

**Colac Otway Planning Scheme Amendment C116cola
Birregurra Flood and Drainage Strategy 2021**

Panel Report

Planning and Environment Act 1987

30 May 2022

How will this report be used?

This is a brief description of how this report will be used for the benefit of people unfamiliar with the planning system. If you have concerns about a specific issue you should seek independent advice.

The planning authority must consider this report before deciding whether or not to adopt the Amendment.
[section 27(1) of the *Planning and Environment Act 1987* (the PE Act)]

For the Amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for Planning for approval.

The planning authority is not obliged to follow the recommendations of the Panel, but it must give its reasons if it does not follow the recommendations. [section 31 (1) of the PE Act, and section 9 of the *Planning and Environment Regulations 2015*]

If approved by the Minister for Planning a formal change will be made to the planning scheme. Notice of approval of the Amendment will be published in the Government Gazette. [section 37 of the PE Act]

Planning and Environment Act 1987

Panel Report pursuant to section 25 of the PE Act

Colac Otway Planning Scheme Amendment C116cola

Birregurra Flood and Drainage Strategy 2021

30 May 2022



Geoff Underwood, Chair

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Glossary and abbreviations

CCMA	Corangamite Catchment Management Authority
Council	Colac Otway Shire Council
FO	Floodway Overlay
LSIO	Land Subject to Inundation Overlay
PE Act	<i>Planning and Environment Act 1987</i>
Planning Scheme	Colac Otway Planning Scheme
SBO	Special Building Overlay

Overview

Amendment summary

The Amendment	Colac Otway Planning Scheme Amendment C116cola
Common name	Birregurra Flood and Drainage Strategy 2021
Brief description	The Amendment imposes flood controls over parts of the Birregurra township likely to be impacted by a 1 in 100-year flood event
The Proponent	The Amendment was prepared by the Colac Otway Shire with the Corangamite Catchment Management Authority
Planning Authority	Colac Otway Shire Council
Authorisation	Authorisation was granted on 8 June 2021
Exhibition	The Amendment was exhibited for 6 weeks from 9 September to 22 October 2021
Submissions	Submissions were made by: <ul style="list-style-type: none"> - Corangamite Catchment Management Authority - Michael and Robyn Barrand - James and Karen Eccles - E Badham - P Fowler

Panel process

The Panel	Geoff Underwood
Directions Hearing	5 April 2022 by video conference
Panel Hearing	3 May 2022 by video conference
Site inspection	No inspection took place. The Panel relied on familiarity with the town and supplied information including aerial photographs and maps
Parties to the Hearing	Colac Otway Shire represented by Mr Sean O’Keeffe, who called expert evidence on flooding from Mr Scott Dunn of Engeny Water Management Pty Ltd Corangamite Catchment Management Authority represented by Mr Alex Simmons Michael and Robyn Barrand represented by Mr Barrand James and Karen Eccles represented by Ms Eccles
Citation	Colac Otway PSA C116cola [2022] PPV
Date of this report	30 May 2022

Executive summary

Colac Otway Planning Scheme Amendment C116cola (the Amendment) proposes to amend current flood controls that apply to the Birregurra township and environs. The Amendment updates maps in the Planning Scheme for the Land Subject to Inundation Overlay and applies the Floodway Overlay and the Special Building Overlay for the first time. The overlays will apply over parts of the township that have flooded from overflow of Atkin Creek and from what the locals call Kettle's Creek but which is formally identified as an unnamed tributary of the Barwon River. Consequential changes are made to the Planning Scheme to reflect the insertion of the Special Building Overlay into the Planning Scheme and the further application of the Floodway Overlay and the Land Subject to Inundation Overlay by administrative changes to relevant schedules.

This proposal applies flood controls over more land within the Birregurra township than currently applies. Though the town has a history of flooding, just five submissions were received on the Amendment. Three submissions were received during exhibition of the Amendment as well as two late submissions, one of which was from the Corangamite Catchment Management Authority so as to preserve a place in the panel proceedings. Past experiences with flooding in the town might explain why the Amendment is accepted by the community.

Submitters were concerned:

- the flood modelling was not effective and overstated the extent of the 2016 flood event
- the proposed overlays would limit development opportunities on land.

Each of these grounds of concern is relevant. The Panel does not respond to other matters in submissions such as impact on rates and the inability to insure property. Through proceedings, each of the presenting submitters accepted the need for planning controls but sought to be satisfied that the extents of Floodway Overlay, the Land Subject to Inundation Overlay and the Special Building Overlay were justified, and that the overlays are properly applied.

The Colac Otway Shire Council, with Corangamite Catchment Management Authority, demonstrated the controls had been properly formulated according to information from best modelling techniques and from ground truthing following the 2016 flood event in Birregurra. It achieved this through the flood study by Engeny Water Management Pty Ltd, independent peer review of the study by Water Technology Pty Ltd and Mr Dunn's expert evidence from Engeny Water Management Pty Ltd.

The Panel is satisfied the controls are warranted, the extents of the overlays are justified and that the controls will apply to protect life and property as required by State Planning Policy.

The overlays will allow development that does not inhibit overland flow paths.

