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*Planning and Environment Act 1987*

**BOROONDARA PLANNING SCHEME  
AMENDMENT C143  
217 AND 219 COTHAM ROAD, KEW**

**Report of a Panel Pursuant to Sections 153 and 155 of the Act**

**Mr Mark Marsden, Chair  
Mr Richard Horsfall, Member**

**13 January 2012**

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## 1. SUMMARY

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Amendment C143 to the Boroondara Planning Scheme proposes to vary three covenants applying to 217 and 219 Cotham Road, Kew to establish a Place of Assembly (museum).

Two of the covenants are 'single dwelling' covenants that were established in the early 1900s. The third covenant was established in 1982 at the instigation of some local residents to effectively prevent the expansion of the Cotham Private Hospital and applies to 217 Cotham Road.

The museum will house a collection of Australian contemporary art works owned by the Lyon family and will be made available for viewing by individual visitations and tour groups.

In addition, the Amendment proposes to introduce an Incorporated Plan into the clause 52.03 schedule. The Incorporated Plan will guide the development and use of the site.

The Amendment was exhibited in August and September 2011 and 37 submissions (plus a number of late submissions) were received. Concerns raised in submissions include:

- Insufficient parking provided on-site, particularly a lack of parking for visitors and adverse impact from overflow parking in residential streets;
- Traffic impacts in residential streets, including increased traffic congestion and safety concerns at the intersection of Florence Avenue and Cotham Road;
- The variation of the restrictive covenants;
- The non-residential use in a residential area, including inconsistency with Clause 22.04 (Discretionary Uses in Residential Areas policy) of the planning scheme and lack of need for this type of use in a residential areas;
- The location of a non-residential use outside an activity centre or existing commercial area;
- The need for this type of community use in a residential area;
- The built form of the new building; and
- Amenity impacts from noise.

In addition, a number of local residents have expressed concern that the Lyons have established the housemuseum (i.e. making the art collection available for public display) at 219 Cotham Road without a planning permit.

The Panel comprised Mark Marsden (Chair) and Richard Horsfall. A Panel hearing was held over four days in December 2011. Comprehensive submissions were made by the parties to the hearing and both planning and traffic expert witnesses were called.

The Panel concludes that the proposal will result in a net community benefit and the Amendment should be approved subject to modifications to some sections of the Incorporated Plan. In supporting the Amendment, the Panel found that:

- The Amendment is in accordance with the principles as to whether a restrictive covenant should be removed or varied by a planning scheme amendment adopted by previous Panels, particularly Amendment C46 to the Mornington Peninsula Planning Scheme;
- The use of clause 52.03 as a mechanism for the consideration of the proposal is appropriate and complies with the purpose of the clause;
- The proposal is consistent with the objectives of the Planning Scheme;
- The proposed use and development will not result in unacceptable amenity impacts to local residents;
- The proposed building form is appropriate;
- There is adequate capacity within approximately 250 metres of the subject site to accommodate the peak parking demand associated with Phase 2 and Phase 3 of the public museum; and
- All other parking and associated traffic issues are, or can be, adequately resolved.

In the Panel's view, the museum housing the Lyon's contemporary art works will be an important cultural facility for Boroondara and the broader arts and culture community and will have an acceptable impact on the amenity of local residents.

## 2. INTRODUCTION

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Amendment C143 to the Boroondara Planning Scheme was prepared by the Boroondara City Council as Planning Authority. As exhibited, the Amendment proposes to:

1. Vary each of the three restrictive covenants affecting the subject land (Covenant No 881422, Covenant No K89664 and Covenant No 747599) by inserting a new Schedule to Clause 52.03 of the Boroondara Planning Scheme to include reference to the subject land. The specifics of the proposed variations to restrictive covenants are outlined as follows:

Covenant No K89664, which applies to the land at 217 Cotham Road, currently states:

*"...the said land shall not be used or permitted to be used for any purpose other than residential use as is approved by the Mayor Councillors and Citizens of the City of Kew their successors and assigns..."*,

It is proposed to vary this with the addition of the words in bold print as follows:

*"...the said land shall not be used or permitted to be used for any purpose other than residential use **or museum** as is approved by the Mayor Councillors and Citizens of the City of Kew their successors and assigns..."*.

Covenant No 881422 also applies to the land at 217 Cotham Road, and currently states:

*"...not more than one house shall be erected on the said Lot hereby transferred and not less than the sum of One thousand pounds shall be expended in the erection of the said house nor shall such house be built of any material other than brick or concrete nor shall any such house be used for any purpose other than a dwelling house."*

It is proposed to vary this with the addition of the words in bold print as follows:

*"...not more than one house **or museum** shall be erected on the said Lot, hereby transferred and not less than the sum of One thousand pounds shall be expended in the erection of the said house nor shall such house be built of any material other than brick or concrete nor shall any such house be used for any purpose other than a dwelling house **or museum**."*

Covenant No 747599 affects the land at 219 Cotham Road and currently states:

*“not more than one house built of brick or concrete and costing not less than One thousand pounds shall be erected on the land hereby transferred nor shall such house be used for any purpose other than a dwelling house”*

It is proposed to vary this with the addition of the words in bold print as follows:

*“...not more than one house shall built of brick or concrete and costing not less than One thousand pounds shall be erected on the land hereby transferred, nor shall such house be used for any purpose other than a dwelling house **or museum.**”*

2. Insert a new Schedule to clause 52.03 to include reference to the document titled "Site specific control under clause 52.03 of the Boroondara Planning Scheme Incorporated Document Nos 217 - 219 Cotham Road, Kew, June 2011".
3. Insert a new Schedule to clause 81.01 to introduce a document titled "Site specific control under clause 52.03 of the Boroondara Planning Scheme Incorporated Document Nos 217 - 219 Cotham Road, Kew, June 2011" as an Incorporated Document under the Scheme.

The Amendment applies to land at 217 and 219 Cotham Road Kew.

The Amendment was prepared at the request of Urbis on behalf of Mr Corbett Lyon and Mrs Yeuji Lyon, owners of the subject land (the Proponent) and was authorised by the Department of Planning and Community Development (DPCD) on 1 August 2011.

The Amendment was placed on public exhibition between 18 August 2011 and 19 September 2011, with 37 opposing submissions received. The main issues raised in submissions identified by Council included:

- Insufficient parking provided on-site, particularly a lack of parking for visitors and adverse impact from overflow parking in residential streets;
- Traffic impacts in residential streets, including increased traffic congestion and safety concerns at the intersection of Florence Avenue and Cotham Road;
- The variation of the restrictive covenants;
- The non-residential use in a residential area, including inconsistency with clause 22.04 (Discretionary Uses in Residential Areas policy) of the planning scheme and lack of need for this type of use in a residential areas;
- The location of a non-residential use outside an activity centre or existing commercial area;
- The need for this type of community use in a residential area;
- The built form of the new building; and

- Amenity impacts from noise.

At its meeting of 17 October 2011, Council resolved to refer the submissions to a Panel. As a result, a Panel to consider the Amendment was appointed under delegation from the Minister for Planning on 27 October 2011 and comprised Mr Mark Marsden (Chair) and Mr Richard Horsfall.

A Directions Hearing was held in relation to the Amendment on 17 November 2011. Following the Directions Hearing, the Panel undertook an inspection of the subject site and its surrounds.

The Panel Hearing was held from Monday 13 December 2011 to Thursday 16 December 2011 at Planning Panels Victoria. Those in attendance at the Panel hearing included:

**Table 1 – Parties to the Hearing**

Submitter	Represented By
Boroondara City Council	Mr John Rantino, solicitor of Maddocks, who called: <ul style="list-style-type: none"> <li>• Ms Charmaine Dunstan, traffic engineer, of Traffix Group</li> </ul>
Mr Corbett Lyon and Mrs Yeuji Lyon	Mr Stuart Morris QC, who called: <ul style="list-style-type: none"> <li>• Mr Tim Biles, town planner, of Message Consultants; and</li> <li>• Mr John Kiriakidis, traffic engineer, of GTA Consultants</li> </ul>
Ms Romana Kristelly and Mr Marcus Pandy	
James and Diana Kimpton Win and Kevin O'Loughlin Wen Chen (Diana) Fang Fang (Brent) Sara and Karlo Testen Ruth Finlayson Ken Finlayson Alex and Meri Mayer Keith and Trudy Callinan	Mr Matthew Townsend, barrister, who called: <ul style="list-style-type: none"> <li>• Mr Rob Milner, town planner, of 10 Consulting</li> </ul> and the following local residents: <ul style="list-style-type: none"> <li>• Merrilyn Beeny</li> <li>• Maria Butler</li> <li>• James Elder</li> <li>• Carol Ellis</li> <li>• Ruth Finlayson</li> <li>• Michael Guilmartin</li> <li>• Paul Hardy</li> </ul>

<b>Submitter</b>	<b>Represented By</b>
Rodden Prichard	• John Kaminsky
Wendy Pitt	• Margaret Pitt
Ann Sawyers	• Ann Sawyers
John Kaminsky	• Joseph Scalzo
Mike and Kaye Guilmartin	
Helen Campbell	
Janice Kesterton	
Damon Cheng	
Dorothy Ferres	
William Clancy	
Diane Tymms	
Brendan and Carol Ellis	
Helen Oakes	
Paul Hardy	
Susan Hardy	
Michael and Joan Bucknell	
Bernard and Anna Lynch	
Maria and Ashley Butler	
Karen and Lois Dupe	
Merrilyn Jean Beeny	
Gertie Bornstein	
Wendy and Lance Hart	
John and Melanie Cassy	
Bev Biggs	
Kate Elder	
James Elder	
Liz Gidley	
Joe and Lina Scalzo	
Rebecca & David Wansbrough	

Submitter	Represented By
Bruce, Joanna Tess Rowley	
Pat Holdenson	
Sarah Kondogiannis	
Andrew Warhurst	
Kim Mescher	
Ann Zachariah	

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A complete list of submitters, including late submitters, is found in **Appendix B**.

In reaching its conclusions and recommendations, the Panel has read and considered the submissions and a range of other material referred to it. This includes written submissions, evidence and verbal presentations. The following chapters of this report discuss the issues raised in submission relating to the Amendment in further detail, with the Panel's conclusions and recommendation provided in Chapter 14.

### **3. BACKGROUND**

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#### **3.1 What is Proposed?**

##### **(i) The Amendment**

The purpose of the Amendment is to vary the restrictive covenants that apply to the land and to introduce a new Incorporated Document to allow the use and development of the land as a Place of Assembly (Museum).

The use and development of the Museum will occur in three phases.

##### **Phase 1**

This phase essentially seeks to regularise the use that is currently operating from the existing building at 219 Cotham Road, as a "housemuseum". This will allow the existing dwelling to be used as a private museum. The building has a gross floor area of 1220m<sup>2</sup> and a net floor area of 1097m<sup>2</sup>.

The housemuseum at 219 Cotham Road is proposed to be open for pre-booked tours between 10am and 5pm, Mondays and Tuesdays and 10am to 6.30pm on Sundays. It is also proposed to have a limited number (8 occasions per year) of events between 6.30pm and 10pm Monday to Friday and between 10am and 6.30pm on Sundays.

The pre-booked tours (Mondays, Tuesday and Sundays) will have a maximum 25 people at any one time. The special events are to be held on a maximum of eight (8) occasions per year and have a maximum of 55 people. None of these tours or events are proposed to be held at the same time. Therefore, most of the time the maximum number of people on the site will be 25 and the eight (8) times a year the maximum number of people will be 55.

During this phase there will be no staff, other than the residents of the dwelling, working at the housemuseum.

This phase does not propose any new buildings or works.

##### **Phase 2**

This phase includes the development of a new building at 217 Cotham Road. The building is two storeys with a small basement for storage and staff amenities towards the front of the site. The new building has a maximum height of 11.9m, a gross floor area of 1527m<sup>2</sup> and a net floor area of 1285m<sup>2</sup>. The building is setback 9m from the site frontage at both levels. Vehicle access is from the rear laneway with

seven (7) car spaces proposed along the rear of the site. Pedestrian access is from Cotham Road, with the main entry on the east side of the building. There is a large open courtyard/plaza in the frontage of the building with public seating, sculptures, planting and bicycle parking. The site will not be fenced and the "Lyon Museum" sign will sit above a retaining wall. This means that the front of the site is directly accessible to the public, even if they are not visiting the public museum.

There are also garden spaces proposed in rear of the building and an internal courtyard on the east. There is also a small cafe to the rear of the building. This cafe is ancillary to the museum use as patrons must pay to enter the museum before they can enter the cafe.

The new building is proposed to be used as a public museum with general admission or 'walk-in' visitation and special events.

The public museum is proposed to be open to the public between 10am and 5pm Tuesday to Sunday. The maximum number of people at any one time is 60.

It is proposed to continue operating the housemuseum for pre-booked tours and events as detailed in Phase 1, during Phase 2. During weekdays, the events at the housemuseum are held outside the times when the public museum is open to the public for walk-in. This means that the maximum number of people on the site during week days would be 85 (25 at 219 Cotham Road and 60 at 217 Cotham Road). On weekends, the only time the special events at the housemuseum coincide with the general admission (walk-in) times at 217 Cotham Road is on Sundays. This means that a maximum of 115 people (55 at 219 Cotham Road and 60 at 217 Cotham Road) would be on the site at one time. This can only occur a maximum of eight (8) times a year.

In the new building, there are also special events up to 10 occasions per year with a maximum of 120 people. These events are proposed to be held between 10am and 9pm on Monday, (excluding the afternoon clearway period on Cotham Road) or between 6.30pm and 10pm Tuesday to Sunday. These events cannot coincide with the special events held at the housemuseum.

The proposal originally included occasional events three (3) times per year with up to 250 people but this was abandoned after Council determined it would not support this aspect of the proposal.

The public museum is not open to the general public or walk-in visitation during the special and occasional events at 219 Cotham Road and not more than one event is proposed to be held at one time.

The Proponent has submitted a museum management plan for the public museum which includes details of operations for day to day use and events. The management plan indicates that there will be a director plus four (4) full time staff on a day to day basis. During events there will also be part time volunteers and interns. There will be a maximum of 12 staff on-site at any one time.

### **Phase 3**

This phase involves physically linking the two properties together via internal walkways. There are two (2) ramps at ground floor and one (1) at first floor which connect the two buildings. At this time, the residents currently living in 219 Cotham Road will move out and the whole site (two buildings) will be used as one public museum. The only internal change to the building at 219 Cotham Road is that the laundry will be converted into a storeroom. The other rooms, including bedrooms will remain and become part of the housemuseum display. The two buildings will have a gross floor area of 2759m<sup>2</sup> and a net floor area of 2392m<sup>2</sup>.

The main pedestrian access will remain from Cotham Road, in front of 217 Cotham Road. The vehicle parking currently provided in the double garage for the residents of the housemuseum will become parking for staff of the public museum. Therefore, there will be a total of nine (9) spaces available on the site.

The hours of operation for public admission (walk-in) and special and occasional events are the same as the hours in Phase 2. The maximum number of general admission patrons proposed is 75 across both sites. This is slightly (10) less than the combined maximum in Phase 2. The number of people for special events will be the same as those allowed in the new building in Phase 2 (ie – 120). As the sites will be consolidated in the final phase, there will no longer be separate special events occurring at the housemuseum. There is no more than one event allowed to be held at any one time and no general admission during events. The table below outlines the maximum number of visitors on the site at any one time.

The museum management plan indicates that the staffing will be similar to Phase 2, as there will be a director plus four (4) full time staff on a day to day basis. There will be a maximum of 15 staff on-site at any one time.

**Table 2 – Maximum number of visitors on site**

	219 Cotham Road (Housemuseum)		217 Cotham Road (New building)		217 and 219 Cotham Road (Combined site)	
	Typical	Special Events	Typical	Special events	Typical	Special events
Phase 1	25	55 (8 per year)	-	-	-	-
Phase 2	25	55 (8 per year)	60	120* (10 per year)	85	115 (8 per year) 120* (10 per year)
Phase 3	-	-			75	120* (10 per year)

\* These events cannot occur at the same time.

### 3.2 Site and surrounds

The subject sites comprise 217 and 219 Cotham Road, Kew.

No 217 Cotham Road is approximately 1358m<sup>2</sup> in area and contains a two storey dwelling located towards the rear of the site (setback approximately 32m from the street) and a tennis court in the front setback. A high brick fence is located along the Cotham Road frontage. Vehicle access to the site is available via a single width crossover on Cotham Road. There is also vehicle access to the site from the rear laneway where a garage is located on the rear boundary. There are a number of small trees along the east and north boundaries on the site. None of these trees are large enough to qualify for consideration under Council's Local Law 1F. There are approximately six (6) on street car spaces available adjacent to the site's frontage, outside of clearway times.

