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**Planning Scheme Amendment C129  
Monash Planning Scheme  
Planning Panels Victoria Hearing  
8 - 11 August & 12 October 2017**

**OUTLINE of SUBMISSIONS  
on behalf of  
STERLING GLOBAL PROPERTY GROUP PTY LTD**

**12 October 2017**

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## Introduction & Summary

1. This Outline of Submissions is made on behalf of Sterling Global Property Group Pty Ltd (**Sterling Global**) in relation to Monash Planning Scheme Amendment C129 (**Amendment**) which seeks to rezone land<sup>1</sup> which was formerly used as a quarry and landfill to facilitate remediation and development for residential (or other suitable) uses.
2. Sterling Global has been engaged by the registered proprietor of the Land<sup>2</sup> as the Development Manager for the proposed remediation and development of the Land.
3. The Amendment seeks to facilitate the future renewal and transformation of the former Talbot Avenue Quarry to a contemporary masterplanned residential community. Whilst the Land was historically used for a wide variety of non-urban activities, it has essentially been inactive for the past several decades whilst awaiting final rehabilitation. There is common ground that in its current condition, the Land is underutilised, in poor condition and blights the area.<sup>3</sup>
4. The Amendment enjoys the broad and in principle support of all government agencies to which it was referred by Monash City Council (**Council**) and has attracted only a minimal degree of comment and opposition from the community.
5. The extensive discussions which have taken place between Council and Sterling Global in the years that predate the Amendment have resulted in there now being very few matters of disagreement between Council and the proponent.
6. The Land is the subject of an extensive array of reports which detail the investigations and findings arising from numerous environment site

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<sup>1</sup> 1221-1249 Centre Road Oakleigh South which is referred to throughout this submission as the **Land**.

<sup>2</sup> Huntingdale Estate Nominees Pty Ltd.

<sup>3</sup> Council Report dated 30 May 2017 at page 3.

assessments. Current environmental site assessment works are being undertaken as part of the environmental audit of the Land.<sup>4</sup>

7. The planning controls which the Amendment seeks to employ will establish a framework within which rehabilitation and development of the Land will occur in a coordinated and staged manner.
8. The approach adopted by the Amendment is not novel.
9. To the contrary, there are numerous examples where the same or very similar tools have been employed to facilitate development for sensitive uses on contaminated land including former landfills.
10. Council had acknowledged the complexities involved with remediation of and development on the Land. In the context of these complexities and the attendant costs, there are good reasons for delaying completion of the audit until after the Amendment
11. The strategic nature of the Land is self evident.
12. The Amendment facilitates the opportunity to achieve the remediation and urban infill sought by *Plan Melbourne* and the Monash planning scheme whilst retaining the requisite degree of flexibility in relation to future uses which will ensure that the Land is suitable for those uses be they sensitive or not.

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<sup>4</sup> As the Panel is aware, Mr Ken Mival who is an independent EPA Contaminated Land Auditor, has been appointed to conduct the s 53X Environmental Audit of the Land.

## Site and Surrounding Land Description & Previous Uses

### Planning Site Description

13. The Panel has the benefit of the description of the Land provided by Mr McGurn.<sup>5</sup> In broad terms, the Land enjoys the following attributes:
- 13.1. it is large at 18.79 hectares;
  - 13.2. it has a significant frontage to Huntingdale Road of around 409.5 metres and a small frontage to Centre Road created by Talbot Avenue;
  - 13.3. the immediate abuttals are predominantly comprised of existing residential development (with some additional approved and to be developed), recreational facilities including an athletics track, a golf course and a park which provides informal open space, playground and barbecue facilities;
  - 13.4. close proximity to educational facilities (including primary schools, a secondary college and Monash University) many of which are within walking distance of the Land;
  - 13.5. close proximity to local services and amenities including the Clayton Major Activity Centre which offers a wide variety of retail, entertainment, community and major health facilities;
  - 13.6. it is well served by public transport in terms of both buses and rail; and
  - 13.7. it is located within a short walk or drive of a number of business/industrial parks.

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<sup>5</sup> Expert Witness Report of Stuart McGurn dated August 2017 (**McGurn EWR**) at [9] - [17] at pages 2 & 3.



## Environmental Site Description

14. From an environmental point of view, there is an extensive array of information before the Panel concerning the Land including comprehensive descriptions of the Land.
15. For the purposes of the numerous environmental assessments which have been undertaken to date, the Land has been divided into five zones. These zones reflect the previous quarrying and operational activities that took place on the Land and would also appear to reflect title boundaries.<sup>6</sup>
16. Mr Sinclair has described each of the zones in terms of their historical uses and the nature of the soils, groundwater and landfill gas which investigations and assessments have identified are present.<sup>7</sup>

## Historic land use

17. A concise summary of historical uses for the Land is found in the Sinclair EWR.<sup>8</sup>

## **The Amendment**

### Proposed planning controls

18. In essence, it is proposed to rezone the Land to the Comprehensive Development Zone (**CDZ2**) so as to realise the opportunity to establish a range of future uses and development for the Land whilst facilitating the necessary rehabilitation and management of the former landfill and quarry.
19. The choice of the CDZ2 is supported by both Council and Mr McGurn.

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<sup>6</sup> Refer to Expert Witness Report prepared by Phil Sinclair dated 28 July 2017 (**Sinclair EWR**) Appendix A Figure 2 and Table 2.1 page 9.

<sup>7</sup> Sinclair EWR at s 2.1.1 to 2.1.3 at pages 9 & 10.

<sup>8</sup> Refer to Table 2.2: Site History Summary at page 12 and to Appendix A Figure 3.

20. In the Council Report<sup>9</sup> which recommended that the Minister for Planning be requested to authorise preparation and exhibition of the Amendment, the Council relevantly said this:

***Proposed Zone – Comprehensive Development zone***

*In order to facilitate the staged approach to site remediation, including the specific steps and requirements for audits prior to development commencing, it is proposed to rezone the land to a Comprehensive Development Zone. This zone allows an inclusion of site specific requirements and a tailored list of potentially appropriate uses to be included in the zone.*

*In addition to allowing a staged and tailored approach to address contamination the CDZ include (sic) provision for a Development Plan that broadly sets out general development form and land uses proposed for the site.*

*The proposed rezoning and application of the Comprehensive Development Zone is not a guarantee that the land can be used for sensitive uses such as residential, nor does it in any way bind Council to approve any future development if that development is considered inappropriate from either an environmental, land use or built form outcome.*<sup>10</sup> [Emphasis added]

21. These sentiments are echoed by Mr McGurn. In his view the rezoning to CDZ2 is appropriate. He says this:

51. *The Amendment proposes to rezone the entire site to the Comprehensive Development Zone (CDZ). The Special Use Zone is no longer an appropriate zone for the site as all quarry and landfill operations have ceased and accommodation uses are prohibited in that zone. Accordingly, a zone that enables a master planned redevelopment of the site for residential or other suitable urban uses is required.*
52. *Whilst part of the site is already in a Residential Zone, to enable the orderly planning of the whole site given its size, and enable the environmental issues and constraints to be planned and managed in an appropriate and coordinated manner, I consider the application of the CDZ across the whole site to be the correct approach.*
53. *This approach is also consistent with the purpose of this zone which is 'to provide for a range of uses and the development of land in accordance with a comprehensive development plan incorporated in this scheme.'*

<sup>9</sup> Dated 27 September 2016.

