

Date: 20 September 2022

Moyne Planning Scheme Amendment C69

Closing Submission on behalf of Moyne Shire Council

Planning Panels Victoria

INTRODUCTION

1. This closing submission is made on behalf of Moyne Shire Council (**Council**) as planning authority for C69moyn (**Amendment**) to the Moyne Planning Scheme (**Scheme**). This submission addresses matters appropriate for reply. It does not intend to canvass all submissions or submissions already addressed. To this end Council relies upon its Part A and Part B submission.
2. Further drafting changes are generally addressed in the other materials to be filed.

SEA LEVEL RISE RELATED MATTERS

The policy

3. A range of parties have presented submissions on the proper application of policy at Clause 13.01-2S which provides that:

Plan for sea level rise of not less than 0.8 metres by 2100 and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

4. It is urged upon this Panel by various submitters that it is not appropriate for one municipality to adopt a figure higher 0.8 metres in the absence of a State led approach. As has been highlighted in the proceeding, the Marine and Coastal Policy identifies periodic (but unspecified) review of the planning benchmark.
5. Council submits that the policy operates in the manner that it is written. The necessary implication of planning for 'not less than' is that, as Council has put to the planning witnesses, the 0.8 metres is a floor and not a ceiling. A contrary reading of the provision simply does not make sense of the text. This is consistent with the advice to Council from DELWP¹ and the expert evidence of Mr Glossop, Mr McGurn and Ms Ring.

¹ Document 110.

6. To put the contrary position – why would the policy that Council must give effect to be drafted as ‘not less than’ if in reality it could only be 0.8 metres.
7. This Panel should proceed in accordance with the expert evidence, the advice of the department and start from a position where it is open to Council to present and justify a position premised on a level higher than 0.8 metres².

Risk – Part 1

8. Submissions on behalf of Rivers Run, subsequently adopted by others, suggest that the Council is adopting an inappropriately risk adverse approach to the application of inundation controls.
9. The position advanced is that the IPCC SSP5.8-5 scenario is ‘plausible but very conservative for planning past mid-century’.³ Council observes that no experts have sought to depart from the use of SSP5.8-5 scenario as the basis for planning for applying sea level rise benchmarks. It is the appropriate scenario to form the basis of sea level rise projections and the Panel should on the evidence accept this.
10. The dispute is confined to whether the mean or 95 percentile of the scenario should be adopted. As is put by all parties this is a matter risk and the appetite for risk.
11. With respect to the drainage experts (Bishop, Swan and Barich) the evidence and submissions about which conservative position to adopt, the mean or the 95th percentile is not compelling. It is inherent in adopting conservative positions that a risk adverse approach is adopted. This Panel is being urged to form a concluded view that the SSP5.8-5 scenario is appropriately conservative as a measure but that it has assessed and formed the view that the 95^h percentile of that scenario is not (rather than the mean). It is unenviable position for the Panel. The IPCC SSP5.8-5 scenario is:

- 11.1. Derived from international scientific research which is not addressed other than in a conclusory manner before this Panel.

² As it persuaded the Panel in C60.

³ Document 141, at 17.

- 11.2. Dependent upon actions not under the control (or only partially) of the Victorian government, let alone the Australian government.
12. Council's position adopts a sea level rise that is within an accepted scenario. It marginally more conservative than the position advanced by the development community, but in reality it is difficult to quantify or measure that conservatism.
13. Why then is it appropriate that this Council can adopt this marginally more conservative position.
14. This Council can because it has placed itself to meet its relevant planning objectives concerning land supply and development of Port Fairy adopting a 1.2 metre scenario. This Council is in the position of having carefully planned for growth of the township and can afford to put in place policy that ensures that the societal risks associated with flood impacts are unlikely to occur. This constitutes good planning. It constitutes orderly planning. It is planning that might not be possible in another municipality because of other constraints but the opportunity is present in Port Fairy.
15. Council adopts the evidence of Ms Ring in this respect who agreed that land supply is one factor relevant to the application of the 'not less than 0.8 metres' policy at a local level.
16. Of course, if climate change adaptation policy gains traction at a *global* level, in the medium term then the position can be reviewed and this may yield modest further development in infill areas. This was at the heart of the evidence of Dr Lauchlan Arrowsmith – we are not yet at the time period when we can safely *know* what climate change impacts on sea level rise will be.
17. The Council's conservatism is appropriate sound planning that leaves Port Fairy in position to meet future growth in the foreseeable future.

