

IN THE MATTER OF  
AMENDMENT C148 TO  
THE MONASH PLANNING SCHEME

PART B SUBMISSION  
ON BEHALF OF  
MONASH CITY COUNCIL

INTRODUCTION

1. This Part B submission is intended to address three matters:
  - (a) First, to provide some commentary on the importance of open space with a view to inform the Panel's consideration of the merits of the Amendment and in particular the contribution rate set;
  - (b) Second, to provide a detailed explanation of how the contribution rate was set; and
  - (c) Third, to respond to any other issues raised in submissions, evidence or Panel directions that were not addressed in the discussion of how contribution rates were set.
  
2. In saying this, the Council submits that, generally speaking, there are two aspects of the Amendment that are largely uncontroversial:
  - (a) First, the proposed changes to the local planning policy framework do not appear to have been the subject of any serious critique. In particular, there is nothing in Mr Milner's evidence to say that he regarded clause 21.10 or 22.15 as inappropriate;
  - (b) Second, the underlying Monash Open Space Strategy ('the MOSS') has also not been a focus of criticism. While the evidence of Mr Milner and Mr Ainsaar does contain some criticism of the MOSS, the Council does not read their evidence as being to the effect that the MOSS should be discarded. Rather, the Council reads their evidence as being that the MOSS, by itself, does not provide a sufficient justification for the adoption of a 10% contribution rate.

## THE IMPORTANCE OF OPEN SPACE

3. In 2008, the then Minister for Environment and Climate Change requested the Victorian Environment and Assessment Council ('VEAC') to undertake an investigation into public land use (including use of public open space) in metropolitan Melbourne.
4. In its discussion paper published in 2010 as part of that investigation ('the Discussion Paper'), VEAC commented on the significance of public open space:

*Public open space was the most common theme raised in submissions to the investigation and by the Community Reference Group. Many submissions commented on the mental and physical health benefits of recreating out of doors; the benefits to the environment from the conservation or re-planting of native vegetation, and the opportunities provided by linear open space for creating habitat links and corridors; and the benefits in counteracting the loss of private open space in a time of increased housing density. Many submissions also raised concerns about the loss of open space in particular municipalities, the need to protect open space from further loss and the need for additional open space to meet increasing population levels. Some submissions were concerned about the disposal of public land that is currently used or could be used for open space.*

*Public open space is a key contributor to Melbourne's liveability. It contributes to a range of liveability goals including healthy, safe and inclusive communities, dynamic resilient local economies, sustainable built and natural environments and culturally rich and vibrant communities.<sup>1</sup>*

5. The Discussion Paper went on to provide a range of examples of how public open space contributed to physical and mental health, social capital formation, stimulated and sustainable economies, and environmental sustainability as well

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<sup>1</sup> Victorian Environmental Assessment Council, *Metropolitan Melbourne Investigation – Discussion Paper* (October 2010), p. 98.

as providing opportunities for artistic expression and for diverse communities to come together.<sup>2</sup>

6. VEAC also recognised, however, that public open space (and public land more broadly) was under pressure. In its Final Report on its investigation, VEAC stated that, in light of Melbourne's growing population, even just maintaining the current contribution of open space to liveability in Melbourne would require the acquisition of new open space:

*Metropolitan Melbourne's population is projected to grow from 4.08 million people in 2010 to between 5.1 million and 5.7 million people by 2031. Metropolitan Melbourne had the largest growth of any Australian capital city in 2009–10 (and has had for the past nine years), with most of this population growth occurring in Melbourne's growth municipalities. In order to maintain the **current** contribution of open space to Melbourne's liveability, existing open space will need to be protected and new open space will need to be provided so that Melbourne's open space network can meet the needs of its growing population.<sup>3</sup>*

7. VEAC also found:
  - (a) There is an uneven distribution of public open space across the investigation area, with no clear patterns. However, established municipalities generally have less open space per capita than outer and growth municipalities.
  - (b) Without the retention and creation of open space on both public land and local council land, public open space per capita will decrease over time for almost all municipalities in the investigation area.

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<sup>2</sup> Id, pp. 98 – 99.

<sup>3</sup> Victorian Environmental Assessment Council, *Metropolitan Melbourne Investigation – Final Report* (August 2011), p. 41.

- (c) The projected decrease in public open space is likely to be exacerbated in established municipalities where there is limited scope to create additional open space.<sup>4</sup>
8. VEAC's predictions regarding reduction of per capita provision over time appear to have been borne out. It predicted that, between 2006 and 2026 and on a per capita basis, public open space provision in Monash would fall from 46m<sup>2</sup> per person to 40m<sup>2</sup> per person.<sup>5</sup> In fact, more recent material suggests that the fall was greater. In a report dated 2017, the Victorian Planning Authority estimated public open space per capita in Monash as being 38.3m<sup>2</sup> per person – i.e. lower than that predicted for 2026.<sup>6</sup>
9. The impact of increased development on the need and demand for public open space has also been recognised in a number of panel hearings considering public open space contributions. Notably, in *Moreland C122*, the Panel commented that:

*[The] Panel accepts that these existing deficiencies [in public open space provision] will be exacerbated by increased demand for leisure and recreation opportunities by the larger population resulting from the additional dwellings associated with further subdivision. This is particularly the case in Moreland where new development is likely to be at higher densities with less private open space than in a suburban context. The Panel is satisfied that, at a macro level, contributions will support strategies to address the need for additional or improved public open space generated by additional development.*<sup>7</sup>

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<sup>4</sup> Ibid, p. 40.

<sup>5</sup> Discussion Paper, Figure 6.6, p. 108.

<sup>6</sup> Victorian Planning Authority, *Metropolitan Open Space Network – Provision and Distribution* (2017), Table 8. A note to the table stated these figures were based on an extrapolation of 2015 ABS data.

<sup>7</sup> *Moreland C122* [2013] PPV 27, [5.1.1.]

10. These comments are equally apt to Monash's situation. In fact, as a proportion of municipal area, Monash has less public open space than Moreland<sup>8</sup> (although it has more public open space on a per capita basis).<sup>9</sup>
11. VEAC also found that, at the same time population was growing, climate change was occurring. Commenting on the impact of climate change and public open space, VEAC stated:

*Severe rainfall shortages have been experienced in Melbourne over recent years. Although there has been a return to wetter conditions this year, it is unlikely that this reflects a long-term shift back to above average rainfall – Melbourne city last registered annual rainfall above the long-term average of 647mm in 1996.*

*Water shortages have had a significant effect on the natural environment and many metropolitan parks and gardens have suffered significant stress. There is ongoing concern that the reduction in rainfall is a step-down from the previous long-term average, and that this may have significant consequences for the future management of parks, reserves and recreation areas on public land.*

*Parks, recreation reserves and treed streets are important visual elements of the Melbourne metropolitan area. These areas of public land provide important contributions to Melbourne's liveability as well as providing habitat and corridors for some native species.<sup>10</sup>*

12. VEAC also noted, however, that public open space had an important role to play in helping to mitigate climate change impacts by countering the 'urban heat island' effect:

*In built-up city areas like urban Melbourne, hard impermeable surfaces such as infrastructure, roads, pavement and building roofs heat above*

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<sup>8</sup> VPA (2017), Table 5 shows 9.9% of Monash as being public open space as compared to 10.3% of Moreland.

