

IN THE MATTER OF  
PROPOSED AMENDMENT GC81 TO THE MELBOURNE  
AND  
PORT PHILLIP PLANNING SCHEMES  
  
FISHERMANS BEND REVIEW PANEL

**OUTLINE OF SUBMISSIONS ON BEHALF OF  
LANDOWNERS GROUP**

**Introduction**

1. These submissions are made on behalf of the parties listed in Appendix A (**Landowners**).
2. They concern Proposed Amendment GC81 to the Melbourne and Port Phillip Planning Schemes. (**Proposed Amendment**) They address the central question for consideration by this Review Panel, namely:

**Is the Proposed Amendment appropriate?**

3. The Landowners are a collective group of 11 submitters, all of whom own land within Fishermans Bend. They would all be directly and materially affected by any significant change to the planning controls that affect their land.
4. Appendix A provides further details as to the identity of the submitters, the nature and location of their various landholdings, the current land use and any relevant planning permits or permit applications that affect their land. Further detail of the individual interests of certain submitters will also be provided during specific submissions made in later stages of this hearing.
5. Appendix A demonstrates that the Landowners have varied and broad interests in Fishermans Bend. Some have a long association with Fishermans Bend, and own land that supports well-established industrial and commercial uses that have benefitted from the excellent proximity of the area to the Melbourne CBD, the road network, the Port of Melbourne and freight connections.

6. Other Landowners have purchased land more recently for the purpose of redeveloping that land in accordance with the current planning controls.
7. In this regard, the re-zoning of Fishermans Bend from industrially zoned land to the Capital City Zone (**CCZ**) in 2012 (in recognition of the strategic position of Fishermans Bend to the CBD and inner city Melbourne) changed the long-term future of the area and, with it, the reasonable expectations of Landowners (and their tenants) with regard to their land holdings.
8. As might be expected, many of the Landowners have acted upon that re-zoning of their land and have applied for and, in some cases been issued, planning permits that allow for the redevelopment of their land. In doing so, they have simply done what is encouraged by the relevant zoning provisions and strategic directions for Fishermans Bend that are identified in *Plan Melbourne* and in State and local planning policy. All of these identify Fishermans Bend as an urban renewal precinct where transformative change is being strongly encouraged. None of them suggest that change should be delayed, or development 'put on hold'.
9. Appendix A identifies the members of the Landowners Group that either have been issued planning permits, or otherwise have outstanding permit applications at various stages of assessment.
10. Whilst not detailed in Appendix A, it is fair to say (indeed, it is obvious) that considerable sums of money already have been expended by Landowners seeking to lawfully redevelop land in accordance with the relevant strategic objectives and statutory planning controls. Given the statutory controls have changed three times since 2012, many amendments and redesigns of proposals have occurred during this time which has been costly and time-consuming for applicants and decision-makers alike. The current call-in of all planning applications has added to the level of uncertainty and frustration and (in some cases anger) at the wasted of time and money that is occurring, particularly when permit applicants are legitimately seeking planning permits in accordance with the planning scheme.
11. Further, given the strategic imperative to redevelop Fishermans Bend as an urban renewal precinct, it is surprising that there appears to be an undercurrent

of criticism against permit holders and permit applicants in Fishermans Bend that they are taking advantage of the re-zoning and seeking to maximise the development potential of their land. It must be remembered that without planning applications and without private developers, Fishermans Bend will never be re-developed.

12. It is even more surprising that planning permits properly issued (in most cases by the Minister) under the current planning provisions have been criticised as being “*inappropriate*”, and (in effect) considered to be irrelevant, or harmful aberrations by the authors of the Proposed Amendment, and (in some cases) the Minister’s witnesses. The Review Panel should reject those criticisms, which have no foundation.
13. The Review Panel should bear in mind that permits that have issued have been approved because they have been judged (again, in most cases by the Minister himself) to be acceptable outcomes that achieve a net community benefit. In the absence of some compelling evidence as to why they should now be regarded as representing inappropriate outcomes that do harm to the community (and there is no such evidence) it would be improper for the Review Panel to adopt the position that they are.

### **A summary of the Landowners submissions**

14. The proposed Amendment is fundamentally and fatally flawed. The flaws are such that they are incapable of being “*fixed*” by this Review Panel.
15. What is required is a comprehensive rethink of many of the critical, underlying assumptions upon which the Proposed Amendment has been based, including the Urban Design Strategy. What is also required is an approach that does not rely upon overly complex, untested and unnecessary planning policies and controls, or seek to mandate built form and/or social outcomes.
16. What is also required is the identification of, and firm commitment to, a clear, equitable and lawful mechanism (or mechanisms) for the delivery and funding of necessary infrastructure. This includes (but is not limited to) transport infrastructure, open space, roads, affordable housing and other community facilities.

17. Those mechanisms must be developed with the recognition that it is primarily the obligation of government to fund that infrastructure, not landowners, and with the intention that any development contributions will be equitable and designed to encourage, rather than stifle, the development of Fishermans Bend.
18. The Landowners submit that the Review Panel should advise the Minister in emphatic terms that the Proposed Amendment is not appropriate. Moreover, the Review Panel should recommend to the Minister that the Proposed Amendment should, under no circumstances, be considered as being appropriate to proceed in its current form as a formal amendment to any planning scheme.
19. The Landowners submit that the Proposed Amendment is flawed because:
  - a) **First**, one of its essential underlying elements is misconceived. The adoption of, and adherence to a “*population target*” of 80,000 people as the starting point for the Proposed Amendment is a critical error. It is no less an error because the *Vision* and the *draft Framework* suffer from the same defect.<sup>1</sup>
    - (i) Further, it is misconceived because:
      - it is not necessary to adopt or adhere to **any** population target as the basis upon which to prepare a set of planning controls for Fishermans Bend (and, in particular, built form controls) other than as an indicative figure to assist with planning the necessary infrastructure; and
      - even if this were not the case, the 80,000 figure is simply the wrong figure. It represents a gross under-estimate of the potential for Fishermans Bend to accommodate Victoria’s future population growth, and a lost opportunity that will adversely impact upon the whole community of Victoria.
  - b) **Second**, the Proposed Amendment is premature because the planning for, and commitment to, the delivery of essential public infrastructure for the Precinct has not been resolved. There is currently:

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<sup>1</sup> For the reasons detailed in a separate submission on this issue, the Landowners submit that the Review Panel is not only entitled to, it is required by the Terms of Reference (TOR) to examine the strategic merits of the *Vision* and the *draft Framework* in order to properly discharge its purpose to assess whether the Proposed Amendment is appropriate.

- (i) no firm commitment to the delivery of any public transport infrastructure. The government has failed to commit to the delivery of any fixed rail infrastructure, including tram or train, and failed to confirm actual routes and station/stop locations;
  - (ii) no settled financial or funding plan for any infrastructure, and no development contribution plan or infrastructure contribution plan which could provide an equitable framework to fund public infrastructure. The absence of these essential elements is compounded by the existing, ad-hoc and unsatisfactory development contribution arrangements, and the proposed mechanism to deliver open space and roads which is neither equitable nor lawful;
  - (iii) no Public Acquisition Overlays being proposed, despite large areas of private land being proposed to be set aside for public purposes; and
  - (iv) no individual Precinct Plans.
- c) **Third**, the Urban Design Strategy, which underpins the proposed built form controls, is misconceived. This is because:
- (i) It seeks to rigidly and unnecessarily limit population and density in Fishermans Bend. It does this not to achieve a built form outcome or to ensure a liveable, attractive and diverse built environment, but simply to achieve arbitrary population targets or density outcomes.
  - (ii) It fails even in this objective since it would not limit population to the 80,000 figure that it claims ought not to be exceeded. In part, this is because it adopts a series of arbitrary and speculative assumptions (such as the 75% build out by 2050 assumption) as the basis for the calculation of the various floor area ratio (**FAR**) controls.
  - (iii) It proposes FAR controls which impose unnecessary and unjustifiable constraints upon the development potential of land in Fishermans Bend. This is illustrated by the substantial disparity between the built form outcomes able to be achieved under those

FARs, and those that would be possible pursuant to the other built form controls and/or the floor area uplift (**FAU**).

- (iv) It employs the FAR controls for an improper and unlawful purpose, namely to enable the acquisition of private land for public purposes without compensation.
  - (v) It is predicated on the false premise that the FAR controls result in there being no disadvantage, financial or otherwise, being suffered by any person whose land is identified as required for a public purpose and no loss of “*development yield*”.
  - (vi) It seeks to achieve unrealistic neighbourhood character outcomes, and to dictate the social mix of various areas in ways that are discriminatory, and without proper strategic justification.
  - (vii) It includes ill-defined and unrealistic assumptions and controls with respect to “*family friendly housing*”.
- d) **Fourth**, if adopted, the proposed controls, through the FAR, will permit the unlawful, inequitable and unfair acquisition of private land for public purposes without compensation contrary to the objectives for planning;
- e) **Fifth**, the FAU scheme is unresolved, uncertain and unlawful. In the absence of any proposed definition of “*public benefit*”, or any incorporated guidelines in the Scheme to guide the exercise of discretion with regard to the delivery of a FAU, it is of uncertain application and effect, and its ability to deliver any particular community benefit cannot be reliably ascertained.
- f) **Sixth**, the proposed controls are badly drafted, unnecessarily complex, overly prescriptive and onerous in application. They would result in highly inequitable outcomes when applied to individual land parcels.
- g) **Seventh**, there is inadequate justification for various heights, setbacks, overshadowing requirements and built form outcomes in the detail of some of the controls.
- h) **Eighth**, there are no transitional provisions proposed, which is unfair.

20. The Proposed Amendment may be “*novel*” and “*ambitious*”, and seeking to address a complex and challenging environment, but, as exhibited, will not result in an acceptable amendment to the Planning Schemes. Merely being “*novel*” and “*ambitious*” is not virtue in and of itself.
21. The Proposed Amendment requires a fundamental re-think and re-exhibition before the long-term strategic planning for such an important urban renewal precinct such as Fishermans Bend is embedded into the Melbourne and Port Phillip Planning Schemes. The Review Panel should advise the Minister that this is the case. It should also be cautious in trying to fix up the flaws in the controls or “*band-aid*” the identified errors in the Proposed Amendment.
22. In this regard, the sense of urgency that is voiced through the Minister’s submissions (and to some extent through the Councils’ submissions) is exaggerated and must not get in the way of the right planning outcome for the Precinct. While further delay would be regrettable, now is not the time for yet another ‘interim’ set of controls. What is needed is a final set of controls that get it right, not an exacerbation of the mistakes of the past to accommodate some illusionary deadline, or to achieve a political outcome. It is more important that the controls are lawful, fair and achieve good policy outcomes able to be sensibly applied by decision-makers.

### **Strategic and Physical Context**

23. The strategic context of Fishermans Bend is well documented in the background material to the Proposed Amendment, submissions to the Review Panel and the various statements of evidence.
24. In summary, these submissions and statements of evidence consistently make the observations that:
  - a) Fishermans Bend is the largest urban renewal area in Australia;
  - b) It has an area of approximately 480ha;
  - c) It lies on the edge of the CBD of Melbourne and in close proximity to major job markets of Central City and St Kilda Road;
  - d) It lies adjacent to the Port of Melbourne and close to the Yarra River;

- e) It lies within an identified *Major Urban Renewal Precinct* under *Plan Melbourne*<sup>2</sup>; and
  - f) It includes a *National Employment and Innovation Cluster* under *Plan Melbourne*<sup>3</sup>.
25. Submissions and evidence also make the observations that the Precinct is not without its challenges including:
- a) A current lack of public transport in the form of fixed rail;
  - b) Poor road connectivity to the CBD and surrounding area;
  - c) Multiple private land holdings;
  - d) Site contamination; and
  - e) Potential flooding.
26. It is submitted these challenges are not insurmountable. Public transport, connectivity to the surrounding area and the provision of infrastructure for the Precinct are envisaged as part of the Proposed Amendment, (albeit not resolved) and issues of site contamination and flooding are essentially construction issues. However, there is no evidence that with proper planning these challenges cannot be address satisfactorily.
27. There is no debate between parties that Fishermans Bend represents a once-in-a-life-time opportunity for urban renewal on the edge of the Central City. It is vital that this opportunity is optimised and properly reflected in the Proposed Amendment.

### **A Flawed Process**

28. At the outset, the Landowners consider it necessary to identify precisely what this process is about.
29. The Review Panel is **not** considering an amendment to the planning scheme. Instead, it has been asked to undertake the novel task of considering whether it

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<sup>2</sup> reference  
<sup>3</sup> reference

is appropriate that the controls which are being proposed should proceed to become an amendment to the planning scheme.

