

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1375/2020  
PERMIT APPLICATION NO. 2020/47

#### CATCHWORDS

Section 82 of the *Planning & Environment Act 1987*; Murrindindi Planning Scheme; Farming Zone; Bushfire Management Overlay; place of assembly; music festival; buildings and works; piecemeal application; agriculture; amenity and noise impacts

#### APPLICANTS

Murray Coates, Bernard and Lynda Taylor  
and Greg Salter

#### RESPONSIBLE AUTHORITY

Murrindindi Shire Council

#### REFERRAL AUTHORITIES

Country Fire Authority  
Goulburn Broken Catchment Management  
Authority  
Head, Transport for Victoria

#### RESPONDENT

Tanglewood Festival Born Rhythm  
Entertainment

#### OTHER

Victoria Police

#### SUBJECT LAND

969 Goulburn Valley Highway, Thornton

#### HEARING TYPE

Hearing

#### DATES OF HEARING

25 and 26 May 2021

#### DATE OF ORDER

12 July 2021

#### CITATION

Coates v Murrindindi SC [2021] VCAT 751

#### ORDER

- 1 In application P1375/2020 the decision of the responsible authority is set aside.
- 2 In planning permit application 2020/47 no permit is granted.

**Christopher Harty**  
Member

## APPEARANCES

For Murray Coates, Bernard and Lynda Taylor and Greg Salter	Mr Scott Edwards, Solicitor from Planning & Property Partners Pty Ltd. Mr Greg Salter, observing
For Murrindindi Shire Council	Ms Clara Gartland, Town Planner Ms Catherine Sherwin, Town Planner observing
For Country Fire Authority	Mr Stephen Foster, Town Planner and Mr Darrin Dorhmann, Fire Safety Officer <sup>1</sup>
For Goulburn Broken Catchment Management Authority	No appearance
For Head, Transport for Victoria	No appearance
For Tanglewood Festival Born Rhythm Entertainment	Mr David Rogers, Environmental Planner from Harmonic Solutions Pty Ltd, Ms Stephanie Born, Director from Tanglewood Festival Born Rhythm Entertainment and Mr Mark Hollis, Security Manager from Guarded Group who attended on Day 2. Mr Rogers called the following expert witness: <ul style="list-style-type: none"><li>• Mr Darren Tardio, Acoustics Engineer from Enfield Acoustics Pty Ltd</li></ul>
For Victoria Police	Acting Senior Sergeant Mick Mannix from Eildon Police Station <sup>2</sup>

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<sup>1</sup> The Country Fire Authority were requested by the Tribunal to attend on Day 2 to respond to questions from the Tribunal on bushfire risk.

<sup>2</sup> The Victoria Police requested leave as an interested stakeholder to be joined to make submissions on Day 2.

## INFORMATION

Description of proposal	The use of the land at 969 Goulburn Valley Highway, Thornton for the purposes of a place of assembly (Tanglewood Music and Arts Festival) annually for 5 years.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Murrindindi Planning Scheme
Zone and overlays	Farming Zone ( <b>FZ</b> ) Part Land Subject to Inundation Overlay ( <b>LSIO</b> ) Part Bushfire Management Overlay ( <b>BMO</b> )
Permit requirements	Clause 35.07-1 – to use the land for a place of assembly <sup>3</sup>
Relevant scheme policies and provisions	Clauses 02, 11, 12, 13, 14, 17, 35.07, 44.04, 44.06, 65 and 71.02

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<sup>3</sup> The permit application did not seek to include any other permissions.

Land description

The music festival is proposed to be located on 2 lots (Lot 1 TP 342881 and Lot 2 TP 342881) on the south side of the Goulburn Valley Highway. These lots form part of the property at 969 Goulburn Valley Highway, Thornton which has an overall area of over 400 hectares (**site**). Access is provided from the Goulburn Valley Highway, which is a road in a Road Zone Category 1 (**RDZ1**). These two lots total 166 hectares. There is a patch of native vegetation to the north east of the site and large scattered trees throughout the site. There are several waterways through the property which are generally vegetated. Lot 2 is 39 hectares in size and developed by way of a dwelling and machinery and shearing sheds. Lot 1 is 127 hectares in size and undeveloped. This lot is generally used for cattle grazing throughout the year. There is an existing track approximately 1.5 kilometres in length traversing both lots.

The site is located between the townships of Thornton (approximately 3.5 kilometres to the south-west and Eildon (approximately 11 kilometres) to the east. The surrounding area comprises large properties ranging in size from approximately 71 hectares to 384 hectares and used primarily for agricultural purposes. They are generally developed by way of single dwellings and machinery sheds. The site is close to but not adjoining prominent waterways such as the Goulburn River to the north and the Rubicon River to the south.