Risk – Part 2

18. Parties are critical of the Council's use of the Floodway Overlay in the context of sea level rise influenced inundation. Again, the Council's approach relates to risk. Document 113 was tabled on behalf of Rivers Run and is extracted below.

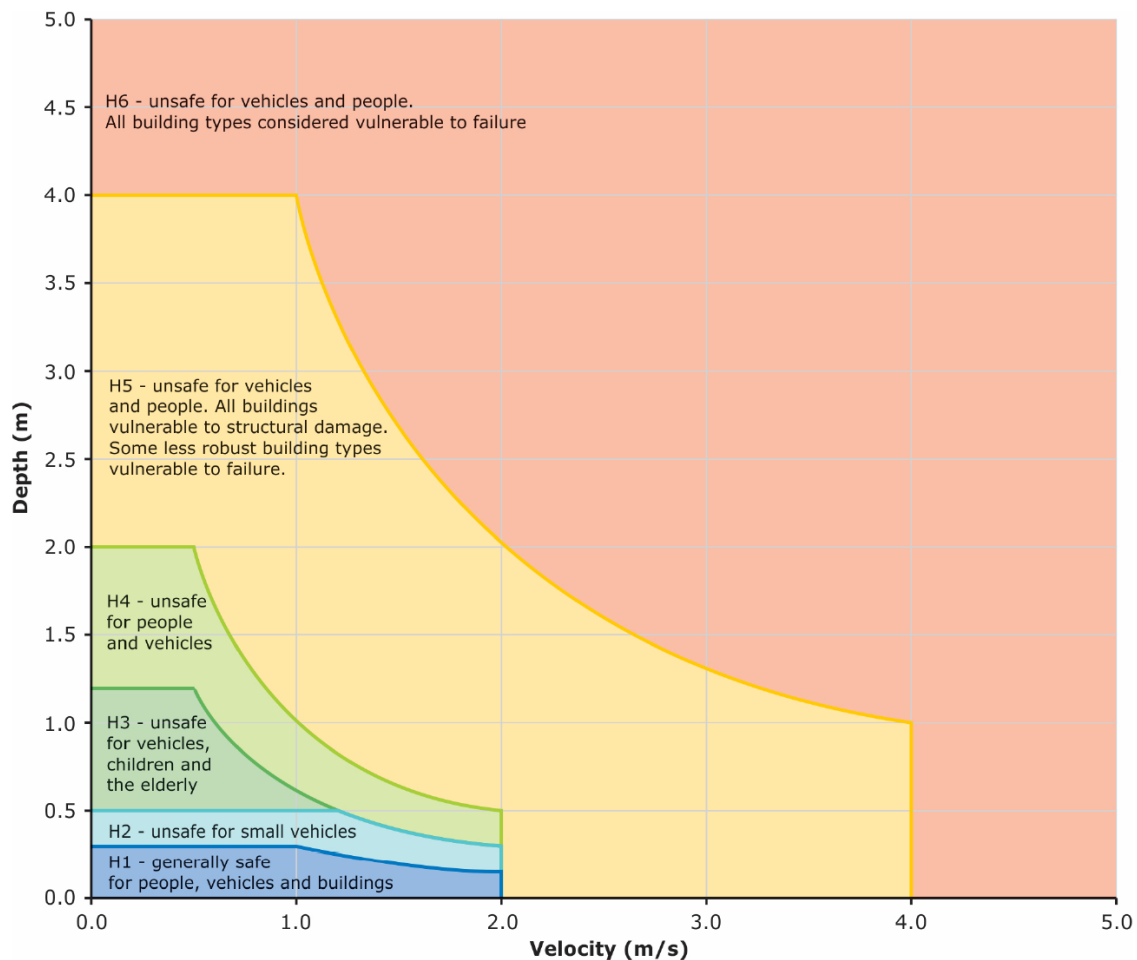


Figure 6.7.9. Combined Flood Hazard Curves (Smith et al., 2014)

19. The Amendment utilises a predicted depth of 0.5 metres as a threshold for the application of the FO. This is the standard measure of when the FO is applied and Mr Bishop did not retreat from this albeit that he took the view that the LSIO was the appropriate tool in the circumstances of this case. It seems that the position advanced is that land is not high risk unless and until the flood levels are realised in future sea level rise scenario. By extension, it is argued that a more liberal control should apply in those circumstances, in this instance the LSIO.

