

IN THE MATTER OF AMENDMENT C69 TO THE MOYNE PLANNING SCHEME

**WRITTEN SUBMISSION ON BEHALF OF PENDRAGON CORPORATION PTY LTD**

1. These submissions are made on behalf of Pendragon Corporation Pty Ltd (**Pendragon**).
2. Pendragon owns approximately 11.2 ha of land at 4 Bowker Court, Port Fairy, as shown in the figure below (**Pendragon Land**):

*Below – Pendragon Land (outlined in blue)*



3. Pendragon :
  - a. Did not oppose proposed rezoning of its land from General Residential Zone, Schedule 1 (**GRZ1**) to the Neighbourhood Residential Zone, Schedule 1 (**NRZ1**);
  - b. in principle, the proposed replacement of the Design and Development Overlay, Schedule 18 (**DDO18**) with a new, consolidated Design and Development Overlay, Schedule 4 (**DDO4**).
4. Pendragon does not support:
  - a. the application of the Floodway Overlay (**FO**) to part of its land;
  - b. the extent of the mapping of the FO and the Land Subject to Inundation Overlay (**LSIO**) shown for the Pendragon Land;
  - c. the proposed amendments to clause 21.06 and 21.09 of the Moyne Planning Scheme (**Scheme**);

- d. the wording of the draft Port Fairy Local Floodplain Development Plan (September 2022 version) (**the LFDP**); and
  - e. the wording of the proposed DDO4.
5. For the avoidance of doubt, these submissions are based on the Part A Day 1 ordinance circulated by Council on 29 August 2022.
6. In summary, and insofar as they affect the Pendragon Land:
- a. the proposed FO:
    - i. is an inappropriate overlay control to deal with coastal inundation and sea level rise;
    - ii. is unnecessary and inappropriate, relying on an improbable and hence unrealistic assessment of the likely sea level rise of 1.2 m;
    - iii. would, in all likelihood, sterilise much of the Pendragon Land for residential development in circumstances where that land has long been earmarked to play an important strategic role in accommodating growth at Port Fairy; and hence
    - iv. would impose unwarranted economic and social costs on both Pendragon and the public by virtue of the unnecessary underutilisation of a valuable asset, being a large part of the Pendragon land;
  - b. the proposed amendments to clauses 21.06 and 21.09 are unnecessary and inappropriate for the reasons given in relation to the proposed FO;
  - c. the proposed wording of the LFDP is too prescriptive, does not allow for a performance based approach to assessment of applications under the FO or LSIO and inappropriately does not allow for flood mitigation works to address coastal inundation;
  - d. the proposed framing of most of the DDO4 built form requirements to the extent that they might be viewed as mandatory requirements:
    - i. is unnecessary to achieve the built form character outcomes described in the *Port Fairy and Coastal Structure Plan (Structure Plan)*;
    - ii. is not supported by any expert evidence; and
    - iii. would unduly constrain the acceptable development of the Pendragon Land.

7. In short, and insofar as it applies to the Pendragon Land, Amendment C69 to the Scheme (**Amendment**) seeks to apply an overly conservative and restrictive matrix of use, subdivision and development controls that:
  - a. are not properly supported, in part or whole, by the expert modelling and evidence before the Panel;
  - b. would constrain rather than facilitate long-standing strategic objectives for the land; and
  - c. would therefore not generate a net community benefit for the municipality or the people of Victoria.
8. The principal flooding and neighbourhood character risks of which Moyne Shire Council (**Council**) are concerned ought not to be dealt with prescriptively in the Scheme but instead by Council and as relevant Glenelg Hopkins Catchment Management Authority (**CMA**) the relevant referral authority in an informed and considered manner at the permit application stage.

#### **Role of the Pendragon Land in accommodating growth at Port Fairy**

9. There is no question that the Pendragon Land is suitable to accommodate residential use and future housing. The Amendment whilst seeking to rezone this land to NRZ from GRZ does not alter its designation and appropriateness under the Planning Scheme for residential use.
10. There is overwhelming support for infill residential development at the Pendragon Land in both the Scheme as currently constituted, and in broader strategic policy.
11. The Pendragon Land is:
  - a. a substantially sized parcel of vacant land;
  - b. already included in the GRZ and has been residentially zoned for at least 20 years;
  - c. located alongside existing residential land;
  - d. is identified in the Structure Plan:
    - i. as an 'Existing' infill residential area, in part, as a 'Ensure residential density reflect constraints', in part, and as a 'Potential Future Wetland/Open Space' for the balance;<sup>1</sup>
    - ii. within the Coastal Settlement Boundary;<sup>2</sup>

---

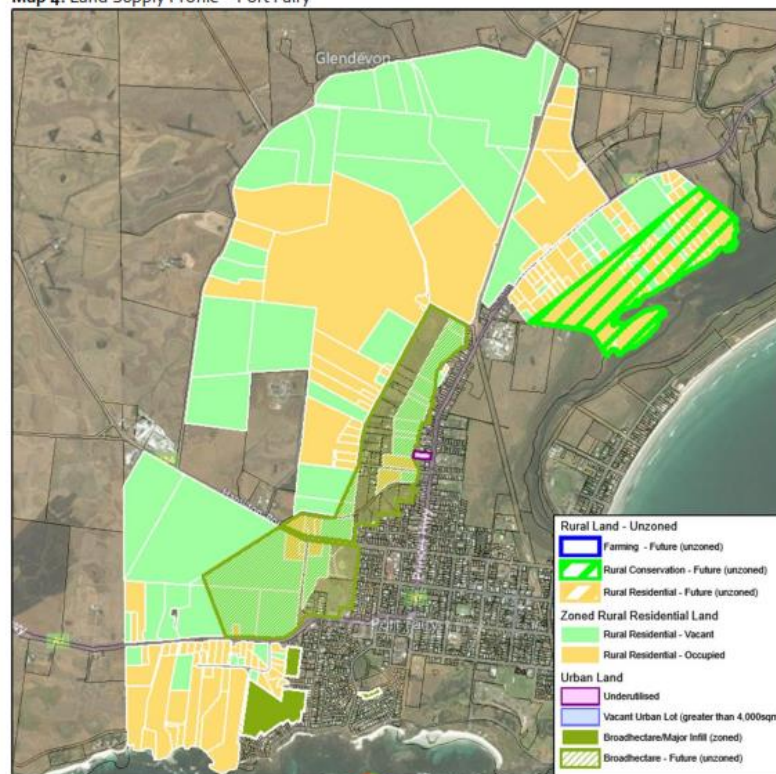
<sup>1</sup> Figure 7 at page 22 and Figure 17 at page 66.

