

PLANNING PANELS VICTORIA
AMENDMENT C125 TO THE KINGSTON PLANNING SCHEME &
PLANNING PERMIT APPLICATION NO. KP12/1

27 FEBRUARY – 1 MARCH 2013

SUBMISSIONS ON BEHALF OF FRIENDS OF EDITHVALE-SEAFORD WETLANDS INC.

Environment Defenders Office (Vic)

1. This submission is made on behalf of the Friends of Edithvale-Seafood Wetlands Inc (**FoESW**). FoESW is opposed to Amendment C125 to the Kingston Planning Scheme (**the Amendment**) and to the proposed planning permit KP12/1 (**the Permit**).
2. FoESW is the peak environmental organisation that has care for the internationally recognised Edithvale-Seafood Wetlands.
3. FoESW is an incorporated association that was formed in 1988. It currently comprises over 200 members. FoESW's role is to protect and improve the Edithvale-Seafood Wetlands for the mutual benefit of both people and wildlife.
4. FoESW plays a very active role in caring for the Edithvale Wetlands environment, providing their expert assistance to the community and government. FoESW is the only environment group recognised in the Edithvale-Seafood Wetlands Management Plan, for the integral role they play in education activities within the Edithvale-Seafood Wetlands.
5. FoESW's activities include the following:
 - (a) FoESW puts out a regular newsletter, The Warbler, every 2 months containing articles about FoESW's works and events, bird sightings and reports from members, and has contributed to national wetlands publications;
 - (b) FoESW provide volunteers for events at the Wetlands Discovery Centre, working closely with Melbourne Water;
 - (c) FoESW runs an annual 'Wetlands Awareness Day'. In 2012, the Day was held at Seafood Wetlands in collaboration with the Seafood North Primary School, and was attended by over 300 people;
 - (d) FoESW acted as consultants to Melbourne Water on the rebuilding of the viewing platform at Edithvale Wetlands;
 - (e) In 2011-2012 FoESW received \$53,000 in funding from the Department of Sustainability and Environment to conduct a weed eradication project;
 - (f) FoESW advised and assisted PeninsulaLink in the construction of a walking and bike path at Seafood Wetlands
6. FoESW also conducts monthly tree planting at the Wetlands. Over the past 2 years, FoESW has revegetated a piece of land adjacent to the Site, which forms part of the buffer to the Edithvale Wetlands. FoESW planted around 2,200 trees, which were carefully selected native plants. Since the planting, FoESW have observed the area being used by birdlife such as small bushbirds.

The Proposal

7. The Panel is considering the following proposal:
- (a) Rezone the eastern part of the Site from Urban Floodway Zone (**UFZ**) to Residential 3 Zone (**R3Z**).
 - (b) Rezone the remaining western part of the Site from UFZ to Public Use Zone (**PUZ**).
 - (c) Amend Clause 21.05, Residential Land Use Framework Plan, to include the Site within “Areas for promotion of Incremental Housing Change”.
 - (d) Grant planning permit KP12/1 allowing for the subdivision of the land into 25 residential lots, with conditions.
8. If the Amendment were not approved, the Permit could not be granted, as UFZ clause 37.03-3 of the Planning Scheme states:

A permit is required to subdivide land. A permit may only be granted to subdivide land if the following apply:

- The subdivision does not create any new lots, which are entirely within this zone. This does not apply if the subdivision creates a lot, which by agreement between the owner and the relevant floodplain authority, is to be transferred to an authority for a public purpose.
- The subdivision is the resubdivision of existing lots and the number of lots is not increased, unless a local floodplain development plan incorporated into this scheme specifically provides otherwise.

As this proposal proposes to subdivide the land from 2 lots to 25 lots, the application does not comply with the first dot-point in clause 37.03-3.

Questions for the Panel

9. In considering the Amendment, the Panel should consider not just whether the Amendment *can* be done, but whether it *should* be done.
10. Ministerial Direction No. 11, Strategic Assessment of Amendments, confirms that the primary question for the Panel should be: ‘Why is the amendment *required*’ (my emphasis)?
11. In our submission, to answer this question, and to ensure that this proposal results in a good planning outcome, the Panel should answer the following questions:
- (a) Is there a strong strategic basis for changing the zoning of part of the land to Residential 3 Zone?

- (b) Will the Amendment and planning permit have an acceptable impact on the environment?
 - (c) Are the Amendment and planning permit a strategically desirable response to a floodplain?
12. For the reasons I will outline, we submit that the answer to each of these questions is 'no'. FoESW therefore urges the Panel to recommend the rejection of this proposal.

Question 1: Is there a strong strategic basis for changing the zoning of part of the land to Residential 3 Zone?