<sup>9</sup> Ibid, Table 8 shows a provision rate of 38.3m<sup>2</sup> per person for Monash as compared to 31.5m<sup>2</sup> for Moreland.

<sup>10</sup> Discussion Paper, p 114.

*air temperature on hot and sunny days, and slowly release heat during the night. This is the heat island effect caused by urbanisation. ...*

*Elevated temperatures from urban heat islands, particularly during summer, can increase the energy used for cooling, and compromise health and comfort.*

*Parks and other treed areas and bodies of water can create cooler areas within a city by providing shading and evaporative cooling. In metropolitan Melbourne, public land containing treed nature strips and parks can reduce the impacts of urban heat islands and protect Melbourne's liveability. For example street trees provide:*

- *shade for homes and buildings, reducing interior temperatures and the costs of cooling*
- *shaded paths encouraging walking and cycling*
- *habitat for some native animals.<sup>11</sup>*

13. Consistent with the important role played by public open space, State and local planning policy recognises the need to maintain and enhance open space provision within metropolitan Melbourne. Relevant policies are set out in the Council's Part A submission and include:

(a) Clause 19.02-6S of the planning policy framework has as its objective to:

*To establish, manage and improve a diverse and integrated network of public open space that meets the needs of the community.*

(b) Clause 19.02-6R, which relates to metropolitan Melbourne specifically, has as its objective:

*To strengthen the integrated metropolitan open space network*

(c) The strategies supporting this objective include:

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<sup>11</sup> Discussion Paper, p. 117.

*Develop a network of local open spaces that are accessible and of high-quality and include opportunities for new local open spaces through planning for urban redevelopment projects.*

- (d) At a municipal level, current clause 21.10 includes the following objectives:

*To encourage the provision of a diverse and integrated network of public open space to meet the sporting, recreational, health and environmental needs and preferences of the community and enhance the image of Monash as a quality environment to live, work in and visit.*

...

*To provide safe, appealing and accessible public open space that is within easy walking distance of the majority of residents.*

*To provide opportunities for the community to pursue the development and enhancement of its recreational and sporting endeavours through the provision of a variety of quality services and facilities.*

...

*To maximise opportunities to add to the open space network in all new development and redevelopment in the municipality.*

*To recognise the impact of urban consolidation on open space resources.*

...

*To enhance all open spaces and parklands as significant community assets for both present and future generations of Victorians.*

- (e) Strategies in support of these objectives include:

*Enhance and improve the safety, usefulness and appearance of existing open space areas and associated facilities such as*

*drinking fountains, toilets and bicycle racks through scheduling of capital works.*

...

*Improve and add variety to open space areas through the addition of playgrounds, exercise and training equipment, community gardens, landscaping, pathways and other components where appropriate.*

...

*Ensure that all new development contributes towards the maintenance or development of new open space areas that are safe, accessible and vibrant or provides adequate good quality open space on-site for the users of the development.*

14. Accordingly, the Council submits there is a clear strategic justification for requiring the provision of additional public open space to meet the demands of a growing – and intensifying – municipality.

#### THE FRAMEWORK FOR CALCULATING A CONTRIBUTION RATE

15. Clarity on the need for public open space has not, however, been matched by clarity about how public open space should be obtained and what is the preferred method for calculating public open space contributions.
16. In its Final Report, VEAC recognised the difficulties faced by councils in delivering open space in line with population growth. It made the following recommendation:

*R9. Government review the open space contribution policy and provisions of the Victorian Planning Provision and the Subdivision Act 1988 with the aim of assisting metropolitan local councils meet the challenges of population increase by maximising the contribution of open space through subdivision of land. This would include:*



- (a) *reviewing the contribution level in the Subdivision Act to determine whether the minimum contribution should be set at five per cent*
  - (b) *streamlining the process for creating a contribution schedule to 52.01 of the Victorian Planning Provisions.*
- 17. This recommendation, although supported in principle by the government of the day, was never acted upon. Nor is there anything in the *Planning and Environment Act 1987*, the *Subdivision Act 1988* or the Victorian Planning Provisions that establishes a process to be followed in the determination of a public open space contribution rate.
- 18. Equally, the State has not provided any policy guidance on how such a contribution rate should be set. While Planning Practice Note 70 articulates how an Open Space Strategy should be prepared and what it should include, it merely identifies a range of options for delivering public open space without setting out a preferred approach to doing so.
- 19. In this context, a planning authority has considerable freedom to decide how it should calculate an open space contribution rate. Merely because one approach has been adopted by one municipality (or even more than one other municipality) does not mean that the adoption of a different approach by another municipality is inappropriate. As Deputy President Dwyer of the Victorian Civil and Administrative Tribunal stated in *Little Lane Early Learning Centre Hawthorn Pty Ltd v Minister for Planning*:

*[I]n planning decision making, there will often be several different outcomes that, objectively considered, are all 'fair and reasonable', and with none being inherently unfair or unreasonable. There is no single ideal outcome that is the only fair and reasonable outcome.*<sup>12</sup>
- 20. Nor should the Panel start from the assumption that a lower public open space contribution is an inherently better or fairer outcome than a higher rate. As Deputy President Gibson observed in *Stubbs Street Kensington Pty Ltd v*

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<sup>12</sup> [2020] VCAT 103, [31].

*Melbourne CC*, in remarks later endorsed by the Panel considering *Moreland C122*,

*In my view, there is no justification for attempting to demonise public open space requirements as some form of tax that, as a matter of principle, the Tribunal should seek to constrain. Public open space requirements are a long standing and recognised means by which councils can collect money to help pay for the acquisition and upgrading of public open space land and facilities for the benefit of the community. The objective is not to tax development, but to provide councils with a source of land or funds to help carry out a legitimate and beneficent responsibility. As communities evolve, it is incumbent on councils to maintain, improve, upgrade and add to public open space facilities as a means of meeting the social needs and changing demands for passive and active open space. Councils are encouraged to prepare public open space strategies and may include open space objectives and strategies in the local planning policy framework of their planning schemes.*<sup>13</sup>

21. Having said all this, as the issue has been raised in submissions and elsewhere, it is useful to comment on what principles, if any, can be derived from the statutory framework established by the *Planning and Environment Act 1987* and the *Subdivision Act 1988*.

