

# **Failing of the environmental laws we already have. Submission from Save Tootgarook Swamp Inc;**

## ***for the senate inquiry of The effectiveness of threatened species and ecological communities' protection in Australia***

### ***Foreword.***

This submission may seem a bit strange, I wish to point out and show the failings of protections we already have for an area on the Mornington Peninsula, the Tootgarook Swamp. I have spoken to many people and similar occurrences are happening all over Victoria. The matter is complex and shows how many small matters can affect the larger picture. I hope you can follow how, letdowns and failures from the body can carry over and affect the next body or part of legislation and it just snowballs into destruction.

With the senate inquiry looking into the below I will show how this is already failing at a local and state level.

The effectiveness of threatened species and ecological communities' protection in Australia, including:

- (a) management of key threats to listed species and ecological communities;
- (b) development and implementation of recovery plans;
- (c) management of critical habitat across all land tenures;
- (d) regulatory and funding arrangements at all levels of government;
- (e) timeliness and risk management within the listings processes;
- (f) the historical record of state and territory governments on these matters; and
- (g) any other related matter.

I will demonstrate how this is having a flow on effect to our environment legislation, weakening it and most importantly effecting the land and wildlife itself.

### ***Submission.***

The Tootgarook swamp is a shallow fresh water marsh it is 380 hectares in size, has recordings the EPBC listed Australasian Bittern, the EPBC migratory protected, Greenshank, Glossy Ibis, Latham's Snipe, Marsh Sandpiper, Sharp Tailed Sandpiper, White-throated Needletail, Eastern Great Egret, and Eastern Cattle Egret. The FFG listed, White-bellied Sea-eagle, Intermediate Egret, Baillon's Crane, Australian Shoveler, Swamp Skink, White-footed Dunnart, and Lewin's Rail.

On top of this list are the species that are in the near threatened categories of both the FFG and EPBC act. The swamp contains at least nine bioregional endangered vegetation communities and a FFG listed community of Coastal Moonah Woodland.

Of the fauna listed above to have an FFG listed action statement made and recovery plan by the state of Victoria I have been able to find on the Victorian DSE website is for the three Egret species. This is in spite of the fact that all are required an action statement.

In August when the places you love campaign started I wrote a letter to our Prime Minister Julia Gillard, about the issue of failings with our current system and that laws should not be weakened, they should be enforced.

19<sup>th</sup> of August 2012

Dear Prime Minister,

I am deeply concerned about the Tootgarook Swamp in Rosebud West Victoria. The Mornington Shire Councillors have voted twice to have a report in to the rezoning of the northern part of the swamp twice. This occurred in 2000 and again in 2003, council officers have been making excuses for not doing this that are frankly invalid.

One month ago I contacted their governance department asking why this was not done it is still sitting there. There currently is a rush by developers to build within the swamp and inaction by the Mornington Shire is putting this swamp that according to Melbourne Water meets Ramsar Criteria. From Everything I have witnessed our environmental laws are not strong enough, filling in of wetlands is occurring here, inadequate ecology reports, illegal vegetation removal, stealing of public land, illegal extending of permits outside allowable time, illegal amending of permits that should have been referred back to VCAT.

How can I as an individual fight such things when no one in a local government takes this seriously? It has taken almost a year of saying that Acid Sulphate soils are in Tootgarook Swamp to get the shire to investigate this with Victorian DPI. Melbourne Water and Victorian DSE did not seem interested when we first brought this up, as just a simple thing as disturbance of these soils or draining of water from these soils can have devastating effects on a wetland ecosystem. With the EPBC listed Australasian Bittern as well as JAMBA, CAMBA, and ROKAMBA birds in the Swamp acidification of Wetlands is a large threat to its existence, as well as many other wetland plants and animals.

Who am I? I'm just an ordinary full time retail worker who cannot believe that my taxes go to departments that don't seem to investigate things thoroughly enough, if that is the case why do we bother to fund them, why do we bother to teach and educate that these things need saving as when it comes to it no Government department seems to want to.

