IN THE MATTER OF AMENDMENT GC81 TO THE MELBOURNE PLANNING SCHEME AND PORT PHILLIP PLANNING SCHEME

OPINION

Introduction

1. We are briefed to provide advice to the Minister of Planning as to the proper interpretation of certain provisions of draft planning amendment GC81 (draft Amendment) and as to the interaction of those provisions with relevant sections of the Planning and Environment Act 1987 (Vic) (PE Act). The draft Amendment is currently the subject of hearing before the Fishermans Bend Planning Review Panel, constituted under section 151 of the PE Act.

2. The draft Amendment would introduce planning scheme controls and policy into the Melbourne and Port Phillip Planning Schemes (relevant schemes) to support implementation of the draft Fishermans Bend Framework, 2017 (draft Framework) and the Fishermans Bend Vision – The next chapter in Melbourne’s growth story, September 2016. The draft Framework would be a reference document under the relevant schemes as amended.

Relevant provisions of the draft Amendment

3. The draft Amendment would introduce into both of the relevant schemes a new schedule (Schedule) to Clause 37.04, Capital City Zone (CCZ). Under the Schedule, a permit would be required to subdivide land or construct a building or carry out works on land in the CCZ unless specified otherwise.

4. Where a permit is required to subdivide land, ‘Clause 3 Subdivision’ would include a ‘Permit requirement’ that:

   The layout of the subdivision must make provision for any new streets, laneways, or public open space generally in accordance with Map 2 and Map 3 of this schedule.
5. Similarly, ‘Clause 4 Buildings and Works’ would include a ‘Permit requirement’ as follows:

A permit must not be granted to construct a building or carry out works where the provision for any new streets, laneways, or public open space generally in accordance with Map 2 and Map 3 is not provided.

6. In the remainder of this Opinion we refer to the provisions set out in preceding two paragraphs as “the relevant provisions”.

7. Both Clauses 3 and 4 would stipulate “Application requirements” and “Decision guidelines” consonant with the relevant provisions.

8. Map 2 to the Schedule shows a proposed street and laneway layout, and Map 3 shows a proposed open space layout, including substantial areas of ‘new public open space’. The content of these maps has been drawn from the draft Framework.

9. The ‘Definitions’ section of the Schedule provides that, for the purposes of interpreting the Schedule, the term ‘New public open space’ is defined as:

   Land identified in Map 3 and is to be provided for public recreation or public resort, or as parklands, or for use for active or passive public open space.

10. Also of relevance for present purposes are the permit requirements in Clause 4 of the Schedule that would preclude the grant of a permit to construct a building or carry out works where the floor area ratio (FAR), calculated as the gross developable area divided by gross floor area, would be in excess of the ratio prescribed for the relevant precinct within Fishermans Bend. The FAR requirement is thus a tool directed to managing overall density levels, operating to fix the maximum yield that can be delivered on any CCZ site.

Matters for opinion

11. We have been asked to provide our opinion on the following matters:

   (a) the meaning and operation of the relevant provisions;

   (b) the interaction of the relevant provisions with section 98 of the PE Act;

   (c) whether the relevant provisions effect an unlawful acquisition of property; and
(d) whether it would be appropriate to vary Clauses 3 and 4 of the Schedule such that they (a) required land use, subdivision and buildings and works to be generally in accordance with the precinct plans at pages 71, 73, 75, 77 and 79 of the draft Framework (infrastructure precinct plans), either in place of Maps 1, 2 and 3, or in addition to them; and (b) included an additional decision guideline directing consideration of whether the proposed land use, subdivision or buildings or works are generally in accordance with the infrastructure precinct plans.

Summary of opinion

12. In summary, it is our opinion that, properly interpreted, the relevant provisions:

(a) are intended to be of substantive effect, requiring that, in order for a planning permit to be granted, the applicant must transfer to the relevant municipal council at no cost such part of its land as is identified in the relevant maps;

(b) would not engage the compensation provisions of sections 98(1) or 98(2) of the PE Act; and

(c) would not, by their operation, constitute an unlawful acquisition of property.

