Planning and Environment Act 1987

Panel Report

Manningham Planning Scheme Amendment C130mann Removal of site specific controls at 11 Toronto Avenue, Doncaster

4 May 2020

VICTORIA State Government | Planning Panels Victoria

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

Manningham Planning Scheme Amendment C130mann

Removal of site specific controls at 11 Toronto Avenue, Doncaster

4 May 2020

Sarah Carlisle, Chair

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Glossary and abbreviations

ACF	Australian Conservation Foundation
Act	*Planning and Environment Act 1987*
Council	Manningham City Council
DELWP	Department of Environment, Land, Water and Planning
GRZ	General Residential Zone
Jurkic No. 1	*Manningham v Jurkic* [2005] VCAT 324
Jurkic No. 2	*Jurkic v Manningham CC* (Red Dot) [2005] VCAT 1162
Jurkic No. 3	Unreported VCAT decision of Justice Morris in December 2005
Jurkic No. 4	*Jurkic v Manningham CC* [2007] VCAT 2364
MSS	Municipal Strategic Statement
P2999/2002	Dragan James Enterprises Pty Ltd v Manningham CC, unreported VCAT decision P2999/2002
PPF	Planning Policy Framework
subject land	11 Toronto Avenue, Doncaster
VCAT	Victorian Civil and Administrative Tribunal
VPP	Victoria Planning Provisions

Overview

Amendment summary	
The Amendment	Manningham Planning Scheme Amendment C130mann
Common name	Removal of site specific controls at 11 Toronto Avenue, Doncaster
Brief description	The Amendment proposes to remove the Design and Development Overlay Schedule 7 from the land
Subject land	11 Toronto Avenue, Doncaster
The Proponent	Roz Wilson (Solicitor and Urban Planner) on behalf of the owner of the land
Planning Authority	Manningham City Council
Authorisation	21 October 2019
Exhibition	5 December 2019 to 13 January 2020
Submissions	Number of Submissions: 1 (opposed), plus a supplementary submission, from Raymond Smith

Panel process	
The Panel	Sarah Carlisle
Directions Hearing	Not required
Panel Hearing	29 April 2020, via video conference
Appearances	Matthew Lynch appeared for Council Roz Wilson appeared for the Proponent Raymond Smith appeared for himself
Site inspections	Unaccompanied, 1 May 2020
Citation	Manningham PSA C130mann [2020] PPV
Date of this Report	4 May 2020

Executive summary

The Amendment seeks to remove a site specific Design and Development Overlay (DDO7) from the land at 11 Toronto Avenue, Doncaster that effectively prohibits the subdivision of the land. The DDO7 was introduced in 2004 amidst a long running dispute about whether the purported single dwelling constructed on the land was in fact two dwellings that were unlawfully constructed. That dispute was resolved in late 2007 or early 2008, when the (now) single dwelling on the land was brought into compliance with plans approved by VCAT pursuant to an enforcement order.

Council received only one submission when the Amendment was exhibited. The Submitter's concerns relate to the existing development on the land, not to the proposal to allow the land to be subdivided. In fact, the Submitter stated at the Hearing that he has no concerns in relation to the subdivision of the land. The Panel is therefore somewhat perplexed as to why he lodged a submission. It appears to be an opportunistic attempt to reopen matters in relation to the existing development on the land that have been resolved by VCAT. It appears that the resolution of those matters was never satisfactory in the mind of the Submitter.

The opening paragraphs of the decision in *Jurkic v Manningham CC* [2007] VCAT 2364 – the last in a series of VCAT decisions relating to the existing development on the subject land – accurately capture the context in which the Panel is required to undertake its task:

> This is a matter in which there are no winners, and it is no longer clear whether there is anyone deserving of the moral or legal high ground. The applicants deserve little sympathy, having blatantly breached the planning scheme and having been tardy in their response to an enforcement order. Faced with contempt proceedings, they at least belatedly sought to have amended plans approved by the responsible authority pursuant to the enforcement order. The responsible authority has however failed to properly exercise its discretion to consider those amendments on their merits, instead issuing an arbitrary and misconceived refusal which has had the effect of prolonging the saga rather than resolving it. Similarly, the longstanding objector Mr Smith has offered no objective basis for his opposition to the amended plans, seeking rather to 'maintain his rage' over the original noncompliance.
>
> The saga of 11 Toronto Avenue, Doncaster has now been before this Tribunal on some 14 occasions. A final resolution, albeit one that not everyone may consider ideal in planning terms, is long overdue.

The Submitter has already fought his battles against the existing development on the land. VCAT has found the existing built form to be acceptable. It is regrettable that the Submitter sought to use the Amendment and Panel process to raise issues that are beyond the scope of the Amendment, and to reopen old arguments that have been authoritatively settled by VCAT.

The removal of the DDO7 would allow the land to be subdivided, subject to obtaining a permit. The opportunity for subdivision of the land is entirely consistent with the level of incremental growth the planning policy framework expects in this area. The continued application of the DDO7 effectively stifles any opportunity for incremental growth. Not only is this inconsistent with the policy framework, it is inconsistent with the planning controls applying to the neighbouring properties, the surrounding area and to Precinct 1 Residential Character Precincts across the municipality more broadly.

To the extent that the DDO7 sought to ensure that the existing dwelling on the land could not be converted into two dwellings without a permit, that concern no longer exists. Under the current controls, both the subdivision of the land and the conversion of the existing dwelling into two will require a permit. Any such proposals will be assessed against Clauses 55 and 56 of the Planning Scheme, and any impacts on the amenity of neighbouring properties, including the Submitter's property, will need to be addressed through the permit process.

The Panel is satisfied that the land can be subdivided and the existing dwelling converted into two dwellings in a manner that meets the requirements of the Planning Scheme, and that does not result in unreasonable impacts on the Submitter's property. The Panel sees no justification for the continued application of the DDO7.

Recommendations

Based on the reasons set out in this Report, the Panel recommends that Council:

1. **Adopt Manningham Planning Scheme Amendment C130mann as exhibited.**

1 Introduction

1.1 The Amendment

(i) Amendment description

The purpose of the Amendment is to remove a site specific Design and Development Overlay (DDO7) from the subject land. The DDO7 effectively prohibits the subdivision of the land, notwithstanding that subdivision is allowed under the General Residential Zone (subject to a permit being obtained).