30. The Minister has not adequately identified why this novel approach is being undertaken. The Minister has not explained why it is that, if the proposed controls are truly at a stage where they could be considered to be suitable to be exhibited as a planning scheme amendment this has not occurred?
31. One logical possibility (indeed one might even say probability) is that this process is being used as a device to justify the Minister subsequently avoiding the “*normal*” planning processes that apply to planning scheme amendments and proceeding to simply approve a subsequent amendment under s.20(4) of the Planning and Environment Act 1987 (**Act**). While the Review Panel has no control over whether this occurs or not, it can (and should) make it clear that this process cannot be regarded as substitute for the ‘standard’ process that applies to planning scheme amendments under the Act. The reasons why will be addressed in more detail later in these submissions.
32. In any event, the fact that the Minister has elected not to follow the “*normal process*” has some significant implications, as follows:
  - a) First, it means that the proposed controls cannot be said to represent a decision made by a planning authority, or to express the will of that planning authority as to how a scheme should be amended. Rather, what is currently before the Review Panel can be regarded as nothing more than a preliminary “*thought bubble*” presented by the Minister to the Review Panel for its consideration and response. It cannot be said to represent “*government policy*”, since it has never been presented, or adopted, as policy. That this is correct is confirmed by the fact that the position of the Minister as to a large number of issues and recommendations remains unknown.
  - b) Second, the task of the Review Panel is not equivalent to the task of a panel that is appointed to consider an actual planning scheme amendment. The Review Panel has not been asked to simply review submissions and provide recommendations as to those submissions. It

can, and should, inquire into, every aspect of the proposed controls regardless of whether they are, or are not, the subject of any submission.

- c) Third, the task of the Review Panel is wider than that of a panel that is called upon to consider an actual planning scheme amendment. The purpose of the Panel is to consider “*the **appropriateness** of the proposed planning scheme amendment*”.<sup>4</sup> This extended scope permits consideration of matters that go beyond merely the merits of the proposed controls, but also allow for consideration of other matters; such as the procedural fairness of the process undertaken to date (both in a strictly legal, but also non-legal sense).
  - d) Fourth, it also has implications for what recommendations the Review Panel ought to make regarding the proposed controls. In simple terms, it means that the Review Panel should not feel obliged to “*fix*” this broken proposal, or to feel compelled to itself prepare an actual planning scheme amendment for the Minister. Instead, the Review Panel can, and should, proceed on the basis that there ought be a further opportunity for review and input provided to all interested parties into an actual planning scheme amendment once that has been prepared by the Minister, and been through a proper process of exhibition, notification and consideration.
  - e) Fifth, the fact that this is not an actual planning scheme amendment also has implications for the question of the urgency of finalising the planning controls for Fishermans Bend. In the absence of any information from the Minister as to what the future intentions are for developing an actual planning scheme amendment for Fishermans Bend, it is impossible for the Review Panel to proceed on the basis that there exists any government agenda to proceed urgently with that amendment.
33. This whole process has been both complicated and compromised by the false sense of urgency that has been forced on the Review Panel and the parties by the Minister. The Minister originally sought, and was granted, an expedited hearing on the basis that they were “*ready to go*” (against the objection of other parties who were not “*ready to go*”, and could not reasonably have been

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<sup>4</sup> TOR paragraph 3

expected to be). Subsequently, it has been amply demonstrated that the Minister was not, in fact, “*ready to go*” and this has led to significant inefficiencies, compromises and unfairness.

34. Despite the best efforts of the Review Panel to make it otherwise, no reasonable observer could conceivably regard this process as representing a model of procedural fairness. It has (because of the Minister’s actions) fallen well below the usual high standards with which panel hearings and advisory committee’s have been conducted in this State in the past.
35. That has occurred because of:
  - a) A disjointed and abbreviated hearing timetable, made necessary by the Minister’s failure to prepare all its evidence in time for the commencement of the hearing that was initially insisted upon, and which has not allowed for each party to present its case in a single coherent block.
  - b) An unreasonably short timetable within which parties other than the Minister were afforded to prepare their cases, given that the Minister has several years of head start on every other submitter.
  - c) The Minister presenting expert evidence that contains numerous recommendations as to changes in circumstances where the position of the Minister as to those recommendations (or in some cases the position of both the Minister and DELWP) is not known.
  - d) The presentation of multiple addendums to witness statements well after the service of the additional evidence.
  - e) The Minister seeking to materially alter the form and effect of the proposed controls after the presentation of evidence by relevant witnesses, the most concerning of which is the proposed alteration to the FAR control that appeared for the first time in the Supplementary Submission.
  - f) The Minister engaging in pointless legal arguments such as the arguments made to support the suppression of Ms Homewood’s rogue email, and the arguments that have been made to try and prevent the Review Panel from considering the *Vision* and the *draft Framework*.

36. If there was ever a process that gave truth to the old adage: “**Act in haste, regret at leisure**” then this is surely it. The contrived urgency with which the Minister has insisted that these proceedings be conducted has been reflected in the lack of quality in Minister’s case, the unsatisfactory nature of much of the evidence presented by the Minister and proposed controls that can now properly be regarded as a “*moving feast*”.
37. It is a damning indictment on the quality of the Minister’s case that even its own witnesses, and particularly Mr Glossop and Ms Hodyl had failed to properly understand the proposed controls and, in the case of Ms Hodyl, presented modelling that was fundamentally at odds with that control.
38. What is needed now is careful, calm and independent reflection and advice. Whatever the perceived political advantages of rushing ahead with these controls, proper and orderly planning is not being promoted.

### **The Context of Population Growth; the starting point for the Framework**

39. It is important to bear in mind that the planning seeks to ensure that the **community of Victoria** is better off as a consequence of planning decisions that are made. This includes decisions with regard to proposed planning scheme amendments. Thus, it is necessary to be bringing a state-wide perspective to decisions, particularly where those decisions concern an area of recognised State significance.
40. As detailed in the evidence of Mr Shimmin, Melbourne is growing at an unprecedented rate; at an average of 80,000 per annum over the last 15 years. Mr Shimmin considers that Melbourne’s population could conceivably be in the range of 8.2 -9.4 million people by 2051, and that this could include up to 705,000-870,000 people in the Central Sector.
41. Consistent with other evidence to this Panel, Mr Shimmin observes that Fishermans Bend presents as a unique opportunity to build on the trend of inner-city living and that facilitating opportunities to substantially increase densities in inner Melbourne will be strategically important to Melbourne’s growth and development.

42. In Mr Shimmin's opinion, the 80,000 population target will be viewed in years ahead as a major opportunity lost. Likewise the employment target of 80,000 will also be viewed as a lost opportunity. The Review Panel should reach the same conclusions.
43. As Mr Shimmin notes (and other witnesses confirm) liveability is very important, but the determining factor resulting in high liveability rating is the ground floor plane, **not** building heights or density *per se*. If Fishermans Bend is to realise its fullest potential there needs to be less focus on controls relating to population density and building heights, and more focus on ground level activation and the provision of transport, facilities and services.
44. The Landowners agree with the evidence of Mr Shimmin, and submit that (given the strategic context of Fishermans Bend, its physical area, proximity to Melbourne's CBD and its lack of any insurmountable site constraints to development) the redevelopment of the Precinct through the Proposed Amendment should not proceed on the basis of a population target. Rather it should proceed on the basis of built form outcomes for the area which maximize the potential for the precinct to accommodate population growth, and yet still deliver excellent liveability.
45. If, contrary to these submissions, the Review Panel is of the view that there should be a population target, it should be a target which is based upon a proper analysis of optimal built form outcomes. Moreover, it should be a target determined transparently, and with the benefit of public input and scrutiny.
46. It is a figure which should be delivered as a product of good urban design and built form outcomes and not as the principal determining factor for these.
47. The Minister has failed to call any expert evidence to explain, justify or support the adoption of the 80,000 resident figure. No witness has been produced to the Review Panel to explain how the figure was derived, or the basis upon which this figure was chosen. Instead, document SIN2 is relied upon and it is asserted that the figure was determined by Places Victoria to be a "*best for project scenario*". The basis for this conclusion has not been presented nor any explanation as to in what way it can be considered to be "*best*" been offered.

48. In the absence of any evidence, the Minister has also adopted the contradictory position of:
- a) On the one hand, arguing that the figure is “*not open for debate*” and must be accepted without question by the Review Panel; and
  - b) On the other hand, seeking to argue through submissions and secondary documents, that the figure has a “*proper strategic basis*”.
49. For reasons explored in detail elsewhere, the Review Panel should reject the proposition that the figure is “*not open for debate*”.
50. It should then proceed to identify, as best it can given the paucity of information available, how, and more importantly why, the figure was identified as the “*best for project scenario*” (whatever that means).<sup>5</sup>
51. In doing so, it should ignore the contentions made by Ms Hodyl and others that the figure is in some way linked to the ability to provide infrastructure for the Precinct. The evidence does not support any contention that it is not possible, or even uneconomic, to provide infrastructure to support more than 80,000 people and 80,000 jobs. Indeed, the weight of evidence is to the contrary.
52. It is also evident from the oral and written evidence of Ms Hodyl that the Urban Design Strategy (**UDS**) did not question the basis of the population targets but simply proceeded to attempt to develop the proposed built form controls that strictly complied with these targets.
53. However, the UDS failed in this objective, in that it allows for the very real potential for the population target of 80,000 to be substantially exceeded by 2050.
54. In Mr Sheppard’s opinion, the UDS and resulting controls are an example of “*the tail wagging the dog*”. This is an apt description. Instead, the process for determining the appropriate built form for Fishermans Bend should be to design the desired built form outcome that balances amenity outcomes and provision for growth, with estimates of the resulting floor area used to inform infrastructure planning.

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<sup>5</sup> Supplementary Submission at page 11.

55. Whilst the Minister's submissions to the Panel<sup>6</sup> and Ms Hodyl's evidence<sup>7</sup> seek to justify the population targets and resulting densities, it is submitted that the arguments put forward are unconvincing in that:
- a) The provision of infrastructure is said to be a reason why the target population is necessary however, there is no evidence before this Review Panel that the proposed infrastructure will be at capacity, or that it cannot be made to accommodate for a larger population.
  - b) Amenity concerns regarding congestion and overcrowding are raised. Again, there is no evidence to suggest that this cannot be addressed through good urban design at the ground plane; and/or with appropriate infrastructure delivery. Moreover, this argument flies in the face of Ms Hodyl's encouragement of additional non-residential floor space in the Non-Core areas on the operation of the FAU;
  - c) Other amenity impacts and built form impacts cannot be an argument for controlling density as built form controls should and will address issues such as open space, public access, connectivity and transition.
  - d) A different character and diversity of built form for the different precincts may be an appropriate planning outcome but it should be remembered that not only does Fishermans Bend abut Port Melbourne which has a generally low scale character, it lies within the broader Melbourne which has vast areas of varying character including predominantly low scale character (accommodating single storey dwellings). As an Urban Renewal Precinct, character need not be driven by an inward-looking concept of diversity or by low scale height (noting the evidence of all urban design witnesses that character varies from place to place and is not always determined by height). Density controls and a population target will not in itself provide diversity in character or housing type.
  - e) There is no evidence to support an argument that increased densities are unsustainable in any way. Moreover, such arguments ignore the somewhat obvious fact that if the population is not accommodated in

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<sup>6</sup> Part A paragraphs 13-22, Supplementary Submissions paragraphs 11-18

<sup>7</sup> Statement of Evidence dated February 2018 paragraphs 78-110

Fishermans Bend it will have be accommodated somewhere. The real consideration is whether it is more sustainable in Fishermans Bend that in an outer, metropolitan growth area.

f) Finally, it is submitted that the various comparisons of densities with other parts of Melbourne and around the world that has been produced to the Review Panel, are simply not helpful in justifying the population target. This is because:

- (i) the examples provided are selective, relate to areas which are not directly comparable to Fishermans Bend, and too few in number to be useful;
- (ii) they do not all relate to urban renewal areas;
- (iii) they do not factor in the extent of commercial uses and population; and
- (iv) they simply demonstrate that there are examples of liveable cities that have low density and liveable cities that have higher density. In this regard, Fishermans Bend sits its own context. It is not Barcelona or Malmo. It lies within a generally very low-density metropolis that has a pressing demand for more accommodation.

56. Ms Hodyl's answer to the fact that her UDS cannot guarantee the delivery of an 80,000 population, and is equally likely to deliver substantially more, or substantially less is that the FAR should be varied to respond to development trends. This is no answer. Once it is acknowledged that the FAR would be increased if development proceeds at a slower pace that the arbitrary 75% build out by 2050 assumption, most landowners will simply respond by waiting until that occurs. Alternatively, if it is reduced, that would result in a gross inequity with some landowners getter greater development potential than others, for no other reason than to achieve an arbitrary population figure

57. It is further submitted that the amendments put forward in the Minister's Supplementary Submissions seeking a mandatory maximum residential FAR

and deletion of the allowance to exceed the FAR with additional floor space<sup>8</sup>, (together a suggestion for “*soft cap*” in the CCZ on the basis that the 80,000 population target should be preserved<sup>9</sup> due to the impact on infrastructure<sup>10</sup>) is simply another exercise in superficial academia and is not supported by any evidence that the infrastructure provision is not capable of accommodating a population above 80,000. It is submitted that “*playing with the numbers*” to fit a pre-set and poorly founded population target is simply not good town planning leading to the best outcome for this precinct.

