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**675 VICTORIA STREET, ABBOTSFORD:**

**SIGNIFICANT GROUND DISTURBANCE ASSESSMENT**

EG Funds Management Pty. Ltd.

by

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March 2022

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## 1. INTRODUCTION

EG Funds Management Pty. Ltd. (EG) proposes to construct a mixed-use office and residential building including underground car park on previously developed commercial premises backing on to the Yarra River at 675 Victoria Street, Abbotsford (Figure 1). Appendix A contains concept plans of part of the proposed development.

Figure 2 is a feature and level survey plan that shows existing conditions. Currently, the subject site is occupied by a three-storey commercial office building, with a covered car parking area on the ground level. The front of the building is paved with bitumen and concrete. The rear of the building is paved with gravel and concrete.

The subject site fronts Victoria Street, which is a four-lane arterial road divided by a tramway. The kerbed street front is completely bitumenised, with a narrow garden bed bedside the footpath. The property boundary on the Yarra River side is cut by the Main Yarra Trail. Above and below-ground services to the subject site include street lighting, gas, water and sewer mains and Telstra cables.

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### 1.1 Aims of this assessment

As part of the planning process for the proposed development, EG asked Heritage Advisor and geomorphologist Dr. Tim Stone to consider:

- whether or not the site (675 Victoria Street, Abbotsford) has been subject to significant ground disturbance as defined under the *Aboriginal Heritage Regulations* 2018;
- whether or not a Cultural Heritage Management Plan (CHMP) is required for the proposed development and the reasons for that conclusion.

The significant ground disturbance (SGD) assessment that follows is guided by First Peoples-State Relations' (FP-SR, formerly Aboriginal Victoria) practice note for demonstrating SGD (Appendix B). Importantly, this note identifies geomorphologists as having the necessary expertise to determine SGD. Dr Tim Stone is a qualified geomorphologist, with a PhD in soil science, as well as being a qualified archaeologist and Heritage Advisor (Appendix C).

Resources utilised in undertaking the SGD assessment include historical records, early photographs and historical to current aerial imagery. Records of geotechnical investigations were also examined and interpreted to determine the geomorphology of the landform and nature of the surface and subsurface.


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Heritage Victoria's site records were also checked for historic sites as was the local planning scheme of the City of Yarra.

Dr Tim Stone undertook a field investigation of the subject site on 19 March, 2022.

## 2. STATUTORY PROTECTION

All Victorian registered and unregistered Aboriginal cultural heritage sites are protected by the State's *Aboriginal Heritage Act* 2006 (commenced May 28<sup>th</sup>, 2007). This Act prohibits harm to any Aboriginal cultural heritage site, place or object unless in accordance with an approved CHMP or cultural heritage permit.

The Victorian State Government instrumentality that administers this Act is FP-SR. All legislation relevant to the discovery of human remains is subordinate to the *Coroners Act* 1985.

### 2.1 *Aboriginal Heritage Act* 2006

The *Aboriginal Heritage Act* 2006 and *Aboriginal Heritage Regulations* 2018 are of particular relevance to the proposed development. A core component of this Act is the preparation of CHMPs, which are required under certain circumstances for high impact activities that require statutory authorisation under the Victorian Planning Provisions. CHMPs must meet prescribed standards and be approved before they can be used to support permit applications to local government or other agencies.

The Act also establishes the Aboriginal Heritage Council, which invites Aboriginal community groups with cultural heritage interests in particular parts of the State to become Registered Aboriginal Parties (RAPs). The RAP(s) may elect to evaluate a CHMP in place of FP-SR. The RAP for the Abbotsford area is the Wurundjeri Woiwurrung Cultural Heritage Aboriginal Corporation based in Abbotsford.

The regulations can be used to determine if a CHMP is required for planning approval. Significant ground disturbance is a key consideration in urban areas, where past development has largely destroyed cultural heritage. The regulations also detail the standards expected of a CHMP and fees payable under the Act.

Importantly, penalties for offences under the Act have increased significantly for individuals and corporations since 1 August, 2016.

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### 3. BACKGROUND ARCHAEOLOGY

Previous archaeological studies of sites in the Port Phillip Bay region have demonstrated Aboriginal occupation dating back at least 20,000 years. The oldest archaeological site in the region is at Keilor west of Melbourne where human remains were unearthed in 1940 (Bowler, 1976). The river terrace deposits at this site also contain the bones of extinct giant marsupials or 'megafauna' in association with Aboriginal stone artefacts (Duncan, 2001). However, none of the evidence suggests that Aboriginal people had hunted the megafauna or had butchered them for food.

The majority of Aboriginal sites in southern Victoria have been recorded along the coast. These date from about 6,000 years ago when sea levels stabilised near their present levels following the melting of the glaciers and ice-caps. Excavations of shell midden deposits have shown how shellfish gathering patterns and technology changed over this period (e.g. Coutts *et al*, 1976). These changes are usually interpreted by archaeologists as responses to changing environmental conditions. Characteristic stone artefacts of the period were burins, backed blades and geometric microliths. The most commonly used raw materials were quartz, silcrete and quartzite.

Most Aboriginal sites in the hinterland are also probably no older than a few thousand years. One of the most significant is the Mount William Axe Quarry located near Lancefield (McBryde, 1984). This is a site where Aboriginal people have extracted diorite or 'greenstone' for the manufacture and trade of stone axe heads. Ground edge axe heads from this quarry have been found throughout Victoria and as far afield as Broken Hill in N.S.W. The Aboriginal people who lived in the Port Phillip Bay region probably manufactured grindstones and axes from basalt procured from surface outcrops around Berwick and Cranbourne (Thomas *et al*. 1967:55).

Presland (1983) and du Cros (1989) have identified salient features of the archaeological record of the Melbourne area. Surface scatters of flaked stone artefacts are the most common site type. These stone assemblages are dominated by flakes and flaked pieces mostly struck from silcrete and chert. Few formalised tool types have been recorded. Scarred trees are also well represented around Melbourne. The densest concentrations of sites in Melbourne's inner south east are along the Yarra River near its confluence with Merri Creek. Sites have also been identified on some of the surrounding scoria cones and lava shields such as Mounts Atkinson and Kororoit (see also Vines, 1995).

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### 3.1 Aboriginal sites at 675 Victoria Street

According to the Victoria Aboriginal Heritage Register (VAHR), no Aboriginal sites are located at 675 Victoria Street, Abbotsford. The closest known Aboriginal site is an isolated artefact find made ~375 m east of the subject site in Hawthorn. The proposed development will not impact this site.

### 3.2 Historic sites at 675 Victoria Street

Heritage Victoria's Heritage Register and Heritage Inventory do not list any historic sites on the subject site at 675 Victoria Street, Abbotsford.

Furthermore, no part of the subject site is covered by any heritage overlays of the City of Yarra local planning scheme.

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## 4. HISTORICAL BACKGROUND

According to the DELWP Biodiversity Interactive Map pre-1750, the subject site prior to colonisation was 'Plains Grassy Woodland', with 'Riparian Scrubs or Swampy Scrubs and Woodlands' along the banks of the Yarra River. European history began soon after the voyages of Bass and Flinders in 1798. The first Europeans to enter the region were either shipwreck survivors or sealers and whalers. They brought fatal diseases such as smallpox and influenza which over the next 30 years at least halved the Aboriginal population (Butlin, 1983). In 1835, John Batman founded Melbourne on the Yarra River, by which time the Aboriginal population had diminished in numbers.

Early European impacts included clearing of the original woodland and other vegetation, with a view to creating pasture and wood for fuel. By early 1837, squatters had occupied land up to 40 km inland of the shore of Port Phillip Bay (James, 1985). Abbotsford beside the Yarra River was prone to flooding in the early years, with problems particularly evident at bends in the river (Presland, 1985). It was not until 1850 that the Crown began subdividing and selling this land for residential and commercial purposes.

Victoria Street first appears on James Kearney's 1855 map when it was a bush track (Figure 3). The 'Richmond Nursery' vineyard had been established on the south side of the track, where today Victoria Street crosses the Yarra River. The land on the north side adjoining the river was a light industrial area dominated by the Steam Washing Company. The subject site was part of this industrial area, with some of the small buildings indicated on the map possibly cottages built to house workers in the area.

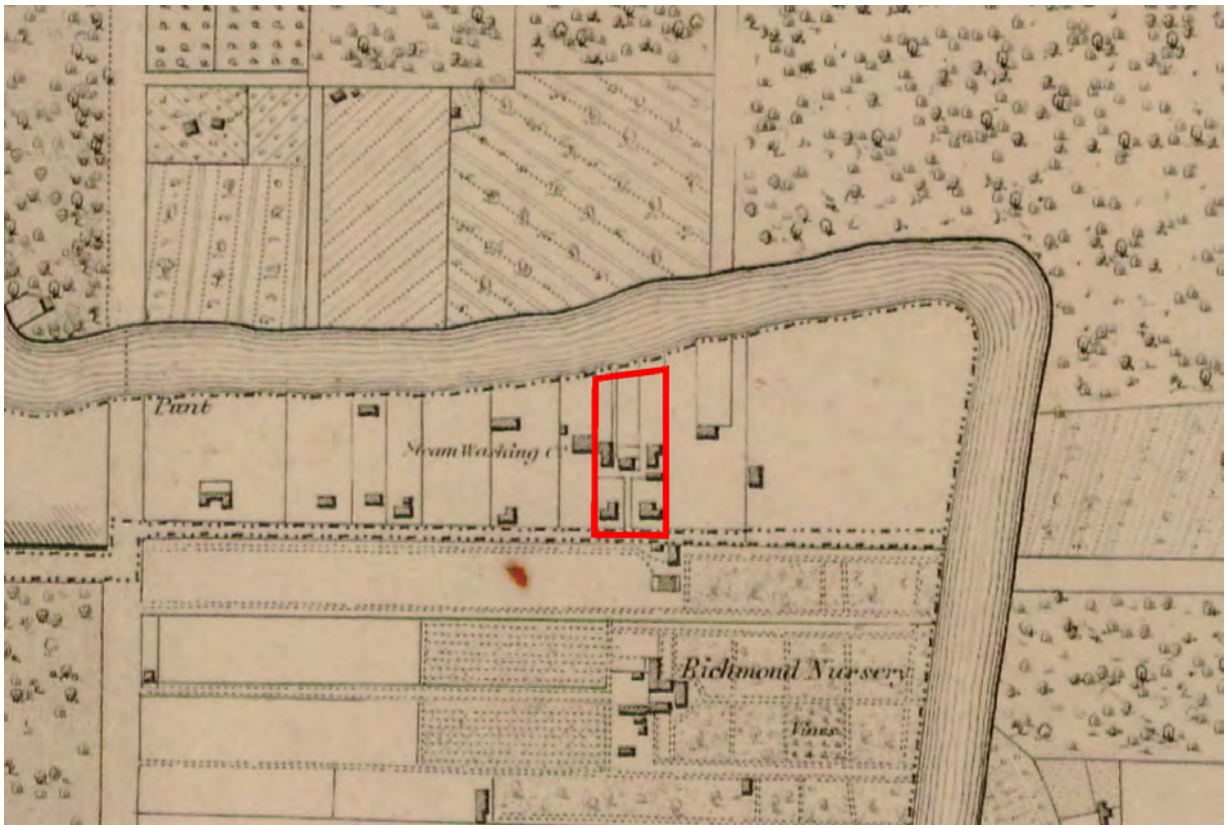
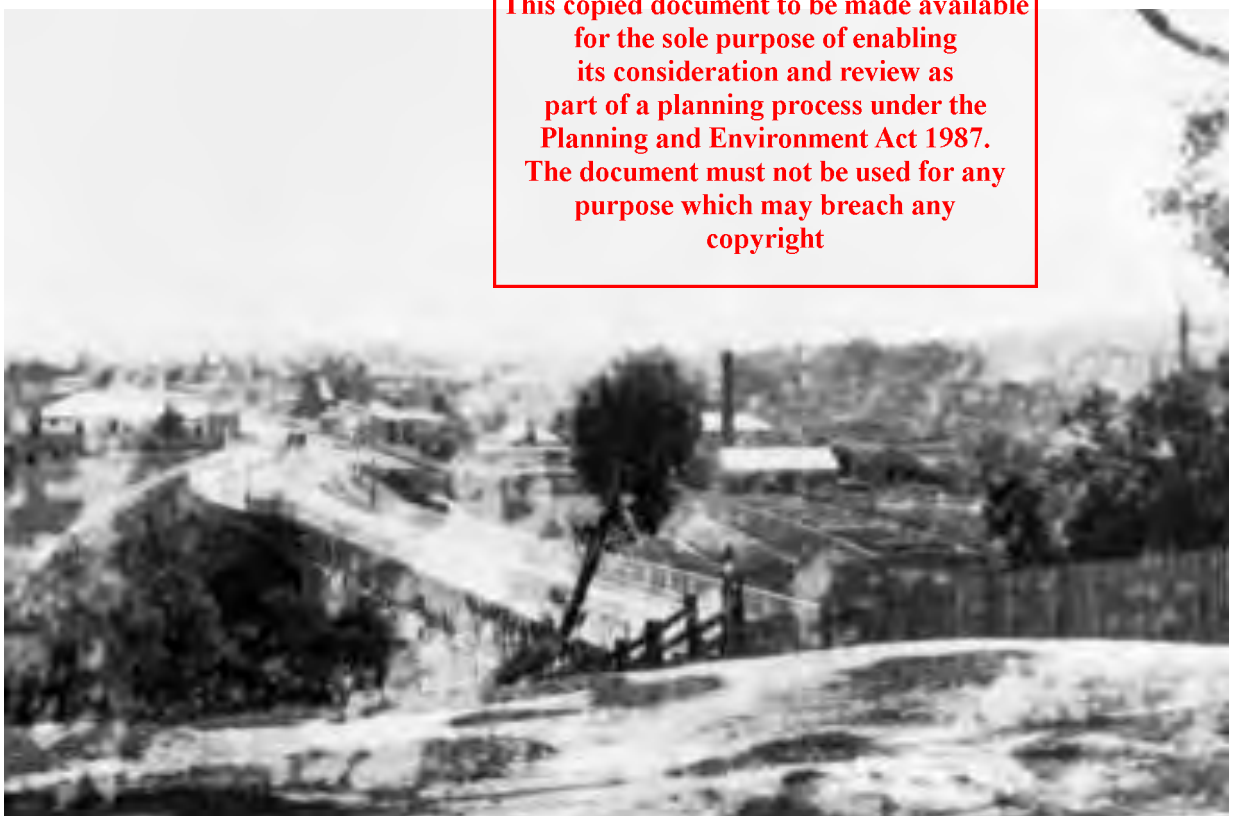