*The Objectives of the Planning and Environment Act*

22. The starting point for any analysis must be the objectives of planning as set out in s 4 of the *Planning and Environment Act*. These specifically include:
- (a) *to provide for the fair, orderly, economic and sustainable use, and development of land;*
  - ...
  - (c) *to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;*

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<sup>13</sup> [2009] VCAT 1947, [15].

(g) *to balance the present and future interests of all Victorians.*

23. Having regard to these objectives, there is clear support for considerations of fairness as part of setting the contribution rate, but it is also appropriate to bear in mind the aim of securing a ‘a pleasant ... living and recreational environment’ and the need to balance the present and future interests of Victorians, including the interests of future Victorians in having access to a good quality open space network in accordance with State and local policy.

*The Section 18(1A) factors are Irrelevant*

24. Insofar as Mr Ainsaar asserts the factors set out in s 18(1A) of the *Subdivision Act* should be used in calculating an appropriate contribution for an individual site have relevance to the task of setting a contribution rate under clause 53.01, this should be rejected.
25. The Council acknowledges that the majority of the Court of Appeal in *Maroondah CC v Fletcher* did hold that the s 18(1A) factors were applicable in determining whether a particular subdivision should have to contribute the full amount specified in a schedule to clause 53.01.<sup>14</sup>
26. The decision in *Fletcher*, however, was effectively and specifically overturned by Parliament when it passed the *Planning and Environment Amendment (General) Act 2013* which amended the *Subdivision Act* to make clear that s 18 only applied where a planning scheme did not specify a figure for public open space contributions.
27. The correctness of this position has been affirmed by several panels considering the setting of public open space contribution rates, notably *Moreland C122*, *Melbourne C209*, and *Maribyrnong C137*. Notably, in *Maribyrnong C137*, the Housing Industry Association made much the same submission as Mr Ainsaar does. Member Wimbush observed:

*[R]eference to Section 18(1A) of the Subdivision Act appears to indicate that the HIA submission does not fully understand the changes to the Act*

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<sup>14</sup> (2009) 29 VR 160.

*introduced post Fletcher; and that Council is not required to consider the principles in Section 18(1A).*

*The Eddie Barron Principles*

28. A number of parties, as well as Mr Ainsaar, have made reference to the *Eddie Barron* principles<sup>15</sup> and their relevance, it should be noted that they are not strictly applicable to a public open space contribution regime. *Eddie Barron* was concerned with the legitimacy of the imposition of permit conditions requiring development contributions prior to the implementation of the statutory development contributions plan regime. It is thus at least two steps removed from a public open space contribution under clause 53.01.
29. The Council acknowledges that consideration of need, nexus and equity are relevant to consider in determining whether the Amendment in its present form is justified. Importantly, however, those concepts need to be understood in light of the statutory framework in which they are to be applied, notably the framework established by the *Subdivision Act*.

*Need*

30. In relation to need, it is clear that the densification of development in Monash, the associated increase in population and the impact of climate change will result in the need for additional open space, and improved carrying capacity and increased usage intensity of existing open space over time. Once provided, open space will need to be improved and protected against the impacts of climate change, which will need to be funded out of the Council's open space budget.
31. Such a proposition was clearly accepted by the Panel in *Moreland C122* and the Panel in *Melbourne C209*. In particular, in *Melbourne C209*, the Panel specifically acknowledged that Melbourne had a 'relatively generous' level of open space provision compared to other municipalities. The Panel continued:

*However, the Panel does not consider that this is a negative factor that should result in efforts to 'wind back' open space provision by providing less in future, but rather be seen as a valuable contributor to*

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<sup>15</sup> Being the principles stated by the former Administrative Appeals Tribunal in *Eddie Barron Constructions Pty Ltd v Shire of Pakenham* (1991) 6 AATR 10.

*Melbourne's liveability that should be maintained and enhanced; particularly in the light of the acknowledged very significant increases in population and population density that are occurring.*<sup>16</sup>

*Nexus*

32. It is a key feature of the *Subdivision Act* that it does not require financial contributions raised from a particular area to be spent in that area (noting that any actual land contribution will inevitably have a spatial connection with the subdivision in respect of which it is made as it will have to form part of the land subdivided).
33. Rather, the *Subdivision Act* simply requires that the money raised be spent on public open space. In this context, insistence on a clear spatial nexus – as opposed to a causal nexus - between the particular subdivision and the open space (or cash in lieu) to be provided is inconsistent with the statutory framework and should not be considered necessary. Rather, what is necessary to establish is a causal nexus between the subdivision and the need for provision of additional open space.
34. In the Council's view, such a position is consistent with how public land is actually used. In *Stupak v Hobsons Bay City Council* ('Stupak'), in remarks that would apply as much to Monash as to Hobsons Bay, Deputy President Gibson stated:

*The residential areas of Hobsons Bay are well established with an established network of public open space throughout. This network comprises small local reserves, regional reserves, coastal areas and linear open space. Residents will use different areas of open space at different times and in different ways depending on the activities they seek to pursue. In my view, it would be fallacious to assume that the majority of people will only use reserves closest to their homes exclusively.*<sup>17</sup>

35. The Deputy President continued:

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<sup>16</sup> *Melbourne C209* [2014] PPV 114, [5.3.2(i)].

<sup>17</sup> [2011] VCAT 618, [20].

*Residents have various recreational needs and the council should plan to provide open space to meet this variety of needs.*

*[The Tribunal referred to a number of policy objectives relating to provision of public open space, including active space]*

*Implementing these objectives requires the council to take a municipal-wide approach. It does this through its budgetary process. Over time, spending is allocated to projects in different parts of the municipality based on the council's overall open space plan and other plans for specific locations. **In these circumstances, I consider that as a general principle, when seeking contribution towards funding for open space, there is no basis to discriminate between different areas in terms of the proportion they should contribute unless there is a clear policy on the part of the council otherwise or in special circumstances.***<sup>18</sup>

36. This position was accepted by the Panel considering *Yarra Ranges C148*, which stated:

*The Panel accepts that residents use a variety of open space in their lifetime. Where they live, whether rural or urban and what is already provided close by, does not necessarily affect the usage of broader open space facilities.*<sup>19</sup>

37. In circumstances where, for example, older children in a dwelling may travel some distance from their home to use higher order sports facilities, there is no basis for saying that because their dwelling is geographically distant from the facility, they do not contribute to demand for the facility and thus should not be required to contribute towards it.
38. The absence of a statutory requirement to provide a spatial nexus in relation to public open space contributions is in clear contrast to the position of development contribution plans under s 46K of *the Planning and Environment Act*. Relevantly, s 46K(1) requires a development contribution plan to:
- (a) Specify the area to which it applies;

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<sup>18</sup> Ibid, [21] – [23].

