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

PART B SUBMISSIONS

THE OPPORTUNITY AND THE CHALLENGE

1. Fishermans Bend represents a once in a century opportunity to undergird Melbourne's success as a city, reinforcing a foundation for its prosperity, liveability and sustainability into the 22nd Century and creating a true legacy for future generations.

2. The challenges involved in transforming Fishermans Bend and realising its extraordinary potential are generally acknowledged and include:

   (a) limited infrastructure, including public transport, community facilities and public open space

   (b) the extent of private ownership

   (c) premature rezoning in 2012

   (d) the dominant pattern of current development intentions, including very high densities, uniform tall tower typology, limited housing diversity, and absence of significant employment generating floorspace or affordable housing

   (e) site contamination from historic industrial activity.

3. Working within these challenges to deliver a world class urban renewal area will require novel approaches to infrastructure delivery and strong built form guidance to achieve distinctive, liveable neighbourhoods.

4. Not all the challenges are able to be solved by the draft Framework and the proposed planning controls ("Amendment'), but together they provide an important platform from which to build this integral new limb of an expanded central city.

5. The solutions presented in the draft Framework and the Amendment are underpinned by a wealth of independent, evidence based research and analysis which demonstrates how the principles of sustainability, liveability, connectivity, diversity and innovation articulated by the vision for Fishermans Bend are to be delivered by the proposed planning controls.

FISHERMANS BEND GOVERNANCE AND INFRASTRUCTURE FUNDING

6. The successful delivery of Fishermans Bend will require more than just a planning scheme amendment. A whole of government response will be required.

7. Two issues that extend beyond the scope of the Amendment *per se* are:

   (a) the future governance arrangements for Fishermans Bend; and

   (b) the totality of funding arrangements for the provision of infrastructure and transport infrastructure in particular.

8. As drafted, the Amendment does not propose any alterations to the existing roles of the Minister, Melbourne City Council or Port Phillip City Council ('the Councils').

9. The Minister acknowledges the submissions from various parties, including Melbourne City Council, which have recommended the creation of a statutory authority with specific responsibility for the delivery of Fishermans Bend.

10. While the Minister does not necessarily oppose this course, it is clear that it would require careful consideration, particularly regarding the structure and funding of such a body and potentially primary legislation to establish any such authority. In this regard, the Minister looks forward to hearing the submissions of the parties and receiving the Panel's recommendations.

11. On the issue of infrastructure financing, the Minister makes the following observations:

(a) The delivery of proposed transport infrastructure, including the proposed tram routes, will be a State government matter. Financing will occur through State government budgeting processes.

(b) The Minister acknowledges that evidence and submissions to the effect that early delivery of transport infrastructure will be a key driver of development in Fishermans Bend.

(c) Both the tram extension and future stages of the Melbourne Metro were considered as part of Infrastructure Victoria's *30 Year Strategy*, released in December 2016, which recommended that:

(i) The Fishermans Bend tram extension should be delivered in the next 5 – 10 years; and

(ii) Investigation for any future stage of Melbourne Metro should begin in the next 5 years with delivery occurring in the next 15 – 30 years.

(d) Both of these recommendations are supported by the State government, noting that the delivery timeframes are beyond the budget window and so implementation within a particular period cannot be guaranteed.[1]

(e) It is anticipated that new streets, laneways and open space required for the anticipated population will be delivered through the imposition of mandatory conditions on development permits which will require them to be provided in accordance with the relevant plan.[2] As such, it will be unnecessary to rely on the Floor Area Uplift scheme or other funding mechanisms to meet this minimum provision.

(f) Community infrastructure will be funded through existing development contributions currently collected and a future suitable

---

1 State of Victoria, *Victorian Infrastructure Plan* (2017), Chapter 3, page 139.

2 The exception to this proposition is instances where whole sites are proposed to be used for public open space in which case, it is intended that they will be acquired. See Taskforce Statement, Fishermans Bend Options for the Funding of Open Space, 13 March 2018.

mechanism, yet to be finalised, but the FAU scheme provides a valuable opportunity to see early delivery of much needed facilities.

12. Notably, the draft Framework identifies key projects for infrastructure delivery, including major parks, community infrastructure and public transport (tram and potential rail)[3] and has the support of Government.

THE POPULATION TARGET

13. At the heart of the draft Framework and the Amendment is the population target of 80,000 residents. The target of 80,000 has informed the Amendment in important ways:

    (a) It underpins the Floor Area Ratio ('FAR') calculated for the core and non-core areas of each precinct;

    (b) It provides the basis for forecasting demand for open space, schools, community infrastructure and public transport;[4]

    (c) It is translated into the dwelling density policy in clause 22.XX.[5]

14. The appropriateness of the target of 80,000 has been the subject of a number of submissions.

15. Some of the anxiety around the 80,000 resident figure appears to stem from the use of the word 'target'. To the extent that 'target' has been interpreted as the ultimate, desired population outcome in the nature of a cap on total development, it may be that the term has created confusion. As Ms Hodyl explains in her evidence, the figure of 80,000 as the target population for Fishermans Bend has been based on a number of matters, including:

    (a) likely overall population growth;

    (b) the ability of the market to deliver dwellings;

---

3 Draft Framework, pages 74-79.

4 See for example *Community Infrastructure Plan*, pp. 9 – 10, 18 and 21 – 23; *Public Space Strategy*, pp. 14, 29, 34, 52 and 54; and *Integrated Transport Strategy,* pp. 5 and 7.

5 Document 66d, LPP-3, p14 Table 2.

(c) consistency with the vision for Fishermans Bend;

(d) the ability of government to supply infrastructure; and

(e) the ability to sustain an appropriate level of amenity; and

(f) a comparison with densities in other parts of Melbourne and in other cities.[6]

16. As such, the supposed 'target' is in many ways an informed expectation rather than a specific figure which the government is hoping to achieve. It is certainly not the case that, if, by 2050, the 80,000 figure is either not attained or is exceeded, then Fishermans Bend will necessarily have failed to achieve its goals.

17. The adoption of a population target, express or implied, is a necessary tool for the orderly and effective planning of an area. The absence of defined expectations about the likely or desirable future population of an area undermines the ability to make non-arbitrary decisions about the level of infrastructure that is required to support the population.

18. Recent planning documents for urban renewal areas have made very clear their expectations about the overall population to be delivered. For example,

(a) The Southbank Structure Plan 2010 anticipated a population of 74,000 by 2040;[7]

(b) The Precinct Structure Plan for Arden-Macaulay contemplated a figure of 20,500 by 2040;[8]

(c) The Structure Plan for City North was premised on a population of 28,400 by 2040;[9]

---

6 Hodyl, urban design evidence, pages 25-29; Urban Design Strategy, Figure 9 and Appendix B.

7 City of Melbourne, *Southbank Structure Plan 2010*, p. 1

8 City of Melbourne, *Arden-Macaulay Precinct Structure Plan* (2012), p. 5

9 City of Melbourne, *City North Structure Plan* (2012), p. 5.

(d) The Comprehensive Development Plan (2017) for Precinct 15 in Hobson's Bay was premised on a final population of approximately 7,000.[10]

19. One of the criticisms made of the 80,000 figure is that it is too low given the level of population growth currently being experienced in Melbourne. It is noted that none of these submissions appears to suggest an alternative figure, but all seem to imply that development levels in Fishermans Bend should be left entirely unregulated. It is questionable whether such an approach could be described as 'planning', let alone 'orderly planning'.

