

**WHITEHORSE PLANNING SCHEME
AMENDMENT C99
PUBLIC OPEN SPACE CONTRIBUTION**

PANEL REPORT

AUGUST 2009

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A handwritten signature in black ink, appearing to read 'Chris Harty', positioned above a horizontal dashed line.

Chris Harty, Chair

AUGUST 2009

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1. Summary

Amendment C99 to the Whitehorse Planning Scheme proposes to:

- amend the Schedule to Clause 52.01 to change the public open space contribution to require a contribution rate of at least 4% whether for residential, commercial or industrial subdivisions. It is proposed for the open space contribution to be administered in accordance with the Whitehorse Open Space Strategy (WOSS) for strategic sites defined by the Strategy or by Council to require a minimum contribution of 4% which could be increased subject to negotiation of a development plan while all other sites would have a flat rate of 4%;
- introduce a new local policy (Public Open Space Contribution) into the scheme at Clause 22.17. The policy makes reference to the WOSS and identifies areas where a land contribution may be sought over a cash contribution for open space; and
- make minor changes to Clause 21.05 and 21.08 and inserts the WOSS into the list of Reference Documents under those clauses.

Twelve submissions were received to the amendment, and concerns were expressed in relation to:

- the strategic justification for changes to the public open space contribution rates;
- the appropriateness of the use of the Schedule to Clause 52.01 and the contribution rates;
- the appropriateness of the local planning policy at Clause 22.17; and
- the Daniel Robertson Brickworks Site.

The Panel hearing was conducted over one day on 4 August 2009 with comprehensive written submissions presented for the consideration of the Panel.

The Panel's overall conclusions are as follows:

- Amendment C99 has strategic justification through the comprehensive nature of the adopted WOSS and the support provided by the policy framework of the Whitehorse Planning Scheme;
- the use of the Schedule to Clause 52.01 is appropriate and satisfactory;
- the flat 4% contribution rate for public open space is appropriate because it is based on a City wide strategic assessment of public open space needs;

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- the minimum 4% contribution rate for strategic sites within the City of Whitehorse with the ability to require an additional contribution based on negotiating a development plan is appropriate. Strategic sites include areas which may be redeveloped in or close to activity centres which can accommodate higher density forms of development and population levels. Such focus points for higher density forms of development will attract a greater demand for public open space and offer a rare opportunity for Council to seek adequate land for open space provision to service these future residential areas; and
 - the new local planning policy at Clause 22.17 is appropriate subject to changes to improve its performance oriented nature, ensure that the selection criteria for land contributions are better aligned with those set out in Table 4-2 of the Whitehorse Open Space Strategy and includes additional criteria to assist decision makers and applicants negotiate any higher contributions towards public open space above the minimum 4% for strategic sites identified under the Schedule to Clause 52.01.

Based on the reasons set out in this Report, the Panel recommends Amendment C99 to the Whitehorse Planning Scheme should be adopted subject to changes as recommended in this report.

2. Background

2.1 The Amendment

Amendment C99 to the Whitehorse Planning Scheme, as exhibited, proposes to:

- amend the Schedule to Clause 52.01 to change the public open space contribution to require a contribution rate of at least 4% whether for residential, commercial or industrial subdivisions. It is proposed for the open space contribution to be administered in accordance with the Whitehorse Open Space Strategy (WOSS) for strategic sites defined by the Strategy or by Council to require a minimum contribution of 4% which could be increased subject to negotiation of a development plan while all other sites would have a flat rate of 4%;
- introduce a new local policy (Public Open Space Contribution) into the scheme at Clause 22.17. The policy makes reference to the WOSS and identifies areas where a land contribution may be sought over a cash contribution for open space; and
- make minor changes to Clause 21.05 and 21.08 and inserts the WOSS into the list of Reference Documents under those clauses.

The planning authority is Whitehorse City Council.

2.2 The Panel

This Panel was appointed under delegation on the 25 May 2009 pursuant to Section 153 of the *Planning and Environment Act 1987* to hear and consider submissions in respect of the Amendment.

The Panel consisted of:

- Chairperson: Chris Harty

Hearings

A Directions Hearing was held on Friday 3 July 2009 at the Whitehorse City Council Civic Centre in Nunawading. The Panel Hearing was held on Tuesday 4 August 2009 at the Whitehorse City Council Civic Centre in Nunawading.

No inspections were required to be made by the Panel because the amendment is of a strategic nature which affects the whole of the municipality.

Exhibition

The amendment was exhibited between 19 February 2009 and 23 March 2009. Notices were placed in the Whitehorse Leader newspaper, and letters were sent to local land surveyors, The Institution of Consulting Surveyors and local community groups within the municipality. As a result of the public exhibition of the amendment a total of twelve (12) submissions were received of which eight (8) have been referred to the Panel for consideration. The other four submissions were from government agencies or authorities who offered no objections to the amendment.

Submissions

The Panel has considered all written and oral submissions and all material presented to it in connection with this matter.

The Panel heard the parties listed in Table below.

Table 1

Submittor	Represented By
Whitehorse City Council	Ms. Maria Marshall of the firm Maddocks who called the following witnesses: <ul style="list-style-type: none"> ▪ Joanna Thompson, Landscape Architect, Thompson, Berrill Landscape Design Pty Ltd. ▪ Esther Kay, Town Planner, Environment & Land Management Pty Ltd.
Valda Arrowsmith	
Robertson Industries Pty Ltd	Tamara Brezzi from Deacons
Blackburn Village Residents Group Inc.	David Morrison who was unable to attend but provided a copy of their written submission that was to be presented.
West of Elgar Residents Association Inc.	Judy Sharples
Mitcham Residents Association Inc.	Neil Kerby
The Institution of Surveyors Victoria	Phillip Dingeldei

A list of written submissions to the Amendment referred to the Panel is included in Table 2.

Table 2

Submittor	Organisation (if any)
Peter Merrigan	Millar & Merrigan Pty Ltd
Phillip Dingeldei	The Institution of Surveyors Victoria
David Morrison	Blackburn Village Residents Group Inc.
Neil Kerby	Mitcham Residents Association Inc.
Dr T H Randle	Gardiner's Creek Community Group
Geoff White	West of Elgar Residents Association Inc.
Graeme Dickson of Graeme Dickson Partners Pty Ltd	Robertson Industries Pty Ltd
Valda & Edward Arrowsmith	

3. What is proposed?

Amendment C99 to the Whitehorse Planning Scheme seeks to implement, in part the recommendations of the Whitehorse Open Space Strategy (WOSS) which was adopted by Council on 19 November 2007. The WOSS reviewed the existing public open space network within the City of Whitehorse and provides the strategic basis for Council's future open space program.

The WOSS included an analysis of existing open space, levels of use, and gaps in the existing open space network. It analysed projected future residential growth and how this growth would influence future open space needs. This analysis enabled the identification of areas where new open space would be required, where existing open spaces could be improved and the work needed to meet the existing and future open space needs of the community. The WOSS recommended a variety of methods to achieve additional open space over the next 15 years. One such method is via public open space contributions made through the subdivision process.

As a result Amendment C99 proposes to amend the Whitehorse Planning Scheme by:

- amending the Schedule to Clause 52.01 to change the public open space contribution to require a flat rate of 4% for public open space contributions whether for residential, commercial or industrial subdivisions. For strategic sites defined by the WOSS or by Council a minimum contribution of 4% would be required for subdivision of land and subject to negotiation of a development plan;
- introducing a new local policy (Public Open Space Contribution) into the scheme at Clause 22.17. The policy makes reference to the WOSS and identifies areas where a land contribution may be sought over a cash contribution for open space. It also contains criteria for selecting land contributions and design requirements for development where a land contribution is preferred; and
- making minor changes to Clause 21.05 and 21.08 and inserts the WOSS into the list of Reference Documents under those clauses.

The WOSS and a companion document called *Whitehorse Open Space Strategy Open Space Contributions Program, July 2008* provides an explanation of how the recommended contribution rates were developed. The contribution of 4% was calculated by estimating the land area likely to be redeveloped due to anticipated population growth in each suburb and multiplying that by the

average residential land value in each suburb, to estimate the total value of land to be developed across the 15-year strategy horizon which came to almost \$700 million or \$42 million per year. Project costs were then calculated (in 2006 dollars) based on projects contained in the WOSS. These include the costs to obtain land and develop new public open space reserves and open space links, and capital works improvements in existing open space and open space links. A proportion of each project cost was allocated to the new population, the total of which over the life of the 15-year strategy is approximately \$24 million.

As a result of these calculations, it was identified that, per year a fair allocation of both land and capital works to the new population would total around \$1.6 million per year. Council identified that this was significantly more than the \$800,000 per annum currently collected using the existing open space contribution requirements. Council identified that 4% is the rate needed to generate \$1.6 million per year from the estimated total value of land to be developed at \$42 million. Council considers that the new contribution rate will remedy the shortfall of public open space by more accurately reflecting the cost to Council of providing for the open space needs of the new population. Council will contribute from its own general funds, the remaining costs of implementing the Strategy on behalf of the existing population.

