

**PLANNING PANELS VICTORIA  
IN PORT FAIRY AND MELBOURNE  
AMENDMENT C69 TO THE MOYNE PLANNING SCHEME**

**BETWEEN:**

**MOYNE CITY COUNCIL**

Planning Authority

**GLENELG HOPKINS CMA**

CMA

**RIVERS RUN PTY LTD**

Rivers Run

**PENDRAGON PTY LTD AND ORS**

Other Submitters

**SUBMISSIONS ON BEHALF OF RIVERS RUN  
RE: 169A AND 183 PRINCES HIGHWAY  
PORT FAIRY**

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## INTRODUCTION

1. This submission is made on behalf of Rivers Run, a land owner and developer within Port Fairy, to Amendment C69 to the Moyne Planning Scheme (**Scheme**). Rivers Run owns land at 169A and 183 Princes Highway, Port Fairy (**subject land, Rivers Run site**).
2. The Amendment seeks to implement the recommendations of the Port Fairy Coastal and Structure Plan 2018 (**Structure Plan**) by proposing changes to the zoning and overlay controls applicable to Port Fairy and revising the local planning policy framework of the Scheme.
3. The proposed changes to cl 21.09 set out a vision for Port Fairy:
  - a) To retain the distinctive character of Port Fairy based on its heritage features, coastal location, rural setting and high quality urban design which are of critical importance.
  - b) To deliver a range of housing which responds to the needs of existing and future residents.
  - c) To develop a settlement which responds to the constraints of the Moyne River floodplain and increasing coastal hazards, while protecting the sensitive coastal surrounds.<sup>1</sup>

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<sup>1</sup> Clause 21.09 – Local Areas - Part A version (Document no. 88).

4. The Structure Plan is proposed to be introduced into the Scheme as a reference document in cl 21.11. Clause 21.09 includes a policy “to ensure that any proposed use or development within Port Fairy is to be consistent with the Port Fairy Framework Plan (at Figure 1 of cl 21.09) and the Port Fairy Coastal Structure Plan 2018.
5. Amendment C69 identifies two main areas for residential growth and proposes a settlement boundary that largely encompasses the existing township and those growth areas.
6. Amendment C69 also proposed a new set of flood related controls which extend the existing mapped area of the LSIO and FO and incorporate a new Local Floodplain Development Plan (September 2022).
7. Amendment C75 to the Scheme is an amendment that was originally proposed to run in tandem with Amendment C69. It considers a third area for residential growth on the Rivers Run site, albeit an area that is smaller and more appropriately considered as an infill opportunity rather than a growth area, noting its proximity to the town and existing infrastructure. Amendment C75 is now to follow Amendment C69 rather than running in tandem with it. Accordingly, Rivers Run is concerned to ensure that Amendment C69 does not prejudice the future consideration by the Panel of the strategic opportunity offered by the Rivers Run site to deliver much a needed new, diverse and shovel ready housing offer for the Port Fairy community.
8. Where relevant, this submission relies on the Part A version of material filed and served by Council on 29 August 2022.

### **Expert evidence**

9. In support of Rivers Run’s case, the following expert evidence will be relied upon:
  - a) Mr Stuart McGurn in relation to planning;
  - b) Mr Warwick Bishop in relation to flood modelling;
  - c) Ms Nina Barich also in relation to flood modelling;
  - d) Dr Iain Cowan in relation to air quality, and

- e) Mr Travis Hancock in relation to noise impacts.
10. Rivers Run also relies upon the conclave statement agreed by the hydrology experts dated 1 September 2022.
  11. On 5 September 2022, Rivers Run tabled two letters from Nick Brisbane of Ethos Urban dated 26 August 2022 and 2 September 2022:
    - a) the 26 August 2022 letter provides an update to the social and economic benefit assessment which was exhibited as part of Amendment C75. The updated assessment takes into account the most recent data available,<sup>2</sup> and
    - b) the 2 September 2022 letter provides a high level response to the Residential Land Supply and Demand Assessment (May 2021) prepared by Spatial Economics and circulated with Council's Part A submission on 29 August 2022.<sup>3</sup>
  12. Rivers Run seeks to rely on both letters prepared by Mr Brisbane.

## **PROPOSED PANEL RECOMMENDATIONS**

13. Rivers Run supports the position of the Council that:
  - a) there is a need to rezone land to provide for residential growth in Port Fairy; and
  - b) Port Fairy's flood mapping should be reviewed and updated to ensure it is fit for purpose.
14. Rivers Run does not support Amendment C69 in its current form. The Panel should recommend:
  - a) retention of the current extent of the Flood Overlay (or minor adjustments to reflect the updated flood mapping, without any allowance for sea level rise);
  - b) amending the LSIO mapping layer so that it represents:

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<sup>2</sup> Document no. 103.

<sup>3</sup> Document no. 104.

- i) a 0.8m sea level rise (rather than a 1.2m sea level rise); or
  - ii) a 0.8m sea level rise plus a 600mm freeboard allowance,
- c) changes to the LSIO and FO schedules to:
  - i) remove unnecessary (duplicate) content;
  - ii) make clear that the FO has been applied to areas which have been modelled to experience a class 3 or above hazard event as defined in the ARR in a combined 1% and 5% AEP event (without an allowance for sea level rise);
  - iii) delete much of the commentary in clauses 1 and 2 of the LSIO and amend the explanation of the derivation of the 1% and 5% AEP event and the extent of the mapping layer.
- d) Changes to the Local Floodplain Development Plan (September 2022) (**LFDP**) including:
  - i) changes to set the Nominal Flood Protection Level (**NFPL**) based upon 0.8m sea level rise;
  - ii) deletion of anything in the LFDP that is already sufficiently covered by the LSIO and FO head clause and DELWP's Guidelines for Development in Flood Affected Areas 2019;
  - iii) removal of mandatory requirement and changes to language to ensure that the requirements for subdivision and new buildings are expressed to reflect post development site condition (i.e. allow for cut and fill); and
  - iv) reflect the further changes recommended by Mr Swan, Ms Barich and Mr Bishop in their written evidence,
- e) adjustments to the wording of the local policy in so far as it relates to areas subject to inundation and industrial sites, as set out in **Attachment A** to this submission; and
- f) add a notation on Figure 1 of the Framework Plan to recognize that the Rivers Run site is a potential site for residential expansion subject to resolution of flooding and interface issues.

## PRINCIPAL PROPOSITIONS

### The LSIO and Sea Level Rise (SLR)

15. The LSIO is the appropriate tool to use to plan for and manage the risks of sea level rise.<sup>4</sup>
16. 0.8m sea level rise by 2100 is an appropriately conservative benchmark for the design of new residential subdivisions and development. It reflects a policy position that was adopted by the State in 2008, at a time when the climate science was different and also a time when the world's transition away from fossil fuels was less advanced than it is today. While currently under review, it is a position that the State has affirmed and re-affirmed on a number of occasions, including through the subsequent versions of the Victorian Coastal Strategy, VC171 (gazetted in September 2021),<sup>5</sup> the *Marine and Coastal Policy 2020*<sup>6</sup> and the *Marine and Coastal Strategy 2022*.<sup>7</sup>
17. In the absence of a change in State policy, it remains the relevant number to adopt for planning purposes, and is consistent with the precautionary principle:
  - a) Ms Barich's evidence is that the current SSP5-8.5 sea level rise for Portland based on the ICPP 6th Assessment Report (2021) has a median value of 0.72 m for 2100.<sup>8</sup> Dr Lauchlan Arrowsmith's evidence is Portland would reach 0.8m SLR under the SSP5.8-5 scenario (median value i.e. 50th percentile) at 2107.<sup>9</sup>
  - b) The SSP5-8.5 is a high emissions scenario. It is plausible but very conservative for planning past mid-century.<sup>10</sup> It assumes no additional

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<sup>4</sup> That proposition, stated in plain terms by Members Carlisle and Carruthers in Amendment C394 to the Greater Geelong Planning Scheme, was recently affirmed by the Minister for Planning in VC171.

<sup>5</sup> Document no. 112

<sup>6</sup> Document no. 31

<sup>7</sup> Document no. 32

<sup>8</sup> Ms Barich's Witness Statement at p 13 (Document no. 75).

<sup>9</sup> Dr Lauchlan Arrowsmith's Witness Statement, Table 2, p 20 (Document no. 66).

<sup>10</sup> Schwalm et al (2020), PDF p 1, Document no. 121.

climate policy and continued socioeconomic development which includes the use of fossil fuels.<sup>11</sup>

- c) On the other hand, a 1.2m SLR by 2098 reflects the 95<sup>th</sup> percentile of the high emissions scenario, which is a “high extreme value”<sup>12</sup>, an “extreme abnormality”<sup>13</sup>, on top of an already conservative value.
- d) The Emissions Gap Report 2021 shows that the new Nationally Determined Contributions (NDCs), combined with other mitigation pledges, put the world on track for a global temperature rise of 2.7°C by end of the century,<sup>14</sup> which correlates with the SSP2.4-5 scenario.<sup>15</sup> The SSP2.4-5 scenario (with warming to 2.7 degrees) is a far cry from the median of the SSP5.8-5 scenario (4.5 degrees), let alone the 95 percentile of the SSP5.8-5 scenario which would see mean global temperature increase of a whopping 5.4 degrees.<sup>16</sup>
- e) Mr Swan agreed that there was not a single document referenced in his report that recommended the adoption of 1.2m SLR, that the choice to apply the 1.2m SLR was not based on his recommendation but at the discretion of the CMA and ended up conceding that he could have supported an amendment that adopted 0.8m SLR plus freeboard.
- f) While the CMA submitted orally to the Panel that the tidal gauge at Portland was tracking along the 1.2m SLR trajectory, that submission must be put into context. Dr Lauchlan Arrowsmith’s evidence is that the:<sup>17</sup>

“Portland gauge is a rate of movement of 3.4 mm/year which is consistent with the predicted rate of movement across all the SSP emissions scenarios presented in IPCC (2021).”

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<sup>11</sup> Dr Lauchlan Arrowsmith, p 12 (Document no. 66).

<sup>12</sup> Dr Lauchlan Arrowsmith, p 19 (Document no. 66).

<sup>13</sup> Ms Barich at p 13 (Document no. 75).

<sup>14</sup> UN Gap Report extract, document no. 120.

<sup>15</sup> Dr Lauchlan Arrowsmith, p 11 (Document no. 66).

<sup>16</sup> Schwalm et al (2020), PDF p 1, Document no. 121.

<sup>17</sup> Dr Lauchlan Arrowsmith, p 19 (Document no. 66).

(emphasis added)

Thus, while important for future adaptive planning, the historic tracking of the Portland tidal gauge is not particularly relevant to which future scenario, or percentile, to adopt for planning purposes.

18. There is, however, a more fundamental point to be made. All experts agree that the decision as to which scenario (and percentile) to adopt for planning purposes is a policy driven decision, based upon appetite for risk. It is a decision that should be made having regard to the very detailed and best scientific information available and having regard to the implications of adopting one scenario over another. It is a decision that is best made at a state level given the sheer complexity of the issue. It is a decision that is best made on advice of the peak body which has been established by the *Marine and Coastal Act 2018*<sup>18</sup> to advise the government on the issue, and after the Minister for Planning has engaged in whatever consultation process is adopted in order to facilitate the relevant planning scheme amendment. If Dr Lauchlan Arrowsmith is indeed correct, and it is a number that must be continually reviewed, then that task must be taken on by the State as it is far too resource intensive to expect local councils to undertake that task through regular review.
19. While the Council argues that there is local reason to adopt a numeric value above the 0.8m, the simple fact of the matter is that there is nothing that differentiates Port Fairy from other coastal towns in terms of the level of SLR. To the contrary, Victoria's Climate Science Report 2019 shows very little variability in projected SLR across the Victorian coastline.<sup>19</sup>
20. While it may be of little practical consequence whether a 1.2m SLR or a 0.8m SLR with 600mm freeboard is adopted in terms of the mapping, the distinction carries significant ramifications in terms of development outcomes, and hence the cost of housing. Specifically, the adoption of a NFPL based upon a 1.2m sea level rise in the LFDP has significant implications on matters such as the levels

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<sup>18</sup> Document no. 111.

<sup>19</sup> Victoria's Climate Science Report, p 35.

required for lots, roads and building envelopes, the extent of cut and fill and construction techniques.

