

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
PLANNING AND ENVIRONMENT LIST

No. P469/2024

BETWEEN:

CROSS COUNTRY SKIING ASSOCIATION VICTORIA INCORPORATED

Applicant for Review/Objector

and

MINISTER FOR PLANNING

Responsible Authority

and

**ALPINE RESORTS VICTORIA (TRADING AS FALLS CREEK ALPINE
RESORT).**

Respondent/Permit Applicant

**OUTLINE OF SUBMISSIONS ON BEHALF OF THE CROSS COUNTRY
SKIING ASSOCIATION VICTORIA INCORPORATED**

INTRODUCTION

1. This outline of submissions is made on behalf of the Cross Country Skiing Association Victoria Incorporated (**"the Association"**).
2. The Association is a not for profit incorporated association. Its objects are:
 - (a) To support the development of cross country skiing in Victoria.
 - (b) To represent the interests of cross country skiers to Alpine Resorts Victoria, any Alpine Resort Management Boards (until 1 Oct 2022),

Parks Victoria, alpine resort lift companies, the Victorian Government and any other relevant bodies.

- (c) To provide information about cross country skiing in Victoria to the general public.
3. The Association objects to and opposes the grant of a permit for a food and drinks premises and information centre, the construction of a new car park (with 73 car parking spaces), the removal of vegetation including the removal of native vegetation and associated works (**“the proposed use and development”**) on unleased land adjacent to the Rocky Valley Dam at Falls Creek (**“the subject land”**).
 4. In summary:
 - (a) The provisions of the Alpine Resorts Planning Scheme (**“the Scheme”**) discourage use and development which will detrimentally impact on threatened species and ecological communities, and the habitat of threatened species and ecological communities.
 - (b) The provisions of the Scheme seek to achieve this outcome by supporting the consolidation of development within resort villages and by discouraging development outside of the resort villages.
 - (c) All of the subject land is outside the Falls Creek resort village.¹ Accordingly, the proposed use and development is discouraged by the strategic planning policy that applies.
 - (d) The proposed use and development will have a substantial detrimental impact on threatened species and ecological communities, and high conservation value habitat of those threatened species and ecological communities.
 - (e) The provisions of the Scheme also seek to:
 - (i) Maintain the use of land outside the resort villages for public recreation and open space; and

¹ As set out in the Strategic Framework Plans at clause 02.04 of the Scheme.

- (ii) Consistent with the above, facilitate the provision of skier links, support the maintenance of ski trail connections between the villages and the ski fields and seek to limit development intrusions onto the ski fields.
- (f) Bogong High Plains Road ("**BHP Road**") between Windy Corner and the proposed new car park is a key cross country trail in the cross - country skiing network.
- (g) The permit applicant, Alpine Resorts Victoria, trading as Falls Creek Alpine Resort ("**ARV**"), has not been open and transparent about the effect of the proposal on the cross country skiing network. Until recently, it kept open the option of keeping BHP Road available for cross country skiing in the declared snow season. However, the evidence circulated on behalf of ARV confirms that ARV proposes to clear BHP Road of snow during the declared snow season, and remove it (and other trails) from the cross country skiing network.
- (h) The proposal to clear this section of BHP Road during the declared snow season, and to remove this key cross country skiing trail connection from the cross country skiing network, and to close other trails, without setting out and committing to implement any alternative arrangements, is completely at odds with the purposes of the Scheme as set out at sub-paragraph (e), above.
- (i) The Scheme also seeks to protect the valued landscape character of the alpine area and to minimise the extent of earthworks associated with development proposals. The construction of the car park with an extensive amount of cut and fill is not consistent with these goals.
- (j) The traffic impacts of the proposed use and development have not been properly assessed.
- (k) Waste disposal associated with the proposed use and development and in particular the disposal of wastewater, has not been properly resolved.
- (l) The extent to which the project will support all year round visitation has not been quantified. To the extent that the project will support all year round visitation, the extent of that benefit is minimal. This is

relevant when undertaking a net community benefit assessment. The significant disbenefits of the proposal outweigh any benefits, especially when assessed through the lens of the strategic planning policy framework that applies.

5. Accordingly, the Association submits that its appeal should be upheld.

BACKGROUND

6. The Minister for Planning ("**Minister**") is the responsible authority for the application. The Association lodged an objection to the proposed use and development. However, the Minister has issued a notice of decision to grant a permit for the proposed development, subject to conditions ("**the NOD**").²

² Dated 3 April 2024. Relevantly, the application was amended before the Minister issued the NOD. As a result, the materials which were the subject of the Minister's assessment included:

1. Architectural plans prepared by Studio B architects dated 5 May 2023;
2. Landscape plans prepared by Peter Boyle dated 15 May 2022;
3. Civil engineering plans prepared by Foresight dated 27 April 2023 ("**civil engineering plans**");
4. Liquor licensing area plans prepared by Studio B architects dated 3 July 2023;
5. Feature survey of existing conditions plans prepared by Foresight dated 24 February 2022;
6. Planning Application report prepared by Biosis dated 26 May 2023 (which superseded an earlier planning application report prepared by Biosis dated 4 July 2022);
7. Flora and Fauna Assessment prepared by Biosis dated 25 May 2023 (which superseded an earlier Flora and Fauna Assessment prepared by Biosis dated 25 May 2023);
8. Request for further information made by the then Department of Environment Land Water and Planning ("**DELWP**") on behalf of the then Secretary to DELWP as a referral authority dated 11 November 2022 (refer also to the attached letter dated 10 November 2022 on behalf of the Secretary to DELWP);

7. The Association has filed an application for review of the Minister's decision to issue the NOD which include a statement of grounds,³ and further and better particulars of its grounds, pursuant to a Tribunal order. This proceeding is Tribunal Proceeding P469/2024.⁴
 8. Separately:
 - (a) Dr Jonathan Spring ("**Dr Spring**") filed an application for review of the Minister's decision to issue the NOD. This proceeding is Tribunal Proceeding P462/2024;⁵
 - (b) The Jaithmathang Traditional Ancestral Bloodline Original Owners First Nation Aboriginal Corporation ("**Jaithmathang**") also filed an application for review of the Minister's decision to issue the NOD
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9. Response to the above request for further information prepared by Biosis and dated 8 December 2022;
 10. Request for further information made by the Department of Transport and Planning ("**DTP**") on behalf of the Secretary to the Department of Energy, Environment and Climate Action ("**DEECA**") as a referral authority dated 23 February 2023 (refer also to the attached letter dated 22 February 2023 on behalf of the Secretary to DEECA);
 11. Response to the above request for further information prepared by Biosis and dated 26 May 2023;
 12. The Site Environmental Management Plan prepared by Biosis and dated 19 May 2023; and
 13. Geotechnical Investigative Report prepared by GHD and dated 10 August 2022 (and supplementary letter prepared by GHD and dated 12 May 2023).

³ Dated 1 May 2024.

⁴ The relevant Tribunal order was Order 5 of the Tribunal's 21 June 2024 orders. The further and better particulars were requested by ARV and the Minister. The further and better particulars provided by the Associated were filed with the Tribunal and served on the other parties and were dated 8 July 2024. Ultimately, the issue of whether the Associations' grounds were relevant for the purposes of the application for review was not pursued by ARV or the Minister.