<sup>19</sup> *Yarra Ranges C148* [2018] PPV 101, [8.4].

- (b) Set out the plan preparation costs, works, services and facilities to be funded through the plan; and
  - (c) ‘Relate the need for the plan preparation costs, works, services and facilities to the proposed development of land in the area.’
39. The Panel should not import statutory concepts from one development contributions regime into an entirely different one. Had Parliament wished to require that public open space contributions have a spatial nexus to the services provided through the contributions, it could have provided that such a nexus was required. It has not.

### *Equity*

40. The application of the concept of ‘equity’ must also be adapted to the application of a planning scheme control which, as noted, does not require a spatial nexus between the subdivision and the open space contribution.
41. The proper approach, in the Council’s submission, is that adopted by the Panel in *Melbourne C209*. There, Member Wimbush stated:

*Many submitters argued that the uniform rates proposed in the Amendment create considerable inequities for property owners and developers. To some extent the Panel accepts this. A review of Table 3 above shows that a developer in South Yarra for example is expected to contribute 5% when the calculated rate is 0.31% based on need. In the other direction a developer in Arden–Macaulay is ‘only’ being asked to contribute 8% when the calculated rate is 14.33%. Within precincts and across precincts there is clearly a level of cross subsidisation.*

*The general agreement from all parties that the Eddie Barron principles that equity is a principle that should be applied in the Amendment is noted elsewhere in this report.*

*However the Panel considers that to end the discussion there and conclude that because the Amendment may be inequitable to specific properties means that the Amendment must fail on equity grounds is overly simplistic and fails to accord any weight to the strategic view being taken by Council in the OSS.*

*Indeed if this were the case, the whole basis for using clause 52.01 would fail. The use of clause 52.01 as an alternative to Section 18(1A) of the Subdivision Act is now clear in the Panel's view; established by the changes introduced in the Planning and Environment Amendment (General) Act 2013.*

*The use of a fixed rate in clause 52.01 almost guarantees some level of inequity at the individual property level; some will contribute more open space than required under a Section 18(1A) assessment, and some will contribute less.*

*The trade-off in equity, if there is one, is that a uniform rate (or rates) established across the municipality provides an even benchmark and a level of clarity and simplicity that cannot be achieved through Section 18(1A) for the planning system as a whole.*

*The Panel also considers it is overly simplistic to assume that a Section 18(1A) assessment results in an equitable outcome. It may for the property owner or may not as the case may be, but either way it may not be the best outcome for the precinct or municipal community; that broader view can only be achieved via such an exercise as has been undertaken through Amendment C209.<sup>20</sup>*

42. The Panel considering Moreland C122 also identified one the advantages of a flat rate as being that it promotes 'consistency and fairness, as all non-exempt subdivisions are subject to the same rate across a municipality or suburb'.<sup>21</sup>
43. The reality is that, as Mr Ainsaar stated in his evidence in *Melbourne C209*, the application of different rates – far from increasing equity – may result in 'significant inequities'. As he observed:

*Every new resident or worker, regardless of location, creates an equal need for open space which must be provided for in some way, either*

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<sup>20</sup> [2014] PPV 116, [5.5.2 (i)]

<sup>21</sup> [2013] PPV 27, [3.1]



*through the creation of new open spaces or through additional demand on existing open spaces.*<sup>22</sup>

44. In this context, and contrary to what Mr Ainsaar went on to assert in *Melbourne C209*, Council does not consider equity is best served by the adoption of differential rates which, for example, provide a windfall to developers who have been fortunate enough to purchase in areas which are already relatively well provided for in terms of public open space. Rather, the fairest position is that everyone pays the same, regardless of immediate geographic need. Again, this is consistent with the position taken by Mr Wimbush in *Melbourne C209* when he accepted that it was appropriate to require a 5% contribution from a person only needing 0.31% additional open space.

*The current method of provision is inadequate*

45. Currently, the Council requires a public open space contribution on a sliding scale based on the number of lots produced. The strategic justification for the initial decision to adopt a sliding scale is unknown – and may simply be an accident of history based on the former VicCode provisions – while the strategic merits of such an approach are highly questionable.
46. As Deputy President Gibson commented in *Stupak*,

*The applicant argued that small subdivisions, which result in only a modest increase in population, should pay less than large subdivisions. In fact they do – 5% of land in a subdivision worth \$500,000 is substantially less than 5% of a site valued at \$5 million. What the applicant has failed to convince me of is why the amount paid by a small subdivision should be proportionally less than a large subdivision. Why should the percentage be 5% in the case of a subdivision of 100 lots, or even 10 lots, compared with a percentage of only 2% in the case of a subdivision of three lots?*

*The following proposition is stated in the council's open space plan:*

*... the amount an additional dwelling will contribute to the provision of open space should be the same regardless of the size*

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<sup>22</sup> [2014] PPV 116, [5.5.1].

*of the development, and therefore, assuming that in most instances residential subdivisions will be small and contributions will be taken as cash, the proportion of the value will be the same for a two dwelling development as it will be for a 20 dwelling development. ...*

*As a general principle, I consider there is merit in supporting this proposition.*

47. The Council also considers that there is merit in such a proposition. Indeed, the Council notes that there are new forms of residential development beginning to enter the market – e.g. ‘build to rent’ type developments – where there may be no or only one subdivision despite the creation of substantial additional demand for public open.<sup>23</sup> On one level, this poses a fundamental challenge for a system of public open space contributions based on subdivision. At the very least, however, it illustrates that there is no necessary correlation between the size of a subdivision and the amount of demand created by it. In the absence of such a link, there is no plausible justification for maintaining the use of a sliding scale.
48. The Council also notes that it is almost alone in retaining a sliding scale. The only other council to retain such a scale is Darebin and that council, like this Council, is currently in the process of seeking to amend its planning scheme to replace it with a flat rate.