The Panel appreciates the willingness of Council and the Corangamite Catchment Management Authority to engage with the submitters to explain the application of the overlays. The continued growth of Birregurra will depend upon landowners being able to develop land in accordance with the Planning Scheme and in turn, that depends on cooperation between landowners and authorities to achieve sound development outcomes.

Based on the reasons set out in this report, the Panel recommends that:

- Colac Otway Planning Scheme Amendment C116cola be adopted as exhibited subject to excluding land at 11 Scouller Street, Birregurra, as resolved by Council on 23 February 2022.

1 Introduction

1.1 The Amendment

(i) Amendment description

The purpose of the Amendment is to implement the findings of the *Birregurra Flood and Drainage Strategy 2021* conducted by Engeny Pty Ltd into the Colac Otway Planning Scheme (Planning Scheme). Specifically, the Amendment proposes to:

- apply the Floodway Overlay (FO) to areas that are likely to convey active flood flows and store floodwaters to hazardous depths.
- apply the Land Subject to Inundation Overlay (LSIO) to land affected with waterways and open drainage systems.
- apply the Special Building Overlay (SBO) to land affected by overland flow from the urban drainage network.
- insert the Special Building Overlay into the Planning Scheme
- insert the Schedule to the Special Building Overlay
- amend the Schedule to Clause 72.03 to list the new Floodway Overlay map
- amend the Schedule to Clause 72.08 – Background Documents – to insert the *Birregurra Flood and Drainage Strategy 2021* as a Background Document.

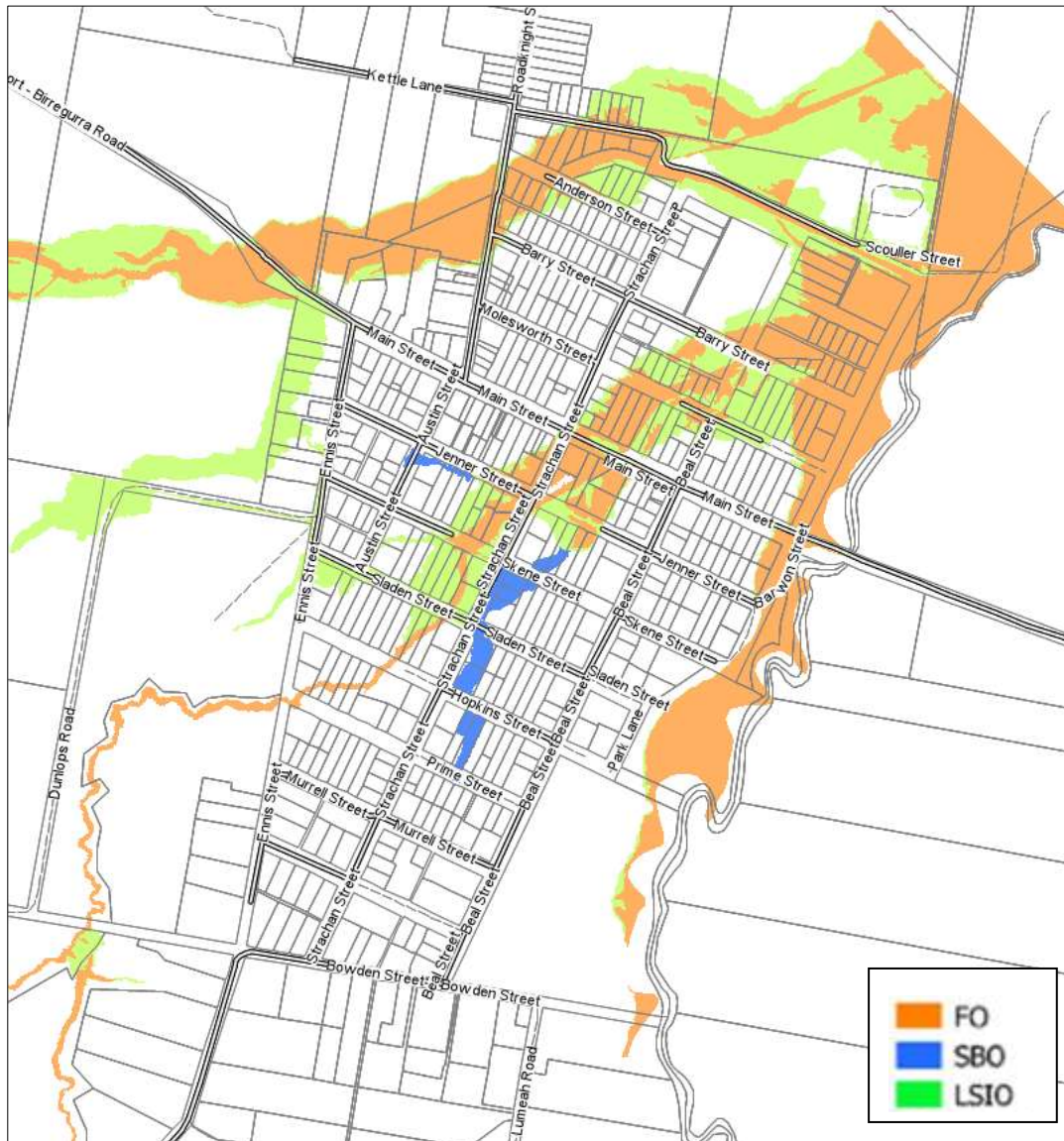
The Explanatory Report states Birregurra has a known history of flooding with recent flood events occurring in November 1995, September 2016 and September 2017. It describes the current extents of the LSIO as ‘inaccurate’ and ‘outdated’. The FO and the SBO are being applied as planning controls for the first time. The overlay controls are based on the modelled extent of a 1 in 100-year flood event as determined in the *Birregurra Flood and Drainage Strategy 2021*.

