

*Planning and Environment Act 1987*

**Panel Report**

**Mitchell Planning Scheme Amendment C145 with  
Beveridge Central Infrastructure Contributions Plan**

**24 December 2020**

### How will this report be used?

This is a brief description of how this report will be used for the benefit of people unfamiliar with the planning system. If you have concerns about a specific issue you should seek independent advice.

The planning authority must consider this report before deciding whether or not to adopt the Amendment. [section 27(1) of the *Planning and Environment Act 1987* (the Act)]

For the Amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for Planning for approval.

The planning authority is not obliged to follow the recommendations of the Panel, but it must give its reasons if it does not follow the recommendations. [section 31 (1) of the Act, and section 9 of the *Planning and Environment Regulations 2015*]

If approved by the Minister for Planning a formal change will be made to the planning scheme. Notice of approval of the Amendment will be published in the Government Gazette. [section 37 of the Act]

### *Planning and Environment Act 1987*

Panel Report pursuant to section 25 of the Act

Mitchell Planning Scheme Amendment C145mith

24 December 2020



Michael Ballock, Chair

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## Glossary and abbreviations

Act	<i>Planning and Environment Act 1987</i>
CDH	CDH properties Pty Ltd
Council	Mitchell Shire Council
ICP	Beveridge Central Infrastructure Contributions Plan
IPPL	Inner Public Purpose Land
Ministerial Direction	Ministerial Direction on the Preparation and Content of Infrastructure Contributions Plans
PAO	Public Acquisition Overlay
PPF	Planning Policy Framework
PSP	Beveridge Central Precinct Structure Plan
VPA	Victorian Planning Authority

## Overview

Amendment summary	
<b>The Amendment</b>	Mitchell Planning Scheme Amendment C145mith
<b>Common name</b>	Beveridge Central Infrastructure Contributions Plan
<b>Brief description</b>	The Amendment introduces an Infrastructure Contributions Plan that will apply to land affected by the Beveridge Central Precinct Structure Plan
<b>Subject land</b>	Beveridge Central Precinct Structure Plan area
<b>The Proponent</b>	Victorian Planning Authority
<b>Planning Authority</b>	Victorian Planning Authority
<b>Exhibition</b>	9 April to 9 June 2020
<b>Submissions</b>	Number of Submissions: 5   Opposed: 1 - Mitchell Shire Council (submission 1) - CDH Properties (submission 2) - Melbourne Water (submission 3) - Petar and Georgina Repic (submission 4) - Department of Transport (submission 5)

Panel process	
<b>The Panel</b>	Michael Ballock (Chair)
<b>Directions Hearing</b>	13 July 2020 by video conference
<b>Panel Hearing</b>	5 October and 23 November 2020 by video conference
<b>Parties to the Hearing</b>	Refer to Appendix A
<b>Citation</b>	Mitchell PSA C145mith [2020] PPV
<b>Date of this Report</b>	24 December 2020

## Executive summary

The Mitchell Planning Scheme Amendment C145mith (the Amendment) seeks to introduce an infrastructure contributions plan that will apply to land affected by the Beveridge Central Precinct Structure Plan (PSP). This PSP was approved by the Minister for Planning and gazetted on 17 January 2019 under Amendment GC55.

Key resolved issues raised in submissions included:

- the exhibited version of Table 11 does not include any non-arterial transport related Inner Public Purpose Land (IPPL) requirements, however, the transport designs indicate that a small amount of land will be required
- funding for a section of RD-05 that is contained within the Public Acquisition Overlay (PAO) for the Cameron's Lane interchange.

Key unresolved issues raised in submissions included:

- parcel 34 is not contribution land
- the Beveridge Central Infrastructure Contributions Plan (ICP) should not apply to parcel 34
- the land credit amount has been incorrectly calculated
- a PAO should apply to parcel 34.

The land identified as parcel 34 in the PSP and the ICP is situated at 4 Lithgow Street, Beveridge and is owned by CDH Properties Pty Ltd (CDH). The land has an area of 2.4813 hectares and all of the property makes up part of the sports reserve SR-01 in the PSP Plan 3 – Future Urban Structure.

CDH submitted that the public land and equalisation elements of ICP were based on the assumption that the landowner would either be a developer or sell the land to a developer. Because the entire property is within the sports reserve and cannot be developed for residential purposes it cannot be considered as contribution land.

The Mitchell Shire Council (Council) proposed what it called a 'practical solution' in an attempt to provide a resolution to the fundamental issue of the timing of the acquisition of the property. However, in the Panel's view, this solution was not appropriate. The Panel urges the VPA and Council to continue to work with CDH to find an acceptable outcome to the acquisition of the property within an appropriate time frame.

The Panel concludes:

- parcel 34 is contribution land
- the ICP is correctly applied to parcel 34
- the calculation of the land credit amount is correct
- the land value estimate should be adjusted to include the 1 July 2019 indexation
- the Council's practical solution is a genuine attempt to resolve the matter but is not supported.

## Recommendations

Based on the reasons set out in this Report, the Panel recommends that Mitchell Planning Scheme Amendment C145mith be adopted as exhibited subject to the following:

- 1. Replace the exhibited Beveridge Central Infrastructure Contributions Plan with the October 2020 version (Appendix 2 of Document 11).**
- 2. Recalculate the land credit amounts to include the indexation for 1 July 2019.**

# 1 Introduction

## 1.1 The Amendment

### (i) Amendment description

The purpose of the Amendment is to replace the interim Beveridge Central Infrastructure Contributions Plan (ICP) with the final version of the ICP for land affected by the PSP.

