SUPREME COURT OF VICTORIA

Rozen v Macedon Ranges Shire Council

[2010] VSC 583

Osborn J

6-8 September, 28 October, 14 December 2010

Development Assessment — Precautionary principle — Land within open potable water catchment — Permit sought for four dwellings — Permit sought contrary to Planning Scheme objectives with respect to water quality — Contrary to precautionary principle — Contrary to Ministerial Guidelines — Exemption to Ministerial Guidelines not applicable — Evidence as to cumulative risk — Other relevant policy considerations — Town planning evidence — Ultimate test to be applied by Tribunal — Macedon Ranges Planning Scheme (Vic).

The appellants wished to erect a dwelling on each of four adjoining lots of land which they owned.

The land fell within an open potable water catchment which was not closed to private ownership and private activity.

The Victorian Civil and Administrative Tribunal (Tribunal) allowed an appeal from a decision of the first respondent (the council) against a refusal of permit. The Tribunal granted a permit for the four proposed dwellings.

On appeal to the Court, the Tribunal's initial decision was set aside, essentially because the Tribunal had failed to properly apply the precautionary principle in circumstances where the relevant planning controls invoked that principle and the respondents contended the permit application raised an issue of cumulative risk of water contamination within the catchment.

The matter was remitted to the Tribunal for rehearing, but prior to this occurring the State Government affirmed the application of the precautionary principle to permit applications of this type by adopting (in place of prior interim guidelines) Guidelines: planning permit applications in open, potable water supply catchment areas (the Guidelines).

The Guidelines affirmed a general benchmark standard of a maximum of one dwelling per 40 hectares within open, potable water catchments. They also addressed a series of other matters relating to development within such catchments.

The Tribunal held that a permit for two dwellings would be consistent with landscape and visual impact objectives, but concluded that having regard to sustainable land management and agricultural land use objectives a permit should issue for no more than one dwelling.

The purposes of the Rural Conservation Zone in the *Macedon Ranges Planning Scheme* (Vic) included:

> To conserve the values specified in the schedule to this zone.

The relevant Schedule of the *Macedon Ranges Planning Scheme* (Vic) stated as a conservation value:

> To ensure that land use within water supply catchments, most particularly proclaimed catchments, will not comprise water quality.

The Environment Significance Overlay (ESO) stated the environmental significance of the area in the following terms:

> Lake Eppalock is a major water storage and recreational facility located within the Campaspe River catchment. It is a major source of water for irrigation, stock and domestic and urban water supplies for towns within the municipality.

It further stated the following environmental objective:

> To ensure the protection and maintenance of water quality and water yield within the Eppalock Water Supply Catchment Area as listed under Section 5 of the *Catchment and Land Protection Act 1994*.

The *State Environment Protection Policy (Waters of Victoria)* (Vic) (SEPP Waters of Victoria) required application of the precautionary principle to guide decisions about the protection and management of Victoria's surface waters.

Held: (1) The Tribunal's decision should be upheld.

(2) The Tribunal's view as to the policies relating to fragmentation of land holdings and agricultural land use was open to it both as a matter of construction of the planning policy matrix applicable to the land, and as a matter of fact in the circumstances of the present case. No error of law has been demonstrated in its approach to these matters.

(3) In the application of the precautionary principle, public and private decisions should be guided by: (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and (ii) an assessment of the risk-weighted consequences of various options.

(4) If the conditions precedent are satisfied, the burden of showing that the threat of serious or irreversible environmental damage would not occur effectively shifts to the permit applicants to show that the threat does not exist or is negligible.

Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; 146 LGERA 10, followed.

(5) It was correct for the Tribunal to conclude as it did, that the Guidelines applied to the four dwelling proposal before it and that it was in breach of them.

(6) The very policies and objectives of the relevant Planning Scheme to which the Tribunal referred adopted the notion of net community benefit and sustainable development as the touchstone of acceptable outcomes. The reference to the preferable outcome on balance is an application of this test.

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

B Marsh Nominees Pty Ltd v City of Moonee Valley (2004) 17 VPR 338.

Brambles Industries Ltd v Nisselle (2005) 22 VAR 433.

Chubb Security Australia Pty Ltd v Kotzman [2010] VSC 242.

Knox City Council v Tulcany Pty Ltd [2004] VSC 375.

Macedon Ranges Shire Council v Romsey Hotel Pty Ltd (2008) 19 VR 422.

McDonald v Guardianship and Administration Board [1993] 1 VR 521.

Melbourne Water v Baw Baw Shire Council (unreported, VCAT, Vic, Liston M, 23 October 1998).

Portland Properties Pty Ltd v Melbourne and Metropolitan Board of Works (1971) 38 LGRA 6.

Returned and Services League of Australia (Victorian Branch) Inc (Glenroy Sub-branch) v Moreland City Council [1998] 2 VR 406.

Rozen v Macedon Ranges Shire Council [2009] VCAT 2746.

S v Crimes Compensation Tribunal [1998] 1 VR 83.

Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; 146 LGERA 10.

Western Water v Rozen (2008) 24 VR 133.

Zumpano v Banyule [2003] VSC 215.

Appeal

These proceedings concerned whether a proposal for four dwellings within a potable water catchment was contrary to certain government guidelines; would be contrary to the precautionary principle; and would be contrary to planning scheme objectives directed to ensuring a potable water supply within the catchment was not contaminated. The facts of the case are set out in the judgment.

N Tweedie, for the appellants.

A Finanzio and *R Watters*, for the first respondent.

M Quigley SC and *P O'Farrell*, for the second respondent.

Cur adv vult

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GLOSSARY

ADWG	Australian Drinking Water Guidelines
ESO	Environmental Significance Overlay
Guidelines	Department of Planning and Community Development (May 2009) Guidelines: planning permit applications in open, potable water supply catchment areas.
LPPF	Local Planning Policy Framework
MSS	Municipal Strategic Statement
P&E Act	*Planning and Environment Act 1987*
Planning Scheme	Macedon Ranges Planning Scheme
RCZ	Rural Conservation Zone
Septic Tank Code	EPA Publication 891.2 *Guidelines for Environmental Management Code of Practice Septic Tank Onsite WasteWater Management* Environmental Protection Authority (December 2008)
SPPF	State Planning Policy Framework
Tribunal	Victorian Civil and Administrative Tribunal

14 December 2010

Osborn J.

Introduction

1 The appellants own four adjoining lots of land west of Woodend with a combined area of 72.35 hectares. They wish to obtain a planning permit to erect a dwelling on each of these lots.

2 The land falls within an open potable water catchment. That is a catchment from which drinking water is collected for public purposes but which is not closed to private ownership and private activity.

3 In May 2007 a Division of the Victorian Civil and Administrative Tribunal (Tribunal) allowed an appeal from a decision of the first respondent (the Council) against a refusal of permit. The Tribunal granted a permit for the four proposed dwellings.

4 The Tribunal's decision was appealed to this Court by both the Council and the second respondent (Western Water) which is the authority having the function of distribution of potable water collected within the catchment.

5 In determining to grant a permit the Tribunal placed significant weight upon the compliance of the proposal with the current Septic Tank Code of Practice.[1]

6 It also took the view that the precautionary principle was not invoked in the absence of the threat of "irreversible" as distinct from "serious harm to the environment".

1 EPA Publication 891. Guidelines for Environmental Management Septic Tank Code of Practice Environmental Protection Authority (March 2003). This Code has since been replaced by EPA Publication 891.2 Guidelines for Environmental Management Code of Practice Septic Tank Onsite WasteWater Management Environmental Protection Authority (December 2008), which was valid at the time of the 2009 VCAT hearing and decision (Septic Tank Code).

7 On appeal to this Court the Tribunal's initial decision was set aside, essentially because the Tribunal had failed to properly apply the precautionary principle in circumstances where the relevant planning controls invoked that principle and the respondents contended the permit application raised an issue of cumulative risk of water contamination within the catchment.

8 The matter was remitted to the Tribunal for rehearing but prior to this occurring the State Government affirmed the application of the precautionary principle to permit applications of this type by adopting (in place of prior interim guidelines) **Guidelines: planning permit applications in open, potable water supply catchment areas** (the Guidelines).[2]

9 The Guidelines affirmed a general benchmark standard of a maximum of one dwelling per 40 hectares within open, potable water catchments.[3] They also addressed a series of other matters relating to development within such catchments.

10 The Tribunal reheard the matter and received evidence called by Western Water from a town planning witness (Mr Glossop) and a scientist with expertise in microbiology and the contamination of potable water (Dr Deere). It also heard evidence called by the appellants from two soil scientists (Mr Williams and Dr van der Graaff) with expertise in the operation of the type of waste water system proposed by the appellants.

11 The Tribunal formed the view that the appeal raised three levels of issue. First, water quality issues and in particular the application of the precautionary principle in the context of development of this type. Secondly, landscape and visual impact issues; and thirdly, sustainable land management and agricultural land use issues.

12 The Tribunal held that a permit for not more than two dwellings should be granted because of unacceptable risks of water contamination associated with increased dwelling density. The Guidelines do not make clear how the 1:40 hectare density is to be measured spatially[4] and both of the respondents conceded in the present case that two dwellings on the subject land could be regarded as reasonably consistent with the Guidelines. The Tribunal further held that a permit for two dwellings would be consistent with landscape and visual impact objectives, but concluded that having regard to sustainable land management and agricultural land use objectives a permit should issue for no more than one dwelling.

13 The appellants now seek to challenge the Tribunal's decision. They contend

2 Department of Planning and Community Development (May 2009) Guidelines: planning permit applications in open, potable water supply catchment areas.

3 Guideline 1 states in full:

> Where a planning permit is required to use land for a dwelling or to subdivide land:
> - the density of dwellings should be no greater than one dwelling per 40 hectares (1:40 ha); and
> - each lot created in the subdivision should be at least 40 hectares in area. This does not apply if a catchment management plan, water catchment policy or similar project addressing land use planning issues and the cumulative impact of onsite waste water/septic tank systems has been prepared for the catchment, and the objectives, strategies and requirements of the plan or project have been included in the planning scheme.

4 That is solely by reference to the land in issue or by reference to the land and the surrounding area in which it is contained and if so how?

firstly that the Tribunal erred in resolving the water quality issues as it did, because it misdirected itself as to the application of the Guidelines, and in the application of the precautionary principle, and failed to have regard to evidence called from Mr Williams.

14 They contend further that the Tribunal misdirected itself in resolving the agricultural land use issues against the appellants because it misapprehended the relevant planning policy framework, failed to have regard to the town planning evidence of Mr Glossop, and failed to apply the correct test in determining that only one rather than two dwellings should be permitted.

15 For the reasons which I elaborate below I have come to the view that the Tribunal's decision should be upheld. First the Tribunal's decision as to water quality was founded on a series of alternative conclusions, each of which was sufficient to dispose of this aspect of the case adversely to the appellants:

(a) the proposal for four dwellings was contrary to the Guidelines;

(b) the grant of the proposed permit for four dwellings would be contrary to the precautionary principle; and

(c) the grant of the proposed permit for four dwellings would be contrary to planning scheme objectives directed to ensuring the potable water supply within the catchment was not contaminated.

16 The second and third conclusions were open to the Tribunal on the evidence before it and each is sufficient to dispose of the water quality issue. The first conclusion raises questions of the interpretation and application of an exemption within the Guidelines. In my opinion the preferable view is that the exemption did not apply, but even if I am wrong as to this, the other conclusions to which I have referred mean that error in this respect would not constitute a vitiating error.[5]

17 The Tribunal's view as to the policies relating to fragmentation of land holdings and agricultural land use was also open to it both as a matter of construction of the planning policy matrix applicable to the land, and as a matter of fact in the circumstances of the case. I do not accept that any error of law has been demonstrated in its approach to these matters.

