

**Referral 39: VCAT Call-in P1597/2023 and P1598/2023
47 South Road, Brighton**

Priority Projects Standing Advisory Committee Report

Planning and Environment Act 1987

11 July 2024

Planning Panels Victoria acknowledges the Wurundjeri Woi Wurrung People as the traditional custodians of the land on which our office is located. We pay our respects to their Elders past and present.

Planning and Environment Act 1987

Priority Projects Standing Advisory Committee Report pursuant to section 25 of the PE Act

Referral 39: VCAT Call-in P1597/2023 and P1598/2023

47 South Road, Brighton

11 July 2024



Kathy Mitchell AM, Chair



Sarah Raso, Deputy Chair



Simon Shiel, Member

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Glossary and abbreviations

Amended Plans	The amended package of architectural material filed on 12 and 18 September 2023
Applicant	Golden Age LB Pty Ltd
<i>Boster</i>	<i>Boster Developments Pty Ltd v Cardinia SC [2013] VCAT 657</i>
<i>Capital Benefits</i>	<i>Capital Benefits (Mont Albert) Pty Ltd v Whitehorse CC [2008] VCAT 2436</i>
<i>Clare</i>	<i>Clare v Maroondah CC [2008] VCAT 606</i>
Committee	Priority Projects Standing Advisory Committee
Council	Yarra City Council
CPTED	Crime Prevention through Environmental Design
D	Document
development application	P1598: planning permit application (P2023/335/1)
DFP	Development Facilitation Program
<i>Inland</i>	<i>Inland Consultants Pty Ltd v Mildura RC [2005] VCAT 994</i>
PE Act	<i>Planning and Environment Act 1987</i>
Permit	draft planning permit
POS	public open space
POSC	public open space contribution
PPTN	principal public transport network
Subdivision Act	<i>Subdivision Act 1988</i>
subdivision application	P1597: planning permit application (P2023/425/1)
subject land	47 South Road, Brighton
<i>Trethowan</i>	<i>Trethowan v Mornington Peninsula SC [2002] VCAT 1377</i>
VCAT Act	<i>Victorian Civil and Administrative Act 1998</i>
VPP	Victoria Planning Provisions

Overview

Referral summary	
Referral land	47 South Road, Brighton
VCAT call-in	Referral 39: VCAT Call-in P1597/2023 and P1598/2023
Subject land	Former Xavier College land at 47 South Road, Brighton
Brief description	<p>P1597/2023: planning permit application (P2023/425/1) to subdivide the land into 14 lots, removal of easements and creation of drainage easement</p> <p>P1598/2023: planning permit application (P2023/335/1) to construct 84 two-storey townhouses with associated buildings and works</p>
Applicant	Golden Age LB Pty Ltd, trading as the Trustee for GA South Road Development Unit Trust
Planning Authority	Bayside City Council (Council officers supported the applications and recommended issue of Notice of Decision to Grant a Permit; Council resolved to refuse the applications at its meeting on 11 December 2023)
No. of objections	<p>P1597/2023: 54</p> <p>P1598/2023: 105 (and one letter of support)</p>

Committee process	
The Committee	Kathy Mitchell AM (Chair), Sarah Raso (Deputy Chair) and Simon Shiel
Supported by	Gabrielle Trowse, Project Officer of Planning Panels Victoria
Directions Hearing	In person at Planning Panels Victoria and online on 9 May 2024
Committee Hearing	At Planning Panels Victoria and online on 4, 5, 6, 11, 12 and 13 June 2024
Site inspections	Accompanied on 21 May 2024
Parties to the Hearing	<p>Golden Age LB Pty Ltd, represented by Barnaby Chessell SC and Sean McArdle of Counsel, instructed by Minter Ellison Lawyers, who called the following expert evidence:</p> <ul style="list-style-type: none"> - Amanda Ring of UPco in town planning - Jason Walsh of Traffix Group in traffic <p>Bayside City Council, represented by David Vorchheimer and Nick Sissons of HWL Ebsworth Lawyers, who called the following expert evidence:</p> <ul style="list-style-type: none"> - Alistair Campbell of Hansen in urban design - John-Paul Maina of Impact Traffic in traffic <p>Local Objector Group, represented by Matthew Butler of Clement-Stone Town Planners, who called the following expert evidence:</p> <ul style="list-style-type: none"> - Mike Wilson of Amber Organisation in traffic <p>Jonathan Altson</p>
Citation	Priority Projects Standing Advisory Committee Referral 39 [2024] PPV
Date of this report	11 July 2024

Executive summary

Overview of proposal

Providing housing opportunities in accessible locations is critical to achieving State and local planning policy aspirations.

The former Xavier College site at 47 South Road, Brighton in the City of Bayside has been vacant for several years and is now in private ownership. Golden Age LB Pty Ltd as Trustee seeks the grant of two planning permit applications to subdivide the site and to develop part of it to construct 84 double storey townhouse dwellings in 14 separate buildings.

Specifically, Permit Application 2023/425/1 (VCAT 1597/2023) relates to the subdivision application and Permit Application 2023/335/1 (VCAT 1598/2023) relates to the residential use and development application.

The matter was reviewed in detail by Bayside Council Officers who recommended Council issue a Notice of Decision to Grant a Permit. Council did not support that and resolved to issue a Notice of Decision to Refuse to Grant a Permit under the provisions of the Bayside Planning Scheme.

The Applicant sought to review both planning permit applications at the Victorian Civil and Administrative Tribunal, with Hearing dates set down in June 2024. The Minister for Planning determined to call in both applications and referred these to the Priority Projects Standing Advisory Committee (the Committee) for its advice, in accordance with its Terms of Reference.

The Minister for Planning requested the Committee provide advice on whether the applications resulted in acceptable outcomes.

The key issues before the Committee that required determination related to:

- compliance with State and local policy
- compliance with ResCode, particularly Standards B28 and B29 of clause 55 relating to private open space and solar access
- whether Hartley Street has sufficient capacity to cope with increased traffic
- how the mandatory public open space contribution provision should be provided.

Reasons for findings

The Committee finds the applications accord with the housing provisions of the State Planning Framework and the local planning policy provisions, including with the intent of the Neighbourhood Residential Zone in which it is situated.

It would add further diversity of housing stock to an area that is predominantly residential and well-supported by road and public transport accessibility, proximity to parks and community facilities as well as retail opportunities.

The site will be sensitively developed and provide an injection of housing into an area that would benefit from opportunities for existing and new residents to potentially downsize.

While there will be increased traffic movements along Hartley Street, it would be within the capacity of the overall function of Hartley Street.

The proposal demonstrates a high level of compliance with the relevant controls. Beyond compliance, the design is well-considered and the integration of generous landscaping, very limited cars on ground level, a rejuvenated heritage building and communal facilities will provide residents with excellent amenity. The density of the proposal balances the strategic need for more housing and the sensitivities of the immediate context.

The form of public open space contribution and a requirement for a public mid-block pathway were extensively discussed and examined. On both issues, the Committee found the proposal was well justified and aligned with the planning scheme, while modifications to create a pocket park and public access provided little benefit and were likely to create new challenges.

Overall, the Committee considers the proposal can be supported and will result in an acceptable outcome for the subject land. It will likely provide opportunities for downsizers or new entry level opportunities. The proposal has planning merit and would result in a net community benefit for the Bayside and wider community.

Recommendations to Minister for Planning

- 1. Issue Bayside Planning Permit 2023/425/1 (VCAT reference P1597/2023) subject to the permit conditions in Appendix E.**
- 2. Issue Bayside Planning Permit 2023/335/1 (VCAT reference P1598/2023) subject to the permit conditions in Appendix F.**
- 3. The public open space contribution to be made by the Applicant to Council be five per cent cash of the total value of the land, (with that value including the 1.2 metre strip on the northern side of Hartley Street) in accordance with Condition 1a of Appendix F.**

1 Introduction

1.1 Terms of Reference and letter of referral

The Priority Projects Standing Advisory Committee (the Committee) was appointed by the Minister for Planning (Minister) on 14 June 2020. The purpose of the Committee is set out in its (amended) Terms of Reference dated 9 September 2023:

... provide timely advice to the Minister for Planning on projects referred by the Development Facilitation Program (DFP), or where the Minister has agreed to, or is considering, intervention to determine if these projects will deliver acceptable planning outcomes ¹.

The Minister's letter of referral was dated 16 April 2024 and this is Priority Projects Standing Advisory Committee Referral No. 39 ². Specifically, the Minister noted:

- the project was referred by the Development Facilitation Branch
- the proceedings raised a major issue of policy and the determination of the proceedings may have a substantial effect on the achievement or development of planning objectives.

The Committee is to provide advice to the Minister on whether the proposal provides for an acceptable outcome, advice and recommendations on whether the planning permits should issue, and if so, the appropriate permit conditions that should be imposed.

The Referral was listed to be heard at the Victorian Civil and Administrative Tribunal (VCAT) in the weeks of 3 and 17 June 2024, dates which the Committee sought to retain. In summary:

- VCAT Proceeding P1597/2023: planning permit application P2023/425/1 proposes to subdivide the land into 14 lots, remove easements and create a drainage easement (subdivision application).
- VCAT Proceeding P1598/2023: planning permit application P2023/335/1 seeks to construct 84 two-storey townhouses with associated buildings and works (development application).

The members of the Committee that considered Referral No. 39 are:

- Ms Kathy Mitchell AM, Chair
- Ms Sarah Raso, Deputy Chair
- Mr Simon Shiel, Member.

The Committee was assisted by Ms Gabrielle Trowse, Project Officer from the Office of Planning Panels Victoria.

1.2 Process

(i) Directions Hearing

Upon receipt of the letter of referral from the Minister and the subsequent VCAT file, the Committee wrote to all parties to the VCAT proceedings on 30 April 2024 advising of the referral and inviting them to attend a Directions Hearing at Planning Panels Victoria on 9 May 2024 ³.

¹ D1

² D2

³ D4

In its letter to parties, the Committee directed that all parties seeking to be heard provide a summary of the key issues they intended to rely upon at the Hearing prior to the Directions Hearing. All parties seeking to be heard complied with that Direction. After reviewing the key issues, the Committee summarised the key issues at the Directions Hearing being (but not exclusively):

- compliance with:
 - planning policy
 - ResCode
- adequacy and form of public open space
- traffic and access, including:
 - impacts on surrounding streets due to vehicle access arrangements
 - impacts on the traffic capacity of Hartley Street from the proposed development.

Further, the Committee identified six other issues to be discussed and resolved at the Directions Hearing, these being:

- hearing dates and order of presentations at the Hearing
- the identified key issues
- focus of traffic evidence
- convening a traffic conclave
- public open space issues
- documents and plans to be relied upon at the Hearing.

The Committee provided the opportunity for all parties at the Directions Hearing to consider and discuss those issues to narrow the matters in dispute.

Consensus and agreement was reached on all but the order of presentations at the Hearing and the way in which to deal with the public open space.

(ii) Site inspections

At the Directions Hearing, the Committee advised parties it would conduct an accompanied site inspection of the subject land and surrounds on 21 May 2024. The Committee directed the Proponent to organise and manage all logistical details for the site inspection ⁴.

The Committee inspected relevant and accessible areas of the subject land and its surrounds. Those in attendance included the Committee (except for Member Raso) and its Project Officer, and representatives of and some witnesses for the Applicant, Council, Department of Transport and Planning (DTP) and local objectors.

The inspection commenced with a briefing from the Committee Chair about the role and purpose of the inspections followed by an explanation by the Applicant of what it was seeking to do across the subject land. Mr Gray of Minter Ellison Lawyers for the Applicant led the inspection and escorted the Committee and representatives to relevant parts of the subject land and its immediate surrounds.

The details of the accompanied site inspection were uploaded as Document 19.

The Committee thanks all parties and objectors for their contribution to this process.

⁴ D52

1.3 Procedural issues

(i) Grounds of refusal and weight to be afforded to Council Officer reports

The Council Officers provided detailed analysis of both applications in their two officer reports of 11 December 2023. Council Officers recommended Council issue a Notice of Decision to Grant a Permit for both applications.

These reports were then considered by Council which determined to refuse both applications on the same grounds, being:

1. The proposal fails to successfully implement the Municipal Planning Strategy and the Planning Policy Framework which seeks to encourage an increase in housing diversity and appropriate subdivision design, balanced with considerations regarding neighbourhood character, heritage, and transport.
2. The proposal fails to comply with the Objectives and Standards of Clause 56 of the Bayside Planning Scheme, in particular:
 - a) Standard C6 Neighbourhood Character: The proposed subdivision fails to respect the existing neighbourhood or achieve a preferred neighbourhood character for this precinct.
 - b) Standard C7 Lot Diversity and Distribution: The proposal fails to incorporate a suitable range of lot sizes and housing mix.
 - c) The application fails to provide land as public open space in accordance with Clause 53.01⁵.

The Applicant drew the Committee's attention to the detail of the Officers reports, both of which were supported by internal and external referrals, from which there were no objections raised. The level of Council Officer and referral support, the Applicant noted through Ms Ring's evidence, was 'unusual'. Noting that Council was not bound by the Officers reports, the Applicant contended the Committee was entitled to analyse the detail of the reports and the extent of the internal Council referral comments and considered analysis.

In noting Council had overturned the recommendations of the Council Officers, Council commented on 'the weight to be afforded to Officers' reports' at the Hearing. In citing *Buckerfield PL v City Port Phillip [1998] VCAT652*, Council submitted:

On this basis, although the officers' reports are a relevant matter, the Committee should be aware that the contents and recommendations made at officer level are not in any way determinative of whether a permit should be granted in the Planning Applications⁶.

The Applicant generally agreed with Council on its submissions about the weight to be afforded to the Officer reports. However it submitted the reports were informed by various internal and external referrals and that ultimately, the Council adopted grounds for refusal were in direct conflict with the analysis undertaken by its Officers.

The Committee agrees the Council Officers' reports are not solely determinative, but it considers both reports provide an excellent analysis of the issues under consideration in a professional, fair and objective manner. For these reasons, the Committee does place weight on these reports, as it does on the submissions of various parties and the evidence called in support of advocate positions at the Hearing.

⁵ D3.016

⁶ D32, para 3.3

(ii) Agreed issues

As mentioned in Chapter 1.2(ii), to streamline the Hearing to focus on key issues in dispute, the Committee asked all parties seeking to be heard to highlight the key issues each intended to rely upon at the Hearing. During the Hearing, Council and the Objector Group introduced other issues, including how emergency vehicles would be accommodated (particularly fire services) and that the subject land should be publicly accessible for those not residing there.

The Applicant expressed its dissatisfaction with this, in that new issues were introduced that had not been previously canvassed, resulting in it needing to source additional advice, particularly with regard to fire services. While the Committee allowed the issues to be explored, the Committee expresses its frustration at the way in which these matters were raised so late in the process.

(iii) Public open space contribution

Council made a written submission prior to the Directions Hearing where it advised there was likely to be a question of law regarding whether the mode of the public open space contribution was a decision to be made by Council alone. Council suggested “...*The Committee should be reconstituted with a legally qualified specialist or otherwise have a senior planning barrister appointed to assist the Committee*”⁷. The Committee invited Council to speak to this at the Directions Hearing.

The Committee understands the key premise of Council’s argument was that only Council (not the Applicant nor the Minister for Planning or Governor in Council) could determine whether the public open space contribution be land or cash, and if land, where that land should be located.

The Applicant did not support those submissions. Notwithstanding this, the Committee advised it could make one of its legal members available to assist and consider the issue if required. However, in the first instance, the Committee directed the Applicant and Council meet to consider the issue more fully and to then advise the Committee of any agreed outcome.

If the issue could not be resolved, the Committee noted it would provide additional time for submissions about this matter on the timetable. The matter was not resolved. On 24 May 2024, the Committee received a short summary report from the Applicant that advised both Council and the Applicant sought the Committee to include a legal member to hear submissions about public open space⁸.

As a Deputy Chair of the Priority Projects Standing Advisory Committee, Ms Raso was joined the Committee as a legal member. An additional day was added to the timetable on Wednesday 12 June 2024 to hear those submissions. While Ms Raso only attended on one day, she took an active interest in the whole matter as a member of the Committee.

(iv) Circulation of Amended Plans

On 7 May 2024, the Applicant circulated updated information that included:

- Document 9 – letter enclosing Day 1 version of project documentation
- Document 10 – statement of changes
- Document 11 – Amended Plans

⁷ D7

⁸ D22

- Document 12 – updated Design Response
- Document 13 – alternative Master Plan (on a without prejudice basis)
- Document 14 – updated Traffic Impact Assessment.

The Committee and all parties used these updated plans and documents as the basis for consideration at the Hearing.

1.4 The Committee's approach

The Committee has complied with and reported on all relevant matters in accordance with its Terms of Reference, in particular clauses 11, 15, 18, 20 and 21.

The letter of referral includes a broad and encompassing purpose to advise the Minister on the whether the proposal is an acceptable outcome and, if so, whether permits should issue and the conditions that should be attached.

The Committee considered all relevant written submissions and material in relation to the permits including:

- original application reports and plans
- Council Officers reports that recommended Council issue a notice of decision to grant the permits of 11 December 2023
- Council resolution to refuse the grant the permits on 11 December 2023
- updated Day 1 material including the Amended Plans
- public open space contribution 'without prejudice' plan
- expert evidence from the parties
- submissions made to the Hearing.

Clause 20 of the Terms of Reference of the Committee require it to provide a 'concise written report' to the Minister for Planning. This report is concise in that it focuses on the key determinative issues only and does not seek to deal with every matter raised through the original objections, the submissions of parties at the Hearing and the evidence provided in support. All submissions and materials have been considered by the Committee in reaching its conclusions, regardless of whether they are mentioned in the report.

This report deals with the key determinative issues under the following headings:

- the proposal
- strategic planning context
- built form and urban design
- landscape and wayfinding
- traffic and access
- public open space contribution
- permits and conditions.

The key recommendations of the Committee are included through its recommended conditions for the Permits at Appendices E (subdivision application) and F (development application).

2 The proposal

2.1 Subject land

The subject land is located at 47 South Road, Brighton as detailed in Plan Number PC372351F Volume 11291 Folio 291, being an area of 3.292 hectares containing three easements each for both drainage and sewer.

The subdivision permit seeks permission to subdivide the land into 14 allotments, comprising a 2.617-hectare allotment to be developed with 84 townhouses (Allotment A) and 13 allotments between 500 to 656 square metres in size. Specifically, it proposed:

- 13 housing sites between 500 and 656 square metres and a single large allotment of 2.617 hectares resulting in a 14-lot subdivision
- Allotments 1 to 4 will have 15.2 metre frontages to South Road
- Allotment 5, being a corner allotment, will have a frontage of 20.1 metres to South Road and a boundary of 32.5 metres with Hartley Street
- Allotments 6 to 9 will front Hartley Street with frontages of 15.25 metres
- Allotments 10 to 13 likewise will front Hartley Street with frontages of 23.92 metres
- the residual area which is irregularly shaped and is referred to as Allotment A, being 2.617 hectares in area with two partial frontages to Hartley Street and New Street.

The development permit sought permission:

- to subdivide the land at 47 South Road Brighton into 14 allotments, comprising a 2.617-hectare Allotment A (to be developed with 84 townhouses) and 13 allotments between 500 to 656 square metres in size
- to develop Allotment A with 84 double storey townhouses
- removal of easements E1 to 3 and creation of a single drainage easement in order to clear the proposed Allotment A rather than bisect it.

The subject land is irregular in shape with frontages to New Street, Hartley Street and South Road.

The subject land is located wholly within the Neighbourhood Residential Zone Schedule 3 which is designated as a minimal growth area. The immediate locality includes existing detached, semi-detached and townhouse development that does not exceed two storeys.

The subject land is affected by:

- Clause 43.01-1 Heritage Overlay (HO342), which only affects a portion of the site and relates to the building referred to as 'Maritima House', a modified Victorian era dwelling, where there will be partial demolition of buildings and works within the Heritage Overlay
- Clause 43.02-2 Design and Development Overlay Schedule 1 (as it applies to buildings and works with a storey height exceeding 3.5 metres and buildings and works associated with roof decks)
- Development Contributions Plan Overlay Schedule 1, which applies to the site in respect of contributions for drainage infrastructure
- Clause 52.29-3 (Land adjacent to the Principal Road Network) to create and alter access to a Transport 2 Zone.