*The Council’s preferred method*

49. The Council has adopted a transparent and readily comprehensible approach to setting the contribution. As set out in the *Open Space Contribution Rate Report* and the MOSS, the Council has:
- (a) Adopted 30m<sup>2</sup> as an appropriate level of provision of public open space per person;
  - (b) Estimated the likely population of Monash as being 206,907 in 2028;

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<sup>23</sup> E.g. a proposed development at 118 Bertie Street, South Melbourne proposes to create 165 dwellings, but they are expected not to be subdivided but instead to be retained in a single ownership and let on a long term basis.

- (c) Based on the above, determined 620.72 ha of open space was required to service that population;<sup>24</sup>
- (d) Based on review of geographical information, determined that the net developable area available within the municipality is 6,494 ha; and
- (e) Based on the above, determined that a percentage figure of 9.56% of each developable hectare was required.<sup>25</sup>

50. The Council then proposes to round the figure of 9.56% up to an even 10%.

51. At the outset, it is important to make one correction to the MOSS and the Open Space Contribution Rate Report. Both these documents stated that in calculating the net developable area in the municipality, parkland had been excluded from the calculation. This is incorrect. In fact, 920 ha of ‘parklands’ were included, noting that this is ‘parkland’ as defined by the Australian Bureau of Statistics in its Mesh Block system. ‘Parkland’ for that purpose is defined as follows:

*Mesh Blocks with parkland, nature reserves and other minimal use protected or conserved areas have been categorised as Parkland. Parkland Mesh Blocks may also include any public open space and sporting arena or facility whether enclosed or open to the public, including racecourses, golf courses and stadiums.*

52. The effect of the inclusion of these areas of parkland in the calculation however, favours developers because it reduces the overall contribution rate. If parklands were to be excluded from the calculation, then the net developable area would be reduced to 5,574ha. Using the population figure from the Open Space Contribution Rate Report and MOSS, adopting this reduced developable area would produce a contribution rate of 11.11%.<sup>26</sup>

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<sup>24</sup> 206,907 persons multiplied by 30m<sup>2</sup> per person = 6,207,210m<sup>2</sup>. That figure can be divided by 10,000 to convert it from m<sup>2</sup> to ha, for a result of 620.72 ha)

<sup>25</sup> 620.71 divided by 6,494 = 0.0956 (rounded to three significant figures). This figure can be converted into a percentage by multiplying it by 100 for a 9.56%.

<sup>26</sup> 206,907 persons x 30m<sup>2</sup> = 6,207,210m<sup>2</sup> / 10,000 (to convert to hectares) = 620.72ha  
(620.72ha / 5,574ha) x 100 = 11.11%

53. The Council acknowledges that each of these inputs / steps in this process is potentially open to challenge and needs to be appropriately justified. In the following sections, the Council will explain the reasoning underlying each of its choices.

*Is the standard of 30m<sup>2</sup> per person appropriate?*

54. The Panel should be satisfied that 30m<sup>2</sup> per person is an appropriate level of provision for Monash.
55. Dr Spiller's evidence sets out a number of sources which his firm considered in determining that a 30m<sup>2</sup> was an appropriate provision rate. Table 1 of his evidence is reproduced below:

TABLE 1: MACRO-PROVISION STANDARDS FOR OPEN SPACE <sup>1</sup> Source	Total open space provision rate (m <sup>2</sup> per capita)	Total open space provision rate (Ha/1000 people)
British National Playing Fields Association (1938)	28.3	2.83
National Capital Commission (Canberra 1981)	40	4
US National Recreation and Parks Association	40	4
NSW Department of Planning (1992)	28.3	2.8
Vic Gov - Planning for Community Infrastructure for Growth Areas (2008)	26.4**	2.6
City of Kingston Open Space Strategy 2012	24	2.4
City of Wyndham Open Space Strategy 2045	30	3
Frankston City Council Open Space Strategy 2016-2036	30.3	3.03
South Australian legislation	12.5% net developable area	4.0 in low density areas 1.0 in higher density areas
South Australian higher density guidelines	Up to 30	3.0
Precinct Structure Plan Guidelines Vic	10% net developable area	n/a

56. Of these, the most relevant metric for the Panel is that adopted by the former Growth Areas Authority in its Precinct Structure Plan Guidelines which is 10% of the net developable area of the land which is subject to a precinct structure plan.
57. While the PSP Guidelines are directed to 'the planning of new urban areas in greenfield locations', there is no logical reason to assume that the level of demand for open space created by a resident in Tarneit is materially different

from the level of demand created by a resident of Monash. If anything, it is to be expected that *aggregate* demand in Monash is likely to be higher than aggregate demand in Tarneit, due to the higher densities of residential development generating greater demand which must be satisfied with less open space. In any event, the Council submits that, if this level of provision is appropriate for greenfield residents, it is no less appropriate for residents of inner and middle suburbs.

58. The Council also notes that the structure plan for the Arden-Macaulay Urban Renewal Area anticipates a similar level of provision of public open space notwithstanding its inner-city location. It states that:

*The public realm within Arden Macaulay includes all the public space between buildings – the open spaces (public parks, squares) and the streets and laneways. This accounts for 35 per cent of all the land area in Arden-Macaulay. Of this, approximately one third is public open space and two thirds are streets and laneways.*<sup>27</sup> (emphasis added)

59. Finally, the Council notes the observation of VEAC around open space provision standards:

*An open space per capita standard used in Victoria is 3.03 hectares per thousand people, of which 1.5 hectares is for organised recreation. One example of the use of this standard is Bayside City Council's Community Neighbourhood and Audit Tool which specifies that the public open space provision should be at least three hectares per thousand residents. This standard was originally developed by the Melbourne and Metropolitan Board of Works in 1954. It is similar to the New South Wales standard of 2.83 hectares per thousand, although somewhat lower than the generally accepted standard of 4 to 5 hectares per thousand used in Queensland.*<sup>28</sup>

60. The standard of 30m<sup>2</sup> can also be tested against current levels of provision in other metropolitan municipalities to see whether it is extravagant. Work done

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<sup>27</sup> City of Melbourne, *Arden – Macaulay Structure Plan* (2012), p. 78. It should be noted that this plan is being reviewed in light of Melbourne Metro.

