



AGENDA

Development Assessment Committee Meeting Wednesday, 20 September 2023

I hereby give notice that a Development Assessment Committee Meeting will be held on:

Date: Wednesday, 20 September 2023

Time: 6.00pm

Location: Council Chamber, 15 Stead Street, Ballan & Online

**Henry Bezuidenhout
Executive Manager Community Planning & Development**

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1 OPENING**2 PRESENT AND APOLOGIES****3 RECORDING OF MEETING**

In accordance with Moorabool Shire Council's Governance Rules, the meeting will be livestreamed.

4 CONFIRMATION OF MINUTES**5 MATTERS ARISING FROM PREVIOUS MINUTES****6 DISCLOSURE OF CONFLICTS OF INTERESTS**

Conflict of interest laws are prescribed under the *Local Government Act 2020* (the Act) and in the *Local Government (Governance and Integrity) Regulations 2020* (the Regulations). Managing conflicts of interest is about ensuring the integrity and transparency of decision-making.

The conflict of interest provisions under the Act have been simplified so that they are more easily understood and more easily applied. The new conflict of interest provisions are designed to ensure relevant persons proactively consider a broader range of interests and consider those interests from the viewpoint of an impartial, fair-minded person.

Section 126 of the Act states that a Councillor has a conflict of interest if they have a general conflict of interest or a material conflict of interest. These are explained below:

- A Councillor has a general conflict of interest in a matter if an impartial, fair-minded person would consider that the member's private interests could result in them acting in a manner that is contrary to their public duty as a Councillor.
- A Councillor has a material conflict of interest in a matter if an affected person would gain a benefit or suffer a loss depending on the outcome of the matter.

A relevant person with a conflict of interest must disclose the interest in accordance with Council's Governance Rules and not participate in the decision-making process on the matter. This means the relevant person must exclude themselves from any discussion or vote on the matter at any Council meeting, delegated committee meeting, community asset committee meeting or, if a Councillor, any other meeting conducted under the auspices of the Council. The relevant person must also exclude themselves from any action in relation to the matter, including an action taken to implement a Council decision, for example, issuing a planning permit.

7 COMMUNITY PLANNING REPORTS

7.1 PA2022210 - FOUR LOT RE-SUBDIVISION AT 369 MYRNIONG-KOROBET ROAD, KOROBET

Author: Victoria Mack, Statutory Planner

Authoriser: Henry Bezuidenhout, Executive Manager Community Planning & Development

Attachments: 1. Proposed plan of re-subdivision (under separate cover)

APPLICATION SUMMARY

Permit No: PA2022210

Lodgement Date: 17 October 2022

Planning Officer: Victoria Mack

Address of the land: 369 Myrniong-Korobeit Road, Korobeit
Crown Allotments 4 & 5, Section 6, Parish of Blackwood & Lot 1 on
Title Plan TP 945779U

Proposal: Four Lot Re-Subdivision

Lot size: 184ha

Why is a permit required? Clause 35.07 Farming Zone – Subdivide land; Clause 42.10 Environmental Significance Overlay Schedule 1 – Subdivide land; Clause 44.04-3 Land Subject to Inundation Overlay – Subdivide land; Clause 44.06-2 Bushfire Management Overlay – Subdivide land

RECOMMENDATION

That the Development Assessment Committee, having considered all matters as prescribed by the *Planning and Environment Act 1987*, issue a Refusal to grant Planning Permit PA2022210 for a Four Lot Re-subdivision at 369 Myrniong-Korobeit Road, Korobeit, otherwise known as Crown Allotments 4 and 5, Section 6, Parish of Blackwood and Lot 1 on Title Plan TP945779U on the following grounds:

1. The proposal is inconsistent with the purpose and decision guidelines of the Farming Zone.
2. The proposal does not comply with the Planning Policy Framework of the Moorabool Planning Scheme relevant to the subdivision of agricultural land.
3. The proposed subdivision does not maximise the agricultural potential of the land.
4. The proposed subdivision does not represent the orderly planning of the area.

PUBLIC CONSULTATION	
Was the application advertised?	Yes.
Notices on site:	Yes, two notices.
Notice in Moorabool Newspaper:	Not required.
Number of objections:	Nil.
Consultation meeting:	Not applicable.

POLICY IMPLICATIONS

The Council Plan 2021-2025 provides as follows:

Strategic Objective 2: Liveable and thriving environments

Priority 2.3: Enhance our natural environments

The proposal is not provided for in the Council Plan 2021-2025 and can be actioned by utilising existing resources.

VICTORIAN CHARTER OF HUMAN RIGHTS & RESPONSIBILITIES ACT 2006

In developing this report to Council, the officer considered whether the subject matter raised any human rights issues. In particular, whether the scope of any human right established by the Victorian Charter of Human Rights and Responsibilities is in any way limited, restricted or interfered with by the recommendations contained in the report. It is considered that the subject matter does not raise any human rights issues.

OFFICER'S DECLARATION OF CONFLICT OF INTERESTS

Under section 130 of the *Local Government Act 2020*, officers providing advice to Council must disclose any interests, including the type of interest.

Executive Manager – Henry Bezuidenhout

In providing this advice to Council as the Executive Manager, I have no interests to disclose in this report.

Author – Victoria Mack

In providing this advice to Council as the Author, I have no interests to disclose in this report.