⁵ Pursuant to Order 1 of the Tribunal's 12 June 2024 orders in Tribunal Proceedings P532/2024.

under section 82B of the *Planning and Environment Act 1987* (and leave was subsequently given for Jaithmathang to apply for the review of the Minister's decision).⁶ This proceeding is Tribunal Proceeding P532/2024;

- (c) The Tribunal made orders keeping the three proceedings as separate proceedings but listing them to be heard and determined together;⁷
- (d) The Tribunal has heard and determined three questions of fact and/or law in a preliminary hearing, concerning in summary the validity of the Cultural Heritage Management Plan 18748 ("**the CHMP**") and whether the activity contemplated in the CHMP was consistent with the activity contemplated under the proposed use and development. In summary, the Tribunal concluded that there was no inconsistency between the permit application and the CHMP, and that the Tribunal did not have jurisdiction to consider whether the CHMP was validly approved pursuant to section 65(2) of the *Aboriginal Heritage Act 2006*; see *Spring v Minister for Planning* [2024] VCAT 907 (Senior Member Martin).

9. The Association did not participate in the above preliminary hearing.

ANALYSIS

Planning policy framework

- 10. The thrust of the strategic planning policy framework as it applies to the subject land and the application before the Tribunal is:
 - (a) To consolidate development within the Falls Creek village, and to discourage development outside of the Falls Creek village.

⁶ Pursuant to Order 1 of the Tribunal's 12 June 2024 orders in Tribunal Proceedings P532/2024.

⁷ Pursuant to Order 1 of the Tribunal's 21 June 2024 orders in all three Tribunal Proceedings.

- (b) To discourage use and development which will detrimentally impact on threatened species and ecological communities, and the habitat of threatened species and ecological communities.
- (c) To encourage the use of the subject land for public recreation and open space.
- (d) As an adjunct to the above, to facilitate the provision of skier links, support the maintenance of ski trail connections between the villages and the ski fields and seek to limit development intrusions onto the ski fields.
- (e) To protect the valued landscape character of the alpine area and to minimise the extent of earthworks associated with development proposals.
- (f) Support development which achieves year round visitation. That said:
 - (i) Development which facilitates year round visitation is directed to occur within the Falls Creek Alpine village.
 - (ii) Limited development is contemplated outside of the alpine village.

Policy support for consolidation of development within resorts, and preservation of skiing trails and connections.

11. The starting point of any planning assessment is the zoning of the land. Here, the vast majority of the subject land, including the land on which the car park is proposed to be constructed, and the site of the ANARE shed, is within the Public Park and Recreation Zone (“PPRZ”). A small portion of the subject land is in the Comprehensive Development Zone – Schedule 2 (“CDZ2”). This is the northeastern corner of the subject land, and land on which earthworks and roadworks are proposed to provide the new connection from BHP Road to the proposed car park. Otherwise, the Falls Creek village is within the Comprehensive Development Zone – Schedule 1

("CDZ1").

12. Relevantly:

- (a) The purposes of the CDZ1 and CDZ2 head clause include the facilitation of "a range of uses and development in accordance with a comprehensive development plan incorporated in this Scheme." However, there is no incorporated development plan for the Falls Creek Resort.
- (b) The purposes of the CDZ - Schedule 1 encourage the development of land within the Falls Creek village, including for "the year round use of land for a commercially orientated, alpine resort."
- (c) The CDZ2 applies to the area which is understood to be leased to the lift company and used or available for use for downhill skiing, but which also contains cross country ski trails and space for other snow-based recreation. It also includes land which is not used for any type of skiing, and a small portion of land at the entry to the proposed car park.⁸ The purposes of the CDZ - Schedule 2 are restrictive in that they support the passive and active recreational use of the land, and seek to minimise the impact of development on significant vegetation, habitat and habitat corridors, and landscape values.
- (d) The purposes of the CDZ - Schedule 2 are as follows:
 - *To identify areas associated with the development and use of an alpine resort on which passive and active recreation occur.*
 - *To enable the development and the use of the land which is in accordance with sound environmental management and land capability practices, and which takes into account the significance of the environmental resources.*

⁸ The land in the CDZ2 corresponds with or generally corresponds with the "ski field lease area" shown on the Falls Creek Resort Strategic Framework Plan at clause 02.04 of the Scheme.

- To minimise impacts on significant landscapes.
 - To minimise impacts on areas of significant vegetation.
 - To minimise impacts on habitat and habitat corridors for indigenous fauna.
(emphasis added).⁹
- (e) Thus, land within the CDZ2 has limited potential for development.
- (f) The PPRZ applies to the area which is understood to be outside the areas leased to the ski lift company and the areas used for downhill skiing or available for use for downhill skiing and other uses.¹⁰ Again, the purposes of the PPRZ are restrictive in that they seek to ensure the continued use of the land for public recreation and open space and seek to protect and conserve areas of significance. That is not to say that commercial uses are not contemplated. They are contemplated but only “where appropriate.”
13. This suite of zoning controls sets out the hierarchy of development potential within the Falls Creek Alpine Resort. Development, including development which facilitates year round use of the resort is directed to land within the Falls Creek alpine village – ie on land within the CDZ1. Otherwise, development outside the alpine village is discouraged, unless it facilitates and does not detrimentally impact active recreational uses, does not detrimentally affect threatened species and ecological communities, habitat for those threatened species and ecological communities, and landscape values.
14. This is especially so for land which is remote from the resort, and within the PPRZ. This is because while the planning policy framework contemplates limited development within the CDZ2 (small scale commercial and retail development in the ski fields – as shown on the strategic land use

⁹ And added elsewhere in this outline of submissions, unless otherwise stated.

¹⁰ The CDZ2 land corresponds with or generally corresponds with the land outside of the “ski field lease area” shown on the Falls Creek Resort Strategic Framework Plan at clause 02.04 of the Scheme. As to the other uses of this land, see [12(c)], above.

framework plan at clause 2.04, subject to provisos),¹¹ it is silent as to any development potential for land outside of these areas. Instead, it sets out an expectation that the land at the edges of the resort will provide a transition between the vegetated landscape in the National and State Parks and development in the resorts and in the downhill ski fields.¹² This supports the proposition that land at the edges of the resort and in the PPRZ, is intended to retain its ecological and landscape value, and provide a buffer between the surrounding National Park and the development within the resort villages and on the downhill skiing fields.

15. This policy direction is relevant in determining whether a particular commercial proposal is “appropriate” for the purposes of the PPRZ. It is submitted that there is less tolerance for the adverse impacts (on environmental values and on active recreational uses) that arise as a result of commercial development at the edge of the resort and on land within the PPRZ.
16. Otherwise, and with this in mind, whether a particular location is appropriate will depend on the environmental values of a particular site, the impacts of a proposal on those environmental values, and the impacts of a particular development on the active recreational use of the land, and surrounding land.
17. It is necessary to set out the planning policy framework in some detail to demonstrate these points.
18. At clause 02-03-1 the Scheme sets out the strategic directions for settlement and housing in the alpine resorts. It states:

The strategic directions for settlement and housing in the alpine resorts are aimed at:

- Consolidating villages within existing boundaries to limit intrusion on the ski fields, ensure effective use of infrastructure, maximise accessibility to facilities and limit

¹¹ Refer clauses 12.04-1L (for all of the alpine resorts) and clause 12.04-1L (for the Falls Creek Alpine resort).

¹² Clause 12.01-1L, ninth strategy.

environmental impacts.

