IN THE MATTER OF
AMENDMENT C148 TO
THE MONASH PLANNING SCHEME

SUBMISSION IN REPLY ON BEHALF OF MONASH CITY COUNCIL

ZONE OF DISCRETION

1. The fundamental task of a planning authority is to implement the objectives of planning in Victoria, which include providing a pleasant environment and delivering facilities – including open space – for the benefit of the community.

2. The Act though is not prescriptive though in how those objectives to be achieved through any given planning scheme amendment. It leaves these matters to the planning authority.

3. In the context of public open space contribution, this discretion is expressly confirmed by Planning Practice Note 70 which leaves to the planning authority the choice of what method of obtaining public open space contributions 'is best for its municipality' (p. 6)

4. In this way, and within the limitations imposed by the law, each municipality in Victoria is, in US Supreme Court Justice Louis Brandeis' celebrated phrase, a 'laboratory of democracy',[1] able to adopt new approaches to delivering on the objectives of planning in Victoria. Indeed, innovation will be critical in addressing planning challenges as the century proceeds.

5. Much of the case for the objector submitters in this hearing seeks to transform the principles which apply to the preparation and approval of DCPs into rules of general application across all development contributions. This should be rejected. It is not a step Parliament has taken and, indeed, it is a step that the Tribunal in *Eddie Barron* refused to take when it declined to apply the concept of 'nexus' to public open space contributions under the planning scheme because, as the Tribunal said,

> *It is well recognised that cash contributions in lieu of land can be applied to the provision of public open space elsewhere in the municipality.*[2]

6. In the absence of compelling legal analysis – which none of the objector submitters have offered thus far – the Panel should not be swayed by arguments which seek to

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[1] *New State Ice Co. v Liebmann* (1929) 285 US 262, p. 272.

[2] *Eddie Barron*, p. 40.

evaluate the striking of a rate for a public open space contribution under clause 53.01 by reference to criteria that are not, having regard to the relevant statutory framework, intended to apply to that method. To do otherwise is akin to criticising a motorboat on the grounds that its on-road performance is terrible.

7. The reality is that, as Mr Ainsaar conceded in cross-examination,

   (a) There are a range of methods open to a planning authority to obtain contributions;

   (b) It is the planning authority's choice which to use;

   (c) It is open to the planning authority to consider the pros and cons of each method;

   (d) The planning authority is not bound to adopt the method most favourable to developers.

8. It is no surprise to hear developers arguing for a DCP style approach to the setting of development contributions as the complexity of that regime creates multiple opportunities for developers to leverage their resources to ensure better outcomes for them.

9. However, the Council here has chosen to adopt a different approach. No basis has been identified for saying that approach is unlawful or contrary to any established policy which actually applies to public open space contributions under clause 53.01. As such, the Council submits that the Panel should apply the ultimate test for all planning scheme amendments and consider whether it will, if adopted, produce a net community benefit.

CAPITAL WORKS EXPENDITURE

10. Salta Properties, Golf Road and Talbot Finance sought to characterise the Amendment as an audacious money grab, suggesting $300million could be raised by the Council with no accountability for how it would be spent. The Council makes four observations in reply:

   (a) The limited analysis undertaken by the Council on the basis of the last 5 years suggests a much smaller per annum rate will be collected, especially when the

$7.35m collected in 2018-2019 is understood as an exceptional year in which some $2million was collected from The Glen shopping centre subdivision.[3]

(b) Based on the information available over the past 5 years, the Council spends appreciably more on open space related projects than it raises through public open space contributions.

(c) Before the Council's works budget – or any given works budget – could serve as a useful comparator to evaluate the appropriateness of a collection rate, it would need to be shown that the budget itself represented the optimal rate of expenditure on open space. The reality is that the Council spends the money it brings in; it does not spend money it does not have.

(d) Assuming Mr Chiappi's figures are appropriate to use as he has done and the value of land per square metre (for lots up to 1000sqm) is $2,025, if the Council spent all its 2018-2019 collection on acquiring land, it could acquire just over 3,500 sqm of land – just over 1/3rd the size of a local park under clause 56.05. The reality is that the cost of land in Monash means that acquisition of meaningful parcels is out of reach if the Council is limited to the open space contributions raised over the last 5 years. As Mr Ainsaar agreed, land is a lumpy asset: you generally cannot purchase half of it. There is no use having a budget of $30m if the land you want to buy is valued at $35m.

