

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P11352/2021
PERMIT APPLICATION NO. PA1841550

CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Hobsons Bay Planning Scheme; Special Use Zone Schedule 4; Native Vegetation Removal; Stormwater Works; Site Remediation; Subdivision; State significant industrial land; Very High and High Biodiversity site; Impact of sea level rise not established; Net community benefit.

APPLICANT Axxcel Management Services Pty Ltd

RESPONSIBLE AUTHORITY Hobsons Bay City Council

REFERRAL AUTHORITIES Department of Environment, Land, Water and Planning

Melbourne Water

Greater Western Water

Head, Transport for Victoria

Powercor

Downer Utilities Australia Pty Ltd

RESPONDENTS Andrew Booth and others

Viva Energy Pty Ltd

AFFECTED PERSON Dominic Ellawala

SUBJECT LAND 37-45 Ajax Road, ALTONA VIC 3018

WHERE HELD Melbourne

HEARING TYPE Hearing

DATE OF HEARING 29, 30, 31 March and 1 April 2022

DATE OF ORDER 3 June 2022

CITATION Axxcel Management Services Pty Ltd v
Hobsons Bay CC [2022] VCAT 528

ORDER

No permit granted

- 1 In application P11352/2021 the decision of the responsible authority is affirmed.



2 In planning permit application PA1841550 no permit is granted.

Joel Templar
Presiding Member

Nick Wimbush
Member



APPEARANCES¹

For Axxcel Management Services Pty Ltd

Mr Chris Canavan QC and Mr Andrew Walker both of counsel, instructed by Goldhirsch and Shnider lawyers.

Evidence was called from the following witnesses:

- Mr Stephen Mueck, ecologist of Biosis.
- Mr Simon Gilbertson, town planner of Contour Consultants.

For Hobsons Bay City Council

Ms Louise Lunn, town planner of Louise Lunn Planning.

Evidence was called from the following witness:

- Mr Lincoln Kern, ecologist of Practical Ecology.

For referral authorities

No appearance.

For Andrew Booth and others

Mr Adrian Marshall, assisted by Mr Andrew Booth and Ms Bonnie Gelman in person, as well as Mr Daniel Epstein of counsel on days 1, 3 and 4.

Evidence was called from the following witness:

- Associate Professor John Morgan, ecologist.

For Viva Energy Pty Ltd

No appearance.

A submission was received from Mr Dominic Ellawala and he made oral submissions on day 1 of the hearing. Mr Ellawala is not a party to the proceeding but was given the opportunity to make a submission in accordance with the order of the Tribunal dated 25 March 2022

¹ All appearances were via an online platform.



INFORMATION

Description of proposal	Subdivision of land (two lot subdivision), the construction or carrying out of works (site remediation & stormwater management works) and removal of native vegetation.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Hobsons Bay Planning Scheme
Zone and overlays	Special Use Zone Schedule 4 Urban Floodway Zone Land Subject to Inundation Overlay
Permit requirements	Clauses 37.01-3, 37.03-3 and 44.04-3 – to subdivide land. Clauses 37.01-4 and 44.04-2 – to construct a building or construct or carry out works. Clause 52.17-1 – to remove, destroy or lop native vegetation.
Land description	The review site is known as Lot H on PS506774U, or 37-45 Ajax Road, Altona. It is an irregularly shaped parcel of land and has frontage to Ajax Road, Slough Road, Chester Road, Aberdeen Road and Galvin Street all to the east. The land has an overall area of 78.6 hectares and is bisected by the Altona railway line, running between Newport and Laverton, with the Werribee railway line abutting the review site to the north.
Tribunal inspection	An accompanied inspection was undertaken on 4 April 2022.



REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 This proceeding is an application for review of Hobsons Bay City Council's (**council**) decision to refuse an application for a two-lot subdivision, building and works associated with stormwater management and site remediation and the removal of native vegetation from the land at 37-45 Ajax Road in Altona (the Land).
- 2 When notice was given, council received 100 objections to the granting of a permit. Objectors Mr Andrew Booth and Ms Bonnie Gelman are parties to this proceeding. By consent, objector Mr Dominic Ellawala is not joined as a party but was given leave to make submissions under the Tribunal order dated 25 March 2022.
- 3 Viva Energy Australia Pty Ltd (**Viva**) was joined as party at a compulsory conference on 9 November 2021. Viva is concerned about potential risk to hydrocarbon pipelines it operates along the boundary of the Land. On 25 March 2022 Viva and Axxcel Management Services Pty Ltd (**applicant**) signed an agreement that subject to whether the Tribunal required their presence, Viva would not attend or participate in the Hearing provided an agreed set of planning permit conditions be applied to any permit issued. Viva remains a party to this proceeding, however.
- 4 Although there are various components to this permit application, the proposed subdivision and works (stormwater and site remediation) were not in dispute by the parties. The key issue in dispute was the proposed native vegetation removal and this is the focus of our decision but we have also made findings on the undisputed matters notwithstanding.
- 5 In this case, based on the submission, material and evidence of the parties, we have found that the proposal is unacceptable. Our reasons are set out below.

THE PROPOSAL

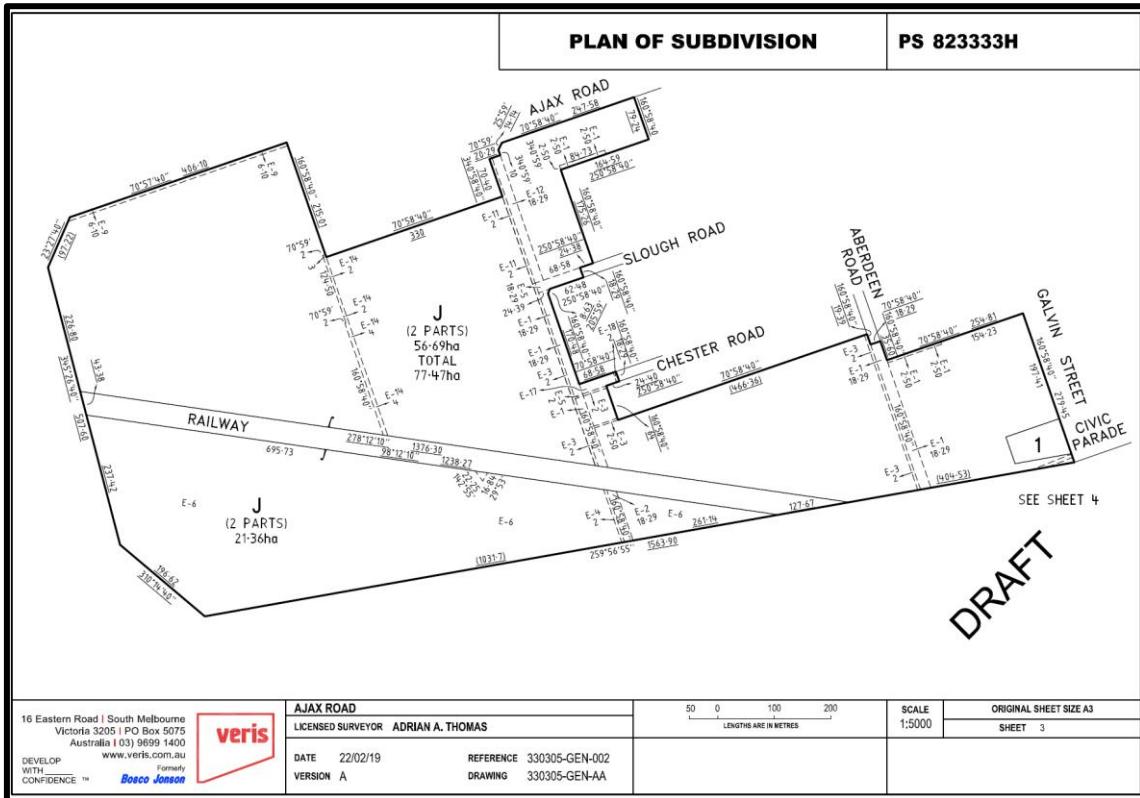
- 6 The application seeks to subdivide the Land into two lots, a 56.69 hectare super-lot (part of Lot H and proposed lot J) and a 5,789 square metre lot (part of Lot H and proposed Lot 1) on the south east corner of the Land on Galvin Street to accommodate the already, and recently, constructed Altona Police Station. The purpose of the subdivision is to allow the police station to be contained on its own lot and leave the remainder of the site vacant. The proposed larger lot would be split into two separate parts by the Altona railway line that currently dissects the land generally in an east-west

² The submissions and any 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.



alignment.³ Each of these portions would be 35.33 hectares and 21.36 hectares, being the northern and southern parts respectively.

