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# Victorian Civil and Administrative Tribunal

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## Myers v South Gippsland SC (No 2) (includes Summary) (Red Dot) [2009] VCAT 2414 (19 November 2009)

Last Updated: 23 November 2009

### RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows.

This Red Dot Summary does not form part of the decision or reasons for decision.

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

#### ADMINISTRATIVE DIVISION

PLANNING AND  
ENVIRONMENT LIST

VCAT REFERENCE NO. P3503/2009  
PERMIT APPLICATION NO. 2008/190

IN THE MATTER OF

Deborah Myers v South Gippsland Shire  
Council

BEFORE

Tracey Bilston-McGillen, Presiding  
Member  
Ian Potts, Member

<b>NATURE OF CASE</b>	Consideration of a coastal hazard vulnerability assessment for a two lot subdivision application.
<b>REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE</b>	
<b>APPLICATION – significant, interesting or unusual use or development; application of policy, provision or principle; or circumstances</b>	Consideration of a coastal hazard vulnerability assessment for a two lot subdivision application. Application of <i>Managing Coastal Hazards and the Coastal Impacts of Climate Change</i> General Practice Note December 2008.

## SUMMARY

This case involved an application to subdivide an existing lot into two lots. The Tribunal issued an interim decision requiring that a coastal hazard vulnerability assessment be undertaken prior to a decision being made. This decision follows from the submission of that assessment. It is of particular interest as it deals with balancing the vulnerability of the land to sea level rise with expectations about an individual development that would otherwise be consistent with the applicable zoning and other planning controls.

The current policy platform requires a precautionary approach when considering the impact of climate change. We have had regard to expert evidence which indicates that by 2100 without mitigation measures, there will be no dune, no foreshore access, no road and the subject site will be inundated by sea water and otherwise lost to use for the purpose of a residential lot.

In the absence of any strategy or work being undertaken in the Waratah Bay area on how the issue of climate change, rising sea level and increase in storm surges is to be addressed, including what mitigation works may be necessary and undertaken, we adopt the precautionary approach of the General Practice Note (December 2008). We cannot support a subdivision in the knowledge that without mitigation works, there will be no dune, no

road, no access to the site and the site is likely to be inundated with sea water. To grant a permit in such circumstances would result in a poor planning outcome that will unnecessarily burden future generations.

## **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

### **ADMINISTRATIVE DIVISION**

#### **PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P3503/2008  
PERMIT APPLICATION NO. 2008/190

#### **CATCHWORDS**

Section 82 of the *Planning and Environment Act 1987*. South Gippsland Planning Scheme, Clause 15.08, Township Zone, Environmental Significant Overlay Schedule 3, Coastal hazard vulnerability assessment, *Victorian Coastal Strategy 2008*, Ministerial Direction No 13 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* General Practice Note December 2008.

#### **APPLICANT**

Deborah Myers

#### **RESPONSIBLE AUTHORITY**

South Gippsland Shire Council

#### **RESPONDENT**

Telfano Holdings Pty Ltd

#### **SUBJECT LAND**

2 Brown Street, Waratah Bay

#### **WHERE HELD**

Melbourne

#### **BEFORE**

Tracey Bilston-McGillen, Presiding  
Member

Ian Potts, Member

#### **HEARING TYPE**

Hearing

#### **DATE OF HEARING**

26 October 2009

#### **DATE OF ORDER**

19 November 2009

#### **CITATION**

Myers v South Gippsland SC (No 2)  
(includes Summary) (Red Dot) [\[2009\]](#)  
[VCAT 2414](#)

#### **ORDER**

1. The decision of the Responsible Authority is set aside. In permit application 2008/190 no permit is granted.

Tracey Bilston-McGillen  
**Presiding Member**

Ian Potts  
**Member**

## APPEARANCES

For Applicant	Mr John Glossop, town planning consultant, Glossop town planning.
For Responsible Authority	Mr Roger Simpson, Town planner.
For Respondent	Mr Paul Chiappi, Barrister. He called the following witnesses: <ul style="list-style-type: none"><li>• Dr Peter Reidel, Coastal Engineer</li></ul>

## INFORMATION

Description of Proposal	Subdivision of the land into two lots: Lot 1 – 537 square metres. Lot 2 – 1067 square metres.
Nature of Application Zone and Overlays	Section 82 <a href="#">Planning and Environment Act 1987</a> . Township 1 Zone. Environmental Significance Overlay Schedule 3.
Permit triggers	cl 32.05-4 A permit is required to subdivide land. cl 42.01-2 A permit is required to construct or carry out works.
Planning policy	State Planning Policy Framework clauses: 15.08- 1 Coastal Areas, 15.08-2, 16 Housing, 19.01 Subdivision. Local Planning Policy Framework clauses: 21.04- 3, 21.04-10 Settlement.
Other documents	<i>Victorian Coastal Strategy 2008</i> . <i>Ministerial Direction no.13 Managing Coastal Hazards and the Coastal Impacts of Climate Change</i> . General Practice Note December 2008.
Land description	The site is located on the south-east corner of the intersection of Brown and Gale Streets in Waratah Bay. The site is generally rectangular in shape with the exception of a splay at the intersection of Brown and Gale Streets. The site has a depth of 50.92 metres, a maximum width of 36 metres and a total area of 1624 square metres.