13. Further, we consider that the relevant provisions:

(a) could appropriately be revised to include the infrastructure precinct plans and a decision guideline requiring consideration of whether the proposed land use, subdivision or buildings or works would be generally in accordance with those plans; and

(b) would benefit from revision to convey more explicitly their intended effect and to ensure their orderly and effective implementation.

Construction of the relevant provisions

14. In our view, the intended meaning of the relevant provisions is well ascertainable, notwithstanding that on its face their drafting, particularly in Clause 4, might seem somewhat opaque.
15. We preface our opinion with some observations as to the proper approach to their construction. A planning scheme is subordinate legislation prepared by a planning authority and approved by the Minister for Planning.\(^1\) Subordinate legislation is to be construed in the context of the legislation under which it is enacted.\(^2\) The PE Act and the relevant schemes should be read together and construed harmoniously, to the extent possible, given that both are part of a cohesive structure for the regulation of planning and the granting of permits, involving an integrated decision-making process.\(^3\) The task of construction must begin with consideration of the text itself, and words should generally be given their plain and ordinary meaning. A construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated) is to be preferred to a construction that would not promote that purpose or object.\(^4\) In doing so, consideration may be given to any relevant matter or document, including all indications provided by the Act or subordinate instrument.\(^5\) The plain and ordinary meaning is only to be displaced in favour of a narrower meaning if such a construction is dictated by the context and purpose of the legislation.\(^6\)

16. Some submitters have contended that it is unclear whether the requirement in Clause 4 that ‘the provision for any new streets, laneways, or public open space generally in accordance with Map 2 and Map 3 is provided’ conveys simply a requirement to demonstrate on a plan the location of the roads or public open space, in accordance with the Maps, or something more substantive, namely, that transfer of the roads or public open space to the municipal council is required.

17. The use of the words ‘provision’ and ‘provided’ within the same clause is unfortunate, and appears to have produced much of the uncertainty raised by submitters. However, despite the somewhat obtuse wording of the relevant provisions, we are of the opinion that their intended meaning is nevertheless apparent.

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\(^1\) Sections 8 and 8A of the PE Act.

\(^2\) See, for example, *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19].

\(^3\) See in this regard *Boroondara City Council v 1045 Burke Road Pty Ltd* [2015] VSCA 27 at [20], [25]-[31], [57]-[58] and [72]-[79].

\(^4\) *Interpretation of Legislation Act 1984* (Vic), s 35(a).

\(^5\) *Interpretation of Legislation Act 1984* (Vic), s 35(b).

\(^6\) *SGRC Pty Ltd v Melbourne City Council* [2014] VSC 238; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503.
18. The word ‘provision’ is not defined in the PE Act or the relevant schemes.\textsuperscript{7} The Shorter Oxford English Dictionary relevantly defines the word ‘provision’ as follows:

The action or an act of providing something; the fact or condition of being provided. Frequently in make provision – make prior arrangements or preparation (for), supply necessary resources (for).

Likewise, in the Macquarie Dictionary:

The providing or supplying of something. As of food or other necessities. ... Doing of something, the meeting of needs, the supplying of means etc. ... Something provided; a measure; other means for meeting a need.

19. In our opinion, the natural and ordinary meaning of the word ‘provision’\textsuperscript{8} as used in the relevant provisions, and especially in the context of a planning permit condition relating to roads and public open space, is that it is directed to the supply of that which has been stipulated – in this case, open space or roads in accordance with the relevant maps. That is all the more the case when one considers the relevant provisions as part of and against the background of the Schedule and draft Amendment more generally.

20. The language of the relevant provisions is thus in our view intended to be of substantive effect, requiring that, in order for a planning permit to be granted, the applicant must transfer to the relevant municipal council at no cost such part of its land as is identified in the relevant maps.

