

MORNINGTON PENINSULA PLANNING SCHEME
AMENDMENT C46 &
PLANNING PERMIT APPLICATION: CP 02/004

PANEL REPORT

April 2004

Planning Panels Victoria

**MORNINGTON PENINSULA PLANNING SCHEME
AMENDMENT C46 &
PLANNING PERMIT APPLICATION: CP 02/004**

A handwritten signature in cursive script that reads "Lawrie Groom".

**Lawrie Groom
(Chair)**

A handwritten signature in cursive script that reads "Rowland Ball".

**Rowland Ball
(Member)**

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1 INTRODUCTION

1.1 The Panel

Lawrie Groom (Chair) and Rowland Ball (Member) were appointed as a Panel on 13 February 2003, under delegated authority from the Minister for Planning, pursuant to Ss153 and 155 *Planning and Environment Act 1987* (the Act). The purpose of the Panel was to consider and hear submissions, and to prepare a report on proposed Amendment C46 to the Mornington Peninsula Planning Scheme (the Amendment), and Planning Permit Application No CP 02/004 (the application).

The **exhibited Amendment and application**, if approved, would facilitate the use and development of 20 Leyden Avenue, Portsea, to construct four single storey dwellings, a tennis court, swimming pool and outbuildings (the proposal).

1.2 Combined Permit and Amendment Process

Section 96A of the Act allows for a proponent who requests a planning authority, such as the Mornington Peninsula Shire Council (the Council), to prepare an Amendment to a planning scheme and to apply to that authority for a permit for any purpose which the Amendment would allow. The Act also authorises an Amendment to provide for the removal or variation of a registered restrictive covenant, and it enables a permit application and the Amendment to be considered concurrently.

Accordingly, this Panel is charged with the responsibility of making a recommendation to the Council about both the Amendment and the application, including the conditions to which the permit should be subject. The permit can only be granted if the Amendment is approved. If the Council decides to adopt the Amendment, it in turn must make a recommendation about the application to the Minister, who makes the final determination. The Minister directs the Council to either issue a permit, or a notice of refusal. There is no appeal from the Minister's decision to the Victorian Civil and Administrative Tribunal.

The next section of this report describes the proposal, including the modifications to the Amendment and permit application.

2 THE PROPOSAL

2.1 The Exhibited Proposal

The **exhibited Amendment and application**, if approved, would facilitate the use and development of 20 Leyden Avenue, Portsea, to construct four single storey dwellings, a tennis court, swimming pool and outbuildings. The Explanatory Report exhibited with the Amendment stated that:

The proposal is a response to the desire to use the site for a family retreat, consistent with the use of most properties within Portsea.
(page 3)

2.2 The Setting

During the course of the hearing, the Panel was requested to **modify the Amendment** to allow a dwelling to be constructed at 16 Leyden Avenue and for the rights for existing dwellings at 18 and 24 Leyden Avenue to be preserved.

The Panel was also requested to agree **to modify the application** for the proposed planning permit. The reasons for these modifications being sought are explained later in this report.

Leyden Avenue is a bushland setting residential neighbourhood. Most lots comprise of well setback, low profile dwellings with extensive vegetation that often in part obscures the houses. Generous size lots in part facilitate the vegetation, the average lot size in Leyden Avenue being in the order of 1,500 square metres (Council submission). Driveways are generally unsealed. Leyden Avenue is a gravel road, with a trafficable width of about 3 m. It is a dead end road, as a result of traffic management works near the intersection with Martins Lane, (which does have a sealed surface).

The property, 20 Leyden Avenue, Portsea, is vacant land and comprises two adjoining allotments (lots 3 and 4) on the western side of the road. The larger of the lots is number 20 (lot 3, LP 52729). This is an irregular shaped allotment with an area of 4368m². The body of the land is contained in the western section, adjoining a recreation reserve. Of this portion of the lot the southern boundary has a length of 55.69 m, the northern boundary 30.02 m and the western boundary adjoining the reserve, a length of 92.96 m. Access to Leyden Avenue is provided by a 15 m wide 'handle' running approximately 35 m from the mid point of the body of the land (Council submission).

The high point of the lot is located in the south western corner from where the land falls at a generally consistent rate to the low point at the north western corner. The fall between these points is approximately 9.5 m. The body of the lot is vegetated by a generally dense stand of Ti tree. The handle to the Leyden Avenue is general free of vegetation. An informal walking path runs east west through the allotment providing passage from Leyden Avenue to the reserve.

The second lot is number 22 (lot 4, LP 52729) Leyden Avenue. This lot is situated lengthways along the southern boundary of the handle of 20 Leyden Avenue. The lot has a street frontage of 15 m and a maximum depth of 32 m, providing a site area of 580m². The land has a 1.5 m cross fall running from the high point in the south western corner to the low point in the north east corner. The south western corner of the lot contains a small stand of Ti trees while the balance of the land is free of vegetation. Both lots 3 and 4 of LP 52729 are contained in Certificate of Title Volume 8583 Folio 689 (Council submission).

The Amendment (as proposed to be modified) would vary the covenants to allow dwellings to be constructed at 16 Leyden Avenue, and for the rights for existing dwellings at 18 and 24 Leyden Avenue to be preserved:

- 16 Leyden Avenue (lot 1) - this is an irregular shaped vacant allotment with a street frontage of 15 m and a maximum depth of 38 m (Council submission). As with number 18, this lot shares a rear boundary with 20 Leyden Avenue.
- 18 Leyden Avenue (lot 2) - this lot adjoins the northern boundary of the handle of 20 Leyden Avenue. The lot has a street frontage of approximately 12 m and a maximum depth of 37 m. The rear boundary of the lot adjoins 20 Leyden Avenue (Council submission). The land contains a single storey weatherboard dwelling situated in the approximate middle of the site.
- 24 Leyden Avenue (lot 5) - this allotment is generally rectangular with a street frontage of 18 m and a depth of 32 m (Council submission). The rear boundary of this land adjoins 29 Leyden Avenue. A single storey weatherboard dwelling is situated in the rear half of the land.

20 Leyden Avenue abuts 28, 34 and 38 Martins Lane, and 14 Leyden Avenue. The north western corner of 28 Martins Lane, which is situated 1 m from the south eastern corner of the subject property, contains a single storey brick dwelling fronting Martins Lane. 34 Martins Lane contains a stone dwelling with a tennis court set close to the southern rear boundary with the subject land. 38 Martins Lane is situated to the north-east of the subject property and abuts a small section of that land. It has a large dwelling and a substantial rear garden. 14 Leyden Avenue is a generally rectangular allotment with a street frontage of 15 m and a depth of 68 m. The land contains a single storey weatherboard dwelling set in the eastern half of the lot behind a high fence. The western half of the southern boundary adjoins the northern boundary of the subject property (Council submission).

Adjoining the entire length of the western boundary of 20 Leyden Avenue is the Portsea Recreation Reserve. Public tennis courts are located 6 m from the western boundary of the property. The courts are sited within a substantial earth cut about 5 m in depth at the south east corner (Council submission).

Across the road from 20 Leyden Avenue are 17 and 21 Leyden Avenue. Number 17 contains a single storey fibro sheet dwelling which is partially screened by vegetation. 21 Leyden Avenue contains a single storey weatherboard dwelling set close to the street frontage, however it is largely

obscured from street views by the high fence running the length of the front boundary (Council submission).

2.3 Need for the Amendment and Planning Permit

The Amendment was requested because 20 Leyden Avenue is subject to restrictive covenants that prevents the erection of more than one private dwelling on the site. Section 61 (4) of the Act prohibits the granting of a planning permit if the permit would authorise anything that would result in a breach of a restrictive covenant. Accordingly, the exhibited Amendment sought to vary the covenants to permit the proposed use and development in accordance with a planning permit.

The Planning Permit is required, because although the property is within a Residential 1 Zone, a permit is required to construct more than one dwelling on a lot. The Design and Development Overlay – DD02-A2 (Bayside and Village Design) over the property also provides that a permit is required for more than one dwelling on a lot. The land is also affected by a Vegetation Protection Overlay – VPO 1 (Township Vegetation) which requires a permit to remove vegetation. A permit is also required to construct use and illuminate the proposed tennis court. The adjoining recreation reserve is zoned Public Park Recreation Zone, and an Environmental Significance Overlay – Schedule 18 (Wetlands) is within a few metres of the southern boundary of 20 Leyden Avenue.

2.4 Proposed Modifications

The Panel considered a number of modifications to the exhibited proposal requested by the proponent and owners of 16, 18 and 24 Leyden Avenue. **The final summation of these modifications comprises the following changes to the wording of the exhibited Amendment, the plans, and the proposed permit:**

(a) Proposed modification to the wording of the exhibited Amendment to include 16, 18 and 24 Leyden Avenue, to enable the land at 16, 18 and 24 to be used and developed for one dwelling each (dwellings already exist at 18 and 24), and that the development at 20 Leyden Avenue must accord with the planning permit. The modification proposed is as follows:

Under the column “Land”, describe the land as:

16, 18, 20, 22 and 24 Leyden Avenue, Portsea, being the land contained in Certificate of Title [insert relevant title details]

Under the column “Requirement”:

Vary the covenants to the following extent:

Following the words:

“that she or they will not at any time hereafter build, construct, erect or cause to be built, constructed or erected on the said lot any building other than one

private dwelling house with outhouses and garage and such dwelling house with outhouses and garage will cost not less than One thousand pounds”,

Insert (in respect of the land at 16, 18 and 24 Leyden Avenue):

Except that nothing herein shall prevent the use and development of the land contained in Certificate of Title [relevant title details], each for one dwelling and usual outbuildings,

And insert (in respect of the land at 20-22 Leyden Avenue):

And except that nothing herein shall prevent the use and development of the land contained in [relevant title details], being lots 3 and 4 on Plan of Subdivision 52729, for the purpose of four single storey dwellings, tennis court, swimming pool and outbuildings, in accordance with a planning permit issued by Mornington Peninsula Shire Council in application No. CP 02/004.

The change would allow dwellings to be constructed at 16 (as well as 20) Leyden Avenue, and for the rights for existing dwellings at 18 and 24 Leyden Avenue to be preserved. The Panel supports this change which would enable a proper and equitable utilisation of these lots. The modified Amendment is included in the Appendix.

(b) Draft Planning Permit No CP02/004 (version 5) – a copy (that does not include changes recommended by this Panel) is included in the Appendix to this report.

(c) Plans prepared by Stephen Akehurst Architects, Drawing Nos: SK 101C, SK 102A, SK 103A, SK 104A and SK 105A. SJB Planning, consultants to the proponent, described the changes to the exhibited plans:

Relocation of residence 2 on the site. This dwelling, which was originally proposed to be parallel to the rear boundary of Numbers 16 and 18 Leyden Avenue has been relocated to the front of the site, straddling the boundary of the access handle and No. 22 Leyden Avenue. Residence 2 will be oriented east-west,

Increased setback of Residence 3 from the western (rear) boundary of No. 24 Leyden Avenue from approximately 3.5 metres to 5.78 metres,

Rotation of residence 1 on the site from a north-south orientation to an east-west orientation. This dwelling is now setback from the northern boundary by approximately 16 metres and from the western boundary by approximately 3 metres,

Deletion of the carport originally proposed within the access handle,

Inclusion of a 2-metre high masonry wall along the southern boundary of No. 18 Leyden Avenue,

Inclusion of a boundary fence along the western boundary of No. 16

Leyden Avenue.

The modifications respond to negotiations between the proponent and some submitters, and would result in full utilisation of 20 and 22 (lots 3 and 4) Leyden Avenue, rather than the development being fully contained in 20 (lot 3) Leyden Avenue. For these reasons, the Panel supports the proposed modifications.

2.5 Council's Attitude to the Modifications

Council at its meeting on 21 July 2003, considered the proposed modification to the Amendment as it affected the covenants. The officer's report stated that the proponent had advised the Panel at a Directions Hearing on 29 April 2003 that it might seek to vary the wording of the covenants, which the officer described, would be "the most 'common sense' outcome" (Information on the proposed variation of wording had been contained in a letter Council sent to the parties on 16 May 2003). With respect to the planning permit application, the officer's report stated:

... , it is noted that the concerns raised by objecting submitters about neighbourhood character and amenity impacts are considered to be important and these issues can be further considered by the Panel. There is also scope at the Panel hearing, for example, to recommend that amended conditions be applied to address amenity impacts such as overlooking after a detailed ResCode assessment has been undertaken.

Council agreed to adopt the following recommendations:

- 1. That Council accept submissions received by 16 June 2003 (or any late submissions prior to the Panel hearing) following the re-exhibition of the proposal.*
- 2. That Council takes a neutral role at the Panel hearing in relation to the covenant variation(s).*
- 3. That Council generally supports the proposed development of lot 3, with a final position in relation to the density and design of development dependent on further consideration following the Panel's report.*
- 4. That Council supports the proposed wording change to the covenant variation at the Directions Hearing to allow no more than one dwelling to be constructed on lots 1, 2, 4 and 5 LP 52729.*

The next section of this report describes the Panel hearings, including the background to the proposal.

3 THE PANEL PROCESS

3.1 Background to the Amendment and Application

The property, together with the neighbouring properties at 16, 18 and 24 Leyden Avenue, are subject to restrictive covenants that prevents the building, constructing or erecting of “any building other than one private dwelling house with outhouses and garage”. Thus, the Council is prohibited from granting a permit if anything authorised by the permit would result in a breach of the covenant. A covenant can be removed or varied through:

- An application to the Supreme Court pursuant to section 84 *Property Law Act* 1958, or
- Action by the Governor in Council to remove a covenant for a development of State or regional significance under Part 9A of the Act, or
- An application to the Council for a planning permit to remove or vary a covenant, pursuant to sections 6A and 60 (2) of the Act, or
- A planning scheme amendment to remove or vary a covenant, pursuant to section 6 (2) (g) of the Act.

Section 96A (1) (b) of the Act enables a person who requests a Council to prepare an amendment which provides for the variation or removal of a restrictive covenant to simultaneously apply for a permit to use or develop the land, pursuant to section 96A (1) of the Act – this is the procedure adopted by the proponent in this instance.

It is important to note that these statutory processes are provided separately in the *Property Law* and *Planning and Environment* Acts; they involve the operation of different principles, and are separately applied without reference to each other. The process set out in section 6(2)(g) of the Act does not require any steps to be taken to protect the interests of people entitled to the benefits of the covenant (*MA Zeltoff Pty Ltd & Anor v Stonnington City Council* [1999] 3 VR 88). There are however two clauses in the planning scheme which are relevant to this process (these are referred to later in this report).

On 26 October 2001, SJB Planning, on behalf of the proponent and owner of the property, made an application to the Council for a planning permit (P 01/2431) for the construction of four dwellings, tennis court, pool, cabana/pavilion and storeroom, and the modification of the restrictive covenants, pursuant to S 60 (2) of the Act. There were seven objections from benefiting owners and eleven other objections.

Later on 17 and 20 May 2002, SJB Planning made a new application, for the same development, together with a request to amend the Planning Scheme to vary the covenants, as provided for in S 96A of the Act. The earlier application for a planning permit was then withdrawn. The Panel understands that the application was withdrawn as it was considered likely that Council would not be

satisfied, because of the receipt of objections, that owners benefiting from the covenants would be unlikely not to suffer the specified losses or detriments as a consequence of the proposed variation of the covenants.

Council at its meeting on 5 August 2002, considered a report on the proposal and agreed to support the use of the combined permit and amendment process to:

- *Prepare and exhibit an Amendment to the Mornington Peninsula Planning Scheme to provide for a variation of the covenant which applies to 20 Leyden Avenue, Portsea, by inserting a provision in the Schedule to Clause 52.02*
- *To exhibit Planning Permit Application No. CP 02/004 to construct four dwellings, tennis court, swimming pool and associated buildings and landscaping at 40 Leyden Ave, Portsea*
- *Exhibit a draft Planning Permit including conditions which require:*
 1. *The maintenance of Leyden Avenue and its amenity during construction to the satisfaction of the Responsible Authority*
 2. *The provision of pedestrian access through the subject site from Leyden Avenue to the Portsea Recreation Reserve at the rear of the site and the design, development and management of such access must be to the satisfaction of the Responsible Authority. (Council minute)*

The proposal was exhibited from the end of October through to December 2002. Twenty five submissions were received, including the Environment Protection Authority (EPA), South East Water, Aboriginal Affairs Victoria, and Council's Health Officer. The Council, following consideration of these submissions, wrote to the Minister for Planning on 31 January 2003, and requested that a Panel be appointed.