<sup>2</sup> Figure 12 at page 38.

- iii. as within a 'Residential Precinct';<sup>3</sup> and
- e. is identified in the *Residential Land Supply and Demand Assessment* prepared by Spatial Economics for Council in May 2021 (**Residential Land Supply Assessment**) as 'Broadhectare/Major Infill' land in Port Fairy<sup>4</sup>, and is one of only two sites within that Assessment with existing residentially zoned lot potential identified in Port Fairy to provide for 110 lots which is intended to cater for eight years of demand based on 2019 projections, with the other lot to the north at 7 Seaview Way with a much smaller land area of 19,865sqm.<sup>5</sup>

### 8.3 Port Fairy

Map 4: Land Supply Profile – Port Fairy



**Above: Map 4 from Residential Land Supply Assessment**

12. The Structure Plan notes that the 'availability of land for residential development is highly constrained', 'demand for dwellings is reasonably high, particularly given the size of the township' and that 'Port Fairy is one of the fastest growing small regional settlements in

<sup>3</sup> Figure 14 at page 45.

<sup>4</sup> Image 1 at page 15.

<sup>5</sup> Pages 9 and 10

Victoria<sup>6</sup>. The importance that Pendragon Land will, should and is intended to play in delivering housing supply in Port Fairy is clear even in Council's own strategic documents.

13. Clause 11.03-4S emphasises the importance of confining residential development within clear settlement boundaries:<sup>7</sup>

**Objective**

*To plan for sustainable coastal development.*

**Strategies**

*Plan and manage coastal population growth and increased visitation so that impacts do not cause unsustainable use of coastal resources.*

*Support a network of diverse coastal settlements that provide for a broad range of housing types, economic opportunities and services.*

*Identify a clear settlement boundary around coastal settlements to ensure that growth in coastal areas is planned and coastal values are protected. Where no settlement boundary is identified, the extent of a settlement is defined by the extent of existing urban zoned land and any land identified on a plan in the planning scheme for future urban settlement.*

...

14. The Explanatory Report for the Amendment said that it implemented the objectives of planning in Victoria in the following way:<sup>8</sup>

The amendment is consistent with the objectives of planning in Victoria below:

- To provide for the fair, orderly, economic and sustainable use and development of land.
- To secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria.
- To facilitate development in accordance with the objectives set out in the points above.
- To balance the present and future interests of all Victorians.

The amendment does this by establishing a 15 to 20 year land use framework that facilitates opportunities for residential, commercial and industrial growth within a settlement boundary and that accommodates projected population growth. Importantly this growth can occur where it avoids or minimises exposure to existing and future natural hazard risk (coastal and riverine inundation and coastal erosion).

Through design controls and standards, the amendment recognises and protects heritage and neighbourhood character as valued features of the town's historic charm and that contributes to its attraction to visitors and tourists.

---

<sup>6</sup> Page 16

<sup>7</sup> See also Planning Practice Note No. 36: Implementing a Coastal Settlement Boundary.

<sup>8</sup> Explanatory Report at page 3.

The settlement planning encourages the efficient use of land, infrastructure and services and ensures that future growth is designed to complement, and with consideration for, visual and physical connectivity with the existing urban fabric in a sustainable manner.

15. None of this is possible if the Pendragon Land cannot contribute to new housing in Port Fairy.
16. When assessing the Amendment, therefore, there is no question that the Pendragon Land should accommodate a substantial increase in housing. The issue is whether the mix of controls and policies contained in the Amendment would strike the appropriate balance between:
  - a. facilitating housing at the Pendragon Land;
  - b. in a manner that recognises and protects neighbourhood character; and
  - c. minimising likely exposure to existing and future natural hazard risk.

## **ASSESSMENT**

### ***Issues not in dispute as between Pendragon and Council***

17. As we have already submitted, Pendragon:
  - a. does not oppose the proposed rezoning of the Pendragon Land from GRZ1 to NRZ1 (albeit it is not accepted that a rezoning is necessary to protect neighbour character or maintain a maximum two storey height given the proposed DD04); and
  - b. in principle, the proposed replacement of the DDO18 with the DDO4.
18. To be clear, this means that Pendragon supports in principle the application of a 9 m height limit to the Pendragon Land and the control of the built form requirements identified in the DDO4.
19. In light of the other submitters' evidence and submission, it is not necessary to press Pendragon's submissions on this point. None of these matters are controversial. Rather, this submission addresses those matters where Pendragon does not support the Amendment.

## **ISSUES IN DISPUTE**

### ***Application of the FO to the Pendragon Land and the extent of the FO and LSIO mapping at the Pendragon Land***

20. Relevantly, the Pendragon is not affected by any overlay controls that identify it as being liable to inundation or flooding, despite the LSIO3 introduced by Amendment C60 being applied to land to the west of the Pendragon Land.

## Planning Overlays

### OTHER OVERLAYS

Other overlays in the vicinity not directly affecting this land

[ENVIRONMENTAL AUDIT OVERLAY \(EAO\)](#)

[EROSION MANAGEMENT OVERLAY \(EMO\)](#)

[FLOODWAY OVERLAY \(FO\)](#)

[HERITAGE OVERLAY \(HO\)](#)

[LAND SUBJECT TO INUNDATION OVERLAY \(LSIO\)](#)

[PUBLIC ACQUISITION OVERLAY \(PAO\)](#)

[ROAD CLOSURE OVERLAY \(RXO\)](#)

[SIGNIFICANT LANDSCAPE OVERLAY \(SLO\)](#)



***Above: Extract of Planning Property Report showing the LSIO to the west and Pendragon Land***

21. It is also not in dispute that the Pendragon Land is not affected by riverine inundation to the extent that the Amendment within the same matrix of controls seeks to deal with both riverine and coastal inundation.
22. Before addressing the dispute between the parties and the experts, respectively, it is appropriate to identify where the surface water/hydrology experts agree and what is not disputed:
  - a. first, the role of flood related overlay controls is not intended to determine land use or sterilise land from potential development<sup>9</sup>;
  - b. second, the role of the FO and the LSIO is not to prohibit subdivision of land. Rather, their role is to require a considered analysis of whether subdivision of the land in question would expose future occupants to an unacceptable risk of harm from flooding or pose an unacceptable risk to the environment;

<sup>9</sup> See conclave joint report item 5

- c. third, if the FO was to prohibit subdivision then it would not be appropriate to control the flood hazard identified in the flood modelling;
- d. fourth, the mapping of the LSIO and the FO is informed by flood modelling premised on a 1.2 m sea level rise (**SLR**);
- e. fifth, 2100 is the appropriate planning horizon to consider SLR<sup>10</sup>;
- f. sixth, the 1.2 m SLR, if it were ever to occur, would be most unlikely to occur until after 2100. Rather, the 1.2 m SLR is only the 95<sup>th</sup> percentile outcome on a global development pathway based on no change to global carbon emissions;
- g. seventh, no jurisdiction in Victoria has applied floodway mapping based on 1.2 SLR by 2100;
- h. eighth, the modelling for coastal inundation at Port Fairy relied on to inform the Amendment selected the maximum wave setup values and was therefore conservative; and
- i. ninth, the FO is intended to apply to areas of higher flood hazard than the LSIO.