(ii) The subject land

The Amendment applies to land at 11 Toronto Avenue, Doncaster (the subject land).

Figure 1 The subject land

Source: Council report dated 25 February 2020

The subject land is on the west side of Toronto Avenue opposite the intersection of Toronto Avenue and Warren Street. It is approximately 770 square metres, with a frontage of around 20 metres and a depth of around 37.5 metres.

The subject land is developed with one two storey dwelling constructed across the full width of the site. From the street, the dwelling appears as two side-by-side dwellings, divided by a party wall. However according to the Council report dated 27 August 2019 (Document 5), large internal openings at the ground and upper levels allow the free movement of people between both sides of the building, limiting its use to a single dwelling. The Council report also indicates that the dwelling contains only one kitchen.

The neighbourhood is characterised by detached single and double-storey brick dwellings on conventionally shaped lots ranging between 650 square metres and 900 square metres. According to the Council report of 27 August 2019, the existing housing stock in the area is gradually being replaced by medium density housing. This was borne out by the Panel's observations on its site visit. The Panel observed several dual occupancy or multi unit developments in the neighbourhood, including at 3 and 3A Toronto Avenue, and on the corner of Toronto Avenue and Stanton Street.

1.2 Procedural issues

(i) Combined amendment and permit originally requested

The original request for the Amendment was combined with a permit application under section 96A of the Act to develop the subject land into two dwellings.

The authorisation for the preparation of the Amendment was subject to a condition that the permit application be removed. The letter of authorisation (Document 6) pointed out that the permit application only sought the construction of two dwellings on the land – not the subdivision of the land. The permit application was permitted under the current controls, and did not need to form part of the Amendment under section 96A.

Council proceeded to prepare and exhibit the Amendment without the permit application. Accordingly, the permit application is not before the Panel.

(ii) Late requests to be heard

The Panel wrote to the Planning Authority, the Proponent and the Submitter on 24 March 2020 advising them that the Panel had been appointed, and requesting that any party who wished to be heard complete a Request to be Heard form by 3 April 2020. No party requested to be heard, and the Panel wrote to the parties on 16 April 2020 advising that it would consider the matter on the papers.

On 16 April 2020, the Submitter wrote to Planning Panels Victoria making what the Panel took to be a late request to be heard. The Panel agreed to provide the Submitter with an opportunity to make further oral submissions, and informed the parties accordingly. The Proponent requested an opportunity to hear the Submitter's oral submissions and to reply. The Panel conducted a brief video hearing on 29 April 2020 in which all parties participated.

As well as the oral submissions made by the parties at the Hearing, the Panel considered a number of documents. The documentation considered by the Panel is listed in Appendix A.

1.3 Summary of issues raised in submissions

(i) The issues

The Submitter's key objection was that the Amendment "*in essence aims to have an unlawful building become lawful*". He raised the following concerns in his original and supplementary objections (Documents 8 and 9):

- previous Manningham administrations did not act on enforcement orders, and delayed repeated demands of Council and VCAT to demolish the existing building on the subject land
- the Amendment would create a precedent for developers to build multiple units in the guise of a single dwelling
- space, trees and vegetation in the area should be protected
- permission has never been granted for "*the units*" or the single dwelling on the subject land
- the existing dwelling is larger than what is shown in the building surveyor's plans
- potentially dangerous materials have been used in the construction of the building
- the size of the existing building generates excessive overshadowing
- the Amendment aims to reverse 17 years of previous decisions and orders of previous councils and VCAT
- if the Amendment is approved, it would send a clear message that Manningham has no effective building regulations.

The submissions remain outstanding.

(ii) Are the submissions relevant?

Council requested the Proponent to respond to the Submitter's original submission. It did so by letter dated 15 January 2020 from Ms Wilson (Document 10), which included the following:

> Section 23(2) of the Planning and Environment Act 1987 states: "A planning authority may refer to the panel submissions which do not require a change to the amendment" [emphasis added].
>
> Mr. Smith's purported 'submission' is a list of his grievances to past actions of Council, the Tribunal and the developer with respect to the existing dwelling at 11 Toronto Avenue. His 'submission' does not address Amendment C130 and he has not raised any planning reasons (or any factual reasons) against deleting the DDO7. It is not "a submission to the planning authority about an amendment" in terms of Section 21(1) of the Planning and Environment Act.
>
> It is therefore submitted that Council should exercise its discretion and not require a Panel hearing.

Council nevertheless chose to refer the submission to a Panel.

Under section 24, a panel must consider all submissions referred to it and give a reasonable opportunity to be heard to any person who made a submission that has been referred to the panel.

However, the obligation of a panel to consider all submissions referred to it (and to provide submitters with the opportunity to be heard) only extends to relevant submissions. This was

established in *Australian Conservation Foundation Inc v Minister for Planning* [2004] VCAT 2029 (Document 13). In that case, Justice Morris said at paragraph 26:

> I think the true position is that a panel can refuse to consider a submission referred to it (or part of a submission) if the submission (or the part of it) is irrelevant to the amendment. Further, the panel can refuse to give a submittor an opportunity to be heard if the submittor seeks to advance a submission which is irrelevant to the amendment. Section 21(1) of the Act permits a person to make a submission "about an amendment". To the extent that the submission is irrelevant, it will not satisfy that test. It would thus be illogical for the panel to be required to consider an irrelevant submission.

Justice Morris went on to consider what amounts to a 'relevant' submission. He said at paragraph 36:

> … a submission concerning a planning scheme amendment will only be relevant if it raises planning issues, as ascertained by reference to the Planning and Environment Act, and it relates to the amendment.

The first limb of the test is that the submission must raise planning issues. Planning issues are those that fall within the scope of the Planning and Environment Act, and in particular the Victorian planning objectives outlined in section 4 of the Act. While the Victorian planning objectives (which are discussed in more detail in Chapter 2.1) are broad, they do not extend to matters that are regulated under building legislation, such as construction materials and compliance with building permits and regulations. Nor do they include issues related to the legality or otherwise of past actions. These matters raised in the submissions are not planning issues, and the Panel has not addressed them further.