No 219 Cotham Road is approximately 1350m<sup>2</sup> in area and contains a large two storey building. The building is setback a minimum of 8m from Cotham Road and 3m from Florence Avenue at both levels. The building is currently used as a dwelling and a museum, known as a 'housemuseum' with limited prebooked tours on Mondays and Tuesdays. The Lyon family's collection of Australian contemporary art on display in the housemuseum is recognised as one of the outstanding collections in the country and is of national and international significance.

Vehicle access is via a double crossover on Florence Avenue with a double garage located to the rear of the dwelling setback 1m from Florence Avenue. Pedestrian access to the site is via a gate on Florence Avenue.

There are approximately seven (7) on-street car parking spaces available along the site frontage, restricted to 2 hours, 8am to 6pm Monday to Friday, on Florence Avenue.

Both sites are burdened by the restrictive covenants described above, which limit uses on the land to residential only.

Cotham Road is classified as a main road and is managed by VicRoads. There are two (2) lanes in each direction and tram tracks in the centre. The nearest tram stop is located in front of 229 Cotham Road, 45m east of the site. There is also a signalised pedestrian crossing across Cotham Road at this location. There are clearways on each side of Cotham Road in the vicinity of the site. The hours for the clearway times are 7am to 9am on the south side and 4.30pm to 6.30pm on the north side of Cotham Road.

Florence Avenue is a residential street containing a single lane plus kerb side parking in each direction. There are 2 hour parking restrictions (8am to 6pm Monday to Friday) between Cotham Road and 7A Florence Avenue on the west side of the street and between Cotham Road and 14 Florence Avenue on the east side of Florence Avenue.

The land surrounding the subject site is described as follows:

- **North:** To the north of the site is a 3m wide laneway which runs from Florence Avenue along the rear of both subject properties and 4/2C Adeney Avenue. To the north of the laneway, No 1 Florence Avenue contains a two storey brick dwelling with a garage on the north boundary. Vehicle access to the site is via a crossover adjacent to the laneway. The dwelling contains Secluded Private Open Space (SPOS) to the rear of the dwelling which has an interface with the subject site.
- **South:** On the south side of Cotham Road, opposite the subject site, the area generally contains residential uses. There are a range of single and double storey dwellings and some unit development and a medical centre at 260 Cotham Road. The buildings are generally constructed of brick and maintain a residential appearance with landscaped front setbacks and high front fences.
- **East:** To the east side of Florence Avenue, No 221-229 Cotham Road contains a large single storey building comprising six (6) residential units. The site is covered by an individual Heritage Overlay and the property is known as the Tanfield Lee Flats. Vehicle access to the site is via Florence Avenue with a long concrete driveway in the frontage, which is concealed by a high brick

fence. Pedestrian access is via Cotham Road, and a tram stop is located in front of the site. The high brick fence continues along this frontage.

- **West:** Abutting the site to the west is Cotham Private Hospital which is located on the corner of Adeney Avenue and Cotham Road. The building is three storey in height with two levels located above an undercroft car park. Vehicle and pedestrian access is via Adeney Avenue. The building is largely unarticulated with sheer rendered walls and some windows to both Cotham Road and Adeney Avenue.

The Panel notes that Mr Biles, who was called to give planning evidence on behalf of the Proponent, included a plan in his expert witness statement that identified the location of non-residential uses in the wider area.

### **3.3 Planning framework**

#### **(i) State and Local Policy**

The relevant SPPF clauses include:

#### **Clause 10 Operation of the State Planning Policy Framework**

This goal of this policy is:

*The State Planning Policy Framework seeks to ensure that the objectives of planning in Victoria (as set out in Section 4 of the Planning and Environment Act 1987) are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.*

#### **Clause 15.01 Urban Environment**

The objectives of this clause are:

- *To create urban environments that are safe, functional and provide good quality environments with a sense of place and cultural identity.*
- *To achieve architectural and urban design outcomes that contribute positively to local urban character and enhance the public realm while minimising detrimental impact on neighbouring properties.*

Under this clause the Safer Design Guidelines for Victoria (Crime Prevention Victoria and Department of Sustainability and Environment, 2005) and the Urban Design Charter for Victoria (Department of Planning and Community Development 2009) must be considered.

## Safer Design Guidelines for Victoria

The following guidelines relevant to this application include the following:

### *Urban Structure*

- *To ensure a well integrated urban structure that increases activity by maximising connections between neighbourhoods.*
- *To develop urban areas with 'walkable neighbourhoods' and active neighbourhood centres.*
- *To encourage active neighbourhoods where people are present during most hours of the day.*
- *To design neighbourhoods that maximise visibility and surveillance of public space to enhance real and perceived safety.*
- *To provide the highest level of natural surveillance and 'eyes on the street' by encouraging walking and cycling.*
- *To provide for natural surveillance of streets by ensuring future buildings have windows facing streets and public spaces.*
- *To maintain natural surveillance of streets and public open space while clearly defining private and public property.*

### *Building Design*

- *To design buildings that contribute to the natural surveillance of adjacent streets and public space.*
- *To encourage active uses along streets to increase the 'eyes on the street'.*
- *To design entrances which provide easy access to all users, afford visibility to and from the street, and minimise the potential for hiding spots.*
- *To maintain visibility and natural surveillance of the public environment and private entrances.*
- *To minimise the occurrence of graffiti on walls and fences to signal care and attention and support people's feeling of safety.*
- *To minimise the potential for walls and fences to be used to gain access to private space.*

### *Car Park Areas*

- *To ensure that pedestrian amenity and safety in the street is not degraded by car park siting and design.*
- *To design all car parking areas to maximise natural surveillance and pedestrian visibility.*

- *To ensure pedestrian access to car park areas from the street is convenient and assists way-finding by maximising visibility.*

#### *Public Facilities*

- *To provide cycle parking in highly visible and accessible locations to enhance user safety.*

#### *Signage*

- *To locate signage where it will assist in way-finding to ensure people feel confident and safe in a public place.*
- *To ensure signage contains current and relevant information to encourage use, particularly the use of public facilities after dark.*
- *To design signage that is easy to see, read and understand. This will assist people to interpret their surroundings and help their way-finding.*

### **Urban Design Charter for Victoria**

*Urban design focuses on the public environment, which includes all places, regardless of ownership, that are open, available and inviting to public use. The intention of the charter is to implement the following twelve public environment objectives to substantially improve the liveability of Victoria's urban settlements:*

- *Organise places so their parts relate well to each other (STRUCTURE).*
- *Provide ease, safety and choice of access for all people (ACCESSIBILITY).*
- *Help people to understand how places work and to find their way around (LEGIBILITY).*
- *Stimulate activity and a sense of vitality in public places (ANIMATION).*
- *Support the intended uses of spaces while also allowing for their adaptability (FIT & FUNCTION).*
- *Integrate complementary activities to promote synergies between them (COMPLEMENTARY MIXED USES).*
- *Recognise and enhance the qualities that give places a valued identity (SENSE OF PLACE).*
- *Balance order and diversity in the interests of appreciating both (CONSISTENCY & VARIETY).*
- *Maintain a sense of place and time by embracing change yet respecting heritage values (CONTINUITY & CHANGE).*
- *Design spaces that minimise risks of personal harm and support safety (SAFETY).*

- *Create places where all people are free to encounter each other as equals (INCLUSIVENESS & INTERACTION).*
- *Create spaces that engage the senses and delight the mind (SENSORY PLEASURE).*

#### **Clause 17.01-1 - Business**

The objective is:

- *To encourage development which meet the communities' needs for retail, entertainment, office and other commercial services and provides net community benefit in relation to accessibility, efficient infrastructure use and the aggregation and sustainability of commercial facilities.*

#### **Clause 17.01-2 Out of centre development for Metropolitan Melbourne**

The objective is:

*To manage out of centre development in metropolitan Melbourne.*

The strategies are:

- *Ensure that proposals or expansion of single use retail, commercial and recreational facilities outside activity centres are discouraged by giving preference to locations in or on the border of an activity centre.*
- *Ensure that out-of-centre proposals are only considered where the proposed use or development is of net benefit to the community in the region served by the proposal.*
- *Discourage large sports and entertainment facilities of metropolitan, State or national significance in out-of-centre locations unless they are on the Principal Public Transport Network and in locations that are highly accessible to their catchment of users.*

#### **Clause 18.01-1 - Land Use and Transport Planning**

One strategy is:

*Plan urban development to make jobs and community services more accessible by:*

- *Ensuring access is provided to developments in accordance with forecast demand, taking advantage of all available modes of transport and to minimise adverse impacts on existing transport networks and the amenity of surrounding areas.*

### **Clause 19.02-3 - Cultural Facilities**

The objectives is:

*To develop a strong cultural environment and increase access to arts, recreation and other cultural facilities.*

The strategies are:

- *Encourage a wider range of arts, cultural and entertainment facilities including cinemas, restaurants, nightclubs and live theatres, at Principal and Major Activity Centres.*
- *Reinforce the existing major precincts for arts, sports and major events of Statewide appeal and establishing new facilities at locations well served by public transport.*

From a local perspective, the relevant Clauses in the MSS and the LPP include:

### **Clause 21.05-1 – Heritage, Landscapes and Urban Character**

This clause identifies that:

*The changing values and housing needs of our community over time have resulted in successive periods of development and re-development. This has resulted in residential areas displaying a range of lot sizes, from the very large to the quite small, and with homes ranging from the quite grand to the more modest.*

### **Clause 21.07-1 - Residential Land Use**

This overview identifies that:

*There has also been a trend for many non-residential uses (such as Medical Centres) to locate or “creep” into our residential areas. Some existing non-residential uses (such as schools) are considered integral to the residential area, providing a service to local residents, and sometimes broader population, but their growth has the potential to create traffic and other amenity problems and to displace housing.*

### **Clause 21.08-3 - Commercial Sector – Objectives, strategies and implementation**

The objectives of this clause, relevant to this application include:

- *To achieve a 100% self containment rate for employment in the City. (The ratio of employed residents within the City to the number of jobs provided in it).*
- *To encourage office and other commercial development within the City.*

- *To ensure that Council is a pro-active business partner, encouraging and facilitating appropriate investment opportunities within the City.*
- *To ensure that commercial development is compatible with the commercial precinct within which it is located, and is sensitive to nearby residential areas.*

### **Clause 21.12 - Movement**

This clause identifies that:

*Boroondara is fortunate in that it generally has very good coverage in terms of access to the public transport network, particularly in an east/west direction. This network, which is able to accommodate both local and inter-suburb trips, comprises trains, trams and buses. The network provides most residents with good access to one or more types of public transport; however, the north/south system is not as comprehensive as the east/west links. Furthermore, information on the available services, especially its connectivity, is poor.*

### **Clause 22.01 - Advertising Signs Policy**

The objectives of this policy are:

- *To encourage the form and location of signs to respect the character of the buildings on which they are attached and the character of the street or area.*
- *To control the number of signs to reflect the nature and intensity of the land use of the area.*

The following performance standards apply to signs on other commercial and community uses:

- *One identification sign per street frontage.*
- *Signs are located within the boundary of the site, are single faced and are parallel or at right angles to the street.*
- *Freestanding signs not exceeding a maximum height of 1.5 metres (measured above the ground level to the top of the sign).*
- *Total sign area not exceeding 0.6 square metres.*

### **Clause 22.03 – Car Parking Policy**

The objectives of the policy include:

- *To ensure that each change of use or new development provides sufficient parking to meet its own demands in appropriate locations.*
- *To maintain the amenity of residential areas by minimising overspill parking from adjacent non-residential uses and centres.*

- *To avoid parking and traffic difficulties in the development and its surrounds.*
- *To ensure fair and equitable treatment of all land owners and users.*

#### **Clause 22.04 - Discretionary Uses in Residential Areas Policy**

This policy is applicable to all Section 2 uses in a Residential 1 Zone. The objective of this policy is to ensure the sensitive integration of discretionary uses into their surrounding areas.

*In accordance with Clause 22.04, it is policy that:*

- *The discretionary use provides a service that responds to local need;*
- *The discretionary use minimises its impacts on existing residential areas;*
- *The creation of clusters of non-residential activity should be avoided;*
- *New buildings and alterations to existing buildings complement the appearance of nearby dwellings;*
- *Sites previously used for non-residential purposes are favoured; and*
- *The demolition of existing dwellings is minimised.*

Place of Assembly falls under the Function Centre category of this policy. Function Centre uses are:

*Defined as large attractors of people at one time, usually regional catchment, usually large purpose built buildings, includes or predominantly evening and weekend hours of operation.*

The following is policy for Function Centre Uses:

- *Intrusion into residential areas be minimised.*
- *Disruption to nearby residences by traffic movement and congestion be minimised.*
- *Buildings are sited to minimise the effect of the activity generated by the site upon adjoining residential properties.*
- *Nearby residential properties not be disturbed by the operation of the activity at night.*
- *Nearby residential properties not be subjected to unreasonable levels of noise.*
- *Rubbish collection does not unduly disturb residential amenity.*
- *Sites be landscaped to minimise the effect of the development upon adjoining and nearby residential properties.*
- *The visual appearance of the site be enhanced through landscaping.*

- *Landscaping areas be provided along the frontage and sideage/s, and for new buildings along boundaries abutting residential properties*
- *Safety of access for patrons be ensured.*

Clause 22.04-4 provides:

*The following performance standards describe one way the proposal may satisfy the relevant policy objectives and statements outlined above. An alternative method may be used if it can be demonstrated to the satisfaction of the responsible authority that the alternative will meet the policy objectives and statements. Similarly, the responsible authority may also diverge from the performance standard if it believes that compliance with the standard will not meet the policy objectives or statements.*

Performance standards for function centres are:

*Preferably adjacent to a commercial centre when activities will primarily be out of business hours, and with access to a Road Zone or collector road.*

*Possible spread of hours 8 am - 11 pm Sunday - Thursday, 8am – midnight Friday and Saturday.*

*Main access point preferably from a Road Zone or collector road, or predominantly non-residential road.*

*Entry and exit points located to avoid car headlight glare spillage onto residential properties.*

*New buildings, refuse and car parking areas located at least 3m from residential property boundaries.*

*Where relevant, noise attenuation barriers are to be constructed along boundaries abutting residential properties.*

*Rubbish collection to occur between 7am and 8pm Monday to Friday.*

*Set down and pick up areas to be provided on site.*

### **Clause 22.07 - Neighbourhood Character Policy**

This policy is applicable to all land within a Residential 1 Zone.

The objective of this policy is:

*To encourage design solutions which enhance and respond positively and creatively to the existing neighbourhood character of residential areas in the City.*

## City of Boroondara Residential Urban Character Study

The subject site falls within Neighbourhood Character Area number 30. This area includes land on the north of Cotham Road between 217 Cotham Road and Normanby Road and the residential area to the north of Cotham Road up to Segtoun Street. The Neighbourhood character statement notes:

*This area is primarily defined by its land form which is an inward facing valley formation, focussed on a drainage line which runs north-west towards Victoria Park.*

*The subdivision and road pattern has been influenced by this land form.*

*The area contains housing from inter-war construction, newer detached houses and some low scale multi-dwelling developments.*

*Normanby and Park Hill Roads, and to a lesser extent Adeney Avenue, carry a reasonable amount of through traffic.*

*Neighbourhood character will be discussed in the assessment section.*

## Single Dwelling Covenant Policy - 1999

This policy was adopted by Council on 15 June 1999. The following lists the strategy objectives of the policy:

*The purposed of this policy is to recognise and reinforce the relevance and significance single dwelling covenants have in relation to the ongoing management of land development in this City.*

*Council acknowledges the role of single dwelling covenants in shaping the urban environment of neighbourhoods, and considers that the issue of the covenant is a major issue when considering multi-dwelling application on land affected by a covenant. Council recognises the major role that single dwelling covenants have played and continue to play in establishing and maintaining the character of any area.*

In assessing planning permit and planning scheme amendment applications, the following objectives apply:

### *Strategic Objective 1*

- 1. the single dwelling covenant is 'dead wood' in nature, and*
- 2. no beneficiary to that single dwelling covenant reasonably objects (refer section 60 (2) and (5) of the Planning and Environment Act 1987), and*
- 3. the variation or removal of the single dwelling covenant would be consistent with broader strategic planning objectives of Council as set out in the Municipal Strategic Statement.*

### *Strategic Objective 2*

*In the event that an application is made for a multi-dwelling proposal on land affected by a single dwelling covenant, Council strongly advises applicants to simultaneously, either as part of the same application, or via a separate application, apply to vary or remove the said covenant so that all matters relevant to the proposal and the covenant are considered together.*

More recently Council officers have prepared an update of this policy which reflects the current legislation for covenants. The strategic objectives have been updated as follows:

### *Strategic Objective 1*

- a) The single dwelling covenant is 'dead wood' in nature;*
- b) No beneficiary to that single dwelling covenant reasonably objects;*
- c) No beneficiary is likely to suffer any detriment, including perceived detriment;*
- d) For those covenants created after 25 June 1991, there will be no financial loss, loss of amenity, loss arising from change of character to the area or any other material detriment; and*
- e) The variation or removal of the single dwelling covenant would be consistent with broader strategic planning objectives of Council as set out in the Municipal Strategic Statement.*

### *Strategic Objective 2*

*In the event that an application is made for a multi-dwelling proposal on land affected by a single dwelling covenant, Council strongly advises applicants to simultaneously, either as part of the same application, or via a separate application, apply to vary or remove the said covenant so that all matters relevant to the proposal and the covenant are considered together.*

*It is policy that where applications for multi-dwellings are on land affected by a single dwelling covenant, the contribution to the character of the area made by the existence of the covenant be considered expressly in conjunction with the considerations under Standard B1 - Neighbourhood Character - of ResCode.*

*It is noted that Council will require the advertising of proposals to remove or vary single dwelling covenants by certified mail.*

## **(ii) Zones**

The subject site is located within a Residential 1 Zone.