- *Providing a variety of accommodation that services both the permanent residents and visitors year-round.*
 - *Providing further ski field infrastructure to address demand, designed and built in accordance with the environmental capacity of the resorts. (emphasis added).*
19. The Falls Creek Resort Strategic Framework plan at clause 02.04 sets out the area occupied by the Falls Creek village, and the “ski field lease areas.” It also identifies ski lifts and other infrastructure within the ski field areas. The CDZ1 applies to the area occupied by the Falls Creek village, and the CDZ2 applies to the land leased to the ski lift company and used or available for use as the downhill ski field, and to land used for other purposes.¹³ It also applies to a small portion of land at the new entry to the proposed new car park. The majority of the subject land is outside of both areas, and within the PPRZ.
20. At clause 11.01-1L the Scheme sets out various policies and strategies for the alpine villages as a whole, and the Falls Creek village. Again, the policies and strategies focus on consolidating development within the village. They also reinforce the importance of limiting development intrusion onto ski fields and to minimise the environmental impacts of development on land outside of the alpine villages.
21. Clause 11.01-1L headed “Alpine villages” sets out the strategies for the alpine villages as a whole:

Consolidate future growth within the existing village boundaries to maximise accessibility and infrastructure use, to limit intrusion into skifields and minimise adverse environmental impacts.

Promote development within the villages on existing and new lease sites to achieve the consolidation of settlement.

¹³ As to the other uses of this land, see [12(c)], above.

Encourage the redevelopment of under-utilised sites to optimise development potential within the village.

Avoid future development outside of the villages unless there is an an [sic] overriding need for a remote settlement.

Encourage a range of residential accommodation types and densities to cater for the needs of the permanent and visitor population.

Ensure increases in resort accommodation or visitor development provide servicing infrastructure.

Promote the commercial nodes of the villages as the primary focus for commercial, tourism and community activities.

Support commercial and other non-residential activities in residential areas if it will not result in any adverse impacts on residents.

Maintain the ski trail connections between the villages and the ski fields. (emphasis added).

22. Clause 11.01-1L Falls Creek village sets out the strategies for the Falls Creek village. These include:

.....

Maintain the Village Plaza precinct as the centre of the resort and the major focus for commercial activity, community facilities, transport, skier congregation and ski field access.

Create a secondary activity area for accommodation, commercial, community, entertainment and recreational activities at the Village Bowl.

.....

Ensure that development does not conflict with skier access and ski field infrastructure at key entry points such as Village Plaza, Village Bowl and Gully Portal.

.....

Promote:

- *Gully Portal precinct as the western entrance to the Village where a mix of commercial, accommodation, medical and car parking facilities will be encouraged.*
 - *Falls Creek East as an area for long term future accommodation opportunities.*
 - *Windy Corner as a future area for development, while maintaining facilities for cross country skiing and snow play.*
 -
 - *A road link between Parallel Street and Arlberg Street.*
 - *Decked car parking on the north side of Bogong High Plains Road to improve parking facilities within the Village. (emphasis added).*
23. Clause 18.02-4L sets out the planning policy for car parking in Falls Creek. One of the strategies that applies seeks to “limit the provision of private car parking and vehicle access to the Village.” The location of short term/day car parking is identified as “Gully Portal, Village Plaza and Windy Corner.” Accordingly, there is no policy support for public short term car parking in the remote location that is proposed. In addition to this, the Scheme also notes that vehicle access is restricted during the declared snow season, allowing ski in/ski out access throughout the Falls Creek village.¹⁴
24. Clause 12.04-1L headed “Sustainable development – alpine resorts” sets out the strategies for the sustainable development of all alpine resorts, and the Falls Creek village. It includes the following strategies:

Limit the development and management of skifield terrain and facilities to within the skifields as shown on the Strategic Land Use Framework Plans at Clause 02.04.

.....

Restrict the use of the skifields to snow based recreational activities.

.....

Encourage commercial facilities in the ski fields that cater for the needs of skiers and are sensitive to the alpine environment.

¹⁴ Refer clause 02.03-7.

Provide strong physical and visual links from village centres to the skifields and visitor arrival points.

Focus commercial activity, community facilities, skier congregations, skifield access points and transport hubs around the resort centres.

Ensure passive and active recreational activities are in balance with the conservation and protection of the natural environment within and adjacent to the resorts. (emphasis added).

25. The Strategic Framework Plan at clause 02.04 refers to a “Skifield Lease Area” which covers land that includes the downhill ski fields, and other uses.¹⁵ Clause 12.04-1L appears to relate to the land shown as “Skifield Lease Area.” Even so, the development of this land for commercial development is intended to be limited to facilities which are snow related, where there is a demonstrated need for these facilities and the development does not impede ski runs or major ski routes. This is set out in clause 12.04-1L – Sustainable development Falls Creek Alpine Resort, which includes the following strategies:

Promote Cloud Nine as the primary commercial area in the ski fields by encouraging the location of active and passive recreation activities at this site.

Encourage small scale commercial and retail development in the ski fields if it:

- *Fulfils a demonstrated need for snow users.*
 - *Is integral to a development for passive alpine recreation.*
 - *Does not impede ski runs or major skier routes. (emphasis added).*
26. There is other policy support for the proposition that development should not impede cross country ski trails, and that cross country skiing links to the Falls Creek village and generally, should be maintained and improved.
27. First, the importance of the “ski-in/ski out” feature of Falls Creek is acknowledged as an important element of the skiing experience at Falls Creek. This is an important element of the “village feel” of the resort¹⁶ and

¹⁵ As to the other uses of this land, see [12(c)], above.

¹⁶ Refer clause 02.03-5.

a feature which enables safe and efficient skiing movements.¹⁷

28. This is a distinctive feature of the Falls Creek ski resort. It, together with the opportunity to ski directly out from the resort to wilderness areas, provides a cross country skiing experience which is a completely different environment and landscape compared to, for example, Europe. This is in contrast to downhill skiing at Falls Creek, which does not meet the standard of international resorts.¹⁸
29. Second, the importance of maintaining ski trails and skier connectively between the resort and more generally is set out elsewhere.¹⁹ To say that the need to maintain ski trails and connections only applies for downhill skiing is not a correct interpretation of the thrust of planning policy.
30. Third, the purposes of the CDZ2, PPRZ and planning policy framework note the importance of active and passive recreation in Victoria's Alpine resorts. Accordingly, a proposal which has a negative impact on the use of the land for that purpose, by removing cross country ski trails, including a

¹⁷ Refer to clause 18.01-2L - Transport systems - Falls Creek. Strategies in clause 18.01-2L include:

Protect public spaces to allow maintenance of the 'ski-in/ski-out' feature of Falls Creek, enabling safe and efficient skier movements

Facilitate pedestrian and skier links to adjoining recreational experiences within the Alpine National Park.(emphasis added).

¹⁸ Statement of Mr Brändli, [16].

¹⁹ Eg: at clauses 02.03-7, 11.01-1L - Alpine Villages, clause 11.01-1L - Falls Creek Village, clause 12.04-1S ("Ensure that increases in skier, pedestrian and vehicular activity in the resorts do not compromise public safety or the accessibility and capacity of ski fields, services, commercial activity and development of trailheads"), clause 17.04-1L ("Facilitate sufficient skifield terrain catering to a range of skill levels, cross country trails, snow play areas and associated infrastructure" and "Encourage development of the cross country trail system, particularly in the Rocky Valley Dam area and the Nordic Bowl") and clause 18.01-2L (ibid). Note also that Windy Corner is the hub for cross country skiing at Falls Creek. And, the Scheme identifies that Windy Corner is a future area for development, with the existing cross country skiing facilities in this location be maintained: see clause 11.01-1L-Falls Creek village.

key cross country ski trail (BHP Road from Windy Corner), and which detrimentally impacts on the connectivity of the cross country skiing network by removing a key link between the Falls Creek village and the cross country skiing network (ie have effect to remove practicable ski in/ski out access from Windy Corner/the Nordic Centre to the cross country skiing fields, or from other parts of Falls Creek village to the ski fields which will be impacted by a road crossing)²⁰ does not enjoy strategic planning policy support, irrespective of whether the policy at clause 12.04-1L - Sustainable development - Falls Creek Alpine Resort applies to land in the PPRZ.