Figure 1 Subject land ⁹

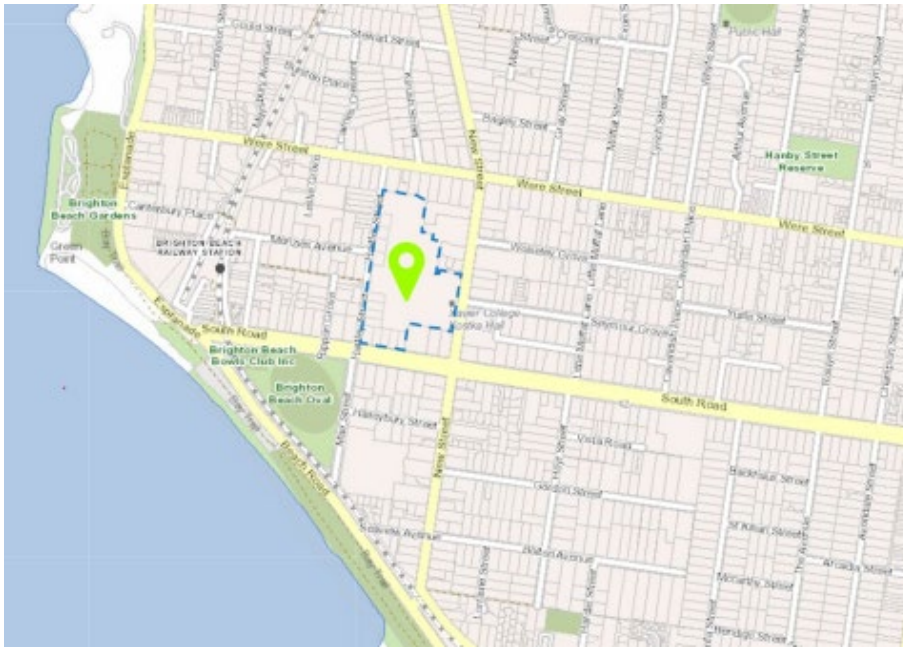


Figure 2 Zone plan ¹⁰



⁹ D17

¹⁰ D17

2.2 Surrounding area

The subject land, which was formerly used as a school, is located within an area that is predominantly residential in nature, with one- and two-storey dwellings. The former school included one- and two-storey buildings, a car parking area, open space and sports fields. The Committee understands Xavier College used the land for a school from the late 1930s until the early 2020s. It is now proposed to be developed for residential dwellings.

The land surrounding the subject site includes:

(i) South

South Road forms the southern boundary of the subject land. South Road is an arterial road with two vehicle lanes in either direction divided by a vegetated median strip and parallel parking on either side with a bicycle lane and turning lanes at intersections. No. 49 South Road is currently vacant but has approval for construction of eight two-storey townhouses with roof decks over basement parking. On the southern side of South Road are one- and two-storey detached dwellings with landscaped curtilages and driveways. The Brighton Beach Oval and allied football club are adjacent to the southwest of the site.

(ii) East

The subject land abuts several residential allotments along New Street of varying types, including three two-storey semi-detached townhouses. One is developed with a two-storey detached dwelling, and another is a three-storey apartment building with a central courtyard that includes a single two-storey detached dwelling to the rear of the allotment. Another is a single detached dwelling including a two-storey pool house on an 'L' shaped allotment.

New Street is a connector street and is typified by residential development with the St Leonards Uniting Church and St Leonards Tennis Centre being proximate.

(iii) North

To the north and north-east of the site are six single and double storey detached dwellings fronting Were Street. The dwellings collectively are a mix of contemporary and older architectural styles with established vegetation, including landscaped areas in a contemporary style with varied side and rear setbacks.

(iv) West

Built form along the western side of Hartley Street is of mixed character with single dwellings on larger and some smaller allotments. Some allotments are approximately 10 metres in width and present as double fronted Italianate villas. Opposite the site, the land is developed as three attached townhouses above basement car parking. Further west, the typical built form consists of two-storey dwellings with landscaped private open space at the front and rear.

3 Strategic planning context

3.1 Background

The Committee had regard to:

- Council Officers' reports of 11 December 2023
- planning evidence of Ms Ring for the Applicant
- relevant submissions.

The key issues to be resolved are:

- whether the applications can be supported by State and local planning policy
- how the proposal will deliver on key policy imperatives.

3.2 Planning policy

Both the Officer reports and the evidence of Ms Ring provided detailed planning assessments of state and local planning policy. These were not contested and therefore are not repeated in this report. The key planning and policy provisions are listed in Table 1 and the planning permit triggers are listed in Table 2.

Table 1 Planning context

	Relevant references
Victorian planning objectives	- section 4 of the PE Act
Planning Policy Framework	- Clauses 11.01-1S (Settlement), 11.01-1R (Settlement – Metropolitan Melbourne), 11.01-1S (Supply of Urban Land), 11.01-1S (Activity Centres), 11.03-1R (Activity centres – Metropolitan Melbourne) - Clauses 15.01-1S (Urban Design), 15.01-1R (Urban design – Metropolitan Melbourne), 15.01-2S (Building design), 15.01-4R (Healthy Neighbourhoods – Metropolitan Melbourne), 15.01-5S (Neighbourhood Character), 15.03-1S (Heritage conservation) - Clauses 16.01-1S (Housing Supply), 16.01-1R (Housing Supply – Metropolitan Melbourne), 16.01-2S (Housing affordability) - Clauses 18.01-3S (Transport System), 18.01-3S (Sustainable and Safe Transport), 18.02-1S (Walking), 18.02-2S (Cycling), 18.02-3S (Public Transport), 18.02-3R (Principal Public Transport Network)
Municipal Planning Strategy and Local Planning Policy Framework	- Clause 02 (Municipal Planning Strategy) - Clause 02.01-1 (Bayside Context) - Clause 02.02 (Vision) - Clause 02.03-2 (Environmental and landscape values) - Clause 02.03-3 (Environmental risks and amenity) - Clause 02.03-4 –(Built environment and heritage) - Clause 02.03-5 –(Housing) - Clause 02.03-7 (Transport) - Clause 02.03-8 (Infrastructure) - Clause 02.04-1 (Residential strategic framework plan)

Relevant references	
	<ul style="list-style-type: none"> - Clause 15.01-5L (Bayside preferred neighbourhood character) - Clause 19.02-6L-02 (Public open space contributions) - General policy guidelines – all precincts - Precinct E2 preferred character strategies - Precinct E2 preferred character policy guideline
Planning scheme provisions	- Neighbourhood Residential Zone
Particular provisions	<ul style="list-style-type: none"> - Clause 52.06 (Car parking) - Clause 52.34 (Bicycle facilities) - Clause 53.18 (Stormwater management in urban developments) - Clause 55 (Two or more dwellings on a lot and residential buildings) - Clause 58 (Better Apartment Design Standards)

Table 2 Planning permit triggers – development application

Provisions	Permit trigger
Clause 32.09-7	To construct two or more dwellings on a lot and a front fence that exceeds 1.2 metres in height
Clause 43.01-1	For partial demolition of a building and alterations and additions to a building in a Heritage Overlay
Clause 43.02-2	To construct a building or carry out works
Clause 52.29-2	To create or alter access to South Road and subdivide land

Table 3 Planning permit triggers – subdivision application

Provisions	Permit trigger
Clauses 32.09-3, 43.01-1, 43.02-3, 52.29-2	To subdivide land
Clause 52.02	To create, vary or remove an easement

3.3 Evidence and submissions

(i) The Applicant

In opening, the Applicant submitted:

The proposal enjoys strong strategic support, given that it will deliver housing growth and diversification within this part of Brighton, on a well-located site, in a manner that is entirely consistent with the applicable zone control, responsive to neighbourhood character ...¹¹

The Applicant pointed to the policy support for the development opportunity of the site but acknowledged it didn't mean that 'anything could go' in terms of amenity and neighbourhood character considerations. The Applicant highlighted the Council Officers' reports where it submitted a very detailed policy and ResCode assessment was properly undertaken that resolved the proposal was acceptable.

¹¹ D27, para 10a

The position of the Applicant was supported by the expert evidence of Ms Ring who said the permits were consistent with, supported by, and furthered the relevant state and local planning policy objectives. She concluded the permits for subdivision and development were appropriate for the following reasons:

- consistency with the purposes of the Neighbourhood Residential Zone
- the site provides for a mix of lot sizes
- the development includes appropriate height and setback considerations
- the land has accessibility to a range of transport opportunities and community uses
- the proposal offers diverse dwelling types
- the site will not result in adverse amenity impacts on neighbouring properties.

Ms Ring noted that subject to her recommendations:

... the development is an acceptable planning outcome having regard to the decision guidelines at Clause 65 of the Scheme and that it can be approved in the interests of net community benefit to present and future generations ¹².

(ii) Council

In opening, Council observed:

Bayside is renowned for its 'village' environment, which is characterised by low rise residential suburbs, which have ample outdoor living space with predominantly tree lined streets. In-fill development must respect the built form and natural elements that make up the neighbourhood character of Bayside ¹³.

Council noted it had no disagreement with the location of the site in the Neighbourhood Residential Zone, nor that the site was a candidate for medium density development through policy. Its key concern related to the detail of the application and its lack of appropriate resolution. Noting the site was large with significant street interface and frontages, Council observed it ought be redeveloped, but it was not saying 'anything goes'. Further, Council acknowledged it was a unique site in an urban setting that required a well thought out resolution.

Council provided a detailed list of relevant State and local planning policies but did not specifically highlight those provisions to indicate how the proposal was not compliant with the policies. Rather, it relied on ResCode, noting "... *the Proposals fail to provide the type of residential development and any envisaged by the Scheme given the number and nature on non-compliances with the objectives and standards of Clauses 55 and 56 ...* ¹⁴". Council noted policy was clear in encouraging development that contributed to existing neighbourhood character through open space, connectivity, respectful built form, neighbourhood character and amenity and said:

... these specific issues override the more general promotion of growth, increase in density and housing supply in Planning Policy ¹⁵.

Despite raising many planning issues, Council did not call planning evidence; rather, it sought to cross examine Ms Ring at length about various ResCode provisions, as well as other matters.

¹² D17, para 277

¹³ D32, para 5.10

¹⁴ D32, para 5.13

¹⁵ D32, para 5.16

In closing, Council contended the proposal was deficient in urban design, neighbourhood character and amenity, particularly through lack of compliance with various ResCode standards. Additionally, Council considered the proposal lacked diversity.

Tellingly, Council could not support that position through reference to any State or local planning policy provision. Both Council and Objector Group contended the proposal did not achieve diversity of choice.

(iii) Objectors

Most objections related to traffic and access, although a key focus of the primary submission of the combined Objector Group related to inconsistency of the proposal with State and local policy. The Group highlighted five grounds to support its submission that the proposal be refused on policy grounds, noting the proposal demonstrated unacceptable responses to the:

... Planning Policy Framework and is not in accordance with the policy expectations as set by Clause 11 (Settlement), Clause 15 (Built Environment) Clause 16 (Housing, and Clause 18 Transport.

... Bayside Planning Scheme and is contrary to the orderly planning of the area ¹⁶.

The Objector Group placed significant emphasis on the predominant form of single and double storey development as recognised in the purpose of the Neighbourhood Residential Zone. When asked by the Committee whether any of the proposed development abutted single storey development, the Objector Group conceded it did not, but noted there remained some single storey houses on the opposite side of Hartley Street to the site.

3.4 Discussion

In the main, the Committee notes that while Council and the Objector Group contended there were State and local planning policy reasons to refuse the proposal, this was not supported by any expert evidence. Rather, both attempted to make their submissions through cross examination of Ms Ring, predominantly on issues relating to ResCode standards (which is dealt with in Chapter 4).

In terms of policy, the Committee fails to see how Council and the Objector Group can dismiss the proposal's compliance with both State and local policy as the Committee considers it ticks many of the key policy imperatives. There appeared to be little acknowledgement by Council and the Objector Group that the proposal provided for housing on an underutilised former school site that has abutment to three roads, access to a range of community and recreation facilities and is located in a zone that provides for housing.

The Committee notes the subject land is included within the Neighbourhood Residential Zone, and is well located in relation to public transport opportunities and accessibility to significant open space. The predominant built form is two-storey and the proposal clusters the townhouses in several groupings around the site. It has three street abutments with vehicle entry points from Hartley Street and New Street. Internally, it has a series of walking paths and various areas of landscape and open space retreats.

With regard to diversity, the proposal provides diversity from what already exists in this part of Brighton and Bayside more widely in that it is a townhouse development on a large lot. It includes significant landscaping and communal facilities in the former heritage listed and to be preserved

¹⁶ D45, paras 3, 5

Maritima House and a new swimming pool. It provides for downsizing opportunities as well as alternatives for entry level accommodation in this part of Brighton.

Further, while Council noted the village environment of Bayside and the low-rise residential development, it did not acknowledge the diversity that this proposal brings to the built form of the Brighton area and the opportunities the housing types envisaged bring to potential downsizers and new home buyers keen to live in the Brighton area.

In this regard, the Committee was assisted by the planning evidence of Ms Ring and the Council Officer reports, both of which concluded the applications were well supported by its location in the Neighbourhood Residential Zone, the local street layout, the form of the development proposed, its consistency with State and local policy, the abundance of transport opportunities in close proximity, its accessibility to local shops and retail opportunities, as well as to recreational facilities and open spaces, including the Brighton Beach foreshore. From a planning perspective, Ms Ring supported the application of Heritage Overlay 342 and that the heritage building would not be compromised by the development.

The Committee is not persuaded by the Council and Objector Group submissions, and it considers subdivision and development applications are strategically justified and well supported by State and local planning policy.

3.5 Findings

The Committee finds:

- The proposal is supported by, and implements, the relevant sections of the Planning Policy Framework.
- The proposal is well founded and strategically justified.
- The land is appropriately zoned to provide for the modest residential development of the scale and intensity proposed.
- There is no planning reason to preclude the issue of the subdivision and the development permits for the land.

4 Built form and urban design

4.1 Background

The Committee had regard to, amongst other matters:

- Council Officer reports of 11 December 2023
- Council's Notices of Refusal of 11 December 2023
- urban design evidence of Mr Campbell of Hansen for Council
- presentation from the Project Architect, Mr McCue of Carr Architects
- relevant submissions
- planning evidence of Ms Ring of UPco for the Applicant.

The key issues to be resolved are:

- neighbourhood character
- built form and amenity
- lot diversity and distribution
- heritage.

Whilst not in dispute, the heritage considerations informed the findings of the Committee.

4.2 Neighbourhood character

(i) Evidence and submissions

Mr McCue gave an overview of the proposal and advised the built form comprises:

- 84 two-storey townhouses arranged in linear block form
- a restored and extended heritage villa
- landscaped communal open space with retention of a substantial oak tree, a new swimming pool, a network of pedestrian pathways and private mews driveways
- car parking all generally placed underground, with the exception of visitors' parking.

The two-storey townhouses are proposed as contemporary 'modernist' buildings typical of new houses in this area. The townhouses are flat-roofed, but the development silhouette is articulated by the alternating closed masses and recessed openings, and substantial breaks between groups of townhouses.

Of the 84 townhouses, 12 have a direct frontage to each of Hartley and New Street. These townhouses are set behind moderate height fences and landscaped front gardens. It is these 12 dwellings visible from the public realm that are most relevant for consideration of neighbourhood character.

Three ramp and basement garage openings present to New Street. A single common carpark ramp is proposed in Hartley Street to access a common basement with garaging. A single gated vehicle entry is proposed in New Street to provide access to the mews and another common basement. These car entry points have generally been minimised and reinforce a sense of street address.

The subdivision includes 13 vacant house lots with frontages to South Road and Hartley Street and a super lot. The area and frontage widths of these lots is within the existing range typical of this area. Development of these lots was not before the Committee, with the Applicant advising the

house lots are proposed to be developed by individual owners. The Committee considers it is reasonable to anticipate these lots will be developed as larger detached houses, generally typical of the Brighton area.

Ms Ring strongly supported the neighbourhood character of the proposal and in summarising this aspect, her assessment noted:

- a number of existing trees and deep planting zones are retained
- the two-storey forms are respectful of the surrounding area
- dwellings facing New and Hartley Streets maintain the rhythm of spacing
- parking is accommodated underground with limited street level impact
- setbacks are compliant and upper floors, while not recessed, are otherwise articulated
- flat roofs are an emerging characteristic of new dwellings in the broader area
- front fences, while higher than Standard B32, balance privacy and security
- the new house lots, of 500 square metres are similar in area and frontage to existing lots
- the retained heritage building will contribute positively to the streetscape.

Mr Campbell similarly found the application appropriately responded to the existing and preferred neighbourhood character. His evidence considered the Precinct E2 preferred character strategy inclusion of “*a pitched roof form with eaves*” but advised the flat roof forms of the proposal to be appropriate. In cross examination, Mr Campbell noted the house lots, when developed, may well have pitched roofs. Mr Campbell’s main concern was that in accordance with the schedule to the Neighbourhood Residential Zone 3, the height of the front fences in Hartley Street should not exceed 1.2 metres (irrespective of the fact that a permit can be granted to exceed this height).

In summary, Ms Ring and Mr Campbell were broadly in agreement, with the exception of the fence height with a desired height of 1.5 and 1.2 metres respectively.

The Objector Group submitted the proposal was not acceptable from a neighbourhood character perspective, in particular:

- the Hartley Street setback was incorrectly measured to the adjoining garage
- the roofs of the proposal should be pitched
- some single-storey townhouses should be included for visual diversity
- the location of the Hartley Street carpark access was at the most sensitive location
- upper levels should be recessed
- the front fences should be no higher than 1.2 metres.

Responding to a question from the Committee, the Objector Group noted that the site did not abut any single storey building.

The Objector Group raised issues about the compatibility of the setback along Hartley Street and its compliance with adjoining development.

Responding to that issue in cross examination, Ms Ring observed the adjoining 46 Were Street lot included an entry from Hartley Street and should properly be understood as a ‘front’ frontage. Further, there was no meaningful difference between the adjacent garage or dwelling setback.

The Applicant clarified the rendered view ‘Main Entry from Hartley Street’ showed the rise of the Hartley Street driveway and a gate obscuring the ‘hole’ of the underground carpark¹⁷.

¹⁷ D12, p34 and D51, paras 120 - 123

Figure 3 Main entry from Hartley Street ¹⁸**(ii) Discussion**

The Committee notes the primary neighbourhood character issue in dispute related to the height of the front fence in Hartley Street. The Amended Plans showed a 1.5 metres high fence and Mr Campbell's evidence preferred 1.2 metres.

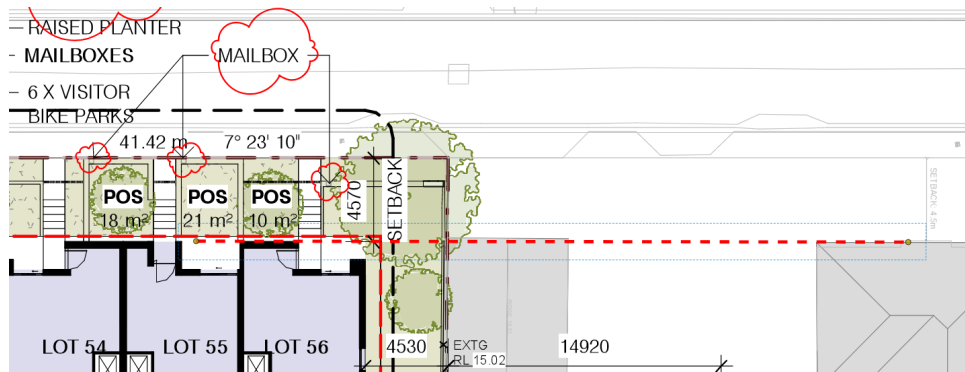
While earlier houses in the area have fences that are generally lower, the majority of more recent house construction incorporates higher fences, and these higher fences are of a similar formal language to recent dwellings. The proposed fences are a combination of solid wall and slightly lower open metalwork palisade integrated with landscape. The relevant frontage is limited to about 27 metres.

The existing fence immediately north on Hartley Street is about 1.8 metres high. The Committee considers a 1.5-metre-high fence balances the openness of the street and passive surveillance with security and privacy and would be an acceptable neighbourhood character response.

While the Applicant and Council were generally in agreement on the other neighbourhood character aspects, the Committee notes the Objector Group's concerns. In terms of setback, the Hartley Street townhouses align with the adjacent building masses of 46 Were Street and are appropriate.

¹⁸ D12, p34

Figure 4 Part plan with Committee added red dashed line indicating alignment of setback ¹⁹



Regarding pitched roofs, single-storey and upper-level setback concerns, the Committee does not agree with the Objector Group that the “flat roof form... upper floor setbacks is monotonous, and lacks articulation” ²⁰. Rather, the Committee observes the building silhouette and form is an articulated rhythm of glazed and recessed areas, planted balconies, flat surfaces and gaps between blocks. The proposal is a good representation of the common contemporary style seen in the area. Some nearby contemporary buildings that have incorporated pitched roofs suggest pitched roofs do not guarantee a good outcome.

Figure 5 View from New Street ²¹



The streetscape impact of the carpark ramp on Hartley Street is best represented by rendering ‘Main Entry from Hartley Street’. The Committee considers dark openings to underground carparks are often unsightly and incongruent with two storey domestic buildings. The proposal successfully resolves this issue and the carpark ramp is well integrated within a vegetated landscape structure of low walls and a pergola. The initial 700-millimetre rise of the driveway and a gate means the ‘hole’ is generally not seen from the street.

¹⁹ D11, p6
²⁰ D45, para 45
²¹ D12, p31

The Objector Group suggested the driveway should be located south of Menzies Street. The Committee notes a ramp and basement in this location would be incompatible with the retention of the mature oak. Given the north-bound bias of traffic (75 per cent), moving the driveway south will increase the length of road with more car movements. Further, if the entry was located opposite Menzies Street, it would in effect result in a cross intersection, which may create other incompatible issues. The Committee concludes the existing driveway access is an acceptable balance of technical and aesthetic considerations.