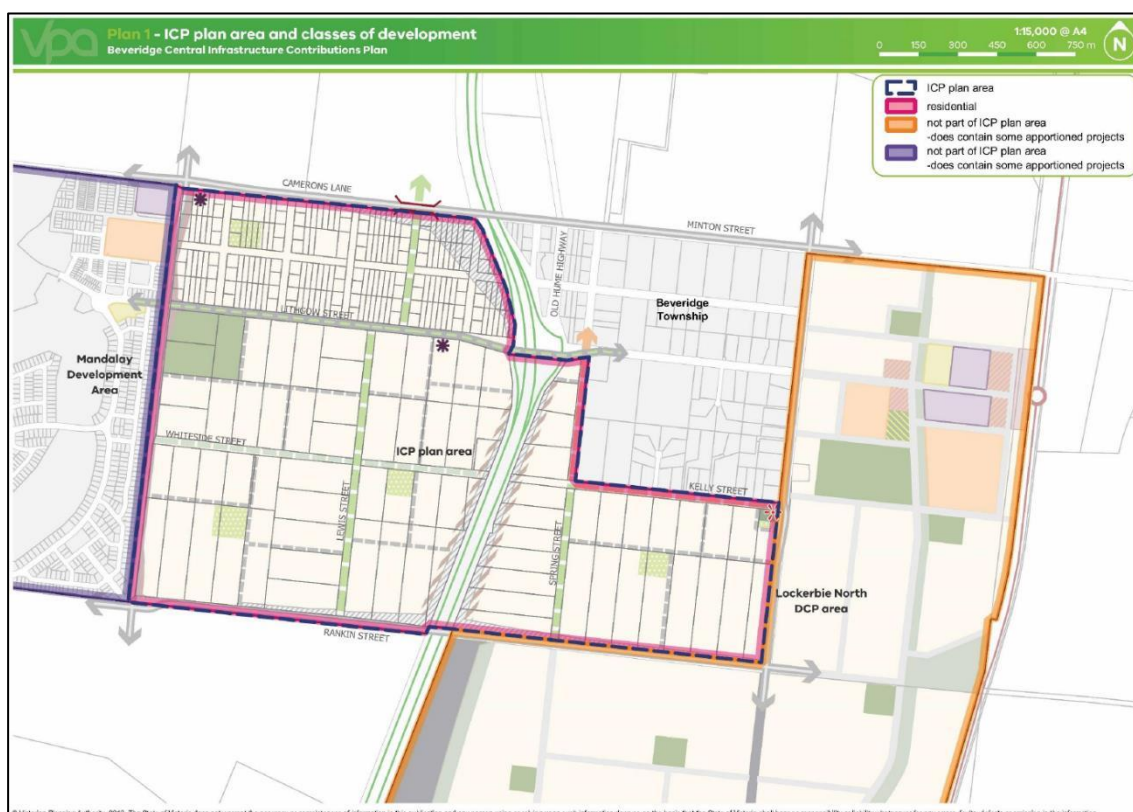
Specifically, Mitchell Amendment C145mith seeks to:

- Amend Schedule 2 to Clause 45.11 Infrastructure Contributions Overlay (ICO2) that applies to land within the Beveridge Central Precinct.
- Amend the Schedule to Clause 72.04 to replace Beveridge Central Infrastructure Contributions Plan, July 2019 (Amended November 2019) with a new incorporated document titled Beveridge Central Infrastructure Contribution Plan, April 2020.

### (ii) The subject land

The Amendment applies to the land shown in Figure 1.

**Figure 1 Beveridge Central PSP area**



### (iii) Background

There are four planning scheme amendments relevant to the development of the ICP:

- Amendment GC55 to the Mitchell and Whittlesea Planning Schemes was gazetted on the 1 January 2019 which incorporated the PSP. The Victorian Planning Authority (VPA) was the planning authority for this amendment.



- Amendment C147mith to the Mitchell Planning Scheme was gazetted on the 4 September 2019. It retitled the PSP document as Beveridge Central Precinct Structure Plan May 2018 (amended July 2019) and amended the document in relation to identifying additional parcels of land within the precinct. The amendment also made associated changes to the Urban Growth Zone Schedule 5 and to the Schedule to clause 72.04.
- Amendment C143mith to the Mitchell Planning Scheme was gazetted on the 5 September 2019 and introduced the interim Beveridge Central Infrastructure Contribution Plan by applying the Infrastructure Contributions Overlay Schedule 2 to land within the Beveridge Central Precinct.
- Amendment C148mith to the Mitchell Planning Scheme was gazetted on the 5 December 2019 and made changes to update the incorporated interim ICP that applies to land affected by the PSP to correct errors.

## **1.2 Procedural issues**

The VPA and CDH originally were the only two parties that requested to be heard. At the Directions Hearing, the VPA challenged whether CDH's submission was based on matters that could legitimately be put to the Panel. As a consequence, the Panel directed that two weeks before the Hearing CDH would circulate its submission and the VPA circulate its submission one week before the Hearing to enable the VPA to consider and respond to CDH's submission.

Following the circulation of the CDH and VPA submissions, on 24 September the Panel received a request from Council to make a submission to the Hearing. Council had submitted to the exhibited Amendment but had not requested to be heard. The Panel agreed to Council's request and its submission was received on 2 October 2020. In that submission Council proposed what it termed a 'practical solution'. Council's solution involved the following:

- an exemption to the calculation of the land credit amount for parcel 34 by reference to the total area of IPPL provided, rather than the area of over-provision
- facilitation of an early acquisition of parcel 34, the ICP to include the cost of finance to purchase parcel 34 as a new ICP early works project to be funded by a supplementary levy.