58. In summary, the starting point of a population target in the proposed Amendment, established by the Vision and developed into the proposed controls though the Urban Design Strategy is misconceived. This alone compels the conclusion that the Proposed Amendment is not “*appropriate*” since this approach infects virtually every part of the proposed controls.

### **Prematurity – Public Transport Infrastructure**

59. Consistent with the submissions of almost all submitters to this review Panel, (including Port Phillip City Council and Melbourne City Council) the Landowners voice their strong concerns that the provision of public transport infrastructure to Fishermans Bend is still unresolved.
60. It is submitted that without the confirmed details of the proposed routes of the tram and train network, and a commitment to the timing of the provision of fixed rail, the Proposed Amendment is premature.
61. This is because the routes of the public transport infrastructure are essential to the manner in which the Precinct will, or should, develop in terms of built form outcomes.
62. This is demonstrated through the inconsistent approaches embedded in the *draft Framework* and the Proposed Amendment which seek to focus intense development in the Sandridge Precinct because it is a possible location for an underground station in 30 years. However no similar density response has been made to the possible provision of an underground station in the Wirraway Precinct.

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<sup>8</sup> Paragraph 40

<sup>9</sup> Paragraph 41(a)

<sup>10</sup> Paragraph 69(f)

63. It should go without saying that a sensible and desirable planning outcome is to have intense development around any underground station and that resolution of the timing and location this essential infrastructure should inform the built form controls.
64. Given that the Urban Design Strategy proceeds on various assumptions including the rate of development take up (75% by 2050) and the desirability of the area to develop for commercial uses (noting the minimum commercial floor area provisions), if and when the public transport is provided will be highly influential to the success, or otherwise, of Fishermans Bend.
65. In the absence of certainty as to the location of essential transport infrastructure, the location of high density development nodes and other important use and infrastructure outcomes cannot be properly considered. To proceed to plan 480 ha of inner city development without first (or at the very least concurrently) settling the proposed transport infrastructure is an example of poor planning.

### **Prematurity – Infrastructure Funding**

66. The objectives of planning in Victoria are contained in Section 4(1) of the Act, as follows:
  - (1) *The objectives of planning in Victoria are—*
    - (a) *to provide for the fair, orderly, economic and sustainable use, and development of land;*
    - ....
    - (e) *to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;*
    - (f) *to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);*
    - (g) *to balance the present and future interests of all Victorians.*
67. Clause 19 of the Planning Scheme, Infrastructure, identifies that: “*Planning authorities are to consider the use of development contributions (levies) in the funding of infrastructure.*” Clause 19.03 states:

## **Objective**

*To facilitate the timely provision of planned infrastructure to communities through the preparation and implementation of development contributions plans.*

## **Strategies**

*Prepare Development Contributions Plans, under the Planning and Environment Act 1987, to manage contributions towards infrastructure.*

68. Unlike other large-scale amendments that are regularly considered by panels, the Proposed Amendment does not include an exhibited development contributions plan (DCP) or infrastructure contribution plan (ICP).
69. Further, despite the Fishermans Bend Advisory Committee Report 1, October 2015, (**MAC Report**) stating that there was an urgent need for a short, medium and long term financial plan<sup>11</sup>, no such Financial Plan has been resolved since that time.
70. The Minister's Supplementary Submissions at paragraph 48 states that it will be produced in the next 12-18 months. The Landowners contend that, given the amount and complexity of public infrastructure proposed in the framework plans, it is submitted this work should have been completed before the preparation of this Proposed Amendment.
71. The absence of one or other of these mechanisms, in addition to the UDS approach of acquiring land for open space and roads through the construct of the FAR without compensation, results in a highly uncertain and unsatisfactory financial position for those directly affected by the Proposed Amendment, the Landowners, as well as the relevant Councils and the taxpayers of Victoria.
72. As stated by Mr Biacsi:

*In my opinion, an investor and/or developer in Fishermans Bend is entitled to know, at this stage in the process, what the likely development contribution regime is to be, the process by which such contributions are to be procured, and how they will be expended, by whom and over what timeframe. Similarly,*

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<sup>11</sup> Page 19

*the same questions are entitled to be asked by the community of their elected Government in terms of significance and scale of public expenditure involved in terms of the declared project of State significance.*

73. The Landowners also accept and agree with the evidence of Mr Shipp. His evidence represents a cogent, well reasoned and compelling discussion as to why the current approach is unacceptable. The Review Panel should adopt these views in their entirety, especially given that the Minister has produced no contrary evidence on these issues.

### **Prematurity – Public Acquisition Overlays**

74. Section 4(2)(l) of the Act provides that the objectives of the planning framework established by this Act are:

*(l) to provide for compensation when land is set aside for public purposes and in other circumstances.*

75. It is submitted that any land earmarked for public purposes (be it public parks or roads) should be subject to public acquisition overlays in the interests of fairness and equity.
76. The MAC Report recommended at page 23 that the Public Acquisition Overlay (**PAO**) should be applied to land required for community or physical infrastructure, once these are identified through the Precinct Plans.
77. The mere fact that the Minister can lawfully proceed to acquire land without using a PAO is not sufficient reason not to do so. Landowners, Councils and taxpayers are entitled to know what land will be acquired, when and how it will be paid for. The suggestion that Landowners whose land is clearly identified in the proposed controls as being required for public purposes will be better off without a PAO is ridiculous.
78. The response in the Supplementary Submissions that a more flexible approach is required because the FAR may not deliver key infrastructure in a timely manner and the Minister should be able to commence compulsory acquisition promptly if necessary<sup>12</sup> does not address the issue of fairness or legality. It merely demonstrates the inadequacies of the FAR mechanism.

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<sup>12</sup> Paragraph 59

79. Further, the flexibility the Minister is seeking with regard to the acquisition of property in Fishermans Bend represents a significant flaw in the method by which public infrastructure is sought to be provided through this Amendment.
80. Putting aside Landowners that are ready to develop land, why would Landowners that have existing businesses on their Land (or are not ready or willing to develop) proceed to develop their land under the Proposed Amendment and “*gift*” open space and roads without compensation, when they could otherwise wait until the key infrastructure was considered to be “*actually required*” and then compulsorily acquired by the Minister with compensation? Further, how can it be fair that some Landowners receive compensation for land to be used for public purposes and not others?
81. Given that the Minister has now made it clear that Landowners who hold out will eventually get the benefit of public acquisition (and compensation), why would anyone decide to go first?
82. If Fishermans Bend is to develop and serve its purpose to provide hundreds of thousands of jobs and houses by 2050, the method of public infrastructure provision cannot be left in the uncertain, unresolved and inequitable state that is proposed through this Proposed Amendment.

### **Urban Design Strategy – Floor Area Ratios (FAR)**

83. The UDS which forms the basis for the built form controls is misconceived. It does not represent an appropriate basis for a proposed Amendment.
84. Further, there is now a significant disconnect between the UDS and the proposed controls. The disconnect is now such that it cannot be claimed that the controls seek to implement the UDS. On the contrary, they are now at odds.
85. In truth the UDS was always doomed to fail. This is because it was asked to achieve the impossible, or at the very least the undesirable and/or unworkable. This is because it was designed to:
  - a) First, control population density to a set figure of 80,000 people. As has already been explained, this is fundamentally the wrong approach. Even if

it were not, it is the wrong figure since it fails to optimise the development potential of the precinct; and

- b) Second, justify the acquisition of private property without compensation by creating a fiction that development opportunities for properties identified as needed for public purposes would suffer no disadvantage as a consequence.
- c) Third, operate as a mechanism to deliver public infrastructure through a FAU system that allowed for increased development rights in return for unspecified "*public benefits*".

86. Ms Hodyl's own evidence demonstrated the significant flaws in the UDS. Even accepting her evidence it is clear that:

- a) The UDS would not achieve the aim to constrain population to the 80,000 figure. On the contrary, it would have allowed for a significantly greater population by allowing buildings to exceed the FAR through the FAU scheme;
- b) The UDS only achieves 80,000 in the unlikely event that the "*75% build out by 2050*" assumption proves to be correct. If the actual "*build out by 2050*" figure exceeds that assumption, there will be a significantly greater population. Conversely, if the actual "*build out by 2050*" figure falls below that assumption then a significantly smaller population will be able to be housed in Fishermans Bend. This would be a disastrous outcome for the community;
- c) The 75% assumption is nothing more than a guess. Ms Hodyl's evidence is that she asked a number of unidentified people what they thought it should be, and in the face of a range of figures between 50% and 100% elected to choose a mid-point. It cannot seriously be suggested that this represents the type of rigour that one would expect for the preparation of a UDS for an urban renewal opportunity of State significance; and
- d) The FAR as developed was entirely unrelated to achieving an acceptable built form. Ms Hodyl concedes that buildings that exceed the FAR but otherwise comply with the built form controls would still allow for diverse,

liveable and high amenity outcomes. Despite this, the FAR seeks to mandate significantly different built form outcomes to serve the ulterior purposes previously identified.

- e) The cross-examination of Ms Hodyl and the evidence Ms Pearson, Mr Sheppard and Mr McGurn demonstrates that the FAR is not achievable on all sites across the Precinct, and therefore results in an inequitable outcome for some landowners (with no compensation provided in the controls for these landowners);
87. The proposed controls as exhibited departed significantly from the UDS; in particular, by proposing to exclude non-dwelling floor space from the application of the FAR in core areas. It is clear that this was a deliberate decision made by those who drafted the controls to attempt to encourage additional commercial floorspace in those areas. It is also clear that the implications of doing so were not properly understood by the author of the controls.
88. However, Ms Hodyl was fully aware that this change had been made in the proposed controls. More importantly, she **fully supported it**. At page 21 of her expert witness statement, she makes the following **Recommendation 3**.

*Update the Urban Design Strategy to remove commercial floorspace area as a potential FAU and **adopt the proposed approach in the Amendment which allows additional commercial floorspace area above the base FAR if it is not used for a dwelling***

89. She also did **not** support a mandatory, minimum commercial FAR.
90. Surprisingly, it also emerged during Ms Hodyl's cross-examination that she also supports the exclusion of non-dwelling floor space from the FAR in **non-core areas** as well. Again, this was said by her to be to incentivise the delivery of commercial floor space in those areas. Accordingly, her evidence is that the proposed controls should exclude non-dwelling floor space **everywhere** in Fishermans Bend
91. Given the above, the proposition now put by the Minister's advocates that it was an **unintended consequence** of the proposed controls that the FARs could be comprised entirely of residential floor area is nonsense.

92. Ms Hodyl, at least, **fully intended** that this would be the consequence because she regarded it as appropriate to incentivise the delivery of commercial floorspace.
93. It should be of great concern to the Review Panel however, that the wider consequences of this intentional strategy appear not to have been appreciated by either Ms Hodyl, Mr Glossop or anybody advising or representing the Minister. It reflects poorly on the Minister's position that the obvious implications of this approach do not appear to have been appreciated by anyone until exposed in cross-examination of Ms Hodyl.
94. Worse still, the Minister is apparently now unable to conceive of a solution whereby commercial floor space can be "*encouraged and incentivised*" in Fisherman's Bend within the suffocating confines of the FAR as currently conceived. Rather, the Supplementary Submissions simply record that the Minister "*continues to consider further opportunities*" to achieve this vitally important outcome.<sup>13</sup> This is, with respect, simply not good enough. It is sufficient in and of itself to justify the Proposed Amendment being regarded as not appropriate.
95. This is symptomatic of many features of the Proposed Amendment and indeed the UDS. Whether by reasons of undue haste, or lack of rigour in their preparation, or the baffling complexity of the body of proposed controls, the Proposed Amendment is riddled with internal inconsistencies, half thought out solutions, and incomplete answers to difficult problems.
96. Further, the subsequent attempts to redraft it have been equally unsuccessful, as evidenced by Document 156A. Amongst other things, that redraft of the CCZ now makes the achievement of any residential floorspace (or social housing) under the FAU impossible, because the Table of Uses does not allow the use of land in excess of the "residential FAR"<sup>14</sup> unlawful;
97. Another example can be found with respect to the scope of the FAU, and the drafting of the provisions that implement it. The Minister now concedes<sup>15</sup> that:

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<sup>13</sup> Supplementary submission at [43].

<sup>14</sup> The reference to "residential FAR" is also an error since Table 1 does not include any "residential FAR" only an "accommodation FAR".