The second limb of the test is that the submission must relate to the amendment. Amendment C130 is about the possible future subdivision of the land. It is not about the building constructed on the land. None of the issues raised in the submissions relate directly to the subdivision of the land. They all relate to the building on the land. On one view, all the issues raised in the submissions fail the second limb of the relevance test.

That said, Justice Morris found in *Australian Conservation Foundation Inc v Minister for Planning* that a submission may satisfy the second limb of the relevance test if it relates to direct or indirect effects of the amendment, if there is a sufficient nexus between the amendment and the effect. He stated at paragraph 41:

> One way of assessing whether the nexus is sufficient will be to ask whether the effect may flow from the approval of the amendment; and, if so, whether, having regard to the probability of the effect and the consequences of the effect (if it occurs), the effect is significant in the context of the amendment.

Although some degree of logical flexibility is required, it could be argued that impacts on overshadowing and space, trees and vegetation could be indirect effects of the subdivision of the land. This is because the layout of the subdivision will determine building envelopes and setbacks, which could, in turn, impact overshadowing, vegetation and a sense of space. The Panel has therefore addressed these aspects of the submissions for completeness in Chapter 5.

1.4 The Panel's approach

The Panel considered all written submissions made in response to the exhibition of the Amendment, oral submissions at the Hearing, observations from its site visit, and the

documentation listed in Appendix A. It has assessed the Amendment against the principles of net community benefit and sustainable development, as set out in Clause 71.02-3 (Integrated decision making) of the Planning Scheme.

This Report deals with the issues under the following headings:

- Planning context
- Planning history
- Strategic justification
- Relevant issues raised by the Submitter.

2 Planning context

2.1 Planning policy framework

The following clauses in the Planning Policy Framework (PPF) are relevant.

Victorian planning objectives

These include:

- to provide for the fair, orderly, economic and sustainable use, and development of land
- to facilitate development in accordance with the above objective
- to facilitate the provision of affordable housing in Victoria
- to facilitate development which achieves the objectives of planning in Victoria and planning objectives in planning schemes
- to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements.

Clause 11 (Settlement)

Clause 11 objectives and strategies include:

- facilitating sustainable development that takes full advantage of existing settlement patterns and investment in transport, utility, social, community and commercial infrastructure and services
- limiting urban sprawl and direct growth into existing settlements
- promoting and capitalising on opportunities for urban renewal and infill redevelopment
- creating mixed-use neighbourhoods at varying densities that offer more choice in housing, create jobs and opportunities for local businesses and deliver better access to services and facilities.

Clause 15 (Built environment and heritage)

Clause 15 objectives and strategies include:

- requiring development to respond to its context and contribute to existing or preferred neighbourhood character
- ensuring development reinforces a sense of place by emphasising the pattern of local urban structure and subdivision.

Clause 16 (Housing)

Clause 16 objectives and strategies include:

- increasing the supply of housing in existing urban areas by facilitating increased housing yield in appropriate locations
- locating new housing in designated locations that offer good access to jobs, services and transport
- increasing the proportion of new housing within established urban areas and reducing the share of new dwellings in greenfield and dispersed development areas
- identifying opportunities for increased residential densities to help consolidate urban areas
- delivering more affordable housing closer to jobs, transport and services.

Clause 21 (the Municipal Strategic Statement)

The MSS includes Clause 21.05 (Residential), which highlights key issues and challenges facing the municipality's residential areas. The policy encourages infill residential development that consolidates the role of established urban areas and reduces pressure in areas with environmental values. The Clause recognises that while detached single dwellings will continue to represent the largest proportion of Manningham's housing stock, there will be the need for a greater mix of housing, including medium density housing.

Clause 21.05-1 (Overview) states:

> **Subdivision**
>
> Effective subdivision design should respond to site opportunities and constraints. There are limited opportunities for large scale subdivision in Manningham. A key issue for Council is inappropriate infill subdivision of smaller lots.

Map 1 (Part 1) – Residential Character Precincts in Clause 21.05 identifies the site as forming part of Precinct 1, residential areas removed from Activity Centres and main roads. It states that an incremental level of change is expected in Precinct 1, with a less intense urban form that reinforces existing front and rear setbacks and site coverage. Opportunities for landscaping and open space in Precinct 1 is a strong theme in Clause 21.05-1.

Clause 21.05-2 (Housing) highlights the need for urban consolidation to address housing growth, and the potential impact of new development on surrounding areas, as key issues. The objectives of Clause 21.05-2 include:

- To accommodate Manningham's projected population growth through urban consolidation, in infill developments and Key Redevelopment Sites.
- To ensure that housing choice, quality and diversity will be increased to better meet the needs of the local community and reflect demographic changes.
- To ensure that areas removed from activity centres and main roads as well as areas with predominant environmental or landscape features are protected from higher density development.

Strategies include:

- Allow housing development that respects existing neighbourhood character and supports incremental level of change in areas removed from activity centres and main roads identified as Precinct 1 on the Residential Framework Plan 1 and Map 1 to this clause.

Clause 21.05-3 specifically addresses subdivision. Key issues are site responsive subdivision, and inappropriate infill subdivision. Objectives include:

- Ensure subdivision responds positively to site features and constraints, integrates well with the neighbourhood, provides a functional environment and achieves energy efficient and environmentally sensitive layouts.
- To ensure the upgrading or provision of appropriate infrastructure and open space as part of subdivision proposals.
- To ensure that infill subdivision addresses future development impacts on adjoining properties and the neighbourhood.
- To ensure that subdivision adopts environmentally sustainable design principles.

Strategies include encouraging subdivision layouts that consider neighbouring uses and developments, and to ensure that subdivision layout considers lot orientation and size and location of building envelopes to achieve ecologically sustainable development outcomes.

Clause 22 (local planning policies)

Clause 22.15 (Dwellings in the GRZ1) is not directly relevant, as the key question in relation to the Amendment is whether it is appropriate to allow the subdivision of the land rather than a consideration of the existing or future built form on the land. Nevertheless, Clause 22.15 will guide future decisions about permit applications for dwellings on the land.

2.2 Planning scheme provisions

A common zone and overlay purpose is to implement the MSS and the PPF.

(i) General Residential Zone

The subject land and the surrounding area are in the General Residential Zone Schedule 1 (GRZ1).

