



Minutes

Hearing of Submissions Committee
Tuesday, 14 March 2017

Held in the
Council Chambers
1 Merrijig Drive, Torquay
Commencing at 4.05pm

Council:

Cr Brian McKiterick (Mayor)
Cr David Bell
Cr Libby Coker
Cr Martin Duke
Cr Clive Goldsworthy
Cr Rose Hodge
Cr Carol McGregor
Cr Margot Smith
Cr Heather Wellington

MINUTES FOR THE HEARING OF SUBMISSIONS MEETING OF SURF COAST SHIRE COUNCIL
HELD IN THE COUNCIL CHAMBERS, 1 MERRIJIG DRIVE, TORQUAY
ON TUESDAY 14 MARCH 2017 COMMENCING AT 4.05PM

PRESENT:

Cr Brian McKitterick (Mayor)
Cr Martin Duke
Cr Clive Goldsworthy
Cr Rose Hodge
Cr Carol McGregor
Cr Margot Smith
Cr Heather Wellington

In Attendance:

Chief Executive Officer – Keith Baillie
General Manager Environment & Development – Phil Rowland
Mich Watt – Coordinator Statutory Planning
44 members of the public
0 members of the press

APOLOGIES:

Cr David Bell and Cr Libby Coker

Committee Resolution

MOVED Cr Rose Hodge, Seconded Cr Margot Smith

That apologies be received from Cr David Bell and Cr Libby Coker.

CARRIED 7:0

CONFLICTS OF INTEREST:

Nil

SUBMITTERS HEARD

- 1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction and
 - 1.2 OA2558 – Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet
1. Maree Coote
 2. Kelli Nicolo-Richmond
 3. Rachel Ann Faggetter
 4. David King (on behalf of Adrienne Clarke)
 5. Gale Jennings (late submitter)
 6. Charlotte Allen (AIDA president)
 7. Brydon King (acting on behalf of applicant)
 8. Tim Wood (applicant)
 9. Adam O'Halloran (applicant)
 10. Rod Duncan (late submitter)

BUSINESS:

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1. ENVIRONMENT & DEVELOPMENT

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

Author's Title: Coordinator Statutory Planning

General Manager: Phil Rowland

Department: Planning & Development

File No: 16/0402

Division: Environment & Development

Trim No: IC17/199

Appendix:

1. 16/0402 - List of Registered Speakers - 115 Bimbadeen Drive Fairhaven (D17/26415)
2. 16/0402 - List of all other Submitters - 115 Bimbadeen Drive Fairhaven (D17/22601)

Officer Direct or Indirect Conflict of Interest:

Status:

In accordance with Local Government Act 1989 – Section 80C:

Information classified confidential in accordance with Local Government Act 1989 – Section 77(2)(c):

Yes

No

Yes

No

Reason: Nil

Reason: Nil

Purpose

The purpose of this report is to hear submitters following invitation of submissions in accordance with Section 223 of the Local Government Act 1989 in relation to planning permit application 16/0402 which seeks approval to re-subdivide the land, creating a separate lot for a dwelling which was approved via Planning Permit 97/7281 and to consolidate the balance of the land with the property at 115 Bimbadeen Road, Fairhaven, located on the opposite side of the Painkalac Creek. The lot sizes created are as follows:

- Lot 1 – 3.276 hectares, designed to include the building envelope approved under Planning Permit 97/7281
- Lot 2 – 30.23 hectares to be annexed to the land on the opposite side of the river which has an area of 6.53 hectares; total area 36.76 hectares.

The Plan of Subdivision which relates to the property at 23-79 Bambra Road, Aireys Inlet contains the following restriction:

The owners of lots on this plan shall not allow the erection of more than one dwelling on any allotment.

In accordance with Planning Permit No. 97/7281 no lot on this plan shall be further subdivided.

The owners of lots on this plan shall not erect a building other than in the building envelopes shown on the endorsed neighbourhood design plan in Planning Permit No. 97/7281.

The application seeks to amend the restriction as follows:

In accordance with Planning Permit 97/7281 no lot on this plan, other than Lot 3, shall be further subdivided and Lot 3 shall only be subdivided on the basis that any further subdivision does not create any additional dwellings.

A Section 173 Agreement also applies to the land. Approval is sought via a separate application to amend the Section 173 Agreement to allow the re-subdivision of the land. Council's decision on the application to amend the Section 173 Agreement will inform the processing of this application. In the event that Council decides to amend the Agreement in a manner which is substantively different to the proposal there would be a need for re-notification of the application as outlined in Section 178C and E of the *Planning and Environment Act 1987*. Such a decision would likely result in the need to defer consideration of the subdivision application.

Summary

The site is located at 23-47 Bambra Road, Aireys Inlet and 115 Bimbadeen Drive, Fairhaven. The site comprises three parcels of land which were subdivided via Planning Permit 97/7281 and are known as 23-79 Bambra Road, Aireys Inlet. The subdivision layout also created a creek reserve area along the alignment of the Painkalac Creek. The site also comprises a lot at 115 Bimbadeen Drive which has been developed with a dwelling.