23. With this foundation it is evident that:

- a. the modelling relied on by Council to map the extent of the FO and the LSIO to the Pendragon Land is based on a very low probability event derived from an implausible scenario. The Commonwealth *Climate Change Bill 2022* received Royal Assent on 8 September 2022. Pursuant to s 10, Australia will have a target of reducing net greenhouse gas emissions from 2005 levels by 43% by 2030 and by 100% by 2050. At the most recent Commonwealth election there was bipartisan support at the Commonwealth level for Net Zero greenhouse gas emissions by 2050,<sup>11</sup> with a realistic prospect that this target will be met well before then. All States and Territories have implemented their own medium term greenhouse emission reductions targets.<sup>12</sup> At COP26 approximately 90% of global greenhouse gas emissions were covered by a pledge to achieve Net Zero at or before 2050;<sup>13</sup>
- b. it follows that a 1.2 m SLR is not a realistic worst case scenario when considering the risk to human life or property that might be posed by flooding in the future. It is not a sound basis to plan for future flooding risk; instead, it is a warning to reduce global

<sup>10</sup> See conclave joint report item 5

<sup>11</sup> See, for example, <https://www.minister.industry.gov.au/ministers/taylor/media-releases/australias-plan-reach-our-net-zero-target-2050>.

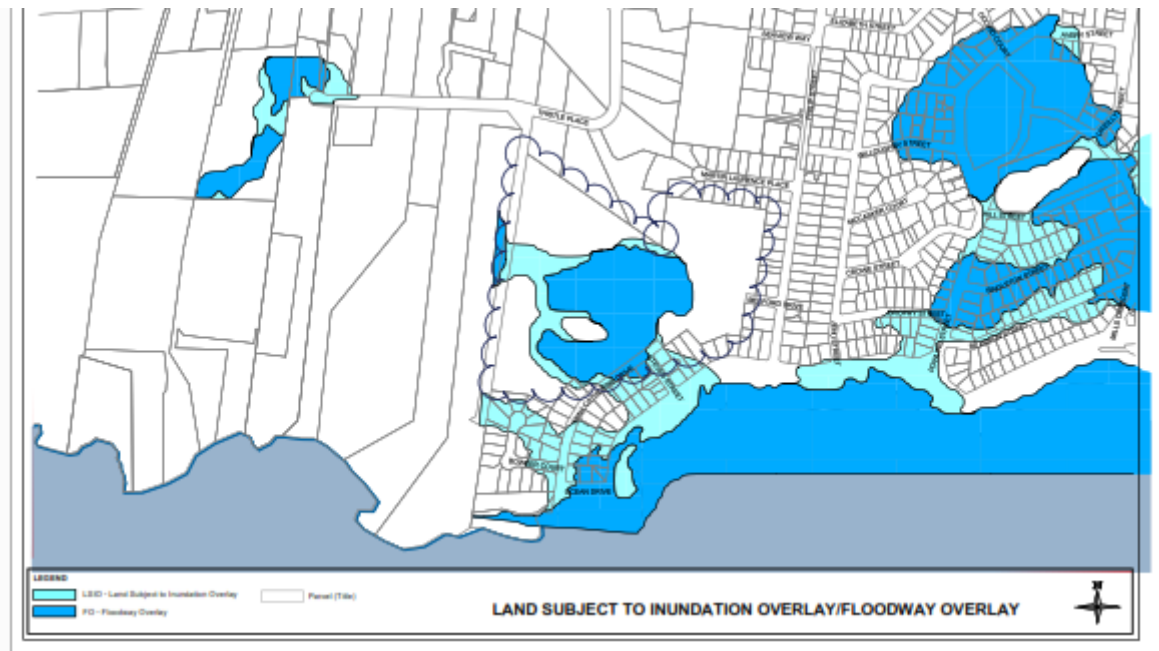
<sup>12</sup> See <https://home.kpmg/au/en/home/insights/2021/09/net-zero-readiness-index.html>.

<sup>13</sup> See <https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf>.



carbon emissions, a worthy but unrelated objective to any promoted by the Amendment. Sensible, prudent and precautionary planning ought not to be based on a scenario that no informed person – including none of the hydrology experts who gave evidence to the Panel – thinks is any reasonable likelihood of occurring over the next 78 years. Even Dr Lauchlan Arrowsmith accepted that if you accept the median and relying on SSP5.8.5 that you do not get to 1.2 SLR for over 125 years and the 95% percentile is a “high extreme value”; and

- c. if this all proves to be wrong – if the modelling of global sea level rise were to be found eventually to be flawed, or Australia and the overwhelming majority of the international community were to depart from the clear pathway to Net Zero that they have all committed to, and then, after all of that, the 95<sup>th</sup> percentile outcome were actually to be a realistic prospect of eventuating – then there would be more than enough time to revise the floodway modelling to account for that new, and wholly unexpected – if not unprecedented – reality.
24. There is simply no case on any conservative scenario to apply the FO to any part of the Pendragon Land and the LSIO to over half of the Pendragon Land based on SLR of 1.2m. Flooding of that land would only have an exceptionally slim likelihood of occurring, in the next century, if the whole world took no action to reduce greenhouse gas emissions. As Mr Bishop indicated in his evidence to the Panel, the Amendment adopts “a number of conservative approaches but on top of each other” and it is “reasonable to question how appropriate and balanced that might be”. The evidence of Ms Barich is that it is “highly unlikely” that SLR of 1.2m will ever be experienced in Port Fairy. Mr Swan concedes that “adoption of the higher SLR scenario may be too conservative or apply conditions that plan for risks that may begin to occur in 2100 or beyond for buildings or works with a design life that ends before this time period”.
25. The implications of the extent of the proposed FO and LSIO for the Pendragon Land is evident in the latest mapping proposed by Council based on the 1.2m SLR and cover approximately ½ of the land.