(iii) Findings

The Committee finds:

- The application is an acceptable response to neighbourhood character.
- The limited frontages to New and Hartley Streets are appropriate.
- The building masses are well articulated.
- There is anticipated variation in the future development of the house lots.
- Retained views of the heritage Maritima House is an asset to the site.
- There is limited and managed vehicle access with limited presence of cars at ground level.
- Dwellings fronting New and Hartley Streets will have legible addresses.

4.3 Built form and amenity

(i) Evidence and submissions

The Committee notes the Council Officers' report which assessed the development application included a detailed and comprehensive table of private open space. It indicated the majority of dwellings could be provided with private open space well in excess of the Standard B28 requirement²².

Ms Ring provided a comprehensive assessment of compliance against clause 55²³. In summary, she concluded the proposal presented a very high level of compliance, with some relatively minor non-compliances remaining:

- Standard B17 Side and rear setback: Lot 63's upper level encroaches on the B17 envelope by about one metre; however, this would abut a tennis court and consequently amenity would be a lower consideration in this location.
- Standard B17 Side and rear setback: Lot 77's upper level encroaches on the B17 envelope by about 750 millimetres.
- Standard B23 Internal views: a variation was sought by Ms Ring, noting she was satisfied that sufficient privacy was provided.
- Standard B27 Daylight to new windows: a variation was sought, as Ms Ring noted that the rooms in question are basement rooms.
- Standard B29 Solar Access to Open Space: a variation was sought for Lot 10 which did not include a roof terrace, however Ms Ring found this was acceptable as it related to one dwelling only and could be offset by the location and quality of communal open space.
- Standard B32 Front Fences: a variation was sought and Ms Ring noted the proposed front fences provide a measure of privacy and security.

²² D3.014, pp 265-267

²³ D17, attachment 2

Regarding Standard B29 compliance, Council submitted that Standard B28 did not allow for roof terraces to be included in secluded private open space as ground level decks were the most convenient access to living areas. On this basis, Council contended Lots 10 to 16 were not compliant.

In response to a Committee question, the Applicant submitted that Standard B28 referred to convenient access from a living area, which did not require the secluded private open space to be at ground level. The Applicant submitted that when Standards B28 and 29 were read together, the roof terraces had convenient access.

In closing, Council agreed with Ms Ring's assessment that dwellings 71 to 74 complied with Standard B29 but maintained dwellings 10 to 16 had significantly compromised ground level open space.

Council disputed that Lot 63 was compliant with Standard B29. Substantial time was devoted to submissions and speculations regarding the height of a newly constructed fence north of Lot 63. The Applicant tabled surveyor-certified relative levels of the fence²⁴. Read with the Amended Plans, the height of the fence is 3.38 metres above the floor and deck level. In light of the updated information, Ms Ring provided a further analysis of Lot 63 compliance and concluded it was compliant with Standard B29²⁵.

In discussing issues about the south facing units in opening, Council acknowledged there will always be some 'runt of the litter' arrangements. It was keen to note that it was not suggesting everything needed to be perfect but that it ought to be planned, designed and resolved to a level of amenity that met contemporary standards.

Council did not raise objections to non-compliance of Lots 63 and 77 with B17.

Mr Campbell's report identified some areas where he considered overlooking to be a concern:

- Lots 59 and 60 have a sensitive interface to an existing pool at 54 Were Street
- Lots 81 and 82 will overlook the second-floor balcony rear of 1/43 Were Street
- Lots 42 to 52 will overlook future dwellings on the vacant lots on Hartley Street (it was acknowledged that this is not non-compliant)²⁶.

(ii) Discussion

The Committee notes in submissions and evidence the key clause 55 matters in dispute were:

- B29 compliance of Lots 11 to 16 and lot 62, and consideration of non-compliance of Lot 10
- B29 compliance of Lot 63
- front fence height
- overlooking and screening, particularly to the rear of Were Street.

Regarding Lots 11 to 16 and Lot 62, the Committee considers that Standard B28 does not strictly require secluded open space to be located at the ground level. The roof terrace need only be convenient, rather than being the most convenient. The proposed roof terraces have easy access to living areas via a lift, incorporate screening and are open to the sky. On this basis, the

²⁴ D44

²⁵ D52, figure 12

²⁶ D20, p17

Committee accepts the terraces should be considered as secluded open space and thus satisfy both Standard B28 and B29. The roof terraces are generous with excellent amenity, easy access and are likely to be well used.

Regarding Lot 63, the Committee notes this dwelling does not have a roof terrace and so compliance with B29 relies on compliance with Standard B28 for the secluded open space at ground level. The Committee agrees with Ms Ring's further analysis that Lot 63 includes more than 20 square metres of secluded open space that is at least five metres wide in the north-south dimension, and therefore compliant with Standard B29.

The Committee notes it was uncontested that Lot 10 is not compliant with Standard B28 and B29. The Committee considers this remaining non-compliance in the context of the overall development of 84 dwellings and the generally high levels of amenity. Standard B28 directs "*the availability of and access to public or communal open space*" must be considered. Lot 10 will enjoy access to the high amenity communal open space and the nearby South Park Reserve and foreshore. On this basis, the Committee considers this non-compliance to be minor and therefore acceptable.

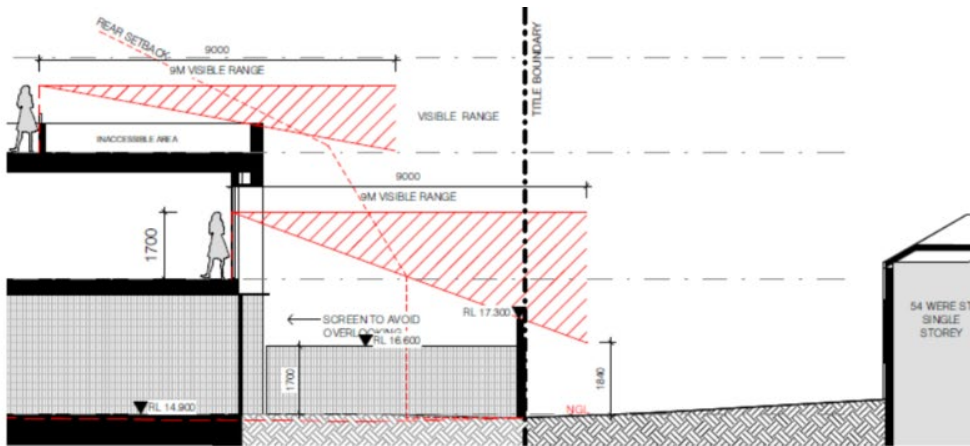
The Committee notes that Lots 63 and 77 are non-compliant with Standard B17. Lot 77 encroaches about 750 millimetres at the upper level for a length of about eight metres. Lot 63 encroaches about one metre for a length of about 15 metres. This dwelling is currently set back at the upper level and further narrowing of the upper level may not be straightforward or desirable. Lot 62 is somewhat awkwardly out of alignment. The northern boundary to Lots 62 and 63 is angled in plan and the height of the adjacent boundary fence compromises the backyard of these dwellings. Further, these two dwellings are at the 'dead end' of a pedestrian path. The Committee considers that consolidation of Lot 62 and 63 into a single larger dwelling is desirable and will:

- allow a B17 compliant building
- reduce the length of the dead end pathway and increase the private open space of the dwelling
- allow an ordered and aligned linear mass for Lots 57 to 62
- have the potential to reduce screening and generally improve amenity
- simplify the basement perimeter and reduce basement area
- improve housing diversity by creating a four bedroom plus study dwelling for a larger household.

The loss of Lot 63 can be expected to be at least partly offset by reduced construction cost and increased value of the dwelling and garden area.

With regard to the issue of overlooking from Lots 59 and 60 as raised by Mr Campbell, the Committee notes the Applicant's section diagram indicated that overlooking was compliant with Standard B22. Further, the rear of 54 Were Street is planted with evergreen screening trees about 4 to 5 metres high.

Figure 6 Extract of Mr Campbell report regarding Lots 59 and 60 ²⁷



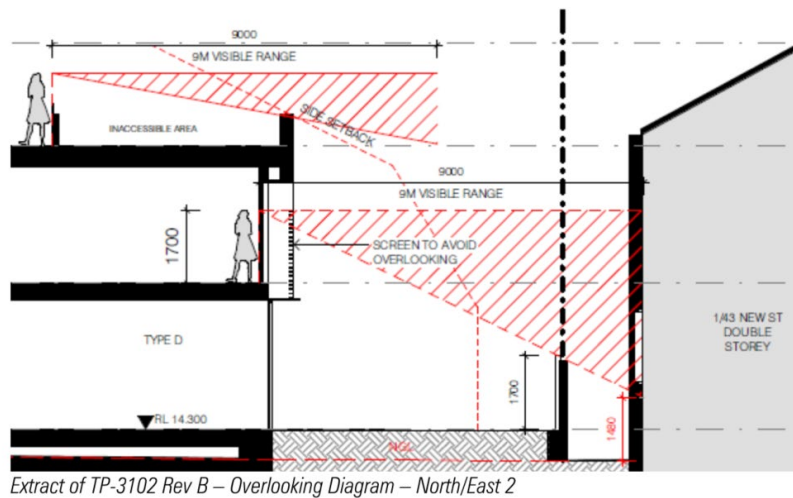
Extract of TP-3101 Rev B – Overlooking Diagram – North 3



Photo of existing interface condition from with subject site

The Committee notes the second-floor balcony rear of 1/43 Were Street is clearly visible from the site. Further, the windows of Lots 81 and 82, and the 1/43 Were Street balcony are separated by nine metres.

²⁷ D20

Figure 7 Extract of Mr Campbell report regarding Lots 59 and 60 ²⁸

The Committee agrees with the Applicant and Ms Ring that the vacant lots will be sold with the pre-existing condition of permitted or constructed windows without screening.

(iii) Findings

The Committee finds:

- The overall built form and amenity of the proposal is acceptable.
- Lot 63 is compliant with Standard B29.
- Lot 10's non-compliance with Standard B29 is minor, and acceptable.
- Lot 77's non-compliance with Standard B17 is minor, and acceptable.
- Lot 63 is non-compliant with Standard B17 and should be consolidated with Lot 62 to create a single larger dwelling and garden.
- Overlooking and screening is acceptable.
- When considered against the requirements of clauses 55 and 56, the built form of the proposal is acceptable, subject to minor changes.

4.4 Lot diversity and distribution

(i) Evidence and submissions

The proposal includes two two-bedroom and 82 three-bedroom dwellings (with study areas).

The Applicant asked Ms Ring's opinion about Council's submission that the proposal was not diverse enough and that it should include four-bedroom dwellings. Ms Ring noted:

- there was plenty of opportunity for four-bedroom houses in the municipality and on the site's proposed house lots
- there is a limited supply of three-bed townhouses in the municipality
- household sizes are shrinking
- diversity should be considered across the area, rather than a 'site-by-site' response.

²⁸ D20

Council submitted census data showing a low proportion of four-bedroom townhouses in the area. In closing, Council submitted that conversion of a single three-bedroom dwelling to a four-bedroom dwelling would be a satisfactory outcome to increase diversity.

In closing, the Applicant noted that when detached dwellings were considered in relevant data for Brighton, the census showed four-bedroom houses were the highest incidence at 38 per cent ²⁹.

(ii) Discussion

The Committee generally agrees with Ms Ring's assessment of the requirement for broader availability and diversity. The developer has the motivation and information to inform the mix of dwellings that best meet market demand. While Council's tabled census data indicated a low number of four-bedroom townhouses in the immediate area, this may well reflect a low demand for this type of housing. The Committee notes the townhouses are generous in size and include a substantial room labelled 'study' that could, with minimal modification, be used as a fourth bedroom. Additionally, it is not uncommon in new developments that some purchasers might buy two units and convert these to one larger dwelling.

Further, the remaining 13 lots, while not considered in the development permit, can be expected to be developed for detached houses, where there is sufficient room and opportunity for four-plus-bedroom dwellings.

Nevertheless, as discussed in Chapter 4.3, there is an opportunity to consolidate Lots 62 and 63 to create a single larger dwelling for a larger household.

(iii) Findings

The Committee finds:

- The proposal generally provides a good level of lot diversity and distribution when considered in the context of the wider Brighton area.
- The consolidation of Lots 62 and 63 into a four-bedroom dwelling will ensure the development provides an acceptable level of lot diversity and distribution without reliance on future development of the vacant house lots.

4.5 Heritage

(i) Submissions

The Committee had regard to the heritage report of Mr Raworth and the Amended Plans ³⁰. The summary of key issues did not include heritage and no evidence was called for nor presented. The heritage report and Amended Plans described:

- retention of the heritage listed Maritima House and the associated mature oak tree
- sensitive extension and ongoing use of the building
- substantially retained views from Hartley Street
- generous landscaped communal open space.

²⁹ D51, para 25

³⁰ D11

Neither Council nor the Objector Group raised any critical issues about the heritage aspects of the proposal.

(ii) Discussion

The Committee considers the retention of Maritima House, the mature oak tree and the landscaped curtilage is a substantial benefit of the proposal and enhances its wider consideration of built form and urban design. The heritage building and curtilage, of approximately 2,900 square metres, forms strong constraints to development of the site and has been successfully integrated in the overall development. In summary the benefits include:

- substantial and high-quality communal facilities and amenity for residents
- sensitive retention and expansion of the heritage fabric with meaningful long-term purpose
- the mature oak tree is a substantial 'day one' landscape asset
- the deep planting zone is clear of the underground car park
- Maritima House and the mature oak provide a landmark for wayfinding throughout the site
- Maritima House and the open space on Hartley Street contribute to the diversity and neighbourhood character of Hartley Street.

(iii) Findings

The Committee finds:

- Heritage aspects of the proposal are appropriate and protect the heritage values of the place.
- Heritage aspects have been well integrated into the development and contribute very positively to urban design and built form.

5 Landscape and way finding

5.1 Background

The Committee had regard to relevant submissions, observations from the site inspection, architectural and landscape documents, and a presentation provided by Ms Howard, the landscape architect, of TCL.

The key issues to be resolved are:

- how the internal site landscape will be realised
- way finding
- public access through the site.

5.2 Internal site landscape

(i) Evidence and submissions

Ms Howard presented an overview of the landscape proposal and discussed:

- retention of the mature oak and other mature trees and palms on site
- communal amenities set in a landscape zone central to the proposal
- the proposed network of landscaped pedestrian paths
- the planting palette of defined sub-precincts within the development.

Figure 8 Internal pathways³¹



Council submitted the pedestrian path from the New Street bus stop along the shared boundary to properties at 1-3/43 New Street presented a risk to existing trees in this area. Ms Howard clarified that paving in this area would be located and detailed to avoid encroaching onto or damaging the root zone of the existing trees.

The Objector Group raised a concern regarding soil volumes of planters on structure to ensure growth and survival of the small trees proposed. In response, Ms Howard clarified the soil

³¹ D32, p36

volumes of the planters were at least 800 millimetres deep and at least 12 cubic metres. Further, these will be compliant with the Better Apartment Design Standards.

There was some discussion at the Hearing about the internal pathway width and the ability of ambulances to use these pathways in an emergency. The Applicant concurred this was a necessary consideration to be addressed.

(ii) Discussion

The Committee considers the existing oak tree and its surrounds with Maritima House provides a level of amenity that embraces the site in an exceptionally positive way. What follows through the landscape plan builds on that amenity and is complementary to it. It is an excellent starting point.

The Committee was satisfied that any changes to the New Street pedestrian path to protect the existing trees would be achievable, relatively minor and expected to be adequately resolved in the detailed development of the design. Further, the Committee was advised on the site inspection that the existing bus stop was to be relocated, and this was expected to allow further flexibility with the detailed location of the pathway.

The Committee notes the rendered views depict a high-quality landscape proposal with integrated structure, planter boxes on structure, architectural signage and a mix of existing mature and new planting³². The Committee is satisfied with Ms Howard's advice that the soil depth in the planters will be sufficient.

The Committee considers ambulance access is warranted and notes that modifications to enable this would be relatively minor and include removal of a single tree and adjustment to some pathway widths.

The Committee notes the landscape proposal will provide substantial benefits and amenity including:

- integrated communal facilities
- retained mature trees, in particular the mature oak and palm trees, will contribute to articulating the skyline and contributing as intuitive wayfinding landmarks
- day one mature tree canopy
- landscape identity for sub-precincts.

(iii) Findings

The Committee finds:

- Landscape aspects of the proposal are appropriate.
- Minor modification of the New Street pedestrian path may be required to minimise disturbance to structural root zones of existing trees, but otherwise the path is acceptable.
- Minor modification of some paths will be required to allow ambulance access.
- Landscape aspects of the proposal will provide substantial amenity to the occupants of the development, in particular for diverse opportunities to experience the communal open space.

³² D32, pp32, 34-38

5.3 Way finding

(i) Submissions and evidence

Mr McCue presented an overview of the proposal and the arrangement of built form. It allowed access for vehicles and pedestrians and for an internal network of pedestrian paths providing ground level access to the dwellings and communal facilities. Except for the four visitor car parks, all vehicles will be garaged below ground and access points will be minimised. There is no street or vehicle network at the ground. Site access will be controlled at the perimeter.

Council submitted the proposed arrangement would create unacceptable issues with larger vehicle deliveries, Uber Eats type deliveries and visitors. The Objector Group echoed Council's concerns.

(ii) Discussion

The Committee considers the proposal includes clearly identifiable address points in both Hartley and New Streets. The internal pedestrian network is straightforward with good visibility to landmarks such as the mature oak. Over time, the landscape will develop its own distinct character in each zone. Integrated architectural signage is proposed at Hartley and New Streets.

The ubiquity of mobile telephones and coordinated delivery notification and navigation systems such as Uber Eats and Australia Post generally provide reliable solutions. Detailed development of the design is likely to incorporate an intercom and handover or parcel drop off points.

The Committee expects that deliveries and visitors' wayfinding will be no more difficult or complex than any typical apartment complex.

(iii) Findings

The Committee finds:

- Wayfinding will be functionable and acceptable.

5.4 Public access through the site

(i) Evidence and submissions

Council submitted the lack of a publicly accessible cross-block link from New Street to Hartley Street was a substantial shortcoming of the proposal. There was constant and negative reference by Council and the Objector Group to the proposal being a 'gated community'.

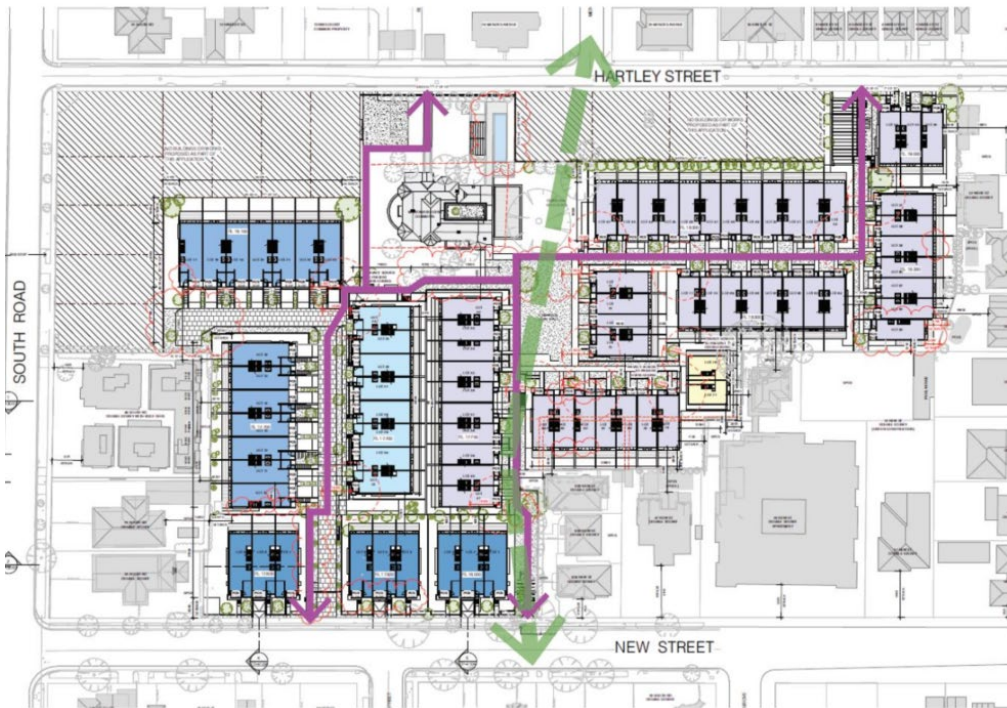
The proposal includes a network of pedestrian pathways that interconnect with the various areas that make up the proposal. This network of paths is secured at the boundary to allow entry by residents only. The Applicant noted in opening that the subject land had a long history as a private school campus that was gated and fenced to all boundaries. There has been no public access through the site at any time.

Figure 9 Pedestrian access at New Street with controlled access ³³



Mr Campbell stated “a mid-block public connection would be warranted” ³⁴. His evidence included guidance from Guideline 1.1.1b of the State Urban Design Guidelines and compared this with the subject site and the bounding streets, indicating the block is larger than desirable. This idea was foreshadowed in Mr Campbell’s initial review to Council but was not included in the Council Officers’ report. The preferred route of this pathway would be the currently proposed path from New Street, west through to Hartley Street.