Tribunal inspection

5 July 2021 unaccompanied

## REASONS<sup>4</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Tanglewood Festival Born Rhythm Entertainment, the respondent (**permit applicant**) seeks to use land at 969 Goulburn Valley Highway, Thornton (**site**) for the purposes of a place of assembly associated with the Tanglewood Music and Arts Festival (**music festival**).
- 2 On 24 July 2020, Murrindindi Shire Council (**Council**) resolved to issue a Notice of Decision to Grant a Permit No. 2020/47 with conditions.
- 3 Murray Coates, Bernard and Lynda Taylor and Greg Salter who are the review applicants (**objectors**) have lodged a joint application with the Tribunal seeking a review of the Council's decision. The issues of concern to the objectors are:
  - The piecemeal and incomplete form of the application for planning permission due to the absence of approval sought for development in addition to the use of the site for a place of assembly.
  - The site-specific effects of the proposal that will adversely impact the amenity and agricultural production of adjoining and nearby farming land because of the increase in human activity including music noise and security, including biosecurity impacts.
- 4 The Council and the permit applicant do not consider a permit is required for buildings and works because of their temporary nature.
- 5 The permit applicant also considers the proposed music festival does not conflict with the purposes of the Farming Zone and is a use that can be appropriately managed to avoid detrimental impacts on agricultural activity and amenity of adjoining and nearby properties.
- 6 The referral authorities offered no objections to the proposal subject to conditions which Council have included in the Notice of Decision to Grant a Permit.
- 7 Victoria Police was critical of the proposal citing issues associated with anti-social behaviour, drug use, unauthorised trespass on adjoining properties to gain access to the site and reduced traffic safety associated with access to and from the site.

### The planning unit

- 8 Mr Edwards for the objectors questioned what the planning unit was having regard to the reference to various allotments in the Notice of Decision to

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<sup>4</sup> The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



Grant a Permit's address of the land. It refers to 969 Goulburn Valley Highway, Thornton, which includes several separate allotments. Council clarified that the planning unit consists of only two lots; Lot 1 TP 342881 and lot 2 TP 342881 (refer to Figure 1).

- 9 Lot 2 contains the existing dwelling and outbuildings and is proposed to be used as the main access to the site, while Lot 1 contains part of the site which is to be used for the music festival.

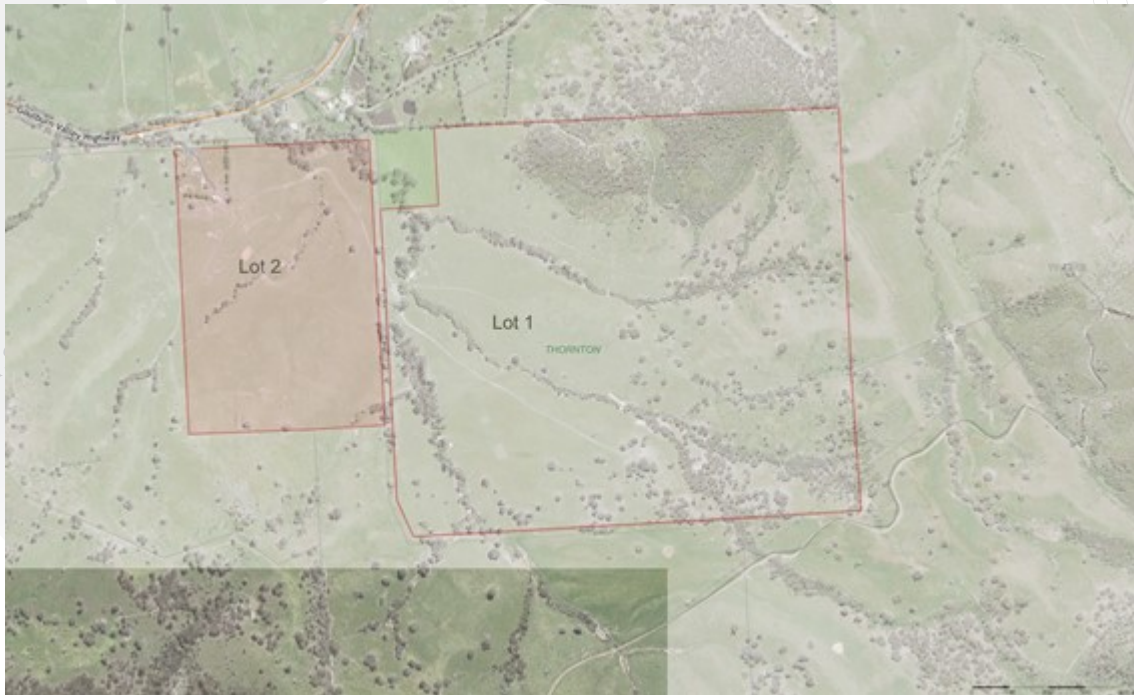


Figure 1: The planning unit comprising Lots 1 and 2 of TP 342881

### The proposal

- 10 The proposal is to run a music festival on part of the site over the new year period for the next five years. The music festival would operate from 30 December through to 3 January and would initially cater for 3,000 patrons in the first year together with 750 event staff. The permit applicant consider that the music festival has the potential to grow by 250 patrons each year reaching a maximum of 4,000 patrons in the fifth year which would be controlled by way of a permit condition.
- 11 The site has previously been used for the operation of the same music festival by the permit applicant on four occasions since 2015 under two previous planning permits.<sup>5</sup>
- 12 The proposed music festival event is promoted as a small boutique music and arts festival consisting of musical performances, cultural activities, and

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<sup>5</sup> Planning Permit No. 2015/151 issued for the use only for one event on 27 November 2015 and Planning Permit No. 2016/113 issued for the use only for three events on 19 December 2016.

artistic workshops. The music festival is targeted at patrons in the 25 to 50 years demographic. The event is also promoted as family friendly whereby children under 12 years of age are permitted to attend the event in the company of a parent or legal guardian. The music festival event is promoted as being environmentally conscious where patrons are requested to bring reusable utensils and other strategies to reduce the event's carbon footprint. These policies are included in the Event Management Plan and Waste Management Plan submitted as part of the permit application.