21. In summary, adoption of a 1.2m SLR:
  - a) is not justified on the evidence before the Panel (on the basis of global, Victorian or local predictions);
  - b) is not justified by the proper application of the precautionary principle; and
  - c) will have significant implications for the delivery of more affordable housing in Port Fairy.
22. While the extent of the *mapped* LSIO has little practical consequences for the Rivers Run site, as a matter of good policy it should be applied having regard to the 0.8m SLR (plus freeboard if desired).

### **The FO and SLR**

23. The FO is not the appropriate tool to use to plan for the risk of sea level rise to 2100. That is the case for a few main reasons:
  - a) The LSIO has been specifically adopted, and adapted, for that task.<sup>20</sup> Planning for a 0.8m SLR to 2100 (which in itself is precautionary) should usually not preclude development but rather ensure that adaptive techniques are implemented in case that scenario eventuates, despite world endeavors to curb the effects of climate change. The LSIO purposes, permit triggers and decision guidelines are useful for that task. Not a single reason has been offered by anyone to date as to why the LSIO is insufficient for the task at hand.
  - b) On the other hand, *prima facie*, the FO prohibits most types of subdivision which create additional lots within the FO. Even on the Council's construction, it would prohibit the subdivision of a single lot into multiple lots. It has the potential to sterilise large areas of land from development. That is not proportionate to the risk of sea level rise, which

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<sup>20</sup> VC171 Explanatory Memorandum, Document no. 112.

can be managed in many places by engineering solutions. If the FO does operate to prevent the creation of additional lots within the extent of the FO layer, then all of the experts before the Panel agree that including an allowance for SLR in its application (as proposed) would result in inappropriate outcomes.

- c) The FO is a control that is primarily directed to allowing the free flow of water through areas that are regularly inundated.<sup>21</sup> In this case, however, it is proposed to be applied to areas which will not be flooded to a class 3 hazard event until at least 2100 (even adopting a 1.2m SLR) and even then, will only flood to that level in the 1% AEP event. It has therefore been applied to sites that have a very *low* likelihood and a very *low* frequency of flooding to a level that would create even a class 3 hazard.
  - d) Council has sought to distinguish between: riverine flooding; coastally influenced riverine flooding; and coastal flooding. Council argues that the tool is applicable in the second two categories. However, that misses the point as to why Rivers Run says the tool ought not be used to plan for SLR to 2100. Unless a much shorter timeframe for sea level rise is adopted than 2100, and hence a much lower sea level rise adopted, then by definition the area will not be one of high risk, because risk is a function of likelihood (not just consequence). So, the FO may well be used to deal with areas which are subject to both riverine and coastally influenced inundation, but only where they fit within the category of high risk areas.
24. As a result, the changes to the mapped extent of the FO, which assumes a 1.2m SLR, should be rejected.
25. The Council's position is also contrary to a declaration as to the proper interpretation of that section, cl 44.03-3, by Deputy President Gibson's decision in *Greater Shepparton CC v Goulburn Broken Catchment Management Authority* [2016]

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<sup>21</sup> See the purposes of the control and the Flood Provisions in Planning Schemes, A guide for councils, Planning Practice Note 12 | 12 (June 2015) (Document no. 24), Mr Bishop's Witness Statement at p 19 (Document no. 77).

VCAT 2181 (**Greater Shepparton**). If it was the case that there was no appropriate VPP tool to use, then the Panel may need to turn its mind to the correctness of DP Gibson’s decision (whether through the use of counsel assisting, or otherwise). However, there is simply no need for that in this case because the LSIO is the correct tool to use in any event.

26. Should the Panel decide that it is appropriate to inquire into the legal construction of the FO, then the following key propositions are made:
  - a) The drafting of the FO is unclear. There are arguments that support both positions.
  - b) The Tribunal is specifically invested with jurisdiction to make declarations as to the legal meaning of planning scheme provisions. The Panel should not lightly proceed upon the basis that DP Gibson is wrong.

**Amendment C69 ought not prejudice Amendment C75**

27. This Amendment should not (whether inadvertently due to timing or by design) prejudice the consideration of Amendment C75 on its merits at the relevant time. Rivers Run accepts that it will need to persuade the Amendment C75 Panel that the site is appropriate for residential development having regard to:
  - a) flooding;
  - b) the relationship between the subject site and Sun Pharma’s site; and
  - c) the usual issues which accompany a residential rezoning request, such as built form, amenity and net community benefit.
28. However, the evidence before this Panel is sufficient to demonstrate that:
  - a) there is a potential community benefit as a result of the rezoning in the form of the delivery of well located, well serviced, diverse and affordable “shovel-ready” housing; and
  - b) there are no “show stopping” issues at this stage of the process that should result in an immutable settlement boundary to the exclusion of the site being explored through a parallel Amendment C75 process.

## RIVERS RUN AND THE SUBJECT LAND

29. The subject land:

- a) is triangular shaped and approximately 7 hectares in area;
- b) is comprised of four parcels being:
  - i) Lot 2 PS306968 known as 169A Princes Highway, and
  - ii) Lot 1 LP209306, Lot 1 TP618374 and Lot 1 PS306968, together known as 183 Princes Highway,
- c) is predominately within the Farming Zone with two smaller portions along the frontage to Princes Highway located within the General Residential Zone;
- d) is affected by Design and Development Overlay schedules 15 and 21; and
- e) is partially affected by the Land Subject to Inundation – Schedule 2 (comprising part of Lot 2 PS306968 and Lot 1 PS306968):

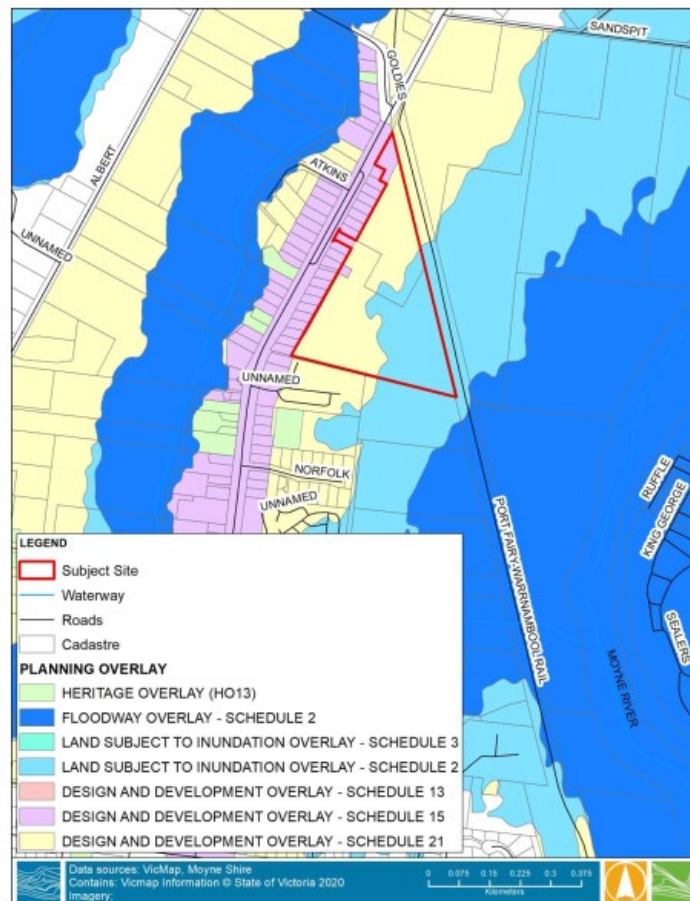


Figure 4-3 Port Fairy - Current Planning Overlays

30. The area surrounding the subject land includes:
- a) To the north is the Port Fairy Rail Trail (and its intersection with the Princes Highway). The northern portion of the Trail is lined with native vegetation. Beyond this is the Sun Pharma pharmaceutical manufacturing premises (**Sun Pharma site**) which is located in the Industrial 1 Zone.
  - b) To the south is a 3.5 metre powerline easement. Beyond this land is in the General Residential Zone and a caravan park. Further south is farming land in the Farming Zone.
  - c) To the north west are residential properties which front Princes Highway. These dwellings are located in the General Residential Zone. Dwellings are also located along the opposite side of Princes Highway.
  - d) To the east is the Rail Trail which forms the eastern (diagonal) boundary. Beyond this is the Sun Pharma site, located within the Industrial 1 Zone. To the south east is vacant farming land as well as low lying land comprising the Belfast Lough and Moyne River.
31. Rivers Run acquired 169A Princes Highway in October 2012. Throughout the 2000s, the previous owner, Mr Ian Hamilton, worked with Council on the potential to develop the land for residential purposes.
32. In 2019, Rivers Run acquired the three lots adjoining 169A Princes Highway at 183 Princes Highway from Wannon Water through a public expression of interest process. Since purchasing the subject land, Mr Hearn of Rivers Run, has continued working together with Council on a possible future multi-lot residential development on the subject land.
33. Mr Hearn is a Registered Builder and has four decades of experience in the building and construction industry. He has extensive development experience along the Great Ocean Road and broader region having worked on developments in Port Fairy, Warrnambool, Portland, Hamilton and the Grampians.
34. Within Port Fairy, Mr Hearn's construction company, MM Hearn Constructions, has contributed to the development of Port Fairy's holiday accommodation market and residential real estate market. Mr Hearn is familiar with the

complexities of developing in the floodplain area, having successfully developed within and next to the floodplain for over 20 years.

35. An example of projects completed within Port Fairy and the surrounding area is provided at **Attachment B**.

#### **Amendment C75**

36. In June 2020, Rivers Run requested Council prepare Amendment C75 to rezone the subject land from Farming Zone and General Residential Land to Neighbourhood Residential Zone. The amendment also proposes to apply a Development Plan Overlay to enable appropriate development controls to be implemented to guide future land use development.
37. Pursuant to s 96A of the *Planning and Environment Act 1987*, an application for a planning permit was also lodged. The permit application seeks approval for subdivision of the subject land into 75 lots, associated earthworks, the construction of 10 townhouses, the removal of easements and access to a Principal Road Network.
38. Council has advised this Panel that Amendment C75 will likely progress early next year (possibly March 2023), after this Planning Panel has considered Amendment C69.
39. Amendment C75 and the associated permit application propose:
  - a) 76 residential lots including a medium density development site comprising 10 townhouses;
  - b) provision of at least 5% affordable housing on the site;
  - c) Environmentally Sustainable Design comprising:
    - i) a gas free estate, with no gas connection proposed to ensure all energy is electric;
    - ii) construction of minimum 7 star NatHERS homes, noting that 7.5 star rated dwellings or higher are encouraged, and
    - iii) a requirement that all dwellings install a grid connected minimum 2.5kW solar photo-voltaic system and energy and water efficient appliances and fittings.

- d) over 3,000 sqm of open space will be provided including:
  - i) a gateway park at the northern end of the site with provision for picnic facilities, bicycle repair station and water refill station;
  - ii) a boardwalk along the drainage reserve with pedestrian and cycling linkage to the Rail Trail, and
  - iii) a community garden adjoining the drainage reserve.
- 40. Rivers Run is also progressing the development of a 2MW/4.5MW community battery facility at the entry to the site to provide power to the community. The battery is intended to power public infrastructure including, electric vehicle charging stations, BBQs and the street lights on the site.
- 41. The permit application proposes to construct all dwellings to respond to predicted sea level rise. Based on State policy, the permit application responds to a sea level rise of 0.8m by 2100.
- 42. A copy of the site context plan was provided to Council as part of Amendment C75 is annexed to this submission at **Attachment C**.

### **Amendment C69**

- 43. Amendment C69 proposes to implement the following changes that are relevant to the subject site:
  - a) Rezone:
    - i) the existing Farming Zone land to the Rural Conservation Zone – Schedule 2, and
    - ii) the General Residential Zone land to the Neighbourhood Residential Zone - Schedule 1.
  - b) Apply Floodway Overlay – Schedule 3 (**FO3**) and modify the extent of the Land Subject to Inundation Overlay – Schedule 4 (**LSIO4**) to identify areas subject to coastal inundation and a 1.2m sea level rise.
  - c) Remove the land from Design and Development Overlay – Schedule 21. Revise the existing DDO15 affecting 169 Princes Highway and apply the new DDO4.