Figure 10 Mr Campbell’s preferred mid-block link shown in green dashed line ³⁵



³³ D32
³⁴ D20, para 88-97
³⁵ D20

Under cross examination, Mr Campbell confirmed the site was privately owned land, appropriately zoned residential, with no historic public path. Further, Mr Campbell advised he was not aware of any Council action to acquire land for permeability. However, in response to a question from the Committee, Mr Campbell stated the lack of a public path through the site was a fatal flaw of the proposal.

In closing, Council showed an example of a cross-block public path in another development. In response to a question from the Committee, Council advised that particular public path was included in the contract of sale of former public land.

In closing, the Proponent noted the pejorative use of 'gated community' in both Council and the Objector Group's submissions and noted that houses and apartment buildings would be more secure by having a non-publicly accessible fence.

(ii) Discussion

The Committee considers the question of a public link through the site to be worthy of examination. Mr Campbell is correct to note that objective 1.1.1 of the State Urban Design Guidelines includes a range of block dimensions and the subject site is in a larger block bound by existing streets. Objective 1.1.1.2 notes:

Tip: a block perimeter of around 600m provides for good pedestrian and vehicular access and an efficient subdivision pattern of the block. Smaller blocks may be appropriate in more intense urban areas.

The Committee notes the objective does not state a maximum perimeter, rather 600 metres is 'good' and 'efficient'.

The Committee observes the strongest 'desire lines' that could traverse the site are to and from Brighton Beach station, while routes to the foreshore and parklands are more likely along South Road. To the west, McKenzie Street is a pleasant pedestrian street and is likely to be used by residents of the development walking to Brighton Beach station. To the east, residents of Stanley and Woolsley Streets could theoretically use a mid-block link but would need to cross New Street.

While the Council requirement for a public path may provide a limited benefit to residents in surrounding streets to, say, move from Hartley Street to New Street, it does not have connection to a pedestrian network to the east or serve a demonstrated need. The Committee notes:

- there is no mid-block pedestrian crossing on New Street, so a safe crossing is not available
- pedestrians from Stanley or Woolsley Street would need to cross at Were Street or South Road and a mid-block link would be the longer route to Brighton Beach station
- the bus stop is noted as the eastern anchor of the public path, however this bus stop is understood to be relocated
- a link was not initially raised by the Objector Group
- there is no existing or historic public path through the site
- there is the potential that internal security may be compromised by allowing unrestricted access through the site to non-residents.

The current application provides a high level of amenity to its residents and changing this link raises new challenges:

- Crime Prevention Through Environmental Design (CPTED) issues, including conflict with the principles of clear definition of territory and opportunity to avoid conflict

- it will likely raise issues with maintenance and liability, noting the expectation is that the proposal will be of high quality, and a public access route (to be maintained by Council) may compromise or lower that amenity
- a public path will bisect the site and will require additional secure gates and materially erode the residents' convenient access to communal space
- it will effectively subdivide the super lot into two separate lots, albeit with a volumetric title.

The Committee considers Council's requirement for a mid-block link is not particularly relevant for this proposal. In particular, it notes this is a long held private site without a public link. The Committee notes none of the usually expected due diligence or process for a new 'public path' appears to have been undertaken by Council, and there:

- does not appear to have been consultation with neighbours of 1-3/43 New Street
- is no proposed Public Acquisition Overlay
- is no policy, strategy or planning scheme indication of a requirement for a public path.

On balance, the historic conditions and land tenure, and the lack of strong and operational challenges outweigh the limited benefits of a public link. The proposal has a high level of compliance and will be of high amenity. A public link is not justified as a trade-off that may be contemplated in a high density or compromised proposal.

(iii) Findings

The Committee finds:

- There is no compelling reason for the proposal to provide for a public pathway through the site.

6 Traffic and access

6.1 Background

The Committee had regard to:

- the traffic, access and parking evidence noted in Table 3
- the original Stantec traffic report (3 May 2023)
- relevant submissions.

Table 4 Traffic, access and parking evidence

Party	Expert	Firm
Applicant	Jason Walsh	Traffix Group
Council	John-Paul Maina	Impact Traffic
Local Objector Group	Mike Willson	Amber Organisation

The key issues to be resolved are:

- whether general access, car parking, bicycle, waste and loading provisions comply with ResCode and the Planning Scheme
- whether Hartley Street can accommodate an increase in traffic movements.

At the Directions Hearing, the Committee indicated that from submissions and the tabled summaries of key issues, the proposal's impact on Hartley Street was the key traffic issue to be resolved. The Committee directed a traffic conclave be convened, which occurred on 29 May 2024, after the traffic evidence had been filed. The results of the conclave were tabled as D26, with a further summary of comparative daily vehicle rates tabled by Mr Walsh as D42. Both documents assisted the Committee and other parties to generally confine its considerations on traffic and access issues.

The conclave resulted in general agreement by the three experts on the following issues:

- car parking supply
- internal car park design
- access locations
- access design (Hartley Street vehicle crossing is splayed to improve access subject to vehicle swept path analysis to confirm satisfactory access)
- site distances from Hartley and Were Streets could be improved with Council installing 'no stopping' restrictions on the south side of Were Street
- waste management arrangements.

There was some agreement on:

- traffic generation rates
- traffic distribution.

6.2 Overall traffic and access matters

(i) Evidence and submissions

The Committee notes:

- the Department of Transport and Planning made no objection to the proposal, subject to conditions
- the Council Officers' report recommended approval for both applications, subject to conditions
- Council subsequently refused both permits, and in relation to traffic noted "*The proposal fails to provide an acceptable traffic outcome through the proposed access arrangements*".

The Council Officers' report noted that from a State policy perspective, the proposal was consistent with clause 18 *Transport* due to its location within a Principal Public Transport Network (PPTN) area that is accessible to public transport, child care services, a primary school, employment opportunities and public open space. More locally, the Council Officers referred the application to its internal traffic engineers who supported the car parking rates, traffic generation rates, car parking design standards and bicycle spaces (noting none are required).

The evidence of Mr Walsh summarised that:

- the level of traffic generated by the proposal would be low and will have no material impacts on the surrounding streets
- provision for car parking and bicycles was acceptable
- loading and waste collection can be appropriately accommodated.

Mr Walsh concluded:

There are no traffic engineering reasons why a planning permit for the proposed residential development and subdivision at 47 South Road, Brighton should be refused, subject to conditions ³⁶.

In responding to the Committee's direction to table a summary of key issues it intended to rely upon at the Hearing, Council said in relation to traffic:

The proposed development provides an unacceptable traffic outcome and impact on the surrounding street network through the proposed access arrangements ³⁷.

At the Directions Hearing, Council indicated this comment was particularly in relation to Hartley Street.

The evidence of Mr Maina summarised that:

- the density of the proposal would exceed the target capacity of Hartley Street and would erode its functional performance
- changes should be made to the development proposal, including:
 - reducing the number of townhouses that have access to Hartley Street
 - inbound access only from New Street
 - egress to New Street or South Road
 - widen the Hartley Street vehicle crossing and introduce traffic calming measures.

³⁶ D18, p38

³⁷ D7

The Objector Group submitted:

- the proposal would result in unacceptable traffic impacts and would not be in accordance with clause 52.6 (Car parking)
- the proposal had inadequate visitor parking
- Hartley Street is too narrow to enable free and easy traffic movement, including passing opportunities
- the location of the Hartley Street proposed vehicle crossing will have a negative impact on the opposite dwellings.

The evidence of Mr Willson summarised that:

- the proposal meets the relevant requirements of the Planning Scheme in relation to car parking and bicycle parking
- the car parking layout is generally in accordance with the Planning Scheme and the relevant Australia standards
- traffic generated by the proposal can be accommodated within the surrounding road network.

Notwithstanding, Mr Willson recommended several changes to access and layout of the site, including:

- the Hartley Street shared vehicle crossover should be increased to 7.4 metres wide (currently 5.5 metres)
- provide for a maximum grade of 1:5 (currently 1:4) and waste locations be reconsidered to reduce internal movements
- include turntables, increase the width of garage doors, and provide flatter grades in the New Street basement car parks and other areas.

While Mr Willson concluded the increase in traffic would be “... *expected to have a minimal impact to the operation of the nearby road network and intersections, and the surrounding road network is able to accommodate the increase in traffic*”, he considered:

... any increase in traffic at the intersection of Were Street/Hartley Street is only likely to exacerbate the crash risk and consideration should be given as to the suitability of allowing more traffic to access Hartley Street ³⁸.

Mr Altson focussed his presentation on vehicle access and enhanced pedestrian access along Hartley Street. He noted the narrow width and condition of the existing footpath on the western side of Hartley Street gave rise to access issues, particularly for less able pedestrians, especially when rubbish bins were out. While submitting the predominate site access should be from South Road, Mr Altson recommended the existing Hartley Street access point should be moved to be in the vicinity of Menzies Street, particularly to reduce headlight glare and traffic banking. He further recommended the Applicant provide a two-metre setback on the eastern side of Hartley Street to provide for a wider pavement. The Committee took that further and inquired whether the existing trees planted by Council could remain.

While not noted as an issue prior to the Hearing, Council and the Objector Group raised concern about access to the site for fire emergency appliances and both pursued this to some extent. The Applicant advised this issue would be considered at the building permit stage but it sought and tabled advice from WRAP Engineering Pty Ltd. That advice noted:

³⁸ D23, para 107, dot point 6

... the hydrant design is preliminary in nature, and is intended to present the schematic design intent for the purposes of architectural coordination during the early stages of the design process. Our design has highlighted potential non-compliances (such as the location of the external fire hydrants) for further discussion and resolution during the detailed design phase.

As part of the preliminary design, hardstands are proposed to be located along New Street and Hartley Street for use by the fire brigade appliance. The fire brigade appliance is not required to physically enter the site beyond the New Street and Hartley Street hardstands as it is intended for FRV to conduct fire-fighting activities via pedestrian access to the remainder of the site³⁹.

The advice further noted that if the final design was not accepted by Fire Rescue Victoria, it would not be signed off at the building permit stage and it would need to be further addressed.

In closing, the Applicant reiterated its submissions that traffic and access issues could be suitably managed to deliver an acceptable outcome.

(ii) Discussion

The Committee accepts the site can accommodate on-site parking, bicycle access, waste and storage. It found the Council Officers' report to be particularly helpful, given the objectivity of its reporting and that it had consulted its own traffic engineers.

The Committee accepts that development of the site will result in some change for the surrounding community, particularly for Hartley Street residents. However, until the school closed, there was always a level of activity along the street during school term time.

With regard to the suggestion the Hartley Street access ramp be widened to 7.4 metres, this is not a critical issue. The Committee understands the traffic engineers discussed the width of the cross over where it splays at about 45 degrees across the nature strip. This will make it 7.5 metres at the kerb (5.5 (vehicle ramp) + 2 × 1.0 (splay on each side)) = providing reasonable space for vehicles to enter and exit the site simultaneously. Undertaking a vehicle swept path analysis of this arrangement is prudent as identified in the traffic conclave, but this matter can be further resolved during detailed design.

The Objector Group expressed concern that some residents might need to reverse out of their properties on a 1:4 grade, which could be dangerous. However, the Committee supports the findings of the conclave and Council's traffic engineers who were generally comfortable with car parking arrangements, internal car parking design, access locations and design.

With regard to proposed firefighting infrastructure, the Committee notes the design submitted by the Applicant is for planning, not building purposes. The hydrant design, while preliminary in nature, ensures hardstands are proposed to be located along New Street and Hartley Street for use by Fire Rescue Victoria appliances.

Were a fire at the site to require attendance by Fire Rescue Victoria, the fire appliances are not required to enter the site. Fire fighters would access the development utilising pedestrian and vehicle access routes.

In terms of the firefighting infrastructure design, it is a matter for Fire Rescue Victoria who, through its legislative processes, ensures that firefighting infrastructure is either deemed to satisfy

³⁹ D41

as compliant or dispensations aligned with the design are agreed. It is understood that Fire Rescue Victoria dispensation can, for example, account for hydrant locations and the length of fire hose used and metering of water supply for firefighting purposes.

The Committee notes a Registered Building Surveyor issuing a permit to enable construction would ensure the design accords with the National Construction Code and any Fire Rescue Victoria dispensations approved in regards the code. For planning purposes, the proposed fire infrastructure is appropriate.

(iii) Findings

The Committee finds:

- The site is capable to accommodate the increase in general traffic and access, including waste, deliveries and general movement.
- Emergency vehicle access is a building compliance issue rather than a planning matter.

6.3 Hartley Street

(i) Evidence and submissions

The key issue in contention related to the capacity of Hartley Street to take additional traffic and the implications of this.

The Applicant noted in opening the only substantive difference between the three experts related to the traffic capacity of Hartley Street and its ability to accommodate the proposed increase in traffic generation. The Applicant summarised that the proposal would result in acceptable traffic implications as it proposed appropriate locations for vehicular access into and out of the site.

The conclave could not reach agreement on the proposed traffic impacts on Hartley Street. Mr Walsh and Mr Willson considered Hartley Street could accommodate around 1,000 vehicles per day and the proposal's traffic impacts would be acceptable. Mr Maina believed a target volume of 660 vehicles per day was appropriate. Mr Maina did not consider the impact of the additional traffic on Hartley Street to be acceptable. Through his evidence and cross examination, he did not resile from that opinion.

Council and the Objector Group considered Hartley Street would be compromised and would experience negative impacts due to the overall increase in traffic movements along the street.

Mr Walsh considered there would be no negative impacts on Hartley Street. He noted traffic access and movement would be spread over three roads (New Street, South Road and Hartley Street) and while there will be modest increases in traffic, such increases were acceptable for each of the roads under consideration.

Specifically, Mr Walsh noted Hartley Street's 6.2-metre-wide carriageway provides a row of parking on one side of the street that allows for a single lane of traffic. As Hartley Street is similar to an 'access place', road users will need to be cognisant of passing opportunities utilising spaces where vehicles do not park such as vehicle crossings and side street intersections as appropriate.

Both Mr Walsh and Mr Willson undertook a tube count survey of Hartley Street, the results of which indicated in summary:

- the northern (Were Street) end of Hartley Street takes more traffic (458 vehicles per day) than the southern (South Road) end (171 vehicles per day)

- majority of motorists travel at or below 28 km/h (85th percentile speed), however it is acknowledged that midblock speeds may be higher as the traffic surveys were undertaken near Were Street and South Road and motorists may still be accelerating as they enter and continue along Hartley Street ⁴⁰.

From the conclave Mr Walsh and Mr Willson considered Hartley Street could accommodate around 1,000 vehicles per day (based on an ‘access place’ having a carriageway width of 5.5 metres similar to Hartley Street) and the proposal’s traffic impacts would be acceptable, while Mr Maina believed a target volume of 660 vehicles per day was appropriate. This was based on a ratio of the Hartley Street reservation width compared to an Access Place (300 to 1,000 vehicles per day) and the lack of separation between vehicular traffic and pedestrians.

Mr Walsh estimated Hartley Street will carry 645 trips at its northern end and 263 at its southern end ⁴¹. Mr Willson estimated Hartley Street will carry an additional 600 vehicles per day (he estimated the existing daily traffic as 300 vehicles per day, with an additional 300 vehicles from the development) ⁴². Mr Maina estimated Hartley Street will carry 718 to 738 trips at its northern end, and 271 to 285 trips at its southern end ⁴³.

The Council Officers’ report noted the number of trips added to Hartley and New Streets were reviewed by its traffic department and concluded such trips “... *are considered relatively low and are not expected to unreasonably impact the traffic flow and can be accommodated by the existing street network*” ⁴⁴. This conclusion was not supported by Council at the Hearing, nor was the Council Officer opinion shared by Mr Maina. His evidence suggested Hartley Street be considered as an access place with a target volume of 660 vehicles per day.

Council and the Objector Group considered more traffic and site access should be funnelled towards South Road.

Council reiterated its position in closing that, due to the geometric profile of Hartley Street, it did not have the design capacity to support increased traffic volumes and that new traffic would result in more speeding.

In closing, the Applicant considered the evidence of Mr Walsh should be preferred over that of Mr Maina and said:

Mr Maina’s approach to estimating capacity is novel and not supported by any traffic engineering source or guide. His method simply interpolates between the volumes attributed to an access land (which is a side or rear laneway) and an access place ⁴⁵.

And further:

Mr Maina conceded in cross examination that the linear interpolation method he applied between an access land and an access place was not a method he had ever adopted before, or that had ever been adopted in any other case ⁴⁶.

In response to the issue of potential access off South Road, the Committee observes the Council Officers’ report noted the Applicant explored options to provide access off South Road “... *however*

⁴⁰ D18, Appendix C

⁴¹ D18, Table 5

⁴² D23, p29

⁴³ D24, p8

⁴⁴ D003.014, p106

⁴⁵ D51, para 99

⁴⁶ D51, para 101

ultimately through Traffic Engineer advice and preliminary discussion with the Department of Transport this was not deemed a reasonable outcome”⁴⁷.

(ii) Discussion

The Committee appreciates local resident concerns that the proposed development may adversely affect Hartley Street traffic conditions. This is understandable as significant change is now proposed.

However, a key consideration for the Committee is that the site was previously used as a school that had its key access to car parking and drop-off/pick-up along Hartley Street. The street has previously and for the long term been exposed to traffic, recognising that such traffic would have had two clear peaks during school days. While traffic conditions during school operation were not available, it is likely the street would have been quite congested.

Residential traffic operates differently to school traffic. There are morning and afternoon peaks, but these tend to be spread out over a longer time period. Weekday traffic tends to be higher than on weekends.

Further, the site is located within the PPTN and is walkable to the Brighton Beach train station, the beach itself, local shops, and various open space areas. That level of accessibility may reduce car dependency for some future residents.

While the traffic experts identified a range of traffic flows along Hartley Street, the Committee agrees with Mr Walsh, Mr Willson and Council’s traffic engineers that daily traffic volumes would be considered acceptable. The fundamental difference with Mr Maina’s approach related to his determination of an acceptable environmental capacity for Hartley Street, which was principally based on the fact that the roadway abuts the footpath and as such, 660 as opposed to 1,000 vehicles per day is more appropriate and his traffic generation rates were slightly higher.

In raising the potential for increased speed, no submitter indicated speed along Hartley Street was currently an issue and, in any event, unless there was evidence before the Committee that speed is or has been a factor in the past, the Committee can place little weight on that assertion. Further, the traffic surveys suggest speeding would not be an issue along Hartley Street.

With regard to the submission that traffic be funnelled to South Road, that is not before the Committee and it is difficult for it to make such a recommendation when there is very little evidence to back it up. It is incumbent on the Committee to determine whether the access arrangements are acceptable, and in this case, the Committee is comfortable that they are. The conditions pertaining to traffic will ensure traffic and access issues can be appropriately addressed.

(iii) Findings

The Committee finds:

- Residential development on the subject land can be comfortably accommodated by the surrounding streets, including Hartley Street.
- Car and bicycle parking can be appropriately provided.
- There are no traffic, car parking or access issues that preclude the approval of the proposal.

⁴⁷ D3.014, p106

7 Public open space contribution

This chapter provides a response to whether the Governor in Council has the power to determine how a public open space contribution (POSC) might be made, and if so, in what form.

7.1 The question

Clause 53.01 of the Planning Scheme establishes the requirement to make a POSC. It provides:

Public open space contribution and subdivision

A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to this clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If no amount is specified, a contribution for public open space may still be required under section 18 of the Subdivision Act 1988.

The subdivision application, being a proposal to subdivide the subject land, triggers this requirement.

Council and the Applicant did not agree on the proper construction of this provision.

The legal question to be considered by the Committee was:

In Permit Application No. 5/2023/425/1, does the Governor in Council have the power to determine:

- whether a public open space contribution is to be provided by land, cash or a combination of the two; and
- the location of the land, where it has determined that a public open space contribution in land is to be made;

under clause 53.01 of the Bayside Planning Scheme in respect of the proposed subdivision of the land situated at 47 South Road, Brighton? ⁴⁸

The Governor in Council has by reason of the referral under clause 58 of Schedule 1 of the *Victorian Civil and Administrative Act 1998* (VCAT Act) and under clause 61(1)(b) of Schedule 1 of the VCAT Act, the power to determine the two appeals and make any orders in relation to the proceeding that could have been made by the Victoria Civil and Administrative Tribunal (Tribunal).

7.2 Submissions

(i) Council

Council submitted:

- on the proper construction of clause 53.01, only Council can decide the manner in which the POSC can be made
- this decision cannot be the subject of review by the Tribunal (or by the Governor in Council following a proceeding being called-in from the Tribunal)
- if it decides the contribution is to be made in the form of land, it is also entitled to specify which land is to be the subject of the contribution, and that this further election cannot be the subject of review.

⁴⁸ D22

More specifically, Council submitted the language of section 18A of the *Subdivision Act 1988* (Subdivision Act) and clause 53.01 make it clear the:

- requirement for public open space is imposed by and given to the “Council”
- use of the word “Council” rather than responsible authority is significant because:
 - the Subdivision Act and the Planning Scheme draw a distinction between the term “responsible authority” and “Council”
 - section 18A and clause 53.01 confer a right on Council (as distinct from the Responsible Authority) to seek a POSC of an amount specified in the Planning Scheme, and in a location to be determined by Council.