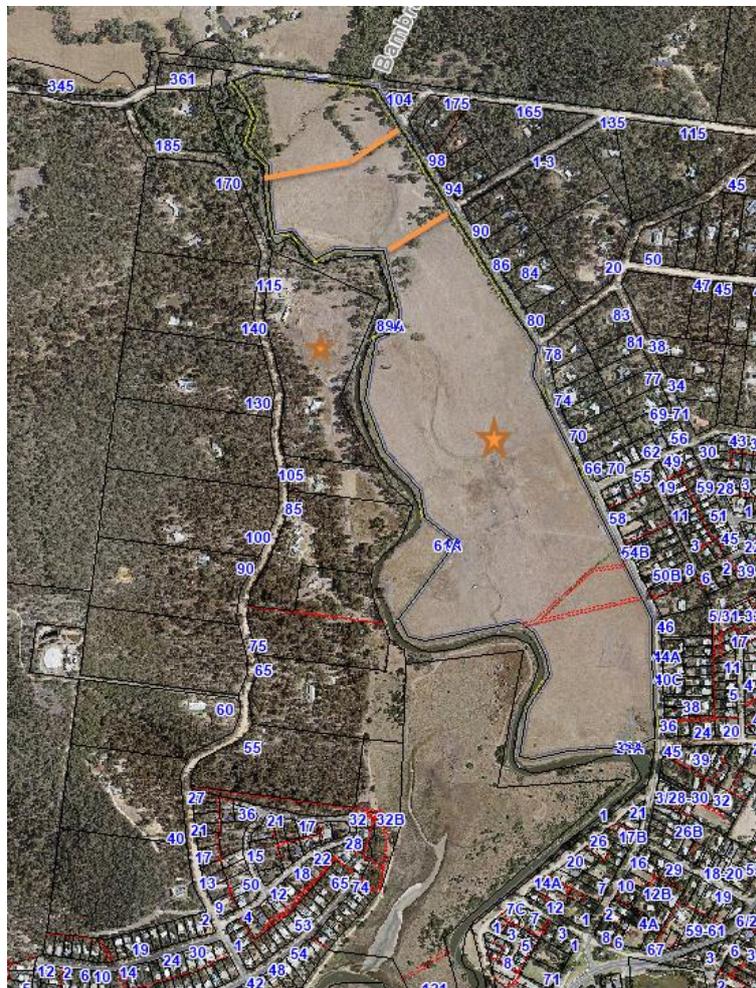
1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

The site at 23-79 Bambra Road is currently used for the grazing of horses and continues to contain open pasture land along the valley floor. It includes a number of horse shelters approved by Planning Permit 10/0570 and fenced paddocks. Two grand gate entrances have been developed for the two lots at the northern end of the site. The low lying land is subject to flooding from Painkalac Creek.

The site at 23-79 Bambra Road is an irregular, elongated shape with a total area of 48.35 hectares. The site is bounded to its west by the Painkalac Creek, to its east by Bambra Road and to its north by Boundary Road. At its southern end it terminates at a point opposite the end of Beach Road.

Residential development is located on the eastern side of Bambra Road, with dwellings having an outlook over the subject site. To the west are further open creek flats and the hills of Eastern View which include a low intensity of residential development. Open creek flats extend to the south of the site beyond the Great Ocean Road.

The site can be seen in the image below. The stars indicate the two lots which are the subject of this Planning Permit application.



Planning Permit 97/7281 approved the development of three dwellings on the lots at 23-79 Bambra Road. This permit has been extended three times and is still valid, expiring on 24 April 2018 if development has not commenced by that date.

Planning Permit 97/7281 was approved by the Victorian Civil and Administrative Tribunal (VCAT). Initially approval was sought for four dwellings and a four lot subdivision, with VCAT ultimately approving a three lot subdivision and the use and development of three dwellings after giving detailed consideration to landscape values, flooding, tenement provisions, flora and fauna and the ongoing management of the site. In approving the Planning Permit VCAT required the consolidation of Lots 3 and 4 and endorsed building envelopes for each of the lots.

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

A Section 173 Agreement was required to provide for ongoing requirements for the development of the land and included requirements that:

- none of the lots created on the plan of subdivision shall be further subdivided and not more than one dwelling will be constructed on each lot
- the setting aside as an area of public open space to vest in the Council upon registration of the plan of re subdivision of such land as may be necessary to ensure a minimum width of public open space of 10 metres along the Paikalac Creek
- creation of building envelopes set back a minimum of 40 metres from Bambra Road having an area not greater than 500 square metres
- no buildings to be constructed outside the building envelopes
- no buildings to exceed a maximum wall height of 3 metres and an overall height of 5 metres above natural ground level
- that no development may commence on any of the lots unless the planting as shown on the landscape plan endorsed to this permit has been established for a period of at least two years prior to the commencement of any development
- that the planting on the endorsed landscaping plan be carried out and maintained to the satisfaction of the Council
- that, save for the establishment of garden beds within a 10 metre radius of any buildings, no planting shall be undertaken on the subject land other than in accordance with the endorsed landscaping plan, without the written consent of Council
- that no dogs shall be kept on the land
- that all stormwater run off from any buildings and hard surfaces shall be treated to the satisfaction of the Council prior to discharge into the creek
- to pay Council's reasonable legal costs associated with the negotiation, preparation, execution and registration of the Agreement.

The Agreement has been executed and applies to the land.

As noted, the Plan of Subdivision for the property at 23-79 Bambra Road, Aireys Inlet contains the following restriction:

The owners of lots on this plan shall not allow the erection of more than one dwelling on any allotment. In accordance with Planning Permit No. 97/7281 no lot on this plan shall be further subdivided.

The owners of lots on this plan shall not erect a building other than in the building envelopes shown on the endorsed neighbourhood design plan in Planning Permit No. 97/7281.

There is significant community concern around the amendment of the Agreement. Public notification of the application was undertaken and 95 objections have been lodged. Some of the main issues raised in the objections are:

- further subdivision of the land should not be permitted
- approval of the subdivision would provide for a lot size which is less than the minimum lot size in the zone
- the approval of four lots in the valley is in direct opposition to the Shire's refusal of Planning Permit 97/7281 in 1988
- the subdivision is prohibited
- the subdivision threatens an environmentally and ecologically significant area with further damage and erosion
- the application seeks to satisfy the commercial interests of one person over the interests of the community
- the existing horse riding business has degraded the land and created a dust bowl, further damage and erosion is likely
- the subdivision will allow the construction of four dwellings
- the subdivision of the land is prohibited by the Section 173 Agreement and the restriction

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

- the proposal contravenes the Aireys Inlet Eastern View Structure Plan which highlights the importance of the valley's open landscape
- the number of horses allowed on the beach will increase and this threatens enjoyment of the beach and local bird species
- the door should not be opened to further subdivision by varying the restriction
- the environmental values of the land and its scenic qualities will be threatened
- an oval should not be permitted on the land
- the construction of a bridge over the creek will impact on the environment and the creek
- the land should be returned to the community as park land.