Figure 3. Location of subject site (red) on 1855 plan of survey (James Kearney, 1855).



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Figure 4. View of Victoria Bridge from Hawthorn c.1887 (Collingwood Library).

In 1884, Victoria Bridge was constructed over the Yarra River. An 1885 Map of the City of Collingwood shows the subject site as part of Crown Allotment 63, 'Soap Works', is shown on the north side of Victoria Street close to the subject site, which may be synonymous with the 'Steam Washing Company' shown in Figure 4.

A grainy c.1887 photograph attributed to J.W. Lindt shows Victoria Bridge before it was widened for use of horse-drawn trams (Figure 4). Importantly, the photo taken from the Hawthorn side of the Yarra River captures the subject site in the middle-distance. The industrial chimney of the soap works (where wool was washed) is clearly visible and in front of it a farm house facing a market garden sloping down to the river.

The Victoria Bridge was widened in 1890 to carry horse trams and in 1914 work commenced to convert the horse tramway to an electric tramway (Victorian Heritage Database). The Ikea car park opposite the subject site was formerly the site of cable tram carsheds built by the Melbourne Tramway and Omnibus Company.

A 1901 Melbourne Metropolitan Board of Works map shows Victoria Street between Burnley Street and the Yarra River as a mix of residential and industrial premises, including the wool washing facilities and soap works on the subject site. By 1930, the cable tram carsheds opposite the subject site had become the engineering products factory of Charles Ruwoldt Pty. Ltd and is now Victoria Gardens (Figure 5).

Figure 5 is a photograph of Victoria Street taken in 1930 from Burnley Street. The front of the subject site is shown in the left-margin of the photograph as part of a collection of gabled roofed buildings that had been accumulating since 1855 (Figure 3).

Trace Environmental (2022) reviewed all available historical aerial photography from 1931 to the present day. In 1931, the only part of the subject site that had not been built on was the rear of the property backing onto the Yarra River. However, the original riparian vegetation had been completely removed. By 1945, a large rectangular building had been added at the rear to the top of the riverbank (Figure 6).

From 1945 to 1985, the layout of the subject site did not change significantly (Trace Environmental, 2022). The commercial office building on-site currently is visible on aerial photography from 1991 and was constructed following demolition of all the pre-1945 buildings. Construction of the old and the new would have required levelling of the landform and excavation for floors and foundations. Certainly, no part of the subject site retains any trace of the original land surface from this imagery.

EG acquired 675 Victoria Street, Abbotsford in April, 2021. It is currently fully tenanted by a range of commercial tenants.

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Figure 5. View of Victoria Street SE from Burnley Street in 1930 (Museum of Victoria).



Figure 6. Aerial image of subject site taken in 1945 (Melbourne 1945 interactive map).

## 5. ABORIGINAL HERITAGE REGULATIONS 2018

The *Aboriginal Heritage Regulations* 2018 that accompany the *Aboriginal Heritage Act* 2006 are particularly relevant and stringent. Under regulation 7, a CHMP is required for a proposed activity, if:

- (a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and
- (b) all or part of the activity is a high impact activity.

According to Regulation 26, any land within 200 metres of a waterway (not subject to significant ground disturbance) is an area of cultural heritage sensitivity. AV online maps identify land within 200 m of the Yarra River as an area of cultural heritage sensitivity. This land includes the subject site at 675 Victoria Street, Abbotsford.

The second prerequisite (b) may be met under Regulation 46:

- (1) The construction of a building or the construction or carrying out of works on land is a high impact activity if the construction of the building or the carrying out of works -
  - (a) would result in significant ground disturbance; and
  - (b) is for, or associated with, the use of the land for any one or more of the following purposes –
    - (iii) a car park;
    - (xvii) an office;
    - (xxi) a residential building.

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Additionally, under Regulation 48:

- (1) The construction of three or more dwellings on a lot or allotment is a high impact activity.
- (2) The carrying out of works for three or more dwellings on a lot or allotment is a high impact activity.

Finally, under Regulation 58:

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- (1) The use of land for a purpose specified in regulation 40(1)(b) is a high impact activity if a statutory authorisation is required to change the use of land for that purpose.

In this case, the proposed development requires statutory authorisation from the City of Yarra prior to construction. However, under Regulation 58(4):

Despite subregulations (1), (2) and (3), if the whole of the activity area for an activity referred to in subregulation (1), (2) and (3) has been subject to significant ground disturbance, that activity is not a high impact activity.

## 5.1 Significant ground disturbance

If an area of cultural heritage sensitivity has been subject to SGD, the disturbed part is no longer an area of cultural heritage sensitivity. SGD is defined by the *Aboriginal Heritage Regulations* 2018 as disturbance of:

(a) the topsoil or surface rock layer of the ground; or

(b) a waterway-

by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping.

Under Regulation 26(2), 'if part of a waterway or part of the land within 200 metres of a waterway has been subject to significant ground disturbance, that part is not an area of cultural heritage sensitivity'.

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### 5.1.1 Levels of inquiry

FP-SR has produced a practice note for determining SGD (see Appendix B). This practice note is based on VCAT's determinations about significant ground disturbance in the *Mainstay* case (VCAT Ref: P1020/2008) and *Colquhouns & Ors vs Yarra SC* (VCAT Ref: P1204/2010). The following determination for 675 Victoria Street, Abbotsford is guided by these deliberations.

Of particular relevance in the present case is *Azzure Investment Group Pty Ltd vs Mornington Peninsula Shire Council* (VCAT Ref: P722/2009), which is reproduced in full in Appendix D. The *Azzure* case is relevant because it involved land that had been extensively developed, serviced and used over an extended period of time. VCAT accepted comparative and contextual information to establish that SGD had occurred on

this lot rather than the ‘hard’ evidence of aerial photography, public records, archaeological or geomorphological investigation or oral history of machine use.

According to FP-SR and VCAT, the words *disturbance*, *topsoil*, *surface rock layer*, *machinery*, *grading*, *excavating*, *digging*, *dredging*, *ploughing* (other than *deep ripping*) are not defined in the regulations and therefore have their ordinary meanings. Topsoil and surface rock layer are of particular relevance to the proposed development because past development has truncated this at the subject site (see Section 6.3 below). VCAT use the Macquarie Dictionary to define topsoil as ‘simply the surface or upper part of the soil’ and state that ‘disturbance to the topsoil could therefore arise through a relatively limited interference at limited depth’.

VCAT further determined that ‘topsoil or surface rock layer’ include the former topsoil or former surface rock layer if that topsoil or surface rock layer is a naturally occurring surface level *that is readily ascertainable* (my emphasis) and does not include the current topsoil or current surface rock layer if established by the mere filling of land.

For SGD to have occurred on the topsoil or surface rock layer, machinery must have been used. If machinery has been used to grade, excavate, dig, dredge or deep rip the topsoil or surface rock layer of an area, it will constitute SGD of that area.

The onus rests with the planning permit applicant to prove that there has been SGD. The standard of proof required should be enough to satisfy a planning decision maker that there has been SGD on the balance of probabilities rather than proof beyond doubt. Mere assertion of disturbance by an applicant or landowner has little weight.

Notwithstanding the burden of proof on the applicant, FP-SR submitted to VCAT that there should be no hard and fast rules on what information should be required to satisfy a planning decision maker that SGD has occurred and cautioned against guidelines that might create unreasonable obligations on applicants or responsible authorities. VCAT agreed. The level of inquiry, and the information required, will depend on the circumstances of each case.

As a result of these deliberations, VCAT proposed four levels of inquiry and that assessment of SGD should be dealt with at lowest applicable level. These levels are summarised by FP-SR as follows:

#### *Level 1 – Common knowledge*

The fact that land has been subject to SGD may be common knowledge. Very little or no additional information should be required from the responsible authority. For example,

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common knowledge about the redevelopment of a petrol filling station with extensive underground storage tanks.

#### *Level 2 – Publicly available records*

If the existence of SGD is not common knowledge, a responsible authority may be able to provide assistance from its own records about prior development and use of land, or advise the applicant about other publicly available records, including aerial photographs. These documents may allow a reasonable inference to be made that the land has been subject to SGD. In such event, no further inquiries or information would be needed by the responsible authority. The particular records and facts relied upon should be noted by the responsible authority as a matter of record.