The Site

13. This Amendment and planning permit application concerns 44 First Avenue, Chelsea Heights (**the Site**), which is roughly 4.71 hectares in size.
14. Given that the Panel is considering whether it is necessary to change the way the Kingston Planning Scheme treats this Site, it is worth firstly outlaying how it currently deals with it.
15. The Site forms part of the once expansive Carrum Carrum Swamp, which was a once large (4,319 ha) freshwater wetland that stretched between Mordialloc and Frankston. Unfortunately, following European settlement in the 19th century the Swamp was extensively drained, and from the late 1950s to the present, significantly encroached upon by residential development.
16. What remains of the Carrum Carrum Swamp is now known as the Edithvale-Seafood Wetlands, which is a wetlands of international importance listed under the Ramsar Convention. The northern part of the Edithvale-Seafood Wetlands is the Edithvale Wetlands, whose boundary runs along the northern edge of the Site. The Site is one of the only pieces of land adjacent to the Wetlands that has not yet been encroached on by residential development.
17. The Site currently performs three important roles:
- (a) It forms part of the buffer between residential development and the Wetlands.
 - (b) It forms part of a habitat corridor that runs between the Edithvale Wetlands and the parkland and Wannarkladdin Wetlands to the south.
 - (c) It is a floodplain that forms part of the Carrum Lowlands floodplain.
18. These roles are recognised in the Site's current zoning:
- (a) It is almost entirely zoned Urban Floodway Zone (**UFZ**).

- (b) It is subject to a Land Subject to Inundation Overlay (**LSIO**).
19. These roles are also recognised in the strategic planning work that has been done for the Site.
20. The strategic planning direction for the Site, and its surrounding area, is very clearly laid out in the Kingston Local Planning Policy. This strategic direction is laid out in a series of Framework Plans:
- (a) Kingston's local planning 'Vision' is contained in clause 21.04 of the Planning Scheme. Clause 21.04-3 explains that 'Kingston's vision for future land use planning is based around key land use themes': one such theme is 'Residential Land Use'. A second theme is 'Environment, Wetlands and Waterways', which I will discuss in more detail later in these submissions.
- (b) Clause 21.04-3 of Kingston's 'Vision' policy explains that 'Council's key strategic directions for future land use are illustrated on the Strategic Land Use Framework Plan'. Clause 21.04-3 goes on to explain that:
- The purpose of the framework plan is to identify locations where specific land use outcomes will be supported and promoted. It also identifies potential 'development opportunity areas' where significant land use change may be expected, as well as areas where land use constraints may restrict future development.
- (c) Clause 21.04-3 further notes that '[s]eparate land use framework plans have generally been prepared for each of the major land use themes identified above...these plans advance the broad strategic directions shown on the overall framework plan, but allow a higher level of detail to be illustrated'.
21. The local policies clearly identify that at a 'broad strategic' level, the Site is not intended for residential development. The Strategic Land Use Framework Plan at clause 21.04-3:
- (a) Identifies the Site as a 'site of environmental significance'.
- (b) Identifies the Site as right in the middle of a 'strategic open space link'.
- (c) The Plan shows that the Site is surrounded by, but importantly not included within, 'Areas for promotion of Incremental Housing Change'.
22. The 'Residential Land Use Framework Plan' at clause 21.05 shows, at a more detailed level, the Site's intended use:
- (a) The Site is again excluded from the 'Areas for promotion of Incremental Housing Change', and within a defined sensitive area which requires a 'sensitive residential interface'.

- (b) Clause 21.05-2 notes that a key issue in Kingston's residential land use is 'management of the interfaces between residential areas and other sensitive/strategic land uses'. This issue is repeated as objective 5 in 'Objectives, Strategies and Implementation', and strategies include: 'ensure the siting and design of new residential development sensitively responds to interfaces with environmentally sensitive areas, including...Edithvale-Seaford Wetlands'.
23. A look at the recent planning history of the area shows that this strategic planning for the Site is not an accident. The area has been the subject of extensive strategic planning, and the Site has been consistently excluded from residential development:
- (a) In 1999, Amendment NPS1 (which introduced the new format Kingston Planning Scheme) very deliberately zoned the Site UFZ. It is assumed that this zoning was a continuance of the Site's previous zoning as Stream and Floodway Zone: the Panel's report recommended, following Melbourne Water submissions with which the Council agreed, that all Stream and Floodway Zoned land be converted to UFZ. Land slated for residential development surrounding the Site was zoned Residential 1 Zone.¹
- (b) In 2004, Amendment C8 applied a new residential land use strategy, intended to provide for residential use into the future. The Site was again situated outside the area for residential development, and as land to which a sensitive residential interface was required. It is suggested that the time for the site to be slated for residential development was then.
- (c) In 2005, Amendment C32 applied the LSIO to the Site, based on flood studies done in 1998, 2001 and 2002. Certain residential development areas, such as at Perovic Place immediately to the south of the Site, were excluded from the LSIO. The Site was not.

24. The Site's intended function within the Kingston Planning Scheme has been clearly identified in the local planning policies: it is a floodway that is part of a sensitive environmental area, and it is not slated for residential development.