Assessment of the proposal is continuing and the application will be presented for a decision by Council at the March Council meeting.

Recommendation

That Council receive and note the submissions to Planning Permit 16/0402 for amendment to a Re-Subdivision of the Land and Variation of the Restriction on PS431010T to Replace "In Accordance with Planning Permit No 97/7281 No Lot on This Plan Shall be Further Subdivided" with "In Accordance with Planning Permit No 97/7281 No Lot On This Plan, Other Than Lot 3, Shall Be Further Subdivided On The Basis That Any Further Subdivision Does Not Create Any Additional Dwellings" at 23-79 Bambra Road, Aireys Inlet and 115 Bimbadeen Road, Fairhaven.

Committee Resolution

MOVED Cr Margot Smith, Seconded Cr Carol McGregor

That Council receive and note the submissions to Planning Permit 16/0402 for amendment to a Re-Subdivision of the Land and Variation of the Restriction on PS431010T to Replace "In Accordance with Planning Permit No 97/7281 No Lot on This Plan Shall be Further Subdivided" with "In Accordance with Planning Permit No 97/7281 No Lot On This Plan, Other Than Lot 3, Shall Be Further Subdivided On The Basis That Any Further Subdivision Does Not Create Any Additional Dwellings" at 23-79 Bambra Road, Aireys Inlet and 115 Bimbadeen Road, Fairhaven.

CARRIED 7:0

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

Report

Background and Discussion

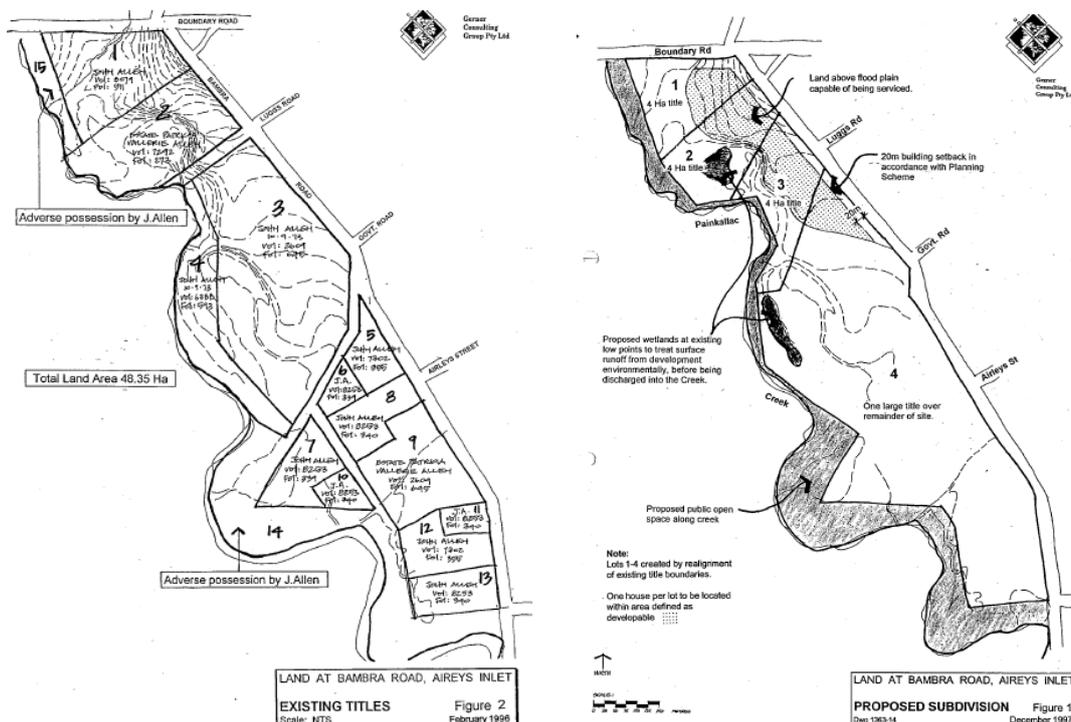
The land was purchased in 1973. At the time the land comprised approximately 60 lots created in 1888 under Plan of Subdivision No. 1757. The lots were consolidated into 13 lots.

In 1984 two applications for a planning permit were made, seeking approval for a house on each of the two lots fronting the northern end of the holding. These permits were refused by the Town Planning Appeals Tribunal with the Tribunal raising concern that a precedent would be created in terms of future subdivision/development in the valley.

An Amendment application, RL34, was made which sought to subdivide the land into 21 residential lots sites in the north east corner of the land, and to rezone the land to Residential A, and transfer the balance of the land into public ownership. This Amendment was abandoned, with the Panel hearing the Amendment concluding that the proposal was at odds with the planning policy for the area. It was determined that the visual significance of the valley as a whole is of major importance and this landscape character should be retained.

In 1990 a proposal was prepared for a 102 lot subdivision. This was rejected by the Painkalac Creek Wetlands Floodplain Environment Study (1990).

Planning Permit 97/7281 sought approval for the re-subdivision of the land into four lots and the development of four dwellings. The plans below show the existing titles and the proposal:



Council refused the application as being contrary to the zone and planning policy. An appeal was lodged against Council's refusal and ultimately VCAT supported a three lot re-subdivision and the use and development of three dwellings. VCAT considered the following issues in detail:

- House 'entitlements' under the tenement clause; The social value of the site and the pleasure the community derives from the contrast between the valley's open pastures and the vegetated hillsides to either side. It was concluded that the views of the valley from the south are particularly valuable
- Visual intrusion
- Flooding
- Flora and fauna impacts
- Siting.

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

A concurrent application was lodged with Planning Permit 97/7281 to use the northern part of the site for a caravan park. This permit application was refused by Council. An application for the review of the decision with the Tribunal was withdrawn.