#### *Level 3 – Further information from applicant*

If common knowledge or publicly available records, do not provide sufficient evidence of SGD, the applicant may need to present further evidence either voluntarily or following a formal request from the responsible authority. Further evidence could consist of land use history documents, old maps or photographs of the land, or statements by former landowners or occupiers. Statements should be provided by statutory declaration or similar means.

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#### *Level 4 - Expert advice or opinion*

If these levels of inquiry do not provide sufficient evidence of SGD (or as an alternative to Level 3), the applicant may submit or be asked to submit a professional report with expert advice or opinion from a person with appropriate skills and experience. Depending on the circumstances, this may involve a site inspection and/or a review of primary documents. If there is sufficient uncertainty, some preliminary sub-surface excavation may be warranted.

VCAT and FP-SR anticipate that a level 1 or 2 inquiry should be sufficient to determine SGD and that a level 3 or 4 inquiry should not be required as a matter of course. In terms of expertise, FP-SR regard geomorphologists as suitable to undertake any high-level inquiry. In this case, the author (and Heritage Advisor) is a geomorphologist, with a MSc and PhD specifically in soil stratigraphy.

## **6. SIGNIFICANT GROUND DISTURBANCE ASSESSMENT**

Common knowledge (Level 1), publicly available records (Level 2) and expert geomorphological advice based on field investigation (Level 4) demonstrate that all of 675 Victoria Street, Abbotsford has been subject to SGD. Figure 1 shows the urban

context of the subject site, its shape, size, condition and configuration including existing buildings, access driveways and paved car parks between the buildings and street fronts (see also Plate 1). Section 6.3 describes the physical evidence for SGD in detail.

### **6.1 Level 1 (common knowledge)**

It is common knowledge that 675 Victoria Street, Abbotsford is an existing commercial building in a long-established industrial area, with all the above and below-ground services usually associated with an address in the Melbourne metropolitan area (Plate 1). The site history is that of an intensively developed industrial site and consequently the original ground surface is no longer recognisable on any part of it. Modification of the original ground surface by machinery is evident from the ground surface, where previous development from early industrial construction and use to construction of the existing commercial office building c. 1990 has impacted 100 % of the subject site. Furthermore, the graded and levelled subsoil that comprises the site has been further cut for the installation of above and below-ground services.

### **6.2 Level 2 (publically available records)**

Publically available records (Level 2) in the form of historical maps, photos and aerial imagery confirm this past development, which is otherwise common knowledge. The aerial image taken in 1945 is particularly instructive because it shows the subject site completely built on or paved, with no part of the original landform visible on this image or any of the subsequent images (Figure 6).

The subject site and surrounds would have been subject to land clearing initially followed by levelling, with the mechanical assistance of horse-drawn machinery (scoops) and steam-powered traction and stationary machinery (rollers, shovels, graders; Historical Construction Equipment Association, 2016). From 1945, any modifications to the surface of this built environment would have involved light and heavy earthmoving machinery, for levelling, excavation, trenching and shaping (Haycroft, 2000).

On the basis of these publically available records, it is possible to reasonably conclude that 100 % of the subject site has been subject to SGD.

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**675 Victoria Street Frontage**



**675 Victoria Street Front Entrance**



**675 Victoria Street West Side**



**675 Victoria Street East Side**



**675 Victoria Street Rear**



**Main Yarra Trail at Rear**

Plate 1. 675 Victoria Street subject site.

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### 6.3 Level 4 (expert advice or opinion)

JC Geotechnics Pty. Ltd. (2021) prepared a geotechnical investigation report for the subject site, which included a borehole in the bitumen pavement at the front of the existing office building to a maximum depth of 15 m. Appendix E contains a map showing the borehole location and the available logs (BH8). Geomorphologist and Soil Scientist Dr. Tim Stone examined these records as part of a Level 4 inquiry. He also investigated the site for first-hand evidence of SGD.

The Surface Geology of Victoria 1:250,000 map book identifies the subject site as Pleistocene to Holocene alluvium (Qa1). This unit largely accords with a palaeo-valley of the Yarra River, where its course is controlled by a lithological contact between Quaternary-age Newer Volcanics (Neo) and older Silurian rocks (Sxm). JC Geotechnics Pty. Ltd. (2021) encountered weathered basalt at 9 m depth.

The borehole logs in Appendix E show a surface layer of asphaltic concrete pavement to a depth of 15 cm abruptly resting on 'fill' composed of gravelly sand with varying amounts of igneous gravel to a depth of 1.5 m. Below the moderately compacted fill, natural clayey silt/silty clay (Qa1) was deposited to a depth of 9 m, with a silty sand layer at 7.5-8 m depth. Weathered basalt regolith (sandy clay) is present beneath the alluvium and basalt bedrock from 11-15 m, where the borehole terminates.

BH8 does not show the fill resting on any natural topsoil (Appendix E). The change from fill to clayey silt/silty clay at 1.5 m depth is abrupt, which indicates a truncated land surface far removed from any topsoil that may have once been present. Rather than topsoil at this depth, the borehole log describes the uppermost clayey silt/silty clay unit as 'low-medium plasticity, orange brown with occasional fine to medium grained ironstone gravel'. Orange brown sediments and ironstone precipitates typically indicate the lowermost part of a soil profile or regolith. Certainly, no topsoil.

Examination of the surface of the subject site by Geomorphologist and Soil Scientist Dr. Tim Stone found no trace of the original land surface. The front is completely paved or otherwise modified and the rear overlooking the Yarra River completely levelled. The rear has been further modified by deep excavation to form the Main Yarra Trail (Plate 1). The subject site has clearly been subject to SGD in its entirety.

As a consequence of complete removal of the original soil profile, the risk of Aboriginal cultural heritage being present at the subject site is extremely low.

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#### 6.4 Is a CHMP required?

Level 1 and 2 inquiries show that 100 % of the subject site at 675 Victoria Street, Abbotsford has been subject to SGD. Expert advice (Level 4) based on geomorphological investigation of the subject site confirms this common knowledge and the historical record. The SGD was caused by:

- land levelling by horse-drawn machinery (scoops) and steam-powered traction and stationary machinery (rollers, shovels, graders);
- excavating footings for building construction;
- excavating footings for asphalt and concrete slab floors;
- excavation of trenches for water, sewer and gas pipes and telecommunication cables by heavy trenching equipment;
- excavating to construct concrete driveways and paved pathways;
- digging footings for property boundary fences.

A CHMP would have been required for the proposed development if the subject site was in an area of cultural heritage sensitivity (see Section 5). However, no part of the subject site is in an area of cultural heritage sensitivity, in accordance with regulation 26(2) of the *Aboriginal Heritage Regulations* 2018, which states:

‘if part of a waterway or part of the land within 200 metres of a waterway has been subject to significant ground disturbance, that part is not an area of cultural heritage sensitivity’.

**Accordingly, a CHMP under Section 46 of the *Aboriginal Heritage Act* 2006 is not required prior to development of the subject site.**

#### 7. HISTORIC HERITAGE OBLIGATIONS

No part of the subject site is listed with Heritage Victoria or the City of Yarra for its historic heritage significance and the potential for significant historical archaeological items is low for the same reasons of SGD. Accordingly, there is no requirement for detailed historical assessment prior to development.

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## 8. RECOMMENDATIONS

Based on the results of this assessment, it is recommended that:

- construction of the proposed mixed-use commercial building including underground car park at 675 Victoria Street, Abbotsford be allowed to proceed without any further Aboriginal or historic cultural heritage investigation, or CHMP. The reason is that the land proposed for development has been subject to significant ground disturbance previously and is not an area of cultural heritage sensitivity that requires a CHMP.
- EG has the option of undertaking a *voluntary* CHMP for the proposed development.
- In the highly unlikely event that items of Aboriginal or historic cultural heritage are uncovered during the course of development, all work must cease and EG (or its contractors) must contact the Heritage Advisor (ph: 0429496607), FP-SR or Heritage Victoria for advice. It is an offence under the relevant legislation to disturb or destroy relics without written authorisation.

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Vines, G. 1995. *Grey Box Forest Ecological and Cultural Heritage Project: Cultural Heritage Study and Management Proposal*. Report for the Federal Airports Federation.

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## APPENDIX A

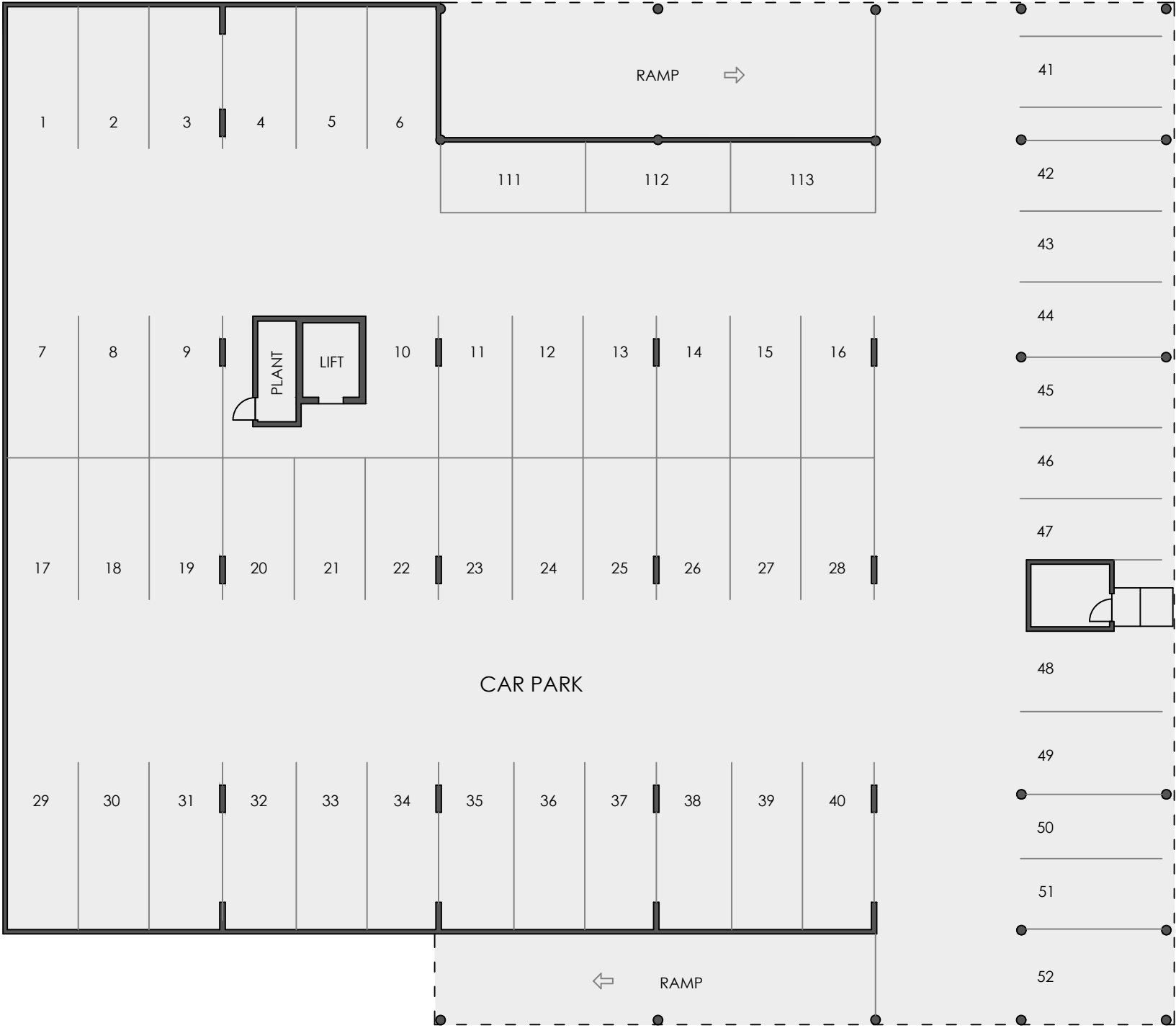
### Plans of Lower Floors of Proposed Development