- 13 The music festival site is proposed to be located towards the rear of Lot 1 around 1.5 kilometres from the Goulburn Valley Highway (refer to Figures 2 and 3). There will be two main stages where live bands and DJs will perform. The music festival will also include a market area where there will be food stalls, an art gallery, and a low-level music space. The food stalls will operate between 9.00 am to 1.00 am and free drinking water will be provided.

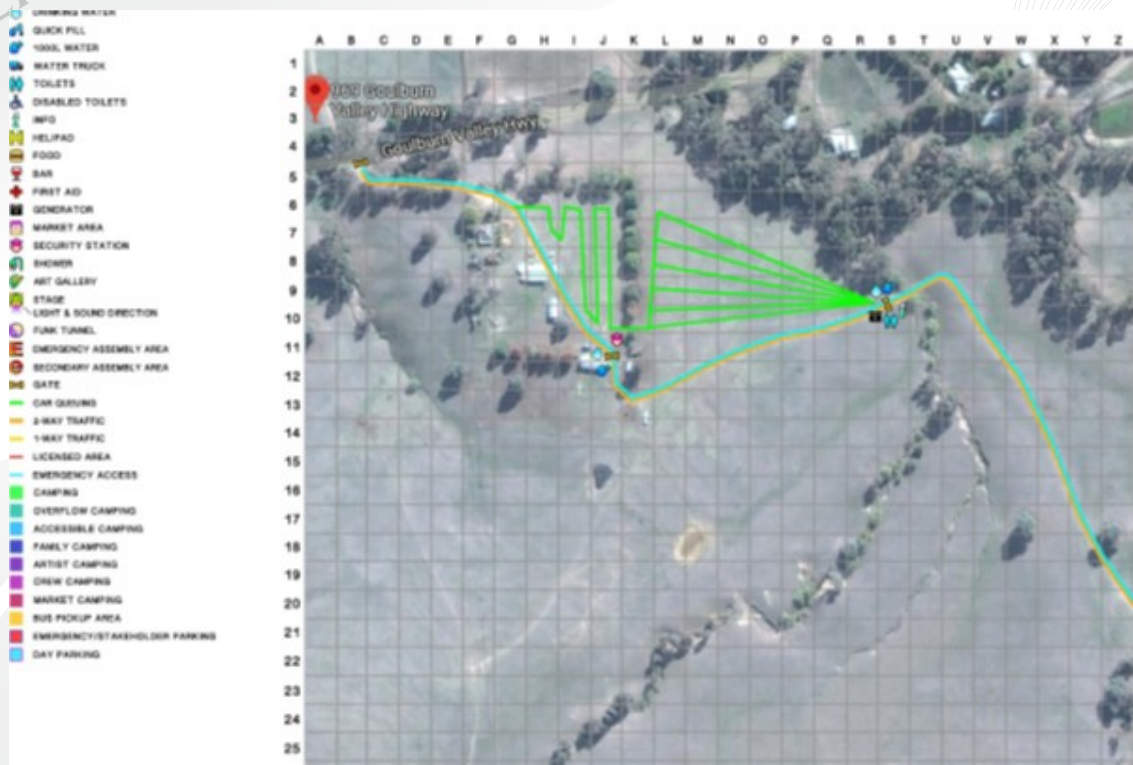


Figure 2: Proposed access and entry arrangement on Lot 2



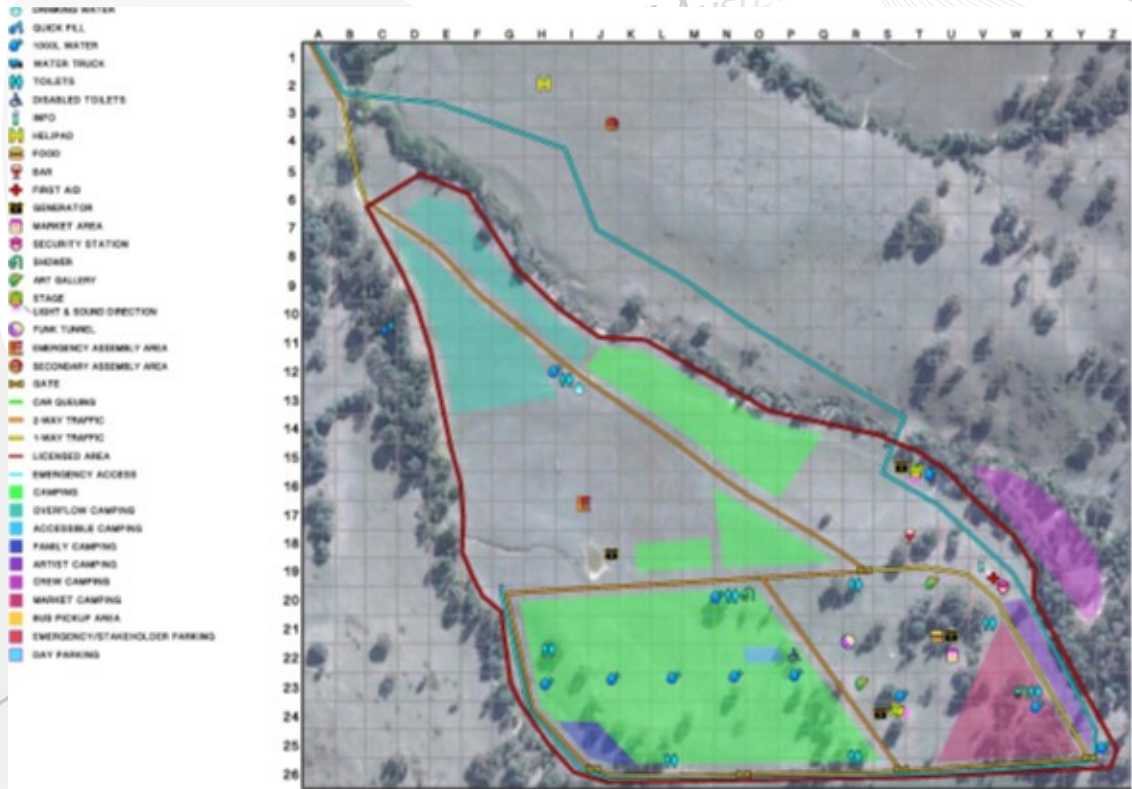


Figure 3: Proposed music festival layout on Lot 1

14 The proposed music festival schedule is as follows:

Date	Time	Activity
30 December	9.00am	Open for patrons
	9.00am – 1.00am	Markets – Food stalls
	2.00pm – 12.00am	Music playing on main stages
	12.00am – 2.00am	Low level music & chill spaces
31 December	10.00am – 6.00am	Music playing on main stages
1 January	10.00am – 11.00pm	Live bands will play – No DJs will play
	8.00pm – 1.00am	Cinema
2 January	12.00pm	Public required to leave the site by 12.00pm
		Volunteers and the crew will remain on-site for the pack down



- 15 The permit applicants also sought the flexibility of having alternative dates in case unforeseen circumstances prevented or cancelled the music festival over the new year period, such as COVID-19 or high bushfire risk. The proposed alternative dates include Australia Day weekend or the last weekend in March. If the music festival is required to change dates, the above schedule would remain the same.
- 16 The permit application was supported by a range of event operational documents and management plans relating to security, fire operations, traffic, medical, water supply, waste, and noise.

### **WHAT ARE THE KEY ISSUES?**

- 17 The issues raised within the context of this review relate to what permissions under the Murrindindi Planning Scheme have and have not been applied for and the proposal's response to the zone, policy and physical contexts of the site and impacts on amenity and agricultural production.
- 18 I also note that part of the site is affected by the Bushfire Management Overlay (**BMO**), which I will address and whether a Cultural Heritage Management Plan (**CHMP**) is also required.
- 19 Having heard the submissions, the key threshold issue arising from this proposal is whether the permit application is complete?
- 20 In light of this, other issues become somewhat secondary, including effects from music noise on amenity and agricultural production.
- 21 I am aware of determining whether the proposal will produce an acceptable outcome with respect to net community benefit having regard to the relevant policies and provisions in the Murrindindi Planning Scheme and the need for integrated decision making<sup>6</sup> and whether a permit should be granted and, if so, what conditions should be applied.