The effect is the overlays may trigger planning permits for development, works and subdivision on land affected by flooding but, as noted in the Explanatory Report, the objective is to improve the performance of the Planning Scheme in responding to flood events in Birregurra. This is supported by State Planning Policy.

(ii) The subject land

The Amendment applies to land shown in the map in Figure 1. This map is similar to Figure 3 in this report, taken from the 2021 flood study.

Figure 1 Land areas covered by overlays in the Amendment



Source – Explanatory Report

The exhibited maps detailing the overlays are included at Appendix A.

Each of the overlays has been selected and applied according to the risk of flooding, including the geographic extent and the depth of water. The Explanatory Report states:

The proposed amendment seeks to update the existing LSIO mapping to reflect the latest flood data. It also identified land that has a greater risk of flooding and/or the implications of flooding are more severe. This land has been included in the Floodway Overlay. Areas at risk of inundation by overland flows associated with the existing town drainage network have been included in a Special Building Overlay.

1.2 Proposed change to the exhibited form of the Amendment

After considering a submission from the landowner, Council proposed to no longer apply the LSIO to 11 Scouller Street, Birregurra. In assessing where the LSIO might have applied, Council officers and the consultants were informed by the conclusion that during a flood emergency escape was available from the site onto the abutting street. They considered that flood waters intruded onto a minimal area of land and that the location of the affected area at the front of the site where there

was the ability to safely access the public road. The officer report to Council recommended removal for those reasons.

The Council officer report noted that where flood modelling created slivers of land affected by overflow, practise was to not apply an overlay. Council called expert evidence on flooding from Mr Dunn of Engeny Water Management Pty Ltd. Mr Dunn noted this is routine practise with flood studies, though there are no threshold margins or benchmarks that commonly apply. In previous hearings of similar matters, planning authorities and experts sought to exclude properties on the basis of one or more instances where land affected is a small area, for the rounding of flow paths, where shallow depths of water are modelled or the velocity of the flow is modelled as slow.

This matter is resolved and not before the Panel because no party objected the proposed change to the Amendment and it was supported by the Corangamite Catchment Management Authority (CCMA).

1.3 Background

CCMA's submission at the Hearing provides background to the Amendment. It states:

4. Birregurra has a known history of flooding. However, prior to the Birregurra Flood and Drainage Strategy, 2021, no formal flood investigations had been undertaken in the town. The existing Land Subject to Inundation Overlay in Birregurra was based on coarse flood information (albeit best available at the time) and was proven to be inadequate during the September 2016 flood event. This event, estimated to be a low to moderate flood event, in the order of 10 to 20% Annual Exceedence Probability (AEP), demonstrated that a number of properties outside the LSIO were subject to riverine flooding.
5. The Amendment is required to implement the findings of the Birregurra Flood and Drainage Strategy, 2021. The study was undertaken by Engeny Water Management and peer reviewed by Water Technology. Both consultancies have vast experience in undertaking and reviewing riverine and urban flood studies. The investigation was calibrated using the flood levels obtained during the September 2016 event, and compared against local community knowledge, obtained during two community drop-in sessions at the beginning of the investigation. The project was overseen by a Project Working Group and the modelling methodology was reviewed by the Corangamite CMA. The Authority believe that Engeny utilized the best available information and best practice methodology in calculating the flood extents and behaviour in Birregurra. Corangamite CMA maintains that the flood modelling and subsequent flood mapping that underpins the proposed LSIO, FO and SBO is as accurate as possible.
6. The proposed Amendment C116cola controls have been created with the purpose of recognising appropriate flood related planning controls that reflect current best practice floodplain management principles and result in more orderly planning outcomes. The review of the 2010-11 Flood Warnings and Response (Victorian State Government 2011) noted that proactive mitigation measures such as land use planning and building standards are generally more cost-effective in reducing risk than modifications to the flow of floodwaters or modifications to response procedures.

1.4 Summary of issues raised in submissions

Of the four landowner submissions, the two about impacts of the controls of land values and rates, and about a stated inability to insure property with a flood overlay, are not relevant considerations for the Panel.

The two landowners who appeared at the Hearing questioned the 2021 flood study methodology, the consequent application of controls, and the limitations they would have on their ability to develop their land.

The owner of land on Roadknight Street sought to build a new dwelling on that part of the site not affected by the current LSI or the proposed FO.

The owner of land on the north-west corner of Jenner and Strachan Streets had no development proposal.

