

IN THE MATTER OF  
NORTH EAST LINK PROJECT

JOINT SUBMISSION  
RELATING TO THE URBAN GROWTH BOUNDARY

1. Strategic work by MacroPlan DiMasi on behalf of Manningham City Council and the North East Link Project has identified the land at 2 – 14 Websters Road, Templestowe, more particularly described as Lot 1 on TP 961033 ('the Land'), as a potential relocation site for businesses displaced from the Bulleen Industrial Precinct ('the BIP').
2. The Land is currently zoned Public Use Zone 6 (Local Government) and sits immediately outside the urban growth boundary ('UGB').
3. The IAC has requested submissions on the legal significance of the UGB in relation to the potential use of the Land as a relocation site. These legal submissions represent the joint position of:
  - (a) Manningham City Council;
  - (b) North East Link Project; and
  - (c) Counsel Assisting.
4. In summary, it is submitted that the legal position is as follows:
  - (a) Both the *Manningham Planning Scheme* ('the Scheme') and the *Planning and Environment Act 1987* ('the Act') have specific provisions which apply to land situated outside the UGB.
  - (b) Clause 51.02 of the Scheme establishes a set of default controls for land in metropolitan Melbourne which is outside the UGB. These

provisions expressly do not apply to the Land, however, as it is zoned PUZ.

- (c) Part 3AA of the Act requires, relevantly, ratification of planning scheme amendments that amend or insert an urban growth boundary or that have the effect of altering or removing any controls over the subdivision of any green wedge land to allow the land to be subdivided into more lots or smaller lots than allowed for in the planning scheme.<sup>1</sup> Given the existing PUZ controls do not impose minimum lot sizes or maximum lot numbers on subdivision, ratification would not be required for a rezoning of the Land, provided that it did not amend the UGB.
- (d) It would be possible to use the Land as a relocation site without the need to rezone the Land or amend the UGB. This would, however, be anomalous and it would be desirable that the Land be rezoned and the UGB be amended as soon as practically possible.
- (e) If the Land was not rezoned this would also have the following practical implications:
  - (i) The relevant as of right uses for which no planning permit is required under the existing zone controls for the BIP could only be carried out with a permit under the PUZ;
  - (ii) The sale and transfer of individual titles in the Land to private ownership, whilst lawful, would be undesirable without the rezoning of the Land. In this regard, we note Ministerial Direction *The Form and Content of Planning Schemes* which specifies that a planning scheme may only include land in a

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<sup>1</sup> Section 46AF(1) of the Act.

public land zone if the land is Crown land or is owned, vested in or controlled by a Minister, government department, public authority or a municipal council<sup>2</sup>.

5. These submissions are only intended to address the legal constraints, arising from planning law, which might apply to the use of the Land as a relocation site outside the UGB. They do not address:
  - (a) the merits of any potential rezoning (which will be addressed in submissions elsewhere); or
  - (b) the need for any other permissions associated with relocation of uses (e.g. any works approval or licencing requirements under the *Environment Protection Act 1970*).

#### PLANNING CONTROLS APPLICABLE TO THE LAND

6. Clause 51.02 of the Scheme provides a set of default controls for 'land in Metropolitan Melbourne that is outside an Urban Growth Boundary as shown on a planning scheme map in this scheme'.<sup>3</sup>
7. The default controls imposed by clause 51.02 are restrictive and, if applicable, would likely render the Land unsuitable for use as a relocation site. This is because the default controls prohibit the majority of the types of uses likely to be found in the BIP, including industry, retail premises and warehouse.<sup>4</sup>

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<sup>2</sup> See paragraph 19 of the Ministerial Direction dated 7 August 2019

<sup>3</sup> Clause 51.02-1, *Manningham Planning Scheme*. Map 3 of the *Manningham Planning Scheme* depicts the Land as being outside the UGB.

<sup>4</sup> Clause 51.02-2, *Manningham Planning Scheme*.

8. Clause 51.02 does not apply to the Land, however, as clause 51.02-1 provides that the default provisions do not apply to land outside the UGB that is already zoned, relevantly, Public Use Zone.<sup>5</sup>
9. Apart from the potential operation of clause 51.02, the UGB does not appear to be relevant to the question of the use and development of the Land under the Scheme.

#### STATUTORY CONTROLS ON REZONING

10. Part 3AA of the Act imposes a requirement of Parliamentary ratification on certain planning scheme amendments affecting either the UGB itself or land outside the UGB.
11. For planning scheme amendments to which Part 3AA does not apply, an amendment comes into force on the day that approval of the amendment is published in the Government Gazette.<sup>6</sup> Once gazetted, the Minister must cause notice of the approved amendment to be laid before each House of Parliament.<sup>7</sup> Either House of Parliament then has ten sitting days from the date of notice to pass a resolution revoking the amendment.<sup>8</sup> Unless and until the amendment is revoked, it will continue in force.
12. Part 3AA in effect reverses the process set out above by providing that an amendment to which Part 3AA applies does not come into force unless the amendment is ratified by Parliament.<sup>9</sup> In order to be ratified, the

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<sup>5</sup> Clause 51.02-1, *Manningham Planning Scheme*.