<sup>10</sup> At pages 4 & 5.

22. It is submitted that the rezoning of the land to CDZ2 is consistent with the purpose of the zone and will facilitate the proposed remediation and development.
23. There are, however, a range of improvements which can and ought be made to the drafting of both the exhibited CDZ2 and the post exhibition changes that the Planning Authority has put forward.

#### Environmental Audit Overlay

24. The Amendment will address the minor anomaly that exists in relation to the extent of the current EAO.

#### Proposed changes to the MSS and local policies

25. The Amendment proposes to insert a number of minor text changes to clauses 21.04 and 22.01 of the Monash planning scheme.<sup>11</sup>
26. These additions will introduce policy direction regarding the future strategic role of the Land in delivering high quality urban renewal outcomes that will help meet the municipality's future housing needs.
27. The changes contemplated to clauses 21.04 and 22.02-2 appropriately acknowledge the Land as an identified urban renewal site.

#### **The Amendment enjoys strong strategic support**

28. The Amendment enjoys strong strategic support.
29. Relevantly, the Victorian Planning Authority (VPA) made the following observations in relation to the strategic justification for the Amendment:

*Based upon the information provided, the VPA supports in-principle the proposed Amendment C129 for the rezoning and redevelopment of the Land at 1221-1249 Centre Road, Oakleigh South. The proposed Amendment C129 will contribute to the orderly planning of the local area and is consistent with strategic planning policy for the municipality at both the local and state level.*

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<sup>11</sup> Residential Development and Residential Development and Character Policy respectively.

*The subject site is located within the Monash National Employment and Innovation Cluster defined in Plan Melbourne and provides an excellent opportunity to redevelop an underutilised parcel of land to provide a diversity of housing in close proximity to employment opportunities. A rezoning that enables predominantly residential development is also justified by the location of existing public transport, open spaces, community infrastructure and retail opportunities nearby.<sup>12</sup>*

30. The fact that the Amendment has attracted strategic support from the State's planning authority is a matter that ought be given considerable weight by this Panel.
31. In the expert opinion of Mr McGurn<sup>13</sup> the Land enjoys strong strategic support because:
- 31.1. it is located within the Monash National Employment and Innovation Cluster (**Monash Employment Cluster**) in *Plan Melbourne* which is, in turn, identified as a place of focus for investment and growth and is an area of State significance;
- 31.2. its size and location makes it a perfect candidate for providing housing choice close to jobs and services whilst reducing the pressure for change in established neighbourhoods;
- 31.3. it will assist in creating a city of "20 minute neighbourhoods" sought by *Plan Melbourne*;
- 31.4. it is consistent with the strategy in the Monash planning scheme which, as a means of achieving the objective of providing housing choice close to jobs and services, seeks to [F]acilitate the remediation of contaminated land, particularly on sites in developed areas of Melbourne with potential for residential development;<sup>14</sup>
- 31.5. it is consistent with the Monash planning scheme in that it has the potential to widen the housing choice available in the municipality;<sup>15</sup>

<sup>12</sup>

Letter from the VPA to Council dated 3 March 2017.

<sup>13</sup>

McGurn EWR at [43]-[50] at page 8.

<sup>14</sup>

Clause 11.06-2 of the Monash planning scheme.

<sup>15</sup>

This objective is identified and discussed at clauses 16.01-4, 21.02-3 and 21.04.



- 31.6. it is consistent with the Monash Housing Strategy 2014 which encourages increased density developments on strategic sites in the Monash Employment Cluster;<sup>16</sup>
- 31.7. it is consistent with the surrounding zoning pattern which reflects the established predominantly residential neighbourhood within which the Land is located;
- 31.8. it provides the opportunity to establish other mixed uses given the Land's large frontage to Huntingdale Road; and
- 31.9. the fact that the Land is well located in relation to a plethora of services including transport, retail, educational, health, employment, public open space and recreational facilities.
32. Given these attributes, there can be no quarrel that the Amendment responds to the strategic direction of the Monash planning scheme in a manner which very few, if any, other sites within the municipality are in a position to do.

### **Key Issues in relation to the Amendment**

33. There are very few issues of substantive contention remaining in relation to the Amendment. This reflects the extensive consultation that has been undertaken with Council, the VPA, the Environment Protection Authority (EPA) and local residents.<sup>17</sup>
34. There are, however, a number of discrete matters which the Panel will need to consider and about which recommendations ought be made. Those matters are described as follows:

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<sup>16</sup> Which is, in turn, consistent with clause 16.01-3 of the Monash planning scheme.

<sup>17</sup> In addition, it is noted that South East Water has no objection to the Amendment and having communicated that position advised it wished to take no further part in the Amendment process.

- 34.1. should the Amendment receive the Minister's approval prior to the issuing of a Certificate or Statement of Environmental Audit pursuant to the *Environment Protection Act* 1970 (**EP Act**);<sup>18</sup>
- 34.2. the timing of the submission to Council of the SESP and ESAs;  
↳ subset: Council wants to receive but also approve them. (see 3-2)
- 34.3. should a Development Contributions Plan Overlay (DCPO) be applied to the Land;
- 34.4. consideration of neighbours' submissions; and
- 34.5. the changes which should be made to the exhibition documents.

35. This submission now proceeds to address these issues.

**The Amendment ought proceed the completion of the audit**

36. There are a number of reasons why, in the circumstances of the Amendment, it is not only appropriate but would be beneficial for the Amendment to proceed before the environmental audit for the Land, or a portion thereof, is completed.

What is proposed?

- 37. It is proposed that a number of environmental audits of the Land will be undertaken in accordance with Part X1D of the EP Act.
- 38. The audit process commenced with the appointment of Mr Mival on 31 July 2013.
- 39. The Amendment through the auspices of the CDZ2 requires the owner of the Land to provide either a Certificate or Statement of Environmental Audit before commencement of a sensitive use<sup>19</sup> or before the construction or

<sup>18</sup> Refer to ss 53Y and 53Z respectively.

<sup>19</sup> Refer to clause 4.4 of the draft CDZ2 provided to the Panel and parties on behalf of Sterling Global (document 18).



carrying out of buildings and works in association with a sensitive use commences.<sup>20</sup>

40. In the event that the Certificate or Statement of Environmental Audit imposes obligations in relation to the ongoing management of the Land, the CDZ2 requires entry into a s 173 Agreement occur before any sensitive use commences or before any buildings or works in association with a sensitive use commence. Such an approach is impliedly endorsed by EPA guidance.<sup>21</sup> It is, in practice, a commonly adopted approach.
41. It is proposed that there will be three environmental audits undertaken, being one for zone 4, one for zone 1 and one for zones 2, 3 & 5 combined.<sup>22</sup> *One SESP. Sewer ESAs.*
42. The audit reports and the staged Statements of Environmental Audit (SoEAs) will be issued prior to any sensitive use commencing on the Land and prior to the construction or carrying out of buildings and works in association with a sensitive use commences.
43. This is the architecture of the Amendment and it reflects the requirement of the EAO which affects the Land.