- 22 However, with this proposed use I find the permit application and the permissions that are sought incomplete. I am unable to assess and determine the matter. I have decided to set aside the decision of Council and direct that no permit be granted. My reasons follow.

### **APPLICATION INCOMPLETE, PIECEMEAL AND UNCERTAIN**

- 23 An issue raised by the objectors is the piecemeal way the permit application seeks approval for the proposal, the incomplete nature of the permissions that are sought and what is required under the Murrindindi Planning Scheme and the uncertainty of the permit application process.
- 24 Mr Edwards on behalf of the objectors contends that the permit application for the music festival is misconceived and fatally deficient in providing information relating to the proposal by way of its buildings and works

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<sup>6</sup> Clause 71.02-3 – *Integrated Decision Making*.

components, as apart from merely the use of the land and as such, I would not be in a position to properly assess and determine this matter.

25 He contends that permission for constructing buildings and constructing or carrying out works was not sought in the permit application. He says that there will be buildings and works involved in setting up and operating the music festival. The objectors say that:

Put simply, the Permit Application, and the Council's assessment of it, lack the requisite rigour and sophistication necessary to establish that the grant of a permit will result in an acceptable planning outcome.

26 The Council and the permit applicant rely on the temporary nature of the proposal. They say the proposed music festival does not have any buildings or works associated with the proposed use because of the temporary, lightweight, small scale and in some cases transportable nature of structures that are erected on, or brought onto the site for the running of the music festival. Accordingly, they consider the proposal does not attract a permit requirement for development.

27 Mr Rogers on behalf of the permit applicant submitted that the largest structures being the stages would have the following dimensions:

- A main stage 10 metres by 7 metres or 70 square metres in area with a raised platform 0.5 metres in height and an overall height of 6 metres.
- A secondary stage 6 metres by 6 metres or 36 square metres in area with a raised platform 0.5 metres in height and an overall height of 6 metres.

28 Mr Rogers submitted the stages and other structures would be erected a few days before the commencement of the music festival and dismantled a few days after the music festival and would have no discernible effect or impact on the area. He submitted that as temporary and small structures and not being permanent structures, they would not be classified as buildings under *Building Regulations 2018* and the music festival would only require an occupancy permit under the *Building Act 1993* as a place of public entertainment (**POPE**).

29 Unfortunately, what may be required under building regulations, bears little resemblance with what approvals may be required under the Murrindindi Planning Scheme.

