**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**PLANNING AND ENVIRONMENT DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P2339/2019

## CATCHWORDS

*Planning and Environment Act* 1987 s 39; extent of Tribunal jurisdiction under s 39; whether planning authority failed to afford implied obligations procedural fairness.

| | |
|---|---|
| **APPLICANT** | 390A Queens Pde Pty Ltd |
| **PLANNING AUTHORITY** | Yarra City Council |
| **OTHER RESPONDENTS** | Minister for Planning and<br>Yarra City Amendment C231 Planning Panel |
| **SUBJECT LAND** | 390A Queens Parade<br>FITZROY NORTH VIC 3068 |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Picha Djohan, Member |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 13 December 2019 and 10 February 2020 |
| **DATE FURTHER WRITTEN SUBMISSIONS RECEIVED** | 21 February 2020 |
| **DATE OF ORDER** | 24 April 2020 |
| **CITATION** | 309A Queens Pde Pty Ltd v Yarra CC [2020] VCAT 518 |

## ORDER

1 Pursuant to s 60(2) of the *Planning and Environment Act* 1987, the Yarra City Amendment C231 Planning Panel is joined as a party to this proceeding.

2 The application under s 39 of the *Planning and Environment Act* 1987 is dismissed.

**Picha Djohan**
**Member**

## APPEARANCES

| | |
|---|---|
| For the applicant | Mr S Morris QC with Ms E Delany of counsel, instructed by Best Hooper Lawyers |
| For the planning authority | Ms S Brennan S.C. with Mr Roshan Chaile, instructed by Maddocks |
| For other respondents | No appearances |

## REASONS[1]

## INTRODUCTION

1 309A Queens Pde Pty Ltd (the **Applicant**) has brought this proceeding under s 39 of the *Planning and Environment Act* 1987 (the **Act)** seeking certain declarations and an injunction concerning the process adopted by Yarra City Council (**Council**) and the Yarra City Amendment C231 Planning Panel (**Panel**) regarding proposed Amendment C231 (the **Amendment**) to the Yarra City Planning Scheme (the **planning scheme**).

2 On 31 July 2019, the Applicant became the registered owner of the land after the formal exhibition of the Amendment but prior to the Panel hearing into the Amendment.

3 In short, the Applicant alleges that Council and the Panel failed to afford procedural fairness to the Applicant during the amendment process that involved–

a. formal exhibition of the Amendment (during the period of 1 October 2018 to 30 November 2018) that relevantly imposed a mandatory building height limit applicable to the land of 21.5 metres (equivalent to 6 storeys);

b. adoption by Council (on 28 May 2019) of recommended changes to the exhibited version of the Amendment that relevantly recommended reduction of the exhibited mandatory building height for the land (from 21.5 metres) to 14 metres (equivalent to 4 storeys). These recommended changes are referred to by the Applicant as the 'Revised Position';[2]

c. recommendation by the Panel in its report on the Amendment (of 31 October 2019) for a further change of the exhibited mandatory building height for the land (from 21.5 metres) to 10.5 metres (3 storeys). This recommendation is termed by the Applicant as the 'Further Revised Position'.[3]

4 The Applicant relied on the following two relevant sources argued as giving rise to a need for procedural fairness–

a. The explicit obligation on the Panel contained in s 161 of the Act; and

b. The implied obligation on the Council and Panel, the source of which being the rule that procedural fairness requires (subject to

---

1 The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

2 The Revised Position is defined by the Applicant in [6] of its primary written submissions to mean the position resolved by Council on 28 May 2019 to 'revise its position in relation to the Amendment by, relevantly, reducing the mandatory heights for Precinct 4 from 21.5 metres to 14 metres (6 to 4 storeys).