***Above: Current Amendment mapping showing extent of proposed FO and LSIO based on 1.2m SLR mapping***

26. But there are further problems with the application of the FO to the Pendragon Land and the extent of mapping of the FO and the LSIO to the Pendragon Land. They are:
- a. there is a strong likelihood that the FO would prevent subdivision of much of the Pendragon Land for housing in the manner contemplated by the strategic planning policies and studies identified earlier in this submission;
  - b. the FO seeks a control of a hazard that would not be present at the Pendragon Land; and
  - c. State policy on the application of the FO and the LSIO is very clear about the extent of SLR that ought to be planned for.
27. We address each problem in turn.

*There is a strong likelihood that the FO would prevent subdivision of much of the Pendragon Land for housing*

28. The decision to propose the FO from the material before the Panel is one chosen at the outset by the CMA, not the Council and not by Mr Swan. It is evident that the implications for prohibition on future residential development and subdivision was not considered or properly considered at the very least in the selection of this overlay control.
29. Clause 44.03-3 of the FO provides as follows:

*A permit is required to subdivide land. A permit may only be granted to subdivide land if the following apply:*

- *The subdivision does not create any new lots, which are entirely within this overlay. This does not apply if the subdivision creates a lot, which by agreement between the owner and the relevant floodplain management authority, is to be transferred to an authority for a public purpose.*
- *The subdivision is the resubdivision of existing lots and the number of lots is not increased, unless a local floodplain development plan incorporated into this scheme specifically provides otherwise.*

30. In *Greater Shepparton CC v Goulburn Broken Catchment Authority* [2016] VCAT 218 the then Gibson DP held in the context of an application for declaration that:

*Subdivision of land in a Floodway Overlay can only be permitted if the subdivision meets the requirements of either limb of clause 44.03-2.*

*The following propositions apply to subdivision of land affected by the Floodway Overlay:*

- *Subdivision, which creates new additional lots, may be permitted provided no lot is entirely within the Floodway Overlay, although a lot may be partly within the Floodway Overlay and partly outside the overlay. There is an exception for a subdivision that creates a lot that is to be transferred to an authority for a public purpose.*
- *If the subdivision creates any lot that is entirely within the Floodway Overlay, then the only type of subdivision that may occur is a resubdivision of existing lots, which means that no additional lots will be created. A local floodplain development plan may provide that resubdivision should not occur in a particular location or may limit or guide the type of resubdivision that can occur.*
- *A subdivision that is a resubdivision is not confined to the circumstances where a new lot is entirely within the Floodway Overlay, but may include resubdivision where lots are partly within and partly outside the overlay.*
- *A local floodway development plan may place conditions on a subdivision that may be permitted under either limb of clause 44.03-2 but it cannot allow anything more than what is permitted under either limb of clause 44.03-2. Thus, a local floodway development plan could not permit additional lots to be created by way of a resubdivision pursuant to the second limb of clause 44.03-2 because the subdivision would then no longer be a resubdivision (which by its very nature does not involve an increase in the number of lots) and because a subordinate instrument such as a local floodway development plan cannot allow more to be done than what is provided for in the planning controls set out in the overlay itself.*

31. The Tribunal decision in *Greater Shepparton CC* is of a legal member and in particular a Deputy President of the Tribunal at the time, is in the nature of a declaration and is the only authority that specifically deals with the interpretation of the first dot point in clause 44.03-3.
32. The earlier decision of SM Code in *Davies v Moira SC* [2011] VCAT 452 sought to be relied upon by Council does not assist Council given there was no LDP in that case and the factual circumstances being considered by the Tribunal was the subdivision of one lot into two lots where none of the lots were entirely within the FO. Further even SM Code at paragraph 5 accepted that the subdivision was not prohibited by the first limb given “neither lot was within the FO”. At

paragraph 9 SM Code accepted that a subdivision in the FO would be prohibited if two lots were subdivided to create three or more lots, or three lots are subdivided to create four or more new lots.

33. In its Part B submission Council makes the startling and most ambitious submission that DP Gibson was wrong on the basis that the word 'resubdivision' means 'a subdivision of existing lots'. Yet even if one was to accept Council's submission it does not explain how the FO would, for example, allow the subdivision of the Pendragon Land into lots capable of accommodating housing at densities commensurate with either the GRZ or the NRZ where such lots would be wholly within the FO in circumstances where that is directly prohibited by virtue of the clear words of the first dot point in clause 44.03-3. Nothing in the second dot point gainsays the very clear meaning of the words in the first. Put simply, even applying Council's own case the LFDP cannot allow something which is prohibited under the first dot point in clause 44.03-3 of the Scheme. This is clear even in the *Davies* decision.
34. It follows that based on both the clear words of the first dot point of clause 44.03-3 and DP Gibson's decision subdivision of most of the Pendragon Land into lots for township housing would be prohibited. Such an outcome would be contrary to the very clear strategic direction for the Pendragon Land identified in the Structure Plan and the Residential Land Supply Assessment and would defeat a key object of the Amendment to promoting growth within the coastal settlement boundary. It was also be contrary to the hydrology evidence before the Panel (including from both the Council and CMA experts) that it would not be appropriate for subdivision to be prohibited within the FO.
35. But even if none of this were accepted – even if the Panel was to agree that DP Gibson was wrong and, one day, other members of the Victorian Civil and Administrative Tribunal were to find otherwise – that view would not in our submission be a prudent basis to proceed with this Amendment or to plan for the Pendragon Land. At its highest, Council's submission on the construction of the second dot point of clause 44.03-3 of the Scheme highlights an evident conflict between the:
  - a. intention of the LFDP to allow subdivision of land subject to the FO for the purpose of housing even where the resultant lots would be wholly contained in the FO, subject to appropriate assessment of the risk at the permit application stage; and
  - b. strong likelihood, on the basis of existing authority, that such an outcome is prohibited irrespective of the content of the LFDP.
36. The principal control to be applied to manage flood hazard at the Pendragon Land should not be attended by the high risk that it would defeat an important object of the LFDP. Long term planning for land earmarked for a valuable and important role to accommodate growth should not be held hostage to the hope that a Tribunal decision by a senior and well-regarded

presidential member of the Tribunal was wrong. Rather, the best control to implement the LFDP, insofar as it would apply to the Pendragon Land, is the LSIO.