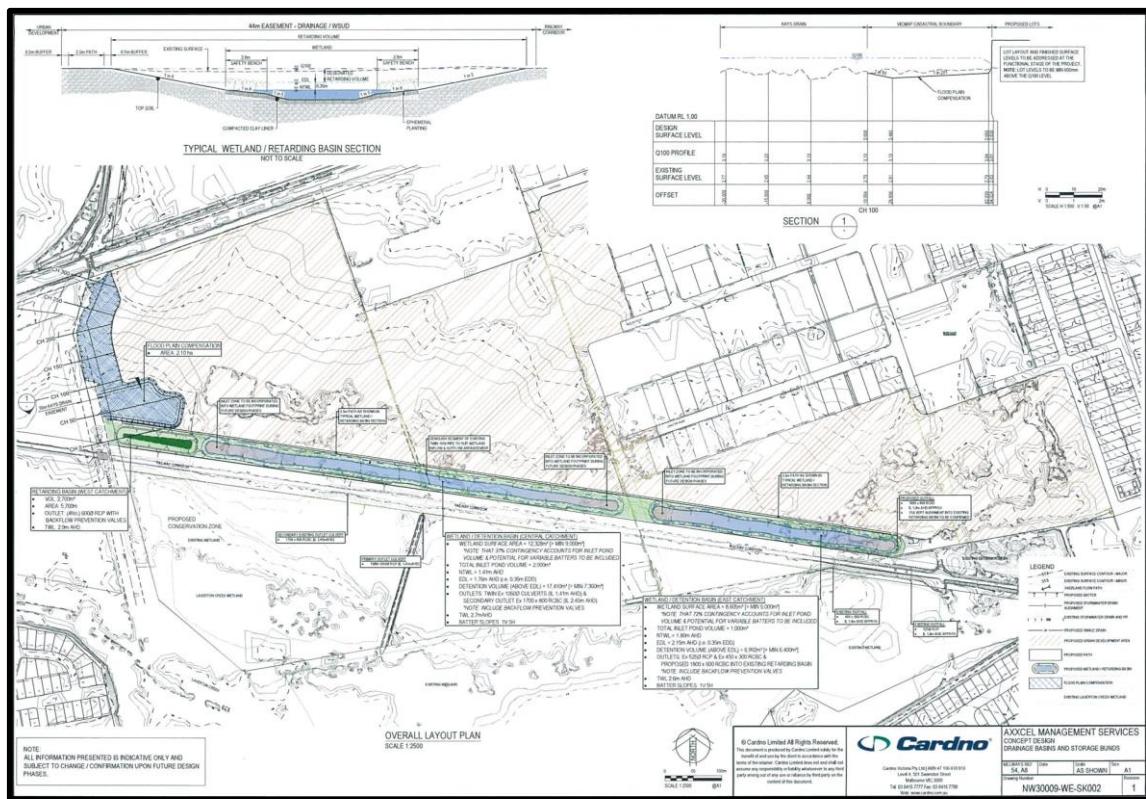
- 7 The southern part is proposed to host part of the native vegetation offsets for the proposed vegetation removal that forms part of this proposal but will remain part of Lot J. As part of the offset arrangement, this land will be required to be managed for at least 10 years, in order to meet the offset obligations.



Proposed plan of subdivision

- 8 The application also seeks approval for works to construct a stormwater management system north of the Altona rail line to prepare for future industrial development. The stormwater management system will include a series of retarding basins, treatment wetlands as well as floodplain compensation works on the western part of the site. The retarding basins and treatment wetlands will be located along the northern side of the railway line. Floodplain compensation works are proposed in the western part of the site, north of the Altona railway line.

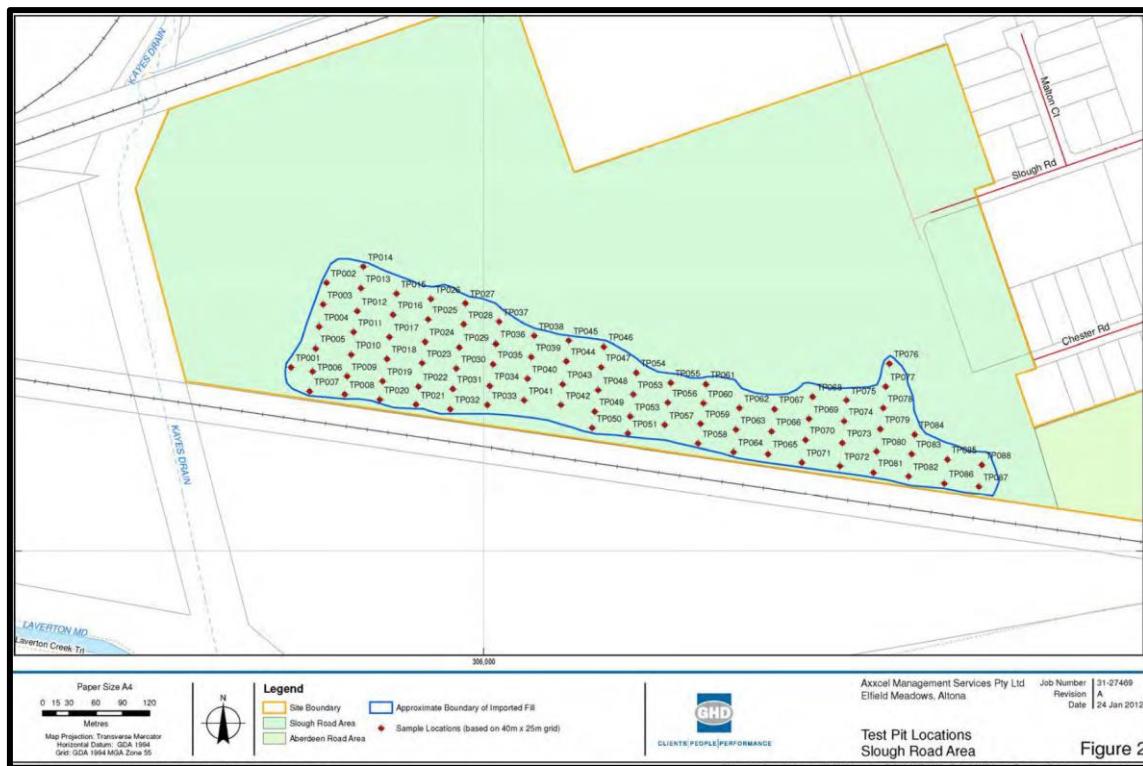
³ The existing lot already contains part of the site on the south side of the railway line and the application before us does not propose to change anything in this regard.



Proposed stormwater management and treatment system.⁴

- 9 During construction of Crown Casino on Southbank in the 1990s, acid sulfate soils were excavated from the casino site and were relocated to the Land. The application includes works to remediate these portions of the site to prepare for future industrial development. These remediation works are proposed to be undertaken in situ, rather than a second exercise of excavation and relocation. The location of the soil to be remediated is shown in the bore logs in the images extracted below.

⁴ Source: Appendix A, Ajax Road, Altona – Stormwater Management Report, Cardno, 25 May 2020.