The site currently accommodates a two storey dwelling.

Cases referred to

*Gippsland Coastal Board v South Gippsland SC & Ors (No2)* (includes Summary) (Red Dot) [\[2008\] VCAT 1545](#).

*Myers v South Gippsland SC* (includes Summary) (Red Dot) [\[2009\] VCAT 1022](#) (22 June 2009).

## REASONS

### Introduction

1. These reasons and the decision of the Tribunal follow on from an interim decision of the Tribunal to grant leave for the permit applicant to prepare a coastal hazard vulnerability assessment for the subject site. The need for such an assessment was addressed in the earlier reasons of the Tribunal when constituted by Member Bilston-McGillen.[\[1\]](#)
2. On behalf of the permit applicant Telfano Holdings Pty Ltd, coastal engineer Dr Peter Reidel has prepared a coastal hazard vulnerability assessment that has considered factors including sea level rise, storm tide and surge, coastal processes, and local topography and geology. Dr Reidel is a qualified coastal engineer with demonstrated experience in the assessment of coastal hazards, coastal engineering and assessment of sea level rise impacts.
3. In addition to the written assessment and statement of evidence prepared by Dr Reidel, he was called as an expert witness to present his evidence and address other matters through evidence in chief and under cross examination.
4. Leave was also given to the Council and Mr Glossop to respond to the additional evidence of Dr Reidel. The Council declined to do so, while Mr Glossop made a short submission in relation to the additional material and evidence.
5. These reasons address only this outstanding issue of the coastal hazard vulnerability assessment. The Tribunal has previously drawn conclusions on the matters of neighbourhood character and the impact on the amenity of adjoining dwellings. In short, the Tribunal found that the grounds for neighbourhood character and amenity impacts were not reasons to set aside the Responsible Authority's

decision to grant a permit. We see no need to discuss these matters any further, as the Tribunal's reasons for these findings are to be found in the interim decision.

6. The determinative issue as to the appropriateness of the subdivision for a second lot (and it follows a second dwelling) is the balancing of the findings of the coastal vulnerability assessment and policy framework with the expectation for development in this Township Zone.
7. Our finding is that given the location of the site, the evidence of Dr Reidel and the policy framework, the subdivision of the site cannot be supported due to the high level of vulnerability to future sea level rise and associated risks to any future development at this location.

#### Policy framework and the response to coastal vulnerability

1. Since the interim decision of June 2009, the policy framework has not changed. The precautionary approach of the policy documents *Victorian Coastal Strategy 2008*, Ministerial Direction no.13 *Managing Coastal Hazards and the Coastal Impacts of Climate Change* and the General Practice Note December 2008 remain. There has been however two further documents released addressing the issue of climate change:
  - *Managing our coastal zone in a changing climate, The time to act is now*, House of Representatives, Standing Committee on Climate Change, Water, Environment and the Arts October 2009; and
  - The Borough of Queenscliffe Council announced its 'Interim Local Floodplain Development Plan' [\[2\]](#).
2. Combined, the breadth of documents addressing climate change that are now available as background information or policies, identify that one thing is for certain, the issue of climate change and the impact on coastal communities is an issue that can no longer be ignored. As decision makers we can no longer leave the issue for the next generation to sort out. We concur with the view expressed by Member Martin in *Seifert v Colac-Otway SC*:[\[3\]](#)

[49] Common sense tells us that, following this approach, the Tribunal should not approve coastal developments that are likely to be unduly threatened by future flooding and/or coastal inundation, creating a mess to be dealt with by future generations.