21. This interpretation is supported by the following:

(a) First, the purpose of the control. The purpose of the Schedule is ‘to implement the Fishermans Bend Vision, September 2016 and the draft Fishermans Bend Framework’ (our emphasis). To adopt a formalistic reading, to the effect that all that is required is a plan depicting a particular layout generally in accordance with the maps, would tend to defeat or undermine the underlying purpose of the relevant provisions.

(b) Secondly, the objectives of the PE Act and planning framework. The interpretation that we consider correct would be consistent with, and would be

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\textsuperscript{7} See section 3 of the PE Act and Clause 74 of the relevant schemes.

\textsuperscript{8} And the like term “provided” that also appears in Clause 4.
likely to further the objectives of, the PE Act. On that reading, the relevant provisions would also be consistent with, and likely to further the objectives of, the planning framework established by the PE Act.

(c) Thirdly, the definition of ‘new public open space’. The language of that definition – ‘land [that is] identified in Map 3 and is to be provided for public recreation ...’ – is in our view supportive of a requirement for the space in question to be in fact made available. We consider that something more than demonstrating a concept on a plan is envisaged by this definition.

(d) Fourthly, the FAR provisions. Importantly, the FAR for any site is to be calculated by dividing the gross developable area, not the net developable area, by the gross floor area. This method appears objectively intended to avoid prejudice to a land owner whose land is affected by the relevant provisions, by avoiding loss of development yield as a consequence of the requirement to cede land for an element in the proposed street network or public open space. The use of a mechanism that avoids prejudice to land owners in the application of the relevant provisions manifests an intention or premise that the relevant provisions will be of substantive effect.

(e) Fifthly, consideration of other parts of the Victorian Planning Provisions and, specifically, of the relevant schemes. The phrase ‘make provision for’ specified matters is used elsewhere within those Provisions, and in particular the relevant

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9 Section 6(1)(a) of the PE Act requires a planning scheme to seek to further the objectives of planning in Victoria in the area covered by the scheme. An interpretation that the provisions are of substantive effect would further the following objectives of the PE Act: s 4(1)(a) (provide for the fair, orderly, economic and sustainable use and development of land); s 4(1)(c) (secure a pleasant, efficient and safe working, living and recreational environment for all Victorians); s 4(1)(e) (enable the orderly provision and co-ordination of facilities for the benefit of the community); s 4(1)(f) (facilitate development in accordance with the objectives); and s 4(1)(g) (balance the present and future interests of all Victorians).

10 The following objectives of the planning framework would be furthered by the relevant provisions: the provision of sound, strategic planning and co-ordination of planning (s 4(2)(a)); enabling land use and development planning and policy to be easily integrated with environmental, social and economic policies at State and local levels (s 4(2)(c)); providing for consideration of social and economic effects when decisions are made about the use and development of land (s 4(2)(d)); and facilitating development which achieves the objectives of planning in Victoria (s 4(2)(e)). We note that s 4(2)(i) provides that one of the objectives of the planning framework is ‘to provide for compensation when land is set aside for public purposes and in other circumstances’. For the reasons set out at paragraphs 23 to 28 below, we are of the opinion that land which may be the subject of the relevant provisions, particularly those parcels of land identified as including areas of new public open space under the draft Framework, would not be considered to be ‘set aside for public purposes’, and that hence this objective is not engaged.
schemes, in a manner which seems clearly to be intended to have a substantive operation.\(^{11}\)

22. We add that, although it is linguistically possible to read the verbiage of the relevant provisions as being of different effect, i.e. as merely requiring that the applicant’s plans show roads and public space as the maps do, such an approach is a strained one, even as a matter of language, and cannot in our opinion be correct when regard is had to the considerations set out above.