20. A common refrain in submissions is the claim that 80,000 is plainly too little because Melbourne is expected to accommodate 100,000 additional residents per annum until 2050; the claim is glib and misleading. At 80,000 residents, Fishermans Bend will accommodate 2.3 % of Melbourne's forecast growth of 3.4 million to 2051[11] and 17% of the forecast growth for the inner metro area.[12] Representing 0.1% of Melbourne's urban land area and 6.5% of the inner metro land area, it can be seen that 80,000 is an elevated share of housing provision.[13] Bearing in mind the totality of development potential across Melbourne and Plan Melbourne's aspirational scenario in which the inner metro area delivers 15% of all new dwelling additions,[14] a contribution of almost one fifth of the inner metro allocation represents a significant component of Melbourne's housing needs over the next 35 years.

21. The establishment of a population target is also useful in establishing a clear and transparent expectation around the level of development that is considered appropriate in Fishermans Bend and its constituent parts over the relevant timeframe. This is desirable in the context of sending signals to the market about what developers can reasonably hope to achieve on a

---

[10] Victorian Planning Authority, *Altona North Comprehensive Development Plan* (2017), p. 6.

[11] Plan Melbourne, figure 1, page 7.

[12] Plan Melbourne, figure 7, page 21.

[13] Areas excluding main roads, farmland and conservation areas.

[14] Plan Melbourne, figure 7, page 21, scenario 2.

particular site and hence what developers should reasonably expect to pay to buy that site. One of the consequences of the rezoning of the land without adequate planning or accompanying density or built form controls was the creation of a presumption amongst landowners that development potential in Fishermans Bend is unconstrained. This presumption is reflected in submissions from landowners asserting that the Amendment introduces "unreasonable" constraints on their development aspirations.

22. It is worth noting that the figure of 80,000 residents has long been the nominated target for Fishermans Bend[15] and is presently referenced in policy at clauses 22.27 and 22.15 of the Melbourne and Port Phillip Planning Schemes.

THE PLANNING CONTROLS

23. Broadly speaking, the controls applied by the Amendment represent an adaptation and refinement of the kind of controls developed and adopted in other urban renewal and repair situations, most notably in Amendment C270 to the Melbourne Planning Scheme.

24. In this regard, it is unsurprising that many of the issues that were agitated in relation to C270 and rejected by that Panel are sought to be reanimated before the Review Panel in the hope of obtaining a different outcome. It is the Minister's respectful submission that, in many respects, the C270 Panel was correct. In particular, in relation to the proposed built form controls which were the subject of extensive consideration in C270 and endorsed by the Panel, the Minister submits that the Review Panel should not lightly recommend departure from the C270 Panel findings.

The use of the Floor Area Ratio control

25. The Minister considers that the use of Floor Area Ratios as a form of density control is appropriate and will serve a number of useful functions:

---

[15] Draft Vision, pages 4, 7, 16, 23; Strategic Framework Plan 2014, pages 7-9, 13, 28; Vision 2016, pages 3, 6, 8 and 15.

(a) First, it assists in ensuring the development in Fishermans Bend will be delivered consistent with infrastructure capacity;

(b) Second, it sends a clear signal to the market about what reasonable development expectations should be in Fishermans Bend;

(c) Third, it works in tandem with the proposed built form controls to deliver a series of distinct neighbourhoods;

(d) Fourth, it provides a mechanism by which to ensure the provision of open space, new streets and laneways within an equitable framework of development yield;

(e) Finally, it establishes a threshold density above which any additional floor space triggers a contribution towards nominated public benefits.

26. Given the historical use of plot ratios in the CBD and the reinstatement of FARs as part of C270, it is submitted that the suitability of FAR controls as a matter of principle is not a matter that should occupy the Panel. As the Panel noted in relation to Amendment C270:

> *The matter of the workability of the FAR and FAU Scheme was the subject of many in depth submissions throughout the Hearing.*

27. Notwithstanding this, the Panel concluded that:

> *… the majority of elements in the proposed package of built form controls will contribute to an enhanced public realm, including the FAR requirements and street wall, podium, daylight, overshadowing and setback requirements. These items were vigorously tested throughout the Hearing. … . The Panel supports the FAR controls in the [General Development Area] and [Special Character Areas].*[16]

28. It is submitted that FAR controls are accepted as a workable method of regulating development density.

[16] C270 panel report, page ii.

29. As such, the Minister submits that the relevant inquiry is whether, in the context of the Fishermans Bend area and the individual precincts proposed, the FARs are set at an appropriate level to deliver the outcomes sought by the vision and the draft Framework.

30. The Minister supports the ratios that have been adopted in the Amendment. As explained in the evidence of Ms Hodyl, the FARs in the Amendment are derived from the overall population and employment targets for the four Fishermans Bend CCZ precincts and the gross floor area required to accommodate the residents and workers predicted.[17] The relevant calculations are fully and transparently articulated in the Urban Design Strategy exhibited with the Amendment.[18]

31. In this context, the assertion that the FAR ratios have been deliberately set too low so as to require the use of the Floor Area Uplift scheme to deliver reasonable development outcomes can be seen to be false.

32. To the extent it is suggested that the FAR should be set higher, due to Fishermans Bend's proximity to the CBD, this is not supported. The vision for Fishermans Bend has never been that it would be a replica of the CBD.[19] As such, adoption of central city FARs would be inconsistent with what the Amendment seeks to achieve.

33. In any event, as Ms Hodyl's work shows, the FAR for the four precincts is already comparable to that found in other urban renewal areas in other cities in Australia.[20]

34. It is also worth noting that, as the C270 Panel observed, the 18:1 figure adopted for the CBD is very generous and significantly higher than that used in other major cities around the world.[21] Indeed, the C270 Panel

---

[17] Hodyl Witness Statement, [112].

[18] Urban Design Strategy, chapter 4 and Appendix A.

[19] In the same way that City North and the Melbourne Arts Precinct are not intended to replicate the form and intensity of the Hoddle Grid notwithstanding their proximity to the CBD and their Capital City zoning. See CCZ, Schedules 5 and 7.

[20] Urban Design Strategy, page 83.

[21] C270 panel report, pages iii, 34-35 and 54.

recommended that, if the FAR for the CBD were to be revised, it should only be downwards.[22]

The provision of open space, new streets and laneways

35. The CCZ Schedule includes:

(a) As a permit requirement in relation to subdivision, 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;

(b) As a permit requirement in relation to buildings and works, that a permit must not be granted to construct a building or construct or carry out works where the provision for any new streets, laneways or public open space generally in accordance with Map 3 and Map 3 is not provided;

(c) Map 2 which shows a street (but not a laneway) layout;

(d) Map 3 which shows an open space layout.

36. It is intended that the provisions operate to the following effect:

(a) All plans provide a spatial depiction of open space and new streets;

(b) All new streets and laneways within development sites are constructed by the developer, with streets and lanes subsequently to vest in the relevant authority;[23]

(c) Remediated and improved public open space is provided by the developer as part of the development, with the cost of remediation and improvement refunded from development contributions,[24] but the land transferred at no cost to the relevant authority.

[22] Ibid.

[23] Para 201, Part A submission is wrong in this respect.

[24] See Taskforce Statement, Fishermans Bend Options for the Funding of Open Space, 13 March 2018.

37. The effect of these provisions is to govern development of land by prohibiting development which does not make provision for the designated public open space and new streets.

38. Many submitters have complained that the requirement to provide for open space, new streets and laneways amounts to an unlawful acquisition of land and an unacceptable departure from principles of need, nexus, equity and accountability.

39. It is important to note that whilst the Review Panel will understandably wish to be generally satisfied as to the appropriateness of the proposed arrangement for provision of public open space and new streets and laneways, it is not the role of the Review Panel to adjudicate the validity of this arrangement as though it were a court of law. This proposition was generally accepted by the C270 panel in relation to the validity of the FAU scheme.[25]

40. The suggestion that the FAR method for provision of open space and new streets and lanes amounts to acquisition of property for a public purpose is premised on the misconception that the unapproved potential for development of land amounts to a property right. The Victorian planning system (as with most planning systems in the developed world) is premised on the public law curtailment of property rights for the common good. Land in Victoria can only be developed in accordance with relevant legislation, including the *Planning and Environment Act 1987* ('Act') and planning schemes prepared under that Act. A planning scheme may prohibit certain uses or developments of land, or impose a requirement to obtain planning permission for the use or development of land. The discretion to grant a permit does not mean the grant of a permit is assured, and refusal of a permit does not result in compensation, except in specific circumstances addressed further below.

