IN PLANNING PANELS VICTORIA
FISHERMANS BEND PLANNING REVIEW PANEL
DRAFT AMENDMENT GC81 to MELBOURNE & PORT PHILLIP PLANNING SCHEMES

SUBMISSIONS ON BEHALF OF THE MINISTER FOR PLANNING

1. These submissions are made on behalf of the Minister for Planning in his capacity as the proponent for draft Amendment GC81 to the Melbourne and Port Phillip Planning Schemes.

2. The submissions are made in response to a submission filed on behalf of 10 landowners by Norton Rose dated 19 December 2017 seeking:

2.1. an adjournment of the Planning Review Panel hearing to a date not before 30 April 2018; and

2.2. various directions regarding the disclosure of communications between the Fishermans Bend Taskforce (Taskforce) (and others) and the Planning Review Panel.

3. The Minister for Planning opposes the adjournment request.

Relevant statutory context

4. The Planning Review Panel (Review Panel) is an advisory committee appointed by the Minister pursuant to section 151 of the Planning and Environment Act 1987 (Act).

5. Because the Review Panel is conducting a hearing, it is bound by the rules of natural justice.1

6. As is open to him under section 151 of the Act, the Minister has prepared terms of reference (Terms) for the Review Panel.

7. While the Review Panel may regulate its own proceedings2, it must do so in a manner consistent with:

7.1. the terms of reference; and

7.2. various provisions of the Act3 including the requirement that, in receiving submissions, it affords natural justice.

8. The Review Panel’s consideration of the adjournment application is more specifically guided by section 165 of the Act, which provides that:

A panel may from time to time adjourn a hearing to any times and places and for any purposes it thinks necessary and on any terms as to costs or otherwise which it thinks just in the circumstances.

9. The proper question for the Review Panel is whether it is ‘necessary’ to adjourn the hearing. In the Minister’s submission, it is not necessary to afford natural justice to the landowners represented by Norton Rose (and other submitters) or for any other stated reason.

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1 This is the effect of sections 152(1), (2)(b) and 161(1)(b) of the Act.
2 See Section 151(6).
3 Sections 159, 161(1), (3) and (5), 161(2), 162 to 165 and 169.
10. The requirements of natural justice vary with the circumstances of the hearing. In considering what it necessary to afford natural justice in the current hearing, the purpose of the Review Panel is significant.4

11. In a broad sense, the purpose of the Review Panel is advisory. More specifically, according to the terms of reference, its purpose is ‘...to advise the Minister for Planning on the appropriateness of the proposed planning scheme amendment GC81.’5 In doing so, it is required consider particular matters including [all] relevant submissions made in regard to the proposed changes to the Port Phillip and Melbourne Planning Schemes6 and to ‘provide an opportunity for any persons who requests to be heard through the submission process to present to it.’7

12. The output of the Review Panel will be a report which provides recommendations on changes to the Planning Scheme and Fishermans Bend Framework8 and a summary (only) of submissions heard that concerned matters outside the consideration of the Review Panel.9

13. The requirement for public hearings arises from the Terms.10 In the context of the Review Panel’s advisory role - receiving submissions from many submitters on various topics – the public hearing is an opportunity for submitters to further explain or expand upon the content of the written submissions made.11

14. Were this a routine planning scheme amendment and associated panel hearing the planning authority would need to put in place ‘reasonable processes’ to ensure that all submitters get a ‘fair go’ and ensure the planning authority has fulfilled its obligations to make all relevant material available for inspection throughout the process.12 This is not such a hearing. Even if it were the Act is not prescriptive in the obligations of the Minister in his capacity as a planning authority at least in so far as material that must be made available throughout the process is concerned.

15. Notwithstanding, the Minister has made available for inspection the same documents that would be required to be made available for inspection if it were such a hearing and the planning authority was a municipal council, except for an explanatory report.13 Since the Planning Review Panel hearing concerns only a ‘draft’ planning scheme amendment, an explanatory report is neither required nor appropriate. However, the draft planning scheme amendment documents and associated documents made available include an ‘Information Sheet’ which addresses similar matters to those addressed in an explanatory report.

16. As far as ‘reasonable processes’ for the hearing are concerned, the Review Panel has in the Minister’s submission, fulfilled its obligation to put in place reasonable processes which ensure all submitters get a fair go at presenting views on the draft ordinance.