Is there a strategic need to change the zoning for the Site?

25. Given the clear function of the Site's current zoning, and role in the strategic schema for the area, is there any strong basis to change this?

¹ Amendment NPS 1, Panel Report, pp. 61-63.

26. The Explanatory Report states that the Amendment is required to 'enable the residential subdivision of part of the land, and for the inclusion of the majority of the site within the public drainage reserve'. I will deal with each of these reasons in turn.
27. The stated reason of 'enabling residential subdivision' is not in itself a strategic basis to change the zoning of the eastern part of the Site. That the land is privately owned, or and that the owner believes development is possible creates no presumption that the Amendment should proceed. Indeed, the clear characterisation of the Site in the Planning Scheme requires that the need for the Amendment should be both clear, and demonstrable.
28. The proponent has not presented any such clear or demonstrable reason:
 - (a) As already described, the Site is not slated as an area for urban growth. On the contrary, it is characterised as an area of environmental significance and a floodplain.
 - (b) There is no suggestion that the Site is failing to perform any of these functions. On the contrary, the evidence before the Panel is that the Site adequately performs its role as a floodplain, as a buffer to the wetland and as a buffer to the wetlands. When questioned, flora and fauna experts Mr Silcocks and Mr Swales both agreed that the Site generally formed part of the buffer between urban development and the wetland. Similarly, floodplain experts agreed that the Site is currently within a floodplain.
 - (c) While there is general policy support for providing new residential housing near existing infrastructure, there is no clear policy support for providing such housing in this precise location. As Mr Witherby's evidence made clear, any benefits from providing new residential housing are generally outweighed by the specific limitations of this Site. Mr Clarke and Mr Witherby agreed that the provision of 25 small lots is only a minor contribution to residential housing.
 - (d) There is broad-based community opposition to the Amendment, embodied not only by FoESW, but also by the Kingston Residents Association, the Kingston Conservation and Environment Council and other local residents here present.
29. Ultimately, the lack of strategic need for this Amendment is crystallised by the fact that the Amendment needs to amend local policy (clause 21.05) to *create* such a strategic justification. However, even so, the proposal arguably does so incompletely, as it fails to amend the Strategic Land Use Framework Plan.

30. The Amendment is also to allow for the inclusion of the majority of the site within the public drainage reserve. FoESW agree that the transfer of the Site to Melbourne Water could be a positive thing and be in accordance with the local policies cited above, but only if that land was actively and strategically managed in a manner consistent with its important environmental features. It is submitted that, in this case, the Panel has no assurance that is the case:

(a) The zoning of 60% of the Site to PUZ, which *could* be consistent with the strategic role of the land, is only achieved at the cost of a rezoning of 40% of the Site to R3Z, which in our submission is *not* consistent with the strategic role of the land. It was Mr Willerby's evidence that no net community benefit is achieved by such a trade-off. This is not a sufficient balance to justify a Planning Scheme Amendment.

(b) The Panel cannot make any assumptions about how the PUZ area will be managed, or used. Melbourne Water have not been able to clarify how they will manage it, for what purpose it will be managed, or even who will manage it. The submissions of Melbourne Water are that the land will likely remain as it is for the next two years, and that a management plan may be prepared in the next 10 or 20 years. This is not a basis on which to conclude that the land will provide any net community benefit.

31. These submissions conclude with two precedents which it is submitted should guide the Panel when considering the above submissions.

32. Firstly, the Panel is urged to look to the Panel's Report for Amendment C159 to the Greater Geelong Planning Scheme. This Panel considered, amongst other things, a proposed extension to the Barwon Heads settlement boundary to include 51 hectares of privately owned land known as the 'Macafee Land', which was to be half developed for urban residential purposes, and half set aside for open space and a buffer between the development at the Murtnaghurt Lagoon and channel. There was significant community opposition to this proposal, including because of the impact on nearby Ramsar wetlands.

33. At page 44, the Panel stated that:

The Panel is satisfied that planning policy does not preclude an extension to the Barwon Heads settlement boundary, but also acknowledges that there is no policy imperative to do so.

Barwon Heads has not been identified as a location for growth, and retaining the current settlement boundary is a legitimate option. The situation would be different in a settlement that

had been identified for growth and where there was a local or regional imperative to provide for that growth.

This is not the case in Barwon Heads, and because of that, it is not the role of the Panel to dictate that Barwon Heads should accommodate further growth. This is an issue that should be determined by Council and the Barwon Heads community. The Panel is satisfied that there is substantial community opposition to any development of the Macafee land and this is not something that the Panel can dismiss.

For these reasons the Panel does not recommend that the settlement boundary be extended.