Area of spoil locations in the Slough Road location⁵



Area of spoil locations in the Aberdeen Road location⁶

⁵ Source: Figure 2, Axxcel Management Services Pty Ltd, *Elfield Meadows Estate Acid Sulfate Soil Management Plan*, GHD, October 2016.

⁶ Source: Figure 3, Axxcel Management Services Pty Ltd, *Elfield Meadows Estate Acid Sulfate Soil Management Plan*, GHD, October 2016.

- 10 The removal of native vegetation to facilitate the works in the application is also sought. The site contains 34.89 hectares of native vegetation, of which 15.82 hectares is proposed to be removed. The 21.36 hectare part of the site south of the Altona rail line contains 19.077 hectares of native vegetation which will form the on-site offset required for the vegetation proposed to be removed; additional offsets required will be sort through the offset trading scheme or another mechanism approved by the Department of Environment, Land, Water and Planning (DELWP). The vegetation on the southern part of the site has been actively managed by the land owner for approximately 3 years, whereas no active management has occurred north of the railway line.
- 11 No industrial use or development⁷ is sought as part of the application.

THE PHYSICAL CONTEXT

- 12 The Land is located approximately 13 kilometres south-west of the Melbourne CBD on the southern edge of the Altona Special Industrial Area.
- 13 It is in two distinct areas north and south of the Altona rail line. South of the rail line is bounded by the line itself, Kayes Drain to the west and the Laverton Creek and Truganina Swamp open space to the south, which is owned and managed by Melbourne Water. Residential development exists to the south-east and south-west of the southern portion of the site but does not abut it.
- 14 North of the Altona rail line the Land is bounded by Kayes Drain to the west, the Altona rail line to the south, the Werribee rail line and existing industrial development along Ajax, Slough and Chester Roads to the north and north-east. The existing Altona Police Station has recently been constructed on the west side of Galvin Street in the south-east corner of the Land. The Land is opposite existing residential development on the east side of Galvin Street and for a small area north of Park Parade.
- 15 The Land is flat with occasional remnant small rocky basalt outcrops. The Altona rail line is elevated on an embankment through the site with a number of culverts for drainage. South of the Altona rail line the land falls gently towards the Laverton Creek. Port Phillip Bay is approximately 1.5 kilometres to the south-east.

⁷ Other than the stormwater, flood compensation and site remediation.





Aerial image of the Land.⁸

- 16 The Land north of the Altona rail line is proximate to an extensive area of significant industrial development and has good access to the arterial road and freeway network.
- 17 The portion of the Land south of the Altona rail line has no legal road access but management vehicle access is obtained over other land which is accessed from Bell Avenue further to the south.

NATIVE VEGETATION REMOVAL

- 18 It was common ground in the Hearing that the proposed removal of native vegetation is the most significant issue associated with the application.

The native vegetation planning controls

- 19 The permit trigger for native vegetation removal in this case is clause 52.17. The purpose of clause 52.17 is:

To ensure that there is no net loss to biodiversity as a result of the removal, destruction or lopping of native vegetation. This is achieved by applying the following three step approach in accordance with the *Guidelines for the removal, destruction or lopping of native vegetation* (Department of Environment, Land, Water and Planning, 2017) (the *Guidelines*):

1. Avoid the removal, destruction or lopping of native vegetation.
2. Minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided.
3. Provide an offset to compensate for the biodiversity impact if a permit is granted to remove, destroy or lop native vegetation.

⁸ Source: Mr Gilbertson's written evidence statement, page 5. Land is bounded by blue lines.

To manage the removal, destruction or lopping of native vegetation to minimise land and water degradation.

20 The decision guidelines at clause 52.17-4 are:

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider the decision guidelines specified in the Guidelines as appropriate.

21 The Guidelines, at paragraph 2.3.3, state the following native vegetation specific decision guidelines at clause 65.01 of the planning scheme are relevant:

- The extent and character of native vegetation and the likelihood of its destruction; and
- Whether native vegetation is to be or can be protected, planted or allowed to regenerate.

22 The decision guidelines in the Guidelines at section 7 include:

Efforts to avoid the removal of, and minimise the impacts on, native vegetation should be commensurate with the biodiversity and other values of the native vegetation, and should focus on areas of native vegetation that have the most value. Taking this into account consider whether:

- the proposed use or development has been appropriately sited or designed to avoid and minimise impacts on native vegetation
- feasible opportunities exist to further avoid and minimise impacts on native vegetation without undermining the key objectives of the proposal

Whether an offset that meets the offset requirements for the native vegetation to be removed has been identified and can be secured in accordance with the Guidelines.

For applications in the Detailed Assessment Pathway only – consider the impacts on habitat for rare or threatened species. Where native vegetation to be removed is habitat for rare or threatened species according to the Habitat importance maps, consider the following:

- The total number of species' habitats.
- The species habitat(s) that require a species offset(s).
- The proportional impact of the native vegetation removal on the total habitat for each species, as calculated in section 5.3.1.
- The conservation status of the species (per the Advisory Lists maintained by DELWP).
- Whether the habitats are highly localised habitats, dispersed habitats, or important areas of habitat within a dispersed species habitat.

23 Clause 65.01 also includes that consideration of the following, as appropriate, must be considered:



- The Municipal Planning Strategy and the Planning Policy Framework.
- 24 Clause 12.01-1S, Protection of biodiversity, has the following Objective and strategies relevant to this proposal:
- Objective
- To assist the protection and conservation of Victoria's biodiversity.
- Strategies
- ...
- Ensure that decision making takes into account the impacts of land use and development on Victoria's biodiversity, including consideration of:
- Cumulative impacts.
 - Fragmentation of habitat.
 - The spread of pest plants, animals and pathogens into natural ecosystems.
- Avoid impacts of land use and development on important areas of biodiversity.
- ...
- 25 Clause 12.01-2S sets out the 'three-step approach' from the Guidelines to decision making for native vegetation removal:
- Avoid the removal, destruction or lopping of native vegetation.
 - Minimise impacts from the removal, destruction or lopping of native vegetation that cannot be avoided.
 - Provide an offset to compensate for the biodiversity impact from the removal, destruction or lopping of native vegetation.
- 26 Clause 71.02-3 includes the following:

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.

The native vegetation on site

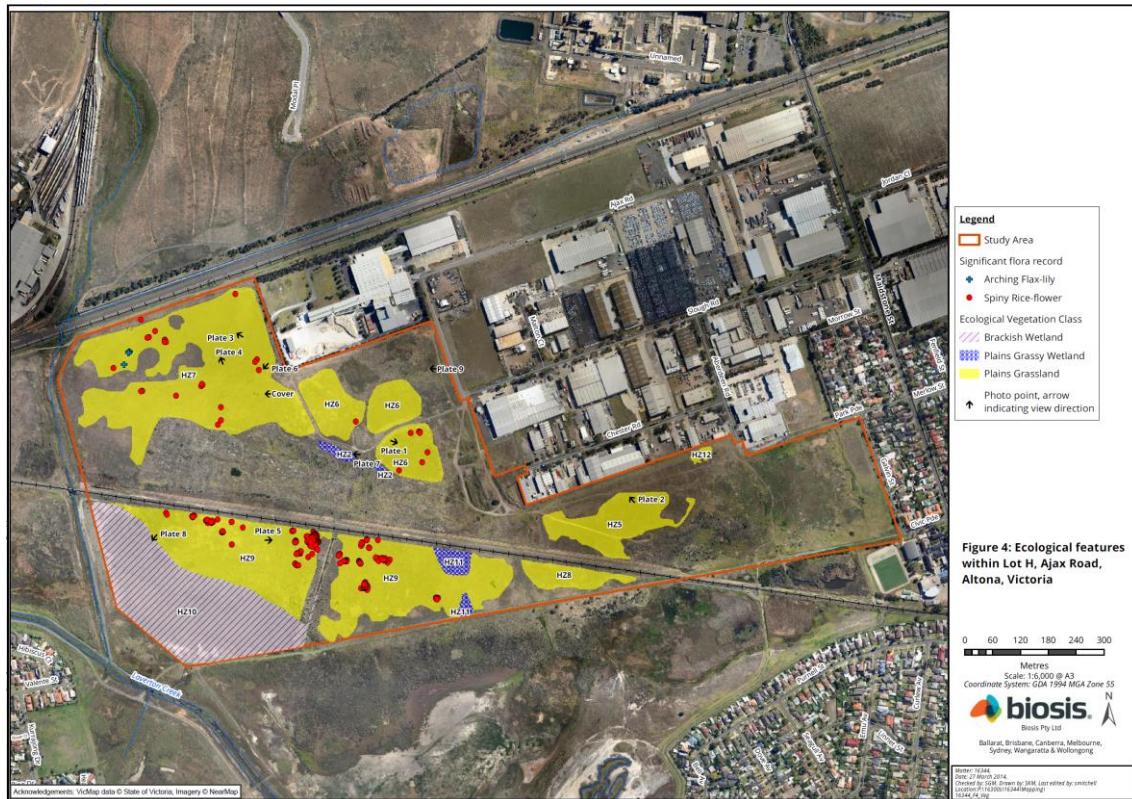
- 27 The vegetation on the site was assessed by Biosis in 2020.⁹ The assessment found 34.897 hectares of native vegetation including Plains Grassland (Ecological Vegetation Class (EVC) 132), Plains Grassy Wetland (EVC 125) and Brackish Wetland (EVC 656); all EVCs being endangered.
- 28 A population of 489 Spiny Rice-flower was recorded, mainly south of the Altona rail line with some also found on the northern part of the Land.