Over the years controversy has continued within the township about the potential for a football oval on the land. The *Aireys Inlet to Eastern View Structure Plan* (November 2015) contains a key action (2) stating:

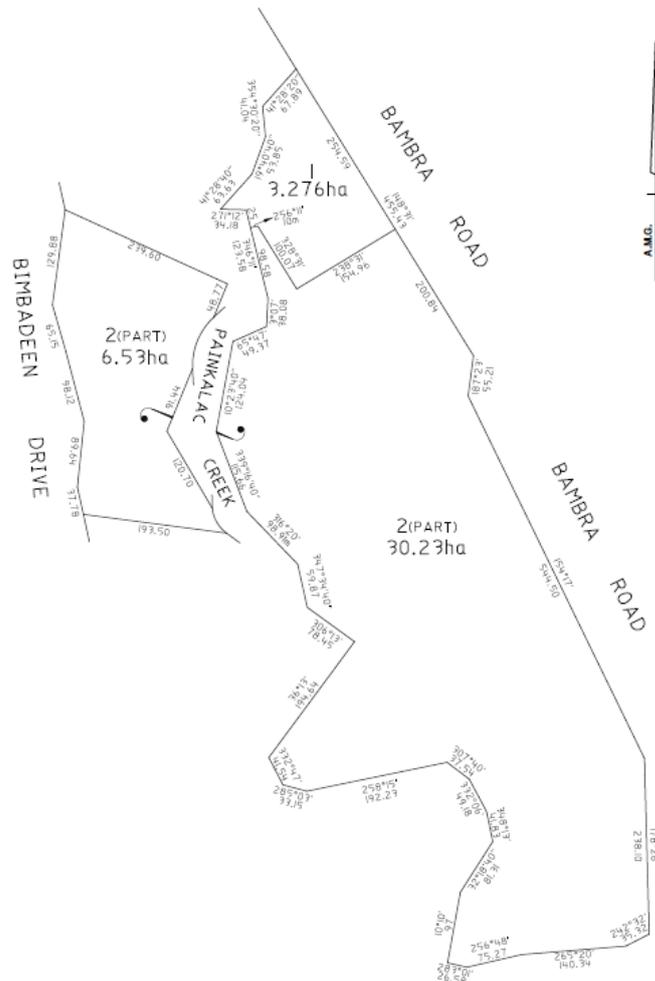
Not progress the development of an active recreation space in the Painkalac Valley, but investigate the opportunity for enhancement of the primary school oval for recreational use and continue to facilitate the sharing of sports facilities in Lorne, Anglesea, Bellbrae and Torquay.

It is noted that a bridge has been developed across the creek to provide access between the land at 115 Bimbadeen Road and the land at 23-79 Bambra Road, Aireys Inlet. A holding area has also been developed on the public land outside the property. Investigations are underway to determine whether the appropriate licences and approvals are in place for these works. It is noted that legal road access is available to both lots and the bridge connection is not required in order to provide access to the land.

Planning Permit 16/0402 seeks to re-subdivide the land to allow:

- Lot 1 – 3.276 hectares, designed to include the approved building envelope
- Lot 2 – 30.23 hectares to be annexed to the land on the opposite side of the river which has an area of 6.53 hectares.

The proposed subdivision is shown below.



1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

Permission is also sought to amend the restriction which applies to the land, allowing for the land to be re-subdivided. The proposed amended restriction is as follows:

In accordance with Planning Permit 97/7281 no lot on this plan, other than Lot 3, shall be further subdivided and Lot 3 shall only be subdivided on the basis that any further subdivision does not create any additional dwellings.

The site is zoned Rural Conservation Zone. The site is subject to a number of overlays, including: Bushfire Management Overlay (part); Design and Development Overlay – Schedule 11; Environmental Significance Overlay – Schedule 1; Environmental Significance Overlay – Schedule 4; Environmental Significance Overlay – Schedule 5 (part); and Land Subject to Inundation Overlay.

The re-subdivision of the land can be approved pursuant to Clause 35.06-3 of the Planning Scheme which states:

A permit is required to subdivide land. Each lot must be at least the area specified for the land in a schedule this zone. If no area is specified, each lot must be at least 40 hectares.

A permit may be granted to create smaller lots if any of the following apply:

- the subdivision is the re-subdivision of existing lots, the number of lots is not increased, and the number of dwellings that the land could be used for does not increase.

A Planning Permit is triggered by the following clauses of the Surf Coast Shire Planning Scheme:

- Clause 35.06-3 – Subdivision in the Rural Conservation Zone
- Clause 42.01-2 – Subdivide land in the Environmental Significance Overlay
- Clause 44.04-2 – Subdivide land in the Land Subject to Inundation Overlay
- Clause 44.06-1 – Subdivide land in the Bushfire Management Overlay
- Clause 52.02 – Variation of restriction.

The provisions of the Rural Conservation Zone allow only one dwelling per lot.

The application has been referred to the Corangamite Catchment Management Authority, the Country Fire Authority and the Department of Environment, Land, Water and Planning. At the time of writing this report a number of responses are outstanding. The responses are required before Council can make a decision on the application.

Financial Implications

There are no direct financial impacts to Council for the processing of the application which occurs via operational budgets.

Council Plan

Theme 1 Environment
Objective 1.1 Preserve and enhance the natural environment
Strategy Nil

Theme 2 Governance
Objective 2.4 Transparency in decision making and access to information
Strategy 2.4.1 Communicate decisions clearly and in a timely manner.

Theme 5 Development and Growth
Objective 5.1 Protect productive farmland and support rural business
Strategy 5.1.2 Work with local businesses

Policy/Legal Implications

There are no legal implications for the consideration of this application.

Planning policy will guide the decision making process.

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

Officer Direct or Indirect Interest

No officer involved in the preparation of this report has any conflicts of interest.

Risk Assessment

The merits of the application are yet to be determined.

Social Considerations

Key themes raised in objections include concerns about the environmental values of the land and the creation of an additional lot in the Paikalac Valley, which is a landscape valued by the community.