20. By more liberal the Council means more facilitative of development in the interim period. For reasons advanced in Council's Part B submission this constitutes short term gain at the societal risk of potentially substantial long term harm through the subdivision and development of land estimated to be the subject of substantial flooding.
21. This issue then becomes a critical decision making junction for the Panel.
22. For reasons that are unclear, Mr McGurn did not express any view on the application of the FO – deferring the question of flooding planning controls completely to the drainage experts. Given the frank acknowledgment of these witnesses that they are not planners this was surprising. Mr Glossop is the only planning witness who offered a view on the use of the FO which he advised was an acceptable planning tool in the context of the amendment. That is the summation of the planning evidence on this topic.
23. Council submits in relation to this issue:
 - 23.1. In respect of predominantly coastal inundation (for example the Pendragon land) its preference is the adoption of the FO given the predicted flood depths.
 - 23.2. In the sea level rise impacted floodplain (for example Model Lane and Rivers Run) the type of predicted flooding is floodplain or floodplain fringe and the application of the FO in these circumstances is consistent with long held practice. To not adopt the use of floodplain management tools in these areas would constitute a departure from usual practice.
 - 23.3. In respect of the riverine flooding (for example Growth Area A) the approach to the application of controls is not contested and entirely uncontroversial.

Risk – Part 3

24. The third area of risk is development risk. Put another way, what is the countervailing risk if the application of the FO reduces or restricts development?

25. The Council has approached the application of the FO in combination with the use of the LFDP with the purpose that it would permit, in certain circumstances, the development of lots wholly within the FO and LSIO.
26. Prior to the hearing Rivers Run instructed its witnesses to proceed on a basis that the combination of these controls prohibited subdivision of lots within the FO. The instruction was absolute in its terms. By the time submissions were presented on behalf of Rivers Run the issue had become 'tricky' and 'unclear'. Certainly not absolute. It is said to the Panel that it cannot resolve the question (and this is agreed by Council) and that the preferable course is to avoid it by accepting the proposition that the LSIO is the appropriate tool for coastally influenced inundation. In that way the issue, it is put, does not become live.
27. Council submits that preferable approach to the issue when dealing with a risk such as flooding which is a risk to life and property, is to adopt the Council's position that the interpretation within *Greater Shepparton CC v Goulburn Broken Catchment Management Authority* [2016] VCAT 2181 is far more likely to be wrong, premised as it is on an assumption that the drafter of the Planning Scheme sought to repeat itself (by saying "a subdivision that does not increase the number of lots" twice?). This is planning for greater benefit – not the short term benefit of a few.
28. What would flow from this approach:
 - 28.1. Firstly, the Council and the CMA have stated their position on the issue through this process. This is a low risk proposition for parties coming forward with permit applications.
 - 28.2. Secondly, if the Council is wrong, the consequence for the township if the limited affected land could not be subdivided is low. A small number of lots in Model Lane and part of the Rivers Run Land.
29. In these circumstances the risk adverse approach to adopt the use of the FO in combination with the LFDP.
30. Lastly on this issue the Panel is cautioned against placing significant weight on the evidence of the drainage engineers on whether land should be within an LSIO or an

FO. In respect of Mr Bishop and Ms Barich, their evidence was coloured by the direction from their instructors. Secondly none of these drainage engineers are equipped to undertake a planning (360 degree) assessment of the issue. Engineers seek to solve problems presented by their client but are not well placed to assist a Panel with whether fundamentally placing liberal controls on a floodplain represents good planning. On this issue no expert evidence was adduced by the submitters.