3 See [10] of the Applicant's primary written submissions (received 6 February 2020).

clear manifestation of contrary intention), a person be afforded a hearing that is fair and without bias before a decision which affects them is made.[4]

5 The Applicant contends that it was directly and materially affected by the alleged failures to afford it procedural fairness, and that the decisions of the Council and Panel may curtail the Applicant's ability to develop the land.[5]

6 For the reasons set out below, I find that-

a. The Tribunal does not have jurisdiction under s 39 of the Act to consider the implied obligations to afford procedural fairness to the Applicant as contended for by the Applicant; and

b. There has not been a failure to comply –

i. by the Council, with Division 1, 2 or 3 of Part 1 of the Act; or

ii. by the Panel, with Division 2 or 3 of Part 3 of the Act; or

iii. by the Panel, with Part 8 of the Act.

7 The reasons for this decision are set out as follows–

a. **Part A** sets out a relevant procedural matter.

b. **Part B** sets out in detail the final relief sought by the Applicant.

c. **Part C** outlines the Applicant's contentions forming the basis for the relief sought.

d. **Part D** outlines Council's response to the Applicant's contentions.

e. **Part E** sets out the Tribunal's findings of fact.

f. **Part F** examines the extent of the Tribunal's power under s 39 of the Act.

g. **Part G** sets out the Tribunal's findings on whether there has been a failure to comply under s 39 of the Act.

## PART A - PROCEDURAL MATTERS

### Hearing on 13 December 2019

8 This proceeding first came on for hearing before me on 13 December 2019 on the Applicant's application for urgent interim orders. For the reasons given by me on that day I declined to make any interim declarations or orders prohibiting Council from adopting the Amendment.

9 By correspondence dated 12 December 2019, the Minister informed the Tribunal the Amendment will not be considered by the Minister while this proceeding is being determined. At the hearing on 13 December 2019, Ms Turnbull, on behalf

[4] See [14] Applicant's primary written submissions (received 6 February 2020).
[5] See [9(b)] Applicant's Amended Statement of Grounds.

of the Minister for Planning, confirmed that the Minister would not take an active role in this proceeding.

## Notice to the Panel of the Applicant's Amended Grounds

10 On 13 December 2019, I made a procedural order in this proceeding the (**December 2019 order**). In brief, that order required amongst other things–

a. the filing and service of an amended statement of grounds to be relied upon by the Applicant;

b. a written notice of the final relief sought by the Applicant;

c. notification to the Panel of the amended grounds and relief sought if the Applicant alleged a failure on the part of the Panel or sought relief against the Panel;

d. an opportunity for the Panel to file material and make written submissions in this proceeding.

11 On 20 December 2019, the Tribunal received the Applicant's amended statement of grounds and written notice of the final relief sought.

12 The Tribunal did not receive any material or written submissions on behalf of the Panel prior to the adjourned hearing of this proceeding on 10 February 2020.

13 At the hearing, I was provided with correspondence from the Applicant to the Panel in compliance with the December 2019 order. Despite the lack of correspondence from the Panel, I am satisfied that the Panel was served with a copy of the Applicant's amended statement of grounds and written notice of the final relief sought by the Applicant and the Panel has declined to participate in this proceeding.

## Joinder of the Panel

14 Section 39(4) of the Act provides that if the failure referred to the Tribunal involves a failure to comply with Division 2 or 3 of Part 3, or with Part 8 of the Act, is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the hearing of the matter. I am satisfied that having received notice of the Applicant's amended grounds, the final relief being sought and the orders made on 13 December 2019, the Panel has made an informed decision not to become an active party in this proceeding.

15 However, the Applicant's amended grounds alleged failures to comply by the Panel, and for this reason I find that the Panel ought to have the benefit of the final order in this proceeding. Accordingly, the Panel is joined as a party to this proceeding.

## Further written submissions at the request of the Tribunal

16 On 13 February 2020, after the hearing of this proceeding, the Court of Appeal delivered judgment in *Melbourne Water Corporation & Anor v Caligiuri & Ors*[6]

6 [2020] VSCA 16.

(the Court of Appeal decision) regarding a decision of Garde J in *Caligiuri v Attorney General (on behalf of the State of Victoria) & Ors (No.2)*[7].

17 The Applicant's primary written submissions discussed at length the decision of Garde J in *Caligiuri.* [8] Accordingly, the Tribunal provided the parties with an opportunity to provide further written submissions concerning the effect of the Court of Appeal decision and those additional submissions[9] have been considered in making this decision.