30 Fundamentally, this is a threshold issue for this matter.

31 The permit application made to Council and what is before me now is only for use. It was accepted by the parties that a music festival falls within the definition of a place of assembly<sup>7</sup> and under Clause 35.07-1 of the Farming Zone requires a permit for the use of the land. However, what was not clear

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<sup>7</sup> Under Clause 73.03 – *Land Use Terms*, place of assembly is defined as *Land where people congregate for religious, spiritual or cultural activities, entertainment, or meetings.*

was that, as a permit required use, a permit for buildings and works was also triggered under Clause 35.07-4 where:

A permit is required to construct or carry out any of the following:

- A building or works associated with a use in Section 2 of Clause 35.07-1.

32 As a place of assembly is a section 2 permit required use, any buildings or works irrespective of being of a temporary nature, size or scale attracts a permit requirement. Unfortunately, in this case, no permission was sought for any buildings and works. Hence, I am not minded to grant a permit for a use, which obviously includes buildings and works, and for which no permission has been sought. To do so, would represent a piecemeal approval and not result in an orderly planning outcome.

33 There are exemptions from the requirement for a permit for buildings and works under both Clause 35.07-4 and under Clause 62.02 – *Buildings and Works*. However, neither of these provisions refers to temporary buildings, structures or works.

34 I acknowledge that outdoor music festivals and other similar events have been a part of the entertainment industry for many years. They include concerts held on sports grounds, showgrounds and on public land and are often associated with sporting or community events. They can also be held on private land, such as at wineries. They can be large, attracting many thousands of people or small community events. Many have been running for long periods of time.

35 The planning scheme facilitates such events by providing specific exemptions for events held on public land that include music festivals.<sup>8</sup> Land uses such as circuses and carnivals also have exemptions subject to a Code of Practice.

36 However, this proposal is not on public land and is on privately owned farmland.

37 Under section 3 of the *Planning and Environment Act 1987*, building is defined as including:

- (a) a structure and part of a building or a structure; and
- (b) fences, walls, out-buildings, service installations and other appurtenances of a building; and
- (c) a boat or a pontoon which is permanently moored or fixed to land.

38 Under the same provision, works are defined as including:

any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil.

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<sup>8</sup> For example, Clause 62.03 – *Events on Public Land*.



- 39 Neither definitions refer to the temporary nature or otherwise of either a building or works.
- 40 The proposal includes tent-like structures associated with temporary stages, bar area, shipping containers used for storage purposes, erected poles used for fencing and erecting shade sails, artwork and toilet facilities including urinals with holes dug in the ground for liquid effluent disposal (refer to Figures 4 to 7). My inspection confirmed the presence of the shipping containers, poles and artwork present on the site.



Figure 4: Tent like structure from previous music festival events on the site

- 41 These items are structures irrespective of whether they are temporary or not and irrespective of their size or function. There are also works involved in establishing the music festival event and these require planning permission under the Farming Zone that affects the site.
- 42 The absence of seeking approval for these structures (buildings) and works as part of the use and development of the site for the music festival as a place of assembly confirms the concerns of the objectors that the proposal is not complete and as such is piecemeal and therefore creates uncertainty regarding what is proposed, where it is proposed and what it will look like.



Figure 5: Urinal structure



Figure 6: Urinal disposal pit





Figure 7: Music festival structures

- 43 Other issues were also not clear to me such as:
- The Country Fire Authority’s statement of grounds indicating that a second emergency access point to the site from the Goulburn Valley Highway would be required. I understand that such an access is informally available, however, any creation or alteration of access to the Goulburn Valley Highway, which is a road in an RDZ1 that would require a permit under Clause 52.29 – *Land adjacent to a Road Zone, Category 1, or a Public Acquisition Overlay for a Category 1 Road* of the Murrindindi Planning Scheme.
  - The presence on the site of shipping containers, which may also require a permit under the Farming Zone.
- 44 These matters should be settled and included in any fresh permit application and not left to a ‘future process’.
- 45 On the material before me I find that a permit for buildings and works is required, which has not been sought, and which is clearly involved with the use of the site for the proposed music festival.
- 46 Accordingly, I find that a permit should not be granted on the basis that the proposed music festival requires approval for not only the use of land, but also for development and the buildings and works associated with the use.



- 47 I am not in a position to amend the application for planning permit to include buildings and works because with no dimensioned or scaled plans showing what the various structures may look like it is simply not possible for me to form a view as to what effects such structures may or may not have on the environment and landscape of the site and local area.
- 48 A fresh permit application would be required which should include detailed plans for both the siting and design of structures that either exist or are proposed to be erected on the site for the music festival.

### **OTHER MATTERS**

- 49 Apart from the piecemeal nature of what has been sought for approval for the proposed music festival, I acknowledge that the permit applicant has undertaken a significant amount of work to support the permit application for use associated with the operational aspects of the proposal. This work is helpful, and indeed, a necessary requirement for the running of the music festival.
- 50 I also acknowledge Council's support for the proposal, particularly given the tourism benefits the proposal and the number of patrons it would attract may bring to the region.
- 51 However, there are a number of other matters that the permit applicant will need to address, and which Council will need to consider and to which I make some observations.

### **Plans**

- 52 As mentioned above, what is missing is a comprehensive set of plans, diagrams and images of what is actually proposed to be erected and constructed on the site, both now and in the future given the proposal to expand the number of patrons over the intended five year period. The plans also need to show where such structures and works are to occur. This material is required irrespective of whether they are temporary or not. It enables a proper assessment and for parties to see what is proposed and where including what it will look like and function. This material is important because it provides the basis of plans that may be endorsed as part of any permit that may be granted.
- 53 This material is lacking in this case.
- 54 Without it, I am not able to assess what is proposed and to be able to make an informed decision. For instance, to gauge an understanding of what was proposed by way of structures, I had to request photographic images depicting what was proposed to be erected. This is not satisfactory.