#### Why delay completion of the Audit?

44. The decision to delay the completion of the audit until after the Amendment is finalised has been driven by a number of reasons.
45. First, the Auditor must consider whether the site is suitable for all possible uses in conducting an environmental audit.
46. Clearly, the Amendment will refine the permissible future uses of the Land.

<sup>20</sup> Clause 6.4 of the draft CDZ2 provided to the Panel and parties on behalf of Sterling Global (document 18). Note that the proposed amendments to the CDZ2 appropriately exclude works which pertain to the remediation of the Land.

<sup>21</sup> EPA Publication 759.3 *Environmental auditor (contaminated land): Guidelines for issue of certificates and statements of environmental audit* (December 2015) (**EPA Auditor Guidelines**) at s 12.3 page 20. *Doc 17 p20*

<sup>22</sup> Refer to s 4.3 on page 15 of the SESP.

47. Accordingly, the rezoning of the Land will inform the Auditor as to the nature of the mitigation and control measures which will be necessary to protect the likely uses on the Land.
48. This has flow on effects.
49. It will inform and dictate the nature of the conditions specified in the SoEAs. And it is only when the proposed conditions are identified by the Auditor with the necessary specificity that they can be sensibly discussed with the planning authority for the purpose of ensuring they are reasonable, practicable and enforceable.<sup>23</sup>
50. Second, development in one zone of the Land may operate to affect and alter the appropriate mitigation measures required in another zone or zones.
51. An example of this occurs in relation to zone 4.
52. During and after completion of the audit of the first stage (zone 4) there is expected to be monitoring of gas and groundwater on the Land and testing of any fill that is still required to be imported. If the audit of other zones is required to be completed prior to any development occurring on zone 4, the most appropriate mitigation and control measures may not be applied to the zone 4 portion of the Land.
53. Filling of zone 4 and covering of most of the zone with paving and buildings (as is contemplated by the Masterplan) has the potential to change the pathway of landfill gas so that landfill gas risks on parts of other zones are altered. This, in turn, could result in a situation where different gas mitigation measures or locating gas mitigation measures in different locations may be required than would be anticipated if the audit of zones 2, 3 and 5 was completed before development occurs on zone 4.<sup>24</sup>

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<sup>23</sup> *Ibid* at 12.3 page 20.

<sup>24</sup> At the moment, landfill gas from Zone 1 can release to air along the boundary with Zone 4, If the filling of Zone 4 creates a 'wall of soil' that gas can't easily penetrate, the landfill gas might move upwards to sideways to find the path of least resistance out of the ground. That may mean different gas mitigation measures would be required than if they were designed without having filled and

54. Completion of the audit after the Amendment is finalised and in stages would avoid this situation.
55. Third, the Amendment will facilitate the environmental goal of cleaning up and remediating a large contaminated site in a manner that delivers a level of financial certainty for the proponent. In the absence of some certainty around development outcomes, the exhaustive costs associated with clean up and remediation of large sites have been recognised as posing a barrier to the transitioning of such sites to their next life.

The proposed timing for completion of the environmental audits is consistent with the EAO and Ministerial Direction No. 1

56. There is no authority for the proposition that an environmental audit must take place prior to approval of the Amendment. *Calculation*
57. It is, however, clear that the environmental audit must be conducted prior to the commencement of a sensitive use or before the construction or carrying out of buildings and works in association with a sensitive use commences.<sup>25</sup>
58. In pre-application discussions, Council was prepared to consider an approach to satisfying the Land's environmental audit requirements other than by an up-front audit.

#### *Planning Scheme Provisions*

59. When considering the Amendment, the Council (and the Panel) is subject to section 12(2) of the *EP Act* which provides:

*In preparing a planning scheme or amendment, a planning authority-*

- a) *must have regard to the Minister's directions; and*
- aa) *must have regard to the Victorian Planning Provisions; and*
- ab) *in the case of an amendment, must have regard to any municipal strategic statement, strategic plan, policy statement, code or guideline which forms part of the scheme; and*

<sup>25</sup> capped Zone 4, or the mitigation measures might be put in a different place than we would anticipate at this point in time, prior to filling and capping of Zone 4.  
Noting that the proposed amendments to the CDZ2 appropriately exclude works which pertain to the remediation of the Land.



- b) *must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or for development envisaged in the scheme or amendment; and*
- c) *must take into account its social effects and economic effects.*

60. Whilst Council is required to consider the type of development proposed and the effects of the Amendment on the environment, it is also required to view the Amendment more broadly, taking into account social and economic effects.

61. Clause 13.03-1 of the Monash planning scheme relates to the use of contaminated and potentially contaminated land. The clause states:

*Objective*

*To ensure that potentially contaminated land is suitable for its intended future use and development and that contaminated land is used safely.*

*Strategies*

*Require applicants to provide adequate information on the potential for contamination to have adverse effects on the future land use, where the subject land is known to have been used for industry, mining or the storage of chemicals, gas, wastes or liquid fuel.*

*Policy guidelines*

*Planning must consider as relevant:*

- *State Environment Protection Policy (Prevention and Management of Contamination of Land).*
- *Ministerial Direction No. 1 – Potentially contaminated land.*
- *National Environment Protection (Assessment of Site Contamination) Measure.*

An EAO applies to the Land.

62. The purpose of the EAO is:

- a) *To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.*
- b) *To ensure that potentially contaminated land is suitable for a use which could be significantly adversely affected by any contamination.*

63. The “Requirement” of the EAO is stipulated as follows:

*Before a sensitive use (residential use, child care centre, pre-school centre or primary school) commences or before the construction or carrying out of buildings and works in association with a sensitive use commences, either:*

- *A certificate of environmental audit must be issued for the land in accordance with Part IXD of the Environment Protection Act 1970, or*
- *An environmental auditor appointed under the Environment Protection Act 1970 must make a statement in accordance with Part IXD of that Act that the environmental conditions of the land are suitable for the sensitive use.*

64. The purpose of the EAO is to ensure that potentially contaminated land is suitable for a proposed sensitive use, through the imposition of a requirement for an environmental audit. The presence of an EAO means that an assessment of the potential for contamination of the land has already been made.
65. The staging of the environmental audits contemplated by the Amendment is not contrary to the terms of the EAO or the Monash planning scheme.
66. There is no suggestion that completion of an environmental audit would not occur prior to the commencement of the sensitive use or before the construction or carrying out of buildings and works in association with a sensitive use commences.<sup>26</sup> To the contrary, the draft CDZ makes express provision for completion of an audit and the provision of either a Certificate or Statement of Environmental Audit.

#### *Ministerial Direction No. 1*

67. The stated purpose of this Ministerial Direction is:

*... to ensure that potentially contaminated land is suitable for a use which is proposed to be allowed under an amendment to a planning scheme and which could be significantly adversely affected by any contamination.*

68. In meeting that purpose – satisfying itself that land will be suitable for the use proposed by the planning scheme amendment – a planning authority is stated to be required to “...satisfy itself that the environmental conditions of that land are or will be suitable for that use”.

<sup>26</sup>

Noting that the proposed amendments to the CDZ2 appropriately exclude works which pertain to the remediation of the Land.