So far in Victoria DSE has been a big letdown with the states FFG laws, this was pointed out by the states auditor general The Flora and Fauna Guarantee Act 1988 (the Act) was passed to conserve threatened species and ecological communities and to minimise activities that posed a threat to Victoria's ecosystems. In the 21 years since its inception, 653 species have been listed as threatened under the Act. By contrast, the department's own 'advisory' list contains over 2,200 species, many of which would qualify for threatened status under the Act. Of those species listed as threatened, less than one-half have had an action statement prepared, and only a handful of these action statements have been reviewed and updated.

If the current environmental laws safeguard our way of life, protect our land and wildlife, and ensure that our air and water are not polluted by destructive development. I am extremely concerned of what the future may hold from an aggressive plan to wind back critical environmental protection laws that protect our land, water and wildlife.

History has shown us that the Federal government has a critical role in protecting matters of national environmental significance, which it must not abdicate. The state of Victoria is currently not protecting our threatened natural heritage. The federal government has had to step in to prevent irreversible harm to our iconic landscapes and wildlife. At least at the moment there is a three tier approach to protecting the environment, which I believe should be strengthened. The EPBC act should have the ability to administer the state acts e.g. FFG act when the state has failed to do so appropriately, not just matters of national importance. The way I see it if it the states had managed their acts correctly we would not have pushed our flora and fauna species to breaking point,

needing federal protection under the EPBC act. At the end of the day the environment belongs to all Australians not just to the individuals in each State.

Time and time again I have asked myself what is it to be Australian? It is the love of the land; the first Australians know that because it's their heritage we are destroying... While we still go down this path of colonisation believing that we can beat the land into submission we will never be true Australians.

Due to unrestrained development our environmental assets are in a state of decline, we need stronger environmental laws not weaker ones. I call on you to reject the proposals laid out in the Council of Australian Governments (COAG) agenda that would fast-track the transfer of federal approval powers to state governments, wind back the Environmental Protection and Biodiversity Conservation Act and allow states and territories to fast-track major development projects.

**Kind Regards,  
Cameron Brown**

Considering the above letter I have now been to VCAT on the 28<sup>th</sup> of November taking enforcement action against the developer and the Mornington Peninsula Shire. I have had to take the position of the Responsible Authority in this matter.

We say that the responsible authority illegally extended the permit by at least three years, this illegal extension, removed legalisation that would have otherwise needed to be done if a fresh permit had been applied for. Such as a cultural management plan (Victoria), a new ecology report, native vegetation offsets, department of sustainability and environment (Victoria) referral, possible EPBC (Federal) referral as Latham's Snipe had been recorded in the area. It also avoided a LSIO (Land Subject to Inundation Overlay) referral and an increased buffer zone along the creek line by another 5 meters. This avoidance we say resulted in the death of at least 5 native animals and one FFG listed swamp skink at the site.



**FFG listed swamp skink 3<sup>rd</sup> of March 2012.**

Another alarming notion for the same lot is that on the 13<sup>th</sup> of August 2012 a question was raised to the Mornington Shire at public question time in regards to de-watering of a site within the Tootgarook Swamp.

## MINUTES OF THE COUNCIL MEETING HELD – MONDAY, 13 AUGUST, 2012

### Question Time (Cont'd)

- **Subdivision at 85 Elizabeth Avenue, Rosebud West**

Mr. Norman McKinlay, a resident of Rye, asked the following question: ... *"Has the developer of 85 Elizabeth Avenue, Rosebud West gained approval to de-water the site into Chinaman's Creek. Is Council aware that today the developer is discharging untreated water into our award winning creek. Will Council take immediate action tonight to stop what I consider an illegal action. Is Council aware that an unattended pump is operating out of hours, noisily annoying local residents including that of the Village Glen and in possible breach of the Health and Safety Act, and Site Environmental Management Plan."*

The question was answered at the meeting by Mr. Stephen Chapple, Director – Sustainable Environment who responded that any issue that you suspect is causing pollution we would suggest your first call is to the Environment Protection Authority. An Environmental Health Officer has been instructed to inspect the site and we will then forward a response based on that investigation

### Mornington Shire Minutes concerning De-watering.

The de-watering increased over time ending up with three large industrial pumps and is now subject to another VCAT hearing between the responsible authority and the developer. Our concern is this only occurred after pumping was commenced 24 hours a day for

approximately 2 weeks starting from Melbourne cup weekend. The responsible authority seemed only to act when complaints of noise were raised considering the time difference between the 13<sup>th</sup> of August 2012 and the ceasing of pumping on the 27<sup>th</sup> of November 2012.