EXECUTIVE SUMMARY

Application referred?	Yes, Greater Western Water, Southern Rural Water, Melbourne Water, Agriculture Victoria, and Council's Environmental Health, Development Infrastructure and Heritage Adviser.
Any issues raised in referral responses?	Agriculture Victoria raised concerns with the subdivision arrangement. Greater Western Water required an Environmental Land Management Plan (ELMP) to identify the environmental benefits of the subdivision.

Preliminary concerns?	The re-subdivision would result four lots, each just over 40ha. The re-subdivision application did not provide any agricultural justification for the realignment of boundaries but did provide a Land Capability Assessment to demonstrate an area for wastewater if a future dwelling is required for each lot.
Any discussions with applicant regarding concerns?	The applicant has been advised of concerns with the application.
Any changes made to the application since being lodged?	No.
Brief history.	Not applicable.
Previous applications for the site?	None.
General summary.	<p>The application to re-subdivide the land, creating four reconfigured lots each over 40ha in area.</p> <p>Two lots would have existing dwellings and two would be vacant lots.</p> <p>This application would result in a productive farm being broken up into similar sized lot not related to the existing agricultural use of land or future potential.</p> <p>An alternative re-subdivision into two lots with each containing a dwelling could be supported.</p> <p>The application does not accord with the Planning Policy Framework or Municipal Planning Strategy.</p> <p>The application is not supported by Agriculture Victoria.</p> <p>It is recommended that the application is refused.</p>
Summary of Officer's Recommendation	
That the Development Assessment Committee, having considered all matters as prescribed by the <i>Planning and Environment Act 1987</i> , issue a Refusal to grant Planning Permit PA2022210 for a Four Lot Re-subdivision at 369 Myrniong-Korobeit Road, Korobeit, otherwise known as Crown Allotments 4 and 5, Section 6, Parish of Blackwood and Lot 1 on Title Plan TP945779U on the grounds contained in this report.	

SITE DESCRIPTION

The subject land approximately 184ha (variable due to extensive creek frontage) and is located approximately 2.8kms south of the centre of the Greendale township, approximately 2.7kms north of the Western Freeway and approximately 4.6kms north northwest of the Myrniong township. There are 20 dwellings within a 2km radius of the subject site. Surrounding land appears to be used for broadacre farming and grazing.

Part of the south and the west boundary of the land is bordered by the Stoney Hut Creek or its tributaries. There is another waterway that dissects the property on the eastern side that also joins the Stoney Hut Creek to the south.

Our Lady of Help Catholic Church, with Heritage Overlay HO150, is in the south-west corner of the intersection of the Myrniiong-Korobeit Road and Morrisons Lane and abuts part of the subject site.

The proposed alignment of the Western Renewable Link is located 850-900m south of both dwellings on the site.

The subject land consists of four lots. There are two dwellings, sundry farm shedding and two dams on the site, as well as three additional dams on the east side waterway. The dwellings comprise of an older style weatherboard farmhouse, and are surrounded by the original farm shedding, and a second brick dwelling to the east on the same side of the Myrniiong-Korobeit Road.

The land has been in continuous ownership and used for agriculture, particularly cattle production and more recently cropping under a share farming agreement. The cropping has been undertaken with the objective to renovate the pastures following the cropping rotation. The pastures are generally of a high quality. The land is gently undulating with scattered native vegetation.



Figure 1: Aerial photo of the subject site showing the lot area of existing lots. The blue easement to the south of the site is the proposed major electricity easement.

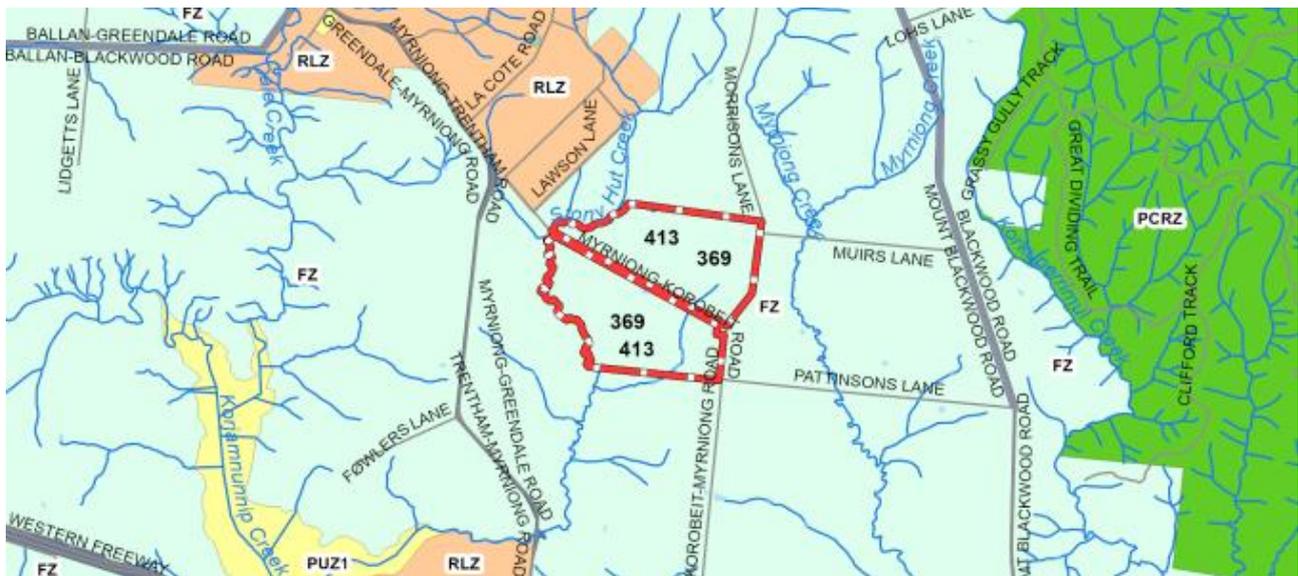


Figure 2: Zone map

PROPOSAL

It is proposed to re-subdivide the land into 4 new lots which would have the following details:

Lot 1 – 56.59ha in area and comprised split into two parts – 11.18ha and 45.41ha. The south side lot would contain the original farmhouse and original farm outbuildings with access from Korobeit Road. The north side would be vacant land.

Lot 2 – 40.01ha in area and used as pastured grazing land with no farm infrastructure.

Lot 3 - 40.41ha in area and used as pastured grazing land with no farm infrastructure.

Lot 4 - 44.74ha in area and would contain the existing dwelling with separate driveway. No farm infrastructure is located on this lot.

The Land Capability Assessment reports to demonstrate wastewater fields for future dwellings being provided with the application for vacant Lots 2 and 3.

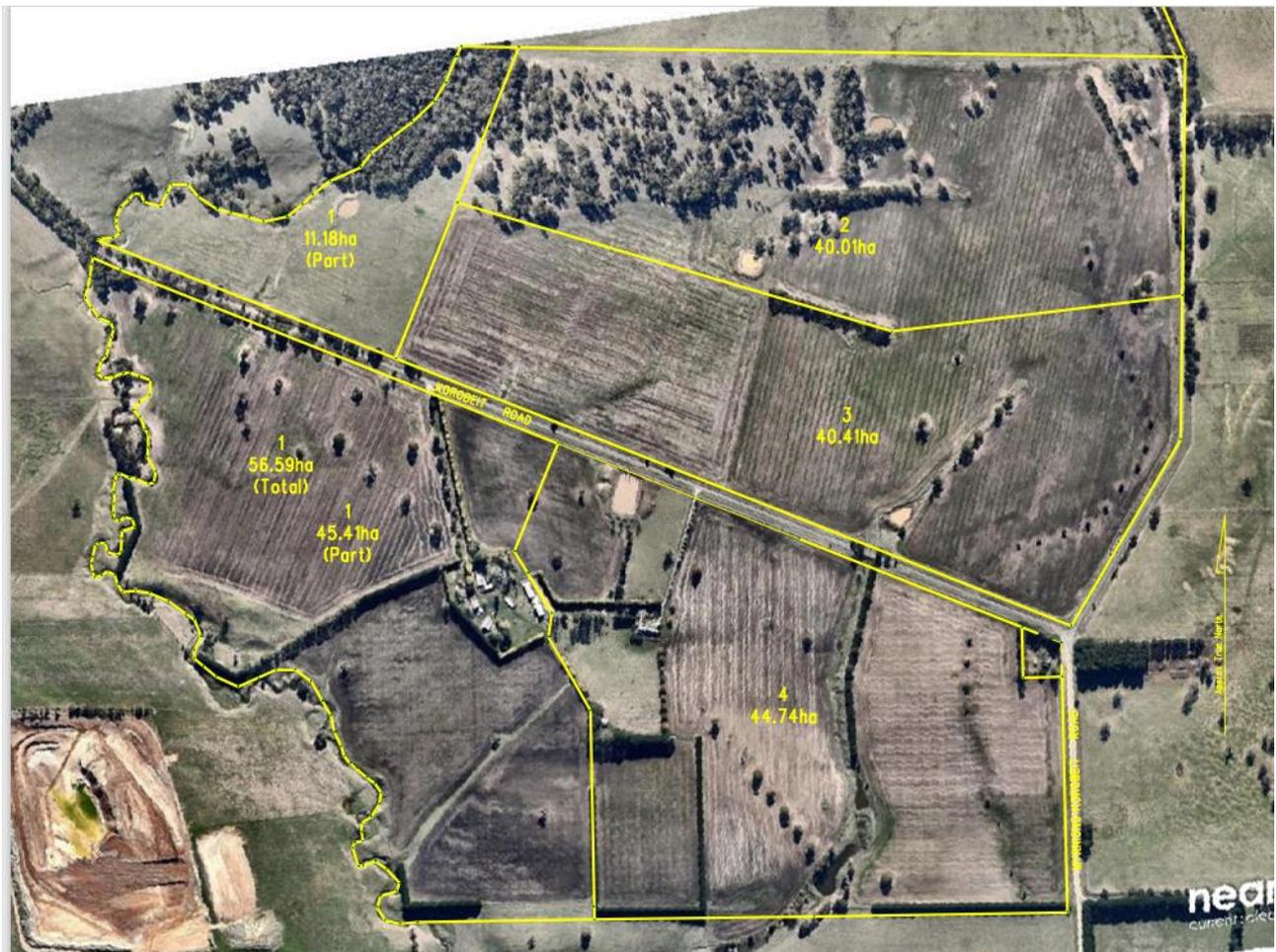


Figure 3: Proposed plan of re-subdivision.

HISTORY

There is no relevant planning history on the site.