18 Likewise, I am satisfied that when the Tribunal's reasons are read as a whole, they demonstrate that it applied the proper test in determining whether two dwellings would be an acceptable planning outcome. Before turning to the reasons for these conclusions it is convenient to repeat my previous summary of some threshold facts:

> The four lots have a combined area of 72 hectares. Each of the lots has a frontage

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5 *Portland Properties Pty Ltd v Melbourne and Metropolitan Board of Works* (1971) 38 LGRA 6, 18 (Smith J) and 22 (Adam J), applied in *Zumpano v Banyule* [2003] VSC 215; *B Marsh Nominees Pty Ltd v City of Moonee Valley* (2004) 17 VPR 338. Smith J stated at 18 in *Portland Properties Pty Ltd v Melbourne and Metropolitan Board of Works* (1971) 38 LGRA 6 that:

> … the appellant, in order to succeed in this case, has to demonstrate to the satisfaction of this Court that the Town Planning Appeals Tribunal [a predecessor of the Tribunal] went wrong in law in arriving at its decision. It would not be enough for the appellant to show that the Tribunal's reasons for its decision are so expressed as to suggest the possibility that the Tribunal proceeded upon a wrong view of the law. This Court is not entitled to interfere with the decision unless it is satisfied that there was, in fact, a vitiating error of law.

> to the Campaspe River, which flows downstream into the Campaspe Reservoir (which supports the town of Woodend). In turn, the Campaspe Reservoir forms part of the water storage system within the catchment of Lake Eppalock.[6]
>
> The site thus sits within what is classified as an open potable water supply catchment. It is open in the sense that it is not in public ownership and is open to access by private individuals without regulation by the catchment authority.
>
> The four lots which are the subject of the present appeal are irregular in shape as a result of their river frontage and their respective areas range from 15.45 to 24.08 hectares.
>
> The land is located about seven kilometres from Woodend and is currently used for agricultural purposes. It is located in a Rural Conservation Zone and covered by an Environmental Significance Overlay Schedule 4 (Eppalock Proclaimed Catchment) pursuant to the relevant planning scheme.
>
> A permit is required to erect a dwelling pursuant to the zone control and there is a further permit requirement pursuant to the overlay control for buildings and works generally.[7]

19 I turn now to the water quality issues, which comprised the focus of the first level of the Tribunal's enquiry.

Water quality issues

20 The permit application proposed the installation of automated secondary treatment waste water treatment facilities for each dwelling as well as a range of detailed siting and management conditions relating to those facilities.

21 Nevertheless the Tribunal concluded that the proposal for more than two dwellings on the subject land was unacceptable for three reasons relating to water quality:

(1) it breached the applicable Guideline which stipulates a maximum density of 1:40 hectares;

(2) it breached the precautionary principle; and

(3) it did not achieve compliance with the express provisions of the *Macedon Ranges Planning Scheme* (Planning Scheme) directed to protecting water quality within the water catchment.

22 Counsel for Western Water submitted that the Tribunal's conclusion that Dr Deere's evidence should be accepted provided a further independent basis for reaching the conclusion it did. The Tribunal however expressed its conclusions in the way I have set out above and treated Dr Deere's evidence as supportive of those conclusions and in particular the second and third conclusions that the grant of the proposed permit would be contrary to the precautionary principle and would be contrary to Planning Scheme directives directed to ensuring that potable water supply within the catchment was not contaminated.

23 It is appropriate in the first instance to deal with the water quality issues by reference to the Tribunal's express framework of reasoning but it is convenient to do so by reference to its conclusions in reverse order.

Permit contrary to Planning Scheme objectives

24 In my view the third conclusion is necessarily dispositive of the water quality issue, whatever may be said with respect to the applicability of the Guidelines or the consequences of the precautionary principle which underlies them.

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6 The catchment areas are listed within the *Catchment and Land Protection Act 1994*, Sch 5.

7 *Western Water v Rozen* (2008) 24 VR 133 at 134-135.

25 The Tribunal expressed the third conclusion as follows:

> Given the primacy of water quality considerations in the planning scheme, we also consider that four dwellings cannot be supported having regard to the zone and overlay provisions applying to the land.[8]

26 The Tribunal was correct to recognise that both the zone and overlay provisions, pursuant to which it was asked to exercise its discretion, expressly recognise the primacy of water quality considerations. The purposes of the Rural Conservation Zone include:

> To conserve the values specified in the schedule to this zone.[9]

27 The relevant Schedule states as a conservation value:

> To ensure that land use within water supply catchments, most particularly proclaimed catchments, will not comprise water quality.[10]

28 The Environment Significance Overlay (ESO) states the environmental significance of the area in the following terms:

> Lake Eppalock is a major water storage and recreational facility located within the Campaspe River catchment. It is a major source of water for irrigation, stock and domestic and urban water supplies for towns within the municipality.[11]

29 It further states the following environmental objective:

> To ensure the protection and maintenance of water quality and water yield within the Eppalock Water Supply Catchment Area as listed under Section 5 of the *Catchment and Land Protection Act 1994*.[12]

30 Under both the Schedule and the Overlay, the control specific decision guidelines require consideration to be given to the impact of the use and development on the water catchment.

31 The above provisions make clear an explicit intent to "ensure" that water quality is not compromised within the catchment. That intent is also elaborated in both the SPPF and LPPF[13] but it is unnecessary to go to these policies for present purposes.

32 It was open to the Tribunal to refuse a permit for four dwellings if it was of the opinion that this was necessary to "ensure" the protection and maintenance of water quality.

33 In turn the evidence of Dr Deere plainly justified this conclusion. The Tribunal summarised the key components of his evidence as follows:

> It was Dr Deere's expert view that the application for a planning permit for four dwellings cannot be supported as development and use of dwellings in an open, potable water supply catchment at a density less than 1:40 ha cannot be supported. He gave evidence that pathogens can result in human harm. Pathogens can contaminate waters in open water supply catchments and can present most risk

8 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [93].

9 *Macedon Ranges Planning Scheme*, cl 35.06.

10 *Macedon Ranges Planning Scheme*, Sch 1 to the Rural Conservation Zone.

11 *Macedon Ranges Planning Scheme*, Sch 4 to the Environmental Significance Overlay.

12 This extract from Sch 4 to the Environmental Significance Overlay appears to contain a misprint. Section 5 of the *Catchment and Land Protection Act 1994* binds the Crown. Section 10 authorises creation of catchment and land protection regions, while Sch 5 to the Act names and defines the areas.

13 State Planning Policy Framework and Local Planning Policy Framework.

when those pathogen sources are from human origins, including from waste water treatment plants. He emphasised that risks arose not so much from a properly functioning, well maintained waste water treatment plant, but from the failure of onsite waste water management systems. Exacerbating issues for the ongoing effective operation of onsite water management systems include institutional limitations, temporal limitations (as new systems becomes old) and human limitations (human error and/or deliberate changes to the operation of the onsite waste water system).

Dr Deere supported the 1:40 ha dwelling density limitation in both the Interim Guidelines and the current Guidelines because:

> It provides an adequate benchmark for protection of the water supply from human pathogens. It is not a precise rule, but rather a good rule of thumb that provides a buffer for things to go wrong.
>
> The density limitation of 1:40 ha provides for safe irrigation practices from onsite waste water management systems ensuring protection of the environment from salts, nutrients and hydraulic flows, as well as the protection of human health relating to the reduction and lack of movement for pathogens into water sources.
>
> Onsite waste water treatment systems present a higher risk to water quality, and higher densities of dwellings with such systems provide a higher water quality risk. He referenced a number of studies reporting poor compliance for onsite systems and a failure to meet performance criteria for aerated waste water treatment systems, which is the type of system proposed in this case.
>
> The dwelling density across the catchment already exceeds the limitation of 1:40 ha.

Dr Deere made the point that water quality in the Campaspe Reservoir is already compromised. In his view, the catchment is at a point where it is uncomfortably close to the limits in terms of current treatment systems. It is not yet at a point where Western Water needs to abandon its attempts to manage the catchment to maintain water quality and opt instead for the installation of much higher cost treatment systems. However, he emphasised that the margin of safety that the one dwelling per 40 hectare density limitations sought to achieve was not so great as to justify the risk of going below the 1:40 ha dwelling density if you have a choice.

He referenced various studies to demonstrate that engineering and management systems fail and this cannot be avoided. Often failure is due to human misunderstanding, lack of maintenance and human intervention resulting in non-conformance with installation and operation instructions. While onsite sewerage management systems are capable of producing good water quality outcomes at first installation, much of the focus is on the performance capability at installation. New systems eventually become old and therefore cumulative increases in onsite sewerage management systems could eventually lead not only to increased risk of failure but also to an increased number of systems failing in any one catchment. It is well established that at an institutional level, there is a very poor track record in ensuring that systems are installed, used and maintained appropriately, and for identifying failing systems.[14]

34 Dr Deere's evidence thus supported the conclusions that human sourced pathogens from waste water treatment plants constitute a risk to human health and that the threat constituted by such risk principally arises from the risk of system failure. The 1:40 hectare density benchmark is an appropriate limitation

14 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [63]-[66].

that provides meaningful safeguards. The catchment in issue already contained dwellings at a greater density catchment wide and water quality management within that catchment was already compromised to a sensitive degree.

35 Accordingly the Tribunal's conclusion that a permit for four dwellings should be refused in order to ensure the protection of water quality was open to it.

Permit contrary to the precautionary principle

36 As I have said, the precautionary principle constituted the second basis on which the Tribunal resolved the water quality issue against the appellants. The Tribunal correctly stated the precautionary principle:

> The Intergovernmental Agreement on the Environment expresses the precautionary principle in the following terms.
>
> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
>
> (i) Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
>
> (ii) an assessment of the risk-weighted consequences of various options.
>
> The State Environment Protection Policy (Waters of Victoria) ("SEPP Waters of Victoria") requires application of the precautionary principle to guide decisions about the protection and management of Victoria's surface waters in virtually identical terms as expressed in the Intergovernmental Agreement on the Environment.
>
> The State Planning Policy Framework (SPPF) of the *Macedon Ranges Planning Scheme* identifies the Intergovernmental Agreement on the Environment as one of a number of national agreements, strategies and policies that provide a broad framework for the development of strategies and policies at the State level to encourage sustainable land use and development. In Victoria, state environment protection policies made under the *Environment Protection Authority Act 1970*, which includes SEPP Waters of Victoria, are binding on all sectors of the Victorian community.[15]

37 The Tribunal was expressly required by s 84B(2)(e) of the *Planning and Environment Act 1987* (P&E Act) to take account of and give effect to the SEPP Waters of Victoria which adopts the precautionary principle as one of its bases.[16]

38 Dr Deere's evidence summarised above also supported the view that the imposition of the 1:40 hectare density benchmark standard was supported by the precautionary principle. The Tribunal concluded with respect to this aspect of the matter:

> The 1:40 ha density is a precautionary measure. The figure of 40 hectares has not been selected on a scientific basis but as a rule of thumb. We accept that experience indicates that water from catchments with dwelling densities at around this level require a certain level of treatment and higher densities require much higher levels of treatment, which are more expensive.
>
> We accept the advice of Western Water that the Campaspe River catchment is at a point which is uncomfortably close to the limits in terms of current treatment

15 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [10]-[12]. Citations omitted.

16 The SEPP also provides in part that on site domestic waste water needs must be managed to prevent the transport of nutrients, pathogens and other pollutants to surface waters and to prevent any impacts on ground water beneficial uses.

> systems. This makes managing the catchment to minimise the cumulative impact of further risks very important. We consider that a proper application of the precautionary principle in the present case would justify requiring a dwelling density of 1:40 ha as advocated by Western Water and in line with the current Guidelines.[17]

39 This conclusion was supported by the evidence of Dr Deere in respect of which the Tribunal stated:

> As we have said, we accept the evidence of Dr Deere. We consider that every time an additional dwelling is permitted in the catchment, an additional, albeit unquantifiable, risk, is created of potential contamination to the quality of water. Individually, the risk from each dwelling may be minimal but the cumulative effect of these incremental risks, coupled with all the other risks which exist, mean that dwelling density in open potable water supply catchments must be curtailed.[18]

40 The Tribunal also relied on the multi-barrier approach to water quality protection endorsed by the Australian Drinking Water Guidelines (ADWG). The ADWG state the following fundamental principles:

> 1. The greatest risk to consumers of drinking water are pathogenic micro organisms. Protection of water sources and treatment are of paramount importance and must never be compromised.
> 2. The drinking water system must have, and continuously maintain, robust multiple barriers appropriate to the level of potential contamination facing the raw water supply.[19]

41 The Tribunal went on to quote from the Guidelines as follows:

> The multiple barrier approach is universally recognised as the foundation for ensuring safe drinking water. No single barrier is effective against all conceivable sources of contamination, is effective 100 per cent of the time or constantly functions at maximum efficiency. Robust barriers are those that can handle a relatively wide range of challenges with close to maximum performance and without suffering major failure.
>
> Although it is important to maintain effective operation of all barriers, the advantage of multiple barriers is that short-term reductions in performance of one barrier may be compensated for by performance of other barriers. *Prevention of contamination provides greater surety than removal of contaminants by treatment, so the most effective barrier is protection of source waters to the maximum degree practical.* Knowing how many barriers are required to address the level of potential contamination in individual systems is important. This requires a thorough understanding of the nature of the challenges and the vulnerabilities of the barriers in place. In terms of reliability, there is no substitute for understanding a water supply system from catchment to consumer, how it works and its vulnerabilities to failure.
>
> Finally, a robust system must include mechanisms or failsafes to accommodate inevitable human errors without allowing major failures to occur.
>
> Catchment management and source water protection provide the first barrier for the protection of water quality. *Where catchment management is beyond the jurisdiction of drinking water suppliers, the planning and implementation of preventive measures will require a coordinated approach with relevant agencies*

17 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [91]-[92].