At the VCAT hearing on the 28<sup>th</sup> of November the Mornington Shire revealed that they have had an expert come and examine the de-watering and 85 million litres of water had been removed from the Tootgarook swamps aquifer, and that they believed that damage to the greater wetlands had occurred.

The rain that had come this year had seen the swamp return to levels that had not been seen for over a decade, it was much needed rehydrating of the ground aquifer that would give the swamps 380 hectares the opportunity to rejuvenate its endangered vegetation communities,

mornington legal & conveyancing  
pty ltd

Our Ref: ADS/JE/212244  
Your Ref: P3313/2012

27 November 2012

The Principal Registrar  
VCAT  
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**URGENT**

BY FAX NO 9628 9789      ATTENTION: MEMBER COOK

Dear Sir/Madam

**RE: Mornington Peninsula Shire v. TJB Pty Ltd and Maw Civil Pty Ltd**  
**VCAT Application for Interim Enforcement Order**  
**Property: 85 Elizabeth Avenue, Rosebud West**  
**Proceeding No. P3313/2012**

We act on behalf of the Mornington Peninsula Shire Council in the above enforcement proceeding.

In that proceeding Council seeks an enforcement order pursuant to section 120 of the Victorian Civil and Administrative Act 1987 ("Act").

Due to the First Respondent confirming that dewatering of the subject site has now ceased, Council no longer intends to press for the orders on an interim basis and instead respectfully requests that the Tribunal lists the matter for an enforcement proceeding pursuant to section 114 of the Act following the Tribunal's determination of the validity of the permit which the subject of proceeding 2467/2012.

Yours faithfully

Per: 

MORNINGTON LEGAL & CONVEYANCING PTY LTD

c.c. Best Hooper - Fax no: 9670 2954  
c.c. Maw Civil Pty Ltd - Fax no: 5981 4319  
c.c. Melbourne Water - Fax no: 9679 7399  
c.c. cameronbrown1976@gmail.com

### Enforcement action for de-watering subject to another hearing on validity of planning permit, VCAT P2467/2012



naturally reduce weed invasion and increase its food offering, and therefore breeding ground for all the fauna contained within the swamp. The illegal de-watering affected all of this as having occurred in spring dropping the water level over such a wide area, as Tootgarook swamp is a Shallow fresh water marsh as well as a peat regenerating wetland.



The largely unprotected Tootgarook Swamp August 2012

This example of how something, which seems at the edge of an area such as the swamp, can have a flow on effect into the greater area. It shows the increased need that we should have in terms of buffer zones and the types and intensity of development that we place there.

Many things have occurred within the Tootgarook swamp including illegal clearing of land. With no buffer zones around the edge of the swamp and largely no protection illegal land clearing is occurring, this is even though the vegetation is bioregionally endangered. Parts of a shire reserve have been annexed for a golf course and endangered swamp scrub removed with the suggestion of a land sale occurring instead of enforcement action. Developers illegally clearing grassland FFG vulnerable southern Gippsland plains grassland on private land and then sowing an agricultural seed on the residential zone1 land. Which is contained within a shire bushland reserve which is also zoned residential? Interestingly enough this is before a developmental proposal was put forth. A major concerning fact is that evidence exists for remediation, and no action has been taken as yet. This suggestion was given when felt the developers ecology report was lacking, a view Melbourne water also took, though ignored by the responsible authority. We have since got a peer review of the site and will be using it to press this matter of illegal clearing with the shire.