At the Hearing on 5 October the parties agreed to an adjournment to allow Council's proposal to be explored in further detail with the possibility of reaching an agreement. The Hearing was adjourned until 23 November 2020 and the parties were to report back on progress the week before the Hearing. However, no agreement was reached and the Hearing proceeded as scheduled with submissions from the VPA, Council and CDH.

As part of its submission CDH made a number of statements on the legality of the ICP as well as its consistency with the Charter of Human Rights and Responsibilities Act 2006. In summary, CDH submitted:

- There is no power under Part 3AB of the Act to include parcel 34 as "contribution land" in the ICP because the land cannot be developed. It is not land in respect of which an infrastructure contribution can be required.
- As the land cannot be developed, it cannot be contribution land within the meaning of section 46GA of the Act.

- An infrastructure contribution cannot be imposed on the land by virtue of section 46GC of the Act.
- The proposed acquisition is contrary to the provisions of the *Charter of Human Rights and Responsibilities Act 2006* and clearly was not contemplated by Minister Pakula when the Charter statement was made to the Parliament on 20 September 2017.

In response both the VPA and Council also offered somewhat different interpretations of the Act.

It is not the Panel's role to rule on the interpretation of legislation. That is a matter for the courts. The Panel's role is to consider the issues raised in submissions. Chapter 4 deals with the issues pertinent to the Amendment raised in submissions. The interpretation of legislation is left for consideration elsewhere.

## 2 Planning context

### 2.1 Planning policy framework

The VPA submitted that gazettal of the PSP in accordance with the Amendment forms the strategic justification for the infrastructure items included in the ICP, the subject of this Amendment.

#### **Clause 19.03-1S (Development and Infrastructure Contribution Plans)**

The Amendment supports Clause 19 by: implementing mechanisms to collect developer contributions to fund infrastructure throughout the PSP.

#### **Clause 22 (Local Planning Policies)**

The VPA submitted that the Local Planning Policy Framework of the Mitchell Planning Scheme was considered during preparation of the PSP and the Amendment ensures developers financially contribute to infrastructure identified as necessary for the precinct by the PSP.

### 2.2 Ministerial Directions

#### **Ministerial Direction 9 – Metropolitan Strategy**

Ministerial Direction 9 was considered in preparing the Amendment. In accordance with Ministerial Direction 9, the Amendment will facilitate the collection of developer levies to fund the required infrastructure to service future urban land within the Urban Growth Boundary.

#### **Ministerial Direction 11 – Strategic Assessment of Amendments**

The Explanatory Report discusses how the Amendment meets the relevant requirements of Ministerial Direction 11 (Strategic Assessment of Amendments) and *Planning Practice Note 46: Strategic Assessment Guidelines*, August 2018 (PPN46). That discussion is not repeated here.

#### **Ministerial Direction on the Preparation and Content of Infrastructure Contribution Plans**

The *Ministerial Direction on the Preparation and Content of Infrastructure Contributions Plans* (Ministerial Direction) contains general requirements that apply to all ICPs and annexures that specify requirements for individual development settings.

Clause 17 of the Ministerial Direction provides requirements for the implementation of a supplementary ICP levy. These requirements are:

- whether the plan preparation costs, works, services or facilities can be wholly or partially funded from a standard levy, unless the applicable Annexure to this Direction specifies those supplementary levy allowable items must not be funded from a standard levy
- whether the works, services or facilities are essential to the orderly development of the area
- whether the works, services or facilities are identified in a precinct structure plan or equivalent strategic plan applying to the land

- whether the land has particular topographical, geographical, environmental or other physical constraints or conditions that significantly affect the estimated cost of allowable items to be funded through the infrastructure contributions plan
- any other criteria specified in the applicable Annexure to this Direction.

## **2.3 Discussion and conclusion**

For the reasons set out in the following chapters, the Panel concludes that the Amendment is supported by, and implements, the relevant sections of the PPF, and is consistent with the relevant Ministerial Directions. The Amendment is well founded and strategically justified, and the Amendment should proceed subject to addressing the more specific issues raised in submissions as discussed in the following chapters.

## 3 Post exhibition changes

### 3.1 Submissions

The VPA submitted that the exhibited version of the ICP indicates that construction project RD-05 (Murray Street) was to be funded for an extent of \$364.63m spanning between Lithgow Street and a PAO that applies to the land to support the future Camerons Lane interchange. The VPA advised that local roads normally would be constructed as developer works, however, in this instance RD-05 is included in the ICP due to the fragmented land ownership.

In response to submissions, the VPA proposed to amend RD-05 to include funding for the construction of the full length of the street to ensure contributions towards a complete connection to Beveridge North West. The proposed change will extend RD-05 to include 56 metres of road within the PAO boundary, requiring an additional levy of \$356,031.79.

The VPA submitted that it was appropriate for the ICP to fund this section of road as the nexus for the work is development within the Beveridge Central PSP.

The VPA advised the Panel that the exhibited version of the ICP indicated that there is public purpose land take requirements associated with non-arterial road and intersection widening.