The purposes of the Residential 1 Zone are:

- *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.*

### **(iii) Overlays**

There are no overlay controls on the subject site.

### **(iv) Particular provisions**

Clause 52.02 - Easements, restrictions and reserves

The purpose of this clause is to enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

The decision guidelines include that in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.

Clause 52.03 - Specific sites and exclusions

The purpose of this clause is:

- *To recognise specific controls designed to achieve a particular land use and development outcome existing on the approval date.*
- *To provide in extraordinary circumstances specific controls designed to achieve a particular land use and development outcome.*

Land identified in the schedule to this clause may be used or developed in accordance with the specific controls contained in the incorporated document corresponding to that land.

The incorporated documents referred to in the schedule to this clause act similar to a planning permit and are enforceable under the *Planning and Environment Act 1987* (P&E Act).

This proposal seeks to include a new incorporated document into this clause.

### **Clause 52.05 - Advertising signs**

The site is located in Category 3 - High Amenity Areas. The purpose of advertising controls in Category 3 - High Amenity Area is to ensure that signs in high-amenity areas are orderly, of good design and do not detract from the appearance of the building on which a sign is displayed or the surrounding area.

A permit is required to display business identification signage of any size in this category.

### **Clause 52.06 – Car Parking**

Council officer's report commented that pursuant to Clause 52.06-5 a Place of Assembly requires 0.3 car spaces to each seat or to each square metres of net floor area, whichever is greater. The existing housemuseum at 219 has a net floor area of 979m<sup>2</sup> and the proposed public museum has a net floor area of 1285m<sup>2</sup>. Therefore, the total net floor area is 2264m<sup>2</sup>. This has a requirement of 679 spaces.

### **Clause 52.07 - Loading and unloading of vehicles**

The purpose of Clause 52.07 is:

*To set aside land for the loading and unloading commercial vehicles to prevent the loss of amenity and adverse affect on traffic flow and road safety.*

### **Clause 52.29 - Land adjacent to a road in a Road Zone**

The purpose of Clause 52.29 is to:

*Ensure appropriate access to identified roads.*

Cotham Road is a Category 1 Road (RDZ1).

There is no vehicle access proposed from Cotham Road. The existing crossover adjacent to 217 Cotham Road is proposed to be removed.

### **Clause 52.34 - Bicycle Parking**

The purposes of this clause are:

- *To encourage cycling as a mode of transport*
- *To provide secure, accessible and convenient bicycle parking spaces and associated shower and change facilities*

The Council officer's report commented that clause 52.34 of the Boroondara Planning Scheme requires a place of assembly to provide 1 bicycle space to each 1500m<sup>2</sup> of net

floor area for employees and 2 for visitors plus 1 to each 1500m<sup>2</sup> of net floor area. One change room is also required for a place of assembly use.

### **Clause 52.36 - Integrated public transport**

The purposes of this clause are:

- *To ensure development supports public transport usage.*
- *To ensure that easily accessible public transport networks, which are appropriate to the scale of the development, and high quality public transport infrastructure are provided as part of new development.*
- *To ensure that development incorporates safe, attractive and convenient pedestrian access to public transport stops.*
- *To ensure that development does not adversely affect the efficient, equitable and accessible operation of public transport.*

#### **(v) Other strategies**

- Boroondara Public Art Strategy 2010-2015
- Arts and Cultural Strategy 2008-2013

## 4. KEY ISSUES

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The submissions to the Amendment and the evidence presented raised a number of issues for resolution. The Panel has summarised these as follows:

- What is the scope of the existing restrictive covenants?
- Is it appropriate to vary the covenants by a planning scheme amendment?
- What is the criteria for varying a restrictive covenant under a planning scheme amendment?
- Does the proposal meet the requirements of Clause 52.03 regarding 'extraordinary' circumstances?
- Is the proposal consistent with the objectives of the Planning Scheme?
- Will the Place of Assembly (museum) result in unacceptable amenity impacts?
- Is the built form acceptable?
- Are the traffic and car parking impacts acceptable?
- Will the proposal result in a net community benefit?
- The Incorporated Document.

## 5. WHAT IS THE SCOPE OF THE EXISTING RESTRICTIVE COVENANTS?

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### 5.1 Covenant No K89664

Covenant No K89664 was created in August 1982 and applies to the land at 217 Cotham Road. It currently states:

*"...the said land shall not be used or permitted to be used for any purpose other than residential use as is approved by the Mayor Councillors and Citizens of the City of Kew their successors and assigns..."*,

It is proposed to vary this with the addition of the words in bold print as follows:

*"...the said land shall not be used or permitted to be used for any purpose other than residential use **or museum** as is approved by the Mayor Councillors and Citizens of the City of Kew their successors and assigns..."*.

Four properties are the beneficiaries of this covenant namely 219 Cotham Road, 1 Florence Avenue, 2 Adeney Avenue and 265 Cotham Road.

### 5.2 Covenant No 881422

Covenant No 881422 was created in March 1919 and also applies to the land at 217 Cotham Road. It currently states:

*"...not more than one house shall be erected on the said Lot hereby transferred and not less than the sum of One thousand pounds shall be expended in the erection of the said house nor shall such house be built of any material other than brick or concrete nor shall any such house be used for any purpose other than a dwelling house."*

It is proposed to vary this with the addition of the words in bold print as follows:

*"...not more than one house **or museum**<sup>1</sup> shall be erected on the said Lot, hereby transferred and not less than the sum of One thousand pounds shall be expended in the erection of the said house nor shall such house be built of any material other than brick or concrete nor shall any such house be used for any purpose other than a dwelling house **or museum.**"*

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<sup>1</sup> These additional words were requested by Mr Morris on the last day of the hearing.



### 5.3 Covenant No 747599

Covenant No 747599 was created in May 1914 and affects the land at 219 Cotham Road. It currently states:

*"... not more than one house built of brick or concrete and costing not less than One thousand pounds shall be erected on the land hereby transferred nor shall such house be used for any purpose other than a dwelling house"*

It is proposed to vary this covenant with the addition of the words in bold print as follows:

*"...not more than one house shall built of brick or concrete and costing not less than One thousand pounds shall be erected on the land hereby transferred, nor shall such house be used for any purpose other than a dwelling house **or museum.**"*

A large number of properties in Adeney Avenue and Florence Avenue are the beneficiaries of this covenant. A map showing the properties is set out in **Figure 2**.

**Figure 2** Properties benefiting from Covenant 747559



## 5.4 Impact of the Covenants on the proposal

The submitters' case is that the covenants operate to:

- Prohibit the operation of the housemuseum as a gallery for public tours and functions;
- Prohibits the construction and use of the proposed public gallery on 217 Cotham Road; and
- Prohibits the integration of 219 Cotham Road into the public gallery in Phase 3.

Accordingly, the local residents made strong submissions that it would be unreasonable for the Panel to recommend a variation to the covenants. They contended that the single dwelling covenants have been a place for a long period of time; the relatively recent 1982 covenant applying to 217 Cotham Road was instigated by local residents to prevent the intrusion of commercial uses in a residential area; and many of the residents have purchased their properties in full knowledge of the role the covenants play in protecting their amenity.

## **6. WHAT IS THE CRITERIA FOR VARYING A RESTRICTIVE COVENANT UNDER A PLANNING SCHEME AMENDMENT?**

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### **6.1 What is the Issue?**

The key issue to be resolved is what tests or principles should be applied in considering whether a restrictive covenant should be varied or removed by a planning scheme amendment.

### **6.2 Submissions and Evidence**

The submissions of the parties did not disagree on the general principles to be applied in considering whether a restrictive covenant should be varied or removed by a planning scheme amendment.

On behalf of Council, Mr Rantino took the Panel through a series of Panel reports where the enunciation of the principles had developed from C23 Stonnington (Interim Report)<sup>2</sup>, C46 Mornington Peninsula<sup>3</sup>, C72 Manningham<sup>4</sup> and C137 Mornington Peninsula<sup>5</sup> and noted that the following passage in C46<sup>6</sup> has been relied on by other Panels:

*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.*

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<sup>2</sup> 29 March 2004

<sup>3</sup> April 2004

<sup>4</sup> 9 September 2008

<sup>5</sup> 21 June 2011

<sup>6</sup> At p.25

*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 addition, Mr Morris submitted that:

- The principles are not "tests" in the sense of preconditions where failure to meet one disqualifies the application, but rather they are general principles to be applied in assessing whether the variation or removal meets the objectives of planning in Victoria as set out in section 4(1) of the P&E Act and achieves a net community benefit. He agreed with Mr Rantino as to the applicable principles and the passage cited by him. However, he considered the two additional matters considered by the Panel in C137 Mornington Peninsula at section 2.2.2 were not relevant.<sup>7</sup>
- The second principle was in effect procedural by virtue of requirement of section 19(1)(ca) of the P&E Act requiring notice of an amendment providing for the removal or variation of a covenant to be given to the owners and occupiers of land benefiting from it.
- The Supreme Court decision in *M A Zeltoff Pty Ltd v Stonnington City Council*<sup>8</sup> is authority for the proposition that the applicable principles for the removal (or variation) of covenants by a planning scheme amendment under section 6(2)(g) of the P&E Act are significantly different from those applicable to those applicable to the removal or variation of a covenant by planning permit, and in particular were not subject to the constraints under Part 4 and sections 60(2) and 60(5) to take steps for the protection of the interests of the beneficiaries of the covenant.
- The argument that the private property rights given by a restrictive covenant have a special status is not relevant. He argued that the P&E Act and the planning scheme subject the private property rights of landowners to the restrictions of the planning scheme, and a covenant is no different except that, in contrast to the rights of a landowner to use his own land, a covenant gives a right to one landowner to restrict the rights of the owner of other land to use or develop his or her land.
- The covenant could not have been removed or varied by a planning permit application. In Mr Morris's view, the restrictions of section 60(5) of the P&E Act would have applied to defeat the application. He submitted that a removal or variation of a covenant by this mechanism is only possible if there were no

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<sup>7</sup> These two matters whether the planning scheme provides a suitable framework for future planning decisions relating to the site and whether the removal of the restrictive covenant would lead to unacceptable or intensification of commercial uses.

<sup>8</sup> Balmford J, [1999] 3 VR 88; [1999] VSC 270 (5 August 1999) especially at [26] and [29].

objections by any beneficiary or it is a 'dead wood' covenant. Likewise, he submitted that an application to the Supreme Court under section 84 of the *Property Law Act 1958*, would not succeed because of the difficulty of meeting the complex requirements of that provision.

Mr Townsend submitted the Panel should follow the principles adopted by the Panel in C137 Mornington Peninsula which adopted the passage from the C46 Mornington Peninsula Panel Report cited above but also said:

*2.2.2 Discussion*

*The Panel considers that the C46 Mornington Peninsula Panel expresses the appropriate test to be applied. However, in addition to the tests identified above, we agree with Mr Dickson that the adequacy of the decision making framework under the planning scheme in meeting the particular circumstances applicable to the land in question is also a relevant consideration. Thus, in addition to consideration of whether a proposal that complies with the planning scheme will be facilitated (the third test), we consider the following considerations should also be addressed.*

- Does the planning scheme provide a suitable framework for future planning decisions relating to the Site or are additional limitations warranted?*
- Will the removal of the restrictive covenant lead to unacceptable expansion or intensification of commercial uses?"*

Mr Townsend submitted the second dot point was particularly significant given the earlier decisions of the Town Planning Appeals Tribunal<sup>9</sup> and the Planning Appeals Board<sup>10</sup> that non-residential uses in the locality were already past the point of saturation. He suggested the term 'interests' in the context of clause 52.02 might be broader than the mere identification of those interests, and that the phrase 'to consider' implies a more thoughtful and contemplative process that enquires into the nature of the covenants and their usefulness and value. He referred to the evidence of the lay submitters that many purchased in the area on the understanding that the covenants would protect their residential amenity.

Mr Milner's evidence did not address this issue. Rather, it concentrated on the net community benefit and the detriment to the beneficiaries of the covenant. However, Mr Milner did assume the provisions of section 60(5) of the P&E Act would apply and expressed the opinion that these provisions would have prevented the variation being sought here.

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<sup>9</sup> *Cotham Properties Pty Ltd v City of Kew* (Appeal No X77/28) [1976-7]7 VPAD 353 (25 October 1977)

<sup>10</sup> *Nella Investments Pty Ltd v City of Kew* (Appeal No P81/60 (23 December 1981)

### 6.3 Discussion

The Panel considers that the C46 Mornington Peninsula Panel Report identifies the appropriate principles to be applied in considering the variation of the covenants by this Amendment.

The Panel agrees with Mr Morris that the property rights conferred by the covenants do not have any special status by virtue of them being conferred by a restrictive covenant, but rather that the interests of the beneficiaries are considered according to the general principles of how the interests of individual persons are considered under the planning scheme in assessing net community benefit and the benefits and disbenefits of the proposal. In this case, the benefits and disbenefits would include the benefit of a significant art collection being made available to the public and disbenefits would include the impacts of on-street car parking, increased traffic, noise from patrons and like amenity impacts.

The Panel considers that the second additional matter referred to in the C137 Mornington Peninsula Panel Report should be considered in the general context of the interests of the affected parties and net community benefit and comments that that the two matters only elaborate the principles adopted in C46 in response to particular submissions in C137.

The Panel will consider Mr Townsend's submissions as to the potential for the intensification of the proposed use and of other non-residential uses in the area in the context of interests of affected parties and net community benefit. The Panel agrees with Mr Townsend that the consideration of the interests of the submitters must be careful, balanced and thoughtful.

Finally, the Panel does not consider clause 52.02 of the Planning Scheme is relevant because this proposal does not involve an application for permit made under that clause.

### 6.4 Findings

The Panel finds that:

- **The principles to be considered in whether a restrictive covenant should be removed or varied by a planning scheme amendment are those enunciated by the Panel report in Amendment C46 to the Mornington Peninsula Planning Scheme.**

## **7. DOES THE PROPOSAL MEET THE REQUIREMENTS OF CLAUSE 52.03 REGARDING 'EXTRAORDINARY' CIRCUMSTANCES?**

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### **7.1 What is the Issue?**

The key issue to be resolved is whether the proposal meets the purpose of clause 52.03 (Specific sites and exclusions), which states:

*To provide in extraordinary circumstances specific controls designed to achieve a particular land use or development.*

### **7.2 Submissions and Evidence**

Mr Townsend expressed surprise at and criticised Council's choice of this clause as the mechanism for the proposal. He asserted that Mr Rantino was unable to indicate any instance where the Council had used it before. Likewise, he said Mr Biles gave it no consideration and stated (at paragraph 113 of his written submission) that it seems both Council and Mr Biles were willing to essentially sidestep the proper operation of the planning scheme on the basis that if they were to remain inside it the proposal would be rejected.

Mr Townsend relied on Mr Milner's evidence that this proposal does not represent any extraordinary or exceptional circumstance that warrants putting aside the established strategic and statutory planning framework.

Essentially he submitted that the choice of this mechanism combined with the Incorporated Plan technique rather than a section 96A combined planning scheme amendment and permit process would be the appropriate approach, especially (as will be discussed below) the Incorporated Plan technique will deprive the residents of remedies under section 87 of the P&E Act. His submission involved the proposition that because the Proponent's objectives could be achieved by another means it was inappropriate to use this clause and not extraordinary to do so.