Other examples

31. There have been limited examples of the application of controls for flood controls influenced by sea level rise presented for Port Fairy and for other areas:
 - 31.1. Amendment C54 Moyne which provided for a 0.2 sea level rise (infill) and 0.8 sea level rise (greenfield). Mr Bishop gave evidence in that case premised upon the application of an FO.
 - 31.2. Amendment C60 Moyne in which a Panel agreed to adopt a 0.8 metre sea level rise by 2080 which is generally consistent with the position advanced by the Council in this case.
 - 31.3. C394 Geelong which applied an LSIO to areas impacted by coastal inundation. It is notable that this was coastal inundation and the proposal to utilise the LSIO does not appear to have been contested. The Panel's comments need to be read in this light.
 - 31.4. C82 Bass Coast which applied the LSIO to areas on the basis of 0.2 infill and 0.8 greenfield mapping.
32. The limited number of cases demonstrate that there is no established practice yet and certainly no prior contested application of the FO as a climate change flooding tool. The Panel should not approach the evaluation of this matter on the basis that there is any settled application principles.

THE RESIDENTIAL ZONES

33. Council has presented detailed submissions on the application of the NRZ in accordance with Planning Practice Note PN91. Council submits that it has clearly

demonstrated that the only material difference between the operation of the GRZ and the NRZ is distinction on height.

34. The first proposition relevant to this issue is whether Port Fairy is an area which satisfies the following purpose:

To recognise areas of predominantly single and double storey residential development.

35. The Panel has inspected the area in some detail and will understand that one and two storey development is the prevailing character of existing Port Fairy. If this is accepted the next question is whether this is intended to change for existing or future areas of development. In respect of existing areas no change is contemplated.
36. Within future development areas, the answer is that it could change, theoretically, but there is no mandate for that change. Growth Area A can develop intensively in a horizontal manner under the NRZ in the same way that it could under the GRZ. If three storey development was permitted in these areas, what would be the impact? – is it likely that we would see three storey apartment living in Growth Area A? – or would we simply see larger homes constructed at three storeys?
37. In Council's submission the bias will be towards the larger three storey homes not more dwellings and to this end there is little to commend a GRZ in the growth areas.
38. Certainly neither of the existing developers, Rivers Run or Pendragon, sought the application of the GRZ (through C75 in the case of Rivers Run). A GRZ was sought, albeit very faintly by the [REDACTED] submission as a preference. No substantive rationale was pressed.
39. If these submissions are accepted:
- 39.1. That the prevailing character is one and two storey.
 - 39.2. That the preferred future character is one and two storey; and
 - 39.3. That there is limited if any material increase in dwelling yield associated with apply the GRZ in the growth areas;

Then this panel should not hesitate in giving effect to the proposed NRZ application. The NRZ would represent a best fit response to policy guidance and reduce the duplication of controls.

40. The Panel has asked whether there are other examples where the NRZ has been applied across a township or in growth areas.
41. Council refers the Panel to the following two examples, Daylesford and Apollo Bay.
42. Hepburn C80 sought to changes that 'Rezones all land in the townships of Daylesford and Hepburn Springs from the General Residential Zone to the Neighbourhood Residential Zone' across four schedules. A Panel chaired by Mr Townsend and Ms McMillan disagreed with Council submissions based upon PN91. The narrative is thoughtful with the Panel concluding that⁴:

The decision to rezone land to the NRZ does not appear to have been informed by any assessment of land supply or a broader review of the settlement patterns in the Shire. Furthermore, the structure planning work conducted in the context of different State policy priorities. Mitigating the risk of bushfire was not afforded the same policy priorities as it was after 2013.

The Panel considers that applying the NRZ ahead of a proper consideration may inhibit strategic planning aims in the future. It is not considered that it is appropriate to apply the NRZ, even as an 'interim' measure.

43. The Panel went onto say:

As a matter of principle, the Panel does not oppose the reduction in GRZ land, however the key issue is whether new zoning selected is strategically justified. The Panel considers that it is premature to rezone Hepburn Springs and Daylesford.

44. Council determined not to adopt the Panel's recommendations on this issue.

⁴ At Page 39.