PUBLIC NOTICE

The application was advertised to neighbouring landowners and occupiers and two signs were erected, one to face the Myrning-Korobeit Road near the dwelling entrance, and the other facing Morrisons Lane.

No objections were received.

PLANNING SCHEME PROVISIONS

Council is required to consider the Victoria Planning Provisions and give particular attention to the Planning Policy Framework (PPF), and the Municipal Planning Strategy (MPS).

The relevant clauses are:

- Clause 02.03-1 – Settlement
- Clause 02.03-4 – Natural resource management:
 - Agriculture
 - Declared Special Water Supply Catchments
- Clause 11.01-1S – Settlement
- Clause 11.01-1L-01 – Settlement in Moorabool

- Clause 14.01-1S – Protection of agricultural land
- Clause 14.01-1L – Agriculture, rural dwellings and subdivision
- Clause 14.02-1L – Declared special water supply catchments
- Clause 16.01-3S – Rural residential development
- Clause 16.01-3L-01 – Rural residential development in Moorabool

The proposal does not comply with the relevant section of the PPF and MPS as outlined in the table below:

MPS	Title	Response
Clause 02.03-4	<p>Natural resource management: Agriculture and Declared Special Water Supply Catchments.</p> <p>The policy seeks to:</p> <ul style="list-style-type: none"> • Protect good quality agricultural land and support the productivity and sustainability of existing and future agricultural and horticultural activities. <p>There is need to avoid fragmentation of land suitable for rural production by discouraging subdivision and houses that are unrelated to the rural use of the land.</p>	This application fragments agricultural land.
PPF	Title	Response
Clause 11.01-1L-01	<p>Settlement in Moorabool.</p> <p>Strategies include to:</p> <ul style="list-style-type: none"> • Limit urban development where it is likely to impact on highly productive agricultural land, environmental values and the long-term sustainability of natural resources. • Direct rural residential and rural living development to strategic growth areas where they will not impact on agricultural and horticultural production. 	The application will create two lots each greater than 40ha that designed to limit impact of productive agricultural land.
Clause 14.01-1S	<p>Protection of agricultural land.</p> <p>The policy seeks to:</p> <ul style="list-style-type: none"> • Protect the state’s agricultural base by preserving productive farmland. <p>Strategies include to:</p> <ul style="list-style-type: none"> • Protect productive agricultural land 	The proposal will reduce and diminish the long-term productive capacity and economies of scale afforded to larger land parcels.

	<p>from unplanned loss due to permanent changes in land use.</p> <ul style="list-style-type: none"> • Protect productive farmland that is of strategic significance in the local or regional context. • Avoid the subdivision of productive agricultural land from diminishing the long-term productive capacity of the land. 	
Clause 14.01-1L	<p>Agriculture, rural dwellings and subdivision.</p> <p>Relevant strategies include to:</p> <ul style="list-style-type: none"> • Discourage subdivision and dwellings unless they are directly related to the agricultural use of land. • Maintain productive farm sizes by discouraging fragmentation of land for non-rural use and development. 	<p>No justification for the subdivision has been provided with the application based on sustaining the agricultural productivity of the land.</p> <p>This application does not accord with this policy.</p>
Clause 16.01-3S	<p>Rural residential development</p> <p>The relevant strategy of this policy is to manage development in rural areas to protect agriculture and avoid inappropriate rural residential development.</p>	<p>This application does not accord with this policy. It would not protect agricultural land and could enable additional rural residential development with adequate wastewater areas demonstrated by the submitted land capability assessments.</p>
Clause 16.01-3L-01	<p>Rural residential development in Moorabool.</p> <p>The relevant strategies to this policy are to:</p> <ul style="list-style-type: none"> • Focus rural living development in areas close to urban centres with good access to services and facilities and where there is minimal impact on productive agriculture and horticulture or areas with environmental values. • Avoid rural lifestyle development in areas without reticulated services where the development would compromise water quality (particularly in Declared Special 	<p>The proposal does not seek to avoid future rural lifestyle development.</p>

	Water Supply Catchments), adversely affect agricultural production, or impact on native vegetation and habitat values.	
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ZONE

Farming Zone

In accordance with Clause 35.07-3 of the Moorabool Planning Scheme a permit is required to subdivide land.

The area specified in the schedule to the Farming Zone in the Moorabool Planning Scheme states that each lot must be at least 100ha. However, a permit may be granted to create smaller lots if the following applies:

The subdivision is the re-subdivision of existing lots and the number of lots is not increased.

OVERLAYS

Environmental Significance Overlay, Schedule 1

In accordance with Clause 42.01-2 of the Moorabool Planning Scheme a permit is required to subdivide land.

Land Subject to Inundation Overlay, Schedule 1 (part of the site)

In accordance with 44.04-3 of the Moorabool Planning Scheme a permit is required to subdivide land.

Design and Development Overlay, Schedule 2

Schedule 2 at Clause 3.0 of the Design and Development Overlay states a permit is not required to subdivide land.

Bushfire Management Overlay (part of the site)

In accordance with Clause 44.06-2 of the Moorabool Planning Scheme a permit is required to subdivide land.

Relevant Policies

Council's Rural Growth Policy

Council's Rural Growth Policy Statement was adopted by Council on 19 September 2012. The document applies to all land in Farming Zone. This Policy is not incorporated in the Moorabool Planning Scheme.