41. In judging the validity and appropriateness of including these requirements for provision of open space and new streets and lanes in the

[25] C270 panel, pages 64 and 69.

planning scheme, the relevant question is whether a prohibition on development and an associated requirement to make provision for open space and streets and laneways are for a reasonable planning purpose.

42. Given the breadth of the purpose of the Act[26] and the objectives of planning and the planning framework, [27] the power to regulate or prohibit development of any land, [28] and in light of existing policy in planning schemes in relation to open space[29] and roads,[30] it cannot be asserted that the planning scheme cannot prohibit or regulate development by reference to the provision of open space or roads.

43. Common circumstances where the planning scheme prohibits or regulates development by reference to the provision of open space or infrastructure include:

    (a) Clause 56 and the operation of Precinct Structure Plans in growth areas in relation to local roads and streets in new subdivisions.[31]

    (b) Transfer of land required for road widening in a growth area as a condition of permit.[32]

    (c) Transfer of 30 acres of open space reserves to Council as a condition of permit.[33]

    (d) Provision of a splay on a CBD corner to assist in the movement of pedestrians.[34]

---

26 Section 1, *Planning and Environment Act 1987*.

27 Sections 4(1) and 4(2), *Planning and Environment Act 1987*.

28 Section 6(2)(b), *Planning and Environment Act 1987*.

29 See for example, clause 11.04. It has been held repeatedly in planning cases that the requirement for public open space serves a planning purpose: *Maroondah CC v Fletcher* [2009] VSCA 250 at [215].

30 See for example, clauses 18 and 56.

31 Mr Shipp makes this observation in his statement at [120]. In growth area subdivisions, roads internal to a site would ordinarily be provided to Council and in any case are likely be justified as a necessary consequence of a specific development.

32 *Tarneit Projects Pty Ltd v Wyndham CC* [2017] VCAT 2168.

33 *Lloyd v Robinson* (1962) 107 CLR 142

34 *271 William Street v City of Melbourne* [1975] VR 156

(e) Provision of a public pedestrian accessway through a two lot subdivision.[35]

(f) Policy that all development is setback a minimum of 30 metres or greater from the banks of the Yarra River;[36]

(g) Footpath widening guidelines in Chapel Street;[37]

(h) The requirement for a 3m landscaped frontages as open space in St Kilda North DDO.[38]

44. The Review Panel can be assured that the requirement to provide the land is not compulsory acquisition by stealth. It is well established that the regulation of use and development of land pursuant to planning schemes is not an acquisition of property.[39] In *Lloyd v Robinson*, the High Court considered the lawfulness of a condition on a permit for subdivision which required the developer to *inter alia* transfer 30 acres of open space reserves to the Crown free of cost and provide a strip of land for road widening and construct a service road. The developer argued that the transfer of land to the Crown free of cost was outside the contemplation of the *Town Planning and Development Act 1928-1959* (WA) because in the absence of any provision for compensation the WA Act should not be construed as intending to authorise what would amount to confiscation of private property. In a much cited passage, the High Court held:

> *…If [this contention] were correct the Board could never give an approval of a subdivision conditionally upon the applicant's giving up land for any purpose, for roads, for public recreational areas, for foreshore reservation purposes, or for anything else, however relevant the condition might be to the observance of proper standards in local*

---

35 *Land Use Town Planning Services Pty Ltd v Knox* [2010] VCAT 848

36 Clause 13,05-2.

37 Clause ACZ Schedule 1, clause 4.

38 DDO26, clause 2.

39 *Lloyd v Robinson* (1962) 107 CLR 142 followed in *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2004] HCA 63 at [45], [51], [116-117]; and cited with approval in *Maroondah CC v Fletcher* [2009] VSCA 250 at [96] and [229].

development. Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enables landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion: Swan Hill Corporation v Bradbury (1937) 56 CLR 746 at pp 757, 758; Water Conservation and Irrigation Commission (NSW) v Browning (1947) 492. If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to say that there has been a confiscation of the second. For the giving up of the second a quid pro quo is received, namely the restored right to subdivide the first. It may be that the quid pro quo is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room for reading the Act down in some fashion by appealing to a principle of construction that has to do with confiscation. If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view of achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too at the price of complying with the conditions.

> *… There is here no expropriation for the benefit of the Crown in any real sense of the expression. …*

45. In the Victorian context, *271 William Street v City of Melbourne* [1975] VR 156 also dealt with a submission that a condition requiring a corner splay to assist in the movement of pedestrians which was not necessary as a direct result of development was an acquisition of property. Harris J said:

> *…it is well established that legislation such as the Town and Country Planning Act 1961 does authorize interference with the proprietary rights of owners, so that the mere fact that the condition of the permit involves an interference with the appellant's proprietary rights is not sufficient of itself to show that the condition is ultra vires.*
>
> *Thus, in Hall and Co. Ltd. v Shoreham-by-Sea Urban District Council, supra, at [WLR] pp. 247, 248) Willmer, LJ said of the English legislation: "The whole scheme and purpose of the Town and Country Planning Acts is to limit the exercise of an owner's property rights. The statute in question here does to my mind clearly and unambiguously authorize the imposition of conditions which will necessarily interfere with an owner's rights of property."*
>
> *Again, in New South Wales, the Court of Appeal in that State spoke to the same effect in North Sydney Municipal Council v Allen Commercial Constructions Pty. Ltd., supra, at p. 6 where, quoting an observation of Sugerman, J in an earlier case, the Court said that the legislation which empowered the making of town planning schemes was: "legislation which on every hand manifested the plainest intention to interfere with the common law right of landowners to do as they will with their own". (See also Kingston-upon-Thames Royal London Borough Council v Secretary of State for the Environment, [1974] 1 All ER 193; [1973] 1 WLR 1549.)*

> *Both these observations are applicable to the Victorian Town and Country Planning Act 1961.*

46. In commenting on the scope of the *Town and Country Planning Act 1961*, Harris J said:

> *Restrictions and regulations which the planning scheme may contain, while they must be applied to particular properties within the specified areas, do not necessarily have to be related solely to the development or use of such particular properties. In my opinion, CL4 enables restrictions and regulations to be included in a planning scheme which are designed to implement some particular planning objective for the whole of the area.*[40]

47. Accordingly, in that case, the Council was not restricted to making provision for splay corners and similar forms of setback at intersections "only in circumstances where such provision may be considered to be called for by reason of circumstances connected with the use to which it is proposed that a particular site will be put, such as the creation of additional pedestrian traffic through the use of a building on the site for offices."

48. It is the Minister's position that the requirement to provide the public open space and new streets and laneways does not give rise to a compensation claim pursuant to section 98. Section 98(1) allows a claim for compensation where land is reserved for a public purpose under a planning scheme and loss is suffered. The Public Acquisition Overlay in the Victorian Planning Provisions provides for the identification of land which has been reserved for a public purpose. No Public Acquisition Overlay, or reservation pursuant to other legislation is proposed as part of the Amendment.

49. In relation to s 98(2), compensation rights are triggered by a refusal of a permit on the grounds that land is needed for a public purpose. In this case, if a permit application was submitted which was inconsistent with Maps 2

---

[40] *271 William Street v City of Melbourne* [1975] VR 156 at 161-163.

and 3 for the layout of streets, laneways and open space, it might be refused because the development was not generally in accordance with the relevant maps or it might be granted subject to conditions requiring the development to be amended to be compliant with the relevant maps.