- d) Revise the local planning policy framework at cl 21.06 and 21.11 to reflect a 1.2m sea level rise benchmark, as proposed in the revised Floodway and Land Subject to Inundation overlays.
- e) Revise the Local Areas policy for Port Fairy at cl 21.09, including:
  - i) application of a coastal settlement boundary for the township as identified in Figure 1: Port Fairy Framework Plan, and
  - ii) application of an Industrial Buffer Zone around the Sun Pharma site.
- f) Introduce new background documents at cl 21.11, including:
  - i) Port Fairy Coastal Structure Plan 2018, and
  - ii) Translation of Port Fairy Coastal Hazard Assessment – Port Fairy Coastal and Structure Planning Project (Cardno) 2019.
- g) Revise the list of Incorporated Documents in the schedule to cl 72.04 to include:
  - i) Port Fairy Local Floodplain Development Plan 2019, and
  - ii) Glenelg Hopkins Catchment Management Authority Guidelines for Fencing in Flood Prone Areas.
- h) Within the Structure Plan
  - i) At Figure 7: Structure Plan part of the subject land is identified as “Belfast Lough environs (private): Rezone to Rural Conservation Zone”.
  - ii) At Figure 8: Settlement and Housing identifies the subject land as “potential residential expansion area (if development can demonstrate accordance with relevant flood controls under 1.2m SLR scenario and that the land is outside any buffer agreed by Sun Pharma and the EPA)”.
  - iii) Figure 8: Settlement and Housing and Figure 12: Economic Development the subject land is included within a 500m “industry buffer”.

- iv) Figure 14: Built Environment and Heritage and Figure 17: Landscape and Environment provide a “key open landscape view” over the subject land.

## **THE NEED FOR RE-ZONING SHOVEL READY DEVELOPMENT SITES IN PORT FAIRY**

44. The Settlement and Housing Plan in the Structure Plan designates the subject land as a “potential residential expansion area”. Rivers Run supports the designation of the land for future residential development and recommends that figure 1 of cl 21.09 be amended to also reflect the subject land as a “potential residential expansion area” or “potential residential expansion area subject to resolution of flooding and industrial interface”, so as to be consistent with the Structure Plan and provide transparency in the Scheme regarding proposed Amendment C75.
45. The sole objective of Cl 11.01-1R – Settlement Great South Coast is to attract more people to the region. The State policy plans for a network of settlements based around Warrnambool, Hamilton, Portland and district towns. Port Fairy is designated as a “district town”. The Great South Coast Regional Growth Plan designates Port Fairy as a district town intended for medium growth.
46. The local policy provides:
- Port Fairy – District Town with moderate growth capacity with some growth potential beyond existing urban zoned land or through infill but within defined settlement boundaries;<sup>22</sup>
47. The Scheme identifies Port Fairy as an historic coastal town that offers a high quality of life for its residents and is a popular tourist destination.<sup>23</sup> As a result it is attractive to retirees and people in search of a better lifestyle.
48. Council’s Settlement and Housing Strategy expects population growth in Port Fairy:<sup>24</sup>

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<sup>22</sup> Cl 21.03.

<sup>23</sup> Cl 21.05.

<sup>24</sup> Cl 21.05.

As mentioned earlier Port Fairy will experience an increase in population movement driven by its attractiveness as a location for new development because of its setting on the coast and along the Moyne River estuary. Port Fairy is made up of a number of different areas, each with its own set of distinct characteristics and natural and built qualities. This combination of natural and built assets generates Neighbourhood Character, which is often valued due to the sense of local identity it provides. **Demand has been strong for new development, redevelopment of older existing properties and more intense forms of urban housing.** This has led to an increase in building heights, which have detrimentally affected the unique character of parts of Port Fairy along the coast and river environment.

(emphasis added)

49. In preparing the Structure Plan, Council engaged Urban Enterprise to undertake a land use analysis. Urban Enterprise found:
  - a) House prices in Port Fairy are significantly higher than nearby towns of Warrnambool and Koroit. The attractiveness of Port Fairy as a tourism destination and therefore for holiday home owners increases competition – this factor, combined with a relatively limited supply of new residential land, places upward pressure on local housing prices.<sup>25</sup>
  - b) It is important that a greater diversity of housing options are provided in Port Fairy in order to meet the needs of the local population and to limit housing affordability pressures.<sup>26</sup>
  - c) There are significant constraints to residential land development created by flooding and heritage controls in Port Fairy. The lack of competition in the greenfield subdivision market is likely to lead to high land prices and increased risk that the rate of new supply being made available will decrease.<sup>27</sup>
50. Council's 2021-2025<sup>28</sup> Plan also recognises the housing pressure faced across the municipality and seeks to reduce barriers and improve equity of access to

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<sup>25</sup> Port Fairy Coastal and Structure Planning Project, Economic and Tourism Land Use Analysis, Issues and Opportunities Report, August 2017, page 44 (PDF 52) (Document no. 9).

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid*, page 51 (PDF 59).

<sup>28</sup> Document no. 52.

affordable, secure and sustainable housing. As Mr McGurn notes, access to affordable housing is an urgent priority in accordance with Council's Plan.

51. The pressure on regional towns to accommodate growth has only increased since the beginning of the COVID-19 pandemic, where there has been a considerable demand for residential property in regional Victoria.<sup>29</sup> In particular, Mr Brisbane's Social and Economic Benefit Assessment considers the attractiveness of Port Fairy is reflected in the high median house and residential land prices achieved compared to other local housing markets. Strong growth has also occurred in the median house and median vacant land prices reflected in his assessment.
52. Currently, there are very limited opportunities to purchase land in Port Fairy. The Spatial Economics Assessment in 2021 estimates that there is an 8 year supply of residential land but it is considered to likely overstate the opportunities for residential development. Mr Brisbane's assessment demonstrates the lack of residential land available to the market:

According to [www.realestate.com.au](http://www.realestate.com.au), only one vacant residential lot (excluding farm zoned lots) is available for purchase (as of 25 August 2022). The 420m<sup>2</sup> lot at 14 Whalers Drive is listed at a significant \$930,000.<sup>30</sup>

53. The lack of available vacant land consequently constrains the number of vacant land sales and dwellings presently able to be developed within Port Fairy.

### **Difficulties with the land supply proposed by the Structure Plan**

54. The Structure Plan plans for two distinct areas to accommodate future residential growth: Growth Area A and Growth Area B.
55. Growth Area A comprises of larger 'parent lots' and is likely to result or at least has the characteristics to result in a 'typical' master-planned land development. It is not highly fragmented, but it is affected by overland flooding issues, environmental constraints and the proposed Port Fairy Bypass is planned

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<sup>29</sup> Social and Economic Benefit Assessment prepared by Mr Nick Brisbane, dated 26 August 2022 (Document no. 103).

<sup>30</sup> *Ibid*, page 6.

- through the Area.<sup>31</sup> In total, Growth Area A is estimated to have a lot yield of approximately 310 lots.
56. Growth Area B is currently zoned a mixture of mixed use and rural living zone. It is characterised by:
- a) significant fragmentation in the existing pattern of development;
  - b) existing rural residential dwellings, and
  - c) overland flooding issues.
57. It is also an area that is not yet sewered.
58. Due to these existing constraints, Spatial Economics advise it is “unlikely that a comprehensive master-planned broadhectare land development/release will result within this area. Rather, sporadic, site specific land developments are likely to occur”. However, Spatial Economics consider, that over the course of time, it is likely to achieve the estimated lot/dwelling yield of approximately 150 [lots]”.<sup>32</sup>
59. While Growth Areas A and B may be good in theory, there is a considerable degree of uncertainty regarding the future supply of lots. The Spatial Economics Assessment fails to provide a timeline for when the land may become available for development.
60. Growth Area B is particularly constrained and its development potential is uncertain. In Mr Brisbane’s assessment, the challenges faced by Growth Area B mean there is limited opportunity for Growth Area B to be redeveloped in a timely manner.<sup>33</sup>
61. This leaves Growth Area A to provide for Port Fairy’s residential growth. Given that Growth Area A is yet to be master planned, it is some way from being able to meet the demand for residential land supply in Port Fairy. Even in circumstances where a master plan is approved, planned communities typically

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<sup>31</sup> Spatial Economics Residential Demand and Supply Assessment, May 2021, page 59 (Document no. 92).

<sup>32</sup> *Ibid.*

<sup>33</sup> Mr Brisbane’s letter dated 2 September 2022, page 3 (Document no. 104).

only release a limited number of lots at any one time decreasing the opportunity for diversity of housing supply.

62. The proposed development of the Rivers Run site responds to the constraints of Growth Areas A and B by:
  - a) offering a genuine shovel-ready option within the single ownership of an experienced local developer;
  - b) encouraging development on multiple growth fronts, to provide the community with greater choice and price competition. Mr Glossop agreed that developing on multiple fronts will assist with the affordability of housing in Port Fairy;
  - c) increasing the proposed diversity of housing stock within Port Fairy;
  - d) providing a mix of stand-alone homes and town houses, which will be attractive to the aging population seeking to downsize, and
  - e) developing a well planned community connected to existing services and community, especially given the proximity of the Rail Trail and existing infrastructure and services.
63. So as the possible residential development of the Rivers Run land is not prejudiced by outcomes of this Amendment, the Panel is invited to recommend that Figure 1 in cl 21.09 be updated to reflect the "potential residential expansion area" as identified in the Structure Plan at Figure 8.

### **The Nomination of the Site for Future Residential Development**

64. If the Amendment had been considered together with C75, there would be no need to determine whether to nominate the Rivers Run land in the Port Fairy Framework Plan as a potential residential site as an interim measure, it would either be inside the settlement boundary and rezoned, or outside the settlement boundary (if rejected by the Panel).
65. Mr Glossop's approach appeared to be that there is no need to nominate it in Figure 1 of cl 21.09 because it will be considered on its merits at the relevant time. However, he had not assessed the site against the Structure Plan and ended up agreeing that it would be consistent with part of the Structure Plan (Figure 8:

Settlement and Housing) if the site was noted as an area for potential residential expansion.

66. Ms Ring's position appears to be that the site should not be recognized in the scheme, and that the settlement boundary should effectively preclude the Rivers Run site from being considered further for residential development until some strategic review of the settlement boundary in many years to come.
67. Mr McGurn's approach is that the notation in the Structure Plan should be followed through to Figure 1 of the local policy to provide clarity and transparency about the upcoming amendment.
68. Mr McGurn's position is appropriate and should be preferred for the following reasons:
  - a) Including the notation in Figure 1 of cl 21.09 which identifies the Rivers Run land for potential residential development in the future is consistent with a proper a proper translation of the Structure Plan into the Scheme. Mr Glossop agreed it would be consistent with translating part of the Structure Plan into the Scheme.
  - b) Including the notation in Figure 1 of cl 21.09 provides a greater degree of transparency and certainty for the community that further investigation of the site is expected and anticipated in accordance with local policy.
  - c) In the short term, the subject land is able to address the need for increased residential land supply within Port Fairy which informs the Structure Plan. The ability to address that need should not be prejudice or limited through the outcome of this Amendment, but rather it is appropriate to carry forward the designation of the subject land to enable further investigation through Amendment C75.

**Recommendation: Figure 1 in cl 21.09 be updated to reflect the Rivers Run land as "potential residential expansion area".**

## **APPLICATION OF FLOODWAY OVERLAY IS NOT STRATEGICALLY JUSTIFIED**

69. We refer to and repeat our primary proposition. Some aspects of those propositions are elaborated upon below.

**The experts have agreed that the FO is not appropriate if DP Gibson is correct**

70. The Council and the CMA experts formed their opinion that the Floodway Overlay was an appropriate tool based upon a particular legal interpretation of the provision which is contrary to the declaration of the Deputy President of the Tribunal.
71. They were of the understanding that residential subdivision which created additional residential lots could be permitted in the Floodway Overlay, notwithstanding the prohibition in the head clause. They thought that a Local Floodplain Development Plan could override the prohibition.
72. To the contrary, Ms Barich and Mr Bishop were instructed on this question of law in accordance with the Tribunal's declaration.<sup>34</sup>
73. At the conclave all four hydrology witnesses agreed that: <sup>35</sup>
  26. If subdivision was prohibited within the FO layer (exhibited extent) or the FO layer was used to prohibit subdivision, it would be considered overly conservative and not appropriate for planning purposes.
  27. If the planning system (incorporating all the planning instruments including the LFDP) did not allow subdivision within the FO, an alternative scenario should be used to define the extent of the FO (i.e. a scenario which reflects a lesser extent of inundation compared to the 1.2m SLR case).
74. Mr Bishop and Ms Barich later confirmed in their respective addenda that the FO should be mapped without an allowance for sea level rise.<sup>36</sup>

**The Prohibition**

75. Within the FO Clause 44.03-3 provides that subdivision to create new lots is only permissible in certain circumstances:

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

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<sup>34</sup> Mr Bishop's Witness Statement at PDF p 86 (Document no. 77); Ms Barich's Witness Statement at PDF p 4 (Document no. 75).