45. This situation is to be contrasted with Port Fairy where extensive structure planning has been undertaken, long term growth areas identified and the decision to rezone to the NRZ consistent with the Structure Plan. The exception to this is the growth area which of course was identified as being within the GRZ prior to the VC143 changes that brought the GRZ and NRZ together in terms of density. It is appropriate to depart from that recommendation of the Structure Plan.

46. In Apollo Bay the township expansion areas are within a NRZ with DDO and DPO controls. Amendment C79 completed on 13 June 2014 introduced the NRZ to the Colac Otway Planning Scheme. C74 was then approved on 10 October 2014 which in part sought changes that:

Amends Clause 21.07 to add the Apollo Bay Settlement Boundary and Urban Design Review 2012 as a reference document;

For land at 6230, 6240, 6250 and 6280 Great Ocean Road, Apollo Bay:

Rezoning land to Neighbourhood Residential Zone; and

Applying Schedule 5 to the Development Plan Overlay to 22.7 hectares of land to guide the orderly development of the land;

47. The Panel chaired by Member Glynn records:

Amendment C74 subsequently was exhibited to introduce the findings of the 2012 Review and zone land that forms part of investigation area 1, to Neighbourhood Residential Zone (NRZ). The proposed use of NRZ, rather than R1Z is consistent with the implementation of the Residential Zone reform process being undertaken by the Minister for Planning. This reform process of the Minister saw other land in Apollo Bay, including the Marriners Vue land zoned NRZ as part of Amendment C79 in June 2014.

48. Council has presented a first principles case on the application of the NRZ to land in Port Fairy. It submits its approach is correct. These further examples demonstrate that the approach taken by Council is not unique.

RESPONSE TO INDIVIDUAL SUBMITTERS

Sun Pharma

49. The Sun Pharma submissions essentially support the Council's proposed application of a policy buffer. This is consistent with the evidence that the Panel has heard.
50. Sun Pharma seek that the Port Fairy Framework Plan within Clause 21.09-3 is updated to reflect the entire land holding of the company including the vacant industrial land to the south. This is not opposed by Council.

██████████

51. The expert called by ██████████ had no relevant qualifications, was unfamiliar with the planning system and had not worked on any like projects. The evidence should not be afforded weight. Notwithstanding this, the central theme of the evidence was to support a review of the Port Fairy bypass and this review is currently on foot⁵. Council supports DoT in this endeavour.

52. Council is critical of the submission that the Amendment fails to address climate change mitigation measures. Council advances two arguments in this respect. Firstly, measures that are unfunded or not 'on the ground' do not form an appropriate basis for the application of zones and controls. Planning of this nature would inevitably create a tension through permit applications prior to delivery of the unfunded mitigation.

53. Secondly, the Structure Plan identifies large tracts of land for development that is unaffected by flooding impacts. It is no orderly to commit funds to the creation of a small number of infill lots at cost to the community.

████████████████████

54. Council supports the NRZ Schedule changes presented in Paragraphs 30-34 of the ██████████ Submission.

⁵ <https://www.parliament.vic.gov.au/questions-database/details/53/4268>

55. Council proposes one further change which is to include a height limit for fences (in effect a permit trigger for fences greater than 1.2 metres.
56. Council supports the submissions at Paragraph 35 that there should be no DDO provided that the NRZ is applied to Growth Area A. In the event the GRZ is applied then a DDO is appropriate to control height.
57. There remain a number of drafting differences between the [REDACTED] version and Council version of the DPO. In short, Council expect that the DPO should facilitate a master planned community which will integrate with its surrounds appropriately in terms of current and future development. Council is concerned that the drafting advanced by the [REDACTED] would not facilitate this outcome.