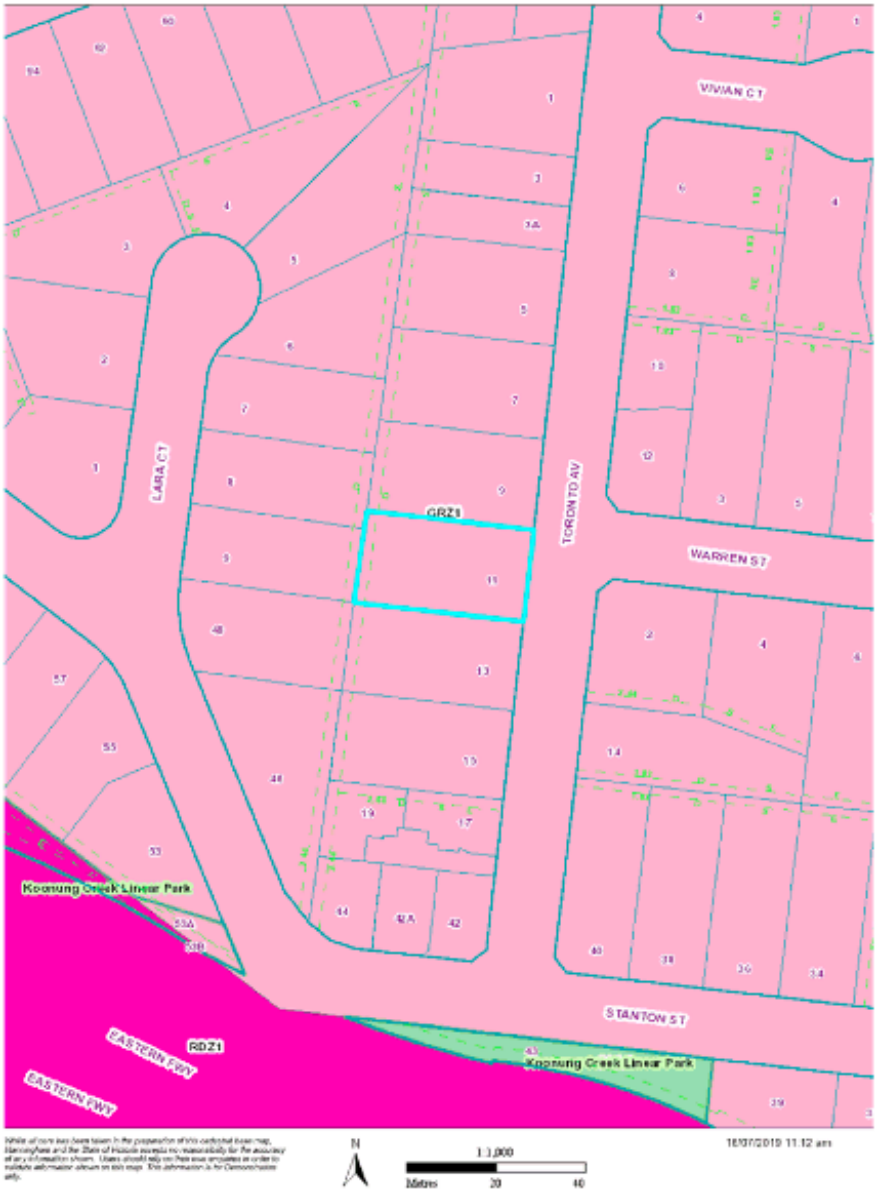

Figure 2 Zoning of the subject land and surrounds

Source: Council report dated 25 February 2020

The purposes of the GRZ are:

- To encourage development that respects the neighbourhood character of the area.
- To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.
- To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.

A permit is required to subdivide land (Clause 32.08-3). A subdivision application must meet the requirements of Clause 56 (Residential subdivision). Any vacant lots of less than 400 square metres that are created by a subdivision must include at least 25 percent as garden area. The garden area requirements do not apply to an application to subdivide land into lots created in accordance with a permit for development.

A permit is also required to construct two or more dwellings on a lot (Clause 32.08-6).

(ii) Design and Development Overlay Schedule 7

The DDO7 applies to the subject land and is proposed to be removed by the Amendment.

Figure 3 DDO7 map

Source: Council report dated 25 February 2020

The purpose of the DDO is:

> To identify areas which are affected by specific requirements relating to the design and built form of new development.

The DDO7 contains the following:

> **3.0 Subdivision**
>
> The land must not be subdivided into two or more lots unless the subdivision is in accordance with the development approved by Planning Permit No. PL02/013542.
>
> A permit cannot be granted to subdivide the land which is not in accordance with this requirement.

In other words, the DDO7 only allows the subdivision of the land in accordance with the development approved under Planning Permit PL02/013542, which allowed the construction of two dwellings on the land. Permit PL02/013542 has expired. As a result, the DDO7 effectively prohibits the subdivision of the land, even though a permit can be granted for subdivision under the General Residential Zone.

The relevance of Permit PL02/013542 and the application of the DDO7 is explained in more detail in Chapter 3, which details the planning history of the subject land.

(iii) Clause 56 (Residential subdivision)

Clause 56 sets out various objectives, standards and decision guidelines for residential subdivisions.

Clause 56.01-1 requires an application for subdivision to be supported by a site and context description and design response that explains how the proposed subdivision:

- responds to any site and context features for the area identified in a local planning policy or a Neighbourhood Character Overlay
- responds to any relevant objective, policy, strategy or plan
- meets the objectives of Clause 56, which include:
  - to create compact neighbourhoods that are oriented around easy walking distances to activity centres, schools and community facilities, public open space and public transport
  - to provide a range of lot sizes to suit a variety of dwelling and household types.

(iv) Clause 55 (Construction of two or more dwellings on a lot)

Clause 55 sets out various objectives, standards and decision guidelines for the construction of multiple dwellings on a lot. The standards are both quantitative and qualitative. For example:

- Standard B10 states that buildings should be:
  - oriented to make appropriate use of solar energy
  - sited and designed to ensure that the energy efficiency of existing dwellings on adjoining lots is not unreasonably reduced.
- Standard B20 states that if a north-facing habitable room window of an existing dwelling is within 3 metres of a boundary on an abutting lot, a building should be set back from the boundary 1 metre, plus 0.6 metres for every metre of height over 3.6 metres up to 6.9 metres.