<sup>15</sup> At [44] of the Supplementary Submission

- a) There needs to be a definition of “*public benefit*” included in the CCZ (and has proposed one in Document 156A); and
  - b) There needs to be further detail in relation to the equivalence ratio for additional open space and community infrastructure hubs (and further feasibility advice is being sought on this question); and
  - c) The implications of the incorporation of the Guidelines need further consideration (although for what reason, and by whom, is not stated).<sup>16</sup>
98. Again, these are remarkable concessions. None of these matters could be regarded as being of no significance to the proposed controls. Nor are these issues in any way new.
99. The obvious problems associated with having no definition of public benefit in the control, or any incorporated guidelines in the Scheme to guide the exercise of discretion for an FAU were comprehensively addressed by the C270 Panel in its October 2016 Report.<sup>17</sup>
100. As late as Friday 13 April 2018, the Minister now proposes amendments to Clause 2.0 of the CCZ to address consequences of the Proposed Amendment that would mean that existing businesses seeking to make minor buildings and works to their land would be required to mandatorily “*gift*” land for roads and open space at that time. Again, these issues arise because of the way the UDS (and particularly the FAR) has been designed to operate. They are indicators that the UDS and the FAR are simply not a viable approach.
101. The Landowners submit that it is necessary to rethink the UDS. The device of the FAR control and its related FAU has been proven to be unable to achieve an appropriate built form outcome in Fishermans Bend. It is the wrong tool for the job.
102. In this regard, the Review Panel should not confuse the FAR proposed here with that adopted by the Melbourne C270 Amendment. Other than the fact that they have been given the same name, they are completely different controls and are designed to achieve different outcomes. The C270 version of the FAR:

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<sup>16</sup> Supplementary Submissions at [43] – [45]

<sup>17</sup> Panel Report at pages 56 -69.

- a) was presented as being intended to achieve a built form outcome, namely to present buildings exceeding a particular height and scale;
  - b) was not intended to control population to a set figure;
  - c) was not designed to facilitate the acquisition of private land without compensation; and
  - d) was set at a level (18:1) which allowed for significant development at the upper level of acceptable built form outcomes; rather than at a level significantly below potential.
103. The FAR control as now conceived has no precedent in any VPP Planning Scheme. There is no evidence that it would or could lead to good planning outcomes. It is novel for good reason; because it is an idea poorly conceived and poorly executed.
104. Whether or not some form of FAR control can have a place in a UDS for Fishermans Bend remains to be seen. It will not be known until a new UDS is prepared, tested and the controls based on it considered, tested and reviewed through the normal process of an actual planning scheme amendment. But it is abundantly clear that this type of FAR control is not the answer.
105. In its Supplementary Submission dated 28 March 2018, (paragraphs 40–44), the Minister now proposes to introduce a mandatory residential FAR in addition to the total FAR and to delete the allowance to exceed the floor area ratio with commercial floor space. The Minister also suggests at paragraph 69(e) that a “*soft cap*” for dwelling use in the CCZ provisions could be introduced to monitor the number of dwellings with regard to infrastructure needs.
106. The Minister has sought to support this approach by reference to the Precinct 15 Panel Report.<sup>18</sup> But Fishermans Bend has no similarity to Precinct 15 because:
- a) Precinct 15 is subject to significant transport infrastructure constraints, mainly as a consequence of the capacity of the road network to accommodate traffic growth.

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<sup>18</sup> Amendment C88 Hobsons Bay Planning Scheme.

- b) The evidence in Fishermans Bend was that the infrastructure could not accommodate more than 3,000 dwellings without the need for significant upgrade, which had not been accounted for in the DCP.
  - c) No material upgrade to public transport was being proposed to service Precinct 15.
107. Fishermans Bend is very different. Additional public transport infrastructure can be, and is, being proposed. Infrastructure is not constrained in terms of what population increase it could serve. Moreover, even if this was not the case, the importance of Fishermans Bend is any necessary upgrades **should** be required and funded by government.
108. It is submitted that not only are these amendments clearly “*planning on the run*” with significant consequences to landholders but they are a further retrograde step in the planning for Fishermans Bend:
- a) The preservation of the integrity of the population target is not a good planning reason given the lack of integrity of the population target in the first place;
  - b) There is no evidence before the Review Panel that there are infrastructure reasons to preserve the 80,000 population target;
  - c) Equity between landowners is not preserved as there are still land parcels where the maximum FAR is not achievable;
  - d) It is not supported by any urban design evidence and conflicts with Ms Hodyl’s evidence as to what is appropriate; and
  - e) It is not supported by any planning evidence.

### **The Use of the FAR to acquire land without compensation**

109. The proposed use of the FAR as a mechanism to justify the acquisition of private land for public purposes without compensation must be rejected by the Review Panel.

110. It is an approach that is both legally flawed, and fundamentally inequitable. It is not an acceptable approach to the planning for Fishermans Bend on both grounds.
111. The approach raises two fundamental questions that must be considered by the Review Panel; namely:
- a) Is the proposed use of the FAR in this manner appropriate?
  - b) Is the proposed use of the FAR in this manner lawful?
112. The landowners submit that both questions can be answered in the negative, for the following reasons.

### **Is the Proposed Use of the FAR Appropriate?**

113. The starting point for this analysis must be a consideration of the objectives of planning as established by s. 4(2) of the Act. The Review Panel should always be conscious that it is an objective of the planning framework established by the Act to:
- (l) to provide for compensation when land is set aside for public purposes and in other circumstances.*
114. Notably, the objective does not refer to the need for land to be “*reserved*” for public purposes to enliven the objective of compensation. Nor is it restricted to where land is **acquired** for a public purpose.
115. Rather, the Act proceeds on the basis that the objective to compensate arises because of the **setting aside** of land for public purposes. This recognises that loss can flow to a landowner where land is **set aside** for such a purpose, even if it is never actually acquired or used for that public purpose.
116. There can be no doubt that the Proposed Amendment seeks to **set aside** private land for public purposes. The term “*set aside*” is not defined in the Act, and so must be given its ordinary and natural meaning. The meaning must be best described in this context as “*to keep in store for future specific use*” or to “*designate*” for particular purpose.

117. That private land is proposed to be unambiguously identified as being required for public purposes. It then cannot be used or developed for any other purpose. Further, it is clearly intended by the Minister that it must be transferred to the relevant municipal council at no cost upon the issue of a planning permit.<sup>19</sup> While it can be doubted that this is, in fact, the result of the Proposed Amendment in the form in which it was presented to the Panel, clearly this is its intent.<sup>20</sup>
118. The Landowners contend that where land has is proposed to be:
- a) unambiguously identified in the proposed Amendment on maps as being required for a public purpose; and
  - b) unable to be used or developed pursuant to a permit for any other purpose; and
  - c) us required to be transferred to the relevant municipal council free of charge upon the issue of a permit –
- the only possible conclusion is that the Land is being “**set aside**” for a public purpose.
119. Further (and contrary to the Opinion) the meaning of **set aside** (or for that matter **reserved**) cannot be determined by the contents of the planning scheme. Put simply, the contents of the planning scheme cannot be used as a basis to ascribe meaning to words used in the Act, or to limit or alter the meaning of words used in the Act.<sup>21</sup>
120. Accordingly, the contention that the relevant provisions do not result in land being set aside for a public purpose must be rejected.
121. At the outset, therefore, the proposition that private land can be set aside for public purposes without any requirement to pay compensation must be regarded as being directly contrary to one of the objectives of planning as specified in the Act, and in particular s.4(2)(e). It is no answer to say that it may

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<sup>19</sup> See: [20] of document 155, being an Opinion dated 20 March 2018 authored by David Batt QC and Marita Foley (**Opinion**).

<sup>20</sup> The Landowners do not accept that the Opinion is correct in saying that the proposed amendment in the form exhibited has this effect. However, it could be amended to put this beyond doubt. The CoPP have given an example of how this could be done, which the Minister appears to have now adopted.

<sup>21</sup> This principal will be addressed later in more detail later in these submissions.

be consistent with other objectives. Objective 2(4)(e) is not expressed as a conditional objective. It is not an objective that should only be achieved “*where possible*”. It is not an objective that can be partly met (in the sense that there is either compensation or there isn’t) or which can be simply sacrificed to meet some other objective.

122. The FAR has been employed as a device to achieve an improper purpose. It is a device fundamentally ill-suited to such a role, given that it is primarily a device used to control either built form or density. The attempt to use it for this purpose was always a bad idea, and (not surprisingly) it has been revealed to be a bad idea in this hearing.
123. The use of the FAR in this manner is based upon the fiction that a landowner who has land identified for public purposes is not suffering any consequent loss because they retain exactly the same development potential under the FAR as a landowner who does not have land so identified.
124. This proposition is clearly a nonsense, for the following reasons:
  - a) First, because it assumes that land which does not have built form on it has no value to a private landowner. This is manifestly incorrect because:
    - (i) Even if it cannot have a building on it, private land at ground level can be developed as private open space for the benefit of future occupants of the buildings. It could, for example, be used to accommodate any necessary communal open space for a development on the balance of the land (and therefore free up space within the building for other uses). Or it could be used for car parking. Or developed as recreational open space (such as an open air cinema, a playground etc.) for use by others at cost. Does a private backyard have no value to its owner because it can’t, or isn’t being built on?
    - (ii) In this regard, even the Opinion concedes that the outlook onto open space is likely to add value to the land (see: Footnote 23 on page 11).

- (iii) Further, as Callinan J observed in *Temwood* with respect to the effect of gazetting an area of land as a public foreshore reserve:

The gazettal of the Foreshore Reserve would, in all likelihood, have had an immediate adverse impact upon the value of the land the subject of it, and also, in all probability upon the value of the land now in the ownership of the respondent to the east of it. The precise legal effect of the gazettal upon the owner's proprietary rights is not entirely clear. **There is no suggestion however that the gazettal deprived the land of all utility and value to the owner.** Indeed, cl 13 of the Scheme provided that the owner could erect a boundary fence without the need for any consent by the appellant, and cl 14 provided that **the owner might continue to use the land for any purpose for which it was lawfully being used before the Scheme had the force of law.** Whilst the Foreshore Reserve remained in private ownership therefore, the owner could still use and occupy it, and deny entry upon or use of it to anyone else except authorized official entrants. **It should not be automatically assumed, and it was not suggested in argument, that all uses or means of exploitation of the land within the Reserve would be necessarily incompatible with its reservation. Furthermore, whilst it remained in the ownership of the same person as owned land to the east of it, it continued to have added value for the purpose of preserving views, of preventing the obstruction of prevailing sea breezes, and as a means of giving direct access to the beach, thereby enhancing the value of the eastern lands. ....”** (emphasis added)<sup>22</sup>

- b) Second, because it ignores the value of any existing use of the land which, but for the provisions of the Proposed Amendment, could have lawfully continued notwithstanding the issue of a permit allowing for the use of development of the balance of the land.<sup>23</sup>
- c) Third, because it ignores the fact that it is proposed that a landowner who is required to give up open space will also be expected to meet the costs of both rehabilitating that land to open space standards, as well as the costs of “*improving or embellishing*” that space. The costs of doing so have never been estimated or quantified by the Minister, but can be assumed to be substantial. Even if those costs are ultimately reimbursed to a landowner (which is doubtful) the need to meet these costs upfront (and not be reimbursed for an undefined period of time) will inevitably reduce the value of that land on the open market.

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<sup>22</sup> See: *Temwood* at [126]

<sup>23</sup> Indeed, the proposition that such existing use rights could be either ignored or extinguished by the proposed new controls is another reason why they can be regarded as unlawful, and contrary to s. 6(3) of the Act.

- d) Fourth, it ignores the additional costs and imposts associated with the constraints and lack of flexibility that the setting aside of an area of private land imposes on the development of the diminished remainder. These include the necessity to develop a smaller land parcel, and (inevitably) to construct buildings which are comparatively taller and more narrow and, as a consequence, more costly to construct.
  - e) Fifth, and most importantly, because the fiction was based upon a fundamental misunderstanding of the way in which the FAR was proposed to operate in core areas, and which excluded all non-dwelling floor space. The belated concession by the Minister in its Supplementary Submissions that this is correct is ample demonstration of the lack of thought that went into the Proposed Amendment in the first place. Moreover, it is a timely and telling reminder that the use of built form controls to acquire people's properties without paying compensation will almost inevitably have "*unintended consequences*".
125. Other than a desire to avoid the complications and expense of paying compensation, no convincing argument as to why the FAR should be employed for these improper purposes has been presented.
126. Nor has any convincing argument as to why it is fair and equitable not to compensate a private landowner for taking their land for the greater public good been identified.
127. Further, no convincing reason been presented as to why a greater share of the burden of paying for public open space should be visited only on certain private landowners in Fishermans Bend. The only proposition that has been presented is the false argument that the landowners who have to give up open space without compensation are in no way disadvantaged in doing so.
128. Presumably, the Minister therefore accepts that, if the Review Panel concludes that there is disadvantage to such a land owner (by reason of one or more of the matters identified above) that this means that the approach no longer has legitimacy?