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VICTORIA STREET



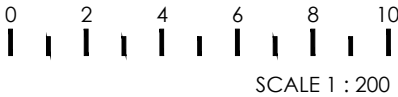
SCHEDULE

CAR PARKING 55 SPACES

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BASEMENT FLOOR



CLIENT:



**PARKING PLAN**  
BASEMENT, 675 VICTORIA STREET,  
ABBOTSFORD, VIC

DATE: 19/03/2021  
REF: 77931 REV: -  
DRAWN: DA CHECKED: AL  
SCALE: 1:200 @ A3 SHEET: 1 OF 6

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VICTORIA STREET



SCHEDULE

CAR PARKING 36 SPACES

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LOWER GROUND FLOOR

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## GROUND FLOOR

## SCHEDULE

CAR PARKING 24 SPACES

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DATE: 19/03/2021

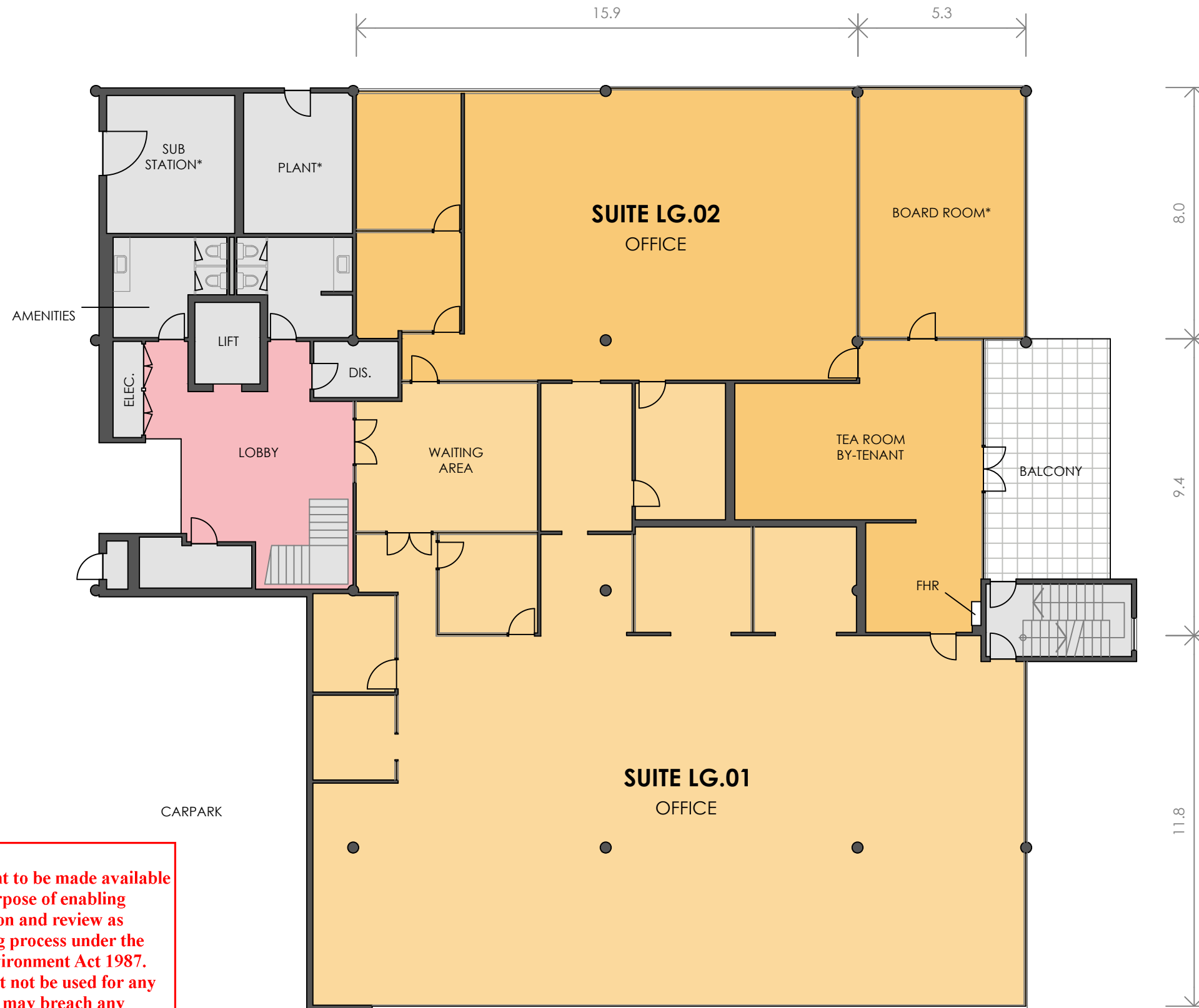
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SCALE:	1:250 @ A3	SHEET:	3 OF 6

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VICTORIA STREET

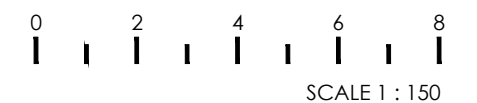


### SCHEDULE OF AREAS

LOWER GROUND	
SUITE LG.01	348.5 m <sup>2</sup>
SUITE LG.02	145.6 m <sup>2</sup>
WAITING ROOM	26.9 m <sup>2</sup>
TEA ROOM	56.9 m <sup>2</sup>
BOARD ROOM	42.5 m <sup>2</sup>
<b>TOTAL AREA</b>	<b>620.4 m<sup>2</sup></b>
LOBBY	30.0 m <sup>2</sup>
AMENITIES	27.5 m <sup>2</sup>
BALCONY	30.7 m <sup>2</sup>

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#### NOTES:

- AREAS MARKED AS \* INDICATE INACCESSIBLE AT TIME OF SURVEY
- AMENITIES BY TENANT INCLUDED

CLIENT:



## MARKETING DRAWING

LOWER GROUND, 675 VICTORIA STREET,  
ABBOTSFORD, VIC

DATE: 19/03/2021

REF: 77931 REV: -  
DRAWN: DA CHECKED: AL  
SCALE: 1:150 @ A3 SHEET: 4 OF 6

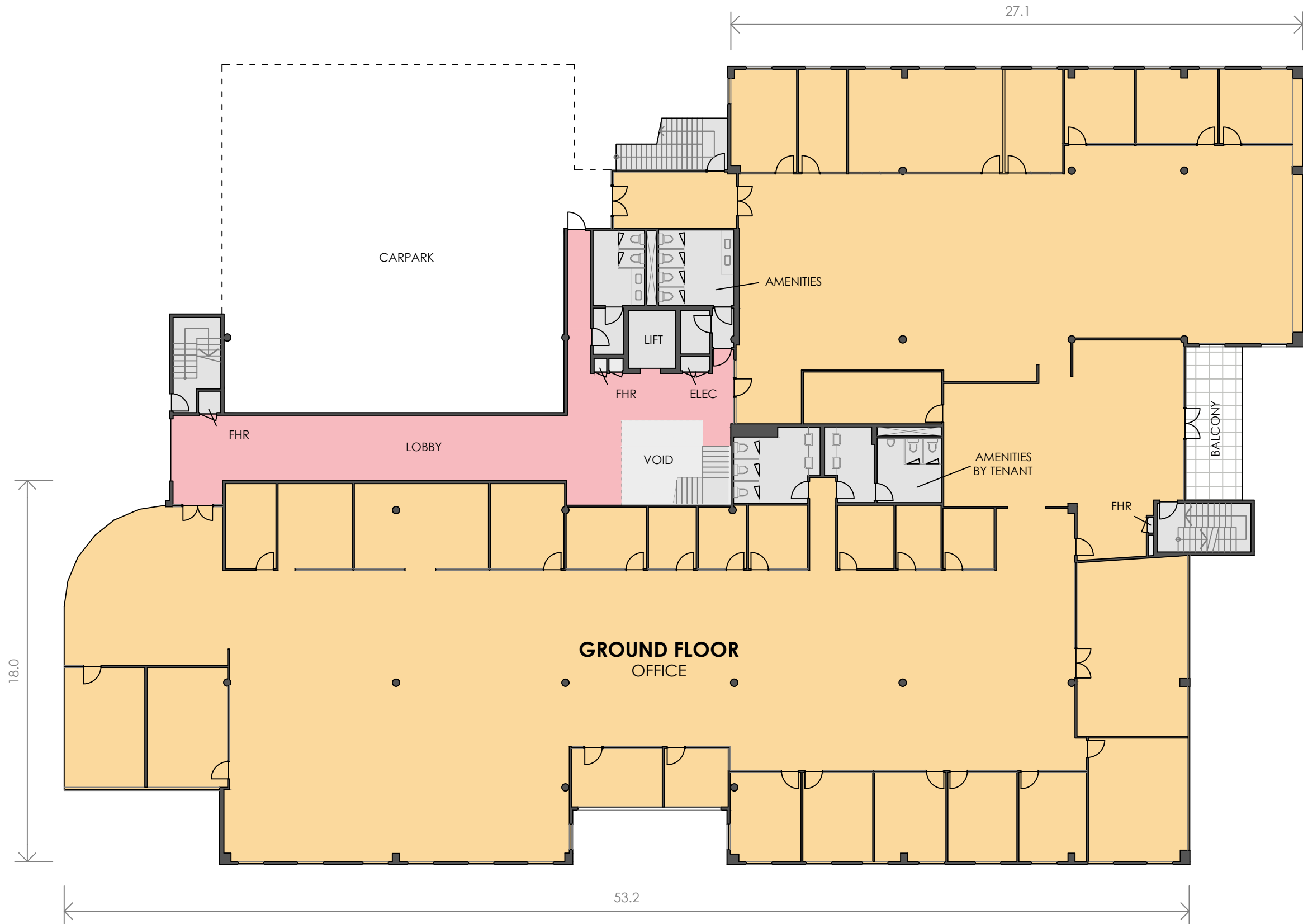
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### SCHEDULE OF AREAS

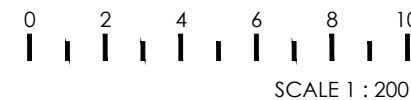
GROUND FLOOR	
OFFICE	1,387.1m <sup>2</sup>
<b>TOTAL AREA</b>	<b>1,387.1m<sup>2</sup></b>
LOBBY	99.2 m <sup>2</sup>
AMENITIES	32.0 m <sup>2</sup>
BALCONY	19.6 m <sup>2</sup>

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### GROUND FLOOR

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**NOTES:**  
1. AMENITIES BY TENANT INCLUDED

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### SCHEDULE OF AREAS

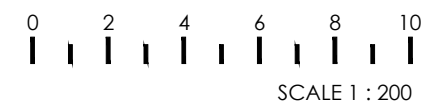
FIRST FLOOR	
SUITE 1.01	340.6 m <sup>2</sup>
SUITE 1.02	1,399.0 m <sup>2</sup>
<b>TOTAL AREA</b>	<b>1,739.6 m<sup>2</sup></b>
LOBBY	34.6 m <sup>2</sup>
AMENITIES	40.7 m <sup>2</sup>
BALCONY	19.6 m <sup>2</sup>

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**FIRST FLOOR**

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## APPENDIX B

### FP-SR Significant Ground Disturbance Practice Note

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# Aboriginal Heritage Act 2006

## Practice Note: Significant Ground Disturbance

This Practice Note provides guidance about the meaning of **significant ground disturbance** as it relates to requirements to prepare Cultural Heritage Management Plans under the *Aboriginal Heritage Act 2006*.\*.