69. A planning authority must satisfy itself by either (1) or (2):

- 1) Before it gives a copy or notice of amendment under Section 17, 18, or 19 of the Act, a planning authority must ensure that:
  - a) A certificate of environmental audit has been issued for the land in accordance with Part IXD of the Environmental Protection Act 1970, or
  - b) If the amendment allows a sensitive use *only* in accordance with plans included or referred to in the amendment an environmental auditor appointed under the Environmental Protection Act 1970 has made a statement in accordance with Part IXD of that Act that the environmental conditions are suitable for the sensitive use in accordance with those plans.
- 2) A planning authority must include in the amendment a requirement to the effect that before a sensitive use commences or before the construction or carrying out of buildings or works in association with a sensitive use commences:
  - a) A certificate of environmental audit must be issued for the land in accordance with Part IXD of the Environmental Protection Act 1970, or
  - b) An environmental auditor appointed under the Environmental Protection Act 1970 must make a statement in accordance with Part IXD of that Act that the environmental conditions of that land are suitable for the sensitive use.

70. In the Explanatory Statement accompanying the Ministerial Direction, option 2 is said to be appropriate in these terms:

*If testing of land before a notice or copy of the amendment is given is difficult or inappropriate, a planning authority may alternatively require a certificate or an auditor's statement at a later date. Under this option, the requirement for a certificate or statement to be issued before a sensitive use commences or buildings or works associated with a sensitive use commences must be included in the amendment.*

71. The Ministerial Direction clearly anticipates a situation where it may be 'difficult or inappropriate' to obtain an audit prior to a notice of amendment being given and thus it may be deferred to a later stage.

72. In this regard, the Panel is referred to the evidence of Mr Ken Mival, Auditor for the Land, which highlighted the need for an auditor to be informed by the proposed use and development on the site or the portion of the site to which the audit relates in concluding an audit.

*(what we do you expect  
arrange the MP  
-SESP)*

*Complexity of the  
site -*



73. In the report *Potentially Contaminated Land Advisory Committee Report*, the Advisory Committee (AC) explored how to:

73.1. better define when it is 'difficult or inappropriate' to require an environmental audit before notice or copy of the amendment is given for a planning scheme amendment; and

73.2. identify the circumstances that justify a responsible authority's request to carry out an audit or site assessment as part of the application or amendment process, prior to deciding on a permit or authorizing a planning scheme amendment.

74. The AC relevantly found:

*The emphasis needs to be on risk management and the phasing of approvals so that costly investigations are not required for a proposal that has no prospects of being approved.*

*It may be appropriate to require an audit before rezoning where there are no mechanisms for managing construction or the ongoing use and it is likely future residents would be directly exposed to the soil on the land. An example would be a low density residential development.*

*A deferral may be justified for a site specific amendment with land in one-ownership where the proponent seeks approval prior to undertaking an audit due to the significant cost involved.*

*An audit before the approval of an amendment may be appropriate when:*

- *The likely development will be a sensitive use residential development where there will be no mechanisms for managing construction in detail, or placing conditions on the use.*

*An audit after the approval of an amendment may be appropriate when:*

- *The site is a higher density residential or mixed use redevelopment of an area where contamination issues can be dealt with as part of overall construction, if there are options for ongoing management, and where there are reasonable development options for the site if some or all of the site cannot be used for a sensitive use.*

*It is important to note that simply because an audit (or assessment) is delayed does not mean that the outcomes are guaranteed. Some councils feel that this uncertainty could expose them to liabilities, or at least the prospect of Court action.*

[emphasis added]

75. It is noted that the Planning Authority accepts that the site is in one ownership and that the costs involved in remediation of the site are significant.<sup>27</sup>
76. The AC then looked at the difficulties faced by Responsible Authorities in satisfying themselves that the land is capable of accommodating the proposed use if the audit has been delayed. The AC considered that a SRSP was an appropriate way for councils to satisfy themselves that contamination issues could be managed and that the environmental conditions at a site would be suitable for the proposed sensitive use or uses.
77. The AC went on to recommend that *Ministerial Direction No. 1* and the *Department of Sustainability and Environment: Potentially Contaminated Land – General Practice Note (June 2005)* (**Practice Note**) be amended to:
- ...adopt a risk-based approach and only require an audit early when there will be no further management options (or limited further management options) of the development process*  
and  
*In the Environmental Audit Overlay require an Audit before a permit is issued where the development proposes any secluded private open space or children’s play areas at ground level.*
78. While this report is not part of the Monash planning scheme and is not binding on the Panel’s deliberations, it is persuasive and helpful commentary regarding the proper approach to the interpretation of the requirements specified in *Ministerial Direction No. 1*.

*State Environment Protection Policy (Prevention and Management of Contamination of Land) (SEPP)*

79. The stated policy goal of this SEPP is:

*...to maintain and where appropriate and practicable improve the condition of the land environment sufficient to protect current and future beneficial uses of the land from the detrimental effects of contamination by ... adopting management practices that will ensure ... pollution is cleaned-up or otherwise managed to protect beneficial uses.*

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<sup>27</sup> Planning Authority’s Submission to the Panel at [72] (Document 3).

80. The policy principles further state that “[T]his requires the effective integration of economic, social and environmental considerations in decision making processes”.
81. The SEPP requires a planning authority to “...have regard to Minister’s Direction No. 1 under the Planning and Environment Act 1987 when preparing an amendment to a planning scheme which would have the effect of allowing potentially contaminated land to be used for a sensitive use”. [emphasis added]
82. Here it is relevant to recall that the proposed CDZ2 does not exclusively mandate use of the land for sensitive uses. Rather, it employs safeguards which will ensure that the environmental audits are completed and a Certificate or Statement of Environmental Audit will be issued before any sensitive use commences or the construction or carrying out of buildings and works in association with a sensitive use commences.
83. If the Land or a portion thereof, cannot be appropriately remediated, the zone contemplates that the Land can be used for a non-sensitive use.

*Department of Sustainability and Environment: Potentially Contaminated Land – General Practice Note (June 2005) (Practice Note)*

84. The Practice Note details how potentially contaminated land is considered by the planning system, detailing the obligations under the *Planning and Environment Act 1989*, Ministerial Direction No. 1 and the EAO.

85. In considering the application of the EAO, the Practice Note states:

*The Environmental Audit Overlay (EAO) is a mechanism provided in the Victoria Planning Provisions and planning schemes to ensure the requirement for an environmental audit under Direction No. 1 is met before the commencement of the sensitive use or any buildings and works associated with the use. The application of the overlay, in appropriate circumstances, ensures the requirement will be met in the future but does not prevent the assessment and approval of a planning scheme amendment.*<sup>28</sup> [emphasis added]

86. In relation to when an environmental audit is necessary, the Practice Note states in relation to the audit:

Direction No. 1 requires that this be done before notice of a planning scheme amendment is given. However, it may be appropriate to delay this requirement if testing of the land before a notice of the amendment is given is difficult or inappropriate.

...