Rivers Run

58. In respect of Rivers Run, the principle flooding related submissions are addressed elsewhere in this submission. There are a small number of remaining matters.
59. Firstly, in respect of the asterisk within the Port Fairy Framework Plan sought by Rivers Run. The Structure Plan at Page 27 includes the following note:

Potential residential expansion area (if development can demonstrate accordance with relevant flood controls under a 1.2m SLR scenario, and that the land is outside any buffer agreed by SunPharma & the EPA)

60. Taken at its highest possible strategic meaning, the Rivers Run land is highlighted for investigation as a potential residential area. Council has commenced this investigation through Amendment C75 which remains on foot. That is, the residential potential of the land will be evaluated through that process.
61. Council submits that the asterisk has simply no more work to do in this context. At the end of the process that is Amendment C75 the land will be rezoned or not. If it is then the asterisk is redundant. If it is not then the asterisk is exhausted. In either instance the inclusion of the asterisk constitutes unnecessary clutter within the Planning

Scheme. To assert that the carriage of C75, an amendment which seeks to investigate the suitability of the land, will be somehow prejudiced by not having an asterisk that supports the lands investigation within the scheme is somewhat baffling.

62. If Amendment C75 was not on foot then the balance may lie elsewhere, but in this instance there is simply utility or need behind the request.
63. In relation to the policy buffer, Council agrees that terms which call upon agreement with industry are problematic and need to be amended.⁶ Rivers Run argue that the policy buffer is not needed but it is not opposed. Council submit that a buffer will serve a useful purpose in alerting the broader community to the planning issues in this area when lodging applications.
64. River Run position of a 300 metre buffer was not supported by Dr Cowan or Mr Hancock in evidence.

Pendragon

65. The majority of the Pendragon issues are bound in the sea level rise considerations advanced in the earlier parts of this submission. These are not repeated here. As stated above, Pendragon supports the NRZ application.
66. Council does address assertions about the consequences of flood mapping for the Pendragon site. It was variously asserted that the imposition of the FO would render the majority of the site undevelopable. The conservative exercise below undertaken in VicPlan, based on the exhibited mapping suggests that 3.6Ha of 11Ha is impacted by the FO layer and that large areas of the site are not.

⁶ Rivers Run Submission at 201.

- [REDACTED]
68. In respect of the Model Lane properties, the following propositions appear to be advanced:
- 68.1. The area can make an albeit modest contribution to the provision of housing in Port Fairy, noting that the area south of Model Lane is almost developed out above the existing FO.
 - 68.2. It would be unfair if lots approved under existing permits could not be developed or are made very difficult to develop on account of the proposed flooding controls.
 - 68.3. The LFDP is unreasonably constraining.
 - 68.4. The land south of Model Lane should not be included within an RCZ.
69. Council addresses these matters in turn.
70. At the core of the Amendment is identification of housing opportunities to accommodate the long term growth of Port Fairy. While this does not preclude infill housing, Port Fairy does not rely on ad hoc infill development (as opposed to substantial sites like the Pendragon site). Accordingly constraining the ability to subdivide lots in an area prone to flooding is not a matter that will materially operate on land supply.
71. Flooding controls represent a present and future constraint of the land in a riverine floodplain. Where the future constraint is substantial (more than 0.5 metres in predicted depth) then the FO is applied. This may operate to limit the opportunity to develop lots in the near term or absolutely. As with other submissions to this Amendment there seems to be a 'flavour' that Council is constraining rights. This is not the case. If land is suitable for development then it can be developed but where it is or will be unsuitable the reverse applies. As was conceded there are many lots rendered undevelopable across the State by bushfire controls, why should flood danger be treated differently?
72. The LFDP is prepared in conjunction with the CMA on the basis of safety. The complaint appears to be that ingress and egress controls are not warranted. Council is supportive of controls that reduce safety risks.