⁹ *Ajax Road, Altona, Flora and Fauna Assessment Final Report 1 July 2020.*



Other state significant species were recorded on the Land including Tussock Skink, Arching Flax-lily and Pale Spike-sedge.

- 29 Twelve different habitat zones were identified across the Land as shown in the figure below.



Habitat zones identified in the 2020 Bosis report.¹⁰

- 30 The application proposes the removal of 15.82 hectares of native vegetation, all north of the Altona rail line, being all the vegetation in Habitat Zones 2, 5, 6, 7 and 12.
- 31 The applicant proposes to retain 19.077 hectares of native vegetation south of the Altona rail line for conservation. The Bosis assessment stated this area includes 456 individual Spiny Rice-flowers, all of EVC656, over two thirds of EVC 125 and about 35% of EVC 132. This area would be set aside in perpetuity for conservation and managed for its environmental values at the applicant's cost for ten years.
- 32 After the provision of the area south of the Altona rail line, offsets for the balance of clearing include 13.541 species units of habitat for Small Golden Moths, 13.541 species units of habitat for Heath Spear-grass and 12.282 species units of habitat for Sunshine Diuris. These offsets were to be sought from external offset providers.¹¹

¹⁰ Ibid.

¹¹ There are also offsets required under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. While these may in some cases be 'shared' with state offsets they are not related or relevant to those required through the application before us.

- 33 North of the railway line, a lesser number of Spiny Rice-flower were found to exist, but where they do exist, they are only present in HZ6 and HZ7.

Expert evidence

- 34 Expert evidence was called on native vegetation by the applicant (Mr Stephen Mueck), council (Mr Lincoln Kern) and the respondents (Dr John Morgan).
- 35 Neither Mr Kern nor Mr Morgan had inspected the review site by accessing it directly but had viewed it from the perimeter. They accepted the assessment of the condition of the vegetation on the site as set out in the Biosis 2020 report.
- 36 There was some disagreement between the three experts about vegetation condition and the potential for restoration, however there was no disagreement about the critically endangered status of the native grasslands of the Victorian Volcanic Plains EVCs.¹²
- 37 Mr Mueck led the development of the 2020 Biosis assessment and has been undertaking ecological surveys on the Land since 2010 but had not visited the site between March 2020, and 22 March 2022 when he inspected the site again. He was also present at the accompanied inspection of the land which was undertaken as part of the hearing for this proceeding. Mr Mueck essentially adopted the 2020 Biosis assessment as his evidence.
- 38 Mr Mueck's opinion was that since the 2020 report surveys were completed (in February 2019) there has been ongoing spread of high threat grassy weeds (Chilean Needle-grass, Paspalum and Canary-grass) in the vegetation north of the rail line. His evidence was that this has not occurred south of the rail line that divides the site due to active management for biodiversity in that area.
- 39 This ongoing spread has, in his view had a significant negative impact on the extent and conditions of the native grassland within the study area north of the rail line, as has La Nina weather conditions which have prevailed over the past two summers, giving better conditions for weed growth. This was confirmed by his site inspection in March 2022.
- 40 Mr Mueck also advised that since the Biosis 2020 report was completed, DELWP had advised there were no species specific offsets on the register for the Sunshine Diuris. DELWP has instead sought a monetary contribution for research into suitable offset locations and propagation and this has been accepted by the applicant.
- 41 Both Mr Kern and Dr Morgan's evidence was that on the northern part of the site, habitat zones HZ6 and HZ7 were, taking a practical approach, the most suitable habitat zones for retention as they contain similar grassland vegetation and landscape values as the area south of the rail line. This part of the Land currently supports Spiny Rice-flowers, although in lesser

¹² Dr Morgan's evidence was that probably less than 1% of the ecosystem survives.



numbers than the southern part of the site. These zones are also on the west of the site with some consequential ability to allow development to occur.

- 42 Mr Morgan also said that the size of grasslands is not as important as for other vegetation types, as the organisms they support tend to be smaller and have smaller ranges. He said that grassland sites of as low as 1 hectare can support high quality biodiversity outcomes for those reasons. This supported his position that HZ6 and HZ7 could and should be retained. He also said that if development on the Land significantly enveloped any retained vegetation, that retained area may become difficult to manage from a practical perspective.
- 43 Mr Kern and Dr Morgan's evidence was that avoidance of native vegetation removal north of the rail line under the native vegetation provisions has not been adequately demonstrated. Mr Kern said this was difficult given the nature of the application:¹³

The structure of the application is also problematic because there is not an opportunity to properly consider the Net Community Benefit of the proposal as the Hobsons Bay Planning Scheme requires. The proposal simply tries to create a clean site for industrial development with no development proposal included so it is impossible to consider the positive benefits of development against the loss of highly significant ecological assets.
- 44 Mr Mueck's judgement about whether the three-step process had been undertaken satisfactorily was also based on the avoidance of any development on the southern part of the site which is proposed to be wholly retained as an offset site as part of this proposal.
- 45 Mr Kern and Dr Morgan agreed that the southern part of the site south of the rail line has higher quality vegetation but this is largely due to the greater absence of weeds given that area has been actively managed, whereas the land to the north of the railway line has not. Their view was that with suitable active management the ecological values north of the rail line could be retained and improved.
- 46 Mr Kern's evidence was that there are very few, if any, known sites that are suitable habitat for the Sunshine Diuris but that HZ6 on the north-western part of the subject site is modelled habitat.
- 47 As a result, the respondents said that the proposed vegetation removal on the northern part of the site would destroy one of the few known sites that contain suitable habitat for the Sunshine Diuris.
- 48 Mr Morgan's evidence was also that the Land is suitable habitat for Sunshine Diuris and it has been found on land nearby and that detectability could be improved on the review site if weed management had been undertaken.

¹³ Expert witness statement paragraph 5.7.