Council relied on *Clare v Maroondah CC* [2008] VCAT 606 (*Clare*) where the Tribunal concluded:

... the decision of the council to choose the nature of the public open space contribution is not subject to review by this tribunal, except on the basis that the decision that is so unreasonable that no reasonable council could have made the decision according to the Wednesbury case principles.

Council submitted:

- if *Clare* is correct, the Governor in Council has no power to consider the validity of the Council’s decision to elect the manner and location in which the open space requirement is satisfied
- even if *Clare* is not correct, the weight of Tribunal authority favours the conclusion that the decision of the Council as to the manner and location in which the requirement for public open space is satisfied should:
 - be given the strongest weight
 - only be varied in the rarest of cases.

Council then took the Committee to a series of Tribunal decisions which it said supported its position and identified a series of key propositions made, including:

In *Trethowan v Mornington Peninsula SC* [2002] VCAT 1377 (*Trethowan*) Senior Member Byard said at [26-27], [31] and [32]:

26. The SD Act provisions clearly preserve the discretion in the council to decide whether a requirement will be imposed, the form of the requirement as to land, cash or combination, and if land, which land.
27. By contrast, Clause 52.01 removes the discretion as to whether there will be a contribution by making it mandatory. Furthermore, it does not spell out in words who has the choice as to whether the contribution will be in land or cash or a combination, and it does not spell out in words who can say which land is to be contributed if the contribution is to be made in that form.
- ...
31. This argument rather overlooks the purposes and policies behind provisions like Clause 52.01 and s 18 SD Act. Whether explicit or implicit, I think the policy behind such provisions is clear enough. It is in the interests of good planning, and in the public interest, that provision should be made for public open space for recreational purposes when subdivision increases the demand and need for such facilities. It is destructive of such policies if the choice of mode of contribution, and the location of land where it is the form of contribution, is transferred into the discretion of the subdivider. ...
- ...
33. A further point can be raised in relation to the question of which land will be contributed, if the contribution is to be wholly or partly in the form of land. If the option is with the subdivider, the subdivider may nominate land that is quite unsuitable or unusable for the purpose of public open space. For example, the

subdivider might nominate land that is under water, or that is contaminated, or that is dangerous due to old mine shafts or that is remote and inaccessible and so inconvenient that people will not use it.

In *Capital Benefits (Mont Albert) Pty Ltd v Whitehorse CC* [2008] VCAT 2436 (*Capital Benefits*) at [22] the Tribunal in referencing *Trethowan* said:

... unless there are legitimate reasons, the location and or decision about alternative contributions should primarily lie with the Council.

In *Inland Consultants Pty Ltd v Mildura RC* [2005] VCAT 994 (*Inland*) Senior Member Rickards emphasised a point that is attributed to *Trethowan* at [13] stating that:

It is a matter for a Council as to how a contribution is to be provided, whether by way of land, cash or a combination of both (*Trethowan v Mornington Peninsula SC* [2002] VCAT 1377).

In *Stubbs Street Kensington Pty Ltd v Melbourne CC* [2009] VCAT 1947 at [15] Deputy President Gibson stated:

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.

Member Deidun's decision in *Boster Developments Pty Ltd v Cardinia SC* [2013] VCAT 657 (*Boster*) where he commented on *Trethowan* and said at [13]:

It follows from this analysis that Council has significant powers in requiring land, or cash, as a public open space contribution. It also falls to the discretion of the Council, and upon review to this Tribunal, as to where that land should be located. But when the Tribunal exercises that discretion, as I have been asked to do in this case, it is my view that the opinion of Council of where public open space is preferred to be located, carries very strong weight. That is the case not only because they have oversight for the planning of open space provision across a broader precinct, particularly where a growth corridor such as is the context here is concerned, but also because ultimately it is the Council that must manage and maintain the land that I decide is appropriate to be set aside as public open space.

Council noted the:

- position in *Trethowan* and adopted in *Inland* has been adopted by the Tribunal in several cases including *Johnson v Macedon Ranges SC* [2009] VCAT 2170 at [40], *Graovac Developments Pty Ltd v Ballarat CC* [2015] VCAT 504 at [17-18], *Buckhurst Developments Pty Ltd v Minister for Planning* [2015] VCAT 1048 at [13]
- reasoning of both *Trethowan* and *Clare* has been adopted in *Peter J Mulcahy and Associates Pty Ltd v Whittlesea CC* [2013] VCAT 375 at [40-41].

Council submitted that even if the Tribunal (and in this case the Governor in Council) has the power to revisit the Council's decision on the manner in which the open space requirement is to be met, there is no basis to depart from the Council's position because:

- adopting the approach taken by the Tribunal in *Boster*, it is the view of the Council that should be preferred over the Applicant's view
- Council's approach to the manner in which the open space should be delivered is correct and consistent with broader policy in this case.

(ii) The Applicant

The Applicant submitted:

- the Governor in Council can decide the manner in which the POSC can be made
- the determination must be made in the context of the Permit application pursuant to which the relevant subdivision is proposed
- should it be determined that the POSC should be made in the form of land, the location and configuration of that land as part of the broader subdivision is a matter to be determined in the context of the relevant Permit Application.

The Applicant submitted the answer to the legal question involved an exercise in statutory construction. That is, consideration of the text, context, and purpose of clause 53.01, having regard to the Planning Scheme, PE Act, Subdivision Act and VCAT Act ⁴⁹. Relevantly, in this respect, it said the PE Act and Subdivision Act should be considered cognate legislation ⁵⁰.

Planning Scheme

The Committee was taken to five key provisions within the Planning Scheme that the Applicant said informed the proper construction of clause 53.01. These were:

- clause 53.01 itself which establishes the requirements to make a POSC
- clause 19.02-6L-02 (Public open space contributions) which applies to permit applications for subdivision, and which seeks to provide guidance to decision makers concerning the circumstances in which a POSC should be made
- clause 56 which indicates that the appropriate provision of public open space is a matter to be considered by a responsible authority when considering a permit application for subdivision
- clause 59 (concerning VicSmart applications) which includes provisions that require a responsible authority to consider POSC requirements when deciding particular types of permit applications
- clause 65 which includes decision guidelines that a responsible authority must consider when deciding whether to grant a permit and includes clause 53.01.

The Applicant submitted the above provisions supporting the construction that the POSC requirements in clause 53.01 are matters that can and must be considered by a responsible authority in deciding a permit application.

VCAT Act and PE Act

The Applicant submitted, and it was not disputed, that in exercising the call-in power (in clause 58 of Schedule 1 of the VCAT Act), the Minister, and Governor in Council, are vested with the same decision-making remit as the Tribunal.

Subdivision Act

In relation to the Subdivision Act, the Applicant said the POSC requirement does not arise under this Act but given the Subdivision Act is properly considered cognate legislation with the PE Act, it is important to consider how public open space (and POSCs) are addressed under that enactment. Key provisions identified by the Applicant were:

⁴⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355

⁵⁰ *Fletcher v Maroondah CC* [2006] VCAT 2205 at [15]

- section 3 which defines ‘public open space’
- section 18 which concerns requirements for the provision of POSCs in circumstances where a requirement is not specified in the Planning Scheme
- section 18A which applies when a requirement for public open space is specified in the Planning Scheme and establishes procedural and temporal requirements relating to POSCs required by a planning scheme (and does not itself impose an obligation to make a POSC)
- section 19 which concerns the valuation of land for the purposes of contributions in accordance with sections 18 and 18A
- section 20 which concerns what a Council must do with financial contributions and land contributions that it collects – it requires land or cash contributions collected by the Council be used for the purpose of providing, acquiring or embellishing existing public open space
- section 24A which concerns the registration of land parcels required or authorised to be vested in an authority, including land set aside as a ‘reserve’ which (according to the definition of ‘reserve’ in section 3) includes public open space.

In summary, the Applicant submitted the Subdivision Act:

- empowers a Council acting as responsible authority to require a POSC in circumstances where a POSC requirement is not specified in a planning scheme
- establishes a procedural and administrative framework for the collection and management of public open space contributions, whether arising under section 18, or under the Planning Scheme.

Applicant’s position

The Applicant submitted clause 53.01:

- is part of the Planning Scheme that must be considered by a responsible authority, and by the Tribunal on review, in determining whether to grant a permit
- the satisfaction of a requirement in clause 53.01 is a mandatory relevant consideration in respect of a decision to grant a permit relating to the subdivision of land
- this is illustrated by the facts of this case, whereby Council, exercising its powers as responsible authority, had regard to the POSC requirements of clause 53.01 in determining to refuse the applications.

The Applicant submitted:

Second, the Planning Scheme provides explicit guidance to responsible authorities, concerning the manner in which POSCs should be made within the municipality. In particular, clause 19.02-6L-02 principally operates as a guide to the exercise of discretion by responsible authorities in the determination of applications of this type.

Third, while clause 53.01 directs that a POSC be made to the Council, it does not prescribe that it is the Council that is entitled to dictate the nature of a POSC in any given circumstance. Instead, given that the obligation is said to be triggered upon a proposal to subdivide land, and given that a proposal of this type is advanced by way of permit application, it is properly the function of the responsible authority to determine the manner in which a POSC contribution should be made to the Council in any given circumstance. Strong contextual support for this construction is found in those provisions concerning

POSCs made in respect of VicSmart Applications, and those concerning POSCs made under the Subdivision Act ⁵¹.

Importantly, the Applicant said:

- the Tribunal can have regard to any matter the responsible authority had regard to in making its decision and “*has all the functions of the decision-maker*” meaning it (and the Governor in Council) have jurisdiction to review the same matters that informed the Council’s decision
- where a responsible authority includes a permit condition requiring a POSC be made, and specifies the means by which that contribution should be given effect, it follows that the condition is:
 - imposed through a valid exercise of the responsible authority’s powers ⁵²
 - amenable to review under section 80 of the PE Act ⁵³
- there is no statutory text to support Council’s submission that Council ‘alone’ can determine, within a proceeding concerning review of responsible authority’s permit decision, the appropriate form of a POSC.

Finally, the Applicant submitted:

Seventh, the Applicant’s preferred construction supports the implementation of the purposes of the PE Act. Relevantly, it is practical for a responsible authority to consider the appropriate form of a POSC required by the Planning Scheme as part of a planning permit decision, because this provides for a decision framework that:

- a) integrates and balances relevant planning objectives;
- b) provides for third party notice and referral authority input;
- c) includes a framework of relevant statutory considerations to guide the decision; and
- d) includes review rights.

Indeed, Deputy President Gibson in *Hassta Holdings Pty Ltd v Maroondah CC* went so far as to conclude that the only way a POSC requirement can be imposed under either the PE Act or Subdivision Act is via a planning permit.

If contrary to the Applicant’s construction, the decision as to the form of POSC is not a decision to be made by a responsible authority, but rather a decision of the ‘municipal council’ acting beyond the ambit of the relevant permit process, then the Planning Scheme and PE Act provide no statutory framework whatsoever for the consideration of the matter. Divorced from a planning permit process, the considerations to inform any ‘decision’ under clause 53.01 would be entirely at large.

Response to Council’s position

The Applicant agreed with Council that *Trethowan* is authority for the proposition that clause 53.01 (then clause 52.01) does not allow the permit applicant to elect a contribution is to be made by way of land or by money or by a combination of land and money. However, the Applicant took the decision further and highlighted paragraphs 36 to 38 which said:

36. In my view Mr Tweedie’s argument here is clearly astray. If the Responsible Authority considered that the land nominated was unsuitable, but that the proposed subdivision was appropriate in other respects, then its proper course would be, not to refuse the application absolutely, but to grant it subject to a condition specifying suitable land and requiring it to be contributed. This could be done by means of a valid permit condition. The subdivider would have a right to apply to this Tribunal for a review of such a condition under s 80 PE Act. By that

⁵¹ Section 18

⁵² *Trethowan*

⁵³ *Jones v Port Phillip CC [2020] VCAT 714*

- means finality could be achieved. It would not be confronted with an unfair and oppressive series of refusals of specific applications as advocated by Mr Tweedie.
37. I believe the same principle applies where the dispute is not about which piece of land is to be contributed, but whether cash should be contributed rather than land. In the present case, I consider it appropriate for the Responsible Authority, if the subdivision is acceptable from other points of view, to determine to grant a permit subject to a condition requiring land rather than cash and specifying which land. The matter having come before the Tribunal on review, the Tribunal, standing in the shoes of the Responsible Authority, is in a similar position. If it considers it appropriate, it can and should impose a similar condition.
38. The question of the validity of such a condition was argued at the hearing. Such a condition clearly satisfies the normal tests of condition validity. In particular, it is directly related to the permission being granted and to the planning purpose of ensuring the provision of suitable open space to meet the increased requirement occasioned by the subdivision⁵⁴.

The Applicant submitted *Trethowan* supported the construction that the responsible authority and Tribunal, on review, has the jurisdiction to review and determine the appropriate form of a POSC.

Referencing *Clare*, the Applicant said the decision should be taken as *obiter* and not determinative of the Tribunal's decision. This was because the permit applicant did not make submissions on whether Council's decision on the issue of the POSC was able to be reviewed by the Tribunal. The Applicant submitted:

Accordingly, the Tribunal's approach in *Clare* may be taken as *obiter*, and not determinative of the Tribunal's decision. Notwithstanding this limitation, the Applicant respectfully submits that the conclusion of the Tribunal in *Clare* at [28]-[29] was unsound. The Tribunal said at [28] that "[t]here is no provision in the *Planning and Environment Act 1987* for review of a such a decision [referring to a 'decision' under cl 52.01 of the scheme] operating independently of the permit under the review provisions in sections 77, 79, 80 or 82." However, the Tribunal in *Clare* was constituted to undertake a review of a permit decision under s80 of the PE Act and to determine the appropriateness of a condition imposed on that permit by a responsible authority concerning public open space in satisfaction of a requirement at clause 52.01 of the scheme. Accordingly, the Tribunal's reasoning at [28] appears to have been directed to the wrong question⁵⁵.

Finally, the Applicant referenced the decision of *Buckhurst Developments Pty Ltd v Minister for Planning* [2015] VCAT 1048 where the Tribunal said:

Clause 52.01 requires an open space contribution of a fixed amount to be provided to the council. The schedule to clause 52.01 does not specify whether the contribution is to be by way of land or cash or some combination thereof. However, clause 52.01 does say unequivocally that the contribution must be to the council. Thus, where the responsible authority may be someone other than the council, it is nevertheless the council to whom the contribution must be made. It is also the council who should have a say in whether the contribution should be by way of land, cash, or a combination of both. This is not something that lies within the discretion of the permit applicant⁵⁶.

The Applicant said the Tribunal's decision does not stand for the proposition that it is the Council (as opposed to the responsible authority) that should determine the nature of the POSC. Instead, given the Tribunal's express reliance on *Trethowan*, the decision supports the view that the ultimate determination of the issue is a matter for the responsible authority.

⁵⁴ D28

⁵⁵ D28

⁵⁶ Footnote in original: "See *Trethowan v Mornington Peninsula SC* [2002] VCAT 1377

7.3 Discussion

The parties agreed, as does the Committee, with three key propositions:

- the POSC must be made to Council – the requirement is mandatory
- the discretion as to the mode of contribution does not lie with the Applicant
- even if Council is not the responsible authority, it is entitled to ‘*have a say*’ as to the nature of a POSC (given that it is the ultimate recipient of that contribution).

It was agreed that in exercising the call-in power (clause 58 of Schedule 1 of the VCAT Act), the Minister and the Governor in Council are invested with the same decision-making remit as the Tribunal. The question which remains unresolved is whether the Governor in Council has the power to review and determine the provision of the POSC, and if so, the location of the land where it has determined that a POSC in land is to be made.

The Applicant prefers to make a cash contribution rather than a contribution in the form of land. Council does not want to accept cash. It seeks the contribution in the form of land and seeks a particular area of land to be set aside for the contribution.

Responding to a legal question invariably involves an exercise in statutory construction which in this case, demands an analysis of the words used in the relevant section of the statute, and an examination of their meaning, when read as a whole. To determine the question of whether the Governor in Council has the power to determine the POSC, it is necessary to forensically examine the relevant parts of the Planning Scheme, PE Act and Subdivision Act. Relevantly, the Committee agrees with the Applicant that the PE Act and Subdivision Act should be considered cognate legislation⁵⁷.

Clause 53.01 of the Planning Scheme establishes the requirement to make a POSC and provides:

Public open space contribution and subdivision

A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to this clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If no amount is specified, a contribution for public open space may still be required under section 18 of the Subdivision Act 1988.

The subdivision application, being a proposal to subdivide the subject land, triggers this requirement. The clause identifies Council as the entity to which the POSC must be made but is silent on which entity is able to determine which form of POSC is to be adopted.

Section 18(1) of the Subdivision Act is useful to highlight, by way of a comparison, given it is the equivalent provision which applies if clause 53.01 does not. It reads:

18 Council may require public open space

(1AA) Subject to subsection (1AB), this section applies if a requirement for public open space is not specified in the planning scheme.

...

(1) A Council acting as a responsible authority or a referral authority under the Planning and Environment Act 1987 may require the applicant who proposes to create any additional separately disposable parcel of land by a plan of subdivision to —

⁵⁷ *Fletcher v Maroondah CC* [2006] VCAT 2205 at [15]

- (a) set aside on the plan, for public open space, in a location satisfactory to the Council, a percentage of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or
- (b) pay or agree to pay to the Council a percentage of the site value of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or
- (c) do a combination of (a) and (b) so that the total of the percentages required under (a) and (b) does not exceed 5 per cent of the site value of all the land in the subdivision.

Reflecting on both the clause 53.01 and Section 18 provisions is helpful. Council submitted the language of clause 53.01 and section 18 make it clear the requirement for a POSC is imposed by and given to the Council. While the language in both instances makes clear the POSC must be *given to* the Council, it does not make clear the requirement is a requirement that must be *imposed by* Council. Equally, clause 53.01 does not specify which entity can determine how the POSC is to be made.

However, it becomes apparent after an examination of relevant provisions in the Planning Scheme and section 18 of the Subdivision Act, that clause 53.01 must be considered by a responsible authority in determining whether to grant a permit.

Clause 19.02-6L-02 (Public open space contributions) is instructive. It applies to permit applications for subdivision and seeks to provide guidance to decision makers concerning the circumstances in which a POSC should be made by either land or cash. Relevantly, it includes a 'policy application' and 'objective':

Policy application

This policy applies to applications for the subdivision of land where a public open space contribution is required.

Objective

To identify when and where land contributions for public open space may be sought in preference to financial contributions or vice versa.

Importantly, clause 19.02-6L-02:

- seeks to guide the exercise of discretion by the responsible authority in relation to a permit application
- envisages that the responsible authority has a discretion to exercise in relation to the appropriate form of the POSC.

This beckons the question, why would the Planning Scheme contain such a policy provision if not to guide the exercise of discretion by the responsible authority? If Council is correct, then this specific policy would have no purpose.

Clause 56.05-2 (Public open space provision objectives) is important because it seeks to guide the exercise of discretion. Its purposes include:

To provide a network of quality, well-distributed, multi-functional and cost-effective public open space that includes local parks, active open space, linear parks and trails, and links to regional open space.

To provide a network of public open space that caters for a broad range of users.

To encourage healthy and active communities.

To provide adequate unencumbered land for public open space and integrate any encumbered land with the open space network.

To ensure land provided for public open space can be managed in an environmentally sustainable way and contributes to the development of sustainable neighbourhoods.

It then identifies the matters which the responsible authority should consider in a subdivision application (Standard C13) and provides another clear link to the decision to be made by the responsible authority.

The Applicant highlighted the provisions in clause 59 of the Planning Scheme which require a responsible authority to consider POSC requirements when deciding particular types of permit applications. Clause 59 provides:

In assessing an application the responsible authority must consider as appropriate:

...

Appropriately accommodate private open space.

It is true, as Council highlighted, clause 59 applies to VicSmart applications. However, it is useful by way of a comparison and provides further support for the premise that a responsible authority must determine the appropriate means of the POSC. It requires a consideration of public open space as described in clause 53.01.

Equally, clause 65 assists in so far as it highlights that:

- the responsible authority must consider the matters set out in section 60 of the PE Act
- section 60 requires a responsible authority to consider, inter alia, “*the relevant planning scheme*” which includes clause 53.01.

Each of these ‘links’ contained in the Planning Scheme direct the responsible authority to consider the operation of clause 53.01. These provide firm contextual support for the proposition that in considering a proposal of this type, the responsible authority (that is, the Tribunal or Governor in Council in this case) does have the power to review and determine the appropriate means by which the POSC should be made.

Thus, in undertaking a similar analysis with respect to the Subdivision Act, it becomes clear that, because section 18(1) unambiguously identifies the Council acting as a responsible authority, there is strong contextual support that Council acts in same capacity in the context of the Planning Scheme.