The Practice Note covers:

- when a Cultural Heritage Management Plan is required
- why significant ground disturbance should be assessed
- what significant ground disturbance means
- who needs to provide proof
- how to determine significant ground disturbance
- who can determine this
- what is the role of the responsible authority
- how Aboriginal cultural heritage is protected in areas of significant ground disturbance.

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## Background

The *Aboriginal Heritage Act 2006* (the Act) and Aboriginal Heritage Regulations 2007 (the Regulations) provide protection in Victoria for all Aboriginal places, objects and human remains regardless of their inclusion on the Victorian Aboriginal Heritage Register or whether they are located on public or private land.

## When is a Cultural Heritage Management Plan required?

A Cultural Heritage Management Plan ("Management Plan") is required for an activity (i.e. the use or development of land) if the activity:

- is a high impact activity
- falls in whole or in part within an area of cultural heritage sensitivity.

The terms 'high impact activity' and 'cultural heritage sensitivity' are defined in the Regulations.

A Management Plan must also be prepared when an activity requires an Environmental Effects Statement, or when directed by the Minister for Aboriginal Affairs.

High impact activities are categories of activity that are generally regarded as more likely to harm Aboriginal cultural heritage. Most high impact activities provided for in the Regulations are subject to a requirement that the activity results in significant ground disturbance. The term 'significant ground disturbance' is defined in the Regulations.

Areas of cultural heritage sensitivity are landforms and land categories that are generally regarded as more likely to contain Aboriginal cultural heritage. A registered Aboriginal cultural heritage place is also an area of cultural heritage sensitivity.

If part of an area of cultural heritage sensitivity (other than a cave) has been subject to significant ground disturbance that part is not an area of cultural heritage sensitivity.

If a Management Plan is required for an activity it must be approved before the sponsor can obtain any necessary statutory authorisation for the activity and/or before the activity can start. For more information about Cultural Heritage Management Plans see Aboriginal Victoria's (AV) website:

<http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/aboriginal-cultural-heritage/cultural-heritage-management-plans>.

## Why should significant ground disturbance be assessed?

It is important to assess significant ground disturbance when considering whether a Management Plan is required because:

- A Management Plan does not need to be prepared for a high impact activity if all the area of cultural heritage sensitivity within the activity area has been subject to significant ground disturbance.
- Some types of activity will not be a high impact activity, meaning a Management Plan would not need to be prepared, if the activity does not cause significant ground disturbance.

The Regulations specify the landforms and land categories that are areas of cultural heritage sensitivity. Areas of cultural heritage sensitivity are displayed in a series of maps available on AV's website. The areas delineated on these maps however do not take account of the past history of land use and development that may have caused significant ground disturbance in localised areas.

## How is significant ground disturbance defined?

'Significant ground disturbance' is defined in r.4 of the Regulations as meaning disturbance of –

- a) the topsoil or surface rock layer of the ground; or
- b) a waterway –

by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping.

The words 'disturbance', 'topsoil', 'surface rock layer', 'machinery', 'grading', 'excavating', 'digging', 'dredging', 'ploughing' (other than deep ripping) are not defined in the regulations and therefore have their ordinary meanings.

The Victorian Civil and Administrative Tribunal (VCAT) has determined that the words "topsoil or surface rock layer" include the former topsoil or former surface rock layer if that topsoil or surface rock layer is a naturally occurring surface level that is readily ascertainable and does not include the current topsoil or current surface rock layer if established by the mere filling of the land.

Ploughing (other than deep ripping) to any depth is not significant ground disturbance. Deep ripping is defined in the regulations to mean 'ploughing of soil using a ripper or subsoil cultivation tool to a depth of 60 centimetres or more'. None of the words used in this definition are defined, and therefore have their ordinary meanings. VCAT has determined that a ripper or subsoil cultivation tool must be distinguished from conventional ploughs or topsoil cultivation tools such as disc ploughs or rotary hoes which are not sufficient to show significant ground disturbance.

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Deep ripping will result in significant ground disturbance regardless of the degree of disturbance caused to the topsoil or surface rock layer of the ground.

## Who needs to provide proof that land has been subject to significant ground disturbance?

The burden of proving that an area has been subject to significant ground disturbance rests with the applicant for a statutory authorisation for the activity (or the sponsor of the activity). The responsible authority may assist by providing the applicant access to any relevant records it has about past land use and development.

## How can a sponsor determine whether significant ground disturbance has occurred?

The responsible authority should require evidence of support for claims that there has been significant ground disturbance of an area. The levels of inquiry outlined below provide some guidance about what information should be required to satisfy a responsible authority (depending on the circumstances of each case) that significant ground disturbance has occurred. The levels of inquiry are listed in order of the level of detail that may be required. An assessment of whether significant ground disturbance has occurred should be dealt with at the lowest possible level in order to avoid unnecessary delay or cost to applicants.

Little weight should be given to mere assertions by applicants or land owners that an activity area has been subject to significant ground disturbance.

### *Level 1 – Common knowledge*

The fact that land has been subject to significant ground disturbance may be common knowledge. Very little or no additional information should be required from the responsible authority.

For example, common knowledge about the redevelopment of a petrol station with extensive underground storage tanks.

### *Level 2 – Publicly available records*

If the existence of significant ground disturbance is not common knowledge, a responsible authority may be able to provide assistance from its own records about prior development and use of land, or advise the applicant about other publicly available records, including aerial photographs.

These documents may allow a reasonable inference to be made that the land has been subject to significant ground disturbance.

In such event, no further inquiries or information would be needed by the responsible authority. The particular records and facts relied upon should be noted by the responsible authority as a matter of record.

For example, a former quarry site subsequently filled, but where the public records show the area of past excavation.

### *Level 3 – Further information*

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If 'common knowledge' or 'publicly available records' do not provide sufficient information about the occurrence of significant ground disturbance, the applicant may need to present further evidence either voluntarily or following a formal request

from the responsible authority. Further evidence could consist of land use history documents, old maps or photographs of the land or statements by former landowners or occupiers. Statements should be provided by statutory declaration or similar means.

For example, the construction of a former dam on a farm.

#### *Level 4 – Expert advice or opinion*

If these levels of inquiry do not provide sufficient evidence of significant ground disturbance (or as an alternative to level 3), the applicant may submit or be asked to submit a professional report with expert advice or opinion from a person with appropriate skills and experience.

Depending on the circumstances, this may involve a site inspection and/or a review of primary documents. If there is sufficient uncertainty some preliminary sub-surface excavation or geotechnical investigation may be warranted.

An expert report should comply with VCAT's practice note on expert evidence.

The responsible authority must be reasonably satisfied that the standard of proof presented by the applicant shows that all of the land in question has been subject to significant ground disturbance.

A level 1 or 2 inquiry will commonly provide sufficient information as to whether or not the activity area has been subject to significant ground disturbance, and a level 3 or 4 inquiry should not be required as a matter of course.

There will be cases when the responsible authority is simply not persuaded or where there remains genuine doubt about significant ground disturbance regardless of the level of inquiry. In these circumstances the default position is that a Management Plan is required. This is in line with the purpose of the Act and Regulations to provide for the protection of Aboriginal cultural heritage in Victoria.

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## Who can provide expert advice about significant ground disturbance?

A person needs to have expertise to decide, based upon an inspection of the land or interpreting primary documents, whether the land has been subject to significant ground disturbance.

A cultural heritage advisor may not necessarily have this expertise. Under section 189 of the Act, an advisor must have a qualification directly relevant to the management of Aboriginal cultural heritage such as 'anthropology, archaeology or history' or have extensive experience or knowledge in relation to the management of heritage. An advisor appropriately qualified in archaeology may be able to assist where excavation is required to determine significant ground disturbance.

Other experts such as a land surveyor, geomorphologist or civil engineer could also have the necessary expertise (depending on the circumstances). For example, a civil engineer should have the qualifications and experience to determine the extent of previous engineering works along a watercourse or road, and therefore the extent of significant ground disturbance.

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## What is the role of the responsible authority?

The responsible authority determines whether a Management Plan is required for an activity. It may require the applicant to provide information to satisfy it that an area has been subject to significant ground disturbance.

Evaluating information relating to the occurrence of significant ground disturbance may be critical in deciding whether a Management Plan is required and therefore whether a statutory authorisation can be granted. This question should be resolved at an early stage in planning a proposed development. Applicants for statutory authorisations and the responsible authority should therefore seek to agree at an early stage about whether a Management Plan is required. In the event of a dispute this can be brought without delay to VCAT for resolution. The responsible authority should take care to document the steps taken in each case.

## What if Aboriginal cultural heritage is discovered in an area determined to have been subject to significant ground disturbance?

It is possible that there are Aboriginal cultural heritage places, objects or human remains within areas determined to no longer be areas of cultural heritage sensitivity due to significant ground disturbance. It is also possible that Aboriginal cultural heritage could be harmed by activities which do not amount to high impact activities.

These Aboriginal places are still protected under the Act. In particular, it is an offence under sections 27 and 28 of the Act to harm Aboriginal cultural heritage unless acting in accordance with a Cultural Heritage Permit or approved Cultural Heritage Management Plan (regardless of whether a Management Plan was required).

*\* This Practice Note is based on VCAT's determination about significant ground disturbance. For further details see VCAT, Reference No. P1020/2008 – Mainstay Australia vs Mornington Peninsula SC and Reference No. P1204/2010 – Colquhoun & Ors vs Yarra SC.*

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### **APPENDIX C**

#### **Curriculum Vitae of Dr Tim Stone**

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## **DR. TIM STONE**

Principal Consultant (archaeology and geomorphology)

Tim Stone Pty Ltd

P.O. Box 1068

Carlton, Vic. 3053

mob: 0429496607

email: [tstoneheritage@gmail.com](mailto:tstoneheritage@gmail.com)

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## **Qualifications**

Bachelor of Arts (combined Honours) Department of Geography and Department of Prehistory and Anthropology, the Australian National University, 1986.

Master of Science, Department of Geography, the Australian National University, 1993.

Doctor of Philosophy, School of Earth Sciences, the University of Melbourne, 2006.

## **Expertise**

Dr. Tim Stone is a Senior Consultant Archaeologist and Geomorphologist with over 30 years of experience. He holds Bachelor and Masters degrees both from the Australian National University and a PhD from the University of Melbourne. His Masters research developed methods for distinguishing Aboriginal shell middens from natural shoreline deposits. The soils and landforms of the Murray Basin were the subject of his PhD. As a Consultant Archaeologist and Geomorphologist he has completed over 600 management reports for a range of developments in most Australian States. In Victoria he is a recognized Heritage Advisor under the *Aboriginal Heritage Act 2006* and routinely undertakes cultural heritage assessments including Cultural Heritage Management Plans (CHMPs) for developers across the State. During the course of this work he has established good relationships with local Aboriginal communities and the various authorities. A sample of past projects is listed below.