The WOSS identifies those areas within the City where additional open space will be needed and therefore where a land contribution may be required. The amendment includes a new local planning policy, Clause 22.17 *Public Open Space Contributions*, to highlight where a land contribution may in certain circumstances be sought instead of a cash contribution. As many sites proposed for subdivision will be unsuitable for a land contribution due to their size, location or attributes, the policy outlines selection criteria to be used to determine if any part of the proposed subdivision site is suitable to be taken as land. Where a land contribution is inappropriate, a cash contribution will be required.

The policy also includes a section on design to enable early consideration of the open space requirements of the scheme and Council's strategic preferences. As subdivision frequently occurs after development, the policy requires development proposals to set suitable land aside for public open space where subdivision will follow.

4. Planning context

This section of the Report considers the policy context for the Amendment and focuses on the strategic and policy issues. It assesses how the Amendment meets the objectives of the Planning Scheme. The following sections of this Report include a brief appraisal of the State Planning Policy Framework (SPPF), the Municipal Strategic Statement (MSS) and Local Planning Policy Framework (LPPF). Consideration of individual zones and overlay controls is not necessary for an amendment such as this because it is of a strategic nature that does not alter any of the zones and overlays currently in the planning scheme.

There are a many planning policies that are in some way applicable to the consideration of the amendment. The submission from Council sets out the details of the relevant policies and the Panel notes that other submitters did not take issue with what was put forward in this regard. Accordingly, the Panel identifies the key points from those policies that may be relevant and will refer to them as appropriate.

4.1 Policy framework

4.1.1 State Planning Policy Framework

The Panel considers the following State Planning Policy Framework (SPPF) Clauses are relevant to the amendment.

Clause 11 – *Introduction Goals and Principles* – Clause 11.03 - *Principles of Land Use and Development Planning* identifies the following 7 general principles for planning in Victoria; Settlement; Environment; Management of Resources; Infrastructure; Economic well-being; Social needs and Regional co-operation. In short, planning must take account of the above matters including their underlying policies and strategies, to ensure the best overall outcomes for current and future generations. This inevitably involves judgement on balances between individual principles. It requires that Victoria's planning objectives are fostered through appropriate land use and development planning which integrates relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.

Clause 11.03-6 – *Social Needs* is relevant as it seeks to ensure that planning recognises social needs and ensures the provision of land for a range of accessible community resources including open space.

Clause 12 – *Metropolitan Development* provides objectives and strategies for Metropolitan Melbourne.

Clause 12.05 – *A Great Place To Be* – seeks to create urban environments that are of better quality, safer and more functional, provide more open space and an easily recognisable sense of place and cultural identity.

Clause 12.05-2 – *Strategies* - under *Neighbourhood Design* seeks to provide a range of open spaces to meet a variety of needs, with links to open space networks and regional parks where possible. Under *Open Space*, a number of strategies are listed that seek to provide new parkland in growth areas and in areas that have an undersupply of parkland, look to ensure that urban open space provides for nature conservation, recreation and play, looks to protect sites of conservation importance and cater for the needs of the broader community.

Clause 12.07 – *A Greener City* – seeks to minimise impacts on the environment to create a sustainable path for future growth and development.

Clause 15.10 – *Open Space* – seeks to assist creation of a diverse and integrated network of public open space commensurate with the needs of urban communities and rural areas.

Clause 15.10-2 - *General Implementation* seeks to ensure that planning authorities plan for open space networks to be used for recreation and conservation of natural and cultural environments, linked with walking and cycle trails and integrated with open space contributions from abutting subdivisions. The policy also looks to ensure that land is set aside and developed in residential areas for local recreational use.

Clause 19.01 – *Subdivision* – contains objectives for the subdivision of land and specifies under Clause 19.01-2 - *General Implementation* that planning schemes should enable the placing of open space requirements on development proposals.

4.1.2 Local Planning Policy Framework

Municipal Strategic Statement

The Municipal Strategic Statement (MSS) is intended to be a concise statement of the key strategic planning, land use and development objectives for the municipality and the strategies and actions for achieving the

objectives. It must be compatible with State Planning Policy. It provides the strategic basis for the application of the zones, overlays, the development of schedules to the particular provisions in the planning scheme and decision making by the responsible authority. Planning and responsible authorities must take account of the MSS when preparing amendments to planning schemes and before making decisions about permit applications.

The Panel considers the following MSS Clauses are relevant to the amendment.

Clause 21.04 – *Strategic Directions* – contains the *Strategic Framework Plan* which identifies various activity centres, but importantly identifies areas targeted for both minimal and substantial change including strategic development sites which are relevant in terms of the amendment seeking a minimum of 4% or higher contribution for open space subject to negotiation of a development plan.

Clause 21.05 - *Environment* outlines the issues affecting and the aims for improving and protecting the city's natural, visual and urban environments.

Clause 21.08 – *Infrastructure* under Clause 21.08-2 – *Key Issues* identifies the opportunity to utilise open space contributions in a manner that ensures net community benefit. Land contributions will be taken whereby there is an opportunity to improve existing open space linkages and provision.

Local planning policy

The Local Planning Policies (LPPs) for the Whitehorse Planning Scheme are at Clause 22. They provide more detailed land use and development objectives, strategies and actions for the future development of the City, which flow on from the policies contained in the MSS. There are no Clauses in the LPPs that are of particular relevance to the proposed amendment.

4.2 Planning scheme provisions

4.2.1 Particular provisions

Under the Particular Provisions contained in Clause 52 there is only one that is relevant to the amendment.

Clause 52.01 – *Public Open Space Contribution and Subdivision*, which contains a Schedule which is proposed to be changed under Amendment C99. This Clause requires that a person who proposes to subdivide land must make a contribution to the Council for public open space in an amount specified in the Schedule to this Clause (being a percentage of the land intended to be

used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). The Clause also states that if no amount is specified, a contribution for public open space may still be required under Section 18 of the Subdivision Act 1988, which requires a contribution that does not exceed 5%.

The Schedule to the Clause currently uses a sliding scale for public open space contributions which ranges from a 2% contribution for subdivisions which create two additional lots through to a 5% contribution for subdivisions which create 5 or more additional lots.

4.3 Other strategic work

4.3.1 Melbourne 2030 and Melbourne @ 5 million

Melbourne 2030 – Planning for Sustainable Growth is a 30 year plan released in 2002 to manage growth and change across metropolitan Melbourne and the surrounding region. An important objective is to ensure that Melbourne retains the qualities that people enjoy about it. The Strategy seeks to reduce excessive urban expansion into surrounding rural areas with the main thrust being to continue to protect the liveability of the established areas and to increasingly concentrate major change into strategic redevelopment sites such as activity centres and underdeveloped land.

Melbourne 2030 is implemented through Clause 12 of the SPPF and through Ministerial Direction No. 9 – *Metropolitan Strategy*, 8 October 2002. It contains nine (9) key strategic directions which aim to guide future metropolitan planning. The following directions and policies are considered relevant to the consideration of Amendment C99:

- Direction 1 *A More Compact City*
 - Policy 1.1 - Build up activity centres as a focus for high-quality development, activity and living for the whole community.
 - Policy 1.2 - Broaden the base of activity in centres that are currently dominated by shopping to include a wider range of services over longer hours, and restrict out-of-centre development.
 - Policy 1.3 - Locate a substantial proportion of new housing in or close to activity centres and other strategic redevelopment sites that offer good access to services and transport.
- Direction 5 *A Great Place To Be*
 - Policy 5.1 - Promote good urban design to make the environment more liveable and attractive.

- Policy 5.6 - Improve the quality and distribution of local open space and ensure long-term protection of public open space.
- Direction 7 – *A greener city*
 - Policy 7.7 - Protect native habitat and areas of important biodiversity through appropriate land-use planning.

Melbourne @ 5 million is an update of Melbourne 2030 which complements and supports the earlier strategy by recognising the increasing rate of growth in the Melbourne Metropolitan area. It recommends improvements to transportation systems and the need to expand the Urban Growth Boundary to accommodate future population growth.

4.3.2 Whitehorse Open Space Strategy (WOSS)

As mentioned earlier in Section 3 of this report, the WOSS is a key strategy which informs and supports Amendment C99. The WOSS identifies a vision, methodology and hierarchy to classify and define the character of public open space areas throughout the City of Whitehorse. It describes the different forms of public open space and its distribution throughout the municipality and recognises that the amount and distribution of public open space found within the City is uneven and unequal.

The WOSS assesses the future needs for public open space by analysing future population growth and demographic change within the municipality and it does this on a suburb by suburb basis so that the impact of activity centre development compared to minimal change areas are considered in an overall and integrated manner. Recommendations made in the WOSS consider the overall needs for public open space in terms of both the future and existing residents of the City in an equitable way and based on need.

The WOSS also considers the quality and design of open space and assesses how existing open space is managed. It contains recommendations for the preparation of Amendment C99 and is argued by Council as the foundation for the changes proposed under the amendment to the Schedule to Clause 52.01 and the new Clause 22.17 local planning policy to implement its directions and achieve its outcomes.