### **Bushfire risk**

- 55 The north eastern portion of Lot 1 of the site is affected by the BMO. The area involving activity associated with the music festival does not occur within this area. Hence, a permit is not triggered under the BMO.

However, the area is in a Bushfire Prone Area (**BPA**) and bushfire risk and associated policy under Clause 13.02-1S – *Bushfire Planning* would still need to be taken into consideration.

- 56 Any second accessway to the Goulburn Valley Highway for emergency purposes should also be clearly identified and permit requirements such as those under Clause 52.29 of the planning scheme taken into consideration in any future permit application.

### **Aboriginal cultural heritage**

- 57 Regarding Aboriginal cultural heritage and area of cultural heritage sensitivity, I note that the music festival area is clear of the area of cultural heritage sensitivity associated with the Rubicon River to the south and appears to not trigger the requirement for a CHMP.

### **Noise**

- 58 A significant issue in the consideration of a music festival is noise impacts. I acknowledge that noise effects were addressed in the evidence of Mr Tardio and whose evidence was the subject of cross-examination. Noise effects and any impacts will need to be re-addressed in any future permit application and an updated assessment of noise impacts provided. This is because as of 1 July 2021, new environment protection legislation and regulations have come into force<sup>9</sup> and Amendment VC203 was gazetted on 1 July 2021 to all planning schemes altering various provisions including policy and provisions relating to noise.<sup>10</sup>

- 59 Regarding noise impacts, I understand that this relates to amenity however I note that the objectors are all related to agricultural production and include:

- Land to the north of the site is a commercial deer farm with the number of deer farmed ranging from around 70 up to 500 deer at any one time.
- Land generally to the south of the site is a commercial cow and calf breeding farm with around 110 head of cattle.
- Land to the north-west of the site is a commercial cattle farm with around 50 head of cattle.

- 60 I do note the submission from Mr Rogers that the land to the north associated with deer farming is gently upslope from the music festival site and approximately 1,180 metres distant. The entry to the site is also approximately 600 metres from the dwelling on this land.

- 61 I noted during my inspection that a hill provides some separation from where deer are present breaking the line of sight to the music festival

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<sup>9</sup> *Environment Protection Act 2017 and Environment Protection Regulations 2021.*

<sup>10</sup> *Noise limit and assessment protocol for the control of noise from commercial, industrial and trade premises and entertainment venues, Publication 1846.4 May 2021.*

ground. This may assist in minimising effects from noise on the deer livestock.

- 62 The music festival ground is directly bordering the land to the south, which is more exposed with hills upslope from music festival ground. Effects from music noise on sensitive receptors on this land are distant<sup>11</sup> and may not be significant, however livestock located closer to the common boundary may be more at risk.
- 63 Mr Rogers submitted the land to the north-west is approximately 2 kilometres from the entry to the site. I noted on my inspection that it is also separated by adjoining hills which may break line of sight in part and hence, impacts on sensitive receptors such as dwellings may be minimised.
- 64 The culmination of these observations are that the music festival is proposed over a short duration of a few days and during a time of the year when late night activity with generally multiple noise sources such as fireworks and the like can tend to be more prominent. The overall effects of noise on amenity may be encompassed with such activity.
- 65 However, this needs to be reviewed and the effects of noise on livestock is an issue that warrants attention in addressing potential adverse impacts on surrounding agricultural activity.

## CONCLUSION

- 66 For the reasons given above, the decision of the responsible authority is set aside. No permit is granted.

**Christopher Harty**  
**Member**

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<sup>11</sup> Mr Rogers submitted the shed on the adjoining land south of the site is approximately 2.3 kilometres.



**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P1375/2020  
PERMIT APPLICATION NO. 2020/47

**CATCHWORDS**

Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*; application for costs

**JOINT APPLICANTS**

Greg Salter  
Murray Coates  
Bernard & Lynda Taylor

**RESPONSIBLE AUTHORITY**

Murrindindi Shire Council

**RESPONDENTS**

Tanglewood Festival Born Rhythm  
Entertainment  
Mick Mannix, Victoria Police

**REFERRAL AUTHORITIES**

Country Fire Authority  
Goulburn Broken CMA  
Head, Transport for Victoria

**SUBJECT LAND**

969 Goulburn Valley Highway  
ALEXANDRA VIC 3714

**HEARING TYPE**

On the Papers – Costs

**DATE OF ON THE PAPERS  
HEARING**

30 November 2021

**DATE OF ORDER**

7 January 2022

**CITATION**

Salter v Murrindindi SC (Costs) [2022] VCAT  
17

**ORDER**

**Costs and fees refused**

- 1 The application for an award of costs pursuant to section 109(2) of the *Victorian Civil and Administrative Tribunal Act 1998* is refused.
- 2 The application for reimbursement of review application and hearing fees pursuant to section 115B(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* is refused.
- 3 No order as to costs.