At the Directions Hearing, the Panel asked Council to further consult with the two parties before the Hearing as a way to address the issues. The Panel acknowledges the conversations that followed between Council, the CCMA and submitters. The Hearing was assisted by those additional conversations which advanced the understanding that:

- the Amendment does not prohibit all development
- the overlays provide discretion for Council and the CCMA to ensure that new development is appropriately located and designed for the purpose of protecting life and property
- the overlay schedules contain numerous exemptions for new works.

1.5 Approach to the report

This report deals with planning policy and the issues raised by the presenting submitters under the following headings:

- Planning context
- Flood modelling
- Development opportunity.

2 Planning context

2.1 Planning policy framework

The Explanatory Report with the Amendment asks and answers the question ***How does the amendment support or implement the Planning Policy Framework and any adopted State policy?***

The amendment supports and implements the Planning Policy Framework (PPF) by supporting Clause 13.03 Floodplains, Clause 13.03-1S Floodplain Management, Clause 14.02 Water, Clause 14.02-1S Catchment Planning and Management and Clause 19.03 Infrastructure by introducing appropriate flood protection measures in areas of known flood risk. The controls are being applied in order to protect life and property from flood hazard and to ensure the natural flood capacity of waterways remain relatively unencumbered.

The policy states that flood risk must be considered in the preparation of planning schemes and land use planning decisions to avoid intensifying the impacts of flooding through inappropriately located uses and developments.

The Amendment implements policy by proposing that land affected by flooding as identified by the Birregurra Flood and Drainage Strategy 2021 be recognised and updated on planning scheme maps accompanied by suitable planning controls. This contributes to the protection of public and private properties from damage, as well as the identification of potential risks to the lives, health and safety of floodplain residents and visitors. Keep this brief and only include relevant information.

The Explanatory Report also asks and answers the question ***How does the amendment support or implement the Municipal Planning Strategy?***

The proposed Amendment is consistent with and supports the Municipal Strategic Statement, particularly Clause 02.02 Vision and 02.03 Strategic Directions by updating appropriate flood protection measures in areas of known flood risk. The controls are being applied in order to protect life and property from flood hazard and to ensure the natural flood capacity of waterways remain relatively unencumbered.

Unsurprisingly, the strategic justification of the Amendment was not challenged by the submitters.

The Panel accepts these submissions.

2.2 Ministerial Directions and Practice Notes

Ministerial Directions

The Explanatory Report states the Amendment is consistent with:

- Ministerial Direction – Form and Content of Planning Schemes as identified at section 7(5) of the Planning and Environment Act 1987
- Ministerial Direction No 11 - Strategic Assessment of Amendments pursuant to Section 12(2) (a) of the Planning and Environment Act 1987.

Planning Practice Notes

Planning Practice Note 11, titled Applying for a Planning Permit under the Flood Provisions, August 2015, provides guidance about making an application for a planning permit where flooding is a consideration and explains how an application will be assessed.

Planning Practice Note 12, titled Applying the Flood Provisions in Planning Schemes – A Guide for Councils, June 2015, provides guidance about applying flood provisions including identifying land affected by flooding, the preparation of policy and other provisions in a planning scheme.

In response to the Panel’s request for further information regarding the form and scope of the Amendment with Planning Practice Notes 11 and 12, Council submitted:

39. The Amendment responds to the requirements of Planning Practice Note 11 ‘*Applying for a Planning Permit under the Flood Provisions August 2015*’. Colac Otway Shire already works with the CCMA and prospective developers on issues associated with planning permit applications in Birregurra (and elsewhere in the Shire) that are triggered by flood controls. It is considered that there will be little change to Council processes in providing advice and determining applications triggered by this amendment.
40. In relation to Practice Note 12 ‘*Applying the Flood Provisions in Planning Schemes – A Guide for Councils*’, the extent of flooding in Birregurra has been clearly defined in accordance with the Practice Note requirements. Given the velocity, flood depths and the source of the flooding demonstrated in the flood modelling, the Flood Overlay (FO), Land Subject to Inundation Overlay (LSIO) and Special Building Overlay (SBO) has been applied in accordance with the provisions of the Practice Note. As previously stated, numerous exemptions have been previously included in the recently updated current Schedule, prepared as part of Amendment C90cola. This approved Amendment was also considered by a Planning Panel and currently forms part of the Planning Scheme.

2.3 Strategic justification

(i) Submissions

The Explanatory Report states “*The Amendment will result in net community benefit, by more accurately reflecting the true flood risk in Birregurra*”.

The CCMA concluded its presentation to the Hearing by stating:

In summary, the Authority accept the methodologies, technical aspects and findings of the Birregurra Flood and Drainage Strategy (2021) on which the Amendment is based. The Amendment as proposed will result in more orderly planning outcomes, reflects current best practice floodplain management principles and will enable safer developments to occur within Birregurra. The Corangamite CMA are therefore fully supportive of the proposed C116cola Amendment.

Council submitted:

41. In summary, it is considered that Amendment C116cola is supported by and implements Victorian planning objectives, relevant sections of the PPF, and is consistent with the relevant Ministerial Directions and Practice Notes. The Amendment also supports net community benefit and sustainable development for the benefit of present and future generations. It is therefore submitted that the Amendment is strategically justified and in accordance with Victorian Planning Provisions.