5. Identification of issues

5.1 Summary of issues

Issues raised in submissions

From the submissions to the Amendment, the Panel identified a number of key issues that need to be addressed. These can be summarised as follows:

- a maximum open space contribution should be set to provide certainty;
- proposed policy contains definitive statements that do not allow flexibility;
- concern that the test of whether public open space contributions are required in the first place is ignored due to the imposition of schedule;
- contribution rate of at least 4% should be applied to all subdivisions including 2 lot subdivisions that are exempt from having to contribute towards public open space;
- contribution rate should be 8% and two-lot subdivisions included;
- collected monies from open space contributions will not be used for open space purchases;
- amendment won't generate enough additional larger open space areas;
- a contribution of 5% should be applied for areas with undersupply; and
- open space contribution has already been made for the Daniel Robertson Brickworks site and the recommendation in the WOSS exceeds what should be sought.

Issues from the Strategic Assessment Guidelines

The purpose of the Strategic Assessment Guidelines is to provide a consistent framework for the evaluation of a proposed planning scheme amendment and the outcomes it produces.

The Guidelines require the Panel to consider:

- Is an amendment necessary?
- Does the amendment comply with the requirements of the Planning & Environment Act?
- Does the amendment support or implement the SPPF?
- How does the amendment support or implement the LPPF, and specifically the MSS?
- Does the amendment make proper use of the VPP?

- How does the amendment address the views of relevant agencies?
- Have the resource and administrative implications of the amendment for the responsible authority been properly considered?

The Panel has considered the response to the Strategic Assessment Guidelines included in the exhibited Explanatory Report for the amendment, together with submissions on the guidelines from Council. The Panel endorses Council's response and considers that no issues are raised by an assessment against the Strategic Assessment Guidelines.

Ministerial Directions

The Minister has made a direction under Section 12(2)(a) that contains the following requirement:

Direction No. 9 Metropolitan Strategy

In preparing a planning scheme amendment a planning authority must:

- *Have regard to the Metropolitan Strategy.*
- *Include in the explanatory report discussion of how the amendment addresses the following matters:*
 - *What aspects, if any, of the Metropolitan Strategy are relevant?*
 - *How does the Metropolitan Strategy affect the amendment?*
 - *Is the amendment consistent with any directions and policies in the Metropolitan Strategy?*
 - *Does the amendment support, give effect to or assist the implementation of the Metropolitan Strategy or can it be reasonably modified to do so?*
 - *Will the amendment compromise the implementation of the Metropolitan Strategy?*

The amendment complies with the Directions.

Form and content

The Minister has made a direction under Section 7(5) in relation to the form and content of planning schemes that specifies:

- the format of the planning scheme;
- the need to write in plain English; and
- the inclusion of schedules.

In addition, *Using Victoria's Planning System, Chapter 9: Plain English* provides advice on form and content as do the following practice notes:

- Writing schedules;

-
- Using maps in planning schemes;
 - Applying the Public Land Zones;
 - Writing a local planning policy;
 - Format of Municipal Strategic Statements;
 - Incorporated and reference documents.

Based on the Panel's assessment, the amendment satisfies the above direction.

5.2 Issues dealt with in this Report

The Panel considered all written submissions, as well as submissions presented to it during the Hearing. In addressing the issues raised in those submissions, the Panel has been assisted by the information provided to it during the hearing.

This Report deals with the issues under the following headings:

- Strategic justification;
- The appropriateness of the use of the Schedule to Clause 52.01 and the contribution rate;
- The appropriateness of the local planning policy; and
- The Daniel Robertson Brickworks site.

6. Strategic Justification

6.1 What is the issue?

Amendment C99 seeks to amend the public open space contribution and introduce a new local planning policy at Clause 22.17 to guide how the form of any public open space contribution is made. The policy identifies areas of the municipality where land contributions would be preferred over cash. Both the amendment to the contribution rate and the policy basis over whether to seek land or cash contributions are governed by the WOSS.

The Panel needs to consider whether the amendment has sufficient strategic justification to support the changes sought to the Whitehorse Planning Scheme.

6.2 Policy context of the issue

The policy context under the Whitehorse Planning Scheme has been described earlier in Section 4 of the report and is further discussed below. Importantly, the Panel acknowledges that the WOSS was adopted by Council on 19 November 2007 and that Amendment C99 is part of the implementation of that adopted strategy.

6.3 Evidence and submissions

The Panel notes that there were no submissions which raised concerns over the strategic policy justification for amending the Schedule to Clause 52.01, the introduction of a new local planning policy or amendment of Clauses 21.05 and 21.08 to the MSS. Many of the submitters supported the fact that Council was prepared to change the public open space contribution rates.

Ms Maria Marshall on behalf of Council submitted that the amendment has strategic justification by way of the fact that it seeks to implement a recommendation from the WOSS, which is an adopted Council strategy. Specifically, the WOSS recommends at 5.6.6 that:

The Schedule to Clause 52.01 of the Whitehorse Planning Scheme be amended as soon as practical to include the new contributions rates and to contain land and cash contribution locations and requirements.

The Panel notes that the WOSS addresses a range of matters relating to public open space including open space contributions. The strategic purpose of the WOSS is:

The Whitehorse Open Space Strategy sets out a cohesive direction for the future provision, planning, design and management of publicly owned land that is set aside for leisure, recreation and nature conservation purposes.

The WOSS has itself been informed by various broader strategic directions including as relevant to the amendment the following:

- *Melbourne 2030 including the directions for urban growth and walkability, particularly in encouraging sustainable vibrant communities and Activity Centre Structure Plans;*
- *The Eastern Regional Housing Statement and the Whitehorse Housing Study to forward plan for open space as part of urban growth across Whitehorse as identified by Council;*
- *Demographic change towards an ageing population;*
- *Regional open space links highlighted in Linking People and Spaces by Parks Victoria;*
- *State Planning Provisions which required Council to plan for the open space needs of existing and future communities with different types of open space and the distribution that should ideally be achieved.*

It was submitted to the Panel by Ms Marshall that the WOSS went through a detailed community consultation program including the results of around 4,000 surveys and a number of community workshops and meetings which sought to gain an understanding of existing patterns of community use of open space and needs. Ms Marshall submitted that the WOSS:

...extensively examines the hierarchy and character of the existing open space within the municipality. It distinguishes between Regional, Municipal, Neighbourhood, Local and Small Local open space and also plots the distribution (across the entire municipality) of each type of public open space. Further, it defines the character of the open spaces within the municipality by reference to location, level of development and design (for example, Botanical, Bushland, Nature conservation, Sporting, etc). Finally, it set out the preferred types of facilities having regard to open space hierarchy.

Where public open space distribution and quantity is concerned, the WOSS identifies the opportunities to improve linear links and

connection and, in particular, examines the areas where land area for open space will be required within the next 15 years.

The Panel's attention was drawn by Council to the document *Whitehorse Open Space Strategy Open Space Contributions Program, July 2008* which outlines that the WOSS supports open space contributions from development in the following ways:

- *The Strategy is based on analysis of the population change anticipated in Whitehorse over the life of the Strategy (intensification of residential and non-residential development), including the size, distribution and characteristics of this population. This is linked to Victorian Government and Council housing studies, demographic forecasts, Council's strategic planning for Activity Centres and policies for normal or minimal growth in existing residential neighbourhoods.*
- *The Strategy recommends expansion and improvements to the open space network based on an analysis of the relative population change that will occur in different parts of the municipality, e.g. through Activity Centre development, conversion of non-residential land to mixed use or residential development, intensification of higher density residential areas (most of which are included in Activity Centre boundaries) and continuing, dispersed redevelopment in other parts of the municipality.*
- *The location, standard and size of existing open space and the facilities offered in them has been considered in terms of existing and new populations.*
- *The Strategy provides a costed program to add open space reserves and links (including capital works development) to deliver the distribution of open space adopted in the Strategy, and to upgrade existing reserves and open space links. The Strategy program is broken down for each post code within the municipality.*
- *The implications of setting a rate on Council's housing policies and attracting development to preferred development sites or areas has been considered.*
- *The Strategy provides the basis for establishing a new contribution rate schedule. It identifies how open space contributions should be collected and spent, including where a land contribution may be sought from development.*

Open space contributions are an important funding source but the Open Space Strategy recognises there are limitations and requirements in relation to their collection and the way they can be spent. For example,

open space contributions cannot be levied to pay for historical open space deficiencies for people already living or working in Whitehorse. The monies received must be spent on open space land purchase or capital works related to the needs of the new population on whose behalf they were collected. These limitations and requirements have been considered in preparing the Strategy.

The Strategy provides a strategic framework for open space provisions over the next 15 years and its recommendations have been prepared to meet the needs of both the existing and future population. A proportion of the cost for implementing these recommendations will be met by open space contributions (where new open space or capital improvements will serve new population) and the remainder by other sources of funding including Council revenue.