3.2 The First Directions Hearing

The Panel held a Directions Hearings at the office of Planning Panels Victoria, 80 Collins Street, Melbourne, on 26 March 2003, with the following parties in attendance:

- The Council, represented by its Strategic Planner, Mr Joshua Clydesdale
- The proponent, represented by Mr Phillip Borelli of SJB Planning
- Mr Robert Imison, a submitter, with his representative, Mr Colin Barlow of Middletons, Solicitors
- Mr Richard Martin, a submitter
- Mr David Morris, representing Mrs Margaret Morris, a submitter.

The Panel noted at the hearing that the provisions authorising the Amendment

and consideration of simultaneous application for the permit is provided in the *Planning and Environment (Restrictive Covenants) Act 2000* which amended the Principle Act. The amendment included a new substituted section 96A (1), inserted paragraphs (c) and (d) in section 96A (4), inserted paragraph (g) in section 96C (1), and inserted paragraphs 2A, 2B and 8A in section 96C of the Act. The effect of these amendments (in summary) is that additional information is required to be provided, specifically:

- Section 96A (4) of the Act provides that the application for the permit must be accompanied by information required by the planning scheme, a copy of the covenant, information clearly identifying each allotment or lot benefited by the covenant, and any other information that is required by the regulations
- Section 96C (1) of the Act provides that the Council must give notice of its preparation of the Amendment and notice of an application being considered concurrently with an Amendment to:
 - The owners and occupiers of allotments or lots adjoining the land to which the application applies (unless the Council is satisfied that the permit would not cause material detriment to any person)
 - The owners and occupiers of land benefited by the covenant.
- Section 96C (2A), (2B) and 8A of the Act provides that the Council must place a sign on the land, publish a notice in the *Government Gazette*, provide a copy of the proposed permit to each person to whom the notice of the Amendment and application was given under section 96C (1) of the Act, and make a copy of the proposed permit available for inspection.

As a consequence of these requirements, the Panel made a Direction requesting the proponent and the Council to provide confirmation that all the information required by the Act had been provided. The Panel also made Directions about the provision of information required by the Panel and parties to the hearing, and the exchange of documents. Four of the Directions requested (amongst other matters), that:

- Council prepare a plan showing each parcel of land that has the benefit of the covenant, and the names and addresses of the owners and occupiers of those parcels
- Council prepare a chronology of the subject property
- Council provide a copy of the application for the planning permit and planning scheme amendment and accompanying documents, copies of submissions received, and copies of advice received from authorities, utility bodies and Council's Health Officer
- Council provide a copy of all relevant title searches, including plans of subdivision and covenants.

During the course of undertaking this work the Council discovered that a

number of administrative errors had occurred and advised the Panel that:

- Seven submitters had not been advised of the appointment of the Panel
- A person(s) who has the benefit of the restrictive covenants had not been notified of the proposed Amendment and planning permit application; and
- The Panel had not been provided with four submissions.

The Panel requested the Council to advise the parties who were invited to attend the Directions Hearing that the Panel may need to cancel the Hearings which were planned to be held on 8, 29 and 30 April. The Panel also requested the Council to obtain legal advice on an appropriate process to resolve the issue. The Panel subsequently advised the Council that it would not be proceeding with the hearing on 8 April 2003.

On 15 April, the Panel received advice from the Council, and a letter from the proponent/applicant's lawyers, Minter Ellison. The Council proposed that notice be served on the omitted beneficiary (together with advice that the Panel had been appointed), that letters be sent to all submitters advising of the appointment of the Panel, and that copies of all submissions be given to all parties. Minter Ellison advised that a notice had been given to the previously omitted beneficiary, and drew the Panel's attention to the powers open to it under section 166 of the Act to overcome technical defects, failures or irregularities in the planning scheme amendment process. The Panel understood that this letter had been circulated to the parties to the Panel process, as well as to the previously omitted beneficiary.

The Panel considered these proposals and decided that it did not wish to embark upon a course of action that might disadvantage or deny natural justice to any person or beneficiary or party with a relevant interest in the Amendment and/or Planning Permit Application. It therefore decided to convene a second Directions Hearing for the purpose of hearing and considering presentations, first by the Council and the proponent on how the relevant provisions of the Act had been satisfied; and, second, submissions from the parties on an appropriate course of action (with indicative timelines) so that the Panel could proceed, in due course, to consider the merits of the Amendment and Planning Permit Application.

The Panel directed that the documents directed to be tabled at the Hearing which was to be held on 8 April, should be tabled by Council and the proponent / applicant at the second Directions Hearing.

The Panel also directed that the Hearing should consider the presentation by Council on the restrictive covenant, subdivision and other history of the property (as determined in the first set of Directions).

Council was requested to notify the parties to the existing Panel process of the reconvened hearing (and indeed agreed to provide preliminary advice by telephone on 17 April 2003).

Council was also requested to notify the other (seven) submitters and the other (one) beneficiary of the current position and that a second Directions Hearing was to be held on 29 April 2003.

3.3 The Second Directions Hearing

The second Directions Hearing was held at the office of Planning Panels Victoria on 29 April 2003. The purpose of hearing was to consider presentations on how the relevant provisions of the Act with respect to the notification of relevant interests had been satisfied, and on an appropriate course of action so that the Panel could proceed, in due course, to consider the merits of the Amendment and application.

The following parties attended:

- The Council, represented by its Strategic Planner, Mr Joshua Clydesdale
- The proponent, represented by Mr Christopher Townshend, of Counsel
- Mr Robert Imison, a submitter, with his representative, Mr Colin Barlow of Middletons, Solicitors
- Mr Richard Martin, a submitter
- Mr David Morris, representing Mrs Margaret Morris, a submitter.

The Council tabled the following documents for the Panel and parties:

- Copy of the application for a planning permit, dated 20 May 2002 (including a ResCode Assessment)
- Copy of plans SK1 to SK7 prepared by Stephen Akehurst: site context plan, building sections A to D, plans of residences 1 to 4, plan of typical residence sections and elevations, plan of carport and pavilion details, and cut and fill plan (all dated 16 May 2001)
- Copy of Amendment C46, with the explanatory report and associated documents
- Copy of proposed planning permit No. CP 02/004
- Copies of 25 submissions received by Council, including advice on the application prepared by Council's Environmental Health Officer
- Copies of letters sent to affected parties
- History of the property, including previous planning permit applications, and subdivision of the property, including the parent title.

Council advised the Panel that further errors had been discovered: a copy of the proposed permit had not been circulated, and the occupier of a property had not been notified. There had also been at least one change in ownership of land since the Amendment process had commenced. Mr Townshend also submitted

that the letter that had been circulated by Council on the Amendment and planning permit application had not been clear as to its intention.

The Council, with Mr Townshend, made a presentation on the restrictive covenants, their history and how the relevant provisions of the Act had been satisfied. The presentation included a detailed analysis of the properties that enjoy the legal benefit of the covenants. This analysis was based on the principle that the legal benefit of the covenant is enjoyed by properties within the same parent title and which were transferred out of the parent title after 28 April 1950. It was established that additional people to those previously notified had the benefit. It also became clear that because three lots forming part the land in the original subdivision, when the restrictive covenant was imposed, had been re-subdivided into five lots, the covenants would restrict the development of the land at 16, 18, 20, 22 and 24 Leyden Avenue to no more than three dwellings. It was also established that additional people who may be affected by the proposals should be provided with the opportunity to make a submission to Council.

Mr Townshend foreshadowed that he would apply to change the wording of the variation of the covenants that had been exhibited in the Amendment. Mr Townshend argued that a wording change would clarify the legal drafting of the Amendment and would respond to submissions by landowners who are also affected by the covenants over land at 16, 18, 20, 22 and 24 Leyden Avenue. The proponent would request the Panel at a future hearing to recommend adoption of the proposal with modifications to the wording of the Amendment to clarify the intended outcome of the variation. This would be that each of the lots at 16, 18, 22 and 24 Leyden Avenue would be restricted to development for no more than one dwelling; and that 20 Leyden Avenue could be developed for four dwellings in accordance with the planning permit application.

The Panel heard submissions on how it should proceed, given the administrative errors that had taken place. At the conclusion of the hearing the Panel determined that Council should correct the administrative errors by writing to the various interests and providing an opportunity for these persons to make a submission to the Council. Accordingly, on 16 May 2003, the Council sent a letter to the legal beneficiaries of the restrictive covenants which were sought to be varied, other properties within the subdivision of the entire parent title, other landowners and occupiers surrounding or in close proximity to the subject property, all existing submitters, as well as to previous submitters to the earlier planning permit application (which had since been withdrawn and replaced). The purpose of the letter was to:

- Ensure that all properties within the original subdivision received notice of the proposal
- Ensure that others who might be affected by the proposal receive notice
- Clarify the implications of the proposed variations of the covenants
- Provide an opportunity for any person who claimed to be a legal beneficiary and whose name did not appear on an attached list, to give notice to the effect that the person considered himself or herself to have the legal benefit

of the covenant and to advise on what basis this claim was made

- Provide a further opportunity for any person who had not made a submission to do so
- Provide an opportunity for any person who had already made a submission to supplement their submission, if they wished to do so.

The letter also provided advice to the effect that the proponent would apply to change the wording of the variation of the covenant that had been proposed in the Amendment, in the manner outlined above.

Council again considered the matter at its meeting on 21 July 2003, when additional seven submissions were received, including submissions from three additional persons.

3.4 The Third Directions Hearing

The third Directions Hearing was held on 15 September 2003, in the Council Chambers, at Council's Mornington Office.

The following parties attended:

- The Council, represented by its Strategic Planner, Mr Joshua Clydesdale
- The proponent, represented by Mr Scott Stewart of Minter Ellison, Lawyers
- Mr Robert Imison, a submitter, with his representative, Mr Colin Barlow of Middletons, Lawyers
- Mr David Morris, representing Mrs Margaret Morris, a submitter.

The Panel noted that there would be one additional party to the public hearing and directed that Council send to Mr Malcolm Hiscock copies of title searches of the land affected by the covenants so as to indicate the beneficiaries.

The Panel also directed Council's Lawyer is to prepare a submission certifying the list prepared by Council of beneficiaries to the covenant, and confirming that notices of the Amendment, Planning Permit Application, Panel appointment and hearings have been given by Council to the appropriate owners and occupiers in accordance with the Act.

Mr Stewart advised the Panel that the proponent would be requesting the Panel to consider a modification to both the proposed Amendment and to the plans.

The Panel decided that it would hear and consider on the first day of the hearing the legal arguments concerning the basis which could enable the Panel to recommend (if it was to take such a course of action) modifications to the exhibited Amendment and Planning Permit Application; the basis on which it was proposed to remove or vary the restrictive covenants; and the appropriate test that the Panel should adopt in determining whether or not to recommend an Amendment to the scheme which would have the effect of allowing the removal or variation of the covenants.

3.5 The Panel Hearing

The Panel hearing was held on 10, 11 and 14 November 2003, in a hearing room, at the office of Planning Panels Victoria, Melbourne. The following parties attended all or part of the hearing:

- The Council, represented by Mr Frank Mangan, Strategic Project Planner, with Mr Ken Griffiths, Development Planner
- The proponent, represented by Mr Christopher Townshend of Counsel, with Ms Karla Loughnan of SJB Planning
- Mr Robert Imison, a submitter, with his representative, Mr Colin Barlow of Middletons, Lawyers (see submission No 6)
- Mr David Morris, representing Mrs Margaret Morris, a submitter (see submission No 8). On the final day of the hearing, Mr Morris withdrew Submission No 8.
- Mr Malcolm Hiscock, representing Martins Lane Pty Ltd, a submitter (see submission No 26); Mr Hiscock tabled correspondence and submissions on behalf of J & D Law (see submission No 24), J & M Baird (see submission No 28), P & T McGinley (see submission No 16), J & P Egan (see submission No 17), Mr R Martin (see submission No 2), and I & K Scott; Mr Hiscock advised the Panel that he represented A & F Duckett (see submission No 9), and he tabled a copy of a letter sent to Council dated 7 January 2002, by Dr G Westlake.

During the hearing, the Panel also received and circulated copies of a letter sent to SJB Planning dated 24 October 2003, by DI Gibbs, Secretary Leyden Avenue Inc (see submission No 4), and letters received by the Panel on 14 November 2003, from Mr Richard Martin (see submission No 2), and MC & JM Baird (see submission No 28).

Mr Phillip Borelli, Principal of SJB Planning, and Mr Mark McWha, Director, Mark McWha Landscape Architects, provided reports and expert evidence to the Panel, in support of the proposal.

At the commencement of the hearing, the Chairman read a list of the documents received by the Panel since Directions Hearing No 1, and additional copies of some of these documents were provided that morning to some of the parties. Copies of reports and other papers were placed on the public documents table in the hearing room. A list of key reference documents considered by the Panel is included in the Appendix to this report.

The next section of this report summarises the issues raised in submissions to the Panel.

4 THE ISSUES

4.1 Submissions

The Panel considered all the submissions and evidence presented at the hearing, and read and considered all the tabled submissions, letters and witness statements, together with all the submissions that were referred to it by the Council.

4.2 Variation to the Covenants

Issues raised in the submissions concerning the covenants, as summarised by Council, include:

- Non-compliance with the principle and requirements of the covenants and an understanding that the existing development of 18 and 24 Leyden Avenue has already ‘fulfilled’ the covenant requirements (that is, no further development rights exist on the subject land or on 16 Leyden Avenue)
- Council is the ‘custodian’ of the covenants and the aspirations of one developer should not override the concerns of legal beneficiaries and other residents.
- The neighbourhood character and atmosphere has materially benefited from the imposition of the single dwelling covenants by retaining large lots, a high degree of privacy and a sense of space.
- The proposal would not satisfy the substantial and overriding community benefit test, but will in fact result in ‘substantial community detriment’.
- The proponent was aware of the covenants at the time of purchase and there must be extraordinary and compelling reasons why the proponent should be relieved of the restriction.
- If the covenants are to be varied, then any other relevant covenants that affect land in the areas should be similarly varied or removed.
- The amended proposal would result in a total of 8 dwellings on land within the same subdivision, when the original subdivision and application of covenants at this time only allowed a total of 3 dwellings.

4.3 Nature of the Development

Issues raised in the submissions concerning the nature of the proposal, as summarised by Council, include:

- Proposal is an over development of the site.
- Concerns about the cumulative impact from the further development of 22 Leyden Avenue that is also owned by the applicant and other land in the wider locality.

- Loss of amenity resulting from the proposed development.
- Concerns about ‘commercial’ potential of the development.
- Impact on neighbourhood character, including the inappropriate height of the development.
- The proponent’s argument that the amended proposal ‘responds to the submissions of landowners affected’ is a ‘nonsense’ as submissions from adjoining landowners were opposed to the proposal.
- Portsea is not a designated growth centre.
- Increased maintenance costs from ‘privately’ maintained unsealed road.
- Wastewater disposal.
- Concerns about ongoing pedestrian access across the subject land to the Portsea Oval.
- The conditions of the permit need to be amended to ensure that Leyden Avenue is appropriately maintained, car parking is directly associated with each individual dwelling and conditions restrict ‘time share’ development.

Submissions were received from Council’s Environmental Health Officer, the Environment Protection Authority (EPA), South East Water, and Aboriginal Affairs Victoria.

The **Environmental Health Officer** requested a Ground Water Impact Statement indicating compliance with the *State Environment Protection Policy - Waters of Victoria* 1988, to the satisfaction of the Council’s Environmental Health Unit, or the connection of all allotments, dwellings and fixtures to the South East Water sewer.

The **EPA** stated that it had no objection to the proposal provided that it complies with Clause 40, *State Environment Protection Policy – Waters of Victoria* 1988; this could involve connecting to the Portsea-Sorrent sewage scheme, or ensuring that the each allotment was capable of adequately treating and retaining all domestic wastewater within its boundaries in accordance with EPA publication 451 *Code of Practice Septic Tanks* 1996. The EPA also stated that the development should be carried out in accordance with EPA publication 275 *Construction Techniques for Sediment Pollution Control*.

South East Water stated that it had no objection to the Amendment. With respect to the application for a planning permit, it consented to the granting of a permit subject to the owner of the property entering into agreements with South East Water for the provision of water supply and sewerage and fulfilling all requirements to its satisfaction. South East Water advised that the proposed development is remote from existing sewers and there were no proposals for the utility to extend a service to this general area in the near future. It advised that it may consider withdrawing the condition that reticulated sewerage be provided, if

Council advises that it is satisfied that all domestic sewage can be adequately treated and retained within the boundaries of each lot, in accordance with the *State Environment Protection Policy – Waters of Victoria 1988*.