In response to submissions, the VPA reviewed the public purpose land requirements indicated in Tables 11 and 17 of the ICP against the indicative transport designs provided in Appendix 3. The review found that an additional 0.49ha of public purpose land across 30 parcels is required to implement the transport designs. The additional land take required for each parcel ranges from 0.0004ha (Parcel 29.58) to 0.1184 (Parcel 51). The VPA proposed to update the relevant tables and make consequential amendments as required to reflect the additional IPPL requirements. The proposed amendments will not result in any new parcels providing a land contribution greater than the ICP land contribution percentage.

### 3.2 Discussion

The Panel agrees with and accepts the post exhibition changes to the ICP proposed by the VPA. These changes are included in the October 2020 version of the ICP included as Appendix 2 in the VPA's submission (Document 11).

### 3.3 Conclusion and recommendation

The Panel concludes that the changes to the exhibited ICP are appropriate.

The Panel recommends:

1. **Replace the exhibited Beveridge Central Infrastructure Contributions Plan with the October 2020 version (Appendix 2 of Document 11)**

## 4 Parcel 34

### 4.1 Background

The land identified as parcel 34 in the PSP and ICP is situated at 4 Lithgow Street, Beveridge and is owned by CDH. The land has an area of 2.4813 hectares and the entire property makes up part of the sports reserve SR-01 in the PSP Plan 3 – Future Urban Structure.

### 4.2 The issues

The issues are whether:

- parcel 34 is contribution land
- the ICP is correctly applied to parcel 34
- the calculation of the land credit amount is correct
- the land value estimate should be adjusted to include the 1 July 2019 indexation.

### 4.3 Relevant policies, strategies and studies

In the context of the Amendment the VPA provided the following explanation of the ICP.

An ICP is a statutory document incorporated in a planning scheme for the purposes of imposing infrastructure contributions to fund the provision of works, services or facilities (infrastructure) and securing land for public purposes.

The ICP system came into effect in October 2016 and was amended in July 2018 by the *Planning and Environment Amendment (Public Land Contributions) Act 2018*. The matters that must be specified in an ICP are set out in section 46GI(1) of the Act.

An infrastructure contribution may consist of either or both of the following two components:

- Monetary component – a monetary levy that may be used to fund the provision of works, services, facilities and plan preparation costs. The monetary construction component is based on standard levies that are pre-set for particular classes of development. If required, the system also allows for a supplementary levy in addition to the standard levy where certain criteria are met. The levy may consist of a standard levy, a supplementary levy or both.
- Land component – The land component of an ICP consists of IPPL, outer public purpose land and any land equalisation amount. IPPL is the land specified in the ICP as land to be set aside for public purposes (such as land for roads, parks and community facilities) and must be vested in, transferred to or acquired by the collecting agency and/or development agency.

#### Land Equalisation and Land Credit Amounts

Landowners who contribute a greater percentage of their land for public purposes are compensated by the landowners who contribute a lesser percentage of their land for public purposes. This is done by requiring each landowner who ‘under provides’ IPPL to pay a land equalisation amount.

Land equalisation funds the payment of a land credit amounts to each landowner that ‘over provides’ IPPL and the acquisition of any outer public purpose land.

The Act prescribes the equalisation method. The planning authority calculates the ICP land contribution percentage, which is the average amount of land that landowners within an ICP area are required to provide for the provision of infrastructure. It is calculated by dividing the total amount of land required for infrastructure by the total 'contribution land area' as defined in section 46GA of the Act.

The parcel contribution percentage for each individual parcel within the ICP is then compared to the ICP land contribution percentage:

- Parcels providing under the average percentage pay a 'land equalisation amount' (in recognition of their lower contribution). The land equalisation rate (across the ICP area) is calculated by the sum of the land credit amounts, divided by the number of hectares of underproviding land. The land equalisation amount (per parcel) is then calculated by the land equalisation rate multiplied by the number of hectares of underproviding land.
- Parcels providing above the average receive a 'land credit amount' (in recognition of their greater contribution and greater loss of developable area). The land credit amount (per parcel) is calculated by establishing a per hectare rate for all public purpose land on that parcel, then multiplying the rate against the number of hectares that are being overprovided.

### **Payment of Land Credit Amounts (section 5.8 of the ICP)**

Section 5.8 of the ICP states:

A person is entitled to be paid the land credit amount specified in this ICP in relation to a parcel of land if:

- On development of that parcel the person must, in accordance with section 46GV(4) of the Act, provide inner public purpose land forming part of that parcel to the collecting agency or a development agency; and
- The parcel contribution percentage of the parcel of land to be developed is more than the ICP land contribution percentage for that class of development.

The land credit amount is to be paid by the collecting agency to the landowner at a time to be agreed, but not before lodgement of a subdivision plan. This may be formalised in a section 173 agreement if the collecting agency and landowner agree.

In this instance, the collecting agency is the Mitchell Shire Council.

The amount the landowner receives is based on the estimated value of the IPPL in their parcel of land. The methods for calculating the land equalisation amounts and land credit amounts are specified in the Ministerial Direction, as are the methods for estimating the values of IPPL and outer public purpose.

Under section 22(5)(a) of the Act, a planning authority must not consider a submission to a planning scheme amendment that requests a change to any land credit amount or land equalisation amount. However, the estimated value of IPPL (on which the value of the land credit amount is based) can be disputed through a separate process.

The payment of land credit amounts is addressed under section 46GW of the Act. The Act does not specify when a land credit amount must be paid after a permit is issued to develop land. The timing of the land credit amount can be negotiated between the collecting agency and the landowner. If there is no agreement, a land credit amount should be paid to the landowner at the time the landowner provides the IPPL in accordance with the Act.