31. None of this is surprising. Whilst all year round use of the resort is supported, the primary function of the resort is to provide active recreation in the form of skiing - which includes cross country skiing. Accordingly, development within the resort should facilitate cross country skiing, and not make it more difficult and less appealing.
32. The primary function of the resort is acknowledged up front in the Scheme. The Scheme states at clause 02.01:

Economy

The resorts make a significant contribution to the Victorian economy. The snow market enjoys average daily spending above any other sector of Victoria's regional tourist industry. Significantly, the investment in the resorts represents one of the highest tourism investments in Victoria. (emphasis added).

33. Relevantly, Falls Creek is Australia's premier cross country skiing resort, as set out at [52] - [54], below.

Environmental and landscape values

34. Again, the starting point of the planning assessment is the zoning of the subject land. Here, the purposes of the CDZ2 and PPRZ prioritise the

²⁰ Refer to the witness statement of Mr James Louw at [28(c)(iv)] and the witness statement of Mr Robert Catto-Smith at [6].

protection and preservation of threatened species and ecological communities and the habitat of these threatened species and ecological communities ahead of development. This is in contrast to land within the CDZ1 being the Falls Creek Village, where the development of land for commercial and other activities (including commercial activities which promote year round use) have strong strategic planning policy support.

35. Alpine areas are recognised as environmentally sensitive areas with significant recreational value. The objective is to protect and conserve these environmentally sensitive areas from development that would diminish their environmental conservation or recreational values.²¹ The same applies to the landscape values of Victoria's Alpine areas.²²
36. There are layers of planning policy to this effect.
37. First, and up front, the significant and fragile nature of the Alpine environment is identified at clause 02.01 – Context. It states:

Environment

The resorts are nestled in significant and fragile natural environments, hosting communities of special and endangered flora and fauna species listed under Commonwealth and State legislation. The high country landscape features sub-alpine Alpine Ash forests, Snow Gum woodlands and wide expanses of alpine meadows.

The Alpine areas of Victoria are particularly prone to bushfires with extensive areas of vegetation cover and steep slopes. Other environmental considerations include climate change, watercourses (catchment and quality issues), salinity and land degradation.

The geotechnical stability of land in the resorts is an important environmental and safety issue. Natural features within the resorts, including geology, soil structure and depth, vegetation cover, overland drainage and subterranean water levels are key influences on stability. (emphasis added).

38. Second, the purposes of the PPRZ seek to protect and conserve areas of significance, where appropriate, and contemplate commercial uses only

²¹ Clause 12.05-1S.

²² Clause 12.05-2S.

where appropriate. And, the purposes of the CDZ2 seek to minimise impacts on habitat and habitat corridors for indigenous fauna, and on areas of significant vegetation.

39. This is reinforced by State and Local planning policy which seeks to avoid impacts of land use on important areas of biodiversity, and improve or enhance threatened species habitat.²³
40. Third, local polices are directed at consolidating development within the existing villages, to, amongst other things, minimise adverse environmental impacts outside the villages.²⁴
41. This is reinforced by the Local Planning Policy at clause 12.01-1L. The policy expresses the need to protect the environmental values of the resort in strong terms. It:

- (a) Has the following objective:

To preserve and enhance the habitat of threatened species and communities within the alpine resorts.

- (b) Lists the following strategies (as relevant to the proposed use and development):

Maintain and improve the present diversity and viability of species and ecological communities within the alpine resorts.

Avoid use and development that detrimentally impacts upon threatened species, habitat or communities.

Minimise the removal of vegetation as part of development.

²³ Clause 12.01-1S, clause 12.04-1S first strategy, clause 12.01-1L, as set out in [41], below. Cf: the second strategy at clause 12.04-1S which refers to the management of use and development which minimises the disturbance of indigenous flora and fauna and sensitive landscapes.

²⁴ Refer to for example, clause 11.01-1L – Alpine villages, first and fourth strategies.

.....

Encourage development to be designed around significant vegetation on the site.

Retain native vegetation, including trees, shrubs and ground cover.

.....

Discourage the destruction and fragmentation of landscapes.

Maintain a transition between the vegetated landscape in the National and State Parks and development in the resorts.

Minimise impacts on significant areas of landscape habitat and habitat corridors for indigenous fauna.

.....

Ensure that existing Mountain Pygmy-possum habitats are preserved.

.....

Protect and enhance existing Stream Complex, Alpine Bog and snow Gum Woodland habitats.

- (c) Includes the following policy guidelines:

Minimising impacts on native vegetation or fauna, through Site Environmental Management Plans and building envelopes.

.....

Ensure that use and development does not detrimentally impact upon the threatened species habitat or communities that are listed in the following table for each of the resorts. (emphasis added).

- (d) Lists several threatened species habitat or communities for the Falls Creek Alpine resort, for the purposes of the above policy guideline. These include the Alpine Bog community, the Mountain Pygmy possum and the Stonefly which are all directly impacted or likely to be directly impacted by the proposed use and development.

42. Fourth, planning policy supports the retention of existing landscape values, and the minimisation of earthworks associated with development.²⁵ In particular, there is a local policy guideline directed at avoiding substantial earthworks associated with the provision of car parking.²⁶
43. Finally, it is true that the Scheme encourages use and development which facilitates year round visitation. But:
- (a) The zoning controls in combination with strategic planning policy direct such use and development to the existing villages;
 - (b) Accordingly, the strategic support for development which facilitates year round visitation must be applied through the lens of the zoning controls and the strategic planning policy which strongly discourages “out of centre” development, and the avoidance of impact on threatened species and ecological communities, and the habitat of threatened species and ecological communities.
44. Thus, if “out of centre” development is proposed, which does have an adverse impact on threatened species and ecological communities, the habitat of threatened species and ecological communities, and the network of cross country ski trails there must be a demonstrated and substantial benefit which is achieved, which outweighs this and other disbenefits of the proposal.
45. ARV has fallen well short of establishing that the proposal will achieve a net community benefit.

²⁵ Refer to for example:

1. Clause 12.04-1L Sustainable development – alpine resorts, second strategy.
2. Clause 13.04-2L Erosion and landslip in alpine resorts.
3. Clause 15.01-2L Strategies – Building siting, first and second strategies (acknowledging this applies to building siting).

²⁶ At clause 18.02-4L.

Impacts on threatened species and ecological communities.

46. The strategic planning policy directed at avoiding and improving or at least maintaining the habitat and environmental values of the environmentally sensitive Alpine areas has been set out in detail above.²⁷
47. According to Dr Meredith, the subject site has “a remarkably high level of significance for biodiversity.” It includes one nationally threatened vegetation community and is habitat for a host of National and State level listed threatened species.
48. Dr Meredith’s conclusion is consistent with the evidence of Mr Clemann, Dr Silvester and Mr Heinz. This evidence should be accepted. Relevantly, Mr Lane and Mr Looby also acknowledge that the site has an overall high biodiversity value.²⁸
49. Given this, the first step is to avoid the removal of native vegetation and vegetation.²⁹ This is especially so as the subject land is outside of the Falls Creek village and outside of an area where development is encouraged.
50. There is a high bar set in relation to the removal of high biodiversity value vegetation. The Guidelines for the removal, destruction or lopping of native vegetation (Department of Environment, Land Water and Planning 2017) (“**the Guidelines**”) require a decision-maker to consider the avoidance and minimisation of the removal of native vegetation in a manner commensurate with the value of the vegetation proposed to be removed.³⁰

²⁷ At [34] – [41].