Aboriginal Affairs Victoria requested conditions be placed on any planning permit addressing the discovery of any Aboriginal cultural material, or suspected human remains, an advisory note about Aboriginal sites.

Mr Robert Imison supported the modified Amendment and application and submitted that the Panel should recommend that the modified Amendment be approved and a permit issue on the basis of the revised plans.

Mr David Morris, representing Mrs Margaret Morris, withdrew her submission on the final day of the hearing.

Mr Malcolm Hiscock, representing Martins Lane Pty Ltd and others, strongly opposed and argued against the modified Amendment and permit application. The next section of this report considers the criteria for varying a restrictive covenant.

5 CRITERIA FOR VARYING A RESTRICTIVE COVENANT

5.1 Objectives of Planning

Section 6 of the Act provides that a planning scheme (and hence an amendment to a scheme such as Amendment C46) “must seek to further the objectives of planning in Victoria within the area covered by the scheme”. Section 4 (1) of the Act provides that the objectives of planning in Victoria are:

- (a) to provide for the fair, orderly, economic and sustainable use, and development of land;*
- (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;*
- (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;*
- (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;*
- (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;*
- (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);*
- (g) to balance the present and future interests of all Victorians.*

These objectives can serve as a check list of matters to be taken into account when an amendment is being considered. The Panel used these objectives to identify and assess the key planning issues.

Particularly relevant to this Amendment are the objectives providing for the fair, orderly, economic and sustainable use and development of land, the facilitation of development; and the need to balance the present and future interests of all Victorians.

The Act also provides that the Planning Authority (the Council) must “implement” these objectives and “provide sound, strategic and co-ordinated planning of the use and development of land in its area” (Ss. 6 & 12).

Section 12 of the Act provides that the Authority must have regard to the *Minister’s Directions*, the planning provisions, Municipal Strategic Statement, strategic plans, policy statements, codes or guidelines in the Scheme, and significant effects the amendment might have on the environment, or which the Authority considers the environment might have on any use or development

envisaged in the amendment.

The Planning Scheme states that it is the State Government's expectations that planning and responsible authorities (and hence Panels) will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development (emphasis by the Panel) (Clause 11.01).

With respect to the covenant, section 6(2)(g) of the Act enables planning schemes to remove or vary a covenant. Clause 19.01-2 of the Scheme states that schemes should enable the removal or variation of easements and restrictions to enable use or development that complies with schemes "after the interests of affected people are considered."

There are no relevant *Minister's Directions* (apart from the direction on the *Form and Content of Planning Schemes*), although the relationship of this Amendment to *Melbourne 2030* is discussed below.

5.2 The Restrictive Covenants

A registered restrictive covenant is defined in the Act as a restriction within the meaning of the *Subdivision Act 1988*. The *Subdivision Act 1988* defines "restriction" as a restrictive covenant or a restriction which can be registered, or recorded in the Register under the *Transfer of Land Act 1958*. Section 23 *Subdivision Act 1988*, provides that:

(1) *If a planning scheme or permit regulates or authorises the creation, removal or variation of an easement or restriction, the owner of the land burdened or to be burdened by the easement or restriction must, in accordance with the planning scheme or permit and with the Planning and Environment Act 1987, lodge a certified plan at the Office of Titles for registration.*

(2) *The consent of any other person who has an estate, interest or claim in the land is not required to the certification and registration of a plan referred to in sub-section (1).*

For the purposes of this report, a restrictive covenant is an encumbrance registered on a certificate of title restricting or controlling the use or the type of development allowed on the land. In this instance the covenant, for Lot 10, LP 21091 for example, provides:

(a) *That no earth clay stone gravel or sand shall at any time hereafter be excavated carried away or removed from the said Lot except for the purpose of excavating for the foundations of any building to be erected thereon and that she or they will not at any time hereafter use or permit or allow the said land hereby transferred to be used for the manufacture or winning of bricks tiles or potteryware and*

(b) *That she or they will not at any time hereafter build construct or erect or cause to be built constructed or erected on the said Lot any building other than one private dwelling house with outhouses and*

garage and such dwelling house with outhouses and garage will cost not less than One thousand Pounds (15 December 1950).

At issue in this hearing is the ‘one dwelling only’ provision in paragraph (b) that was placed over all the lots in LP 21091, including the land which is now 16-24 Leyden Avenue and which were lots 10, 11 and 12 in that subdivision. Between 1950 and about 1962, these lots were reconfigured to produce the present layout, that is four lots fronting Leyden Avenue (1, 2, 4 and 5) and lot 3 containing all of the rear portions of the original lots 10, 11 and 12. It is relevant to note that although land in this area is now quite unlike the original subdivision, all of the lots on LP 52729 remain subject to the ‘one dwelling only’ covenants. There are dwellings on lots 2 and 5, but none on lots 1, 3 and 4. The Panel is being requested to agree to a proposition that would allow dwellings on lots 1, 2 and 5, as well as four dwellings on lots 3 and 4, LP 52729.

5.3 Principles for Removal or Variation of a Covenant by a Planning Scheme Amendment

The Panel considered submissions on the appropriate test or criterion that it should adopt in determining whether or not to recommend an Amendment that would have the effect of allowing the removal or variation of the covenants. At issue was whether the Panel should base its decision to vary the covenants on whether it could be demonstrated that the variation would either produce a “substantial community benefit”, or a “net community benefit”.

Mr Hiscock submitted that the covenant played “a valid role in providing a conspicuous layer of character and density control in addition to any applicable planning control” (Submission). He argued that the appropriate deciding criteria was “substantial and overriding community benefit”, and that the proposal would result in a “substantial community detriment”. He further argued that “substantial community benefit” was a more exacting and demanding criterion or test than “net community benefit”, and that such an approach was appropriate because of the special nature of a restrictive covenant.

Council supported the “substantial community benefit” concept but adopted a neutral position on whether it should be varied. This was the position followed by Council at the Panel hearing that considered Amendment C5 to the Mornington Peninsula Planning Scheme.

Mr Townshend and Mr Barlow argued in favour of “net community benefit”. As noted elsewhere, Mr Barlow supported the modified variation to the covenants.

The Panel traced the history of the restrictive covenant provisions in the Act and Planning Scheme, and noted the decision of Justice Balmford in *M.A. Zeltoff Pty Ltd and Another v. Stonnington City Council* [1999] 3 VR 88. The Panel also examined earlier Panel reports on restrictive covenants where other Panels had developed and then applied tests or criteria, in particular: Camberwell L41 (April 1995), Melbourne L161 (October 1995), Daylesford and Glenlyon L14 (May 1995), and Mornington Peninsula C5 (December 1999).

These and other Panels had developed a series of criteria relating to the purpose and benefit of the particular covenant under consideration, changes to the neighbourhood, impact on amenity, the strategic planning framework, and the creation of a precedent. These were similar to the issues raised by some submitters during the hearing. Other Panels have accepted the proposition that the removal or variation of a covenant must result in a “substantial community benefit” and that “net community benefit” is not sufficient to overcome any existing private contractual proprietary right that might be said to be embodied in a restrictive covenant.

It appears that the “substantial community benefit” approach was developed by Panels prior to the introduction of new format planning schemes, and the commencement (on 13 December 2000) of the *Planning and Environment (Restrictive Covenants) Act 2000*, that amended the principal Act in relation to restrictive covenants. The “substantial community benefit” test evolved in the absence of express criteria in the earlier planning schemes. The test in seeking to impose special considerations, appears to ignore the fact that planning controls, by their nature, interfere with proprietary rights. Most planning controls impact, often quite severely, on property rights because the legislation is made for the general benefit of the community (*Lloyd v Robinson* [1962] 107 CLR 142; *271 William Street Pty Ltd v City of Melbourne* [1975] VR 156; *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* [1970] 123 CLR 490).

With respect to the Mornington Peninsula Scheme, the new format scheme was made on 6 May 1999, and provides that planning schemes should enable the removal or variation of restrictions to enable use or development that complies with schemes, after the interests of affected people are considered (Clause 19.01-2). Indeed, the Schedule to Clause 52.2 of the scheme has already authorised the variation of a covenant in the Shire.

As noted above, the broad criteria for preparing and considering an Amendment set out in S 6(1) of the Act requires a planning scheme and an Amendment to further the objectives of planning in Victoria, whilst S 12(2) specifies a number of general considerations. The only specific provisions that require notice to be given to beneficiaries, is a procedural requirement to ensure that those parties are given an opportunity to be heard and then that the interests of affected people are considered (clause 19.01-1). Section 12(2) (aa) of the Act provides that in preparing an Amendment, the planning authority (in this case, the Council) must have regard to the Victoria Planning Provisions. The introduction to these provisions (in the Mornington scheme) includes State Planning Policies that apply to all land in Victoria. Clause 11.01 states that:

These policies must be taken into account when preparing amendments to this scheme or making decisions under this scheme.

The clause includes the basic test that:

It is the State Government's expectation that planning and responsible authorities will endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.

This Panel therefore concludes that the principles or criteria for considering an Amendment that would enable the variation or removal of a restrictive covenant are:

First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. The Panel must have regard to the *Minister's Directions*, the planning provisions, MSS, strategic plans, policy statements, codes or guidelines in the Scheme, and significant effects the Amendment might have on the environment, or which the environment might have on any use or development envisaged in the Amendment.

Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.

Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.

Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.

In considering this proposal, the Panel has gone to considerable lengths to ensure that affected parties (including beneficiaries) have been made aware of the proposal, including the foreshadowed modifications to the exhibited Amendment and application. The Panel has considered the interests of affected parties, including the beneficiaries of the covenants.

The next section of this report considers the planning issues.

6 PLANNING ISSUES

6.1 Introduction

This section of the report explains the planning issues, including State and Local planning policy. It also addresses the issues and interests of the persons affected by both the proposed modified variation to the covenants, and the application.

6.2 State Planning Policy Framework

State planning policies must be taken into account when preparing an amendment to the planning scheme. The Panel considered a number of State policies, including those relating to settlement, medium density housing, and coastal areas.

The objectives of the **settlement policy** are:

To ensure a sufficient supply of land is available for residential, commercial, industrial, recreational, institutional and other public uses.

To facilitate the orderly development of urban areas. (Clause 14.01-1)

The scheme states that:

Planning authorities should plan to accommodate projected population growth over at least a 10 year period, taking account of opportunities for redevelopment and intensification of existing urban areas as well as the limits of land capability and natural hazards, environmental quality and the costs of providing infrastructure.

In planning for urban growth, planning authorities should encourage consolidation of existing urban areas while respecting neighbourhood character. Planning authorities should encourage higher density and mixed use development near public transport routes. (Clause 14.01-2)

The objective of the **medium density housing policy** is to:

To encourage the development of well-designed medium-density housing which:

- *Respects the neighbourhood character.*
- *Improves housing choice.*
- *Makes better use of existing infrastructure.*
- *Improves energy efficiency of housing. (Clause 16.02-1)*

The scheme states that responsible authorities should use Clauses 54 and 55 in considering applications for medium-density housing. Clause 54 of the scheme addresses one dwelling on a lot proposals, whereas Clause 55 applies to an

application to:

- Construct a dwelling if there is at least one dwelling existing on the lot
- Construct two or more dwellings on a lot
- Extend a dwelling if there are two or more dwellings on the lot, or
- Construct or extend a residential building, in the Residential 1 Zone, Residential 2 Zone, Mixed Use Zone and Township Zone.

The purpose of the policy is:

To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To achieve residential development that respects the existing neighbourhood character or which contributes to a preferred neighbourhood character.

To encourage residential development that provides reasonable standards of amenity for existing and new residents.

To encourage residential development that is responsive to the site and the neighbourhood.

The scheme states that a development “must meet all of the objectives” and “should meet all of the standards” of the clause. If the schedule to a zone specifies a requirement of a standard different from a requirement set out in the clause, the requirement in the schedule to the zone applies. If the land is included in a Neighbourhood Character Overlay and a schedule to the overlay specifies a requirement of a standard different from a requirement set out in this clause or a requirement in the schedule to a zone, the requirement in the schedule to the overlay applies. If the land is included in an overlay, other than a Neighbourhood Character Overlay, and a schedule to the overlay specifies a requirement different from a requirement of a standard set out in this clause or a requirement of a standard set out in the schedule to a zone, the requirement in the overlay applies.

The objective of the **coastal areas policy** is to:

protect and enhance the natural ecosystems and landscapes of the coastal and marine environment, ensure sustainable use of natural coastal resources and achieve development that provides an environmental, social and economic benefit enhancing the community’s value of the coast. (Clause 15.08-1)

The Panel considered submissions that argued that Portsea is not a growth centre, that the proposal would be an over development of the property, and that it would have an undesirable impact on the character of the neighbourhood.

Mr Borelli, an expert witness for the Proponent, submitted that the proposal is consistent with State planning policy because:

- *It will allow residentially zoned land to be used more efficiently, but at a density of about one dwelling per 1000 square metres which is consistent with the density of other housing in the area.*
- *It will facilitate the provision of high quality housing suited to either temporary or permanent residents and suited to the accommodation of traditional families. This is the type of housing that is in strong demand in the Portsea area.*
- *The housing proposed offers a high standard of amenity and will also achieve at least a 4-star rating in terms of energy efficiency. (Statement of Planning Evidence)*

The Panel agrees, noting that the proposal would occupy existing, vacant residential land at a similar density to other development in the immediate area. Further, the proposed permit provides that the dwellings must be designed to achieve not less than four star energy rating.

6.3 Minister's Directions, *Melbourne 2030*

Minister's Direction No 9, *Metropolitan Strategy*, provides that in preparing an Amendment, a planning authority must have regard to the Metropolitan Strategy, *Melbourne 2030*.

Policy 1.3, within Direction 1, *A more compact city*, states that it is policy to:

Locate a substantial proportion of new housing in or close to activity centres and other strategic redevelopment sites that offer good access to services and transport (draft clause 12.05-1).

Council advised the Panel that the "proposal seeks to develop a large site, which accords with the compact city principle." (Council submission) Council confirmed that the property is not near to an activity centre, however that based on *Melbourne 2030*, "adequate consideration would need to be given to neighbourhood character and the sense of place of this particular locality." (Council submission)

Mr Borelli, in evidence, stated that the proposal is consistent with the strategic directions and relevant policy initiatives of *Melbourne 2030*:

- *The land is within the proposed urban growth boundary and hence the development will not have any impact on agricultural productivity or environmental conservation in the green wedge and non-urban areas of the peninsula. (Direction 2 in Melbourne 2030).*
- *The development is also consistent with 'Direction 5: A Great Place to Be' and 'Direction 7: A Greener City' in that the development facilitated by the amendment responds well to its urban context,*

contributes to the existing sense of place and cultural identity of Portsea, reinforces the landscape character of the area and the values and aspirations of the local community and incorporates sustainable development characteristics such as energy efficient design, communal recreational facilities, environmentally responsible effluent disposal and improved natural landscape and habitat. (Statement of planning evidence).

The Panel agrees with these submissions and considers that the design and proposed landscaping are sympathetic to the character of the neighbourhood, including its sense of place.

6.4 Council's Corporate Plan and the Municipal Strategic Statement

Council's **corporate plan**, *Community Plan 2003 to 2005*, addresses town planning. The section, *Sustain and enhance the biodiversity of our unique environment*, and its goal 1.1, *Managing and accommodating growth*, is to "direct and contain urban growth to designated townships whilst limiting the adverse impacts on the local character, features and values of each township" (page 7). The Panel believes that the proposal is consistent with Council's goal as it would not entail an expansion of the existing urban area. Further, the proposed permit conditions limit any adverse impacts on the local amenity of the area.

The **Municipal Strategic Statement** (MSS) is another key document, and it must be taken into account when preparing amendments to the scheme. The MSS is a concise statement of the key strategic planning, land use and development objectives of the municipality. The *Strategic Assessment Guidelines for Planning Scheme Amendments* (2001) states that "there should be a clear link between the objectives and outcomes sought by the MSS and the requirements applied in the scheme" (page 3).

The MSS states that the Mornington Peninsula is not a designated urban growth area but notes that "within the established boundaries of the townships on the Peninsula there are still substantial areas set aside for further residential development" (Clause 21.02). In the section on *challenges and opportunities*, the MSS recognises that increasing population builds the economic base to support town centres but brings demand for services and increases pressure on local environments and green spaces (Clause 21.03-3). The MSS includes the *Mornington Peninsula Strategic Framework Plan*, and the Panel was advised by Council that the proposal is contained within the Portsea/Sorrento Township Area. The plan defines township growth boundaries "as a means of focusing future development in the major towns" (Clause 21.04).

