

Planning and Environment Act 1987

Panel Report

Maribyrnong Planning Scheme Amendment C137

Open Space Strategy

20 January 2016

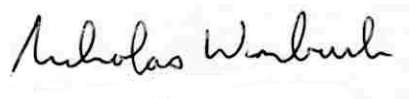
Planning and Environment Act 1987

Panel Report pursuant to Section 25 of the Act

Maribyrnong Planning Scheme Amendment C137

Open Space Strategy

20 January 2016

A handwritten signature in black ink, appearing to read 'Nicholas Wimbush'. The signature is written in a cursive, flowing style.

Nick Wimbush, Chair

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List of Abbreviations

HIA	Housing Industry Association
MWFRG	Maidstone and West Footscray Residents Group
OSS	Open Space Strategy
PV	Places Victoria
VCAT	Victorian Civil and Administrative Tribunal

Executive Summary

Amendment C137 to the Maribyrnong Planning Scheme seeks to introduce a new local planning policy and schedule to Clause 52.01 to guide public open space contributions from development.

The Amendment is supported by an Open Space Strategy (OSS) which will be a reference document in the planning scheme.

The OSS and associated Contributions Report provide a detailed level of analysis of Council's existing open space and future demand based on anticipated population growth. A contributions rate of 5.7 percent is then calculated based on the provision of new open space and the development of facilities on open space to cater for the new population.

The Amendment attracted 17 submissions, many of which supported the Amendment in whole or part. Some submitters sought specific changes to the proposed regime for different areas, such as a land contribution rather than the proposed cash contribution.

A submission from the Housing Industry Association (HIA) opposed the Amendment in principle; primarily on the basis that a site by site contribution process should be maintained.

Having reviewed the submissions against the Amendment, the Panel considers it is supported in planning policy and the OSS provides a sound methodology to logically determine the contributions rate required to provide an acceptable level of open space.

Apart from some minor wording changes the Panel supports the Amendment as exhibited. Based on the reasons set out in this Report, the Panel recommends:

Adopt Maribyrnong Planning Scheme Amendment C137 as exhibited subject to the following:

1. **Replace the introductory sentence of the 'Land contributions greater than 5.7 per cent' section of the proposed Clause 22.07 with the following:**

The Council will have regard to the following matters when considering whether a contribution greater than 5.7 per cent is required under Clause 52.01.

2. **Replace the following wording in the schedule to Clause 52.01:**

5.7% or greater subject to negotiation and having regard to the density and layout of the development where provided as land.

With the following wording:

5.7 per cent or greater to the satisfaction of Council where provided as land.

1 Introduction

1.1 The Amendment and submissions

Maribyrnong Planning Scheme Amendment C137 (the Amendment) was prepared by Maribyrnong City Council as Planning Authority. As exhibited, the Amendment proposes to:

- Introduce a public open space contribution rate of 5.7% in the schedule to Clause 52.01 (with a greater rate able to be negotiated for subdivisions over 10 or more lots where a land contribution is sought)
- Introduce a local policy at Clause 22.07 (Public Open Space Contributions) to provide guidance on when Council would prefer a land or cash contribution and introduce the Open Space Strategy (OSS) as a reference document
- Make consequent changes to the Municipal Strategic Statement (MSS).

The Amendment was placed on public exhibition between 2 July 2015 and 3 August 2015. Submissions to the Amendment were as follows:

- Seven in support
- Eight seeking changes
- One objecting
- One withdrawn.¹

At its meeting of 28 April 2015, Council delegated the decision on submissions to the Chief Executive Officer. The delegate approved referral of all submission to a Panel on 14 September 2015.

1.2 The Panel process

Mr Nick Wimbush was appointed as the Panel under delegation from the Minister for Planning on 28 September 2015.

A Directions Hearing was held in relation to the Amendment on Monday 16 November 2015 at the Council offices in Footscray, followed by the main Hearing on Wednesday 9 December 2015 at the same venue. Parties to the Panel Hearing are listed in Table 1.