18 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [87].

19 Australian Drinking Water Guidelines (2004) as cited *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [39].

> *such as planning authorities*, catchment boards, environmental and water resources regulators, road authorities and emergency services.
>
> Effective catchment management and source water protection include the following elements:
>
> developing and implementing a catchment management plan, which includes preventive measures to protect surface water and groundwater
>
> ensuring that planning regulations include the protection of water resources from potentially polluting activities and are enforced
>
> promoting awareness in the community of the impact of human activity on water quality.
>
> Whether water is drawn from surface catchments or underground sources, it is important that the characteristics of the local catchment or aquifer are understood, and the scenarios that could lead to water pollution are identified and managed. The extent to which catchment pollution can be controlled is often limited in practical terms by competition for water and pressure for increased development in the catchment.
>
> Effective catchment management has additional benefits. By decreasing contamination of source water, the amount of treatment and quantity of chemicals needed is reduced. This may lead to health benefits through reducing the production of treatment by products, and economic benefits through minimising operational costs.
>
> In surface water catchments, preventive measures can include:
>
> selection of an appropriate source water (where alternatives exist)
>
> exclusion or limitations of uses (eg restrictions on human access and agriculture)
>
> protection of waterways (eg fencing out livestock, management of riparian zones)
>
> use of planning and environmental regulations to regulate potential water polluting developments (eg urban, agricultural, industrial, mining and forestry)
>
> use of industry codes of practice and best practice management
>
> regulation of community and on site wastewater treatment and disposal systems
>
> stormwater interception.[20]

42 The Tribunal found the ADWG to be directly relevant (a conclusion not challenged on appeal).

> The National Water Quality Management Strategy, which auspices the Australian Drinking Water Guidelines, is one of the national agreements referred to in clause 11.03-2 of the SPPF, together with the Intergovernmental Agreement on the Environment. Thus the Australian Drinking Water Guidelines are directly relevant to a consideration of this application. Further, we consider that they would fall within the ambit of section 60(1A)(g) of the Act as a matter that, in the circumstances, the responsible authority (and hence the Tribunal) should consider.[21]

43 It cannot be disputed the ADWG provided a proper framework within which to consider the application of the precautionary principle in this case.

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20 Australian Drinking Water Guidelines (2004) as cited *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [41] and [42]. Emphasis in Tribunal decision.

21 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [43].

44 The concept of the precautionary principle was carefully analysed by Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council*[22] (the *Telstra* case). I accept his Honour's fundamental conclusion:

> The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible environmental damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.[23]

45 If the conditions precedent are satisfied, the burden of showing that the threat of serious or irreversible environmental damage will not occur effectively shifts to the permit applicants to show that the threat does not exist or is negligible.[24]

> If each of the two conditions precedent or thresholds are satisfied — that is, there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty — the precautionary principle will be activated. At this point, there is a shifting of an evidentiary burden of proof. A decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent of the economic or other development plan, programme or project.
>
> The rationale for requiring this shift of the burden of proof is to ensure preventative anticipation; to act before scientific certainty of cause and effect is established. It may be too late, or too difficult and costly, to change a course of action once it is proven to be harmful. The preference is to prevent environmental damage, rather than remediate it. The benefit of the doubt is given to environmental protection when there is scientific uncertainty. To avoid environmental harm, it is better to err on the side of caution.[25]

46 His Honour was, however, careful to note that precaution should not necessarily result in prohibition:

> The precautionary principle, where triggered, does not necessarily prohibit the carrying out of a development plan, programme or project until full scientific certainty is attained.
>
> If the precautionary principle were to be interpreted in this way, it would result in a paralysing bias in favour of the status quo and against taking precautions against risk. The precautionary principle so construed would ban "the very steps that it requires". It must be recognised that "precautions against some risks almost always create other risks".[26]

47 In my view the Tribunal's conclusions as to the applicability of the precautionary principle were open to it having regard to Dr Deere's evidence which it accepted and which supported conclusions that:

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22 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10.

23 Nicolas de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (2nd ed, 2005), 155 in *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [128].

24 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [150]-[155].

25 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [150]-[151].

26 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [179]-[180], citations removed.

(a) the risk of escape of pathogenic micro-organisms into the water supply was a threat of serious damage to the environment;
(b) there is a lack of full scientific certainty as to the degree of threat engendered by the cumulative increase of dwellings within the water catchment;
(c) the application of a 1:40 hectare dwelling density benchmark was proportional to the risk in issue; and
(d) the response advocated was not one of total prohibition of dwellings but of reasonable limitation of density only.

48 These conclusions were reached within the conceptual framework of the multi-barrier approach endorsed by the ADWG, which were properly found to be relevant to the Tribunal's conclusions.

49 I turn then to the terms of the ground of appeal expressly directed to the Tribunal's conclusions concerning the precautionary principle.

Ground 3 – findings concerning the precautionary principle

The Tribunal misconstrued and misapplied the precautionary principle in that it:

(i) **wrongly proceeded on the basis that that [sic] the precautionary principle applied in circumstances where there was** "any risk" **to human health;**
(ii) **wrongly concluded that any risk to human health must be regarded as serious environmental damage;**
(iii) **failed to assess whether the risk to human health or damage to the environment was of sufficient magnitude so as to be properly regarded as a threat;**
(iv) **failed to make any assessment of the gravity of the risk to human health posed by the application, or the relative gravity of the risk posed by one, two, three or four dwellings;**
(v) **failed to make assessment of the** "risk weighted consequences" **posed by the grant of a permit for one, two, three or four dwellings; and**
(vi) **failed to make any assessment of the** "risk weighted consequences" **posed to water quality and/or human health of the various land use options, including the use of the land as a productive agricultural enterprise.**

50 Ground 3(i)-(iv) are directed to [18] of the Tribunal's reasons which stated:

> In our view, any risk to human health must be regarded as serious. We consider this is implicit in the terms of the *Safe Drinking Water Act 2003* and the *Australian Drinking Water Guidelines*. Therefore, when considering development in open potable water supply catchment areas, risk to human health is highly relevant and, because of its serious nature, must be given priority over other planning objectives. This priority is recognised in the planning policy context of the planning scheme. Water industry legislation and policy provide detailed guidance as to how to protect water resources and avoid serious risk to human health. Essentially, this is a multiple barrier approach. It is in this context that the *Guidelines: planning permit applications in open, potable water supply catchment areas* must be considered and applied – as one barrier in a multiple barrier approach to protect drinking water quality.[27]

27 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [18].

51 It is plain from the context in which [18] appears that it is directed to risks to human health from contamination of drinking water. It was also a matter of common ground as between the experts called on each side that the contamination of drinking water with pathogenic micro-organisms constitutes a serious risk to human health. Further that risk is recognised explicitly in the ADWG to which the Tribunal properly had regard.

52 Paragraph 18 of the Tribunal's reasons further crystallises in the endorsement of a multi-barrier approach to "avoid serious risk to human health". It is plain that the Tribunal proceeded by way of examining the evidence as to such a risk and not simply "any risk to human health."

53 It is also plain that the Tribunal addressed the question of whether the risk to human health in issue was of sufficient magnitude as to be properly regarded as a threat.

54 It subsequently accepted Dr Deere's evidence that it did constitute a threat warranting the application of a limitation on dwelling densities.

55 Likewise, it considered whether the 1:40 hectare standard was a proportional response to the threat and once again concluded on the basis of Dr Deere's evidence that it was.

56 There is no substance in these grounds of appeal. The Tribunal properly regarded the precautionary principle as engaged by the facts of the case and applied it having regard to the evidence before it.

The Guidelines

57 I turn then to the Guidelines upon which the Tribunal founded its decision as to water quality in the first instance.

58 As the Court recorded in its previous decision relating to this matter, the Guidelines have their origins in a decision of the Tribunal which recognised the difficulty inherent in assessing the potential risk of cumulative developments on a site by site basis.[28]

59 The interim Guidelines which preceded the current Guidelines formed the basis of a series of decisions in which the Tribunal adopted a precautionary approach and refused to permit development exceeding the 1:40 hectare benchmark.[29] Nevertheless, the Guidelines were also criticised by some Divisions of the Tribunal as a "blunt instrument".

60 Section 60(1A)(g) of the P&E Act provides:

> Before deciding on an application, the responsible authority, if the circumstances appear to so require, may consider — …
>
> (g) any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council;

61 As I have previously observed with respect to the interim Guidelines although s 60(1A) provides that the responsible authority "may" consider such a guideline, it is its duty to do so when it is plainly relevant to the subject matter of the permit application.[30]

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28 *Western Water v Rozen* (2008) 24 VR 133 at 141, referencing *Melbourne Water v Baw Baw Shire Council* (unreported, VCAT, Vic, Liston M, 23 October 1998).

29 *Western Water v Rozen* (2008) 24 VR 133 at 142.

30 *Returned and Services League of Australia (Vic Branch) Inc (Glenroy Sub-branch) v Moreland City Council* [1998] 2 VR 406 at 413-414 (Hayne JA).

62 Nevertheless the Guidelines comprised matters required to be considered, rather than matters required to be given effect to. This follows from their description as a "guideline" and their expressed intent to "assist" rather than govern a decision and from the very terms of s 60(1A)(g) of the P&E Act.

63 In the present case the Tribunal stated:

> We accept that the special needs of open potable water supply catchments justify a limitation on dwelling density that operates over and above any zone provisions. In the absence of a specific water catchment overlay, the Government has clearly expressed a strong policy position to limit dwelling density to one per 40 hectares by adopting the Guidelines: planning permits in open, potable water supply catchment areas (May 2009).
>
> We consider that planning permit applications in open potable water supply catchments should be determined by reference to the policy in the current Guidelines; that each of the individual guidelines should be applied cumulatively; and that the current Guidelines should take priority over competing policy objectives or decision guidelines in the planning scheme in the event of a conflict. We endorse guiding principle 1 of the Australian Drinking Water Guidelines that protection of water sources is of paramount importance and must never be compromised.
>
> We therefore conclude that an application of the current Guidelines, in particular the density of dwellings guideline of one dwelling per 40 hectares, must lead to a conclusion that the current permit application for four dwellings cannot be supported.[31]

64 The Tribunal set out the background to the current Guidelines:

> Following the Supreme Court decision in *Western Water v Rozen and Anor*, the Minister for Planning adopted in May 2009 the *Guidelines: planning permit applications in open, potable water supply catchment areas* ("the current Guidelines").
>
> The current Guidelines have been adopted by the Minister for Planning for the purposes of section 60(1A)(g) of the *Planning and Environment Act 1987*. The current Guidelines apply to all open, potable water supply catchments declared to be special water supply catchment areas under Division 2 of Part 4 of the *Catchment and Land Protection Act 1994*. They apply to the subject land and we find that the circumstances here require the current Guidelines to be considered.
>
> The current Guidelines restate and reinforce the dwelling density of 1:40 ha in open, potable water supply catchment areas. They make it clear that compliance with the Septic Tank Code of Practice is not of itself sufficient, a point that was made by Justice Osborn. They refer to the provisions of the SPPF relating to the importance of water quality in water catchments and section 53M of the *Environment Protection Authority 1970*, which provides that a municipal council must refuse a septic tank permit if a proposed onsite waste water/septic tank system is contrary to any state environment protection policy or waste management policy. SEPP Waters of Victoria requires the application of the precautionary principle to guide decisions about the protection and management of Victoria's surface waters when considering a permit for a septic tank system. The current Guidelines state:
>
> > The proper application of the precautionary principle requires consideration of the *cumulative risk* of the adverse impact of onsite waste water/septic tank systems on water quality in open, potable water supply catchments resulting from increased dwelling density. [Tribunal emphasis]

31 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [88]-[90].