Section 18 enables Council “*acting as a responsible authority*” to require a POSC in circumstances where a POSC requirement is not specified in a Planning Scheme. In doing so, it establishes a procedural and administrative framework for the collection and management of POSCs, whether arising under section 18, or under the Planning Scheme.

Overall, the Committee prefers the position advanced by the Applicant which supports the implementation of the purposes of the PE Act. Relevantly, it is practical for a responsible authority to consider the form of a POSC required by the Planning Scheme as part of a planning permit decision. This provides for a decision framework that:

- integrates and balances relevant planning objectives
- provides for third party notice and referral authority input
- includes a framework of relevant statutory considerations to guide the decision
- includes review rights.

Indeed, for the reasons set out in *Hassta Holdings*, Deputy President Gibson found that if land is not set aside on the proposed plan of subdivision for public open space, then any contribution

required under clause 53.01 should be specified in a condition in the planning permit. This is to ensure the permit applicant can review the way in which the POSC will be made.

If the decision on the form of POSC is not a decision able to be determined by a responsible authority, but rather remains a decision of the Council only, then the Planning Scheme and PE Act provide no statutory framework whatsoever for the consideration of the matter. Removed from a planning permit process, the considerations to inform any 'decision' under clause 53.01 would be entirely at large.

The position of the Committee is supported by the decision in *Trethowan* where the Tribunal found that the responsible authority, and Tribunal on review, has the jurisdiction to review and determine the appropriate form of a POSC required by the Planning Scheme. The Tribunal rejected the argument by the permit applicant that the proper course for a responsible authority, if not satisfied in respect of the proposed mode of POSC, was to refuse the permit, rather than modify the proposal by way of permit condition. The Tribunal preferred the view that the proper course for a responsible authority is to impose a condition which would then be amenable to review by the Tribunal.

Finally, in relation to *Clare*, which is the decision Council most principally relied on to support its position, the Committee considers it should not be preferred in light of other more considered cases where the issue was analysed in detail by the Tribunal. The decision was not informed by a contested argument, as compared to for example, the clear and detailed analysis by *Hasta* and *Trethowan*. In considering these two lines of authority, it is clear the *Hasta* and *Trethowan* decisions should be preferred.

7.4 Findings

The Committee finds:

- The answer to both parts of the legal question:

In Permit Application No. 5/2023/425/1, does the Governor in Council have the power to determine:

- *whether a public open space contribution is to be provided by land, cash or a combination of the two; and*
- *the location of the land, where it has determined that a public open space contribution in land is to be made;*

under clause 53.01 of the Bayside Planning Scheme in respect of the proposed subdivision of the land situated at 47 South Road, Brighton?

is 'yes'.

- Properly construed, the requirement in clause 53.01 of the Planning Scheme allows a decision maker, including the Governor in Council, to determine:
 - the type of public open space contribution to be made to the Council in the context of any given application to subdivide land
 - if the contribution is to be made (wholly or in part) in the form of land, the location and configuration of that land is within the broader subdivision.
- The Committee's construction of clause 53.01 allows for these matters to be determined by Governor in Council in the context of the application that gives rise to the POSC.

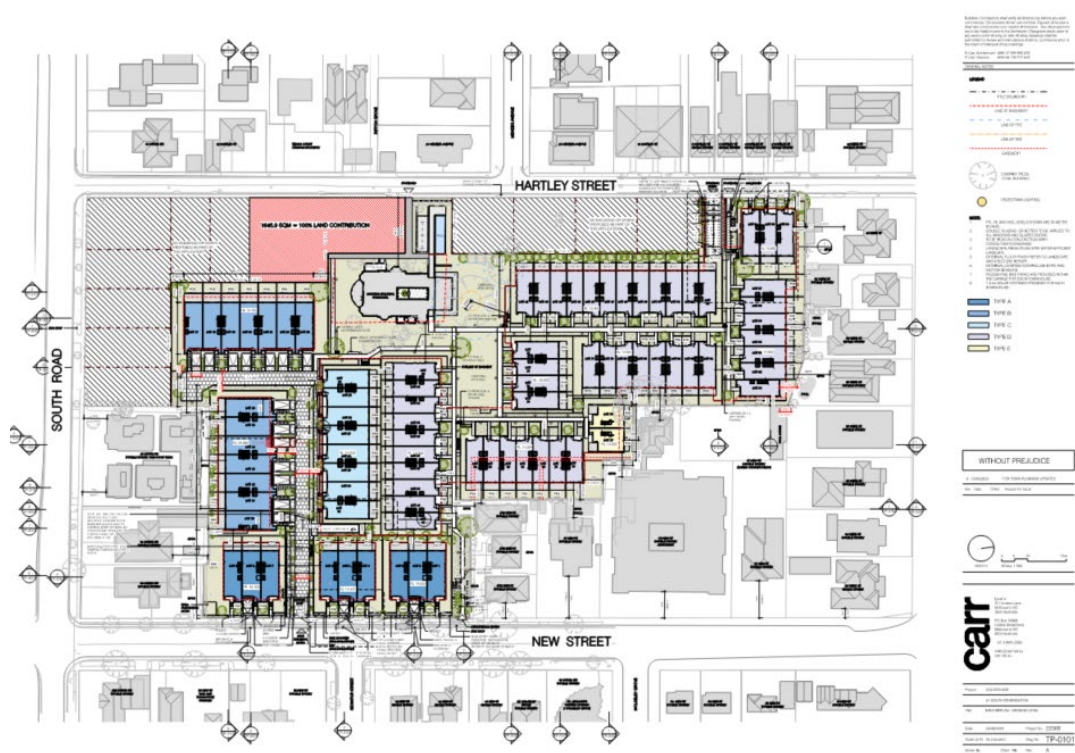
7.5 Form of public open space contribution

(i) Evidence and submissions

In considering this issue, the Committee had regard to relevant submissions, planning and urban design evidence, Bayside Planning Scheme clauses 02.03-8, 19.02-6L-02, and 53.01, and the Bayside Open Space Strategy.

The Applicant advised it preferred a financial contribution would be the appropriate form of contribution to public open space. Notwithstanding this, it submitted a ‘without prejudice’ alternative masterplan indicating the potential extent and location on Hartley Street of a contribution in the form of approximately 1,645 square metres of land equal to five per cent of the site⁵⁸.

Figure 11 Applicant’s ‘without prejudice’ alternative masterplan with POS highlighted in red⁵⁹



Ms Ring provided a comprehensive assessment and justification for the Applicant’s preference for a financial rather than land contribution to public open space and concluded a financial contribution was appropriate for the following reasons:

- in accordance with clause 19.02-6L-02 of the Bayside Planning Scheme, the site is within 400 metres of public open space and therefore a financial contribution is preferred
- the subject site is outside a ‘Moderate’ and ‘Key Focus Residential Growth Area’
- a land contribution would be substantially smaller than the minimum 0.9 hectares required
- a land contribution was not aligned with the *Bayside Open Space Strategy*⁶⁰.

⁵⁸ D13

⁵⁹ D13

⁶⁰ D17, paras 193 - 212

In closing, the Applicant filed a proposal to surrender approximately 287 square metres of land. This land, in the form of a 1.2-metre-wide strip for the widening of the majority of Hartley Street, is to be vested in Council and was in addition to the contribution to public open space required by clause 53.01.

Council submitted the perceived amenity shortfall with respect to some dwellings, in particular Standard B29, “*goes directly to Council’s reasoning*” for a land contribution ⁶¹.

Council’s submission contended for a land contribution and stated:

One issue of concern is that almost a quarter of the proposed 84 dwellings provide a questionable and a significantly compromised level of amenity for future residents. The inadequate amenity of these dwellings **goes directly to Council’s reasoning** for the open space contribution to be provided by way of a land contribution pursuant to Clause 53.01 of the Scheme ⁶². (Committee emphasis)

Further, Council’s email of 4 June 2023 noted:

The provision of the POS **is considered to be critical** as it will ensure that the future residents of the unit development will have access to quality open space given the identified questionable quality of the private open space areas associated with a number of the proposed dwellings ⁶³. (Committee emphasis)

Council submitted that a land contribution, and preferably a northern location on Hartley Street, would benefit residents to the north in areas identified as deficient in open space. Council submitted a diagram to express this.

Figure 12 Council diagram indicating benefit to residents north of the subject site ⁶⁴



⁶¹ D32, para3.14

⁶² D32, para 3.14

⁶³ D40

⁶⁴ D50

Council's instructions to Mr Campbell did not include consideration or justification of a land versus cash contribution. Further, in cross examination, Mr Campbell provided no urban design justification for land and expressed "*this was a matter for Council*".

Council disputed the location of the Applicant's proposed land contribution. Council required the contribution be located north of the communal open space. Mr Campbell expressed a preference for a third option of a northern location split on either side of the communal open space of the proposed development.

Council's reasons for rejection of the Applicant's proposed location were:

- a northern location would provide an opportunity for passive surveillance
- a northern location would benefit residents north of the site in an area identified as being deficient in open space
- the Applicant's location would encumber the public open space with a requirement to provide views to Maritima House
- the Applicant's proposal created a hidden corner with CPTED impacts.

In response to a question from the Committee, the Objector Group responded it had a "*slight preference, not a strong preference*" for contribution in the form of land and initially expressed a preference for the Applicant's proposed location. It later changed its mind and indicated it supported Council's preference. Otherwise, the Objector Group made no other submissions about the form or location of the contribution.

While Mr Altson's submission was primarily concerned with traffic in Hartley Street and the provision of pedestrian amenity and safety, he proposed that a strip of the subject site along Hartley Street be added to Hartley Street to widen the road reserve and allow for a footpath and landscape verge. Mr Altson suggested this land could potentially be considered, in part or whole, as a contribution to public open space.

(ii) Discussion

The Committee considers the clearest guidance on the form of the POSC is at clause 19.02-6L-02 Public open space contributions of the Planning Scheme. The objective of this clause is:

To identify when and where land contributions for public open space may be sought in preference to financial contributions or vice versa.

Further, the clause strategies direct:

Provide funding towards the acquisition of land for new usable public open space in areas that are currently deficient in public open space provision, as identified in the Deficiencies in open space in Bayside map forming part of this policy.

Council provided plans that highlighted existing residential access to public open space. One of these plans at Figure 13 clearly indicates the subject site, in light blue, is not within the area that is deficient in open space.

Figure 13 Existing residential access to public open space plan ⁶⁵

The Committee has examined Council's position of compromised amenity for future residents (discussed in Chapter 4.3), where in summary it noted:

- dwellings 11-16, and 32-41, and 62 have convenient access from a living room to private roof terraces (Standard B28) and can be considered to comply with Standard B29
- dwelling 63 complies with Standard B29
- dwelling 10 does not comply with Standard B29, however these residents will enjoy access to the substantial communal open spaces.

In addition to the private amenity of the dwellings, the Committee considers future residents of the proposal will enjoy access to the substantial communal open space. Residents of the development are expected to derive little additional utility from the public open space area, either in the location provided by the Applicant or that sought by Council.

Given the compromised amenity is limited to a single dwelling in a very high amenity development, the Committee is not persuaded by Council's contention of inadequate dwelling amenity as a reason for a land contribution.

The Committee notes that both clause 19.02-6L-02 and the schedule refer to a minimum area of 9,000 square metres. The five per cent land contribution would be 1,645 square metres, which is minor and will not result in any meaningful opportunity to be an area of destination or character. The Committee notes the Objector Group, who Council suggested would be the beneficiaries of a land contribution, expressed only a slight preference for a land contribution.

Council did not provide any specific strategy, policy or stakeholder consultation justification for a land contribution in its preferred location.

⁶⁵ D50

The Committee agrees with Ms Ring's assessment that Council's proposed land contribution does not align with Council's *Bayside Open Space Strategy*, in particular:

- It will not be the type of park that would address the suburb's key deficiencies – that is, a large park.
- It will not address the need for the creation of open spaces in the Martin, Bay and Church Street Activity Centres – areas which are Moderate or Key Focus Residential Growth Areas.
- It will not be part of an existing or proposed 'trail', that is, in the nature of a chain of open space. It is not adding the size or extent of an existing open space⁶⁶.

Further, the Committee anticipates there could be design and ongoing management challenges with the public open space area, including:

- the small area and isolated location will mean it does not have sufficient 'critical mass' to ensure a range of appropriate activities and facilities, and sufficient usage to avoid the potential for problematic behaviour and disturbance
- it would result in an awkward boundary or fence condition between public open space and private communal open space in both the Applicant and Council preferred location
- visibility would be limited to short sections of Hartley Street and Menzies Avenue.

In summary, the Committee is persuaded by the following reasons against a land contribution:

- Bayside Planning Scheme clause 19.02-6L-02 and schedule provide clear guidance that a cash contribution is preferred
- Council's preferred land contribution is about one-fifth of the minimum area required in clause 19.02-6L-02
- Council's preferred land contribution from the subject land would not fund acquisition of land in an area deficient in open space
- the subject land is already located diagonally opposite substantial public open space, South Park Reserve, which provides substantial outdoor amenity
- residents of the subject land will enjoy a high degree of outdoor amenity in the private yards and roof decks, landscaped pathway network and communal open space
- Council's preferred land contribution is unlikely to be an additional amenity to residents of the subject land or its neighbourhood, and was not strongly advocated for by existing residents
- Council's preferred land contribution would not contribute to improvement in any identified deficient areas of Bayside
- Council's preferred land contribution is not aligned with the *Bayside Open Space Strategy*
- Council's preferred land contribution is small and isolated and may be likely to present management and safety risks.

The Applicant agreed to Mr Altson's suggestion to surrender a strip of land to widen the Hartley Street road reserve⁶⁷. This land, in the form of a 1.2 metre wide strip for widening the majority of Hartley Street along its eastern side, would be vested in Council. While not included as a contribution to public open space, the Committee considers this proposal is a material contribution and improvement to an existing deficiency of the public realm. If considered as an

⁶⁶ D17, para 210

⁶⁷ D55

alternative to the pocket park land contribution, the wider verge to Hartley Street is superior. A condition to the subdivision permit has been added to provide for this.

Further to the issue of form of the POSC, the Committee considers the disputed location of a land contribution. Given the Committee's recommendation, the question of location is limited to a situation where the Governor in Council finds in favour of Council for the form of the POSC but seeks the recommendation of the Committee regarding the location. In this regard, Council noted:

Council's preference is that the public open space starts north of the communal open space and runs north. The provision of the public open space on the Subject Land in this manner will create an opportunity for the redesign of Townhouses #42 - #53, so that they front the public open space, providing an opportunity of passive surveillance of the public open space⁶⁸.

The Committee notes this benefit is essentially the same as the Applicant's proposed location and, in this regard, there is no advantage to the Council's location.

In cross examination, Mr Campbell agreed the location of the public open space was a matter of preference rather than acceptability. While visibility from Menzies Street would be improved, this location does not appear to have significant advantages over the location shown in the Alternative Masterplan. Mr Campbell's location has the disadvantage of awkwardly splitting the public open space into two blocks either side of the privately held communal open space.

Council presented an aerial map with marked up blue circles and submitted that a northern location would benefit residents north of the site⁶⁹. The Committee notes that given the size of the proposed land contribution, there would be no change or reduction to the area identified as deficient in public open space.

Council submitted the Applicant's location would encumber the public open space with a requirement to provide views to Maritima House. Clause 19.02-6L-02, which lists encumbrances, does not include views of a heritage place as an encumbrance. In fact, Clause 15.01-5L includes protecting views of a heritage place as a function of public open space. The Committee was not convinced by Council's submission in this regard.

Council submitted the shape of the Applicant's proposal created a hidden corner with potential CPTED impacts. The Committee considers this corner could be improved, but CPTED issues remain for any land contribution of this size in Hartley Street.

The Committee is not convinced that either of the locations preferred by Council or Mr Campbell was superior to the Applicant's proposal.

(iii) Findings

The Committee finds:

- The contribution to public open space in the form of the value of five per cent of the land as a cash contribution in lieu of land, is supported, subject to it being the value of the whole of the land before the 1.2 metres strip of land along Hartley Street is surrendered.
- If this finding is not supported, the location of the land as proposed by the Applicant is acceptable.

⁶⁸ D32, para 6.5

⁶⁹ D50

- The surrender of a 1.2 metre strip of land for the widening of the Hartley Street eastern verge is supported, which is included in Condition 1a of the subdivision permit.

8 Permits and conditions

8.1 Summary of considerations

Clause 71.02-3 of the Planning Scheme requires a responsible authority considering a permit application to take an integrated approach, and to balance competing objectives in favour of net community benefit and sustainable development.

Clause 65 of the Planning Scheme states:

Because a permit can be granted does not imply that a permit should or will be granted. The Responsible Authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.

The letter of referral from the Minister for Planning seeks advice from this Committee on whether the proposal provide acceptable outcomes.

Clause 65.01 requires the Responsible Authority to consider, as appropriate:

- the Planning Policy Framework
- the purpose of the zone, overlay or other provision
- the orderly planning of the area
- the effect on the amenity of the area
- factors likely to cause or contribute to land degradation, salinity or reduce water quality
- the extent and character of native vegetation, the likelihood of its destruction, and whether it can be protected, planted or allowed to regenerate

Other matters to be considered include:

- objections
- comments and decisions of referral authorities, including the Council
- other matters a Responsible Authority must and may take into account under section 60 of the PE Act, including the Victorian planning objectives and the economic, social and environmental impacts of the proposed use and development
- relevant submissions and evidence provided to the Committee.

In reviewing and balancing these considerations, the Committee concludes the subdivision and development applications have merit and provide for an acceptable outcome, subject to conditions. It therefore recommends the applications be approved subject to the conditions for each application as noted in Appendix E (Subdivision) and Appendix F (Development).

8.2 Recommendations to the Minister for Planning

Issue Bayside Planning Permit 2023/425/1 (VCAT reference P1597/2023) subject to the permit conditions in Appendix E.

Issue Bayside Planning Permit application 2023/335/1 (VCAT reference P1598/2023) subject to the permit conditions in Appendix F.

The public open space contribution to be made by the Applicant to Council be five per cent cash of the total value of the land (with that value including the 1.2 metre strip on the eastern side of Hartley Street) in accordance with Condition 1a of Appendix E.

Appendix A Terms of Reference

Version 2: Amended June 2023

Standing Advisory Committee appointed pursuant to Part 7, section 151 of the *Planning and Environment Act 1987* to advise the Minister for Planning on referred priority planning proposals.

Name

1. The Standing Advisory Committee is to be known as the 'Priority Projects Standing Advisory Committee' (the Committee).
2. The Committee is to have members with the following skills:
 - a. statutory and strategic land use planning
 - b. land development and property economics
 - c. urban design and architecture
 - d. heritage
 - e. civil engineering and transport planning
 - f. social impacts
 - g. environmental planning
 - h. planning law.
3. The Committee will include a lead Chair, Chairs, Deputy Chairs and not less than ten other appropriately qualified members.

Purpose

4. The purpose of the Committee is to provide timely advice to the Minister for Planning on projects referred by the Development Facilitation Program (DFP), or where the Minister has agreed to, or is considering, intervention to determine if these projects will deliver acceptable planning outcomes.

Background

5. The Victorian Government is committed to streamlining the assessment and determination of projects that inject investment into the Victorian economy, keep people in jobs and create homes for people. The planning system is an important part of supporting investment and economic growth in Victoria.
6. The DFP focusses on new development projects in priority sectors and/or projects that are in the planning system that face undue delays. These can include (but are not limited to) housing, mixed use, retail, employment, tourism, industrial and other opportunities.

Method

7. The Minister for Planning or delegate will refer projects by letter to the Committee for advice on whether the project achieves acceptable planning outcomes.
8. The referral letter must specify:
 - a. the specific issues the Minister for Planning seeks advice about
 - b. the mechanism of intervention being considered (for example, but not limited to, draft planning scheme amendment, call-in from the Victorian Civil and Administrative Tribunal, planning permit application)
 - c. whether submissions are to be considered by the Committee, and if so, how many are being referred, and
 - d. how the costs of the Committee will be met.

9. The letter of referral will be a public document.
10. In making a referral, the Minister for Planning or delegate must, either:
 - a. be satisfied that any proposed planning controls for the land make proper use of the Victoria Planning Provisions and are prepared and presented in accordance with the Ministerial Direction on The Form and Content of Planning Schemes, or
 - b. seek advice from the Committee on the drafting of the planning controls or permit conditions.
11. The Committee may inform itself in anyway it sees fit, but must consider:
 - a. The referral letter from the Minister for Planning
 - b. referred submissions
 - c. the comments of any referral authority
 - d. the views of the project proponent
 - e. the views of the relevant Council and
 - f. the relevant planning scheme.
12. The Committee is not expected to carry out additional public notification or referral but may seek the views of any relevant referral authority, responsible authority, or government agency.
13. The Department of Transport and Planning (DTP) will be responsible for any further notification required. New submissions, if required, will be collected by DTP.
14. The Committee may seek advice from other experts, including legal counsel where it considers this is necessary.
15. The Committee is not expected to carry out a public hearing but may do so if it is deemed necessary and meets its quorum.
16. The Committee may:
 - a. assess any matter 'on the papers'
 - b. conduct discussions, forums, or video conferences when there is a quorum of:
 - i. a Chair or Deputy Chair, and
 - ii. at least one other member.
17. The Committee may apply to vary these Terms of Reference in any way it sees fit.