37. This position is wholly consistent with all of the experts' evidence on this, none of which supported the application of the FO if it was to prohibit subdivision of land.
38. It is therefore submitted that *on Council's own case* the FO is not an appropriate control for any part of the Pendragon Land. Only the LSIO could appropriately manage any realistic future flooding hazard attending the future development of the Pendragon Land.

*The FO seeks a control a hazard that would not be present at the Pendragon Land*

39. As it is, the FO is not intended to manage the type and severity of flooding hazard which has been modelled on behalf of Council to apply to the Pendragon Land.
40. There is no Planning Scheme that we are aware of that has sought to use the FO to address the future risk of SLR and coastal inundation, not surprisingly given the purposes of the control and the implications for development within the FO.
41. The purposes of the FO is:

*To implement the Municipal Planning Strategy and the Planning Policy Framework.*

*To identify waterways, major floodpaths, drainage depressions and high hazard areas which have the greatest risk and frequency of being affected by flooding.*

*To ensure that any development maintains the free passage and temporary storage of floodwater, minimises flood damage and is compatible with flood hazard, local drainage conditions and the minimisation of soil erosion, sedimentation and silting.*

*To reflect any declarations under Division 4 of Part 10 of the Water Act, 1989 if a declaration has been made.*

*To protect water quality and waterways as natural resources by managing urban stormwater, protecting water supply catchment areas, and managing saline discharges to minimise the risks to the environmental quality of water and groundwater.*

*To ensure that development maintains or improves river and wetland health, waterway protection and flood plain health.*

42. The purpose of the LSIO is:

*To implement the Municipal Planning Strategy and the Planning Policy Framework.*

*To identify flood prone land in a riverine or coastal area affected by the 1 in 100 (1 per cent Annual Exceedance Probability) year flood or any other area determined by the floodplain management authority.*

*To ensure that development maintains the free passage and temporary storage of floodwaters, minimises flood damage, responds to the flood hazard and local drainage conditions and will not cause any significant rise in flood level or flow velocity.*

*To minimise the potential flood risk to life, health and safety associated with development.*

*To reflect a declaration under Division 4 of Part 10 of the Water Act, 1989.*

*To protect water quality and waterways as natural resources by managing urban stormwater, protecting water supply catchment areas, and managing saline discharges to minimise the risks to the environmental quality of water and groundwater.*

*To ensure that development maintains or improves river, marine, coastal and wetland health, waterway protection and floodplain health.*

43. It is evident that unlike the FO, the LSIO is expressly intended to identify flood-prone coastal land. This is significant given the substantial overlap between the purpose of the FO and the LSIO.

44. Planning Practice Note 12 identifies two types of flooding – ‘mainstream’ and ‘stormwater’. ‘Mainstream’ flooding is defined to mean:

*Inundation of normally dry land occurring when water overflows the natural or artificial banks of a watercourse in a catchment. Mainstream flooding generally excludes water carriers constructed with pipes or artificial channels, which are considered as stormwater channels.*

45. The practice note does not mention coastal flooding.

46. The *Marine and Coastal Policy* of March 2020 is more recent and hence alive to the risk of coastal flooding that might be caused by rising sea levels. Relevant ‘Policies’ include the following:

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

*6.2 Consider available local coastal hazard assessments and localised projections when planning for coastal hazard risks.*

*6.3 Avoid development in identified areas that are vulnerable to coastal hazard risk from impacts such as erosion and flooding (both estuarine and coastal), inundation, landslips and landslides, and geotechnical risk.*

*6.4 Consider and plan for how coastal hazard risks will change over time including from gradual increases in the sea level.*

47. Footnote 4 is revealing:

*The impacts of climate change, including sea level rise, will be affected by global emissions trajectories and mitigation efforts. Sea level rise is not globally uniform and regional differences within  $\pm 30\%$  of the global average can result from several factors. The ‘not less than 0.8m’ figure is used as the statewide planning benchmark to provide a consistent policy setting across the State. It will be updated as necessary and supported by modelling that places global projections into the Victorian context to provide greater accuracy for regional and local-level adaptation.*

48. This document is referenced at clause 13.01-2S.

49. There is nothing, in short, in the text of clauses 44.03 (FO), 44.04 (LSIO), 13 (Environmental Risks and Amenity), Planning Practice Note 12, the *Marine and Coastal Policy*, or indeed any other document which explains why the FO should be preferred to the LSIO for coastal land that is not affected by or adjacent to a waterway and hence will not accommodate the passage of flood waters.
50. The only reason given by Council for the application of the FO to the Pendragon Land in preference to the LSIO is that the modelled flood level would exceed 0.5 m in depth. This, Council says, makes the land a 'high hazard area'.
51. The notion that much of the Pendragon Land is a 'high hazard area' should be understood in the following context:
- a. first, as all experts accept or do not dispute, there is *no existing high hazard modelled risk* of any part of the Pendragon Land; and
  - b. second, at some point after 2100 there is an *exceptionally low* risk that part of the Pendragon Land would be inundated to a depth exceeding 0.5 m were the 1% AEP flood event to occur.
52. Put another way, for the Panel to recommend the application the FO to the Pendragon Land it would need to be satisfied that a very low percentile risk, derived from an implausible development path, capable only of being realised well after the potential life of buildings to be developed on the land, renders the Pendragon Land a 'high hazard area' for planning *now*.
53. Put that way the notion that the Pendragon Land should be controlled now on the basis that it might one day become a 'high hazard area' has no strategic basis, is poor planning and inappropriately sterilises the land..
54. Moreover, such an approach treats a modelled estimate as to the future depth of a remote flood event alone as being indicative of the gravity of the future hazard without consideration of any other factor that might influence the risk to life posed by a flood event, such as velocity, natural storage and warning time. As Planning Practice Note 12 explains:<sup>14</sup>

Flood risk factors include:

- land use
- duration of flooding
- available flood warning time
- size and frequency of flood

---

<sup>14</sup> At page 3.