- 49 This was not disputed by Mr Mueck but he did say that the prospect of this species being on the site was limited, although he accepted it was suitable habitat. He also agreed that the importance of this site is somewhat elevated given it has largely not been impacted by development unlike other sites.
- 50 Mr Kern's evidence was that the area south of the railway line will be impacted by sea level rise which may affect its ability to successfully be an offset site in the medium to long term. His view was that the area in future is likely to be brackish wetland rather than grassland based on probable sea level rise.
- 51 Mr Kern said that section 9.1.1 of the Guidelines¹⁴ says that consideration of the future state of an offset site should be considered as to whether it is an appropriate site for offsets. This section of the Guidelines states:
- All offset sites must meet the following eligibility requirements:
- the landowner or manager can control significant threats to the condition of the native vegetation.
- 52 Mr Kern acknowledged he had not undertaken an analysis of whether the minimum 0.8 metre sea level rise predicted by 2100 at clause 13.01-1S would have any impact on this part of the site.
- 53 It was Mr Kern's evidence and the respondents' submission that the applicant has no way of being able to control sea level rise and the threat to the proposed offset site.
- 54 In response, the applicant submitted that sea level rise could be managed, if and when necessary, by the implementation of engineering solutions to stop such a threat.
- 55 There was also agreement from all three biodiversity witnesses that there would be great benefit from a biomass burn-off (ecological burn). An ecological burn of grasslands removes weeds and native grass biomass and allows the germination of native species from the seedbank in the soil.
- 56 Mr Mueck's view was that an ecological burn is critical for the management of the area to be protected south of the rail line while Mr Kern and Dr Morgan also saw great potential for an ecological burn north of the rail line to help identify species and protect the grassland values in this area.
- 57 Mr Mueck agreed that undertaking an ecological burn would improve the ability to detect species on the northern part of the site but that he did not advise the applicant to do so, as it is rarely done for surveying purposes. He did concede, however, that biomass burning has occurred on another site in Deer Park for survey purposes.
- 58 Mr Kern and Dr Morgan also said that detectability of native species would be impacted by the lack of weed management on the northern part of the Land. Mr Mueck did not disagree, and all agreed that ecological burning

¹⁴ *Guidelines for the removal, destruction or lopping of native vegetation* (Department of Environment, Land, Water and Planning, 2017)



would assist with detecting and identifying more accurately the species still on site.

Referral authority response

- 59 DELWP is a recommending referral authority pursuant to clause 66.02-2 of the planning scheme and provided its consent to the permit application, including the offset area in the southern area, subject to conditions. The applicant has also commenced payments to DELWP in advance of any permit being granted, for offsets for the Sunshine Diuris.
- 60 The response from DELWP dated 14 December 2020 provides the following commentary:

The application proposes to remove native vegetation to facilitate a three lot subdivision and subsequent industrial development. DELWP has assessed this application in accordance with the detailed assessment pathway.

The total area of native vegetation proposed to be removed totals 15.820 hectares within location category 3. This is comprised of:

- 8 patches of native vegetation with a total area of 15.820 hectares containing 0 large trees.

This application has now satisfied the information requirements of Clause 52.17 of the Hobsons Bay planning scheme following receipt of a reply to a DELWP further information request (6 May 2019). DELWP has assessed this application using the detailed assessment pathway process.

DELWP is satisfied that the applicant has taken adequate steps to avoid and minimise the proposed native vegetation removal and that the required offsets can be secured. The Native Vegetation Report (Biosis, 1 July 2020) supplied with the application adequately describes the native vegetation to be removed and the offset requirements, should clearing be approved.

DELWP notes and supports the proposal to establish an on-site offset (Conservation Reserve with management transferred to Hobsons Bay City Council with Trust For Nature covenant) in addition to the proponent sourcing remaining third-party native vegetation offsets (evidence supplied of availability).

DELWP notes the intention of the proponent to implement an alternative arrangement for the provision of offsets for Sunshine Diuris Diuris fragrantissima, as per DELWP Secretary approval SBR010805 dated 26 February 2020. Evidence of implementation of this arrangement will form part of the evidence required to meet DELWP condition 4 (above).

DELWP notes that an approval under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* applies to this proposal (EPBC 2014/7208).