## 4.4 Submissions

CDH submitted that the public land and equalisation elements of ICP were based on the assumption that the landowner would either be a developer or sell the land to a developer. Because the entire property is within the sports reserve and cannot be developed for residential purposes it cannot be considered as contribution land.

CDH added that infrastructure contribution plans and public contributions are intended to work for large developers where part of the land is developed for urban purposes and part of the land is set aside for public land. However, the system fails where a landowner cannot develop any of its land. CDH added:

If there is a power to include the land as contribution land in an ICP, that power should not be exercised because:

- it is not intended that the provisions relating to the land component of an infrastructure contribution should apply when the land cannot be developed
- to apply the provisions of the ICP to the land is contrary to the objectives of planning in Victoria
- to apply the provisions of the ICP to the land is contrary to section 20 of the Charter of Human Rights and Responsibilities Act 2000
- if (contrary to the above submissions) the land is to be included as contribution land in the ICP, then there should be no reference to the ICP land contribution percentage. Therefore, the land credit amount should be the full value of the land in accordance with the ICP of \$4,342,292, and not the “land credit amount of \$3,913,041.80
- the ICP should specify that SR-01 must be acquired within 2 years of the approval date of C145.

CDH advised that the ICP identified SR-01 as a short to medium term project which means about five to 10 years and this was consistent with advice provided by Council that it would be unlikely to acquire the property for 10 years. It argued that even though the ICP Table 11 Public Purpose Land Credit and Equalisation Amounts classified the land as residential it could not be developed because all of the land was required for a public purpose. Consequently, it was inaccurate to apply the ICP land contribution percentage to the property because there is no power to impose an infrastructure contribution on the land.

CDH submitted that a:

... fundamental requirement before land can be subject to an ICP is that the land must be land to which an infrastructure contribution can be applied and is “contribution land.” This term is defined to mean:

The land in the ICP plan area of an infrastructure contributions plan in respect of which an infrastructure contribution is to be imposed under the plan if any of that land is developed.

CDH added that the:

The ICP system is inextricably linked to development. It does not and was not ever intended to be applied to the detriment of a landowner who cannot develop their land because the whole of their land is to be acquired for a public purpose in the future.

CDH recommended that parcel 34 should be excluded from the ICP and a PAO be applied to the land with the cost of acquisition included in the ICP.

The VPA submitted that a submission challenging the ICP system or the Ministerial Direction is beyond the scope of the Panel and it should limit its consideration to whether the ICP has



been developed in accordance with relevant requirements. The VPA added that the CDH submission that parcel 34 could not be developed and was not contribution land was incorrect.

With respect to the development of the land the VPA submitted:

The land will clearly and obviously be developed pursuant to the PSP and the ICP. It will be developed as a sports reserve accommodating a pavilion, three soccer pitches, eight tennis courts, car parking and landscaping. Neither the relevant legislation nor the Ministerial Direction prevent land being identified as contribution land simply because it has not been identified as being intended to be developed for residential, commercial or industrial purposes.

It added that the CDH submission confused the class of the development of land with the applied zoning. The property was not zoned residential but the demand for the sports reserve would be generated by residential development.

The land will clearly be the subject of development pursuant to the PSP and accords with the definition of inner public purpose land pursuant to the Ministerial Direction. Accordingly, it is also capable of being classified as 'contribution land' pursuant to the ICP.

The VPA submitted that:

- Section 46GA of the Act and the Ministerial Direction defines IPPL as "*land in the ICP plan area of an infrastructure contributions plan that is specified in that plan as land to be set aside for public purposes*".
- SR-01, an active reserve planned for the corner of Lithgow Street and Patterson Street, is an allowable item under the Ministerial Direction.
- Under section 46GE of the PE Act, the land component of an infrastructure contribution in relation to a parcel of land in an ICP plan area is "*any inner public purpose land that forms part of the parcel of land*".
- An ICP can be applied to an area, therefore defined as an 'ICP plan area' and is the appropriate planning mechanism in this instance.
- Parcel 34 has been correctly identified as contribution land.

Council informed the Panel that it was the lead agency for the delivery of the sports reserve project with the timing for completion up to 10 years and the total cost apportioned to the PSP. Council submitted that parcel 34 is properly designated as contribution land, the land credit amount for parcel 34 has been correctly calculated and a PAO should not be applied to the land.

Council submitted that it was open to the Panel to find that the application of the land contribution percentage artificially depressed the land value of parcel 34 resulting in unfairness to CDH. To address this situation the Panel could recommend that the Minister grant an exemption under Clause 29 of the Ministerial Direction to modify the calculation of the land credit amount. With respect to CDH's submission that parcel 34 was not contribution land and the application of Part 3AB of the Act, Council stated:

That is not how Part 3AB of the Act works. ICPs are a precinct-level control. Some land is developable and some is not. The inner public purpose land within parcel 34 should not be counted differently to any other inner public purpose land. It is all contribution land. Although it is open to the Panel to find that the calculation of the land credit amount results in unfairness to parcel 34, it has been calculated correctly in accordance with the statutory regime.

Council stated that it opposed the application of the PAO to parcel 34 because, while the PAO would clarify CDH's right to compensation for financial loss, the right to compensation

is specifically excluded from IPPL required to be provided under an ICP. In addition, it would be contrary to the Act for parcel 34 not to be counted as IPPL. Council added that should parcel 34 be excluded from the IPPL:

it would extend to an assessment of compensation under the *Land Acquisition and Compensation Act 1986* (LAC Act), including (if available) market value, professional expenses, disturbance and solatium.