Another illegal land clearance occurred very close by with the same characteristics, clearing of native vegetation and then the sowing of an agricultural seed, just after a developmental proposal was rejected. The land had an ecology report done in 2005 stating that the area was state significant. FOI documents have revealed that this report was never given to the Mornington Peninsula shire. We highly suspect that the remediation for this block is not

based on this original report, but another that has occurred after land destruction. This will not show the true value of the land and we are meeting with shire to show our evidence and hopefully achieve a better outcome.

Why is it so hard? We have legislation, why is this legislation not followed by local and state governments? Why do ordinary citizens have to spend their hard earned dollars to keep protecting the environment if our laws are so fantastic? If we can't get these basic things right what hope do we have of protecting the critical habitat and animals.



**The Federally protected Australasian Bittern Photographed on the 17th of September 2011.**

Within these areas of illegal clearance, and inappropriate developments the Australasian Bittern has been sighted over 17 times by a member/s of Birdlife Australia since 2008. It also shows up in the same area on the maps below from the Ecology report of 85 Elizabeth Ave from 2005.

This shows the pressure that our endangered species are facing, the habitat in which the Australian Bittern has been seen so many times is under threat; it is not the only endangered animal in this area. Interestingly enough DSE has none of this data, we have been told that DSE is in the middle of an upgrade to their database and has not been able to add recordings to it from the last 5 years. DSE has also not completed action statements for so many of the animals on the FFG act list and fails dismally in this respect of recovery plans for threatened species. This would be an absolute disaster if federal laws were handed to DSE considering their current ability to cope with the state of Victoria's endangered and near threatened animals and plants.