## **Select CHMPs**

- Industrial subdivision 29-39 Encore Avenue, Somerton
- Sewage Pump Station Development, Rockbank
- Colac Water Supply Upgrade Project, Barongarook

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- Golden Plains Food Production Precinct Water Infrastructure Stage 1 Extension
- Anglesea-Aireys Inlet Water Pipeline and Pump Station
- Sorrento Area A6 Pressure Sewerage System, Sorrento
- Bannockburn Pump Station Upgrade and Rising Main Replacement
- O'Hallorans Road Rising Main, Lara West
- Colac Water Reclamation Plant Upgrade
- Odour Management Facility, Browns Road, Boneo
- Loch to Nyora Sewer Rising Main, South Gippsland
- Janefield Rising Main Realignment, Bundoora
- Northern Towns Water Supply Pipeline Project, South Gippsland
- Armstrong Creek Recycled Water Main and Trunk Sewer, Geelong
- Wonthaggi Wastewater Treatment Plant Extension
- Warehouse Development 13 Clancy Road, Mount Evelyn
- Multi-unit residential development 26-28 Warranwood Road, Warranwood
- Multi-unit residential development 70 Stanley Road, Keysborough
- Residential development 121 Rymer Avenue, Safety Beach
- Apollo Bay Bulk Water Storage
- Lynbrook Drainage Channel and Culverts
- Waterford Water and Sewer Infrastructure, Melton South
- Venus Bay Saline Outfall Pipeline
- Tarwin River Water Supply Main, Leongatha South
- Kinglake West Sustainable Sewerage Project
- M360 Diamond Creek Crossing Water Pipeline Replacement, Hurstbridge
- Berwick Select Entry School, Berwick
- Banksia Street Wetland, Heidelberg
- Lyndhurst Primary School, Lyndhurst
- Mill Park Lakes East Primary School, South Morang
- Tarneit Central School, Tarneit
- Miller Road Emergency Relief Structure, Heathmont
- Yering Recycled Water Main Alignment, Lilydale
- Aurora-Craigieburn Transfer System, North Epping
- Eumemmering Creek Wetlands, Dandenong South

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## Select Cultural Heritage Due Diligence Assessments

- Peninsula ECO Transfer Main Pipe Track and Boneo STP
- Belgrave and Selby Backlog Sewerage Project
- Augusta Street Contingency Storage Tank, Mount Martha
- Grant Street SPS, Emergency Storage and Rising Main, Bacchus Marsh
- Armstrong Creek Trunk Sewer and Water Main, Geelong
- Foster Winter Storage Wastewater Lagoons and Land Irrigation
- Northern Towns Water Supply Pipeline, Leongatha
- Poowong, Loch and Nyora Sewerage Scheme
- Mernda South Rising Main
- Warrandyte Backlog Sewerage Project
- Amaroo Branch Sewer Kalkallo
- Coburg Stormwater Harvesting Project
- Harvest Home Road PRS and RWM, Epping North
- Findons Creek Branch Sewer, North Epping

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## International experience

Physical Cultural Resources Adviser to Nam Theun 2 Dam Project, Peoples Democratic Republic of Laos, 2004.

## Select publications

Stone, T. 1991. Megapode mounds and archaeology in northern Australia. *The Emu*, 91:255-256.

Stone, T. 1995. Shell mound formation in coastal northern Australia. *Marine Geology*, 129:77-100.

Stone, T. and Cupper, M. 2003. Last Glacial Maximum ages for robust humans at Kow Swamp, southern Australia. *Journal of Human Evolution*, 45:99-111.

Stone, T. 2004. Robust and gracile. *Australasian Science*, 25 (2):18-20.

Stone, T. 2006. Last glacial cycle hydrological change at Lake Tyrrell, south east Australia. *Quaternary Research*, 66:176-181.

Stone, T. 2006. The late Holocene origin of the modern Murray River course, southeastern Australia. *The Holocene*, 16:771-778.

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## **APPENDIX D**

**Azzure**

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## RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P722/2009  
PERMIT APPLICATION NO. P08/3193

### IN THE MATTER OF

Azzure Investment Group Pty Ltd v  
Mornington Peninsula Shire Council

### BEFORE

Mark Dwyer, Deputy President

NATURE OF CASE	When Cultural Heritage Management Plan required under <i>Aboriginal Heritage Act 2006</i>
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LEGISLATION – interpretation or application of legislative or regulatory provision	<i>Aboriginal Heritage Regulations 2007</i> rr 6, 28; whether Cultural Heritage Management Plan required; activity on land within 200 metres of high water mark; whether land subject to previous 'significant ground disturbance'.
ANALYSIS – exposition of how to assess an issue or matters to consider	difficulties with level of inquiry, available evidence, and standard of proof; <i>Mainstay v Mornington Peninsula SC</i> considered.
CHANGE TO LEGISLATION OR VPPS – whether change to VPPs or statutory provisions is required or desirable	difficulties in application of CHMP requirements to small developed sites; whether 'part' of land still in area of cultural heritage sensitivity; use of comparative and contextual approach for small lots.
ADDITIONAL COMMENTS	Regulatory clarification would be desirable to address practical difficulties and anomalies exposed in the <i>Mainstay</i> decision and this decision, particularly for 'significant ground disturbance'

### SUMMARY

This decision relates to the question whether a Cultural Heritage Management Plan (CHMP) is required under the *Aboriginal Heritage Regulations 2007* (AH Regulations).

The decision is a useful companion piece to the decision in *Mainstay Australia Pty Ltd v Mornington Peninsula Shire Council (Red Dot)* [2009] VCAT 145, and further addresses difficulties in the application of the AH Regulations to determine whether land has been subject to past 'significant ground disturbance'. In this decision, no CHMP was required.

This case involved a relatively small (840 m<sup>2</sup>) lot in an established urban area where the lot had been extensively developed, serviced and used over an extended period of time. There was however no 'smoking gun' evidence available from aerial photographs, public records, archaeological or geomorphological investigation, or oral testimony that firmly established past 'significant ground disturbance' as strictly defined – i.e. disturbance of topsoil by machinery in the course of grading or excavation etc.

The Tribunal accepted evidence that 'significant ground disturbance' for the lot could nonetheless still be established to a sufficient level of satisfaction in this case from other comparative and contextual information. This included the urban context within which the land is situated; the timing of subdivision; the shape, size, topography and configuration of lots in the subdivision; the actual development of dwellings and outbuildings and the pattern of use over time; the provision of underground drainage and services; the style and configuration of the house and garden; and the lack of remnant vegetation.

The comparative and contextual information must still reasonably satisfy the decision maker that the relevant land has been disturbed in the past by machinery in the course of grading, excavating, digging, dredging or deep ripping (other than ploughing) – i.e. the definition in the AH Regulations must still be met. However, in the absence of a single item of proof, the contextual approach may assist in achieving this level of satisfaction through a reasonable inquiry and examination of a range of relevant information (none of which is necessarily conclusive in itself) and 'joining the dots' to reach a common sense conclusion from the available information. In this case, a reasonable level of

analysis of these factors disclosed extensive site coverage by buildings and works, a prior underground septic system and other services. There was also some comparative research disclosing mechanical grading of similar lots in the area at the time of subdivision. The combination of factors in this case made it likely that the whole site had been subject to 'significant ground disturbance' over time.

**Planning and Environment Act 1987.**

A planning decision maker still needs to be reasonably satisfied, on the balance of probabilities based on the information in a given case, that 'significant ground disturbance' (as defined) has occurred. However, the balance of probabilities does not require proof beyond doubt. The level of inquiry, and information required, to satisfy a decision maker will depend on the circumstances of each case. In relation to a relatively small intensively developed urban lot (as here), the required level of inquiry or information required might therefore be more limited as compared with that required for a sparsely developed larger site. The acceptance of this view does not affect the principles that underscored the decision in *Mainstay*.

The use of a comparative or contextual approach to the consideration of 'significant ground disturbance' is not without difficulty in practice, but it may provide a useful mechanism to deal with smaller developed lots, for example, up to a traditional 'quarter-acre' block or 0.1 hectares in size. The decision however recommends regulatory clarification to create greater certainty for permit applicants and responsible authorities for matters arising under the AH Regulations in relation to 'significant ground disturbance'.

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### ADMINISTRATIVE DIVISION

#### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P722/2009  
PERMIT APPLICATION NO. P08/3193

#### CATCHWORDS

*Aboriginal Heritage Regulations 2007* rr 6, 28; whether Cultural Heritage Management Plan required; proposed activity on land within 200 metres of high water mark of coastal waters; whether land subject to previous significant ground disturbance; whether 'part' of land still in area of cultural heritage sensitivity; *Mainstay v Mornington Peninsula SC* considered; difficulties with available evidence; difficulties in application of CHMP requirements to small developed urban lots; use of comparative and contextual approach.

#### APPLICANT

Azzure Investment Group Pty Ltd

#### RESPONDENT/ RESPONSIBLE AUTHORITY

Mornington Peninsula Shire Council

#### SUBJECT LAND

1807-1829 Point Nepean Road  
TOOTGAROOK VIC

#### WHERE HELD

55 King Street, Melbourne

#### BEFORE

Mark Dwyer, Deputy President

#### HEARING TYPE

Hearing

#### DATE OF HEARING

17 July 2009

#### DATE OF ORDER

14 August 2009

#### CITATION

Azzure Investment Group Pty Ltd v  
Mornington Peninsula SC (includes Summary)  
(Red Dot) [2009] VCAT 1600

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#### ORDER

- 1 On the preliminary question, I find that:
  - The land has been the subject of significant ground disturbance, and the proposed activity in this proceeding falls within the exemption under Regulation 28(2) of the *Aboriginal Heritage Regulations 2007*; and
  - A Cultural Heritage Management Plan is not required under the *Aboriginal Heritage Act 2006* and the *Aboriginal Heritage Regulations 2007* for the proposed activity.

- 2 The proceeding is adjourned to an administrative mention on 28 August 2009. By that date, the parties must advise the Tribunal in writing whether the matter is ready to be listed for a hearing, or whether further procedural orders or directions are required.

Mark Dwyer  
**Deputy President**

**APPEARANCES:**

For the Applicant

Ms Tania Cincotta, solicitor, of Best Hooper, Solicitors.

The applicant called the following witness:

- Mr Andrew Long, heritage consultant

For the Responsible Authority

Ms Elisa de Wit, solicitor, of Deacons, Solicitors.

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## REASONS

### What is this proceeding about?

- 1 The applicant, Azzure Investment Group Pty Ltd, made application for a planning permit for the development and use of land at 1807-1829 Point Nepean Road, Tootgarook for a service station and associated uses.
- 2 The main proceeding before the Tribunal comprises an application by the applicant under s 79 of the *Planning and Environment Act* 1987, seeking to review the 'failure' of the responsible authority to decide the permit application within the prescribed period.
- 3 Following a practice day hearing, the matter has been referred to me for a hearing and decision on the preliminary question of whether a Cultural Heritage Management Plan (CHMP) is required under the *Aboriginal Heritage Act* 2006 (AH Act) and the *Aboriginal Heritage Regulations* 2007 (AH Regulations) for the proposed activity.

### Introductory comments

- 4 In *Mainstay Australia Pty Ltd v Mornington Peninsula SC (Red Dot)*<sup>1</sup>, Member Naylor and I set out some principles to assist in the determination of when a CHMP is required. In that case, a CHMP was required. In *Tsourounakis v Ballarat CC (Red Dot)*<sup>2</sup>, I applied these same principles, which in that case led to a conclusion that a CHMP was not required. A similar issue arose for consideration in *Alesci Lawyers v Mornington Peninsula SC*, where a CHMP was required.
- 5 In all of those cases, as here, the determining factor was whether all of the land in the activity area had been subject to past 'significant ground disturbance'. Those cases, as here, turned on the level of inquiry and the quality of the available evidence in each case to establish whether significant ground disturbance had occurred.