Generally an environmental audit should be provided as early as possible in the planning process. This may not always be possible or reasonable and requiring an environmental audit as a condition of permit may be acceptable if the responsible authority is satisfied that the level of contamination will not prevent the use of the site.<sup>29</sup> [emphasis added]

### Maribyrnong C82 (PSA)[2011] PPV 10

87. In this report by PPV, the Panel examined both the requirements and practical application of Ministerial Direction No. 1 and said this:

Council submitted:

*In practice, despite Ministerial Direction No 1 – Potentially Contaminated Land, it was a widely held practice within Victoria that Certificates or Statements of environmental audit were not required prior to the notice of amendment, but instead were required later in the process post approval of any amendment.*

*It is clearly preferable that issues relating to whether remediation of the site is possible or not are dealt with earlier rather than later in the planning process, but we think that there is a need to distinguish between determining what needs to be done, and actually carrying out the physical works.*

*Ideally the Policy would provide some clearer guidance around what 'practical or reasonable' means in this context – the words are taken from the Practice Note – but no guidance is provided in the Policy (or Practice Note) and certainly it is not appropriate as part of this Hearing to introduce new tests without public exhibition.*

*We make the observation that 'practical' would seem to deal with the physical possibility of conducting the audit, and 'reasonable' the financial impact on the developer of conducting the audit in the absence of any certainty that a permit would be issued or a planning scheme amendment approved. We struggle to see that it is reasonable to bring forward the costs of clean up in the typical development scenario.*

*The proposed Site Remediation Strategy Plan provides a good way of identifying issues and setting out a roadmap without bringing forward site works, with the attendant costs and disruption this would involve.*

*We think that the practice of making the cleanup part of the development process is appropriate,...*<sup>30</sup> [emphasis added]

<sup>29</sup>

Page 5.

<sup>30</sup>

At pages 67 and 68.



88. Again, while this PPV Report does not prescribe an approach interested parties are bound to follow, it is a helpful discussion in relation to the reasonableness of requiring an audit first approach in the absence of planning certainty.

*EPA Auditor Guidelines<sup>31</sup>*

89. When considering when an environmental audit is required, the EPA Auditor Guidelines state:

*An environmental audit overlay may be used by the planning authority to defer the requirements of Minister's Direction No. 1 from the time of the planning scheme amendment to the time the use commences. If a site is covered by an environmental audit overlay an environment (sic) audit will be required prior to change to a sensitive use, in accordance with Minister's Direction No. 1.<sup>32</sup>*

90. This guideline makes the sensible distinction from a timing perspective between on the one hand, a planning scheme amendment and on the other hand, commencement of the sensitive use.

*The EPA's position*

91. There is no planning merit for the most recent position adopted by the EPA which is understood to be that approval of the Amendment ought be deferred until a (finalised) SESP and ESA are finalised and verified by an auditor is submitted to Council's satisfaction.<sup>33</sup>

92. This position is not supported by either of the two EPA accredited auditors which have given evidence before the Panel.

93. Nor is it supported by the Planning Authority.

*Conclusion*

94. Under the approach suggested by the proponent, 3 audits will be completed.

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<sup>31</sup> Document 17.

<sup>32</sup> Refer to s 5 page 8.

<sup>33</sup> EPA Submission at page 3 Introduction (Document 8).

95. No party before the Panel is advocating that the Amendment ought be abandoned because the audits are yet to be completed.
96. There is no planning basis for deferral of the Amendment in the manner proposed by the EPA.
97. Both the EPA and PPV have accepted the staged audit approach.

The Land can be made suitable for the proposed sensitive use

98. The SESP together with the relevant ESAs are acceptable tools by which the Council can satisfy itself that the Land will be suitable for the proposed development and that environmental issues will be adequately managed.<sup>34</sup>
99. The SESP sets out the overarching strategy and process going forward to ensure management of environmental risks which will facilitate development of the site. The SESP is a strategic document that contains indicative site management and monitoring controls which are proposed to be implemented after each clean up activity.
100. The SESP was informed by the Remediation Options Report<sup>35</sup> which identified the remediation goals and presented a remediation technology screening assessment to identify and assess the performance and feasibility of the available remediation approaches.<sup>36</sup>
101. As Mr Sinclair states:

*The SESP included the suite of preferred remedial measures, the proposed validation works for the remediation, a broad outline for environmental issues management and a data gap assessment for information required to complete staged Section 53X Environmental Audits of the site. The SESP has been reviewed and endorsed by the Environmental Auditor.*

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<sup>34</sup> The Panel's attention is drawn to the helpful discussion in the Potentially Contaminated Land Advisory Committee Report at pages 45 to 47.

<sup>35</sup> Coffey, May 2014b.

<sup>36</sup> Refer to Sinclair EWR at s 3.2 page 19.



*Based on the SESP, Coffey prepared a "Workplan for Supplementary Environmental Site Assessment" (Coffey, August 2015a) and is currently engaged to undertake ESA works at the site.<sup>37</sup>*

102. The scope of works that have been conducted in accordance with the Workplan and which has been approved by the environmental auditor, are detailed in the Sinclair EWR.<sup>38</sup>

103. In his review of the SESP, Mr. Mival, the independent environmental auditor appointed in relation to the Land, concluded:

*Having considered the information available for the site up to November 2014, in our experience the remediation options being proposed by Coffey for this site in the Strategy Plan and the supporting documents listed in this letter, are consistent with similar approaches to remediation of these types of sites, and are considered to be feasible if implemented diligently and with due regard to the physical site properties and the materials used.*

*Provided that they are suitably implemented in accordance with the Plan, good practice, and any conditions required by a Statement of Environmental Audit when issued, we consider that there is no overriding issue that would prevent redevelopment of the site, or portions of the site, subject to the suitable completion of the remedial process outlined in Coffey's Strategy Plan, and completion of the audit process with acceptance by EPA.<sup>39</sup>*

104. To the extent that Council sought to quibble with the nature of the endorsement provided by Mr Mival, the Panel has now had the benefit of the evidence of Mr Mival in this regard.

105. The EPA endorses the approach adopted by the Amendment. Correspondence from the EPA to Coffey<sup>40</sup> relevantly states:

*EPA support(sic) in principle the staged audit approach. We have precedents for adopting this approach as a means to promote clean up and remediation of large sites by supporting financial viability of development proposals.*

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Refer to Sinclair EWR section 1.8 at page 8.

<sup>40</sup> Dated 17 October 2014.

106. The approach which underpins the Amendment will in no way prevent or detract from completion of the audit for the relevant stage prior to the commencement of any sensitive use or before the construction or carrying out of buildings and works in association with a sensitive use commences.<sup>41</sup>
107. So long as the commencement of a sensitive use or the construction or carrying out of buildings and works in association with a sensitive use<sup>42</sup> is deferred until the audit is completed and a certificate or statement of environmental audit is issued, both the purpose and the requirement of the EAO will be met.

*The evidence establishes that the Land can be made suitable for the proposed development*

108. The evidence before the Panel establishes that from both a contamination and a geotechnical point of view, the Land can be made suitable for and will allow the proposed redevelopment.
109. Whilst there is some additional assessment to be undertaken, this is not expected to alter the conclusions reached by Mr Sinclair, Mr Pedler and the independent environmental auditor, Mr Mival.
110. Indeed, the works which have been undertaken pursuant to the auditor approved Workplan have not resulted in the assessment and remediation implementation process outlined in the SESP becoming outdated or obsolete. To the contrary and in Mr Sinclair's expert opinion, they remain viable and appropriate.<sup>43</sup>
111. Similarly, Mr Pedler also opines that:

*...the various Zones across the development can be developed for the proposed mixed and sensitive uses subject to the undertaking and results of further site investigations, detailed design of appropriate foundation systems and service*

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<sup>41</sup> Noting that the proposed amendments to the CDZ2 appropriately exclude works which pertain to the remediation of the Land.