The policy states:

- Encourage dwellings in areas nominated in Map 1 of Council Rural Growth Policy Statement.
- Ensure the siting of any dwellings is designed to have a minimal impact on any existing or future agricultural activities on the site and on surrounding land.
- Ensure it is clear whether the dwelling is required for agricultural operation, use or to maintain rural communities.
- Ensure sufficient infrastructure is available or that alternative methods are available which do not require normal infrastructure.

- Encourage development of dwellings, to support communities, on land which is unlikely to support agricultural (use) while still considering any other overlays which may impact the land. This is land which is constrained for use as agriculture by other environmental factors such as vegetation, slope, soil quality, etc.

The land is suited to agricultural use but a re-subdivision does not seek to increase agricultural productivity.

Council's Rural Housing Policy

Council's Rural Housing Policy 2012 was adopted by Council on 19 September 2012 and has been developed to provide direction for how limited farming potential rural dwellings should be considered, and more broadly, rural settlement patterns. This Policy is not incorporated into the Moorabool Planning Scheme.

The principles of the policy relevant to this application include to:

- Support the agricultural sector so that it can be more productive, diverse, resilient, and adaptive to changing agricultural trends, including supporting agricultural activities that recognise Moorabool's advantageous proximity to market.
- Protect agricultural land use from loss and allow development that increases agricultural productivity.
- Focus growth opportunities in settlements along major transport corridors, in particular where there is physical and social infrastructure and services.
- Recognise that there are substantial existing lots under 40ha capable of supporting the viable operation of agricultural enterprises.
- Promote a rural housing market that meets the needs of the Shire's rural communities.
- Land parcels for the proposed on-farm living dwellings are to have a minimum lot size of 8ha as identified in Map 1.

The proposal does not increase agricultural production of the land.

DISCUSSION

Policy/Farming Zone

The application is for a re-subdivision of four lots to create four differently configured lots. While this is a permitted application, the intention of the re-subdivision in this the application are not clear.

The application did not provide any strategic justification for the re-subdivision based on the agricultural use of the land, but conversely provided Land Capability Assessments for wastewater treatment on each of the vacant lots which is only required for future dwellings and not to maintain the agricultural potential of the land. The Land Capability Assessor stated in writing a sustainable onsite wastewater management system can be built to meet the needs of a new residence on the vacant lots containing an existing dwelling.

Policies within the Planning Policy Framework and Municipal Planning Strategy do not support this application. The proposal would continue to fragment prime agricultural land and not seek to consolidate parcels to improve their agricultural potential.

Local policy at Clause 14.01-1L aims to discourage subdivision and dwellings unless they are directly related to the agricultural use of land; and maintain productive farm sizes by discouraging

fragmentation of land for non-rural use and development. The current 184ha is a productive farm. The proposal would break it up into 4 lots each with two lots containing dwelling and two vacant lots not arranged for agricultural potential of the land or consolidate land as part of a re-subdivision.

The application was referred to Agriculture Victoria, who raised concerns with the application and referred to a number of recent VCAT decisions that do not support fragmentation of productive land. These included the *Estate of JE Walker v Wangaratta RCC* [2021] and *Jackson v Hepburn SC* [2020]. Agriculture Victoria considers that the proposal's justification for a re-subdivision in the Farming Zone would appear contrary to the purpose of the Zone and the strategic objectives of the Moorabool Planning Scheme.

The proposal does not align with the purpose of the Farming Zone, as it is not considered essential or sufficiently beneficial to undertaking to improve agricultural production by adjusting boundaries between existing lots.

GENERAL PROVISIONS

Clause 65 - Decision Guidelines have been considered by officers in evaluating this application.

Clause 66 - Stipulates all the relevant referral authorities to which the application must be referred.

REFERRALS

Authority	Response
Greater Western Water	Consent with conditions.
Southern Rural Water	Consent with conditions.
Melbourne Water	Consent, no conditions.
Agriculture Victoria	Advice, application not supported.
Council's Development Infrastructure	Consent with conditions.
Environmental Health	Consent with conditions.
Heritage Planning	No objection.

FINANCIAL IMPLICATIONS

The recommendation of refusal of this application has no financial implications to Council.

RISK & OCCUPATIONAL HEALTH & SAFETY ISSUES

The recommendation of refusal of this application does not implicate any risk or OH&S issues to Council.

COMMUNICATIONS STRATEGY

Notice was undertaken for the application, in accordance with s.52 of the *Planning and Environment Act 1987*, no further correspondence is required as no objections were received. The applicant was invited to attend this meeting and invited to address the Development Assessment Committee.

OPTIONS

That the Development Assessment Committee could consider the following options:

- Issue a Refusal to Grant a Planning Permit in accordance with the grounds in the recommendation of this report; or
- should the Development Assessment Committee wish to support the application and issue a Planning Permit with conditions, the Committee will need to demonstrate how the proposal complies with the Moorabool Planning Scheme.

CONCLUSION

The proposal to re-subdivide to create four lots at over 40ha each does not satisfy the relevant provisions of the Moorabool Planning Scheme, in particular planning policy framework relating to subdivision in rural areas, and the Farming Zone provisions. The proposal does not represent the orderly planning of the area, but subdivision boundaries are not arranged to maximise agricultural potential or consolidate smaller sized lots. The proposed re-subdivision should not be supported.