Council's submission concluded that the WOSS provides a comprehensive framework for its approach in relation to existing and future open space needs and places an equal focus on dealing with the acquisition of new land to add to the availability of public open space as well as on improving existing open space assets. It establishes a link between population growth and the demands on existing public open space areas while quantifying deficiencies of the existing public open space network and making recommendations for addressing these pressures, which support Amendment C99.

6.4 Discussion

The Panel acknowledges the lack of concern expressed in the submissions regarding the strategic basis and policy justification for the changes sought by the amendment to the public open space contribution rates in the Schedule to Clause 52.01 and the directions outlined in Clause 22.17.

The preparation of the WOSS and its purpose and outcomes are not questioned and given that it is an existing adopted strategy of Council, which has been through an extensive community consultation process, the Panel considers it carries significant weight in its considerations. The Panel considers that the range of matters identified and analysed in the WOSS are appropriate and have been comprehensively addressed. The Panel's views on this are supported by the fact that the main focus of concern expressed in submissions relate to how well the contribution rate is based on a fair assessment of need and how much the contribution rate for public open space should be rather than on whether or not there should be a contribution rate.

The Panel considers that the WOSS and the amendment, as an action derived from the WOSS, is clearly supported by strategic planning policy contained in both the SPPF and LPPF of the Whitehorse Planning Scheme. With respect to the SPPF, the Panel considers that the amendment satisfies the following key policies:

- Clause 12.05 – *A Great Place to be*, the amendment ensures that new development contributes to open space and improves the quality and distribution of open space through guidance under the Clause 22.17 for open space to be provided in areas that have an undersupply of parkland and rectifying gaps in the open space network;
- Clause 12.07 - *A Greener City*, the amendment supports the conservation of areas of valuable native habitat and biodiversity by providing opportunities for such areas to be included within open space areas;
- Clause 15.08 – *Open Space*, the amendment specifically satisfies the purpose of this policy by putting in place a mechanism to require public open space that is geared to the circumstances of the City of Whitehorse and provides guidance in the form of policy to assist decision makers on how open space contributions are to be provided (i.e. land or cash contributions) within the various suburbs of the municipality; and
- Clause 19.01 – *Subdivision*, the amendment continues to utilise the planning scheme for setting out the requirements for public open provision on development proposals.

With respect to the LPPF, the Panel considers that the amendment satisfies the following key policies:

- Clause 21.05 – *Environment*, the amendment further supports the aim of this policy to protect natural, visual and urban environments by the addition of a further strategy which seeks to ensure that all new development contributes to the provision of public open space; and
- Clause 21.08 – *Infrastructure*, the amendment further supports the issue identified under this policy that contributions may be taken as land where there is an opportunity to improve existing open space linkages and its provision by specifying that contributions may be taken as land where the selection and location criteria in the WOSS are met.

Overall, the Panel considers that Amendment C99 is supported by and itself supports the strategic intent of the policy framework contained within the Whitehorse Planning Scheme.

With respect to Clause 21.05 – *Environment*, the Panel has some concerns over the wording of the additional strategy proposed under the amendment. The new strategy reads:

Ensuring all new development contributes to the provision of public open space.

The wording relates solely to requiring public open space contributions within the context of a policy which has a focus on the environment, while its scope is broad in that it relates to all new development. The Panel believes that this is not appropriate both in the context of the policy subject matter and the conflict it produces with regards to the fact that not all development may be able to or legally bound to contribute towards public open space. For example two (2) lot subdivisions may be exempt under Clause 52.01 from contributing towards public open space.

The Panel considers that the strategy should be reviewed to firstly recognise that not all new development can be assured of contribution towards public open space, but more importantly, that the subject of the strategy needs to relate more to encouraging public open space to assist in the protection of environmental assets. In this regard the Panel considers that the strategy should refer more to land contributions where sites of high conservation value can be identified protected as part of the public open space network. Accordingly, the Panel suggests wording such as:

Ensure that where applicable, the contribution of land towards any public open space requirements can assist in the protection of sites of environmental value identified as having high conservation significance.

The Panel considers that the wording as suggested would be a better fit for purpose strategy under Clause 21.05 dealing with the environment.

6.5 Conclusions and recommendations

The Panel concludes that Amendment C99 has strategic justification through the comprehensive nature of the adopted WOSS itself and through the support provided by the policy framework of the SPPF and the existing and amended policy framework provided under the LPPF.

The Panel recommends that:

- 1. Clause 21.05 – Environment should be amended to replace the strategy under Clause 21.05-4 with the following to better reflect the purpose of the policy:**

Ensure that where applicable, the contribution of land towards any public open space requirements can assist in the protection of sites of environmental value identified as having high conservation significance.

7. Appropriateness of the Schedule to Clause 52.01 and the Contribution Rate

7.1 What is the issue?

The key issues that have arisen from considering Amendment C99 are the appropriateness or otherwise of using the Schedule to Clause 52.01 to seek public open space contributions that are tailored to the circumstances of Whitehorse City Council and whether the contribution rates contained in the amendment are appropriate.

7.2 Policy context of the issue

The Panel notes that public open space contributions can be collected pursuant to Clause 52.01 – *Public Open Space Contribution and Subdivision of the Whitehorse Planning Scheme*. Clause 52.01 provides that:

A person who proposes to subdivide land must make a contribution to the Council to public open space in an amount specified in the schedule to the clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If not amount is specified, a contribution for public open space may still be required under Section 18 of the Subdivision Act 1988.

The Clause also states that a public open space contribution may be made only once for any land to be subdivided and also that a two (2) lot subdivision of land is exempt from a public open space contribution where Council considers it unlikely that each lot will be further subdivided.

The Panel is aware that if a planning scheme specifies a contribution rate at Clause 52.01, the provisions of Section 18 of the *Subdivision Act 1988* (Subdivision Act) do not apply. In particular, the rate of contribution payable pursuant to Clause 52.01 is mandatory and not open to appeal and that the rate can also be higher or lower than the rate specified in the *Subdivision Act 1988*¹.

Currently, in the Whitehorse Planning Scheme, the Schedule to Clause 52.01 has been used to require public open space contributions based on a sliding

¹ Section 18 of the Subdivision Act 1988 specifies a public open space contribution of up to 5%.

scale from 0% to 5% depending on the number of lots proposed in a subdivision application.

7.3 Evidence and submissions

Council's submission was that the WOSS provides a comprehensive review of existing and projected public open space needs based on the analysis of projected population growth and the nature of that growth and given the:

- urban developed nature of the municipality;
- extent and distribution of existing public open space found within the municipality; and
- intensification of future growth within areas such as activity centres and other large sites identified as 'strategic sites' where higher densities of development may occur and where it is expected that demands for public open space may become critical.

Ms Marshall submitted that given the above:

....the WOSS recommends a general open space contribution rate of 4% and a minimum contribution rate of 4% in respect of strategic sites where flexibility is recommended on the basis that some part of this land will be required to be converted to open space.

Ms Marshall further stated that:

....the key difference between the contribution rates called for pursuant to the current Schedule to Clause 52.01 and the rates proposed as part of the Amendment, is that they are tailored to the local circumstances within the municipality of Whitehorse.

Opposed to the proposal to specify a 4% public open space contribution rate a number of submitters expressed concern that the 4% contribution rate was too low and should be higher ranging from 5% to 8%. The Panel heard from Mrs Valda Arrowsmith who stated that:

....we request consideration for a recommendation to Council to increase the Open Space contribution from developers which would improve the amenity for new residents along with existing residents to have the opportunity to exercise or relax in fresh air. We still think 8% is not unreasonable as this municipality has as much difficulty in providing for its residents and people working in this City as municipalities who have green fields to develop and require more than a 4% contribution.

Likewise, the Panel heard from Mr Neil Kerby from the Mitcham Residents Association Inc. who submitted that:

- a higher rate of at least 8% should be required overall;

- a higher minimum rate of 8% should be required for strategic development sites and subject to further higher contributions as 'negotiated' as well as for sites within 450 metres of an activity centres; and
- a Development Contributions Plan should be developed for 2 lot subdivisions which form the majority of subdivisional activity within the municipality and which are lost from the requirement to contribute towards public open space provision due to the Clause 52.01 exemption.

In relation to the lost opportunity to accrue public open space contributions from incremental forms of development associated with 2 lot subdivisions etc..., Mr Kerby made reference in his submission to correspondence with Council over subdivision figures and open space contributions, which would possibly support his contention that there were many new lots created which escape from contributing towards public open space due to being exempted. In this regard, Mr Kerby advised the Panel that at the time of the hearing he was awaiting a further reply from Council seeking to clarify the number of lots created by subdivisions and contributions made towards public open space. The Panel received the Council reply after the conclusion of the Panel Hearing, which confirmed for the Panel that there is a higher number of lots created which appear to have not been required to contribute towards public open space and consequently impact on the increasing shortfall between the needs of future residents and those of the existing residents in the municipality.