<sup>42</sup> Clause 5.4 noting that the proposed amendments to the CDZ2 appropriately exclude works which pertain to the remediation of the Land.

<sup>43</sup> Sinclair EWR at s 1.1 page 2 noting that the further assessment undertaken in relation to landfill gas will require the technical and design details for the gas mitigation measures detailed in the SESP to be updated.

*connections and close monitoring of the performance of the fill and building structures.<sup>44</sup>*

112. Whilst it is true that further assessment work could identify further environmental issues which need to be addressed, this is allowed for in the SESP.<sup>45</sup>
113. Mr Sinclair's written evidence noted that there are benefits to completing the environmental audit after an amendment to the planning scheme is approved.<sup>46</sup> These benefits were explored, tested and verified during the evidence Mr Sinclair provided to the Panel in person.

#### *Common approach*

114. Council has determined it to be appropriate to proceed with the Amendment prior to the completion of an environmental audit.
115. Given that the Minister has approved the preparation and exhibition of the Amendment, it is reasonable to conclude that he too accepts the approach adopted by the Amendment.
116. This is not surprising. Rather, it reflects an acknowledged approach which has been adopted and implemented previously on a number of occasions.
117. The Panel is directed to the Summary Table prepared on behalf of Sterling Global.<sup>47</sup>

#### **Timing of the submission to Council of the SESP and ESAs**

118. According to the submission made to the Panel on behalf of the Planning Authority:

*The only issue between Council and the proponent is when the ODP, SESP and ESA ought be completed and approved by Council.<sup>48</sup>*

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<sup>44</sup> Expert Witness Report prepared by Ian Pedler dated 1 August 2017 (**Pedler EWR**) at s 1.5.

<sup>45</sup> Sinclair EWR at s 3.2 page 20.

<sup>46</sup> Sinclair EWR at s 5.1 page 35.

<sup>47</sup> Refer to Tab 5A of the folder of Panel documents submitted by Sterling Global.

<sup>48</sup> Refer to [82] of document 3.

## Council's position

119. Council's post exhibition version of the CDZ2 requires submission and approval of a SESP and auditor endorsed ESA prior to any planning permit application being made.<sup>49</sup>
120. There has been no planning or environmental rationale identified to support this post exhibition change.
121. There is no evidence before the Panel to support the post exhibition position taken by Council. To the contrary, all expert evidence before the Panel disagrees with the Council's post exhibition position.
122. In essence, the Council's position is essentially an arbitrarily drawn "line in the sand". Whilst it may sound compelling in a factual vacuum, there has been no material reason advanced to substantiate a requirement for provision of the SESP and relevant ESA prior to the planning permit application
123. Council's approach is inconsistent with the exhibition version of the CDZ2 which required planning applications to include an SESP and an ESA endorsed by an accredited environmental auditor.<sup>50</sup>
124. Additionally, the exhibition version of the CDZ2 acknowledged that:
- Planning applications can be staged across the site and must include an SESP for the site and an ESA pertaining to the relevant stage.*
125. The discussion in the Council Report which purports to substantiate the post exhibition changes is difficult to follow and unconvincing.<sup>51</sup>
126. The Council Report includes three separate recommendations. Of the three, recommendations 1 and 2 are effectively identical and are to be contrasted with recommendation 3.

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<sup>49</sup> Refer to clause 2.2 of the CDZ2 which appears at Tab 1 of the Council's folder of documents (Document 2).

<sup>50</sup> Clause 3.2 Application requirements.

<sup>51</sup> At pages 3-7.

127. Contrary to the position asserted in the Council Report,<sup>52</sup> the SESP is completed and has been endorsed by the environmental auditor.
128. Each ESA report will detail all environmental investigation works for audit purposes including results of all site testing so as to appraise the contamination status of soils, groundwater and landfill gas. The report will address the management of site contamination issues and confirm (or otherwise) that the land is suitable for sensitive uses subject to completion of an environmental audit. Each ESA will be carried out by a qualified environmental consultant and will be endorsed by an independent accredited environmental auditor.
129. Given this, an auditor endorsed ESA ought be required to be lodged concurrently with each planning permit application. It was Mr Sinclair's (unchallenged) evidence that it ought be lodged with Council as close to completion of the audit to which it pertains as possible.

#### The VPA's position

130. According to the VPA's submission:

*[T]he Site Environmental Strategy Plan (SESP) and the Environmental Site Assessment (ESA) should be conducted prior to the planning permit application stage.*<sup>53</sup> [Emphasis added]

131. The proponent concurs with this view and submits that both the version of the CDZ2 proposed by Mr McGurn and the later version provided by Sterling Global to the Panel and parties<sup>54</sup> is consistent with this approach.

#### The EPA's position

132. The most recent position taken by the EPA in relation to the timing for provision of the SESP and the ESA appears entirely to be based on what the EPA considers may be a "false message" sent to developers.<sup>55</sup> This fails to

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<sup>52</sup> At page 3.

<sup>53</sup> VPA letter to Council dated 3 March 2017.

<sup>54</sup> Document 20.

<sup>55</sup> EPA submission to the Panel dated 10 August 2017 at [50].



appreciate or acknowledge that the proposed CDZ2 is not a licence to develop residential or other sensitive uses in the absence of an independent EPA accredited auditor having issued a SoEA “authorising” such use.

133. The Panel will recall that when this rationale was put to Mr McGurn, he disagreed with its premise.

### **Timing for the approval of the Overall Development Plan**

#### Council’s position

134. Council’s post exhibition version of the CDZ2 contemplates that the Overall Development Plan (ODP) can be lodged for approval with the Responsible Authority concurrently with a planning permit application.<sup>56</sup>

#### VPA’s position

135. In the most recent submission made by the VPA, it said this:

*It makes sense to exhibit to the community both the draft Outline (sic) Development Plan and first planning permit application concurrently because this will provide greater clarity and context for surrounding property owners and occupiers.*

*Therefore the VPA submission suggesting that ‘the ODP must be approved prior to lodging an application for planning permit’ should be disregarded. Instead, it is suggested that Council should have considered the content of the ODP and resolved any initial issues in relation to the plan prior to giving notice of the ODP and permit application. This will enable the ODP and permit application to be advertised to the community concurrently.<sup>57</sup>*

136. Accordingly, the proponent, the Planning Authority and the VPA are in agreement that the ODP can be submitted concurrently with the first planning permit application for the site. It is, of course, understood that the submitted ODP must be approved to the satisfaction of the Responsible Authority before a decision is made with respect to the planning permit application.

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<sup>56</sup> Refer to clause 2.0 of the CDZ2 which appears at Tab 1 of the Council’s folder of documents (Document 2).

<sup>57</sup> Letter from the VPA to Council dated 21 April 2017.