²⁸ Ecology conclave report, item 4.6.

²⁹ This is the first step in any case. See *Axxcel Management Services Pty Ltd v Hobsons Bay CC* [2022] VCAT 528 (“*Axxcel*”), [83] (Members Templar and Wimbush). Relevantly, the summary of the decision-making framework that was set out in *Axxcel* has been accepted by subsequent divisions of the Tribunal. See: *PL (Drouin) Pty Ltd v Baw Baw SC* [2024] VCAT 351, [16] (Members Deidun and Byrne); *Nascon Group Pty Ltd v Brimbank CC* [2024] VCAT 254, [13] (Member Deidun).

³⁰ Guidelines, section 7 decision guideline No.1. Pursuant to clause 52.17-4 of the Scheme, these decision guidelines must be taken into account in the decision-making process. Refer also to *Axxcel*, [71].

To put this another way, there must be a very good reason and a strong justification to move from avoidance to minimisation in the circumstances of this development proposal.

51. The proposed use and development will remove and fragment high biodiversity value vegetation and will have an unacceptable impact on the biodiversity values of the fragile Alpine environment. Amongst other things:
- (a) The subject land supports:
 - (i) One nationally threatened vegetation community (Alpine Sphagnum Bogs and Associated Fens ("**Alpine Bog community**")). Relevantly the Alpine Bog community is one of the species listed in the Scheme, with a policy guideline that use and development "does not detrimentally impact" upon that community.³¹
 - (ii) Twelve flora species that are threatened at the state level (one critically endangered, eight endangered and three vulnerable).³²
 - (iii) Four nationally threatened fauna species (the Broad- toothed rat (vulnerable), the Mountain Pygmy possum (endangered), the Alpine She-oak Skink (endangered) and the Gang Gang Cockatoo (endangered)). Relevantly the Mountain Pygmy possum is one of the species listed in the Scheme, with a policy guideline that use and development "does not detrimentally impact" upon that threatened species.³³
 - (iv) Three of the above fauna species are also listed at the State Level. The Broad- toothed rat is listed as vulnerable, the Mountain Pygmy possum is listed as endangered and the Alpine She-oak Skink is listed as critically endangered.

³¹ At clause 12.01-1L.

³² Refer to Dr Meredith's evidence statement, p.9.

³³ At clause 12.01-1L.

- (v) One additional fauna species – the Tussock Skink, is listed as endangered at the State level.
- (b) In addition to the above, six further threatened flora species and eight further threatened fauna species are considered to have a medium to high likelihood of occurring at the subject site.
- (c) Two threatened species that were not the subject of specific targeted surveys (the Mountain Pygmy Possum and Tussock Skink) were recorded on the subject land.
- (d) The non-native vegetation is an important habitat for threatened species. Notwithstanding this, the fauna surveys mostly did not include surveys of the areas mapped as non-native vegetation.
- (e) According to Dr Meredith, the survey evidence suggests that there are thriving populations of the Broad-Toothed rat, Alpine She-oak skink and Tussock skink present. Indeed, these species have been recorded in the areas of non-native vegetation, despite the limited nature of the surveys in these areas.
- (f) The extent of the vegetation proposed to be removed is substantial:
 - (i) 0.742 hectares of threatened species habitat is proposed to be removed, including 0.239 hectares of native vegetation and 0.503 hectares of predominantly introduced (non-native) vegetation.
 - (ii) Some of the native vegetation that is proposed to be removed is Nationally listed threatened vegetation community. 0.0044 hectares of Alpine Bog community is proposed to be removed. This figure is unlikely to be accurate given the potential hydrogeological impacts on the Alpine Bog behind and above the ANARE shed, and the construction impacts of installing the retaining wall behind the ANARE shed.
- (g) The alpine bogs are groundwater dependent, and the impacts of potential alterations to the upper section of the Alpine Bog by installing the retaining wall above the ANARE shed have not been considered. It is also unclear as to whether the Alpine Bog adjacent to the ANARE shed has been accurately mapped and the retaining wall

can be installed in a way which minimises the impact on the Alpine Bog community.

- (h) According to Dr Meredith, the record of the dispersing Mountain Pygmy possum suggests that the subject land forms part of a connection between the meta-populations on the Bogong High Plains, (ie part of a route linking different Mountain Pygmy possum communities) and with the construction of the Rocky Valley Dam, the subject land could be a choke point. This is a hypothesis which requires further investigation so that the full impacts of the proposed use and development on this nationally threatened listed species can be fully understood. The precautionary principle should be applied in these circumstances.
- (i) Surveys have not been undertaken for Stonefly (two species of Stonefly also being two of the species listed in the Scheme, with a policy guideline that use and development “does not detrimentally impact” upon that threatened species).³⁴ This was despite the Stonefly being one of the species that Biosis assessed as having a medium probability of occurring on the site.
- (j) The previous disturbance of the subject site does not affect its high conservation value. Instead, the major construction works for the construction of the Rocky Valley Dam are unlikely to have impacted the site, and in any case, those parts of the subject land which were disturbed are likely to have recovered, or be in the process of recovering.
- (k) The sub-niveal space under snow is used by small mammals during winter, including the nationally threatened Broad-toothed rat. The removal of snow from the proposed car park and along the BHP Road will remove this sub-niveal space.
- (l) Translocation is an inadequate mitigation measure.

³⁴ At clause 12.01-1L.

- (m) The Biosis report is not adequate in documenting the number and location of *Flora and Fauna Guarantee Act 1988* (Vic) listed flora species.
52. The proposed use and development requires the removal of native and non-native vegetation, the clearing of snow from the car park and BHP Road, extensive cut and fill and the road pavement for the 73 space car park. Paved areas remove habitat, and constitute barriers to dispersal for some fauna species and especially for the Mountain Pygmy possum and Broad-toothed rat. Increased road traffic especially during the winter months will also constitute a barrier to species movement. Further, the snow on BHP Road provides a barrier to predators accessing the subject land during winter. The clearing of BHP Road will provide predators with easy access to the subject land. This will increase the predation pressure on threatened native fauna that venture onto the cleared road surfaces and exacerbate the role of these paved surfaces as a barrier to fauna movement.
53. For all of these reasons, the proposed use and development will have a substantial and unacceptable detrimental impact on high conservation significance vegetation and habitat for a host of National and State level listed threatened species, and the proposal should be rejected on this basis alone.

Impacts on the network of cross country skiing trails

54. Falls Creek is Australia's premier cross country skiing resort. According to ARV's own webpage:

Falls Creek is Australia's home of cross country skiing.

XC skiing is a huge part of the unique activity base that makes Falls Creek so special, and it includes more than you may think. Skating on fast corduroy trails, exploring new off-piste terrain in the National Park, making telemark carves down the lift-accessed runs - it is all part of this booming winter snowsport. (emphasis added).

55. Falls Creek hosts the Kangaroo Hoppet, the largest and most prominent cross country ski race in the Southern Hemisphere. The Kangaroo Hoppet attracts a mix of elite skiers and amateur cross country skiing enthusiasts

from around the world.³⁵ It regularly has over 1,000 entrants.³⁶ Falls Creek also hosts International Ski and Snowboard Federation (“**FIS**”) races, and is the centre for cross country skiing races and training in Australia. All of this raises the profile of Falls Creek, and draws tourists and elite athletes (including Olympic gold medallists) to Falls Creek from interstate and overseas.