7.2 PA2021001 - VARIATION OF RESTRICTIVE COVENANT AJ807260A AT 9 PELICAN POINT, HOPETOUN PARK**Author:** Mark Lovell, Coordinator Statutory Planning**Authoriser:** Henry Bezuidenhout, Executive Manager Community Planning & Development**Attachments:** Nil**APPLICATION SUMMARY****Permit No:** PA2021001**Lodgement Date:** 24 December 2020**Planning Officer:** Mark Lovell**Address of the land:** 9 Pelican Point, Hopetoun Park**Proposal:** Variation of Restrictive Covenant AJ807260A**Lot size:** 1.26ha**Why is a permit required?** Clause 52.02 – Variation of a restriction**RECOMMENDATION**

That the Development Assessment Committee, having considered all matters as prescribed by the *Planning and Environment Act 1987*, issue a Refusal to grant Planning Permit PA2021001 for a Variation of Restrictive Covenant AJ807260A Items (b) and (k) at Lot 105 on PS 619339J, known as 9 Pelican Point, Hopetoun Park, subject to the following conditions:

1. The proposed variation of covenant does not satisfy the tests in Section 60(2) of the *Planning and Environment Act 1987*.
 2. The proposed variation of covenant will likely cause owners benefitting from the restriction to suffer detriment.
-

PUBLIC CONSULTATION	
Was the application advertised?	Yes.
Notices on site:	Yes.
Notice in Moorabool Newspaper:	Yes.
Number of objections:	One.
Consultation meeting:	No. Officer did consult separately with the objector and applicant to attempt to resolve the concerns raised.

POLICY IMPLICATIONS

The Council Plan 2021-2025 provides as follows:

Strategic Objective 2: Liveable and thriving environments

Priority 2.1: Develop planning mechanisms to enhance liveability in the Shire

The proposal is consistent with the Council Plan 2021 – 2025.

VICTORIAN CHARTER OF HUMAN RIGHTS & RESPONSIBILITIES ACT 2006

In developing this report to Council, the officer considered whether the subject matter raised any human rights issues. In particular, whether the scope of any human right established by the Victorian Charter of Human Rights and Responsibilities is in any way limited, restricted or interfered with by the recommendations contained in the report. It is considered that the subject matter does not raise any human rights issues.

OFFICER'S DECLARATION OF CONFLICT OF INTERESTS

Under section 130 of the *Local Government Act 2020*, officers providing advice to Council must disclose any interests, including the type of interest.

Executive Manager – Henry Bezuidenhout

In providing this advice to Council as the Executive Manager, I have no interests to disclose in this report.

Author – Mark Lovell

In providing this advice to Council as the Author, I have no interests to disclose in this report.

EXECUTIVE SUMMARY

Application referred?	No.
Any issues raised in referral responses?	Not applicable.
Preliminary concerns?	None.
Any discussions with applicant regarding concerns?	Not applicable.
Any changes made to the application since being lodged?	Yes. The application was amended twice to reduce the number of variations to the restrictive covenant.

Brief history.	Since 2016 there have been issues with non-compliance with relevant building and planning requirements, including up to 18 shipping containers placed on the property for the storage of goods and materials. Submission of the current permit application in December 2020 was done in part to resolve identified enforcement issues.
Previous applications for the site?	None.
General summary.	<p>It is proposed to vary covenant AJ807260A items (b) and (k) to enable the construction of Colorbond fencing and outbuildings up to 25m long x 15m wide x 4.6m high to the eaves.</p> <p>One beneficiary objection was received raising concerns including detrimental impacts on amenity and neighbourhood character.</p> <p>With a beneficiary objection, the proposal is deemed to be inconsistent with the relevant provisions of the Moorabool Planning Scheme and thereby fails to meet the tests of Section 60(2) of <i>Planning and Environment Act 1987</i>.</p>
Summary of Officer's Recommendation	
That, having considered all relevant matters as required by the <i>Planning and Environment Act 1987</i> , the Development Assessment Committee issue a Refusal to grant Planning Permit PA2021001 for Variation of Restrictive Covenant AJ807260A items (b) and (k) at Lot 105 on PS 619339J, known as 9 Pelican Point, Hopetoun Park, on the grounds contained within this report.	

SITE DESCRIPTION

The subject site and surrounding land are in the Low Density Residential Zone and characterised by single dwelling development on lots of generally 5,500sqm-1.1ha in size. Ancillary outbuildings of varying sizes are commonplace. To the south of the site is an escarpment below which the Werribee River flows into Melton Reservoir to the southeast.

The subject site known as 9 Pelican Point, Hopetoun Park, is located on the south side of Pelican Point approximately 280m west of Thomas Drive. The site is irregularly shaped with an 84.27m wide frontage and developed with a single storey dwelling located close to the rear property boundary and several ancillary outbuildings including shipping containers spread across the site. Vehicle access is via two crossovers and a gravel internal driveway.



Figure 1: Aerial photograph highlighting subject site and objector’s property.