<sup>28</sup> Discussion Paper, p. 102.

by Urban Enterprise for LaTrobe City Council in 2016 identified the level of provision in various metropolitan LGAs as follows:

- (a) Melbourne: 56m<sup>2</sup> per resident;
  - (b) Moonee Valley: 50m<sup>2</sup> per resident;
  - (c) Port Phillip: 49m<sup>2</sup> per resident
  - (d) Moreland: 40m<sup>2</sup> per resident
  - (e) Maribyrnong: 37m<sup>2</sup> per resident
  - (f) Yarra: 31m<sup>2</sup> per resident
  - (g) Stonnington: 20m<sup>2</sup> per resident<sup>29</sup>
  - (h) Greater Dandenong: 36m<sup>2</sup> per resident
61. Having regard to these numbers, adoption of 30m<sup>2</sup> level of provision would still result in Monash having a level of provision comparable to many inner urban suburbs.
62. To the extent it is put that the figure 30m<sup>2</sup> is relatively high, this is not a reason not to adopt it. It is properly open to a planning authority to make choices about the preferred character of the municipality.
63. In this case, Monash prides itself on its status as a ‘garden city’. This is reflected in clause 21.01-1 of the local policy framework, which states:

*Monash 2021 establishes a vision for ‘a green and naturally rich city that keeps its green leafy character and values open spaces’. The City of Monash is known for its garden city character, consisting of leafy, low-rise suburbs with well vegetated private gardens and wide streets with street trees. This characteristic is highly valued by the community and visitors to the municipality. High canopy trees are a dominant feature, particularly towards the east of the municipality. This garden city characteristic is predominant in residential areas and the higher quality commercial areas, especially the planned business parks. Industrial areas are clearly designated and buffered precincts that*

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<sup>29</sup> It is noted that the level of provision for Stonnington quoted in the LaTrobe report and that quoted by Mr Ainsaar, also of Urban Enterprise, in his evidence are materially different.

*incorporate wide streets, large, well landscaped setbacks and provide an overall high quality environment.*

...

*The garden city character of Monash reflects the historical development of the area and contemporary community values. It therefore has strong cultural and community significance for Monash residents. As the suburban housing stock ages and the size and profile of the community changes, different forms of housing will be needed to address future requirements, expectations and environmental standards.*

64. This legitimate desire to maintain and build upon the existing character of Monash provides additional support for the adoption of the 30m<sup>2</sup> provision rate.
65. To the extent that Mr Milner seeks to suggest that Monash is sufficiently well served by existing open space that it ought to lower its contribution rates even below those that currently exist, this is not accepted for three primary reasons:
  - (a) First, looked at objectively, Monash is not comparatively well-served by existing public open space. According to the VPA's 2017 report, Monash has less open space per capita than a number of other inner / middle metropolitan municipalities, including Port Phillip, Maribyrnong, Moonee Valley, and Darebin.
  - (b) Second, and in any event, even if Monash were *currently* well served by public open space, the changing character of the municipality – in particular, the increase in density of housing – means that it would be wholly inappropriate to reduce contributions now. This would be equivalent to quitting your job on payday because you were currently in funds. Both VEAC and the *Melbourne C209* Panel have expressly recognised that addressing future demand is an appropriate part of setting a contribution rate. The decline in per capita open space over time is evident from:

- (i) A comparison of the 2010 VEAC rate for Monash of 44 m<sup>2</sup> per capita and the 2017 VPA rate for Monash of 38.3 m<sup>2</sup> per capita;<sup>30</sup>
  - (ii) The last two columns of Table 4 of the Open Space Contribution Rate report of October 2018 which documents the reduction in the per capita provision of community open space over the next 12 years if no change is made to the provision rate, namely a 6% reduction in provision.
  - (c) Third, the current sliding scale is the equivalent of 6.3m<sup>2</sup> per resident<sup>31</sup> and a 5% rate is the equivalent of 13m<sup>2</sup> per resident,<sup>32</sup> both of which represent an inadequate provision rate.
66. Having regard to the totality of the above, the Council submits that the Panel should be satisfied that 30m<sup>2</sup> represents an appropriate level of provision having regard both to other standards, including local standards for public open space, and to the Garden City character and identity which Monash aspires to retain.

*Are the population estimates appropriate?*

67. The Council has relied consistently upon work done by Forecast .id, a reputable provider of information whose data is utilised by many organisations, including State and local government as well as consultants.
68. The Council submits that the population estimates relied upon in the Open Space Contribution Rate Report and the MOSS were appropriate at the time those documents were prepared.
69. However, the population of Monash has grown considerably faster than anticipated in the Open Space Contribution Rate Report which has led to a corresponding increase in the projected demand for open space in 2028.

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<sup>30</sup> Noting both figures use a public open space area of over 700 ha, which is not limited to community open space.

<sup>31</sup> MOSS 30.

<sup>32</sup> MOSS 21.



70. The population forecasts relied upon in the MOSS and Open Space Contribution Rate Report were updated by Forecast .id in 2019:
- (a) The 2017 Forecast .id estimate for Monash's population in 2028, adopted in the Open Space Contribution Rate Report in 2018, was 206,907;
  - (b) The most recent Forecast .id figures estimate that the population of Monash in 2028 will be 220,786;<sup>33</sup>
  - (c) Table 8 of the Open Space Contribution Rate Report identified the expected population increase between 2018 and 2028 as being 14,057 persons. The current forecast represents a near doubling of that level of increase to 27,936 persons;
  - (d) If the target year is updated to 2030, consistent with the adoption of a 10 year timeframe as used in the Open Space Contribution Rate Report, the final population would be 225,133.<sup>34</sup>
71. The use of the updated population figures results in an increase in the level of projected demand for open space and correspondingly, in the contribution rate required to satisfy that demand (noting that the developable area remains constant):
- (a) If 2028 is retained as the end year for the MOSS, then the contribution figure becomes 10.19%;<sup>35</sup>
  - (b) If the 2030 figure is adopted as the new end year for the MOSS, then the contribution figure becomes 10.40%.<sup>36</sup>
72. Consistent with the approach taken in the Open Space Contribution Rate Report, the Council accepts that 10.40% should be rounded down to 10%, but

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<sup>33</sup> See <https://forecast.id.com.au/monash/population-households-dwellings> accessed 15 February 2020. Placing the cursor over the bar in the bar chart for the relevant year will cause a total population figure for that year to appear.

<sup>34</sup> Ibid.

<sup>35</sup>  $220,786 \text{ persons} \times 30\text{m}^2 = 6,623,580\text{m}^2 / 10,000 \text{ (to convert to hectares)} = 662.358 \text{ ha.}$   
 $(662.358\text{ha} / 6,494\text{ha}) \times 100 = 10.19\%$

<sup>36</sup>  $225,133 \text{ persons} \times 30\text{m}^2 = 6,753,990\text{m}^2 / 10,000 \text{ (to convert to hectares)} = 675.399\text{ha.}$   
 $(675.399\text{ha} / 6,494 \text{ ha}) \times 100 = 10.4\%$

notes that it would strictly result in an under provision of open space, having regard to the best available data.