Table 1 Parties to the Panel Hearing

Submitter	Represented by
Maribyrnong City Council	Mr Terry Montebello from Maddocks Lawyers assisted by Mr Ben Weiner ² . Expert witness statements were provided for Council pre-Hearing by Ms Joanna Thompson (open space) and Ms Esther Kay (open space contributions) but they were not called to give evidence.
Housing Industry Association	Mr Mike Hermon
Mr Sam Tuhan and Ms Serpil Guclu	Mr Oscar Yildiz

¹ Council Hearing submission para 14.

² A number of other Council officers attended as observers.

1.3 Planning context

(i) Background

The Explanatory Report for the Amendment outlines the planning context including as relevant:

- References to open space, liveable communities and neighbourhoods and urban design in the State Planning Policy Framework
- References to open space planning, landscape character, climate change adaptation and walking/cycling in the Local Planning Policy Framework

In his submission at the Hearing, Mr Montebello for Council outlined the OSS methodology and the background to this approach to open space planning. He identified a number of other municipalities who have adopted a similar approach which has been accepted by Panels including Melbourne C209 and Glen Eira C120.

At the Hearing Mr Montebello did suggest some minor wording changes to the introductory sentence to the Land contribution greater than 5.7 per cent in Clause 22.07. He suggested the sentence should read:

The Council will have regard to the following matters when considering whether a contribution greater than 5.7% is required under Clause 52.01.

(ii) Panel response

The Panel notes that there were no submissions explicitly questioning the planning foundations of the Amendment or seeking to refute the methodology in principle behind the OSS. Some submissions suggest a different approach is to be preferred and other changes to the Amendment, but these do not go to the principle of the need to provide open space and the support for that objective.

The Panel is also satisfied that the OSS behind the Amendment and the Amendment itself is consistent with *Practice Note 70: Open Space Strategies*; no submitter sought to argue against this proposition.

The Panel considers that the planning context supports the Amendment and its implementation will contribute to sound planning in Maribyrnong.

In relation to Mr Montebello's suggested wording change above, the Panel considers this a minor 'tidy up' which improves the wording and does not go to any matters of substance; it is thus supported.

The Panel recommends:

Replace the introductory sentence of the 'Land contributions greater than 5.7 per cent' section of the proposed Clause 22.07 with the following:

The Council will have regard to the following matters when considering whether a contribution greater than 5.7 per cent is required under Clause 52.01.

2 Submissions

Given the low number of objecting submissions and submissions requesting changes, the Panel addresses these by submitter.

2.1 Objecting submission

2.1.1 Housing Industry Association

Mr Hermon for the Housing Industry Association (HIA) raised a number of objections to the Amendment. These are discussed below.

(i) Nexus

Mr Hermon submitted that a flat rate (5.7%) does not provide for a nexus to be considered between the lots being created and the additional demand created by the residents of dwellings on those lots. He further submitted that it would be more appropriate to apply a sliding scale of contribution based on the number of lots being developed up to a maximum of 5%.

It was his view that:

HIAs understanding of what we are being told by Council is that all subdivisions are all the same and all create an equal demand for public open space – what an easy and convenient position this is for Council to take.³

Essentially the argument of the HIA was that each subdivision open space contribution should be negotiated on a case by case basis, up to a 5% maximum as provided in the *Subdivision Act 1988*.

Mr Hermon further submitted that Council has not considered the principles in Section 18(1A) of the *Subdivision Act*.

(ii) Certainty

Mr Hermon submitted that the 'by negotiation' element of the schedule to Clause 52.01 for land contributions on subdivisions greater than 10 lots will result in uncertainty for developers.

(iii) Opportunity for input

Mr Hermon submitted that the HIA has not been adequately or effectively consulted during the OSS and Amendment preparation, and this reflects on the rigour and robustness of the OSS. He further submitted that if the strategy is reviewed in future, then HIA would welcome the opportunity to contribute.

³ HIA Hearing submission p3.