1. While we recognise the policy drivers are for action now rather than later, we also recognise, as was stated in the interim reasons, that to address the issue of coastal vulnerability on a lot by lot or development by development basis is a heavy burden for applicants to bear. From the nature of the issues raised in Dr Reidel's assessment and the forms of action that might be undertaken to address coastal hazards, at the very minimum a regional, if not State wide approach is to be preferred. Such an approach should assess issues and potential remedial actions, be they engineering or planning based, and seek to produce a coordinated response. We see value in such an approach providing more certainty to all sectors of the community, be they responsible authorities and other decision makers, referral agencies, developers, land owners or other affected members of the community.
2. We also recognise that such an approach will not be without its difficulties and undoubtedly take time to prepare. It is apparent to us however, that while there is an increasing awareness of the broader issue of coastal vulnerability in the community, there appears within some sectors to be an inertia against addressing some of these harder issues.
3. In light of the matters we have been called to decide upon and the evidence from Dr Reidel, it is our view that now is the time for those responsible for the planning of land use along the coast to take the next step and not leave it to others in some nebulous future time.
4. Nevertheless, having identified the benefits of a coordinated approach addressing the issue of coastal hazards on communities, we cannot delay a decision until such planning is undertaken. The Tribunal is called upon to make a decision on the present matter based on the evidence before it.

#### The coastal hazard vulnerability assessment

1. Mr Glossop criticised the evidence of Dr Reidel<sup>[4]</sup> and submitted that it did not satisfy the requirement specified in the Tribunal's Direction dated 22 June 2009<sup>[5]</sup>. We agree with Mr Glossop that the evidence report largely concentrated on the general observations of the impact of sea level rise and storm surges and did not specifically address the impact on 2 Brown Street, Waratah Bay. However, during his evidence and cross examination Dr Reidel orally referred

to the specific impact on the site. We are therefore satisfied that the direction of the Tribunal has been met.

2. What then did the coastal hazard vulnerability assessment find?
3. The assessment addressed the issues of sea level rise: storm tide and surge; coastal processes including topography and geology; shoreline stability; waves and beach response; a review of the historical shoreline location through photographs and images; present day vulnerability; vulnerability over planning period to 2070; vulnerability for coastal strategy 0.8m sea level rise and mitigation options.
4. In summary, the findings of Dr Reidel included:
  - At present day sea levels, the beach has been stable since at least the 1940's.
  - For 2070 it is assumed that a sea level rise of 0.49 metres will have occurred[\[6\]](#). With this sea level rise, there will be a landward migration of the beach. Dr Reidel adopts two methods for calculating the extent of this migration, which results in estimates of a 24.5 or 26 metre recession. He suggests that the resulting differences between the two methods are inconsequential when considering the ultimate hazards to Waratah Bay and the subject site.
  - With the recession of the beach, the present day width of the dune, approximately 40 metres, will be reduced to approximately 15 metres. In proximity to the subject site, a lower area of beach which forms an access pathway, the dune would be eroded back to the edge of Gale Street.
  - Shoreline recession due to the predicted sea level rise of 0.8 metres[\[7\]](#) is estimated to be approximately 40 metres. Dr Reidel's assessment is that with such a recession the dune system would, in response, migrate further landward and cover the present road. If the dune was to be cleared to maintain access along Gale Street he concludes that there would be no dune left along the foreshore and the road would then be vulnerable to storm surge damage. His evidence is that the combined impacts of sea level rise and storm surge under a 2100 scenario is that Gale Street would be lost and that the subject site would be inundated by seawater. Dr Reidel notes that even if the road was built up and a seawall constructed to

protect it from storm surge, some overtopping could still occur and the site would remain vulnerable to seawater inundation.

- Mitigation options available to address the hazards of sea level rise and storm surge are:
    - Raising the level of the road along its existing alignment and armouring the seaward side of the road with rock to prevent erosion and damage to the road during storms. The road would need to be raised by 2 metres.
    - Relocating the road onto the reserve between the existing road and the private properties and allow a new dune to form over the existing road. The new dune would form naturally to a certain extent, but may need to be augmented to withstand the 100 year return period storm.
    - Re-establishment of the dune, on the sea side of the road. This would require sand from an alternate source.
  - If nothing is done to the dune by 2100, Gale Street will be washed out by salt water and the subject site will lose the protection of any dune system and be exposed to storm surge inundation.
5. In light of his findings, Dr Reidel suggests that we should consider that the economic life of any house built on the proposed lot would be around 50 years. He suggests that this is the same time scale that rising sea levels would begin to present difficulties. In light of such timeframes, he suggests that one practical response is for the property to be ‘sacrificed’ as it would be at the end of its economic life.
  6. His evidence also draws us to the conclusion that if there is no road as a consequence of the shoreline recession, then there is no access to the subject site and the land would effectively be lost in any case.

#### The Tribunal’s Response to the evidence

1. The evidence of Dr Reidel is clear. By 2100 without mitigation measures, there will be no dune, no road and the subject site will be inundated by sea water and otherwise lost to its purpose of a residential lot.
2. We accept the technical expert evidence of Dr Reidel as to the vulnerability of the site and the broader vulnerability of Gale Street. The issue now is what implications these findings have for the question of whether a permit for subdivision should be granted.