34. In 2012, Kingston Planning Scheme conducted a review of its Planning Scheme. The Review identified that environmental protection was one of the key areas of the Kingston Planning Scheme that required addressing. While these suggestions are obviously not yet part of the Planning Scheme, they are telling and sensible indications as to the future direction of planning in Kingston that the Panel should bear in mind when considering the Amendment and planning permit application. As part of its Report, the Review recommended the updating of the Municipal Strategic Statement to include a new overview focusing on environmental issues, which would read²:

The protection of Kingston's ecological systems and the biodiversity they support is one of the most significant environmental management challenges facing Council. The condition of our ecological and biological resources is deteriorating, as increased urbanisation places pressure on these natural resources. Continuous reduction of the region's biodiversity, in turn, affects the ability to maintain natural resources in a sustainable way. The environmental landscape of the City of Kingston is recognised for its diversity and significance in both a regional and international context through key assets, including the Edithvale Seaford Wetlands. Degradation has occurred in many of Kingston's natural environments resulting in loss and fragmentation of indigenous vegetation and the invasion of pest plants and animals. Significant opportunity exists to enhance the quality and ecological value of Kingston's natural environments. These areas also host important historical and social sites, both indigenous culture and significant post-settlement heritage features, that require protection.

Question 2: Will the Amendment and planning permit have an acceptable impact on the environment?

The Edithvale Wetlands

35. The Site is immediately adjacent to the Edithvale Wetlands, which as noted already, are part of the Edithvale-Seaford Wetlands.

² Kingston Planning Scheme Review, Final Report, 2012, page 42,
http://www.kingston.vic.gov.au/Files/Planning_Scheme_Review_Final_Report.pdf.

36. The environmental significance of the Wetlands cannot be understated: it is a site of state, national and international importance. In 2001, the Wetlands were listed under the Ramsar convention as a wetlands of international significance.
37. The Wetlands are described in detail in the Edithvale-Seaford Ramsar Site Management Plan (18 February 2009) (**the Management Plan**). The Management Plan is a mandatory consideration for the Panel under clause 13.02-1 of the State Planning Policy.³ The Management Plan describes the Wetlands' key environmental features, the risks affecting the Wetlands, and the management strategies for dealing with these risks.
38. In summary, the Edithvale-Seaford Wetland:
- (a) Is the last remaining representative example of the Carrum Carrum swamp, a shallow freshwater marsh wetland, which is a wetland type which has been depleted by approximately 70% within the Gippsland Plain Bioregion.
 - (b) It is home to a huge number of important flora including 11 native vegetation communities (including 8 of high local or regional significance) and 46 significant plant taxa (of which 45 are of regional botanical significance).
 - (c) It is a significant haven for threatened wildlife. The diversity and significance of the wetlands for birdlife is very well-known: recorded at the wetlands have been 25 species listed under CAMBA and 25 under JAMBA, 14 species listed under the FFG Act, and two species are listed under the EPBC Act. The diversity of water birds (75 native waterbird species and especially the sharp-tailed sandpiper) is one reason for its Ramsar listing.
 - (d) It has an important function in providing critical flood storage capacity and providing part of the regional drainage system protecting surrounding properties from inundation, retaining and naturally treating stormwater and run-off effectively protecting the water quality of Port Philip.
 - (e) It is of important historical and cultural significance, situated within the traditional lands of the Bunurong tribe.
39. The Edithvale-Seaford Wetlands is the only Ramsar wetland in Victoria, and one of very few in Australia, that is entirely found within an urban landscape. Over its history the Wetlands have been subject to significant disturbance, particularly by the encroachment

³ Clause 13.02-1, Floodplains Management, has the objective of protecting '[f]loodplain areas of environmental significance or of importance to river health'. The Policy guidelines state that planning must consider as relevant 'any...wetland or floodplain management strategy adopted by the relevant responsible floodplain management authority'.

of residential development. The Edithvale-Seaford Ramsar Site Management Plan (**the Management Plan**) repeatedly notes that adverse affects of urban development on flora and fauna, and on the vulnerable hydrology of the Wetlands.

40. The Edithvale Wetlands are unique as an urban wetland: they are highly ecologically important, but also highly vulnerable to impacts of residential development. In considering the Amendment, the Panel should bear this in mind.

How does the Planning Scheme require the Panel to consider impacts on the Wetlands?