(iv) Housing affordability

Mr Hermon submitted that all of the above factors will contribute to increased stress on housing affordability as increasing developments costs, including open space contributions, are passed on to householders and homebuyers.

(v) Council response

In their original response to the submission Council noted that the existing system of open space contributions is the model preferred by the HIA, that is the site by site negotiation of open space contributions.⁴

The response noted that this current approach does not provide a strategic approach to open space planning and provision, and the OSS and Amendment are to move Council's consideration to that more strategic approach, including providing more certainty to developers.

In his reply at the Hearing, Mr Montebello for Council noted that the 'sliding scale' approach had already been criticised by VCAT on the basis that there is no rationale for a smaller development to be subject to a proportionally smaller rate.⁵

He also submitted on housing affordability that the HIA often raise this point but rarely produce any evidence to support it. He submitted that the value of open space to residents endures for the life of the dwelling and additional up front costs should be amortised over the life of the dwelling.

(vi) Panel response

The Panel notes the submission of the HIA. The HIA is essentially arguing that the Council should retain the existing site by site consideration of open space as provided for in the *Subdivision Act*.

The Council has undertaken the OSS and Amendment to intentionally move away from this approach to take a more thorough, detailed and strategic view of the likely population and open space demand across the whole municipality, and then determine what they consider to be the appropriate contribution rate.

The Panel does not consider it fair that the HIA has criticised the approach proposed without any apparent criticism or analysis of the methodology put forward. Furthermore, reference to Section 18(1A) of the *Subdivision Act* appears to indicate that the HIA submission does not fully understand the changes to the Act introduced post *Fletcher*; and that Council is not required to consider the principles in Section 18(1A).⁶

The Panel also notes the submission in relation to certainty where negotiation of a higher land contribution for larger developments is possible. This issue is discussed in more detail in Section 2.2.8.

⁴ Attachment 2 to Delegates Report signed on 14 September 2015.

⁵ *Stupak v Hobsons Bay City Council* [2011] VCAT 618, at para 17.

⁶ See Section 18(1AA).

The HIA submission in relation consultation is noted. Whether or not ‘non statutory’ consultation with industry was adequate during OSS preparation is not an issue the Panel needs to draw any conclusions on. There is nothing before the Panel to suggest that the Amendment exhibition was flawed; this is evidenced by the HIA submission itself.

The Panel notes Mr Montebello’s submission in reply in relation to housing affordability. The Panel agrees there is no evidence before the Panel of a substantive effect, and thus it is difficult to conclude that the Amendment should be changed or abandoned on this basis. The submission does not fairly acknowledge that even if open space contributions do worsen housing affordability to some extent, again a point not proven to the Panel, then this should be offset over the life of the development or dwelling by improved quantity and quality of open space and its consequent positive effects on liveability.

The Panel does not recommend any changes to the Amendment as a result of the submission.

2.2 Other submissions

2.2.1 Ms Lehet

(i) ‘Land’ versus ‘cash’

Ms Lehet objected to an area of Footscray being nominated as ‘cash preferred’ in the local policy rather than ‘land preferred’; submitting that additional open space in this area is required.

Ms Thompson in her circulated evidence provided a comprehensive response to the submission.⁷ Essentially the response was that as the area is not subject to substantial projected population growth, there is not a particular need to provide additional land for open space in this area.

Importantly she noted that if this situation changes, then the OSS may need to be revised to include the need for open space.

(ii) Panel response

The Panel notes the response to the submission and finds it persuasive. No change is recommended to the Amendment.

2.2.2 Mr Tuhan and Ms Guclu

(i) Lighting around Edgewater Lake

Mr Yildiz appeared at the Hearing and spoke for Mr Tuhan and Ms Guclu, providing a series of slides illustrating their particular concern. Essentially the concern relates to the lack of lighting around the harbour plaza and lake walk on Edgewater Lake (Burndap Park). The lack of lighting, it was submitted, gives rise to significant safety and security concerns.

⁷ Ms Thompson, expert evidence, para C3 onwards.