3. We dismiss the suggested ‘sacrifice of the property’ approach put by Dr Reidel as an appropriate response. It is a simplistic approach that takes no account of ongoing expectations of those who may be future owners of the property.
4. We accept that there may be options available to mitigate the future recession of the shoreline and the vulnerability of the property to inundation. However, we are conscious of the fact that there is no certainty as to what option, if any, may be adopted. There has been no submission from the Council as to what mitigation measures may be undertaken and who may pay. In fact the Tribunal is acutely aware of the fact that the Council failed to make any submission at all in response to Dr Reidel’s evidence or in response to leave given by the Tribunal to address these coastal hazard issues.
5. Further we were advised that the Council does not have any local or Council policy in place to address the nature or type of issues raised in Dr Reidel’s assessment at a more regional level.
6. In some respects, we are not surprised by such a position from the Council. It is apparent that developing a response is likely to be beyond the resources of some local councils. To a large extent it appears that the Council is reliant on the findings of other assessments. However we find this an extremely disappointing approach given that within this municipality there are many coastal locations that will be affected. The Council’s absence of any response provides no assistance to us and, more broadly, will not assist them in deciding on future applications of the type before us.
7. Ultimately, what the permit applicant is asking us to do is to approve a subdivision to allow a second dwelling in the knowledge that by 2070 (not even 2100 as specified by the *Victorian Coastal Strategy* 2008), the subject site is likely to have no access, as the beach would have receded to the existing road and could be flooded by repeat storm surges. We are also asked to do this within the policy platform of a precautionary approach [General Practice Note December 2008].
8. The permit applicant notes that this application raises the issues of hazards and risks resulting from climate change that not only relate to this site, but the whole of Waratah Bay. It was further submitted by the permit applicant that the proposed subdivision sits within an existing established community and it is reasonable to conclude that measures will be taken to protect them. Those measures will likewise

protect the subject land.

9. In effect, what has been put to us is that this proposal will make little if any difference to the intergenerational burden when the whole of the town of Waratah Bay will be affected and a broader, coordinated response is required in any case.
10. The objector submits that a balance needs to be struck between the reasonable rights of a private landowner to develop their land and the foreseeable risks associated with climate change and rising sea levels. It was further submitted that we should not become alarmist and rush to the conclusion that there is to be no further development possible in Waratah Bay. The objector further highlighted that the subject lot is the lowest lying residential lot and there must be recognition of the risks from a rising sea level.
11. We agree that we should not become alarmist and we certainly do not see our role to be making broad findings for the whole of the Waratah Bay township. However, State policy requires that we consider climate change impacts and we have evidence before us stating that without any mitigation works, it is quite foreseeable that there will be no dune, no road and therefore no access to the site and the site will be inundated by storm surges. Policy directs us to consider the need for long term planning for the future consequences of climate change, rising sea levels and storm surges. We accept that a problem already exists for the community of Waratah Bay that depends on the access road. However as it was stated in the earlier Tribunal decision, at some point a line in the sand needs to be drawn as there is a cumulative effect of single subdivisions (or development proposals) on our environment.
12. We find that in the absence of specific local policy or planning scheme responses to such issues, it falls on us to consider whether to grant a permit for this subdivision in the light of Dr Reidel's evidence. It follows from all that we have set out here that to grant a permit in these circumstances would consent to a poor planning outcome that would unnecessarily burden future generations.

## Conclusion

1. The current policy platform requires a precautionary approach when considering the impact of climate change. We accept the evidence and approach of Mr Reidel that as climate change is a gradual

process, you cannot go and build a new road tomorrow at a higher level or new dune now as it simply wouldn't work. In the absence of any strategy or work being undertaken in the Waratah Bay area on how the issue of climate change, rising sea level and increase in storm surges is to be addressed including what mitigation works may be necessary and undertaken, we adopt the precautionary approach of the General Practice Note (December 2008).

2. On this basis, we cannot support a subdivision in the knowledge that without mitigation works, there will be no dune, no road, no access to the site and the site is likely to be inundated with sea water.
3. Having regard to the above, we will order that no permit issue.

Tracey Bilston-McGillen  
**Member**

Ian Potts  
**Member**

[1] *Myers v South Gippsland SC* (includes Summary) (Red Dot) [2009] VCAT 1022 (22 June 2009). [2] Media Briefing Note Impact of Climate Change and Seal Level Rise in the Borough of Queenscliffe, 23 October 2009. [3] [2009] VCAT 1453 [4] *Coastal Engineering Solutions 2 Brown Street Waratah Bay Coastal Hazard Vulnerability Report* August 2009 [5] *Myers v South Gippsland SC* (includes Summary) (Red Dot) [2009] VCAT 1022 (22 June 2009). [6] Gippsland Coastal Board, 2009. [7] As adopted in the *Victorian Coastal Strategy*, 2008.

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