Mr Milner asked the question "are the circumstances extraordinary?" and answered it as follows:

*It is my opinion that an extraordinary circumstance is one so out of the ordinary that it had not been conceived of and cannot be accommodated within the planning framework; something that is strongly supported by the objectives of planning in Victoria, however cannot be accommodated within the standard framework.*

*The proposed use and development does not present any extraordinary circumstances that warrant the use of Clause 52.03 – the proposed use and development can be approved under the existing provisions of the Boroondara Planning Scheme.*

*While the offer to provide public access to a significant private art collection is commendable, it cannot be considered to be extraordinary, nor is the location of an Exhibition Centre within a Residential 1 Zone so unusual it cannot be considered under the existing planning framework.*

He referred to the Panel Report in Amendment C62 to Greater Dandenong Planning Scheme where that Panel found the circumstances for a proposal for a Go-kart complex were not extraordinary for the purposes of clause 52.03 and that neither the Council nor Proponent addressed in detail the specifics of the extraordinary nature of the proposal. That Panel applied the principles adopted by the Panel in Amendment C28 to the Melbourne Planning Scheme. In both Panel reports, the principles used were called "tests".

Mr Milner acknowledged that the clause had been amended with the approval of Amendment VC37 on 19 January 2006 to delete the purposes that the relevant policy issue must be a major one and whether the outcome is necessary to achieve or develop the planning objectives of Victoria.

Mr Rantino's first proposition was that Council failed to understand how and why Panels have converted the purpose of a control into a "test". He submitted that while it is a legitimate question to ask whether a proposal is consistent with or advances the purposes of a control, it never imparts some jurisdictional test, and there is no reason why clause 52.03 should be any different.

He warned that care should be taken not to elevate the word "extraordinary" beyond its intended meaning and referred to the Oxford Dictionary meanings as:

1. *out of the usual course; (of official etc.) additional, specially employed (ENVOY extraordinary).*
2. *exceptional, surprising, unusually great.*
3. *outside the usual order.*

He submitted that the dictionary meaning recognises that in some senses the word can mean *exceptional surprising, unusually great*. It is also used in the sense of *out of the usual course, additional, specifically employed*".

The Macquarie Dictionary definition is similar:

*Extraordinary*

1. *beyond what is ordinary; out of the regular or established order: extraordinary power or expenses.*
2. *exceptional in character, amount, extent, degree, etc.; unusual, remarkable, extraordinary weather, weight, speed, and extraordinary person or book.*
3. *(usually used only after nouns) (of officials) etc.) outside of, additional to, or ranking below an ordinary one: a professor extraordinary.*

He submitted clause 52.03 is part of the planning scheme framework, and that a Proponent can hardly be criticised for using a provision which the scheme makes available for use. He also said it had been used in many Ministerial amendments in circumstances that could not be described as exceptional.

Mr Morris supported Mr Rantino's submission on the characterisation of the purpose of clause 52.03 as a purpose rather than a test. He said it is only a guideline and not a *test* in the sense that the purpose must be strictly complied with before the clause can lawfully be applied.

He elaborated on the history of the clause and the deletion of the two additional provisions in the Purpose referred to in the Melbourne C28 Panel report.

He submitted that while in Melbourne C28 the Panel applied both a higher and lower levels of meaning of the word, in the context of the clause it means *out of the ordinary*, as the purpose of the clause is to deal with cases where the ordinary provisions of the planning scheme are not adequate and reflected the pre-VPP practice of inserting permits within the scheme.

He submitted this proposal is exceptional and out of the ordinary for the following reasons:

- The uses of 219 Cotham Road as a housemuseum and of 217 Cotham Road as a public museum are out of the ordinary because of their unusual and public character;
- The phased nature of the development over a considerable period of time (completed only when Mr and Mrs Lyon decide to cease living at 219 Cotham Road as their home) is unusual and out of the ordinary;
- The project is exceptional as it involves a private endowment for the public benefit of a considerable scale and significance. Mr Morris relied on Mr Lyon's evidence of the very large value of the gifts of land, buildings, art collection and investments to fund the ongoing operation of the proposal and also on the

evidence of Mr Jason Smith of the Heide Museum of Art and Ms Maudi Palmer AO as to the significance of the Lyon collection; and

- The proposal is out of the ordinary because it needs not only planning permission but also variation of the covenants which can only be successfully achieved by a planning scheme amendment.

### 7.3 Discussion

The Panel considers that the purpose of clause 52.03 is not a test in the sense of it having to be strictly complied with before the clause's mechanism can be used, but is a guideline or purpose to be considered in assessing whether the proposal should be approved under the planning scheme.

The Panel agrees with Mr Rantino and Mr Morris that the word 'extraordinary' should be interpreted as out of the ordinary in accordance with the dictionary definitions and not be given an elevated or restricted meaning relating to amount or scale. Words used in the planning scheme should, except where defined, be given their ordinary meaning in English usage. The Panel acknowledges that a word may have a number of meanings or shades or degrees of meaning. None should be exclusive unless the context of the planning scheme or the Act demands otherwise.

The Panel is of the opinion that the proposal is exceptional for the reasons identified by Mr Morris and Mr Rantino, not only in the procedural sense but also because of the nature of the proposal.

The Panel does not agree with Mr Milner that a proposal can be exceptional only if the mechanism of clause 52.03 is the only mechanism available to approve the proposal.

The Panel's comments on this issue do not affect its view that in the consideration of the proposal and whether or not it will have a net community benefit, full and careful consideration should be given to the evidence and submissions of the residents as to their amenity and interests.

The Panel does not agree that the use of clause 52.03 by the Proponent is outside the operation of the Scheme or is unlawful and notes that it is a legitimate process available to any party to pursue.

### 7.4 Findings

The Panel concludes that:

- **The use of clause 52.03 as a mechanism for the consideration of the proposal is appropriate and complies with the purpose of the clause.**

## **8. IS THE PROPOSAL CONSISTENT WITH THE OBJECTIVES OF THE PLANNING SCHEME?**

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### **8.1 What is the Issue?**

As stated in Chapter 6, one of the principles to be considered in varying a restrictive covenant by a planning scheme amendment is whether the proposal is consistent with the objectives of the Planning Scheme.

In this Chapter, the more relevant State and local policies are identified in the assessment as to whether the proposal meets the objectives of the Planning Scheme.

### **8.2 Submissions and Evidence**

The Panel heard detailed submissions and evidence as to whether the proposal is in accordance with Planning Scheme objectives.

On behalf of Council, Mr Rantino submitted that not every community, recreational or leisure use can be placed within or adjacent to an activity centre and that non-residential uses outside an activity centre should be:

- On the principal public transport network;
- On a main road; and
- Managed (by hours of operation, permit conditions etc) so as to manage potential amenity impacts.

Council is satisfied that the proposal meets these criteria.

In addition, Mr Rantino submitted the proposal meets a number of local policies and strategies, including the Discretionary Uses in Residential Areas Policy (Clause 22.04).

Mr Rantino also submitted that Council is satisfied that the proposed building meets relevant built form policies.

On behalf of the Proponent, Mr Morris called Mr Tim Biles to give planning evidence. Mr Biles' starting point was that the cultural significance of the museum must be understood in its place and setting, just like the Boyd House in South Yarra, Rose Seidler's House in Wahroonga in New South Wales and the Heide Museum in Bulleen.

In terms of relevant State and local policies, Mr Bile's evidence in support of the proposal was that:

- The proposal is supported by the objectives for planning in Victoria as the proposal will be managed in an orderly manner conducted in a sustainable way for the benefit not just of local people but all Victorians and visitors to Victoria;
- It facilitates a change in use that benefits a suburb with a high level of educational use, creating mutually supportive synergy between these activities;
- The planning policies identified in the MSS and in local policy confirm the protection of local amenity and character as an important part of policy; and
- Council's Arts and Cultural Strategy 2008-2013 gives clear recognition of the need for facilities of this kind.

Mr Morris also referred to a number of sections of the Arts and Cultural Strategy that identified the Council's desire for more arts venues and facilities.

On behalf of the residents, Mr Townsend called Mr Rob Milner to give planning evidence. The main thrust of Mr Milner's evidence was that the proposal was contrary to planning policy because it should be located in or near an activity centre.

In terms of relevant State and local policies, Mr Milner's evidence against the proposal was that:

- The subject land is not in or near a nominated Activity Centre in the Planning Scheme;
- Leisure uses (including such uses as exhibition and gallery facilities) are intended to form the focus of activity centres;
- Under Council's Activity Centre Strategy (June 2011), recently adopted by Council, single purpose uses, including recreational facilities outside of activity centres, are discouraged by giving preference to locations in or on the border of an activity centre;
- While support might be sought from the site's location on a tram route and arterial route, this does not itself make the site suitable;
- Housing policy notes a caution and trend for non-residential uses to 'creep' into residential areas, creating traffic and other amenity problems;
- The proposed use and development is not strategically justified within the strategic planning framework, and therefore cannot be considered to be orderly;
- The proposal fails almost every policy test and expectation of a non-residential use in a residential zone; and
- The form and mass of the proposed building does not complement the urban character strategy or policy.

In relation to Council's Discretionary Uses in Residential Areas Policy (Clause 22.04), Mr Milner stated that:

*Approval of the proposed use in this location would contradict almost all the expectations of the general policy for non-residential zones in residential areas and zones.*

- Successfully established the uses' appeal and attraction, would be vastly beyond the ordinary interpretation of serving a local need. Appropriate publicised it is easy to envisage it serving the metropolitan community as well as a much wider visitor patronage;*
- Well patronised and in the absence of adequate off street parking the experience of parking, and disturbance in local streets by visitors would be a regular source of irritation intruding into, rather than minimising, the impact upon the amenity of residential areas;*
- Rather than avoiding the concentration of non-residential uses in a single location, the proposal positively provides for such an outcome, particularly if with time the use of the existing house ceases to be as a dwelling. The whole frontage between Adeney and Florence Avenues would be for non-residential uses;*
- As discussed below it is difficult to conclude that the form of the proposed development complements the appearance of nearby dwellings;*
- Finally carried to completion residential use will be removed from two adjacent allotments and a dwelling of seemingly sound quality and reasonable amenity and which makes a positive contribution to the sense of place and character of the area will be removed.*

In cross examination, Mr Rantino took Mr Milner to clause 22.04-4 of the Policy Performance Standards – Function Centres. Mr Rantino queried Mr Milner as to why he did not consider these performance standards. He also put it to Mr Milner that seven of the eight performance standards were met, or were at least substantially met. In response, Mr Milner stated that in his view the proposal did not meet the Policy's general provisions and as such did not make it to 'first base' and that therefore it was not necessary to consider the performance standards.

Mr Milner also assessed the proposal against Council's Single Dwelling Covenant Policy and concluded that the proposal did not comply with this policy. This policy has been recently updated by Council but is not part of the Boroondara Planning Scheme.

In response to Mr Milner's evidence on activity centre policy, Mr Morris submitted that the objective to encourage the concentration of major developments into activity centres did not preclude the consideration of major developments outside activity centres. He said that activity centres could not accommodate every possible use, otherwise activity centres would simply run out of space. Further, he stated that

activity centres encouraged more intensive uses that have higher levels of synergy with other uses, such as a major cinema, cultural institution or office. He said that the proposal for the museum was a low intensity use and that in any event, an important feature of the housemuseum part of the proposal was how art could be integrated into the design of a dwelling.

### **8.3 Discussion**

In the Panel's view, the most relevant State and local planning policies that need to be considered in assessing whether the proposal meets the objectives of the Planning Scheme include:

- Clause 11.01 – Activity Centres
- Clause 17.01-2 – Out of Centre development for Metropolitan Melbourne
- Clause 17.03-2 – Tourism in Metropolitan Melbourne
- Clause 21.07 – Residential land use
- Clause 22.04 – Discretionary Uses in Residential Areas Policy

In addition, consideration is given to policies outside the Boroondara Planning Scheme, including:

- Boroondara Activity Centre Strategy (June 2011)
- Single Dwelling Covenant Policy (1999)
- Arts and Cultural Strategy 2008-2013

#### **(i) Clause 11.01 – Activity Centres**

In the Panel's view, the proposal for the Place of Assembly (museum) is not a highly intensive use that would undermine Activity Centres policy to encourage the concentration of major retail, residential, commercial, administrative, entertainment and cultural developments into activity centres.

The proposal is confined to two standard residential sized allotments and the maximum number of people to be accommodated on site at any one time is limited to 85 persons during Phase 2 and 75 persons during Phase 3 (excepting the 10 special events per year limited to 120 people). Such numbers are not considered to be highly intensive.

Nor does the Panel consider that the introduction of the use adjacent to the existing Cotham Private Hospital to the west will result in a commercial node that will result in a 'mini' activity centre that undermines Activity Centre objectives.

Indeed, the Panel agrees with Mr Biles that the broader neighbourhood is 'peppered' with non-residential uses, most notably a number of schools, and that a cultural facility as that proposed here is complementary to these non-residential uses.

Finally, the Panel agrees with submissions made by the Proponent that this is not a use that can be simply relocated to another site required to overcome perceived planning restrictions. Its cultural significance, particularly as far as the housemuseum is concerned, lies with accommodating a significant art collection in a residential setting. Some precedents have occurred elsewhere (as referred to by Mr Biles) and while these types of uses must be managed to be mindful of residential neighbours, there is scope to provide suitable management arrangements through the Incorporated Plan in this case.

**(ii) Clause 17.01-2 – Out of Centre development for Metropolitan Melbourne**

The objective of this policy is:

*To manage out of centre development in Metropolitan Melbourne.*

While one of the two strategies under this policy is to discourage major developments by giving preference to such developments in or on the border of activity centres, the other strategy is:

*Ensure that out-of-centre proposals are only considered where the proposed use or development is of net benefit to the community in the region served by the proposal.*

The Panel addresses the issue of net community benefit in Chapter 12.

**(iii) Clause 17.03-2 – Tourism in Metropolitan Melbourne**

Submissions were made on behalf of the Proponent that the proposal will have a local, national and international tourism benefit.

The Panel notes that one of the strategies in this clause is:

*Nurturing artistic and cultural life.*

The Panel is satisfied the proposal meets this strategy.

**(iv) Clause 21.07 – Residential land use**

An objective of this policy is:

*To maintain and enhance the City's present degree of residential amenity and high standard of residential development.*

Relevant strategies include:

*Protect existing housing stock and residential use.*

*Minimise the impact of institutions and other non-residential uses on their surrounding areas.*

The proposal will result in the loss of one dwelling in the short term and an additional dwelling in the longer-term.

The Panel does not consider the loss of two dwellings will be significant (particularly given other policies in the Boroondara Planning Scheme to increase residential development opportunities) and that the loss of these dwellings will be offset by meeting Council's policy objective to increase the number of arts and cultural facilities and venues.

**(v) Clause 22.04 – Discretionary Uses in Residential Areas Policy**

The Panel considers that this is an important policy in assessing whether or not the proposal has policy support.

As noted above, Mr Milner submitted that the proposal does not meet the general policy provisions. In response to Mr Milner's comments on each of the general policy provisions, the Panel considers that:

- While the proposed museum may go beyond meeting local needs because it will attract visitors outside the municipality, Councils Arts and Cultural Strategy clearly states there is a need for more arts and cultural facilities and venues in Boroondara;
- As discussed in Chapter 9 below, the Panel is satisfied the proposal will minimise its impacts on residential areas;
- The proposal will result in some clustering of non-residential uses (ie the proposed museum and the private hospital), however the focus of activities is on Cotham Road which meets other policy imperatives that non-residential uses should be located on main roads; and
- As discussed in Chapter 10 below, the Panel is satisfied with the built form for the area.

The Panel does not dispute Mr Milner's findings that the proposal does not meet the provisions that favours non-residential uses on sites previously used or constructed for non-residential purposes and that the demolition of existing houses be minimised. However, the Panel is satisfied that the overall objectives of the Discretionary Uses in Residential Area Policy are met.

The Panel agrees with Mr Rantino that it would have been appropriate for Mr Milner to also have addressed the performance standards in Clause 22.04-4 for function centres. As stated by Mr Rantino, this clause links the performance standards with the general provisions in that they:

*...describe one way the proposal may satisfy the relevant policy objectives and statements outlined above.*

The Panel considers the proposal meets, or is capable of meeting, all but the last of the following eight performance standards:

*Preferably adjacent to a commercial centre when activities will primarily be out of business hours, and with access to a Road Zone or collector road.*

*Possible spread of hours 8 am - 11 pm Sunday - Thursday, 8am - midnight Friday and Saturday.*

*Main access point preferably from a Road Zone or collector road, or predominantly non-residential road.*

*Entry and exit points located to avoid car headlight glare spillage onto residential properties.*

*New buildings, refuse and car parking areas located at least 3m from residential property boundaries.*

*Where relevant, noise attenuation barriers are to be constructed along boundaries abutting residential properties.*

*Rubbish collection to occur between 7am and 8pm Monday to Friday.*

*Set down and pick up areas to be provided on site.*

**(vi) Boroondara Activity Centre Strategy (June 2011)**

Mr Milner advised that this policy has been recently adopted by Council and it has requested authorisation of an amendment which would reference the policy in the planning scheme. He submitted that the policy reinforces the 'Out of Centre' policy at clause 17.01-2 that discourages proposals outside of activity centres by giving preference to developments in or on the border of activity centres.