56. The importance of cross country skiing to the ongoing attractiveness of Falls Creek as a skiing destination, and hence to the ongoing viability of the resort as a whole, should not be underplayed or understated.³⁷
57. Attached, for convenience, are maps and photographs. These show the existing cross country skiing trails, the proposed closures of those trails, a summary of the impacts of those closures and signage at Windy Corner.
58. The attachments are:
- (a) Attachment 1: Map (2 pages) produced by ARV. These maps are available on the Falls Creek resort website. The maps show the cross country skiing trails at Falls Creek which consists of:
 - (i) The “High Plains Cross Country Trails” (known as the “**outer trail network**”)(page 1)(“**the outer trail network map**”).
 - (ii) The “Resort Cross Country Trails” (known as the “**inner trail network**”)(page 1) (“**the inner trail network map**”).³⁸
 - (b) Attachment 2: Figures 1 and 2 being maps prepared by ARV and attached to the evidence of Mr Callum Brown. Figure 1 shows what Mr Brown understands to be the network of cross country skiing

³⁵ Witness statement of Mr Lauro Brändli, at [10]; witness statement of Ms Sandra Paul, at [50] – [52].

³⁶ Witness statement of Ms Sandra Paul, at [47].

³⁷ See, for example, the witness statement of Mr Robert Catto-Smith at [4].

³⁸ Refer to the witness statement of Mr James Louw, Section B ([7] – [18]).

trails. Figure 2 (“**the ARV proposed closure plan**”) shows cross country skiing trails which are proposed to be closed if the proposed development proceeds.

- (c) Attachment 3: A plan prepared by the Association which summarises the effects of the closure of the various cross country skiing trails.
- (d) Attachment 4: A series of photographs of signage in and around Windy Corner and the Nordic Centre.
- (e) Attachment 5: map showing the impact of road clearing on the FIS course, and official maps of the 5 and 3.5 km FIS courses. These are Annexure G to the statement of Ms Sandra Paul. A description of the Kangaroo Hoppet course is also set out in the evidence of Ms Paul at [62].

Closure of BHP Road and other cross country skiing trails.

59. ARV has not been open and transparent about the impacts of the proposal on the network of cross country skiing trails:
- (a) The Falls Creek Resort Master Plan 2016 (“**Master Plan**”) refers to the use of the Lakeside precinct for “green season” leisure activities, water activities and the gateway to the Alpine National Park. It does not refer to the use of the proposed kiosk as a year round activity. Instead it states that the kiosk is “summer only.”³⁹
 - (b) The permit application is opaque as to the effect of the proposal on the network of cross country ski trails. In particular, the project components are described as:
 - (i) Consideration of snow clearing requirements to allow all season activation if required.

³⁹ Falls Creek Resort Master Plan, 2016, p.39.

- (ii) *Consider improvements/infrastructure integration for both mountain biking and cross country skiing in this area.*⁴⁰
- (c) Relevantly, the permit application:
- (i) Alludes to the potential removal of BHP Road from the cross country skiing network but falls short of saying that its removal is required or proposed;⁴¹
 - (ii) Does not mention the closure of any of the other cross country ski trails that is necessitated by the proposed use and development;
 - (iii) Does not describe any improvements that might be made to mitigate the adverse impacts associated with the closure of the cross country skiing trails (because there are none that have been committed to);
 - (iv) Does not assess the impacts that the closure of the cross country skiing trails (including BHP Road) would have on the cross country skiing network.
- (d) The planning officer assessing the application was also unclear of the impacts of the proposal, and in particular whether it was proposed to clear BHP Road of snow during the declared snow season. The planning officer stated, in response to submissions made by objectors concerning the impact on the cross country skiing network:

172. *In response, as stated earlier, the ARV are responsible for clearing roads under their management and ensuring they remain safe and accessible for all users. The ARV, in response to this issue, have advised that 'clearing of BHP Road is an operational consideration and is not directly part of the application. No final decision has been made with respect to clearing of the road or otherwise. If FCAR does elect to clear the 1.2km section of BHP road in winter, due consideration will be given to the infrastructure, operations and use of the road to ensure safety standards*

⁴⁰ Biosis, Falls Creek Lake Side Precinct: Planning Application Report, 26 May 2023, p.10.

⁴¹ Cf: the statement from the Board, 28 July 2022, Annexure I to the statement of Mr James Louw. Even then, the statement describes BHP Road as currently forming the base of the cross country trail network.

are appropriate and meet contemporary levels for an alpine environment.'

173. To date, it is yet to be determined by the ARV whether the 1.2km section of the BHP Road will be cleared to allow all season access to the new facility at the Lakeside Precinct. However, the ARV have confirmed that the 1.2km section of the BHP Road from Windy Corner to the Rocky Valley Dam is not a formal or designated cross country trail, set aside solely for cross country skiing purposes. This section of the road is used by many user groups during winter, such as Emergency Services (for access to high plains), AGL (for access to their infrastructure and depot at the Rocky Valley foreshore), Falls Creek Ski Lifts (for access to their infrastructure in Sun Valley) and by Falls Creek Ski Patrols (for patient evacuation). (emphasis added).

- (e) It was only on 23 September 2024, when ARV filed its evidence, that ARV disclosed its true intention. That is, to clear BHP Road of snow from Windy Corner to the access to the proposed new car park, and to clear the new car park of snow, for year round access (ie including during the declared snow season).⁴²
 - (f) Not only this, it was only on 23 September 2024 that ARV first provided a plan showing the other proposed ski trail closures as part of its planning application (or to be precise, as part of the case it proposes to present to the Tribunal).
60. In summary, ARV proposes to remove the following trails from the cross country skiing trail network:
- (a) BHP Road between Windy Corner and the proposed 73 car space car park. This will remove access from Windy Corner and the Nordic Centre to the Nordic Bowl and trails beyond.
 - (b) Little Panorama trail (part of Little Panorama trail being in the location of the proposed car park, with another part being affected by a road crossing).
 - (c) A section of the Panorama Loop and Pretty Valley Road Trail (also known as McKay Road) (and the loss of a critical connection) which provides convenient and safe access between AGL corner and BHP

⁴² Statement of Mr Callum Brown, [29].

Road). What this means is that access to the trails beyond (including Sun Valley Loop, Little Canada, Aitkens trail, Pipeline trail, Pretty Valley Road/McKay Road,) is made far more circuitous if skiing from the village (given that the northern part of Aitkens trail is a one-way trail), and in the case of the Little Canada, Aitkens trail, Pipeline trail and Pretty Valley Road/McKay Road, more circuitous even if skiing from the proposed new car park.

- (d) The loss of Little Canada downhill section.
61. These impacts are the natural and direct consequences of the proposed use and development. ARV has confirmed this when filing its evidence. It is beside the point that ARV has operational management of BHP Road. According to its own annual reports and evidence, it currently keeps BHP Road groomed for use as a cross country skiing route. It proposes to stop doing so if the project receives approval and is constructed.
 62. No alternative cross country skiing trails or connections are proposed to replace these removed trails. Instead, there is a suggestion that bus services will be provided to the proposed new car park. There is also a belated suggestion that a drop off and pick up area will be provided at the Nordic Bowl⁴³ (although no commitment has been provided to the effect that a stopping area will be provided and if so, whether it will accommodate buses, including school buses, and whether any works, including any removal of native vegetation is required, and whether any further planning permission is required to undertake these works).
 63. The potential impacts on the cross country skiing network and measures which might be implemented to mitigate these impacts appear to have been considered as an afterthought.