- rate of rise of floodwater
  - access and evacuation
  - depth and velocity of floodwater
  - available flood storage capacity
  - environmental values.
55. Council's proposed application of a blanket demarcation between 'high' and 'low' hazard of a modelled 0.5 m depth is antithetical to precisely the type of considered and comprehensive risk and hazard assessment actually called for by the policy and unduly elevates the importance of floodway modelling conducted now in the future subdivision, use and development of the Pendragon Land.
56. This conclusion is reinforced by consideration of the physical circumstances of the Pendragon Land as being subject only to a remote risk of coastal inundation.
57. This point is made well by Mr Bishop in his written report:<sup>15</sup>
- *The extent of the Floodway Overlay (FO) is excessive as it is based on projected sea levels that won't be reached for decades (and potentially centuries) into the future. The full extent of the FO does not reflect "mainstream flooding" or areas that are likely to block or impact flooding, particularly within the next few decades.*
  - *It is my view that the emphasis of the floodway overlay in this amendment is overly focussed on flood hazard, rather than the flood capacity of the waterway and floodplain. As noted in Sections 5.2.2 above, a key criteria for delineation of floodways in Practice Note 12 is "These areas convey active flood flows or store floodwater.". While flood hazard (such as safety and access) is a consideration for the FO, the primary reason to differentiate these areas from the LSIO is to protect the hydraulic function of the waterway and floodplain. Issues related to hazard (protection of property, safety and access) are thoroughly covered by the Guidelines for Development in Flood Affected Areas and are typically addressed through the permit application and referral process. In Port Fairy they will also be addressed by the Local Floodplain Development Plan.*
  - *I am confident that there are areas within the presently defined FO (and as I understand zoned for residential development) that could be demonstrated to fulfill the requirements of the Guidelines for Development in Flood Affected Areas. This includes the hazard criteria.*
  - *Whilst I acknowledge that the 0.5 m threshold for delineation of the FO is often used in flood studies, it is important to recognise that it is a somewhat arbitrary benchmark. This is because the depth of water does not determine if an area is critical to the "free passage" of flood waters. In terms of safety hazard, when considering the potential of land for development, it is the safety and risk based on proposed development conditions that is critical, taking potential mitigation measures into account. For areas that have flood depths slightly greater than 0.5 m but are in backwater area and not part of the active floodplain, it may be quite feasible to achieve an acceptable flood risk*

---

<sup>15</sup> Pages 42 and 43.



*outcome for a subdivision through filling of the land. This opportunity would be available under the LSIO but not with the FO where subdivision is not permitted under the VPP.*

- *As noted above, I consider the current modelling of coastal wave-setup impacts to be overly conservative, further extending the area of FO compared to what may be more accurately defined.*
- *Whilst consideration of the LSIO with respect to climate change is appropriate in consideration of the Victorian Coastal Strategy I believe that adjusting the Floodway Overlay based on the same data is not appropriate. This is because the designation of floodway should be based on the catchment flows primarily. Increases in mean sea level will not significantly impact on the conveyance capacity within floodplains. Hence using SLR impacts to extend the FO will place undue restriction on the development potential of some land. Any development within the LSIO will still need to meet strict development requirements including accounting for climate change.*
- *As flagged in Section 7.3 I do not support the application of FO in areas that are only impacted by coastal inundation. Areas where coastal inundation occur without any significant waterway do not present the same issues and driving purpose that the FO is intended to address, i.e., the “free passage and storage” of flood waters. In some instances, for example, developments that block the passage and landward spread of coastal inundation could be considered beneficial. This is contrary to the requirements of the FO.*

58. Ms Barich agreed with Mr Bishop’s views. Dr Lauchlan Arrowsmith was not instructed to consider the application of the flood controls nor has she undertaken any modelling.

59. In the Panel Report for Greater Geelong Planning Scheme Amendment C394ggee dated 3 April 2020 that considered coastal inundation and hazard on the Bellarine Peninsula and Corio Bay the Panel accepted that the *“LSIO is the current and most appropriate planning tool available to address the risk of sea level rise and storm tide surge”*.<sup>16</sup> Relevantly the Panel made the following comments<sup>17</sup>:

*PPN12 indicates that the FO is intended to apply to areas that convey active flood flows or store floodwater in a similar way to the Urban Floodway Zone, but with a lesser flood risk. The FO generally addresses a higher flood risk than the LSIO, on land where deeper flood levels and/or greater velocities are anticipated. Therefore, the level of assessment of permit applications under the FO is likely to be higher than under the LSIO, and any measures required to address the flood risk under the FO should, in theory, be adequate to address the (lesser) risk under the LSIO.*

*That said, although the LSIO is not the perfect tool to address coastal inundation (for the reasons discussed in Chapter 3.3), the LSIO makes it very clear that the purposes of the overlay is to address coastal inundation. **Nothing in the FO or its schedule indicates that the land might be subject to this particular type of flooding.***

---

<sup>16</sup> P ii of iv Executive Summary

<sup>17</sup> Pages 16 and 17

*\*Emphasis added*

60. For these reasons, it is submitted that the Panel should recommend against the application of the FO to any part of the Pendragon Land even it were to be satisfied that part of that land were at future risk of inundation.

*State policy on the application of the FO and the LSIO is very clear about the extent of SLR that ought to be planned for*

61. The *Marine and Coastal Policy* supports planning for a SLR of 'not less than' 0.8 m. This is consistent with clause 13.01-2S of the Scheme:

**Objective**

*To plan for and manage coastal hazard risk and climate change impacts.*

**Strategies**

*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.*

*Ensure that land subject to hazards is identified and appropriately managed to ensure that future use and development is not at risk.*

*Avoid use and development in areas vulnerable to coastal inundation and erosion.*

*Respond to marine and coastal processes in the context of the coastal compartment type.*

*Assess the effectiveness, costs, benefits, impacts (direct, cumulative and synergistic) and path dependency of available adaptation options in the following order:*

1. *non-intervention*
2. *avoid*
3. *nature-base methods*
4. *accommodate*
5. *retreat*
6. *protect*

*Ensure that development or protective works that seek to respond to coastal hazard risks avoid detrimental impacts on coastal processes.*

62. It is correct to note that the words 'not less than' can support planning for a higher sea level rise if local circumstances render that appropriate. For reasons given, and as explained by Mr Bishop without contradiction from the other hydrology experts, having regard to the full range of flood risks identified by policy there are no local circumstances that would warrant departure from the statewide standard provided for in policy. There is no evidence before the Panel that

suggests that Port Fairy is different from other coastal towns in relation to SLR where the state wide and consistent approach for planning for SLR of 0.8 should not be applied.