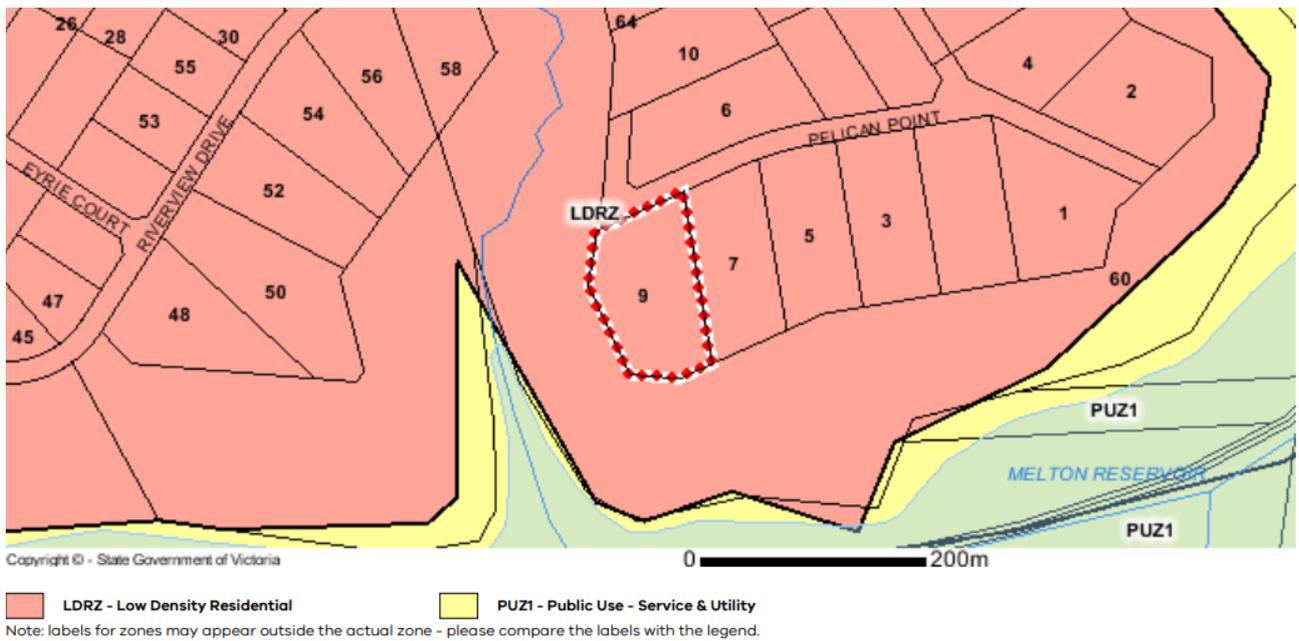


Figure 2: Zone map.

PROPOSAL

It is proposed to vary Covenant number AJ807260A, items (b) and (k).

Covenant AJ807260A states that *“the Transferee with the intent that the benefit of this covenant shall be attached to and run at law and in equity with every lot on Plan of Subdivision No. 619339J other than the Lot hereby transferred and that the burden of this covenant shall be annexed to and run at law and in equity with the said Lot hereby transferred does hereby covenant from himself/herself, their heirs, executors, administrators and transferee and the registered proprietor or proprietors for the time being of every lot described in the said Plan of Subdivision (other than the Lot hereby transferred) that the Transferee, his/her executors, administrators and transferees will not...**(b) erect or construct on the Lot hereby transferred any boundary or internal fence***

other than a standard post and wire type fence, excluding swimming pool fencing; (k) site any outbuildings on the Lot other than towards the rear of the Lot and behind any dwelling house and generally in such a manner as to minimise visual impact from the streetscape. No such outbuilding shall be of a size greater than 13 metres in length, 7 metres in width and 4 metres in height to the eaves nor shall they be constructed prior to the erection of a dwelling house on the Lot.”

The proposed variation of item (b) is to allow for the construction of Colorbond fencing on or around the perimeter of the property.

The proposed variation of item (k) is to allow construction of an outbuilding up to 25m long x 15m wide x 4.6m in height to the eaves anywhere on the property. This variation is proposed to facilitate the storage of various personal goods and materials. The shed will have an area of 375sqm.

BACKGROUND TO CURRENT PROPOSAL

Since 2016 there have been issues with non-compliance with relevant building and planning requirements, including up to 18 shipping containers placed on the property for the storage of goods and materials. Submission of the current permit application in December 2020 was a result of identified enforcement issues.

HISTORY

There is no relevant planning history on the site.

PUBLIC NOTICE

Notice of the application was given by post to all beneficiaries of the covenant which included adjoining and surrounding landowners and occupiers, a sign was erected on site for a minimum 14 days and a notice placed in the local newspaper.

One beneficiary objection was received.

SUMMARY OF OBJECTIONS

The objection received is detailed below with officer’s accompanying comments:

Objection	Any Relevant Requirement
Multiple outbuildings anywhere on the property up to 50m length significantly deviates from amenity and neighbourhood character.	Clause 52.02.
Officer’s Response:	
The beneficiary objector has expressed a neighbourhood character and amenity concern, demonstrating they are adversely affected by the variation of the covenant.	
Objection to three grazing animals in the area which present issues such as strong smells.	Clause 52.02.
Officer’s Response:	
The application was amended to remove this component of the application. The covenant already allows for keeping of one grazing animal.	

No issue with Colorbond fencing providing it is professionally installed and consistent in new materials and colour.	Clause 52.02.
<p>Officer's Response:</p> <p>The applicant agrees to this condition in any approval issued and the beneficiary objector is no longer concerned with this component of the application.</p>	

PLANNING SCHEME PROVISIONS

Council is required to consider the Victoria Planning Provisions and give particular attention to the Municipal Planning Strategy and Planning Policy Framework (PPF).