**Conclusion in relation to timing for the submission and/or approval of the ODP, SESP and ESAs**

137. The essential requirement is that any planning permit which issues ought be generally consistent with an approved ODP and an auditor endorsed SESP and relevant ESA(s).
138. Additionally, it must reflect the requirements of the EAO.
139. For the reasons that have been identified by the evidence of Messrs Mival and Sinclair and the submissions made on behalf of Sterling Global, the Panel ought be comfortable that the draft CDZ2 which has been circulated on behalf of the proponent will achieve this outcome.<sup>58</sup>

**The proposed DCPO is unnecessary and inappropriate**

The DCPO is not part of the Amendment

140. The Amendment does not contemplate the application of a Development Contributions Plan Overlay (DCPO) to the Land. Accordingly, the Amendment fails to advance any strategic or statutory basis for the application of a DCPO.

The VPA did not advocate for a DCPO

141. Further, the VPA does not propose the application of the DCPO to the Land.
142. The VPA submission with respect to development contributions recommends (on the basis that this may enhance the function of the draft provisions and achieve a coordinated approach):

*Inclusion of an item about the resolution of development contributions to ensure that adequate infrastructure is established to meet the needs of future occupants and manage impacts to surrounds. The VPA submits that inclusion of a provision to triggering developer contributions for transport, open space and community infrastructure is warranted. This may be achieved through a Section 173 Agreement as part of the Overall Development Plan approval.*

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<sup>58</sup> Document 18.

143. The VPA submission also includes a suggestion that the ODP address a number of issues, including:

*Engineering infrastructure:*

- Existing infrastructure and utilities on the subject site;
- Drainage and land remediation plans; and
- Detail regarding an infrastructure contributions plan that considers, transport, public realm, recreation and community infrastructure needs of the site.

144. The exhibited CDZ Schedule included a requirement for the ODP to address “engineering infrastructure”. The revised CDZ schedule circulated by the Council post-exhibition picks up the above detailed suggestions in the VPA submission in relation to engineering infrastructure.

145. The draft CDZ2 circulated on behalf of the proponent<sup>59</sup> largely adopts the wording of the exhibited CDZ Schedule with some minor drafting changes.

C125 is not supportive of the application of a DCPO

146. The Panel ought be wary of the assertion made by Council that the imposition of a DCPO is “...consistent with the approach that was taken in Amendment C125...”.<sup>60</sup>

147. The Panel which considered Monash PSA C125 recommended deletion of the proposed DCPO1 on the basis that:

147.1. the exhibited DCPO was not justified beyond broad assertions that the more intensive development would create additional demands on existing infrastructure and open space; and

147.2. systematic analysis should underpin proposed contribution requirements for the Monash NEC... and other parts of the

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<sup>59</sup> Document 18.

<sup>60</sup> Council Report dated 30 May 2017 at page 8.

municipality where significantly more intensive, residential institutional and employment development is proposed.<sup>61</sup>

148. In making those recommendations, the Panel stated that:

*The Panel considers there is no justification to apply the DCPO1 before the DCP has been prepared. The basis for development contributions has been set out in policy, guidelines and case law and the new system for infrastructure contributions maintains these core principles and the need to justify contributions to infrastructure provision, albeit within a streamlined system.*

*As the Standard Development Contributions Advisory Committee noted the DCPO performs two important functions within planning schemes:*

- *the overlay maps the area where the DCP applies and provides notice to landowners/developers whose properties are affected by a DCP incorporated into a planning scheme.*
- *distils the key information from the DCP i.e. the charges, rates and liabilities for easy reference and application<sup>162</sup>.*

*The principles<sup>163</sup> for valid requirements for development contributions of need, nexus, equity and accountability remain central to the justification for and implementation of development contributions.*

*The Panel was referred to a number of examples where the DCPO has been or is proposed to be applied in advance of the preparation of a DCP. With the exception of Fisherman's Bend, the Panel understands that these examples relate to growth areas where the nature of likely infrastructure requirements draws on extensive experience gained through review of Precinct Structure Plans and the associated DCPs, precinct structure planning was well advanced and the infrastructure required had been identified.*

*The Standard Development Contributions Advisory Committee summarised the principles from the legislation and Victorian case law in relation to the use of permit conditions to require the provision of infrastructure.*

*The Panel does not doubt that intensification may well generate needs for additional infrastructure, facilities and public open space. However, in the absence of a DCP and an open space strategy, it would be challenging to justify contributions on a case by case basis when the need for the infrastructure results from the cumulative intensification resulting from discrete applications over an extended timeframe.*

*Council was unable to give any indication to the Panel of the level of or basis for contributions that would be negotiated with permit applicants under the proposed DCPO. This lack of transparency and uncertainty for applicants, particularly smaller scale applicants, is not acceptable.*

162. Page 21 *Standard Development Contributions Advisory Committee Report 1* December 2012.

163. *Eddie Barron principles as cited in Dennis Family Corporation v Casey CC [2006] VCAT 2372.*

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<sup>61</sup> Monash Planning Scheme Amendment C125 Panel Report dated 6 December 2016 at page 139.

149. In the oral submissions made on behalf of Council, there appeared to be an acknowledgment that the imposition of a DCPO is not necessary.

150. This change in position accords with the evidence given by Mr McGurn which highlighted that a DCPO is both unnecessary and unwanted in the circumstances of the Amendment because:

- There is no strategic or statutory basis for a DCPO.
- This is not a typical residential infill site. There are considerable development costs involved in the remediation and rehabilitation of the site which will result in a net community benefit in the cleanup of the site and opening up the site to the surrounding community.
- The site is in one ownership and therefore there is no need to establish infrastructure requirements upfront to allow for the distribution of the cost of these between various land owners.
- The redevelopment of the site will include roads, publicly open spaces and links and community infrastructure which will all be provided to the satisfaction of the Responsible Authority.<sup>62</sup>

151. The Panel's attention is also drawn to the Summary Table prepared on behalf of Sterling Global.<sup>63</sup>

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<sup>62</sup> Refer to McGurn EWR at [79] at page 12.

<sup>63</sup> Refer to Tab 5A of the folder of Panel documents submitted by Sterling Global.



## **Response to the neighbours' submissions**

152. Exhibition of the Amendment resulted in Council receiving submissions from the following individuals:

152.1. Angelo Valente who is the registered proprietor of 23 Scotsburn Avenue, Oakleigh South;

152.2. Anthony Sammut of 2 Talbot Avenue, Oakleigh South;

152.3. Colin Owen of 10 Valley Street, Oakleigh South; and

152.4. Michael Bunter who lives at 1/426 Huntingdale Road, Oakleigh South.

Angelo Valente

153. Mr Valente objects to the proposed rezoning of the Land to CDZ on a number of different bases.
154. The proponent draws the Panel's attention to the evidence which concludes there is strong strategic support for the Amendment including the proposed rezoning of the Land.
155. In relation to the proposition that Council ought purchase the Land, it is noted this is not a matter before the Panel and does not form part of the Amendment.
156. Clearly, Council does not intend to purchase the Land. Rather, it is seeking approval for the Amendment in order to facilitate rehabilitation and redevelopment of the Land.
157. Notwithstanding this, it is noted that the Land is "bookended" by two large areas of public open space and that the masterplanning for the Land contemplates further areas of open space will be created.
158. Insofar as Mr Valente raises concerns regarding the timing for remediation works, the Panel is directed to the Sinclair EWR.<sup>64</sup>
159. Both Messrs Sinclair and Pedler consider Mr Valente's concerns regarding stability of the Land to be well founded. Both experts, however, express the opinion that these issues have been appropriately addressed by the proposed remedial works that will be undertaken. Additionally, Mr Sinclair makes the important point that:

*The design of the remediation takes into account the geotechnical conditions at the site and when implemented, landslip and stability issues will be addressed. It is more likely that land stability issues will continue if the site remains undeveloped or only slowly developed under public ownership.*

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<sup>64</sup>

At s 7.3 pages 40 to 42.