Mr Borelli advised the Panel that the proposal complies with Local policy:

Council's MSS seeks to direct new development to the existing townships on the peninsula, including Portsea/Sorrento. The proposal comprises an infill development within the existing residential area of this township and hence is consistent with the local strategy that is aimed at meeting anticipated demands for new housing, with minimal

impact on the rural and non-urban coastal areas of the peninsula
(Statement of planning evidence).

The Panel believes that the proposal is consistent with the MSS as it would utilise an area zoned for residential development.

6.5 Local Planning Policies

Local planning policies are planning tools to implement the objectives and strategies of the MSS. Local policy must be taken into account when an amendment to the scheme is prepared. The General Practice Note, *Strategic Assessment Guidelines for Planning Scheme Amendments* (2001) states that:

It is not necessary to include references to specific proposals in the LPPF. The LPPF does not need to identify every project, but rather sets the policies and strategic objectives against which individual projects will be addressed. (page 3)

The relevant Local policy in the scheme concerns *Township environment*, at Clause 22.13, which applies to the Residential 1 Zone and other land within the township areas. The policy notes that both within existing townships and in new growth areas, the MSS emphasises environmental sustainability as a guiding principle. This involves a need to balance and integrate social needs, ecological care and economic development. Accordingly, the scheme provides that it is policy that:

- *New development areas will be connected to reticulated sewerage.*
- *Applications for infill development in unsewered areas will be required to demonstrate that proposals for wastewater treatment and disposal comply with State environment protection policies and will not add to the pollution of groundwater or surface waters.*
- *Existing premises within unsewered areas may be required to improve inadequate treatment and disposal systems where wastewater discharges do not meet the required standards and are contributing to the pollution of groundwater or surface waters.*
- *Best practice environmental management, which has regard to the whole water cycle, must be used in the design, construction and operation of drainage systems to reduce impacts on surface waters, coastal areas and ground water, including the provision, where appropriate, of litter control devices and sediment traps.*
- *New developments and redevelopment must be designed and managed to minimise the impact of stormwater run off on waterways, in accordance with best practice environmental management guidelines including Construction Techniques for Sediment Pollution Control (Environment Protection Authority (EPA, May 1991) and Environmental Guidelines for Major Construction Sites (EPA 1995).*

- *The subdivision of land that includes or adjoins a streamline must have regard to the effect of development on the environmental, landscape and open space values of the streamline and the potential effect of streamside erosion on future development.*
- *Where reasonable and practical a reserve with a minimum width of 30 metres should be maintained on both sides of a streamline. (Clause 22.13-3)*

The objectives of the policy are:

- *To ensure that infill development proposals, which will result in new or increased waste water discharge, will meet State environmental standards and will not add to the pollution of groundwater or surface waters.*
- *To ensure that proposals for new development provide appropriate stormwater treatment measures in accordance with relevant best practice environmental management guidelines, including Draft Best Practice Guidelines for Stormwater Management (Melbourne Water, 1999).*
- *To ensure that construction activities do not adversely impact on the regional drainage function of waterways, drains, retarding basins and floodplains.*
- *To ensure that all development, including drainage, roads and sewerage systems are designed to protect the air environment, land, waterways and ground water resources from polluting discharges and activities in accordance with State environment protection policies and relevant best practice environmental management guidelines.*
- *To ensure that development does not reduce the extent or integrity of areas of remnant indigenous vegetation within township areas and provides for the reinstatement of native vegetation and the protection and enhancement of habitat corridors.*
- *To promote energy efficiency in the design of new development.*
- *To ensure that where land that has been previously used for non residential purposes, including orcharding or other forms of intensive agriculture, is proposed to be developed for residential or community purposes, proper consideration is given to assessing potential contamination and necessary remedial measures in accordance with the Minister's Direction No 1. (Clause 22.13-2)*

The policy includes a series of decision guidelines, that state that before deciding on an application, the responsible authority must consider, as appropriate:

- *The need for a report, from a suitably qualified person, to ensure that all waste water and effluent generated by a proposed use or*

development will be treated and retained onsite, and will not pollute surface or groundwaters, in accordance with State environment protection policies and best practice environmental management guidelines.

- *The need for a report, from a suitably qualified person, to ensure that drainage and stormwater disposal from a proposed use or development will meet State environment protection policies and best practice environmental management guidelines and will not adversely effect the environmental values or the regional drainage function of waterways, drains, retarding basins and floodplains.*
- *The extent to which development proposals provide for the retention of remnant native vegetation and established areas of introduced vegetation with significant environmental, streetscape and township character values. This may include:*
 - *Limiting vegetation removal to the maximum extent that is reasonable and practical.*
 - *Provision for the retention of native vegetation and habitat corridors.*
 - *Provision for the revegetation and protection of streamlines, wetlands and other sensitive areas, having regard to the benefit of using locally indigenous species and the need to avoid the introduction and spread of environmental weeds.*
 - *Appropriate management of fire regimes and bushfire prone areas.*
 - *The need for a report, from a suitably qualified person, assessing impact of a proposed use or development on the quality and habitat value of vegetation and, where necessary, detailing recommended modifications to the proposal or remedial works to achieve the objectives of this policy.*
 - *The need, where it is proposed to use or develop land that has been previously used for non residential purposes, including intensive forms of horticulture and agriculture, for a report, by a properly qualified person, assessing potential contamination and necessary remedial measures in accordance with best practice environmental management guidelines.*
 - *The extent to which proposed development meets energy efficiency principles in relation to providing for solar access and energy efficient house design. (Clause 22.13-4)*

Some of the specific matters are considered below, however at this stage it is relevant to note that Mr Borelli stated, and the Panel agrees, that the proposal is consistent with Local planning policies that seek to encourage development that is compatible with local character and which is environmentally sustainable.

6.6 Existing Planning Controls

Council advised that the property and surrounding residential land to the east, north and south are subject to the following planning provisions:

- Residential 1 Zone (Clause 32.01)
- Design and Development Overlay (Clause 43.02) – Schedule 2: Bayside and Village Design (DDO 2)
- Vegetation Protection Overlay (Clause 42.02) – Schedule 1: Township Vegetation (VPO 1).

Clause 52.21 of the scheme is relevant because the proposal includes a tennis court.

A recreation reserve zoned Public Park Recreation Zone (Clause 36.02) abuts the western boundary of the property. An Environmental Significance Overlay - Schedule 18 (Wetlands) encroaches to within a few meters of the southern boundary of 20 Leyden Avenue.

6.7 Residential 1 Zone

The property is in a Residential 1 Zone. The purposes of the Residential 1 Zone are:

To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

To provide for residential development at a range of densities with a variety of dwellings to meet the housing needs of all households.

To encourage residential development that respects the neighbourhood character.

In appropriate locations, to allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs.

Under the zone a permit is not required for the use of a dwelling, however, pursuant to Clause 32.01-4 a permit is required to construct two or more dwellings on a lot. The assessment of two or more dwellings on a lot must meet the requirements of Clause 55 of the Scheme. Some submissions argued that the proposal would reduce the amenity of the area. Council undertook an assessment of the application against Clause 55, a copy of which is included in the Appendix. Council's assessment, which was discussed at length at the hearing, concludes that the proposed development in its revised or modified form generally complies with Clause 55 of the scheme.

With regard to neighbourhood character, water and septic system, energy efficiency, overlooking, and the design of the front fence, the Panel notes

Council's advice that:

- The overall density of the proposal at one dwelling per 1,250 square metres is similar to the overall density in Leyden Avenue
- The potential impact of the 2 metre boundary fence, where this fence is within the front setback of the building can be addressed in a permit condition, by requiring the height to be lower in the vicinity of the road reserve; concern was also expressed at the height of the front fence (see proposed condition 1 in the Appendix)
- Overlooking into 24 Leyden Avenue could be addressed by fencing or by planting of screening vegetation (see proposed condition 1).

The other issue of concern was the ability of the development to contain its domestic wastewater within the boundaries of the property. The Panel considered a number of submissions on this issue, including a letter of advice from Mr John Lawrey, Wastewater Consultant of EWS Environmental to SJB Planning of 13 November 2003. Mr Lawrey confirmed in the letter that the wastewater system must comply with environmental policies and Council's requirements and made reference to the EPA's *Septic Tanks Code of Practice* and the *Groundwaters of Victoria* SEPP. Mr Lawrey recommended the installation of a combined aerated wastewater system for all the residences by Envirosep Sewage Treatment Australia, and a soil filtration system, Ecomax ER12 for 1200 gBOD/d. The Panel was advised that both systems are approved by the EPA.

Council tabled the following proposed condition at the hearing, which the Panel considers will satisfactorily address the issue:

The construction of the dwellings hereby permitted must not be commenced until the details of design and management of the proposed effluent disposal treatment system are approved, to the satisfaction of the Responsible Authority.

All waste water from the approved development must be treated and contained on site in accordance with the Code of Practice – Domestic Waste Water and then maintained to the satisfaction of the Responsible Authority. (Proposed condition 5)

The Panel notes that proposed permit conditions drafted by Council and included in the Appendix also address storm water and energy efficiency (see proposed conditions 6 & 15). This advice and the proposed conditions are adopted by the Panel.

6.8 Design and Development Overlay – Schedule 2 (DDO 2)

Clause 43.02-2 to the overlay states that “A permit is required to ‘Construct a building or construct or carry out works’. This does not apply “If a schedule to this overlay specifically states that a permit is not required”. The land is subject to Schedule 2 – Bayside and Village Design to the Design and Development Overlay (DDO 2). Under Part 2 of the Schedule to the overlay it states under the section headed ‘Number of Dwellings’:

No more than one dwelling, excluding a dependent person’s unit, may be constructed on a lot. A permit to vary this requirement must meet the following requirements:

- *The proposal involves no more than two dwellings for every 1300 square metres of site area.*
- *Applications for approval must include a site analysis and site development plan that responds to the design objectives of this schedule.*
- *This provision has not been previously applied to any of the land involved in the application.*
- *The proposed development (in both its original and amended form) meets the minimum density requirements of the control.*

Developments within the overlay control are required to be assessed against the relevant Design Objectives of the Schedule. Council provided the Panel with an assessment of the application against these provisions, a copy of which is included in the Appendix. The Panel notes Council’s advice that:

- The revised proposal is consistent with and adequately responds to relevant design objectives setout in Schedule 2 of the overlay
- Upon maturity, the planting detailed in the landscape plan will be of positive streetscape value
- The variation in height above natural ground level of dwellings 1 and 2 is a minor, acceptable variation
- A condition could be included to address earthworks required for the dwellings and tennis court (see proposed conditions 10 and 22)
- The setback of the tennis court from the public tennis courts in the adjacent reserve is considered acceptable.

Council’s advice is adopted by the Panel, including proposed conditions 10 and 22.

6.9 Vegetation Protection Overlay – Schedule 1 (VPO 1)

Clause 42.02-2 to the Vegetation Protection Overlay specifies that a permit is required to remove, destroy or lop any vegetation specified in a schedule to this overlay. There are some exemptions to this Clause however they are not relevant to the proposed development.

Schedule 1 (Township Vegetation) to the overlay states that a permit is required to remove, destroy or lop any vegetation except for a number of exemptions that are not applicable to the vegetation removal associated with the proposal. Accordingly a permit is required for the vegetation removal under the VPO 1. The Panel considered the evidence of Mr McWha, together with Council's assessment of the application against these provisions; a copy of Council's assessment is included in the Appendix. The Panel adopts the assessment.

The Panel notes that the development does not propose to reduce the extent or integrity of indigenous vegetation (refer to proposed planning permit conditions 1 & 11). The proposed permit conditions are adopted by the Panel.

6.10 Tennis Court

A permit is required to construct, use and illuminate the tennis court, pursuant to Clause 52.21 of the scheme, because the land is affected by the Vegetation Protection Overlay, and because it departs from the performance criteria of the *Code of Practice – Private Tennis Court Development* in respect of excavation, height of the fence and the removal of vegetation. See Council's assessment of the application against these provisions, a copy of which is included in the Appendix. The Panel notes that with the imposition of the proposed conditions, the development of the tennis court satisfactorily addresses the elements of the Code. The Panel adopts the assessment and agrees with the proposed conditions.

6.11 Clause 65 Design Guidelines

Council assessed the proposal against the decision guidelines in clause 65 of the scheme and advised the Panel:

The planning scheme amendment and development permit are considered to fulfil the requirements of the Decision Guidelines and are recommended for approval in accordance with the requirements of the draft conditions.

The Panel agrees with the assessment, a copy of which is included in the Appendix.

6.12 Other Issues

Some submissions argued that the proposal could become a commercial time share development (perhaps with further development), and increase maintenance costs of Leyden Avenue. Concern was expressed about car parking, noise, outdoor lighting, and the loss of access across the private land to the adjacent reserve. Other submissions expressed concern over the impact of the development on the adjoining residence in Martins Lane, including traffic. Possible consolidation of the property was discussed. Aboriginal Affairs Victoria requested conditions addressing the possible discovery of any Aboriginal cultural material. These issues were considered and the Panel notes:

Commercial development, including time share, would require the further consent of the Council, if an application was made. The Panel also notes that the covenant limits land use to private dwellings.

Leyden Avenue; the Panel was advised that the owner, with other owners abutting the road, would contribute to the maintenance of Leyden Avenue. The proposed permit includes a condition requiring that the trafficable section of the road must be maintained during the time the development is being constructed.

Car parking; the driveway and car parking spaces at the front of 20 Leyden Avenue has been relocated in the revised proposal and the car port removed. The proposed permit also provides that:

Before the occupation of dwelling units the areas set aside for the parking of vehicles and access lanes as shown on the endorsed plans must, to the satisfaction of the Responsible Authority, be:

- *constructed,*
- *properly formed to such levels that they can be used in accordance with the plans,*
- *surfaced with an all-weather seal coat or similar approved impervious surface or hard standing surface,*
- *drained and maintained,*
- *line-marked to indicate each car space and all access lanes,*
- *parking spaces for visitors allocated and marked.*

Parking areas and access lanes must be kept available for these purposes at all times.

The selection of paving materials to be used on the land must be to the satisfaction of the Responsible Authority.

In areas set aside for car parking, measures must be taken to the satisfaction of the Responsible Authority to prevent damage to fences or

landscaped areas.

Concrete kerbs or other barriers must be provided to the satisfaction of the Responsible Authority to prevent direct vehicle access to an adjoining road other than by a vehicle crossing (Proposed condition 8).

Noise; the proposed permit contains the following conditions:

Sound levels emanating from the land must not exceed those required to be met under State Environment Protection Policies Nos. N-1 (Control of Noise from Commerce, Industry and Trade), and N-2 (Control of Music Noise from Public Premises).

Air-Conditioning or other plant and equipment must be baffled to prevent nuisance or annoyance to persons in dwellings nearby or adjoining land.

The Panel **recommends** that proposed condition 9.4 regarding air-conditioning should be amended to read:

Air-Conditioning or other plant and equipment must be located and baffled to prevent nuisance or annoyance to persons in dwellings nearby or on adjoining land.

This change should provide greater protection to people on nearby or adjoining land, including users of the reserve.

Outdoor lighting; the proposed permit includes the following conditions:

Prior to the occupation of any dwelling approved under this permit or the installation of any outdoor lighting the owner must provide a detailed outdoor lighting plan and specifications to the satisfaction of the Responsible Authority. The plan and specification must show:

- *the location and position of all outdoor lights including security lighting and street pathway lighting;*
- *details of baffling light dispersal onto adjoining private residential land; and*
- *where possible the use of solar lighting. (Proposed condition 16)*

Access to the reserve; the Panel does not support the inclusion of a condition to allow public access over the subject property. Such a condition would be beyond the power of the Council to impose. The Panel was advised of a possible unused lane or narrow road between Nos 8 and 10 Leyden Avenue to the reserve that could be investigated by Council as a possible access to the reserve.

Adjoining property in Martins Lane; the Panel obtained further advice from Mr McWha on the impact of residence 4, that is proposed to be constructed on the south west corner of the property, on the adjacent residence in Martins Lane. The Panel accepts Mr McWha's evidence and agrees with his advice that the

provision of a 1.6 m high brush fence and the complementary landscape planting will obscure residence 4 from 38 Martins Lane.

Traffic in Martins Lane; there is no connection along Leyden Avenue to Martins Lane, so the proposal will not have a traffic impact on that road.

