of a permit.<sup>17</sup> On the other hand, the need for a facility, particularly where there are significant community benefits to be gained, may weigh in favour of the grant of a permit and in some circumstances may outweigh its adverse impacts.<sup>18</sup>
- 72 I firstly accept that the use is also one that may draw custom from local and broader catchments, particularly the latter in light of the area's popularity for tourism related activity.
- 73 However, there is no evidence of any compelling need for this proposal that warrants a departure from its features that weigh against the grant of a permit.
- 74 Rather, I find that the proposal's benefits would primarily derive from the convenience it would provide to customers seeking to access fuel and other related items and services in this part of the Dandenong Ranges, as well as other retail based goods such as snacks. The convenience related attributes of this proposal (fuel sales in Kallista where presently there are none and the sale of other related services and convenience items such as snacks across a broader

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<sup>16</sup> Particularly in the submissions by Mr Chalmers and Ms Pitty.

<sup>17</sup> *Shell Co. of Aust Ltd v City of Frankston* (1983) 8 APA 126 at 135; *Vernia Pty Ltd v City of South Melbourne* (unreported; editorial comment (1987) 1AATR2).

<sup>18</sup> *Church of England Trusts Corp for the Diocese of Melbourne v City of Brighton* (1983) 1 PABR 362 at 336.



spread of hours than, for example, from the general store opposite) is also to be distinguished from concepts of need.

- 75 Moreover, I find that the proposal's convenience related attributes would be relatively small for reasons similarly adopted, in part, by the Tribunal in *Platinum King Investments Pty Ltd v Manningham CC* [2016] VCAT 1509 (*Platinum King*). Namely, there are four other service stations within approximately 5km to 6.7km of the site, noting that refuelling a vehicle usually necessitates the presence of that vehicle on location. These existing alternatives are not particularly inconvenient.<sup>19</sup>
- 76 To the extent that the applicant submits that the proposal may contribute to a net community benefit for the role it may play during adverse natural events, there is similarly no evidence before me to enable such a conclusion to be reached.

## **IS THIS PROPOSAL SUITABLE FOR THIS LOCATION IN THE KALLISTA TOWNSHIP?**

### **Overview of contentions**

- 77 While the Council generally accepts that in-principle, a service station use is one that may be suitable for land within the C1Z, the Council and respondents variously submit that the proposal is not suited to this particular site. They submit this proposal would not enhance the local identity of the town centre and nor would it be compatible with the character, role and function of the Kallista town centre and its surrounds. They also question whether this centre can even be categorised as an activity centre, given its modest size and land use attributes.
- 78 They otherwise submit that relative to the small scale of the town's commercial centre, the proposal would occupy a disproportionate amount of land for a vehicle based use whose look, feel and activities would be at odds with the established role and land use composition of the centre. The location of two vehicle cross-overs to the site proximate to a pedestrian crossing which is also used by primary school children was said to represent a poor planning outcome and may create unsafe conditions for pedestrians.
- 79 In built form terms, the siting and appearance of the proposed canopy and convenience store buildings, amount of hard paved surfacing and levels of illumination were said to be at odds with the pattern, spacing and form of existing development in this township which is said to have a unique village character. In its wider context, the proposal was also said to be inconsistent with the low scale, low density, naturalistic landscape character of surrounding land beyond the commercially zoned centre. In terms of landscaping, this is said to be inadequate.

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<sup>19</sup> [132]



- 80 Submissions by Ms Pitty also questioned the removal of the existing tree on the land and whether the town centre could even be categorised as an activity centre given its modest size.
- 81 For the applicant, it was Mr McBride-Burgess's evidence that this proposal, being a commercial use in an activity centre on land in a C1Z with a main road frontage is entirely consistent with State and local policies. More particularly, it is his evidence that the proposal is consistent with the role and function of this activity centre, will complement the existing range of services and facilities on offer, will contribute to consumer choice, and create employment opportunities on a site that has been underutilised since 2006.
- 82 In terms of design and built form, it was Mr McBride-Burgess's evidence that the appearance, scale and siting of the convenience store and canopy structure is consistent with the pattern of existing buildings in the street and will maintain views towards the treed backdrop of land to the east. The materials and finishes of the buildings were said to be compatible with the character of the surrounding area while respecting classic Dandenongs design themes and attributes, consistent with the design requirements of DDO14.
- 83 Use of the existing vehicle cross-overs together with the closure of the Church Street crossover is said to be acceptable. Landscaping in the site's frontage is relied upon to provide a softening of the proposal's development features and is said to represent an improvement over existing conditions.

### **Tribunal's findings**

#### Is the Kallista town centre an activity centre?

- 84 The Kallista town centre is an activity centre and more particularly a neighbourhood activity centre. In making my findings, I have considered the explanatory report for Amendment C126 (the **explanatory report**), land use and development features of this area and the glossary of terms in *Plan Melbourne*. As defined in *Plan Melbourne*,<sup>20</sup> activity centres are:
- Areas that provide a focus for services, employment, housing, transport and social interaction. They range in size and intensity of use from smaller neighbourhood centres to major suburban centres and larger metropolitan centres.
- 85 Neighbourhood activity centres are defined as:
- Local centres that provide access to local goods, services and employment opportunities and serve the needs of the surrounding community.
- 86 This centre, whose area includes land within the C1Z and Public Use Zone, contains a clustering of commercial and community based facilities that are consistent with the definition of an activity centre. Given the size of this centre and its primary focus on serving local needs albeit with some activity also directed towards tourists and visitors, this centre has attributes of a neighbourhood activity centre.

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<sup>20</sup> Page 138.





- 87 I am assisted in my findings by the explanatory report for Amendment C126. This amendment introduced five schedules to the DDO – Schedules 12, 13, 14, 15, 16 and 17 largely derived from *Vision 2020 by Design*. Schedule 14 applies to Kallista and three other towns. The explanatory report states that the design guidelines ‘reinforce the role of neighbourhood activity areas that serve these communities’ and that these will ‘contribute to a higher standard of building design resulting in improvements to the appearance, operation and public safety of town centres’.
- 88 In terms of how the amendment supports or implements the State Planning Policy Framework, the explanatory report refers to various policies that include those for activity centres and urban design. In relation to the former, the following text appears:
- The DDO schedules will apply to town centres which fall into the category of neighbourhood activities centres. The design guidelines will reinforce the objectives of encouraging neighbourhood activities areas that comprise a mix of activities, are not car dependent, and which provide a community focal point. [Tribunal underlining]
- 89 Thus, planning scheme policies relating to out of centre development are not applicable and conversely those that relate to activity centres, amongst other use and development related policies, are relevant.

Is the proposal suitable for this location within the activity centre?

- 90 On its face, redevelopment with a commercial use on this site that is in disrepair and which has laid dormant for many years appears soundly based. Further, both the zoning of the land and policies for activity centres including State and regional policies at clauses 11.03-1S, 11.03-1R, and local policies at clauses 21.04-2, 21.05 and 21.06 support the containment and consolidation of existing commercial centres. Clause 21.04-2 states that ‘commercial centres are the preferred location for retail, business and community services and encroachment of these uses into other areas be discouraged.’ The latter has an objective ‘To maintain and enhance the rural setting and compact form of the rural townships’. Policies also support employment generating uses in township locations.
- 91 The site’s main road frontage is also a feature that is a favourable attribute for a use that is substantially vehicle based.
- 92 That said, decision guidelines in the C1Z require a consideration of planning scheme policies, the interface with adjoining zones, particularly residential areas, the effect of traffic to be generated on roads, the movement of pedestrians and vehicles providing for supplies and:
- The streetscape, including the conservation of buildings, the design of verandahs, access from the street front, protecting active frontages to pedestrian areas, the treatment of the fronts and backs of buildings and their appurtenances, illumination of buildings or their immediate spaces and the landscaping of land adjoining a road. [Tribunal underlining]



93 Further, a key issue identified by policy at clause 21.04-2 is that while there is a need to consolidate commercial uses in commercial centres:

- The challenge is to achieve (and maintain) a delicate balance between tourism, the environment and protecting the amenity of the existing residents.