41. Under section 12(2)(b) of the *Planning and Environment Act 1987*, a planning authority 'must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development'.
42. To give effect to this requirement, the Panel should look to the principles enshrined in the State and Local Planning Policy Framework of the Kingston Planning Scheme.
43. These policies clarify that the Edithvale Wetlands necessitate not only a precautionary approach, but also that the Amendment demonstrate a net environmental benefit.
44. The State Planning Policy Framework clearly outlines the singular importance of wetlands, the need to act cautiously when considering potentially threatening actions like residential development:
- (a) Clause 12, Environmental and Landscape Values, calls on to planning to 'help to protect the health of ecological systems and the biodiversity they support (including ecosystems, habitats, species and genetic diversity) and conserve areas with identified environmental and landscape values'. The policy states that planning *must* implement environmental principles for ecologically sustainable development, which include the precautionary principle.⁴
 - (b) Strategies under clause 12 include:
 - (i) 'Assist the conservation of the habitats of threatened and endangered species and communities as identified under the *Flora and Fauna Guarantee Act 1988*, including communities under-represented in conservation reserves such as...wetlands'.
 - (ii) 'Address potentially threatening processes identified under the *Flora and Fauna Guarantee Act 1988*'. Relevantly, '[w]etland loss and

⁴ development that have been established by international and national agreements, foremost of which is the Intergovernmental Agreement on the Environment. Precautionary principle is 3.5.1.

degradation as a result of change in water regime, dredging, draining, filling and grazing' is a threatening process listed under the FFG Act.

- (iii) 'Ensure that any changes in land use or development would not adversely affect the habitat values of wetlands and wetland wildlife habitats designated under the Convention on Wetlands of International Importance (the Ramsar Convention) or utilised by species designed under the Japan-Australia Migratory Birds Agreement (JAMBA) or the China-Australia Migratory Birds Agreement (CAMBA)'.

45. The Local Planning Policy Framework applies these principles to the Edithvale Wetland specifically. Again, the thrust of these provisions are towards a cautious approach that requires not just the protection, but the *enhancement* of the Wetlands:

- (a) Clause 21.02 notes that Kingston is recognised for its environmental landscape – it specifically identifies the Edithvale-Seaford Wetlands as an environmentally significant part of Kingston.
- (b) Clause 21.03 outlines Kingston's 'Land Use Challenges for the New Millennium'. It notes that 'the integrity of many of Kingston's pre-settlement natural ecosystems has been degraded over time as a result of the impacts of urbanisation and environmental negligence in key remnant natural areas. Opportunities to *enhance* the quality and ecological value of Kingston's natural environments exist through improved management of urban stormwater, land use and resource management, and integrated catchment planning' (my emphasis).
- (c) The key future directions for Kingston's 'Environment, Wetlands and Waterways', as one of the key land use themes in Kingston's local planning vision, are set out at clause 21.09. The policy overview repeats clause 21.03's statement that 'degradation has occurred in many of Kingston's natural environments as a result of the impacts of urbanisation', and that 'significant opportunity exists to enhance the quality and ecological value of Kingston's natural environments'. The policy sets out the key strategies to achieve this vision, which include to 'protect the physical and habitat diversity of the Edithvale-Seaford wetlands to recognise its role as an internationally significant wetlands area'.
- (d) The Environment, Wetlands and Waterway Framework Plan at clause 21.09 identifies the Site as a 'site of identified environmental significance', and flags it as being part of 'potential wetlands linkages based on 'Chain of Wetlands' concept'.

(e) Clause 21.10 addresses non-urban areas. Its objective is 'to protect and enhance environmental values including wetlands, flora and fauna habitats, and drainage functions'. Its strategies are to 'ensure that all development provides for the protection and enhancement of local and regional assets of...ecological...significance, including pre-settlement wetland morphologies, drainage and flooding, flora and fauna corridors and wildlife habitats.'

46. That State and Local Policy urge a cautionary approach in relation to the Edithvale-Seafood wetlands was established in the Victorian Civil and Administrative Tribunal decision of *White Ash v Frankston City Council* [2004] VCAT 2170. In this case, the Tribunal considered a series of residential developments close to the Seafood Wetlands, and rejected two of them, due to their incursion into the buffer zone adjacent to the Wetlands. Members Jane Monk and John Bennett said at [51]:

The policy framework clearly invites a cautious approach in relation to development that might affect a scientifically significant and rare ecosystems [sic]. The policy outcomes sought refer also to enhancement. It is our conclusion that to bring development of this nature so close to the open water of the duck pond would unacceptably reduce the options for rehabilitating this area.

47. Similarly, in the Panel Report for Amendment C159 at page 37, the Panel stated that environmental assets of the calibre of the Murtnaghurt Lagoon demanded a high standard of planning:

Given the environmental significance of the Lagoon and the channel, the Panel believes that any development of the Macafee land should achieve a net environmental benefit, rather than simply seek to mitigate impacts. This approach would be consistent with the SPPF objectives in relation to coastal areas and waterways, which seek not only their protection, but also their restoration and enhancement. This 'higher' test is appropriate for the Macafee land given that the significance of the Lagoon and channel and the lack of any demonstrable need or policy requirement to develop any of residential purposes.

Application of Policy: Should the Panel recommend further impacts on the Edithvale Wetlands buffer?

48. The Site in its currently unoccupied status as a floodplain performs an important role in relation to the Edithvale Wetlands: it forms a buffer between the intense urban development of Chelsea Heights and the Wetlands.