Consolidation of the property; the proponent agreed that lots 3 and 4 of LP 52729 should be consolidated, although it is noted that some of this land is intended to be the subject of a resubdivision application for consolidation with an abutting submitter (see proposed condition 21).

Aboriginal Affairs Victoria; the proposed permit includes the following condition:

Work must cease immediately upon the discovery of any Aboriginal cultural materials, and Aboriginal Affairs Victoria shall be immediately notified of any such discovery.

Development on the land must cease immediately upon the discovery of any suspected human remains. The Police or the State Coroner's Office must be informed of the discovery without delay. If there are reasonable grounds to suspect that the remains are Aboriginal, the discovery should also be reported to Aboriginal Affairs Victoria (Proposed condition 19).

Council raised a number of other issues that have been addressed in the proposed conditions: address of the land, inclusion of the tennis court in the permit description, and time expiry of the permit.

The Panel noted that proposed condition 4.1.3, concerning hours of construction, refers to aged care facilities and accordingly **recommends** that the reference should be removed from the permit.

6.13 Section 60 Assessment

Section 60 of the Act provides that before deciding on an application for a planning permit the responsible authority:

(a) must consider -

(i) all objections and other submissions which it has received and which have not been withdrawn; and

(ii) any decision and comments of a referral authority which it has received; and

(iii) any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development; and

(b) if the circumstances appear to so require, may consider—

- (i) any significant social and economic effects of the use or development for which the application is made; and*
- (ii) any strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and*
- (iia) any amendment to the planning scheme which has been adopted by a planning authority; and*
- (iii) any other relevant matter.*

Council provided the Panel with its “Section 60 Assessment” of the application, a copy of which is included in the Appendix. The assessment concluded that:

The planning scheme amendment and development permit are considered to fulfil the requirements of the Decision Guidelines and are recommended for approval in accordance with the requirements of the draft conditions.

The Panel considered the assessment and adopts Council’s advice.

The next section of this report sets out the Panel’s assessment of the modified Amendment, and application.

7 PANEL'S ASSESSMENT OF THE PROPOSAL

7.1 Introduction

The Panel is charged with the responsibility of making a recommendation to the Council about both the Amendment and the application, including the conditions to which the permit should be subject. The permit can only be granted if the Amendment is approved. Accordingly the first task is to assess the modified Amendment.

7.2 The Modified Amendment

The Panel concluded earlier in this report that the principles or criteria for considering an Amendment that would enable the variation or removal of a restrictive covenant are:

First, the Panel should be satisfied that the Amendment should further the objectives of planning in Victoria. The Panel must have regard to the *Minister's Directions*, the planning provisions, MSS, strategic plans, policy statements, codes or guidelines in the Scheme, and significant effects the Amendment might have on the environment, or which the environment might have on any use or development envisaged in the Amendment.

Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant.

Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.

Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development.

The Panel concludes that the modified Amendment would further the objectives of planning in Victoria. The Panel has had regard to S 12 of the Act and has considered environmental impacts. The Panel has also been conscious of the need to balance the present and future interests of all Victorians. The Amendment would facilitate the provision of high quality housing in keeping with the existing character of the locality and would allow vacant residentially zoned land to be used more effectively without affecting the amenity of the surrounding area.

The Panel has gone to considerable length to ensure that affected parties (including beneficiaries) have been made aware of the proposal, including the foreshadowed modifications to the exhibited Amendment. The Panel has considered the interests of affected parties, including the beneficiaries of the covenants and considers that appropriate issues and concerns have been addressed through improvement to the equity and application of the covenants, and improvements to the proposed development.

The variation of the covenants would enable residential use and development of vacant land, which is a use or development that would otherwise comply with the planning scheme.

The proposed use and development is sustainable: the dwellings would achieve a four star energy rating; the proposal would not adversely affect the local environment with the satisfactory provision of on site domestic waste; storm water would be contained within the site, via soakage pits; and landscaping works would improve local vegetation.

The proposal would contribute to a net community benefit, principally through the appropriate and efficient use of vacant residential land.

7.3 The Modified Application

The Panel has been greatly assisted by the detailed assessment of the modified application by Council. All submissions have been considered and where appropriate the requirements of referral authorities have been included in the proposed permit conditions. The Panel is satisfied that:

- The proposal is unlikely cause an unreasonable level of detriment to the area
- The proposal would not adversely affect the local environment with the satisfactory provision of on site domestic waste water containment
- The proposal is neutral in its effects on social and economic planning issues and complies with relevant strategic plan, policy, statement or guideline of a Ministry or public authority
- The proposal accords with State and Local planning policy, including *Melbourne 2030*
- The proposal satisfies the purpose, objectives and decision guidelines of the planning provisions
- The proposal would contribute to the orderly planning of the area
- The impact of the proposal on the adjoining reserve would be minimal and will not adversely affect the amenity of park users
- Stormwater would be contained within the site via soakage pits
- The proposal satisfactorily complies with vegetation removal controls, and the poor quality of the existing vegetation does not warrant protection; the proposal would however upgrade the landscape quality by removing non-indigenous vegetation and planting Council-nominated species that are indigenous to the southern peninsula coastal environment.

The Panel considered whether the proposal would have a significant effect on the environment, or whether the environment might have an effect on the proposal and concludes that these issues (energy efficiency, waste and storm water disposal, removal of vegetation, impact on the adjoining reserve) have

been satisfactorily addressed in the proposed permit conditions.

The Panel has addressed potential disbenefits: the impact of the proposal is largely contained within the boundaries of the subject land; overlooking, overshadowing and other detrimental impacts are unlikely to occur. Where necessary, potential disbenefits have been addressed in the revision to the plans and the inclusion of improved or additional permit conditions. The benefits clearly outweigh the concerns expressed to the Panel in submissions.

The Panel concludes that the Amendment should proceed, as modified (and included in the Appendix), and a permit issued in accordance with the draft which is also included in the Appendix. The Panel has recommended two changes to the permit conditions (relating to noise and hours of construction).

As indicated in Section 6.12 of this Report (page 41), the Panel does not support a condition requiring public access through the subject property to the adjoining recreation reserve.

The next section of this report contains the strategic assessment of the proposal.

8 STRATEGIC ASSESSMENT

8.1 Introduction

Section 12A of the Act requires controls on the use and development of land in a planning scheme to relate to the objectives and strategies set out in the MSS for the municipality. It is therefore important for the Panel to ensure that there are clear linkages between the MSS and the application of zones, overlays, schedules and policies, and that links to the Council's Corporate Plan are apparent. In a similar manner, an amendment should seek to support and implement State planning policy.

This section of the report is a broad assessment of the proposal and brings together the work of the Panel, in the form of a 'check list'.

8.2 Strategic Assessment of the Proposal

Is an Amendment Required?

The Amendment is required to vary restrictive covenants.

Is a Permit Required?

A permit is required to authorise the proposed use and development.

Strategic Justification

The proposal accords with State and Local planning policy.

Planning and Environment Act

The proposal is neutral in its effects on social and economic planning issues.

The proposal would not adversely affect the local environment. The Panel considered the disposal of storm and waste water, the removal and planting of vegetation and the energy efficiency of the development.

The Amendment, as modified, complies with the requirements of the Ministerial Direction on the form and content of Planning Schemes.

State Planning Policy Framework

The proposal is consistent with State planning policy.

Municipal Strategic Statement

The proposal is consistent with the MSS.

Local Planning Policy

The proposal conforms to Local planning policy.

Zones, Overlays and Schedules

The provisions of the VPPs have been addressed.

Outcomes of the Amendment

The Amendment, as modified, would vary the restrictive covenants to allow residential use and development of residentially zoned land.

8.3 Implementation of the Metropolitan Strategy, *Melbourne 2030* – Planning for Sustainable Growth

What aspects, if any, of the Metropolitan Strategy are relevant?

Directions 1, 5 and 7.

How does the Metropolitan Strategy Affect the Amendment?

The Amendment, together with the proposed planning permit, as modified, would allow residential use and development on residentially zoned land.

Is the Amendment consistent with any directions and policies in the Metropolitan Strategy?

Yes.

Does the Amendment support, give effect to or assist the implementation of the Metropolitan Strategy or can it be reasonably modified to do so?

Yes.

Will the Amendment compromise the implementation of the Metropolitan Strategy?

No.

Does the Amendment highlight any conflict between the Metropolitan Strategy and other aspects of the planning scheme?

No.

9 RECOMMENDATIONS

The Panel recommends that:

1. Amendment C46 to the Mornington Peninsula Planning Scheme should be adopted, as modified and included in the Appendix.
2. Planning Permit Application CP 02/004 should be issued in accordance with the conditions included in the Appendix, subject to the following changes:
 - (a) That condition 9.4 regarding air-conditioning should be amended to read:

Air-Conditioning or other plant and equipment must be *located and* baffled to prevent nuisance or annoyance to persons in dwellings nearby or *on* adjoining land.

- (b) That condition 4.1.3 regarding hours of construction should be amended to read:

Sunday and Public Holidays 9.00 am to 5.00 pm.

* * *

APPENDIX ONE

COUNCIL'S ASSESSMENT OF THE APPLICATION FOR A PLANNING PERMIT

Proposed permit

Assessment against Clause 55 (ResCode)

The subject land is zoned Residential 1. Clause 32.01-4 states that a permit is required to “construct two or more dwellings on a lot”. A development must meet the requirements of Clause 55 (ResCode).

For the benefit of the Panel a brief Clause 55 (ResCode) assessment for both the initial and the adjusted proposal is provided.

Where it is considered that an element of the design may not satisfy the relevant ResCode Standard as noted in the table, further explanation is provided below the table. Where a ResCode Standard is more appropriately considered under Schedule 2 of the Design and Development Overlay, comment to that effect is made in the table and the consideration of the key issues included in the following sections of the Appendix.

<i>Clause/ Standard</i>	<i>Objectives</i>	<i>Satisfy Objectives/Standards</i>	
		First Proposal	Second Proposal
Clause 55.02-1 <i>Neighbourhood Character objectives</i> Standard B1	<ul style="list-style-type: none"> • To ensure that the design respects the existing neighbourhood character. • To ensure that development responds to the features of the site and the surrounding area 	Consider under the DDO2.	Discussed below and Consider under the DDO2.
Clause 55.02-2 <i>Residential Policy objectives</i> Standard B2	<ul style="list-style-type: none"> • To ensure that residential development provided is in accordance with any policy for housing in the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies. • To support medium densities in areas where development can take advantage of public transport and community infrastructure and services. 	Yes	Yes

Clause 55.02-3 <i>Dwelling diversity objective</i> Standard B3	<ul style="list-style-type: none"> To encourage a range of dwelling sizes and types in developments of ten or more dwellings 	N/A	N/A
Clause 55.02-4 <i>Infrastructure objective</i> Standard B4	<ul style="list-style-type: none"> To ensure development is provided with appropriate utility services and infrastructure. To ensure development does not unreasonably overload the capacity of utility services and infrastructure. 	On site storm water and septic required	On site storm water and septic required. Discussed below
Clause 55.02-5 <i>Integration with the street objective</i> Standard B5	<ul style="list-style-type: none"> To integrate the layout of the development with the street. 	Yes	Yes
Clause 55.03-1 <i>Street setback objective</i> Standard B6	<ul style="list-style-type: none"> To ensure that the setback of buildings from a street respect the existing or preferred neighbourhood character and make efficient use of the site. 	Yes	Yes
Clause 55.03-2 <i>Building height objective</i> Standard B7	<ul style="list-style-type: none"> To ensure that the height of buildings respects the existing or preferred neighbourhood character 	Yes	Yes
Clause 55.03-3 <i>Site coverage objective</i> Standard B8	<ul style="list-style-type: none"> To ensure that the site coverage respects the existing or preferred neighbourhood character and responds to the features of the site 	Yes	Yes
Clause 55.03-4 <i>Permeability objectives</i> Standard B9	<ul style="list-style-type: none"> To reduce the impact of increased stormwater run-off on the drainage system. To facilitate on-site stormwater infiltration. 	Yes	Yes.

<p>Clause 55.03-5</p> <p><i>Energy efficiency objectives</i></p> <p>Standard B10</p>	<ul style="list-style-type: none"> • To achieve and protect energy efficient dwellings and residential buildings. • To ensure the orientation and layout of development reduce fossil fuel energy use and make appropriate use of daylight and solar energy. 	No details provided	No details provided.
<p>Clause 55.03-6</p> <p><i>Open space objective</i></p> <p>Standard B11</p>	<ul style="list-style-type: none"> • To integrate the layout of development with any public and communal open space provided in or adjacent to the development. 	Yes	Yes
<p>Clause 55.03-7</p> <p><i>Safety Objective</i></p> <p>Standard B12</p>	<ul style="list-style-type: none"> • To ensure the layout of development provides for the safety and security of residents and property. 	Yes	Yes
<p>Clause 55.03-8</p> <p><i>Landscaping objectives</i></p> <p>Standard B13</p>	<ul style="list-style-type: none"> • To encourage development that respects the landscape character of the neighbourhood. • To encourage development that maintains and enhances habitat for plants and animals in locations of habitat importance. • To provide appropriate landscaping. • To encourage the retention of mature vegetation on the site. 	Yes	Yes
<p>Clause 55.03-9</p> <p><i>Access objectives</i></p> <p>Standard B14</p>	<ul style="list-style-type: none"> • To ensure vehicle access to and from a development is safe, manageable and convenient. • To ensure the number and design of vehicle crossovers respects the neighbourhood character. 	Yes	Yes
<p>Clause 55.03-10</p> <p><i>Parking location objectives</i></p> <p>Standard B15</p>	<ul style="list-style-type: none"> • To provide convenient parking for resident and visitor vehicles. • To avoid parking and traffic difficulties in the development and the neighbourhood. • To protect residents from vehicular noise within developments. 	Yes	Yes

Clause 55.03-11 <i>Parking provisions objective</i> Standard B16	<ul style="list-style-type: none"> • To ensure that car and bicycle parking for residents and visitors is appropriate to the needs of residents. • To ensure that the design of parking and access areas is practical and attractive and that these areas can be easily maintained. 	Yes	Yes
Clause 55.04-1 <i>Side and rear setback objective</i> Standard B17	<ul style="list-style-type: none"> • To ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings. 	Yes	Yes
Clause 55.04-2 <i>Walls on boundary objective</i> Standard B18	<ul style="list-style-type: none"> • To ensure that the location, length and height of a wall on boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings. 	N/A	N/A
Clause 55.04-3 <i>Daylight to existing windows objective</i> Standard B19	<ul style="list-style-type: none"> • To allow adequate daylight into existing habitable room windows. 	Yes	Yes
Clause 55.04-4 <i>North facing windows objective</i> Standard B20	<ul style="list-style-type: none"> • To allow adequate solar access to existing north-facing habitable room windows. 	Yes	Yes
Clause 55.04-5 <i>Overshadowing open space objective</i> Standard B21	<ul style="list-style-type: none"> • To ensure buildings do not significantly overshadow existing secluded private open space. 	Yes	Yes
Clause 55.04-6 <i>Overlooking objective</i> Standard B22	<ul style="list-style-type: none"> • To limit views into existing secluded private open space and habitable room windows. 	Yes	Discussed below
Clause 55.04-7 <i>Internal views objective</i> Standard B23	<ul style="list-style-type: none"> • To limit views into the secluded private open 	Yes	Yes

Clause 55.04-8 <i>Noise impacts objective</i> Standard B24	<ul style="list-style-type: none"> • To contain noise sources in developments that may affect existing dwellings. • To protect residents from external noise. 	Yes	Yes
Clause 55.05-1 <i>Accessibility objective</i> Standard B25	<ul style="list-style-type: none"> • To encourage the consideration of the needs of people with limited mobility in the design of developments. 	Yes	Yes
Clause 55.05-2 <i>Dwelling entry objective</i> Standard B26	<ul style="list-style-type: none"> • To provide each dwelling or residential building with its own sense of identity. 	Yes	Yes
Clause 55.05-3 <i>Daylight to new windows objective</i> Standard B27	<ul style="list-style-type: none"> • To allow adequate daylight into new habitable room windows. 	Yes	Yes
Clause 55.05-4 <i>Private open space objective</i> Standard B28	<ul style="list-style-type: none"> • To provide adequate private open space for the reasonable recreation and service needs of residents. 	Yes	Yes
Clause 55.05-5 <i>Solar access to open space objective</i> Standard B29	<ul style="list-style-type: none"> • To allow solar access into the secluded private open space of new dwellings and residential buildings. 	Yes	Yes
Clause 55.05-6 <i>Storage objective</i> Standard B30	<ul style="list-style-type: none"> • To provide adequate storage facilities for each dwelling. 	Yes	Yes
Clause 55.06-1 <i>Design detail objective</i> Standard B31	<ul style="list-style-type: none"> • To encourage design detail that respects the existing or preferred neighbourhood character. 	Yes	Yes

Clause 55.06-2 <i>Front fence objective</i> Standard 32	<ul style="list-style-type: none"> • To encourage front fence design that respects the existing or preferred neighbourhood character. 	Yes	Discussed below
Clause 55.06-3 <i>Common property objectives</i> Standard B33	<ul style="list-style-type: none"> • To ensure that communal open space, car parking, access areas and site facilities are practical, attractive and easily maintained. • To avoid future management difficulties in areas of common ownership. 	Yes	Yes
Clause 55.06-4 <i>Site services objectives</i> Standard B34	<ul style="list-style-type: none"> • To ensure that site services can be installed and easily maintained. • To ensure that site facilities are accessible, adequate and attractive. 	Yes	Yes

Discussion of highlighted above points

Standard B1 Neighbourhood Character

In this context it is noted that the MSS identifies that a key factor is the balance between open space, built form and vegetation. “One key distinction is between areas where street space is defined and enclosed by buildings in contrast to areas where land form and landscape are dominant and provide a setting for buildings. It is clear that the extent of site coverage has a direct effect on the ability to retain or reestablish site vegetation, and that the ability to retain a “bushland” or “woodland” setting is often dependent on retaining larger lot sizes.”