<sup>35</sup> Hydrology Conclave Statement dated 1 September 2022, p 4 (Document no. 95).

<sup>36</sup> See Documents 105 and 106.

lot, which by agreement between the owner and the relevant floodplain management authority, is to be transferred to an authority for a public purpose. **(First Limb)**

- 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. **(Second Limb)**

76. The Part A Draft Port Fairy Local Floodplain Development Plan 2022 purports to allow new lots if certain conditions are met:

#### 6.2 Subdivision

Applications to subdivide land that is either partly or wholly within the FO or LSIO must not create new lots entirely within these overlay areas unless:

- each new lot contains an existing dwelling; or
- there is an adequate building envelope on each lot (which must be formally defined on the plan of subdivision) where the inundation depth is estimated to be no more than 300mm during a 1% AEP flood level under the 1.2m sea level rise scenario; and
- vehicle access to the building envelope does not traverse land where the inundation depth is estimated to exceed 300mm during a 1% AEP flood under the 1.2m sea level rise scenario.

77. Council's Part A submits that "consistent with PPN12, the Amendment proposed to incorporate the LFDP into the Planning Scheme. The LFDP works in conjunction with the FO and LSIO. The requirements in the LFDP prevail over the FO and LSIO. This allows the controls to target local requirements".<sup>37</sup>

#### **The VCAT Declaration**

78. The Council's submission is inconsistent with declarations made by Deputy President Gibson's decision in Greater Shepparton.

79. In Greater Shepparton, the Tribunal was asked to consider a dispute about the interpretation of the provisions of the FO in relation to a proposed subdivision. The relevant CMA considered the proposed subdivision to be prohibited by the Second Limb of cl 44.03-2. The permit applicant submitted the subdivision was

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<sup>37</sup> Council Part A Submission at [49] (Document no. 88).

not prohibited by cl 44.03-2 because the Local Floodplain Development Plan exempts the subdivision from compliance with the Second Limb.

80. The Deputy President found that a subdivision which creates a lot that is entirely within the Floodway Overlay (which is prohibited by the First Limb) may be allowed by the Second Limb but only if it is a re-subdivision of existing lots, which means that no additional lots will be created. A local floodplain development plan may provide that re-subdivision should *not* occur in a particular location or may limit or guide the type of re-subdivision that can occur, but it cannot allow a subdivision to occur that would create additional lots within the Floodway Overlay extent.
81. Following Deputy President Gibson's decision, if the FO is applied to the Rivers Run land, then a proposed subdivision of the land which creates additional lots within the Floodway Overlay extent will be prohibited notwithstanding anything to the contrary in the Local Floodplain Development Plan 2022. This has very serious consequences for Amendment C75, which proposes a residential subdivision on the land. Much of that proposal would become prohibited.

### **Response to Council's Submission on DP Gibson's decision**

82. Council is asking the Panel to proceed on the basis of a legal proposition that is contrary to an unchallenged decision of a Deputy President of the Tribunal (who is also an extremely experienced planning lawyer) on a question of law. The question of law that was decided involved a question of statutory construction. There is a large body of both statutory and common law concerning principles of statutory construction. The Tribunal is vested with jurisdiction to, *inter alia*, determine those questions, including jurisdiction to make declarations concerning the interpretation of planning schemes. It was in the exercise of that jurisdiction that the Tribunal made its ruling in Greater Shepperton, not just as incidental to determining the merits of an application for review.
83. In those circumstances, even as a matter of principle, the Panel ought not recommend in favour of the Amendment on the basis that DP Gibson is wrong.
84. We also note that the Tribunal's decision has stood for some years. If the Minister had considered it wrong, it could have been clarified by a Planning

Scheme amendment in any one of the “tidy up” amendments that have happened since the decision was handed down.

85. Further, although Council says that DP Gibson’s decision is plainly wrong, that is simply not the case. There are clear arguments that go both ways, and Council has only addressed the Panel on a very narrow basis.
86. Principles of statutory construction consider text, context and purpose.

*Text*

87. The provision is in standard form. Prima facie, it sets out:
  - a) a **prohibition**, ie. “a permit may only be granted to subdivide land if the following apply”;
  - b) two **exemptions** to the prohibition, ie. “the subdivision does not create any new lots, which are entirely within this overlay” (first limb) and “the subdivision is the resubdivision of existing lots and the number of lots is not increased” (second limb); and
  - c) a **qualification** to each of the exemptions, ie. “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” (first limb) and “unless a local floodplain development plan incorporated into this scheme specifically provides otherwise” (second limb).
88. When the grammatical composition of the second limb is analysed, the use and placement of the comma is notable. Prima facie, on a grammatical construction, it means that a permit may only be granted if “the subdivision is the resubdivision of existing lots and the number of lots is not increased” but that “exemption” from the prohibition is qualified by the exemption, namely that it will *not* apply if “a local floodplain development plan incorporated into this scheme specifically provides otherwise”.
89. This grammatical construction supports DP Gibson’s findings regardless as to whether she was correct about whether a resubdivision means a subdivision that does not create additional lots or not.

### *Context and Purpose*

90. If the intent of the FO is to tightly control subdivision, then DP Gibson's decision is supportable by taking a purposive approach. It limits very tightly the circumstances in which subdivision is allowed.
91. If the intent of the control is as Council suggests, then the control could have been drafted much more simply, namely:

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. (First Limb)
- ☐ The subdivision is:
  - a subdivision of more than one lots; and
  - the number of lots is not increased unless a local floodplain development plan incorporated into this scheme specifically provides otherwise.

92. However, this interpretation gives rise to a very curious question: why could a LFDP allow the subdivision of more than one lot into multiple lots but not the subdivision of a single lot into more than one lot? This issue does not arise on DP Gibson's construction.
93. Rivers Run does not suggest that the Supreme Court would decide the question one way or another. It only wishes to point out that the question of construction is not simple and the Panel should be slow to make a finding that DP Gibson was plainly wrong on the limited submissions made by the Council.
94. The following submissions are made to explain why it is not appropriate to apply the overlay taking into account the potential for seal level rise (whether or 0.8m or 1.2m or some other number), on a merits basis, rather than a legal basis.

### **Purposes of the FO**

95. The purpose of the FO includes (relevantly):

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

(emphasis added)

96. Planning Practice Note 12: Applying the flood provisions in planning schemes (PPN12) provides guidance about applying the flood provisions. In relation to applying the FO, it states:

The FO applies to mainstream flooding in both rural and urban areas. **These areas convey active flood flows or store floodwater in a similar way to the UFZ, but with a lesser flood risk.** The FO is suitable for areas where there is less need for control over land use, and the focus is more on control of development.

As with the UFZ, in some cases the FO can cover the full extent of land subject to inundation, for example, in situations where the floodplain is relatively narrow and deep.

The FO can be applied in three situations (see Cases 2 to 4 in Table 1 and Figures 2.2 and 2.3).<sup>38</sup>

(emphasis added)

97. Having regard to the purpose of the FO, it is intended to identify high hazard areas that have “the greatest risk and frequency of being affected by flooding” and ensuring that any development maintains the free passage and temporary storage of flood water.
98. The subject site provides a good illustration as to why the Floodway Overlay has been applied erroneously. The subject site is not:
- a) a waterway, major floodpath or drainage depression;<sup>39</sup> or

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<sup>38</sup> Document no. 24.

<sup>39</sup> In the hydrology conclave statement, all four experts agreed that the FO was being applied to highlight areas of higher flood hazard than the LSIO.

- b) a “high hazard area” which has “the greatest risk and frequency of being affected by flooding”.
99. To the contrary, in order for the site to be flooded to 500mm depth (the relevant class 3 hazard criteria), there would have to be 1.2m of sea level rise (which all consultants consider unlikely even at 2100) and a 1% AEP riverine event combined with a 5%AEP coastal event. It is therefore exceedingly unlikely that the subject site will be inundated in such a way as to create a class 3 hazard, at least for the next 80 years and even then the chances of such a hazard are still exceedingly low (approximately 1 in 100 each year).
100. Mr Bishop and Ms Barich are correct that the LSIO is the appropriate tool to use to take into account future sea level rise, not the Floodway Overlay.
101. Their position is consistent with both VC171 and with previous panel reports, all of which have considered that the LSIO is the appropriate tool to give effect to the risks associated with sea level rise.
102. In addition to amending cl 13.01-2S, VC171 updated the LSIO to include coastal hazards. The Explanatory Report to VC171 explains:
- The Amendment updates the Land Subject to Inundation (LSIO) and the Erosion Management Overlay (EMO) to include coastal hazards. The LSIO and EMO are already used in coastal contexts however the LSIO does not refer to sea level rise and the EMO does not refer to coastal erosion.<sup>40</sup>
103. When considering whether VC171 made proper use of the Victoria Planning Provisions, the Minister considered:
- Updating the LSIO and EMO to consider coastal erosion and flooding makes efficient use of the existing VPPs and **are the most appropriate VPPs to give effect to requirements relating to erosion and sea-level rise.**<sup>41</sup>
- (emphasis added)
104. The Minister’s view that the LSIO and EMO are the more appropriate tools, echoes the findings of earlier Planning Panels. In Amendment C394 to the

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<sup>40</sup> Document no. 112.

<sup>41</sup> *Ibid.*

Greater Geelong Planning Scheme a planning panel comprised of Sarah Carlisle and Geoffrey Carruthers was asked to consider the proposed implementation of the Bellarine Peninsula – Corio Bay Local Coastal Hazard Assessment (December 2015). The amendment included policy changes to the Municipal Strategic Statement, introduced a new Land Subject to Inundation Overlay Schedule 2 and applied the LSIO2 to the properties identified as being subject to future flood events and sea level rise.

105. After considering the submissions and evidence, the Panel supported the Amendment:

After considering all written submissions and expert evidence, the Panel concludes that the Amendment is supported by, and implements, the Planning Policy Framework, and is consistent with the relevant Ministerial Directions and Practice Notes. **The LSIO is the current and most appropriate planning tool available to address the risk of sea level rise and storm-tide surge.** The Amendment is well founded and strategically justified, and provides net community benefit and sustainable development consistent with the requirements of Clause 71.02-3 of the Scheme. Council is to be commended for its forward looking and proactive approach in preparing the Amendment.

(emphasis added)

106. The application of the LSIO is also consistent with the approach taken by Melbourne Water. Mr Swan says:

Melbourne Water does not routinely apply the Floodway Overlay, in contrast to Catchment Management Authorities. For example, there are very few areas of the Yarra River floodplain, where depths are in excess of 1 metre, that are covered by the FO.

Melbourne Water's view has been that the LSIO provides sufficient planning control to refuse development in flood storage and fast flowing areas.<sup>42</sup>

107. The panel should place great weight on that statement for two reasons
108. Firstly, adopting a class 3 hazard in the 1%AEP for application of the FO (even without SLR) is a conservative approach to take (more conservative than the approach adopted by Melbourne Water).

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<sup>42</sup> Mr Swan's Witness statement at PDF p 23 (Document no. 63).

109. Secondly, the LSIO is an appropriate planning control to guide the exercise of discretion having regard to whether a proposal on a property infrequently subject to those levels of inundation adequately protects property, life and limb.
110. At the time of Amendment VC171, the FO was not amended and as far as Rivers Run has been able to assess, the FO has not been applied in response to sea level rise, including in other catchment areas. Rather, the most appropriate tool to address sea level rise, as encouraged by Planning Panels and the Minister, is the LSIO.

**Recommendation: The Floodway Overlay should be mapped taking into account existing conditions, and not including future sea level rise.**

### **THE APPLICATION OF A 1.2M SLR BY 2100 BENCHMARK IS NOT APPROPRIATE**

111. The application of the LSIO should take into account the potential for sea level rise. This can be done in three ways:
- a) by extending the mapping to encompass areas that are not yet affected by the 1%ARI event but may be affected by the 1%ARI event in the future as a result of sea level rise; and
  - b) by future proofing new developments through requirements such as high floor levels, road levels and so on; and
  - c) assessing the appropriateness of new development having regard to the potential flood risk to life, health and safety having regard to the potential for future sea level rise.
112. Amendment C69, as exhibited, maps the extent of the LSIO having regard to a 1.2m sea level rise and also, through the Local Floodplain Development Plan, imposes onerous physical requirements on new development on the basis that it should anticipate a 1.2m sea level rise to 2100.
113. For reasons that follow:
- a) the onerous requirements in the Local Floodplain Development Plan are not justified having regard to the likelihood of a 1.2m sea level rise at 2100; and

- b) there is no local justification to adopt a more conservative position than the State benchmark of 0.8m.