- 6 It is perhaps an interesting addendum to the decision in *Mainstay* that:
  - Aboriginal Affairs Victoria has now embodied much of the *Mainstay* decision in a practice note; and
  - Despite the misgivings of some of the parties in *Mainstay* about the CHMP requirement, the CHMP ultimately undertaken did reveal the existence of stone artefacts within the proposed activity area. The approved CHMP was able to consider the significance and

<sup>1</sup> [2009] VCAT 145

<sup>2</sup> [2009] VCAT 905

<sup>3</sup> [2009] VCAT 1110

consequences of this discovery, and permission was given for the area to be disturbed<sup>4</sup>.

- 7 In *Mainstay*, Member Naylor and I had highlighted some potential difficulties and anomalies in the application of the AH Act and the AH Regulations on the issue of 'significant ground disturbance'. This present case exposes further difficulties and anomalies that might warrant regulatory reform if the requirements for CHMP's are to operate effectively in practice.

### Is a Cultural Heritage Management Plan required in this case?

- 8 Regulation 6 of the AH Regulations indicates that a CHMP is required for an activity if:

- all or part of the activity area for the activity is an "area of cultural heritage sensitivity"; and
- all or part of the activity is a "high impact activity".

- 9 In the present case, as in *Mainstay*, the application of the AH Regulations is straightforward in all but one respect. It is agreed that:

- The development proposed by Azzure is not a generally exempt activity under the AH Act or AH Regulations.
- The proposed development is a high impact activity. Under r 43(1)(b)(xxi) of the AH Regulations, the construction of buildings and works for use as a service station is a high impact activity.

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- Subject to the issue of significant ground disturbance, the subject land is in an area of cultural heritage sensitivity. Under r 28(1) of the AH Regulations, land within 200m of the high water mark of the coastal waters of Victoria in an area of cultural heritage sensitivity. It is a common ground that the land is within 200m of the high water mark of Port Phillip Bay.

- 10 Regulation 28(2) of the AH Regulations however provides as follows:

28(2) If part of the land specified in subregulation (1) has been subject to significant ground disturbance, that part is not an area of cultural heritage sensitivity.

- 11 It follows from r 28(2) that, if all parts of the land in this proceeding have been the subject of significant ground disturbance, then none of the land will be deemed to be in an area of cultural sensitivity, and no CHMP will be required even though all other criteria for a CHMP are met.
- 12 In this case, the proposed activity area for the service station comprises 3 separate parcels of land:

<sup>4</sup> This information was provided, in part, by the responsible authority in this proceeding. The Tribunal is also aware of this outcome, as a matter of public record, from the 'merits' hearing in *Mainstay* that followed the completion of the CHMP.

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- 1807-1815 Point Nepean Road comprises shops and a concrete carpark;
  - 1819-1827 Point Nepean Road comprises a skating rink and amusement centre;
  - 1829 Point Nepean Road comprises a dwelling and outbuilding.
- 13 It was common ground that the first two parcels of land have been subject to significant ground disturbance through their past use and development. The whole of the land in both parcels has been entirely covered with buildings and paved surfaces for many years. Whilst it does not automatically follow that past site coverage by buildings and paved areas equates to 'significant ground disturbance', I am content on the facts of this case to endorse the responsible authority's acceptance of past significant ground disturbance for these two parcels of land.
- 14 The question in this case is thus limited to whether the land at 1829 Point Nepean Road has been similarly disturbed<sup>5</sup>.
- 15 As indicated in *Mainstay*, whether land has been subject to significant ground disturbance is essentially a question of fact, to be determined by evidence. The burden rests with the applicant to establish (on the balance of probabilities) that land has been subject to prior significant ground disturbance. It should perhaps be emphasised that the responsible authority and Tribunal do not have a 'merits' discretion to waive a CHMP requirement even if it appears unnecessary, undesirable or anomalous in the circumstances of a particular case. In the absence of sufficient evidence to establish 'significant ground disturbance' (and assuming the other requirements of the AH Regulations apply), the default is that a CHMP is required for the proposed activity.
- 16 The term 'significant ground disturbance' is defined in the AH Regulations, and discussed at some length in *Mainstay*. It requires, for this case, that the applicant establish, on the balance of probabilities, that the topsoil or surface layer at 1829 Point Nepean Road has been disturbed in the past by machinery in the course of grading, excavating, digging, dredging or deep ripping (other than ploughing). However, apart from deep ripping, there is no 'depth' criterion set for disturbance by other means, so the past mechanical disturbance to the topsoil need not necessarily be to significant depth.
- 17 In this case, the applicants purported to satisfy the burden and standard of proof through the evidence of a cultural heritage adviser – Mr Andrew Long. I have no reason to doubt Mr Long's significant expertise in cultural

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<sup>5</sup> An issue was raised by the applicant in this case as to whether part of the land at 1829 Point Nepean Road was outside the activity area, as it did not form part of the development area or 'planning unit' for the service station development. This would further limit the part of the land where 'significant ground disturbance' needed to be established. However, the activity area is not at all clear from the application material, and the land description in the permit application. Given my finding on other issues, it is unnecessary to finally decide this issue in this case.

heritage. However, as noted in *Mainstay*, a cultural heritage adviser may not always have the requisite experience to determine whether past significant ground disturbance has occurred as a matter of established fact.

- 18 Mr Long noted he had not undertaken any testing or subsurface excavation to establish past ground disturbance. Indeed, he also readily conceded that there was no 'smoking gun' evidence available from aerial photographs, public records, archaeological or geomorphological investigation, or oral testimony that firmly established past 'significant ground disturbance' as strictly defined – i.e. disturbance of topsoil by machinery in the course of grading or excavation etc.
- 19 Accepting the difficulties arising from the way in which the AH Regulations are formulated, Mr Long's evidence was that significant ground disturbance could nonetheless still be established to a sufficient level of satisfaction, on the balance of probabilities, from other comparative and contextual information. This included the urban context in which the land is situated; the timing of subdivision; the shape, size, topography and configuration of lots in the subdivision; the actual development of dwellings and outbuildings and the pattern of use over time; the provision of underground drainage and services; the style and configuration of the house and garden; and the extent or lack of remnant vegetation.
- 20 In the present case, historical records show there were 14 lots in the original subdivision, all on relatively level ground and of a similar and relatively small size to the lot and the immediate area presents as medium density urban land in an established urban area. 1829 Point Nepean Road is approx. 840 m<sup>2</sup> in area, with much of the land covered by a dilapidated dwelling erected on stumps, and an outbuilding. There is no remnant vegetation. There is a small front and rear yard, mostly now overgrown but with some evidence of a typical suburban yard and garden. The lot is serviced with water and sewer (indicating underground services across the block, and particularly in the front yard). The Council indicated that there is known to have been an underground septic tank on the land in the past, although its exact location is unclear. From an examination of the site, its likely location is in the rear yard (indicating disturbance in that area).
- 21 Mr Long's conclusion was that it is reasonable to infer from this intensive development and long use of a relatively small urban lot as a residence that there has been significant ground disturbance through grading, excavation, site clearance, digging, servicing, and development over time.
- 22 The key absence in the analysis thusfar, arising from the definition in the AH Regulations, is any clear evidence that the disturbance arose by *machinery*. Mr Long had researched this issue and was satisfied that subdivisions in this area in the mid-20<sup>th</sup> century had commonly utilised mechanical grading, and there is comparative evidence of this in a proximate subdivision. It is also likely that the installation of the septic tank, drainage lines and later services would have involved mechanical

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excavation. Whilst this research is perhaps 'indefinite testimony' that would be insufficient, by itself, to establish significant ground disturbance (as defined), it forms part of the overall comparative and contextual information to support the conclusion reached in this case.

- 23 Whilst I have some reservations with how Mr Long's approach might be applied more broadly in practice, I agree with his analysis and its application to a relatively small suburban lot in *this* case.
- 24 However, even accepting this approach, there still remains another potential difficulty or anomaly stemming from the present wording of the AH Regulations. Under several of the AH Regulations, if any *part* of the land has been subject to significant ground disturbance, that *part* is not an area of cultural heritage sensitivity. The AH Regulations provide no assistance as to what may constitute a 'part' of the land. The consequence is that even if most of a parcel of land has been significantly disturbed, but some small part is undisturbed, that undisturbed part remains an area of cultural heritage sensitivity, and a CHMP is required for the whole proposed activity. For larger sites (such as in the *Mainstay* or *Alesci* cases), this would seem to be an intended and desirable outcome – i.e. there is still a material undisturbed portion of the land that is arguably still of cultural heritage sensitivity and still warrants the preparation of a CHMP.

- 25 For smaller sites, such a strict approach is anomalous and potentially absurd. For example, if say 1% of the 840m<sup>2</sup> lot here (or, say, only a few square metres adjacent to the boundary or in the middle of a suburban back yard) has no clear evidence of mechanical disturbance, should this lead to a conclusion that this small or isolated area is still an area of cultural heritage significance. The consequence is that a CHMP is then required for the whole activity on the land, leading potentially to enormous cost and delay to an applicant for no obvious gain.

- 26 I am not convinced that the legislation intended such an outcome. Adopting modern principles of statutory interpretation and a purposive and contextual approach, I think it self-evident that the reference in the AH Regulations to a 'part' of the land must read as meaning a *material* part of the land. In the absence of regulatory clarification, the difficulty lies in where decision makers should draw the line as to what is material, and leaves the matter in a state of some uncertainty. If say 1% is an immaterial 'part', what about 2%? Or 5%? Or three tiny areas totalling 5%? The materiality of even a very small part of land may be a matter of fact and degree in the circumstances of a particular case.

- 27 The use of the comparative and contextual approach for a small lot helps to address this dilemma. A reasonable level of inquiry of the contextual factors above might reasonably satisfy a decision maker on the balance of probabilities in a given case (as here) that the whole of the small lot has been subject to 'significant ground disturbance'. This standard of proof may

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be met without there being absolute proof beyond doubt of mechanical disturbance by grading, excavation etc of every square metre of the lot.

- 28 In my view, for smaller subdivided urban lots (say, up to a standard 'quarter acre' block, or perhaps 0.1 hectare in size), I think it is possible for a decision maker to be satisfied, on the 'balance of probabilities', based on a comparative and contextual approach, that there has been significant ground disturbance of that entire lot for the purpose of the AH Regulations. This does not mean that all small urban lots should automatically be considered to have been the subject of past significant ground disturbance. However, in an established urban area, where a reasonable level of inquiry establishes that a lot has have been extensively developed, serviced and used over an extended period with significant site coverage by buildings and works, likely mechanical grading or levelling as part of the subdivision, underground servicing, and with small yards or garden areas showing little or no signs of remnant vegetation or undisturbed ground, a finding of 'significant ground disturbance' of the entire lot is certainly open.
- 29 It is should perhaps be emphasised that this approach does not entitle the decision maker to ignore the essential elements of the definition of 'significant ground disturbance' in the AH Regulations. The comparative and contextual information must still reasonably satisfy the decision maker that the relevant land has been disturbed in the past by machinery in the course of grading, excavating, digging, dredging or deep ripping (other than ploughing). However, in the absence of a single item of proof, the contextual approach may assist in achieving this level of satisfaction through a reasonable inquiry and examination of a range of relevant information (none of which is necessarily conclusive in itself) and 'joining the dots' to reach a common sense conclusion from the available information. In this case, the site coverage of buildings and works on a small block, the research of likely mechanical disturbance through grading, the underground servicing, the old septic system etc all lead reasonably to a conclusion that the has been 'significant ground disturbance' here.
- 30 The acceptance of this view does not affect the principles that underscored the decision in *Mainstay*. Member Naylor and I had noted in that case that the level of inquiry, and information required to satisfy the decision maker, will depend on the circumstances of each case. The standard of proof is on the 'balance of probabilities' – not proof beyond doubt. There must be sufficient information, objectively considered, to persuade the decision maker to a reasonable level of satisfaction in a given case that there has been significant ground disturbance. In my view, the level of inquiry, and information required, for a small developed urban lot might therefore be relatively more limited as compared with a sparsely developed larger site.
- 31 As also noted in *Mainstay*, the Aboriginal Affairs Victoria submission in that case had supported a view that there should be no hard and fast rules on what information should be required to satisfy a planning decision maker that significant ground disturbance has occurred, and cautioned against

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strict guidelines that might create unreasonable obligations on permit applicants or responsible authorities. This decision, as with *Mainstay*, endorses and attempt to give effect to that sentiment.