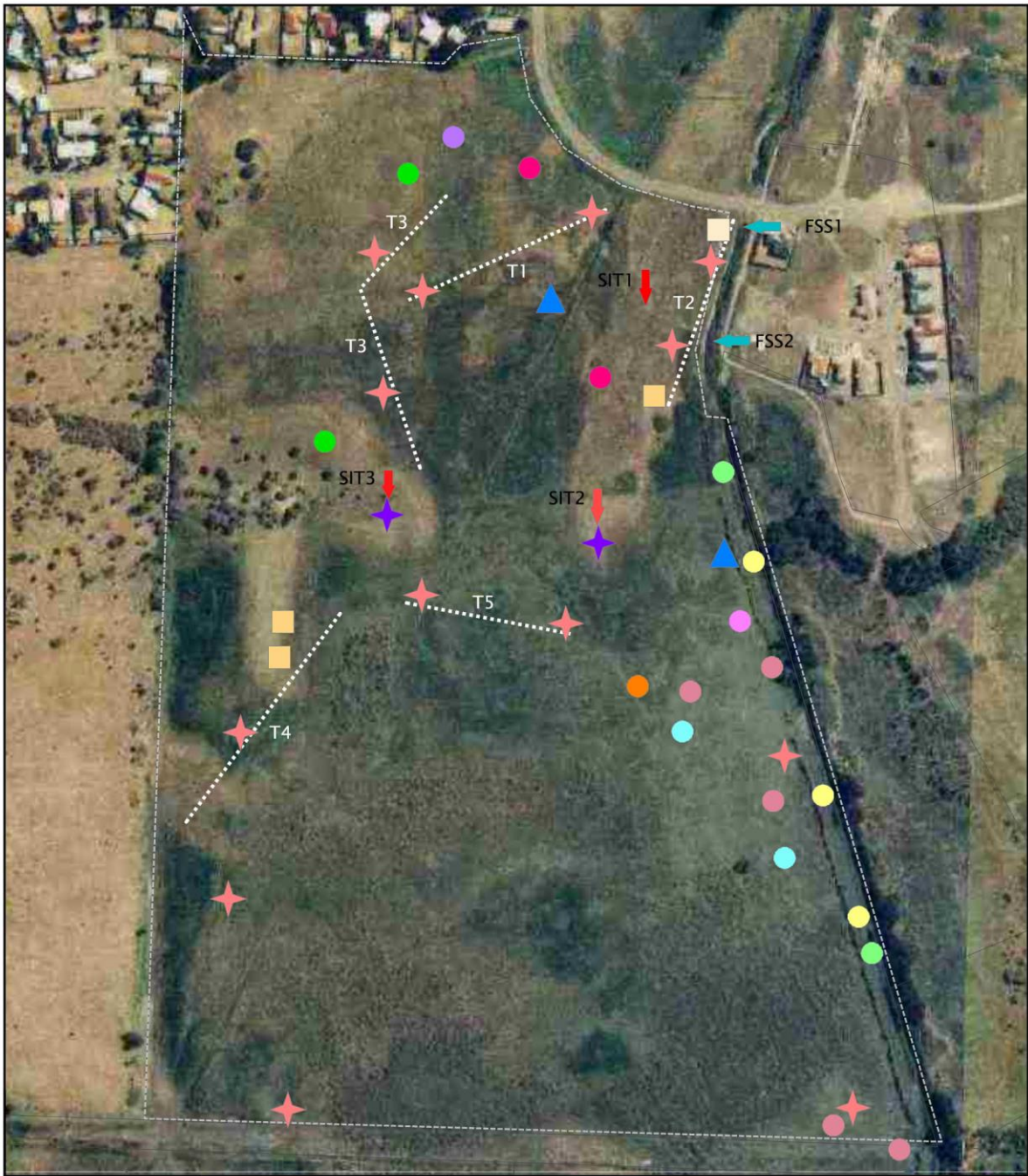


We have been told that the front 1/3 of this block would not be remediated something that concerns us greatly as it complex EVC and provides a higher habitat value.



**From the Ecology report for 92 Elizabeth Ave. The report was not submitted to shire with a planning permit, the land was illegally cleared after the planning permit was rejected.**





**LEGEND**

- |                                   |                              |               |                          |              |                        |
|-----------------------------------|------------------------------|---------------|--------------------------|--------------|------------------------|
|                                   | Elliot trap transect (T1-5)  | <b>Birds:</b> |                          | Hardhead (V) |                        |
|                                   | Fish sampling site (FSS 1-2) |               | Nankeen Night Heron (NT) |              | Australian Bittern (E) |
|                                   | Sheet iron trap (SIT 1-3)    |               | Latham's Snipe (NT)      |              | Sharp-tailed Sandpiper |
| <b>Reptiles &amp; Amphibians:</b> |                              |               | Marsh Sandpiper          |              | Lewin's Rail (V)       |
|                                   | Southern Toadlet (V)         |               | Buff-banded Rail         |              | Spotless Crake         |
|                                   | Swamp Skink (V L)            |               | Royal Spoonbill (V)      |              |                        |
|                                   | Glossy Grass Skink (NT)      |               |                          |              |                        |
| <b>Mammals:</b>                   |                              |               |                          |              |                        |
|                                   | Swamp Rat                    |               |                          |              |                        |

**NOTES**

Scale bar indicative only  
 Conservation Codes DSE (2003):  
 E: Endangered  
 V: Vulnerable  
 NT: Near Threatened  
 L: FFG Listed

Mapping by Andrew Picone & Christine Connelly  
 Survey undertaken Sept-Dec 2005  
 Survey by Malcolm Legg  
 Generated using Tumaus mapping software  
 Version | 01 | Finalised | 04.01.06