**The interaction between the relevant provisions and section 98(1) of the PE Act**

23. In our opinion, neither the relevant provisions nor the identification of land in the draft Framework for the purpose of roads and public open space has the effect of reserving land for a public purpose under a planning scheme, within the meaning of section 98(1)(a) of the PE Act. The relevant provisions indicate the desired use or development of land in Fishermans Bend for a number of purposes, but do not constitute a reservation of land for a public purpose under a planning scheme as required by section 98(1)(a).\(^{12}\)

24. The relevant schemes designate land which is land “reserved for a public purpose under a planning scheme” by the application of the Public Acquisition Overlay (PAO) (Clause 45.01). The express purpose of the PAO is ‘to reserve land for a public purpose’. Clause 45.01-6 provides that land which is subject to the PAO is ‘reserved for a public purpose within the meaning of the Planning and Environment Act 1987, the Land Acquisition and Compensation Act 1986 or any other Act’. By operation of clause 45.01-6, land which is affected by the PAO is land ‘designated as being reserved for public purposes’ within the meaning of section 6(2)(c) of the PE Act. If

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\(^{11}\) See for example, schedule 1 to the Development Contributions Overlay in the Melbourne Planning Scheme (DCPO 1), which requires the imposition of a condition on any planning permit authorising subdivision or development requiring entry into a section 173 agreement that ‘makes provision for development contributions’. The references to ‘provision’ in DCPO 1 are intended to convey that the agreement will specify the mechanism and timing of the payment of development contributions, not merely acknowledge a liability.

\(^{12}\) We recognise that for the purpose of this analysis a “public purpose” is wider than the term “government purpose” (Australian Tyre Manufacturers Association Ltd v Commonwealth (1993) 176 CLR 480), and that the use of land for public open space has previously been characterised as a use for a public purpose (Whelan and Kartaway Pty Ltd v Minister for Planning and Housing (1993) 2 VR 59 at 64). The use of land for public open space or a road is likely to be regarded as a use for a “public purpose”. However, to satisfy s 98(1)(a) of the PE Act, the land must not only be identified as suitable for public purposes, it must be expressly “reserved for a public purpose under a planning scheme”.

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land is not the subject of a PAO, then as a consequence of the proper construction of section 6(2) of the PE Act and the scheme, it is not ‘reserved’ land.

25. The mere fact that a control imposes a restriction on the development potential of land for the benefit of the locality does not, in our opinion, have the effect that the land has been relevantly ‘reserved’. Nor is the land to be deemed to have been reserved or required for a public purpose. Land cannot be reserved by mere implication arising from a restriction on the private use and development of it. There is no legislative intention evident in the PE Act, nor any discernible intention in the relevant schemes, to constitute land, other than land the subject of a PAO to which Clause 45 has application, as ‘reserved land’.

26. The question of construction that then arises is whether Clause 45.01 is exclusive so far as land reserved for a public purpose is concerned. In our opinion, it is. Sections 6(2)(c), and also 6(fa) and (i), of the PE Act make clear reference to the ability on the part of a planning scheme to ‘designate’ land which is ‘reserved for a public purpose’. The provisions which are concerned with designated land being reserved for public purposes in sections 6(2)(c) and (fa) and (i) are quite specific. If land is to be ‘reserved’ in a scheme, the Act clearly envisages that it should be so designated. Clause 45 provides the statutory mechanism for reservation of land for a public purpose. There is no scope within the statutory framework of section 6(2) and the provisions of the relevant schemes for any other “reservation” of land which falls outside Clause 45, whether by reference to parts of a strategic document (such as the draft Framework) or by its incorporation.

27. We also consider that there is no basis for an argument that, in addition to land being designated as ‘reserved’ under the relevant schemes via the imposition of a PAO, land may be ‘reserved by stealth’ or ‘subterfuge’ by some other means such that it is to be treated as if ‘reserved’ land for the purposes of the PE Act. As a matter of statutory

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See Van Der Meyden v MMBW [1980] VR 255 at 262, where it was unsuccessfully argued that the inclusion of land within a “Conservation Zone” was the equivalent of reservation of the land for a public purpose under s 42(1)(c)(ii) of the Town and Country Planning Act 1961, the predecessor to s 98(1) of the PE Act.