In the current Guidelines, Guideline 1 regarding density of dwellings is different to the wording of the equivalent guideline in the Interim Guidelines. It now includes explicit reference to the cumulative impact of onsite waste water/septic tank systems and provides as follows:

> Guideline 1: Density of dwellings
>
> Where a planning permit is required to use land for a dwelling or to subdivide land:
>
> the density of dwellings should be no greater than one dwelling per 40 hectares (1:40 ha); and
>
> each lot created in the subdivision should be at least 40 hectares in area.
>
> This does not apply if a catchment management plan, water catchment policy or similar project addressing land use planning issues and the *cumulative impact of onsite waste water/septic tank systems* has been prepared for the catchment, and the objectives, strategies and requirements of the plan or project have been included in the planning scheme.[32]

65 The appellants submit that the present case falls within the exception to the Guidelines stated above. It is submitted that the Guideline exemption should be relevantly construed as follows:

> This [the Guideline] does not apply if:
>
> • A water catchment policy;
>
> • Addressing land use planning issues; and
>
> • The cumulative impact of on-site waste water/septic tank systems
>
> • Has been prepared for the catchment; and
>
> • The objectives, strategies and requirements of the (policy) have been included in the planning scheme.

66 It is further submitted that the policy contained in clauses 22.03 and 22.19 of the LPPF within the Planning Scheme is itself a "water catchment policy" within the meaning of the exemption contained in the Guidelines.

67 The reference to "catchment management plan, water catchment policy or similar project …" in the exemption is preceded by reference to such plans in the Guidelines.

> The importance of water catchments is also reflected in the catchment management plans prepared by Catchment Management Authorities under Division 1 of Part 4 of the *Catchment and Land Protection Act 1994*. These plans assess the land and water resources of catchments in a region and identify objectives and strategies for improving the quality of those resources. They can also direct land use activities in a catchment. It is State Planning Policy (Clause 15.01-2) that planning authorities must have regard to relevant aspects of:
>
> Any regional catchment strategies approved under the *Catchment and Land Protection Act 1994* and any associated implementation plan or strategy, including regional vegetation plans, regional drainage plans,

32 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [48]-[51]. The Guidelines themselves adopt a multi-barrier approach and after providing for a benchmark density, go on to provide by Guideline 2 with respect to effluent discharge and septic tank system maintenance, Guideline 3 with respect to vegetated corridors and buffer zones along waterways, Guideline 4 with respect to buildings and works and Guideline 5 with respect to agricultural activities (Tribunal emphasis).

> regional development plans, catchment action plans, landcare plans, and management plans for roadsides, soil, salinity, water quality and nutrients, floodplains, heritage rivers, river frontages and waterways
>
> …
>
> Any special area plans approved under the *Catchment and Land Protection Act 1994*.
>
> For information about any catchment management plans that have been prepared for catchments in your region, contact the regional office of the relevant catchment management authority.[33]

68 I do not accept that clause 22.03 or 22.19 are policies of the type contemplated by the Guidelines.

69 It is true they are planning policies directed to planning within potable water supply catchments.

70 Furthermore, one express objective of clause 22.03 is to apply the regional catchment strategy as adopted by the relevant regional catchment management authority. In turn the policy within the clause itself provides: "New land use and development shall be consistent with the relevant catchment strategy for the area."

71 Clause 22.03 also addresses the question of cumulative density by allowing for its assessment in a particular case.

> Proposals involving the use of septic tanks and/or other forms of waste water treatment must demonstrate that they will not be detrimental to the quality of water in the catchment.
>
> Council may require a report to be prepared certifying that the proposed density of septic tanks within the area:
>
> - Will not overload the natural environment with effluent and lead to pollution of water courses or other properties.
> - That the design and location of septic tanks is appropriate to the site and environmental characteristics of the allotment.
> - That the disposal of effluent and [sic] will not result in the discharge of waste water from the site.[34]

72 Clause 22.03 does not however itself constitute a plan or policy which has been prepared for the catchment, *addressing the question of cumulative impacts of onsite waste treatment and septic tank systems*. It facilitates a proposal based ascertainment of cumulative impact, but does not itself address this issue on a catchment wide basis.

73 Further, in my view, what the Guidelines envisage is a catchment plan or policy prepared by the Catchment Management Authority, independently of the Planning Scheme, and then incorporated in terms of its outcomes within the Planning Scheme. This has not occurred. A draft Macedon Ranges Shire Water Quality Risk Assessment was submitted to the Tribunal by Western Water as potentially forming the basis of a future policy of the type contemplated.

74 The appellants submit that the Guidelines do not apply because a "catchment management plan, water catchment policy or similar project" as first referred to in the Guideline is not required to be included in the Planning Scheme. What is required to be included in the Planning Scheme is simply the objectives,

33 Department of Planning and Community Development (May 2009) "Guidelines: planning permit applications in open, potable water supply catchment areas".

34 *Macedon Ranges Planning Scheme*, cl 22.03.

strategy and requirements of the "plan or project" only. It is submitted "a water catchment policy" therefore means a policy already contained in the Planning Scheme. I do not accept this submission. The initial use of the phrase "water catchment policy or similar project" means that the subsequent use of the word "project" embraces "water catchment policy". But in any event clause 22.03 does not have the relevant content.[35]

75 Likewise, clause 22.19, which applies to an area described as "northern catchment" within the Lake Eppalock and Lauriston catchments, does not itself address the question of cumulative impacts across this catchment from waste treatment systems and septic tanks. It does not constitute a catchment management plan or policy prepared by the Catchment Management Authority.

76 Clause 22.03 also identifies two documents as policy reference documents[36] which might potentially constitute a catchment management plan or water catchment policy of the type in issue and which might be thought on their face to be the subject of the express objective contained in clause 22.03 "to apply the regional catchment strategy as adopted by the relevant regional catchment management authority."

- "Campaspe Water Quality Strategy", Campaspe Water Quality Committee, 1997.
- "Western Water Catchment Policy", Macedon Regional Water Authority, 1994.

77 When this matter last came before me I expressed the conclusion that on its face the first document constituted the strategy referred to in the objectives and terms of the policy contained in clause 22.03 of the Planning Scheme.

78 The policy reference documents identified above were not brought before the Tribunal on the rehearing of this matter, but in the interests of finality and fairness to the appellants, the Court has permitted the subpoena of such documents by the appellants following the initial hearing of the appeal and has subsequently received written submissions in respect of them.[37]

79 The following documents were produced in response to the subpoena:

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35 See [72] above.

36 See Department of Infrastructure. VPP Practice Notes "Incorporated and reference documents" (August 2000).

37 The appellants initially submitted to this Court:

> 37 On the face of it, these missing reference documents present as the type of documents which might be taken to fulfil the exemption criteria. Indeed, this was a specific conclusion of Osborn J with regards to the 1997 Campaspe Water Quality Strategy.
>
> 38 Despite the fact that neither the Tribunal, nor any of the parties, had access to, or had seen, the missing reference documents, the Tribunal made findings about the contents of those documents, which were crucial to its decision and prejudicial to the appellants' case. In particular, it concluded that the missing reference documents did not address the cumulative impact criterion in Guideline 1, and this was a crucial component of its conclusion that the exemption in Guideline 1 did not apply.
>
> …
>
> 62 The Tribunal has not disclosed the path of reasoning that led it to conclude that the policies and reference documents (including the missing reference documents) did not address the cumulative impact criteria.
>
> (Citations omitted.)

- "Macedon Region Water Authority Catchment Protection Policy and Background Report", Macedon Region Water Authority, 1994 (the "MRWA") which was produced by the second respondent; and
- "Campaspe Water Quality Strategy", Campaspe Water Quality Committee, 1997, which was produced by the North Central Regional Catchment Authority.

80 The written submissions filed on behalf of the appellants make the following concession:

> 9. Having examined the documents, the Applicant concedes that neither of these documents, when considered on their own, can be described as "a catchment management plan, water catchment policy or similar project addressing land use planning issues and the cumulative impact of onsite waste water/septic tank systems has been prepared for the catchment".
> 10. This is because:
> (i) the MRWA document does not apply directly to the Campaspe Catchment (being the catchment within which the subject land is located); and
> (ii) the Campaspe Water Quality Strategy does not address the cumulative impact of onsite waste water/septic tank systems.[38]

81 It follows that neither document provides a basis for invoking the exemption under the Guidelines.

82 The appellants, however, go on to make a series of further submissions on the basis that the MRWA is a document which addresses land planning issues and addresses the cumulative impact of onsite waste water/septic tank systems analogous to those in issue in the present case. Having read the document I have come to the conclusion that it does not address cumulative impacts in any way relevant to this case. First, insofar as it does refer to the notion of cumulative impacts, it does not address the acceptability of additional development within the relevant catchment. Further, although it recognises at least implicitly the issue of cumulative risk, it does not address that risk other than by way of the most general provision. The background paper contained in the MRWA refers to a decision of the Planning Appeals Board which identifies the issue of cumulative risk.[39] In turn the MRWA contains a general policy basis statement which commences as follows:

> The basis of this policy is the need to minimise the opportunity for contaminants and pollutants to reach the water supply so as to prevent the outbreak of disease and maintain water quality consistent with recommended standards for human consumption. There are three ways in which this can be achieved in the regulation of land use and development.
>
> The first one is to restrict the subdivision of development of land. Where possible opportunities for the development of additional dwellings within the catchment generally should be restricted particularly where these are close to the water supply. This includes the elimination of subdivision options which allow tenements to be subdivided. Other techniques must be used to protect water quality where development is to occur within the catchment area.[40]

83 I interpolate that this general policy approach could not be said to assist the

38 Appellants' written further submissions, filed 12 November 2010, [9]-[10].

39 MRWA Background Report, 3.

40 MRWA Catchment Protection Policy, 3.

appellants in any way. The policy goes on to stipulate matters that should be considered upon development applications including the overall objective of ensuring that any development or use which is approved by the authority can be conducted in such a way that water quality is protected. This mirrors Planning Scheme objectives which the Tribunal specifically found were not satisfied in the present case.

84 The matters to be considered by the authority include:

> • factors external to the site such as stream distance from the site to the inlet pipe for the water supply, pattern and existing development in the surrounding area, the extent to which the proposal will set an undesirable precedent or assist in ensuring proper water catchment management.[41]

It could not seriously be contended that such a general provision could assist the Tribunal in determining whether the application of the benchmark density contained in the Guideline was appropriate. It adds nothing to the matters identified as relevant by the evidence before it.

85 It follows that it was correct for the Tribunal to conclude as it did, that the Guidelines applied to the four dwelling proposal before it and that it was in breach of them.

> We do not consider that any of the local planning policies in the planning scheme or the reference documents they refer to can be considered to be "a catchment management plan, water catchment policy or similar project *addressing land use planning issues and the cumulative impact of onsite waste water/septic tank systems*, which has been prepared for the catchment, and where the objectives, strategies and requirements of the plan or project have been included in the planning scheme", as contemplated by the exemption to Guideline 1. None of the policies or reference documents fulfil both criteria, in particular the cumulative impact criterion.[42]

86 If I am wrong however and the exemption contained in the Guidelines is invoked by the planning policy provisions contained in the Planning Scheme on which the appellants rely, the appellants face a further fundamental problem. The provision which "addresses" the issue of cumulative density in clause 22.03 envisages the decision-maker may require preparation of a report certifying that the proposed density of waste water treatment systems will not overload the natural environment and lead to the pollution of water courses.

87 As I have said, the Tribunal has rejected the reports of Mr Williams and Dr van der Graaff and accepted the evidence of Dr Deere. If the matter is to be approached on the site specific basis envisaged by clause 22.03, the Tribunal has concluded on the evidence before it that the cumulative risk inherent in the proposal is unacceptable.