The relevant clauses are:

- Clause 02.03-5 – Built environment and heritage
- Clause 11.03-3S – Peri-urban areas
- Clause 15.01-5S – Neighbourhood character
- Clause 15.01-5L – Landscape and neighbourhood character

ZONE

Low Density Residential Zone

There is no permit requirement under the zone to vary a restrictive covenant.

OVERLAYS

Development Plan Overlay, Schedule 2

There is no permit requirement under the overlay provisions to vary a covenant.

RELEVANT POLICIES

There are no Council policies applicable to the assessment of this application.

PARTICULAR PROVISIONS

Clause 52.02 Easements, Restrictions and Reserves

A permit is required before a person proceeds under Section 23 of the *Subdivision Act 1988* to vary or remove a restriction.

The decision guidelines state before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider the interests of affected people.

DISCUSSION

The relevant consideration for assessment of this application are the provisions of Section 60(2) of the *Planning and Environment Act 1987*. Under Section 60(2) of that Act, the Responsible Authority must not grant a permit which allows the variation of a restriction (within the meaning of the *Subdivision Act 1988*) unless it is satisfied that the owner of any land benefited by the restriction will be unlikely to suffer as a consequence of the variation of the restriction.

Two of the tests under Section 60(2) *Planning and Environment Act 1987* are b) and c), which are:

- b) loss of amenity; and

c) loss arising from change to the character of the neighbourhood.

The character of the neighbourhood is defined by single dwellings on large residential allotments with ancillary outbuildings of varying dimensions. The scale and form of development combine with mostly low scale garden plantings of ground covers, shrubs and small trees and the relatively flat or gently sloping topography above an escarpment to the east, west and south, create a spacious character setting. There are some examples of prominent detached outbuildings due to their size, height and lack of visual screening in contrast with the prevailing neighbourhood character of the area.

The development of an outbuilding 25m long x 15m wide x 4.6m high exceeding the covenant requirement of 13m in length, 7m in width and 4m in height to the eaves would result in a longer, wider and higher outbuilding that is not in keeping with the existing or preferred neighbourhood character of the area. The objector benefitting from the covenant has expressed concerns that the variation of item (k) of the restrictive covenant would facilitate development that deviates with the streetscape character, which is a key element when assessing neighbourhood character. The beneficiary objector also stated that this will adversely affect their amenity due to size and scale of the outbuilding, which is visible from their property, as the immediate adjacent property to the east. It is deemed that the character of the area would change because of the proposed variation of the covenant and a beneficiary of the covenant would likely suffer detriment as a result of a change to the prevailing neighbourhood character.

There is a recent VCAT decision that looked at larger sheds in Hopetoun Park and variation of covenants under Section 60(2) of the *Planning and Environment Act 1987*. *Quigley vs Moorabool SC (2023)* affirmed a refusal to grant a permit to variation of covenant at 25 View Gully Road Hopetoun Park and stated that all four tests set out at sub-paragraphs (a) to (d) must be met to satisfy the overall ‘...unlikely to suffer...’ test set out in Section 60(2), in relation to any relevant beneficiary of the covenant. In conclusion, the tribunal found that the applicant had failed to show that the beneficiary objector is unlikely to suffer a loss arising from a change to the character of the neighbourhood as the written objection made it clear the beneficiary does not want to live in a neighbourhood which includes a very large shed.

With the beneficiary objector making an objection on neighbourhood character grounds and they are therefore likely to suffer a loss from a change to the neighbourhood character and a loss of amenity. The application should not be supported.

GENERAL PROVISIONS

Clause 65 Decision Guidelines have been considered by officers in evaluating this application.

Pursuant to Clause 65 of the Moorabool Planning Scheme, the Responsible Authority must consider, among other things, the matters set out in Section 60 of the *Planning and Environment Act 1987*.

Clause 66 stipulates all the relevant referral authorities to which the application must be referred.

REFERRALS

The application was not required to be referred.

FINANCIAL IMPLICATIONS

There are no financial implications for Council in refusing this application.

RISK & OCCUPATIONAL HEALTH & SAFETY ISSUES

The recommendation to refuse this application does not have any risk or OH&S implications for Council.

COMMUNICATIONS STRATEGY

Notice was undertaken for the application, in accordance with s.52 of the *Planning and Environment Act 1987*, and further correspondence is required to all interested parties to the application because of a decision on this matter. The applicant and objector were invited to attend this meeting and address Council.

OPTIONS

- Issue a Refusal to Grant a Permit on the grounds listed in the recommendation of this report; or
- issue a Notice of Decision to Grant a Permit with conditions. The Development Assessment Committee would need to satisfy itself that the covenant beneficiaries would be unlikely to suffer detriment consistent with the provisions of Section 60(2) of the *Planning and Environment Act 1987*. This option may result in the objectors appealing the Committee's decision to VCAT.

CONCLUSION

The application was advertised, and one beneficiary objection was received, which raised amenity and neighbourhood character concerns. Based on the objection received from a beneficiary of the covenant, the proposal is deemed to be inconsistent with tests of Section 60(2) of the *Planning and Environment Act 1987* for the protection of residential amenity and neighbourhood character. The application is recommended for refusal.

8 UPDATE ON TRENDS, ISSUES AND OTHER MATTERS

9 UPDATE ON VCAT DECISIONS

10 OTHER BUSINESS

11 DATE OF NEXT MEETING

Wednesday 18 October 2023

12 MEETING CLOSE