94 The following policies also appear at clause 21.04-2 in addition to the policy cited above giving preference to commercial centres for non-residential uses:

- Any proposed land use reinforces and enhances the established role of the centre.
- The proposed use be located on a site that can provide adequate car parking without compromising the character and appearance of the built and natural environments.
- Traffic generated by a proposed use be able to be accommodated without compromising the functioning of the centre or detracting from the residential amenity of the surrounding area.
- Shops and business uses in the core area of the centre provide a continuity of retail display windows at ground floor level.  
[Tribunal's underlining]

95 These policies that seek to reinforce and enhance the established role and function of centres are expanded on and complemented by settlement policies at clause 21.05 whose objective for sustainable towns is 'To establish sustainable and attractive townships which can support a range of residential, commercial, retail, community and recreational facilities and services.' This is supported by the following relevant strategies:

- Enhance the economic viability, safety and efficiency of the towns.
- Encourage activities which reinforce the character and function of each centre while catering for local and visitor needs.
- Encourage small business and their use by local communities.
- Promote good design and a high quality level of amenity which helps to define and enhance the individual character of each town.
- Consider and respond to needs for infrastructure.
- Provide for quality retail, commercial and community facilities which cater for consumer needs.
- Provide adequate design and services that allow rapid and effective response by emergency services.
- Retain compact townships with their distinct village-like character and environmental features.
- Prevent the intrusion of uses that would fragment the form and layout, and that are not complementary to the role and function, of the centre.
- Cluster land uses that complement the role and function of the centre.



- Encourage land uses that will maintain and enhance the viability of the centre.
- Contain and consolidate existing commercial centres to improve the centre's convenience to users and minimise any impacts or intrusions into adjoining residential areas or natural environments.
- Develop the continuity of shopping activity at street frontages in the core retail area. [Tribunal underlining]

96 Built form policies at clause 21.06 and the development controls in SLO9 and DDO14 provide for development rather than use related guidance. These build on the preceding policy themes guiding land use outcomes. But as highlighted by the issues in this proceeding, use and development features are inextricably linked. That is, a service station use has particular vehicle based functional requirements that include quite specific development related features. These all require consideration in determining the suitability of this proposal for this location.

97 Clause 21.06 identifies a number of key issues for built form, including that the Shire's:

... towns, villages and rural areas each have their own visual identity which is valued by residents and visitors. It is important that new development respects and maintains these valued characteristics.

Good design in the built environment is not simply limited to aesthetically pleasing design. It encourages a sense of local identity and seeks to improve people's experience of a space or locality. It contributes to creating places that people want to be in.

The creation of a more sustainable urban form that consolidates development in existing town centres has many environmental and social benefits. It reduces car dependency, makes more efficient use of community infrastructure and adds life and vitality to town centres.  
[Tribunal underlining]

98 According to this policy, planning and design of new development is to be guided by the five following sustainable design principles:

- Sense of Place – New development must add to the character and identity of distinct localities in Yarra Ranges.
- Protection of Environments – New development must respect and protect sensitive environments, significant landscapes and cultural and natural heritage.
- Design Quality – New development must be of high design quality.
- Sustainable Urban Form – New development must contribute to environmentally sustainable forms of urban and rural development.
- Sustainable Building Design – New development must incorporate best practice in ecologically sustainable building design.

99 Objective 2 of this policy for Town Centre Design seeks to:



Provide well designed and integrated commercial centres that provide a range of retail and business facilities and associated community services that meet the needs of the local residents and the tourists visiting the municipality. [Tribunal underlining]

100 Corresponding strategies are to:

- Design new development to reinforce valued built form characteristics of the town centre.
- Create attractive streets and other places that are safe, encourage pedestrian activity and enhance the overall amenity and identity of the centre.
- Retain existing architecturally, historically or culturally significant buildings.
- Create attractive entries and a sense of identity for each town centre.
- Provide safe and efficient traffic circulation and car parking within each town centre.
- Design and landscape new development to respect the amenity of adjoining residential areas. [Tribunal underlining]

101 Overlay controls under SLO9 and DDO14 build on these policies. The statement of nature and key elements of landscape in SLO9 refers to the Shire's natural features including mountain scenery in the east to the expansive rural plains of the Yarra Valley in addition to the slopes and enclosed valleys of the Dandenong Ranges where a 'harmonious balance of forest, farmland and small townships has generally been achieved'. This area in SLO9 called 'Main Ridge – Dandenong Ranges' is not within a 'classified' National Trust Landscape. Notwithstanding, in addition to panoramic viewing points from various locations in this area, its 'key elements of significant landscape' include the following:

The landscape of this area is characterised by a unique combination of low density residential areas set amidst many large and mature gardens of exotic plants, pockets of rural land and remnants of the original Mountain Ash forests and fern gullies.

... The townships within the area comprise only small commercial centres which have generally retained a "village" character.

102 This statement further explains that the Dandenong Ranges are:

... an important visual, environmental and recreational resource for not only the local community, but for Melbourne and the State in general. The area is a major focus for tourist activities and its appearance is important in defining the overall image of the Dandenong Ranges as an attractive visitor destination.

The protection of the diverse landscape elements of this area would be compromised by further intensification of residential development, the spread of commercial land uses outside established town centres and the development of inappropriate commercial development which does not reflect the established character of the townships. [Tribunal underlining]





103 In relation to DDO14, the character statement explains that the town centres in the Dandenong Ranges will continue to comprise ‘informal collections of buildings, small in scale and somewhat irregularly spaced and aligned. They will retain their distinctive appearance as a cluster of buildings in a forest, rather than a ‘wall to wall’ urban environment. They will continue to sit comfortably in a landscape dominated by the tall trees, lush vegetation and hilly topography of their surrounds.’

104 Design objectives seek:

- To reinforce the distinctive built form, streetscape and landscape character of the town centre.
- To ensure that buildings within the town centre remain visually dominated by the surrounding vegetation and landscape.
- To encourage simple contemporary design which draws from the traditional building forms in the town centre and harmonises with the surrounding landscape.
- To reinforce the main street as the focus of business and pedestrian activity in the town centre.
- To protect and enhance the amenity of residential and public places within and adjoining the town centre.
- To provide safe and convenient on site car parking that has a minimal visual impact on public places. [Tribunal underlining]

105 Design requirements for ‘Town centre character’ ask for building heights that do not exceed 7.5m which this proposal would comply with, and include amongst other things, the following:

- New development should reinforce the pattern of existing development in the town centre with mostly narrow fronted shops and strongly articulated facades.
- The siting and setbacks of new buildings should reflect the generally established spacing of buildings in the town centre and to maintain views to background vegetation.
- New buildings should adopt, in a contemporary style, classic Dandenongs design themes that incorporate elements such as timber and natural materials, asymmetrical design, wide span pitched rooflines and front gables.
- Verandahs should be provided on the street frontage of buildings to provide weather protection.
- Big box structures with bland facades, and building bulk that is out of proportion with other elements of the town centre, are discouraged.
- Buildings and works that comprise drive through sales facilities are discouraged.
- The massing of larger buildings should be articulated through design treatments including the use of openings, different materials, textures and colours.



- The design of new buildings should relate to the topography of sloping sites and minimise the extent of earthworks. [Tribunal underlining]

106 Other design guidelines in DDO14 are specified for ‘Interface with public places and residential areas’ and ‘Landscaping’. They include:

- New buildings should be constructed with zero setbacks from the main street frontage.
- Any larger buildings that are likely to generate significant pedestrian movement should abut the main street.
- Buildings should provide an active interface with the main street and provide passive surveillance to all abutting streets and other public places using techniques such as clear glazed windows and upper level balconies.
- New crossovers and car parking between a building and its main street frontage are discouraged.
- Soft visual screening techniques such as landscape planting and mounding are preferred to hard screening structures such as fences and walls.
- Landscaping should be integrated with the design of the development and complement the landscaping of adjoining public places.
- Established canopy trees should be retained, protected and incorporated into the landscaping of the site.
- Additional canopy trees should be planted, wherever practical, to provide shade and visual interest.
- Landscape design should avoid the use of formal structures, hard surfaces and hard edges. [Tribunal underlining]

107 Design requirements for ‘Car park design’ include that:

- Car parking should be designed as an integral part of a development.
- On site parking for vehicles should be located to have a minimal visual impact on the streetscape and adjoining public spaces. Parking between the front of the building and the street should generally be avoided.
- The number of vehicle crossovers should be minimised and where possible provided from laneways or secondary street frontages.
- Entry and exit points should be located to facilitate safe vehicle and pedestrian movements.
- All car parks should provide for safe and convenient pedestrian access from parked vehicles to adjoining areas.
- All car parks, including entry and exit points, should be well lit and clearly identified with signage.