73. Council considers that the land to the south of Model Lane should be included within an RCZ. This is consistent with the Structure Plan and will operate to preserve the land for its aesthetic landscape and environmental contribution.
74. The RCZ will not of itself prevent development on approved lots. It is true that other controls could be used such as overlays but that is not the manner in which this amendment is advanced, in support of the work undertaken by Hanson. Ultimately it will yield an appropriate outcome of limiting development within Belfast Lough. The environmental values of Belfast Lough include landscape values are recognised in the Great South Coast Regional Plan and the existing Planning Scheme.
75. In relation to the [REDACTED] land.
76. The land has remained undeveloped for something approach 50 years in the zone. It was submitted that the land within the INZ1 could be developed for factoriettes. That may be the case but equally there are some substantial constraints associated with developing a new industrial use within a floodplain.
77. Council though the Amendment is directing industrial growth in the short and long term to the west of Port Fairy. The Panel will recall passing large areas of undeveloped industrial land through this area. While it may be an outcome contrary to the submitters desire, the RCZ will operate as an equally useful buffer to the Sun Pharma plant with the additional benefit of limited development within the Belfast Lough.
78. The Amendment will not unreasonably impact the continued farming of the presently FZ parcel. While it is correct that buildings and works associated with the existing use will trigger a permit under Clause 63.05, the extent to which this impacts day to day farming was overstated. Farm shedding is an occasional application – not an impediment on daily farming. Further it is appropriate that farm shedding in the floodplain is controlled.

Coastal Unit Investments

79. The submitter agitates for the proposed rezoning of land at 5a Barclay Street to the NRZ to be abandoned. It would prefer the land be within the C1Z. The land is presently

tied via a section 173 to the supermarket use.⁷ The submitter further seeks to vary the extent of application of the DDO1 to include 5a and the rear of 30a Sackville street.

80. The Panel will recall that Mr Glossop was asked about the application of the C1Z to the properties. Mr Glossop generally observed that there was a case to consideration of extension to the C1Z. In the event Council already proposes to include the rear of 30A into the C1Z via an anomalies amendment.
81. This leaves live the issue of the zoning of 5A Barclay Street. In this respect the change from the GRZ to the NRZ to the land is of no materiality to the current use. The use operates under existing use rights and can be developed for commercial purposes. Zoning is not a barrier to this.
82. For reasons that are not made clear, in apparent breach of the section 173 agreement the land at 5A has not been consolidated. There reduces the impetus to rezone this separate parcel on the basis that the owner could at any time request that the section 173 agreement be ended.⁸ The choice ultimately is to place land which is ostensibly abutting residential properties within a C1Z.
83. In these circumstances Council submits that it is not necessary or warranted to amend the zoning at this time.

39 Bank Street and 6 Bank Street

84. Port Fairy's village character is an asset that the township trades off. It is a low scale character. Council considers the maintenance of this almost uniform height across the centre. The changes to DDO1 change the discretionary height from 8 metres to a mandatory height of 9 metres or, in effect two storeys,
85. This control in addition to the HO that applies will ensure the low scale development of the town centre and will encourage development consistent with the character being commercial ground floor and dwellings above.

⁷ Dealing number AC577790G.

⁸ Pursuant to Section 178A of the Act. For example if the stated intention to purchase the property at 30A Sackville street is realized.

86. Sometimes submitters ask why not (go higher) but it is equally relevant to ask 'why so' in the current circumstances. What is the planning need. Council submits that its careful approach to planning in Port Fairy has served it well and will continue to do so as increased land value encourages greater investment and yield.



87. The submission is wide ranging in its compass. A number of the matters raised in the submission respond to the Amendment and a large number do not. Council focussed on a number of the issues relevant to the amendment.
88. The submitter raises concerns about housing affordability within Port Fairy. It is correct that housing prices are an issue across regional Victoria – Port Fairy is a long and expensive centre and Council's identification of land for development will assist the supply of land, and most likely price. Equally, it should be noted that the impact of recent rates rises is beginning to have an effect on affordability in the market.
89. It is notable that VBA building data from 2021 suggests a reasonable degree of substitutability within the general market.
90. While Council is giving effect to a 15 year supply over all of the Shire (and in fact Port Fairy), it is not a requirement of the Planning Scheme to have all levels of pricing in all centres. Indeed it is unrealistic to attempt to give effect to this.
91. Criticisms concerning consistency are raised at 107-110. The submission does not indicate that the Amendment is proposed (as exhibited) to bring 2 Regent Street into a residential zone whereas the two properties identified are already within a residential zone.
92. There are a range of detailed drafting matters raised which will be considered by the Council through the drafting process.

CONCLUSION

93. The Council submits that the Amendment is sound and should be recommended for approval subject to changes.


HARWOOD ANDREWS

on behalf of

Moyne Shire Council