Ms Thompson noted that lighting may be required in areas of Regional open space such as this and further assessment against the criteria would need to be undertaken by Council.⁸

In closing, Mr Montebello submitted that the submission was reasonable but could not be directly addressed by the Amendment. He did note that the OSS criteria for lighting⁹ may provide the opportunity for the submitters to seek support from Council for their request.

(ii) Panel response

The Panel does not consider that this is an issue that goes to its advice on Amendment C137. That being said, the Panel notes that the submission was compelling and appeared to make a good case at face value that there is a real need in this area.

The Panel does not make any recommendations in relation to the Amendment as a result of the submission but encourages the submitters to work with Council to try and resolve their issue.

2.2.3 Ms Sparks

(i) Boulevard Plaza

Ms Sparks submitted that the park on the corner of Bracken Avenue and Edgewater Boulevard in the Edgewater Estate should be softened and beautified into a ‘useable green family friendly playground’.

In their response to submissions, Council noted there is an opportunity to improve the park; this will be considered in future funding allocations.¹⁰

Ms Thompson suggested that the park could be upgraded in accordance with guidance in the OSS as the park (Boulevard Plaza) has recently been transferred to Council as part of the open space contribution for the Estate. She suggested this would need to be funded separately to the OSS framework as it would be for the existing Estate population.¹¹

(ii) Panel response

The Panel notes the submission and response and considers it an issue Council could consider as part of its broader open space management. No change to the Amendment is recommended.

2.2.4 Ms Lester

Ms Lester provided a number of comments on the values and benefits of open space and suggestions for management and improvement; primarily aimed at the creative sphere:

The quality, beauty, design and suitability of the space for public amenity and purpose need to be protected and built in explicitly the policy (sic). Quality and

⁸ Ms Thompson, expert evidence, para C6.

⁹ Page 267 of the OSS.

¹⁰ Attachment 2 to Delegates Report signed on 14 September 2015.

¹¹ Ms Thompson, expert evidence, para C1.

good design is much more important than just the amount of land or the amount of money allocated.

She made the following specific request for changes to the proposed local policy.

(i) Early consultation

She submitted that in 'land preferred' areas early consultation occur to ensure high quality design and open space outcomes.

Council noted that the proposed policy already includes an 'early consultation' Clause. Ms Kay in her circulated evidence noted that the early consultation Clause is to ensure that open space land provided meets requirements for size and location amongst other elements.¹²

(ii) Funds for public art

Ms Lester submitted that funds collected under the OSS contributions should be able to be used for public art, and for larger contributions public art contributions should be able to be considered.

Council responded that contributions may be used when the public art is integrated into the functional use of open space but not for freestanding art pieces.¹³

(iii) Transparent reporting

Ms Lester submitted that there should be detail provided of the additional investment into open space and what it is spent on.

Council responded that the funds raised can only be spent on specific purposes and the suggestion of public reporting could be considered.¹⁴ Ms Kay in her response to submissions noted that Council will provide some information in its annual report.¹⁵

(iv) Panel response

The Panel notes Ms Lester's submissions on the OSS and Amendment and considers that in general, many of the submissions she has made are consistent with the objectives of the OSS, even if some of the 'devil will be in the detail' of implementation.

In relation to her specific comments on the policy, the Panel considers they are valid issues but do not give rise to a change in the Amendment. The first point is already in the Amendment. The second and third points may be further considered by Council for action but can either not be considered in the Amendment, or are not dependent on changes to the Amendment.

¹² Ms Kay, expert evidence pp15-16.

¹³ Attachment 2 to Delegates Report signed on 14 September 2015.

¹⁴ Attachment 2 to Delegates Report signed on 14 September 2015.

¹⁵ Ms Kay in her response to submissions noted that Council will provide some information in its annual report.¹⁵

2.2.5 Dr Kwasik

(i) Improvements to Cowper Street

Dr Kwasik submitted that Cowper Street in Footscray should be protected and improved based on its nature of a green boulevard with green median strip and verges. He made a number of suggestions for improving the character of the street including consideration of protection via heritage listing.