*Is it appropriate to use the whole of the municipality as the contribution area?*

73. One issue raised in submissions is whether the whole of the municipality is the appropriate contribution unit or whether smaller units should be adopted. A number of submitters suggest that it is inequitable or unfair to require future subdividers to all contribute the same amount of open space or cash in lieu when different areas within the city require different levels of additional open space, either because they currently suffer from a deficiency of open space or because they are earmarked for more intense future growth.
74. The Council does not accept this argument. Having regard to the position taken by decision makers in *Stupak, Moreland C122*, and *Melbourne C209*, the proper consideration of the principles of need, nexus and equity applied in the statutory context of a public open space contribution under the *Subdivision Act* favours a flat rate over differential rates.
75. To the extent that the Panel in *Moreland C122* stated that spatially differentiated rates across a municipality ‘can’ be justified, it did not say that the use of spatially differentiated rates was required. In fact, the Panel had earlier observed: *It is noted that the architecture and past implementation of Clause 52.01 provides for precinct based (or even municipality wide) contributions rather than site by site assessment. In many planning schemes Clause 52.01 contributions apply on a municipality wide basis...<sup>37</sup>.*
76. A recent example of the adoption of a municipal rate exceeding 5% is *Maribyrnong C137*, where the Panel approved a flat 5.7% base rate for the entire municipality, albeit the schedule was drafted to require ‘at least’ 5.7% for strategic redevelopment sites.
77. In these circumstances, the Council considers it would be artificial to attempt to break up the municipality into suburbs on the basis about assumptions about what open space residents and workers are or are not likely to use (and in what proportion) over the duration of their lives in the municipality.

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<sup>37</sup> [2013] PPV 28, [5.1.2].

*Is the net developable area correctly identified?*

78. A number of submissions have been received which suggest that the net developable area is too large on the basis that it includes land that is encumbered or not truly developable. This is, to some extent, true as it includes significant areas of parkland as defined by the ABS.
79. As outlined above, however, the inclusion of this land operates to the benefit of developers in that it reduces the level of contribution required. For example, if all non-residential (parkland, commercial and industrial land) were excluded, the net developable area would be 4,272 ha. Assuming we utilise the population figures and demand adopted in the original calculation, this would produce a contribution rate of 14.53%. If updated population figures were adopted, this would be even greater.

*Is it appropriate to round the contribution rate to a whole number?*

80. In his evidence, Mr Ainsaar suggested that it is inappropriate to round the contribution up from 9.56% to 10%.
81. Whatever the merits of this position as a matter of theory, the practical reality is that there is a degree of imprecision inherent in the figures used to derive the contribution amount, most particularly, in the population estimates which are likely to be significant underestimates. It would be mistaken to proceed on the basis that calculation of an appropriate provision rate is an exact science, capable of pinpointing definitive figures with accuracy to two decimal places.
82. Given the most up to date population forecasts, rounding to the nearest whole number has been shown to be prudent in building a buffer into the contribution rate.

MATTERS RAISED IN SUBMISSIONS AND EVIDENCE AND BY THE PANEL

*Has the Amendment considered the Eddie Barron principles?*

83. As set out above, the Council considers that the Amendment is consistent with the proper interpretation of the *Eddie Barron* principles in the context of the Subdivision Act and clause 53.01.

*Should existing open space be taken into account and how?*

84. Council considers that, by including parkland in the calculation of the net developable area, it has properly taken existing open space into account. The effect of doing so is to reduce the contribution required from other subdividers.
85. As noted, the effect of excluding the parkland from the net developable area would be to increase the public open space contribution for the remaining land from 10.4% to 12.12%. In the context of a theoretical development with a land value of \$10,000,000, this would result in a decrease in the contribution of \$172,000.<sup>38</sup> Given that the public land is unlikely to be subdivided, this is effectively revenue foregone and presents a subsidy to the developer.
86. The Council accepts that it could have adopted an approach where new subdividers were required to only provide the difference between existing public open space and the total open space required. The Council, however, did not prefer this option.
87. To do so would effectively ignore the fact that residents of new subdivisions will utilise existing open space in addition to any new open space provided from their contributions.
88. Moreover, it would confer an advantage – in the form of reduced contributions – on subdividers simply for turning up at the end of the development cycle, rather than earlier. This is not a morally satisfactory distinction and inconsistent with the objective of fairness set out in s 4 of the *Planning and Environment Act*.

*Use of a single figure across the municipality*

89. For the reasons set out above, the Council considers that a single rate is the most equitable approach, as it avoids crediting developers for accidents of history in terms of the level of additional provision required.

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<sup>38</sup> 12.12% would be \$1,202,000. 10.4% would be \$1,040,000. The difference is \$172,000.

*Use of a single figure across different land use types*

90. Another matter raised in submissions is that the contribution required does not vary by land use – e.g. residential vs commercial – and that different land use types have different demands.
91. The Council accepts that workers have different demands, but this is not the same as not having demands. What those demands are is likely to depend on the type of employment uses that exist. The character of Monash – including the Monash National Employment and Innovation Cluster centred around Monash University<sup>39</sup> – is different from say, the Bulleen or Brooklyn Industrial Precincts in Manningham and Brimbank respectively. High amenity working environments are part of the attraction of Monash and likely to be particularly attractive to the kind of white collar, knowledge workers that the NEIC seeks to attract.
92. Having said that, the Council accepts that, as a general rule, workers are likely to require less open space than residents in terms of land area alone (because they will presumably undertake more of their recreation near home).
93. However, whilst public open space in employment areas may be less in terms of land area, the capital investment in the public open space to ensure it meets the recreational needs of workers is much higher than for a suburban park which may be used for more informal recreation. The intensity of the usage of workers' open space is concentrated in the working week and generally condensed into the lunch time hours. This intensity of use requires more capital-intensive urban infrastructure such as pavers, more seating, all weather paths, sculpture and the like.
94. The Panel need only venture across the road at lunch time to see this in action.
95. Moreover, it cannot be assumed that subdivided employment land will not be converted to residential land over time. Critically, s 18A(4) of that Act provides that, once a public open space contribution is made in respect of a particular parcel of land, no further contribution can be made.

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<sup>39</sup> It is noted that the NEIC is earmarked by clause 21.01 and the Council's Housing Strategy as a preferred location for residential development, notwithstanding its current zoning, with a particular focus on student accommodation: Housing Strategy, [24] [52], [71].

96. In this context, adopting a differential rate and applying it based on *current* land use, rather than potential future land use, creates an opportunity for subsequent windfall gains when industrial land is subsequently converted to residential use.
97. Accordingly, the Council does not support the adoption of a differential rate based on current land use for the reasons set out above.