88 The policy on which the appellants rely does not substitute a more generous standard than 1:40 hectares. At best from the appellants' point of view it contemplates a site specific enquiry. The Tribunal has conducted this enquiry and resolved the outcome adversely to the appellants. It follows that even if the Tribunal erred in its view as to the applicability of the exemption there was no vitiating error in its decision.

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41 MRWA Catchment Protection Policy, 9.

42 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [55]. Emphasis in original.

89 Further, I do not accept the Tribunal's conclusion as to the guidelines had the impact upon its reasons for which the appellants contend. The appellants submitted:

> The Tribunal itself characterised interpretation and application of the Guidelines as a "critical issue" in the proceeding. Its conclusion that Guideline 1 applied to the application led directly to the refusal of the application for four dwellings.[43]

90 I accept the Tribunal dealt with compliance with the Guideline as a threshold issue relating to water quality, but as I have explained, the Tribunal also went on to specifically reject the proposal on water quality grounds by reference to the precautionary principle and relevant Planning Scheme objectives directed to ensuring the protection of the water catchment. I do not accept the contention that the Guidelines "significantly impacted" on the Tribunal's further conclusions which were evidence based and stood independently of the Guidelines.

91 The appellants also submitted that the Tribunal's conclusion on the issue of the Guidelines:

> meant that the Applicants' position shifted from one where the Guidelines provided that no presumption as to dwelling density applied, to a position where the Tribunal regarded the appellants as being obliged to persuade it that a lesser density than 1:40 could be countenanced.[44]

92 In my view, the effect of both the precautionary principle and the relevant Planning Scheme objectives was that in the circumstances, as the Tribunal found them on the basis of Dr Deere's evidence, the evidentiary onus was properly regarded as being on the appellant to justify a lesser density than 1:40 hectares.

93 The notice of appeal raises a series of specific challenges to the Tribunal's decision with respect to the Guidelines.

Ground 1 – the exemption under the guidelines

The Tribunal erred in law in concluding that the exemption contained within Guideline 1 of the "Guidelines: planning permit applications in open, potable water supply catchment areas (May 2009)" **did not apply to the application, by:**

(i) **wrongly concluding that none of the local policies in the Macedon Ranges Planning Scheme** ("the Planning Scheme") **addressed the cumulative impact of onsite waste water/septic tank systems;**

(ii) **reaching a conclusion that was not reasonably open on the evidence before it, namely that none of the reference documents in the Planning Scheme addressed the cumulative impact of onsite waste water/septic tank systems, in circumstances where the Tribunal had not been provided with copies of all of those reference documents;**

(iii) **denying the permit applicant procedural fairness in purporting to make findings about the contents of certain reference documents referred to in the Planning Scheme, in circumstances [where] those documents were never produced to the Tribunal or to the Appellant; and**

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43 Appellant's written submissions, filed 12 August 2010, [73].

44 Appellant's written submissions, filed 12 August 2010, [80].

(iv) **concluding that Guideline 1 had been** "deliberately intended" **to exclude the reference documents noted at the end of various clauses of the Planning Scheme from being considered as fulfilling the requirements of the exemption.**

94 The critical question is not whether the local policies in the Planning Scheme address the cumulative impact of waste water systems, but whether there is a catchment management plan or policy which addresses that issue on a catchment wide basis and has resulted in the inclusion of specific outcomes in the Planning Scheme. On the evidence there is not.

95 The complaints as to lack of production of reference documents have been met by the procedure adopted by the Court. Neither the Council nor Western Water constitute the relevant catchment management authorities which were the makers of the documents. Prior to the hearing before the Tribunal the appellants were advised by the Council that it did not have the documents in issue. The appellants chose not to pursue by subpoena the production of further documents at this stage. It would be inherently unsatisfactory however to resolve this matter on the basis that the documents in issue were not produced to the Tribunal and should not be considered by the Court. The proper course is to resolve the matter on the basis of the documents which have now been produced.

96 I accept that it may be that the Tribunal went too far in declaring the "deliberate intention" of the amendment of the Guidelines in the following passage:

> We do not intend to undertake an exhaustive analysis of what Justice Osborn said on this point because he was considering the Interim Guidelines, which have now changed. We consider that the changes made to the exemptions to Guideline 1, in particular now requiring a catchment management plan, water catchment policy or similar project to address the cumulative impact of onsite waste water/septic tank systems as well as addressing land use planning issues, was deliberately intended to exclude the range of old (and sometimes unavailable) reference documents noted at the end of various clauses of the planning scheme from being considered as fulfilling the requirements of the exemption. We consider this intention is evident from a comparison of the exemption to Guideline 1 in the Interim Guidelines and the exemption in the current Guidelines. The words underlined are additions to the current Guidelines: the strike through words are deletions from the Interim Guidelines.
>
> > Guideline 1: Density of dwellings
> >
> > Where a planning permit is required to use land for a dwelling or to subdivide land:
> >
> > - The density of dwellings should be no greater than one dwelling per 40 hectares (1:40 ha); and
> > - Each lot created in the subdivision should be at least 40 hectares in area.
> >
> > *This does not apply if a catchment management plan, water catchment policy or similar project addressing land use planning issues and the cumulative impact of onsite waste water/septic tank systems has been prepared for the catchment, and the objectives, strategies and requirements of the plan or project have been included in the planning scheme*.
> >
> > ~~This does not apply if~~:
> >
> > ~~A catchment management plan or similar project addressing land use planning issues has been prepared for the catchment, and the objectives,~~

> ~~strategies and requirements of the plan or project have been included in the planning scheme; and~~
>
> ~~A land capability assessment for the on-site management of domestic wastewater has been completed which shows that a greater or lesser minimum-subdivision area and density of development is appropriate.~~
>
> ~~The land capability assessment should be undertaken in accordance with the requirements of Appendix A to the Code of Practice - Septic Tanks, On-site Domestic Wastewater Management, EPA, March 1996 to the satisfaction of the Responsible Authority.~~
>
> ~~The EPA is preparing an information bulletin which will set out in greater details, the procedure and criteria for preparing a land capability assessment and will supplement Appendix A.~~[45]

97 What is plain however is that the amended Guidelines impose much more restrictive criteria for exemption than the Guidelines previously did.

98 As I have indicated the documents upon which the appellants seek to rely do not meet these criteria. Insofar as the Tribunal's finding as to "deliberate intent" may be regarded as overstated (at least in the absence before it of relevant documents), it does not bear on the validity of its finding that the Guidelines were applicable to the present case.

99 The appellants have now submitted that if the MRWA had been provided to the Tribunal the course of the hearing and the Tribunal's decision might have differed. Having read the document I do not accept that this is a realistic possibility. The MRWA does not relate to the relevant catchment. It does not provide a proper basis for disregarding the Guidelines, the ADWG, the precautionary principle, the relevant Planning Scheme objectives or the expert evidence. It provides no sensible basis on which the Tribunal could have reached different conclusions. In summary the Tribunal's conclusion relating to the exemption contained within Guideline 1 was correct and none of the appellants' submissions with respect to the MRWA are of sufficient substance to justify a conclusion that the Tribunal misdirected itself in a way which resulted in a vitiating error of law.

Ground 2 – the planning scheme policies relating to water quality

The Tribunal failed to give sufficient reasons for its conclusion that none of the policies or the reference documents in the Planning Scheme addressed the cumulative impact of onsite waste water/septic tank systems.

100 The construction of the documents referred to fundamentally involves questions of fact. The conclusion set out at [55] of their decision[46] was open to the Tribunal in respect of the documents before it and, for the reasons I have stated, correct.

101 Insofar as additional documents have now been produced to this Court, nothing within them validates this conclusion.

Ground 4 – the evidence of Mr Williams

The Tribunal erred in law in that it:

(a) **failed to have regard to relevant considerations, namely the expert evidence of Mr Williams regarding:**

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45 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [54]. Emphasis in original. The words "water catchment policy" should also have been highlighted in bold.

46 Quoted at [85] above.

(i) **The cumulative risks to water quality associated [with] the proposed development;**

(ii) **The risk that the waste water treatments would not function as designed; and**

(iii) **The gravity of the risk to water quality posed by a failure of the proposed waste water systems to function as designed; and**

(b) **failed to provide proper reasons with respect to Mr Williams' evidence.**

102 Although the Tribunal undertook a detailed analysis of the competing views of Dr Deere and Dr van der Graaff,[47] it also expressly referred to Mr Williams' evidence:

> Mr Paul Williams also gave evidence on behalf of the Rozens about the aerated waste water treatment system proposed for each of the four dwellings and provided a land capability assessment for each lot. The waste water treatment system is a sophisticated, secondary treatment fully automated system that incorporates a multiple barrier approach to guard against conceivable sources of contamination as recommended by the Australian Drinking Water Guidelines.
>
> Mr Williams' overall conclusions were as follows:
>
> > While impacts from contaminated drinking water can be severe, the risk of this occurring from the proposed development is extremely low. The LCAs[48] recommend a conservative, scientifically based, well founded waste disposal system with inherent multiple barriers of safety. *Land remediation and the removal of stock in the development will improve the quality of returns from the subject land*.
> >
> > Cumulative risk from the development is also extremely low and can be further lowered by adopting additional measures if required. The risk of serious or irreversible damage is extremely low.[49]

103 It was submitted by the appellants that the passage quoted omitted three further paragraphs of conclusion:

> Inherent in the proposal are additional ameliorative measures to be implemented. These include provision of a planted riparian zone and fencing to exclude stock access to the river.
>
> These two measures, alone, would overwhelm the small theoretical impact of four AWTS[50] realising a net environmental gain.
>
> Reducing the overall (theoretically sustainable) stock numbers by one horse (equivalent) per property would more than compensate for any risk from the proposed development.

104 The passage quoted did, however, expressly postulate that "Land remediation and the removal of stock in the development will improve the quality of returns from the subject land." The issue expanded in the further conclusions was thus identified in principle.

105 Having summarised Mr Williams' evidence, the Tribunal went on to state as follows:

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47 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [76]-[87].

48 Life Cycle Assessment.

49 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [69]-[70]. Emphasis added.

50 Alternative Waste Treatment Systems.

> No issue was taken by any party with Mr Williams' evidence that if the waste water treatment system was installed, operated and maintained as recommended by Mr Williams, it would function satisfactorily, meet statutory requirements and would not result in a risk of contamination to surface or ground waters.
>
> However, we consider the real issues are the risks associated with waste water treatment systems that do not function as designed (for various reasons) and the increased presence of people generally within the catchment.[51]

106 This conclusion rejected the basis of Mr Williams' opinion as to cumulative risk. Mr Williams' evidence in chief proceeded on the basis that cumulative risk is assessed to determine how robust a system is as a whole. In this case he assumed "the system" was contained within the proposed development.[52]

107 The Tribunal concluded in part that the question of cumulative risk related to the increased presence of people generally within the catchment. Further the Tribunal rejected Mr Williams' primary assessment of risk. It did so because that assessment made a series of assumptions as to ongoing maintenance and operational conditions. The Tribunal's view was reached on the basis of the evidence before it including the evidence of Dr Deere summarised by it in the passage quoted at [33] above.

108 Dr Deere elaborated these concerns in answer to cross-examination.

109 Conversely, Mr Williams conceded in cross-examination that his opinion as to the ongoing risk from the proposal was premised on a series of assumptions as to operating and maintenance requirements.

110 Mr Williams envisaged that an agreement would be placed upon title requiring compliance with a management plan.[53] He was taken through 13 requirements in the management plan relating to issues such as the maintenance of the grassed disposal area and the need to ensure that it was mowed, fenced, not trafficked and regularly inspected. He envisaged that the inspection would be done by an independent expert retained pursuant to a prepaid contract and that the system would be serviced four times year. The system would also require implementation of sequential irrigation, zoned dosing and gypsum application. At the conclusion of this cross-examination the Deputy President of the Tribunal confirmed by direct question that the fail-safe nature of the system which involved telemetry, maintenance, monitoring and other elements depended on the participation of an outside third party. It followed that if there was a breakdown in the monitoring by the third party for whatever reason then the fail-safe character of the system might be compromised.[54] It is plain that the conclusion stated in [72] of the Tribunal's reasons, and reproduced in [105] above, was open to the Tribunal. It was open to conclude that the real issues giving rise to risk associated with the waste water treatment systems related to the possibility that they would not function as designed for a variety of reasons, that this risk raised a serious threat of contamination and that this threat had to be assessed on a catchment wide basis. It follows that ground 4(a) must fail. The Tribunal did have regard to the expert evidence of Mr Williams and stated reasons for rejecting his conclusions which were open on the evidence. It

51 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [71]-[72].