While the Panel can only give this policy limited weight, it notes that this policy would not be able to override clause 17.01-2 that requires consideration of net community benefit for out of centre development.

**(vii) Single Dwelling Covenant Policy (1999)**

Given this policy was adopted by Council thirteen years ago and still has not been included in the planning scheme, virtually no weight can be given to this policy.

It is also noted that since the policy was adopted there have been changes to the P&E Act concerning the removal and variation of covenants.

**(viii) Arts and Cultural Strategy 2008-2013**

Mr Morris quoted many sections of this policy in prosecuting his case for the proposal. In response to a question from the Panel, Mr Rantino advised that the policy was adopted by Council on 27 October 2008 but is not part of the planning scheme. He further advised that the policy was likely to be considered for inclusion as a reference document when Council reviews its planning scheme in 2012.

While noting the strong support for the proposal under this policy, the Panel can only give it limited weight given its status.

## **8.4 Findings**

The Panel finds that:

- **The Amendment to establish the Place of Assembly (Museum) meets the objectives of the Planning Scheme.**

## **9. WILL THE PLACE OF ASSEMBLY (MUSEUM) RESULT IN UNACCEPTABLE AMENITY IMPACTS?**

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### **9.1 What is the Issue?**

As stated in Chapter 6, one of the principles to be considered in varying a restrictive covenant by a planning scheme amendment is to consider the interests of affected parties.

Having regard to the submissions made to the Panel, the interests of affected parties include potential loss of amenity, the built form and car parking and traffic impacts.

This chapter deals with amenity impacts.

### **9.2 Submissions and Evidence**

On behalf of the local residents, Mr Townsend stated at paragraphs 69 and 70 of his submission that:

*If the consideration of “interests of affected people” is to mean anything at all, this has to be a case in which the Proposal is refused or at the very least scaled back to respond to the clearly identifiable interests of the beneficiaries that are directly threatened by the Proposal before the panel.*

*Indeed, if the panel recommends approval of the Proposal despite;*

- a) the nature of the covenants, being squarely intended to thwart the type of Proposal now before you;*
- b) the reliance placed on its existence by beneficiaries who purchased into the area in clear reliance on their existence; and*
- c) in the case of the 1982 covenant being relatively contemporary –*

*the panel will be conclusively stating the phrase “the consideration of interests of affected people” in Clause 52.02 has little or no practical meaning.*

Mr Biles assessed the amenity impacts in terms of the proposed building and the activities of patrons visiting the museum.

In relation to the proposed building, Mr Biles provided a ResCode assessment (although the building is not subject to ResCode’s requirements) and found that:

- While the new building is taller than the 9 metre maximum, this is not fatal in a context where the principal address is Cotham Road and the structure sits beside the Cotham Private Hospital which is similar in height;

- The side and rear setbacks of the building show that at the rear they comfortably satisfy the ResCode B17 standard. On the side boundary there is a minor variation required for the party wall on the north west quarter but this is not an issue of substance where the abutting interface is the hospital, a neighbour's side garden and the garage; and
- The amenity of the neighbour's courtyard/side garden will not be affected as a result of this proposal because the demolition of the existing dwelling and its replacement with a lower structure near the boundary results in effectively no change to the morning sunlight to this space.

In response to the concerns raised by Ms Pitt, who lives in the unit to the immediate west, Mr Morris suggested that the western wall of the proposed building could be extended northwards to the alignment of Ms Pitt's garage thus removing the gap between the rear of the proposed building and the garage. Ms Pitt did not consider this modification would have much impact.

Mr Morris advised that in response to concerns about the kitchen exhaust, that amended plans have been prepared which relocate the exhaust from the ground floor roof to the first floor roof to reduce potential adverse amenity impacts. These amended plans were tabled at the hearing.

In relation to the activities of patrons, Mr Biles said:

*In general people who visit a museum are well mannered and respectful; interested in learning they come in small groups or alone. This is not a land use that encourages intensive use and loud behaviour; it is not a sporting club, a pub, a school/kindergarten or restaurant – all of which are acceptable land uses scattered around the residential neighbourhoods of Melbourne.*

*The museum's scale and operating nature have been carefully limited to ensure it is able to co-exist comfortably with surrounding residential neighbours.*

Mr Milner stated that "arguably" the greatest impact on the largest number of residents will be from traffic and car parking generated by the use of the site.

Mr Milner also suggested other management problems, such as the unlikelihood of turning patrons away once the ceiling of 75 patrons had been reached and the tendency of patrons to shift their cars to surrounding local streets once the 4.30pm clear-way kicked in.

He considered that the special events were likely to have an even greater impact on residential amenity, due to:

- The number of events and attendees;
- Likelihood of the majority of events being held on evenings, when more people are at home; and

- The likelihood of alcohol being served at such events.

He also expressed concern that with the current operation of the Cotham Private Hospital during the week and the peak use of the museum on the weekend, that there will be little reprieve from amenity impacts for local residents at any time.

While noting the number of patrons and hours of operation were included in the proposal, he expressed concern in relation to the Incorporated Plan that provides for the variation of these matters at the discretion of the Responsible Authority (that is, without notification to local residents).

Mr Townsend also addressed potential amenity impacts in his submission. He referred to the evidence from Ms Pitt, Mr Guilmartin and Ms Ellis that noise from the subject land carried throughout the neighbourhood (as had occurred at a recent teenager party held at 217 Cotham Road).

He also submitted that there was no evidence that the wall around the proposed building will act as a better acoustic barrier to what is currently at 217 Cotham Road.

Finally, he said the rear open car park would increase noise by slamming of car doors, congregation of people before departing and that the staff using these spaces may smoke cigarettes and eat meals.

A number of residents raised concern that the public plaza at the front of the site may attract or encourage unsociable behaviour.

### **9.3 Discussion**

While the Panel acknowledges that the covenants are to prevent the establishment of non-residential uses in the area and that some residents may have relied on them in making a decision to purchase their property, the Panel does not agree with Mr Townsend's submission that supporting the proposal means that the "consideration of interests of affected people" has little or no practical meaning.

In the Panel's view, the "consideration of the interests of affected people" requires a very careful consideration as to how the interests of the people are to be affected in terms of potential loss of amenity and other considerations.

In relation to the amenity impacts of the development, the proposed building will not have an unacceptable adverse impact on the dwelling to the immediate west given the fact that the new wall on this boundary will be lower than the existing wall of the two storey dwelling and that there will be effectively no loss of sunlight to the adjoining private open space area.

The Panel considers that extending the western wall of the proposed building to close the gap between the proposed building and the adjoining garage may have some benefit to reduce potential noise impacts, and should be supported.

The proposal to relocate the kitchen exhaust to the first floor roof is supported.

In relation to the activities of patrons and impacts on amenity, the Panel agrees with Mr Biles that a distinction can be made between patrons visiting a museum where there will be a degree of contemplation and quietness, as distinct from a sporting venue or nightclub where people are more likely to be louder and boisterous.

While the special events catering for up to 120 people with the serving of alcohol will generate some noise, limiting these events to no more than 10 per year, finishing such events at or before 10.00pm and constructing a 1.5 metre high paling fence on top of the existing retaining wall on the northern boundary should ensure that the level of noise travelling throughout the neighbourhood will not be unreasonable. The Panel does not consider this needs to be demonstrated by acoustic evidence.

The Panel notes that currently the rear yard at 217 Cotham Road is elevated, which may explain the spread of noise from this area into the neighbourhood.

Nor does the Panel consider that the front public sculpture plaza will attract or encourage unsociable behaviour. From the plans, it is clear the plaza is an open area with no fencing (other than a low retaining wall) and will be highly visible from Cotham Road.

Finally, the Panel considers that management systems to ensure patron numbers are not exceeded and hours of operation are adhered can be implemented through the museum management plan, which is a requirement of the Incorporated Plan. This matter is further discussed in Chapter 13.

## 9.4 Findings and Recommendations

The Panel finds that:

- **The proposed use and development will not result in unacceptable amenity impacts to local residents.**

The Panel recommends:

- **The western wall of the proposed building be extended to close the gap between the proposed building and the adjoining garage.**

## **10. IS THE BUILT FORM ACCEPTABLE?**

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### **10.1 What is the Issue?**

Built form issues are relevant to the interests of affected parties given the criticisms of the proposed building form of the museum to be constructed at 217 Cotham Road.

The key issue to be resolved is whether the built form of the proposed museum is acceptable.

### **10.2 Description of the proposed built form**

The proposed building is described in the exhibited documents as follows:

*The form of the new building is expressed as a finely detailed prismatic volume which articulates its function as a secure container for the precious objects it preserves and displays. The rectangular form is punctuated by a small number of window openings. This optimises security for the collection and controls the amount of UV light entering the building.*

*The principal facades on the front and rear of the building are constructed from designed, three dimensionally moulded 'white concrete' precast panels. These provide a high degree of visual and formal interest when the building is viewed from the street, particularly at close quarters at human scale.*

*The scale, proportion and massing of the new building reflects this role and its contribution as a significant new cultural asset for the City of Boroondara. The design response also recognises and responds to the scale and character of the building's immediate context including its adjacent residential interfaces.*

### **10.3 Submissions and Evidence**

A number of submitters expressed concern about the proposed building form. On behalf of local residents, Mr Milner submitted that:

- The building would be a striking, distinctive building statement in the streetscape that would serve to reinforce its difference with rather than association within its residential context;
- The proposed building's profile and rectangular form appears to be driven by its proposed function as a generous exhibition space and its stronger associations, of form and shape, with the presentation of the hospital;

- The building will be setback from the street in a manner that is respectful of a residential setting but the open forecourt will interface with the building as a hard, urban space reinforced by signage and minimal soft landscaping; and
- At various sections the building would span from boundary to boundary, joining with the established house and gallery to form a continuous built form across the Cotham Road frontage. This would entail the removal of the established avenue of trees down the eastern boundary and eliminates a significant suburban characteristic in the spacing and setback between buildings.

Mr Rantino submitted that Council did not share the criticism of the building form given that:

- There was not any real amenity impacts (overshadowing, overlooking etc);
- There is no heritage or neighbourhood character overlay; and
- The built form character along Cotham Road is mixed.

## 10.4 Discussion

The Panel agrees with Mr Milner that the building will be a striking, distinctive building statement in the streetscape. However, the Panel does not consider that this outcome will be unacceptable in Cotham Road where there is some variety of building forms, which reflects the number of non-residential developments.

Further, the Panel considers it is unrealistic to expect that a non-residential building should look like something other than what it is.

The Panel notes that along other main roads in Boroondara, such as Burke Road and Barkers Road, there have been recent developments of school sites with new striking and distinctive buildings. In the Panel's view, these buildings add visual interest in the municipality.

Indeed, as one drives through the municipality, there are numerous significant buildings in residential areas, whether they be schools, halls or churches.

Perhaps more importantly, the Panel does not consider that the proposed building form will dominate or overwhelm the immediate residential environment. While the building will be large, its scale is in keeping with what is around it.

Finally, the Panel agrees with Mr Rantino that the building form is not required to address any specific design requirements as may be found in a heritage or urban character overlay.

## 10.5 Findings

The Panel finds that:

- **The proposed building form is acceptable.**

## **11. ARE THE CAR PARKING AND TRAFFIC IMPACTS ACCEPTABLE?**

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### **11.1 What is the Issue?**

As stated in Chapter 6, one of the principles to be considered in varying a restrictive covenant by a planning scheme amendment is to consider the interests of affected parties.

It would be fair to say that car parking and traffic impacts were of most concern to local residents.

The key issue to be resolved is whether the proposal for the Place of Assembly (museum) will result in unacceptable car parking and traffic impacts to local residents.

### **11.2 Existing and proposed car parking arrangements**

Two car spaces located in a garage off Florence Avenue are available to the residents of 219 Cotham Road. There is no on-site car parking for visitors to the housemuseum.

It is proposed to provide seven on-site car parking spaces behind the proposed museum building at 217 Cotham Road. These spaces will be allocated to employees and will be accessed from the rear east-west lane running behind the property. There is no proposal to provide on-site car parking for visitors to the museum.

Accordingly, visitors to the housemuseum and public museum will be using Cotham Road, Florence Avenue, Adeney Avenue and potentially other local streets to park their vehicles.

### **11.3 Submissions and Evidence**

Council engaged Ms Charmaine Dunstan of Traffix Group to provide traffic engineering evidence to the Panel and the Proponent engaged Mr John Kiriakidis of GTA Consulting. At the direction of the Panel, the two traffic experts conducted a consultation to identify areas of agreement and areas of disagreement in their respective expert witness statements.

Mr Townsend, on behalf of 38 local residents, called a number of residents to provide evidence as to their experiences with car parking and traffic issues in the

area. Many of the residents also expressed strong concern that the proposed use was relying on street parking and that no on-site car parking was being provided.

Ms Romana Kristelly and Mr Marcus Pandy, who live at 21 Florence Avenue, also made submissions regarding traffic and car parking issues.

Ms Dunstan and Mr Kiriakidis were almost in total agreement as to traffic and car parking issues. With respect to empirical parking demand and supply, the following conclusions were made:

- The empirical parking generation rates for the housemuseum and public museum are 0.48 and 0.36 car spaces per patron;
- Adopting Ms Dunstan's analysis of empirical parking demands in Table 10 of her evidence (which are slightly more conservative than Mr Kiriakidis' findings), the parking shortfall is 12 spaces for Phase 1, 39 spaces for Phase 2 and 33 spaces for Phase 3 during typical operating conditions;
- For special event operating conditions (ie events for up to 120 people), the parking short-fall is 20 spaces for Phase 1 and 34-36 spaces for Phases 2 and 3;
- Based on surveys undertaken by both Traffix Group and GTA Consulting, there is a sufficient number of vacant parking spaces in Cotham Road to meet projected demand;
- The peak demand time for parking within proximate areas of Cotham Road was recorded at 11am on Thursday 1 December 2011, when a total of 30 parked cars were observed (representing occupancy of 38% and 50 vacant spaces); and
- Should parking not be available within 250 metres of the subject land in Cotham Road, it is likely that patrons will use the residential side streets, particularly Florence Avenue.

In terms of other traffic and car parking issues, both Ms Dunstan and Mr Kiriakidis agreed that:

- The subject land has good public transport access;
- Special events should not be scheduled to coincide with Clearway times along Cotham Road;
- Special events on-site should not exceed 120 patrons;
- Bicycle facilities proposed in association with the development are satisfactory;
- Bus parking should be considered and incorporated within any parking management plan prepared for the proposed development;
- The proposed on-site parking layout is satisfactory;

- Proposed traffic generation in association with the development can be accommodated by the surrounding street network without compromising its functional role and/or classification;
- Council should review parking demands in association with the development proposals within nearby residential streets and explore where necessary the implementation of parking control mechanisms to discourage parking in residential streets should they be considered necessary; and
- Loading and waste collection arrangements proposed for the development are considered satisfactory, although should be limited to Monday to Friday.

The one area of disagreement between Ms Dunstan and Mr Kiriakidis was that Ms Dunstan considered the peak weekend period is forecast to equal 0.40 spaces per patron while Mr Kiriakidis considered a rate of 0.36 spaces per patron was more appropriate. However, this difference would result in a difference of 3 car parking spaces during the peak (weekend) operating period and was not considered to be of material consequence.

As stated above, Mr Townsend called a number of local residents to provide evidence on their experiences with parking in the neighbourhood.

Much of the concern related to the traffic and car parking associated with the Cotham Private Hospital, with high demand for on-street parking in the areas close to the hospital, loading and unloading of deliveries occurring on the street and motorists disobeying basic road rules, such as parking across driveways. Most concerned appeared to centre on Adeney Avenue. Some of the residents tabled photographs that demonstrated their concerns, including Ms Ann Sawyers, who tabled a traffic survey conducted in Adeney Avenue on 21 and 23 November 2011 in her witness statement.

Mr Townsend also made submissions on traffic and car parking issues. He stated that in a situation where two predecessors of VCAT have previously found that their area is already saturated from the hospital *“one striking aspect of the Proposal is that it provides no parking for patron’s cars”*.