**Christopher Harty**  
**Member**

## REASONS<sup>1</sup>

- 1 In an order dated 12 July 2021, the Tribunal determined to set aside the decision of the Murrindindi Shire Council (**Council**) in planning application 2020/47, and direct that no planning permit be granted. The proposal was for the use of land for a place of assembly associated with a music festival to operate on an annual basis for five years. The land is described as Lots 1 and 2 TP 342881, 969 Goulburn Valley Highway, Thornton (**site**).
- 2 The application for review was one brought under section 82 of the *Planning and Environment Act 1987* by objectors to the planning permit application, against the Council's decision to grant a planning permit.
- 3 On 3 September 2021 the Tribunal received from Greg Salter, a joint application with Murray Coates and Bernard and Lynda Taylor (**applicants**) for costs and reimbursement of fees against Council. The application for costs was made pursuant to section 109(2) of the *Victorian and Civil Administrative Tribunal Act 1998* (**VCAT Act**). An application for reimbursement of fees was also made pursuant to section 115B(1)(a) of the VCAT Act.
- 4 It is noted that the costs application does not seek any costs or fee reimbursements from the respondent Tanglewood Festival Born Rhythm Entertainment (**permit applicant**). The costs application is seeking costs and fee reimbursement from Council only.
- 5 Following an order from the Tribunal dated 5 October 2021, the applicants provided further information regarding their costs application under cover of an email dated 19 October 2021. In that correspondence the applicants advised that they seek legal costs amounting to \$21,487.50. These costs were made up of three separate invoices comprising the following:
  - Invoice number 29743, 30 April 2021 for legal costs associated with the merits proceeding - \$2,838.20.
  - Invoice number 30019, 31 May 2021 for legal costs associated with the merits proceeding - \$16,780.95.
  - Invoice number 31072, 31 August 2021 for legal costs associated with the costs proceeding - \$1,868.35.
- 6 With regards to the application relating to reimbursement of fees, the application nominates \$870.80 for the initial application fee.
- 7 The applicants seek the following orders from the Tribunal:

### Fees

- Pursuant to section 115B of the VCAT Act, Murrindindi Shire Council must reimburse the applicants the value of any application fee

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<sup>1</sup> The written submissions of the parties have been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

and daily hearing fees paid by the applicants in connection to this proceeding.

#### Costs

- In proceeding P1375/2020, the Murrindindi Shire Council must pay the nominated legal costs of the applicants. In default of agreement, such costs are to be assessed by the Victorian Costs Court on a standard basis on the County Court Scale of Costs.
- That the incurred costs and fees of the applicants must be paid within 30 days of any order.

8 The applicants have provided documentation attached to their submission as exhibits outlining that the costs have been incurred.

#### **STATUTORY BASIS FOR AN AWARD OF COSTS AND REIMBURSEMENT OF FEES**

9 The statutory basis for the Tribunal's consideration of an application for costs and the matters the Tribunal must consider are set out in section 109 of the VCAT Act. Relevantly, it provides as follows:

##### **Power to award costs**

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
    - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
    - (iii) asking for an adjournment as a result of (i) or (ii);
    - (iv) causing an adjournment;
    - (v) attempting to deceive another party or the Tribunal;
    - (vi) vexatiously conducting the proceeding;
  - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;



- (d) the nature and complexity of the proceeding;
- (e) any other matter the Tribunal considers relevant.

....

- 10 The statutory basis for the Tribunal's consideration of an application for reimbursement of fees and the matters the Tribunal must consider are set out in section 115B of the VCAT Act. Relevantly, it provides as follows:

**Orders as to reimbursement or payment of fees**

- (1) At any time, the Tribunal may make any of the following orders—

- (a) an order that a party to a proceeding reimburse another party the whole or any part of any fee paid by that other party in the proceeding, within a specified time;

....

- (3) In making an order under this section, other than in a proceeding to which section 115C or 115CA applies, the Tribunal must have regard to—

- (a) the nature of, and issues involved in, the proceeding; and
- (b) the conduct of the parties (whether occurring before or during the proceeding), including whether a party has caused unreasonable delay in the proceeding or has failed to comply with an order or direction of the Tribunal without reasonable excuse; and
- (c) the result of the proceeding, if it has been reached.

**WHAT DO THE PARTIES SAY?**

- 11 The applicants argue that an award of costs against the Council is appropriate as:

- The permit application was incomplete, misconceived, fatally deficient and bound to fail.
- Council's assessment of the permit application lacked the requisite rigour and sophistication necessary, particularly:
  - That Council granted a permit, which it ought not to have, on what was ultimately held to be an incomplete and piecemeal application.
  - That Council only granted a permit based on the use of the land rather than both the use and development of the land
  - That Council failed to consider the requirement that a permit would be required for buildings and works.
- There is a public interest and benefit in the applicants bringing the application to the Tribunal. It would not be fair to allow the applicants to bear the cost burden of the application, in these circumstances.