- Lighting should be unobtrusive, with more low rather than few high-mast poles used. Light spill beyond the car park should not occur.
- Vehicle access points should be separate from pedestrian access points.
- Water sensitive urban design treatments should be adopted in the design of car park areas. [Tribunal underlining]

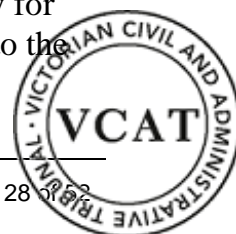
108 These policies, design requirements and other provisions of the overlay controls clearly ask for high quality design with building forms, landscaping and materials that respect and enhance the distinctive visual qualities of township locations while minimising impacts on residential amenity. They seek to maintain and enhance existing valued features rather than introducing substantial levels of change. These are common and well understood planning concepts. There are however other dimensions to them, some of which are less common and more difficult to quantify, but which proposals must still respond to. These relate to broader urban design principles and the structural characteristics of townships with planning scheme directions that seek to:

- encourage proposals that enhance a sense of local identity particularly at township entries;
- avoid uses that would fragment the form and layout, and that are not complementary to the established role and function of the centre;
- provide continuity of retail uses in the centre's core; and
- improve people's experience of township centres with a particular emphasis on encouraging pedestrian activity.

109 On balance, I find that there are a number of attributes of the site's physical and strategic contexts including its green wedge location outside the UGB, that weigh against the grant of a permit. When tested against planning scheme policies, overlay controls DDO14, SLO9 and BMO (the latter to which I return in more detail later) and various decision guidelines and planning scheme provisions, I find that the proposal is not a suitable one for this location.

110 I say this for the following reasons.

111 First, the existing activity in the Kallista township comprise a somewhat eclectic mix of uses – quintessentially reflective of the qualities that give this Dandenong Ranges township its distinctive and intimate village feel. Existing uses are relatively low intensity and are primarily directed at serving the needs of the surrounding community at a localised level while also offering personal services and goods that, to a lesser extent, serve the wider community engaged in tourist related activities. Community related facilities including the public hall, community house, primary school and pre-school are the major non-residential features of this activity centre. Of the commercial uses based around Monbulk Road, these are of a relatively low intensity, catering primarily for day time trade with the obvious exception of the small pizza restaurant to the



south. Many include outdoor street based trading elements, comprising goods on display beneath verandahs, and tables and seating.

112 I consider that the proposal, occupying two lots whose operation is proposed both day and night, seven days a week, would bring about a substantial change to the low-key look and feel of this activity centre which otherwise has an emphasis on community based activity, day time trade and small scale specialist retailing. The proposal, due to the nature of this use, hours of operation and functional requirements would not be complementary to the established role and function of this centre. The incongruous nature of the use would be amplified by the site's large size relative to other commercial uses within the activity centre and the commercial centre itself, with a frontage spanning more than 44m to Monbulk Road near the centre's northern entry.

113 Secondly, the proposal is primarily focused on car based activity. Based on the traffic evidence of Mr Willson I accept that vehicles moving to and from the site are expected to come from 'by-pass' trips already on the road network. I also acknowledge that the two cross-overs to Monbulk Road already exist, albeit requiring some modifications and that closure of the Church Street cross-over is a positive feature. However, the re-introduction of a proposed service station use in this location runs counter to the pedestrian oriented focus of the centre that contemporary planning scheme policies and controls including the DDO14 seek to maintain and enhance as a preferred feature in this type of neighbourhood centre. The issue has a sharper focus in the context of:

- the proximity of the northern most driveway entry into the site to the unsignalized pedestrian crossing on Monbulk Road which connects both sides of the activity centre;
- the presence of the abutting lot to the north (No. 84 Monbulk Road) also in the C1Z and its future prospects of achieving an enhanced level of integration with the balance of the activity centre;
- projected traffic volumes to and from the site estimated by Mr Willson to be approximately 100 vehicle movements per hour split evenly between arriving and departing trips; and
- the site's location that I find either falls fully, or partly, within the core of the township's commercial centre.

114 I should add that there is clear and consistent planning scheme direction giving preference to proposals that enhance rather than fragmenting the functioning of the centre including pedestrian movements. As cited above in the planning scheme extracts that I have highlighted, the minimisation of cross-overs, avoidance of carparking within site frontages, the siting and design of buildings that provide a continuity of retail display at ground floor level and discouragement of buildings and works comprising drive through sales facilities are all directed at promoting street level activation and pedestrian movement that enhance the centre's attractiveness and sense of place.

115 Thirdly, I accept that there are aspects of the development that are acceptable in visual amenity terms. These include the provision of landscaping areas.





partial masking of the brown brick wall of the abutting grocery building to the south and maintenance of visibility to shops at 78 Monbulk Road. The gable roof form of the main canopy, building heights, proposed colour scheme and palette of materials using earthy tones are also broadly acceptable. I also acknowledge that techniques such as baffling of lights have the ability to limit light spill from outside the site boundaries and I do not oppose the removal of the existing tree on the land given its status as an environmental weed species.

- 116 These features of the development do not however overcome the shortcomings with the overall form of the development which are largely a product of its functional requirements reflecting a vehicle related use. These result in building siting, large hard paved areas of more than 600sqm, incongruous proportions of solid to void elements and large areas of illumination at night in a manner that will stand in stark contrast to the appearance of surrounding development and overall ambience of the area. These outcomes are contrary to the design requirements of DDO14 for 'Town centre character' which asks for development that 'reinforces the pattern of existing development in the town centre with mostly narrow fronted shops and strongly articulated facades' and the siting and setbacks of new buildings which 'should reflect the generally established spacing of buildings in the town centre'.
- 117 Fourthly, the site is located in close proximity to residential neighbours whose properties are sited little more than 20m away at 87 and 89 Monbulk Road and 4 Church Street on land not within the C1Z. I agree with Mr McBride Burgess' assessment that in interface locations between commercial activity and residential use, some tempering of amenity expectations is a reasonable proposition. The main road attributes of Monbulk Road is another relevant factor that bears upon amenity expectations in relation to those dwellings sited on the opposite side of this street. In this case however, the area's green wedge location, low-density and low intensity mix of surrounding non-residential uses that primarily involve day time activity lead me to conclude that existing levels of residential amenity are higher than what might normally be expected in other more urbanised settings.
- 118 I find that the concentration of vehicle based activity (such as vehicle doors banging and engines being started) on this site at night, seven days a week and noise from the site's operational features more generally, are likely to bring about an appreciable change to existing levels of background noise and thus ambient levels of amenity that nearby residents presently enjoy. These are factors that weigh against the grant of a permit. I make these findings assisted by my inspection in the evening and having considered the acoustic report<sup>21</sup> submitted with the amended application documents which concludes no unreasonable sleep disturbance or off-site noise impacts to these nearby residential dwellings will occur. However, the report's findings are to be understood in the context of noise modelling undertaken on a desk-top basis without the conduct of background noise readings and are also to be

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<sup>21</sup> Report by Enfield Acoustics Pty Ltd dated 21 June 2021.



distinguished from an assessment of the amenity related impacts to which I refer.

- 119 Overall, I find that primarily due to its vehicle based attributes, the proposal has use and development features that would not complement or enhance the role, structure, functioning and appearance of this centre, particularly in relation to pedestrian amenity. It would also bring about a type and level of change to the ambience and amenity of this centre and its surrounds that is inconsistent with its particular characteristics that the planning scheme seeks to maintain and enhance.

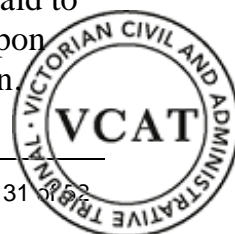
## **IS THE PROPOSAL ACCEPTABLE HAVING REGARD TO BUSHFIRE RISK?**

### **Introduction**

- 120 The issue of bushfire risk was the subject of extensive filed material and oral and written submissions by the parties at the hearing.
- 121 In my interim order subsequent to the hearing, I also provided the parties with the opportunity to make further written submissions in relation to a document which was brought to the Tribunal's attention on the last day of the hearing by Mr Pizzey. The document is titled *Design Guidelines – Settlement Planning at the Bushfire Interface (July 2020)* (the **2020 Design Guidelines**).
- 122 I have considered the submissions and material filed during the hearing and those made in response to my interim order in relation to bushfire risk related matters. I do not recite all of that material here but have endeavoured to summarise the position of the parties and contents of relevant documents. I record that no witnesses were called to give evidence in relation to any of the material filed.
- 123 For completeness, I also acknowledge that the BMO includes exemptions from third party notice and review rights under clause 44.06-7. However, nothing much turns on this due to the Council's ground of refusal relating to bushfire related matters. I am also mindful that land affected by a BMO is also within a 'designated bushfire prone area'. Thus, in the context of submissions made by respondents, various policies related to natural hazards and bushfire planning including policies at clauses 13, 13.01-1S, 13.02-1S and the decision guidelines of clause 65 are validly called up.