(ii) Discussion and conclusion

The Panel agrees with the submissions regarding the Amendment’s strategic basis.

The Panel concludes the Amendment:

- is supported by various clauses in the Planning Policy Framework
- meets Victorian planning objectives in the PE Act
- assists in implementing State policy objectives
- supports and implements local planning policy
- is consistent with the relevant Ministerial Directions and Practice Notes.

3 Issues

3.1 Flood modelling

(i) The issue

The issue is whether the flood modelling is appropriate to support the Amendment.

(ii) Evidence and submissions

Submitters expressed concerns at the efficacy of the flood modelling both as a result of their inability to understand the modelling and because of their experience with the 2016 flood event in Birregurra. Residents submitted that the data of the 2016 flood event overstated the extent of flood flows. The issue for the Panel is about reducing the difference in perceptions.

The inability to understand the reports and the modelling is not uncommon for lay people. To use the words of Mrs Eccles in her submission to the Panel¹, she is *“not an expert in this field and so am happy to acknowledge that much of the information contained in both the flood study and the peer review are difficult for me to understand.”*

The material that supports this Amendment includes the original flood study and a peer review. The material available to the Panel adds detailed analysis of the submissions by Council and their consultants as well as an expert witness report. The CCMA has contributed its expertise and knowledge of Birregurra. These are substantial documents in size and content. All this information is complex for the lay person.

The lay person does, however, understand what they see and experience. Hence, the comment in submissions about the extent of past flood events is valuable input into measuring the future. This is acknowledged in the submissions from Council, by the consultant in the response to submissions, and Mr Dunn his witness statement. The anecdotal evidence of the 2016 flood event and photographs have assisted in the calculation of flood levels as inputs to the modelling.

Submissions by Council, the CCMA and the expert reports all acknowledge the 2016 event but come back to and rely upon the modelling that shows that event was not a 1 in 100-year event but sits somewhere near a 1 in 10-year event.

This is supported by Mr Dunn in his witness statement who advised:

Based on the data available, the September 2016 flood event was considered the only event where sufficient information was available to enable calibration of modelled flood levels to surveyed flood marks. The magnitude of this event was estimated to relate to a flood event in the range of 10 % to 20 % Annual Exceedance Probability (AEP)

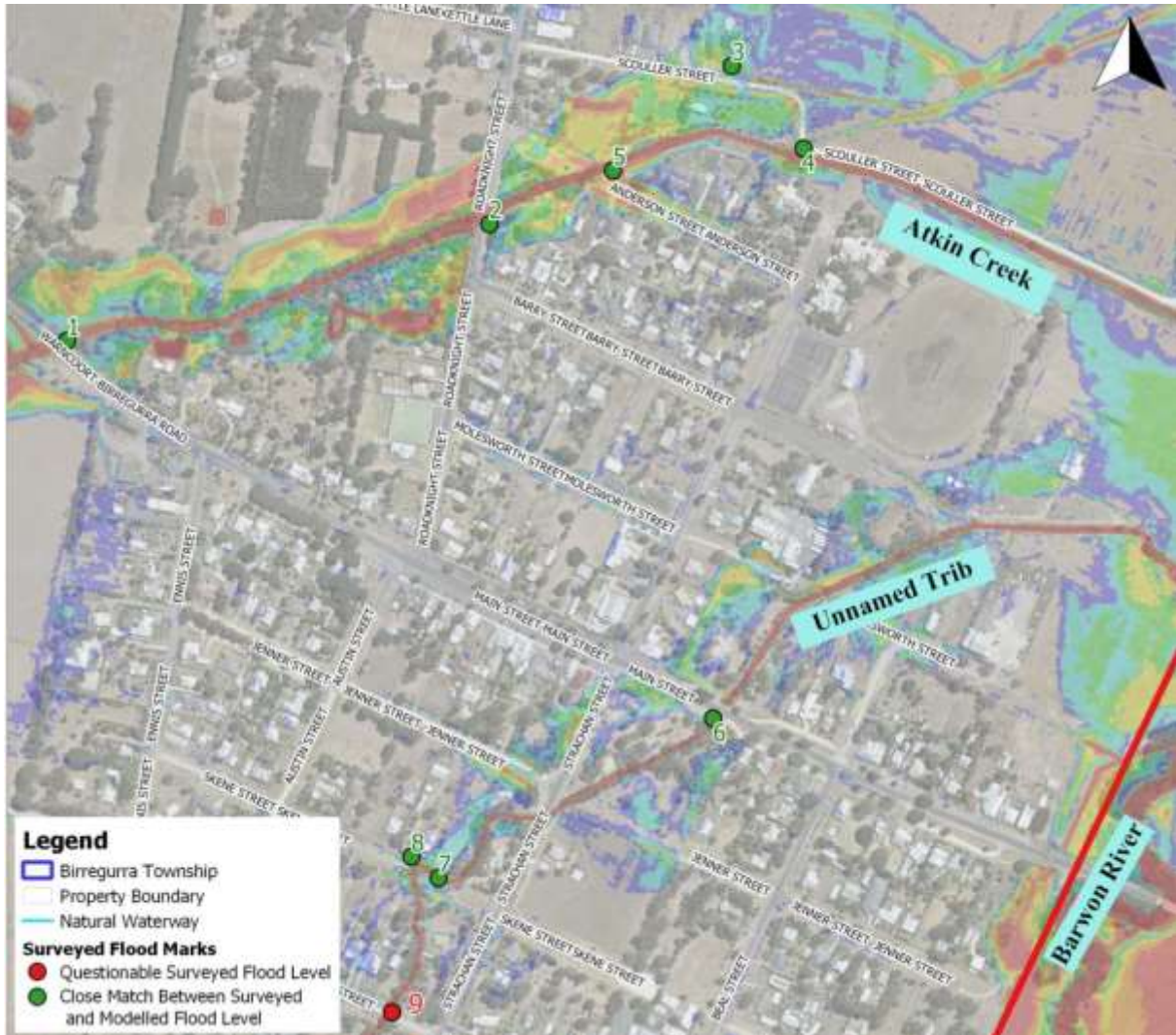
Mr Dunn expressed a high degree of confidence in the result of the modelling and the accuracy of the boundaries of the overlays. He relied on the anecdotal evidence about the 2016 event, measurements from survey points along Aitkin Creek and the unnamed tributary, levels produced by LiDAR survey. His evidence included the statement that the modelling *“provides confidence in the accuracy of the flood mapping outputs”*.²