Additional social issues for consideration include the opportunity for a tourism based, local employer to continue to operate from the township.

Community Engagement

The planning permit application was placed on public notification. Public notification of the proposal has generated 95 objections.

Environmental Implications

Objectors are concerned about the environmental implications of the proposal.

Communication

A copy of the Council's decision will be provided to the applicant and all submitters.

Conclusion

The objections received have detailed a number of significant matters that require careful consideration. These are to be presented to Council via the Hearing of Submissions meeting.

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

APPENDIX 1 16/0402 - LIST OF REGISTERED SPEAKERS - 115 BIMBADEEN DRIVE FAIRHAVEN

Hearing of Submissions

Tuesday 14 March 2017

4:00pm

**Council Chambers
1 Merrijig Drive, Torquay**

ORDER OF SPEAKERS

**115 Bimbadeen Drive, Fairhaven and 23-79 Bambra Road, Aireys
Inlet – 16/0402**

Item	Time	Submitter
1.	4.00pm	Maree Coote & Lex Ridgeway
2.	4.10pm	Edward Richmond
3.	4.20pm	Rachael Ann Faggetter
4.	4.30pm	Adrienne Clarke
5.	4.40pm	Gael Jennings
6.	4.50pm	Charlotte Allen (AIDA president)
7.	5.00pm	Brydon King (acting on behalf of applicant)
8.	5.10pm	Adam O'Halloran (applicant)
9.	5.20pm	Tim Wood (applicant)

1.1 115 Bimbadeen Drive Fairhaven and 23-79 Bambra Road Aireys Inlet - Re-Subdivision of the Land (Boundary Re-alignment) and Variation of Restriction

APPENDIX 2 16/0402 - LIST OF ALL OTHER SUBMITTERS - 115 BIMBADEEN DRIVE FAIRHAVEN

List of all other submitters

Nan McNab
Gael Jennings
Andrea McLaughlin
Julie Fink
M Seeger & J Austin
Geoffrey McNaughton
GF & LM Powell
D & A Stubbings
Simon James Egan
NJ Harding & HA Lawless
MJ & GJ Healey
Michael Heyward & Penny Hueston
LJ & RA Healey
S & J Downey
David Ritchie & Michelle Dewar
Ian Godfrey & L Ord
Kim Dalton & Penny Robins
Max Dalton
GC & WM Johnson
Megan Short
Stephen & Kerry Harris
Liz Wood & Kate Driscoll
Bron Ives & Brian Agland
Barbara Leavelsey
Natalie Utmar & Gavin Cross
B Hammond & C Ryan
G McKenzie

L & D Court

Clarke Veale

Heather Lawson

DJ & MA St John

HN & JF Senbergs

Linda Lee Phalp

Mark Wellard

Sandra Fairthorne

J Borenstein & G Chambers

Janice Carpenter

Simon Braxton & Eva Hall

Roger Ganly

Mary Anne Boyd-Squires & Elena Mitchell

Jane Grant

G Nicoletti, L Cade & D O'Connell

Wildwood Nord Pty Ltd

Jane Stephens

Simon Horsburgh

Mary T Prince

I & A Porter

Tim & Sarah Day

A & D Lamb

Gary James McIntosh

P & D Love

Jennifer York

Vicki Philipp & J Raglus

Libby Mears

A D Trood

Gregory Day

E Lowe & L Wicks

Ian Godfrey & L Ord

Kim Neubecker

Rod Tucker

Gretel Lamont

Robert Ashton

June Laurie

Gabriel Fuller

Michael Grutzner

Vicki McKay

Valdi Kapelis

Marek Sikora & Rachel Juriansz

Doug Humann

JO Murray

Marcus Rodda

Elizabeth & Colin Gomm

Mary-Jane Gething

David & Ellinor Campbell

A Davies & M Tehan

P Dunai

JA & JH Lawlor

Sue Guinness

Malia McCutcheon

LK Mcrindle & MO McCutcheon

Deborah Chemke

Jacqui & David Lamont

Angela Berry

Kristin McDonald

Clair Hanley

David Isaac & Trudy Wyse

Cornelia Jaeger & Deborah Mayall

Mishelle Noe

Graham Hobbs & Ulrike Wurth

Lynn Barnett

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

Author's Title: Coordinator Statutory Planning
Department: Planning & Development
Division: Environment & Development

General Manager: Phil Rowland
File No: OA2558
Trim No: IC17/198

Appendix:

1. OA2558 - List of Registered Speakers - 23-79 Bambra Road Aireys Inlet (D17/26407)
2. OA2558 - List of all other Submitters - 23 Bambra Road Aireys Inlet (D17/22582)

Officer Direct or Indirect Conflict of Interest:

In accordance with Local Government Act 1989 –
Section 80C:

Yes

No

Reason: Nil

Status:

Information classified confidential in accordance with
Local Government Act 1989 – Section 77(2)(c):