50. Even if the requirement to provide the land were characterised as a "reservation" or as "needed for a public purpose" (which is submitted is not the case) such as to trigger a compensation claim pursuant to section 98, in the Minister's submission there is no financial loss suffered as a consequence of the provision of the street or open space because of the independent constraint on development imposed by way of the mandatory FAR. In circumstances where the mandatory FAR can be achieved on all sites where open space is to be provided, as has been demonstrated by Ms Hodyl's modelling, there is neither loss nor inequity in requiring the nominated land to be provided as public open space, and indeed may result in an uplift.[41]

51. In any case, affected landowners who are aggrieved by the proposed provision of open space and new streets and lanes have the opportunity to test the above propositions by seeking to trigger the operation of section 98 and pursuing a claim for compensation under Part 5 of the Act.

52. Although many submitters assert that the proposed approach to public open space provision does not meet tests of need, nexus, equity or accountability,[42] no cases establish these criteria as the basis for validity of a planning scheme control as opposed to the validity of a condition on a planning permit.[43]

53. To the extent that these considerations are relevant to the appropriateness of the proposed controls in the CCZ, the Minister submits as follows:

---

[41] The only potential loss which might arise is any additional cost of delivery by way of the cost of construction of a taller building. On the other hand, the enhanced value of adjacency to new public open space or primary outlook to a new street or lane may outweigh any additional construction of a taller building.

[42] See also for example, the evidence of Mr Shipp.

[43] Cf *Eddie Barron Constructions Pty Ltd v Pakenham SC* (1990) 6 AATR 10.

(a) There is no debate that development in Fishermans Bend needs to be supported by additional public open space. The quantum and distribution of this space is dealt with in the Public Space Strategy and in the evidence of Ms Thompson who identifies the need for more, not less, open space. The need for new streets and lanes is fundamental to both identified urban design and sustainable transport objectives, found in the draft Framework and Amendment, supported by the Urban Design Strategy and the Integrated Transport Plan.

(b) Because the open space and the street are to be provided on the development site (as opposed to adjacent or distant land), there is a nexus between the requirement and the proposal.

(c) Because all sites are equally subject to the FAR regime for their precinct, irrespective of their area, configuration, orientation or interface conditions, and hence share a uniform formula for development yield, equity between landowners is preserved, even where some sites provide some land for new streets, lanes or open space. This proposition is conveniently illustrated in the Urban Design Strategy.[44]

(d) Insofar as the criterion for accountability is directed to ensuring that any contribution is expended or delivered for the purpose for which it is received, this consideration will always be satisfied because the open space, street or lane will be provided as part of the development, rather than delayed until sufficient funds are collected in the future pursuant to other funding mechanisms.

54. The Minister accepts that this approach is a new one but novel approaches will be necessary in the challenging setting of Fishermans Bend where planners are retrofitting infrastructure provision after land has already been rezoned.

---

[44] Urban Design Strategy, section 4.2, pages 80-81.

The FAU uplift scheme

55. The FAU scheme operates through the prohibition in the CCZ on exceeding the mandatory FAR unless a public benefit is provided and secured by way of s 173 agreement.[45] Accordingly, the provision of a public benefit agreed by a responsible authority is properly characterised as a condition precedent to exceeding the mandatory FAR.

56. The operation of the FAU is proposed to be informed by the document titled *How to Calculate Floor Area Uplifts and Public Benefits in Fishermans Bend* ('the Guidelines') exhibited with the Amendment. Specifically, the potential public benefits are set out in the closed list in the exhibited Guidelines, in order to provide certainty and associated transparency. This contrasts with the C270 FAU scheme which provides for an open list of potential benefits which allows for negotiation but reduced transparency.

57. The lawfulness and appropriateness of the FAU scheme was debated before the C270 panel and the Minister acknowledges the panel's recommendation that the FAU scheme not be pursued and its findings that the FAU scheme failed to clearly apply the principles of equality, consistency, accountability and transparency to the securing of benefits; that its implementation was vague and may be open to misinterpretation; that the strategic justification for the scope of public benefits was absent; and that there were too many opportunities for inconsistent outcomes in the 'negotiation' of agreements for public benefits.[46] The Minister also notes however the acceptance by the C270 panel that the FAU scheme, particularly in relation to the contribution of public benefits was a worthy principle.[47]

58. Two themes emerge in submissions about the FAU scheme:

    (a) First, that the C270 panel's observations about the inappropriateness of the FAU scheme stand;

---

[45] Document 66e, CCZ4, p3 and p6.

[46] C270 panel report, page 69.

[47] C270 panel report, page 68.

(b) Second, that the FAU will allow additional population in terms of residents and workers which has not been catered for in terms of demands on basic infrastructure.

59. In relation to the first of these matters, the Minister maintains that the principles of equity, transparency and accountability are upheld by the FAU scheme; that the Act expressly empowers a planning scheme to provide that any development of land is conditional on an agreement being entered into with the responsible authority; and that the provision of works, services and facilities by way of a voluntary section 173 agreement and as required by the planning scheme is explicitly provided for by the Act.

60. The section 173 agreement is properly characterised as voluntary because, unless it is entered into, development is capped at the nominated FAR. The permit applicant must therefore elect to enter into a section 173 agreement in order for a greater FAR to be allowable. The condition requiring the section 173 agreement is not severable from the permit, because without it, the nominated cap on FAR would apply.

61. Further, the Minister notes that the FAU scheme proposed in this Amendment has two material differences from that considered in C270:

(a) Detailed analysis of demand for community infrastructure has informed the public benefit category for community infrastructure;[48]

(b) The list of proposed public benefits is limited to three specific categories rather than open ended.

62. In relation to the second of these matters, it is correct to say that the FAU scheme has the potential to result in an increase in the overall number of workers and residents in Fishermans Bend, including potentially beyond the 80,000 population and employment targets.

---

[48] By contrast, in C270 the Guidelines contemplated five public benefits, plus other public benefits of comparable relevance and value. See *How to Calculate Floor Area Uplifts and Public Benefits*, November 2016.

63. This is not necessarily a problem, however:

    (a) First, some of the additional infrastructure required to support a population larger than 80,000 is likely to be provided in order to obtain the uplifts to provide that population (e.g. additional open space beyond that contemplated in the draft Framework);

    (b) Second, any increase in the population beyond 80,000 will not occur overnight. Use of the FAU scheme will be monitored throughout the life of Fishermans Bend. This will enable the appropriate body to take steps to address any emerging shortfall in infrastructure before it becomes critical.

Mandatory built form controls are justified

64. The use of mandatory built form controls is justified in the Fishermans Bend area, due to its unique circumstances as a State significant urban redevelopment area, the need to establish the individual character of the individual precincts and the need to manage existing development pressure.

65. It should be noted at the outset that the current interim controls include a number of mandatory provisions. Some of these are relaxed under the Amendment. In this regard, the Amendment provides an increase in the flexibility available to developers. Nonetheless, the Minister accepts that the imposition or continuation of mandatory controls should be properly justified.

66. Historically, most commentary on mandatory built form controls relates to blanket restrictions on overall building height. Practice Note 59, which provides non-statutory guidance as to where mandatory provisions should be used, also concentrates on height restrictions.

67. The Amendment is not about overall building height controls. The only instance in which the exhibited controls seek to mandate overall building is limited ensuring an appropriate interface with the existing character of established residential neighbourhoods in Port Melbourne (where it is

proposed to reduce the extent of mandatory height control currently in force in any case).

68. The mandatory controls proposed through this Amendment relate to:

(a) street wall heights;

(b) front setbacks above the street wall;

(c) side and rear setbacks;

(d) tower separation within a site;

(e) prohibition on additional shadow to new and existing parks; and

(f) prohibition on buildings and works over 40m which would cause unsafe wind conditions.