Importance of BHP Road to the cross country skiing network.

64. ARV seeks to downplay the importance of the BHP Road to the cross country skiing network. BHP Road is an integral, or if not integral, a key, component of the cross country skiing network:

⁴³ Statement of Mr Callum Brown, at [33(b)(ii)].

- (a) The Falls Creek Annual reports from 2017 – 2022 state that the BHP Road is not cleared of snow which enables “its use as a key cross country ski trail;⁴⁴
- (b) BHP Road provides a key cross country skiing connection between the Falls Creek village (specifically Windy Corner, which is the centre for cross country skiing facilities such as cross country equipment, tuition, tour and trail information)⁴⁵ and the Nordic Bowl, where cross country skiing lessons take place, and cross country skiing races start;
- (c) BHP Road also provides a key connection between the Falls Creek village at Windy Corner and the outer cross country skiing trail network;
- (d) The inner and outer trail map describe the degree of difficulty of each cross country skiing trail;
- (e) The Nordic Centre and Windy Corner are noted as the trail head for the cross country skiing network in the signage at Windy Corner.⁴⁶ The Masterplan also refers to Windy Corner as the trail head. It states that Windy Corner is “the Nordic Centre and Trail Head for Falls Creek” with a net gain in car parking identified as proposed infrastructure;⁴⁷
- (f) The signage at Windy Corner shows cross country skiing access from Windy Corner to the Nordic Bowl via BHP Road;
- (g) The signage at Windy Corner includes a copy of the inner and outer trail map;

⁴⁴ Statement of Mr James Louw, at [20]. Refer also to [23] – [37].

⁴⁵ [Falls Creek Cross Country - Falls Creek Alpine Resort:
https://www.fallscreek.com.au/listing/falls-creek-cross-country/](https://www.fallscreek.com.au/listing/falls-creek-cross-country/)

⁴⁶ Refer to Attachment 4.

⁴⁷ Masterplan, p.37.

- (h) The inner trail map shows BHP Road as providing easy access from Windy Corner to the Nordic Bowl;
 - (i) The inner trail map shows BHP Road as providing easy access from Windy Corner to the trails which start from in and around the ANARE shed;
 - (j) The BHP Road allows ski in/ski out cross country skiing from the Falls Creek village at Windy Corner. This is a valued attribute of the Falls Creek Resort. This valued attribute would be removed if the proposal proceeds;
 - (k) The intermittent or occasional use of BHP Road by tracked vehicles during the snow season does not affect its status as a key cross country ski trail, as the road provides easy access and is wide, so that any vehicle tracks do not prevent the continued use of BHP Road for cross country skiing. Further and in any case, BHP Road is regularly groomed for cross country skiing.
65. Submissions and evidence to the effect that BHP Road is not an integral, or if not integral, a key, component of the cross country skiing network cannot be sustained, and should not be accepted.
66. Otherwise, the Association relies on the evidence of Ms Sandra Paul, Mr James Louw, Mr Lauro Brändli, Mr Matthew Brumby, Ms Kim Franzke, Mr Robert Catto-Smith and Mr Glen Clark:
- (a) According to Ms Paul, it will not be possible to design a compliant course for the Kangaroo Hoppet if the proposed use and development proceeds.⁴⁸
 - (b) ARV has not discussed the impacts on the Kangaroo Hoppet with the Kangaroo Hoppet organisers, the Association or Snow Australia or any alternative arrangements that might be made so that the race could continue to be held at Falls Creek.⁴⁹

⁴⁸ Statement of Ms Paul, [53] – [69].

⁴⁹ Statement of Ms Paul, [53].

- (c) Falls Creek currently has a 3.75km and a 5km FIS racecourse. These meet FIS standards (ie have satisfied homologation requirements). Ms Paul is a qualified FIS technical delegate (“TD”) and a qualified FIS Cross County Homologation Level 3 Inspector. According to Ms Paul, it will not be possible to design a compliant 3.75 or 5.0 kilometre racecourse if the proposed use and development proceeds.
- (d) ARV has had a cursory discussion with certain individuals in the cross country ski community whereby ARV has put forward an alternative 5 km FIS racecourse. Ms Paul has reviewed this proposal and determined that it would not satisfy homologation requirements. The proposal was put forward in 2022. There have been no further discussions or proposals put forward since then.⁵⁰
- (e) A “replacement” route is proposed adjacent to the proposed car park. However, there will be a steep drop off from the trail on its eastern side. Further, the new car park would have to be regularly cleared of snow. The snow is likely to be pushed out towards the east, and the “replacement route.” The cleared snow would be contaminated with grit, stones and salt which is likely to compromise snow quality.⁵¹ And, having a road next to a cross country skiing trail is sub-optimal.⁵²
- (f) Snow on the inner trail network is better retained, and visibility is better during foggy and windy conditions. And, specifically, the section of BHP Road that is currently groomed for cross country skiing and is proposed to be removed from the network offers generally sheltered skiing with a greater snow depth than the majority of the cross country skiing network.⁵³
- (g) For various reasons, including mainly the extent to which the individual trails are groomed, the entire extent of the cross country skiing network is rarely available for cross country skiing on any

⁵⁰ Statement of Ms Paul, [42] – [46].

⁵¹ Statement of Ms Paul, [68] – [69].

⁵² Statement of Mr Glen Clarke, [2] – [5].

⁵³ Statement of Mr Louw, [9] – [10].

particular day.⁵⁴ Relevantly, BHP Road is currently one of the most frequently groomed trails.⁵⁵

- (h) Falls Creek's value as a cross country skiing training venue would be diminished significantly with the removal of BHP Road from the network. It has a number of characteristics which make it highly sought after for training purposes. Amongst other things, it holds snow and is out of the wind. It is wide. It has been described as the lynchpin of the Falls Creek trails. And, access from Windy Corner to the Nordic Bowl via the Aqueduct Trail is not nearly as convenient.⁵⁶ Indeed, access to the Aqueduct Trail from Windy Corner is via a steep uphill slope (which doubles as a downhill skiing access run to Windy Corner from Wombat's Ramble). That is quite unsuitable for inexperienced and even experienced cross country skiers.
- (i) The proposal to provide car parking/bus transport at the new car park does not provide nearly as convenient access. It is not sheltered, like the BHP Road. It does not have the facilities of the Nordic centre. It would introduce a number of road crossings which do not currently exist in the inner trail network, making it difficult for skiers (particularly para skiers) to use the inner trails.⁵⁷ It is not logistically convenient or safe for school groups compared to current arrangements.⁵⁸

67. For these reasons, the closure of BHP Road and other trails, is completely at odds with:

- (a) Falls Creek's status as the premier cross country skiing destination in Australia, including as the host of the Kangaroo Hoppet, FIS races, and as a cross country training facility.

⁵⁴ Statement of Mr Louw, [13] – [15].

⁵⁵ Statement of Mr Louw, [23(b)].

⁵⁶ Statement of Mr Robert Catto-Smith, [6]. See also the statement of Ms Kim Franzke, [15].

⁵⁷ Statement of Mr Matthew Brumby.

⁵⁸ Statement of Ms Kim Franzke.

- (b) Scheme objectives to maintain the use of land outside the resort villages for public recreation and open space.
- (c) Consistent with the above, Scheme objectives which facilitate the provision of skier links, support the maintenance of ski trail connections between the villages and the ski fields (including ski in/ski out access) and seek to limit development intrusions onto the ski fields.