- 32 Moreover, the land in *Mainstay* was very different to here. It was a large site, many hectares in size, comparatively undeveloped as a low-density residential block on the outskirts of a developed area, and where a relatively large proportion of the land was clearly undisturbed for the purpose of the AH Regulations. [Indeed, Mr Long concurred with the finding that a CHMP was reasonably required in *Mainstay* even on his contextual approach.]. The differentiating factors in the present case before me are the small lot size and the intensity of development and use within a clearly urban context.
- 33 As indicated earlier, in this case Mr Long conceded there had been no testing or subsurface excavation as part of his investigation. That may well have been helpful. However, I do not consider it an essential part of a reasonable level of inquiry for a small developed urban lot. Given the views I have set out above, an test result indicating no significant disturbance of an isolated part of a small lot, or an inconclusive test result about whether any disturbance was mechanical, would not have changed the outcome in this case. In this case, the outcome is reached by a contextual approach to the entire lot rather than a physical examination of every square metre of the land. This outcome can be differentiated from the outcome in the *Alesci* case. Despite archaeological evidence there that 90% of the land had been significantly disturbed, the remaining 10% was still a material part of the land for which a CHMP requirement was warranted. Equally, in *Mainstay*, the test dig results were evidence of significant ground disturbance was highly relevant, as objective evidence of significant ground disturbance was otherwise lacking for the large undeveloped area across the central part of that land. The limited and inconclusive test results there raised (rather than resolved) doubts about past disturbance, and thus reinforced the finding and CHMP requirement. Again, the differentiating factors in the present case before me are the small lot size and the intensity of development and use within a clearly urban context.
- 34 In this case, based upon the comparative and contextual response by Mr Long and the other information provided by the parties by way of submission, I am satisfied on the balance of probabilities that the land has been subject to past significant ground disturbance.
- 35 It follows that the specific exemption in Regulation 28(2) of the AH Regulations is made out in this case, and the land at 1807-1829 Point Nepean Road, Tootgarook is not to be characterised as being within an area of cultural heritage sensitivity. It therefore also follows, for the purpose of r 6, that a CHMP is not required for the proposed activity<sup>6</sup>.

<sup>6</sup> It is perhaps worth noting the likelihood of aboriginal cultural heritage existing on the land is not directly relevant to whether a CHMP is required. The obligations under the AH Act continue to apply to the land if aboriginal cultural heritage exists or is discovered on the land in the future.

- 36 In reaching this view, I make no criticism of the responsible authority. It had reached its view that a CHMP was required, based on an earlier and less detailed report from Mr Long that had not addressed the *Mainstay* principles, and in a still emerging regulatory environment where the AH Regulations are difficult to apply in practice. The responsible authority had attempted to carefully apply the *Mainstay* principles. Had I been called upon to decide the matter based on Mr Long's limited first report, I would have reached a similar view to the responsible authority.
- 37 To provide greater certainty to responsible authorities and permit applicants, there is perhaps a need for some regulatory clarification to address the anomalies and difficulties exposed in *Mainstay* and this decision, and other practical difficulties that might be arising in practice with the AH Regulations. It may be, for example, that there should be a clear exemption created for smaller urban lots up to a certain size, or where certain criteria are met, to avoid the difficulties in establishing significant ground disturbance by machinery across an entire lot. Equally, if a stricter approach is intended by the AH Regulations, contrary to the approach adopted in this case, that too should be clarified. These are matters of policy beyond the Tribunal's decision-making role in this case.

#### Consequences for existing 'failure' application

- 38 The responsible authority had raised a secondary question of jurisdiction. If a CHMP was required, the responsible authority contended that the s 79 application to the Tribunal is premature and should be struck out, as the prescribed time within which the responsible authority must make its decision has not expired having regard to s 52 of the AH Act. The applicant did not address the issue at length, and sought the opportunity to do so only if a CHMP was required.

- 39 Given my finding on the preliminary question, it is unnecessary to decide this secondary question in this case. It is potentially an issue of some significance, and I am aware that the Tribunal may shortly be called upon to decide it as a 'live' issue in another proceeding. It is however another matter worthy of regulatory clarification to provide certainty and to avoid possibly unintended procedural consequences emerging from the new legislation.
- 40 Given no CHMP is required here, this s 79 application can clearly proceed, and the proceeding will be referred to an administrative mention to determine its future conduct.

Mark Dwyer  
Deputy President

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### **APPENDIX E**

#### **Borehole Logs from JC Geotechnics Pty. Ltd. (2021)**

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BH8

Approximate Site  
Boundary

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Source: GoogleMap, dated 19<sup>th</sup> April 2021









Drawn	NC	<b>Trace Environmental</b> <b>Proposed Multi-use Development</b> <b>675 Victoria Street, Abbotsford VIC</b>		Figure	1
Checked	JC			Title	<b>Borehole and Groundwater Monitoring Well Location</b>
Date	19/04/2021			Job No.	<b>GR1225.1J</b>
Scale	NTS				

Client: Trace Environmental  
Project: Proposed Multi-use Development

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Borehole No: BH8  
Project No: GR1225.1J

Location:	675 Victoria street. Abbotsford, VIC	Elevation:	Datum:
Drilling Contractor:	Matrix Drilling	Date Drilled: 16.03.2021	Logged By: AM
Drill Rig:	Truck Rig (HQ3)	Date Completed: 16.03.2021	Checked By: JC

Ground Water Observation	Well Description	Depth	Graphic log	USCS Classification	Description	Field moisture content	Consistency	Field Sample(DS)	Field Tests	Remarks
This information pertains only to this boring and should not be interpreted as being indicative of the site.	DOC of Auger	0			Asphaltic concrete: 150mm thick					
		0.5		FILL	FILL: Gravelly sand, grey, fine to medium grained igneous gravel	M			8, 8, 5 N=13	Appears Moderately Compacted
		1								
		1.5		CL-ML	CLAYEY SILT/SIITY CLAY: low-medium plasticity, orange brown with occasional fine to medium grained ironstone gravel	MC < PL	(Vst)		4, 6, 9 N= 15	HP Reading:290KPa
		2								
		2.5								
		3			As Above but red brown molted orange brown				6, 11, 12 N=23	
		3.5								
		4								
		4.5							N=10	
		5								



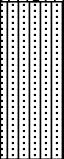


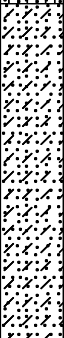
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**Client:** Trace Environmental  
**Project:** Proposed Multi-use Development

**ADVERTISED  
PLAN**

**Borehole No:** BH8  
**Project No:** GR1225.1J

Location:	675 Victoria street. Abbotsford, VIC	Elevation:	Datum:
Drilling Contractor:	Matrix Drilling	Date Drilled: 16.03.2021	Logged By: AM
Drill Rig:	Truck Rig (HQ3)	Date Completed: 16.03.2021	Checked By: JC

Ground Water Observation	Well Description	Depth	Graphic log	USCS Classification	Description	Field moisture content	Consistency	Field Sample(DS)	Field Tests	Remarks
This information pertains only to this boring and should not be interpreted as being indicative of the site.	DOC of Auger	5.5			As Above.	MC < PL	(Vst)			
		6							5, 7, 10 N=17	
		6.5								
		7								
		7.5								
		7.5		SM	SILTY SAND: fine to medium grained, Red to Brown	M	MD		7, 10, 12 N=22	
		8		SM/ML	SANDY SILT: Low plasticity	MC<PL	(Vst)			
		8.5								
		9		SP-SC	SANDY CLAY: low to medium plasticity, light brown, extremely weathered material	XW	H		N=SPT=30/R	Soil Strength
		9.5								
		10								


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**Client:** Trace Environmental  
**Project:** Proposed Multi-use Development

**ADVERTISED  
PLAN**

**Borehole No:** BH8  
**Project No:** GR1225.1J

Location:	675 Victoria street. Abbotsford, VIC	Elevation:	Datum:
Drilling Contractor:	Matrix Drilling	Date Drilled: 16.03.2021	Logged By: AM
Drill Rig:	Truck Rig (HQ3)	Date Completed: 16.03.2021	Checked By: JC

Ground Water Observation	Well Description	Depth	Graphic log	USCS Classification	Description	Field moisture content	Consistency	Field Sample(DS)	Field Tests	Remarks
		10.5			As above	XW	H			
		11			Refer to Cored Borehole Log					
DOC of Auger		11.5								
		12								
		12.5								
		13								
		13.5								
		14								
		14.5								
		15								
		15.5								

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# CORING LOG OF BOREHOLE NO. BH8

**ADVERTISED  
PLAN**

<b>Client:</b> Trace Environmental	<b>Project No.:</b> GR1225.1J
<b>Project:</b> Proposed Multi-use Development	<b>Logged By:</b> AM
<b>Location:</b> 6075 Victoria street. Abbotsford, Vic	<b>Checked By:</b>
<b>Drilling Equipment/Method:</b> Truck Rig (HQ3) Diamond Type	<b>Elevation:</b>
<b>Date Drilled:</b> 16.03.2021	<b>Completed:</b> 16.03.2021
<b>Datum:</b> AHD	
<b>Depth To Water:</b>	<b>TOTAL DEPTH:</b> 15 ft

GW Observation	Depth (m)	Graphic Log	Material Description	Weathering Condition	Strength	DEFECT DESCRIPTION	Defect Spacing mm	Point Load(a)							
								EL<0.3	VLO.3-0.1	LO.1-0.3	MO.3-1.0	HI.1-0.3	VH.3-10.0	EH>10.0	
Full Return	11		Start coring at 11.00m BASALT: light brown	DW	(VL)	11.18, JT, 45° 11.25, BE, 10°, 10mm 11.32, BE, 0-15°, 5mm									
	11.5					11.40, BE, 10-20°, 11.5, CZ 11.6, CZ, 90°									
	12					11.84, BE, 0° 12.2, CZ,									
	12.5		No core: 170mm thick												
	13		SILTY CLAY: low to medium plasticity, light-grey molted light brown	RS	(H)										
	13.5														
	14		BASALT: medium to coarse grained, orange brown	DW	(L)	13.65, JT, 45° 13.8, DE, 10-15°, PL SM= 13.95, CZ									
	14.5				(H)	14.05, CZ 14.17, RO, 0-10° 14.5, CZ 14.5, JT, 45°, P, S 14.7, JT, 10°, P, S									
	15		End of borehole at 15.00m												
	15.5														

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