49. The importance of wetland buffers generally is well recognised. Expert reports⁵, and Andrew Silcocks' evidence to this Panel, have noted that buffers:

(a) Provide additional habitat for wetland species, particularly birds.

⁵ See fMichael Weston, Mark J Antos, Hayley K Glover, 'Birds, buffers and bicycles: a review and case study of wetland buffers', *The Victorian Naturalist*, Vol. 126, 3, 2009.

- (b) Act as a corridor for bird movement, particularly between other wildlife habitat.
 - (c) Reduce disturbance to birdlife living in the wetlands, caused by noise from construction and living, stormwater run-off, predation by urban animals like cats and dogs and increased energy expenditure caused by being startled.
50. The importance of buffers generally, and in relation to the Edithvale Wetlands in particular, was also discussed in the *White Ash* decision quoted above.
51. The Management Plan explains the importance of buffers to the Edithvale Wetlands, but also indicates the uncertainty of how they are to be applied (at page 6-7):
- (a) The Plan notes that 'inadequate buffer zones adjacent to sensitive wetland habitats may pose threats to the values exhibited by the Ramsar site. Inadequate buffer areas between sensitive wetlands, publicly accessible open land and residential may also enhance disturbance to native flora and fauna, particularly timid waterbirds'.
 - (b) The Plan notes that 'ability to provide adequate buffer areas at Edithvale Seaford Wetlands is compromised by the encircling urban environment and lack of adjacent land currently owned by Melbourne Water'.
 - (c) The precise buffer distance that is required near the Wetlands remains unclear. The Plan notes that 300 metres would be desirable, but that 150 m could be sufficient with revegetation and landscaping.
 - (d) Given this uncertainty, the Management Plan ultimately recommends that the buffer distances should be 'reviewed and updated, given the constraints associated with the encircling residential area'. Later in the Plan (page 7-12), the identification of buffer objectives and the review of recommended buffer distances is identified as a management action with 'high priority'. However, Mr Silcocks' evidence was that this has not occurred.
52. Unfortunately, as was agreed by Mr Silcocks and Mr Smales, residential development in Chelsea Heights has already encroached significantly into the Edithvale Wetlands buffer. As such, the Site presents one of the only remaining opportunities to protect buffer areas around the Edithvale Wetlands. One way this may be characterised is that one more encroachment doesn't matter. In our submission, the policies I have highlighted state that this is not an acceptable approach.
53. As I have already outlined, the Planning Scheme clearly sets aside the Site from residential development as non-urban open space, crystallising the Site's function as a

buffer. As noted above, there has no been no evidence to suggest that the Site is failing to perform this role.

54. However, even if the Site's current strategic function was in question, could it be said that developing the buffer would provide a net environmental benefit to the Wetlands, when a precautionary approach is adopted? The answer to this question must be no:
- (a) If the Panel approves the Amendment and planning permit, the Wetlands and its birdlife can expect increased disturbance from residential development, such as human and construction noise, increased traffic around the Wetlands, and potential predation from cats and dogs. This is the evidence of both Mr Smales and Mr Silcocks. This disturbance will be in addition to that already experienced due to the intense urban development around the Site. While the Panel cannot of course deal with the impacts from existing residential development, the opportunity exists in this case to prevent a worsening of the situation.
 - (b) The Amendment does involve the attractive prospect of gifting the western part of the Site to Melbourne Water to be managed as public land. This approach would certainly be desirable if applied to the entire Site. However, in this case, the trade-off results does not result in a net environmental benefit:
 - (i) The Panel has been presented with no specific evidence of how Melbourne Water intends to manage the Site, and whether or how this will benefit the environment, or the Wetlands in particular.
 - (ii) On the contrary, the Site is to be used for a complex swale system, which will require construction and maintenance whose impacts, although perhaps not significant, could certainly not be said to be a benefit. Mr Swale's evidence was that he had no role in designing the swale system to provide an environmental benefit.
 - (iii) The setting aside of the *entire* Site would clearly be a more beneficial outcome. This could be achieved through a process of public acquisition: while certainly not easy, such a process is possible. Alternatively, the land could also be used in private ownership to provide a site for offsets.
 - (c) The precise buffer distances required at the Edithvale Wetlands, and the impacts of residential development within these buffers, although specifically identified in the Management Plan, remains unclear. Taking a precautionary approach, such

issues should be clarified before allowing the final vestige of buffer to be occupied to any degree.

55. FoESW believe that the Site, in its entirety, has the capacity to be significantly improved as a buffer to the Edithvale Wetlands. This could be achieved through public acquisition of the land, and its rehabilitation and management as buffer. The Kingston Open Space Strategy Update 2012, having identified a shortfall of open space in the local area which includes the Site, states that the Site would add 'significant value to the open space in public ownership' (although ultimately does not recommend its public acquisition).
56. FoESW can attest to the potential of such a rehabilitation project, and could provide expertise and assistance. Over the past 2 years, FoESW have been involved in planting works on the land immediately to the north of the Site, and the results have been very successful.
57. This would maximise the Site's potential as a wetlands buffer, open space and wildlife corridor, which could provide a net environmental benefit to the Edithvale wetlands, but also a significant community benefit to the surrounding residential area. In light of the negative impacts identified above, however, the current proposal achieves neither.