69. The mandatory requirements are nuanced, in that they allow:

(a) differential approaches depending on the overall height of the building;

(b) differential approaches depending on the interface between habitable rooms on adjoining sites;

(c) variation in the case of robust interfaces, such as the Westgate Freeway.

70. Although detailed, the controls are properly described as a sophisticated response to a challenging setting.

71. There are multiple recent instances of mandatory development controls being approved. The new residential zones are an example of State approval of mandatory controls on height, de facto site coverage and density. Other important activity centre contexts also incorporate mandatory built form controls:

(a) mandatory overall height limits apply to the Fitzroy and Acland Street Activity Centres (Port Phillip Planning Scheme, DDO6);

(b) mandatory street wall height limits and upper level setbacks apply to South Melbourne Central (Port Phillip Planning Scheme, DDO8);

(c) mandatory tower front, side and rear setbacks, street wall heights, overall height limits, landscape setbacks and solar access provisions apply to the St Kilda Road North Precinct (Port Phillip Planning Scheme, DDO26); and

(d) mandatory overall height limits apply to the Moonee Ponds Activity Centre (Moonee Valley Planning Scheme, ACZ).

72. Within the central city context, the last few years have seen a number of Panel reports consider the application of mandatory built form controls in areas requiring urban renewal or repair:

(a) C270 (the Central City Built Form Review);

(b) C245 (Queen Victoria Market precinct);

(c) C240 (Bourke Hill precinct);

(d) C196 (City North);

(e) C190 (Arden Macaulay); and

(f) C171 (Southbank).

73. The Minister acknowledges that for both C171 (in 2012) and C196 (in 2013), the panel did not support the imposition of mandatory built form controls, although it is perhaps relevant to note that in both cases the Minister for Planning had stated, expressly or implied, that he did not seek the imposition of mandatory controls in any event.

74. More recent panels, however, have been more supportive of mandatory controls. Panel reports for C190 (in 2015), C240 (in 2015), C245 (in 2016) and C270 (in 2016) all found that the imposition of some mandatory controls was an appropriate planning outcome. As the Panel observed in C190,

> *There is no doubt that mandatory provisions are the exception rather than the rule in the Victorian planning system, but this does not mean*

that there is no place for them. Practice Note 59 sets out the grounds for when they are appropriate.[49]

75. The panels which favoured mandatory controls have taken a relatively uniform approach by asking:

    (a) Are there exceptional circumstances which justify the application of mandatory controls?

    (b) If there are exceptional circumstances, are the tests set out in Planning Practice Note 59 met?

76. The Minister submits that the circumstances of Fishermans Bend are indeed exceptional, not to say unique:

    (a) First, Fishermans Bend is a declared Project of State Significance under Part 9A of the Act;

    (b) Second, the vision for Fishermans Bend is for a series of distinctive precincts, each with their own character. For each precinct, this distinctive character has to be created, because it does not presently exist;

    (c) Third, due to the early rezoning of Fishermans Bend in 2012 to the highly permissive CCZ control, parts of Fishermans Bend – Montague in particular – are already coming under significant development pressure.

77. The need to mitigate development pressure was recognised as an exceptional circumstance in each of C240, C245 and C270:

    (a) Both C245 and C270 found that the need to address sustained development pressure in the inner city and its consequential adverse amenity impacts (including inequitable development, increased overshadowing, and pressure on available infrastructure) gave rise to exceptional circumstances;[50]

---

[49] C190 panel report, page 35.

[50] Both Panels referred to the Explanatory Report to Amendment C262 and the negative impacts identified there.

(b) In C240, the Panel recognised the value in putting mandatory controls in prior to sustained development pressure occurring. The Panel stated:

> *With regard to the question 'Are mandatory controls necessary?', perhaps they have not been so in the past, as was asserted by Mr Pitt, Mr Jackson and others, but as development pressures mount, mandatory controls will set clear parameters around acceptable development outcomes. In this respect, the Panel is mindful that the initial redevelopment proposal for the Palace Theatre site was for a 99 metre building – many times higher than the 15 metre discretionary control. The Panel agrees with the National Trust submission that it is appropriate that a pro‐active approach be taken to managing change in this precinct rather than leaving it to 'after the horse has bolted.*[51]

78. Having regard to the Palace Theatre example given in C240, the Minister notes that the majority of the existing permit applications for development in Montague would not be consistent with the Amendment.

79. The need to establish the desired future character for each of the precincts is another factor contributing to the exceptional circumstances of Fishermans Bend. Practice Note 59 identifies one of the circumstances where mandatory controls may be appropriate as being areas of 'strong and consistent character themes'. It is submitted that this principle could equally be applied to areas where it is desired to establish strong and consistent character themes, a proposition advanced in C190.

80. In saying this, the Minister acknowledges that, as the character of each precinct becomes more established and development pressure lessens, there may be scope to review the operation of the controls and consider a potential departure from a mandatory approach. As such, it could be

---

[51] C240 Panel Report, p. 97.

appropriate to review the mandatory controls at a certain point in the future.

81. Insofar as it is alleged that mandatory built form controls will restrict site responsive design, the Minister adopts the observations of the C240 Panel, which stated:

> *So far as the argument that mandatory height controls inappropriately restrict site responsive design is concerned, it is acknowledged that site responsive design is a desirable approach to development and one which is complementary to performance based decision making such as underpins the VPP. Site responsive design should be fostered wherever possible. The Panel considers, however, that where an absolute height is strategically justified and is applied, that height limit is capable of being viewed as another site constraint to be taken into account by a designer.*[52]

82. Similar views were expressed by submitters to the C270 Panel. In its Report, the C270 Panel recorded:

> *While some submitters (such as Tierney Properties - Submitter 39) and witnesses (such as Capital Eight - Submitter 38) supported discretionary controls on the basis that they would enable more site responsive and creative designs by architects, other designers indicated that they could work within set built form controls. Indeed, the Australian Institute of Architects (AIA) (Submitter 74) supported defined mandatory limits on the basis that it would assist a designer in persuading a client not to overdevelop a site. Professor Rob Adams in his evidence for the Minister expressed the opinion under cross examination that mandatory controls would not stifle architectural creativity. Rather, he said, "most creative architecture comes from the most constrained environments".*[53]

---

52 C240 Panel Report, page 98.

53 C270 panel report, page 78.

83. In the Minister's submission, the proposed controls meet the criteria in Practice Note 59 as follows:

(a) The controls are strategically supported because Fishermans Bend is an area of declared State significance.

(b) The mandatory provisions are appropriate to the majority of proposals. The modelling demonstrates that all sites can be developed within the parameters of the mandatory built form provisions.

(c) The mandatory provisions provide for preferred outcomes. The mandatory requirements for minimum setbacks and building separation significantly reduce the risk of adverse planning outcomes in circumstances where the absence of such controls in the CBD and Southbank produced negative public and private realm consequences and where constant pressure on policy and discretionary provisions in individual applications eroded confidence in a performance based approach.

(d) The majority of proposals not in accordance with the mandatory provisions would be unacceptable. The threshold for support for mandatory controls is not a demonstration that the proposed control is the only way to achieve the outcomes in all circumstances. Rather, it is sufficient to show that most proposals that do not meet the control would fail the outcome sought.

(e) The mandatory controls have been formulated with demonstrated consideration of:

- Creating clear and consistent controls that support efficient decision-making and certainty of outcomes;

- Improving public amenity through the protection and enhancement of the streets and open spaces within Fishermans Bend to ensure that they are comfortable, safe, attractive and welcoming places for people;

- Prescribing adequate building separation so that in conjunction with the Better Apartments Design Standards, the quality of internal amenity in future dwellings is assured;
- Facilitating building diversity and site specific responses;
- Achieving the allowable FAR for development sites within the mandated building envelopes;
- Thereby, supporting future investment in Fishermans Bend by protecting Melbourne's reputation for liveability and its global competitiveness, while enabling sufficient capacity to meet projected residential and commercial demand for new floor space.

