



Planning Panels Victoria

Department of Environment, Land, Water and Planning

8 May 2018

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Mr Peter O'Farrell
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Dear Mr O'Farrell

Fishermans Bend Review Panel:

Draft Amendment GC81 Melbourne and Port Phillip Planning Schemes

Several submitters have made legal submissions regarding the provisions in the proposed Capital City Zone (CCZ) schedule that require land identified for future streets, lanes and open space to be transferred to the relevant authority at no cost.

The relevant provisions, taken from Document 156A (the Minister for Planning's Part B changes to the CCZ schedule), read:

4.0 Buildings and works

...

Permit requirement

A permit must not be granted or amended to construct a building or construct or carry out works in respect of land shown as a new road, street or laneway on the relevant Map in the schedule until an agreement made under section 173 of the *Planning and Environment Act 1987* has been entered into by the landowner, the Responsible Authority and the local council (if not the Responsible Authority) which must provide for:

- In respect of any part of the land which is shown as new roads, streets or laneways on the relevant Map in the schedule:
 - Its construction to the satisfaction of the Responsible Authority and the relevant road management authority; and
 - Its transfer to, or vesting in, the relevant road authority as a public road at no cost to the relevant road authority.

A permit must not be granted or amended to construct a building or construct or carry out works in respect of land shown as new open space on the relevant Map in the schedule until an agreement made under section 173 of the *Planning and Environment Act 1987* has been entered into by the landowner, the Responsible Authority and the local council (if not the Responsible Authority) which must provide for its transfer or vesting in the local council as public open space at no cost to the local council.

Legal issues raised include whether:

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1. the provisions (and therefore the draft Amendment) are legally valid
2. the provisions amount to a de facto reservation of the affected land for public purposes
3. the provisions trigger compensation under section 98(1)(a) of the *Planning and Environment Act 1987* (the **Act**), on the basis that the land is, in substance, 'reserved for a public purpose under a planning scheme'
4. (if a permit application were refused), the provisions trigger compensation under section 98(2) of the Act, on the basis that refusal would be because the land 'is or will be needed for a public purpose'
5. a Public Acquisition Overlay should be applied to the affected land.

Various parties have also raised issues regarding the fairness of the provisions. Other parties have submitted the provisions are legal and fair.

It is not the role of the Review Panel to make legal rulings. However, the Review Panel considers that it would benefit from a legal opinion from Counsel Assisting regarding the legal issues raised by various parties.

Relevant documents that deal with or touch upon the legal issues to date include (but may not be limited to):

- Document 120 (Submissions on behalf of Melbourne City Council), at paragraphs [43] to [46]
- Document 151 (Minister's Supplementary Submissions to Part B Submissions) at [19]-[23], [29]-[30] and [57]-[62]
- Document 155 (Opinion of Mr Batt and Ms Foley regarding the provisions)
- Document 253 (General submission of Mr Tweedie) at [74]-[82] and [109]-[199], together the Documents 255, 256, 257 and 258 (extracts from cases referred to in Mr Tweedie's submission)
- Document 254 (Memorandum of Advice from Mr Morris regarding Amendment C270, tabled by Mr Tweedie)
- Document 276 (General submissions of Ms Collingwood) at [56]-[58]
- Document 295 (Supplementary Information Note 14 – Planning approval processes for recent major projects tabled by the Minister).

Mr Morris and Mr Canavan made oral submissions in relation to the legal issues on Day 31 (Thursday 3 May 2018), and the Review Panel has directed those submissions be put in writing by noon on 11 May 2018. Other relevant documents tabled by Mr Morris and Mr Canavan include:

- Document 285 (Extracts from a report prepared by Mr Morris in 1983 for the then Minister for Planning entitled *Land Acquisition and Compensation – Proposals for New Land Acquisition and Compensation Legislation*, referred to in his oral submissions)
- Document 286 (extracts from *Whelan Kartaway v Minister for Planning*, referred to by Mr Morris in his oral submissions)
- Document 287 (extracts of provisions from the *Planning and Environment Act 1987*, referred to by Mr Canavan in his oral submissions).

You should be aware that your response will be tabled as a public document.

Given the timing of the Hearing with the last day scheduled for Thursday 24 May 2018, the Review Panel would like to receive your legal opinion by noon on Friday 18 May 2018, to allow parties the opportunity to address your opinion in closing submissions should they seek to do so.

Yours sincerely



Kathy Mitchell

Fishermans Bend Review Panel Chair