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4 See Winky Pop Pty Ltd v Hobsons Bay CC [2008] VCAT 206 [25] to [27].
6 See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, paragraph 27(d).
8 See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, Paragraph 35(a)-(e).
10 See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, paragraph 16.
11 See Winky Pop Pty Ltd v Hobsons Bay CC [2008] VCAT 206, [26].
12 See Winky Pop Pty Ltd v Hobsons Bay CC [2008] VCAT 206, [33].
13 See section 17(1) of the Act.
Notice of the Review Panel hearing and GC81

17. The submissions and hearing process of the Review Planning does not arise 'out of the blue'.

18. Planning for the Fishermans Bend precinct has been ongoing for many years and has resulted in an engaged community (including both statutory and non-statutory stakeholders):

18.1. Planning for the area commenced in 2012 when the site was identified as an area of State significance and rezoned.

18.2. There have been multiple Planning Scheme Amendments including GC7, GC27, GC50 and GC 59 which variously resulted in the introduction of a framework plan and interim controls for the precinct.

18.3. The appointment of a Ministerial Advisory Committee in 2015.

18.4. The Taskforce was appointed in Jan 2016 to prepare the new strategic planning for Fishermans Bend for exhibition.

19. As a result of this ongoing discourse there exists a level of familiarity and engagement with the affected community. The affected community has a heightened level of awareness when compared to some other proposed amendments.

20. The recent tranche of communications relating to the release of the Fishermans Bend Framework on 21 October 2017 and draft controls on 1 November 2017:

20.1. Commenced on 21 October 2017 with the launch of the draft Fishermans Bend Framework. This was communicated through a launch and a series of email and newsletter communications.

20.2. Included advertisements in the Age, Herald Sun and a range of other newspapers between 28 October and 1 November concerning the new ordinance and submissions process.

20.3. Included a mail out of 14,505 letters to land owners and occupiers which identified both the submissions process and the hearing process.

20.4. Was supported by a series of information sessions or briefings and other community and development industry events over the exhibition period.

21. Submissions were open for 6 weeks (noting that the statutory timeframe for advertising of a Planning Scheme Amendment is 4 weeks). The submissions process was undoubtedly a success with some 241 of submissions received.

22. There are 5 clear 'working weeks' between the close of the submissions and the proposed Review Panel hearing. To this end while it is reasonable to exclude the week of Christmas and New Years, the planning jurisdiction is well and truly up and running from 8 January 2018, with the Tribunal listing throughout that week.

23. There has been in excess of 3 months notice of the proposed commencement of hearing.\(^{14}\)

24. In this context parties will have had three months to placemark potential witnesses and representatives in the event they foresaw a possibility that they wished to expand upon or explain a written submission. This is not unreasonable.

\(^{14}\) The advertisements in newspapers either refer to arrangements for hearing dates or identify those dates.
25. It is not the case in fact or at law that the right to be heard and to representation requires that a party can be represented by senior counsel. Within the planning jurisdiction it is common for a party to:

25.1. Represent themselves.
25.2. Be represented by planning consultants.
25.3. Be represented by lawyer advocates.
25.4. Be represented by a barrister or barristers.
25.5. Be represented by a combination of the above.
25.6. Attend only part of or all of a hearing.
25.7. Cross examine via any one of the above forms of representation.

26. There exist a broad range of appropriately experienced advocates within the jurisdiction. The affidavit of Ms Brezzi does not support a conclusion that parties are unable to obtain appropriately experienced counsel nor appropriate planning or other witnesses. The material presented are matters of opinion, unsupported by the background assumptions or information and is of no or little probative value to the Review Panel.

27. The Minister further observes the commentary within the affidavit of Ms Brezzi concerning urgency. The Minister has two comments in this respect. Firstly, the information presented, taken at face value represents a summary opinion from the author of her interpretation of questions and answers (which are not provided) at an information session. On the limited information provided the opinion is of limited or no probative value to the Review Panel.

28. Secondly the question of urgency does not respond to the core question of whether the timelines afford a fair opportunity to be heard and whether the adjournment is ‘necessary’ (the question is whether the adjournment is necessary and not whether the hearing timeframe is necessary).