### **Overview of contentions**

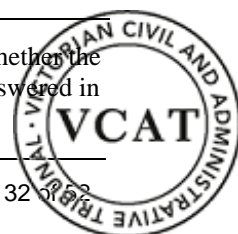
- 124 The Council and respondents were critical of the proposal's response to bushfire risk which was variously referred to as 'too simplistic and 'a tick the box' approach that does not adequately address the particular risks associated with the use of the land for a service station during bushfire events. They also concur that the *2020 Design Guidelines* are a relevant consideration and variously say that this document is to be given some or great weight. The site's exposure to a bushfire threat emanating from the south-west was said to be contrary to the *2020 Design Guidelines* and is another factor relied upon against the acceptability of the proposal and its suitability in this location



- 125 In particular, the respondents raise concerns that the proposal’s consequential impacts on the surrounding environment and likely disproportionate consumption of scarce emergency resources when threatened by bushfire events – both pre-emptively and during such events. The diversion of such scarce emergency resources away from, for example, houses, nearby community related facilities, the general store opposite with its heritage overlay and other buildings or property under threat from fire, was said to be an inappropriate use of such resources that are relied upon by the whole community. They also say that if the use were to succumb to a bushfire, the consequences for human life, the surrounding area and community infrastructure would be wide reaching and potentially catastrophic. They also highlight prevailing infrastructure constraints (such as power outages) that are said to occur more frequently in this area than in urban areas, contributing to their concerns with the effectiveness of enacting preventative and emergency management measures.
- 126 The road network, with an absence of alternatives to Monbulk Road and Church Street were also said to make these routes vulnerable to blockages in an evacuation scenario given the absence of road alternatives and the hazardous nature of the proposal. The effects of climate change in the assessments undertaken for the applicant and lack of consultation with local emergency management services were also highlighted.
- 127 The applicant submits that the *2020 Design Guidelines* are not a relevant consideration, given that they are not a background or incorporated document in the planning scheme and, to its knowledge, have no status in the *PE Act* as a Practice Note or Ministerial Direction. Reference was made to the opinion expressed by the Tribunal on a question of law in *Gelwick Management Pty Ltd v Moreland CC [2018] VCAT 768*<sup>22</sup> (*Gelwick*) in support of these submissions.
- 128 The applicant relies on the *Terramatrix Report* and the review undertaken in the *Nexus opinion* to submit that the proposal can acceptably respond to bushfire risk. In summary, the *Terramatrix Report* identifies the following measures which are to be implemented as permit conditions and which comprise the Bushfire Management Plan (**BMP**):
- Constructing buildings to a minimum BAL-29 standard.
  - Provision of a 5000 litre water tank above ground for fire fighting purposes.
  - Provision of defensible space (modified vegetation) to the property boundary.
- 129 The applicant also draws support from the CFA’s non-objection, whose position and status as a relevant determining authority is also said to weigh strongly in favour of the proposal’s acceptability in terms of bushfire risk.

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<sup>22</sup> [164] – [165] The question of law to be determined in that proceeding relevantly related to whether the Moreland Apartment Design Code (2015) was a relevant consideration. The question was answered in the negative.



- 130 The CFA confirmed its acceptance of the *Terramatrix Report* including the recommended bushfire protection measures in the BMP and agrees with the views expressed in the *Nexus opinion*. It is also satisfied that access and egress to/from the subject site is available for attending fire appliances from Monbulk Road.
- 131 Subject to permit conditions as outlined above, the CFA would be satisfied that the proposal can practically mitigate the identified risks beyond the site to an acceptable level.
- 132 In response to the ‘tick the box’ criticisms levelled against the applicant’s assessment of bushfire risk, the CFA accepts that the approved measures in clause 53.02 provide a useful assessment tool but are not the only consideration in forming its opinions. In its submissions, the CFA cited other planning scheme policies and provisions associated with bushfire considerations, including policy at clause 13.02-1S and the operational provisions for integrated decision making at clause 71.02-3. The CFA submits that these other planning considerations would be satisfied on the basis of the bushfire measures recommended in the *Terramatrix Report*.
- 133 The CFA also addressed its understanding of concerns raised by respondents about ‘the potential contribution of the proposed service station use to the bushfire risk, such as the storage of flammable liquids/dangerous goods’ as an additional consideration.<sup>23</sup> It submits that ‘the safe storage of flammable goods associated with the proposed use is regulated by legislation other than through the planning permit process in Victoria.’ The CFA defers to the established regulatory framework and standards established to appropriately manage those risks, including the legislation such as the *Dangerous Goods Act 1985*.
- 134 In support of these submissions, the CFA referred to the findings by other divisions of the Tribunal where risk related issues about the storage and handling of dangerous goods have been raised. These included *Platinum King*<sup>24</sup> and *Epworth Healthcare v Yarra CC* (includes Summary) (Red Dot) [2012] VCAT 1801 (*Epworth*).<sup>25</sup>
- 135 In relation to the *2020 Design Guidelines*, the CFA submits that these principally apply to broader land use planning considerations at a wider settlement or township scale (rather than to infill development on single lots); are more relevant to subdivisions and are to be given little weight. It was submitted that preferential weight should be given to other documents, particularly *Planning Applications Bushfire Management Overlay - Technical Guide (2017)* (the **2017 Technical Guide**).
- 136 Notwithstanding, the CFA supports the following statement which appears in the *2020 Design Guidelines*<sup>26</sup>:

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<sup>23</sup> Page 9 of main written submission.

<sup>24</sup> [229]

<sup>25</sup> [37] – [39]

<sup>26</sup> Page 10.





Hazardous uses, such as a petrol station, can potentially present a significant risk during a bushfire and can become sources of fires well beyond the settlement interface. They can also create toxic smoke and plumes.

These types of uses should be located away from the settlement interface and away from locations exposed to a north-west or south-west bushfire.

Locating them on the eastern side of a settlement means that winds would tend to push smoke away, rather than towards more populated areas.

137 That support is however qualified by the CFA's following submission:<sup>27</sup>

CFA supports the above statement in bushfire planning, ensuring that hazardous uses, such as petrol filling stations, are not located on the interface of settlements in close proximity to exposed locations presenting a heightened bushfire hazard. However, it is again pointed out that this statement is primarily referring to the need to locate hazardous uses away from higher bushfire risk areas when planning new settlements or redeveloping existing townships at the broader scale. If the Tribunal decides that statement is relevant to considering development on a single lot, CFA submits that the appeal site is located within the centre of the commercial area of Kallista, and not in close proximity or adjacent to the higher risk Sherbrooke Forest to the south-west.

## **Tribunal's findings**

### What the planning scheme says

138 I begin with an overview of key planning scheme policies, applicable controls and decision guidelines in relation to bushfire considerations.

139 Policy at clause 13 for Environmental risks and amenity asks that:

Planning should strengthen the resilience and safety of communities by adopting a best practice environmental management and risk management approach.

140 This policy goes on to identify key measures to achieve this policy, based on key management approaches directed at identification of risks, preventive measures including locational considerations and controls that mitigate significant impacts:

Planning should identify, prevent and minimise the risk of harm to the environment, human health, and amenity through:

- Land use and development compatibility.
- Effective controls to prevent or mitigate significant impacts.

Planning should identify and manage the potential for the environment and environmental changes to impact on the economic, environmental or social wellbeing of society.

Planning should ensure development and risk mitigation does not detrimentally interfere with important natural processes.

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<sup>27</sup> Page 2 of submission by CFA dated 16 August 2021.



Planning should prepare for and respond to the impacts of climate change.  
[Tribunal underlining]

141 Policy at clause 13.01-1S for ‘Natural hazards and climate change’ has the objective:

To minimise the impacts of natural hazards and adapt to the impacts of climate change through risk-based planning. [Tribunal underlining]

142 Strategies include the following:

Consider the risks associated with climate change in planning and management decision making processes.

Identify at risk areas using the best available data and climate change science.

Integrate strategic land use planning with emergency management decision making.

Direct population growth and development to low risk locations.

Site and design development to minimise risk to life, property, the natural environment and community infrastructure from natural hazards.

[Tribunal underlining]

143 Clause 13.02-1S sets out State policy for ‘Bushfire planning’. Under its opening heading ‘policy application’, the following statement appears:

This policy must be applied to all planning and decision making under the *Planning and Environment Act 1987* relating to land that is:

- Within a designated bushfire prone area;
- Subject to a Bushfire Management Overlay; or
- Proposed to be used or developed in a way that may create a bushfire hazard. [Tribunal underlining]

144 I note that the drafting of this statement is very broad. It requires application of this policy to all manner of planning decisions by planning authorities (for example when preparing planning scheme amendments or structure plans) and responsible authorities (including the determination of planning permit applications). It also applies to proposals that may themselves be an ignition source in a way that may create a bushfire hazard. This circumstance applies independently of a site’s location in a BMO or designated bushfire prone area. In this case, the proposal presents with all three characteristics.