**Significant Fauna Sites and Survey Locations**  
 92 Elizabeth Avenue Rosebud

**Practical Ecology Pty Ltd**

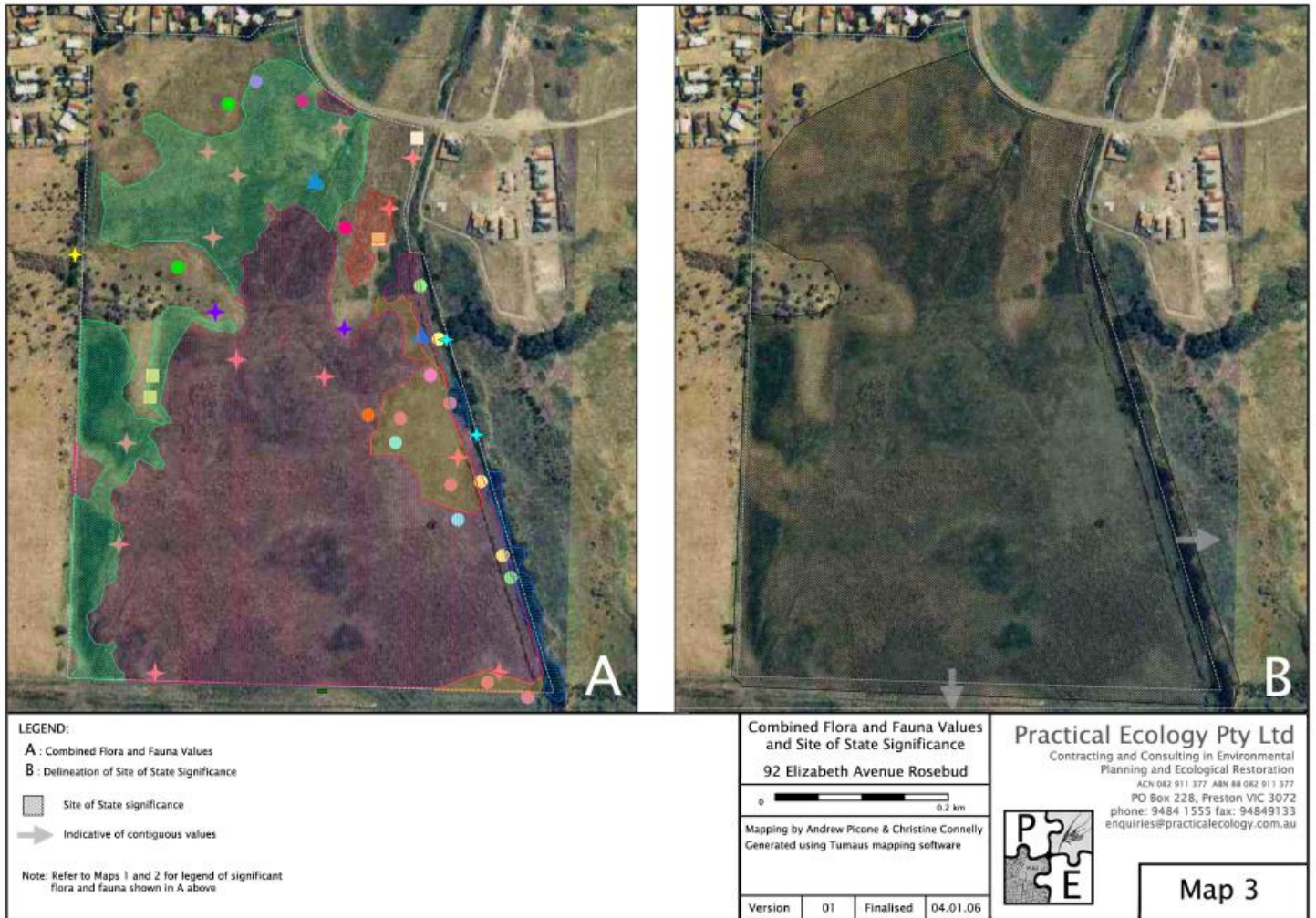
Contracting and Consulting in Environmental Planning and Ecological Restoration  
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**Map 2**

**From the Ecology report for 92 Elizabeth Ave. The report was not submitted to shire with a planning permit, the land was illegally cleared after the planning permit was rejected.**





**From the Ecology report for 92 Elizabeth Ave. The report was not submitted to shire with a planning permit, the land was illegally cleared after the planning permit was rejected.**

How can we protect these critically endangered animals and plants when we just can't get the basic legislation to be followed correctly?

Developmental threats occur from inaction of two shire resolutions from 2000 and 2003 requesting a report into rezoning within the Chinamans Creek catchment. It is unknown what these may have revealed or suggested. I have had great difficulty in finding out why these recommendations were not followed within reason.