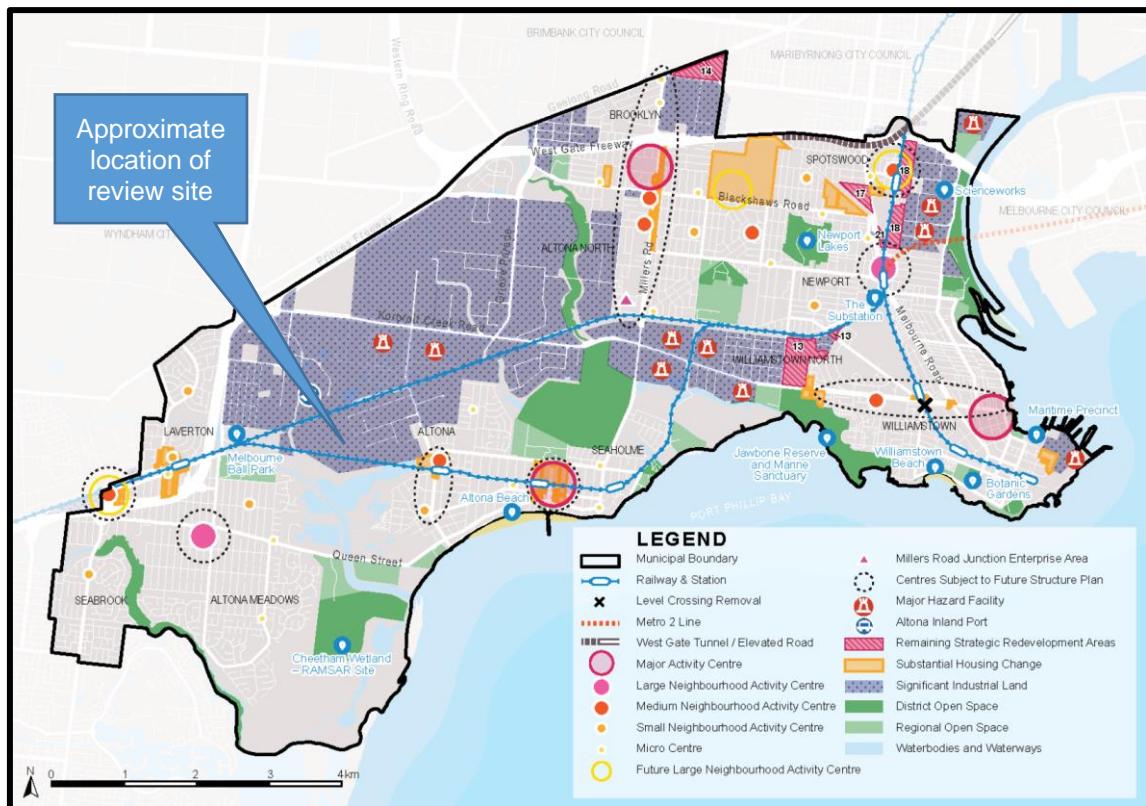


Industrial land use planning

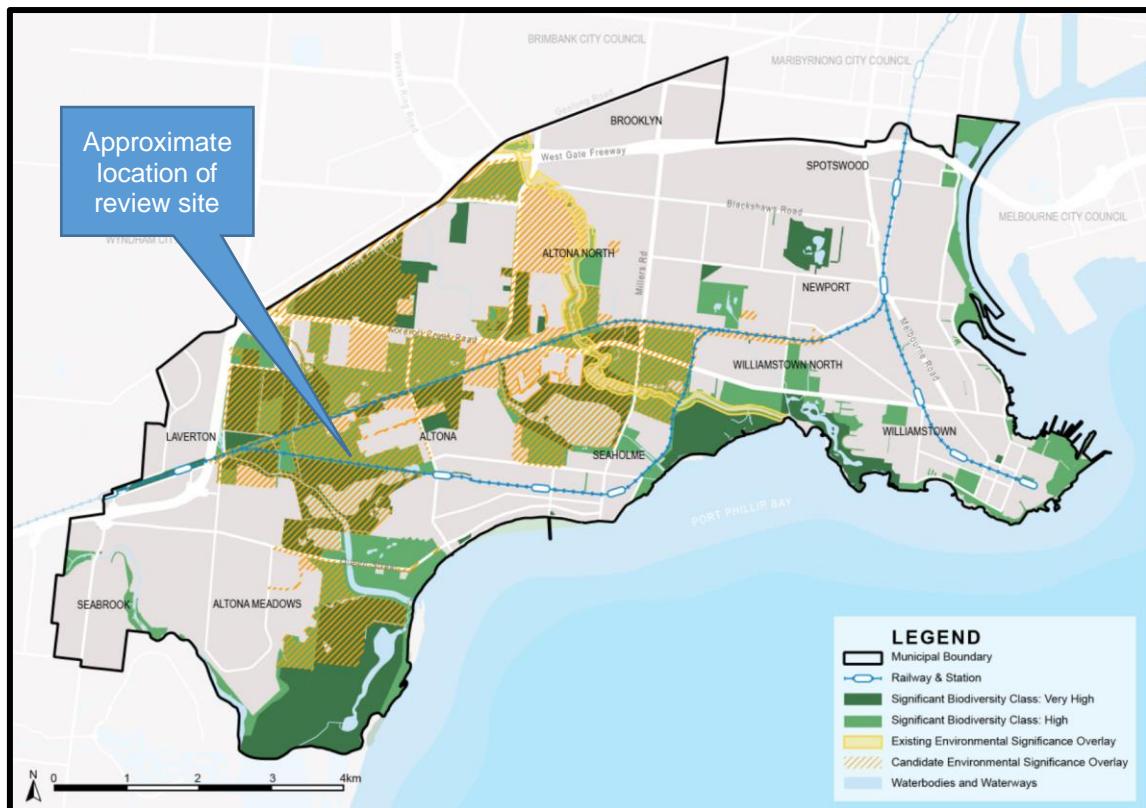
- 61 At clause 02.04 of the planning scheme, the site is identified in an area of high significant biodiversity, as well as being located within an area of Significant Industrial Land.
- 62 The site is also identified in an area of State Significant Industrial Land in the *Melbourne Industrial and Commercial Land Use Plan 2020*.
- 63 The SUZ4 is a zone which includes density limits on employees and has a preferred maximum site coverage for new buildings. This is in support of the nearby petrochemical industries and to ensure the ongoing viability of those industries, without being impacted by other uses in areas such as the Land which may compromise this ongoing and important industry. This is also supported in clause 17.03-3S which seeks to ensure heavy industrial uses are protected from other incompatible uses.
- 64 The first purpose of the SUZ4 is:

To provide for a range of industrial uses and services that do not prejudice the operation and expansion of the petrochemical industry.
- 65 Read holistically, the combination of zoning and policy means that the review site has some limitations in respect of meeting the industrial and economic development policies in the scheme, although there are obvious conflicts between industrial/economic development and biodiversity outcomes sought by the planning scheme. The mapping of the site within areas of both state significance for industry, as well as high biodiversity are illustrations of this.





Strategic Framework Map extracted from clause 02.04 of the planning scheme.



Significant Biodiversity Plan extracted from clause 02.04 of the planning scheme.

Discussion on native vegetation removal

- 66 At a high level, there is tension between relevant policy for industrial land supply as part of economic development, and for the protection of native vegetation.
- 67 We accept that the ecological condition of the land to the south of the railway line is better than that to the north. The ecologists agree that this is partly due to the active management that has occurred on this part of the site and that if similar management had occurred on the remainder of the site, similar outcomes might have been expected.
- 68 However, the evidence of the ecologists is that significant remnant conservation values remain north of the rail line, noting that there is a difference between Mr Kern and Dr Morgan on the one hand and Mr Mueck on the other as to the difficulty involved in restoration.
- 69 These values include critically endangered grassland habitat with its component rare and threatened species, as well as being identified as one of very few areas with modelled habitat for the Sunshine Diuris.
- 70 We also accept, however, that in the absence of active management the habitat values of the area north of the rail line are in decline, and the proliferation of weeds will over time likely result in the loss of these values.
- 71 The Guidelines require a decision-maker to consider the avoidance and minimisation of native vegetation in a manner commensurate with the value of the vegetation to be removed.
- 72 DELWP is the authority responsible for assessing native vegetation removal and conditionally supported the vegetation removal. We note that its assessment appears to be based on the future industrial development of the land.
- 73 From the commentary in DELWP's referral response from 14 December 2020, it is not clear what DELWP understood the 'subsequent industrial development' to be, and as they were not present at the hearing, we were unable to explore this.
- 74 We note the applicant's submission that their view is that there has been significant 'avoidance' of native vegetation removal given the land south of the railway line is to be provided as actively managed offset and will not be developed.
- 75 However, the respondents submitted that this has only been avoided as it has no legal road access and thus is undevelopable.
- 76 The land to the south of the railway line is landlocked, with no legal road access. Mr Gilbertson's evidence was that access would be required to be created to enable this part to be developed and that would be a separate



process to do so. He suggested some form of access over the railway line is a possibility, but this remains uncertain.

- 77 This means that as it stands, there is little to no prospect that the land south of the railway line could be developed given it has no legal road access. The result of this is that the northern part of the site remains as the developable part of the site.
- 78 The two clear areas of the site north and south of the rail line is a somewhat novel situation, on one level we accept that when viewed as a whole, the applicant has demonstrated significant remnant vegetation protection and offsets south of the rail line as agreed to by DELWP. However, there is nothing to suggest the applicant has sought to avoid native vegetation removal north of the rail line.
- 79 There is no substantive industrial development proposed on the northern part of the site as part of this application. The applicant submitted that the stormwater works, flood compensation works and site remediation works are to prepare the site for future industrial use and/or development and that those works effectively amount to works associated with industry as a result. The applicant also submitted that they would not opt to undertake these works and then not develop the land for industrial purposes, as it would not make financial sense to do so.
- 80 However, the fact remains that there is no industrial use or development before us that would necessitate these works. The vegetation removal is being sought even though, of the works proposed, we understand only the flood compensation works will have an impact on the remnant native vegetation, and at that, only on a small portion of HZ7.
- 81 The three-step process for assessing native vegetation removal under the planning scheme is clearly based on the concept of understanding how a use and/or development responds to the existing conditions of a site, and then working towards an outcome that has the least impact on native vegetation.
- 82 It is inherent in the provisions and policies in the planning scheme for the protection of native vegetation, including the Guidelines, that when a proposal is being developed, consideration of where the native vegetation is located, what the value of that is and attempting, in the first instance, to avoid any impact to that native vegetation be undertaken.
- 83 In our view, the concept of ‘avoid’ must start at the need to attempt to avoid *all* native vegetation removal. This is applicable to this case because there are areas of the site that could be developed and are proposed to have works undertaken on them under this application, where no native vegetation removal would need to occur to facilitate such development.
- 84 Moving to the second step, ‘minimisation’ is only to be undertaken if, when formulating the proposed use or development and having regard to the objectives of the use or development, total avoidance cannot occur.



85 The Guidelines¹⁵ state the following;

Avoiding the removal of native vegetation can be achieved by locating or designing a development so that native vegetation is not removed.

An application to remove native vegetation must demonstrate or provide appropriate evidence to show that no options exist to avoid native vegetation removal, that will not undermine the objectives of the proposed use or development.

86 When making an overall judgement about whether all native vegetation should be retained or not, the planning scheme, including the Guidelines, asks the decision-maker to balance all components of a proposal and the relevant policy for each.

87 The part of clause 71.02-3 extracted earlier requires that the issues to be determined must have the relevant policies applied to them.

88 There is no industrial use or development of any substance¹⁶ that is before us and so, that is not a matter to be determined.

89 Clause 71.02-3 contains a concept of fundamental importance in making a decision of balancing competing policy.

90 In making an integrated decision we are unable to conclude on the positive benefits of a proposed use or development on the northern part of the site outweighing the disbenefits of vegetation removal due to:

- a. the absence of such a proposal; and as a result,
- b. because of the lack of known actual benefits that will result from such use or development.