The Panel also viewed the written submission from the Blackburn Village Residents Group Inc. who, although generally support the amendment because it is better than what it replaces have expressed reservations that the 4% contribution rate would be insufficient and considered that:

- a 5% minimum open space contribution should be adopted for subdivisions;
- acquisition of open space is made before the population increases so that the new population enjoy the open space they have paid for; and
- clear performance measures are in place for regular assessment of the WOSS against strategies and objectives.

More specific concerns were expressed regarding the issue of certainty over flexibility with the submission from Millar & Merrigan Pty Ltd raising concern over the lack of certainty without a maximum limit on the public open space contribution associated with strategic development sites. This uncertainty relates to situations where a minimum 4% contribution is

required but are then subject to 'negotiation' of a development plan to ascertain any higher contribution requirements.

Ms Tamara Brezzi on behalf of Robertson Industries Pty Ltd raised the issue that:

The proposed schedule contemplates, for strategic sites, that the contribution will be 4% minimum subject to negotiation of a development plan. The proposed schedule must be rejected because it lacks sufficient certainty to constitute a 'requirement' under the planning scheme. The principle that requirements and obligations arising from legislation (including delegated legislation such as planning schemes) must be certain and clear is fundamental to the planning system and to the interpretation of planning schemes. Landowners must be entitled to proceed on the basis that their obligations are certain. The proposed schedule does not allow that to occur.

The Panel heard evidence from Ms Esther Kay, Town Planner from Environment & Land Management Pty Ltd on behalf of Council who outlined the following key principles extracted from an interim Panel Report prepared for Amendment C20 to the Glen Eira Planning Scheme dated 14 May 2002. This report assisted in informing the development of the WOSS and how the public open contribution rate as proposed under Amendment C99 was developed:

- *Establish a framework for increasing and / or improving upon open space to satisfy the community's expectation.*
- *Develop a formula for improving / increasing open space based on increased densities and changing demography.*
- *Understand the open space requirements of new dwellings in a more comprehensive and rigorous manner. For example, how much more demand for open space is likely to be generated by certain types of development? Will a three-unit development on a 1000 square metre site place different demands on municipal open space than a ten-unit multi-storey apartment block? If so, what are these demands?*
- *Develop an open space contribution based on the need to bring existing open space to a reasonable level based on an anticipated population density on a precinct by precinct basis.*
- *When completed, ...establish the relationship between the new contribution rate and the City's open space strategies.*

Evidence from Ms Joanna Thompson, Landscape Architect from Thompson Berrill Landscape Design Pty Ltd described how the contribution rates were

calculated. She advised that the assessment was done using a suburb by suburb assessment or precinct approach which reviewed:

- the location and magnitude of planned future growth;
- the extent of existing public open space;
- the level of satisfaction with open space from the existing population; and
- an assessment of the anticipated works beyond what was needed for existing use and what was needed for the new population.

She advised that the costs of project works or capital works for providing open space were apportioned on a ratio basis between the existing and new population based on the location of where the majority of new population from development would occur and where a need for additional public open space would be generated.

Ms Thompson stated that:

Based on the apportionment of the costs to the existing and new population for every project including new land area for open space, a total dollar value of what is required to be raised from the new population via open space contributions has been determined. This is distinct from the costs to implement the works to meet the needs of the existing population. The quantity of projects included in the Strategy was carefully reviewed by Council to ensure they could adequately fund and administer the projects outlined in the Strategy.

The evidence from both Ms Thompson and Ms Kay was that the contribution rate proposed under the amendment represents a fair allocation of project costs to the future, new population based on the total value of project costs contained in the WOSS. They both re-iterated that the rates are adequate to raise funds to deliver projects identified in the WOSS to meet the needs of the new population as distinct from those of the existing population.

7.4 Discussion

In dealing with public open space contributions under the Whitehorse Planning Scheme, it is important to distinguish that the contribution rates contained in the Schedule to Clause 52.01 relate to the needs of the new population as distinct from the needs of the existing population. Any shortfall in supply needs to be met by Council using other funding sources. The use of funds collected from Clause 52.01 are to be used to provide new open space or upgrade existing open space to cater for the additional new population growth arising from the approval of subdivisions. This reflects the need to assess whether the approval of a subdivision will result in an

additional need for public open space either from additional population growth or further intensification of use of existing public open space. These principles are reflected in the provisions of the *Subdivision Act 1988* and referred to in the submissions from both Millar & Merrigan Pty Ltd, and The Institution of Consulting Surveyors.

7.4.1 Is the contribution rate based on need?

The surveyors concern can be expressed in terms of demonstrated nexus between need and provision. Individual subdivisions are assessed under the *Subdivision Act 1988* against the need for public open space based on the extent of the subdivision i.e. a 3 lot subdivision would generate less demand for public open space and hence require a smaller contribution compared to a 6 lot subdivision. The flat rate of 4% does not consider the level of demand whereby in the above example a 3 lot subdivision and a 6 lot subdivision would both attract the same level of contribution towards public open space without considering the scale of development.

With regards to the above, the Panel considers that the amendment introduces the flat 4% contribution rate on the basis of an adopted strategy (WOSS), which has assessed the public open space needs of the whole City of Whitehorse. It shifts the focus from individual assessments for public open space contribution as required under the *Subdivision Act 1988* to an assessment process based on a strategic approach to public open space provision across the municipality. It is a smoothing out of the low and high contributions associated with providing public open space that developments of variable size would attract.

Amendment C99 uses the provisions of Clause 52.01 to achieve the above with the support of a local policy and the WOSS as a reference document under the Whitehorse Planning Scheme. The Panel considers that this is an appropriate use of Clause 52.01 because it is a planning tool specifically established to provide the opportunity for planning authorities to make provision for public open space contributions based on a municipal wide strategic approach. This approach moves the consideration away from individual assessment that occurs on a piecemeal basis under the *Subdivision Act 1988* to a more strategic basis based on municipal wide needs. The test is to ensure that the recommendations arising from any open space strategy are soundly based on the principles outlined under Section 18 of the *Subdivision Act 1988* and demonstrate a nexus between demand and the provision of public open space. The Panel believes that this has been achieved.

7.4.2 Has the contribution rate been correctly calculated?

The Panel considers that the methodology of how the public open space contribution rate was calculated is appropriate and satisfactory. This consideration is based on the fact that no party offered an alternative method of calculating an appropriate contribution rate. No other party apart from Ms Brezzi cross examined the expert evidence of Ms Thompson or Ms Kay and although Mr Kerby submitted a detailed rebuttal of their evidence, he did not call his own independent evidence to substantiate his claims.

The Panel is satisfied that the methodology of calculating the public open space contribution rate proposed in Amendment C99 is appropriate and does follow the principles outlined in both the Glen Eira C20 Panel Report and the WOSS. The Panel notes that in the course of developing the WOSS, an extensive community consultation process was undertaken whereby opportunities to question and test the contribution rate would have been available. The Panel notes that the WOSS has been adopted by Council and will operate to govern Council public open space management procedures for the next 15 years.

The Panel believes that the contribution rate as proposed under the amendment is an improvement on that which currently exists in the Schedule to Clause 52.01 of the Whitehorse Planning Scheme. The calculation of the 4% contribution rate is based on a precinct approach to assessing open space needs compared to what is available and what will be required in the future as a result of new development and re-development and the associated population growth. The Panel considers that this approach to planning for future public open space needs is strategic and tailored to the circumstances that are found in Whitehorse.

There will also be opportunities for Council to monitor how successful the contribution rate has been which allows Council to determine whether it may need reviewing over time or not and the Panel believes this opportunity will remain available to Council.

7.4.3 Is there certainty with a minimum contribution rate?

The issue of certainty with the provision for a minimum of 4% subject to negotiation of a development plan for strategic sites as defined by the WOSS and Council was a concern for submitters. The Panel acknowledges that the nature of a requirement under a planning scheme does need to be clear with limits. The terms 'strategic sites as defined by the WOSS or Council' and 'subject to negotiation of a development plan' raises a degree of uncertainty and the question is whether this appropriate or not.

With regards to 'strategic sites defined by the WOSS or Council', the Panel understands that under the WOSS strategic sites are defined as redevelopment sites within activity centres or large sites with potential for redevelopment that are located outside of activity centres and which have been identified in the WOSS. The Panel notes that under the *Strategic Framework Plan* in Clause 21.04 of the MSS, three (3) strategic re-development sites are identified, while under Section 5.3 of the WOSS, each of the activity centres are discussed with recommendations regarding various open space opportunities. Finally, under Section 5.4 of the WOSS eight (8) strategic sites which are located outside of activity centres are identified and discussed.

The Panel questioned Council about whether other strategic sites may be identified in the future that may arise from future State Government planning processes such as reviews of Melbourne 2030 or Melbourne @ 5 Million etc.... In response Council stated that:

The Panel will appreciate that from time to time new strategic sites will emerge/become available – it is precisely for this reason that the State Government's Urban Development Program is updated on an annual basis.

It is highly likely that there will, for instance, be sites which become available for development in the future as a consequence of, for instance, sale/rationalisation of government/corporate sites or the redevelopment of existing large residential sites.