129. It was suggested at one point in the hearing that the proposed system could be regarded as akin to a “*land equalisation*” system which applies under a DCP. Nothing could be further from the truth. Under a DCP, a landowner who contributes more than its’ fair share to open space is entitled to a credit which reflect the monetary value of that excessive contribution. That credit is then offset against any liability the landowner has to pay development contributions. In this way, equity across all landowners is ensured.
130. The proposed FAR control bears no similarities to this system. A landowner whose land is required to be gifted as open space does not receive any “*offset*” or any compensation for that occurring. Indeed, the whole FAR control is predicated on the mistaken belief that there is no loss to offset!
131. The use of the FAR in the manner, and for the purpose, proposed is entirely novel. No other planning scheme in Victoria has used a FAR in this manner. As such, its legality is, (at the very least) open to serious debate, as are the effects of the use of such a system on (amongst other things) the two Councils who will be exposed to the risk of paying compensation should the Minister’s somewhat optimistic legal advice as to liability for compensation prove to be incorrect.
132. The Review Panel should consider whether it is appropriate to use Fishermans Bend as the “*guinea pig*” for this sort of controversial approach to planning. In doing so, it should consider the very serious implications of the Opinion being shown to be wrong.
133. It should also consider the import of the following statement of principle:

*Public authorities, particularly those with power to affect proprietary rights, are bound to act not only in good faith, but also fairly and reasonably. No public interest is truly served by conduct which falls short of this standard. Indeed, high-handed, unfair acquisitive conduct is not only unlawful but is also likely to weaken the authority of, and confidence in public administration.*<sup>24</sup>

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<sup>24</sup> Callinan J in *Temwood* at [129].

134. Accordingly, the Landowners submit that the Review Panel should find that the use of the FAR as proposed is not appropriate, even if it could be regarded as legal.

### **The Use of the FAR in this Manner is Unlawful**

135. It is significant that the question of legality seems to have been a matter upon which the Minister has acted first, and sought advice later.

136. The Minister now seeks to rely upon the contents of the Opinion. It can be noted that the Opinion is dated 20 March 2018. It would appear therefore, that the mechanism was developed first, and the issue of its legality considered at a much later stage (indeed, well after the commencement of this hearing). This is not a sound approach to planning the most important urban renewal opportunity in Australia<sup>25</sup>.

137. Further, the advice that the Minister has now received is misconceived, in at least two fundamental respects.

a) First, because the Opinion does not address a fundamental question; namely whether the proposed provisions that seek to create the obligation to deliver land required for a public purpose at no cost to a Council is within the scope of what is permitted by the Act to be included in a planning scheme. The Opinion instead only addresses the narrow question as to whether the relevant provisions constitute an “*unlawful acquisition of property*”. In doing so, it fails to address many other fundamental considerations regarding the legality of the relevant provisions.

b) Second, because the Opinion arrives at the conclusion that there would not be a reservation of land for a public purpose land for the purposes of s.98(1) by way of a flawed process of reasoning. That is, it uses the contents of the planning scheme (being subordinate legislation made under the P&E Act) to interpret the meaning of words in the Act. This is not the correct approach at law to the interpretation of legislation.<sup>26</sup>

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<sup>25</sup> Alternatively, if other advice was obtained, why has that not been produced?

<sup>26</sup> See, for example: **Seventh Columbo Pty Ltd v Melbourne City Council** [1998] VSC 7 per McDonald J at [35], and the authorities referred to at [31].

- c) Adopting the correct approach leads to the conclusion that the land that is identified in the Proposed Amendment as being required for open space and/or roads is both **set aside** for and **reserved** for public purposes. As such, Councils would be exposed to the requirement to pay compensation under s.98(1)

138. The above propositions are now addressed in more detail.

### **Are the Relevant Provisions within the Scope of what is authorised by the Act?**

139. To be lawful, the proposed planning controls must be justified by reference to a statutory power. In other words, there must exist some Act of Parliament that allows them to be included in a planning scheme

140. Further, there must be a *“direct and substantial connection”* between the likely operation of the FAR Control and the statutory object it serves.<sup>27</sup>

141. The FAR control (and the related FAU control) bears no resemblance to plot ratio controls that previously existed in the Scheme (or which still persist in some planning schemes of Victoria). It is different to the plot ratio controls that exist in other states, or other cities of the world. This is because it is not primarily intended to operate as a built form control. While it may have that **indirect effect**, by preventing certain forms of development, it is not intended to achieve any particular built form outcome.

142. Rather, its purposes (as now expressed in the redrafted CCZ Schedule are:

- a) To provide public benefits where the scale of development exceeds nominated Floor Area Ratios; and
- b) To facilitate the provision of public open space and the road network shown on the Maps of this schedule by the imposition of Floor Area Ratios.

143. The question then is whether these purposes or these outcomes are permissible outcomes of a planning scheme control enacted in Victoria under the Act.

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<sup>27</sup> *South Australia v Tanner* (1989) CLR 161, 178-9 per Brennan J.

144. Ironically, this issue has been previously addressed in a Memorandum of Advice obtained by the Minister prepared by Stuart Morris QC and dated 25 August 2016 (**Morris Advice**).
145. The Morris Advice was obtained by the Minister with regard to Amendment C270 to the Melbourne Planning Scheme, and subsequently provided to the C270 Panel in order to support an argument that the (very different) FAU scheme proposed by that amendment was lawful.
146. The Morris Advice correctly identifies that to determine whether a Proposed Amendment is within the scope of the Act, it is necessarily to consider (amongst other things) whether the Amendment is:
- a) Expressly repugnant to a provision of the Act; or
  - b) Impliedly repugnant to a provision of the Act.
147. First, it can be noted that the relevant provisions are clearly expressly repugnant to section 4(2)(l) of the Act and the objective to provide for compensation when land is set aside for public purposes and in other circumstances.
148. In this regard, a distinction needs to be drawn between proposed planning scheme provisions which have as their purpose land the identification and preservation of land that is, or may be required for a public purpose, and those that are directed towards avoiding the need for compensation to be paid for the acquisition of that land. The proposed controls are an example of the latter.
149. The former can be said to be provisions which give effect to the objectives of planning identified in the Act, and achieve a legitimate planning purpose. In contrast, the latter are directly contrary to an identified objective of planning in the Act, and are motivated by an improper purpose; namely the desire to avoid paying compensation. They reflect an administrative desire to avoid the need for the State or a Council to pay compensation. That is; it is a purpose based on fiscal rather than planning objectives.

150. At [25] to [28] of the Morris Advice the learned author provides his advice on the question of when a provision can be regarded as being impliedly repugnant to a provision of the Act. That opinion is as follows:

*A further qualification is that the regulatory provision, requiring the provision of a public benefit, must not be impliedly repugnant to the Act or a provision of the Act.*

*Thus, in my opinion, a provision requiring a public benefit must not amount to the acquisition of property.*

*The Act makes specific provision for the acquisition of land, incorporating the provisions of the Land Acquisition and Compensation Act 1986. If the Act were used to compulsorily acquire property using some other mechanism, particularly one that did not provided compensation, this would by-pass the protection afforded by the Act.*

*This follows by the application of long-standing principles of statutory interpretation.*

151. At [23] of the Morris Advice, the learned author further notes that the provision he was asked to consider “*must not infringe the protection given by section 6(3) of the Act in relation to existing uses*” and that this did not appear to arise in relation to the amendment he was called upon to consider.
152. The same cannot, however, be said for the Proposed Amendment. Here, the relevant provisions clearly infringe upon those protections. This is so because they are intended to require land which is identified as open space to be “*transferred at no cost to the relevant municipal council*”, thereby extinguishing any right the landowner has to continue a lawful existing use of that land.
153. The Landowners adopt the Morris advice which correctly states the law in this regard. The effect of the relevant provisions is to achieve the acquisition of property without compensation. This is not only their effect; it is the **express intention** of the relevant provisions (at least according to the Minister).
154. The Morris Advice is consistent with long standing authority in Victoria that the use of a planning scheme provision to achieve “*reservation by subterfuge*”

would be arguably unlawful. In *Equity Trustees Executors and Agency Co Ltd And Ors v Melbourne and Metropolitan Board Of Works* [1993] 81 LGERA 86 (**Equity Trustees**) Gobbo J expressed that principle as follows (at pages 95 to 96):

*Where a planning authority is empowered to create zones or to reserve land for public purposes, it would arguably be an abuse of the power granted to the planning authority for it to create a zone which was a reservation by subterfuge. Such a course would be analogous to an exercise of power, not for the specified purpose but for an ulterior object. An illustration of how the courts will restrain such an acquisition may be seen in *Werribee Council v Kerr* (1928) 42 CLR 1. See also *Criterion Theatres Ltd v Municipal Council of Sydney* (1925) 35 CLR 555.*

*If a Conservation zone were created that was a reservation by subterfuge, or more particularly deprived the owner of all beneficial use of the land but by the device of a zoning description set out to deny the owner any right to compensation, then there is no reason in principle why an owner may not be able to attack such action as an abuse of power, which he could seek to set aside by declaratory proceedings. ...*

155. At [27] the authors of the Opinion argue that “*reservation by stealth*” or “*subterfuge*” is not a “*sustainable line of argument*” and suggest that the decision of the High Court in **Walker Corporation** makes this clear. This must also be rejected since:
- a) The decision in **Walker Corporation** says nothing whatsoever about “*reservation by subterfuge*”, and does not refer to **Equity Trustees**; and
  - b) while the High Court cautions against adopting common law principles based on previous statutory provisions or statutory provisions in other jurisdictions, that principle has no application to **Equity Trustees**, which is a decision from the same jurisdiction, and concerns exactly the same statutory provisions as are relevant here.

156. The Morris Advice is also consistent with other authority. In this regard, the decision of Cowdroy J in *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning* [2000] NSWLEC 20 (**Meriton**) is directly apposite to the legality of the proposed provisions<sup>28</sup>. **Meriton** is not referred to in the Opinion.

157. In **Meriton**, Cowdroy J was required to consider the legality of certain provisions of a planning instrument that required a developer to make contributions for “affordable housing”<sup>29</sup>. The provisions in question were closely analogous to the proposed controls in their terms and intent (albeit far more sophisticated, transparent and detailed).<sup>30</sup>

158. Cowdroy J ruled that the provisions were unlawful because they:

- a) were not authorised by any Act, because they were implemented for a purpose which could not be properly regarded as a “planning purpose”; and
- b) amounted to an unlawful acquisition of property without compensation; and
- c) constituted an unauthorised interference with proprietary rights, and were thus unreasonable in the *Wednesbury* sense.

159. In doing so, Cowdroy J adopted long standing authority that:

*“The fact that the challenged provisions may be for a laudable purpose is not germane to the issue raised in these proceedings. Such purpose cannot validate an excessive use of power...”* (at [39]).

160. At [55], Cowdroy J gave reasons as to why the proposed provisions represented an unlawful interference with property rights as follows:

*The practical effect of the challenged provisions is that an applicant’s property would be controlled by the community housing provider without any compensation. In *Belfast Corporation v O.D. Cars Ltd.* [1960] AC 490 Viscount Simonds at 517-518 stated: ‘It is no doubt, the law that the intention to take away property without compensation is not to be*

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<sup>28</sup> Which was cited with approval in *Maroondah City Council v Fletcher & Anor* [2009] VSCA 250 at [232].

<sup>29</sup> Consisting of residential accommodation within the development that had to be assigned to a nominated housing authority by permanent reservation or transfer of title, or a cash contribution.

<sup>30</sup> In that the detailed “guidelines” as to how the contributions were to be calculated, delivered and secured were incorporated as part of the planning control, whereas the FAR Controls do not include any such detail.

*imputed to the legislature unless it is expressed in unequivocal terms.’ This proposition has been affirmed by the High Court of Australia in *C.J Burland Pty Limited v Metropolitan Meat Industry Board* (1968) 120 CLR 400 at 403, 406, 415. The Act contains no express provisions permitting the acquisition of property without compensation as envisaged by the challenged provisions. Thus if the Act as the enabling statute does not authorise such a power of acquisition the purported authorisation of such power by a subordinate instrument, namely the LEP cannot be valid. The principle has been clearly established that inconsistency between the provisions of a statute and delegated instrument there under will result in the invalidity of the inconsistent portion of the instrument (see: *Morton v The Union Steamship Company of New Zealand* at 410).*

161. While section 6(2)(k) of 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” this does not mean that the power to do so is unconstrained, and any condition whatsoever can be imposed. For example, section 6(2)(k) would not justify the insertion into a planning scheme provision that made development conditional upon entering into an agreement to wash the Minister’s clothes.
162. The form of the control, and what it requires a developer to deliver is the critical consideration. And, for the reasons set out in **Meriton**, it is not lawful to implement a control that requires a developer to give up without compensation land for public purposes, particularly where those benefits have no connection or nexus whatsoever to the impacts of the development that is being proposed.
163. The Landowners agree with the authors of the Opinion that “*the enquiry is one that turns on the provisions of the statute itself*” and the relevant “*statutory language*”. However, the statutory language of the Act simply cannot be ascertained by reference to the planning scheme.
164. Nor can a “*reservation by subterfuge*” be achieved lawfully under the Act, and certainly not by adopting the artifice of avoiding the use of a PAO and proposing provisions that do the same thing but by an alternative means.