Dr Kwasik also commented that there are rubbish issues in the Footscray city centre that appear worse than other urban centres and this should be addressed.

Council in reply noted that the suggestions put forward by Dr Kwasik are generally consistent with the objectives of the OSS and could be considered for implementation by the open space project team.¹⁶

Dr Kwasik's concerns in relation to rubbish were referred to the waste management section of Council.

Ms Thompson in her expert statement noted that the Cowper Street median had not been specifically included in the OSS as the median is less than 10 metres in width, and thus not defined as open space in her methodology.¹⁷ She also noted that the proposal for a new park in the area is consistent with the OSS recommendations.

(ii) Panel response

The issues raised by Dr Kwasik should be considered by Council in its broader consideration of open space management and implementation. The Panel does not consider that a change is needed to the OSS and Amendment.

2.2.6 Confidential submission (8)

(i) Use of open space

The submitter supports the Amendment and raises a number of issues about the provision and functionality of open space; particularly in relation to ensuring the vulnerable have access to open space and programs within it.

Ms Thompson provided a comprehensive response in her evidence and identified areas where the OSS should help to assist with some of the outcomes identified by the submitter.¹⁸

(ii) Panel response

The Panel notes the submission and considers many of the elements should be able to be addressed through OSS implementation. No change to the Amendment is recommended.

¹⁶ Attachment 2 to Delegates Report signed on 14 September 2015.

¹⁷ Ms Thompson, expert evidence, para C8.

¹⁸ Ms Thompson, expert evidence, para C5.

2.2.7 Ms Mittermaier

(i) Provision of open space and open space acquisition

Ms Mittermaier provided a detailed list of improvement suggestions for open space in the City including provision of more spaces and opportunity for youth; more art focused spaces; more sports grounds; and improvements to Footscray to lift its attractiveness, accessibility and cleanliness.

Ms Thompson provided a detailed response in her evidence statement to the issues raised by Ms Mittermaier.¹⁹ She noted that the OSS includes many elements consistent with the submitters objectives including the need to provide for a diversity of open space and the need to provide additional sports grounds.

Ms Thompson also highlighted Section 5.2.3 in the OSS which identifies how open space will be acquired.

(ii) Panel response

The list of suggestions provided by Ms Mittermaier appears reasonable and the Panel is satisfied that they can be considered within the framework of the OSS and Amendment, but do not require a change to the Amendment. In relation to how land will actually be acquired, the Panel considers the OSS provides adequate guidance and a flexible approach as to how this will be achieved.

2.2.8 Maidstone and West Footscray Residents Group

The Maidstone and West Footscray Residents Group (MWFRG) submitted on a number of issues.

(i) Maribyrnong defence site

The MWFRG submitted that all of the Maribyrnong defence site should be used for recreation and open space and be part of a linear park from the Organ Pipes to Port Phillip Bay. They submitted it could be a major recreational focus akin to Yarra Bend Park, Royal Park and other large regional parks in Melbourne.

Council submitted in response that the defence site will be an important part of open space in Maribyrnong including the linear park along the river which is supported by the OSS. They considered that open space provision will be an important part of the urban renewal opportunity but that the whole site will not be provided for open space.²⁰

Ms Thompson noted that the site will likely provide a regional open space component beyond that covered by the OSS but local parks will still be needed.

(ii) Maidstone cash v land preference

The identification of 'cash preferred' areas in Maidstone as opposed to 'land preferred' was also criticised, on the basis that there are many linear barriers (roads and railways) blocking

¹⁹ Ms Thompson, expert evidence, para C7.

²⁰ Attachment 2 to Delegates Report signed on 14 September 2015.

access to local parks. To solve this problem it was submitted additional land may be required to provide better park access.

Council submitted that the approach in the OSS is to use local streets to provide/maintain access in established urban areas and improve the streetscape with that objective in mind.²¹

The basis for the land/cash preferred approach is provided in the strategy itself at Section 6.5.