He further stated:

*Into this environment, the traffic engineers and Mr Biles have essentially said that because these impacts are experienced mostly during the week, the weekends are fair game for alternative, non-residential uses.*

He was also critical of Ms Dunstan’s evidence because it did not include a value judgement of the proposal against the qualitative provisions of the residential zones and was also critical of Mr Kiriakidis *“Let’s wait and see”* approach to managing traffic and parking impacts.

Ms Kristelly and Mr Pandey questioned the methodology of Mr Kiriakidis' analysis in terms of statistical significance and identified some errors in the report.

They submitted that the traffic engineering report's findings are based on a limited number of data collection days, whereas their observations are based on four years of living in the area.

They further submitted that the car parking rate per patron should be based on 0.48 spaces per patron given that it is unlikely that many patrons will utilise public transport.

Moreover, they submitted that because there is an overlap between visitors coming and going from the public museum, that parking demand will be at least 1.5 times the expected number of visitors. Hence, for 75 visitors at 0.48 there will be a demand for 55 car parking spaces. They noted this rate does not include employees, special events, deliveries and chartered buses.

Finally, they questioned whether buses and cycling are feasible transport option given the indirect and poor bus service and the dangers to cyclists using the Cotham Road bike route.

In response to queries raised by the Panel, Mr Morris advised that while the construction of a basement car park was technically feasible, it would be cost prohibitive, basement car parks are not highly utilised by visitors and in any event, there was sufficient car parking off site to accommodate parking demands.

## 11.4 Discussion

In the Panel's view, it is appropriate that the traffic and car parking issues are considered by asking the two key questions as posed by Mr Kiriakidis, namely:

- Are there sufficient vacancies available within the vicinity of the subject site to cater for forecast demand?
- Would a level of reliance within the residential street network be at odds with objectives set out in local policy guidelines surrounding residential amenity outcomes?

Following this analysis, the Panel will deal with other traffic and car parking issues raised in evidence and submissions, including:

- Traffic volume impacts;
- Bus parking;
- Loading/unloading;
- Requirements for a Green Travel Plan and Parking Management Plan; and
- Compliance with the road regulations.

However, some comments are first made about the weight to be given to the evidence provided by various parties.

As noted above, the Panel heard expert evidence from two traffic engineers and evidence and submissions from a number of local residents on traffic and car parking issues.

While the Panel does not dispute the experiences of residents with traffic and car parking issues, it is appropriate that the Panel give greater weight to the two traffic engineers' expert witness statements as their reports are based on accepted traffic engineering methodology and practice for assessing traffic and car parking impacts.

The Panel does not agree with Ms Kristelly's and Mr Pandy's submissions that questioned the methodology of the traffic engineering evidence. While they may consider the methodology does not provide an accurate assessment of traffic and car parking impacts, they did not provide any counter expert evidence that questioned whether the methodology met accepted practice.

Further, the Panel notes that both Ms Dunstan and Mr Kiriakidis are both highly regarded traffic experts who regularly appear before Panels and VCAT.

The Panel also notes that no party took issue with the Council's traffic engineer's assessment of the parking and traffic impacts (included in the Council's Urban Planning Special Committee Agenda of 18 July 2011).

**(i) Are there sufficient vacancies available within the vicinity of the subject site to cater for forecast demand?**

As noted above, both Ms Dunstan and Mr Kiriakidis reached similar conclusions as to the predicted empirical demand for parking associated with the three phases of the proposal and the availability of on-street car parking.

While there was some debate as to the reliance of public transport to determine empirical demand and whether the Heide Museum in Bulleen provided any relevant guidance given its relative isolation from fixed public transport modes, the Panel accepts that the rates of 0.48 spaces per patron for the housemuseum and 0.36 spaces per patron for the public museum during normal operating conditions is reasonable.

The Panel also accepts the evidence of the two experts in relation to the extent of vacant on-street parking spaces in the vicinity of the site and their findings that most patrons will park on Cotham Road within 250 metres of the subject land and if parking is not available within this distance, patrons will be likely to use the side streets particularly Florence Avenue. The Panel also accepts the two expert's findings that this overflow into the residential streets will be fairly limited and will

be largely confined to the southern end of the Florence Avenue, which, the Panel notes, has an abuttal to 219 Cotham Road.

In terms of the combined impact of the existing Cotham Private Hospital and the proposed Public Museum, the Panel notes that both experts agreed that the different peak periods of the two facilities were at different times and should not result in unacceptable levels of congestion at particular times. The Panel also notes this was not challenged by the local residents – indeed, their main concern is the spreading out of peak demand of the two facilities and having no respite.

The Panel agrees with the findings of the two traffic experts that special events will occur at times when car parking demands within the surrounding area are generally lower. The Panel further agrees with the findings that the special events should be limited to no more than 120 visitors.

In making its findings to accept the two engineering experts' conclusions in relation to the predicted empirical demand for parking associated with the three phases of the proposal and the availability of on-street car parking, the Panel notes there was no expert evidence that contradicted the quantifiable data provided by the two experts.

**(ii) Would a level of reliance within the residential street network be at odds with objectives set out in local policy guidelines surrounding residential amenity outcomes?**

As stated by Mr Kiriakidis, this question is perhaps the more difficult of the two and it requires a level of judgement to determine the acceptability or otherwise of any forecast parking outcome.

In the Panel's view, the level of judgement requires consideration of:

- Criteria for car parking dispensations; and
- Local expectations.

**Criteria for car parking dispensation**

While Ms Dunstan was criticised by Mr Townsend for not providing a qualitative assessment as to whether it is appropriate to accept the traffic and car parking outcomes, she did base part of her analysis on the criteria for car parking dispensation under Clause 52.06 of the Boroondara Planning Scheme. This assessment does require a level of judgement.

Two purposes of this provision are:

*To promote the efficient use of car spaces through the consolidation of car parking facilities.*

*To ensure the provision of an appropriate number of car spaces having regard to the activities on the land and the nature of the locality.*

The decision guidelines of this provision states (the most relevant criteria is bolded):

*Before a requirement for car spaces is reduced or waived, the applicant must satisfy the responsible authority that the reduced provision is justified due to:*

- *Any relevant parking precinct plan.*
- ***The availability of car parking in the locality.***
- ***The availability of public transport in the locality.***
- *Any reduction in car parking demand due to the sharing of car spaces by multiple uses, either because of variation of car parking demand over time or because of efficiencies gained from the consolidation of shared car parking spaces.*
- *Any car parking deficiency or surplus associated with the existing use of the land.*
- *Any credit which should be allowed for a car parking demand deemed to have been provided in association with a use which existed before the change of parking requirement.*
- *Local traffic management.*
- *Local amenity including pedestrian amenity.*
- ***An empirical assessment of car parking demand.***
- *Any other relevant consideration.*

In terms of the most relevant decision guidelines, the Panel considers that:

- The two traffic engineering expert witness statements have clearly identified the availability of sufficient parking in the locality;
- It is not unreasonable to place some reliance on the public transport services in the locality, which includes most significantly Tram Route 109 in Cotham Road;
- There is scope to provide bus parking (this is discussed further below); and
- The two traffic engineering experts have provided an empirical assessment of car parking demand, which has demonstrated that the area will be able to provide for predicted demand.

Having regard to the above findings, the Panel does not consider it is necessary for additional on-site car parking to be provided. It also agrees with the Proponent that a basement car park may not be appealing to many patrons, particularly if there is

available on-street parking within 250 metres of the subject site. A basement car park is therefore not considered necessary.

### **Local expectations**

Clearly, the experiences felt by many local residents in the area are that over time there has been an increase of traffic and increased demand for on-street car parking.

This concern has been underpinned by previous efforts by some former residents and one existing resident to prevent the expansion of the Cotham Private Hospital by the imposition of the covenant at 217 Cotham Road in the late 1970s and early 1980s.

While local concerns about these matters are legitimate, they need to be considered against a backdrop of increasing population in metropolitan Melbourne, an expansion of student numbers in nearby schools and an increase of the number of registered vehicles on the road. In other words, localities across many part of Melbourne are experiencing similar growth and congestion issues to the residents opposing the Public Museum.

Despite Mr Townsend's assertions, there was no evidence to the Panel that the local area is subject to unacceptable levels of congestion in terms of traffic and on-street car parking. In the Panel's view, this is a relevant factor in considering local expectations.

### **(iii) Traffic volume impacts**

The Panel agrees with the findings of both traffic experts that the proposed use can be accommodated by the surrounding street network without compromising its functional role and/or classification.

### **(iv) Bus parking**

It is anticipated that a proportion of bookings will utilise bus and/or coaches for group events. Mr Kiriakidis noted that it is not proposed to provide any specific area to accommodate bus parking, though it should be directed to occur on Cotham Road.

Ms Dunstan noted that due to the expected short duration of stay, buses would be expected to stay within the local area rather than return to pick up the groups at a later time. She considered potential locations for bus parking were:

- Along the site's frontage on the north side of Cotham Road (for smaller buses), however this area was observed to be regularly used for parking;

- Along the site's frontage on the west side of Florence Avenue (for larger buses); and
- Other areas of Cotham Road on both the north and south side, where sufficient length between crossovers and/or side streets is available to facilitate larger and smaller buses.

Further, Ms Dunstan considered Council could, if deemed appropriate, create a 'Bus Zone' in either Cotham Road or Florence Avenue without having a significant impact on the loss of on-street car parking (estimated to be three spaces).

Both traffic experts considered the bus parking issue could be resolved as part of the Green Travel Plan.

On behalf of the local residents, Mr Townsend expressed strong concern about the acoustic and air quality impacts should buses idle while waiting for students to return. He tabled a report *Bus Idling and Emissions, Report Prepared for Passenger Transport Executive Group by Transport and Travel Research Ltd*, T Brightman, S Girnary and M Bhardwa, September 2010.

In the Panel's view, it would be appropriate to establish a 'Bus Zone' in the vicinity of the site given that it is likely for some tour groups to use this mode of transport. A formalised 'Bus Zone' would be preferable to a situation where bus drivers are searching for sufficient space between parked vehicles. However, the Panel considers that further investigations are required to identify the most appropriate location for a 'Bus Zone' and that further consideration should be given to prohibiting buses idling.

#### **(v) Loading/unloading**

There are no statutory requirements for the proposed building to provide a loading/unloading area. However, it is proposed to include a condition in the Incorporated Document to restrict loading on site or in Cotham Road and between the hours of 10.00 am and 4.00pm.

Both traffic experts are satisfied with proposed loading/unloading arrangements, which include:

- Day to day activities – expected to be carried out by staff of the site and would be conducted from the car parking spaces at the rear of 217 Cotham Road; and
- Artwork deliveries – expected to occur on a quarterly basis and would occur along Cotham Road.

Mr Townsend submitted that local residents provided clear evidence of the illegal loading and unloading of goods associated with Cotham Private Hospital and that

Council has failed to address this issue. He therefore submitted that Council “*will be equally dilatory in enforcing the conditions in the proposed incorporated document*”.

In the Panel’s view, the loading and unloading of goods associated with the day to day activities and the delivery of art works should not result in any major inconvenience to residents given the relatively small size of most of the goods expected to be loaded and unloaded and the relatively infrequent times art works will be delivered.

**(vi) Requirements for a Green Travel Plan and Parking Management Plan**

The Proponent has expressed a willingness to develop a Green Travel Plan and Parking Management Plan. The purpose of the Green Travel Plan is to encourage patrons to use alternative transport modes to private motor vehicles. The purpose of the Parking Management Plan is to discourage patrons using local streets (particularly Florence Avenue) for parking and to consider whether any parking restrictions should be introduced.

Both Mr Kiriakidis and Ms Dunstan considered the Green Travel Plan had merit, though considered its impact to reduce reliance on private motor vehicles would be limited. Mr Townsend expressed doubt that the Green Travel Plan would make any difference to change transport modal splits, but did not oppose it.

Mr Townsend was very critical that the Parking Management Plan was a “let’s wait and see” approach, and that parking issues should be resolved prior to the commencement of the operation of the public museum. In response, Ms Dunstan submitted that it is preferable to review the impact of actual parking arrangements prior to the introduction of any strategies or restrictions otherwise inappropriate strategies or restrictions may result (as has happened around the Tooronga development according to Ms Dunstan).

In the Panel’s view, both the Green Travel Plan and Parking Management Plan initiatives should be supported. While the Green Travel Plan may have a limited impact, any positive impact nonetheless should be supported and be considered in a wider context of a general cultural shift towards increased usage of public transport.

The Panel agrees that it is preferable that any strategies or parking restrictions are developed having regard to actual parking arrangements.

**(vii) Compliance with the road regulations**

A number of the local residents provided evidence of breaches of the road regulations, such as parking over driveways and loading/unloading in the street. Mr Townsend questioned Council’s resolve to properly enforce the regulations.

Failure of motorists to adhere to the road regulations is not a reason to refuse this proposal. If there are significant on-going problems, the Panel is aware of the capacity of Council to conduct a 'blitz' to enforce compliance. Measures such as the painting of "hockey sticks" on the road pavement can also be considered.

## **11.5 Findings**

The Panel finds that:

- **There is adequate capacity within approximately 250 metres of the subject site to accommodate the peak parking demand associated with Phase 2 and Phase 3 of the public museum.**
- **All other parking and associated traffic issues are, or can be, adequately resolved.**

## 12. WILL THE PROPOSAL RESULT IN A NET COMMUNITY BENEFIT?

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### 12.1 What is the Issue?

As stated in Chapter 6, one of the principles in considering a variation to a restrictive covenant by a planning scheme amendment is to balance conflicting policy objectives in favour of net community benefit and sustainable development. The Mornington Peninsula C46 Panel Report stated:

*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.*

### 12.2 Submissions and Evidence

Mr Rantino stated that:

*Every planning permit application and scheme amendment ultimately comes down to asking*

- *Does the proposal advance every planning policy relevant to the permission (or amendment) being sought;*
- *If there are conflicting policies, will a proposal deliver net community benefit once those policies are integrated and balanced.*

*Council is strong in its conviction that the proposed development and use will deliver net community benefit and substantially accords with the relevant policy objectives (Panel emphasis).*

He further stated:

*The benefits to the community delivered by the proposed use and development are unquestioned (though some have questioned the magnitude of the benefit) (Panel emphasis).*

On behalf of the Proponent, Mr Morris made submissions about the significant financial investment that was being made by the Lyon's in establishing the museum and that in the long-term it was proposed to hand over the art collection, estimated to be valued at \$20 million within the next 10 years, to the community through a public trust.

He said that the total contribution would be \$42 million (with a \$25 million tax benefit), "was a very substantial contribution" and "a very significant public benefit".

He also submitted that an important part of the proposal was to locate the museum in conjunction with the existing housemuseum, and referred to Mr Biles' evidence on this matter.

Following concerns by Mr Townsend that Mr Morris was giving evidence from the bar table, Mr Morris called Mr Lyon to give evidence as to the decisions that have led to the request for the Amendment.

In evidence in chief, Mr Lyon confirmed the importance of establishing the museum in the proposed location and that not much thought had been given to investigating alternative sites if the Amendment failed. However, he said if the Amendment failed other options would not be ruled out including a "do nothing" option.

Mr Townsend therefore said:

*On this basis, it is submitted that any net community benefit claimed by reason of the operation of any taxation scheme for the donation of art to the public, must be tempered by the absence of any evidence that it does not occur in the present location, it will not be provided at all.*

Mr Biles considered the proposal to be a substantial benefit to both the local and wider community because it gives access to a unique art collection that is well regarded by the community and is able to be achieved in a manner that respectful of resident neighbours with a foreshadowed management system.

Mr Milner stated:

*In essence, the assessor is asked to balance the expansion or consolidation of a tourism and cultural facility which will probably have wide patronage, from within and beyond the metropolitan area, against the choice of a suboptimal location.*

In his view, a net community benefit would not be achieved because:

- *The arts community would be better served by a more accessible location in a multi-functional centre.*
- *The local community in this matter has the benefit and protection of multiple covenants to provide a level of greater assurance about the character of their neighbourhood and the amenity of the area.*
- *The local community had had to fight over an extended period to prevent ongoing erosion of its amenity and have secured the support of predecessors to VCAT that a reasonable threshold has been reached for non-residential uses in this area.*

## 12.3 Discussion

In the Panel's view, the Lyon's proposal to establish the museum at 217 Cotham Road adjacent to the existing housemuseum at 219 Cotham Road and to donate an important art collection to the community in the longer-term will result in a substantial community benefit without having an unacceptable impact on local residents.

In response to Mr Milner's points that net community benefit would not be achieved, the Panel considers that:

- It could not be said that the site does not enjoy good accessibility – it is on a main road less than 10 kms from the Melbourne CBD and less than 2 kms from the Kew Activity Centre, and is well served by public transport;
- Despite the existence of the covenants, the proposal meets the criteria to vary or remove a restrictive covenant by a planning scheme amendment because it meets the objectives of the planning scheme and the interests of affected parties are not significantly eroded by loss of amenity, the building's built form or traffic and car parking impacts; and
- Despite decisions made by VCAT's predecessors, the Panel has not been convinced that the establishment of the museum will result in an unreasonable threshold for non-residential uses in the area, particularly having regard to the specific nature of the proposed use and the management regime that is to be put in place to control visitor numbers and hours of operation.