Some guidance as to what Melbourne 2030 considers to be a "strategic redevelopment site" is useful in terms of setting some criteria around sites to be declared by Council as strategic sites for purposes of clause 52.01, in circumstances where those sites are not already specifically nominated in the WOSS.

Under Policy 1.3 of Melbourne 2030 strategic redevelopment sites are recognised as sites which are able to be developed to provide more than 10 dwellings located close to activity centres and well served by public transport. Council acknowledged that the wording in the Schedule could be amended to include reference to the State Government and that the definition of a strategic site was adequately defined under the WOSS. The Panel is reasonably comfortable that the recognition of a strategic site for redevelopment in the WOSS is well aligned with that under Melbourne 2030. The Panel also acknowledges and accepts Council's willingness to change the wording in the Schedule to Clause 52.01 and considers that given the WOSS will be included as a reference document any concerns regarding what is meant by a 'strategic site' can be easily clarified by reference to the WOSS.

With regards to the issue of certainty over the minimum contribution rate for strategic sites, the Panel considers that any lack of certainty in the requirement in the Schedule can be overcome by the support offered in the proposed new Clause 22.17 local planning policy. The policy can provide guidance and criteria regarding how additional public open space is meant to be provided over and above the minimum 4 %. The 4% is proposed to be applied for reasons of consistency with the flat 4% rate for all other land in the municipality, so that all sites requiring an open space provision are treated in a consistent manner. In relation to this issue, Ms Marshall stated that:

The logic behind specifying a 4% minimum contribution will be - such sites should, at least, make the same provision as all other sites in the municipality. However, it is submitted that there are sound reasons why such sites ought be capable of providing a contribution over and above that which is provided by the "standard sites". For example, such sites will typically be the beneficiary of planning scheme policies which support higher density development – it is reasonable to assume that they will have a greater need for public open space than other sites in the municipality. Secondly, it is the case that if a flat rate of 4% across the municipality is applied, then it will, by definition, be a self-perpetuating limit on the capacity of Council to provide larger areas of public open space, even on very large sites.

A similar outcome could be achieved in other ways, for instance, through the use of the policy, to specify the factors that ought be taken into account in determining a contribution greater than 4%.

In this regard, it is likely that such criteria would include:

- An examination of any relevant strategic planning documents, including the WOSS, to determine if land or cash should be requested and whether those strategic documents give any indication as to an indicative land contribution;*
- Consider the existing public open space within the area and the type of open space that is required – have regard to the hierarchy of public open space and recommendations in the WOSS;*
- Consider likely population/dwelling number changes.*

The policy at Clause 22.17 already contains some criteria for the selection of land contributions and offers the opportunity to also include criteria or guidelines to support Council in exercising its discretion to seek higher public open space contributions for sites that have the potential and policy support to be redeveloped at higher densities and accommodating a greater density of people than other infill development sites. The Panel considers

that Clause 22.17 could be amended to include additional criteria to guide decision makers about how the additional public open space above the 4% minimum can be 'negotiated'. The Panel notes and accepts Council's response to agree to such changes. The Panel notes Council's response in its right of reply and evidenced by a set of criteria to assist in determining any negotiated contribution rates for open space above the minimum 4% for strategic sites included in the document *Draft Assessment Criteria for Minimum 4% Open Space Contributions on Strategic Sites, 31 July 2009* tabled by Ms Marshall during the hearing (refer to Appendix A).

7.4.4 Has the correct planning tool been chosen?

The issue of whether it is appropriate to use the Schedule to Clause 52.01 or to use the Development Contributions Plan Overlay also requires consideration. Mr Kerby has more specifically raised the issue of the Development Contributions Plan Overlay for situations involving 2 lot subdivisions which are exempted under Clause 52.01 to add to the level of contributions from an increase in population arising from these types of small, incremental developments.

The Panel acknowledges that the Development Contributions Plan Overlay (DCP) is a legitimate planning tool that is available for Council to use for the purpose obtaining contributions for public open space. The DCP is a planning tool that is specifically geared towards requiring contributions from development towards the cost or provision of infrastructure required by such new development. A DCP is a suitable mechanism for obtaining contributions towards infrastructure in established urban areas that are experiencing dispersed new development. In these situations, a DCP would allow the Council to collect a proportion of the cost of providing the infrastructure, but is unlikely to recover the whole cost. With regards to using the DCP to require public open space contributions, unlike other forms of infrastructure such as community facilities like child care centres, libraries, community halls etc..., which can only be funded through the DCP, the provision of public open space is able to be made under an alternative mechanism under Clause 52.01. In this instance, Council has made the decision to not pursue the use of the DCP, but rather to use the Schedule to Clause 52.01 mainly because it is already in use under the Whitehorse Planning Scheme. Amendment C99 merely seeks to amend the Schedule to adjust the rate of contribution based on the WOSS. Accordingly, the Panel concurs with this intent and does not consider that there is enough strategic justification to pursue the use of the DCP.

7.4.5 What about 2 lot subdivisions?

With regards to the submission from Mr Kerby that the DCP should be used to pick up contributions towards public open space from 2 lot subdivisions which could address shortfalls in public open space contributions, the Panel considers that this is not appropriate. Clause 52.01 and Section 18(8) (c) of the Subdivision Act both specify that the subdivision of land into 2 lots is exempt from the need to contribute towards public open space unless Council considers it likely that each lot could be further subdivided. This may also be further compounded if the land, which is the subject of a subdivision proposal, has already made a contribution where 'double dipping' is not allowed. The Panel believes that the issue of lost opportunity from small incremental subdivisions being exempted from contributing towards public open space has been taken into consideration by the WOSS. The WOSS has assessed the open space needs of not only the existing but future population right across the municipality and has identified and recommended the contribution rates proposed under the amendment as a step towards significantly redressing and providing for sufficient capacity to provide and maintain public open space within the City of Whitehorse over the next 15 years.

7.5 Conclusions and recommendations

The Panel concludes that the choice, format and content of the Schedule to Clause 52.01 is appropriate and satisfactory. The use of the DCP is not seen as useful when the opportunity to use the Schedule is available as a dedicated tool to require public open space contributions. The Panel considers that this is supported by the fact that the WOSS has articulated a detailed set of recommendations for public open space throughout the City of Whitehorse and is proposed to be included as a reference document in the planning scheme. The 4% contribution rate for public open space across the municipality is based on a comprehensive analysis of public open space needs of the City. It takes into proper regard the existing shortfall and variability in public open space provision as well as the needs of both the existing and future population and clearly establishes the basis of the contribution rate on the need to provide public open space for the future population of the City as distinct from the needs of the existing population.

The Panel concludes that setting a minimum 4% contribution rate for strategic sites within the City with the ability to require an additional contribution based on negotiating a development plan is appropriate. Strategic sites include areas which may be redeveloped in or close to activity centres which can accommodate higher density forms of development and population levels. Such focus points for higher density forms of

development will attract a greater demand for public open space and offer a rare opportunity for Council to seek adequate land for open space provision to service these future residential areas.

The Panel considers that subject to improvements to the Schedule to include reference to strategic sites that may be identified arising from State Government strategic planning processes, the changes proposed to the Schedule to Clause 52.01 are satisfactory.

The Panel recommends that:

- 2. The Schedule to Clause 52.01 should be changed to include reference to the State Government in defining strategic sites with the sentence under the heading "Type or location of subdivision" amended to read as follows:**

The subdivision of land on a strategic site (as defined by the Whitehorse Open Space Strategy or Council or State Government)

8. Appropriateness of the Clause 22.17 Local Planning Policy

8.1 What is the issue?

The amendment proposes to introduce a new local planning policy at Clause 22.17 – *Public Open Space Contribution*. The issue is whether or not the policy is appropriate.

8.2 Policy context of the issue

Clause 22.17 is a local policy which seeks to guide the exercise of discretion with respect to whether a land or cash contribution should be sought when a contribution is triggered by a subdivision. The policy seeks:

- *To implement the Whitehorse Open Space Strategy.*
- *To identify when and where land contributions for public open space may be sought over cash contributions.*
- *To ensure that where appropriate, land suitable for public open space is set aside as part of the design of a development so that it can be transferred to or vested in Council, to satisfy the public open space contribution requirement.*

The policy includes selection criteria to be used by Council in determining where a land contribution may be sought over a cash contribution which covers a range of matters to be considered including:

- the minimum site size required to meet any given type of public open space (i.e. Regional, Municipal, Local, etc);
- whether the land is in good physical condition (i.e. free of contamination and weed infestation);
- whether the land is adversely affected by any adjoining land use;
- whether the land is accessible or has the potential to be accessible;
- whether the land contributes to the wider open space network including forming open space corridors; and
- whether the land is unduly restricted by services or easements.

The policy also contains a section on design whereby it encourages applicants for development within those parts of the City of Whitehorse where a preference for land contributions for public open space have been

identified to consult early with Council to ascertain the suitability of land for public open space and how it may be incorporated into the design of a development.