52 Mr P Williams, Statement of Evidence Report (VCAT Application for Review P86/2006), July 2009, 14.

53 An agreement pursuant to ss 173 and 181 of the P&E Act.

54 Transcript of Proceedings, *Rozen v Macedon Ranges Shire Council* (VCAT, Gibson DP, O'Leary and David MM, 5 August 2009) at 369.

specifically quoted and had regard to Mr Williams' conclusion regarding cumulative risk (ground 4(a)(i)) risk of malfunction (ground 4(a)(ii)) and gravity of risk (ground 4(a)(iii)).

111 Ground 4(b) alleges a failure to give proper reasons with respect to Mr Williams' evidence. In argument, this ground crystallised in a complaint that the Tribunal did not give reasons for rejecting Mr Williams' opinion that the removal of direct access for stock to the Campaspe River would offset the risk of contamination from additional domestic waste treatment systems. Mr Williams stated in his report to the Tribunal:

> *Removal of stock*. Stock contribute to the nutrient and pathogen load of runoff water through faeces, urine, soil compaction and bank erosion. Manure is distributed on the land surface, where it can be transported into receiving waters. The nutrient load is equally damaging regardless of its source, because excess nutrients in the receiving environment can contribute to blooms of cyanobacteria. Many animal-derived pathogens are less damaging to human health than those from human sources because they are non-transferable between animals and humans; however some pathogens are transferable between species.…
>
> Removal of stock from the property as part of development will reduce the impost, risk and cost associated with water treatment from animal borne pathogens and nutrients. One cow produces as many pathogens and nutrients as ten humans; the effluent is untreated and left on the ground where it is susceptible to runoff into the river. The property is currently unfenced along its riverine border. Additional fencing and revegetation associated with development will reduce contaminants associated with stock. There is no limit to the number of stock allowable per hectare in the area, apart from the RSPCA guidelines for humane treatment of animals. There is no guarantee to protect the catchment from the risk of contamination through overstocking.
>
> The Australian Drinking Water Guidelines (2004) state that in order to prevent contamination of water sources by giardia and other pathogens, preventative measures should be:
>
> – installation, design and maintenance standards;
> – setback distances;
> – riparian zones;
> – stocking rate controls;
> – stream fences;
> – flow diversion from reservoir of highly contaminated first-flush water following heavy rainfall.
>
> All these preventative measures are used in the development except the reservoir flushing, which is not applicable in this case.[55]

112 However, the evidence of Dr Deere made clear that the distinction between animal derived pathogens and those derived from human sources adverted to by Mr Williams is a significant one. The Tribunal specifically relied on this evidence.

> In his evidence, Dr Deere highlighted that it is when waste water/septic tank systems are not functioning optimally and other things occur, such as extreme rainfall events, that problems can arise. He emphasised that the state of knowledge concerning catchment management, the management of drinking water systems and the vast array of contaminants that may present in drinking water has advanced dramatically in recent years. This reflects the view expressed in the

55 Mr P Williams, Statement of Evidence Report (VCAT Application for Review P86/2006), July 2009, 12-13.

> Australian Drinking Water Guidelines. Dr Deere instances knowledge about human viruses as one significant area where the state of knowledge has advanced. He says that human viruses are a problem and that septic tanks do not deal with them or neutralise them in the same way that they can deal with and neutralise ecoli and other pathogens. Viruses may contaminate water supplies both from disposal of effluent from septic tank waste water treatment systems and from direct contact with surface waters (eg swimming or boating). Whilst Dr van der Graaff had not taken them into account, Dr Deere emphasised that Western Water needed to do so.
>
> Invariably, says Dr Deere, contamination is a result of human error, human failing, ageing systems, lack of maintenance and monitoring, and the failure by people to appreciate the implications of how their system works in order to appreciate the possible consequences of poor operation and maintenance. All these factors increase the risk of contamination. For this reason, a limitation on the density of dwellings to protect water quality was one appropriate measure to limit the risk from treated effluent affecting environmental and human health. Limiting dwelling density is just one element in the multi barrier approach to ensuring safe drinking water that is incorporated in the Australian Drinking Water Guidelines.[56]

113 The Tribunal accepted the evidence of Dr Deere. Dr Deere is a scientist with expertise in water microbiology and biotechnology and extensive experience in water quality management and public health microbiology. Mr Williams is a soil scientist (as was Dr van der Graaff). Mr Williams conceded in cross-examination that he was not an expert in pathogens.[57]

114 The Tribunal was entitled to prefer Dr Deere's evidence as to the nature of potential contamination from the proposed waste treatment systems.

115 Once Mr Williams' view as to cumulative risk was rejected for the primary reason that it did not adequately acknowledge the cumulative operational risk of malfunction inherent in the proposed systems as a component of activity in the catchment as a whole, and Dr Deere's view as to the potential risk from human sourced pathogens was also accepted, there was no sensible basis on which Mr Williams' opinion as to the potential offset available from fencing out stock could be said to meet Dr Deere's concerns.

116 Dr Deere responded directly to this issue in the course of his cross-examination:

> Would you accept the proposition that you can contemplate a situation in which a development application might achieve a net benefit in terms of water quality? - - - Absolutely, yes, quite possible and there are plenty of examples of exactly that development model. The difficulty of that development model, it normally requires the existence of a pollution offset scheme which doesn't operate in this catchment. Now, when I worked at Sydney Catchment Authority I worked very closely with the development to develop a pollution offset scheme for a Sydney catchment that is now in place which properly and fairly allows pollution to be offset and pollution offset with like pollution so in this case you'd have to offset viral pollution with viral pollution for instance so I agree with you in principle. In this particular case I don't see any scheme operating that will allow you to develop an offset for this particular development in the short-term.
>
> Leaving aside pollution offset schemes, it would be not hard to contemplate a situation here where works or conditions of an approval of two houses for example could bring about a net benefit to the quality of water in this catchment?

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56 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [85]-[86].

57 Transcript of Proceedings, *Rozen v Macedon Ranges Shire Council* (VCAT, Gibson DP, O'Leary and David MM, 5 August 2009) at 369.

> - - - It's difficult to go from a rural type, agricultural type environment to one that has extra humans and have a net benefit because when you bring extra humans in, you bring in a whole new type of pathogen and viruses, you bring in human infectious strains of (indistinct) and bacteria (indistinct) and you bring in increased use of pesticides, increased use of fertilisers. It's difficult in this situation to go from the current quite broad agricultural type land to much more intensive developed properties. It's more a rural living type, rural residential type environment. They're notoriously poor in terms of water pollution outcomes, hobby farms. The work we did on pesticides in Sydney Catchments found by far the highest pesticide run-off are from the hobby farm areas, not agricultural areas so I think that in practice it would be highly unlikely you could increase the number of dwellings on this block and have a net benefit in practice.[58]

117 He elaborated these answers and explained that pathogenic viruses are not balanceable against stock pollution, because stock do not carry pathogenic viruses. *Cryptosporidium hominis* is also not generated by stock.

> … almost all water borne diseases are caused by either cryptosporidium or by a small number of viruses, or viro-viruses. You don't get C hominis or viro-viruses from stock. You only get them from humans so if you have got 50 stock down to 10 stock, you've got less pollution, but if you've got humans on site as well, you've got a whole new cast of pollutants that are in the catchment that weren't there before.

118 He conceded the theoretical possibility of developing a catchment management paradigm which controlled stock density, human density and management practices. He did not however accept that this paradigm was achievable in this case.

119 He also elaborated the view that as a matter of experience, there were greater problems with small rural residential holdings (or hobby farms as they were referred to in cross-examination) than larger agricultural holdings in terms of improper use of pesticides, dumping of animal carcasses and other potential sources of water contamination.

120 I accept Mr Tweedie's submission that the Tribunal's reasons do not descend to an explicit analysis of the issue of potential setoff resulting from a reduction in pollution load following conditions requiring a reduction in stock access to the Campaspe River. Nevertheless the combination of the rejection of Mr Williams' assessment of cumulative risk for the reasons I have been through, and the acceptance of Dr Deere's evidence by the Tribunal gives rise to the necessary inference that the Tribunal failed to view the postulated setoff as being satisfactorily established.[59] This view was open to it. In particular it was open to conclude as the Tribunal expressly did that the addition of dwellings within a catchment would create an additional, unquantifiable but unacceptable risk of water contamination, and that the cumulative effect of such increased risk meant that the dwelling density in this potable water supply catchment should not be increased.[60]

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58 Transcript of Proceedings, *Rozen v Macedon Ranges Shire Council* (VCAT, Gibson DP, O'Leary and David MM, 4 August 2009) at 225-226.

59 Cf *Chubb Security Australia Pty Ltd v Kotzman* [2010] VSC 242 at [48]; *Brambles Industries Ltd v Nisselle* (2005) 22 VAR 433 at [22].

60 See *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [87] quoted above.

121 This conclusion was reached in the context of Dr Deere's evidence that the catchment was vulnerable to further contamination.[61]

122 There was a proper evidentiary basis for the critical conclusions of the Tribunal and that evidence provided a logical and satisfactory basis for the way in which it responded to Mr Williams' evidence. It was open to the Tribunal to reason and conclude as it did.[62] Ground 4(b) fails.

Ground 5 – other planning policy considerations

The Tribunal failed to have regard to all relevant considerations within the local planning policy framework of the Planning Scheme, in that it:

(1) **misconstrued clause 22.01 of the Planning Scheme in finding that protection of water quality was** "the primary planning consideration"; **and consequently failed to have regard to the other primary considerations identified in clause 22.01 of tourism, recreation and nature conservation;**

(2) **failed to have regard to the vision and policy contained in clause 22.17 of the Planning Scheme to enhance (as well as protect) the existing forest mosaic, and consequently incorrectly dismissed the policy as having** "little, if any, relevance" **to the application;**

(3) **failed to have regard to the specific vision contained in clause 21.07-3 for the areas around Woodend and consequently incorrectly construed the policy as** "very broad brush" **in its approach; and**

(4) **failed to have regard [to] the specific vision contained in clause 21.07-3 for the areas around Woodend to** "protect and enhance the forest mosaic".

123 The Tribunal considered the relevant planning policy context firstly insofar as it bore on the issue of water quality.

124 It recorded first the relevant objectives of both the zone and the ESO which I have set out at [26]-[29] above.

125 These provisions seek to ensure that water quality is not comprised within the relevant catchment.

126 The Tribunal then referred to the SPPF which also speaks of ensuring that water quality is protected in water supply catchments.

> The discretion to grant a permit under both controls must be exercised having regard to the State Planning Policy Framework (SPPF) and Local Planning Policy Framework (LPPF) of the planning scheme. Clause 18.09-2 of the SPPF states that:
>
> > Planning and responsible authorities should ensure that water quality in water supply catchments is protected from possible contamination by urban, industrial and agricultural land uses.
>
> Clause 15.01 of the SPPF deals with protection of catchments, waterways and groundwater. The objective is:
>
> > To assist the protection, and where possible, restoration of catchments, waterways, water bodies, groundwater, and the marine environment. [63]

61 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [65] as quoted above.

62 *S v Crimes Compensation Tribunal* [1998] 1 VR 83.

63 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [24]-[25].

127 The Tribunal then turned to the LPPF and observed that it contains numerous references to the significance of water quality within the Macedon Ranges area. It then quoted from clause 22.01 and 22.03 as comprising extracts *illustrating* the significance of water resources and the need to protect them.