*Impact on development viability and affordability*

98. While it is theoretically possible that excessive demands for infrastructure contributions – of any kind – could dampen development activity, there is no evidence before the Panel that the rate proposed that the rate proposed here will actually do so. In fact, despite such assertions being made in submissions, neither Mr Ainsaar nor Mr Milner expresses that view.
99. Moreover, insofar as there may be an impact on affordability, the Council notes Mr Wimbush’s observations in *Maribyrnong C137* that these impacts may be offset by the benefits of provide more and or better public open space. He said:

*The submission does not fairly acknowledge that even if open space contributions do worsen housing affordability to some extent, again a point not proven to the Panel, then this should be offset over the life of the development or dwelling by improved quantity and quality of open space and its consequent positive effects on liveability.<sup>40</sup>*

*Figure 4: Current Access to Open Space Network*

100. The Panel directed the Council to provide further information on Figure 4 of the Open Space Contribution Rate Planning. This Figure is a reproduction of Map 2 of the MOSS and a composite of the information depicted in the precinct based maps in chapter 9 of the MOSS; it depicts those parts of the municipality which do not have a park within 400m.
101. The purpose of this information is to assist in identifying gaps in open space and is one of the inputs which will inform where the Council will spend public

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<sup>40</sup> *Maribyrnong C137* [2016] PPV 9, [2.1 (vi)].

open space contributions in the future, as contemplated by direction 2 of chapter 4 which articulates key directions for good quality future open space.<sup>41</sup>

*Relevance of expenditure on projects from past contributions*

102. The Panel has requested a summary of the Council's capital works expenditure on open space for the past 5 years and it is provided in response to the Panel's direction.
103. To the extent that some submitters seek to scrutinise and critique the Council's past expenditure, the proper forum for such debate is a public meeting in the Council chamber, not this Panel.
104. For the record, the Council maintains that it has expended money collected through public open space payments in accordance with s20 of the Subdivision Act, namely to buy or improve land used for public recreation or public resort, as parklands or for similar purposes.
105. In relation to the issue of the acquisition of the Talbot Quarry site – a former sand mine and landfill located at 1221-1249 Centre road, Oakleigh South – for public open space, it is noted that this issue was considered at length by the Panel considering *Amendment C129* to the Monash Planning Scheme.
106. *Amendment C129* proposed to rezone the former quarry site to the Comprehensive Development Zone which the proponent of the amendment contended would best be used as mix of medium- and high- density apartments, with retail, open space and mixed use elements. Ultimately the panel recommended that *C129* be abandoned because it was not satisfied the contamination and pyrotechnical issues raised by the proposal had been adequately addressed.
107. Among the submitters to *C129* were a large number of submitters who contended that the Council should exercise its right to purchase the site under a s 173 agreement entered into in 1993 by Oakleigh Council.

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<sup>41</sup> MOSS 32.

108. The panel found that it was beyond its remit to consider whether the quarry site should be purchased, but did consider the issue of whether additional public open space was required in Oakleigh South. The panel stated:

*The Panel's consideration with respect to open space is therefore confined to whether there is such a need for open space in this area that it demands that the proposed use for housing or other built urban uses should be set aside in favour of it.*

*In this respect, there is a comprehensive analysis of open space requirements for the period to 2026 in the draft Open Space Strategy 2017 which generally supports Mr McGurn's conclusion that Oakleigh South is well served by public open space.<sup>42</sup>*

109. The draft Open Space Strategy referred to by the panel in C129 subsequently became the adopted MOSS. Table 5 of the MOSS shows that based on 2016 population figures, Oakleigh South has 3ha of public open space per 1000 residents, equivalent to the target figure of 30m<sup>2</sup> which is above the Monash average of 27m<sup>2</sup>.
110. As in C129, the Council takes the position that it is not the role of this Panel to determine whether or not the Council ought to purchase the quarry site. The Council has already resolved not to purchase the land. To the extent the Panel is minded to consider the issue however, the MOSS confirms that there is no immediate need for significant areas of additional public open space in Oakleigh South.

*The absence of a costed infrastructure plan*

111. Nothing in PPN70 or any other document identifies a costed infrastructure plan to be mandatory and the Council does not consider it to be a superior approach to the standards based approach adopted in this Amendment.
112. First, such a plan is likely to underestimate and underprovide infrastructure in the long run as the determination of the rate will be based the provision of a

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<sup>42</sup> [2018] PPV 93, [11.3].



fixed amount of infrastructure determined at a particular point in time based on particular assumptions about the future population. The rate is then tailored to deliver that particular infrastructure and no additional infrastructure. By contrast, adoption of a fixed rate builds in capacity to increase the provision of infrastructure if development and associated subdivision occurs faster than expected, because the rate has not been tailored to deliver a particular level of income.

113. Second, a costed infrastructure plan restricts the ability to respond to opportunities that may arise (noting the observation in the VEAC report that acquisition of land for POS is likely to be opportunistic in established suburbs) to add to POS unless those opportunities have been specifically anticipated in the infrastructure plan (because there will be no money set aside for other items).
114. It is noteworthy that proposed clause 21.01 identifies implementation of the actions in the MOSS, which includes preparation of an action plan for each of the twelve precincts to identify priority land acquisition, capital works projects based on gaps and future growth and providing a diversity and range of open spaces.<sup>43</sup> The MOSS reinforces that projects which are selected for the capital works budget in the future should have regard to the MOSS.<sup>44</sup>

#### *Changes to the Amendment*

115. Direction 10(a) of the Panel's direction letter dated 9 December 2019 required the Council's Part B submission to set out any proposed post exhibition changes to the Amendment.
116. There are two minor changes that should be made to clause 21.10 as proposed:
  - (a) the first is deletion of the reference to the Dandenong Valley Parklands Future Direction Plan 2006 which is referred to in the existing clause 21.10 but is not a document which informed the preparation of the MOSS or this Amendment (and indeed cannot be located by the Council);

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<sup>43</sup> MOSS 33.

<sup>44</sup> MOSS 26.

- (b) the second is the reference to further strategic work in clause 21.10 which mentions a policy to determine appropriate circumstances for an open space contribution resulting from the development of residential, commercial, industrial or a mix of uses. Proposed Clause 22.15 which forms part of this Amendment represents that further work and accordingly, the proposed MSS reference is no longer required.

- 117. Subject to the above amendments and any matters arising in reply, the Council does not seek further changes to the exhibited version of the Amendment.

CONCLUSION

- 118. The Council commends the Amendment to the Panel and will address any outstanding matters arising from submissions and evidence in its reply at the close of the hearing.

Susan Brennan

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Instructed by Maddocks Lawyers

17 February 2020