8.3 Evidence and submissions

Although there was generally little comment on the policy from submitters, the Panel does note the submission from Mr Phillip Dingeldei, Chairman of The Institution of Surveyors Victoria who stated:

The clause is valuable in providing clarity and consistency in determining where cash contributions will be accepted in lieu of land and establishes well the selection criteria for land acceptable as public open space. It also has the benefit of allowing for the early identification of potential public open space requirements that can be considered in the design of a development.

The Association of Consulting Surveyors Victoria and the Institution of Surveyors Victoria have serious concerns with the policy statement in the clause that:

- *In **all** other areas of the municipality, a cash contribution equal to the amount specified in Clause 52.01 **is** required.*

Such a definitive statement provides no opportunity for flexibility for either applicants or councils. It effectively stifles innovation in design when a requirement cannot be varied in individual or exceptional circumstances even if all parties were to agree.

In response Council submitted that such concerns would have merit if there was a lack of strategic support to justify the requirement for a cash contribution as set out in the policy. However, the strategic support for the requirement for cash and for land within particular parts of the municipality is provided by the WOSS. The WOSS has been developed in recognition of the considerations set out in Section 18(1A) of the Subdivision Act and include consideration of:

- the existing and proposed use or development of land;
- any likelihood that existing open space will be more intensively used after than before subdivision;
- any existing or likely population density in the area and the effect of subdivision on this;
- the existing places of public resort or recreation and their adequacy;
- how much land is likely to be used for places of resort or recreation by land owners; and

- any policies of Council concerning the provision of places of public resort and recreation.

Ms Marshall for Council summed up the response:

Thus, rather than being merely arbitrary, the requirement for a cash contribution in respect of certain land within the municipality has a sound basis which guards against inflexibility.

8.4 Discussion

The Panel was informed by Council that the selection criteria contained in Clause 22.17 for the acceptability of land contributions for public open space was informed by assessment criteria found in Table 4-2 of the WOSS. A comparison of the criteria between those found in the WOSS and those listed in Clause 22.17 found a discrepancy between the two with not all of the criteria in the WOSS being included in the policy. The Panel considers that the selection criteria in the policy should be reviewed to ensure better alignment between those in the policy and those found in Table 4-2 in the WOSS.

With respect to the concern expressed by Mr Dingeldei that the policy statement that; *in all other areas of the municipality, a cash contribution equal to the amount specified in Clause 52.01 is required* is too definitive or inflexible and does not represent good policy, the Panel is in agreement. The Panel considers that local planning policy should not be mandatory in its requirements and that a performance oriented approach is required. The Panel note that the VPP Practice Note – *Writing a Local Planning Policy* advises that a local planning policy is a statement of intent or expectation and should be based on performance measures that, irrespective of any requirements, flow logically from the local planning policy objective. The relevant objective is; *to identify when and where land contributions for public open space may be sought over cash contributions*. The objective is not mandatory and nor should the policy which seeks to support its implementation. Accordingly, the Panel considers that the policy statement is too limiting and should be varied to remove the mandatory nature of its requirement for cash contributions for public open space to one of preference for seeking such contributions.

Earlier in the preceding section of this report, the Panel highlighted the benefit of the local planning policy supporting the discretion offered under the Schedule to Clause 52.01 regarding seeking public open contributions in addition to the 4% for strategic sites based on negotiation of a development plan. The Panel concluded that the degree of flexibility or uncertainty regarding what could be the ultimate open space contribution for a strategic

site could be countered by criteria or guidance included in the local planning policy.

The Panel is aware of criticisms of Council for not calculating an upper or maximum public open space contribution rate for strategic sites, but agrees with Council's position that it is too difficult to establish such a maximum contribution rate when the nature and extent of development that may be proposed for a strategic site is unknown. The Panel supports the inclusion of the section on *Design* under Clause 22.17 because it at least makes applicants aware of the importance of consulting with Council over opportunities to provide land contributions for public open space.

However, the Panel considers that the policy is lacking further guidance on how Council will deal with a 'negotiated' contribution in addition to the 4% minimum for public open space provision. The Panel acknowledges Council making available during the hearing some additional information to assist with establishing how discretion should be exercised (a copy is provided at Appendix A). These guidelines included reference to:

- reviewing WOSS recommendations;
- assessment criteria for determining an appropriate open space land contribution on strategic sites included in the WOSS;
- assessment criteria for determining an appropriate open space land contribution on strategic sites not included in the WOSS; and
- assessment criteria for determining an appropriate open space cash contribution.

The guidelines also contained the following suggested wording for the policy which could be added in Clause 22.17 after *Design*:

Contributions greater than 4%

Contributions greater than 4% (as set out in the schedule to clause 52.01) should have regard to:

- *The selection criteria for public open space note: this refers to text in the exhibited policy.*
- *The open space type and required land size note: this refers to text in the exhibited policy.*
- *The existing characteristics of the site including features to be retained.*
- *The intensity of the proposed development and surrounding development.*
- *Recommendations for the site and surrounding area contained in the Whitehorse Open Space Strategy.*

- *Any other relevant strategic planning document.*

In additions to these criteria, the Panel considers that it is beneficial for the policy to make cross reference to the Rescode criteria for public open space outlined under Clause 56.05-2. This particular provision has been used and referred to in the evidence from both Ms Thompson and Ms Kay and would appear to be relevant and consistent in considering its requirements in determining appropriate contribution rates based on the extent of development proposed on a strategic site.

The Panel also considers that it is important to include reference not only to additional population but also the anticipated demographics based on the development design i.e. a development may target a retired or elderly population whereby the extent of communal open space within the development may be higher and the need for public open space may be less than that required for a population comprising young couples or middle aged families whose may be more active and whose open space needs may be quire different.

8.5 Conclusions and recommendations

The Panel concludes that the new local planning policy at Clause 22.17 is appropriate subject to changes to:

- improve its performance oriented nature;
- ensure that the selection criteria for land contributions are better aligned with those set out in Table 4-2 of the WOSS; and
- includes additional criteria to assist decision makers and applicants negotiate any higher contributions towards public open space above the minimum 4% for strategic sites.

The Panel recommends that:

3. **Clause 22.17 under "Location" in Clause 22.17-3 - "Policy" the second paragraph should be amended to read as follows:**

In all other areas of the municipality, a cash contribution equal to the amount specified in Clause 52.01 is preferred.

4. **Clause 22.17 under "Selection criteria for public open space" in Clause 22.17-3 "Policy" should be reviewed and amended to ensure a better alignment with the assessment criteria listed under Table 4-2 on page 38 and 39 in the Whitehorse Open Space Strategy relating to assessment criteria for land contributions towards public open space**

and to refer to Clause 56.05-2 “Public open space provision objectives” to ensure consistency.

5. Clause 22.17 after “Design” in Clause 22.17-3 “Policy” should be amended to include the following new section for the assessment of public open space contributions greater than the minimum 4% rate:

Contributions greater than 4%

- Contributions greater than 4% (as may be required under Clause 52.01) should have regard to:
 - The selection criteria for public open space.
 - The open space type and required land size.
 - The existing characteristics of the site including features to be retained.
 - The intensity of the proposed development and surrounding development.
 - The quantity of the additional population and the anticipated demographics based on the development design.
 - Recommendations for the site and surrounding area contained in the Whitehorse Open Space Strategy.
 - Any other relevant strategic planning document.

9. The Daniel Robertson Brickworks site

9.1 What is the issue?

The Daniel Robertson Brickworks site is an area of land approximately 4.52 hectares in size located on the corner of Station Street and Norcal Road in Nunawading. The site has been identified as a strategic site under the WOSS and as such has the potential to provide some additional open space. The owners of the site object to the amendment because it may require a public open space contribution that is unfair and exempt. Ms Brezzi stated on behalf of Robertson Industries Pty Ltd, (the landowners) that:

The proposed amendment to the Schedule is opposed on the ground that a public open space contribution has already been paid in respect of the Land. It is submitted that the Land should be specifically exempted from such a contribution under the Schedule.

9.2 Policy context of the issue

The policy context for this issue revolves around what a responsible authority must consider between any adopted plan of Council, such as the WOSS or a structure plan and the provisions of Clause 52.01 regarding when a contribution can be requested from a subdivision proposal for public open space.

9.3 Evidence and submissions

Ms Brezzi submitted details to the Panel demonstrating that the Daniel Robertson Brickworks site had previously made contributions towards public open space in the early 1960's and in the early 1970's. She argued that in accordance with the provisions of Clause 52.01 a public open space contribution may be made only once for any of the land to be subdivided. Her submission was that the Daniel Robertson Brickworks site has already made its contribution towards public open space provision and that it was exempt from being required to make any further contributions irrespective of what the WOSS recommended or any adopted structure plan of Council.

Ms Brezzi expressed concern to the Panel that it would be unfair for either the WOSS or any structure plan and any associated Development Plan Overlay to require further public open space contributions as part of future development of the Daniel Robertson Brickworks site.

The response from Council was put to the Panel by Ms Marshall that:

It is submitted that where a landowner can satisfy Council that a public open space contribution has previously been paid in respect of land, no further contribution will be required.