MINUTES OF THE ORDINARY MEETING OF COUNCIL HELD – 08/11/00 (CONT'D)

SECTION 4 – NOTICES OF MOTION

4.1 Notice of Motion No. 96 (Cr. Bell)

Cr. Bell has given notice of her intention to move:

“ That the Manager – Conservation and Environmental Services be requested to prepare a report for Council which addresses the appropriateness of existing controls on development and works within coastal cliff zones, especially where the cliff is unstable or has the potential to be destabilised by development and/or works”.

COUNCIL DECISION

MOVED: CR. BELL  
SECONDED: CR. GIBB

THAT NOTICE OF MOTION NO. 96 BE ADOPTED.

CARRIED

4.2 Notice of Motion No. 97 (Cr. Bell)

Cr. Bell has given notice of her intention to move:

“ A report is requested to consider the present zoning of the land (Chinamans Creek) as described in Item 2.1.7 from the Development Approvals Committee Meeting held on the 23 October 2000, and whether this zoning is supported by this Council. The report is to also discuss future management/zoning options that may be available”.

COUNCIL DECISION

MOVED: CR. BELL  
SECONDED: CR. GIBB

A REPORT IS REQUESTED TO CONSIDER THE PRESENT ZONING OF THE LAND (IN CHINAMANS CREEK CATCHMENT) AS DESCRIBED IN ITEM 2.1.7 FROM THE DEVELOPMENT APPROVALS COMMITTEE MEETING HELD ON THE 23 OCTOBER 2000, AND WHETHER THIS ZONING IS SUPPORTED BY THIS COUNCIL. THE REPORT IS TO ALSO DISCUSS FUTURE MANAGEMENT/ZONING OPTIONS THAT MAY BE AVAILABLE.

MINUTES OF THE DEVELOPMENT ASSESSMENTS COMMITTEE MEETING HELD  
TUESDAY 11 MARCH 2003

Application for Planning Permit  
85 Elizabeth Avenue, Rosebud West (P02/1197)

ITEM NO. 2.1.1

FURTHER MOTION

MOVED: CR. BELL  
SECONDED: CR. COUACAUD GRALEY

THAT A REPORT BE PRESENTED TO COUNCIL WITHIN SIX (6) MONTHS WHICH REVIEWS THE ZONING OF THIS LAND AND THE RESIDENTIAL LAND ON THE SOUTH SIDE OF ELIZABETH AVENUE, HAVING REGARD TO THE CAPACITY AND MANAGEMENT OF THE CHINAMANS CREEK AND ASSOCIATED DRAINAGE AREAS.

CARRIED

Council minutes with a resolution for a report into rezoning. From 2000 and 2003.



In the area of Tootgarook swamp I would suggest that management of critical habitat on private land is an absolute failure, at a local level the responsible authority does not seem interested in enforcing the management principles of the planning scheme. The clearing of FFG listed Southern Gippsland Plains Grassland. The clearing of land on the opposite side of Chinamans creek of 92 Elizabeth Ave (VCAT P2811\_2010), all within area that the Austrasian Bittern, Lewin's Rail, Great Egret, Intermediate Egret, Cattle Egret, White footed dunnart, swamp skink, Baillon's Crake and many more endangered species, all within a peat regenerating wetland the most threatened wetland type.

## 2.9 Other issues associated with the Planning Permit and not addressed by any documents reviewed

### 2.9.1 Coastal Alkaline Sulphate Soils

The development site is identified by the Department of Primary Industries (DPI 2012) as potentially containing Coastal Acid Sulphate Soils (CASS). Landform disturbance including excavation, installation of pipes, footings, and the dumping of fill has the potential to disrupt the soil profile and water table. Warping or disrupting the deeper soil profile will potentially exposing pyrite (FeS<sub>2</sub>) to oxygen in situ, thus producing sulphuric acid (H<sub>2</sub>SO<sub>4</sub>). The release of sulphuric acid into the adjacent swamp will have catastrophic effects on the ecosystem; causing a toxic environment and potentially widespread mortality of flora and fauna. There appears to be no reference to this concern in the current proposal. This issue is also discussed in section 2.6.4 above.