## Background

- 114. Amendment C69 was authorised by DELWP on 3 March 2020 and was exhibited from 14 May 2020 to 28 June 2020. Council received 86 submissions. Of particular concern to submitters was the justification of the proposed extent of the FO and LSIO.
- 115. In August 2020, Council engaged Hydrology and Risk Consulting Pty Ltd to undertake the additional flood modelling in August 2020 and received their report in August 2021. The Glenelg Hopkins Catchment Management Authority assisted Council to refine the recommendations of the report. It was then released with updated flood overlay maps and the draft Local Floodplain Development Plan.
- 116. The updated floodway overlay mapping provided the basis for determining the area of application of the FO and LSIO and took into account the level of risk posed by a mean SLR of 1.2m.
- 117. Amendment C69 proposes to apply the FO and LSIO to parts of Port Fairy that are influenced by a 1.2m SLR projected to the year 2100. This Amendment also proposes to amend the local policy at cl 21.06 to reflect a 1.2m SLR projected to the year 2100 benchmark.
- 118. The application of a 1.2m SLR projected to 2100 is a deeply conservative approach that unnecessarily limits the potential for development on the subject land.
- 119. Despite a plethora of documentation being provided, the strategic basis for the 1.2m SLR remains unclear. There have been multiple studies which have *modelled* various scenarios using a SLR of 1.2m. However, the Amendment was not accompanied by a report which provided a sound justification for the adoption of the 1.2m SLR at Port Fairy as opposed to the 0.8m State benchmark. To the contrary, the 2019 Cardno “Translation” report notes that various scenarios were modelled, including 1.2m SLR and that:

The maps and information provided in this report will enable Stage 2 of the project to be commenced utilizing a risk based approach to develop appropriate planning controls.

120. Once the amendment went on exhibition using a 1.2m SLR, the Flood Study was prepared which supports the use of the 1.2m SLR but certainly does not express a preference for 1.2m to be used over and above the state benchmark.
121. In fact Mr Swan specifically stated that he could support 0.8m SLR plus freeboard if that had been proposed by the CMA and Council instead of the 1.2m SLR scenario.

### **Existing approach to sea level rise in the Planning Scheme**

122. For over a decade State planning policy has provided the benchmark of planning for a sea level rise (**SLR**) of not less than 0.8m by 2100.
123. On 20 September 2010, Amendment VC71 was gazetted which provided a revised State Planning Policy Framework (**SPPF**) into the Victorian Planning Provisions. VC71 introduced a new Coastal inundation and erosion policy at cl 13.01-1, which sought to “plan for and manage coastal impacts of climate change”. The relevant strategy provided:

**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.

124. Since the revised SPPF was introduced by VC71, cl 13.01-1 has been subject to various amendments. As a result of the new format planning schemes, cl 13.01-1 can now be found at cl 13.01-2S.<sup>43</sup>
125. Most recently, the objective and strategies of cl 13.01-2S were amended by VC171 on 6 September 2021. VC171 was implemented to ensure State planning policy was consistent with the State Government’s Marine Coastal Policy (March 2020).
126. The Marine Coastal Policy concerns matters relating to and affecting the marine and coastal environment. The Policy was required to be made by the Minister

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<sup>43</sup> VC148.

for Environment and Climate Change in accordance with s 24 of the *Marine and Coastal Act 2018* (**MC Act**).

127. The purposes of the MC Act include (relevantly):

- a) **to establish an integrated and co-ordinated whole-of-government approach to protect and manage Victoria's marine and coastal environment; and**
- b) to provide for integrated and co-ordinated policy, planning, management, decision-making and reporting across catchment, coastal and marine areas; and
- c) to establish objectives and guiding principles for ecologically sustainable planning, management and decision-making under this Act; and
- d) to replace the Victorian Coastal Council with the Marine and Coastal Council; and
- e) **to provide for the preparation of a Marine and Coastal Policy, a Marine and Coastal Strategy, and a State of the Marine and Coastal Environment Report; and**
- f) to provide for other planning mechanisms in the form of environmental management plans and coastal and marine management plans.<sup>44</sup>

(emphasis added)

128. Section 16 of the MC Act prescribes the Marine and Coastal Council with following functions (relevantly):

- a) to provide guidance and strategic advice to the Minister on the development of the Marine and Coastal Policy and the Marine and Coastal Strategy, and
- b) to provide advice to the Minister on matters requiring scientific research.

129. To guide the advice of the Marine and Coastal Council, the MC provides three guiding principles:

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<sup>44</sup> *Marine and Coastal Act 2018*, s1 (Document no. 111).

a) evidence-based decision making:

It is a guiding principle for the management of the marine and coastal environment that marine and coastal planning and management decisions should be based on best available and relevant environmental, social and economic understanding, recognising that information will often be limited.<sup>45</sup>

b) the precautionary principle:

It is a guiding principle for the management of the marine and coastal environment that if there are threats of serious or irreversible environmental and other damage, lack of full certainty should not be used as a reason for postponing measures to prevent environmental or other degradation.<sup>46</sup>

c) the proportionate and risk-based principle:

It is a guiding principle for the management of the marine and coastal environment that risk management and regulatory approaches should be proportionate to the risk involved.<sup>47</sup>

130. In relation to sea level rise, the Marine Coastal Policy (March 2020) summarised:

The latest projections from the Intergovernmental Panel on Climate Change on global sea level rise are for an increase of between 0.61 and 1.10 metres by 2100 above 1986-2005 levels under a high-emissions scenario, with a global average 0.84 metres. The range of possibilities requires us to prepare to be adaptable and flexible, and to respond to new information and observed changes in the physical environment.<sup>48</sup>

(citations omitted)

131. It then adopted as policy:

**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.<sup>49</sup>

(emphasis added)

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<sup>45</sup> *Ibid*, s 11.

<sup>46</sup> *Ibid*, s 12.

<sup>47</sup> *Ibid*, s 13.

<sup>48</sup> Marine Coastal Policy (March 2020), page 34 (Document no. 31).

<sup>49</sup> *Ibid*, page 36.

132. Importantly, the footnote to the policy advises:

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.**<sup>50</sup>

(emphasis added)

133. Rivers Run agrees with Ms Barich that the Marine Coastal Policy (March 2020) indicates the Victorian Government’s intention to ensure there is a consistent and state wide approach to the adoption of a 0.8m SLR.<sup>51</sup>

134. Following the gazettal of VC171, the objective of Cl 13.01-2S – Coastal inundation and erosion was amended “to plan for and manage coastal hazard risk and climate change impacts”. The relevant strategy remains unchanged to the extent it continues to plan for an SLR of not less than 0.8m by 2100:

**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.

(emphasis added)

135. The State Government’s application of the “0.8m SLR by 2100” benchmark has guided and informed the development of Moyne Shire’s existing local flooding policy.

136. The 0.8m SLR benchmark is currently relied upon in Council’s local policy and structure planning in west Port Fairy. Moyne’s local policy at cl 21.03 – Factors influencing future planning and development provides:

Moyne Shire is located within both the Glenelg-Hopkins and the Corangamite Regional Catchments and both the Glenelg Regional and Corangamite Regional Catchment Strategy is recognised in the Victorian Coastal Strategy as the primary mechanism to coordinate and improve

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<sup>50</sup> Ibid.

<sup>51</sup> Ms Barich’s Witness Statement, page 11 (PDF 12).

catchment based activities that impact on the coastal and marine environment.

**Climate change will impact on the coastline and planning for sea level rise of no less than 0.8 metres will be adopted for all development.**

(emphasis added)

#### **Amendment C54**

137. In December 2014, Amendment C54 was introduced to the Scheme which implemented part 1 stage 1 of the Port Fairy Floodplain Management Plan. The amendment introduced:

- a) new flood mapping through the use of the FO and the LSIO, and
- b) local planning policy to the Scheme to give statutory effect to the findings of the 2008 Port Fairy Regional Flood Study and the 2010/2012 Port Fairy Regional Flood Study Addendum - Sea Level Rise Modelling.

138. Water Technology prepared the Port Fairy Regional Flood Study (Flood Study) in 2008. Commissioned by Glenelg Hopkins CMA it was undertaken using a risk based approach, emphasizing uncertainties and consequences of a range of factors including rainfall intensity and sea level conditions. The influence of climate change was also considered.

139. Mr Bishop gave evidence that the modelling in C54 was agreed between the Council and the CMA. He recalled that the LSIO was based on a 1% AEP catchment with a 10% storm surge, plus a 0.2m increase in water level to allow partially for climate change and the floodway overlay was modelled on a greater than 0.5m flood extent.

140. The C54 Panel states:

At the time of the Flood Study, there was limited information regarding predicted sea level rise. Since 2008, the Victoria Coastal Strategy (VCS 2008) has provided a framework for including sea level rise in long term planning.

An Addendum to the Flood Study was undertaken in 2010 which included sea level rise and storm surge information. In addition to the 0.8 metre sea level rise to 2100 recommended by the Victorian Coastal Strategy 2008, a higher 1.2 metre sea level rise was investigated.

141. At the C54 Panel, Council submitted:

The Council submitted that in the absence of a coastal settlement boundary (or town boundary) for Port Fairy, the area that is covered by the proposed overlays includes mainly urban zoned land so the benchmark for urban infill should be implemented. **Council added that, for simplicity of application and interpretation of Clause 13, the single benchmark for urban infill' should be used in Port Fairy, rather than a combination of flood modelling showing a sea level rise of 0.8m for 'greenfield' and a sea level rise of 0.2 for 'urban infill'.**

(emphasis added)

### **Amendment C60**

142. In October 2016, Amendment C60 was introduced to the Scheme. The Amendment applied to land in west Port Fairy and implemented the Port Fairy West Structure Plan 2014 and, among other things, applied the LSIO to areas subject to inundation.

143. At the Panel hearing, Council's sought to apply a 0.8m SLR by 2080:

Council submitted that the PFCHA modelled different sea level rise scenarios of 0.4m by 2050, 0.8m by 2080 and 1.2m by 2100. In order to achieve consistency with the SPPF, Council chose the 0.8m by 2080 benchmark to apply the LSIO for coastal inundation in the Port Fairy West area.<sup>52</sup>

144. The Panel agreed with Council:

The Panel agrees with Council that it is obliged to plan for and manage the coastal impacts of climate change in accordance with the Victorian Government benchmark of a 0.8m sea level rise by 2100. This is set out at Clause 13.01-1 (Coastal inundation and erosion) of the SPPF.

145. Despite the benchmark modelling of 0.8m by 2080 being the pursued by Council at the Panel hearing, and the Panel agreeing, the current Port Fairy West local policy provides:

Given the subject areas proximity to the Southern Ocean, there is an increased risk of coastal inundation and erosion due anticipated sea level rise of **not less than 0.8m by 2100**.<sup>53</sup>

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<sup>52</sup> Amendment C60 to the Moyne Planning Scheme, Panel Report dated 3 May 2016, page 11 (PDF 17).

<sup>53</sup> Cl 21.09-5.

(emphasis added)

**The State Planning Policy benchmark should be applied**

146. The Marine and Coastal Policy indicates that ‘not less than 0.8m’ figure is used as the statewide planning benchmark to provide a consistent policy setting across the State. While cl 13 has been subject to various amendments throughout that time, the application of the “not less than 0.8m by 2100” benchmark has remained consistent.
147. Council has submitted that the use of the words “not less” means that the benchmark is considered a “floor” as opposed to ceiling. Rivers Run agrees, however, any departure from the benchmark of 0.8m by 2100 should be undertaken as part of a whole-of-government reform, rather than on a council-by-council, town-by-town basis. This is consistent with the outcome in C60, where Council sought to apply a more conservative benchmark of 0.8m by 2080, and the Minister on implementing the amendment imposed the State benchmark of 0.8m by 2100.
148. Current State Government policy prescribes that the existing benchmark will be the subject of review by the Marine and Coastal Council.
149. Under MC Act the State Government recently established the Marine and Coastal Council, replacing the Victorian Coastal Council.<sup>54</sup> The MC Act sets objectives and guiding principles for the planning and management of Victoria’s marine and coastal environment. It establishes an integrated and coordinated whole-of-government approach to work with Traditional Owners, industry and the community manage the marine and coastal environment.
150. The MC Act requires a Marine and Coastal Policy be developed to set out policies for planning and managing the marine and coastal environment, and to provide guidance to decision makers in achieving the Act’s objectives.