145 The objective of this policy is:

To strengthen the resilience of settlements and communities to bushfire through risk-based planning that prioritises the protection of human life.

146 Various strategies are identified and those that are relevant are set out below:

**Protection of human life**

Give priority to the protection of human life by:

- Prioritising the protection of human life over all other policy considerations.



- Directing population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.
- Reducing the vulnerability of communities to bushfire through the consideration of bushfire risk in decision making at all stages of the planning process.

### **Bushfire hazard identification and assessment**

Identify bushfire hazard and undertake appropriate risk assessment by:

- Applying the best available science to identify vegetation, topographic and climatic conditions that create a bushfire hazard.
- Considering the best available information about bushfire hazard including the map of designated bushfire prone areas prepared under the *Building Act 1993* or regulations made under that Act.
- Applying the Bushfire Management Overlay to areas where the extent of vegetation can create an extreme bushfire hazard.
- Considering and assessing the bushfire hazard on the basis of:
  - Landscape conditions - meaning conditions in the landscape within 20 kilometres (and potentially up to 75 kilometres) of a site;
  - Local conditions - meaning conditions in the area within approximately 1 kilometre of a site;
  - Neighbourhood conditions - meaning conditions in the area within 400 metres of a site; and
  - The site for the development.
- Consulting with emergency management agencies and the relevant fire authority early in the process to receive their recommendations and implement appropriate bushfire protection measures.
- Ensuring that ... planning permit applications ... properly assess bushfire risk and include appropriate bushfire protection measures.
- Not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measures can be adequately implemented.

### **Settlement planning**

Plan to strengthen the resilience of settlements and communities and prioritise protection of human life by:

- Directing population growth and development to low risk locations, being those locations assessed as having a radiant heat flux of less than 12.5 kilowatts/square metre under *AS 3959-2009 Construction of Buildings in Bushfire-prone Areas* (Standards Australia, 2009).
- Ensuring the bushfire risk to existing and future residents, property and community infrastructure will not increase as a result of future land use and development.



- Achieving no net increase in risk to existing and future residents, property and community infrastructure, through the implementation of bushfire protection measures and where possible reducing bushfire risk overall.
- Assessing and addressing the bushfire hazard posed to the settlement and the likely bushfire behaviour it will produce at a landscape, settlement, local, neighbourhood and site scale, including the potential for neighbourhood-scale destruction. ...  
[Tribunal underlining]

- 147 Policy guidelines that are to be considered as relevant are any applicable approved state, regional and municipal fire prevention plan.
- 148 Local policy refers to environmental hazards at clause 21.09-2 whose objectives and strategies are aligned with these broader statewide policies. I note that this policy dated 21 May 2009 variously refers to ‘wildfire’ which I take to mean land subject to the BMO. The BMO was previously known as the Wildfire Management Overlay prior to 18 November 2011. This circumstance and this policy’s age make it no less relevant.
- 149 Relevant strategies include the following:
- Limit development in areas prone to intense wildfire behaviour and provide township protection features.
  - Provide adequate design and services that allow rapid and effective response by emergency services.
  - Ensure the community is aware of the risks of ... wildfire hazards ... and the need to limit, and even prevent, development where there are problems or to apply special development criteria.
- 150 An implementation statement is to apply a ‘Wildfire Management Overlay, to land where intensity of wildfire is significant and likely to pose a threat to life and property.’
- 151 In relation to the BMO, this control’s purposes are to implement planning scheme policies and:
- To ensure that the development of land prioritises the protection of human life and strengthens community resilience to bushfire.
  - To identify areas where the bushfire hazard warrants bushfire protection measures to be implemented.
  - To ensure development is only permitted where the risk to life and property from bushfire can be reduced to an acceptable level.  
[Tribunal underlining]
- 152 A permit is required for buildings and works associated with 11 specified uses. A service station is one of the listed uses in clause 44.06-2 and none of the exemptions apply that would otherwise set aside a requirement for a permit.
- 153 Application requirements are specified at clause 44.06-3 and these require the preparation of:



- A bushfire hazard site assessment including a plan that describes the bushfire hazard within 150 metres of the proposed development;
- A bushfire hazard landscape assessment including a plan that describes the bushfire hazard of the general locality more than 150 metres from the site;
- A bushfire management statement describing how the proposed development responds to the requirements in this clause and Clause 53.02. If the application proposes an alternative measure, the bushfire management statement must explain how the alternative measure meets the relevant objective.

154 Clause 44.06-4 states that an application must meet the requirements of Clause 53.02, noting that there is no applicable schedule.

155 Mandatory conditions are specified at clause 44.06-5 which are to be included in any permit granted.

156 Decision guidelines require a consideration of planning scheme policies and the decision guidelines of clauses 53.02 and 65.

157 Clause 53.02 has identical purposes to the BMO except that it has an additional purpose as follows:

To specify location, design and construction measures for a single dwelling that reduces the bushfire risk to life and property to an acceptable level.

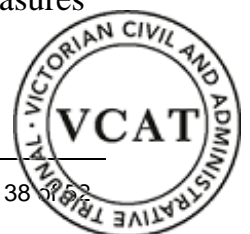
158 In terms of its application, clause 53.02-1 confirms that the clause applies to all applications under the BMO. More particularly, the provisions of clause 53.02-3 apply only to single dwellings in specified circumstances and clause 53.02-4 applies to all other applications.

159 The operation provisions at clause 53.02-2 explain that the provisions of this clause contain:

- **Objectives.** An objective describes the outcome that must be achieved in a completed development.
- **Approved measures (AM).** An approved measure meets the objective.
- **Alternative measures (AltM).** An alternative measure may be considered where the responsible authority is satisfied that the objective can be met. The responsible authority may consider other unspecified alternative measures.
- **Decision guidelines.** The decision guidelines set out the matters that the responsible authority must consider before deciding on an application, including whether any proposed alternative measure is appropriate.

160 There are three objectives and these are accompanied by ‘Approved Measures’ and in some cases ‘Alternative Measures’. I return to these later.

161 Decision guidelines relevantly include the following:





The bushfire hazard landscape assessment, the bushfire hazard site assessment and the bushfire management statement submitted with the application.

The impact of any State, regional or local bushfire management and prevention actions occurring around the site and in the wider area on the bushfire hazard and the level of risk to the proposed development.

Whether the proposed development meets the objectives of Clause 53.02-4 regardless of other measures which may be available, including private bushfire shelters, community shelters and the presence of places of last resort.

Whether the proposed measures can be practically implemented and maintained in conjunction with the ongoing use of the land.

If one or more of the objectives in Clause 53.02-4 will not be achieved in the completed development, whether the development will, taking all relevant factors into account, reduce the bushfire risk to a level that warrants it proceeding.

Whether the risk arising from the broader landscape can be mitigated to an acceptable level or warrants the development not proceeding. [Tribunal underlining]

162 Clause 65.01 includes amongst its considerations:

- The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.

163 Guidance for integrated decision making at clause 71.02 refers to the following:

The Planning Policy Framework operates together with the remainder of the scheme to deliver integrated decision making. Planning and responsible authorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations. [Tribunal underlining]

### The fire risk

164 Having considered the various reports and submissions made, I accept that the site is in an area where the landscape risk identified is within a 'Broader Landscape - Type 3', as described in the *2017 Technical Guide*.

165 I also accept the CFA's assessment that the:

- surrounding broader landscape is assessed as being 'high' within the bushfire risk spectrum; and
- overall, the expected fire behaviour in this area is rated as 'high'.



166 I further accept the following aspects of the CFA's substantive written submissions<sup>28</sup> presented during the hearing:

- The Dandenong Ranges, within which both the site and township are located, comprise heavily forested areas interspersed with other townships, residential, commercial and public areas.
- Surrounding terrain comprises some steeper slopes and wet gullies. Vegetation comprises tall canopy eucalypts with understorey varying from having 'natural state' fuels (including shrubs, ferns and leaf litter) to being partly managed by public authorities and private land owners.
- The most significant forested areas are the Sherbrooke Forest to the south (forming part of the Dandenong Ranges National Park) and the Sassafras Creek Nature Conservation Reserve to the north.
- While land with modified vegetation is predominantly found within 150m of the site, that modified vegetation also has interfaces with surrounding forest vegetation (Sherbrooke Forest) with significant fuel loads, elevating the risk to the township.
- That part of the Sherbrooke Forest within the 150m assessment area has slopes of between 10 to 15 degrees but otherwise, the topography within the assessment area is relatively benign, and would not in itself elevate the intensity of a bushfire attack.
- The most likely bushfire threat:
  - ... would be from the north/north-west direction and under a wind change from the west/south-west in Victorian weather conditions. A fire run of several kilometres is possible from numerous directions, including the above aspects.<sup>29</sup>
- The following fire scenarios extracted from the *Terramatrix Report*<sup>30</sup> and with which the CFA concurs:
  - Kallista has the potential to be impacted by a large, landscape scale fire approaching from the south-west...an established fire on the southern face of the range could spread rapidly up the hill through the forest of the National Park. This fire could impact on the Kallista area rapidly and with little warning.
  - Further, under extreme conditions Kallista could conceivably be impacted by spot fires from a large fire on the western face of the Dandenong Ranges. Approach from the north-east is considered less likely, but it is noted that the 1962 bushfire burnt along the eastern face of the range towards Kallista as well as the western slopes. (page 12)
- In an extreme bushfire event, areas within the township that contain lower or no fuels (such as car parks and roads), would have little effect in

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<sup>28</sup> Pages 4 and 5.