EPBC Act approval

58. There has been some suggestion by the proponent in their submissions, and also in the evidence of Mr Smales, that the Panel should rely heavily on the fact that Federal Environment Minister has approved the development under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*. The Panel should not do so.
59. As the Panel will be aware, the EPBC Act has applied a very different test to the development: it has asked whether it will likely result in a 'significant impact' on a matter of national environmental significance. Importantly, the Federal Environment Minister's decision:
 - (a) Does not consider the impact on environmental features of State or local significance.
 - (b) Is not a planning decision – it does not consider the planning value of the development as a whole, taking into account other factors such as flooding, or assess the values of the development against the policies of the Planning Scheme.
 - (c) Does not consider whether the development provides any net environmental benefit.

60. Moreover, the Panel does not have a copy of the Environment Minister's reasons for his decision. The Panel cannot make any assumptions about the basis for his decision.
61. While the Panel may take some comfort from the Environment's Ministers decision that the development will not have a *significant* impact on matters of national environmental significance, this does not help the Panel answer whether any smaller impacts are acceptable, or will result in a desirable planning outcome.

Question 3: Are the Amendment and planning permit an acceptable response to a floodplain?

62. The Site is located on a floodplain. Accordingly, it has since at least 1999 been zoned UFZ and, since 2004, covered by the LSIO.
63. The Panel is contemplating whether to change this zoning in part to R3Z. These submissions have already demonstrated that there is no strategic support for the imposition of the R3Z. But is doing so an acceptable response to its status as a floodplain?
64. The State and Local Planning Policy in relation to floodplains is quite clear:
 - (a) Clause 13 of the State Policy deals with 'environmental risks', of which flooding is one. The clause overview requires the Panel to adopt a 'best practice environmental management and risk management approach which aims to avoid or minimise environmental degradation and hazards'.
 - (b) Clause 13.02 deals with floodplains in particular. The two policy requirements are that planning, firstly, identify land affected by flooding in planning maps and, secondly, avoid intensifying the impacts of flooding by inappropriately located uses and developments.
 - (c) The Local Policy on Environment, Wetlands and Waterways includes at clause 21.09-2 a policy that relates specifically to floodways: its objective is to 'manage and protect floodplains and flood prone areas to minimise the impacts of flooding'. The strategy to achieve this is to 'prevent incompatible land use and development in areas affected by flood risk to avoid intensifying flooding impacts in urban and non-urban areas'. This strategy is implemented by 'applying the Urban Floodway Zone to land identified as part of the active floodway' and 'applying the Land Subject to Inundation Overlay to land along open waterways which has been identified as being liable to flooding as a result of a 1 in 100 year storm event'.

- (d) The role of the UFZ in identifying floodplains is explained in Practice Note 12, 'Applying the flood provisions in planning schemes' (November 2012). The Note states the following:

The UFZ applies to mainstream flooding in urban areas where the primary function of the land is to convey active flood flows. It applies to urban floodway areas where the potential flood risk is high due to the presence of existing development or to pressures for new or more intensive development. The UFZ restricts the use of such land, as the risk associated with flooding renders it unsuitable for any further intensification of use or development.

65. The Site's current planning controls (UFZ and LSIO) are consistent with the Planning Scheme's requirement to identify flood prone land. The UFZ also furthers the objective of avoiding intensifying the impacts of flooding by preventing the subdivision of the Site, as proposed by the developer.
66. The Amendment and Permit seek to elevate the Site above the floodplain using fill. This practice is not a recognised policy approach to dealing with floodplains: the parties can point to no policy support for this in the Planning Scheme.
67. Moreover, this practice does not avoid the application of the above-mentioned policies. The Site is a floodplain, and Policy requires that planning avoid intensifying the impacts of flooding by inappropriately located uses and developments. Filling the Site, and building houses on it, constitutes an intensification of the Site, and thus the development is contrary to policy.
68. Floodplain experts Mr Finlayson and Mr Craigie were in agreement on this point: development on floodplains is not a good precedent to set. Mr Craigie's evidence was that ultimately, there has already been so much development on this floodplain, that one further would likely not hurt. Floodplain policies are in place to avoid precisely such ad-hoc decision making. As Mr Finlayson notes in his evidence, when many small impacts are grouped together, they can eventually amount to a large impact.
69. Mr Finlayson's evidence pointed to some of the problems with building on floodplains, and in relation to the Site in particular:
- (a) Mr Finlayson's view is that while development on floodplains may be possible, it is not a good idea. This is because filling above the 1 in 100 year flood level does not eliminate flood risk. In Mr Finlayson's opinion, the proposed residential development on this Site would pose an unacceptable flood risk to residents.
- (b) The Lower Carrum Plains flood levels are relatively unique, in that they are entirely dependent on pumps. This is a fallible system, and requires on-going and effective maintenance.