¹ Document 8

² Document 7 Expert witness statement page 3

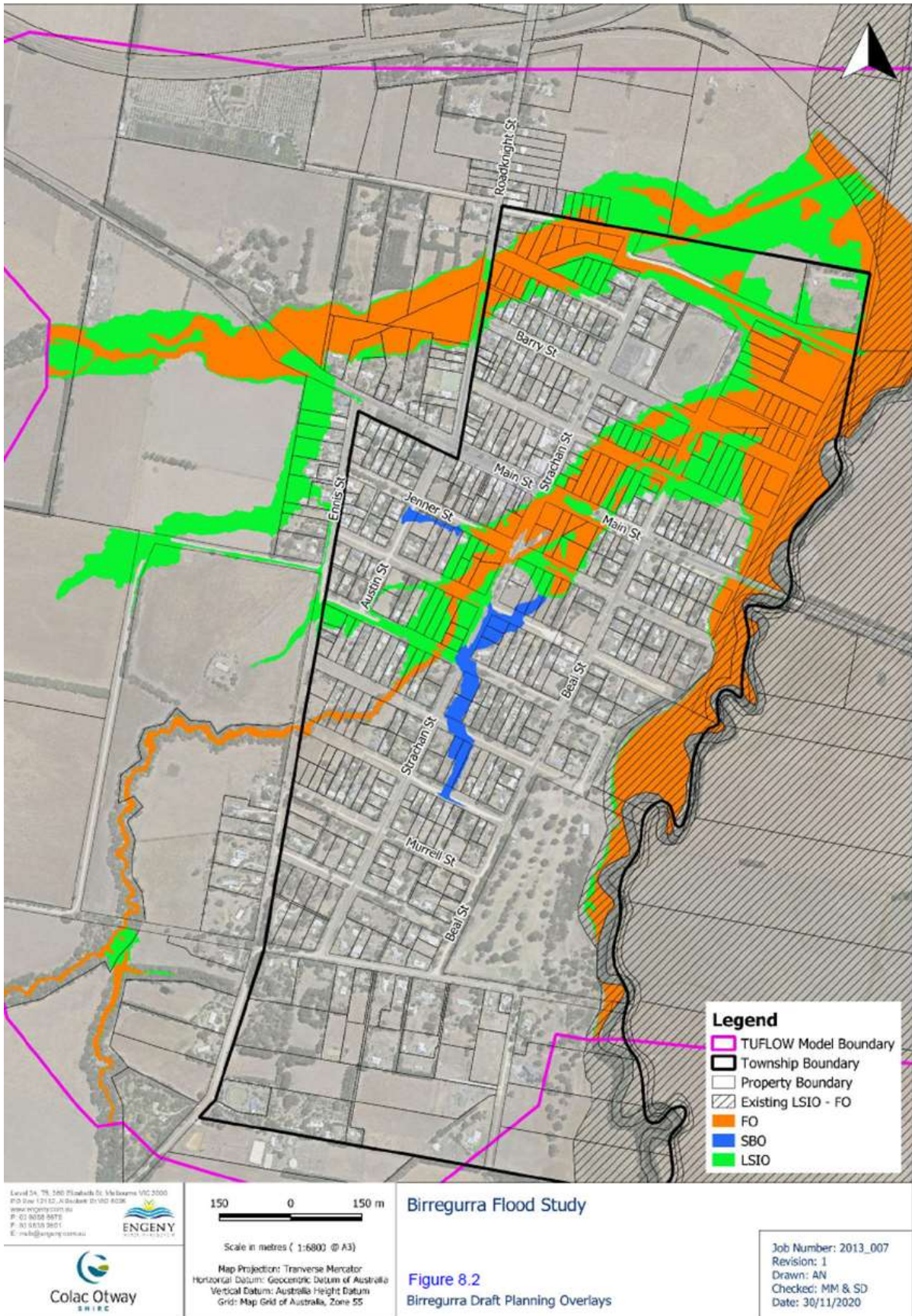
The impact of the 2016 event is shown in Figure 2 is taken from the witness statement. It is to be compared with the modelled impact of a 1 in 100-year event shown in Figure 3.