- The applicants had little option but to bring the application in the light of Council's conduct and failure to discharge duties in accordance with the Murrindindi Planning Scheme.
  - The Council has greater capacity to pay the costs than the permit applicant.
- 12 The applicants submit that the Tribunal ought to be satisfied that it would be fair in the circumstances for the Tribunal to award costs in this proceeding having regard to the matters set out in sections 109(3)(c), (d) and (e) of the VCAT Act.
- 13 The submissions from Council and the permit applicant can be summarised as follows:
- The applicants have sought its legal costs and reimbursement of fees from Council. This includes the costs incurred by the applicants in preparing and lodging the costs application itself. The starting point in an application for costs is an overriding presumption that each party is to bear their own costs in the proceeding. As such, the applicants bear the onus of establishing that it would be fair for costs to be awarded. The applicants have not established an entitlement to their costs and reimbursement of fees and should be refused.
  - It is a situation in this case of a matter of differences in interpretation of the planning permit requirements under the Murrindindi Planning Scheme. Council and the permit applicant consider that any errors made with the making of the permit application and its processing were merely of a clerical nature. They were made based on a use only application and not for buildings and works and were based on issues arising from the complexity of applying planning and other regulatory requirements to an activity that is seasonal in nature and associated with a temporary musical festival.
  - The processing of the permit application, which was for use only was not based on a 'blank cheque' whereby there was no information available to consider and assess the proposal. The permit application was accompanied by a range of management type documents that ranged from security to traffic to acoustic management. The extent of information also extended to the giving of acoustic evidence during the review hearing.
  - Council should not be penalised merely because its decision was overturned by the Tribunal.
- 14 Council says that, unlike the Tribunal case example<sup>2</sup> referred to in the submission of the applicants, which was a matter concerning approval for a permanent building associated with a food and drink premises where no floor plans or elevations were provided with the application or assessed

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<sup>2</sup> *Crothers v Moira SC* [2019] VCAT 1375.

before a decision was made, the matter in this case was for a music festival where permanent structures are somewhat minimal and generally of a temporary nature and form. The comparison is somewhat unfair and an exaggeration.

## TRIBUNAL DETERMINATION

### Costs

- 15 Generally, each party is to bear their own costs in a proceeding, that is clear from section 109(1) of the VCAT Act.
- 16 To vary otherwise, the Tribunal must be satisfied that it would be fair to do so as set out in section 109(3) of the VCAT Act.
- 17 Having regard to the submissions, I find that it would not be fair to do so for the following reasons:
  - It was open for Council to process the application for planning permit as it did. Thus, it would be unfair to penalise Council for an interpretation of the permit requirements of the Murrindindi Planning Scheme that overlooked buildings and works permit requirements merely as an omission or oversight and not as a deliberate action on its part. I am not convinced on the material before me that Council did so or intended to do so.
  - The music festival had previously operated on four occasions since 2015 under two previous planning permits.<sup>3</sup> These permits had been granted for use only. I do not find it surprising that Council did not consider whether approvals were required for development. It would not be a completely unrealistic view to assume that approvals for development were not required, particularly given such development would be, for the most part, of a temporarily erected or demountable form.
  - Similarly, I find that the strength of Council's claims is reasonable given it believed that the proposal for a seasonal music festival as a place of assembly, was an activity that was primarily associated with the use of the site and that due to what was perceived as the erection of staging, artwork and other structures that was of a temporary nature, would not qualify for requiring planning permission for development. I can understand this incorrect interpretation as it is made more difficult due to the temporary nature of a music festival where the main activity is to play and listen to and enjoy music. This is an interpretation that albeit an incorrect one, is not what I consider to be the type of error that ought necessarily lead to an award of costs against the Council.

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<sup>3</sup> Planning Permit No. 2015/151 issued for the use only for one event on 27 November 2015 and Planning Permit No. 2016/113 issued for the use only for three events on 19 December 2016.



- I also consider the regulatory complexity or difficulty associated with managing music festivals is heightened by provisions such as Clause 62.03 that differentiates between events on public land including for temporary buildings and works required for the event from those on private land. Such clear direction is lacking for events like music festivals on private land that involve temporary structures associated with music festivals that are of a short duration.
- The consideration of music festivals that are seasonal and temporary on large rural holdings is a complex land use and development matter that the Murrindindi Planning Scheme, or probably any other planning scheme, is not particularly well structured to deal with. Accordingly, if errors of interpretation are made, it is, in my view, not surprising.
- The review application lodged against Council's issuing of a notice of decision to grant a permit was a matter where merits of the proposal were also at the forefront of considerations and I do not consider errors in identifying and appropriately applying the permit triggers required under the Murrindindi Planning Scheme as the sole matters that were at play in lodging and considering the review application.

### **Fees**

18 With respect to the application for reimbursement of fees and having regard to the provisions of section 115B(3) and the submissions, I find that the reimbursement of fees would not be fair for the following reasons:

- As mentioned earlier, the nature of, and issues involved in, the proceeding were complex and uncertain. This is due to the temporary and seasonal nature of the music festival and the buildings and works that are associated with the conduct of the use. Staging and artwork is small in scale and relatively light weight while works are not necessarily transformative of the topographic condition of the land. The complexity of these matters often means that testing these issues around such proposals are warranted.
- No party has conducted themselves in a way that has unnecessarily disadvantaged another party by conduct that failed to comply with a Tribunal order, or failed to comply with the law, regulations, or requirements of the Murrindindi Planning Scheme. I do not see, based on the material before me, that Council or the permit applicant had caused unreasonable delays in the proceeding or conducted themselves without unreasonable excuse.
- The merits of the proposal have been determined and the matter finalised.

### **CONCLUSION**

19 Overall, I find the application for costs and reimbursement of fees should be refused.

- 20 I am not satisfied that an award of costs or a reimbursement of fees would be a fair outcome in the circumstances.
- 21 Although I note that whilst Council and the permit applicant may have erred in not seeking approval for development in addition to use, these are not deliberate errors or delays that sought to evade the appropriate permissions required for the conduct of a music festival in Thornton.
- 22 Accordingly, I direct that the application for costs and reimbursement of fees is refused and no costs awarded, or fees reimbursed.

**Christopher Harty**  
**Member**