29. The Minister submits that unless the Panel regards the process as materially flawed, it unnecessary to grant an adjournment. The Minister submits that the case for an adjournment is not made good.

**Hearing process**

30. In relation to the hearing process, it is asserted (by Mr Morris QC) that the Review Panel has had meetings with the Taskforce and possibly, with local councils. It is further asserted that because these meetings took place without relevant stakeholders being either aware of them or present, the Review Panel should disclose communications between the Taskforce and the Review Panel and others.

31. Provided the timing of the requested directions do not prejudice the commencement of the hearing on the scheduled date, being 12 February 2018, the Minister would not oppose the Review Panel making such directions.

32. From the perspective of the Taskforce, the Review Panel’s actions are entirely consistent with its Terms (and the Act). The Terms relevantly provide that:

32.1. The Review Panel will be briefed on relevant background documents by the Fishermans Bend Taskforce;\(^{15}\)

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\(^{15}\) See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, paragraph 21.
32.2. The Review Panel is required to attend public briefings by the Fishermans Bend Taskforce on date as agreed.\textsuperscript{16}

32.3. The Review Panel may meet and invite other to meet with it when there is a quorum of at least two Committee members including either the Chair or Deputy Chair.\textsuperscript{17}

33. Certainly, the effect of the Terms renders the current process different to that of a planning panel but the Review Panel is sitting as an advisory committee and not a panel. Differences in process are not surprising in this context.

34. In accordance with the Terms, the Taskforce has briefed the Review Panel on relevant background documents. It has done so by:

34.1. providing the Review Panel with no more documents than have been made publicly available on the Fishermans Bend website. Described broadly, those documents comprise;

34.1.1. the Draft Fishermans Bend Framework;
34.1.2. draft Planning Scheme Amendment GC81;
34.1.3. draft Framework Fact sheets and Technical fact sheets;
34.1.4. 17 background reports to the Draft Framework;
34.1.5. the Fishermans Bend Vision (September 2016);
34.1.6. the Fishermans Bend Strategic Framework Plan (2016 update);
34.1.7. Fishermans Bend Ministerial Advisory Committee Terms of Reference April 2016;
34.1.8. the Ministerial Advisory Committee Report One - Recommendations and Ministerial Response;

34.2. responding to a request by the Review Panel to arrange and accompany it on a site inspection of Fisherman’s Bend. The Taskforce has offered to arrange further site inspections or tours as part of the hearing, if required to do so by the Review Panel;

35. Consistent with its terms of reference, the Review Panel conducted two public briefing sessions attended by the Taskforce on:

35.1. 10 am, 10 November 2017 at Planning Panels Victoria; and
35.2. 10 am, 24 November 2017 at Planning Panels Victoria.

36. The public briefing sessions were both about the draft Planning Scheme Amendment and the Planning Review Panel process.

37. The dates of the public briefing sessions were published on the Fishermans Bend website at: http://www.fishermansbend.vic.gov.au/ from to 1 November to 15 December 2017. Additionally, the dates were published in a Fishermans Bend ‘e-News’ on 1 November 2017.

\textsuperscript{16} See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, paragraph 37.
\textsuperscript{17} See Terms of Reference, Fishermans Bend Planning Review Panel, dated 22 October 2017, paragraph 17.
38. DELWP has made an officer, Ms Fawn Goodall, Statutory Planner, available to provide administrative and operational support to the Review Panel on request. For example, by compiling and providing a spreadsheet of submissions identifying the issues raised in the submissions. This is referred to in a note headed 'Project Management' which follows the Terms of Reference.

39. Any communications to or from the Review Panel (including from Ms Goodall) outside of the site inspection and public briefings have occurred via Ms Andrea Harwood, Senior Project Manager of Planning Panels Victoria.

40. In the circumstances, the Taskforce is confident the other parties in this matter have not have been unfairly disadvantaged by its communications with the Review Panel.

41. As far as the Minister is concerned, compliance with the requested directions will not require an adjournment of the hearing.

CONCLUSION

42. In closing, it is respectfully submitted the advisory committee dismiss any request for an adjournment of the hearing

Date: 20 December 2017

HARWOOD ANDREWS
on behalf of
The Minister for Planning