### 2.9.2 Potential illegal clearing of native vegetation

The removal of native vegetation prior to the Ecology Partners assessment (2010) across large portions of the site has been anecdotally noted by adjoining residents and local naturalists. We have considered this matter as part of the peer review as it is potentially fundamental to the amount of native vegetation that exists (or recently existed) at the site.

The site was mapped by the ARI study that resulted in the document *Remnant Native Vegetation on the Mornington Peninsula: Mapping and Condition Assessment* (Sinclair *et al.* 2006). The mapping that resulted from this study shows the majority of the study site to comprise of EVC 132 Plains Grassland (Figure 2), which is an FFG listed ecological community (Plains Grassland (South Gippsland) Community). It has been noted that the researchers were not granted access to the site during this study and it has been inferred that therefore they could not have determined the Ecological Vegetation Class and distribution of the vegetation. However, the ARI study was "not a desk top assessment but compiled from detailed field inspections" (Pergl 2010) and as the site is surrounded by a Council-managed Bushland Reserve, the site is accessible from more than one side via the adjoining land and is open with no visual obstructions, the site could easily have been viewed from many different locations to assess the vegetation present and determine the EVC. We would agree that the quality of the vegetation probably could not have been determined without site access, which also has not been ruled out.

**Peer review funded by members of the public, indicates that enforcement action should take place.**

The sharing and collaboration of information with DSE, Melbourne water, Mornington Peninsula Shire Council and other government departments. The reporting of illegal clearing

to appropriate government departments. DSE developing and implementing recovery plans which have not been done as mentioned by the Victorian auditor general in 2009.

[http://download.audit.vic.gov.au/files/flora\\_fauna\\_full\\_report.pdf](http://download.audit.vic.gov.au/files/flora_fauna_full_report.pdf)

It seems that funding is a key issue as we have heard many a time that DSE has not met these obligations, due to budgetary restraints. This then directly interferes with the regulatory requirements under the FFG act. This also affects timeliness, listing and then risk management, as none of this can be done due to budgetary cutbacks.

Other matters such as developers getting “green washed” ecology reports also seem to be an issue. The peer review we funded had many points of contention from the developer’s report, a view that was also shared by Melbourne Water as they also thought that the developer’s ecology report was not satisfactory. The responsible authority seemed satisfied with the developer’s report. DSE also seemingly accepted the ecology report. On top of this this was EVC mapping that was done by the responsible authority that had not been submitted to DSE along with surveys for the surrounding reserve.

We see this as a tick box approach to our native environment, with the authorities’ stance being that as long as the report exists all is ok.

No one seems to question the contents of the report, even when evidence is given that questions its findings.

Peer reviews of ecology reports should be done to improve the validity of ecology reports. Evidence should also be gathered from locals who know the area and may provide evidence.

## **Summary**

It seems that time and time again decisions that affect our endangered animals and habitat are made without proper regulatory process even by state and local government.

It seems that the processes and procedures, and expected collaboration and data sharing between levels of government are not happening effectively or not being done at all. It seems that funding is lacking and the unwillingness to apply enforcement actions, a process that could provide additional funds.

We need to meet our obligations; we need to do this to secure the heritage of all Australians especially the future ones. We need to look at ways that the information can be improved upon to streamline the process that doesn’t seem to be currently working.

The ability for members of the public to add to an official database for reported sightings with evidence of video, sound and photo and an easy way from internet connected devices such as smartphones and tablets, This way rises and falls in populations could also be monitored.

The databases need to become unified and collaborative across all levels of government in terms of our natural ecosystem. I believe it should be a federal database shared by the states and local government. The database could also be worked in with data from environmental and conservation groups. The database could then be used to make sure from a federal level that the states are meeting their obligations for actions statements to endangered species and their recovery plans. If green tape is to be changed it needs to be strengthened and streamlined in unity between all states and federal government, similar to the new Australian consumer law. A change is needed to make sure that all our animals and plants don’t make it to a critical point of extinction, this is where money would be saved.



Good data and good information, lead to a good decision, poor information and poor data will result in poor decision.

Kind Regards,  
Cameron Brown  
President

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