It is considered that the proposal adequately responds to this context. The overall density of about one dwelling per 1,250 square metres is similar to the overall density in Leyden Avenue and can in combination with the landscaping proposed provide a ‘bushland setting’. The original proposal had all dwellings well setback from Leyden Avenue. The revised plans show one dwelling having a frontage to and an adequate setback from Leyden Avenue. This dwelling can be considered a ‘low-profile’ dwelling as its narrow sections faces the road and as the elevated portion of the building is well setback from the front of the house.

A minor aspect of concern in relation to the revised plans is the potential impact of the 2 metre boundary fence, where this fence is within the front setback of the dwellings. It is suggested that a condition may address this issue, by requiring the height to be lower in the vicinity of the road reserve.

The revised plan is considered to better respond to its context in relation to the adjoining reserve. The reserve includes an oval and pavilion in a picturesque setting. Generally only filtered views are provided to surrounding residential properties. These views from the reserve are better maintained in the revised plans.

Standard B4 Infrastructure

The subject land is not connected to the reticulated sewerage system. During the assessment of the application Council requested (on a number of occasions) details of the proposed domestic waste water treatment system. Details of the intended system to be used were provided on 6 November 2003.

It is proposed to treat domestic waste water via the use of an Ecomax system with a capacity to process 1200 liters per day. One treatment plant is required per dwelling. From the indicative site plan provided the systems are to be located in close proximity to their respective dwellings with the exception of the system for dwelling 3 which is to be located to the south of dwelling 2.

The Ecomax system is a new type of treatment system. While this system has EPA approval, the Council has limited experience with the requirements of the system and the environmental impacts on ground water that the system may have. Only one Ecomax system has been approved by the Council and this was on an experimental basis in relation to a small dwelling development.

In considering the limited information provided by the applicant and the short time period which Council has had to assess the outlined proposal, the following additional information has been required by the Council's Environmental Health Department prior to an approval of this type of system:

1. A ground water impact statement; this should detail (as a minimum) the nature of the groundwater level at present and the forecasted nature of the groundwater after the development and therefore the impact on the groundwater from the development.
2. A land capability assessment of the property with consideration to the proposed development (including a detailed forecast and evaluation of the waste water flows on the property).
3. A detailed waste water management plan for the proposed development (this management plan, when approved will be required in the form of a Section 173 Agreement (Planning and Environment Act 1987) and
4. The two titles to be consolidated into the one title.

In the brief comments recently provided by the Environmental Health Department, these above comments are based on three justifications:

- The lack of evidence for long term nutrient reducing from the Ecomax system, (as opposed to other systems such as drip irrigation where the impact is relatively known);
- The size of the development which is expected to generate considerable quantities of waste water;
- The fact that there are four independent waste water disposal systems located on the land require long term management practices developed and tied to the property.

It is the concern of the Council that the Ecomax system may not be able to achieve the levels of environmental performance required to gain approval for installation and use. The only alternative option available is for the use of a drip irrigation system for which may be insufficient undeveloped land is available for installation.

Standard B22 Overlooking

The dwellings are compliant with the overlooking objectives of the Standard. One area of concern is that the proposal appears to offer views into the private open space of the dwelling at 24 Leyden Avenue. This overlooking may be addressed by fencing (details of which have not been provided on the site plan), or via the planting of screening vegetation along this section of the title boundary. However, such concern could be addressed by an appropriate condition.

Standard B32 Front Fence Objective

In the amended proposal, details of front fencing have not been noted on the plans. As Leyden Avenue is a residential street, fencing along the front title boundary must not exceed 1.5m to comply with the fencing Standard.

Although 1.5m fence height is the requirement under Clause 55, the DDO2 states that fencing must not exceed 1.8m in height. The DDO2 overrides Clause 55 and hence 1.8m becomes the default fence height requirement.

Low level fencing is encouraged as a means to aid the integration between the dwelling and the street and to accord with the character of the neighbourhood.

Conclusion on ResCode Assessment

The proposed development in its original and amended form generally complies with the relevant Standards of Clause 55 of the Planning Scheme.

The outstanding area of concern is the ability for the development to contain its domestic waste water within the boundaries of the land. It has not been satisfactorily demonstrated that the proposal is able to achieve Standard B4 Infrastructure Objectives at this stage and further investigation of this point should be conducted in the near future.

Clause 43.02 Design and Development Overlay Schedule 2

The subject land is affected by Schedule 2 to the Design and Development Overlay – Bayside and Village Design.

The development of more than one dwelling requires a permit.

Schedule 2 to the Overlay has 10 'Design Objectives' which a development must achieve before an application is recommended for approval.

In consideration of the proposed development at 20 and 22 Leyden Avenue, the following 'Design Objectives' are considered most relevant:

- To ensure that the design of subdivision and housing is responsive to the environment, landform, site conditions and character of coastal and bayside residential areas and rural
- To ensure that development densities are compatible with the environmental and infrastructure capacities of the area, including the capacity of local streets, drainage systems and sewerage systems. Where reticulated sewerage is not available, particular consideration must be given to the ability to contain all waste water onsite and the impact of development on ground water conditions. Particular attention must be given to the impact of development on streamlines, water ways and wetlands and to avoiding the development of land susceptible to stream erosion or flooding.
- To recognise areas where substantial vegetation cover is a dominant visual and environmental feature of the local area by ensuring site areas are large enough to accommodate development while retaining natural or established vegetation cover and to provide substantial areas for new landscaping and open space.
- To ensure that new development has proper regard for the established streetscape and development pattern in terms of building height, scale and siting.
- To ensure that buildings are designed and sited to avoid being visually obtrusive, particularly in terms of creating a silhouette above a skyline or existing tree canopy line when viewed from surrounding streets and properties.
- To recognise areas where a lower intensity of residential activity and traffic movement contributes to the amenity of the area.
- To recognise areas, with limited access to infrastructure, services and facilities, including public transport, that are considered inappropriate for higher densities of occupation.

It is considered that the revised proposal adequately responds to the above criteria, generally as outlined under the discussion of the neighbourhood character objective of Clause 55.

The Schedule to the Overlay also provides a set of eight 'General Requirements', which a dwelling, or dwelling addition, must meet in order to not require a permit.

Although this is the case a permit is required in any event, the 'General Requirements' provide an outline of the type of development that is preferred in land affected by this Schedule to the Overlay. Accordingly, it is beneficial to assess the proposal against the General Requirements and identify the aspects of the development proposal which do not comply with the General Requirements. The non-compliant aspects of the development are as follows:

No building may exceed a wall height of 5.5 metres or a building height of 6

metres.

The dwellings are proposed to have a maximum building height of 6.85m above ground level. The heights above natural ground level may vary slightly between the dwellings however it is appropriate to state that the Dwellings 1 and 2 have a variation of between 0.5 metre and 0.75 metre above the 'General Requirements' standard of 6.0m above natural ground level. Given the design of the dwellings this minor variation is considered acceptable. Dwellings 3 and 4 in the amended plans are sited in cuts which result in their overall building height being below 6.0m above natural ground level.

The difference between finished ground level and natural ground level as a result of excavation and filling must not exceed one metre, except for the purpose of constructing an in ground swimming pool, and all works must be properly battered or stabilised.

The details provided on the original and amended plans do not explicitly display the extent of earthworks required for the development of the dwelling and the tennis court. From a correlation of the survey plan and the noted finished levels, it is possible to determine that approximately 2.0m of cut is required for the siting of Dwelling 3 and approximately 3.5m + of cut for the siting of the tennis court. It is suggested that the remaining dwellings could be constructed with a requirement of less than 1.5m of cut and fill. It is evident that the earthworks required for the dwellings and the tennis court exceed the 'General Requirement' of 1.0m and consequently a permit is required for earthworks. It is therefore suggested that an additional condition be included in the proposed permit in relation to the provision of adequate construction details in relation to this matter.

All buildings must be located at least 10 metres from land within a Public Park and Recreation Zone, Public Conservation and Resource Zone or Road Zone and at least 6 metres from any cliff edge

The proposed tennis court is set on the boundary of the land adjoining the Portsea Reserve, which is land affected by the Public Park and Recreation Zone. Dwellings 1 and 3 are setback 3.0m from the western boundary. The development of the tennis court and dwellings include a variation to the 10 metre setback requirement of this standard. Given that both dwellings are 'side-on' to the reserve and taking into account the length of the total boundary to the reserve, as well as the level differences, the setback reduction is considered acceptable. The 'zero-setback' of the tennis court is considered acceptable as it is located adjacent to tennis courts in the reserve.

Clause 42.02 Vegetation Protection Overlay – Schedule 1

The subject land is affect by Schedule 1 to the Vegetation Protection Overlay – Township Vegetation. A permit is required to remove vegetation other than for the siting of the dwellings and driveway.

The proposed development exceeds the as of right provisions of this overlay and consequently a permit is required for vegetation removal.

It is noted in the supporting documentation submitted with the application that majority of the existing vegetation on the land is in poor condition and of limited environmental value. The Council's Vegetation Officer assessed the land and agreed with this conclusion.

It is an objective of the VPO1 that where removal occurs, a net environmental gain should be achieved. In this instance sufficient undeveloped land remains in which appropriate indigenous replanting may occur and a net gain achieved.

Adjusted permit

Based on the above and a review of the exhibited permit, a number of adjustments are suggested should the panel see fit to recommend that the amendment be approved and the permit be issued. The adjusted permit is attached as Appendix 6. The recommended changes are underlined. The deletions are noted in the right margin.

The first change is to include 22 Leyden Avenue in the address of the land. The Volume and Folio numbers remain the same.

The second change is to include mention of the development of the tennis court in the permit description. Under the DDO2 the tennis court requires a permit in its own right. It is not appropriate to consider the court as works associated to the dwellings. The swimming pool is 'as of right' within the zone and does not trigger a permit under the overlay and consequently does not require specific mention in the permit description.

The third and fourth changes relate to domestic waste water disposal to the reticulated sewerage network - Conditions 5 and 15. At present it is not practical to meet the requirements of the existing condition to connect to the reticulated sewerage network. Accordingly, it is recommended that standard conditions requiring on site containment be incorporated into the permit. The Proponent is aware of this recommended amendment. As noted in the ResCode assessment, it is yet to be demonstrated by the Proponent that the development can satisfactorily achieve this requirement.

Condition 13 of the permit addresses the time expiry of the permit. It is considered that this condition may be inappropriate for this permit as it refers to use approval when the permit is for development. The condition also makes reference to staging schedules for the development. It is suggested that, should the Panel see fit to recommend the approval of the permit, that a standard condition be placed on the permit providing two year to commence and two years to complete the development with the standard option to extend the permit within 3 months of the expiry. An addition to the standard condition should state that the development must not commence until the covenant has been varied on the titles to the subject land. These alternative conditions are listed as Condition 22.

Condition 21 of the permit has been included to meet the requirements of the Department of Natural Resources and Environment in their referral comments dated 19 November 2002.

In addition to these changes it is suggested that consideration should be given to the merits of a condition requiring the consolidation of the two lots within Vol 08583 Fol 689 into the one title. This requirement is specific to the amended application which seeks approval to construct dwelling 2 across the title boundary. While it is possible to approve a development across a title boundary, it is not good practice and this situation should be rectified prior to the development of the dwellings.

The second recommended condition is required to address potential concerns resulting from the development of the tennis court along the title boundary. Due to the extent of the earthworks required along this boundary, it is considered prudent to have details of these works approved by the Council prior to the commencement of the development of the tennis court.

In addition, it is recommended that a condition be included that requires the applicant to properly maintain Leyden Avenue during construction, to ensure this unmade road is not detrimentally affected by the traffic related to the building works.

Response to submissions made

The issues raised by submitters have generally been raised above.

Conclusion

Amendment

In relation to the Amendment Council has taken a neutral position, to facilitate the proposed variation of the covenant to be exposed to a public process.

Proposed permit

In relation to the proposed permit Council has outlined that the proposed development generally complies with a range of planning policies and controls, but also highlighted a number of minor concerns and provided suggestions for improvements to the proposed permit.

Clause 43.02 Design and Development Overlay

Schedule 2 Bayside and Village Design

The Panel has requested an assessment of the development application against the Decision Guidelines of the DDO control.

The Decision Guidelines of the control are twofold. Clause 43.02-5 of the overlay sets out nine guidelines which must be satisfied by an application prior to its recommendation for approval.

In addition to this, the various schedules to the overlay also provide their own Decision Guidelines which must be considered prior to determining an application. In the case of Schedule 2, an additional eight Decision Guidelines are provided.

An explanation of the workings of the DDO and its Schedules was provided in the Council's main submission to the Panel on the second day of the hearing. For the purpose of this summary of the Decision Guidelines, it is sufficient to state that a permit is required for the development of the dwellings under consideration of Clause 43.02-2 in that no exemptions are explicitly provided in the schedules for the development of more than one dwelling on a lot.

Although many of the Decision Guidelines specified in the overlay and the schedule are repetitive and some of them not directly applicable to the consideration at hand, it is appropriate in the context of the Panel's request to provide comment against each of the guidelines.

Clause 43.02-5 Decision Guidelines of the Overlay

Clause 43.02-5 states that "Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate" the following decision Guidelines. Comment is provided after the quoted guideline as to the development's compliance with the guideline.

The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

It is considered that the application is consistent with the State Planning Policy Framework in that it will:

- allow residential zoned land to be used more effectively. To this extent the application is consistent with Clause 14 Settlements;
- Facilitate the provision of high quality housing;
- Will not affect the amenity of the surrounding area and is in keeping with the existing character of the locality;
- The dwellings can achieve a four star energy rating. In this regard the development is consistent with Clause 15.12 Energy Efficiency.

It is considered that the application is consistent with the Local Planning Policy Framework and the MSS in that the development is an in fill development within an existing township and is compatible with the character of the surrounding area.

The design objectives of the relevant schedule to this overlay

As discussed in the main submission to the Panel, it is concluded that the application is consistent with the relevant design objectives of Schedule 2 of the DDO. An extract of the most relevant objectives was provided in the submission and comment against these objectives provided. In summary, the design objectives seek to ensure that new development has proper regard for the existing and preferred streetscape and development patterns of the locality especially with regard to the site specific constraints of the subject land. To this end, the proposal accords with the objectives and where variations are required

to the general requirements of the buildings and works controls, these variations can be justified against the relevant objectives.

The provisions of any relevant policies and urban design guidelines

The subject land is not affected by any additional policies or design guidelines above and beyond the DDO and the VPO. There are, for example, no neighbourhood character controls / policies and the Council is not currently (or intending) to produce any new policies or controls in this regard in the near future.

Whether the bulk, location and appearance of any proposed buildings and works will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area

These issues are discussed in the Design Objectives of the DDO2. It was determined that the application accords with the relevant objectives of this control. For example, it is an objective that “buildings must be designed and sited to avoid being visually obtrusive” and furthermore that “buildings must have proper regard for the established streetscape in terms of building height, scale and siting”. The proposal accords with these requirements and hence compliance with the decision guideline has been achieved.