165. The Landowners note further the reliance by the authors of the Opinion on the decision of the High Court in **Lloyd v Robinson** (1962) CLR 142 to support their argument that the relevant provisions do not effect an unlawful acquisition of property.<sup>31</sup> In truth, however that decision stands for the opposite conclusion regarding the relevant provisions.
166. In **Lloyd v Robinson** the High Court was required to consider the legality of a condition on a sub-division permit that required land within the subdivision to be set aside as open space reserves. It did not consider the legality of a provision in a VPP planning scheme that required the setting aside, and subsequent transfer without cost to a Council, of land.
167. Critically, however, in that case the need for the open space was generated by that very subdivision; and so there was a direct nexus between the need for the reserves and the development being approved under the permit.
168. Notably, at [14] in **Lloyd v Robinson** the High Court said:

*The assumption may be accepted that the statutory power to annex conditions to an approval of a subdivision does not extend to requiring the setting aside for public recreation of land which is so unrelated to the land to be subdivided, because of remoteness from it or some other circumstance, that there is no real connexion between the provision of the open space and the contemplated development of the area to be sub-divided.*

169. In a similar way, it must be regarded as beyond the scope of the power of the Act to include provisions in a planning scheme that require the setting aside of public open space and roads (without compensation) in circumstances where **“there is no real connexion between the provision of the open space and the contemplated development”** allowed under a particular planning permit.
170. It is also not correct to say that by allowing for the regulation of the use and development of land that the Act necessarily takes away a person’s rights to be compensated for the acquisition of that land. On the contrary, the Act says expressly that its objective is **not to do this**.

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<sup>31</sup> See Footnote 25 on page 11.

171. While it may be the case that some acts that regulate town planning in other jurisdictions (such as the Western Australian laws considered in **Lloyd v Robinson** and in **Temwood**) may allow for such an outcome to be achieved by their respective planning schemes or controls, the Act that operates in this jurisdiction clearly does not.
172. Further, the mere fact that the Act allows development rights to be infringed, and permission required to then develop or use the land, does not lead to the conclusion that anything at all can be specified as the cost of securing this right. As an extreme example, it could not be regarded as lawful for the Act to require that a landowner give up his or her rights to Australian citizenship as a quid pro quo of obtaining permission to develop land. Similarly, the Act does not contemplate that a planning scheme can provide that the right to develop land can only be secured at the costs of forgoing a right to compensation for the acquisition of part of that land for a public purpose which has no connexion to the use of development that is proposed.
173. The real question is not simply (as the Opinion seems to suggest) whether a planning scheme can include provisions that require a quid pro quo; rather it is whether **the proposed provisions** represent a lawful exercise of power to enact a planning scheme that requires quid pro quo.
174. While it can be accepted that it is a lawful exercise of power under the Act to use the planning scheme to **identify** land that is used for a public purpose, it does not follow that it is also lawful to use the planning scheme as a mechanism by which to avoid the need to pay compensation for the acquisition of that land.
175. The VCAT decision in **Skedero** does not alter the above.<sup>32</sup> Unlike what is being proposed here, there was no express or implied requirement within the scheme provisions considered in that case that required land to be transferred without cost to a municipal council. Rather, the land had been identified as possibly needed for a school in a PSP plan. There was never any suggestion that, if a school was required, that the land for the school would be simply handed over to the government by the landowner free of charge.

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<sup>32</sup> See Footnote 18 on page 10.

176. At the very least, the correct legal position is extremely uncertain, and the correctness of the Opinion open to serious debate.
177. In such circumstances the Review Panel should seriously question whether it is proper and orderly planning to employ such a novel and controversial (not to mention inequitable) mechanism to acquire open space. Why not simply employ the mechanisms contemplated by the Scheme?
178. Why not simply do what is unquestionably fair and legal?

### **Do the Relevant Provisions Reserve or Set Aside Land for Public Purposes?**

179. The Opinion does not dispute that the use of land for a road and/or open space represents a public purpose.<sup>33</sup> Indeed, it would be untenable to argue the contrary.<sup>34</sup>
180. However, the Opinion concludes, in effect, that land can only be considered to be **reserved** for a public purpose where it is subject to a PAO. This view must be rejected.
181. It can be noted that, even though the Opinion suggests in footnote 10 on page 6 that the question as to whether land could be “*set aside for a public purpose*” pursuant to s.4(2)(l) is addressed in [23] to [28] in fact it is not. Nowhere does the Opinion seek to explain why the relevant provisions could not be regarded as having “*set aside*” land for public purposes.
182. The Opinion arrives at its conclusions through a process of circular reasoning, as follows:
- a) The Scheme contains a mechanism by which land **can be** designated for public purposes, namely the PAO;
  - b) The PAO is not being used; and, accordingly
  - c) The relevant provisions do not **reserve** or **set aside** land for public purposes, whatever the actual, practical effect of the relevant provisions.

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<sup>33</sup> See Footnote 12 on page 7.

<sup>34</sup> *Whelan Kartaway Pty Ltd v Minister for Planning And Housing* [1993] 2 VR 59; *Van der Meyden v Melbourne and Metropolitan Board of Works* [1980] VR 255 both of which make it clear that the use of land for public open space must be regarded as a public purpose

183. The Review Panel should reject this flawed logic, for the following reasons:

- a) The starting point is to identify the meaning of the words **set aside**<sup>35</sup> and/or **reserved** for a public purpose. Neither word is defined in the Act. Thus, their meaning must be ascertained by reference to accepted principles of statutory construction.
- b) The Opinion, however, does not do this. At no point do the authors seek to ascribe meaning to either term. Rather, they argue that land can only be considered **reserved** if it has a PAO applied to it. Presumably, this means that they consider that the meaning of these terms in the Act must be construed as meaning: "**Identified in a planning scheme by a PAO**" and nothing else.
- c) There no express provision in the Act to support this proposition. Had this been the intended meaning, the terms could have been so defined in the Act. They are not.
- d) Further, there is nothing in the Act that states or implies that land can only be considered to be reserved or set aside if it has been subject to a PAO (or indeed any other mechanism). Indeed, it would be impossible for the Act to have included such a provision, since the PAO is a construct of subordinate legislation; namely a planning scheme. There is, in fact, nothing in the Act that requires a PAO (or any other overlay for that matter) to **ever** be used in any planning scheme.
- e) The relevant provisions of the Act also pre-date the introduction of VPP planning schemes. It cannot be that the meaning of words in the Act can be interpreted by reference to subordinate legislation that was not in existence at the time the relevant provisions in the Act were enacted.
- f) The fact that s.98 (1) operated to entitle landowners to claim compensation under the Act when their land was reserved for public purposes before the PAO even came into existence amply demonstrates the incorrectness of the Opinion in this regard.<sup>36</sup>

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<sup>35</sup> In s. 4(2)(l)

<sup>36</sup> See: *Equity Trustees* as one example of where this occurred.

- g) The fact that the application of a PAO now expressly results in land being identified as **designated as reserved** for public purposes simply puts the status of that land beyond doubt. It does not, however, imply that in no other circumstances could a provision of a planning scheme be regarded as having that effect.
- h) There is, of course, a very real irony inherent in the Opinion, in this sense. If it is indeed correct that the Act contemplates that land can only be considered at law to be reserved for a public purpose if it is subject to a PAO, then what possibly justification is there for achieving the same practical end by an alternate mechanism? Is the Minister suggesting that the relevant provisions are specifically intended to avoid the need to use the only mechanism by which land can be lawfully regarded as having been reserved for a public purpose? If so, is this an approach that the Review Panel is prepared to endorse as representing proper, orderly and equitable planning?
- i) Notably, the position argued in the Opinion is unsupported by any direct, or even indirect, authority. It is also contrary to long accepted planning practice. VCAT have on numerous occasions concluded that land is required for a public purpose notwithstanding that no PAO has been applied. This includes where, for example, the land is clearly identified in the relevant planning schemes as being required for a public purpose (such as, for example, a drainage reserve).<sup>37</sup> Moreover, compensation has on numerous occasions been paid by Council's to landowners where this has occurred (**Mainline** being one example).
- j) The Opinion also ignores the fact that there are also many ways in which land may be reserved for a public purpose other than by operation of the planning scheme. The *Crown Land Reserves Act 1978* is one such mechanism.<sup>38</sup> The proposition that land reserved by such alternative means should not be regarded as not having been **set aside or reserved** for a public purpose must be rejected.

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<sup>37</sup> See: for example: *Mainline Investments v City of Whittlesea* [2005] VCAT 2017.

<sup>38</sup> See: for example section 4.

184. The Landowners contend that the ordinary, natural meaning of **reserved** in the context in which it is used in the Act is: “**set apart for a particular use or purpose**”<sup>39</sup>. The phrase **set aside** is effectively of equivalent meaning, if not arguably wider in its terms.
185. Having regard to that meaning, it should be concluded that land is **reserved** or **set aside** for a public purpose where it is clearly identified in a planning scheme as being **set apart** for that purpose. The relevant provisions unambiguously have that effect. In combination, they purport to (and are intended to):
- (i) identify that land is required for a public purpose, be it a road or public open space; and
  - (ii) prevent the issue of a planning permit for any use or development of that land; and
  - (iii) require the land to be transferred without charge to a relevant authority.

### **The need for a landowner to pay for improvements and rehabilitation**

186. Not content with simply acquiring land without compensation, the Proposed Amendment also proposes that a landowner also pay the costs of:
- a) Remediating the land for public open space; and
  - b) improving or embellishing the public open space.<sup>40</sup>
187. Further, they now propose that any necessary road also be constructed by the Landowner. (see Document 156A clause 4.0).
188. Again, there appears to be no proper basis for these requirements, since the works have no connexion with or nexus to what is being approved under a permit for the use of development of each land parcel. Rather, they represent a form of development contribution which is being required to deliver a wider public benefit.

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<sup>39</sup> See (for example): Macquarie Australian Encyclopaedic Dictionary, 2006

<sup>40</sup> See. Document 99 at [22](b) (iii) and (iv).

189. As such, they cannot lawfully be imposed on a landowner by permit condition. The only way they can be secured is through a voluntary s.173 agreement.
190. It is suggested that the landowner will be “*reimbursed*” for these costs from the “*interim developer contributions*”. However, how (for less when) this could actually be guaranteed to occur is not properly explained.
191. The proposition in Document 99 is that the landowner will be reimbursed at some unspecified future time from moneys obtained through what is described in that document as “*interim developer contributions*”. It appears that this means development contributions collected via the existing DCPO.
192. However, whether this is legal or practical is also open to serious debate. This is primarily because the existing DCPO does not require this, and there can be no guarantee that any interim developer contributions either can, or would, be applied for this purpose.
193. It is clear that the Fishermen’s Bend Taskforce (which purports to be the author of Document 99) has no real idea as what the existing DCPO actually requires, or how the Act operates with regards to development contributions. This is because, currently, no DCP exists for Fisherman’s Bend.
194. Accordingly, leaving aside the preparation and approval of a site specific development contributions plan, provision can only be made for development contributions by way of an agreement with the developer and the responsible authority.
195. In this regard, the statement at [5] of Document 99 that permits require a s.173 agreement to be entered into with the Victorian Planning Authority (VPA) is simply incorrect. Rather, the agreement must be with the relevant **responsible authority** not the VPA.
196. While it is open to the developer and the responsible authority to agree that the payments will be made to the VPA, that is a matter to be determined in the context of each individual agreement. Further, neither the landowner nor the responsible authority could be legally required agree to such an arrangement since it is not a requirement of the DCPO that the VPA receive any contributions.

197. In addition, assuming that the contributions were agreed to be paid to the VPA, there exists no mechanism by which the VPA could be legally required to:
- a) spend those contributions on any particular infrastructure; or
  - b) reimburse a landowner for the payments made with regard to those costs of rehabilitating or improving/embellishing public open space.
198. This is because the VPA will not (and cannot lawfully be) a party to that agreement, and accordingly cannot be bound by its terms.
199. Accordingly, the assertions made as to the manner in which “*interim developer contributions*” could or would be expended in the future by the VPA have no weight. They are empty promises that cannot be enforced by anyone. In the absence of an approved DCP for Fishermans Bend, the current ad hoc system which relies upon the contents of a series of individual agreements between individual landowners, and thereafter the “*goodwill*” of the VPA as to how those contributions will be spent will be required to continue. That system is wholly unsatisfactory. A new DCP or ICP is urgently required.