3 Planning history

The site has a complex planning history. While the planning history is not directly relevant to the Amendment, it is necessary to understand the planning history to understand how the DDO7 came to be applied to the land.

3.1 Chronology

Table 1 is based on the planning history provided by the Proponent (Document 11), the history in the Council report dated 27 August 2019 (Document 5), the Explanatory Report for Amendment C42 which introduced the DDO7 (Document 1) and three VCAT decisions involving the subject land (Documents 2, 3 and 4).

Table 1: Chronology

Date	Event
March 2001	The Proponent (or related parties) lodged Planning Application PL01/012404 with Council for two attached two-storey dwellings. Eight objections were received.
6 March 2002	Planning Application PL01/012404 was refused by Council, confirmed by VCAT on appeal. *Dragan James Enterprises v City of Manningham & R. Smith,* unreported (P51405/2001)
May 2002	The Proponent (or related parties) lodged a revised application (Planning Application PL02/013542) for two attached two-storey dwellings. Two objections and a petition were received.
November 2002	The Proponent (or related parties) lodged an application for review for Council's failure to determine Planning Application PL02/013542 (P2999/2002). Council subsequently advised that it would have refused the application.
25 March 2003	Building Permit BA-03/51529 issued for a single dwelling with a footprint and layout similar to the two dwellings sought under the application plans submitted with Planning Application PL02/013542. The single dwelling did not require a planning permit under the then Residential 1 Zone.
26 May 2003	VCAT determined that a permit should be granted for two dwellings on the site, subject to amended plans being submitted that showed a number of changes to minimise the impact of the development on the amenity of adjoining properties. *Dragan James Enterprises Pty Ltd v. Manningham CC, R Smith & R Wilkinson,* unreported (P2999/2002)
3 June 2003	Planning Permit PL02/013542 issued for the construction of two dwellings. This is the permit referred to in the DDO7. Amended plans that addressed VCAT's requirements in P2999/2002 were never submitted endorsed under the permit. The permit was never acted upon and has since expired.

Date	Event
July 2004	Council formed the view that the Proponent had commenced construction of two dwellings on the site, not one, in contravention of the Planning Scheme. Although Permit PL02/01542 (which allowed construction of two dwellings on the land) had issued, no modified plans were submitted and endorsed as required under condition 1 of the permit. The permit was therefore not active. Council commenced enforcement action against the Proponent.
8 July 2004	The DDO7 was applied to the site by Amendment C42 (see Chapter 3.2 below for more detail).
25 February 2005	VCAT determined Council's enforcement action. VCAT agreed with Council that two dwellings were under construction, not one. It issued an Enforcement Order that required the two dwellings to be: (a) removed (b) modified to comply with Planning Permit PL02/01542 (c) otherwise brought into compliance with the Planning Scheme to the satisfaction of the responsible authority. *Manningham v Jurkic* [2005] VCAT 324 (*Jurkic No. 1,* Document 2)
21 March 2005	The Proponent submitted plans for two dwellings for endorsement under Permit PL02/013542, seeking to satisfy paragraph (b) of the Enforcement Order.
24 March 2005	Council refused to endorse the plans on the basis that they were unsatisfactory.
April – May 2005	The Proponent lodged amended plans for two dwellings with Council under Permit PL02/013542.
18 May 2005	Council refused to approve the amended plans on the basis that they were unsatisfactory.
Some time around June 2005	The Proponent lodged single dwelling plans with Council, pursuant to paragraph (c) of the Enforcement Order.
6 June 2005	Council advised that the single dwelling plans were unsatisfactory and indicated changes that Council required.
Some time around June 2005	The Proponent applied to VCAT to: - extend the time to comply with the Enforcement Order (section 121 of the Act) - amend Planning Permit PL02/01542 to allow two dwellings in accordance with the 'as built' building, with relatively minor modifications (section 87) - approve the single dwelling plans as satisfying paragraph (c) of the Enforcement Order (section 149). The Proponent indicated that it preferred to succeed on the section 87 application (ie to construct two dwellings).

Date	Event
24 June 2005	VCAT: - extended the time to comply with the Enforcement Order from 10 June 2005 to 1 September 2005 - refused the Proponent's section 87 application on the basis that, among other things, the as built dwelling(s) failed to meet the requirements of Clause 55 and impacted unreasonably on the Submitter's dwelling - deferred a decision on the Proponent's section 149 application. *Jurkic v Manningham CC (Red Dot)* [2005] VCAT 1162 *(Jurkic No. 2*, Document 3).
2 December 2005	VCAT declared that single dwelling plans prepared by EATAS Design dated 7 October 2005 satisfy the requirements of paragraph (c) of the Enforcement Order. *Panel note: the Panel assumes that this is the decision on the Proponent's section 149 application. This decision is unreported.*
Some time between December 2005 and December 2007	The Proponent failed to amend the building to comply with the EATAS Design single dwelling plans, and Council commenced contempt proceedings for the Proponent's failure to comply with the Enforcement Order. It is not clear what the outcome of those proceedings was.
Some time between December 2005 and December 2007	The Submitter built a roofed structure adjacent to the southern boundary of the Proponent's land which called into question the need for changes to the southern boundary wall that had been intended to prevent overshadowing or overlooking of this area.
30 July 2007	Council refused to approve amended plans prepared by EATAS Design in satisfaction of paragraph (c) of the Enforcement Order. The Proponent subsequently lodged an application under section 149 of the Act seeking a declaration that the single dwelling plans were satisfactory.
11 December 2007	VCAT determined the Proponent's section 149 application, and ordered that the amended single dwelling plans satisfied the requirements of paragraph (c) of the enforcement order. *Jurkic v Manningham CC* [2007] VCAT 2364 (*Jurkic No. 4,* Document 4).
Some time after December 2007	The construction of the single dwelling was then completed in accordance with these amended plans.

3.2 Amendment C42

Amendment C42 applied the DDO7 to the site on 8 July 2004. It was prepared by the Minister for Planning at Council's request. The Council report dated 27 August 2019 (Document 5) explained that the purpose of Amendment C42 was to restrict how the site could be subdivided, having regard to past unauthorised building activity, and the possibility that further unauthorised activities may occur.