160. The submission that was made by Mr and Mrs Valente to the Panel on 11 August 2017 raised a myriad of matters additional to the issues the subject of the submission made by the Valentés to Council in response to the exhibited Amendment.<sup>65</sup> Many of those issues arose from the expert witness statements of Messrs Sinclair and Pedler which were circulated prior to the commencement of the Panel hearing.
161. Although the Valentés took their opportunity to put questions in cross examination of Messrs Sinclair and Pedler, those questions did not address all (or many) of the matters that the Valentés subsequently went on to assert in their written submission to the Panel. As a consequence, neither of Messrs Sinclair and Pedler was afforded the opportunity to respond to various (unsubstantiated) assertions contained in the Valente written submission.
162. As the Panel will be aware, the failure of the Valentés to afford Messrs Sinclair and Pedler with the opportunity to agree or disagree with those assertions impacts on the weight that the Panel ought accord to those (unsubstantiated) assertions.
163. It is the proponent's submission that the Panel ought disregard the Valente submissions to the extent that they:
- 163.1. are statements of opinion;
  - 163.2. are unsubstantiated by an appropriately qualified witness;<sup>66</sup> and
  - 163.3. were not tested against the expertise of either of Messrs Sinclair or Pedler.
164. In any event and in order to assist the Panel, the proponent has arranged for Messrs Sinclair and Pedler to review the submission made by Mr and Mrs

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<sup>65</sup> Refer to the letter to Council from A&S Valente & Associates Pty Ltd dated 3 March 2017.

<sup>66</sup> Whilst Mr Valente states he is a registered building practitioner, his qualifications do not extend to contaminated land or geotechnical engineering.

Valente and to comment on those aspects of the submission that fall within their respective experience and areas of expertise. In this regard, the Panel is directed to the folder of Panel documents submitted by Sterling Global at Tab 9.

165. The Valentés have raised a myriad of issues some of which are technical and others of which appear to be borne out of frustration with the Planning Authority's aspirations for the Land. In the proponent's submission, none of the matters raised by the Valentés provide a basis for the Panel recommending that the Amendment be abandoned as the Valentés desire.

Anthony Sammut

166. Mr Sammut's submission advises that he does not object to the Amendment provided that:

166.1. approval is not given for any high density apartment blocks; and

166.2. Talbot Avenue is not extended through the Land.

167. As the Amendment will not result in approvals for any development including high density dwellings or the extension of Talbot Avenue through the Land, these are not matters that the Panel need be concerned with. If the Amendment is approved and gazetted, there will be subsequent opportunities for the community to make submissions in relation to the manner in which it is proposed the Land be developed including in relation to the Overall Development Plan.

Colin Owen

168. Mr Owen raises the exact same concerns as does Mr Sammut.

Michael Bunter

169. Mr Bunter raises concerns in relation to:



- 169.1. the proposed area shown on the Comprehensive Development Plan for mixed use;
  - 169.2. the scale of development; and
  - 169.3. traffic.
170. The matters raised by Mr Bunter can be the subject of consideration by Council at the appropriate time if the Amendment proceeds. They are not matters which arise for consideration by the Panel.

## Miscellaneous – background matters

171. Throughout the course of the hearing a number of issues have arisen concerning, what the proponent would term, matters of background.
172. One such issue arose in relation to the ecological assessments that have been undertaken in relation to the site.
173. In this regard, it is noted that the Panel has been provided with a copy of the Ecological Assessment conducted by Ecology and Heritage Partners dated 2 October 2014.<sup>67</sup> That Flora and Fauna Assessment together with an arboricultural report undertaken by Treeologic<sup>68</sup> were submitted to Council with the section 96A application which was subsequently withdrawn.
174. The Ecology and Heritage Partners Flora and Fauna Assessment recommended that additional night surveys for the growling grass frog be conducted.
175. In accordance with that recommendation a two day targeted survey was undertaken by Ecology and Heritage Partners in December 2014 during which there were no growling grass frog adults, metamorphs or tadpoles observed. The targeted survey was subsequently recorded in a Ecology and Heritage Partners report titled “*Targeted Growling Grass Frog Litoria raniformis surveys at 1221-1249 Centre Road, Oakleigh South Victoria*” dated 24 December 2014”.
176. It is noted that in his capacity as auditor, Mr Mival also raised a question regarding management of any populations of protected species that may be present in the pond at the base of the former quarry. Mr Mival was provided with the material produced by Ecology and Heritage Partners.

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<sup>67</sup> Report 13 – PreHearing Document List.

<sup>68</sup> Preliminary Arboricultural Assessment 1221 – 1249 Centre Road Oakleigh South, March 21 2014.

177. Additionally, a question was raised during the course of the first day of the Panel hearing concerning potential flooding on site. This issue emerged from the VPA's recommendation that the ODP address potential flooding issues.
178. Although the Land is not the subject of a LSIO, Sterling Global has engaged Dalton Consulting Engineers Pty Ltd (**Dalton**) to prepare a Stormwater Strategy. That strategy was submitted to Council with the section 96A application.
179. It is noted that the open space delineated in green on the Comprehensive Development Plan the subject of the Amendment coincides with the retention basins and wetlands which were recommended by Dalton as part of the strategy.

#### **The format of the exhibited documents**

180. The proponent commends the updated version of the CDZ2 which was tabled on behalf of Sterling Global at the hearing to the Panel.<sup>69</sup>
181. The changes that have been proposed are sensible and worthy of support.
182. For the reasons which have already been outlined, there is no identifiable planning merit in the Council's post exhibition changes which, amongst other things, requires approval by Council of the SESP and ESA prior to the making of a planning permit application.
183. Nor has there been identified a meritorious planning reason as to why the position preferred by the EPA ought be adopted.
184. Instead, there are a number of practical reasons why approval of the ODP, and consideration of an auditor endorsed SESP and relevant ESA ought occur concurrently whilst Council is considering a planning permit application.

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<sup>69</sup> Document 18.

185. The Panel has before it the revised Comprehensive Development Plan tabled by Mr McGurn.<sup>70</sup>
186. Additionally, there were a number of changes to the CDZ2 which were the subject of questions put to Mr McGurn during cross examination and by the Panel.
187. Sterling Global does not challenge their adoption should the Panel consider they have merit.

### **Conclusion**

188. For the foregoing reasons, Sterling Global respectfully requests that the Panel recommend that Council adopt the Amendment subject to the revisions to the draft CDZ2 and CDP which have been addressed.

**Joanne Lardner**  
**Barrister**

Instructed by Rory O'Connor & Sonia Turnbull  
Norton Rose Fulbright Australia  
12 October 2017

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<sup>70</sup> Document 14.