While CDH would benefit from these entitlements they would become Council's liabilities as the acquiring authority. Council submitted that these liabilities should not be forced upon it because it is contrary to the provisions of the Act. In addition, there is no need for a PAO and Council, as the acquiring authority, has not requested one.

Council stated:

The ICP system is based on an orderly rollout of infrastructure. Land required for public purposes is delivered progressively as the need arises and funding becomes available.

It précised the CDH submission as:

The core of CDH's complaint is not unfamiliar; it is not getting what it wants when it wants it. That is an inherent feature of the system, not a flaw.

Council submitted that if parcel 34 is properly characterised as contribution land and the PAO should not apply then the CDH submission comes to:

- the land credit amount should be \$4,342,275
- the ICP should oblige Council to acquire the land within two years.

Council submitted that:

Council cannot bring forward the purchase of parcel 34 unless development happens earlier than expected. That is unlikely, given the fragmented nature of the precinct, which comprises 80 properties over an area under 300ha. Landowners will likely need to consolidate parcels to facilitate development.

Council's budget for 2020/21 includes \$39.774m in capital works, comprising \$23.638m of new works and \$16.406m in works carried forward. The combined land value in land credit amounts for SR-01 (including the whole of parcels 34, 30 and 31) is \$12,163,035.17. In the context of Council's budget, that is a significant sum.

Council proposed what it characterised as a 'practical solution' which involved:

- an exemption by the Minister for Planning be sought to calculate the land credit amount for parcel 34 by reference to the total area of IPPL provided, rather than the area of over-provision; and
- facilitation of an early acquisition of parcel 34, by amending the ICP to include the cost of finance to purchase parcel 34 as a new ICP early works project to be funded by a supplementary levy.

The VPA submitted that the early delivery of the SR-01 land must be identified as "*essential to the orderly development of the area.*" The VPA argued that to make an informed decision on the need for early delivery of a project the Panel would need to understand:

- when the item would ordinarily be required
- when Council is reasonably expected to be able to deliver the item (without additional funds)
- why early delivery is essential – supported by robust analysis and evidence

- detailed evidence regarding borrowing costs to enable those costs to be scrutinised and, if appropriate, supported.

The VPA submitted that the community infrastructure needs were assessed as part of the development of the PSP and SR-01 was to be delivered in the short to medium term. This same assessment noted that the shortfall of open space in the Mandalay development informed the location of SR-01 on the western edge of the PSP even though it is totally apportioned to Beveridge Central. In addition, no submissions were made that identified the need for the early provision of the open sports reserve. In summary the VPA argued that insufficient evidence had been presented to support this recommendation.

The VPA stated that it did not think an exemption under Ministerial Direction Clause 29 was warranted. It added:

The principles of the ICP system are therefore based on a shared obligation between developers and the Council to plan for, and deliver, allowable items in line with growth in a timely manner.

The VPA stated that it is open to the Panel to make recommendations that an exemption to the requirement of the Direction be sought *“to facilitate financing of Council’s early delivery of SR-01 in this instance”*.

The VPA submitted:

- Section 46GV(2) of the PE Act identifies the obligation of an applicant to make an infrastructure contribution. However, the timing of a land credit amount is addressed under sections 46GV(4)–(6) which require either a permit to be granted or an agreement entered into.
- The VPA acknowledges that the timing of payment of a land credit amount would typically be negotiated between a landowner and the Council, and included as a condition of a permit at the time of development, in line with sections 46GV(5)–(6).
- The VPA considers that sections 46GV(2)–(6) of the PE Act provides a mechanism for the landowner to trigger payment of a land credit amount, by way of an application for either a planning permit to develop the land or a building permit to carry out building work on the land.
- In circumstances where an ICP requires 100% of a landholding and the collecting agency has no present desire to acquire the land, provided the landowner is able to trigger payment, no unfairness results. The VPA submits that the terms of the PE Act make clear that a landowner is capable of triggering compensation payments in this circumstance.

Council advised the Panel that it did not support this interpretation on the Act and added:

We remind the Panel that Council is not the Planning Authority in this case; the VPA is the planning authority. In putting together an ICP the planning authority is under an obligation to establish to the Panel that the ICP is not only sound but is also fair to all parties involved. Evidently it is not.

It does not seem fair to those parcels that are entirely affected by IPPL with no development potential and if the submissions lodged on Friday are correct, it is not fair to the collecting agency which is expected to pay out the whole of the land credit amounts on (essentially) day 1 when funds for those very significant land credit amounts will not exist for many years.

In response to the VPA submission added:

On the assumption that the legal submissions of Friday (by the VPA) are correct, Council does not consent to be the collecting agency or development agency to this ICP absent an early works delivery charge to address the unique circumstances of this ICP. VPA should be nominated as the collecting agency and delivery agency.

Council argued that if it were forced to acquire the land ahead of schedule it may fall foul of the principles of sound financial management detailed in section 101 of the *Local Government Act 2020*.

In response to questions by CDH and at the Panel's request, after the Hearing had concluded the VPA provided further detail on:

- the estimation of public purpose land values
- the method of adjustment of land credit amounts per parcel
- the notice given of changes to IPPL.

In response, CDH accepted the basis for the estimation of public purpose land values. However, it challenged the indexation of the land credit amount on the basis the valuation was prepared in April 2018 and was indexed on 1 July 2020. CDH submitted that the land credit amount should have also been indexed on 1 July 2019.