Yes

No

Reason: Nil

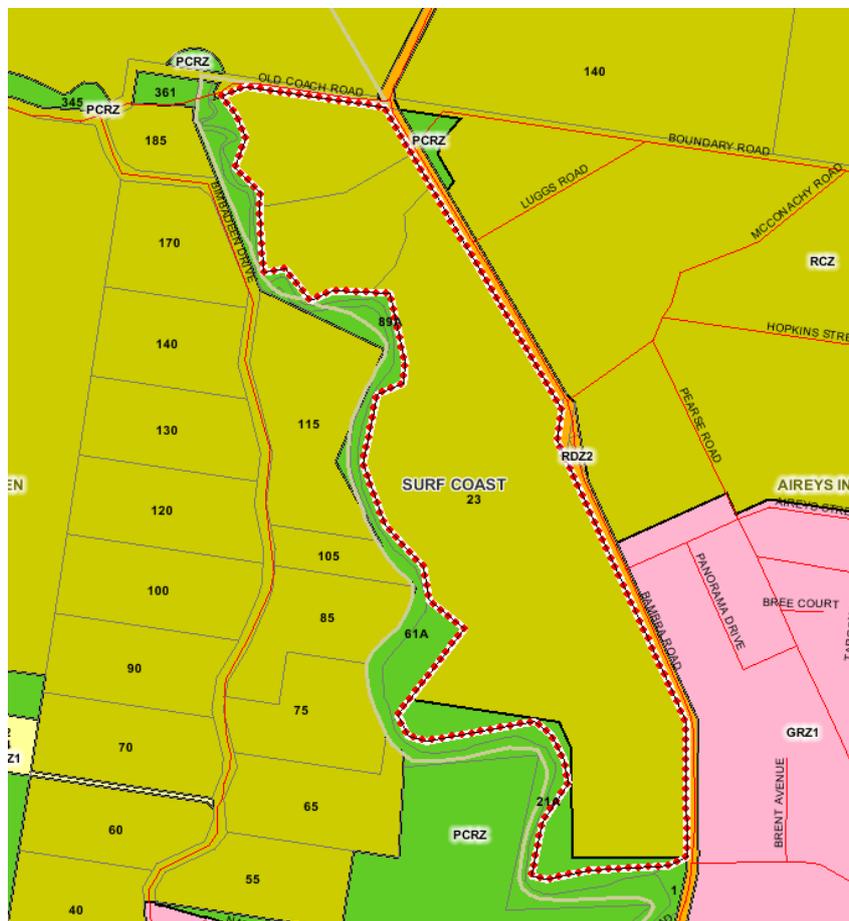
Purpose

The purpose of this report is to hear submitters following invitation of submissions in accordance with Section 223 of the Local Government Act 1989 in relation to planning permit application OA2558 which seeks approval to amend a Section 173 Agreement by:

- changing Clause 4.1 to allow the re-subdivision of Lot 3 of PS431010T with adjoining land
- deleting Clause 4.6 which restricts the wall height of buildings to 3 metres
- deleting Clause 4.11 prohibiting any dogs on the lots.

Summary

The site is located at 23-47 Bambra Road, Aireys Inlet. The site comprises three parcels of land which were subdivided via Planning Permit 97/7281. The subdivision layout also created a creek reserve area along the alignment of the Painkalac Creek. The site can be seen in the image below:



1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

The site is currently used for the grazing of horses and continues to contain open pasture land along the valley floor. It includes a number of horse shelters and fenced paddocks. Two grand gate entrances have been developed for the two lots at the northern end of the site. The low lying land is subject to flooding from Painkalac Creek.

The site is an irregular, elongated shape with a total area of 48.35 hectares. The site is bounded to its west by the Painkalac Creek, to its east by Bambra Road and to its north by Boundary Road. At its southern end it terminates at a point opposite the end of Beach Road.

Residential development is located on the eastern side of Bambra Road, with dwellings having an outlook over the subject site. To the west are further open creek flats and the hills of Eastern View which include a low intensity of residential development. Open creek flats extend to the south of the site beyond the Great Ocean Road.

Planning Permit 97/7281 approved the development of three dwellings on the lots and a three lot re-subdivision. This permit has been extended over the years and is still valid, expiring on 24 April 2018 if the development has not commenced by that date.

Planning Permit 97/7281 was approved by the Victorian Civil and Administrative Tribunal (VCAT). Initially approval was sought for four dwellings and a four lot subdivision, with VCAT ultimately approving a three lot subdivision and the development and use of three dwellings after giving detailed consideration to landscape values, flooding, tenement provisions, flora and fauna and the ongoing management of the site. In approving the Planning Permit VCAT required the consolidation of Lots 3 and 4 and endorsed building envelopes for each of the lots.

A Section 173 Agreement was required to provide for ongoing requirements for the development of the land and included requirements that:

- none of the lots created on the plan of subdivision shall be further subdivided and not more than one dwelling will be constructed on each lot
- the setting aside as an area of public open space to vest in the Council upon registration of the plan of re subdivision of such land as may be necessary to ensure a minimum width of public open space of 10 metres along the Painkalac Creek
- creation of building envelopes set back a minimum of 40 metres from Bambra Road having an area not greater than 500 square metres
- no buildings to be constructed outside the building envelopes
- no buildings to exceed a maximum wall height of 3 metres and an overall height of 5 metres above natural ground level
- that no development may commence on any of the lots unless the planting as shown on the landscape plan endorsed to this permit has been established for a period of at least two years prior to the commencement of any development
- that the planting on the endorsed landscaping plan be carried out and maintained to the satisfaction of the Council
- that, save for the establishment of garden beds within a 10 metre radius of any buildings, no planting shall be undertaken on the subject land other than in accordance with the endorsed landscaping plan, without the written consent of Council
- that no dogs shall be kept on the land
- that all stormwater run off from any buildings and hard surfaces shall be treated to the satisfaction of the Council prior to discharge into the creek
- to pay Council's reasonable legal costs associated with the negotiation, preparation, execution and registration of the Agreement.

The Agreement has been executed and applies to the land.

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

Council also has an application to allow the re-subdivision of the land and the variation of a restriction. The two applications are being processed concurrently. Effectively, if the application to amend the Section 173 Agreement, as it relates to subdivision fails, the re-subdivision application must also fail as the subdivision is prohibited.