Whether the design, form, layout, proportion and scale of any proposed buildings and works is compatible with the period, style, form, proportion, and scale of any identified heritage places surrounding the site.

There are no buildings of historic significance located in close proximity to the subject land. The nearest building with heritage significance (recognised within the planning scheme) is located at the corner of Blair Road and Back Beach Road, more than 500m from the subject land.

Whether any proposed landscaping or removal of vegetation will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area.

It is submitted by the permit applicant and the Council that the existing vegetation on the lot is of limited streetscape value. The removal of this vegetation and its replacement with appropriate plantings, of which a majority will be indigenous to the locality, will satisfy this decision guideline. Upon maturity, the plantings detailed in the landscape plan will be of positive streetscape value.

The layout and appearance of areas set aside for car parking, access and egress, loading and unloading and the location of any proposed off street car parking.

The initially proposed location of the driveway and car parking spaces at the front of 20 Leyden Avenue was an issue of concern to many of the residents of the immediate surrounding lots. With the submission of amended plans, the driveway is more sympathetically sited and the contentious long car port has been removed. Sufficient turning area is provided within the land to allow

vehicles to exit the site in a forward direction and more than adequate parking is provided within the site to ensure that vehicle parking does not spill into the street.

Whether subdivision will result in development which is not in keeping with the character and appearance of adjacent buildings, the streetscape or the area.

The application does not involve subdivision. While this may be an issue at a future date, at this point in time, the issue requires no further comment other than to state that should subdivision occur, the dwellings would satisfy the above criteria.

Any other matters specified in a schedule to this overlay

This decision guideline introduces into the assessment all those matters within the DDO2 including the decision guidelines of that overlay, to which this assessment will now turn.

Decision Guidelines of Schedule 2 to the Design and Development Overlay

Part 4.0 of Schedule 2 of the overlay sets out the decision guidelines relating to the overlay. As with the overlay itself, it commences by stating that “Before deciding on an application the responsible authority must consider...”. The schedule provides 8 decision guidelines. These are as follows:

The design objectives of this schedule

The dwellings accord with the design objectives of the schedule. As stated above, this issue was discussed in the body of the submission. Where the proposal requires a variation to the general requirements, this variation was found to be in accordance with the relevant design objectives. For example, the height of the dwellings exceeds the general requirement of 6.0m above natural ground level. The variation to the standard by up to 0.75m was determined to be consistent with the relevant streetscape and character objectives of the schedule and was worthy of approval. The Council is comfortable in stating that the development accords with the objectives of the schedule to the overlay.

Where an objective has been applied from Clause 54.02 to 54.06, inclusive, the relevant decision guidelines from that Clause

Schedule 2 of the overlay provides for consideration of single dwellings and dwelling additions only, hence the reference to Clause 54 of the Planning Scheme “One dwelling on a lot”. The application has been assessed against the requirement of Clause 55 to which it is compliant in all aspects with the only question being Clause 55.02-4 Infrastructure and the ability of the site to adequately contain its domestic waste water on site.

Any relevant development plan, heritage study, code or policy relating to the protection and development of land in the area.

As noted in the consideration of the decision guidelines of the overlay, the subject land is not affected by any study, code or policy relating to the protection and development of land in this area. The DDO2 is the key control by which the planning objectives for this locality are sought to be achieved.

Whether opportunities exist to avoid a building being visually obtrusive by the use of alternative building designs, including split level and staggered building forms, that follow the natural slope of the land and reduce the need for site excavation or filling.

The applicant has demonstrated that the dwellings will not be visually obtrusive on the adjoining and surrounding lands. Although a minor variation to the overall building height requirement of the general requirements is necessary, the dwellings will not be overly exposed to the surrounding low lying lands or the recreation reserve to the west. Consideration of alternative designs is not warranted. The Council is satisfied that the application in its amended form satisfies this decision guideline.

The effect of any proposed subdivision or development on the environmental and landscape values of site and of the local area, including the effect on streamlines, foreshores, areas of remnant vegetation, areas prone to erosion.

The dwellings are nestled into the land and will not have a detrimental impact on the landscape values of the locality. While some of the dwelling roofs will be visible from some local vantage points, the dark roof tone and low pitch design will soften any visual impact this exposure may have. Built form will not be significantly exposed above the canopy line and silhouetting against a sky backdrop will not occur. The site is not affected by a streamline or wetland and is distant from the foreshore. The site is within 500m of the Portsea Lagoon. With appropriate on site containment of domestic waste water, no detrimental impact on the wetland will occur. Vegetation removal and appropriate replanting will benefit the site and erosion is unlikely to occur due to the limestone rock underlay.

The effect of any proposed subdivision or development on the amenity and accessibility of areas of public open space.

At present an informal walking track cuts across the subject land from Leyden Avenue to the recreation reserve. A condition has been placed on the exhibited permit which requires a carriageway easement be placed on the title to protect these existing access arrangements. The proponent has stated that they intend to challenge the requirement of this condition. Access to the reserve is an issue identified in a number of the submissions to the application. It would be beneficial to the outcome if public access across the subject land could be retained.

In areas where reticulated sewerage is not available, whether the applicant has submitted a report from a suitably qualified person to demonstrate whether effluent can be treated and retained on-site, without contaminating groundwater, in accordance with State Environment Protection Policies.

Insufficient information has been provided for the Council to conclude that this decision guideline has been achieved. While the Panel may see fit to approve the amendment and the development permit, it is to be acknowledged at this point, that the development application may have to be amended / altered before the Council's Environmental Health Department approve the waste water treatment works. Further comment on this issue is expected by the proponent in the final day of the hearing.

The need to ensure that the design of development has adequate regard to fire risk and includes appropriate fire protection measures.

The subject land is not affected by a Wildfire Management Overlay and is not recognised in the building regulations as a fire prone area.

Clause 42.02 Vegetation Protection Overlay Schedule 1 Township Vegetation

Clause 42.02-2 states that a permit is required to remove, destroy or lop any vegetation specified in a schedule to this overlay.

Schedule 1 of the overlay states that "a permit is required to remove any vegetation". There are eight listed exemptions to this requirement. The subject development proposes to remove vegetation in excess of the as of right requirements of the VPO1 and hence a permit is required. As vegetation removal is not a key issue in the assessment of this proposal, an assessment against the decision guidelines of only the schedule to the overlay will be conducted. These are as follows.

The vegetation protection objectives of this schedule

The schedule to the overlay provides eleven objectives. Many of these objectives do not directly relate to this site or relate to issues which are likely to impact on this site. In short, the low environmental value of the existing vegetation and the intention to replant on the site in accordance with the landscape plan (as required by permit condition), is sufficient to note that the removal of the vegetation accords with the decision guideline.

The value of the native vegetation to be removed in terms of its habitat, landscape and environmental values, age, physical condition, rarity or variety.

These issues have all been addressed in the landscape report prepared by Mark McWha. The findings of the report concur with the comments of the Council's Vegetation Officer that the existing vegetation is mostly invasive Ti tree and weed species. The Ti tree is estimated to be approximately 50 years old and in average to poor health. The eastern half of the land is largely devoid of trees and shrubs and what can be seen from Leyden Avenue does not provide a significant

contribution to the streetscape of the area.

The need for a report, by a properly qualified person and to the satisfaction of the responsible authority, on the vegetation and habitat significance of the vegetation to be removed.

The Mark McWha Landscape report satisfies this requirement.

Whether there is any reasonable alternative means of siting buildings and works in order to conserve the native vegetation of the area.

The site does not contain any significant vegetation. Alternative siting to conserve vegetation is not an issue applicable to the assessment of this proposal.

The extent of the proposed vegetation removal and its likely effect on the stability of the site, particularly along streamlines or in erosion prone areas.

Vegetation removal is unlikely to have a detrimental affect on soil stability. A condition of the permit will require the stabilisation of all disturbed surfaces. The subject land is not located in an erosion prone area such as a dune foreshore. Details of the retaining works for the tennis court are required via permit condition. These works must not commence until the Council is satisfied that the development of the tennis court may occur without undue impact on the stability of the surrounding land.

The extent to which the removal of vegetation is necessary to achieve proper fire management.

The subject land is not in a designated fire prone area under planning or building regulations.

The benefit of conditions providing for the relocation of significant species prior to development of a site, having particular regard to the occurrence of native orchids.

This decision guideline is not applicable to the assessment of this application.

The benefit of conditions requiring planting, replanting and other treatment of the land, having regard to the relationship between buildings and the landscape and the maintenance, where possible, of shared view lines.

The exhibited permit contains conditions which meet this decision guideline. The additional plantings will not impact on any shared view lines.

The need for replacement vegetation to be of an appropriate species and to exclude environmental weeds.

The Council's Vegetation Officer comments that there are no environmental weeds listed in the planting schedule of the landscape plan. Replanting is of appropriate species many of which are indigenous to the locality.

The need for a condition requiring the payment of a bond as part of a development approval to ensure that no unauthorised removal of vegetation occurs.

The value of the tree species to be removed does not justify the imposition of a bond.

The comments of any relevant coastal management, fire prevention, land management or soil conservation authority

Not applicable.

Clause 52.21 Private Tennis Court

The Purpose of the clause is:

- To ensure that tennis courts used in association with a dwelling are sited and constructed to minimise the effects of the development on nearby properties.
- To ensure that the use of tennis courts in association with a dwelling does not cause unreasonable disturbance to adjoining residents or adversely affect the residential amenity of adjoining areas.

The clause states “A permit is required to construct, use or illuminate a private tennis court if the performance requirements specified in the Code of Practice - Private Tennis Court Development March 1999 are met.

A permit is required to construct, use or illuminate a private tennis court on land within:

- An Urban Floodway Zone, an Environmental Significance Overlay, a Heritage Overlay, a Land Subject to Inundation Overlay, a Rural Floodway Overlay, a Significant Landscape Overlay.
- A Vegetation Protection Overlay if any vegetation specified in a schedule to the overlay is to be removed, destroyed or lopped.

A permit for the development of the tennis court is also triggered under the Design and Development Overlay regardless if the proposal meets the buildings and works requirements of the DDO2, as the development is not specifically exempted in the DDO buildings and works exemptions in Clause 43.02-2.

The decision guidelines of Clause 52.21 require consideration of the objectives and elements of the Tennis Court Code of Practice.

Element 1 Court Location

Objective:

- “To achieve a layout which minimises the impact on the established land form and vegetation and which respects the amenity and character of the surrounding area”.

The proposed tennis court meets the performance requirements of the element in that the court is located more than 3.0m from the front title boundary and adjoining dwellings and is not within 20m of a declared Melbourne Water drain. The tennis court is surrounded on three sides by the propose development, thus limiting its impact on the surrounding land.

Element 2 Fencing and Enclosures

Objective:

- To ensure that the size, appearance and materials of the tennis court fencing and enclosures are not unduly visually intrusive;
- To provide aesthetic compatibility with nearby streetscapes and public areas.

The tennis court abuts the western boundary of the subject land. To meet the performance requirements, fencing along this boundary must not exceed 3.0m above playing level. The fencing must not be solid and must be constructed in materials which blend with the surrounds.

The ‘Landscape Concept Design Report’ comments that tennis court fencing shall be to a height of 3.6m above surface level. A 600mm variation to the height requirement is considered reasonable given that the court is positioned adjoining the public courts and that half the length of the court is sited in a cut – reducing the visual impact of the fence height. The fence is to be constructed of black wire mesh.

Element 3 Site Works

Objective:

- To ensure the stability of the tennis court site;
- To contain off site effects so as to cause no detriment to adjoining land or structures;
- To limit the impact of increased stormwater run off on drainage systems.

Details of the earthworks required for the development of the tennis court are required via permit condition. The Council must be satisfied that the impact of these works can be contained within the subject land prior to the commencement of works. Stormwater must also be contained within the site boundaries. Although details are lacking at this stage, it is expected that the tennis court may

be constructed in a manner which achieves the objectives. It is unfortunate that the tennis court is to be sited over the vacant drainage easement. It would be preferable for the tennis court to be free of the easement.

Element 4 Landscaping

Objective:

- To minimise the removal of vegetation;
- To ensure that revegetation is compatible with the landscape characteristics of the area.

A permit is triggered under the VPO1 for the removal of vegetation for the siting of the tennis court. As noted on a number of occasions, the vegetation is not considered significant and does not form a significant part of the streetscape. The replanting proposed in the landscape plan meets the landscape objectives of this element.

Element 5 Illumination

Illumination of the tennis court is not proposed. If, in the future, illumination is proposed, a planning permit will be required and this application would (most likely) be advertised.

Element 6 Privacy

Objective:

- To ensure that the tennis court and its use do not detract significantly from the amenity of the surrounding area and do not cause unreasonable detriment to privacy.
- To limit views into neighbouring secluded private open spaces and habitable rooms.

The development of the tennis court will not detract from the amenity of the surrounding area. The tennis court is surrounded on three sides by developments within the subject land. It would be unlikely that the use of the tennis court would affect the amenity of the existing dwellings fronting Leyden Avenue. As the tennis court is adjoined to the west by the public tennis courts, it is reasonable to assume that the amenity of this land will not be adversely affected.

The hours of operation of the tennis court shall be limited to exclude the hours specified in the Code of Practice – being between 10.30 pm and 7.30 am and that mechanical equipment must not be used on the court between 7.00 pm and 8.00 am. Furthermore, the tennis court must not be used for commercial purposes. This was a concern expressed by a number of the submitters to the proposal. The Council's standard permit note is recommended to be placed at the bottom of the permit noting that the use must at all times operate in accordance with the Code of Practice – Private Tennis Court Development.

Element 7 Construction Methods

Objective:

- To ensure that the method and timing of construction prevent undue disturbance to the existing conditions of the site and the amenity of the surrounding area.

There are no physical restrictions limiting access to the tennis court development site. The construction methods and hours in which development may occur are governed by the 'Guide Specifications for Tennis Court Construction' and additionally by any construction requirements of the Building Surveyor through the building permit. With the presentation of satisfactory engineering details on the retaining works, the objectives of this element have been achieved.

It is concluded that the development of the tennis court satisfactorily addresses the elements of the Code of Practice – Private Tennis Court Development.

Clause 65 Decision Guidelines

The Decision Guidelines state that "Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause".

Many of the Decision Guidelines set out in the Clause 65 have been addressed in the DDO Decision Guideline assessment. The following brief assessment is made with this in mind.

The matters set out in Section 60 of the Act

60(1)(a) Objections

All objections have been considered and it is concluded that it is unlikely that an unreasonable level of detriment will occur as a result of the development.

60(1)(a)(ii) Referral Authorities

Where appropriate the requirements of referral authorities have been included in the permit.

60(1)(a)(iii) Environmental Affects

With the satisfactory provision of on site domestic waste water containment, the development will not adversely affect the local environment.

60(1)(b) Other Relevant Matters

The development is neutral in its effects on social and economic planning issues and is not contrary to any relevant strategic plan, policy, statement or guideline of a Ministry or public authority.

60 (2) to (7) inclusive – Covenants.

The Council is neutral on this issue and comment is not warranted.

The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

These issues are addressed in the DDO decision guideline consideration. Further comment is not required.

The purpose of the zone, overlay or other provision

These issues have been addressed above. The development satisfies the purpose, objectives and decision guidelines of these controls.

Any matter required to be considered in the zone, overlay or other provision

As commented above.

The orderly planning of the area

The Design and Development Overlay is the key planning tool by which an assessment of orderly planning is conducted. The proposed planning scheme amendment and associated development are considered to contribute to the orderly planning of the area.

The effect on the amenity of the area

The impact of the development is largely contained within the boundaries of the subject land. Overlooking, overshadowing and other detrimental impacts are unlikely to occur.

The proximity of the land to any public land

The impact of the development on the adjoining park land will be minimal and will not adversely affect the amenity of park users.

Factors likely to cause or contribute to land degradation, salinity or reduce water quality

These issues are not directly applicable to a consideration of this application.

Whether the proposed development is designed to maintain or improve the quality of stormwater within and exiting the site

Stormwater shall be contained within the site via soakage pits.

The extent and character of native vegetation and the likelihood of its destruction

Noted in the VPO assessment. The development satisfactorily complies.

Whether native vegetation is to be or can be protected, planted or allowed to regenerate.

The poor quality of the existing vegetation does not warrant protection.

The degree of flood, erosion or fire hazard associated with the location of the land and the use, development or management of the land so as to minimise any such hazard.

These issues are not directly applicable to a consideration of this application.