CDH also argued that it was not notified of the changes introduced into the October 2020 version of the ICP. The VPA confirmed that only the owners of 30 parcels impacted by the additional IPPL requirements were notified of the changes. CDH was not one of the owners notified.

## 4.5 Discussion

CDH's primary argument is that parcel 34 cannot be considered as contribution land because it cannot be developed. The implication is that only residential or commercial land can be developed. However, in the Panel's view, this approach takes a very narrow view of development. Section 3(1) of the Act includes "*the construction or carrying out of works*" under the definition of development. And works are defined as:

**works** includes any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil

In the Panel's view the CDH argument confuses use with development. The Act defines use as:

... in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed.

The works necessary to transform parcel 34 from its current state into part of SR-01, in the Panel's view, accords with the meaning of development. The CDH argument appears to be that because the land cannot be used for residential use, it cannot be developed. In the Panel's view that is not the case.

In this respect, the Panel accepts the VPA's submission that all of the land will be developed with SR-01 and the property in its entirety will make up the land component of an infrastructure contribution. Therefore, the land is contribution land and legitimately included in the ICP.

In effect, the land contribution percentage is the proportion of IPPL that all landowners contribute as part of the ICP. Those that under provide IPPL pay the difference and those that over provide are paid a land credit amount. Parcel 34 is no exception to this requirement, even though all of the land will be used for SR-01. The contribution of its share of the IPPL is made up of the land contribution percentage and the remainder then becomes the land credit amount. With respect to the calculation of the land credit amount the Panel

accepts the submission of the VPA and Council that the amount has been calculated correctly.

Nevertheless, the Panel notes that indexation of the land equalisation and land credit amounts for each parcel were indexed on 1 July 2020 following the initial 2018 valuation. While the interim ICP was gazetted in September 2019 it was based on the 2018 valuation. The clarification of the ICP calculations provided by the VPA (Document 26) provides an explanation of how and when indexation occurs. However, the Ministerial Direction states that:

... the land equalisation amount must be indexed on 1 July of each financial year in which a revised estimate of inner public purpose land value report is not prepared for the purposes of clause 35.

The interim ICP used the 2018 land value estimate and consistent with the Ministerial Direction the ICP should have been indexed on 1 July 2019 but, on the basis of the information provided by the VPA, was not. The Panel agrees with CDH that the land credit amount should have been indexed on 1 July 2019 as well as 1 July 2020.

Both the VPA and Council informed the Panel that the acquiring authority (Council) had not made any request for the application of a PAO to parcel 34. The Panel agrees with Council's submission that the application of the PAO would "*clarify CDH's right to compensation.*" The Panel also supports the Council's view that the application of the PAO would be transformative in that it would have to apply to all parcels making up SR-01 and consequently is beyond the scope of the Amendment.

The circumstances of parcel 34 are unusual and to some extent CDH's submission that the public land and equalisation elements of ICP were based on the assumption that the landowner would either be a developer or sell the land to a developer appears accurate. For the most part there are landowners or developers who own or have access to significant land holdings that are partially impacted by the various elements of the future urban structure plan. The nature of Beveridge Central is that there is a large number of landowners with mostly small, individual land holdings. Nevertheless, parcels 30, 31 and 34 are all individually owned and are totally within the sports reserve SR-01. In this circumstance CDH was concerned that it was unable to sell its property until the Council was prepared to purchase it, sometime within the next 10 years, as part of the development of the sports reserve. In CDH's view it could not develop the property and there were no prospective purchasers other than Council. For its part Council argued that it could not afford to purchase the property until sufficient funds were collected through the ICP over the next 10 years. The VPA argued that it had complied with all the relevant Ministerial guidelines and provisions of the Act.

The Panel acknowledges the 'practical solution' proposed by the Council as a genuine attempt to provide a resolution to this fundamental issue. In effect the Council's solution was to recommend to the Minister that the land credit amount be calculated differently to effectively remove the land contribution percentage and include the finance costs as early works for the purchase of parcel 34 (and most likely 30 and 31) as a supplementary item. As discussed above, the Panel agrees with both Council that land credit amount has been correctly calculated however, it is no more or less unfair to CDH than other landowners in the PSP area. Consequently, the Panel does not support Council's proposal that the Panel should recommend a different approach to the Minister.

The second part of Council's solution was to provide for finance costs for the purchase of the land. The process Council outlined was:

- if CDH is agreeable, Council to negotiate an agreement to purchase Parcel 34 at the proposed land credit amount
- the ICP to include the financing costs of the full purchase price as a new project for early works funding
- Council to borrow the funds required to purchase the land
- the financing costs to be levied back onto the ICP area as a supplementary levy item.

Borrowing to provide the infrastructure could be a sound course of action and a reasonable course of action to deal with the concerns of both Council and CDH. The question for the Panel is whether the financing costs of borrowing the funds to purchase the land early should be charged to the ICP. This requires consideration of whether the criteria in the Ministerial Direction are met, in particular whether the early delivery of the item *"is essential to the orderly development of the area"*.

In the Panel's view, the shortcoming of this approach lies in that it only proposes the purchase of the land. Funding for the land purchase would address CDH's main issue and Council's lack of funds, which is ultimately the purpose of the proposal. However, it is likely that SR-01 would not be developed for some time after the transfer and the Panel does not agree that the purchase of the land alone is essential to the orderly development of the area.