(f) The mandatory provisions will reduce administrative costs. The controls will provide certainty and clarity to applicants, and reduce administrative and holding costs by minimising times associated with negotiating acceptable proposals with the responsible authority to an extent which significantly outweighs the benefit of a performance based provision.

84. As Planning Practice Note 59 acknowledges, the imposition of mandatory controls may confer benefits. As it states:

> *Nevertheless, there will be circumstances where a mandatory provision will provide certainty and ensure a preferable and efficient outcome …*[54]

Commercial floor area

85. The provision of 40,000 jobs in the CCZ precincts of Fishermans Bend is an essential element of the draft Framework which seeks to leverage Fishermans Bend's strategic location in proximity to the CBD, Webb Dock

[54] Planning Practice Note 59, *The Role of Mandatory Provisions in the Planning Scheme* (July 2015), p. 1.

and other major employment areas. The delivery of a 'commuter suburb' comprised largely of residential uses coupled with some limited small scale commercial development in a location such as this would represent a significant lost opportunity.

86. To ensure this does not occur, the Amendment contains a number of elements aimed at ensuring that the objective of delivering 40,000 jobs within the CCZ precincts is met (with a further 40,000 to be delivered in the Employment Precinct). These are:

(a) A local policy establishing a preferred amount of floor space which should be delivered as part of any development ('the Commercial FAR Policy') in Lorimer or in a core area of the Port Phillip Precincts;[55]

(b) The delineation in Map 1 in the CCZ Schedule between core and non-core areas;

(c) A provision in the CCZ Schedule permitting the FAR to be exceeded where the excess floor area is not used for a Dwelling ('the Non-Dwelling FAR Exception');[56] and

(d) A purpose of the CCZ Schedule to 'create a highly liveable mixed-use area that prioritises employment uses over residential uses…'.[57]

The Commercial FAR Policy

87. Clause 22.XX of the Amendment contains a range of policy provisions aimed at ensuring that the vision for Fishermans Bend is delivered. Relevantly, it includes the following objective:

> *To promote employment generating floor space that supports growth in the knowledge, creative, design, innovation, engineering and service sectors.*[58]

---

[55] Document 66d, LPP-3, pp. 1 – 8.

[56] Document 66e, CCZ 4.0, p.5.

[57] Document 66e, CCZ Objs p3.

[58] Document 66d, LPP-2, p.3

88. This objective is implemented through policy provisions which provide that all development in core areas of the CCZ Precincts should provide a preferred amount of floor area for non-residential uses.[59]

89. It also identifies a number of factors to be considered where a development proposes to provide less than the preferred amount of floor area to determine whether that variation is acceptable.[60] Ms Hodyl has recommended the tightening up of the relevant decision guidelines to ensure that the priority for employment generating uses is upheld.

90. Submissions have identified two issues in relation to the Commercial FAR Policy, being:

    (a) Whether there is a strategic justification for imposing commercial FAR requirements in circumstances where it is said that Fishermans Bend is not presently developed enough to support commercial uses;

    (b) Whether the commercial FAR requirements should be in the form of a mandatory requirement embedded in a planning control (i.e. within the CCZ), rather than being a policy within the Local Planning Policy Framework.

91. The Minister considers that there is a proper strategic justification for introducing the Commercial FAR Policy at the outset of the redevelopment of Fishermans Bend.

92. The provision of significant commercial (non-residential) employment generating uses in the CCZ Precincts is a crucial part of the draft Framework. This has two distinct benefits:

    (a) First, at the individual development level, the provision of commercial floor area delivers jobs which contribute to achievement of the 40,000 job target; and

---

[59] Document 66d, LPP-3, pp. 1 – 3 and Table 1.

[60] Document 66d, LPP-3, pp. 4 - 8.

(b) Second, at the broader level, the delivery of large areas of commercial floor space in close proximity to one another provides an opportunity for the 'agglomeration benefits' derived from colocation of businesses and contributing to the broader economic prosperity of the central city.

93. As Mr Szafraniec explains, there is a risk that allowing unrestricted residential development in Fishermans Bend may result in commercial development being 'crowded out':

> *94. While the employment opportunity for Fishermans Bend is significant, it has the potential to be undermined by competition from residential developments…. Inner Melbourne has experienced unprecedented levels of housing development and price growth in recent years. This pressure for residential use and development has challenged the viability of commercial uses when required to compete directly. As a result, any zoning that permits residential uses is currently likely to deliver residential development, often to the maximum possible extent. Furthermore, once land is developed for residential purposes, it is almost impossible to transition to alternative uses at a later point due to various design factors and fragmented (i.e. strata) ownership structures.*
>
> *95. Residential use may currently be the highest and best financial use for a site. However, if replicated across an entire precinct, it can have adverse consequences for the local and broader community. It also represents a lost opportunity for the broader metropolitan economy which gains benefits from agglomerating more employment within the central core.*[61]

96. To mitigate this risk, it is appropriate to adopt a mechanism which establishes an express presumption that commercial floor space should be provided as part of every development in the core areas of the CCZ Precincts and to ensure that any departure from that presumption is

---

[61] Szafraniec, [40] – [41].

properly justified. This is what the Commercial FAR Policy does. It also sends a clear signal to the market that development will, all things being equal, be expected to provide commercial floor area as part of its footprint.

97. It should be noted that in comparative terms, Fishermans Bend has a high ratio of residents to jobs benchmarked against other central city areas,[62] and hence the Minister's view is that the FAR derived for employment generating floor space is not onerous.

98. Having said that, the Minister accepts there may be limited demand for commercial floor space in Fishermans Bend in the immediate future. It is for this reason that the Minister does not propose to include a mandatory commercial FAR requirement in the CCZ at this time. It is proposed to monitor the effectiveness of the Commercial FAR Policy and, if the required commercial floor area is not being delivered, to consider imposition of a mandatory commercial floor space requirement.

99. It is submitted that this approach broadly aligns with that of the Ministerial Advisory Committee which, although supporting a formal planning control requiring a mandatory minimum commercial FAR, [63] recognises that employment uses 'may not currently be viable in some developments'[64] and recommends a 'transitional arrangement (for 5 years) to allow minimum employment related FARs to be reduced subject to meeting conditions', including in relation to development viability. [65] In the Minister's view, the Commercial FAR Policy functions in substantively the same way as a mandatory zone requirement subject to exceptions.

---

[62] Urban Design Strategy, Figure 7.

[63] MAC submission, Document 57, slide 19.

[64] Ibid, slide 20.

[65] Id. The Ministerial Advisory Committee recommended that the assessment of viability be carried out by an independent Development Viability Review Panel. While acknowledging this approach has been adopted in other jurisdictions, the Minister does not consider it is necessary or appropriate at this time. Should it become necessary to adopt a mandatory control, the establishment of such a panel could always be considered as part of that process.

Non-Dwelling FAR Exception

100. The CCZ control prohibits the grant of a permit for a development with an FAR in excess of that specified in the relevant table.[66] In the core areas of the CCZ Precincts, there are two exceptions to this rule:

(a) Where a public benefit and floor area uplift is provided;[67] or

(b) Where the 'excess' floor area is not used for a Dwelling.[68]

101. The purpose of the second of these exemptions is to ensure that the use of the FAR control to regulate development intensity does not create disincentives for development by forcing the provision of commercial floor space instead of residential floor space. The Non-Dwelling FAR Exception means that, subject to applicable built form controls, a developer's ability to deliver on a market preference for residential floor area is not compromised by complying with the Commercial FAR Policy.