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<sup>54</sup> Between August 1995 and 30 June 2018, the Victorian Coastal Council (VCC) was the Victorian Government’s peak advisory body on coastal management. The role of the VCC was to provide strategic direction and improve the coordination of coastal planning and management in Victoria. The VCC (and the three regional coastal boards) ceased on 30 June 2018 when the Coastal Management Act 1995 was replaced by the *Marine and Coastal Act 2018*. The new Act established the Victorian Marine and Coastal Council as the peak advisory body about coastal and marine issues.

151. In March 2020, the State Government published the Marine Coastal Policy. In relation to managing coastal hazard risk, the Policy provides:

The sea level rise planning benchmark will be revised through the development of Marine and Coastal Strategy. The revision will consider the most recent sea level rise projections as they relate to the coast of Victoria with a particular focus on applying global projections to provide locally relevant and accurate information.<sup>55</sup>

152. Following the publication of the Marine Coastal Policy, the Council published the 2022 Marine and Coastal Strategy. The strategy identifies actions to achieve the Policy’s vision. Action 3 seeks to “Adapt to climate change”:

This action supports planners and decision makers to adapt by improving our understanding of climate change impacts and coastal hazard risks, embedding long-term climate change adaptation into planning and management frameworks and tools, and building the capacity of land managers to adapt.<sup>56</sup>

153. In relation to strategic planning, Action 3:

embeds adaptation as a core component of planning and management in the marine and coastal environment using a range of state-wide and local approaches. **Updated projections and benchmarks for sea level rise and other climate change drivers and impacts will be incorporated into state-wide land use planning tools and policies so they remain responsive to changing circumstances.** The Victoria’s Resilient Coast – Adapting to 2100+ project (VRC) develops a state-wide adaptation framework for long-term coastal hazard adaptation and the Marine Spatial Planning Framework (MSP Framework) will embed adaptation as a core component of planning in the marine environment. A range of tools, including Regional and Strategic Partnerships (RASPs), CMMPs, Environmental Management Plans (EMPs), marine plans (where developed) and **statutory planning mechanisms will be used to embed adaptation at a local and regional level.**

(emphasis added)

154. Action item 3.9 commits Government to:

Reviewing and updating planning benchmarks:

- a. for rises in sea level based on the latest and best available science (Intergovernmental Panel for Climate Change (IPCC) reports)<sup>1</sup>

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<sup>55</sup> Marine and Coastal Policy 2020, page 35.

<sup>56</sup> Marine and Coastal Strategy 2022, page 15 (PDF 21).

- b. establish a process for future reviews and updates of planning benchmarks so that they are aligned with the findings of future IPCC reports and assessments

in line with the IPCC reports 2022.

- 155. The Strategy provides that DELWP will lead this work in collaboration with the Marine and Coastal Council.
- 156. The relevant “footnote 1” provides:

As noted in the Policy, **the sea level rise planning benchmark will be updated as necessary and supported by modelling that places global projections into the Victorian context.** In parallel to the development of this Strategy, **the sea level rise planning benchmark is being reviewed with consideration of the latest projections and how they relate to the coast of Victoria from the IPCC** as outlined in the ‘Special Report on the Ocean and Cryosphere in a Changing Climate’ (SROCC) released in 2019. **Revised modelling of the extent of these projections is currently occurring. Any government approved changes to the benchmark will be reflected in the Policy.**

(emphasis added)

- 157. From the Marine and Coastal Policy and the Marine and Coastal Strategy it is clear that the State Government, lead by DELWP, is considering updating the sea level rise planning benchmark in line with the research provided in the IPCC reports. The Strategy outlines priority actions for the next five years from 2022,<sup>57</sup> so this modeling is a priority for the State Government.
- 158. The Marine and Coastal Council advise that any Government approved change to the benchmark will be reflected in the Policy. Neither the Policy nor the Strategy suggest that this work will be undertaken by local council on a regional basis. Rather, updated projections and benchmarks for sea level rise and other climate change drivers and impacts are intended to be incorporated into state-wide land use planning tools and policies. Given that DELWP is designated to lead this work, it is not appropriate for an individual Council to seek to differ from the State policy on an ad hoc basis. Rather, any change in the policy should

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<sup>57</sup> Marine and Coastal Strategy 2022, page 3 (PDF 9) (Document no. 32).

be subject to review in parallel with the strategic working undertaken by the DELWP in collaboration with the Marine and Coastal Council.

159. Most recently, VC171 sought to update State planning policy to ensure State planning policy was consistent with the Marine Coastal Policy (March 2020). At this time, the State Government had the opportunity to revise the existing benchmark. The existing benchmark remains. That may be because of the further work that is required to assess the complex body of science that sits behind the IPCC reports and apply that science in the context of managing Victorian coastal hazard. It may be because it considers the current benchmark remains appropriate.
160. In any event, current State Government policy is clear that any change to the benchmark is a matter for the State Government that requires a whole-of-government approach. The proposed shift to a more conservative benchmark should not be left to a disagreement between Council and developers within the narrow lens of the strategic planning context of Port Fairy.
161. Until the State Government implements a revised benchmark, the policy in the Scheme should be followed.

#### **The DELWP advice is outdated**

162. Council has tabled a letter from DELWP advising that Council's proposed application of a 1.2m SLR is "consistent with State Planning Policy for coastal climate change, which provides that planning and responsible authorities must consider and give effect to policies and guidelines including the Victorian Coastal Strategy (Victorian Coastal Council, 2014).<sup>58</sup> The letter is dated 13 March 2018.
163. Since the time of the DELWP letter:
  - a) The Victorian Coastal Council has been abolished and replaced with the Marine and Coastal Council, whose express purpose includes to provide for integrated and co-ordinated policy, planning, management, decision-making and reporting across coastal areas;

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<sup>58</sup> Document no. 110.

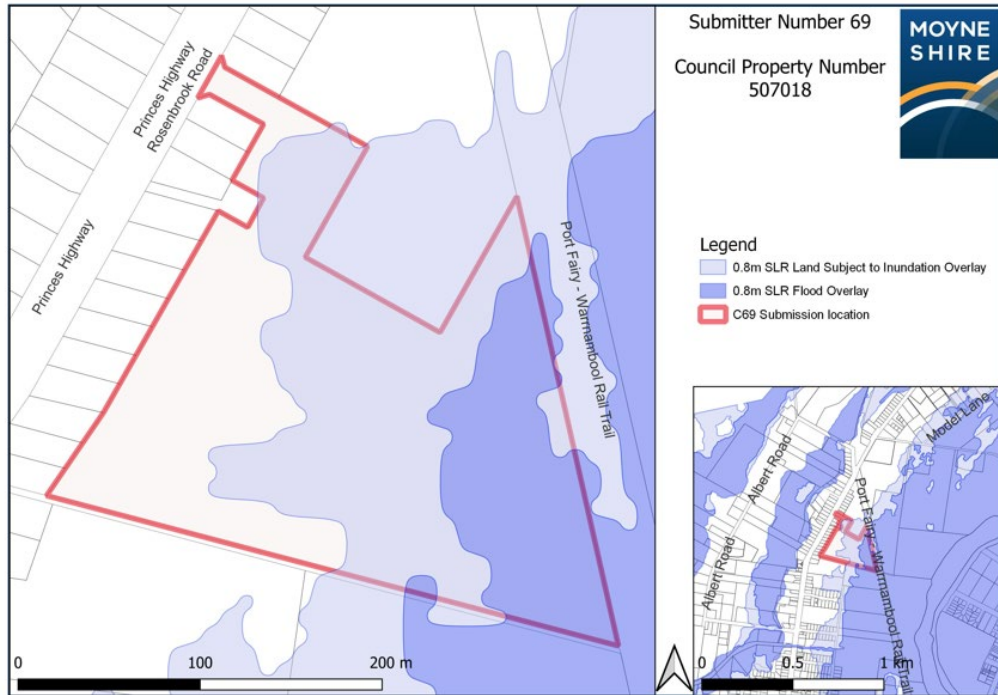
- b) The Marine and Coastal Council has published its 2020 Policy and 2022 Strategy.
  - c) Under the Strategy, DELWP in collaboration with the Marine and Coastal Council has been tasked with:
    - i) reviewing and updating the planning benchmarks in accordance with action 3.9 in the Strategy, and
    - ii) updating or amending planning responses to coastal hazards to consider climate adaptation pathways and apply best available science and data consistent with state policy and strategy in planning controls, practice notes and processes.<sup>59</sup>
  - d) VC171 was implemented to update State planning policy to ensure policy is consistent with the Marine Coastal Policy.
164. Given that since the time of the DELWP letter a new peak body has been established and DELWP is now required to lead the review to consider updating the existing benchmark, the Department's advice in the letter is outdated and must be given little weight, if any.

**The application of a 0.8m SLR by 2100 is a conservative approach**

165. In the event that the Panel considers it appropriate to review the existing planning benchmark, the application of the 0.8m SLR projected to 2100 is already a conservative and appropriate approach to managing coastal hazard.
166. The application of a 0.8m SLR projected to 2100 will provide for an LSIO to be applied to the majority of the subject land and reduces the depth of flooding over the subject land to a level where only a small portion of the site will experience a higher hazard of flooding:

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<sup>59</sup> Marine and Coastal Strategy 2022, page 18 (Document no. 32).



*Council's Part A, 0.8m SLR modelled flood extent maps, submitter 69.*

167. Both Mr Bishop and Ms Barich agree that the “0.8m SLR by 2100” benchmark is a more than acceptable control and conservative approach for flood prone land.
168. International Climate Change policy also confirms that the application of the 0.8m SLR by 2100 benchmark is conservative control. As Ms Barich sets out, the CSIRO and the Bureau of Meteorology release climate predictions for Australia, including projection tools for sea level rise.<sup>60</sup> Applying a Representative Concentration Pathway (**RCP**) 8.5, the median sea level rise for Portland (approximately 55km west of Port Fairy) is 0.61m by 2090. Ms Barich explains:

RCP8.5 is a global emission scenario based on business as usual, where emissions continue to rise throughout the 21st century, with fast population growth, a low rate of technological development and high energy use. This is scenario was defined in the Intergovernmental Panel on Climate Change (IPCC) in assessments up to and including the 5th Assessment (IPCC, 2014). Until recently, this was considered to be the worst case scenario that could be used for climate change planning and is thought to be very unlikely to occur.<sup>61</sup>

<sup>60</sup> <http://www.climatechangeinaustralia.gov.au/>

<sup>61</sup> Ms Barich's Witness Statement, page 13 (PDF 14).

169. The RCP8.5 is therefore a conservative modelling scenario.
170. More recently, the Intergovernmental Panel on Climate Change's (IPCC) 6<sup>th</sup> Assessment Report redefined the RCPs to be Shared Socioeconomic Pathway (SSP) scenarios. The current SSP5-8.5 SLR for Portland based on the ICPP 6<sup>th</sup> Assessment Report has a median rise of 0.72m SLR by 2100.
171. Ms Barich explains:
- The SSP5-8.5 is a pathway based on no changes to emissions and no additional climate change policy adopted by any governments, therefore it is a very conservative estimate.<sup>62</sup>
172. These values in sea level rise are based on a high reference scenario with no mitigation attributable to international climate policy seeking to reduce the impact of climate change. Like the RCP8.5, the SSP5-8.5 is also a conservative modelling scenario.
173. Given that the most recent IPCC modelling predicts a median sea level rise for Portland of 0.72m in 2100, an allowance of 0.8m SLR to 2100 is already a conservative and appropriate to manage flooding risk in Port Fairy.

**Planning for 0.8m SLR by 2100 satisfies the principles of ecologically sustainable development including the precautionary principle**

174. Cl 12 – Environmental and landscape values provides:

Planning must implement environmental principles for ecologically sustainable development that have been established by international and national agreements. **Foremost amongst the national agreements is the Intergovernmental Agreement on the Environment, which sets out key principles for environmental policy in Australia.**

(emphasis added)

175. The Intergovernmental Agreement on the Environment 1992 (IGAE) says:

3.4 Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things:

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<sup>62</sup> Ms Barich's Witness Statement, page 13 (PDF 14).

- ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process;
- ensuring that there is a proper examination of matters which significantly affect the environment; and
- **ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.**

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

### **3.5.1 precautionary principle -**

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- **an assessment of the risk-weighted consequences of various options.**

...