<sup>6</sup> Section 37, *Planning and Environment Act 1987*.

<sup>7</sup> Section 38, *Planning and Environment Act 1987*.

<sup>8</sup> *Ibid.*

<sup>9</sup> Section 46AG, *Planning and Environment Act 1987*.

amendment must be laid before both Houses of Parliament and each House must then, by resolution, approve the amendment within 10 sitting days of the amendment being laid before that House.<sup>10</sup> If the amendment is not ratified by both Houses in the time allowed, it will lapse.<sup>11</sup>

13. The critical provision for present purposes is s 46AF which identifies the kinds of amendments to which Part 3AA applies. It states the ratification procedure applies to:

*an amendment to a metropolitan fringe planning scheme that has been approved by the Minister under section 35 and—*

- (a) *that amends or inserts an urban growth boundary; or*
- (b) *that has the effect of altering or removing any controls over the subdivision of any green wedge land to allow the land to be subdivided into more lots or into smaller lots than allowed for in the planning scheme.*

14. For the purposes of Part 3AA and s 46AF in particular,
- (a) the Scheme is a ‘metropolitan fringe planning scheme’;<sup>12</sup> and
  - (b) the Land is ‘green wedge land’, as it is land described in a metropolitan fringe planning scheme as being outside a UGB.<sup>13</sup>
15. Plainly, an amendment which amended the UGB to include the Land would require ratification under Part 3AA.

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<sup>10</sup> Section 46AH, *Planning and Environment Act 1987*.

<sup>11</sup> Section 46AK, *Planning and Environment Act 1987*.

<sup>12</sup> Section 46AA, *Planning and Environment Act 1987*.

<sup>13</sup> Section 46AC, *Planning and Environment Act 1987*.

16. On the other hand, an amendment which simply changed the zoning of the Land from PUZ to some other zoning would be unlikely to require ratification under this Part. As set out above, paragraph (b) of s 46AF(1) applies to amendments which:
- (a) have the effect of altering or removing any controls over the subdivision of green wedge land; and
  - (b) the alteration or removal is such as to allow the land to be subdivided into more lots or into smaller lots than allowed for in the current planning scheme.
17. Under the PUZ, a permit is required for subdivision. Apart from this permit requirement, however, the PUZ does not impose any restrictions on the kind of subdivision that may be undertaken – e.g. by imposing minimum lot sizes. In the absence of any such restrictions in the PUZ, it is unlikely that any rezoning could be said to ‘allow the land to be subdivided into more lots or into smaller lots’ than could currently be done.
18. On this basis, it appears that a simple rezoning could be carried out without the need for Parliamentary ratification.
19. For completeness, nothing in Part 3AA prevents the Minister for Planning from using his power under s 20(4) of the Act to ‘fast track’ an amendment to which Part 3AA applies. The amendment, once exempted and approved, would still have to go through the Part 3AA process, however.

#### SHORT TERM OPTIONS

20. It is not strictly necessary for rezoning of the Land to occur before it could be used as a relocation site.

21. Under the Public Use Zone, any use is potentially permissible (i.e. allowed with a permit). Leaving aside the specifically enumerated uses in the PUZ, which are not relevant to relocating businesses, the PUZ provides that ‘any other use’ is a Section 1 use if the following conditions are met:
  - (a) The use is for the purpose described in the table to Clause 36.01-6 which corresponds to the notation on the planning scheme map; and
  - (b) The use must be carried out by or on behalf of the public land manager, in this case the Council.
22. It is sufficient to observe that it is unlikely that the use of the Land for commercial activities by businesses relocating from the BIP could be characterised as a use carried out by or on behalf of the Council. As a result, any relocated uses would be Section 2 uses and would require a permit to lawfully use the Land.
23. Beyond the permit requirement, however, there is nothing in the terms of the PUZ that would prevent the use of the Land as a relocation site.
24. Having said that, if the Land is to be used for relocated businesses on anything other than an interim basis, it would be preferable to rezone the Land so as to avoid the anomaly of public land being used for private purposes. In addition, rezoning has the capacity to facilitate relocation by removing permit requirements that would exist under the PUZ. Rezoning would also be desirable if the Land were to be sold to a private owner consistent with paragraph 19 of the Ministerial Direction *The Form and Content of Planning Schemes* which states that a planning scheme may only include land in a public land zone if the land is Crown land or is owned, vested in or controlled by a Minister, government department, public authority or a municipal council.