> The local planning policy, Macedon Ranges and Surrounds, in clause 22.01 states in the policy basis:
>
> > The policy is directed primarily to the planning and management necessary for the conservation and utilisation of the policy area both as a water catchment for urban and local supply and as a location of State, metropolitan and local importance for leisure activities and nature conservation.
>
> Specifically, it is policy that:
>
> - Protection and utilisation of the resources of the policy area for water supply, tourism and recreation, and nature conservation must be the primary concern.
> - Where appropriate, due account must be given to the value of the area for forestry and agriculture.
> - All development in proclaimed water catchment areas and in elevated areas must be strictly limited and regulated to protect water quality, and maintain or enhance natural systems and landscape character.
> - Planning for recreation and leisure must be directed predominantly towards activities, which require natural or semi-natural surroundings and must be integrated with planning for water catchment management and nature conservation so as to minimise conflicts.
>
> Major influencing factors include:
>
> - The unacceptable detriment to the valuable landscape, recreation, water and nature conservation resources, which would ensue if all subdivided land in the policy area were to be developed for residential purposes - and the need to develop equitable policies to avoid that result.
>
> The local planning policy, Catchment Management and Water Quality Protection, in clause 22.03 identifies that the Macedon Ranges Shire contains a number of potable water supply catchments. It states:
>
> > Most of these areas are open catchments. The integrity of the water supply, both from surface watercourses and groundwater, is threatened by inappropriate land use or development. Water quality is largely determined by the quality of and management and farming practices of private landowners. The lack of reticulated sewerage and the dependence on septic tank systems for effluent disposal in many urban and rural areas of the Shire is of particular concern.
> >
> > Unplanned and inappropriate patterns of development can undermine water quality in catchments which may lead to increased treatment levels and higher water tariffs. The appropriate management of the water catchments is essential for the protection of the quality and quantity of domestic, agricultural and commercial water supplies. It is also important for the maintenance of reservoirs and watercourses as recreational resources.[64]

128 The Tribunal then referred to the background to these policy provisions.

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64 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [28]-[31]. The objectives of the policy are set out at 145-146 and the policy at 146-147 of the Court's previous decision of *Western Water v Rozen* (2008) 24 VR 133.

A number of these policy provisions were introduced or amended as an outcome of the council's Rural Areas Review. The Rural Areas Review resulted in Amendment C21 to the *Macedon Ranges Planning Scheme*. The panel that considered Amendment C21 said in its report:

> The Shire's rural areas present a range of complex and often competing issues that are not capable of easy resolution. Large areas of the Shire are in open water catchments, there are significant areas of important remnant vegetation, the Shire has a diverse and highly valued range of landscape characteristics, agriculture is a continuing and important element of the local economy and substantial areas are highly susceptible to land degradation. These issues are exacerbated by the competing interests and expectations of landowners and the continuing pressure for residential development in rural areas. If these issues are not well managed, then the important characteristics and resources that make such a significant contribution to the Shire's identity will continue to be damaged. This is not just a local issue because the Shire's water catchments, habitats and recreational features are of state significance.
>
> In order to address these issues, the Shire needs a comprehensive and considered framework that seeks to protect and enhance the positive characteristics and features that are under threat. This means that some of the practices of the past must stop, landowners cannot expect to have an unfettered right to subdivide and develop, and Council must be prepared to make difficult decisions in support of its planning objective.
>
> In developing its understanding of the issues that affect the Shire's rural areas the Panel has formed a number of overarching conclusions:
>
> • The protection of water quality should be the primary planning consideration of the Shire's water catchments; …[65]

129 The Tribunal concluded:

> We agree with the panel's conclusion that the protection of water quality should be the primary planning consideration in the water catchments. We consider that the wealth of planning policy and planning control objectives in the planning scheme lead to this conclusion. Whilst planning must always involve a balancing of conflicting objectives, we have no hesitation in finding that in respect of the Shire's open potable water supply catchments, net community benefit and sustainable development require protection of water quality to be the primary planning consideration. This primacy is explicitly stated in clause 22.01, which states it is policy that:
>
> • Protection and utilisation of the resources of the policy area for water supply … must be the primary concern.[66]

130 It can be seen that this conclusion is not founded on one specific policy but on the clear importance expressed in the relevant zone and overlay provisions, state policy, and local policy which the Tribunal had elaborated.

131 I note in passing that s 7(4) of the P&E Act provides:

> (4) If there appears to be an inconsistency between different provisions of a planning scheme —
>
> (a) the scheme must, so far as practicable, be read so as to resolve the inconsistency; and
>
> (b) subject to paragraph (a) —

65 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [32].

66 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [33].

(i) the State standard provisions prevail over the local provisions; and

(ii) a specific control over land prevails over a municipal strategic statement or any strategic plan, policy statement, code or guideline in the planning scheme.

132 It follows that both the state policy provision to which the Tribunal referred and the specific control provisions cited by it are not to be subordinated to the LPPF.

133 In my view, the state policy provisions and the zone and overlay provisions relied on by the Tribunal are plainly sufficient to warrant its conclusion as to the primacy of water quality issues within water supply system catchments.

134 Ground 5(1) of the notice of appeal takes the point that clause 22.01 refers to more than one element of primary concern:

> Protection and utilisation of the resources of the policy area for water supply, tourism and recreation and nature conservation must be the primary concern.

135 The fact that this statement does not stop at its first element does not however detract from the fact that it illustrates the recurrent and predominant emphasis in policy upon the protection of water supply catchments. The primary concern stated does not contemplate tourism, recreation or nature conservation without protection of water supply.

136 The Tribunal's conclusion as to the combined effect of the provisions referred to by it was clearly open to it.

137 It is further submitted that the Tribunal's conclusion led it to disregard other relevant policy imperatives and in particular the reference in clause 22.01 to nature conservation as an element of primary concern (tourism and recreation were not relevant on the facts of this case).

138 More specifically, the appellants submit that the Tribunal failed to have regard to the appellants' case that the proposed subdivision would facilitate revegetation of part of the land and in particular revegetation of a streamside buffer.

139 The appellants called evidence from a landscape architect detailing a landscaping proposal prepared for the subject land.

140 The Tribunal specifically dealt with the planning benefits of the revegetation proposal in its reasons:

> The primary benefit advanced by the Rozens for allowing dwellings on the land is that the implementation of the revegetation/management plan would be certain to achieve environmental benefits. These benefits would be consistent with various aspects of planning policy. They say that these benefits must be balanced against the alleged risk of detriment to water quality that an additional two dwellings on this land might cause.
>
> We do not accept this argument. We agree that the planning scheme acknowledges the opportunity to use the grant of a permit for a dwelling as the catalyst for achieving positive environmental outcomes. But when evaluating the positive environmental outcomes that may result from allowing one or two dwellings on this land, we have concluded that the greater chance of success and long term improvements will result if the land is retained in a single holding and managed as a single unit.[67]

67 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [130]-[131].

141 There is no basis for concluding that the Tribunal failed to have regard to the potential conservation benefits of the proposal when it specifically adverted to them and recognised they would be consistent with aspects of planning policy.

142 Ground 5(2) further asserts that the Tribunal failed to have regard to the vision and policy contained in clause 22.17 of the Planning Scheme with respect to the existing forest mosaic in the surrounding area.

143 The Tribunal stated:

> Clause 22.17 Living Forests policy
>
> The subject land is also included in the Living Forests Area under clause 22.17. The objective of this policy is to protect the existing forest mosaic, and to protect the character and landscapes of the area. A permit will only be granted for a dwelling in this area where it can be conclusively demonstrated that this land use and development will not compromise existing native vegetation. However, given the absence of native vegetation on the land this policy has little, if any, relevance.[68]

144 The subject land was described at the outset of the Tribunal's decision as comprising "mainly cleared grazing land with a few patches of remnant native vegetation particularly close to the Chambers Road side of the site." An aerial photograph demonstrates this description is accurate. The reference to absence of native vegetation at [114] of the Tribunal's reasons should therefore not be read as "complete absence". The substantial absence of native vegetation was relevant because the proposed dwellings could be erected without adversely impacting upon existing native vegetation.

145 The policy basis stated for clause 22.17 is council's vision for the areas around Woodend, Macedon and the Cobaws of protecting and enhancing the existing forest mosaic. It further states residential development on existing lots will only be permitted where existing vegetation will not be comprised by requirements for dwelling sites, fire protection buffers and other associated infrastructure. The objectives of clause 22.17 are:

- To protect the existing forest mosaic.
- To protect the character and landscapes of the area.

146 The policy contains specific provisions with respect to dwellings:

> A permit will only be granted for a dwelling in this area where it can be conclusively demonstrated that this land use and development will not compromise existing native vegetation. The application must provide a comprehensive assessment to Council demonstrating that the lot can support a dwelling, associated infrastructure and appropriate fire protection buffers without requiring removal or destruction of existing native vegetation.

147 There was no dispute before the Tribunal that the proposal met the objectives of this policy and the specific provision I have quoted. It can be seen the Tribunal's conclusions responded directly to them.

148 The policy also supports ancillary enhancement of existing native vegetation.

> In granting a planning permit for development in this area, Council may require on property works to enhance existing native vegetation. These works may include fencing of remnant vegetation, revegetation of critical areas such as contributing to vegetation links or enhancing the sustainability of existing stands.

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68 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [114].

149 The potential for ancillary enhancement of vegetation by way of permit condition was addressed by the Tribunal in the passages I have already quoted at paragraphs [130] and [131] of its decision. The failure to expressly refer to the specific endorsement in clause 22.17 of the potential for such conditions cannot sensibly be said to demonstrate a defect in its reasoning.

150 Grounds 5(3) and (4) of the notice of appeal further contend that the Tribunal failed to have regard to clause 21.07-03 of the Planning Scheme.

151 The Tribunal introduced that policy as follows:

> • *Clause 21.07-3 Sustainable Rural Land Management - Rural Living, Environmental Living and Agricultural Landscapes.*The subject site is located within an area where the future direction for rural land is identified as "Environmental Living" on the Rural Land Use Strategy Plan in the council's municipal strategic statement at clause 21.07-3. This is a somewhat confusing section of the planning scheme. The Environmental Living Area applies to a large area of the Shire and accordingly is very broad brush in its approach. Essentially, the objective is to protect significant environmental assets and to achieve an improvement in the condition of the environment. We agree with the council's interpretation of this provision that there should be no expectation that all land in the Environmental Living area can be developed for rural living. Whether the development of land for a dwelling is acceptable will depend upon whether it results in a net environmental benefit. If development is allowed, it must achieve positive environmental outcomes.[69]

152 The Tribunal specifically recorded the core submissions made on behalf of the appellants with respect to this policy.

> The Rozens were critical of the council and Western Water for assuming that because the land is located in a rural area, agriculture is the preferred land use outcome and dwellings are discouraged unless they are associated with commercial agricultural use of the land. They placed considerable emphasis on a statement about rural living in clause 21.03 of the municipal strategic statement relating to key issues and trends that:
>
> > Rural living development can be used to make a positive contribution to growth management and environmental enhancement.
>
> This was linked to statements in clause 21.07-3 about the Environmental Living area that:
>
> > Limited development will be supported, subject to positive environmental outcomes.[70]

153 The Tribunal went on to record the town planning evidence of Mr Glossop bearing on this question.

> On the other hand, as Mr John Glossop said in giving town planning evidence on behalf of Western Water:
>
> > It is counter intuitive to say that lots in the Rural Conservation Zone should be used for housing instead of certain rural or environmental values. The RCZ is one of the most restrictive non-urban zones in terms of controlling activity to retain high quality environmental values. Rural-residential or lifestyle land use, particularly where one holding is fragmented into four,

69 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [114].

70 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [115] and [116].

> does not necessarily bring environmental benefits notwithstanding the potential for regulation through management plans or the best of intentions of the current or future owners. Such properties do not rely on the active use of the land to derive an income and are often used as weekend retreats for leisure and relaxation rather than rural tasks such as weed management, control of pests and fence mending.[71]

154 The Tribunal concluded:

> We consider it is inappropriate to "cherry pick" isolated statements from the diversity of the local planning policy framework applying to the subject land. We consider that the overall thrust of the LPPF, when read as a whole, focuses on protection of water catchments and water quality, recognising the rural character and associated landscapes of the area, and protecting agricultural land. We do not consider that there is any overall support for promoting dwellings in this area. Rather, if dwellings are to be permitted, then they must make a positive contribution to improving the condition of the environment. This does not mean that the potential for improving the condition of the environment of itself justifies further dwellings. Instead, we interpret the LPPF to mean that especially with larger land holdings used for agriculture, such as the subject land, it is policy that dwellings are related to agricultural production and that further fragmentation of land is avoided.
>
> We therefore consider that in deciding whether one or two dwellings should be permitted, the most relevant issues to consider are sustainable land management and protecting the use of the land for productive agriculture.[72]

155 In my view the Tribunal's analysis of the planning issues raised by clause 21.07-03 was an entirely rational one. It cannot be said the Tribunal failed to have regard to that clause, nor can it be said that it failed to address the appellant's key submissions concerning it.