(emphasis added)

176. Mr Swan, on behalf of Council, advises that a “precautionary approach” has been adopted at Port Fairy based off modelling that provides an indication of future risks that should be planned for, even if the possibility of that risk occurring is “very rare”.<sup>63</sup>
177. A proper application of the precautionary principle is not to plan for future events no matter what their likelihood of occurring. It is not as simple as saying “it could happen, and so we should plan for it”.
178. A proper application of the precautionary principle calls for an assessment of the risk-weighted consequences of various options. Dr Lauchlan Arrowsmith agreed

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<sup>63</sup> Mr Swan’s Witness Statement, page 19 (PDF 20) (Document no. 23).

this is the correct application. In relation to the subject land, it is appropriate to consider whether there is a reasonably foreseeable risk of inundation and then an assessment of appropriate responses having regard to the level of risk.<sup>64</sup>

179. The possibility of a 1.2m SLR by 2100 lies within the 95% percentile.<sup>65</sup>
180. Mr Bishop considers an assessment of nominal trigger levels on a 1.2m SLR by 2100 benchmark is an “extremely conservative assumption” and does not reflect a balanced approach to flood risk management.
181. Ms Barich characterises 1.2m SLR by 2100 as an “extreme abnormality and therefore, “very unlikely” that this scenario will occur.<sup>66</sup>
182. In both Mr Bishop and Ms Barich’s opinion, it is reasonable to adopt the median of the range of RCP8.5 modelled SLR outputs, not the 95<sup>th</sup> percentile. By adopting the 1.2m SLR by 2100 benchmark, Council’s policy seeks to ignore the likely future trajectories in human population and international action on greenhouse gas emission reduction which see international action towards reducing emissions.
183. The Council’s proposed approach is inconsistent with the principles underpinning the IGAE and directly challenges the precautionary principle.
184. Council’s proposal to adopt a very unlikely and deeply conservative modelling scenario seeks to significantly limit the development potential of the Rivers Run land. By seeking to apply with 1.2m SLR benchmark, the Council is seeking to rely on a measure disproportionate to the significance of the problem it is seeking to address.

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<sup>64</sup> *Gippsland Coastal Board v South Gippsland SC & Ors (No 2) (includes Summary) (Red Dot)* [2008] VCAT 1545 at [45].

<sup>65</sup> Mr Bishop’s Witness Statement, page 22 (Document no. 77). Ms Barich’s Witness Statement, page 13 (PDF 14) (Document no 75). Dr Lauchlan Arrowsmith’s Witness Statement, page 20 (Document no. 66).

<sup>66</sup> Ms Barich’s Witness Statement, page 13 (PDF 14) (Document no 75).

## THE PORT FAIRY FLOODPLAIN DEVELOPMENT PLAN (SEPTEMBER 2022)

185. The LFDP establishes minimum design and development performance criteria for subdivision and buildings and works in the areas affected by the Floodway Overlay and Land Subject to Inundation Overlay.
186. Clause 3 of the LFDP defines the Nominal Flood Protection level to mean:

Nominal Flood Protection Level, the flood protection level adopted by the Floodplain Management Authority and Moyne Shire Council. For the purposes of this Local Floodplain Development Plan, the NFPL is the 1% AEP flood level estimate for the 1.2m mean sea level rise scenario.
187. Clause 4.5 of the LFDP provides the NFPL applicable to the Rivers Run land is:

**Within the area affected by rising mean seal level (as indicated by FO3 and LSIO4)** - the “estimated maximum 1% AEP flood level which could be caused by either:

  - a 1% Riverine flood or a 1% Storm Tide flood when mean sea level is 1.2 metre higher than the 1995 – 2014 mean level, with no added freeboard.
188. Council, adopting the evidence of Mr Swan, submitted that the impact of the NFPL in terms of building heights is a “matter of a few centimetres difference”. Rivers Run has considered the application of the proposed NFPL at 1.2m in its modelling for Amendment C75 and cannot agree with Council’s submission. The proposed NFPL imposes an immensely onerous physical requirement on development within the Rivers Run land, to the extent that it will be costly and may not be possible to meet the requirement.
189. The proposed NFPL is based on the equivalent of a 0.8m SLR plus a 600mm freeboard. However, the application of the proposed NFPL does not equate to the 1% AEP flood level with an appropriate freeboard when the potential future building and development with respect to the controls in the planning overlays are taken into account.
190. The impact of the proposed NFPL is most easily understood through a practical example.
191. The exhibited plans for Amendment C75 were prepared on the basis of the current controls, allowing for a 0.8m SLR with additional freeboard. This

- approach allows the level of the site to be lifted and filled to 2.7m AHD, including lots and infrastructure. Fill will be taken from the retention basin in a net fill scenario, with no requirement for imported fill. On 2 December 2019, the CMA advised that this approach could be supported under the current controls subject to an appropriate plan of subdivision that includes a restriction on the plan requiring lots and roadways to be finished at the required NFPL.<sup>67</sup>
192. Under the Amendment C69 proposed NFPL allowing for a 1.2m SLR with no additional freeboard, the lots would need to be lifted to 3.34m AHD and the roads and infrastructure lifted to 3.04 AHD. Amendment C75 as exhibited would not be able to meet this requirement without seeking to import fill, an approach which is typically not allowed by the CMA.<sup>68</sup> To achieve a height of 3.34m AHD, also requires creative engineering with driveways and garages potentially being suspended to allow water to flow underneath.
  193. Both Mr Bishop and Ms Barich have prepared diagrams which seek to demonstrate the difference between the two scenarios. These diagrams are provided at **Attachment D**.
  194. The Panel is invited to recommend the preferred approach of the NFPL to be consistent with State policy and allow for adaptation on the following bases:
    - a) The application of a well defined flood level with a freeboard is standard industry practice. Adopting the approach proposed in the LFDP, will likely lead to confusion and misunderstanding by both the community and water professionals. A reasonable approach to flood risk management can be achieved through the adoption of a standard design flood level plus freeboard.<sup>69</sup>
    - b) In both Mr Bishop and Ms Barich's view, the safety of people and property may be protected through the application of a 0.8m SLR plus

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<sup>67</sup> CMA letter to Mr Brad Henderson, Utilis, dated 2 December 2019.

<sup>68</sup> Cross examination of Dr Lauchlan Arrowsmith by Ms Forsyth and Ms Cincotta.

<sup>69</sup> Mr Bishop's Witness Statement, p 48.

freeboard. In Mr Bishop's opinion, this is far more important than raising all the infrastructure to a certain height.

- c) The application of the LSIO will:
  - i) trigger referral of any future development to the CMA for consideration, and
  - ii) require any proposed development to comply with the Guidelines for Development in Flood Affected Areas (DELWP, February 2019) which provides a requirement for freeboard.
- d) Mr Bishop's evidence is that the proposed 1.2m SLR with no freeboard scenario will have a greater cost to the community in terms of the potential increase to the cost of land and housing. While an engineering solution may be achieved, it may result in a heavy burden of cost for the purchaser.

**Recommendation: Changes to set the Nominal Flood Protection Level based upon 0.8m sea level rise.**

#### **Other changes sought to the Local Floodplain Development Plan**

195. Together with Council, Rivers Run will prepare a revised draft of the LFDP, which will

- a) delete anything in the LFDP that is already sufficiently covered by the LSIO and FO head clause and DELWP's Guidelines for Development in Flood Affected Areas 2019;
- b) remove the proposed mandatory requirement and changes to language to ensure that the requirements for subdivision and new buildings are expressed to reflect post development site condition (ie allow for cut and fill); and
- c) reflect the further changes reflected by Mr Swan, Ms Barich and Mr Bishop in their written evidence and further memorandum provided.

#### **SUN PHARMA AND THE WORDING OF THE LOCAL POLICY**

196. Rivers Run does not dispute that Sun Pharma is an important facility at a local level as well as being important more broadly due to its position in the market of

particular products. It is clearly a well-run facility and an important contributor to the town. A few points to note are:

- a) The closest sensitive receptor is approximately 80m from the main operation area of the plant on the opposite site of the Princes Highway to the west.<sup>70</sup>
- b) The Port Fairy Rail Trail separates the two sites with a well vegetated buffer.
- c) The Sun Pharma site is well secured, albeit that there is visual permeability through the site, including from the Rail Trail.
- d) The Rivers Run site is located generally to the SSW of the Sun Pharma site and is approximately 110m from the closest odour source, being the ‘calamity’ tank, as shown below.



197. Rivers Run does not propose to develop its land in a manner that will require Sun Pharma to shut down or move or even curtail its operations beyond that

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<sup>70</sup> Letter from Mr Ramsay To Mr Quadroy, Sun Pharma, dated 28 June 2021.

which is required by law to ensure an appropriate level of amenity for its existing residential neighbours in any event.

198. The evidence called by Rivers Run, and the position of the EPA, demonstrates that there is nothing fundamentally incompatible between Sun Pharma's operations and residential development of the Rivers Run site. There is, of course, a need for careful consideration of reverse amenity issues, but there is nothing insurmountable. To the contrary, the potential for reverse amenity impacts are relatively low and relatively easily managed in so far as these sorts of industrial/residential conflict cases are concerned.

### **The proposed local policy**

199. Figure 1 of cl 21.09 and Figure 7 in the Structure Plan propose a 500m “industry buffer” around the Sun Pharma site. In the Structure Plan, the relevant strategy provides:

For residential land within identified industrial buffer zones, require further investigations by qualified professionals based on localised conditions and agreed with the EPA and relevant industrial operators before determining appropriate residential densities.

(emphasis added)

200. This strategy has been carried forward to clause 21.09.
201. Rivers Run has no objection to policy identifying Sun Pharma as an important premises, and requiring that impacts are properly addressed, but this wording – requiring that something (although it is not clear what) is “agreed” with industrial operators - is highly unusual and undesirable.
202. The Settlement and Housing Plan (Figure 8) in the Structure Plan designates the Rivers Run land as:

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 Sun Pharma and the EPA).

203. Rivers Run's position is that this note should be broadly translated over to cl 21.09, but with a more appropriate “turn of phrase” than requiring that land be “outside any buffer agreed by Sun Pharma”.

204. It appears that Council's proposed "industry buffer", correctly, does not seek to prohibit residential development within a 500m radius of the Sun Pharma site. Instead, it is intended to ensure:
- a) the Sun Pharma site is not impacted upon by residential development, and
  - b) the possible impact on future residential amenity is properly considered.
205. Sun Pharma's approach (as set out in its submission 77a) is to go further and suggests that the strategy should be modified to actively discourage the rezoning of land for new residential uses if this land acts as a buffer to industrial uses.
206. River's Runs position is that:
- a) a defined industry buffer is not necessary;
  - b) if a defined buffer is to be included, then it should be based upon a rigorous assessment (as per Mr Glossop's evidence) and be no greater than 300m; and
  - c) the "policy" buffer should not preclude residential development within its boundaries, but rather act as a note to ensure that impacts are appropriately assessed before approvals are granted, in the ordinary way.
207. Rivers Run's position is supported by the evidence of Dr Cowan and Mr Hancock.

## **EPA's Position**

### *EPA Position on C75*

208. On 15 November 2017, the EPA gave advice to Rivers Run in relation to rezoning the Rivers Run site to residential. The letter is instructive and should be read in full. In essence:
- a) the EPA did not take issue with the rezoning from the point of view of the Sun Pharma site, so long as the intervening land was rezoned from Industrial 1 to a suitable interface zone (which is now proposed as part of Amendment C69, noting the zoning is proposed to be RCZ);

- b) in relation to odour, the EPA noted that while the ('calamity') tank is used infrequently there is scope to improve it to meet best practice source control principles; and
  - c) the EPA noted that there are residences that are closer than the land proposed to be rezoned (estimated at 55 m and 100 m) and there is no record of pollution reports for noise from Sun Pharma.
209. On 24 February 2021, EPA again gave advice to Rivers Run in relation to rezoning the Rivers Run site to residential. That letter refers to the ongoing correspondence between the EPA and Rivers Run and provided further comments on proposed separation distances. The letter raises no "show stoppers", but rather recommends careful consideration of the interface issues with Sun Pharma.
210. On 18 August 2021, EPA provided a formal response to Amendment C75 and suggested that the assessments be updated to reflect the requirements of the new *Environment Protection Act 2017*. Once again, no "show stoppers" were identified in the correspondence.
211. On 26 July 2022, EPA responded to the updated assessments provided to it and indicated that it withdrew its submission on the basis of proposed changes to the DPO and conditions of the permit to deal with acoustic issues. Further, the letter stated, in relation to odour:

Noting that the risk profile does not appear to have changed since our previous advice, EPA maintains that the risk of odour still appears to be low. While upgrading the tank as per our previous advice would be beneficial, it doesn't have a bearing on our overall position.