The Explanatory Report for Amendment C42 (Document 1) explains that:

- The Proponent had commenced construction of a dwelling without consideration of VCAT's requirements (presumably a reference to VCAT's 26 May 2003 decision,

which held that a number of amendments were required to the original application plans for the two dwellings to render them acceptable).

- A building approval had issued for a single dwelling with a similar footprint and layout to the two dwellings originally proposed.
- Internal changes to a building, including the types of changes necessary to convert a single dwelling into two dwellings, may not require a permit and could occur without consideration of clause 55 of the planning scheme.
- Council was concerned that the Proponent may at a later date request a permit to subdivide the existing dwelling into two attached dwellings.
- Council had previously requested the Proponent to enter into a section 173 Agreement to prevent the use of the land for two dwellings or for the land to be subdivided at any time, other than in accordance with Planning Permit No. PL02/013542.
- The Proponent had refused to enter into any such section 173 Agreement.

3.3 Changes to Clause 62.02

Clause 62.02 lists buildings and works that do not require a permit (unless specifically required by the scheme). Internal works to a building are exempt, subject to qualifications. When Amendment C42 was gazetted, the relevant exemption stated:

> - The internal rearrangement of a building or works provided the gross floor area of the building, or the size of the works, is not increased.

Therefore, at the time Amendment C42 was introduced, the single dwelling on the land could have been converted into two dwellings without triggering a permit. Council explained that this was a key rationale for putting the DDO7 in place.

Since Amendment C42 was introduced, Clause 62.02 has been amended. The relevant exemption now reads (changes underlined):

> - The internal rearrangement of a building or works provided the gross floor area of the building, or the size of the works, is not increased and the number of dwellings is not increased.

Converting the existing dwelling into two will therefore no longer be exempt under Clause 62.02, and will require a permit under the GRZ (Clause 32.08-6). Council explained at the Hearing that the rationale for applying the DDO7 therefore no longer applies, and the control is no longer necessary.

3.4 VCAT decisions

As the chronology in Chapter 3.1 shows, there are five relevant VCAT decisions relating to the existing development on the site, only three of which are reported:

- *Dragan James Enterprises Pty Ltd v Manningham CC*, unreported P2999/2002, where VCAT decided that Permit PL02/013542 should be granted for two dwellings on the site, although the original application plans needed to be amended to include a number of changes to minimise the impact of the development on the amenity of adjoining properties.
- *Manningham v Jurkic* [2005] VCAT 324, the Enforcement Order issued by VCAT on 25 February 2005 which required the two dwellings unlawfully constructed on the

site to be removed, modified to comply with Planning Permit PL02/01542, or otherwise brought into compliance with the Planning Scheme (*Jurkic No. 1*).

- *Jurkic v Manningham CC (Red Dot)* [2005] VCAT 1162, the 24 June 2005 decision in which VCAT (among other things) refused to amend Planning Permit PL02/01542 to allow the two dwellings as built, on the basis that the as built dwelling(s) failed to meet the requirements of Clause 55 and impacted unreasonably on the Submitter's dwelling (*Jurkic No. 2*).
- The unreported decision of Justice Morris on 2 December 2005, that the single dwelling plans prepared by EATAS Design dated 7 October 2005 satisfy the requirements of paragraph (c) of the Enforcement Order (*Jurkic No. 3*).
- *Jurkic v Manningham CC* [2007] VCAT 2364, the 11 December 2007 decision at which VCAT decided that amended single dwelling plans prepared by EATAS Design dated 19 May 2007 and 13 September 2007 satisfy the requirements of paragraph (c) of the Enforcement Order (*Jurkic No. 4*).

In *Jurkic No. 2*, Justice Morris found that the 'as built' development then on the site failed to meet the standards in Clause 55, and had an unreasonable impact on the amenity of the Submitter's property. His main concerns were the height, extent and setback of the upper level of the development abutting the Submitter's property, which he considered did not provide for adequate solar access to the Submitter's dwelling, and compromised the energy efficiency of the Submitter's dwelling.

However Justice Morris observed at paragraph 22:

> Significantly, I observe that it would be possible to design a dual occupancy on the subject land – even a large, two level dual occupancy – which reasonably protected the energy efficiency of the Smith dwelling. This could be achieved by concentrating the bulk of any upper level towards the centre of the site in much the same way as the permit requires.

He went on to observe at paragraph 26:

> But it can only be resolved in one of two ways. One way is for the upper level of the dwelling abutting the Smith property to be substantially changed; but the applicants have not sought this outcome notwithstanding an opportunity to do so. The other way – and this may be a remote possibility – is that the existing solar access to the windows in the Smith dwelling is no longer required or desired by a new owner of that land. But it would be premature to seek to cross that bridge at this stage.

Since then, Justice Morris approved amended plans that presumably increased the upper level setbacks for the development on the site (*Jurkic No. 3*).

Subsequent to that, VCAT approved further amended plans that allowed the retention of the garage wall on the Submitter's boundary, and smaller openings in the internal wall that separated the two dwellings originally constructed on the site (*Jurkic No. 4*). VCAT stated at paragraphs 29 and 30:

> … Since that time, however, Mr Smith has constructed a permanent roofed structure and pergola over this open space. It is now Mr Smith's own structure that causes the loss of solar access to the private open space and prevents any prospect of overlooking. The removal of the wall would no longer have any material bearing on these matters …
>
> Having regard to the structure now erected on Mr Smith's land, we find that the removal of the former garage wall on the southern boundary is unnecessary and would no longer achieve any useful planning outcome – certainly not one that has any

> bearing on the objective of the enforcement order and compliance with the planning scheme.

The Council report dated 27 August 2019 indicates that the dwelling is now complete, and in accordance with the plans approved in *Jurkic No. 4*. The dwelling therefore complies with the Enforcement Order, and the Planning Scheme.

4 Strategic justification

4.1 Council's analysis

Council's report dated 27 August 2019 includes an extensive discussion of the strategic justification for the Amendment. It states:

> 3.14 The development of the site with two dwellings is considered to meet all relevant objectives under clause 15 [State policy relating to the built environment]. The existing dwelling has contributed to the safety, health and function of the neighbourhood ensuring a sense of place for at least 10 years. Converting the existing dwelling into two dwellings would achieve the same outcomes in this urban environment.
>
> 3.15 The existing built form is consistent with the neighbourhood character in respect to scale, form, materials, setbacks to the boundaries and contemporary design. All material impacts from the dwelling have already been established. There are currently no unacceptable amenity impacts. The conversion into two dwellings is unlikely to create any additional unacceptable amenity impacts.