11. Insofar as Ms Valente's submission challenging the Council's allocation of its resources across the municipality is of any relevance to the Panel, the Council notes for the record that significant open space contributions are collected from the northern parts of the municipality and significant open space expenditure is made in the southern parts of the municipality.

12. In the Council's submission, it has not been shown that use of a future works budget is a preferable approach to calculation of a contribution rate. Factors against such an approach include:

(a) The rate is tailored to reflect a specific range of assumptions made at a particular point in time. As Dr Spiller said, it is likely to be conservative. For example, if you budgeted on receiving $5m, you would not contemplate the

[3] Notably, payment of a subdivision contribution for the The Glen shopping centre was unsuccessfully contested by the owner: *Vicinity Centres PM Pty Ltd v Monash CC* [2018] VCAT 443.

acquisition of a parcel of land worth $10m. But if you actually collected $10m, you might acquire that parcel.

(b) Moreover, calculation of a rate based on a future works budget provides a false promise of certainty in the calculation: it might cost land and improvements for one part of the municipality based on a mistaken assumption about the extent of future growth in that area, such that when greater growth proceeds elsewhere and sufficient land and improvements have not been planned and costed for that area, the rate is based on erroneous assumptions.

(c) Most importantly, it cannot change if circumstances change – e.g. if works were planned in 2018 on the basis of a population of 206,907 in 2028 and a rate fixed accordingly, then the rate will clearly have been set too low to provide for the now expected population of 220,133 in 2028.

(d) It is illusory to think that such an approach to calculation provides greater accountability in terms of the Council's expenditure. Any catalogue of works would not be legally binding. It would simply be a list of things that the Council could do, depending on its collections.

FAIRNESS

13. The Council accepts that fairness is an important principle against which to assess the Amendment. Notions of equity and fairness are often contestable, particularly in debates about uniform or differential treatment.

14. In this regard, it is noteworthy that Mr Ainsaar did not seriously argue for a precinct based approach, and Mr Milner was not able to identify a clear principle by which precincts should be differentiated: for example, whether a higher rate should be payable by reference to forecast growth or by reference to current underprovision, especially for precincts such as Oakleigh which is forecast for growth but is presently relatively well provided in terms of open space.

15. The Council submits that in this case, the uniform rate approach is fair because it is:

(a) Clear: for the vast majority of sites undergoing subdivision, developers will know exactly what they have to pay – 10%.

(b) Consistent: the rate applies to all subdivisions. There is no scope for arbitrary and inconsistent decision-making.

(c) Treats like situations alike: as Mr Ainsaar agreed, all new residents generate the same level of demand for open space and all new workers generate the same level of demand for open space. Prima facie, two developments which generate the same level of demand should contribute the same amount to satisfying demand.

(d) Does not reward or punish persons for circumstances beyond their control: any surplus or deficit of public land in any particular precinct will be the result of many decisions made over many years by many different people. In this context, it makes no sense to in effect reward or punish developers for acts over which they had no control.

16. The assertion that treating demand the same regardless of the location of its source is "ideological" and based on considerations beyond the planning scheme should be rejected. As the High Court explained in *Allen Commercial Constructions v Sydney Municipal Council*, the scope of 'planning policy' is to be determined by reference to the relevant legislative framework. Here, the Act explicitly endorses fairness as part of the planning scheme and, for the reasons set out above, a uniform approach is fairer than one which, by requiring less contributions from places that already have greater open space, operates to further comfort the comfortable and further afflict the afflicted. Moreover, arguments against cross-subsidisation – both within and across precincts – were specifically rejected by the Panel in Melbourne C209 on the basis that they relied on an overly simplistic conception of equity.

17. The Council respectfully agrees with the Panel in Melbourne C209. Even setting aside the arguments made above, Council considers that, given the way in which open space is used, it is facile to assert that improvements to open space outside the locality of a particular development do not or cannot benefit that development. To take a simple example, if the enhancement of a park in Precinct A leads to a reduction in the number of people using a park in Precinct B, that is a benefit to the residents of both Precincts – directly to the residents of Precinct A through provision of an improved park and indirectly to the residents of Precinct B because there is less pressure on their park.

18. This reality was in fact recognised by the Tribunal in *Eddie Barron* where it was argued that, because there was already a child and maternal health centre within the subdivision which would satisfy local need, the subdivider should not have to pay for other child and maternal health centres. The Tribunal rejected this.