63. But even if that was not accepted, for the reasons given by both Mr Bishop and Ms Barich a 0.8 m SLR accords with appropriate risk management principles:<sup>18</sup>
- *As highlighted in Section 5.2.4, the latest IPCC modelling reports show that the median projected sea level rise to 2100 for the RCP8.5 scenario is around 0.8 m.*
  - *The RCP8.5 scenario reflects assumptions that do not appear consistent with likely future trajectories in human population and international action on greenhouse gas emission reduction. However, it is considered prudent and in keeping with the precautionary principle to adopt this scenario for planning purposes.*
  - *Choosing RCP8.5 is consistent with the Victorian Marine and Coastal Strategy and other planning policies and guidelines.*
  - *Given the extensive global modelling and scenario testing that has been undertaken it is reasonable to adopt the median of the range of RCP8.5 modelled SLR outputs. A similar approach is taken in design hydrology for the determination of design flow peaks, where the median is adopted rather than the maximum (from a range of possible storms based on different temporal rainfall patterns).*
  - *If we adopt the median prediction for each IPCC Scenario, the date by which the 1.2 m SLR will be exceeded could range from around 2120 to 2270. That is in 100 to 250 years. Whilst many models suggest the dates could be earlier than this, an equal number suggest it could be later.*
  - *Water Technology has undertaken many coastal hazard studies around Australia in the last 15 years. I am not aware of any study in any jurisdiction that has adopted 1.2 m SLR for planning purposes.*
64. Even Mr Swan accepted in evidence that he could have supported an amendment that adopted 0.8m SLR plus freeboard.
65. Put simply, 0.8 m SLR would still be based on the same implausible scenario from which the 1.2 m SLR was derived, but would represent the median outcome. This is a reasonable approach to take to identifying hazard and managing risk given the great unlikelihood that the underlying premise upon which the scenario is based would ever be borne out. This appropriately takes a precautionary approach to SLR.
66. There is, in short, no reason to adopt a SLR of greater than 0.8 m in the circumstances of the Amendment or the Pendragon Land.
67. If that approach was taken then none of the Pendragon Land would, on Mr Bishop's modelling, be subject to the FO, and only a small portion would be subject to the LSIO as shown in Scenario 2 in Figure 7-5 in Mr Bishop's expert report. That outcome would not cause any undue, inappropriate or unreasonable risk to human life.

---

<sup>18</sup> At pages 41 and 42.

68. Finally, it is apt to note Mr Bishop's criticisms of the wave height assumptions used for the flood modelling relied on by Council when preparing the Amendment in light of his overall evidence as to the proper role of modelling to govern strategic land use planning decisions:<sup>19</sup>

- *The 2013 coastal hazard assessment overestimated the impact of wave set-up and runup on coastal inundation and within the Moyne River. Hence, subsequent flood modelling for the amendment and the resulting design flood levels are considered to be overestimated across much of the mapping area.*
- *Whilst I expect that design flood levels are likely to be overestimated across much of the C69 mapping area. I do not necessarily consider that the mapping extent should therefore not be adopted. I am sure that each of the authorities and consultants involved in developing the material were working with the best information they had available to them at the time. It is my view that Councils should seek to implement new flood mapping into planning schemes as it becomes available, providing it has been undertaken to an acceptable standard.*
- *I believe the conservatism in the coastal boundary condition could be accepted for the 0.8 m SLR scenario. It is the proposition of the 1.2 m SLR scenario that has caused the mapping to be exaggerated in its extent and impact.*
- *It is fair to say that modelling and mapping studies are never "perfect" and can usually be improved given more time and resources. The LSIO is intended to be an indicator of areas prone to flooding and provides a trigger within the planning scheme to initiate a referral to the responsible floodplain management authority (the GHCMA in this instance). The potential consequences of adopting an extremely conservative approach to the flood scenarios are:*
  - *The extent of the LSIO is inflated and there will be an increased number of referrals and hence additional load on Council and CMA officers (unnecessarily).*
  - *Additional concern and within the community due to a perceived increase in risk compared to what is reasonable.*
  - *Over-extending the Floodway Overlay which could have significant impacts on land, preventing any subdivision on land within the FO that might otherwise be considered for development.*
- *It is important to recognise that the CMA has the responsibility and flexibility to assess each LSIO referral on its merits and provide advice back Council that may or may not agree with the flood information that supports the overlay.*

69. This is a reasonable approach and should, it is submitted, be adopted. The extent of mapping should only be adopted if the documents ultimately approved by the Amendment including the LFDP is based on 0.8m SLR and the application only of the LSIO, not the FO.

---

<sup>19</sup> At page 42.

***The proposed amendments to clauses 21.06 and 21.09 are either unclear or inappropriate***

70. For the reasons given in this submission and in Mr Bishop's and Ms Barich's evidence, clauses 21.06 and 21.09 should be amended in the manner described by Mr Bishop in his report.<sup>20</sup>
71. The local policies should not make reference to 1.2m SLR.
72. In proposed clause 21.09-3 the following strategies should be deleted and these matters appropriately addressed under the LSIO application and referral process:
- Locate new uses, development and redevelopment away from areas that are or will be negatively impacted by coastal hazards.*<sup>21</sup>
- Do not support any increase in residential density....in areas affected by coastal inundation.*
- Do not support any mitigation measures undertaken by individual landowners or undertaken site by site as a basis for any development proposal.*<sup>22</sup>
73. It is unclear on what basis that mitigation measures to address coastal inundation should not be encouraged other than to unnecessarily and inappropriately sterilise and prevent development of land. Feasible mitigation measures are often implemented to enable development of land in flood prone areas. It would be unduly restrictive to not allow this to occur. The permit application process and referral under the LSIO will be able to appropriately assess the appropriateness of any mitigation measures.

***Drafting of LFDP***

74. Mr Bishop made further comments with respect to the LFDP and other matters.<sup>23</sup> Pendragon supports and relies on Mr Bishop's evidence on this point.
75. Given both the FO and LSIO require an application to "be consistent" with the LFDP it is important that the wording of LFDP is properly 'performance based', is not prescriptive and allows appropriate assessment of applications. This is particularly pertinent given the LFDP is to be an incorporated document which can only be amended by a Planning Scheme Amendment.
76. In particular clause 6.2 should not be drafted in a manner where the third dot points are preconditions to the approval of subdivision but rather are considerations. The mandatory

---

<sup>20</sup> At pages 42 and 43.

<sup>21</sup> Page 6 of 22

<sup>22</sup> Page 9 of 22

<sup>23</sup> At pages 45 to 51.

language in clauses 6.2 to 6.4 should be removed and allow for post development situations which allow for cut and fill and flood mitigation measures.

77. Access criteria should not apply to existing access to land on Council roads that is not within the control of permit applicants, a point accepted by Mr Swan and in the conclave statement. This is particularly the case whether the southern public access road to the Pendragon land at Anna Catherine Drive is already constructed and serves existing housing to the south and south west.
78. The evidence of Mr Bishop (which is also supported by Ms Nina Barich) is that the proposed 1.2m SLR with no freeboard will result in great cost to the community and is not necessary. The evidence before the Panel of Ms Barich is that the application of a NFPL based on 1.2m SLR is not the equivalent of 0.8m SLR plus freeboard and will result in significant fill and additional cost to developers and the community.
79. If a NFPL is to be specified (which on the evidence of Mr Bishop is that it need not be) it should not be based on 1.2m SLR but 0.8m SLR. If a freeboard is to be specified it should be 300mm not 600mm.