9.4 Discussion

The Panel accepts that the response from Ms Marshall satisfies the core of this issue, which is that if public open space contributions have previously been made for land involved in a subdivision then there can be no more requirement made for further contributions under Clause 52.01 of the Whitehorse Planning Scheme. Accordingly the issue of whether further public open space can be asked for the Daniel Robertson Brickworks site rests on the basis of evidence being provided by the landowner to clearly demonstrate previous contributions.

Although, the Panel considers this an issue which is not at the core of what it has been asked to consider with Amendment C99 it does need to address the second part of the concern expressed by Ms Brezzi which is whether the Schedule to Clause 52.01 ought be changed to specifically exempt the Daniel Robertson Brickworks site from further public open space contributions. In this regard, the Panel considers that this is not necessary because the Clause itself is clear about not allowing “double dipping” on requiring contributions for public open space. With respect to Ms Brezzi’s concern that other strategies such as the WOSS or adopted structure plans may contain recommendations for the Daniel Robertson Brickworks site to provide public open space, the Panel is confident the provisions of Clause 52.01 will provide clear direction on this matter.

9.5 Conclusions and recommendations

The Panel concludes that the Schedule to Clause 52.01 does not need to be amended to include reference to exempting the Daniel Robertson Brickworks site from making a contribution towards public open space because of earlier contributions as this can be satisfactorily addressed under Clause 52.01.

10. Recommendations

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

Amendment C99 to the Whitehorse Planning Scheme should be adopted subject to the following recommendations:

1. **Clause 21.05 – Environment should be amended to replace the strategy under Clause 21.05-4 with the following to better reflect the purpose of the policy:**

Ensure that where applicable, the contribution of land towards any public open space requirements can assist in the protection of sites of environmental value identified as having high conservation significance.

2. **The Schedule to Clause 52.01 should be changed to include reference to the State Government in defining strategic sites with the sentence under the heading “Type or location of subdivision” amended to read as follows:**

The subdivision of land on a strategic site (as defined by the Whitehorse Open Space Strategy or Council or State Government)

3. **Clause 22.17 under “Location” in Clause 22.17-3 - “Policy” the second paragraph should be amended to read as follows:**

In all other areas of the municipality, a cash contribution equal to the amount specified in Clause 52.01 is preferred.

4. **Clause 22.17 under “Selection criteria for public open space” in Clause 22.17-3 “Policy” should be reviewed and amended to ensure a better alignment with the assessment criteria listed under Table 4-2 on page 38 and 39 in the Whitehorse Open Space Strategy relating to assessment criteria for land contributions towards public open space and to refer to Clause 56.05-2 “Public open space provision objectives” to ensure consistency.**

5. **Clause 22.17 after “Design” in Clause 22.17-3 “Policy” should be amended to include the following new section for the assessment of public open space contributions greater than the minimum 4% rate:**

Contributions greater than 4%

- **Contributions greater than 4% (as may be required under Clause 52.01) should have regard to:**
- **The selection criteria for public open space.**
- **The open space type and required land size.**

- **The existing characteristics of the site including features to be retained.**
- **The intensity of the proposed development and surrounding development.**
- **The quantity of the additional population and the anticipated demographics based on the development design.**
- **Recommendations for the site and surrounding area contained in the Whitehorse Open Space Strategy.**
- **Any other relevant strategic planning document.**

Appendix A Draft Assessment Criteria for Minimum 4% Open Space Contributions on Strategic Sites, 31 July 2009

DRAFT V2

Assessment Criteria for minimum 4% open space contributions on Strategic Sites

Whitehorse Open Space Strategy

July 31 2009

Strategic Sites are characterised by:

- Larger than average lot sizes
- Redundant buildings and/or land uses which encourages redevelopment investment
- Location for higher density development compared to the remaining areas of the municipality
- Appropriate for higher density residential, commercial or mixed use

As a result, the Whitehorse Open Space Strategy has highlighted that these sites may be required to contribute a higher open space contribution rate to reflect the increased intensity of use in these strategic locations. It was not possible to determine a final rate in the Strategy for each site due to the lack of detailed information available on the scale of redevelopment and circumstances of each site. Therefore the open space contribution was set at a minimum 4%.

This paper includes the method for Council to use in assessing the open space contribution for Strategic Sites and the criteria on which Council will base its decision regarding a contribution greater than 4%.

1. MINIMUM 4% OPEN SPACE LAND CONTRIBUTION

1.1 Review open space strategy recommendations

- 1.1.1 Review the Strategic Site recommendations in the Open Space Strategy, or if the site is not included in the Strategy then review the precinct recommendations in which the Strategic Site is located. Additionally, review any relevant strategic planning document such as a Structure Plan or Urban Design Framework. This will determine if land or cash should be requested and whether an indicative land contribution has been provided for the Strategic Site or precinct.

- 1.1.2 Assess the existing open space within 500 metres of the Strategic Site for any changes or updates since the preparation of the Open Space Strategy. This should include a review of the Open Space Strategy Distribution Plan (WOS-03).
- 1.1.3 Assess the area within 500 metres of the Strategic site and confirm if the proposed Strategic Site redevelopment is generally consistent with the population and dwelling forecasts in the Open Space Strategy. If there are additional sites/areas of likely change, quantify the anticipated change to population density within the catchment and compare to the planned change in the Strategy. Estimate any future impacts this additional population may have on the future provision of open space on the Strategic Site (refer to 1.2 and 1.3).
- 1.1.4 If there are no major changes within the Strategic Site's catchment, then apply the recommendation for this site or its precinct from the Open space Strategy. If there are changes within the Strategic Site's precinct location and/or the site was not identified in the Strategy, then review this change and take this into account when assessing the open space contribution required (refer to 1.2 and 1.3).
- 1.2 Assessment criteria for determining an appropriate open space land contribution on Strategic Sites included in the Strategy**
- 1.2.1 The proposed land area is to meet the criteria outlined in Table 4~2 of the Strategy.
- 1.2.2 The Strategy specifies the hierarchy classification of the additional open space required. Refer to Table 3~1 for the size of each hierarchy. This determines its physical size and requires a land area equating to the average size of the open space hierarchy classification. For example, if an additional Local open space is recommended, the size for this open space ranges from 0.26 hectares to 0.99 hectares. The average is 0.63 hectares, and this will be the required land area.
- 1.2.3 Assess the proposed population density on the site. An increase in population density beyond that anticipated for the subject site or precinct in the Open Space Strategy will result in an increase in open space land area beyond the average size for the specified open space hierarchy. A reduction in population density proposed for the site may lead to a reduction in the open space size.
- 1.2.4 Where the land contribution is less than 4% the remaining amount will be required as a cash contribution to make up the balance to achieve a minimum 4% open space contribution.
- 1.3 Assessment criteria for determining an appropriate open space land contribution on Strategic Sites not included in the Strategy**

- 1.3.1 The proposed land area is to meet the criteria outlined in Table 4~2 of the Strategy.
- 1.3.2 Refer to the Precinct Recommendations in which the Strategic Site is located. If the site is located within a gap area, it will be necessary for the strategic site to contribute land as open space. To determine the hierarchy of open space required, assess the following:
- population density on the site
 - the presence of and potential links to other open space in the precinct
 - features on the site which may form part of the open space or require additional area to be set aside, eg. historical built features, remnant indigenous vegetation, topographic features, established trees etc
- 1.3.3 Nominate the appropriate hierarchy classification of the additional open space required. Refer to Table 3~1 for the size of each hierarchy. This determines its physical size and requires a land area equating to the average size of the open space hierarchy classification (refer to 1.2.2 for example of how the average size is determined).
- 1.3.4 Where the land contribution is less than 4% the remaining amount will be required as a cash contribution to make up the balance to achieve a minimum 4% open space contribution.

2. MINIMUM 4% OPEN SPACE CASH CONTRIBUTION

2.1 Review Open Space Strategy recommendations

As per 1.1

2.2 Assessment criteria for determining an appropriate open space cash contribution

- 2.2.1 Assess the quantity of the additional population and the anticipated demographics based on the development design.
- 2.2.2 Estimate the scale of facilities required to meet the additional population needs with the indicative cost estimates for the future facilities and works required.
- 2.2.3 Calculate the contribution rate required to raise adequate funds to construct the future works based on the current agreed land valuation.

3. SUGGESTED WORDING FOR THE LOCAL PLANNING POLICY 22.17 PUBLIC OPEN SPACE CONTRIBUTION

In clause 22.17 add the following text after the sub-section titled **Design**

Contributions greater than 4%

Contributions greater than 4% (as set out in the schedule to clause 52.01) should have regard to:

- The selection criteria for public open space **note: this refers to text in the exhibited policy**
- The open space type and required land size **note: this refers to text in the exhibited policy**
- The existing characteristics of the site including features to be retained
- The intensity of the proposed development and surrounding development
- Recommendations for the site and surrounding area contained in the Whitehorse Open Space Strategy
- Any other relevant strategic planning document.