There is significant community concern around the amendment of the Agreement. Public notification of the application was undertaken and 115 objections have been lodged. Some of the main issues raised in the objections are:

- there will be no community benefit associated with the approval of the amendments
- the amendments satisfy commercial interests only and will jeopardise the interests of the wider community and the environmental values of the Painkalac Valley
- the protections provided by the Section 173 Agreement have worked well and there is no compelling reason to change them
- the terms of the Agreement continue to be relevant to the land
- the Agreement was entered into at the direction of VCAT which gave considerable weight to the impacts of the proposed use and development and the environmental values of the valley
- council argued at VCAT that a wall height in excess of three metres was not appropriate and the restriction remains relevant as it limits the visibility of dwellings permitted on the land from views into the valley. An increased wall height would intrude on, rather than enhance, the landscape qualities of the area
- VCAT expressed concern for the protection of habitat remnants, the ongoing habitat value of the creek and wetlands and the impact that dogs may have on specific species of the area such that the restriction on dogs should remain
- the further subdivision of land could increase the number of dwellings developed in the valley
- an amendment which allows the further intrusion of the business Blazing Saddles into the Painkalac Valley should be opposed in the strongest possible terms. The environmental impact of this business is readily visible, with native habitat reduced by the business
- the applicant is not entitled to make application to amend the Section 173 Agreement
- the amendment of the Agreement would result in the Shire contradicting its own Agreement and demonstrating negligence of its responsibility to the community.

Assessment of the proposal is continuing and the application will be presented for a decision by Council at the March Council meeting.

Recommendation

That Council receive and note the submissions to OA2558 for Amendment to a Section 173 Agreement at 23-79 Bambra Road, Aireys Inlet.

Committee Resolution

MOVED Cr Heather Wellington, Seconded Cr Margot Smith

That Council receive and note the submissions to OA2558 for Amendment to a Section 173 Agreement at 23-79 Bambra Road, Aireys Inlet.

CARRIED 7:0

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

Report

Background

OA2558 which seeks approval to amend a Section 173 Agreement by:

- changing Clause 4.1 to allow the re-subdivision of Lot 3 of PS431010T with adjoining land
- deleting Clause 4.6 which restricts the wall height of buildings to 3 metres
- deleting Clause 4.11 prohibiting any dogs on the lots.

Council also has an application to allow the re-subdivision of the land and the variation of a restriction. The two applications are being processed concurrently. Effectively, if the application to amend the Section 173 Agreement as it relates to subdivision fails, the re-subdivision application must also fail as the subdivision is prohibited.

Discussion

As noted, the Section 173 Agreement was required by VCAT as part of the approval of Planning Permit 97/7281. The circumstances of the site, including the zoning and planning policy framework have not markedly altered since the decision was made.

Council is required to consider the following issues:

- a) the purpose of the agreement
- b) the purpose of the amendment
- c) whether any change in circumstances necessitates the amendment
- d) whether the amendment would disadvantage any person, whether or not a party to the agreement
- e) the reasons why the responsible authority entered into the agreement
- f) if the amendment is to remove land from the application of the agreement, whether the land is subject to any further liability under the agreement
- g) any relevant permit or other requirements the land is subject to under the Subdivision Act 1988
- h) any other prescribed matter.

When making its decision on the re-subdivision of the land, VCAT provided the following statements around wall heights and the keeping of dogs:

While we note that other property owners in the area may have dogs, we do not consider that this means dogs should be allowed on the subject land. Dr Meredith expressed concern about the impact of dogs on specific species in the area. Our concern for the protection of habitat remnants, and the ongoing habitat value of the creek and wetlands, lead us to conclude that whatever we can do by way of minimising further hazard to surviving fauna in these areas should be done.

We have also accepted the Council's argument about the specification of a maximum wall height as well as an overall building height as well as an overall building height. We do not think it would be appropriate to enable walls in excess of three metres, possibly on a large scale and with a flat roof, to be built on the subject land.

It is not considered that the environmental circumstances of the site have changed since the Agreement was entered into and it is considered that the Clauses 4.6 and 4.11 were applied to ensure that the site was appropriately developed and that fauna would be protected.

In relation to the subdivision of the land, it is considered that the specifics of the land have changed, in that it is now sought to consolidate the bulk of Lot 3 onto land located on the other side of the creek, which creates a large parcel of land and allows for a viable horse riding operation to continue to operate from the township. While the re-subdivision creates an additional lot within the valley floor, it does not result in the creation of an opportunity for an additional dwelling to be developed. Lot 1 will contain a dwelling approved by Planning Permit 97/7281 and Lot 2 will contain the existing dwelling which has been developed on the land at 115 Bimbadeen Road, Fairhaven. The provisions of the Rural Conservation set out that only one dwelling can be approved on a lot. The amendment of the Agreement will not allow the construction of additional dwellings on the valley floor.

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

The re-subdivision of the land will allow horses to continue to graze on the land in much the same way as they currently do. It is not considered to result in a discernible visual outcome for the site and surrounding area. While it is noted that VCAT decided to reduce the number of lots on the valley floor from four to three, it is not considered that the amendment to the Agreement would erode VCAT's decision for the land. The VCAT determination outlines the decision to reduce the lots from four to three on the basis that the number of dwellings approved would be reduced to three, and sought to protect views from the south of the valley which were identified as being particularly valuable. The ability to re-subdivide Lot 3 is not considered to erode, or impact on the important views of the valley from the south given that there will not be an opportunity to develop an additional dwelling on the land. The location of the future dwelling site has been approved by VCAT.

The merits of the re-subdivision are the subject of a separate application.

It is open to Council to:

- a) decide to amend the Agreement in accordance with the proposal
- b) decide to amend the Agreement in a manner that is not substantively different from the proposal
- c) propose to amend the Agreement in a manner that is substantively different from the proposal
- d) refuse to amend the Agreement.

There is an ability to appeal Council's decision through VCAT.

If Council decides to amend the Agreement in a manner which is substantively different to the proposal there would be a need for re-notification of the application as outlined in Section 178C and E of the *Planning and Environment Act 1987*. Officers have sought legal advice on the words 'substantively different' and have been advised that if Council was to amend the Agreement in accordance with only part of the proposal (ie support dot point 1 only), Council is effectively proposing to amend the agreement in a manner which is substantively different from the advertised proposal. This view was taken having regard to the ordinary meaning of the word 'substantive' as 'meaningful or considerable'.

Council has also been advised that Section 178E of the *Planning and Environment Act 1987* doesn't provide Council with an option to agree to part of a proposal to amend an agreement but refuse another part. Council's lawyers were unable to identify any Tribunal decisions discussing the application of Section 178E in this context.