91 With no industrial use or development of any substance, there is little for us to weigh up and balance in favour of the application. In this case, what the applicant is asking the Tribunal to do is to take into account the likely future industrial use or development of the land and thereby saying that this invokes relevant policy regarding industrial land use and development to tip the balance in favour of the application.

92 We find this approach is not how the planning scheme seeks the decision maker to weigh up the competing policies in this case. Whilst we accept that there is a likelihood of the land being used and/or developed for industrial purposes, we have proceeded to be cautious about this in arriving at our decision for two reasons.

93 Firstly, despite the zoning of the land and related policy in the planning scheme for industrial land use and development, the absence of any meaningful proposal for industrial purposes means there is always the prospect that the land might be used for another purpose.

¹⁵ At section 4, under the 'Avoid' sub-section.

¹⁶ Apart from the stormwater, flood compensation and remediation works.

- 94 Secondly, there is no specific proposal before us for the use or development of the land, including further subdivision, for industrial purposes whereby we are able to assess what impact that might have on whether additional native vegetation could be retained.
- 95 Being asked to give considerable weight to existing industrial land use policy in the absence of a specific proposal, but the prospect or likelihood of future industrial use or development is a bridge too far in this case. Certainly, we find it should not be given greater weight than the native vegetation and biodiversity outcomes under the planning scheme, even when taking into account the extent and quality of native vegetation to be both retained and removed.
- 96 We accept that there is a prospect of native vegetation removal occurring at some time in the future given the current zoning of the land and the policy in the planning scheme that identifies this land for future industrial purposes. However, that will be a matter for future determination.
- 97 With respect to submissions and evidence on other matters, we make the following observations.
- 98 If further avoidance or greater minimisation of native vegetation removal was to occur on the northern part of the site, we expect this could change the extent and capacity of the stormwater and flood compensation works, as less of the site would be developed with hard surfaces and therefore reduce the stormwater and flood compensation capacity required. This could also consequently reduce the impact on the extent of native vegetation removal further.
- 99 With respect to the preference of Mr Kern and Dr Morgan for habitat zones HZ6 and HZ7 to be retained, if this were done in whole or part, there would still be a significant proportion of the northern part of the Land available for development. This could then result in a more balanced outcome with respect to avoidance and minimisation.
- 100 We note the submissions and evidence that the offset site would be impacted by future sea level rise and therefore could not be regarded as an offset site under the Guidelines, pursuant to section 9.1.1. We are not persuaded that sufficient analysis on this issue has been provided to the Tribunal for us to rule conclusively either way.
- 101 In our view, the conflicting policy for the site supporting industrial use and development while protecting significant critically endangered biodiversity must be weighted towards biodiversity protection in the absence of a specific industrial use or development proposal. We consider the permit should not issue.
- 102 We note there is no requirement on the applicant to manage the biodiversity of the Land either north or south of the rail line on an ongoing basis if a permit does not issue and this has weighed heavily on us. However, we consider the principles of remnant vegetation protection as articulated in the



planning scheme and Guidelines should and must take primacy in our decision.

ISSUES NOT IN DISPUTE

- 103 Other aspects of the proposal either have little, or no impact on the proposed native vegetation removal.
- 104 The site remediation does not impact any native vegetation identified in the Biosis report. Similarly, the stormwater retarding areas also do not impact on any of the identified habitat zones. It is only the flood compensation works that impact on a small portion of HZ7.

Viva pipelines

- 105 We note the permit conditions proposed and agreed between the applicant and Viva. No other party sought to be heard on this matter and council did not object to the proposed conditions.
- 106 Protection of the pipelines from works is clearly an important consideration; for this application it would be protection from the stormwater and soil remediation works if a permit were to issue as no other development is proposed at this time.
- 107 We have reviewed the proposed permit conditions which largely go to ensuring a Safety Management Study is undertaken at no cost to Viva and implementation of recommendations of that study is also funded by the applicant.
- 108 Given the importance of this pipeline, in the event we decided to direct the grant of a permit, the conditions as proposed would have been applied to the permit.

Subdivision

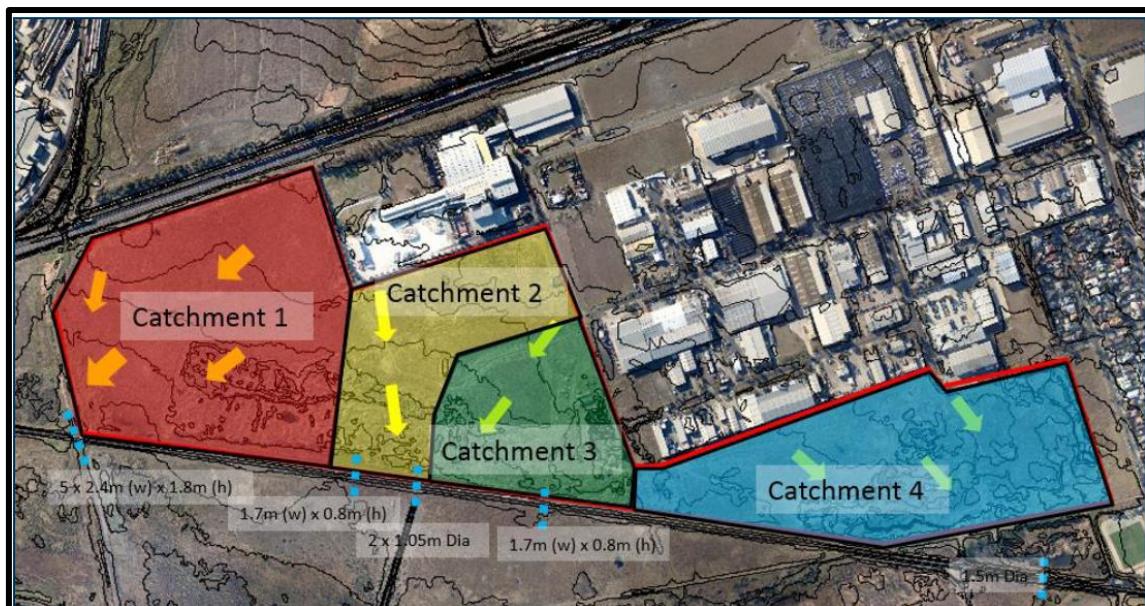
- 109 It was put to us that the two lot subdivision is to subdivide off the relatively small parcel of land for the existing Altona Police Station. It appears that the subdivision has no other practical purpose related to the future use and development of the balance of the land for an industrial purpose
- 110 No party objected to the subdivision in principle, and the Tribunal notes that the police station is an apparently large modern facility that has been recently constructed.
- 111 The subdivision to allow this facility to be on its own lot makes sound planning sense. We note that there is no other part of the proposal that hinges on the subdivision or vice versa and that it would appear that a permit application to subdivide the land in the manner proposed could be made without the other aspects of the proposal and would be acceptable on that basis.
- 112 However, as the subdivision was part of the total permit application ‘package’, we are not able to disaggregate the application and grant a



permit only for the subdivision. If the applicant wishes to pursue the subdivision alone, it could simply lodge a fresh application to the council.