In terms of consistency with State housing policy in Clause 16, the report states:

> 3.18 The development of one additional dwelling adds to the residential housing stock of Manningham and contributing to the housing market needs of the community. The side-by-side design is one of several design typologies available in the Manningham housing market.

The report notes that the site is located near services, particularly Westfield Doncaster which is a Major Activity Centre. Jobs and transport are also readily accessible.

The report analyses the Amendment against local planning policy in Clause 21.05 (Residential) and Clause 22.15 (Dwellings in the General Residential Zone, Schedule 1). It states:

> 3.20 Manningham is divided into four residential character precincts. The site and neighbourhood are located in Precinct 1 (Residential Areas Removed from Activity Centres and Main Roads), where an incremental level of change is expected.
>
> 3.21 The future development vision is to encourage development that reinforces existing front and rear setbacks and site coverage to provide opportunities for landscaping and retain areas of open space. Precinct 1 therefore encourages a less intensive urban form.
>
> 3.22 Whilst the design of future dwellings may vary from the existing built forms, dwellings will need to provide increased open space for the planting and retention of trees and associated landscaping. The prevailing character of low front fences, retaining walls or the absence of front fences is also encouraged.
>
> 3.23 The proposal is consistent with this policy. Developing the existing dwelling into two dwellings is considered an incremental level of change as anticipated in Precinct 1. The existing dwelling already reinforces the setbacks and site coverage, and there are ample opportunities to provide landscaping in the open spaces areas.
>
> …
>
> 3.25 The proposal generally complies with clause 22.15. An assessment is at Attachment 7.

Council's 27 August 2019 report refers to observations made by Council's Corporate Counsel, which were summarised as follows at paragraph 3.8:

- Planning Scheme Amendment C42 appears to have been directed towards the punishment of the then landowner for their conduct through the planning system rather than prosecuting the landowner for a breach of the Planning and Environment Act 1987, or seeking a VCAT enforcement order, which would be the usual enforcement methods for dealing with such breaches.
- In the absence of strategic justification for the control remaining in the planning scheme, it is considered insistence upon the retention of the control would be punishment of the landowner, rather than a good planning outcome having regard to the controls council has otherwise determined should apply to this land by virtue of the present zoning.

The report goes on to note that the existing development on the site exceeds the minimum garden area requirements that now apply under the GRZ1, including the requirements that would apply if the land were to be subdivided into two lots.

4.2 Discussion

The Victorian planning objectives provide for the fair, orderly, economic and sustainable use and development of land in Victoria and seek to facilitate development which achieves the planning objectives. Stifling development that is otherwise consistent with planning objectives, for reasons of addressing past non-compliance with planning and building controls, or (in the words of Council's Corporate Counsel) to 'punish' landowners, is not a legitimate function of planning controls.

So, is the prevention of subdivision by the DDO consistent with contemporary planning objectives for the land?

The planning objectives include facilitating sustainable development that takes full advantage of existing settlement patterns and investment in infrastructure and services. The PPF recognises the need to limit urban sprawl, to increase the supply of affordable housing, to increase housing diversity including through offering different forms of housing typology, and for varying density neighbourhoods that offer more choice in housing, as well as access to existing services and facilities.

The PPF recognises a clear need to increase housing yield in established urban areas, in appropriate locations. It seeks to identify opportunities for increased residential densities to help consolidate existing urban areas, and to ensure an adequate supply of redevelopment opportunities within established urban areas, to reduce the pressure for fringe development and development in environmentally sensitive areas.

The site is located in Residential Character Precinct 1, in which incremental growth is anticipated. Incremental growth does not mean no growth. Subdivision within Precinct 1, particularly on larger lots, is consistent with incremental growth.

The Panel acknowledges that Clause 21.05 states that Precinct 1 areas are located away from Activity Centres and main roads. However the site is close to multiple public open space facilities and a primary school, and is not too distant from a large Park and Ride facility serviced by multiple bus routes, and Doncaster Shopping Centre. It has relatively good access to transport and services.

While the PPF encourages incremental growth and infill development in this area, any such growth must be appropriate, and must respect neighbourhood character and the amenity of

surrounding properties. For example, key themes in Clause 21.05 in relation to subdivision include:

- avoiding inappropriate infill subdivision of smaller lots
- ensuring that infill subdivision addresses future development impacts on adjoining properties and the neighbourhood
- ensuring that subdivisions respect existing development patterns and neighbourhood character
- ensuring that subdivisions allow opportunities for landscaping and open space.

Clause 21.05-3 recognises the need for subdivision layouts to consider neighbouring uses and developments, and lot orientation and size and location of building envelopes to achieve ecologically sustainable development outcomes.

The need to respect neighbourhood character and protect neighbouring amenity is also well recognised in the purposes of the GRZ and in the applicable particular provisions (Clauses 55 and 56).

At 770 square metres, the subject land is a relatively large lot. The Panel observed on its site visit that the lot size of the subject land is consistent with surrounding lots, perhaps on the larger size. Subdivision of the land would introduce smaller lot sizes, although it appears this has already started to occur in the area (for example, the lots on the corner of Stanton Street and Toronto Avenue). In any event, the PPF calls for urban consolidation and a diversity of housing in established urban areas. Subdividing the subject land into smaller lots is not inconsistent with this policy objective, and would not, in the Panel's view, adversely impact on the neighbourhood character.

The opportunity for subdivision of the land is entirely consistent with the incremental growth the PPF expects in this area. The continued application of the DDO7 effectively stifles any opportunity for incremental growth. Not only is this inconsistent with the PPF, it is inconsistent with the planning controls applying to the neighbouring properties, the surrounding area and to Precinct 1 areas across the municipality more broadly.

The policy framework provides detailed guidance for assessing any future subdivision application. Future subdivision proposals would be assessed against the policy objectives of addressing development impacts on adjoining properties and the neighbourhood, ensuring that subdivisions respect existing development patterns and neighbourhood character, and providing opportunities for landscaping and open space.