70. The development's stormwater management is not best practice, and this has potential impacts on the Edithvale Wetlands:
- (a) The Site proposed management system, the swale system, is limited by the presence of acid sulphate soil and aboriginal cultural heritage issues. This presents increased complexities in construction, ongoing maintenance, and future upgrades. In addition, this prevents the usual practice of balancing cut and fill, and will result in a small reduction of the floodplain capacity. While this is not a major reduction, neither can it be said to be 'best practice'.
 - (b) The Stormwater Management Plan acknowledges that best practice in relation to stormwater pollutant retention will not be met. Again, while this might have quite a small impact, it cannot be said to be without impact.
 - (c) Brian Finlayson's evidence is that the development may have impacts offsite, including in the Wetlands.
71. Appropriate floodway management is especially important at the Site, because of the adjacent wetlands. The Edithvale Wetlands, as with all wetlands, possess a unique hydrological system that is bound up with seasonal flooding. It is also highly vulnerable to changes in its hydrological system:
- (a) The Management Plan identifies 'altered hydrology' as a key threatening process to the values of the Edithvale Wetlands: it is listed as having a 'high' risk rating.
 - (b) The Management Plan further notes that:

Hydrology plays a critical role in protecting and maintaining many of the key values associated with the Edithvale-Seaford Wetlands. These values relate to the Ramsar criteria for which the wetlands were originally listed, and also include values that have been identified since listing. Precise relationships between birds and water levels at Edithvale Seaford Wetlands are not yet established, but changes in hydrological regime are thought to impact on sharp-tailed sandpiper habitat and other waterbird habitat. Water quality at the Ramsar site is adversely impacted by the surrounding urban landscape and its history of disturbance. Although a lack of detailed water quality data exists for the site, it is anticipated that a significant source of pollution to the wetlands results from poor quality urban stormwater entering the system. Urban stormwater transports sediment, nutrients, heavy metals, toxicants, and litter into the wetlands...Poor quality stormwater may result in changes to nutrient, turbidity, and pH levels which will impact a number of values exhibited by the wetlands.
72. The UFZ performs an important role in implementing floodplain policy – by identifying floodplains, and by warning that planning should avoid intensifying the effects of flooding. There is no suggestion in this case that the Site is not a floodplain – nor that

the UFZ is inappropriate. The proposed development does not propose something that is strategically desirable – only something that is possible. Further, it does so in a manner that is not best practice, and that does, in however minor a way, intensify the effects of flooding. Such an approach is inconsistent with State policy, and it is not good planning.

Planning Permit

73. If the Panel is minded to allow the Amendment, FoESW also oppose the issuing of the Permit for the same reasons outlined above.
74. If a permit were to be granted, FoESW would request the inclusion of conditions that:
 - (a) Require that all residential interfaces with the PUZ land be designed to be sensitive to the role of the PUZ land as buffer to the Wetland, to the satisfaction of Council or Melbourne Water.
 - (b) That Acid Sulphate Soil be managed to the degree of caution outlined in the evidence of Ms Richards.

Conclusion

75. The Panel's decision in this case turns upon the characterisation of the Site, and what is strategically desirable for its future. The proponent would say that the Site is an area for growth, and for an expansion of the existing urban development around the Edithvale Wetlands.
76. As I have submitted, the Policy states otherwise: the land is clearly identified as a floodplain that is part of an important environmental significance. It acts as a buffer to the internationally significant Edithvale Wetlands.
77. Kingston has little to gain from the proposal, but much to lose: in particular, the last remaining buffer area adjacent to this already vulnerable and encroached upon Wetlands. In considering this risk, the Panel is required to apply a precautionary approach, and one that requires the Amendment achieve a net environmental outcome. This is not achieved here.
78. The land is also a floodplain. While it may be possible to mitigate most (but, on the evidence of the flood experts, not all) of the consequences of this by filling the Site, there is evidence before the Panel that this will not eliminate all flood risks to residents. Indeed, this is not a response to floodplains that is validated by the Planning Scheme, or that should see wide application. So why allow it here? Particularly at a Site already

hampered with limitations, such as acid sulphate soil and the presence of aboriginal cultural heritage.

79. At best, the Panel may be satisfied that the proposed residential development at the Site is *possible*, with minor negative outcomes. But this is not sufficient to achieve a good planning outcome. Neither is the possibility that some land will be allocated to public hands, where the actual use that will be made of that land is completely uncertain.
80. The Panel is urged to reject, in its entirety, this Amendment and planning permit application.

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for Friends of Edithvale-Seafood Wetlands Inc

29 February 2013