Stormwater works

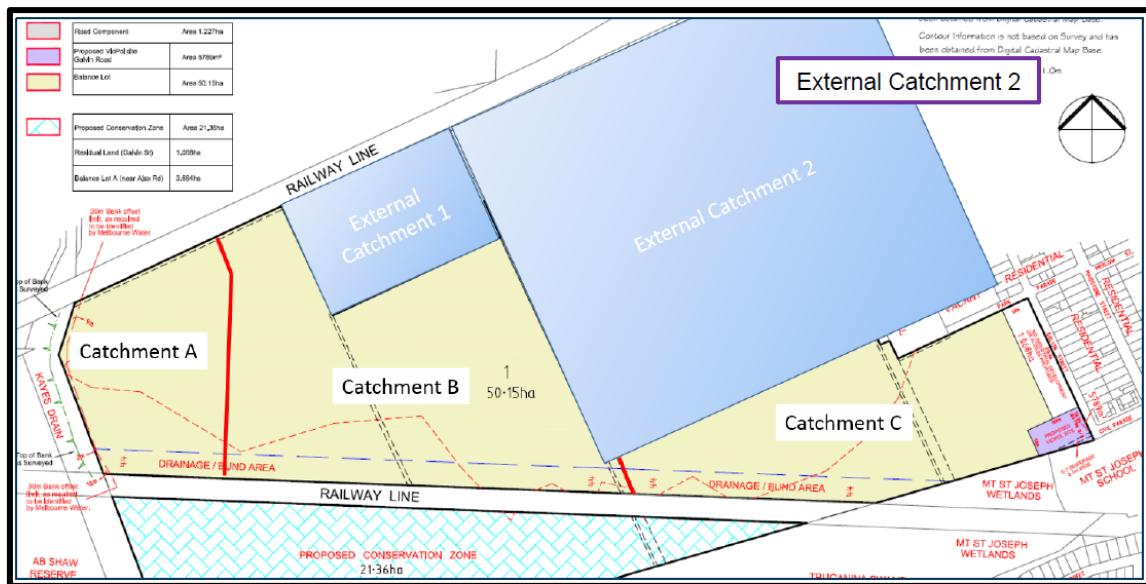
- 113 A Stormwater Management Report to support the application was prepared by Cardno.¹⁷
- 114 The land north of the Altona rail line is divided into four catchments with drainage being to the south and five existing culverts under the rail line. The existing culverts are to be retained and no additional culverts provided.



Existing catchments on the land north of the railway line.¹⁸

- 115 Cardno developed the proposed stormwater management system for post industrial development assuming a 90% rate of imperviousness from buildings and hardstand areas.
- 116 Post development they envisage three catchments on Lot J north of the rail line; Catchment A to the west, Catchment B in the centre and Catchment C covering the area east to Galvin Street.

¹⁷ Ajax Rd, Altona, Stormwater Management Report V160087W, Version 10 25 May 2020.
¹⁸ Source: Figure 2-2, Ajax Road, Altona – Stormwater Management Report, Cardno, 25 May 2020



Proposed catchments on the land north of the railway line.¹⁹

- 117 The stormwater management proposal is that runoff from Catchment A will be detained to pre-development flow rates utilising constructed floodplain capacity and released to Kayes Drain. In low flow periods runoff from Catchment A will be diverted through the stormwater treatment wetlands in Catchment B.
- 118 Stormwater from Catchments B and C will be detained to ensure flows are managed to the capacity of existing culverts under the railway and water quality treatment will occur through incorporation of wetland elements.
- 119 The proposed stormwater management and treatment system is shown in the figure below.
- 120 The Cardno report concluded that the proposed scheme will be acceptable in managing flooding, stormwater quantity and stormwater quality.
- 121 In correspondence dated 3 June 2020 Melbourne Water indicated they did not object to the application subject to a range of conditions. These conditions were included in the draft planning permit provided to the Tribunal.
- 122 No party objected to the stormwater management proposals in principle.
- 123 There was some discussion around hydrological effects on the proposed offset area south of the Altona rail line. We are satisfied that given the culverts under the rail line are not being modified and the detention and treatment functions of the stormwater management proposals, there should not be significant changes to the hydrological regime in the proposed reserve area.

¹⁹ Source: Figure 2-5, Ajax Road, Altona – Stormwater Management Report, Cardno, 25 May 2020

Site remediation

- 124 Approximately 104,000 cubic metres of contaminated imported spoil has been deposited on proposed Lot J in two areas of the site near Slough Road (south central to site) and Aberdeen Road (eastern end of the site).
- 125 An assessment of the material and treatment options was undertaken by GHD in 2016.²⁰ The material was predominantly from the construction of Crown Casino in 1994 and was identified as Coode Island Silt, solid inert waste, building rubble and minor domestic rubbish.
- 126 Coode Island Silt is well known to be an acid sulphate soil, that is, a soil containing iron sulphides that when exposed to air can oxidise and release acid with potentially detrimental effects on ecology and infrastructure.
- 127 The GHD assessment found that there is some acid sulphate soil, particularly in the Slough Road area and proposed to place the material in bunds, treat it with lime to neutralise any acid and cap it with compacted clay.
- 128 As part of the current application, it is now proposed to treat any acid sulfate soil in-situ by neutralising with lime; said to be a lower impact approach compared to excavating and transporting the material across the site into bunds.
- 129 GHD in further advice to the applicant dated 25 November 2020 stated that they considered any soil remediation works north of the Altona rail line were unlikely to have impacts south of the rail line in the proposed reserve offset area.
- 130 No parties objected to the site remediation aspect of the application.
- 131 We consider this is an issue which could have been addressed via conditions as the prospects of site remediation are good and there is negligible risk of ongoing threats to human health or the environment.
- 132 An Environmental Management Plan is proposed via condition to the satisfaction of the Responsible Authority to confirm the details of the remediation strategy and ensure works are satisfactorily implemented prior to the release of the Statement of Compliance.

Amenity

- 133 The amenity of abutting residential areas to the east was an issue raised in the original objections.
- 134 Mr Ellawala in his submission at the Hearing raised a number of issues said to affect the amenity of the residential areas during industrial development. These included the need to retain vegetation and its impacts on the heat

²⁰ Axxcel Management Services Pty Ltd, *Elfield Meadows Estate, Acid Sulfate Soil Management Plan*, October 2016.



island effect, the need for provision of a buffer zone between industrial development and houses, and dust amongst others.

- 135 The applicant submitted that no amenity issues arise as a result of the proposed subdivision and works and any impacts in future will be managed through the further planning processes that will be required.
- 136 It further submitted that under the zone control the subdivision is exempt from notice and review and the works are also exempt as they are more than 30 metres from the residential zone.
- 137 We consider the subdivision will not of itself lead to any amenity impacts and accept the applicant's submissions that amenity issues will need to be addressed in future applications for industrial use and/or development, noting that under the current SUZ4 provisions, buildings and works are also exempt from third party notice and review rights²¹.
- 138 The exemption from notice and review of buildings and works is noted but we consider given the extent of earthworks for site remediation and stormwater management there is potential for dust to adversely impact both existing industries and nearby residential areas to the east.
- 139 Having reviewed the proposed permit conditions the Tribunal notes there are a number of conditions in the Construction Management Plan which address amenity generally and dust explicitly. The Tribunal considers these conditions would satisfactorily address any amenity risks from the works application, had a permit been issued.

Conclusion on issues not in dispute

- 140 Although none of these matters raise any particular issues in themselves, or at least that could not be addressed via conditions, they form part of an overall proposal for which one permit has been sought.
- 141 Because we have found that a permit should not be issued for the native vegetation removal, we do not find it appropriate to disaggregate the different parts of the proposal and issue permits for those that are found to be acceptable.
- 142 Notwithstanding the stormwater works are based on an assumption of a certain degree of permeability, based on our findings on the native vegetation component, it may be that the stormwater requirements will change should there be a future application for native vegetation removal along with subdivision, buildings or works.

CONCLUSION

- 143 Our decision to direct that no permit be issued should not necessarily be seen as one that demands the vegetation on the northern part of the site be retained in whole or part. Rather, that the approach taken by the applicant in this case is not one where we have been persuaded has been an acceptable

²¹ In clause 4.0 of SUZ4.



approach based on the framework of the planning scheme, where the avoidance of native vegetation has been properly explored through a holistic and integrated approach.

- 144 The application before us is presumptuous as to what might happen in the future, without exploring that in a coordinated manner and enabling the proper balancing exercise to take place with the native vegetation proposed to be removed.
- 145 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Joel Templar
Presiding Member

Nick Wimbush
Member