> *Facilities such as pre-schools and maternal and child health centres depend for their social effectiveness on their accessibility to the catchment they are*

intended to serve. Should any of the identified facilities not be provided the effect will be to increase pressure on those facilities which are provided and to reduce their social effectiveness because of overcrowding and lack of accessibility. Thus, whilst a facility may already be proposed for this subdivision, its effectiveness will be dependent on the provision of the identified network of facilities elsewhere. This subdivision will benefit from the provision of all the planned facilities by virtue of the fact that it is part of the community of Pakenham.

ENCUMBERED LAND

19. In relation to the issue of encumbered land:

    (a) It is correct that clause 53.01 does not in its terms preclude the offering up of 'encumbered' land, noting that this not a term used in the Planning and Environment Act.

    (b) It is well-established, however, that the decision whether to require land or cash and, if land, what land, is a decision for the Council. This was established by the Tribunal in *Trethowan v Mornington Peninsula SC*. Indeed, one of the reasons given for concluding that the decision lay with the Council was that otherwise a subdivider might offer up manifestly unsuitable land – e.g. contaminated land.

    (c) The objection raised by Salta, Golf Road and Talbot overstates the role of local planning policy, which is intended to guide discretion, but not determine it. Insofar as it says encumbered land will not be accepted, any decision to refuse encumbered land can always be challenged in the Tribunal.

    (d) What clause 22.15 does, quite properly, is to identify that encumbered land will generally not be accepted. Having regard to the specified categories of encumbered land enumerated there, it is obvious why this position is taken.

CLAUSE 22.15

20. Limited submissions have been made in relation to the content of Clause 22.15.

21. In the Council's submission, the map is appropriate to provide guidance about where land will be considered. It is based on Figure 4 of the SGS work, the component parts of which have now been explained, and shows the gaps in the distribution of community open space, as that term is defined in the Monash Open Space Strategy.

The intention in relation to strategic redevelopment sites is that where larger renewal projects are undertaken which require rezoning, consideration of the public open space requirements may justify more than a 10% contribution. This is consistent with the approach adopted in Maribyrnong where the Panel said:

> *In relation to the negotiation of a higher open space contribution, where land is being provided for subdivision greater than 10 lots, the Panel considers that this is a reasonable approach. Higher open space contributions are often negotiated for strategic development sites, appropriately in the Panel's view. The Panel does consider that Mr Montebello's suggested change to bring the wording back 'into the fold' of the Planning and Environment Act 1987 is to be preferred, and whilst PV were not at the Hearing to comment on the suggestion, the Panel is comfortable supporting it as it provides a much clearer framework for any dispute resolution via VCAT.*[4]

22. Kingston also provides a useful option where the schedule to clause 53.01 was amended to specifically provide for a defined class of strategic redevelopment sites.

23. Another approach would be to adjust clause 22.15 to make it clear that it applies to planning scheme amendments which involve rezoning from a non-residential zone to a zone which allows residential use and development, so that a greater provision can be negotiated in the course of a rezoning request. In the course of any such rezoning, adjustments can be made to the clause 53.01 schedule to address the issues raised by Mr Little; it would be wholly inappropriate to provide a carve out in clause 53.01 prior to rezoning which would allow site by site negotiations to proceed without a 10% minimum identified in the planning scheme.

TRANSITIONAL PROVISIONS

24. The Council confirms its position that it does not support transitional provisions. Any legislative reform will have an impact and in this case, sufficient time has passed during the preparation of the Amendment to ensure that land owners and prospective developers have adjusted to take account of the proposed increase in open space contribution rates.

[4] [2016] PPV [12]

SOCIAL AND ECONOMIC EFFECTS

25. As the explanatory report documents, the Amendment provides strong social benefit for the community through increased social interaction, improved physical and mental health and opportunities for sports and recreation. Its economic effects include more accurate financial resources to fun public open space projects, certainty for developer allowing improved cost planning and a more equitable means of distributing costs.

26. In considering economic effects, it is important to bear in mind that it is the public economic costs and benefits, rather than the private returns or losses which are relevant to planning decision making.[5]

CONCLUSION

27. The Council respectfully requests the Panel to recommend in favour of adoption and approval of the Amendment with the minor changes identified in the Part B submission and such adjustments in relation to strategic redevelopment sites that the Panel considers appropriate.

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21 February 2020

[5] *Kentucky Fried Chicken v Gantidis* [29179[HCA 20.