### **Urban Design Strategy – Floor Area Uplift**

200. Much like FAR control, the FAU proposed through the UDS and the proposed controls is flawed, possibly illegal, and likely to promote poor built form and amenity outcomes.
201. It is yet another example of a controversial, untested and poorly conceived planning control that is being pressed into service in proposed Amendment, largely to achieve the ulterior purpose of shifting the burden of providing infrastructure from government to developers.
202. The only example of an FAU scheme being used in Victoria is the Scheme adopted by the Minister through Amendment C270 to the Melbourne Planning Scheme.
203. The Minister adopted that Scheme despite against the recommendations of the Panel who recommended it be abandoned.
204. At page 69, the Panel stated:

*The Panel concludes the following, without making a recommendation as to whether the FAU Scheme is valid or lawful:*

- *The FAU Scheme is proposed is in some ways similar to a DCP, but without meeting the requisite statutory requirements. The Panel was unable to identify any other existing statutory basis of the AU scheme as proposed.*
- *The intention to exclude reviews of the development contribution for a particular project does not seem likely to be achievable.*
- *The requirement to enter into a s173 does not appear to be a voluntary requirement when coupled with the proposition that the exercise of discretion as to the agreed public benefits category cannot be reviewed under the usual statutory processes*
- *The FAU Scheme fails to clearly apply the principles of equality, consistency, accountability and transparency to the securing of benefits and its implementation, including the Guidelines, is vague and may be open to interpretation.*
- *The strategic justification for the scope of public benefits is absent.*
- *There are too many opportunities for inconsistent outcomes in the “negotiation” of agreements for public benefits.*
- *The absence of CIL makes the scheme less workable.*

*The FAU Scheme should be abandoned*

205. While the Scheme proposed here is not identical, it shares all its major features, and all its inherent flaws. The recommendation of the C270 Panel has direct reliance to the FAU scheme proposed here.

206. As exhibited, the flaws in the proposed controls included:

- a) The absence of any definition of “*public benefit*”;
- b) The failure to incorporate any guidelines as to how to assess public benefit, or the adequacy of any public benefit being offered in the Scheme;  
and

- c) In many causes, a significant discrepancy between the development outcomes allowed under the FAR, and those that might be possible under the FAU and the other proposed built form controls.
207. The Minister has now proposed to include a definition to Public Benefit in the CCZ Schedule.<sup>41</sup> This proposed definition was not considered by any of the Minister's witnesses, including Mr Glossop.
208. As is usually the case with planning on the run, the definition as now proposed has not apparently been given much consideration and creates further issues. It would likely lead to a myriad of "*unintended consequences*". Some of those are as follows:
- a) First, the definition makes no reference to the guidelines for the assessment of public benefits that have been exhibited, or indeed to any guidelines. Thus, there exists no means by which a planning decision maker could possibly assess whether the "*Public Benefit*" proposed justifies the uplift sought. Further, the seemingly deliberate refusal to refer to those guidelines would compel the conclusion that they are not intended to be applicable to the assessment.
  - b) Second, clause 4.0 has been altered so that the required s.173 agreement must now be with **both** the Responsible Authority **and the local council** (if not the Responsible Authority). The question of what happens if the Council and the Responsible Authority cannot agree is not addressed.
  - c) Third, the provision does not specify that the agreement must be to the satisfaction of any person. However, the definition of "*Public Benefit*" required the delivery of the three defined categories of benefit to be "*to the satisfaction of the Responsible Authority*". This creates significant confusion as to whether there would be a right to review the merits of any "*public benefit*" agreement under s.149 of the Act. It would be unacceptable if it could not be.
  - d) Fourth, if the sufficiency of the public benefit being offered (or the adequacy of the uplift being offered in return) can be reviewed by VCAT,

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<sup>41</sup> See: document 156A, page 17 of 18

how can its appropriateness be assessed or measured? There is nothing proposed in the scheme that would allow for this to be done, and guidelines which sit outside the scheme are as good as worthless in this regard. How could VCAT possibly assess whether the “*open space*” or “*social housing*” which is being offered justifies a proposed uplift? It is an impossible task under the proposed controls.

- e) Fifth, as now proposed to be defined, the identical “*public benefit*” can be provided anywhere in Victoria, provided it is to the satisfaction of the Responsible Authority and is “*for the benefit of the community*”. That “*community*” is not restricted to the community of Fishermans Bend (or nor could it practically be so defined). This leaves open to possibility that an FAU could be lawfully granted to a developer of land in Fishermans Bend in return for the delivery of Social Housing in Mildura.
209. Further, and perplexingly, the delivery of a Public Benefit has been included as a matter to be considered in the proposed Decision Guidelines for use and subdivision applications (see: Clauses 2.0 and 3.0). This makes no sense whatsoever, since it is irrelevant to those types of applications. Further, it is not a matter that is intended to be the subject of any discretion, even with regard to applications for buildings and work permits.
210. The Minister’s belated attempt to re-draft these planning scheme provisions on the run has failed miserably. The FAU Scheme continues to reflect the flaws identified by the Amendment C270 Panel.
211. Further, the fact that development that can be permitted under the FAU (and which complies with the other built form controls) is conceded even by Ms Hodyl to lead to acceptable build form outcomes for Fishermans Bend conclusively demonstrates why the FAR control as currently drafted is so fundamentally misguided. The suggestions that the delivery of an acceptable scale and density of built form in Fishermans Bend should only be achieved in the unlikely event that developers agree to provide “*public benefits*” as a cost of developing to that level is, at best, a risky proposition.

212. And what is at stake is not developer returns. Rather, it is the optimisation of a scarce resource, and the ability to get jobs and houses where they can be most sustainably accommodated.
213. It is also noted that the amendments put forward in the Minister's Supplementary Submissions to address the "*unintended consequences presented by the operation of the CCZ4*" are also not supported by Ms Hodyl. Relevantly, nor are they supported by Ms Biacsi, Mr Sheppard, Ms Heggen or Mr McGurn.
214. Further, the evidence suggests that the very low FAR proposed for many of the areas within the Precinct (such as 2.1:1 for Wirraway Non-Core) has the practical effect that the utilisation of the FAU, although strictly voluntary, may be necessary to make the development viable.
215. It is noted that the Minister seeks to justify the FAU scheme (and the gifting of open space and roads through the Urban Design Strategy and proposed controls) through arguments of "*value adding*" and "*windfall profits*" that occurred from the re-zoning in 2012.
216. These contentions have no logical basis because:
- a) Any "*uplift*" in land value occurred pursuant to a lawful planning scheme amendment in 2012. That rezoning, in the community interest, was merely the event which unlocked value.
  - b) The fact that any arguable "*uplift*" in value that occurred as a consequence of that rezoning was not captured by the government cannot now be visited upon the current Landowners. If a past increase in value as a consequence of a historical rezoning is considered an appropriate basis upon which to extract financial contributions from Landowners, then all land in Victoria should be considered to be subject to this principal.
  - c) Further the effect of this proposed Amendment would be to reduce value, particularly for the many landowners who have purchased since 2012.
  - d) If the principal is to have any moral basis, it should apply both ways. In other words, equity and fairness would dictate that if uplift is to be

captured, then value reduction should be compensated. However, heritage overlays, conservation zonings, residential schedules and other planning controls which reduce land value do not attract compensation although they provide a “windfall loss”

## **Affordable housing**

217. The statement of evidence of Mr Biacsi details the method in which the Proposed Amendment seeks the provision of affordable housing in new development through Clause 22 (a 6% contribution) and as part of the FAU scheme. In Mr Biacsi’s opinion, whilst there is no question Fishermans Bend should provide affordable housing, the definitions of affordable housing vary and whose responsibility it is and how it going to be provided is unclear.
218. In the Landowners submission, the provision of affordable housing in the form of “gifting” social housing as is proposed in this Proposed Amendment faces significant issues with satisfying principles of need and nexus. It is not the case that a need for affordable housing arises as a result of development. Rather, a need for affordable housing arises as a result of macro-economic factors.<sup>42</sup>
219. Affordable housing is properly a State government responsibility to be managed across Victoria – not one that falls only on Landowners in Fishermans Bend.
220. In the Panel Report to Amendment C88 to the Hobson’s Bay Planning Scheme, the issue of affordable housing was debated. At section 7.4 the Panel said:

### *7.4 Discussion*

#### *(i) Policy framework*

*The issue of affordable housing occupied considerable time at the Hearing through evidence, cross-examination and submission.*

*In 2017 the Victorian government introduced the Planning and Building Legislation Amendment (Housing Affordability and Other Matters) Bill into Parliament. The Bill seeks to implement policy initiatives set out in Homes for*

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<sup>42</sup> See *Homes for Victorians: Affordability, access and choice*, State of Victoria, 2017, p. 3, which states:  
“It’s undeniable that house prices and rental costs are influenced by taxation, population, and income support policies – all controlled by the Commonwealth Government.”

*Victorians for voluntary arrangements to facilitate the provision of social and affordable housing, using section 173 agreements.*

*It proposes that the Minister for Planning be given powers to specify what is appropriate (in a planning sense) for social and affordable housing, including the location of housing in relation to public transport and activity centres, amenity and household size. The Bill received Royal Assent on 26 August 2017.*

*As there is no statewide framework in place, implementation of a definitive way to deal with affordable housing is unclear.*

*The Panel appreciates this is a key social and economic issue, the policy basis for which is emerging with a soon-to-be introduced policy framework into the Act. The evidence and submissions has assisted greatly in the Panel's view on this matter.*

*Given this, the approach of the Panel is quite straightforward on two issues:*

- Without a statewide policy framework in place, any notion of mandatory requirements, including the gifting of housing stock, cannot be supported. On this basis, the Panel does not accept the evidence from Dr Spiller that 300 dwellings should be gifted by the landowners to Council or a Housing Trust. The Panel notes Council's adjusted position on this. Any requirement must be via a negotiated agreement that, inherently, must be to the satisfaction of both parties.*
- What constitutes affordable housing is a moot point. Consistent with Council's reference to Yarra Planning Scheme Amendment C185 Panel Report, it is not for the Panel to define what constitutes affordable housing (whether it is solely market housing or social non- market housing), particularly as the State Government is seeking to resolve this issue.*

*The provision of affordable housing broadly has a policy basis in Clause 16.01 of the SPPF, and in Clause 21.03 of the MSS. Apart from Council's Affordable Housing Policy Statement 2016 that sits outside of the planning scheme, the policy in the planning scheme is silent on the quantum of affordable housing to be provided. The Act allows Council to give some weight to local policy that*

*has been adopted by Council, however in this instance on such a significant issue and where a new statewide policy framework is imminent, this weight is limited.*

221. Finally, it is submitted it is relevant that the Review Panel should have regard to whether the provision of affordable housing is yet another unknown cost of development in Fishermans Bend that potentially makes development unviable and therefore unlikely to proceed. In this regard, Mr Mackintosh's conceded in cross-examination that even the requirement to gift 6% affordable housing returns almost a nil land value in his feasibility scenarios.

### **Family friendly**

222. The use of the proposed controls to try and manufacture a particular social mix within Fishermans Bend, through requiring the delivery of 'family friendly housing' is yet another novel and unjustifiable aspect of the proposed Amendment.
223. Notably, even Mr Glassop refused to express support for this aspect of the controls. He described them as "*Orwellian*" in nature, which is an apt description.
224. As proposed, they are unworkable. The proposed definition of "*family friendly housing*" in the policy is "... *housing that supports the living arrangements of families, particularly with children*".
225. This raises the question: what type of housing can be regarded as not supporting the living arrangements of a family without children?
226. It is apparent that, despite the definition that includes all possible (and almost infinite) permutations of a "*family*" within the scope; the real intention of the Minister is to limit that definition to "*families with children*", and by doing so place this particular sub-set of "*family*" in a privileged position compared to every other type of "*family*" in the community. Those other types of family it seems are not proposed to be specifically and particularly catered for by the proposed controls.

227. Those controls include controls that seek to mandate a particular social mix, by mandating the delivery of certain types of dwellings, on the basis that such dwellings better cater to the needs of “*families with children*”
228. The Landowners can think of no planning control or policy in this state that seeks to mandate a particular social mix in a particular area. For example, there exists no policy in Stonnington, or Bayside, or Boroondara or the City of Melbourne that requires new development to accommodate “*families with children*”, or any other type of family or household.
229. There is also no policy in any area that discourages other types of households. However, that is the practical effect of a policy that implements mandatory controls that require the delivery of particular dwelling types at the expense of others. For each, 3-bedroom dwelling that is being mandated for the benefit of families for children one or more smaller dwellings that may be more suitable for a different form of family, or a lone household (as well as more affordable) is being prevented, regardless of what the market demand is for that dwelling type.
230. Planning has always encouraged the delivery of a variety of household types to meet the varying requirements of different sections of the community. But it has quite properly focused on providing opportunities and incentives for the provision of variety, and not sought to force a particular social mix on an area.
231. There is no evidence that this approach has failed, and no strategic vision or State policy that suggests that more “*Orwellian*” approach should take over, either in Fishermans Bend or anywhere else in Victoria.
232. The Landowners submit that the use of the term “*family-friendly*” housing throughout the Amendment is problematic particularly as it has become apparent that it is intended to mean households with children, and that the Urban Design Strategy appears to proceed on the assumption that “*family-friendly housing*” should be low-scale housing with ground level open space.
233. Apart from the obvious point that “*families*” cannot just be households with children and that seeking a certain social “type” of household is fraught with issues, it is submitted that the assumption that family friendly housing should be low-scale housing cannot be justified.

234. In this regard, the Landowners rely on Mr Sheppard's evidence that "*family-friendly housing*" may be provided in many forms including 6-8 storey apartments such as in Barcelona or a variety of building types such as in Vancouver.