Figure 2 Flood depth results for the September 2016 event



Source - Figure 3-5 in document 8: Expert witness statement response to submissions

Figure 3 Flood extents and draft planning overlays



Source – Birregurra Flood and Drainage Strategy Detailed Report, Engeny Water Management Pty Ltd 2021

(iii) Discussion

It is unnecessary to repeat the detailed assessment or include photographs from the documentation. Suffice that the consultants acknowledge to ‘close match’ between residents’ stated recollection of events, the photographs of flood levels and the duration of flooding in the 2016 and that that material *“has provided further confidence that the hydraulic modelling results for the September 2016 event are a good match to those reported by residents across the township”*.³

The issue for the Panel is about understanding the difference in community perception of the 2016 flood event and the expansion of affected areas now to be covered by overlays under the Amendment. If the 2016 event is so good a precedent for the flood controls, why then does the Amendment go further than the extents established from the 2016 event?

The Panel questioned Mr Dunn about the statements in his expert witness statement about confidence in the mapping results. He repeated his confidence in the outputs by citing the data comparing the surveyed depths from 2016 to the depths produced by the model. The Panel accepts the evidence.

Submissions to the Panel establish that Birregurra has not experienced a 1 in 100-year flood event. In a way, the Amendment is getting ahead of the probability of such an event. It is a proper step to take to protect life and property into the future. And, as submitted, it is also supported by State Planning Policy.

(iv) Conclusion

The Panel concludes the flood modelling is appropriate to support the Amendment.

3.2 Development opportunity**3.2.1 The issue**

The is whether the Amendment will unreasonably affect development opportunity on land.

3.2.2 Evidence and submissions

Each of Mr Barrand and Mrs Eccles argued they should be able to build on their property. This is a common proposition in similar Amendments. Landowners do not like to feel restricted with entitlements being taken from them.

The submission made by Mr and Mrs Eccles during exhibition⁴ focussed on the impacts of the change in controls to their land on Roadknight Street and a feared restriction on their ability to build a new dwelling. They submitted that in 36 years of living on the site, the existing house had never flooded. As a result, they looked for assurance that they would be able to build on the higher ground within the site. Their submission criticised the overlays for singling out their property saying “we are not aware of any other properties that will be affected to the extent we are”.

Mrs Eccles repeated the theme in her presentation to the Panel⁵.

³ From page 8 of the expert witness statement titled Response to Submissions, document 7

⁴ Submission 2

⁵ Document 8

Mr and Mrs Barrand submitted a similar concern at the inability to build on land at 42 Strachan Street relying on lived experience in Birregurra since 1978. They blamed a lack of maintenance along waterways and flow paths for causing flooding and disputed the accuracy of the modelled impacts on the subject site.

Each of the submissions was addressed in the assessment of submissions by Council in the first instance, and by the consultant in material before the Panel. That information contained photographs of the 2016 event and details of the modelling, including the inputs from the 2016 event, which produced flood depths that warranted the FO and LSIO ⁶.

Council responded to the concerns with particular information about each land parcel.

For Mr and Mrs Eccles, Council submitted an outline for later discussion between Mr and Mrs Eccles, Council and the CCMA. The Council submitted ⁷:

there may be potential to develop a second dwelling on the site to the east of the location of the existing dwelling, in place of and to the rear of the outbuildings on flood free land and land to be included in the LSIO (an overlay where works may be supported providing they do not impede the free passage and temporary storage of floodwaters and they minimise flood damage). Any future planning permit application would also need to include a subdivision application to realign boundaries.

For Mr and Mrs Barrand, Council expressed a willingness to explore development options in consultation with the CCMA by looking at parts of the site that are clear of flooding or within an area subject to minor flooding in the LSIO area ⁸.

3.2.3 Discussion

Damage to property and, sometimes, loss of life are tragic consequences of flooding. State policy seeks to protect both as far as possible. Whereas most planning outcomes are balanced decisions weighing all positions, floodplain management policy at Clause 13.03-1S in the Planning Scheme includes an objective to assist the protection of life, property and community infrastructure from flood hazard with strategies to:

- Identify land affected by flooding, including land inundated by the 1 in 100 year flood event or as determined by the floodplain management authority in planning schemes.
- Avoid intensifying the impact of flooding through inappropriately located use and development.
- Locate emergency and community facilities (including hospitals, ambulance stations, police stations, fire stations, residential aged care facilities, communication facilities, transport facilities, community shelters and schools) outside the 1 in 100 year floodplain and, where possible, at levels above the height of the probable maximum flood.

The consultations with Council and the CMA, as well as the proceedings before the Panel, have helped each of the submitters better understand the overlays and how they relate to development prospects for their land. Each property will have an overlay according to the flood criteria but the authorities are willing to discuss how to adapt development options to shape a permit application.