In response to Mr Townsend's submission that net community benefit should be "tempered" because the tax benefit from the donation of the art collection could be obtained whether or not the museum is established on the proposed site, the Panel considers that the unique nature of the proposal – that is, the evolution of the proposal from displaying a significant art collection in a domestic setting to the expansion of the collection in a small-scale, but culturally-important museum – is an essential component in understanding the cultural significance of the proposal. In other words, the cultural significance of the art collection would be reduced to a large degree if it was necessary to house the collection in a commercial building in a commercial area. Given the Panel's findings about the limited impacts on local residents, it is not necessary for the proposal to be established in an activity centre.

## 12.4 Findings

The Panel finds that:

- **The adoption of Amendment C143 and the consequential variation of the covenants represent a satisfactory balancing of policies and interests resulting in a net community benefit to the City of Boroondara and the State of Victoria.**

## 13. THE INCORPORATED DOCUMENT

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### 13.1 What are the Issues?

There are three main issues concerning the Incorporated Plan, including:

- A number of local residents feel that they were misled by the Lyon's in the establishment of the housemuseum. While this is not a matter that is relevant to the Panel's consideration, the Panel makes the point that that this situation appears to have resulted in some mistrust between the Proponent and local residents. Accordingly, the Panel considers that it is important that the Incorporated Plan requirements are clearly set so they can be readily understood by all parties.
- Mr Townsend submitted that seeking to amend the planning scheme to include an Incorporated Plan rather than make an application under section 96A of the P&E Act as a joint application for a permit and an amendment to vary the covenants deprives the residents of rights to apply under section 87 of the P&E Act to amend or cancel a permit in a number of circumstances.
- Submissions were received that expressed concern that there were a number of open-ended provisions in the Incorporated Plan that could result in a substantial expansion of the facility without any recourse for notification to local residents. Time was spent during the Panel hearing discussing on a without prejudice basis potential changes to the Incorporated Plan. It is proposed to briefly respond to the submissions raised.

### 13.2 Discussion

#### Section 87 Remedies

Mr Townsend submitted that by seeking to amend the planning scheme to include an Incorporated Plan rather than make an application under section 96A of the P&E Act as a joint application for a planning scheme amendment and permit to vary the covenants, the submitters have been disadvantaged as it may take away the capacity for the residents to seek to cancel or amend the permit on the grounds set out in section 87 of the P&E Act which entitles VCAT to amend or cancel a permit in a number of circumstances including:

(b) *any substantial failure to comply with the conditions of the permit, or*

.....

(d) *any material change of circumstances which has occurred since the grant of the permit.*

He submitted this was neither appropriate nor fair.

Mr Morris responded by referring to section 114 of the P&E Act which gives any person and the Council the right to bring enforcement proceedings in VCAT against any person if there is any contravention of, amongst other things, the planning scheme, which would include the Incorporated Document, and that VCAT has wide powers to enforce compliance including an order to stop the use or development. He also referred to section 89(1)(b) of the P&E Act which restricts the rights of a person who was an objector to the permit application to apply under section 87 to three circumstances, the relevant one of which is any substantial failure to comply with the conditions of the permit. He submitted that in the light of this provision and section 114 the suggestion of a loss of substantive rights was illusory.

In the Panel's view, there is some loss of rights to seek to amend or cancel the permit. However, in the Panel's experience these remedies, when available to an objector, are intended to deal with situations where a person has not been notified of a permit application, has been misled in the application or there is an underlying material mistake involved. In this case, given the wide advertising of the proposal and the extent of material available, as well as the thorough assessment of the proposal at both Council and Panel level, any challenge to the proposal under these provisions is likely (See section 89(1)(b)).

The only remaining relevant issue is compliance with the Incorporated Plan. The Panel is of the view that section 114 of the P&E Act gives the residents and Council adequate powers to enforce the conditions of the Incorporated Plan including seeking an order to stop the use, which is tantamount to revocation of a permit. Accordingly, the loss of the availability of the power under section 87 should not be seen as significant.

### **General conditions**

These general conditions set out requirements regarding site layout and design, a Green Travel Plan, loading and unloading, external sound amplification, a museum management plan, baffling of outdoor lighting and a general amenity condition. These conditions are typical of conditions found on a planning permit.

Many of these conditions include provision for secondary consent – ie no modification or change to arrangements “without the further written consent of the Responsible Authority”.

Mr Townsend expressed concern with the secondary consent aspect of some of these conditions as they could result in significant changes to the proposal without notification to local residents.

Mr Morris referred to the principles developed by VCAT that limit the scope of change under secondary consent (*Westpoint Corporation v Moreland CC (Red Dot)* [2005] VCAT 1049.)

In the Panel's view, it is appropriate to include the secondary consent in these conditions to provide some degree of flexibility for the use and development. The Panel agrees that there are limitations in the scope of change permitted under secondary consent, which is a matter the Responsible Authority must consider when assessing any secondary consent request.

### **Phase 1 conditions**

Condition 10 limits the number of visitors for pre-booked tours, student tours, Sunday tours and special events. There is a secondary consent provision that any variation to these numbers must first be approved by the Responsible Authority.

Mr Townsend is opposed to the secondary consent provision.

Mr Morris suggested the Proponent would support an amendment to the condition that would limit the variation of visitor numbers to no more than 20% and that notification with affected persons must occur before the Responsible Authority made a decision (though the preferred position is not to require notification if the 20% ceiling is introduced).

Any proposal to vary these requirements by more than 20% would require a permit or further planning scheme amendment.

Mr Townsend did not support the suggested amendments proposed by Mr Morris.

In the Panel's view, Mr Morris' suggestion to limit the variation to 20% is reasonable. The Panel considers notification with affected persons should also occur. Hence, the secondary consent provisions should be amended as follows:

*Any variation to the number of visitors on the site as outlined above must not be more than 20% and must first be approved by the consent of the Responsible Authority following notification to affected persons.*

Condition 11 limits the pre-booked tours and student tours between the hours of 10am to 5 pm on Monday or Tuesday. The museum must also be closed Anzac Day, Good Friday and Christmas Day.

There is also a secondary consent provision requiring the approval of the Responsible Authority to any change to the hours and days of operation.

Mr Townsend requested that the tours stop at 4pm and that the museum should be closed on all gazetted public holidays.

Mr Morris opposed Mr Townsend's amendments. However, he suggested that the condition could be amended so there would not be an increase in the total number of hours available to tours.

The Panel does not support the request to close the museum on all gazetted public holidays. It is on some public holidays where it is appropriate for cultural facilities to be open to the public.

In terms of the secondary consent provision, the Panel supports Mr Morris's suggestion.

Hence, the condition needs be amended as follows:

*Any change to the hours/days of operation must not result in an increase of the total number of hours available to tours and must first be approved by consent of the Responsible Authority.*

Condition 13 states that no more than one 'event' or 'tour' (as referred to in Condition 10) can be held on 219 Cotham Road any one time except with the consent of the Responsible Authority.

Mr Townsend requested the secondary consent provision be deleted. Mr Morris did not oppose this. Hence, the condition is to read as follows:

*No more than 'event' or 'tour' (as referred to in Condition 10) can be held on 219 Cotham Road at any one time.*

## **Phase 2 conditions**

It was agreed by all parties that Conditions 25, 27 and 28 need to be amended to delete reference to events catering for up to 250 people. Hence, Condition 25 (a) is to read as follows:

*Consideration of noise emissions during special and occasional events.*

Condition 27 – strike out (*and up to 250 visitors*)

Condition 28 – strike out *c) Occasional Events – 250 persons on a maximum of 3 occasions per year.*

As with Condition 10 in Phase 1, Condition 28 includes a secondary consent provision that any variation to the number of visitors requires the consent of the Responsible Authority.

Mr Morris suggested the 20% ceiling also be applied to this condition. The Panel agrees. Hence, the condition should read as follows:

*Any request for the variation to the number of visitors on the site as outlined above must not be more than 20% and must first be approved by the consent of the Responsible Authority following notification to affected persons.*

Similar to Condition 11 in Phase 1, Mr Morris suggested that Condition 30 could be amended as follows:

*Any request for a change to the hours/days of operation must not result in the total number of hours available to tours and must first be approved by consent of the Responsible Authority.*

The Panel supports this amendment.

Similar to Phase 1, the Panel does not support the proposal that the museum be closed on all gazetted public holidays.

Mr Morris agreed that the secondary consent provisions be deleted from Conditions 31 and 32.

### **Phase 3 conditions**

It was agreed by all parties that reference to occasional events for up to 250 persons in Condition 39 should be deleted.

Similar to Phase 1 and Phase 2, Mr Morris suggested the variation of numbers be limited to no more than 20% and that there be some flexibility in the days and hours the tours operate provided there is no total increase in the number of days and hours.

As per the Panel's recommendations in Phase 1 and Phase 2, it supports similar amendments to conditions 39, 40 and 41.

Mr Morris agreed that the secondary consent provisions should be deleted from Conditions 42 and 43.

### **Other conditions**

On instructions, Mr Townsend requested conditions requiring additional management measures such as a complaints register, a requirement for 80 on-site car parking spaces, enclosure of the car park at the rear, removal of open space areas where loitering could occur and the prohibition of outside events.

The Panel does not consider these conditions are necessary for reasons explained in the preceding chapters.

### 13.3 Findings and Recommendation

The Panel finds:

- **The Incorporated Plan is an appropriate mechanism to facilitate the proposed development and use;**
- **The enforcement mechanisms under section 114 of the P&E Act provide scope to Council and local residents to ensure compliance with the Incorporated Plan; and**
- **The Incorporated Plan is satisfactory subject to changes identified in Appendix A.**

The Panel recommends:

- **That the Incorporated Plan be approved subject to the changes identified in Appendix A.**

## **14. PANEL CONCLUSIONS AND RECOMMENDATIONS**

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The Panel recommends that Amendment C143 to the Boroondara Planning Scheme be adopted as exhibited subject to the following changes:

**a) Covenant No 881422 is further amended as follows:**

*“...not more than one house or museum shall be erected on the said Lot, hereby transferred and not less than the sum of One thousand pounds shall be expended in the erection of the said house nor shall such house be built of any material other than brick or concrete nor shall any such house be used for any purpose other than a dwelling house or museum.”*

**b) the Incorporated Plan is amended in accordance with the modifications identified in Appendix A.**

**c) the western wall of the proposed building is extended to close the gap between the proposed building and the adjoining garage.**

**APPENDIX A    INCORPORATED PLAN  
(AS REVISED BY THE PANEL)**

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**BOROONDARA PLANNING SCHEME**

**Site specific control under Clause 52.03 of the Boroondara Planning Scheme  
INCORPORATED DOCUMENT**

**Nos. 217 - 219 Cotham Road, Kew**

**October 2011**

**This document is an incorporated document in the Planning Scheme pursuant to  
Section 6(2)(j) of the *Planning and Environment Act 1987*.**

## **1 INTRODUCTION:**

This document is an Incorporated Document in the Schedule to Clause 52.03 and the Schedule to Clause 81.01 of the Boroondara Planning Scheme (the Scheme).

Despite any provision to the contrary in the Scheme, pursuant to Clause 52.03 of the Scheme the land identified in this Incorporated Document may be used and developed for a Place of Assembly (museum) in accordance with the specific controls contained in this document, including the 'Incorporated Plans' (as amended).

In the event of any inconsistency between the specific controls contained in this document and any provision of the Scheme, the specific controls contained in this document will prevail.

## **2 ADDRESS OF THE LAND:**

The land at Nos. 217 - 219 Cotham Road, Kew, in the City of Boroondara, (the land) described as:

- No 217 Cotham Road Lot 4 on Plan of Subdivision 005505 Volume 04192 Folio 298
- No 219 Cotham Road Lot 3 on Plan of Subdivision 005505 Volume 03797 Folio 386

## **3 PURPOSE:**

The purpose of this Incorporated Document is to allow the phased development and use of the land for a Place of Assembly (museum) as follows:

- **Phase 1** – Limited operation of the existing dwelling at No 219 Cotham Road for a private museum (Housemuseum).
- **Phase 2** – Continued operation of the private museum at No 219 Cotham Road and development and operation of a public museum at No 217 Cotham Road; and
- **Phase 3** – Operation of a consolidated public museum at Nos. 217 and 219 Cotham Road.

## **4 THIS DOCUMENT ALLOWS:**

### *Phase 1:*

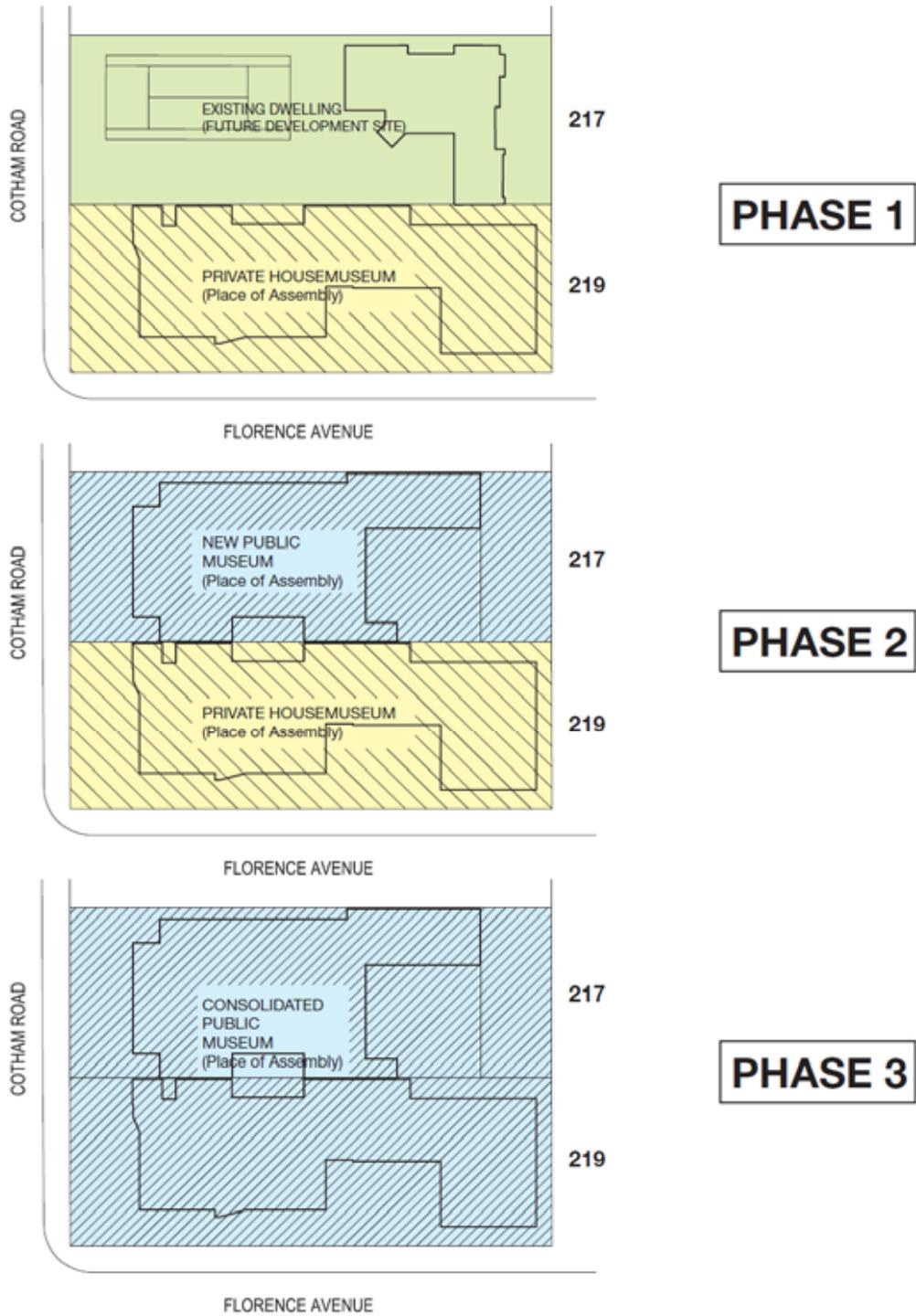
The use of No 219 Cotham Road for a Place of Assembly (museum) in association with an existing dwelling, generally in accordance with the 'Incorporated Plans' (as amended).