### ***Broader Planning Implications to be Considered***

80. Pendragon relies on Mr McGurn's evidence on this issue. He concluded as follows:<sup>24</sup>
  - *The Port Fairy Structure Plan (and associated documents) identify increasing demand for housing in Port Fairy and a need for increased diversity to support an ageing population and housing for key workers and families.*
  - *Residential development within Port Fairy is constrained by flood risk and heritage, reducing the apparent future supply. Consequently there is a need to consider land which is suitable for future residential development.*
  - *The subject site is well located in the context of the township, is contiguous with existing residential subdivision and proximate to township services.*
  - *The subject land has enjoyed residential zoning for a period in excess of 20 years and there is an expectation for a significant contribution to residential opportunities in the township.*
  - *The consideration of flood risk is a detailed matter which is addressed in the advice of Mr Warwick Bishop of Water Technology and I defer to him in this regard. I rely on his advice that the land can be suitably managed through the application of the Land Subject to Inundation Overlay and detailed and reasonable design outcomes.*
  - *In the face of a major infill opportunity in a highly constrained township there is a need for development opportunities to be determined on their merits and capable of being addressed through detailed investigation and design.*

---

<sup>24</sup> At page 21.

81. Such reasoning supported his assessment that the proposed DDO4 should seek to facilitate the development of housing at the Pendragon Land in light of its proposed rezoning from GRZ1 to NRZ1:<sup>25</sup>

*The rezoning of the land from the General Residential Zone to the Neighbourhood Residential Zone is by its nature more restrictive given the purposes of the zone and the relative heights imposed in each case. In addition there will be a complicated interplay between the 'garden area' and site coverage requirements, mandatory and discretionary heights controls and other requirements of the DDO (such as setbacks) and Rescode. It is also not apparent that a detailed assessment has been undertaken in relation to the character controls of the DDO (being largely more prescriptive than the existing DDO control). This includes the requirement for a 6 metre front setback and 6 metre side 'separation' which (notwithstanding they are discretionary) appear relatively onerous in this setting.*

*Given the relatively limited 'interface' issues as well as the detail of flood considerations, I consider that a more flexible approach to controls should be taken to play a facilitative role in the development of the land. This will support it being utilised in a manner which best meets the challenges of the population and housing demands identified by the Structure Plan.*

*In the face of a major infill opportunity and a highly constrained township I consider that there is a necessity to keep the options for development 'open' and capable of being addressed through detailed investigation and design. These are complex matters and will be suitably addressed on a 'case by case' basis informed by expert advice. To this end, the zoning and overlay regime should not minimise or prevent what may otherwise be suitable outcomes on land which clearly has a significant role to play in addressing the housing demand and diversity issues facing Port Fairy.*

82. As Mr Glossop accepted in cross examination, the proposed built form requirements in the DDO4 are derived from the Structure Plan.<sup>26</sup> Save for the question of building height, all of the matters canvassed in the Structure Plan were identified as discretionary requirements; that is, requirements that 'should' be met.
83. The essence of Mr Glossop's evidence on this topic was that it was not clear if the word 'should' denoted a discretionary requirement and the word 'must' denoted a mandatory requirement in the proposed DDO4. Mr McGurn did not consider this issue in his written evidence because, while the exhibited form of the proposed DDO4 sought to implement the language and the intent of the Structure Plan's recommendations for the Pendragon Land within the broader precinct subject presently to the DDO18, in its Part A submission Council gave notice of its intention to rely on a far more prescriptive form of the proposed DDO4 in which most of the proposed built form requirements 'must' be complied with.
84. To avoid any confusion over the likely meaning of the word 'must' in Council's preferred version of the DDO4 it should be reinstated as 'should'. It stands in contradistinction to the word 'should' as used elsewhere in the DDO4, and would potentially deny Council the power to approve a proposal that did not comply with one or more of the many built form requirements that under

---

<sup>25</sup> At page 20.

<sup>26</sup> At page 102.

the proposed amendments to the DDO4 'must' be complied with, or at least create confusion as to whether this requirement is intended to be mandatory.

85. But even if this were not accepted there is no reason why the DDO4 should depart from both the language and the very clear intention of the Structure Plan in circumstances where not a single town planning witness suggested that the DDO4 should include any mandatory built form requirements for any matter other than the height of a building. Mr Glossop was at pains to say that he did not recommend the extensive changes to the proposed DDO4 now advocated for by Council. They are unsupported by any neighbourhood character or other study and there is no analysis of how they would promote or (more likely) inhibit the realisation of the clear strategic support for housing within the coastal settlement boundary. They have seemingly come from nowhere.
86. Moreover, if the proposed DDO4 were approved in Council's preferred form it would contain a more prescriptive suite of built form requirements than would apply to Growth Areas A and B under the proposed Neighbourhood Residential Zone, Schedule 2. As Mr Glossop accepted, there is no planning justification for this differential between the Pendragon Land – a Major Infill site – and the two identified Growth Areas.
87. Mr Glossop was right: the language of the proposed DDO4 should be clear. This is best achieved by rejecting Council's extensive effort to convert most of the proposed built form requirements in it to ones which a proponent 'must' comply with.
88. The other proposed changes to the DDO4 are more reasonable and Pendragon does not oppose them. In particular the recent change to allow for building height to be measured from the designated floor height rather than the natural ground level if in a flood overlay is supported and consistent with height controls in the residential zones.

## **CONCLUSION**

89. On balance to the extent that the Amendment seeks to plan for the growth of Port Fairy and plan for SLR and coastal inundation it is supported. However, for the reasons given in this submission Council has drastically overreached in its approach to assessing and then managing the likely risk of inundation at the Pendragon Land. The use of the FO to deal with coastal inundation and planning for a SLR of 1.2m has no strategic or proper planning basis and should not be supported. Taken together, these would imperil the capacity of the Pendragon Land to accommodate growth within the settlement boundary and thereby defeat one of the key objectives of the Amendment.



90. Pendragon has proposed reasoned and well-founded changes to the Amendment based on conservative expert evidence which it submits should be supported by the Panel.

Dated: 14 September 2022

Tania Cincotta

BEST HOOPER LAWYERS

For and on behalf of Pendragon