⁶ See table 3-1 in document 7, the expert witness report by Mr Dunn

⁷ Paragraph 63 document 6

⁸ Paragraph 64 document 6

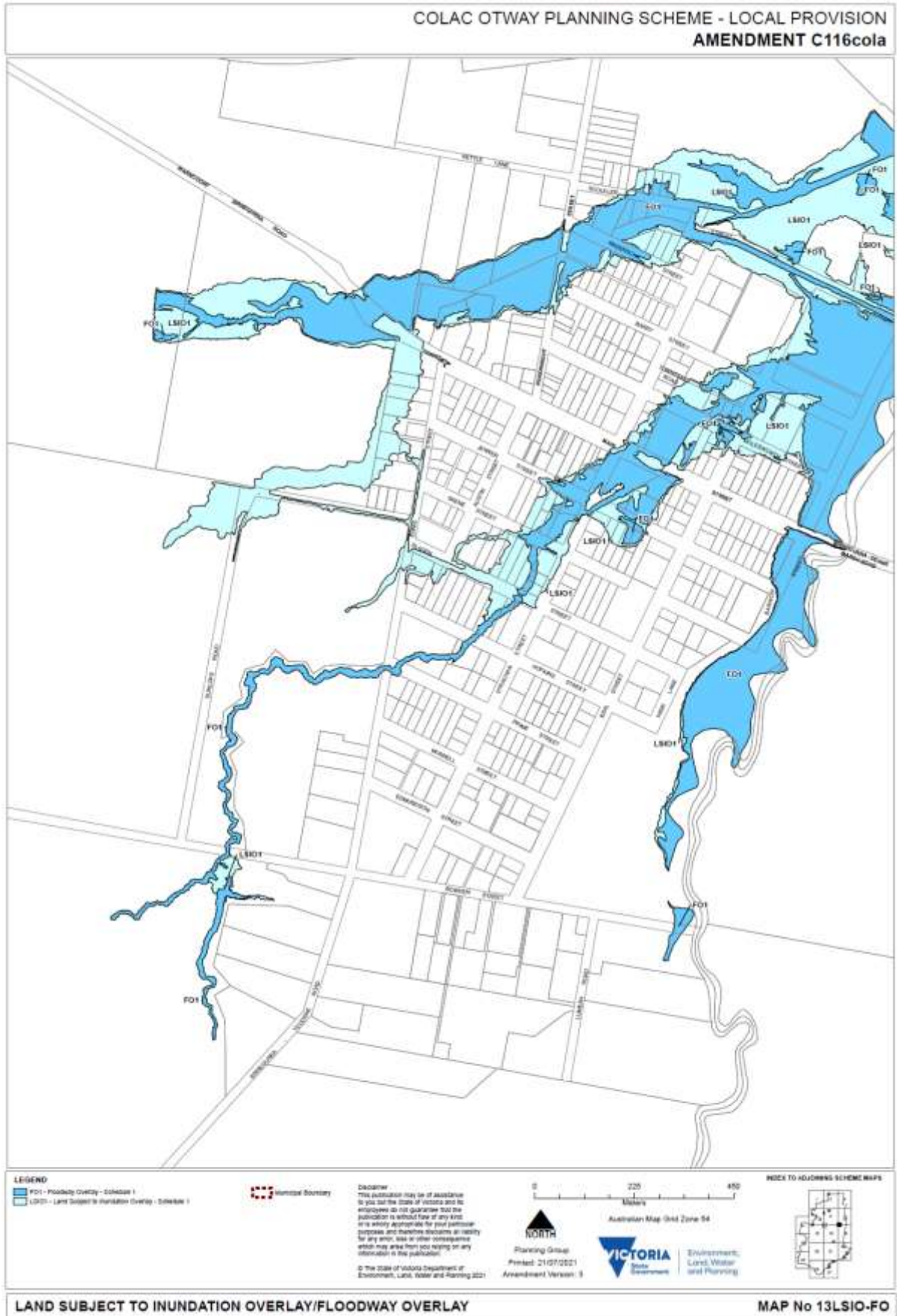
(i) Conclusion

The Panel concludes the Amendment will:

- introduce a framework for managing flood related issues without unreasonably impacting development
- enable Council to assess how a development proposal responds to flooding issues through the permit application process.

Appendix A Exhibited planning scheme maps







Appendix B Document list

No.	Date	Description	Provided by
1	23 March 2022	Package 1 of Council information	Council
2	23 March 2022	Panel Directions Hearing notice	Planning Panels Victoria
3	4 April 2022	Package 2 of Council information	Council
4	5 April 2022	Further information from Council	Council
5	13 April 2022	Panel directions and timetable notice	Planning Panels Victoria
6	26 April 2022	Council submission to Panel	Council
7	26 April 2022	Scott Dunn, Engeny Water Management, expert witness report for Council	Council
8	1 May 2022	Submission to Panel	Mrs Eccles
9	2 May 2022	Submission to Panel	Mr Barrand
10	2 May 2022	Submission to Panel	Corangamite CMA