Submissions are public documents

18. The Committee must retain a library of any written submissions or other supporting documentation provided to it in respect of a referred project until a decision has been made on its report or five years has passed from the time of the referral.
19. Any written submissions or other supporting documentation provided to the Committee must be available for public inspection until the submission of its report, unless the Committee specifically directs that the material is to remain confidential. A document may be made available for public inspection electronically.

Outcomes

20. The Committee must produce a concise written report to the Minister for Planning providing the following:
 - a. a short description of the project
 - b. a short summary and assessment of issues raised in submissions
 - c. a draft planning permit including relevant conditions from Section 55 referral authorities, or draft planning scheme control depending on the nature of the referral
 - d. any other relevant matters raised during the Committee process

- e. its recommendations and reasons for its recommendations
- f. a list of persons or authorities/agencies who made submissions considered by the Committee and
- g. a list of persons consulted or heard, including via video conference.

Timing

- 21. The Committee is required to submit its reports in writing as soon as practicable, depending upon the complexity of the referred project between 10 and 20 business days from either:
 - a. the date of receipt of referral, if no further submissions or information are to be sought, or
 - b. receipt of the final submission of material or final day of any public process in respect of a referral.

Fee

- 22. The fee for the Committee will be set at the current rate for a Panel appointed under Part 8 of the *Planning and Environment Act 1987*.
- 23. The costs of the Committee will be met by each relevant proponent.



Sonya Kilkenny MP
Minister for Planning

Date:

9/9/2023

Appendix B Letter of referral



The Hon Sonya Kilkenny MP

Minister for Planning
Minister for the Suburbs

1 Spring Street
Melbourne, Victoria 3000 Australia

Ref: BMIN-1-24-1317

Ms Kathy Mitchell AM
Chair (Lead)
Priority Projects Standing Advisory Committee
Planning Panels Victoria
planning.panels@delwp.vic.gov.au

Dear Ms Mitchell

I refer to the *Victorian Civil and Administrative Tribunal* (VCAT) applications P1597/2023 and P1598/2023, which relate to the subdivision of land at 47 South Road, Brighton, into 14 lots including creation of a super lot and the construction of 84 dwellings and associated buildings and works. The project was referred to me by the Development Facilitation Program.

I advise that I have decided to call in the proceedings from VCAT under Clause 58(2)(a) of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* as I consider that the proceedings raise a major issue of policy and the determination of the proceedings may have a substantial effect on the achievement or development of planning objectives. I have also decided to refer the matter to the Priority Projects Standing Advisory Committee for advice and recommendations on whether planning permits should be issued, and if so, the appropriate permit conditions that should be imposed.

On 20 December 2023, the applicant applied to VCAT under section 77 of the *Planning and Environment Act 1987* for a review of Bayside City Council's decision refuse to grant a planning permit for applications 2023/425/1 (subdivision) and 203/335/1 (84 dwellings and associated buildings and works).

A practice day hearing was held for both applications on 23 February 2024 where it was agreed that both applications can be heard together. A full hearing of both applications will commence on 3 June 2024.

The cost of the advisory committee will be met by the applicant, Golden Age LB Pty Ltd as the Trustee for GA South Road Development Unit Trust.

If you have any questions about this matter, please email Matt Cohen, Director, Development Approvals and Design, Department of Transport and Planning, on email matthew.cohen@delwp.vic.gov.au.

Yours sincerely



The Hon Sonya Kilkenny MP
Minister for Planning

Date: 16/4/2024

Appendix C Objectors – Local Objector Group

No.	Objectors to Permit P1597/2023	No.	Objectors to Permit P1598/2023
1	Grant Bennett	1	Grant Bennett
2	Julie Moffatt	2	Peter Fitzgerald
3	Brian Doherty	3	Chris Sheppard
4	Julie Mitchell	4	Rebecca Crabtree
5	Noela Simpson	5	Kate Henderson
6	Geoff Simpson	6	Denise Allen
7	Merrilyn Laws	7	Julie Moffatt
8	Barrie Laws	8	Peter Moffatt
9	Marcel Dayan	9	Brian Doherty
10	Eva Dayan	10	Julie Mitchell
11	Ruth Lewis	11	Merrilyn Laws
12	Andy Wallis	12	Barrie Laws
13	Jason Morris	13	Marcel Dayan
14	Peter Hayden	14	Eva Dayan
15	John Gledhill	15	Ruth Lewis
16	Sandra Hilford	16	Alison Wallis
17	Geoff Parkin	17	Jason Morris
		18	Peter Hayden
		19	John Gledhill
		20	Kate Gledhill
		21	Sandra Hilford
		22	Geoff Parkin
		23	Pauline Glenie
		24	Fiona Cochrane
		25	Campbell Bennett
		26	Georges Fast
		27	Ann Fast
		28	Maria Sorrell
		29	Graham Lewis
		30	Ian McKay
		31	Deirdre Hayden

	32	Danny Hayter
	33	Jon Bjarnason
	34	Michelle Greene
	35	Mal Walden
	36	Robert Christenson

Appendix D Document list

No	Date	Description	Presented by
2023			
1	9 Sept	Terms of Reference	Minister for Planning
2024			
2	16 April	Letter of Referral	Minister for Planning
3	29 April	Referred material for VCAT proceedings P1597/2023 and P1598/2023: <ul style="list-style-type: none"> - Plans and documents relating to permit application 2023/425/1 (Documents 3.001 – 3.013) - Documents relating to Council’s decision to refuse permit application 2023/425/1 (Documents 3.014 – 3.026) - Documents relating to VCAT proceeding P1597/2023 (Documents 3.027– 3.043) - Plans and documents relating to permit application 2023/335/1 (Documents 3.044 – 3.063) - Documents relating to Council’s decision to refuse permit application 2023/335/1 (Documents 3.064 – 3.075) - Documents relating to VCAT proceeding P1598/2023 (Documents 3.076 – 3.106) 	Victorian Civil and Administrative Tribunal (VCAT)
4	30 April	Directions Hearing letter	Planning Panels Victoria (PPV)
5	7 May	Summary of key issues	Joint respondents represented by Matthew Butler of Clement-Stone Town Planners (Objector Group)
6	7 May	Summary of key issues	Golden Age LB Pty Ltd as the Trustee for GA South Road Development Unit Trust (Applicant)
7	7 May	Summary of key issues	Bayside City Council (Council)
8	7 May	Summary of key issues	Jonathan Altson
9	7 May	Letter enclosing Day 1 versions of project documentation	Applicant
10	7 May	Statement of changes	Applicant

No	Date	Description	Presented by
11	7 May	Day 1 version of amended plans	Applicant
12	7 May	Day 1 version of design response	Applicant
13	7 May	Day 1 version of alternative master plan (without prejudice)	Applicant
14	7 May	Day 1 version of Traffic Impact Assessment	Applicant
15	9 May	Comments on timing and procedural matters	Applicant
16	13 May	Version 1 Directions and Hearing Timetable	PPV
17	20 May	Expert witness statement of Amanda Ring	Applicant
18	20 May	Expert witness statement of Jason Walsh	Applicant
19	20 May	Site inspection plan	Applicant
20	22 May	Expert witness statement of Alastair Campbell	Council
21	23 May	Submission	Jonathan Altson
22	24 May	Position on open space	Applicant and Council
23	27 May	Expert witness statement of Michael John Willson (updated)	Objector Group
24	27 May	Expert witness statement of John-Paul Maina	Council
25	28 May	Committee correspondence and version 2 timetable	PPV
26	30 May	Traffic expert witnesses' statement of agreed opinions and facts	Applicant
27	3 June	Opening submission	Applicant
28	3 June	Submission on open space issue	Applicant
29	3 June	Summary of landscape design	Applicant
30	3 June	Land survey	Applicant
31	3 June	Authorities referred to in submissions:	Applicant
		a) Alcan Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27	
		b) Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council (1970) 123 CLR 490	
		c) Anderson v Stonnington City Council [2019] VSC 453	
		d) Argus Tallow Merchants Pty Ltd v Greater Dandenong CC [2015] VCAT 1915	
		e) Buckhurst Developments Pty Ltd v Minister for Planning [2015] VCAT 1048 (16 July 2015)	
		f) Capital Benefits (Mont Albert) Pty Ltd v Whitehorse CC [2008] VCAT 2436 (10 December 2008)	

No	Date	Description	Presented by
		g) CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384; (1997) 141 ALR 618; (1997) 71 ALJR 312 (4 February 1997)	
		h) Clare v Maroondah CC [2008] VCAT 606	
		i) Commissioner for Railways (NSW) v Agalianos (1955) 92 CLR 390	
		j) Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503	
		k) Fletcher v Maroondah CC [2006] VCAT 2205	
		l) Hassta Holdings Pty Ltd v Maroondah CC (includes Summary) (Red Dot) [2007] VCAT 2445 (21 December 2007)	
		m) Jones v Port Phillip CC [2020] VCAT 714	
		n) Maroondah City Council v Fletcher & Anor [2009] VSCA 250 (23 October 2009)	
		o) Optus Administration Pty Ltd v Saluwadana [2023] VSCA 266 (1)	
		p) Parliamentary Debates (Hansard), Legislative Assembly, 47th parliament, first section, Thursday, 30 August 2012, p 3892.	
		q) Peter J Mulcahy and Associates Pty Ltd v Whittlesea CC [2013] VCAT 375 (28 March 2013)	
		r) Project Blue Sky (1998) 194 CLR 355	
		s) Reardon v Magistrates' Court of Victoria (2018) 56 VR 266	
		t) SZTAL (2017) 262 CLR 362	
		u) Trethowan v Mornington Peninsula SC & Ors [2002] VCAT 1377 (26 November 2002)	
32	3 June	Opening submission and submission on open space issue	Council
33	3 June	Cases referred to in opening submission	Council
34	3 June	Site photos	Council
35	4 June	Day 1 Draft Permit Conditions (Development)	Council
36	4 June	Day 1 Draft Permit Conditions (Subdivision)	Council
37	4 June	Subdivision application referral comments:	Applicant
		a) Referral Comments (Comdain Multinet Gas) dated 15 November 2023	
		b) Referral Comments (Drainage) dated 13 November 2023	
		c) Referral Comments (DTP) 29 November 2023	

No	Date	Description	Presented by
		d) Referral Comments (Melbourne Water) dated 20 November 2023	
		e) Referral Comments (Open Space) dated 13 November 2023	
		f) Referral Comments (South East Water) dated 16 November 2023	
		g) Referral Comments (Traffic Engineering) dated 17 November 2023	
		h) Referral Comments (United Energy) dated 30 November 2023	
38	4 June	Townhouse application referral comments:	Applicant
		a) Referral Comments (Arborist) undated	
		b) Referral Comments (Drainage) dated 13 November 2023	
		c) Referral Comments (DTP) dated 4 October 2023	
		d) Referral Comments (ESD) dated 21 September 2023	
		e) Referral Comments (Heritage) dated 6 October 2023	
		f) Referral Comments (Strategic Planning) dated 24 October 2023	
		g) Referral Comments (Street Addressing) undated	
		h) Referral Comments (Traffic) dated 25 September 2023	
		i) Referral Comments (Urban Design) dated 20 October 2023	
		j) Referral Comments (Waste Management) dated 9 October 2023	
39	4 June	Expert witness statement of Michael John Willson (tracked changes)	Objector Group
40	4 June	Letter regarding standard B29 and public open space	Council
41	5 June	Consultant advice notice on external hydrant locations	Applicant
42	5 June	Comparison table referred to by Mr Walsh	Applicant
43	6 June	Project architect response to Council submission paragraph 6.11	Applicant
44	6 June	Updated survey of rear fence	Applicant
45	7 June	Submissions	Objector Group
46	11 June	Authorities to be referred to in open space discussions	Applicant
47	11 June	Brighton dwelling mix data and chart	Council

No	Date	Description	Presented by
48	11 June	Brighton dwelling size data with Council calculations	Council
49	11 June	Instructions to Mike Willson	Objector Group
50	12 June	Open space diagram - Review of 400 metres	Council
51	12 June	Closing submission	Applicant
52	12 June	Standard B6 and B29 Assessment (Amanda Ring)	Applicant
53	12 June	Draft Permit Conditions (Development) - Tracked changes on Day 1 Council version	Applicant
54	12 June	Draft Permit Conditions (Subdivision) - Tracked changes on Day 1 Council version	Applicant
55	13 June	Ground level masterplan	Applicant
56	13 June	Closing submission	Council
57	13 June	Draft Permit Conditions (Development) - Clean	Applicant
58	13 June	Draft Permit Conditions (Subdivision) - Clean	Applicant
59	13 June	Alternate permit conditions	Applicant
60	14 June	Updated Draft Permit Conditions (Development) - Clean	Council
61	14 June	Updated Draft Permit Conditions (Subdivision) - Clean	Council
62	14 June	Draft Permit Conditions (Subdivision) with alternate footpath condition	Applicant

Appendix E Committee preferred version of Permit 2023/425/1

Based on Document 62: Applicant – Draft Permit Conditions (Subdivision) with alternate footpath condition.

[Track added](#)

PERMIT PREAMBLE

- to subdivide the Land into Fourteen (14) lots
- removal of Easements E1, E2 & E3 on PC372351F
- creation of Drainage Easement E1

CONDITIONS

Amended Plans Required

1. Before the certification of the plan of subdivision, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions. The plans must be generally in accordance with the proposed plan of subdivision prepared by Taylors labelled with Surveyor reference 24122-S1 dated 18 April 2023 and having the reference PS906553G, but modified to show:
 - a) the allocation of a 1.2 metre wide strip of land for the widening of the Hartley Street road reservation along the [eastern side of the](#) Hartley Street frontage extending from South Road to the northern edge of Lot 13 to enable a footpath and nature strip as shown on drawing reference TP-0101 Revision C dated 12 June 2024 prepared by Carr Architects, and identified as a Road which must be vested in the Council as a public road at no cost to the Council. [This allocation is in addition to any public open space contribution.](#)

General

2. The subdivision on the endorsed plans must not be altered without the written consent of the Responsible Authority.
3. The plan of subdivision submitted for certification under the Subdivision Act 1988 must be referred to the relevant authority in accordance with Section 8 of that Act.

Public Open Space Contribution

4. Before the statement of compliance is issued under the Subdivision Act 1988, a cash contribution in an amount equivalent to five (5) per cent of the site value of the land intended to be used for residential purposes must be paid to the Council in accordance with section 18A of the Subdivision Act 1988, [with that value including the to be surrendered 1.2 metre strip of land on the eastern side of Hartley Street.](#) The timing for payment of the contribution may be varied by agreement in accordance with section 18A(2)(c) of the Subdivision Act 1988.

Footpath and nature strip construction

5. Before the statement of compliance is issued under the Subdivision Act 1988, a footpath and nature strip fronting Hartley Street that is generally in accordance with the footpath and nature strip shown in drawing reference TP-0101 Revision C dated 12 June 2024 prepared by Carr Architects is to be constructed along the eastern side of Hartley Street, connecting from the existing footpath and extending to the South Road frontage, all to the satisfaction of the Council. Construction and landscape plans for the construction of the footpath and nature strip must be submitted to and

approved by the Council prior to the certification of the Plan of Subdivision, or at some other time as approved by the Council in writing.

Telecommunications Conditions

6. The owner of the land must enter into an agreement with:
 - a) a telecommunications network or service provider for the provision of telecommunication services to each lot shown on the endorsed plan in accordance with the provider's requirements and relevant legislation at the time
 - b) a suitably qualified person for the provision of fibre ready telecommunication facilities to each lot shown on the endorsed plan in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.
7. Before the issue of a Statement of Compliance for any stage of the subdivision under the Subdivision Act 1988, the owner of the land must provide written confirmation from:
 - a) a telecommunications network or service provider that all lots are connected to or are ready for connection to telecommunications services in accordance with the provider's requirements and relevant legislation at the time;
 - b) a suitably qualified person that fibre ready telecommunication facilities have been provided in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.

Drainage Engineer conditions

8. Before the development starts, the permit holder must apply to Council for the Legal Point of Discharge for the development from where stormwater is drained under gravity to the Council network.
9. Before the development starts, detailed plans indicating, but not limited to, the method of stormwater discharge to the nominated Legal Point of Discharge (and On-Site Detention System where applicable) must be submitted to and approved by Council's Infrastructure Assets Department.

South East Water conditions

10. The owner of the subject land must enter into an agreement with South East Water for the provision of drinking water supply and fulfil all requirements to its satisfaction.
11. The owner of the subject land must enter into an agreement with South East Water for the provision of sewerage and fulfil all requirements to its satisfaction.
12. Prior to certification, the Plan of Subdivision must be referred to South East Water, in accordance with Section 8 of the Subdivision Act 1988.

Comdain Multi-Net Gas condition

13. A Statement of Compliance be obtained from Multinet Gas prior to the plan of subdivision being released from the Titles Office.

Development Contribution

14. Prior to the issue of a Statement of Compliance, the permit holder must pay a drainage levy in accordance with the amount specified under the Bayside Drainage Development Contributions Plan. The levy amount payable will be adjusted to include the Building Price Index applicable at the time of

payment. The levy payment shall be submitted to Council with the Bayside Drainage Development Levy Charge Sheet and it must include the Building Price Index applicable at the time of payment.

United Energy conditions

15. The plan of subdivision submitted for certification under the Subdivision Act 1988 shall be referred to the Distributor in accordance with Section 8 of that Act.

16. The applicant shall provide an electricity supply to all lots in the subdivision in accordance with the Distributor's requirements and standards.

Notes: Extension, augmentation or rearrangement of the Distributor's electrical assets may be required to make such supplies available, with the cost of such works generally borne by the applicant.

17. The applicant shall ensure that existing and proposed buildings and electrical installations on the subject land are compliant with the Victorian Service and Installation Rules (VSIR).

Notes: Where electrical works are required to achieve VSIR compliance, a registered electrical contractor must be engaged to undertake such works.

18. The applicant shall, when required by the Distributor, set aside areas with the subdivision for the purposes of establishing a substation or substations.

Notes: Areas set aside for substations will be formalised to the Distributor's requirements under one of the following arrangements:

- RESERVES established by the applicant in favour of the Distributor.
- SUBSTATION LEASE for a period of 30 years with rights to extend the lease for a further 30 years. The Distributor may register such leases on title by way of a caveat prior to the registration of the plan of subdivision.

19. The applicant shall establish easements on the subdivision, for all existing Distributor electric lines where easements have not been otherwise provided on the land and for any new power lines to service the lots or adjust the positioning existing easements.

Notes:

- Existing easements may need to be amended to meet the Distributor's requirements
- Easements required by the Distributor shall be specified on the subdivision and show the Purpose, Origin and the In Favour of party as follows:

Easement Reference	Purpose	Width (Metres)	Origin	Land Benefited / In Favour Of
	Power Line		Section 88 - Electricity Industry Act 2000	United Energy Distribution Pty Ltd

Permit Expiry

20. This permit will expire if:

- a) The plan of subdivision is not certified with compliance within two (2) years of the date of this permit.
- b) The registration of the subdivision is not completed within five (5) years of the date of certification of the plan of subdivision.

The Responsible Authority may extend the time if a request is made in writing before the permit expires or within six months afterwards.

Appendix F Committee preferred version of Permit 2023/335/1

Based on Document 57. Applicant – Draft Permit Conditions (Development)

[Tracked Added](#)

~~Tracked Deleted~~

PERMIT PREAMBLE

- to construct two or more dwellings and a front fence that exceeds 1.2 metres in a Neighbourhood Residential Zone Schedule 3 (NRZ3)
- to construct and carry out works associated including storey heights that are 3.5 metres or greater and to construct roof top decks within a Design and Development Overlay Schedule 1 (DDO1)
- for partial demolition and buildings and works within a Heritage Overlay (HO342)
- to create/alter access to a road in a Transport Zone 2

CONDITIONS

Amended Plans Required

1. Before any stage of the development starts, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions. The plans must be generally in accordance with Architectural Plans, Project No. 22068, TP-0001, TP-0002, TP-0011, TP-0012, TP-0100 to TP-0103, TP-0151, TP-0201 to TP-0203, TP-1001 to TP-1012, TP-1101, TP-1102, TP-2001 to TP-2007, TP-2011, TP-2012, TP-3001 to TP-3004, TP-3101, TP-3102, TP-4101 to TP-4105, TP-5001 to TP-5012, TP-9001 to TP-9022, Revision No. A prepared by Carr dated 12 April 2024 but modified to show:
 - a) locations of wayfinding signage to assist in the legibility of the access arrangements and internal linkages;
 - b) a staging plan for each stage of the development. This must include the development of the Maritima building in the first stage of the development unless otherwise agreed in writing by the Responsible Authority;
 - c) visual corner splays to be annotated on both sides of each proposed crossover in accordance with Design Standard 1 of Clause 52.06-9 of the Bayside Planning Scheme;
 - d) cross sectional diagrams to demonstrate that the ramps to the New Street frontage satisfy gradient requirements of Design Standard 3 of Clause 52.06-9 of the Bayside Planning Scheme;
 - e) amendment of the Hartley Street vehicular access ramp to increase the width of the crossover to a minimum of 7.4m. The crossover to this access ramp must include a splay;
 - f) the screening measures of obscure glazing and external screens indicated on the site diagram of TP-3102 to be clearly indicated on proposed elevation plans;
 - g) [consolidation of Lots 62 and 63 to form a single dwelling with no less than four bedrooms, with built form in compliance with Clause 55 Standard B17;](#)
 - h) a minimum of six cubic metres of storage to be provided to each dwelling in accordance with Standard B30 (storage) of Clause 55.05-6 of the Bayside Planning Scheme;
 - i) elevations of the proposed mailboxes at the pedestrian entry points of Hartley and New Streets;

- j) an amended Sustainability Management Plan in accordance with Condition 11;
- k) a Stormwater Management Strategy in accordance with Condition 14;
- l) an amended Landscape Plan in accordance with Condition 16;
- m) an Arboricultural Impact Assessment Report in accordance with Condition 19 and any development alterations required as a result of this;
- n) any alterations to the alignment and surface treatment of the pedestrian path connecting to New Street adjacent to Trees 37, 38, 39 and 40 in accordance with the Arboricultural Impact Assessment Report;
- o) a Tree Protection Management Plan in accordance with Condition 20;
- p) provision of the Drainage Development Contributions Levy in accordance with Condition 39,
- q) a schedule of conservation works to the former Maritima building in accordance with Condition 40;
- r) a heritage interpretation strategy in accordance with Condition 41;
- s) a notation for all disused or redundant vehicle crossings along South Road must be removed in accordance with Condition 44;
- t) a Waste Management Plan in accordance with Condition 48;

all to the satisfaction of the Responsible Authority.