Landscape impacts.

- 68. The Scheme seeks to protect the valued landscape character of the alpine area and to minimise the extent of earthworks associated with development proposals. The construction of the car park with an extensive amount of cut and fill is not consistent with these aspirations. The construction of the new car park and adjacent “replacement” ski trail requires an extensive amount of earthwork. 4,475 cubic metres of fill and 4,000 cubic metres of cut is proposed. At least 625 cubic metres of fill will have to be brought onto the subject land. A maximum cut of around 3.0 metres in depth is proposed. A maximum fill of over 6.0 metres in height is proposed.
- 69. The proposed use and development will introduce significant new infrastructure into a remote location of the resort. The new landform and extensive hard surface car parking area will present as a new, and unnatural, element in the landscape, which is currently covered by deep snow drifts. It will be a jarring element in the landscape, especially in winter when the car park will be cleared of snow and as a car park and transit hub. What is currently an idyllic snow covered landscape in winter will be transformed into a utilitarian at grade car park. This is inconsistent with the outcomes sought by the Scheme in this location.

Traffic impacts

- 70. The traffic impacts of the proposed use and development have not been properly assessed. In particular, the proposed use and development proposes to introduce a new commercial use, in a remote location, which is proposed to be accessible in winter when the driving conditions are the most challenging. In the circumstances, a Road Safety Audit (“RSA”)

should have been undertaken to identify whether the BHP Road is fit for purpose and whether any remedial works and/or management measures are required. It is not sufficient to merely state that ARV is likely to complete an independent RSA. If works are required to make the road access safe, they should be identified now, and a commitment made to implementing all of the required measures.

71. The evidence of Mr Harris should be preferred to the evidence of Ms Dunstan on this topic.
72. The question of whether BHP Road provides safe access to the proposed car park during the declared snow season, and when cross country ski trails cross the road, is a relevant matter for the Tribunal to consider.⁵⁹
73. It is not an answer to say that ARV can be relied upon to undertake an independent RSA and implement its recommendations. ARV has made no unequivocal commitment to do so.

Waste disposal

74. Waste disposal associated with the proposed use and development and in particular the disposal of wastewater, has not been properly resolved.
75. A waste management plan should have been prepared for a project such as this. The kiosk is in a remote and sensitive location. It is important to ensure that waste associated with the proposed use and development (including food and cooking waste) is managed so that it does not impact the surrounding sensitive Alpine environment.
76. The civil engineering plans show “2X 11,000 L extra heavy duty blackwater collection tanks.” They also show the construction of a sewer main beneath the new car park and access to the car park, which does not connect to an

⁵⁹ See for example, albeit in a different context: *Brumbys Road Investments Pty Ltd v Manningham CC* [2018] VCAT 449; *Green Wedge Protection Group Inc v Nillumbik Shire Council* [2004] VCAT 1916. It is accepted that these decisions involved different facts and circumstances. But what they do demonstrate is that a proposal should be refused in road access arrangements are unacceptable and/or unsafe.

existing sewer main. Instead, the existing sewer main between the AGL building and the existing public toilets is to be decommissioned.

77. From this it is understood that the sewer main is being constructed to link into a potential future sewer main along BHP Road. However ARV has not disclosed whether there are any plans to construct this new sewer. From this it is also understood that until such time as the new sewer is installed (if it is ever installed) wastewater will be collected in the blackwater tanks and presumably pumped out and transported to the Falls Creek wastewater treatment system on an as needs basis, using a wastewater collection and transport vehicle.
78. There are potentially extremely adverse environmental impacts if wastewater is not disposed of properly, and/or the wastewater disposal system that is proposed fails to operate as planned. Indeed, Rocky Valley Lake is a source of Falls Creek's drinking water supply.⁶⁰
79. However, the basis on which wastewater will be collected and disposed of, and measures in place to ensure that the system works, and the redundancy measures in place to seek to ensure that the system does not fail, has not been disclosed or explained.
80. This is unacceptable for a development in a highly sensitive Alpine environmental area, including one next to a water supply. It is another basis for refusal.

Net community benefit

81. As set out above:
 - (a) The thrust of the strategic planning policy framework as it applies to the subject land and the application before the Tribunal is:

⁶⁰ Falls Creek Alpine Resort Management Board, Water Quality Annual Report 2021-2022, available at <https://www.alpineresorts.vic.gov.au/about-arv/publications/annual-reports/falls-creek-annual-reports>

- (i) To consolidate development within the Falls Creek Alpine village, and to discourage development outside of the Falls Creek Alpine village.
 - (ii) To discourage use and development which will detrimentally impact on threatened species and ecological communities, and the habitat of threatened species and ecological communities.
 - (iii) To encourage the use of the subject land for public recreation and open space.
 - (iv) As an adjunct to the above, to facilitate the provision of skier links, support the maintenance of ski trail connections between the villages and the ski fields (including ski in/ski out access) and seek to limit development intrusions onto the ski fields.
 - (v) To protect the valued landscape character of the alpine area and to minimise the extent of earthworks associated with development proposals.
 - (vi) To support development which achieves year round visitation.
That said:
 - (A) Development which facilitates year round visitation is directed to occur within the Falls Creek Alpine village.
 - (B) Limited development is contemplated outside of the alpine village.
- (b) Thus, if “out of centre” development is proposed, which has a significant adverse impact on threatened species and ecological communities, the habitat of threatened species and ecological communities, and the network of cross country ski trails there must be a demonstrated and substantial benefit which is achieved, which outweighs this and other disbenefits of the proposal.

82. The proposal is for a kiosk and a car park in a remote location of the resort.

83. It is submitted that:
- (a) The kiosk and car park will not act as an attraction for increased visitation during the declared snow season. Additional visitors are not likely to be attracted to visit Falls Creek because there is a kiosk and a new car park at the ANARE shed. They are likely to visit Falls Creek because of the downhill and cross country skiing trails and skiing facilities that are available. A kiosk and car park in this remote location offers little if anything to the skiing experience. To the contrary, it detracts from it for the reasons summarised below.
 - (b) The kiosk and car park will detrimentally impact on Falls Creek status as Australia's premier cross country skiing resort, by removing a key cross country skiing route, removing ski in and ski out access from Windy Corner to the ski fields, by generally fragmenting and decreasing the connectivity of the cross country skiing network, and by removing the capacity for Falls Creek to host the Kangaroo Hoppet and FIS racing events. All of these matters are likely to decrease the number of visitors to Falls Creek during the declared snow season.
 - (c) Hikers doing the Falls Creek to Hotham walk (or vice versa) are unlikely to make the decision to do the walk because there is a kiosk at one end of the trail, particularly when there are high-quality food and drink options available at Falls Creek village.
 - (d) There is no demonstrated need for the car park to be constructed in order to accommodate visitors to the Rocky Valley Dam during the green season.
 - (e) Again, the fact that there is a kiosk and a car park at the ANARE shed is unlikely to increase the number of visitors to the Rocky Valley Dam during the green season.
84. ARV has fallen well short of establishing that the proposal will achieve a net community benefit. The benefits have not been quantified in any meaningful way, and in any case, are not significant. They do not outweigh the significant disbenefits of the proposal, when assessed against through the lens of the applicable strategic planning policy framework and zoning controls that apply.

CONCLUSION

85. For the above reasons, the Tribunal is respectfully requested to uphold the appeal, and direct that no permit issue for the proposed use and development.

7 October 2024

W.T. HOUGHTON

ANDREW WALKER

Owen Dixon Chambers West

Instructed by Marcus Lane Group