102. Submissions have raised two issues about the Non-Dwelling FAR Exception, being:

(a) The risk of unplanned development occurring through the use of the Non-Dwelling FAR Exception, resulting in larger numbers of workers than anticipated; and

(b) The question of whether the Non-Dwelling FAR Exception should be expressed to exclude all non-commercial uses.

103. In relation to the first issue, this is the same issue as raised in respect of the FAU and is addressed in the section dealing with the FAU provisions.

104. In relation to the second issue, a deliberate choice has been made to enable the development of land for any use other than a dwelling for two reasons:

(a) First, 'commercial' use is not a concept recognised by the Victorian Planning Provisions. As such, the scope of such a restriction would

---

66 Document 66e, CCZ 4.0, pp.3 and 4.

67 Ibid, p. 7.

68 Ibid, p. 6.

need further articulation or it would generate uncertainty. Adopting the non-dwelling criterion is clear and certain.

(b) Second, adopting the non-dwelling criterion means that land can be used for employment-generating accommodation uses – such as residential hotels and aged care accommodation – which might be excluded if a broader prohibition were adopted. As these uses generate employment, they have the capacity to help deliver the target of 40,000 jobs in the CCZ Precincts. In addition, employment generating accommodation uses typically remain in a single ownership, meaning that they do not present the same barrier to conversion to other uses that a building comprised of private dwellings would.

105. Accordingly, the Minister considers that the Non-Dwelling FAR Exception is appropriate as drafted.

Affordable housing

106. The provision of affordable housing is an important element of the vision for Fishermans Bend.

107. The Amendment includes two mechanisms designed to facilitate the provision of affordable housing:

(a) Policy contained in clause 22.XX establishing a target of 6% of all housing to be affordable;[69] and

(b) The identification of the provision of affordable housing as a form of public benefit for the purposes of the FAU scheme.[70]

108. These mechanisms are designed to operate in tandem by establishing a target and providing an incentive to meet it. As detailed in the Guidelines, the provision of an affordable housing unit entitles a developer to construct eight market rate dwellings.[71]

---

[69] Document 66d, LPP-3, p. 16.

[70] Document 66i, *How to Calculate Floor Area Uplifts and Public Benefits in Fishermans Bend*.

[71] Ibid, FAU Note , p.33.

109. This approach was developed in consultation with the Affordable Housing Industry Group,[72] which observed in its submissions to the Review Panel that the 8:1 ratio appeared to provide a sufficient incentive to encourage uptake of the provision of affordable housing as a form of public benefit.[73]

110. A number of submitters – most particularly, the MAC and the Councils – have suggested that a more aggressive approach should be taken, adopting mandatory affordable housing requirements and increasing the percentage of affordable housing to be provided overall.

111. The Minister does not support a mandatory approach at this time for two reasons:

    (a) First, the Minister notes that, as detailed in *Homes for Victorians*, Government policy favours a collaborative approach to the provision of affordable housing by developers.[74] The proposed mechanisms reflect the approach set out in *Homes for Victorians*.

    (b) Second, the problem of providing affordable housing is not confined to Fishermans Bend. As such, the Minister considers any decision on 'inclusionary zoning' should be made in the context of the Victorian planning framework as a whole.

112. The Minister notes that the provision of affordable housing will be monitored and that there is always scope to revisit the issue of inclusionary zoning in the event that the market response is inadequate.

113. As regards the percentage of housing to be provided as affordable housing, the Minister considers that the figure of 6% is realistic and achievable, while a higher figure (e.g. 10%) may be unduly onerous. In any event, depending on uptake, the figure can be amended in future.

---

72 *Fishermans Bend Technical Fact Sheet 1: Delivering affordable housing as a public benefit*.

73 Document 62, 15(iii).

74 State of Victoria, *Homes for Victorians: Affordability, Access and Choice* (2017), p. 22.

Existing Industrial Uses

114. Fishermans Bend is currently home to a large number of industrial uses. Part of delivering the vision in the draft Framework will be managing the transition to a more diverse set of uses in a way which ensures adequate amenity for new residents and workers without compromising the ability of existing uses to continue to function, at least for the medium term.

115. The CCZ control seeks to manage the transition by:

(a) Making the 'as of right' use of land for sensitive uses conditional on compliance with any relevant threshold distance contained in clause 52.10. Failure to meet this condition would mean that a sensitive use would have to seek a permit.

(b) Imposing a requirement that applications for a permit for a sensitive use within a certain distance of specified industrial uses be accompanied by an Amenity Impact Plan which may include:

- *A site plan that identifies the type and nature of the industrial/warehouse uses surrounding the site.*
- *An assessment of the impact of the proposed sensitive use on existing industry/warehouse uses.*
- *An assessment of the amenity impact of nearby port operations, freight routes or major transport infrastructure on the proposed sensitive uses.*
- *Measures proposed to mitigate potential amenity impacts of existing industry/warehouse uses or port, freight, or transport infrastructure on the proposed sensitive use, to within acceptable levels.*[75]

[75] Document 66e, CCZ 2.0, pp. 7 – 10.

(c) Introducing a decision guideline for use applications which requires consideration of the incorporation of appropriate measures to mitigate against adverse amenity from existing uses.[76]

116. The purpose of this regime is to ensure that any sensitive use located in proximity to an industrial use with potential amenity impacts is assessed both for its potential to be affected by existing industrial uses and port, freight or transport infrastructure but also for the development's own potential to adversely affect existing industrial uses.

117. Importantly, and consistent with the 'agent of change' principle, the policy places the onus on the applicant to mitigate the impacts on the sensitive use. This means that the developer will bear the costs of addressing impacts from existing uses.

118. The Minister acknowledges the concerns expressed by the Barro Group over these provisions,[77] but considers that they are adequate as drafted.

119. In particular, it is not considered appropriate to introduce third party notice and rights of review in the Capital City zone for existing industrial uses, noting that the Capital City zone provisions are structured to exempt specified types of applications rather than retain rights for specified types of affected parties. There may be merit in listing the EPA as a recommending referral authority for uses that do not meet the clause 52.10 threshhold.

120. It should be noted that by contrast with the other Capital City zone schedules which prohibit industry for a purpose listed in clause 52.10, "industry" in Fishermans Bend remains an unconditional section 2 use.

121. There is a reasonable expectation that over time industrial uses will be phased out as the value of land in Fishermans Bend indicates a higher and better use for sites presently used for industrial purposes. Until that time, interim arrangements which require the agent of change to bear responsibility for managing the land use interface represent the

[76] Document 66e, CCZ 2.0, p34.

[77] Submission 89, pp. 5 and 6.

appropriate balance. At the time of transition, the EAO will manage site remediation.

Development Plan Overlays

122. The Ministerial Advisory Committee explained the thinking underlying the application of the Development Plan Overlays in their submissions.

123. Essentially, the intent of imposing the Development Plan Overlays to incentivise larger-scale (i.e. larger than site-by-site) developer-led master planning. The Minister supports this objective, and invites submissions about alternative mechanisms which might achieve this outcome by other means.

Parking Overlay

124. Sustainable transport measures are embedded in the Amendment, including through:

(a) Distribution of core areas in Map 1, CCZ adjacent to planned public transport routes;

(b) Identification of the potential metro rail alignment in Map 1, CCZ;

(c) Location of public open space in Map 3, CCZ within 200m of all residents and workers;

(d) Discretionary direction in the DDO for active frontages on primary and secondary active streets shown on Map 1;[78]

(e) Prohibition on cross overs on designated streets in Map 2, CCZ;

(f) Policy for ensuring new streets, laneways and pedestrian connections are no more than 100m apart in non core areas, no more than 50 metres apart in core areas and within 200m of public transport routes;[79]

[78] Document 66F, DDO2, p105.

[79] Document 66d, LPP-3, p92.