### **Built form outcomes; height, setbacks, overshadowing, location of roads, location and area of open space**

235. With regard to the built form outcomes proposed through the Capital City Zone provisions and the Design and Development Overlays, the Landowners rely on the evidence of Mr Mark Sheppard including his Overarching evidence and Precinct statements.

236. A consolidated list of recommendations can be provided to the Review Panel if required.

### **The Drafting of the Proposed Amendment is too complex and confusing**

237. It is submitted that the amendment is extraordinarily badly drafted and is much too complex. This is raised in many submissions and the statements of evidence of the Mr Biacsi, Mr Sheppard, Mr McGurn, Mr Milner to name a few.

238. It is submitted that re-drafting of the Amendment is not a case of simply fixing a few issues – it needs a substantial re-write to make it clear and user-friendly.

### **Transitional provisions**

239. In any amendment making fundamental changes to development potential, it is submitted that transitional provisions are necessary to provide fair, orderly, economic and sustainable use of land. It is common practice<sup>43</sup>.

240. This is particularly so in Fishermans Bend where Landowners have been subjected to a series of fundamental planning scheme changes over the space of 5 to 6 years. This has resulted in hundreds of thousands of dollars thrown away on proposals which have become prohibited or obsolete.

241. The modelling prepared by the Taskforce and provided to the parties on [date] showing the built form of existing approvals demonstrates that subject to some

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<sup>43</sup> Amendment GC29 to the Melbourne Planning Scheme included transitional provisions

amendment of the precinct plans, the proposals generally do not fundamentally detract from the achievement of the Vision for Fishermans Bend in a built form sense.

242. In this regard, it is submitted that it is quite absurd that the precinct plans for Fishermans Bend do not take into account existing approvals at the very least.
243. It is submitted that if the Amendment is approved, transitional provisions must be provided in fairness.

### **Car parking and Traffic**

244. With regard to issues of public transport provisions, car parking and road layout, the Landowners rely on, and adopt, the evidence of Ms Dunstan.
245. Ms Dunstan considers that the Framework and Proposed Amendment fails to deliver with any certainty the level of public transport that is required for the development of Fishermans Bend. She considers that the most critical issue is the metro rail alignment and station locations and how this should influence development in the Wirraway and Employment Precinct.
246. Ms Dunstan considers that the proposed Parking Overlay needs a complete review.
247. She considers that the parking rates and expectations in Fishermans Bend should be no more onerous than those that already apply in the Capital City Zone elsewhere in Melbourne. In her view, the car parking rate at 0.5 spaces per dwelling is not appropriate at this time.
248. Ms Dunstan states at Section 5.4: (emphasis added)

*It is my opinion that while car parking limitations are part of a suite of measures necessary to reduce reliance on private car travel, other factors are more important to lowering reliance on private vehicles for journey to work purposes. The most critical area:*

*Provision of alternative transport modes, including public transport, cycling and walkability and that these modes are competitive with private vehicles in terms of access to places of work.*

*The ability of residents to live and work locally, allowing walking and cycling to be competitive mode choices.*

*All of the established suburbs reviewed in these sections strongly meet these criteria.*

*I am satisfied that the Framework Plan and ITP place suitably strong emphasis on these two areas. I am satisfied that public transport active transport modes have been appropriately prioritised under these plans. Residents of Fisherman Bends will have excellent access to jobs either within Fishermans Bend or the CBD and immediate surrounds in the year 2050.*

*However, I am not satisfied that there is sufficient certainty regarding when public transport services will be extended into Fishermans Bend. This especially applies to metro rail services, which are being planned for, but not committed to under the ITP.*

*Furthermore, the rate of 0.5 cars per dwellings is substantially too low if there is a desire to have 20-30% of dwellings providing 3 or more bedrooms to accommodate families, depending on the precinct.*

*As set out below, most families will require at least 1 car, even though it may not be used for work or school trips every day to meet their transport needs. Assuming that the 3 bedroom dwellings are allocated one car space, this leave the rest of the remaining 70 to 80% of dwellings be provided at a parking rate of between 0.29 and 0.38 cars per dwelling. This is simply not enough parking for this housing mix prior to high capacity public transport and the full build out of services.*

*It is my opinion that it is most definitely premature to apply a maximum car parking rate of 0.5 car spaces/dwelling to dwellings within Fishermans Bend at this time. There may be a time in the medium term when such a control is appropriate, however it is not now. That would be the same time that controls in the rest of the inner areas of Melbourne would be reviewed and not Fishermans Bend in isolation.*

*The rate should remain at 1 per dwelling as is the case under the current controls.*

249. Ms Dunstan also considers that the road locations and controls need to be more flexible (i.e. discretionary) and that existing uses should be able to construct buildings and works without being required to provide new roads.

250. The Landowners rely on this evidence.

### **Conclusion**

251. For the above reasons, and in reliance of the evidence of Mr Biacsi, Mr Sheppard, Mr Shimmin and Ms Dunstan, it is submitted that the Review Panel should advise the Minister that the Proposed Amendment is not appropriate. It should not progress to become an actual Amendment to any planning scheme. It needs a significant rethink, and in the absence of a clear plan for infrastructure, delivery and funding is premature

**19 April 2018**

**Chris Canavan**

**Nick Tweedie**

**Jane Sharp**

Instructed by Norton Rose Fulbright and Russell Kennedy Lawyers

**Appendix A**

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
1. CitiPower Pty Ltd	90-96 Johnson Street, South Melbourne	Sandridge	CCZ1	PPCC	Electrical substation	No application	175	N/A	N/A	N/A	Y
2. Costa Fox Developments Pty Ltd	99-111 Lorimer Street, Docklands	Lorimer	CCZ4	MCC	Car parking associated with Subaru car dealership on adjoining site	13/09/2017: Planning Permit Application (No. PA1700285) lodged for 40-storey mixed use building, comprising residential apartments, retail, offices, food and drinks premises, library and basement parking  11/10/2017: RFI received  21/02/2018: application called in by the Minister	71	Lorimer page 22	Site 2	Y	N/A
3. Goodman Property Services (Aust) Pty Limited	Unit 19/62 and 62 Salmon Street, Port Melbourne  437, 451, 461, 465, 467, 477 and 481 Plummer Street, Port Melbourne	Wirraway	CCZ1	PPCC	Mix of 1 and 2 storey office warehouse units with ancillary parking. Site also includes showroom use.	No application	149	N/A	N/A	N/A	Y

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
	80 and 111 Turner Street, Port Melb.  768 Lorimer Street, Port Melbourne  Part 770 Lorimer Street, Port Melb.	Employment	IN1Z (for 111 Turner Street) & C2Z	MCC	One (1) story office warehouse units with ancillary parking.  Three (3) story office with ancillary parking.	No application					
	850, 854 and 858 Lorimer Street, Port Melbourne	Lorimer	CCZ4	MCC	2 storey building used for commercial, warehouse and office purposes	07/04/2014: Planning Permit Application No. 2014001348 lodged for 3 towers of 28, 42 and 44 storeys containing dwellings with retail and commercial uses on lower levels  21/02/2018: Application called in by the Minister					
	349 and Unit 7-13/350 Bridge Street, Port Melb.  520 and Unit 4A, 4B and 4C/522	Sandridge	CCZ1	PPCC	Hardstand and car parking  1 and 2 storey office warehouse units with ancillary	No application					

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
	Graham St, Port Melb.  Unit 5A and 5B of 533 Plummer St, Port Melb.  Unit 1-6/153 Bertie St, Port Melb				parking. Site also includes showroom use.						
<b>4. Lie Property Pty Ltd</b>	187-197 Normanby Road, Southbank	Montague	CCZ1	PPCC	1 storey commercial building used as hardware and tools supplies business	16/10/2017: Planning Permit Application No. PA1700294 lodged for 40-storey mixed use building, comprising residential apartments, retail, offices, food and drinks premises and car parking application.  21/02/2018: Application called in by the Minister	87	Montague page 31	Site 5	N/A	N/A
<b>5. Normanby Road Developments Pty Ltd</b>	235-239 and 241-243 Normanby Road, South Melbourne	Montague	CCZ1	PPCC	Tertiary education facility	18/12/2017: Planning Permit Application No. PA170035 lodged for 40 storey mixed-use building comprising dwellings, retail, offices and parking  21/02/2018: Application called in by the Minister	207	Montague page 89	Site 6	N/A	N/A

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
<b>6. Perpetual Normanby Pty Ltd</b>	228-232 & 234-238 Normanby Road, Southbank	Montague	CCZ1	PPCC	2 attached 2 storey buildings used as vehicle showroom and service centre	<p>20/05/2015: Planning Permit No. MPA 14/0007 issued for mixed use development comprising 2 towers of 39 and 43 storeys, with dwellings, retail and parking</p> <p>19/03/2017: EOT approved</p> <p>20/05/2018: intended commencement date</p> <p>20/05/2021: expected completion date</p> <p>No further application for EOT lodged as yet</p>	120	Montague page 72	Site 7	N/A	N/A
<b>7. Salvo Property Group (land owner: SPG Johnson St Landowner Pty Ltd)</b>	60-82 Johnson Street, South Melbourne	Sandridge	CCZ1	PPCC	Environmental works and investigation commenced	<p>20/05/2015: Planning Permit No. MPA 14/003-1 issued for 4 towers of 46, 26, 43 and 20 storeys, including residential use, non-residential use and parking.</p> <p>17/10/2016: Planning Permit amended</p> <p>EOT approved – must commence by 20 May 2019 and completed by May 2023</p>	250	Sandridge page 46	Site 1	N/A	N/A

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
<b>8. Springbank Properties Pty Ltd</b>	162-188 Turner Street, Port Melbourne	Lorimer	CCZ4	MCC	2 storey commercial building at Turner Street frontage; warehouse building with saw tooth roof and yard area to rear	29/06/2015: Planning Permit Application No. 201535676 lodged for 5 towers of 31, 39, 40, 35 and 40 storeys, including dwellings, retail, office and community space, and parking.  Application for Review filed at VCAT  20/02/2018 CoM resolved to support the application  21/02/2018: application called in by the Minister	104	Lorimer page 31	Site 3	N/A	N/A
<b>9. Third Street Pty Ltd</b>	320 Plummer Street, Port Melbourne	Wirraway	CCZ1	PPCC	1 storey warehouse building and large hardstand area to south	12/08/2015: Planning Permit No. MPA14/0005 issued For: 3 residential towers of 15, 12 and 12 storeys comprising dwellings, retail and parking  04/10/2015: Amended Planning Permit issued  25/02/2016: Application to amend Planning Permit lodged (No. PA1600082)  12/03/2018-16/03/2018: construction commencing; no	217	Wirraway page 37	Site 8	N/A	N/A

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
						application for EOT lodged					
	365 Plummer Street, Port Melbourne	Wirraway	CCZ1	PPCC	3 x 2 storey warehouse buildings	28/02/2017: Planning Permit Application No. PA1700209 lodged for 3 residential towers of 12, 18 and 18 storeys comprising dwellings, retail and parking  18/10/2017: appeal lodged at VCAT  21/02/2018: application called in by the Minister		Wirraway page 42	Site 9	N/A	N/A
	17 Rocklea Drive, Port Melbourne	Wirraway	CCZ1	PPCC	2.5 storey warehouse and grade parking	28/02/2017: Planning Permit Application No. PA1700210 lodged for a 18 storey tower comprising of dwellings, retail and parking  18/10/2017: appeal lodged at VCAT  21/02/2018: application called in by the Minister		Wirraway page 47	Site 10	N/A	N/A
<b>10. Belsize Nominees Pty Ltd</b>	351-387 Ingles Street, Port Melbourne	Lorimer	CCZ4	MCC	1 x 1 storey warehouse and commercial	01/02/2013: Planning Permit Application No. 2013006575 lodged for 5 towers of 25, 35, 30, 40 and 45 storeys,	196	Lorimer page 45	Site 4	N/A	N/A

Submitter Name	Affected Land	Precinct	Zone	Local Gov	Current use	Planning Permit / Planning Permit Application Status	Sub no.	Sheppard ref.	McGurn ref.	Dunstan ref.	Heggen ref.
					building, 1 x 2 storey warehouse and commercial building, and at-grade car parking	comprising residential, retail and office space, and parking  10/2016: application put on hold  21/02/2018: application called in by the Minister					
<b>11. Sel Reklaw Pty Ltd</b>	541 Graham Street, Port Melbourne	Wirraway	CCZ1	PPCC	Currently occupied by single and double storey warehouse buildings and at-grade car parking on site.	21/12/2017: planning permit application PA1700321 lodged for 2,061sqm of retail/office floor space at ground floor level and 680 residential apartments.  Status: Called in by the Minister on 20 February 2018.  Response to request for further information due by 18 May 2018, following an extension of time being granted by the Department of Environment, Land, Water & Planning on 13 April 2018.	150	Wirraway page 32	Site 11	N/A	N/A