<sup>29</sup> [19]

<sup>30</sup> [20] – [21]



moderating the impact of a fire front or spot fires caused by embers driven by wind from a distant bushfire.

- The CFA's assessment<sup>31</sup> that anticipates under extreme conditions:  
... the Kallista township could be impacted by significant ember attack, including lit debris such as small branches, leaves, and stringy bark from trees like the Mountain Ash that are common in this forest. These embers may cause spot fires to ignite and spread, if left unattended.

167 I also accept the following statement in the *Terramatrix report*<sup>32</sup> about the role of land containing modified vegetation closer to the site and its effects on fire behaviour in certain environmental conditions:

Whilst the residential and commercial areas in the townships of Kallista may moderate the speed and intensity of the fire before it impacted the site, under the BMO conditions of low humidity, high temperatures and strong winds, the site could be subjected to significant ember attack and possibly radiant heat. The cultivated gardens and Modified vegetation around the development site are unlikely to substantially reduce the threat from radiant heat and flame impacts. [Tribunal underlining]

Weight to be given to the 2020 Design Guidelines and 2017 Technical Guide

168 The *2020 Design Guidelines* is not a background document, policy document or incorporated document in the planning scheme. The *2017 Technical Guide* has an identical status.

169 That being the case, neither document forms part of the planning scheme and I am not required to consider or give effect to them.<sup>33</sup>

170 However, under s. 60(1A)(g) of the *PE Act*, if the circumstances appear to so require, I may<sup>34</sup> consider documents of this kind. The question then becomes what weight should be given to them?

171 I firstly observe that both are relevant but have different and complementary roles to play.

172 The *2017 Technical Guide* provides useful information about the methodology to assist in the preparation and assessment of applications within the BMO. I have given some weight to this document for its methodological related assistance at the individual site level. However, I note this document's focus on permit applications for single dwellings. I also note that the list of uses under the heading 'Clause 44.06-1 Permit Requirements' excludes reference to the use 'service station'.

173 Its more recent companion, the *2020 Design Guidelines*, has been developed to assist in understanding and applying the matters set out in State planning

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<sup>31</sup> [22]

<sup>32</sup> Page 12.

<sup>33</sup> See clauses 71.02-2 and 72.08.

<sup>34</sup> As distinct from the provisions of s. 60(1) of the *PE Act* which sets out a different suite of matters that *must* be considered.



policy at clause 13.02-1S, including policies for settlement planning under this clause.

174 The *2020 Design Guidelines*<sup>35</sup> apply to:

- The preparation of strategic planning related plans by planning authorities such as structure plans for new and existing communities;
- The preparation of planning scheme amendments;
- Planning for development including subdivision in bushfire prone areas that call up a consideration of bushfire policies under clause 13.02; and
- Planning Permit applications under the BMO, especially for subdivisions but not to the exclusion of any other development applications aside from applications for a single dwelling in a BMO.

175 The *2020 Design Guidelines* also assist in understanding the need for, and importance of, a settlement wide approach to planning for bushfire risk and what is meant by enhancing the resilience of existing communities to such risk.<sup>36</sup>

176 I note that while its guidance has been drafted to apply primarily to landscapes with a lower bushfire risk – that is Type 1 and Type 2 landscape – the principles adopted in the *2020 Design Guidelines* can be applied to any bushfire risk landscape type. Thus, the *2020 Design Guidelines* may be applied to Type 3 landscapes such as that which is present in this case.

177 Further, the *2020 Design Guidelines* provide some helpful – if not common sense – guidance, about matters such as the distribution of land uses in settlements including vulnerable uses (such as aged care facilities) and hazardous uses.

178 The guidance on page 10 of the *2020 Design Guidelines* usefully confirms that:

- service stations can be regarded as a hazardous use that can potentially present a significant risk during a bushfire and can become sources of fires well beyond the settlement interface; and
- such uses should be located away from the settlement interface and away from locations exposed to a north-west or south-west bushfire.

179 This commentary is no substitute for a fulsome risk assessment which assesses and addresses the suitability of this site for this proposal. This principle can be applied to any other site involving vulnerable or hazardous uses. That said, this commentary should not be read to mean that this proposal must automatically fail, despite the site being located, in my view, both close to the settlement interface from which the main bushfire threat is likely (110m away) and vulnerable to exposure from a south-west bushfire. But at the very least this commentary, and the *2020 Design Guidelines* more broadly, affirm the importance of approaching hazardous uses such as service stations with

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<sup>35</sup> Page 4.

<sup>36</sup> Page 5.



considerable care when assessing bushfire risk and making decisions about proposals, their location, and their likely implications for the resilience of settlements and communities. This approach is to be distinguished from the assessment that occurs in relation to the siting, design and on-site mitigation measures of a proposal's individual parts within the confines of its site boundaries.

- 180 I find that while not determinative of this proposal's acceptability, the guidance offered by the *2020 Design Guidelines* is therefore of some assistance particularly in understanding the application of clause 13.02-1S. Thus, I also give this document some weight.

### Acceptability of the proposal's response to bushfire risk

#### Breadth and nature of considerations

- 181 I begin with findings about the applicability of strategies under 'Settlement planning' in clause 13.02-1S. Aside from the last of the seven strategies under this heading whose application is confined to 'any strategic planning document, local planning policy, or planning scheme amendment', no such qualification exists in relation to the other six strategies.
- 182 Further, there is very clear direction under this policy's opening heading 'Policy application' that this policy 'must be applied to all planning and decision making under the *Planning and Environment Act 1987* relating to land within' a designated bushfire prone area, BMO or which is proposed to be used or developed in a way that may create a bushfire hazard. As I observed above, this policy has very broad application.
- 183 I therefore reject the assertion in the *Nexus opinion* that:
- The policy of ensuring there is no increase in the bushfire risk to existing residents, property and community infrastructure is only referenced in the 'Settlement' planning strategies of Clause 13.02-1S and a decision about whether to grant a planning permit for a proposal of this kind, on a vacant lot in an established town centre does not constitute a 'Settlement' planning decision.<sup>37</sup>
- 184 Further, I do not agree with the *Nexus opinion* that, notwithstanding flaws in the assessment undertaken in relation to clause 53.02 to which I return, that because the *Terramatrix Report* is said to comply with the applicable BMO objectives by complying with:
- ... the relevant Approved measures of Clause 53.02 – being AM2.1, AM2.2, AM2.3, AM3.1 and AM4.1 ... that this is the appropriate methodology for assessing compliance with Clause 13.02-1S.<sup>38</sup>
- 185 Rather, I agree with and adopt the Tribunal's findings in *Department of Environment, Land, Water and Planning v Yarra Ranges SC (Red Dot)* [2019] VCAT 323<sup>39</sup> that:

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<sup>37</sup> Page 3.

<sup>38</sup> Page 3.

<sup>39</sup> [214] – [218] The Tribunal was constituted by Gibson DP and Harty M.





The provisions under clause 53.02 outline a rather automated approach to decision making that runs a risk of not appropriately considering the overall consequence of a decision to permit the use and development of the site for the purposes of a dwelling. Similar to biodiversity, planning for bushfire is not a ‘tick the box’ approach. Certainly, achieving compliance with the approved measures meets objectives under the clause and is very helpful in decision making, however any proposed use and development must also satisfy the policy framework, which guides decision making.

In this case, we find that the policy under clause 13.02-1S is unequivocal when it includes the strategy under *Protection of human life*, to direct development to low risk locations. The site is not a low risk location given the evidence and the commentary from the CFA regarding extreme bushfire risk. ... [My underlining]

186 While the site in the proceeding before me is not in an area of ‘extreme bushfire risk’, nor is the site in a ‘low’ risk location. On the risk spectrum, the site is in a ‘high’ risk location in relation to bushfire hazards. The Tribunal’s observations in the above case apply equally to the circumstances here. In short, an assessment under the BMO and clause 53.02 cannot be assumed to satisfy the broader range of considerations in the policy framework, particularly policy directions that relate to site locational attributes in a settlement context, and the strengthening of settlement resilience including that of their communities, as described in clause 13.02-1S.