(iii) Panel response

The Panel notes that Council agrees that a linear park along the Maribyrnong is a key element of open space and that the Maribyrnong defence site will also make an important contribution, even if that contribution is not yet clear.

Whilst the MWFRG may wish Council to be ‘brave’ and pursue the whole site for open space, the Panel notes that the development of the land will be led by the State Government through Places Victoria (PV). Council will have a critical role in this process but plans for the site already include significant proposals for housing and other development. This site is discussed further below.

No change to the Amendment is recommended.

2.2.9 Places Victoria

(i) The contribution rate and private open space

PV has two major urban renewal sites in the City at Footscray (34 Cowper Street) and the Maribyrnong defence site. PV is concerned that both sites, being larger sites of more than 10 lots, will potentially attract the ‘negotiation’ Clause in the Schedule to Clause 52.01, namely:

5.7% or greater subject to negotiation and having regard to the density and layout of the development where provided as land.

Specifically they considered that additional factors such as density bonuses, publicly accessible privately owned open space and the opportunity for open space contribution ‘swaps’ across large sites owned by the same owner.

PV also elaborated on their concerns in relation to publicly accessible private open space; submitting that it should be given greater consideration in open space decision making, and particular in areas such as the Footscray central activity area where a higher scale and density of development is proposed.

In response Council submitted that the greater rate by negotiation is justified, although Mr Montebello did suggest some modified wording in the Clause to the following:

*5.7 per cent or greater to the satisfaction of Council where provided as land.*²²

²¹ Attachment 2 to Delegates Report signed on 14 September 2015.

²² Council Hearing submission para 94.

He submitted this is a more normal form of words rather than ‘by negotiation’ and would provide a clearer trigger for action by a party under Section 149 of the *Planning and Environment Act 1987* for a challenge to VCAT.

Council, and Ms Kay in her evidence, in relation to privately owned public accessible open space submitted that such provisions should not be considered as part of the open space contribution process, although they might be part of the broader development discussion. Ms Kay noted that other Panels have adopted a common view on this issue.²³

(ii) Panel response

In relation to publicly accessible private open space, the Panel notes the discussion in the Melbourne C209 Panel report on this issue and in essence adopts that position.²⁴ This position is primarily that whilst publicly accessible private open space may be considered in the overall open space and public realm discussion, it should not be included as a specific contribution to *public* open space. By definition it is not public open space; it is private land given over, perhaps temporarily, to public use.

In relation to the negotiation of a higher open space contribution, where land is being provided for subdivision greater than 10 lots, the Panel considers that this is a reasonable approach. Higher open space contributions are often negotiated for strategic development sites, appropriately in the Panel’s view. The Panel does consider that Mr Montebello’s suggested change to bring the wording back ‘into the fold’ of the *Planning and Environment Act 1987* is to be preferred, and whilst PV were not at the Hearing to comment on the suggestion, the Panel is comfortable supporting it as it provides a much clearer framework for any dispute resolution via VCAT.

The other elements of the PV submission related to consideration of density and land swaps the Panel is comfortable can be accommodated within the open space framework proposed.

The Panel recommends:

Replace the following wording in the schedule to Clause 52.01:

5.7% or greater subject to negotiation and having regard to the density and layout of the development where provided as land.

With the following wording:

5.7 per cent or greater to the satisfaction of Council where provided as land.

²³ Ms Kay, expert evidence p19.

²⁴ Melbourne C209 (PSA) [2014] PPV 116, Section 4.3.3(i).

Appendix A Submitters to the Amendment

No.	Submitter
1	Public Transport Victoria
2	Angela Sparks
3	John Charles Adams
4	Andrea Lester
5	Nick Pelham-Bomar
6	Nancy Jean Lehet
7	Jan-Paul Kwasik
8	Confidential by request
9	Sam Tuhan
10	Withdrawn
11	Katrina Mittermaier
12	Housing Industry Association
13	Hobsons Bay City Council
14	Elizabeth Meddings
15	Michele Lanera
16	Maidstone & West Footscray Residents Group
17	Places Victoria