The applicant has an express right of review in respect of Council's ultimate decision in Section 184A (1)(A) of the Act. It provides that the person who applied to amend an Agreement may apply to the Tribunal for review of Council's decision under Section 178E 'to amend the Agreement in a manner that is different to the proposal.'

Financial Implications

There are no direct financial impacts to Council for the processing of the application which occurs via operational budgets.

Council Plan

Theme	1 Environment
Objective	1.1 Preserve and enhance the natural environment
Strategy	Nil
Theme	2 Governance
Objective	2.4 Transparency in decision making and access to information
Strategy	2.4.1 Communicate decisions clearly and in a timely manner.
Theme	5 Development and Growth
Objective	5.1 Protect productive farmland and support rural business
Strategy	5.1.2 Work with local businesses

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

Policy/Legal Implications

There are no legal implications for the consideration of this application.

The *Planning and Environment Act 1987* guides the decision making process.

Officer Direct or Indirect Interest

No officer involved in the preparation of this report has any conflicts of interest.

Risk Assessment

The merits of the application are yet to be determined.

Social Considerations

Key themes raised in objections include the impact of the amendments on the Painkalac Valley which is valued by the Aireys Inlet community.

Blazing Saddles is a tourism related industry which provides local employment.

A number of local residents agist their horses on the land.

These issues will be considered in the analysis of the proposal and the recommendation to Council.

Community Engagement

The planning permit application was placed on public notification. Public notification of the proposal has generated 115 objections.

Environmental Implications

Objectors have highlighted the importance of the Painkalac Valley from an environmental perspective.

Communication

A copy of the Council's decision will be provided to the applicant and all submitters.

Conclusion

The objections received have detailed a number of significant matters that require careful consideration. These are to be presented to Council via the Hearing of Submissions meeting.

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

APPENDIX 1 OA2558 - LIST OF REGISTERED SPEAKERS - 23-79 BAMBRA ROAD AIREYS INLET

Hearing of Submissions

Tuesday 14 March 2017

4:00pm

Council Chambers
1 Merrijig Drive, Torquay

ORDER OF SPEAKERS

23 Bambra Road, Aireys Inlet – OA2558

Item	Time	Submitter
1.	4.00pm	Maree Coote & Lex Ridgeway
2.	4.10pm	Edward Richmond
3.	4.20pm	Rachael Ann Faggetter
4.	4.30pm	Adrienne Clarke
5.	4.40pm	Gael Jennings
6.	4.50pm	Charlotte Allen (AIDA president)
7.	5.00pm	Brydon King (acting on behalf of applicant)
8.	5.10pm	Adam O'Halloran (applicant)
9.	5.20pm	Tim Wood (applicant)

1.2 OA2558 - Amend a Section 173 Agreement: 23-79 Bambra Road, Aireys Inlet

APPENDIX 2 OA2558 - LIST OF ALL OTHER SUBMITTERS - 23 BAMBRA ROAD AIREYS INLET

List of all other submitters

Nan McNab

David Isaac & Trudy Wyse

Stuart Menzies & Susan Geraghty

John Hughes & Carole Sklan

Peter McPhee

Gael Jennings

Kim Dalton & Penny Robins

Andrea McLaughlin

M Seeger & J Austin

Monika Gehrt & Bryce Menzies

GF& LM Powell

Geoffrey McNaughton

Anna Dalton

S & J Harnett

S & J Downey

J & G Healey

D & L Ford

NJ Harding & HA Lawless

MJ & GJ Healey

Painkalac Pastoral Co Pty Ltd

SJ Egan

J Wilson

S Chambers & R Carroll

H M Wilson

David Ritchie & Michelle Dewar

Ian Godfrey & L Ord

Max Dalton

D & A Stubbings
LJ & RA Healey
GC & WM Johnson
Megan Short
Stephen & Kerry Harris
Lis Wood & Kate Driscoll
P & P Brockwell
Bron Ives & Brian Agland
Heather Lawson
Barbara Leavelsley
Natalie Utmar & Gavin Cross
Roger Galy
Tim & Sarah Day
A & D Lamb
P & D Love
Jennifer York
B Hammond & C Ryan
Julie Matthers & Bill Spiteri
Clarke Veale
Libby Mears
GJ McIntosh
A & V Turnbull
DJB & MA St John
Mary Anny Boyd-Squires & Elena Mitchell
HN & JF Senbergs
Jane Grant
G Nicoletti, L Cade & D O'Connell
Linda Lee Phalp

Wildwood Nord Pty Ltd

Mark Wellard

Jane Stephens

Sandra Fairthorne

F J Escott

Janice Carpenter

Simon Horsburgh

Simon Braxton & Eva Hall

S Gell

I & A Porter

A D Trood

Mary T Prince

Gregory Day

E Lowe & L Wicks

Valdi Kapelis

Gabriel Fuller

June Laurie

Rod Tucker

Brenda Roberts

Gretel Lamont

Robert Ashton

M Grutzner

Vicki McKay

Kim Neubecker

Marek Sikora & Rachel Juriznsz

Deborah Chemke

Jacqui & David Lamont

Kristin McDonald

Cornelia Jaeger & Deborah Mayall
Marcus Rodda
Elizabeth & Colin Gomm
Mary-Jane Gething
David & Ellinor Campbell
A Davies & M Tehan
Sue Guinness
David & Robyn Buckley
N & R Millen
Malia McCutcheon
E Stapleton
Geoff Brown
LK McCrindle & MO McCutcheon
P Dunai
Angela Berry
R & L Woodger
Claire Hanley
DA & AJ Robertson
Lynn Barnett
JA & JH Lawlor
Doug Humann
JO Murray
Graham Hobbs & Ulrike Wurth
Mishelle Noe
Margaret McDonald
Elizabeth Lee & Ewan Hanmer
L & D Court

Close: There being no further items of business the meeting closed at 5.42pm.