187 I otherwise make the following observations about key elements of bushfire planning related considerations that arise from my reading of the various planning scheme policies that apply, the provisions of clause 53.02, the BMO and clauses 65.01 and 71.02-3:

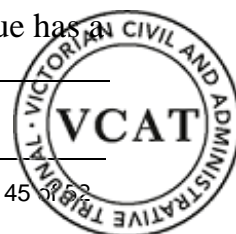
- When it comes to decision making in bushfire affected areas, the protection of human life must be prioritised over all other considerations;
- The resilience of settlements, communities and their safety is to be strengthened rather than maintained or reduced in planning and decision making involving proposals subject to bushfire risk (clauses 13 and 13.02-1S);
- These overarching objectives for resilience of settlements and communities and prioritising human life are to be realised by achieving no net increase in risk to existing and future residents, property and community infrastructure. This is to be achieved by implementing bushfire protection measures and where possible reducing bushfire risk overall (clause 13.02-1S);
- Strategies for the protection of human life at clause 13.02-1S and for natural hazards at clause 13.01-1S both seek to direct development to low risk locations.
- Strategies for the protection of human life at clause 13.02-1S also seek to reduce the vulnerability of communities to bushfire by consideration of bushfire risk in decision making at all stages of the planning process.



- Strategies for bushfire hazard identification and risk assessment at clause 13.02-1S include consulting with emergency management agencies early in the assessment process. I take this to mean first responders, such as the local CFA brigade are to be consulted early in the planning process to ‘receive their recommendations and implement appropriate bushfire protection measures’. Such consultation is to be distinguished from, and in addition to, the CFA in its statutory role as the relevant fire authority and relevant determining authority. The need to do so may however vary from one site to the next and one proposal to the next and will necessarily depend upon the particular circumstances at play;
- Settlement planning strategies at clause 13.02-1S refer to multiple spatial dimensions when assessing and addressing the breadth of the bushfire hazard posed to the settlement and likely bushfire it will produce. These spatial dimensions are to be assessed and addressed at a landscape, settlement, local, neighbourhood and site scale, including the potential for neighbourhood-scale destruction;
- Adoption of a best practice environmental and risk management approach and consideration of the best available information about bushfire hazard and factors that contribute to this hazard (including climatic conditions) is sought.<sup>40</sup> This legitimately calls up a consideration of the effects of climate change, having regard to the need for integrated decision making (clause 71.02), policies at clauses 13 and 13.02-1S, and policy at clause 13.01-1S in relation to climate change. The latter refers to the following:
  - Consider the risks associated with climate change in planning and management decision making processes.
- Planning permit applications are required by clause 13.02-1S to ‘properly assess bushfire risk and include appropriate bushfire protection measures’.
- Both the use and development aspects of proposals in bushfire affected areas must be considered and addressed and an evaluation of the degree of risk undertaken. When measures to mitigate risks are necessary, decision guidelines in clause 53.02-4.5 ask for a consideration of whether these can be:
  - ... practically implemented and maintained in conjunction with the ongoing use of the land.
- When the degree of risk to life and property from bushfire cannot be reduced to an acceptable level, developments should not be permitted. This is a consistent planning scheme expectation reflected in policy at clause 13.02-1S, the purposes of the BMO and clause 53.02 and decision guidelines at clause 53.02-4.

188 These policies, controls and decision guidelines set a high bar when decisions involving use and development in areas subject to bushfire risk. The issue has a

<sup>40</sup> Clause 13.02-1S.



sharper focus in circumstances involving the interplay of factors here, namely the:

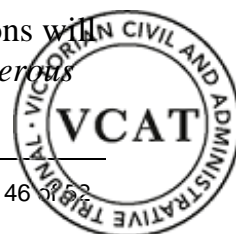
- Policy direction of directing development to low risk locations;
- Bushfire risk associated with the broader landscape is assessed as being ‘high’;
- The expected fire behaviour in this area is ‘high’;
- Nature of the proposed use where highly flammable materials are stored and transacted, particularly at times of heightened bushfire risk where the degree of vigilance in managing that risk, both on the site by those with on-site management responsibilities, and by emergency agencies, is potentially higher than other uses with a lower propensity for fire related hazard generation; and
- The location of the site at the main road into and out of the township.

189 In this case, I am not persuaded that there has been an adequate demonstration of:

- This site’s suitability for the proposal having regard to the high level of risk associated with the site’s location relative to the broader landscape and the site’s susceptibility to the effects of radiant heat and ember attack;
- The type and acceptability of preventative management measures required to limit the proposal’s contribution to bushfire risk;
- The type and likely efficacy of on-site management measures and intervention by emergency agencies both pre-emptively at times of predicted heightened bushfire danger and during bushfire events, having regard to particular environmental and infrastructure constraints in this area. Will, for example, there need to be a reliance on back-up power supplies and if so how dependable will these measures be? Can the surrounding road network be relied upon for access to and from the site taking into account the attributes of the road network and its partial passage through forested areas that are the most likely source of fire risk? and
- The implications of this proposal’s demands on, and availability of, emergency resources for both this site and the broader community, both pre-emptively at times when a heightened likelihood of bushfire danger is predicted, and during bushfire events.

190 Nor has the applicant’s assessment considered the role of climate change and its likely effects on the frequency and severity of bushfire events. Thus, such effects on the degree of risk associated with the suitability of this location for this proposal and any mitigation measures – both now and in the longer term – remains unclear.

191 There is no information before me demonstrating that these considerations will necessarily be addressed under the regulatory processes under the *Dangerous Goods Act 1985* with the level of certainty required in the particular



circumstances. Nor do I know whether such measures will bring about changes to the development features of this site and what the implications of those changes may be in terms of, for example, the appearance and functioning of this proposal.

192 I also find that the reliance upon the Tribunal's findings in other cases about the role of the *Dangerous Goods Act 1985* is of little assistance to the circumstances here. The decisions variously referred to by the parties need to be understood in the context of the following considerations:

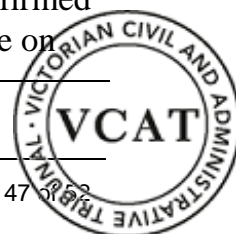
- In *Platinum King* a planning permit was not required for buildings and works associated with a service station use under the provisions of the BMO at the time of that decision. That circumstance changed some 12 months later on 19 September 2017 with the gazettal of Amendment VC132 – a ministerial amendment that made administrative changes to the Victoria Planning Provisions which included the introduction of 'service station' to the list of uses in clause 44.06-2 requiring a permit. Thus, bushfire considerations were not front and centre in relation to the Tribunal's consideration of that proposal and the site's suitability for the use and development of a service station, other than the Tribunal observing that the site's location in an area of bushfire risk weighs against the suitability of that location and the measures required to manage bushfire risk influenced, to some extent the landscaping response;<sup>41</sup>
- A strengthening and broadening of considerations in the State planning policy framework for environmental risks has occurred since *Platinum King*, particularly in relation to bushfire planning at clause 13.02-1S; and
- In *Epworth*, the review site was not located in a BMO.

193 In this case I find that none of the material relied upon by the applicant provides an adequate assessment of the risk profile of the proposed use and development. Nor is there any assessment of the implications of this particular use and its potential contribution to bushfire risk at the individual site or broader settlement level having regard to the particular nature of activities associated with a service station use where transactions and the storage of flammable materials is self-evidently necessary. Fuel spillages, even small spills when fuel is being decanted from bowsers to vehicles during refilling, the release of vapours during that process and the storage of gas bottles are just some considerations that come to mind. The flammability and thus the hazards that these elements pose needs to be understood in the same way that the flammability of vegetation is required to be managed in defensible space.

194 Further, upon my questioning of the applicant, it was initially unknown and not documented in any of the material made available to me as to whether vent pipes associated with the release of vapours (and pressure) from underground fuel tanks would be required. On the last hearing day, the applicant confirmed that between two and four such vent pipes would be required somewhere on

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<sup>41</sup> [190] and [228]



the site but not proximate to the sales building due to the proposed installation of solar panels on the roof of this building – with the reason for this locational constraint being unclear to the applicant. The need for these vents raises further questions as to what management measures are required for these vents during times of predicted heightened bushfire risk or during bushfire events and what are the implications if they are subject to ember attack and radiant heat?