In addition, the Panel has not been presented with any evidence or much in the way of submission about the early need for SR-01 or how it would be provided given the financing costs are intended for the land purchase only. The Panel agrees with the VPA that the Council has not provided sufficient justification to warrant the inclusion of early works financing costs.

The Panel notes that the 7 September 2020 notice was sent to the owners of the 30 parcels directly affected by the corrections to the IPPL. The Panel accepts the VPA's position that CDH were fully aware of the changes proposed because they were contained in the VPA's submission which was circulated to all parties on 30 September 2020.

Finally, the Panel notes the VPA's submission that payment of the land credit amount could be triggered by way of an application for either a planning permit or a building permit. The Panel also notes Council's response to this submission. The Panel makes no further comment on these matters because they go well beyond the scope of the Amendment.

## **4.6 Conclusions and recommendation**

The Panel concludes:

- parcel 34 is contribution land
- the ICP is correctly applied to parcel 34
- the calculation of the land credit amount is correct
- the land value estimate should be adjusted to include the 1 July 2019 indexation
- the Council's practical solution is a genuine attempt to resolve the matter but is not supported.

The Panel recommends:

- 2. Recalculate the land credit amounts to include the indexation for 1 July 2019.**

## Appendix A Parties to the Panel Hearing

Submitter	Represented by
Victorian Planning Authority	Ms Carly Robinson of Counsel instructed Rory O'Connor of Hall & Willcox
Mitchell Shire Council	Mr Terry Montebello of Maddocks Lawyers
CDH properties	Mr Graeme Peake of Counsel instructed Rennick & Gaynor

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## Appendix B Document list

No	Date	Description	Provided by
1	16/07/2020	Directions by video or papers letter	PPV
2	05/08/2020	Directions letter	PPV
3	04/09/2020	Corrected Directions letter	PPV
4	21/09/2020	Submission on behalf of CDH Properties	CDH Properties
5	24/09/2020	Email request by Mitchell Shire Council to make a submission	Mitchell Shire Council
6	25/09/2020	Email of further Direction agreeing to Mitchell Shire Council making a submission	PPV
7	25/09/2020	Letter from Hall & Wilcox on behalf of the VPA requesting an adjournment and legal member	VPA
8	28/09/2020	Email from Rennick & Gaynor on behalf of CDH Properties responding to VPA request	CDH Properties
9	29/09/2020	Email from PPV responding to VPA request	PPV
10	29/09/2020	Email from Maddocks on behalf of Mitchell Shire Council advising of a late submission from Council	Mitchell Shire Council
11	30/09/2020	Submission on behalf of the VPA Appendix 1 – Response to submissions Appendix 2 - Beveridge Central ICP Appendix 3 - Tracked changes to Schedule 2 to Clause 45.11 Appendix 4 - Letter from Maddocks on behalf of Mitchell Shire Council to CDH properties	VPA
12	01/10/2020	Letter from Rennick & Gaynor on behalf of CDH Properties requesting an adjournment	CDH Properties
13	01/10/2020	Email from Hall & Wilcox on behalf of the VPA responding to the letter from Rennick & Gaynor	VPA
14	02/10/2020	Email from PPV outlining Hearing arrangements	PPV
15	02/10/2020	Submission on behalf of the Mitchell Shire Council	Mitchell Shire Council
16	04/10/2020	Documents provided by CDH Properties with Attachments 1. Mitchell and Whittlesea GC102 Panel Report 2. Melton Amendment C201 Panel Report 3. Melton C195 Panel Report 6. GC55 Beveridge Central VPA Part B Panel submission 7. Amendment GC55 Final Panel Report July 2017 8. Planning and Environment (Public Land Contributions) Act 2018	CDH Properties

No	Date	Description	Provided by
		9. R&G letter to VGSO & Maddocks hardship application	
		10. VGSO letter to R&G hardship application	
		11. Maddocks letter to R&G hardship application	
		12. Land Acquisition and Compensation Act 1989	
		13. Planning and Environment Act 1987	
		14. Charter of Human Rights and Responsibilities Act 2006 Interpretation of Legislation Act 1984	
		15. EPA v The Australian Sawmilling Company [2020] VSC 550	
		16. Hansard Assembly Daily Extract Wednesday 20 September 2017 from Book 12	
		17. Planning and Environment (Infrastructure Contributions) Act 2015	
		18. Hansard Assembly Daily Extract Wednesday 10 June 2015 from Book 8 see pages 1885 to 1187	
		19. Planning and Environment (Infrastructure Contributions) Act 2015	
		20. Hansard Assembly Daily Extract Wednesday 10 June 2015 from Book 8 see pages 1885 to 1187.	
17	12/10/2020	Beveridge ICP explanation of changes	VPA
18	12/10/2020	Beveridge ICP VPA explanation of changes - landowner letter	VPA
19	14/10/2020	Further Directions letter	PPV
20	20/10/2020	Further Directions email	PPV
21	16/11/2020	Email from VPA concerning failure to reach an agreement with Council	VPA
22	16/11/2020	Email from the Rennick & Gaynor concerning failure to reach an agreement	CDH Properties
23	18/11/2020	Email from VPA stating it unable to agree to Council's proposal	VPA
24	20/11/2020	VPA Addendum to Part B submission	VPA
25	23/11/2020	Further submission on behalf of the Mitchell Shire Council	Mitchell Shire Council
26	01/12/2020	Clarification of the IPPL calculations and notice	VPA
27	03/12/2020	Comment on the VPA clarification and notification letter	CDH Properties