See Equity Trustees Executors and Agency Co Ltd v MMBW [1994] 1 VR 534 at 537. It was there argued that to zone land “Special Conservation zone” constituted a “reservation by subterfuge”, with the consequence that the zoning was to be ignored for the purpose of assessing compensation. Gobbo J concluded, at 545, that the zoning of the land as Special Conservation (a zoning which applied to many
construction, reservation by ‘stealth’ or ‘subterfuge’ is not a sustainable line of argument. As the decision of the High Court in *Walker Corporation v Sydney Harbour Foreshore Authority* 15 has made clear, notions of this kind, arising from earlier times and not founded in the statutory provisions or compatible with them, are not to be entertained. The enquiry is one that turns on the provisions of the statute itself.

28. The overarching consideration thus must be the statutory language. To treat another planning control, outside Clause 45, as reserving land for a public purpose would require the Court to treat such control (in this case, the relevant provisions) as operating to reserve land even though there was no such provision. Such an interpretation would require the relevant provisions and the draft Framework reference document to be so treated in circumstances where section 6(2) of the Act gave specific authorisation for the designation of land as being reserved for a public purpose and the relevant schemes had not so designated in respect of land affected by the relevant provisions. Such an interpretation would usurp the language of the PE Act and in our opinion be unsound.

**The interaction between the relevant provisions and section 98(2) of the PE Act**

29. It is a precondition of an award of compensation under section 98(2) that the refusal by the responsible authority to grant a permit to use or develop the land in question is ‘on the ground’ that the ‘land is or will be needed for a public purpose’. In the present context, if a permit application were refused because the relevant provisions had not been complied with, this would not in our opinion engage section 98(2) of the PE Act.

30. When considering a claim under section 98(2), because there is not a reservation or a proposed reservation, it is necessary to establish financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land ‘is or will be needed for a public purpose’. Nothing less will suffice. 16 Section 98(2) looks to the reason for the refusal and the refusal must be on the specific ground provided by section 98(2). The

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refusal is not merely the ‘trigger’ for compensation but is itself the event that frames the substantive right.\textsuperscript{17} A refusal on the basis that land ‘may be needed’ for a public purpose does not satisfy the requirements of section 98(2).\textsuperscript{18}

31. In our opinion, it would not be correct to characterise the operation of the relevant provisions, read in context, as having the effect that a failure to satisfy them meant that a resultant permit refusal was because the land is or will be required for a public purpose. Rather, it would be because the application was not one that could be said to have been generally in accordance with Maps 2 and 3 for the layout of streets and open space. It would be a failure to satisfy that stipulated requirement for the grant of a permit that would properly be characterised as the ground of refusal. The position is to be distinguished from a refusal where, and because, land has been identified as needed, or likely to be needed, for a public purpose.

32. We add that it would be possible for a permit to be granted subject to a condition requiring the application to be amended to ensure compliance with the layout specified in Maps 2 and 3. In this scenario too, section 98(2) would not be activated.\textsuperscript{19}

33. Finally, even if, contrary to our view, a permit refusal were to be characterised as on the ground that the land was ‘needed for a public purpose’, the owner of the land, in order to be able to claim under s 98(2), would still need to establish that financial loss was suffered as the ‘natural, direct and reasonable’ consequence of the refusal.\textsuperscript{20} However, the imposition of development controls on land is commonplace in the Victorian planning regime without any compensation to landowners.\textsuperscript{21} If the specified FAR could be achieved on the relevant land by adopting a different design response to the constraints, including those constraints introduced by the relevant provisions, it

\textsuperscript{17} Fitzwood v Whittlesea City Council (1998) 98 LGERA 28 at 50-51.
\textsuperscript{18} Skerdero Pty Ltd v Cardinia Shire Council [2014] VCAT 1334 at [72].
\textsuperscript{19} See also Minister for Planning v SB Partitions [2009] VSC 333.
\textsuperscript{20} As to what is required to establish that loss is the ‘direct, natural and reasonable consequence’ of the reservation or permit refusal, see Studley Developments Pty Ltd v Department of Planning and Urban Growth [1994] 1 VR 643; Hahwood Corporation v Roads Corporation [1998] 2 VR 439 and Anaed Pty Ltd v Roads Corporation (1998) 1 VPR 336.
\textsuperscript{21} For example, heritage overlays or a design and development overlay specifying setbacks and street wall heights and maximum building heights might place significant constraints on the ultimate form of development that might be achieved by a land owner in respect of the land. All of these controls are imposed without compensation being paid to the owner.
may be that no financial loss of the stipulated character could be said to be suffered.\textsuperscript{22} Of course, this would ultimately depend upon the particular facts of the matter under consideration. However, stated at a general level, there might be neither loss nor inequity in requiring the nominated land to be provided as public open space. Indeed, it is even possible that the ceding of land pursuant to the FAR might result in an uplift in the value of the land.\textsuperscript{23}