The planning scheme amendment and development permit are considered to fulfil the requirements of the Decision Guidelines and are recommended for approval in accordance with the requirements of the draft conditions.

* * *

APPENDIX TWO

Permit Conditions (version 5)

(not including recommendations of the Panel)

ADDRESS OF THE LAND

20 and 22 Leyden Avenue, Portsea; land contained in Certificate of Title
Volume 8583 Folio 689

THE PERMIT ALLOWS:

Development of the land for four dwellings, a tennis court and associated buildings and works and removal of vegetation in accordance with the endorsed plans.

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

Conditions Nos 1 to 23 inclusive

1. PLANS REQUIRED

Before the development starts, plans, to the satisfaction of the Responsible Authority generally in accordance with the plans prepared by Stephen Akehurst Architects, Drawing no.'s: SK101C, SK102A, SK103A, SK104A and SK105A, must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit (The plans must be drawn to scale with dimensions and three copies must be provided). The plans must show to the satisfaction of the Responsible Authority:

- a) the dimension of the setback of Dwelling 2 to the frontage.
- b) the external colours and materials for all dwellings.
- c) the wall height and overall height of all dwellings.
- d) The layout details (including extent of landscaped/paved surfaces, colours and materials of non-landscaped areas and treatment of retaining walls) and landscaping details adjusted to accord with the landscape plan prepared by Mark McWha Landscape Architect, File Drawing Number 1177-LC2.
- e) Details of any front fence, with any front fence not exceeding a height of

1.5 metres.

- f) The fence along the common boundary with 18 Leyden Avenue, Portsea, not exceeding 1.5 metres in height, within 3 metres from the frontage and be tapered to a height of 2 metres at an angle of not less than 45 degrees.
- g) The height, colours and materials of fences along all common boundaries with adjoining land, ensuring that any overlooking of the land at 24 Leyden Avenue complies with Standard B22 of Clause 55.04-6 of the Mornington Peninsula Planning Scheme.
- h) The location of the waste water disposal system referred to in condition 5.
- i) The plans marked to show any proposed boundary realignment.

2. ENDORSED PLANS TO BE COMPLIED WITH

- 2.1 The layout of the land, the size and type of the proposed buildings and works, including the materials of construction, on the endorsed plan must be complied with and not altered or modified without the consent of the Responsible Authority.
- 2.2 The layout and activities as indicated on the endorsed plans must not be altered without the consent of the Responsible Authority.

3. SATISFACTORY CONTINUATION

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

4. HOURS OF CONSTRUCTION

- 4.1 All building work associated with the construction of the development is to be limited to the following hours, unless otherwise approved by the Responsible Authority:
 - 4.1.1 Monday to Friday 7.00 am to 8.00pm
 - 4.1.2 Saturday 8.00 am to 5.00 pm
 - 4.1.3 Sunday and Public Holidays 9.00 am to 5.00 pm (except for aged care facility where construction must not start earlier than 10.00 am).
 - 4.1.4 The use of the following items of plant on the site is also restricted to the abovementioned hours except for Sunday and Public Holidays when they must not be used: compressors, bulldozers, power operated woodworking machines, excavators and loaders, jackhammers, ramset guns, concrete mixers and concrete delivery wagons, hoists, winches, welding and riveting plant.

5. SEWERAGE

5.1 The construction of the dwellings hereby permitted must not be commenced until the details of design and management of the proposed effluent disposal treatment system are approved, to the satisfaction of the Responsible Authority.

5.2 All waste water from the approved development must be treated and contained on site in accordance with the Code of Practice – Domestic Waste Water and then maintained to the satisfaction of the Responsible Authority.

6. INFRASTRUCTURE

6.1 TELEPHONE AND ELECTRICITY

6.1.1.1 All telephone and electricity services must be installed via underground connections to the satisfaction of the Responsible Authority.

6.2 STORMWATER

6.2.1 Prior to the commencement of any buildings or works the owner must provide an updated detailed stormwater drainage plan for the development to the satisfaction of the Responsible Authority. The drainage plan must:

6.2.1.1 be in accordance with the ‘Urban Stormwater – Best practice Environmental Management Guidelines’ CSIRO Publishing 1999;

6.2.1.2 show how existing drainage patterns on the subject land will be affected by the proposed development and what changes are proposed to these drainage patterns;

6.2.1.3 show measures of onsite collection for onsite collection and treatment of all stormwater runoff.

6.2.1.4 permanent siltation control measures during construction;

6.2.2 All areas of the development must be drained to a legal point of stormwater discharge via an underground drainage system or other approved method of stormwater drainage to the satisfaction of the Responsible Authority and this drainage system must include permanent siltation control measures during construction.

7. SITE MAINTENANCE DURING CONSTRUCTION

7.1 During construction all materials and builder’s facilities including toilets must be stored on site and the site must be maintained in a clean condition to the satisfaction of the Responsible Authority.

8. CAR PARKING

- 8.1 Before the occupation of dwelling units the areas set aside for the parking of vehicles and access lanes as shown on the endorsed plans must, to the satisfaction of the Responsible Authority, be:
- 8.1.1 constructed,
 - 8.1.2 properly formed to such levels that they can be used in accordance with the plans,
 - 8.1.3 surfaced with an all-weather seal coat or similar approved impervious surface or hard standing surface,
 - 8.1.4 drained and maintained,
 - 8.1.5 line-marked to indicate each car space and all access lanes,
 - 8.1.6 parking spaces for visitors allocated and marked.
- 8.2 Parking areas and access lanes must be kept available for these purposes at all times.
- 8.3 The selection of paving materials to be used on the land must be to the satisfaction of the Responsible Authority.
- 8.4 In areas set aside for car parking, measures must be taken to the satisfaction of the Responsible Authority to prevent damage to fences or landscaped areas.
- 8.5 Concrete kerbs or other barriers must be provided to the satisfaction of the Responsible Authority to prevent direct vehicle access to an adjoining road other than by a vehicle crossing.

9. AMENITY

- 9.1 All ground surfaces on the land must be kept dust free by the planting of grass or by other treatment to the satisfaction of the Responsible Authority.
- 9.2 The amenity of the area must not be detrimentally affected by the use or development, through the:
- 9.2.1 transport of materials, goods or commodities to or from the land;
 - 9.2.2 appearance of any buildings, works or materials;
 - 9.2.3 emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, or;
 - 9.2.4 presence of vermin.

- 9.3 Sound levels emanating from the land must not exceed those required to be met under State Environment Protection Policies Nos. N-1 (Control of Noise from Commerce, Industry and Trade), and N-2 (Control of Music Noise from Public Premises).
- 9.4 Air-Conditioning or other plant and equipment must be baffled to prevent nuisance or annoyance to persons in dwellings nearby or adjoining land.
- 9.5 Goods or materials must not be stored on Leyden Avenue unless with the permission of the Responsible Authority.
- 9.6 All goods and materials must be stored to the satisfaction of the Responsible Authority out of view or so as not be unsightly when viewed from nearby roads or lands.
10. **FILL MATERIAL**
- 10.1 Land must be filled with clean fill material consisting of soil (being clay, silt and sand), gravel and rock, all being naturally occurring materials to the satisfaction of the Responsible Authority.
- 10.2 Prior to the commencement of buildings and works, details of the extent of cut and fill to be placed on the site must be submitted to and approved by the Responsible Authority. Land must only be filled with clean fill material as defined in the Environment Protection Authority Information Bulletin "Classification of Wastes", Publication No. 448 September 1995, and:
- 10.2.1 solid inert wastes;
- 10.2.2 putrescible waste
- 10.2.3 low level contaminated soil; or
- 10.2.4 prescribed waste;
- as defined therein must not be used for the purposes of land filling.
11. **LANDSCAPING AND TREE REMOVAL**
- 11.1 Before the occupation of any building approved by this permit starts, landscaping works as shown on the endorsed plans must be completed and then maintained in a healthy condition, to the satisfaction of the Responsible Authority. Any dead diseased trees or shrubs must be replaced as soon as reasonably possible. The area set aside for landscaping must be used for no other purpose.
- 11.2 All existing vegetation on the property to be retained must be suitably marked before any development starts on the land. The vegetation must not be removed, destroyed or lopped without any written consent of the Responsible Authority.

- 11.3 Temporary barricades to protect trees to be retained must be erected to the satisfaction of the Responsible Authority prior to the commencement of any works.
- 11.4 No goods or materials are to be stored or vehicles parked within the drip line of any trees to be retained.
- 11.5 No excavation, trenching or soil removal is to be carried out within one metre of any tree to be retained without the prior written approval of the Responsible Authority.
12. MATERIALS
- 12.1 The materials and finish of all buildings must be in accordance with the endorsed plans or other non-reflective materials or painted in muted shades of colours approved by the Responsible Authority and then maintained to its satisfaction.
13. SWIMMING POOL
- 13.1 All backwash water from the swimming pool must be treated and contained on site to the satisfaction of the Responsible Authority.
14. SOIL REMOVAL
- 14.1 Unless with the permission of the Responsible Authority, no soil shall be removed from the land or sold as top soil.
15. ENERGY EFFICIENCY
- 15.1 The dwellings hereby permitted must be designed to achieve not less than a four star energy rating, using the Sustainable Energy Authority of Victoria 'First Rate' system or equivalent.
- 15.2 A report to the above effect must be submitted to the Responsible Authority prior to the commencement of the construction of the dwellings hereby permitted.
16. OUTDOOR LIGHTING
- 16.1 Prior to the occupation of any dwelling approved under this permit or the installation of any outdoor lighting the owner must provide a detailed outdoor lighting plan and specifications to the satisfaction of the Responsible Authority. The plan and specification must show:
- 16.1.1 the location and position of all outdoor lights including security lighting and street pathway lighting;
- 16.1.2 details of baffling light dispersal onto adjoining private residential land; and
- 16.1.3 where possible the use of solar lighting.

17. SECURITY ALARMS
 - 17.1 All security alarms or similar devices installed on the land must be of a silent type approved by the Standards Association of Australia and be connected to a registered security service to the satisfaction of the Responsible Authority.
18. MISCELLANEOUS
 - 18.1 Unit/dwelling numbers must be clearly displayed and visible for emergency vehicles and visitors.
 - 18.2 Excavations must be properly guarded and protected with hoardings or fencing to prevent them from being dangerous to life and property.
 - 18.3 To ensure compliance with this permit all buildings and driveways must be set out by a licensed surveyor and the survey report must be lodged with the Responsible Authority upon completion of the footings, prior to the external wall construction proceeding above floor level and prior to the roadways being completed.
 - 18.4 To ensure compliance with this permit a licensed surveyor's report confirming reduced levels as shown on the approved plans with particular regard to the finished floor levels must be submitted to the Responsible Authority on completion of the relevant floor(s).
19. ABORIGINAL AFFAIRS VICTORIA
 - 19.1 Work must cease immediately upon the discovery of any Aboriginal cultural materials, and Aboriginal Affairs Victoria shall be immediately notified of any such discovery.
 - 19.2 Development on the land must cease immediately upon the discovery of any suspected human remains. The Police or the State Coroner's Office must be informed of the discovery without delay. If there are reasonable grounds to suspect that the remains are Aboriginal, the discovery should also be reported to Aboriginal Affairs Victoria.
20. This permit has no effect until the restrictive covenants contained in instruments of transfer 2297215, 2319752 and 2370984 in relation to land at Lots 1, 2, 3, 4 and 5 LP 52729, being the land at 16 to 24 (incl.) Leyden Avenue Portsea, have been varied to the satisfaction of the responsible authority to facilitate the development hereby permitted.
21. Prior to the completion of the construction of the dwellings hereby permitted, lots 3 and 4 of PS 052729 Vol 08583 Fol 689 must be consolidated into the one lot to the satisfaction of the responsible authority, subject to any realignment of title boundaries which may be separately permitted by the responsible Authority, generally in accordance with the plans endorsed under this permit.
22. Prior to the construction of the development hereby permitted,

engineering plans for the construction of the tennis court, all earth and drainage works and all retaining walls must be submitted to and approved by the responsible authority. The plans must demonstrate that the development will not affect the long term stability of the adjoining land to the west and that it will not jeopardise the future use of the drainage easement.

23. The applicant must, to the satisfaction of the responsible authority, maintain the trafficable section of Leyden Avenue during the time the development hereby permitted is being constructed to avoid the condition of this road being deteriorated as a result of the additional traffic caused by the building works hereby permitted.

Note: Unless hereby approved, the use and development of the tennis court shall at all times be carried out in accordance with the 'Code of Practice for Private Tennis Court Development' and the 'Guide Specifications for Tennis Court Construction'.

APPENDIX THREE
MODIFIED AMENDMENT
SCHEDULE TO CLAUSE 52.02

1.0 Under Section 23 of the Subdivision Act 1988

Land	Easement or restriction	Requirement
16, 18, 20, 22 and 24 Leyden Avenue, Portsea, being the land contained in Certificates of Title	The covenants contained in Instruments of Transfer no. 2297215, 2319752 and 2370984.	Vary the covenants to the following extent.
(16 Leyden Avenue) Lot 1 PS. 052729 Vol. 08583 Fol. 688		Following the words:
(18 Leyden Avenue) Lot 2 PS. 052729 Vol. 08417 Fol. 425		“that she or they will not at any time hereafter build, construct, erect or cause to be built, constructed or erected on the said lot any building other than one private dwelling house with outhouses and garage and such dwelling house with outhouses and garage will cost not less than One thousand pounds”,
(20 Leyden Avenue) Lot 3 PS. 052729 Vol. 08583 Fol. 689		
(22 Leyden Avenue) Lot 4 PS. 052729 Vol. 08583 Fol. 689		Insert (<i>in respect of the land at 16, 18 and 24 Leyden Avenue</i>):
(24 Leyden Avenue) Lot 5 PS. 052729 Vol. 08344 Fol. 381		<i>Except that nothing herein shall prevent the use and development of the land contained in Certificate of Title Volume 08583 Folio 688, being Lot 1 on Plan of Subdivision 052729, Certificate of Title Volume 08417 Folio 425, being Lot 2 on Plan of Subdivision 052729, Certificate of Title Volume 08344 Folio 381, being Lot 5 on Plan of Subdivision 052729, each for one dwelling and usual outbuildings,</i>
		And insert (<i>in respect of the land at 20-22 Leyden Avenue</i>)
		And except that nothing herein shall prevent the use and development of the land contained in Certificate of Title Volume 8583 Folio 689, being lots 3 and 4 on Plan of Subdivision 52729, for the purpose of four single storey dwellings, tennis court, swimming pool and outbuildings, in accordance with a planning permit issued by Mornington Peninsula Shire Council in Application No. CP02/004.

2.0 Under Section 24A of the Subdivision Act 1988

Land	Person	Action
None specified.		

3.0 Under Section 36 of the Subdivision Act 1988

Land	Easement or right of way	Requirement
Certificate of Title Folio 687.	5249 The right of carriageway in favour of land marked A-1 on Plan of Road Closure by Peter Herbert & Associates (Vic) P/L Surveyors Reference 1839- RC over Roads Coloured Brown.	Easement is removed.
Certificate of Title Folio 687.	5249 Any easements affecting land marked E-1 on Plan of Road Closure by Peter Herbert & Associates (Vic) P/L Surveyors Reference 1839- RC over Roads Coloured Brown.	Easements are removed.
Certificate of Title Folio 456.	Vol 8502 Carriageway and drainage easements created by Instrument of Transfer B943376 over that area marked E-2 on Plan of Subdivision PS 343726M	Easements are removed.
Certificate of Title Folio 692.	Vol 8618 Covenant created by Instrument of Transfer C494513 affecting land shown as C-1 on Plan 457/156/2A by Peter Herbert & associates (Vic) P/L.	Covenant is removed.
Certificate of Title Folio 9627 Folio 456.	Volume Roads and easements.	Roads and easements are removed and extinguished.

APPENDIX FOUR

KEY DOCUMENTS

Planning Panels Victoria (1995)	<i>Report: Amendment L14 Daylesford and Glenlyon Planning Scheme</i>
Planning Panels Victoria (1995)	<i>Report: Amendment L 41 Camberwell Planning Scheme</i>
Planning Panels Victoria (1995)	<i>Report: Amendment L 161 Melbourne Planning Scheme</i>
Planning Panels Victoria (1999)	<i>Report: Amendment C5 Mornington Peninsula Planning Scheme</i>

Decisions of the Supreme Court

MA Zeltoff Pty Ltd & Anor v Stonnington City Council [1999] 3 VR 88

Decisions of the Victorian Civil and Administrative Tribunal

C Thompson v Stonnington City Council & Others [2003]

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