*EPA Position on C69*

212. On a letter dated 24 February 2021, EPA wrote a very confusing letter to Council in relation to the amendment. It seems to proceed on the basis that Council intended to apply the ESO to the Sun Pharma site, which is clearly not the case. It was very clear, however, in stating that "a pre-determined separation distance in accordance with EPA Publication 1518 does not apply to the Sun Pharma site", which has been the advice that the EPA has consistently provided to Rivers Run since 2017.

### Mr Ramsay's Advice and Evidence

213. On 28 June 2021, Mr Ramsay advised Sun Pharma that:

- a) that a 500m buffer “amenity” be provided from the relevant activity area within the site on the basis that “the operations at Sun Pharma’s facility involve production of pharmaceutical products of capacity greater than 2,000 tonnes per year” and that “in accordance with EPA Publication 1518, the recommended separation distance to sensitive uses for industrial residual air emissions is 500 m”;<sup>71</sup> and
- b) that a 280m noise buffer from the relevant activity area within the site be provided.<sup>72</sup>

214. Mr Ramsay was clearly wrong. The 500m buffer distance does not apply. His evidence now accepts that error, as it states:

The Facility does not fit into the categories within EPA Publication 1518 as it does not meet the threshold for imposing a typical separation for a pharmaceutical production facility.<sup>73</sup>

215. He has also revised his opinion about the noise buffer.

216. Mr Ramsay’s evidence recommends that:

- a) A separation distance, measured at 300 metres from the location of the calamity tank is appropriate to make sure that future residential development is compatible with the ongoing operation of the Facility.
- b) A separation distance of 150 metres between the boundary of the Facility and future residential receptors is appropriate to prevent noise impacts exceeding the relevant criteria for future residents.

217. In summary, Mr Ramsay’s evidence should be rejected for the following reasons:

- a) Mr Ramsay’s June 2021 advice was poorly researched and demonstrates a surprising lack of diligence. His subsequent evidence to this Panel was similarly lacking in rigour. His report purported to offer an opinion on

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<sup>71</sup> Ramsay Buffer Assessment dated 28 June 2021, p 5.

<sup>72</sup> *Ibid*, p 13.

<sup>73</sup> *Ibid*, p 17.

acoustic issues, despite the fact that he is not a qualified acoustic witness; while his odour assessment was based upon a set of meteorological data that he was unfamiliar with. While he said that he had done a risk assessment and Environment Improvement Plan for the site, he could not remember any of the details of the recommendations of that report. His evidence statement failed to mention the General Environmental Duty, which is a central concept underpinning the new *Environment Protection Act*. In short, his evidence was of such a low standard that the Panel should be cautious to give it any real weight.

- b) The calamity tank is used as part of Sun Pharma's routine operations. It is not an "upset" condition. It is a contingency for a known event that occurs as often as a number of times per month.
  - c) A buffer of 300m is not required for the calamity tank given that Sun Pharma has an existing obligation to mitigate the risk of odour from the use of the calamity tank under its existing GED; and
  - d) A separation distance of 150 metres is not required for noise given that there are both techniques that could be employed by Sun Pharma (to bring it into compliance with its existing GED) and techniques that could be employed by the developer to ensure an acceptable residential amenity.
218. A buffer in the planning scheme is neither necessary nor desirable. Sun Pharma has not demonstrated by evidence that the proposed buffer is rigorously justified. Rivers Run will, in the ordinary course, and as required by State policy, need to demonstrate to the Amendment C75 Panel that its proposed rezoning is appropriate having regard to the interface with Sun Pharma.
219. Should the Panel reject the primary position of Rivers Run and recommend a buffer, then the buffer should be no greater than 300m.

### **Air quality**

220. There is no warrant for a separation buffer based upon odour or air quality emissions from the Sun Pharma site.

221. Dr Cowan advises that in accordance with the Scheme there is no statutory threshold, separation or buffer distance which applies to the Sun Pharma site. In particular:
- a) Cl 53.10 applies to the establishment of industry rather than for the consideration of reverse amenity.
  - b) The separation distance contained in the EPA Publication 1518 is not considered to be recommended as the facility produces less than 2,000 tonnes per annum of product.
222. Dr Cowan's evidence is supported by EPA and Mr Ramsay now accepts that position.
223. Mr Ramsay's evidence recognises that there have been previous complaints in relation to odour from the calamity tank on the Sun Pharma site and therefore suggests that a 300m separation distance from the calamity tank is appropriate to ensure future residential development is compatible with the operation of the Sun Pharma site.
224. Ms McKinley gave evidence that the Complaints Register provided in Mr Ramsay's evidence may be missing data. In response to a later question, she clarified this position by stating that it did not detail a complaint in relation to odour from last year nor include a complaint from August this year. The Panel ought proceed on the basis that the complaints summary provided by Mr Ramsay is a complete record of complaints up until February 2022, noting that:
- a) it includes a complaint dated 4 June 2021 relating to odour, which is likely the complaint "from last year" that Dr McKinley was referring to, and
  - b) the Complaint Summary provided to Mr Ramsay is only updated to 8 February 2022. With evidence due to be filed and served on 19 August 2022, it is likely Mr Ramsay was given a copy of the register that is not up to date as at August.
225. In relation to the complaints received in relation to odour from the calamity tank:
- a) The Public Complaints Summary provided by Mr Ramsay shows four complaints in relation to trade waste odour on 14 March 2012, 16 March 2012, 11 October 2015 and 7 March 2018.

- b) In any event, four complaints in 10 years is not a significant number of complaints.
226. Mr Ramsay's evidence fails to acknowledge that Sun Pharma has an existing General Environmental Duty imposed by the *Environment Protection Act 2017* to consider the risk of odour emissions from all odour sources on the site and whether there are reasonably practical steps that can be undertaken to eliminate, or otherwise reduce risks of harm to human health or the environment from those emissions.
227. EPA had made its position clear: the risk of odour appears to be low; there are practical measures that can be implemented to reduce the risk further by covering the tank; however, while upgrading the tank would be beneficial, it doesn't have a bearing on EPA's position that the risk is low.
228. On the site inspection, it was revealed that the calamity tank is used in circumstances where Wannon Water cannot accept discharge. Dr McKinley gave evidence that Sun Pharma may seek to use the calamity tank between 15 - 25 times a year. At the site visit, the Panel was informed that it was used 20-30 times per year. In addition to the proposal by EPA to cover the tank, Sun Pharma revealed that it is also able to manage this situation by removing it off-site in tankers.
229. This is an existing and expected issue for residents and Sun Pharma. It is not a significant issue; it is not an "upset event" as Mr Ramsay described, it is not a new issue; it is an issue that can be readily managed. It is not a "show stopper".
230. While there is no justification for a specified industry buffer on grounds related to air quality, this is not to say that matters of air quality and odour will not be relevant considerations at the time amendment C75 and the associated permit application are considered.
231. Dr Cowan recommends that at time of a future development application it would be prudent to undertake an assessment in accordance with EPA publications 1881 and 1883, which provide guidance on how to undertake a proper odour assessment. This may be a requirement that is included at the time Amendment C75 is assessed.

## Noise

232. Cl 13.05-1S seeks to assist the management of noise effects on sensitive land uses. The policy seeks to ensure that development is not prejudiced and community amenity and human health is not adversely impacted by noise emissions.
233. During evidence in chief, Mr Ramsay observed that the Hygienics data shows that there are currently “a number of non-compliances” in relation to noise levels. Mr Ramsay recommends a separation distance of 150m between the boundary of the Sun Pharma site and future residential land uses to prevent noise impacts at a similar distance to the houses for which a non-compliance was noted. However, that approaches ignore the fact that Sun Pharma is not above the law: it is required to address its non-compliances, not perpetuate them into the future.
234. Neither Mr Ramsay nor Dr McKinley could tell the Panel whether the recommendations from 2013 had been adopted, nor whether any follow up noise reports had been done. So while Sun Pharma may say that it is a good neighbour, and that it is implementing its GED, there is a lack of data to support that assertion.
235. Mr Ramsay agreed that if noise attenuation treatments can be provided so that an acceptable standard of amenity can be provided, then in principle a separation buffer would not be required. This may, for example, be achieved by erecting an acoustic fence on the Sun Pharma site or by acoustic treatments on the Rivers Run site if it is developed for residential.
236. Mr Hancock’s assessment of the Rivers Run land describes the surrounding noise environment as “complex” with significant contributions from Sun Pharma, traffic noise from the Princes Highway and surf noise from the coast. In Mr Hancock’s opinion, a noise buffer around the Sun Pharma site is not required, as:
  - a) There is a low risk of adverse noise amenity impacts on the subject land due to noise from Sun Pharma. That is, the noise Sun Pharma may not currently comply with the regulatory noise limits at the northern extents of the subject land, under certain conditions.

- b) Sun Pharma may seek to mitigate their noise emissions to achieve compliance with the regulatory noise limits at existing residential dwellings. In this circumstance then compliance is highly likely to be achieved on the subject land.
  - c) If the subject land is developed for residential use, regardless of the current noise emissions from Sun Pharma, there are design responses that the residential development can implement to achieve an appropriate level of external acoustic amenity across the subdivision.
237. In the event that the Panel is minded to impose a buffer, Mr Ramsay's proposed 150m buffer is more appropriate than the blanket 500m buffer currently proposed by Council.
238. Mr Ramsay's buffer of 150 metres is reflected in Figure F5 of his witness statement. It is slightly smaller than the 280m buffer he previously recommended from the edge of the plant (rather than from the site boundary). It shows that existing residential development surrounding Sun Pharma and the northern tip of the Rivers Run land are within the proposed buffer.
239. The existing use of residential land within Mr Ramsay's buffer distance demonstrates that residential land and the Sun Pharma site can reasonably co-exist. As Mr Hancock suggests, an appropriate urban design response and noise treatment can be applied at the permit stage to ensure future residential amenity is protected within the 150m buffer.

### **Known Consignor Status**

240. Arguments about a 'known consignor status' and the "trusted trader" program are little more than a distraction. The known consignor scheme is in place primarily to "prevent an unauthorised explosive being inserted into cargo originating from your nominated site/s". The emphasis in the application form is very much about security of the product and packaging during the production process and its route out of the facility to the airport. i.e. checking staff, visitors to the site, the handlers driving the products to the airport. Known consignor status can be granted even to small businesses operating from a home office. The application form does not require details to be provided about either proximity to residential or other neighbours or the density of residential or other

neighbours.<sup>74</sup> Likewise with the Aust trusted trader program, the section of the form on security is directed to security measures onsite, rather than proximity to or density of neighbours.

241. The Sun Pharma facility has very sophisticated security measures in place at the facility to prevent intruders and to monitor staff to make sure that there is no tampering with the materials that are exported. That is a necessary requirement of Sun Pharma's licence. Dr McKinley confirmed that the security measures on site provide a very high degree of protection from outside interference with outgoing product. The risk of losing known consignor status due to some additional neighbors is little more than fanciful.

**Recommendation: The “industrial buffer” be removed from Figure 1 of cl 21.09. If the Panel is minded to recommend a policy buffer, within which sensitive uses must be further assessed, the appropriate distance is 150m from the site boundary.**

## CONCLUSION

242. Rivers Run supports the efforts of Council to progress this Amendment to allow for the level of growth encouraged by the Scheme and is not seeking to challenge the strategic justification for the Amendment.
243. To successfully facilitate increased housing diversity within Port Fairy, the future use of the Rivers Run land for residential purposes will be subject of further consideration in Amendment C75 and should not be prejudiced by the outcome of this amendment, especially as the Rivers Run site is “shovel-ready” and, subject to successful rezoning, able to contribute to the housing mix of Port Fairy within the short term.
244. Rivers Run is seriously concerned by the proposal to adopt a 1.2m SLR benchmark. The extent of the proposed LSIO should apply the existing “0.8m SLR by 2100” benchmark to ensure that development is not restricted by extremely conservative flood modelling, the FO paired back and the provisions

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<sup>74</sup> <https://www.cisc.gov.au/reporting-and-compliance-subsite/Documents/known-consignorapplication-form-guide.pdf>

of the LFDP reviewed to reflect a nominal flood protection level based upon an 0.8m sea level rise, with an appropriate allowance for freeboard.

**Juliet Forsyth**

**Kate Lyle**

Owen Dixon Chambers West

Date 13 September 2022

**List of Attachments:**

<b>A.</b>	Revised local policy
<b>B.</b>	Examples of development undertaken by Michael Hearn
<b>C.</b>	Amendment C75 - Site Context Plan
<b>D.</b>	Diagrams prepared by Mr Bishop and Ms Barich