- 195 All of these matters give rise to considerable uncertainty as to the proposal's acceptability when tested against the policy matrix for bushfire risk including whether the proposal can be said to result in no net increase in risk to existing and future residents, property and community infrastructure.
- 196 I find that to properly respond to bushfire planning considerations including the policy matrix for environmental risks, an assessment of bushfire risk and the measures necessary to mitigate that risk therefore demand a more sophisticated approach than that which has been undertaken for this proposal. Such an approach – a best practice approach – can be characterised as offering 'more' rather than 'less' – involving the integration rather than disaggregation of all relevant considerations or their deferral to a later stage.

The proposal's response to clause 53.02

- 197 Despite the CFA's support for the assessment relied upon for the applicant, I find that the applicant's assessment has not demonstrated that all, if any, of the three objectives under clause 53.02-4 have been met, namely:

- Clause 53.02-4.1 - Landscape, siting and design
- Clause 53.02-4.2 - Defendable space and construction
- Clause 53.02-4.3 - Water supply and access

- 198 All three objectives are provided with Approved Measures.

- 199 The second and third objectives are also provided with Alternative Measures.

- 200 The objectives at clause 53.02-4.1 for Landscape, siting and design are:

Development is appropriate having regard to the nature of the bushfire risk arising from the surrounding landscape.

Development is sited to minimise the risk from bushfire.

Development is sited to provide safe access for vehicles, including emergency vehicles.

Building design minimises vulnerability to bushfire attack.

- 201 The corresponding Approved Measures for 'Defendable space and construction' which are deemed to meet the objective are set out below.





### Approved measures

Measure	Requirement
AM 2.1	The bushfire risk to the development from the landscape beyond the site can be mitigated to an acceptable level.
AM 2.2	A building is sited to ensure the site best achieves the following: <ul style="list-style-type: none"><li>▪ The maximum separation distance between the building and the bushfire hazard.</li><li>▪ The building is in close proximity to a public road.</li><li>▪ Access can be provided to the building for emergency service vehicles.</li></ul>
AM 2.3	A building is designed to be responsive to the landscape risk and reduce the impact of bushfire on the building.

202 The *Terramatrix Report*<sup>42</sup> provides the following response to AM2.1

As identified in Section 3, the landscape is not one of extreme bushfire risk. The topography is not extreme and the fuel hazard over the Dandenong Ranges is unlikely to exceed that presumed in the BMO/AS 3959-2018 model for Forest; no fuel load is attributed to Modified vegetation.

Accordingly, it is proposed that the risk can be mitigated to an acceptable level by implementing approved bushfire protection measures in compliance with the BMO requirements, including BAL construction standard, commensurate defensible space, provision of a water supply for firefighting, and ensuring good access and egress are available for occupants and emergency services.

203 In the first instance, and setting aside the fact the site is in ‘high’ landscape risk typology in the context of policy directions at clause 13.02-1S to direct development to ‘low’ risk locations, I am unable to reconcile contentions for the applicant that because the landscape is not regarded as one of ‘extreme’ bushfire risk that the proposed location is therefore deemed to be acceptable when both the CFA and *Terramatrix Report* acknowledge that:

- The site could be subjected to significant ember attack and possibly radiant heat; and
- The cultivated gardens and modified vegetation around the development site are unlikely to substantially reduce the threat from radiant heat and flame impacts.

204 Moreover, it is unclear whether the management measures for ‘Defensible space and construction’ and ‘Water supply and access’ would be acceptable for this particular use and development. The measures relied upon for the applicant refer to the next two objectives in clause 53.02-4 and their Approved Measures.

205 The objective at clause 53.02-4.2 for ‘Defensible space and construction’ is:

<sup>42</sup> Page 14.



Defendable space and building construction mitigate the effect of flame contact, radiant heat and embers on buildings.

- 206 Approved Measure 3.1 is relied upon as the means of meeting this objective. A BAL-29 construction standard is proposed for both buildings on the land and modified vegetation is proposed on the site.
- 207 The objectives at clause 53.02-4.3 for 'Water supply and access' are:
- A static water supply is provided to assist in protecting property.
  - Vehicle access is designed and constructed to enhance safety in the event of a bushfire.
- 208 Approved Measure 4.1 is relied upon to meet these objectives. More particularly, the provision of a 5000L water tank is adopted with the *Terramatrix Report* noting that a driveway less than 30m is provided.
- 209 However, both Approved Measures 3.1 and 4.1 only apply to:
- A building used for a dwelling (including an extension or alteration to a dwelling), a dependent person's unit, industry, office or retail premises ...
- 210 None of the listed uses relate to buildings associated with the proposed use of the land as a service station. Nor is the term 'service station' a use that is nested in any of these or, for that matter, any other land use term<sup>43</sup> identified in the table to clause 73.03.
- 211 I regard the reliance upon Approved Measures 3.1 and 4.1 as a key shortcoming of the methodology relied upon in support of the applicant's assertions that the proposal satisfies clause 53.02, its objectives and the BMO, setting aside the need to satisfy other policies at clauses 13, 13.01-1S and 13.02-1S that I have described.

## Conclusion

- 212 Overall, I find that the Council's ground of refusal in relation to bushfire risk has been made out. I also find that the respondents' concerns about the proposal's effects upon the resilience of its settlement and community have not been adequately assessed and addressed by this proposal. The assessment relied upon by the applicant and supported by the CFA is too simplistic and incorrectly references measures in clause 53.02 that have been drafted in the planning scheme to apply to buildings used for a dwelling and a select number of other uses, but not a service station use.
- 213 Absent any other information in relation to measures that are necessary to mitigate bushfire risk associated with this proposal for a service station, I am not satisfied that the assessment relied upon for the applicant has demonstrated that the objectives of clause 53.02-4 are met.
- 214 That being the case, I cannot be satisfied that the last two decision guidelines of clause 53.02-4.5 have been met. They refer to whether:

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<sup>43</sup> See clause 73.04-17.



- The proposed development will reduce the bushfire risk to a level that warrants it proceeding; and
- The risk arising from the broader landscape can be mitigated to an acceptable level.

215 I am therefore not persuaded that this proposal has demonstrated that either the development itself or risk arising from the broader landscape can reduce the bushfire risk to such a level that warrants the proposal proceeding.

216 Together with the shortcomings I have found with the acceptability of the proposal for this location in terms of its relationship with the functioning and role of this part of the activity centre, I find that a permit must not be granted.

217 In light of my findings above about the suitability of this location for the proposed use and development in terms of planning scheme directions and bushfire risk, I provide only brief findings on other key issues raised at the hearing.

## **OTHER ISSUES**

### **Traffic and parking**

218 While some disruption to traffic flows may occur when right-turning vehicles are propping in Monbulk Road to turn into the site, I broadly accept that traffic, parking and access arrangements can be satisfactorily managed.<sup>44</sup>

### **Waste water disposal**

219 Were I granting a permit and absent the availability of reticulated sewerage, I would have required on-site treatment of waste water using suitable measures such as a packaged treatment plant rather than simply allowing untreated storage of waste water within tanks that are pumped out monthly or when nearly full. This is due to the potential adverse effects of odours when untreated waste from tanks is being transferred to waste removal vehicles for disposal off the site.

### **Tree Protection Zone (TPZ) of Oak tree in Church Street road reserve**

220 While the extent of development depicted on the plans indicates that the level of encroachment into this tree's TPZ would be acceptable, impacts associated with other undocumented works such as drainage infrastructure and vent pipes are uncertain.

### **Health effects of fumes from materials such as petrol**

221 This is not a reason that warrants refusal of this proposal and I adopt the Tribunal's often quoted findings in *Hunt Club Commercial Pty Ltd v Casey CC (includes Summary) (Red Dot)* [2013] VCAT 725<sup>45</sup> that it is not the role of town planning to address all issues of public health.

<sup>44</sup> I also note that the Council and relevant road authority to whom the application was referred do not oppose the grant of a permit on traffic and access grounds.

<sup>45</sup> [15]



## **Storm water management**

222 I accept that management of storm-water run-off from the site can be implemented in a way that limits potential impacts on nearby waterways. However, the consequences of system failures whether or not during extreme weather events would potentially be very high. Though not fatal to this proposal, this circumstance cannot be viewed as a favourable attribute that supports the suitability of this site's location for a service station.

## **CONCLUSION**

223 Overall, I conclude that this proposal has particular use and development features and is of an intensity that is not suited to this location. It would not complement or enhance the role, structure and appearance of the activity centre nor enhance its functioning.

224 Further, having regard to the hazardous nature of the use and its location in a high bushfire risk location, the proposal has not demonstrated with the level of certainty required that it would achieve an acceptable outcome in terms of bushfire risk and settlement planning considerations, particularly when tested against policy for bushfire planning at clause 13.02-1S.

225 I therefore affirm the decision of the Council.

226 I will direct that a permit must not be granted.

Mary-Anne Taranto  
**Member**