Both the subdivision of the land and the conversion of the existing dwelling into two will require a permit under the GRZ. Any future subdivision proposal would be assessed against the requirements of Clause 56, and any future proposal to convert the existing dwelling into two would be assessed against the requirements of Clause 55. The permit process would include consideration of any potential impacts on the Submitter. If Council considers that the Submitter could be materially affected by future permit applications, he will be notified and will have review rights.

In reality, the Panel expects that future subdivision proposals on the site will be largely driven by the existing built form. Both Council and VCAT have recognised that the existing built form (at least following *Jurkic No. 4*) provides appropriate front and rear setbacks that are consistent with the neighbourhood character, appropriate garden areas and opportunities for landscaping and open space, and appropriate solar access to the

Submitter's property, now that he has constructed a pergola and roofed structure along his northern boundary.

The original request for the Amendment to be prepared was accompanied by a permit application to convert the existing dwelling into two dwellings. As noted in Chapter 1.2(i), the permit application was removed from the Amendment and is not before the Panel. Nevertheless, the Panel notes that the Council report of 27 August 2019 contains a detailed assessment of that application against the current requirements of the Planning Scheme, including Clause 55. The report concluded that the proposed permit application was largely compliant with the requirements of the Planning Scheme.

The Council report also notes that a building permit will be required if the existing dwelling were to be converted into two dwellings, to (among other things) complete the fire-rated wall between the dwellings. Council's Building Services Unit were consulted and advised that the buildings works required to convert the dwelling are achievable.

This gives the Panel considerable comfort that any future proposal to convert the existing single dwelling into two in association with a future subdivision of the site will be achievable and able to meet the requirements of the Planning Scheme and building regulations.

In light of these previous assessments, it is difficult to see how any subdivision that reflects the existing built form could impact unreasonably on the Submitter.

The Panel notes that the Victorian planning objectives include to provide for effective enforcement procedures to achieve compliance with planning schemes, permits and agreements. It appears that in the past, there has been some difficulty in securing the Proponent's compliance with the Planning Scheme and with Permit PL02/013542. While the Panel acknowledges the frustration that this has clearly caused for both the Submitter and the Council, it is not the role of planning controls to punish recalcitrant landowners. Redressing past breaches of planning controls provides no strategic justification for the continued application of the DDO7.

4.3 Conclusions and recommendations

The Amendment is strategically justified and should be supported. The Panel recommends:

1. **Adopt Amendment C130mann as exhibited.**

5 Relevant issues raised by the Submitter

5.1 Submissions

As noted in Chapter 1.3(ii), most of the issues raised by the Submitter are not relevant matters for the Panel to consider. The only planning issues raised by the Submitter are:

- space, trees and vegetation in the area should be protected
- the size of the existing building generates excessive overshadowing.

Even these issues are not directly related to the Amendment (or the question of whether the land should be allowed to be subdivided), but rather to the built form of the existing development of the land. Nevertheless, the Panel has addressed these issues for completeness.

5.2 Council's analysis

Council's report dated 25 February 2020 (Document 12) provided a detailed and thorough response to all of the grounds raised by the Submitter, notwithstanding that the majority of those issues are irrelevant.

In response to the Submitter's objections about the protection of space, trees and vegetation, the report noted that the separation of buildings and vegetation characteristics in Toronto Avenue are elements of neighbourhood character that must be considered in the assessment of any future permit application. The report pointed out that "*opportunities can be created to enhance a property should a planning permit be granted. This is most obvious in the landscaping treatments that are required and which can contribute to the existing neighbourhood character*."

Council's report noted that overshadowing was assessed in the planning permit application that originally accompanied the Amendment. It noted:

> The extent of overshadowing was assessed as being well within the allowable limits under the Scheme. Given that this planning application no longer forms part of Amendment C130mann, overshadowing would now only be formally considered under a separate planning permit application.

5.3 Discussion

As noted in Chapter 4.2, any future application to subdivide the land, or to convert the existing dwelling into two dwellings, is likely to be largely driven by the existing built form on the site. Based on the Council's assessment of the permit application that originally accompanied the request for the Amendment, the Panel is confident that the land can be subdivided, and the existing dwelling converted into two dwellings in a manner that meets the requirements of the Planning Scheme. Any impacts on open space, vegetation or overshadowing have already been assessed by VCAT as acceptable. The Panel agrees with these assessments.

5.4 Conclusions and recommendations

The Panel concludes:

- The Panel is confident that if the DDO7 is removed, the land can be subdivided, and the existing dwelling could be converted into two dwellings, in a manner that is consistent with the requirements of the Planning Scheme.
- Impacts on space, trees and vegetation and overshadowing are issues that will be considered as part of any future permit application.
- There is no justification for retaining the DDO7 on the basis of potential impacts to overshadowing, open space or vegetation.

Appendix A Documents considered by the Panel

No.	Date	Description	Provided by
1	undated	Explanatory Report for Amendment C42, which was gazetted on 8/7/2004	Panel's own research
2	25/2/2005	*Manningham v Jurkic* [2005] VCAT 324 (*Jurkic No. 1*)	Panel's own research
3	24/6/2005	*Jurkic v Manningham CC (Red Dot)* [2005] VCAT 1162 (*Jurkic No. 2*)	Panel's own research
4	11/12/2007	*Jurkic v Manningham CC* [2007] VCAT 2364 (*Jurkic No. 4*)	Panel's own research
5	27/8/2019	Council report supporting Council's resolution to seek authorisation to prepare and exhibit the Amendment	Council
6	21/10/2019	Letter from DELWP to Council authorising Council to prepare the Amendment	Council
7	N/A	Exhibited amendment documentation: - Explanatory report - Instruction sheet - proposed schedule to Clause 72.03 (What does this Planning Scheme consist of?) - map indicating the proposed deletion of DDO7 from the subject land	Council
8	12/1/2020	Original submission from R Smith	Council
9	21/1/2020	Supplementary submission from R Smith	Council
10	15/1/2020	Letter from R Wilson to Council in response to the Submitter's original submission	Proponent
11	undated	Planning History of 11 Toronto Avenue, Doncaster prepared by Proponent	Proponent
12	25/2/2020	Council report supporting Council's resolution to consider the submissions and refer them to an independent panel	Council
13	29/10/2004	*Australian Conservation Foundation Inc v Minister for Planning* [2004] VCAT 2029	Panel's own research