156 The Tribunal's view balances clause 21.07-03 against other policy provisions and in particular clause 22.19, in respect of which it stated at [114]:

> Clause 22.19 Northern Catchments policy
>
> The objectives of this policy include to protect water quality in the northern catchments and to provide for sustainable, productive agriculture. The policy applies to all areas included in the ESO4[33]. The policy basis recognises that the reservoirs in the northern catchments area provide potable water supply for many townships in the region. It also recognises that this land provides agricultural output, which is important for the shire's economy. Agricultural output is threatened by fragmentation of land and the introduction of residential uses not related to agriculture. It is important that land use within the northern catchments area does not have a negative impact on water quality as well as protecting agricultural productivity of the area. These objectives can be achieved by ensuring that development, including dwellings, are related to agricultural production and that further fragmentation of land is avoided.

157 This statement accurately reflects and repeats the stated policy basis and objectives of the policy. The policy specifically envisages that the agricultural productivity of the area will be protected and that planning should seek to ensure that development (including dwellings) is related to agricultural production.

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71 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [117].

72 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [118] and [119], citations removed.

158 Ultimately it fell to the Tribunal to resolve potentially conflicting objectives within the policy matrix. Insofar as the clause 22.19 objectives relating to agricultural productivity were in conflict with the 21.07-03 provisions recognising the potential for incidental environmental benefits generated by conditions upon development (including "enhancing the forest mosaic"), the Tribunal was entitled to give greater weight to clause 22.19. The Planning Scheme provisions governing decision making (to which I shall return below) expressly recognise that decision making will potentially involve the balancing of competing considerations including competing policy objectives. The Tribunal's reading of the relevant policies was a logical, balanced and sensible one. It disclosed no error of law. Ground 5 must therefore fail.

Ground 6 – Mr Glossop's evidence

The Tribunal erred in law in failing to have regard to a relevant consideration, namely the independent expert planning evidence of Mr John Glossop that he regarded the development of two dwellings on the subject land to be an acceptable planning outcome.

159 Mr Glossop was called on behalf of Western Water to give independent evidence as to the planning merits of the appellants' permit application.

160 In the course of his cross-examination Mr Glossop conceded that on a proper application of the Guidelines, a permit for at least one dwelling should be granted and possibly two.[73]

161 Mr Glossop further stated:

> Whether it is one or two I think is a question for the Tribunal.[74]

162 It is this question which the Tribunal has decided. Mr Glossop's concession that two dwellings were potentially acceptable having regard to the guidelines was a view the Tribunal shared. It ultimately found that two dwellings were not acceptable on other grounds.

163 There is nothing in this ground of appeal. There was no inconsistency between Mr Glossop's evidence and the Tribunal's reasoning.

Ground 7 – the test applied by the Tribunal

The Tribunal erred in law in failing to consider whether the grant of a permit for two dwellings was a reasonably acceptable outcome having regard to the matters relevant to its decision under the planning scheme, and instead wrongly refused to grant approval for two dwellings on the basis that it was not "the preferable outcome".

164 The Tribunal expressed its ultimate conclusion by stating that whilst two dwellings might be supportable on water quality and catchment management grounds, all other things being equal, having regard to issues associated with sustainable land management and agricultural productivity, "we consider that one dwelling is a preferable outcome."

165 The appellants submit that the Tribunal has applied the wrong test in resolving the question of whether two dwellings should be permitted. The true issue was simply whether two dwellings would be a reasonably acceptable outcome having regard to relevant considerations under the Planning Scheme.

166 Clause 11.02 of the SPPF contained in all Victorian Planning Schemes states:

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73 Transcript of Proceedings, *Rozen v Macedon Ranges Shire Council* (VCAT, Gibson DP, O'Leary and David MM, 3 August 2009) at 96.

74 *Rozen v Macedon Ranges Shire Council* at 97.

> The State Planning Policy Framework seeks to ensure that the objectives of planning in Victoria (as set out in Section 4 of the *Planning and Environment Act 1987*) are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.[75]

167 This goal reflects the potentially conflicting nature of the objectives stated in s 4 of the P&E Act and the need to integrate a range of considerations in arriving at an appropriate planning decision.

168 The LPPF provisions contained in each Victorian Planning Scheme provide for a municipal strategic statement ("MSS") which among other things furthers the objectives of policy in Victoria to the extent that the SPPF is applicable.[76] They further provide for local planning policies as tools used to implement the objectives and strategies of the MSS. The LPPF thus looks back to the SPPF which, as I have said, expresses net community benefit and sustainable development as the touchstones of planning outcomes.

169 Both the zone control and the overlay control applicable to the subdivision application before the Tribunal in turn require regard to be had to the SPPF in exercising the discretion to grant a permit.[77]

170 Clause 65 of the Planning Scheme provides an overarching set of considerations relating to decision making including specific provisions relating to applications to subdivide land.

> 65 Decision Guidelines
>
> Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal *will produce acceptable outcomes* in terms of the decision guidelines of this clause.
>
> 65.01 Approval of an application or plan
>
> Before deciding on an application or approval of a plan, the responsible authority must consider, as appropriate:
>
> - The matters set out in Section 60 of the Act.
> - The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
> - The purpose of the zone, overlay or other provision.
> - Any matter required to be considered in the zone, overlay or other provision.
> - The orderly planning of the area.
> - The effect on the amenity of the area.
> - The proximity of the land to any public land.
> - Factors likely to cause or contribute to land degradation, salinity or reduce water quality.
> - Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site.
> - The extent and character of native vegetation and the likelihood of its destruction.

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75 State Planning Policy Framework, cl 11.02.

76 Section 12A of the P&E Act provides that an MSS must "further the objectives of planning in Victoria to the extent that they are applicable in the municipal district".

77 Clause 35.06-6 with respect to the zone control and clause 42.01-4 with respect to the overlay control.

- Whether native vegetation is to be or can be protected, planted or allowed to regenerate.
- The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.

65.02 Approval of an application to subdivide land

Before deciding on an application to subdivide land, the responsible authority must also consider, as appropriate:

- The suitability of the land for subdivision.
- The existing use and possible future development of the land and nearby land.
- The availability of subdivided land in the locality, and the need for the creation of further lots.
- The effect of development on the use or development of other land which has a common means of drainage.
- The subdivision pattern having regard to the physical characteristics of the land including existing vegetation.
- The density of the proposed development.
- The area and dimensions of each lot in the subdivision.
- The layout of roads having regard to their function and relationship to existing roads.
- The movement of pedestrians and vehicles throughout the subdivision and the ease of access to all lots.
- The provision and location of reserves for public open space and other community facilities.
- The staging of the subdivision.
- The design and siting of buildings having regard to safety and the risk of spread of fire.
- The provision of off-street parking.
- The provision and location of common property.
- The functions of any body corporate.
- The availability and provision of utility services, including water, sewerage, drainage, electricity and gas.
- If the land is not sewered and no provision has been made for the land to be sewered, the capacity of the land to treat and retain all sewage and sullage within the boundaries of each lot.
- Whether, in relation to subdivision plans, native vegetation can be protected through subdivision and siting of open space areas.[78]

171 The test of acceptable outcomes stated in the clause is informed by the notions of net community benefit and sustainable development. An outcome may be acceptable despite some negative characteristics. An outcome may be acceptable because on balance it results in net community benefit despite achieving some only of potentially relevant planning objectives and impeding or running contrary to the achievement of others.

172 The weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision maker.[79]

78 Macedon Ranges Shire Planning, cl 65. Emphasis added.

79 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

173 Furthermore, the potential complexity of issues raised by a particular application renders the question of what would be the optimal form of development for use in a particular case fundamentally difficult of resolution and one on which different minds might reasonably differ.

174 In *Knox City Council v Tulcany Pty Ltd*, I observed:

> The planning scheme does not require an ideal outcome as a prerequisite to a permit. If it did, very few, if any, permits for development would ever be granted and there would be difficult differences of opinion as to whether the outcomes were in fact ideal. The Tribunal is entitled to grant a permit where it is satisfied that the permit will result in a reasonably acceptable outcome having regard to the matters relevant to its decision under the planning controls.[80]

175 For these reasons I accept the appellants' submission that the test which the Planning Scheme requires to be applied is one of acceptable and not ideal outcomes.

176 The question in the present case is whether the Tribunal's reasons read in context demonstrate that it has failed to apply the correct test. The underlying task of the Tribunal is after all to reach the "correct or preferable" decision on the material before it.[81]

177 In this sense the preferable outcome is not to be equated with the "ideal" outcome.

178 The sense in which the Tribunal is to be understood to have referred to the preferable outcome in the present case can be derived by reference to the context in which the expression is used.

179 The Tribunal initially postulated the relevant issue expressly on the basis of whether two dwellings would be acceptable.

> At the hearing, both the council and Western Water conceded that in terms of applying the current Guidelines, two dwellings would be acceptable, which on a site specific basis would result in a density of approximately 1:36 ha. The Rozens said that if the Tribunal would not support their application for four dwellings, it should grant a permit for two dwellings rather than one only or rejecting the application completely.[82]

180 As I have said it then concluded that, by reference to water quality and landscape and visual impact considerations, two dwellings would be acceptable.[83]

181 After reviewing relevant planning policy it then stated:

> We therefore consider that in deciding whether one or two dwellings should be permitted, the most relevant issues to consider are sustainable land management and protecting the use of the land for productive agriculture.[84]

182 It concluded two dwellings were not acceptable in terms of these issues.

> Overall, we consider that there are serious disadvantages associated with fragmenting ownership of this land from a rural land management perspective. Whilst the disadvantages associated with two dwellings are not as great as if four

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80 *Knox City Council v Tulcany Pty Ltd* [2004] VSC 375; 18 VPR 229 at 234.

81 *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422 at 433; *McDonald v Guardianship and Administration Board* [1993] 1 VR 521 at 528.

82 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [98].

83 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [108]-[110].

84 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [119].

> dwellings were permitted, they are still substantially greater than if only one dwelling was permitted and the land is retained in a single ownership. We consider that the land is more likely to be used for sustainable, productive agriculture if it is retained in a single ownership and that much better land management practice and environmental improvements are likely to result. Hence, on this basis, only one dwelling should be permitted.[85]

183 It rejected the appellants' case as to achievement of positive environmental benefits.[86] It then stated:

> We are responsible for applying the policies and objectives of the planning scheme and other documents and guidelines that we are required to have regard to by virtue of the planning scheme and the Act. On balance, a consideration of these matters and the evidence and facts of this case lead us to the conclusion that the preferable outcome is to grant a permit for only one dwelling, not two.
>
> We acknowledge that both the council and Western Water conceded that two dwellings would be acceptable. Nevertheless, we are not bound by this concession. We consider that whilst two dwellings at a density of 1:36 hectares might be supportable on water quality and catchment management grounds, all other things being equal, having regard to issues associated with sustainable land management and agricultural productivity, we consider that one dwelling is a preferable outcome. This will result in a dwelling density for this land that is considerably more than the 1:40ha density specified in the current Guidelines instead of a density that is slightly less. We regard this as a beneficial outcome for the catchment because evidence and policy all indicate that the lower the dwelling density in open, potable water catchments the better.[87]

184 I do not read this statement as other than a conclusion to the enquiry which commenced at [98] of the Tribunal's reasons quoted above, namely whether two dwellings would be an acceptable outcome.

185 The very policies and objectives of the Planning Scheme to which the Tribunal refers adopt the notion of net community benefit and sustainable development as the touchstone of acceptable outcomes. The reference to the preferable outcome on balance is an application of this test. Read in context and as a whole, the Tribunal's conclusion is one that the grant of a permit for two dwellings would not result in net community benefit and sustainable development. Conversely the grant of a permit for one dwelling would. At [138] the Tribunal went on to expressly state:

> We have concluded that in the interests of net community benefit and sustainable development, a permit for only one dwelling should be granted.[88]

186 This is a finding that one dwelling is an acceptable outcome and two dwellings are not. Accordingly this ground of appeal fails. In my view the Tribunal has in fact applied the relevant test.

187 For the above reasons the appeal is dismissed.

Appeal dismissed

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85 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [128].

86 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [130]-131].

87 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [133]-[134].

88 *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 at [138].

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J VENEZIANO