### *Phase 2:*

The development and use of the land at No 217 Cotham Road for a Place of Assembly (museum) generally in accordance with the 'Incorporated Plans' (as amended) and continued use of No 219 Cotham Road as per Phase 1.

### *Phase 3:*

The development and use of the land (No 217-219 Cotham Road) for a Place of Assembly (museum), generally in accordance with the 'Incorporated Plans' (as amended).



\* Plans are indicative only. Refer to Incorporated Plans (as amended) for details on the layout of the buildings on the land

## NEW PUBLIC MUSEUM AT 217-219 COTHAM ROAD, KEW

CORBETT LYON ARCHITECT 25 MAY 2011 DRAWING NO: A500

## 5 INCORPORATED PLANS

Drawing	Number	Drawing Title
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A102a	Site Plan and Ground Floor Plan Showing New Public Museum (and Existing Housemuseum)
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A103	First Floor Showing New Public Museum (and Existing Housemuseum)
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A104	Artwork Storage (Basement) Plan
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A105a	Landscape Plan Showing Ground Level Plan of New Public Museum
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A201	Cross Sections A:A and B:B
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A202a	Cross Section C:C and Longitudinal Section D:D
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A203a	Streetscape (Cotham Road) Elevations
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A204a	East & West Elevations
New Public Museum at 217 Cotham Road Kew Vic 3101	LM02/A205	East Elevation of Cotham Private Hospital (Facing Proposed Museum)

and including any amendment of the plans that may be approved by the Responsible Authority under the conditions of this document. Once approved, these plans will be the endorsed plans.

## 6 THE FOLLOWING CONDITIONS APPLY TO THIS DOCUMENT:

*Note: The 'general conditions' outlined below apply to all use and development of the land during all phases under this Incorporated Document. The conditions under each 'Phase' are specific to the staging of the development/use of the land in accordance with this Incorporated Document.*

### GENERAL CONDITIONS:

1. The layout of the site and the size, levels, design and location of buildings and works, the description of the use(s) and signage on the endorsed Incorporated Plans must not be modified for any reason (unless the Boroondara Planning Scheme specifies that a permit is not required) without the prior written consent of the Responsible Authority.
2. The actions contained within the green travel plan prepared by GTA Consultants (reference JM12040 issue a) dated 29 June 2011 must be implemented to the satisfaction of the Responsible Authority. The approved Plan will form part of the endorsed plans and must not be altered without the written consent of the Responsible Authority.
3. All loading/unloading of vehicles must only take place on the subject land or on Cotham Road. Loading/unloading via Cotham Road must only take place between the hours of 10:00am and 4:00pm. Delivery vehicles must not park in the laneway at any time. Any change to the loading/unloading arrangements as specified above must have the consent of the Responsible Authority.
4. No external sound amplification equipment or loud speakers are to be used for the purpose of announcement, broadcast, playing of music or similar purpose, to the satisfaction of the Responsible Authority.
5. Prior to the commencement of the use hereby permitted the applicant must submit a museum management plan generally in accordance with the indicative museum

management plan submitted with the application except that the management plan must include:

- a) Details of how visitor numbers will be restricted and managed in order to comply with the numbers outlined in this document, including general admission walk-in visitors and all event visitors;
- b) How the number of special events will be limited and managed to accord with the number of occasions outlined in this document;
- c) Details of notification to Council and surrounding residents of the intended dates and times of special events;
- d) Maximum staff numbers during each phase including the maximum number of staff expected during special events.

to the satisfaction of and to be approved by the Responsible Authority.

6. The use of the land must be carried out generally in accordance with the approved museum management plan by the Responsible Authority. The museum management plan must not be modified for any reason without the prior written consent of the Responsible Authority.
7. All outdoor lighting must be designed, baffled and located to prevent light from the site causing any detriment to the locality or adjoining properties, to the satisfaction of the Responsible Authority.
8. All buildings and works, including art installations in the front court yard, must be maintained in good order and appearance to the satisfaction of the responsible authority.
9. The amenity of the area must not be adversely affected by the use and development as a result of the:
  - (a) Transport of materials, goods or commodities to or from the land; and/or
  - (b) Appearance of any building, works, stored goods or materials; and/or
  - (c) Emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, ash, dust, waste water, waste products, grit or oil; and/or
  - (d) The presence of vermin.or in any other way, to the satisfaction of the Responsible Authority.

***PHASE 1: LIMITED OPERATION OF THE EXISTING DWELLING AT NO. 219 COTHAM ROAD FOR A PRIVATE MUSEUM (HOUSEMUSEUM):***

*Use*

10. The maximum number of visitors in the private museum at any point in time during the period will be as follows:
  - a) Pre-Booked Tours - A maximum of 25 persons at any one time on a maximum of 47 days per calendar year.
  - b) Student Tours - A maximum of 25 persons at any one time persons on maximum of 10 days per calendar year.
  - c) Sunday Tours - A maximum of 25 persons at any one time on maximum of 6 days per calendar year.
  - d) Special Events - 55 persons on maximum of 8 occasions per calendar year.Any request for the variation to the number of visitors on the site as outlined above [must not be more than 20% and](#) must first be approved by the consent of the Responsible Authority [following notification to affected persons](#).
11. The operation of the private museum use may only be open to the public for 'pre-booked tours' and 'student tours' (as referred to in Condition 10) between the hours of 10am to 5:00pm on Monday or Tuesday. The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a change to the hours/days of operation must not result in an increase in the total number of hours for tours and](#) must first be approved by consent of the Responsible Authority.

12. The operation of the private museum use may only be open to the public for 'Sunday tours' and 'events' (as referred to in Condition 10) between the hours of 6:30pm and 10:00pm on weekdays and 10:00am and 6:30pm on Sundays. The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a](#) change to the hours/days of operation [must not result in the total number of hours and](#) must first be approved by consent of the Responsible Authority.
13. No more than one 'event' or 'tour' (as referred to in Condition 10) can be held on at 219 Cotham Road any one time ~~except with the consent of the Responsible Authority.~~

**PHASE 2: CONTINUED OPERATION OF THE PRIVATE MUSEUM AT NO. 219  
COTHAM ROAD AND DEVELOPMENT AND OPERATION OF A PUBLIC  
MUSEUM AT NO. 217 COTHAM ROAD**

*Development*

14. Once the development at No 217 Cotham Road has been started it must be continued and completed to the satisfaction of the Responsible Authority.
15. Within 3 months of the commencement of development and prior to the commencement of the use, a landscape plan to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. Once approved the Landscape Plan will form part of the Incorporated Plans and must not be altered without the written consent of the Responsible Authority.  
The landscape plan must be generally in accordance with the landscape concept plan A105a dated May 2011, except that the plan must show:
  - (a) A survey (including botanical names) of all existing trees to be retained and of those to be removed. The intended status of the trees shown on the landscape plan must be consistent with that depicted on the development layout plan;
  - (b) A planting schedule of all proposed trees, shrubs and ground covers including botanical names, common names, pot sizes, sizes at maturity and the quantities of each plant;
  - (c) Landscaping and planting within all open areas of the site.
16. Landscaping as shown on the endorsed landscape plan/s must be carried out and completed to the satisfaction of the Responsible Authority prior to the occupation of the development.
17. All landscaping works shown on the endorsed landscape plan/s must be maintained and any dead, diseased or damaged plants replaced, all to the satisfaction of the Responsible Authority.
18. Prior to the completion of development, the owner of the subject land must:
  - a) Construct all necessary vehicle crossings and demolish all unnecessary vehicle crossings (subject to any permits required from any relevant authority ) and reconstruct and upgrade the footpaths adjacent to all boundaries of the site together with associated works including the renewal and/or relocation of kerb and channel and the relocation of all services pits and covers as necessary, at no cost to the Responsible Authority and in accordance with plans and specifications first approved by the Responsible Authority.
  - b) Not alter existing footpath widths and street levels adjacent to the subject land for the purpose of constructing a new vehicle crossing or pedestrian entrances without first obtaining written approval from the Responsible Authority.
  - c) Undertake any road/on-street parking space line marking/signage works that are required as a result of the development in life long materials prior to the use of the land.  
or as otherwise agreed by the Responsible Authority.

19. The areas set aside for the parking of vehicles and access ways (excluding the existing right of way) to the car parks must be:
  - a) Constructed and properly formed to such levels that may be used in accordance with the plans;
  - b) Surfaced with an all weather surface or seal coat (as appropriate);
  - c) Drained and maintained; and
  - d) Line marked to indicate each car space, loading bay and/or access lane; or as otherwise agreed by the Responsible Authority.
20. The car parking spaces must not be used for any other purpose and all access ways must be kept clear to the satisfaction of the Responsible Authority.
21. Bicycle parking must be provided and located in accordance with the endorsed plans to the satisfaction of the Responsible Authority.
22. Prior to the commencement of the use in Phase 2, the applicant must organise bicycle parking to be installed in accordance with the approved plans, the bicycle parking on the footpath/naturestrip (6 racks/hoops total) is to be approved and installed by Council and the applicant is responsible for fully funding the supply and installation of these facilities to the satisfaction of the Responsible Authority.
23. Any air conditioning plant must be screened and baffled and/or insulated to minimise noise and vibration to other residences to the satisfaction of the Responsible Authority.
24. Any plant equipment, including flues and the like must be designed or acoustically treated to prevent unreasonable noise impact on residential properties.
25. Prior to the commencement of the development associated with Phase 2, an acoustic report must be submitted and approved by the Responsible Authority, and as a minimum must include:
  - a) Consideration of noise emissions during special events ~~including the impact of up to 250 people patrons plus staff occupying the lawn sculpture court;~~
  - b) Consideration of noise emissions from any live music
  - c) Management of noise emissions from speeches within external areas.

Any recommendations of the report must be implemented and detailed on the endorsed plans to the satisfaction of the Responsible Authority.

26. The development at No 217 Cotham Road must be completed to the satisfaction of the Responsible Authority within a period of three (3) years from commencement of construction. The Responsible Authority may extend the construction period if a request is made in writing prior to the elapse of time, or within three months afterwards.

#### *Use*

27. Prior to the commencement of the use a traffic and parking management plan must be submitted to and approved by the responsible authority. The traffic and parking management plan must identify appropriate measures to manage traffic and parking activity in the area, and seek to minimise intrusion into residential streets, for any proposed 'special events' catering for 120 visitors on the site. That the plan must demonstrate that:
  - a) Special events have no additional parking impact in residential streets beyond that of the day to day operation of the use;
  - b) Special events have no reliance on parking in nearby residential streets. Cotham Road is not considered to be a residential street.
  - c) Local roads (Florence Avenue and Adeney Avenue) are not to be promoted or identified in the plan as access points to the site.
  - d) Event commencement and completion times do not coincide with school pick up or drop off times.

- e) All visitors to all events are notified of the above criteria and advised of alternative travel options to and from the site at least one week prior to each event.
28. The maximum number of visitors in the public museum at any point in time during the period will be as follows:
- General Admission ('walk in' public visitations) - 60 persons for general admission between the hours outlined in Condition 29.
  - Special Events - 120 persons on a maximum of 10 occasions per calendar year. Any [request for a](#) variation to the number of visitors on the site as outlined above [must not be more than 20% and](#) must first be approved by the consent of the Responsible Authority [following notification to affected persons](#).
29. The operation of the museum use may only be open to the public for general admission between the hours of 10am to 5:00pm Tuesday to Sunday. The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a](#) change to the hours/days of operation [must not result in a total increase of hours for tours and](#) must first be approved by consent of the Responsible Authority.
30. The operation of the museum use may only be open to the public for 'events' (as referred to in Condition 28 as follows:
- Between the hours of 10:00am and 9:00pm on Monday (excluding the afternoon clearway period on Cotham Road); and
  - Between the hours of 6:30pm and 10:00pm on Tuesday to Sunday. The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a](#) change to the hours/days of operation [must not result in a total increase of hours and](#) must first be approved by consent of the Responsible Authority.
31. No more than one 'event' (as referred to in Condition 28 and Condition 10(d)) can be held on the land at any one time ~~except with the consent of the Responsible Authority~~.
32. No 'walk in' public visitations (general admission) are permitted during any 'events' (as described in Condition 30 ~~except with the consent of the Responsible Authority~~).

**PHASE 3: OPERATION OF A CONSOLIDATED PUBLIC MUSEUM AT NOS. 217 AND 219 COTHAM ROAD.**

*Development*

33. Prior to the commencement of works associated with the consolidation of the property into a single integrated public museum facility, amended plans (including amended landscape plans) to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. These plans must be drawn to scale with dimensions and three copies provided. The plans must be generally in accordance with the Incorporated Plans specified in Section 5 of the Incorporated Document (or as amended) but modified to include additional works required to connect the two buildings.
34. Once the works associated with the consolidation of the property into a single integrated public museum facility has been started, they must be continued and completed to the satisfaction of the Responsible Authority.
35. The areas set aside for the parking of vehicles and access ways to the car parks must be:
- Constructed and properly formed to such levels that may be used in accordance with the plans;
  - Surfaced with an all weather surface or seal coat (as appropriate);
  - Drained and maintained; and
  - Line marked to indicate each car space, loading bay and/or access lane; or as otherwise agreed by the Responsible Authority.
36. The car parking spaces must not be used for any other purpose and all access ways must be kept clear to the satisfaction of the Responsible Authority.

37. Bicycle parking must be provided and located in accordance with the endorsed plans to the satisfaction of the Responsible Authority.
38. Works associated with the consolidation of the property into a single integrated public museum facility must be completed within a period of two (2) years from the approval of plans under Condition 33. The Responsible Authority may extend the construction period if a request is made in writing prior to the elapse of time, or within three months afterwards.

*Use*

39. The maximum number of visitors in the integrated public museum at any one point in time must be as follows, to the satisfaction of the Responsible Authority:
- a) General Admission ('walk in' public visitations) - 75 persons for general admission between the hours outlined in Condition 40.
  - b) Special Events - 120 persons on maximum of 10 occasions per calendar year.
- Any [request for a](#) variation to the number of visitors on the site as outlined above [must not be more than 20% and](#) must first be approved by the Responsible Authority [following notification to affected persons](#).
40. The operation of the museum use may only be open to the public for general admission between the hours of 10am to 5:00pm Tuesday to Sunday. The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a](#) change to the hours/days of operation [must not result in an increase in the total number of hours for tours and](#) must first be approved by consent of the Responsible Authority ~~To the satisfaction of the Responsible Authority.~~
41. The operation of the museum use may only be open to the public for the 'events' (as referred to in Condition 39) as follows:
- a) Between the hours of 10am and 9:00pm on Monday (excluding the afternoon clearway period on Cotham Road); and
  - b) Between the hours of 6:30pm and 10:00pm on Tuesday to Sunday.
- The museum must be closed on Anzac Day, Good Friday, and Christmas Day. Any [request for a](#) change to the hours/days of operation [must not result in an increase in the total number of hours and](#) must first be approved by consent of the Responsible Authority.
42. No more than one 'event' (as referred to in Condition 39) can be held at any one time ~~except with the consent of the Responsible Authority.~~
43. No 'walk in' public visitations (General Admission) are permitted during any 'events' (as described in Condition 41) ~~except with the consent of the Responsible Authority.~~

**END OF DOCUMENT**

**APPENDIX B: LIST OF SUBMITTERS  
(INCLUDING LATE SUBMISSIONS)**

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James and Diana Kimpton  
Win and Kevin O'Loughlin  
Wen Chen (Diana)  
Fang Fang (Brent)  
Sara and Karlo Testen  
Ruth Finlayson  
Ken Finlayson  
Alex and Meri Mayer  
Keith and Trudy Callinan  
Rodden Prichard  
Wendy Pitt  
Ann Sawyers  
John Kaminsky  
Mike and Kaye Guilmartin  
Helen Campbell  
Janice Kesterton  
Damon Cheng  
Dorothy Ferres  
William Clancy  
Diane Tymms  
Brendan and Carol Ellis  
Helen Oakes  
Paul Hardy  
Susan Hardy  
Michael and Joan Bucknell  
Bernard and Anna Lynch  
Maria and Ashley Butler  
Karen and Lois Dupe

Merrilyn Jean Beeny  
Gertie Bornstein  
Wendy and Lance Hart  
John and Melanie Cassy  
Bev Biggs  
Kate Elder  
James Elder  
Liz Gidley  
Joe and Lina Scalzo  
Rebecca and David Wansbrough  
Bruce, Joanna Tess Rowley  
Pat Holdenson  
Sarah Kondogiannis  
Andrew Warhurst  
Kim Mescher  
Ann Zachariah  
Ms Romana Kristelly and Mr Marcus Pandy  
Healthscope Cotham Private Hospital  
Ken Spence  
William Clancy  
Barry David O'Callaghan  
Garry Oliver  
Kathleen Patricia Gervasoni