The relevant provisions do not effect an unlawful acquisition of property

34. A number of submitters have alleged that the relevant provisions have the effect of impermissibly acquiring property without compensation. In our opinion these submissions are premised on the misapprehension that the ability to exploit the potential for development of land amounts to a property right. In Victoria, land may only be developed in accordance with the requirements of relevant legislation, particularly the PE Act and the relevant subordinate legislation, the planning scheme. Planning legislation authorises interference with the proprietary rights of owners, so that the mere fact that a condition of a permit involves an interference with property rights is not sufficient of itself to show that a condition is unlawful.\textsuperscript{24}

35. Properly characterised, the relevant provisions establish requirements that a permit applicant must meet if it wishes to obtain a permit to subdivide or to develop land affected by the relevant provisions. The relevant provisions do not seize land, but instead facilitate land being ceded to the municipal council for the purpose of public open space or roads as part of a \textit{quid pro quo} pursuant to which the permit applicant will obtain the benefits which arise from the grant of a permit.

36. Such a provision does not effect an unlawful acquisition of property.\textsuperscript{25} Likewise, a condition which requires a land owner to cede part of a parcel of land as a \textit{quid pro...

\textsuperscript{22} An equivalent point applies in relation to s 98(1), discussed above.

\textsuperscript{23} The loss that might arise is any additional cost of delivery by way of the cost of construction of a taller building. However, the enhanced value realised from the fact that the development will be adjacent to new public open space or would enjoy a primary outlook to a new street or laneway might outweigh any additional construction costs of achieving a taller building.

\textsuperscript{24} 271 William Street v City of Melbourne [1975] VR 156 at 161-163.

\textsuperscript{25} Lloyd v Robinson (1962) 107 CLR 142, where Kitto, Menzies, and Owen JJ (speaking as a unanimous High Court) considered an appeal that raised the lawfulness of conditions requiring land for open space and also for roads. At 152-155 the Court concluded that the conditions were within power and within the contemplation of the relevant legislation and did not amount to confiscation of private property.
for permission to develop that parcel should not be considered to be an exercise of power to achieve extraneous ends merely because the development right was obtained at what the permit applicant regarded as too high a cost.\textsuperscript{26}

37. The relevant provisions require owners of land identified in the draft Framework for roads or public open space to cede the identified parts of their land in return for obtaining the right to develop it, including building to significant heights and undertaking residential, retail and commercial development. In our view, the requirements specified in the relevant provisions and the quid pro quo are plainly sufficiently connected with the provisions and objectives of the PE Act and relevant schemes.\textsuperscript{27} In our opinion, the use of the FAR mechanism to secure land required for public open space and roads is not incompatible with, or invalid under, the PE Act.

**Infrastructure precinct plans and additional decision guideline**

38. We consider that there is no statutory of other impediment to variation of Clauses 3 and 4 of the Schedule such that they required land use, subdivisions and buildings and works to be generally in accordance with the infrastructure precinct plans. Whether such an amendment should be contemplated requires the weighing of the benefits of the inclusion of the infrastructure precinct plans against potential disadvantages.