2. The layout of the site and the size, levels, design and location of buildings and works shown on the endorsed plans must not be modified for any reason (unless the Bayside Planning Scheme specifies that a permit is not required) without the prior written consent of the Responsible Authority.
3. Before the occupation of [the dwellings of](#) each stage commences or by such later date as is approved in writing by the Responsible Authority, all buildings and works must be carried out and completed to the satisfaction of the Responsible Authority.
4. No plant, equipment, services or architectural features other than those shown on the endorsed plans are permitted above the roof level of the building/s without the written consent of the Responsible Authority.
5. All pipes (excluding downpipes), fixtures, fittings and vents servicing any building on the site must be concealed in service ducts or otherwise hidden from view to the satisfaction of the Responsible Authority.
6. Before the occupation of the dwellings of each stage commences, screening of windows including fixed privacy screens be designed to limit overlooking in accordance with the endorsed plans and be installed and maintained to the satisfaction of the Responsible Authority thereafter for the life of the building.
7. The walls on the boundary of the adjoining properties shall be cleaned and finished to the satisfaction of the Responsible Authority.
8. Vehicle Crossings must be constructed to Council's Standard Vehicle Crossover Guidelines and standard drawing unless otherwise approved by the Responsible Authority. Separate consent/permit for crossovers is required from Council's Asset Protection Unit. Kerb and channel to be constructed or reinstated to the satisfaction of the Responsible Authority.
9. The existing footpath levels must not be lowered in any way at the property line to facilitate the basement ramp except with the consent of the Responsible Authority. This is required to ensure that normal overland flow from the street is not able to enter the basement due to any lowering of the footpath at the property line. Any public assets (including service pits, poles and trees) that are

required to be removed/relocated to facilitate the development must be done so at the cost of the owner/applicant and subject to the relevant authority's consent. The redundant vehicular crossing must be removed and the footpath, nature strip and kerb reinstated at the owner's cost to the satisfaction of Council.

10. Prior to the commencement of any proposed works above basement level, all levels and gradients of the ramp must be checked by a qualified surveyor.

Sustainability Management Plan

11. Prior to the endorsement of plans pursuant to Condition 1, a Sustainability Management Plan must be submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Sustainability Management Plan, Project No. 23148, Revision No. 06 prepared by WRAP Consulting Engineering dated 7 August 2023 and include, but not be limited to the following:
 - a) Water Sensitive Urban Design (WSUD) initiatives to comply with the best practice performance objective set out in the *Urban Stormwater Best Practice Environmental Management Guidelines*, Victoria Stormwater Committee 1999;
 - b) a STORM or MUSIC model report demonstrating Best Practice stormwater management to the satisfaction of the Responsible Authority;
 - c) complete BESS report demonstrating the initiatives selected to achieve the 60% or greater standard committed to in the summary report;
 - d) preliminary building energy ratings to align with plans;
 - e) demonstration that stormwater detention volume requirements are in addition to stormwater retention;
 - f) clearly state that in addition to producing a Building User's Guide that it will be provided to occupants;
 - g) endorsed SMP Report initiatives to be fully integrated with architectural and building services plans and specifications for building approval,to the satisfaction of the Responsible Authority.
12. All works must be undertaken in accordance with the endorsed Environmentally Sustainable Development (ESD) Management Plan to the satisfaction of the Responsible Authority. No alterations to the ESD Management Plan may occur without the written consent of the Responsible Authority.
13. Prior to the occupation of any dwelling approved under this permit, a report from the author of the Environmentally Sustainable Development (ESD) Management Plan report, approved pursuant to this permit, or similarly qualified person or company, must be submitted to the Responsible Authority. The report must be to the satisfaction of the Responsible Authority and must confirm that all measures specified in the Environmentally Sustainable Development (ESD) Management Plan have been implemented in accordance with the approved Plan.

Stormwater Management Strategy

14. Prior to the endorsement of the plans, a Stormwater Management Strategy must be submitted to and approved by the Responsible Authority that is generally in accordance with the Stormwater Management Strategy prepared by Taylors dated 27 July 2023. The plan will be endorsed and will then form part of the permit.
15. All actions and measures identified in the Stormwater Management Strategy must be implemented to the satisfaction of the Responsible Authority.

Landscape Plan

16. Prior to the endorsement of plans pursuant to Condition 1, a detailed landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned to the satisfaction of the Responsible Authority must be submitted to and be endorsed by the Responsible Authority. The plan must be generally in accordance with the Landscape Architecture Report, Revision No. 02 prepared by TCL dated 11 August 2023 and the *Bayside Landscaping Guidelines* and be drawn to scale with dimensions. The report must be modified to show:
- a) any changes in accordance with Condition 1;
 - b) a staging plan for the landscaping to correspond with the staging of the development;
 - c) the provision of a canopy tree within the rear Secluded Private Open Space of Lot 62 with a minimum mature height of 8 metres;
 - d) an amended planting schedule of canopy trees to be a minimum of 80% indigenous which will require the quantities of each species of canopy tree, mature heights, pot sizes, sizes at maturity, and quantities of each species;
 - e) details of surface finishes of pathways and driveways;
 - f) a survey, including, botanical names of all existing trees to be retained on the site including Tree Protection Zones calculated in accordance with AS4970-2009;
 - g) a survey including botanical names, of all existing trees on neighbouring properties where the Tree Protection Zones of such trees calculated in accordance with AS4970-2009 fall partially within the subject site;
- to the satisfaction of the Responsible Authority.
17. Before the occupation of the each stage of the development the landscaping works shown on the endorsed plans must be carried out and completed to the satisfaction of the Responsible Authority.
18. The landscaping shown on the endorsed plans must be maintained to the satisfaction of the Responsible Authority, including that any dead, diseased or damaged plants are to be replaced.

Arboricultural Impact Assessment Report

19. Prior to the endorsement of plans pursuant to Condition 1, an Arboricultural Impact Assessment Report in accordance with *Australian Standard 4970-2009 Protection of Trees on Development Sites* must be submitted to and be endorsed by the Responsible Authority.

The report will explain design and construction methods proposed to minimize impacts on trees to be retained (site trees and neighbouring trees) where there is encroachment into the calculated TPZ.

The report must consider the alignment and surface treatment of the pedestrian path connecting to New Street adjacent to Trees 37, 38, 39 and 40 to ensure the [long term](#) retention [and care](#) of these trees.

Tree Protection Management Plan

20. Before the development starts, including any related demolition or removal of vegetation, a Tree Protection Management Plan (TPMP), prepared by a suitably qualified arborist, to the satisfaction of the Responsible Authority, must be submitted to and be endorsed by the Responsible Authority. This report must be made available to all relevant parties involved with the site.

The TPMP must include:

- a) details of Tree Protection Zones, as per *AS4970-2009*, for all trees to be retained on the site and for all trees on neighbouring properties (including public open space trees) where any part of the Tree Protection Zone falls within the subject site;
- b) protection measures to be utilised and at what stage of the development they will be implemented;
- c) appointment of a project arborist detailing their role and responsibilities;
- d) stages of development at which the project arborist will inspect tree protection measures;
- e) monitoring and certification by the project arborist of implemented protection measures.

Before any works associated with the approved development, a project arborist must be appointed and the name and contact details of the project arborist responsible for implementing the endorsed TPMP must be submitted to the Responsible Authority.

Any modification to the TPMP must be approved by the project arborist. Such approval must be noted and provided to the Responsible Authority within seven days.

The TPMP must include a Tree Protection Plan (TPP) in accordance with *AS4970-2009 Protection of Trees on Development Sites*.

The TPP must:

- a) Be legible, accurate and drawn to scale;
- b) Indicate the location of all tree protection measures to be utilised;
- c) Include the development stage (demolition, construction, landscaping) of all tree protection measures to be utilised;
- d) Include a key describing all tree protection measures to be utilised;
- e) Include Tree Protection Zone Sign location(s),
to the satisfaction of the Responsible Authority.

21. All actions and measures identified in the Tree Management Report must be implemented.
22. Before any works associated with the approved development, the contact details of the project arborist responsible for implementing the endorsed Tree Management Report must be submitted to the Responsible Authority.
23. Any pruning that is required to be done to the canopy of any tree to be retained is to be done by a qualified Arborist to *Australian Standard – Pruning of Amenity Trees AS4373-1996*. Any pruning of the root system of any tree to be retained is to be done by hand by a qualified Arborist.

Protection of trees for services

24. All underground services must be located outside of Tree Protection Zones (TPZ) of all trees to be retained. If this is not possible, any underground service installations within a TPZ must be bored beneath the entire TPZ to a minimum depth 800mm. If this is not possible, any excavation within the TPZ required for the connection of services must be undertaken by approved non-destructive digging techniques, under the supervision of a project arborist and with the written approval of the Responsible Authority.

Street tree protection

25. Before the development starts, tree protection fencing is to be established around the street trees marked for retention prior to demolition and maintained until all works on site are complete. The

fencing is to be constructed and secured so its positioning cannot be modified by site workers. The Tree Protection Zone is to be established and maintained in accordance with *AS 4970–2009*. The fencing is to be as close to the TPZ boundary as practically possible provided that it does not encroach onto the road, footpath, crossover or proposed works.

26. Street trees must not be removed, lopped, damaged or pruned by any party other than Bayside City Council authorised contractors. There must be no soil excavation within the specified SRZ (Structured Root Zone) and the Exclusion zone (no excavation permitted) in line with council guidelines for working near council trees. Any installation of services and drainage within the TPZ must be undertaken using root-sensitive, non-destructive techniques.

Existing crossover removal within the TPZ (Tree Protection Zone)

27. Removal of existing infrastructure is to be undertaken by approved root sensitive non-destructive techniques only (i.e. air spade or hydro).
28. All roots that will be affected must be correctly pruned by hand, in accordance with section 9 of *AS4373-2007 'Pruning of Amenity Trees'*.
29. Roots greater than 50mm must not be cut unless authorised by Council's Open Space Arborist in writing.
30. The street trees will require protection during the existing crossover removals.
31. Street trees must not be removed, lopped, damaged or pruned by any party other than Bayside City Council authorised contractors.

Drainage

32. Before the development starts, the permit holder must apply to the Responsible Authority for the Legal Point of Discharge for the development from where stormwater is drained under gravity to the Council network.
33. Before the development, detailed plans indicating, but not limited to, the method of stormwater discharge to the nominated Legal Point of Discharge (and On-Site Detention System where applicable) must be submitted to and approved by Council's Infrastructure Assets Department.
34. Council records indicate that there is a council stormwater drain running parallel to the east side of the property boundary. The Responsible Authority considers this asset to be protected by an implied easement. The plans indicate no proposals to encroach into the implied easement with any buildings or structures of note. Proposals to be built over the easement will require Build Over Easement consent from the Responsible Authority/Authorities. For an amendment to the existing easement the applicant must seek a permit from the council capital delivery team for further work.
35. The surface of all balconies and terraces are to be sloped to collect the stormwater run-off into stormwater drainage pipes that connect into the underground drainage system of the development to the satisfaction of the Responsible Authority.
36. The permit holder must obtain approval from the relevant authorities to build over the easement(s).
37. Subsurface water must be treated in accordance with Council's Policy for "Discharge of Pumped Subterranean Water Associated with Basements or Below Ground Structures".

Drainage Development Contributions Levy

38. Prior to endorsement of the plan/s required under Condition 1 of this permit, the permit holder must pay a drainage levy in accordance with the amount specified under the Bayside Drainage Development Contributions Plan. The levy amount payable will be adjusted to include the Building Price Index applicable at the time of payment.

The levy payment shall be submitted to Council with the Bayside Drainage Development Levy Charge Sheet and it must include the Building Price Index applicable at the time of payment.

Heritage

39. Before the development including demolition commences a schedule of conservation works to the former Maritima prepared by a suitable qualified consultant must be prepared and submitted to the satisfaction of the responsible authority.
40. All external works on the former Maritima building must be undertaken in accordance with the endorsed schedule of conservation works.
41. Before the development including demolition commences an interpretation strategy for the former Maritima prepared by a suitable qualified consultant must be prepared and submitted to the satisfaction of the Responsible Authority. The interpretation strategy must include amended or additional plans that include the details of any recommended on-site interpretation for endorsement by the Responsible Authority.

Department of Transport and Planning (Ref No. 44118/23)

42. The permit holder must take all reasonable steps to avoid disruption to bus operation along South Road and New Street during the construction of the development. Any planned disruptions to bus operation during construction and mitigation measures must be communicated to and approved by the Head, Transport for Victoria 8 weeks prior.
43. The permit holder must ensure that public transport infrastructure is not altered without the consent of the Head, Transport for Victoria or damaged. Any damage to public transport infrastructure must be rectified to the satisfaction of the Head, Transport for Victoria at the full cost of the permit holder.
44. All disused or redundant vehicle crossings along South Road must be removed and the area reinstated to kerb, channel and footpath to the satisfaction of and at no cost to the Head, Transport for Victoria prior to the occupation of the buildings hereby approved.

Car Parking and Accessways

45. Before the use starts, areas set aside for the parking of vehicles and access lanes as shown on the endorsed plans must be:
 - a) fully constructed;
 - b) properly formed to such levels that they can be used in accordance with the plans;
 - c) surfaced with an all-weather sealcoat;
 - d) drained, maintained and not used for any other purpose;
 - e) line-marked to indicate each car space and all access lanes, all to the satisfaction of the Responsible Authority.
46. Parking areas and access lanes must be kept available for these purposes at all times.

Waste Management Plan

47. Prior to the endorsement of the plans, a Waste Management Plan must be submitted to and approved by the Responsible Authority that is generally in accordance with the Waste Management Plan prepared by Leigh Design dated 8 August 2023. The plan will be endorsed and will then form part of the permit.
48. Waste collection from the development must be in accordance with the plan, to the satisfaction of the Responsible Authority.

Potentially Contaminated land

49. Before the development starts, the permit holder must provide:
- a) a preliminary risk screen assessment (PRSA) statement prepared by an EPA appointed environmental auditor in accordance with Planning Practice Note 30 Potentially Contaminated Land, stating that no audit is required; or
 - b) an environmental audit statement under Part 8.3, Division 3 of the Environment Protection Act which states that the site is suitable for the use and development allowed by this permit; or
 - c) an environmental audit statement under Part 8.3, Division 3 of the Environment Protection Act which states that the site is suitable for the use and development allowed by this permit if the recommendations made in the statement are complied with.
50. Where an audit statement is provided, all the recommendations of the environmental audit statement must be complied with to the satisfaction of the responsible authority, prior to commencement of use of the site. Written confirmation of compliance must be provided by a suitably qualified environmental consultant or other suitable person acceptable to the responsible authority.
- Compliance sign-off must be in accordance with any requirements in the environmental audit statement recommendations regarding verification of works.
51. Where there are recommendations in an Environmental Audit Statement that require significant ongoing maintenance and/or monitoring, the applicant must enter into a Section 173 Agreement under the *Planning and Environment Act 1987* providing for this to occur at the expense of the owner/s of the land. The Agreement must be executed on title prior to the occupation of any dwelling. The owner must meet all costs associated with drafting and execution of the Agreement, including those incurred by the responsible authority.
52. Should the land be unable to be remediated or the environmental audit statement conditions seek change to the form of development approved under this permit or extensive statement conditions for the future management of the site, the Responsible Authority may seek cancellation or amendment to the permit pursuant to Section 87 of the *Planning and Environment Act 1987*.

Construction Management Plan

53. Prior to commencement of any building works or the issue of a Building Permit, a Construction Management Plan (CMP) prepared to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plan will be endorsed and will form part of this permit. The plan must provide for (but not limited to):
- a) pre-conditions survey (dilapidation report) of the land and all adjacent Council roads frontages and nearby road infrastructure;
 - b) works necessary to protect road and other infrastructure;
 - c) remediation of any damage to road and other infrastructure;
 - d) containment of dust, dirt and mud within the land and method and frequency of clean up procedures to prevent the accumulation of dust, dirt and mud outside the land;
 - e) facilities for vehicle washing, which must be located on the land;
 - f) the location of loading zones, site sheds, materials, cranes and crane/hoisting zones, gantries and any other construction related items or equipment to be located in any street;
 - g) site security;
 - h) management of any environmental hazards including, but not limited to:

- i. contaminated soil and ground water
 - ii. materials and waste
 - iii. dust
 - iv. stormwater contamination from run-off and wash-waters
 - v. sediment from the land on roads
 - vi. washing of concrete trucks and other vehicles and machinery
 - vii. spillage from refuelling cranes and other vehicles and machinery;
- i) the construction program;
 - j) preferred arrangements for trucks delivering to the land, including delivery and unloading points and expected duration and frequency;
 - k) parking facilities for construction workers;
 - l) measures to ensure that all work on the land will be carried out in accordance with the Construction Management Plan;
 - m) an outline of requests to Council /Public authorities to occupy public footpaths or roads, or anticipated disruptions to local services;
 - n) an emergency contact that is available for 24 hours per day for residents and the Responsible Authority in the event of relevant queries or problems experienced;
 - o) the provision of a traffic management plan to comply with provisions of AS 1742.3-2002 Manual of uniform traffic control devices - Part 3: Traffic control devices for works on roads;
 - p) include details of bus movements throughout the precinct during the construction period;
 - q) where multiple development sites may occur in proximity to one another on the same street, a cumulative impact assessment must be submitted to and approved by the Responsible Authority;
 - r) a Noise and Vibration Management Plan showing methods to minimise noise and vibration impacts on nearby properties and to demonstrate compliance with Noise Control Guideline 12 for Construction (Publication 1254) as issued by the Environment Protection Authority in October 2008. The Noise and Vibration Management Plan must be prepared to the satisfaction of the Responsible Authority. In preparing the Noise and Vibration Management Plan, consideration must be given to:
 - i. using lower noise work practice and equipment
 - ii. the suitability of the land for the use of an electric crane
 - iii. silencing all mechanical plant by the best practical means using current technology
 - iv. fitting pneumatic tools with an effective silencer
 - v. other relevant considerations
 - vi. any site-specific requirements,

During the construction:

- s) any stormwater discharged into the stormwater drainage system must be in compliance with Environment Protection Authority guidelines;

- t) stormwater drainage system protection measures must be installed as required to ensure that no solid waste, sediment, sand, soil, clay or stones from the land enters the stormwater drainage system;
- u) vehicle borne material must not accumulate on the roads abutting the land;
- v) the cleaning of machinery and equipment must take place on the land and not on adjacent footpaths or roads;
- w) all litter (including items such as cement bags, food packaging and plastic strapping) must be disposed of responsibly, to the satisfaction of the Responsible Authority.

If required, the Construction Management Plan may be approved in stages. Construction of each stage must not commence until a Construction Management Plan has been endorsed for that stage, to the satisfaction of the Responsible Authority.

54. Prior to the commencement of construction, a “SiteHive” or similar device must be installed and maintained to the satisfaction of the Responsible Authority. This device must remain operational throughout construction to monitor noise, dust and similar construction activity.

Completion of Buildings and Works

55. Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

Amenity of Area

56. The amenity of the area must not be detrimentally affected by the works, through the:
- a) transport of materials, goods or commodities to or from the land;
 - b) appearance of any building, works or materials;
 - c) presence of vermin;
 - d) others as appropriate,
- all to the satisfaction of the Responsible Authority.

Permit Expiry

57. This permit will expire if one of the following circumstances applies:
- a) the development is not started within four years of the date of this permit;
 - b) the development is not completed within eight years of the date of this permit.

In accordance with Section 69 of the *Planning and Environment Act 1987*, a request may be submitted to the Responsible Authority within the prescribed timeframes for an extension of the periods referred to in this condition.