(g) Policy for midblock through links on sites more than 3000m2;[80]

(h) Policy for design to support 80 per cent of movements via active and public transport;[81]

(i) Decision guidelines in the CCZ which require consideration of how a proposal contributes to establishing sustainable transport as the primary mode of transport through integrated walking, cycling and pedestrian links;[82]

(j) Introduction of a parking overlay incorporating a maximum parking provision of 0.5 spaces per dwelling.[83]

125. Many submissions challenged the proposed parking rate for dwelling on the basis that without public transport infrastructure, the rate was too low and would not meet purchaser expectations. The parking overlay rate is but one component of the sustainable transport initiatives but remains vitally important in mutually reinforcing the total suite of provisions. Irrespective of the implications for traffic congestion if higher number of cars are allowed, there is an environmental imperative to achieve the 80% sustainable transport goal and controlling supply through the parking overlay is an essential tool for delivery of that goal. In the short-term, a discretion is available to exceed the parking rate on the basis that the parking plan (with associated sustainable transport components) is provided, but this discretion will operate in conjunction with the clause in the DDO requiring provision for adaptable design and future conversion over time[84] and the clause in the CCZ seeking retention of parking areas in single ownership.[85]

[80] Docuemtn 66d, LPP3, p98.

[81] Document 66d, LPP3-111.

[82] Document 66e, CCZ4-53.

[83] Document 66h, PO3.01,p1

[84] Document 66f, DDO2, p121.

[85] Document 66e, CCZ3.0, p3.

Flooding and Drainage

126. The Councils submit the proposed approach to flooding will conflict with good urban design outcomes. In particular, they submit raised building floor heights will prevent or severely limit the ability for buildings to present active ground level interfaces with the public realm, an outcome expressly sought by the planning controls.[86]

127. Port Phillip City Council submits flooding and water management should be managed at a precinct level rather than a localised building or lot level and design response should flood and water sensitive. To this end, it submits the approach proposed in the *Fishermerans Bend: Designing innovative and integrated regional water management approaches* prepared by Ramboll dated 7 March 2018 ('Ramboll Study') should be incorporated into the draft Framework and Amendment.

128. The Ramboll Study sets out a conceptual plan to manage flooding in Fishermans Bend alternative to the draft Framework. The plan proposes to manage flooding through installation of 'Blue Green Infrastructure'. Blue Green Infrastructure involves reintroducing the natural water-cycle into the urban landscape and creating multi-functional greenspace and land-use. Infrastructure includes 'Cloudburst Boulevards and Detention' areas, 'Green Streets', 'Blue Laneways', rainwater tanks and a 'liveable levee'.[87] The Ramboll Study supports the draft Framework's proposed use of rainwater tanks.

129. In the Minister's submission, the approach proposed in the draft Framework will provide adequate flood protection. It has been developed

[86] Document 66c, clause 1.4; document 66e, CCZ4.0,p56; document 66f DDO2.0,p105-119.

[87] See the definition of these terms at page 19, Ramboll Study. In summary, the plan aims to detain water close to its runoff point, then convey it safely to discharge in the Yarra or the pipe network to the south of Fishermans Bend. Surface flow of water, rather than through pipes, is preferred. Proposed detention areas are designed to allow water to be held for a period until the Yarra River level has fallen and water can be discharged by gravity. The existing pipe and pump network would be used where necessary. Further modelling and design would be required; the exact location and size of the detention and conveyance areas has not been finalized; this would need to be refined during subsequent phases of the design. Detailed modelling and further design work is required.

from comprehensive flood mapping of Fishermans Bend and in consultation with Melbourne Water and the Councils.

130. Further, the precinct planning stage will manage and integrate building, public realm and open space design responses to flooding and water management.

131. Nevertheless, the Minister acknowledges there may be alternative design responses which acceptably respond to flood risk. Therefore, the proposed controls, policies and guideless contain discretion to allow for alternative design solutions which achieve Melbourne Water and Council requirements. This discretion is incorporated into:

(a) Application requirements in the CCZ;[88]

(b) Decision guidelines in the CCZ;[89]

(c) Requirements in the DDO requiring incorporation of innovative approaches to flood mitigation and stromwater runoff and best practice WSUD;[90]

(d) Policy to create a '*water sensitive community where the design of developments accommodates sea level rise and storm events by ensuring any level changes required between street level and elevated ground floor levels are integrated into the design of buildings to maintain good physical and visual connection between the street and internal ground floor spaces. This may include use of footpath level building entries with internal level changes'.*[91]

[88] Document 66e, CCZ4.0, p45, 46 and 48.

[89] Document 66e, CCZ4.0, p63.

[90] Document 66f, DDO2.0, p141.

[91] Document 66d, LPP-3,p56 and 57.

132. These controls clearly contemplate the use of raising building floor level to respond. However, they also include sufficient discretion to consider alternative responses to flood risk provided the proposal:

(a) creates a 'climate adept' and 'water sensitive' environment;

(b) incorporates sustainable water management practices' and

(c) incorporates landscaping which is innovative in its approach to '*flood mitigation and stormwater runoff, and at least best practice water sensitive urban design'*.

133. The application of these high-level controls and policy will ensure adequate response to flood risk at the local precincts and individual specific buildings/lots design stage.

The controls are not overly complex

134. A great deal of criticism has been made that the drafting of the Amendment is too complex and unclear.

135. A number of the submissions suggest that combination of the use of the FAR control alongside built form controls is inappropriate because there is a misalignment between the level of development which is achievable under the FAR and the level of development which is achievable under the built form controls.

136. This is not accepted. The FAR and the built form controls serve distinct purposes and are intended to operate in tandem. It should not be expected that every site can be developed to its maximum physical capacity but it is evident from the modelling undertaken by Ms Hodyl that the allowable FAR can be realised within the built form envelope contemplated by the proposed controls.

137. The introduction of diagrams to aid interpretation of the DDO is supported but the use of tables rather than text will not necessarily improve readability or clarity in relation to the built form provisions.

138. Whilst there can be legitimate debate about whether built form principles are articulated in the policy framework or through the DDO control, a

drafting convention which allocates quantitative requirements to the DDO and qualitative discretion to the policy has been sought in the Part A version; suggestions for improvement in this regard are welcome.

139. Although the controls contain a large amount of content, each provision is directed to a specific and important planning outcome and the controls avoid duplication.

140. Given the complexity of the Fishermans Bend environment, the extent of direction required by the planning scheme for development is necessarily substantial and consequently, the controls are necessarily detailed. The success of the controls should be judged by their clarity and workability rather than their length or complexity.

Transitional provisions

141. The issue of transitional provisions was addressed in the Minister's submissions of 14 March 2018.

142. It is not proposed to repeat those submissions beyond observing that the evidence of Mr McIntosh is that the introduction of the Amendment would not impact on the viability of development in Fishermans Bend.

CONCLUSION

143. Whilst some submitters' interests are served by delaying introduction of new controls and the Councils want greater detail of all matters concerning Fishermans Bend, there is an urgency arising from the imminent expiry of GC50, the call in of 26 permit applications[92] and the level of developer interest which warrants prompt deliberation on the draft Framework and the Amendment.

144. The Minister expects to provide further material, information and submission as the hearing progresses, including in response to evidence recently served by the Councils, evidence to be served as part of Stage 2,

[92] The Minister confirms his commitment to an expeditious process for consideration and decision of outstanding applications upon finalisation of the proposed controls the subject of the Amendment.

the submissions of parties through the balance of the hearing, and outstanding matters raised by the Review Panel.

145. The Minister will provide a final Part C submission to address outstanding matters at the conclusion of Stage 2.

Susan Brennan

Isaacs Chambers

Marita Foley

Castan Chambers

Rupert Watters

Owen Dixon Chambers West

Instructed by Harwood Andrews

14 March 2018