39. The inclusion of the plans might provide the benefit of added transparency and also give greater statutory weight to the layout depicted in them than if they were confined to the draft Framework. Applications would be required to demonstrate that they were in ‘general accordance’ with what is depicted in any plan included as part of the relevant provisions.\textsuperscript{28} We also note that the infrastructure precinct plans identify the

\textsuperscript{26} See *Western Australian Planning Commission v Tenwood Holdings Pty Ltd* (2004) 221 CLR 30 at 51 and 115-117. In *Tenwood*, a condition that a foreshore reserve be conveyed to the Crown free of cost and without compensation was held lawful where the planning legislation had taken away the right to subdivide without approval and no compensation was given for the loss of that right. The ‘price’ of obtaining the valuable permission to subdivide was the ceding of the foreshore reserve.

\textsuperscript{27} As to the objectives of the PE Act, the relevant provisions find support from, or are sufficiently connected with, the objectives set out in ss 4(1)(a), (c), (e), (f) and (g). The relevant provisions are also referable to objectives of the planning framework established by the PE Act, such as those set out in ss 4(2)(a), (c), and (d). As to the provisions of the relevant schemes, reference is made in particular to Clauses 11 (Settlement) and 19 (Infrastructure).

\textsuperscript{28} It is a question of fact whether a proposed development is in ‘general accordance’ with plans. The two need not be identical. See *Canet v Brimbank CC* (2003) 13 VPR 58; *Casey Development Pty Ltd v Casey CC* [2009] VCAT 2489; *Beachley Street Pty Ltd v Maribyrnong CC* [2013] VCAT 766 and *Fibocot Pty Ltd v Whittlesea CC* [2014] VCAT 600.
areas of investigation for community hubs and schools, which might be important in the consideration of any Floor Area Uplift under Clause 4.0 of the Schedule.

40. However, there might also be disadvantages to the inclusion of the infrastructure precinct plans; for example if the plans were inconsistent with other provisions or contained too much, or too little, detail. Difficulty might also be encountered if the plans were likely to require frequent amendment, as a planning scheme amendment would be needed if they were included in the Schedule.

41. Ultimately, it will be a matter for the planning authority, presumably informed by the recommendations of the panel, how to strike the balance between too much and too little detail. If the infrastructure precinct plans are to be included in the Schedule, it will be important to ensure that there is consistency between what is depicted in the draft Framework and any maps that form part of the Schedule. If there are differences between the maps in the draft Framework and those to be included in the Schedule, the difference should be the product of a considered strategic decision, as opposed to inadvertence.

42. Our preference would be for the existing Maps 2 and 3 to be removed from the Schedule and replaced with the infrastructure precinct plans. The inclusion of those plans would accord greater weight to the layout provided in them whilst retaining a degree of flexibility insofar as a permit would be required to be ‘generally in accordance’ with the identified plans. If the plans are to be included in the relevant provisions, it would be appropriate to include an additional decision guideline requiring the responsible authority to consider whether the proposal in question will produce acceptable outcomes in terms of them. We add that when precinct plans, which we understand are under preparation, have been finalised for each precinct, it may be appropriate to insert the maps from those precinct plans into the relevant provisions in substitution for the infrastructure precinct plans.

Potential refinements to the wording of the relevant provisions

43. In our opinion, the drafting of the relevant provisions could certainly be improved, and would benefit from considered revision. We have not been briefed to redraft the relevant provisions, but make the following general recommendations to assist in any revision of the relevant provisions that may take place.
44. Consideration should be given to removing the words ‘provided’ and ‘provision’ as currently used in reference to open space and roads, and replacing them with clear and direct language that not only does away with the current duplication of terminology in Clause 4 but also removes the ambiguity alleged by submitters as to the effect of the relevant provisions and better conveys their intent. One possibility that might be considered is a prescription for the inclusion of a condition requiring a section 173 agreement between the responsible authority, the permit applicant and the municipal council (if not the responsible authority). The terms of the section 173 agreement would be required to specify that land identified on the maps included within the relevant provisions for the purpose of public open space and roads will be transferred to the municipal council at no cost to the municipal council, and the timing of the transfer.

Dated: 20 March 2018

D. J. BATT
Ninian Stephen Chambers

M. FOLEY
Castan Chambers

In the case of both David Batt and Marita Foley, liability limited by a scheme approved under Professional Standards Legislation