## PART B - THE RELIEF SOUGHT BY THE APPLICANT

18 The Applicant seeks the following declarations and injunction:[10]

1. A declaration that where under s 23(1) of the *Planning and Environment Act 1987 (Vic)* ***(Act)*** the Council at its meeting on 28 May 2019 intended to and did revise its position on Amendment C231 to the Yarra Planning Scheme, an obligation of procedural fairness arose in all the circumstances to inform the Applicant and provide it with the opportunity to make submissions and be heard before the Panel.
2. A declaration that where the Panel under s 24 of the Act intended to and did recommend a further change to the Amendment, an obligation of procedural fairness arose in all the circumstances to inform the Applicant and provide it with the opportunity to make submissions and be heard before the Panel.
3. A declaration that the Council and Panel have failed to comply with these obligations.
4. An injunction restraining the Council from adopting under s 29(1) of the Act the Amendment in the form put forward by the Panel, insofar as it relates to the Applicant's land at 390A Queens Parade.

## PART C - THE APPLICANT'S CONTENTIONS

19 At paragraph 2 of its amended statement of grounds,[11] the Applicant makes the following allegation –

> On 20 March 2019 the Applicant lodged a planning permit application in respect of the Subject Land with Council which sought to construct four storey town houses (**Planning Application**). The Planning Application and title information submitted in support of same made it clear that the Applicant was not yet the registered proprietor of the Subject Land.

20 At paragraph 9 of its amended grounds, the Applicant contends that–

---

7 [2019] VSC 365.
8 See [15] –[25] of the Applicant's primary written submissions.
9 See Applicant's supplementary submissions of 19 January 2020 (delivered with its written Reply) and Council's further submissions of 21 February 2020.
10 Revised final orders sought by the Applicant received 20 December 2019.
11 Amended Statement of Grounds received 20 December 2019.

a. The Council and the Panel have an implied (and in the case of the Panel, express, under s 161(1)(b) of the *Planning and Environment Act 1987* (Vic) (**Act**)) obligation to afford procedural fairness to persons who may be adversely affected, in a direct way, by a proposed change to an amendment to a planning scheme.

b. The Applicant was directly and materially affected by the failure to afford it the opportunity to be heard in respect of the proposed changes before the Panel. The decisions of the Council and Panel in respect of the Amendment may curtail the Applicant's ability to develop the Subject Land.

21 At paragraph 5 of its amended grounds, the Applicant contends that the implied obligation on Council to afford procedural fairness to the Applicant arose because procedural fairness required Council to–

a. give notice to the Applicant of Council's decision to recommend changes to the Amendment including, insofar as it relates to the land, a reduction in the maximum building height from 21.5 metres to 14 metres (six to four storeys);[12]

b. afford the Applicant the opportunity to make written submissions on the described change; and

c. afford the Applicant the opportunity to appear before the Panel to be heard.

22 In its primary written submissions, the Applicant also contends that –

a. prior to adopting recommended changes to the Amendment at its May 2019 meeting, Council was obliged to give to the Applicant and allow it to make submissions on the recommended changes;[13]

b. there was an implied obligation on Council to direct the Panel to hear the Applicant, as a person who could be *materially affected* by the recommended changes, at the Panel's hearing on the Amendment.[14]

23 In its amended grounds,[15] the Applicant describes the circumstances giving rise to an obligation on Council to give notice of the proposed changes as–

a. Council's knowledge of the Planning Application;

b. Council resolving on 28 May 2019 to inform all landowners/occupiers directly affected by the proposed change; and

c. Council issuing a second request for further information to the Applicant on 11 July 2019 (following the 28 May resolution) without bringing the proposed changes to the attention of the Applicant.

---

12 This decision is variously described by the Applicant as the 'Proposed Change' (in its Amended Statement of Grounds); the "Revised Position" (in its written submission of 6 February 2020 and further written submissions of 19 February 2020).

13 See [26(a)] of the Applicant's primary written submissions.

14 See [26(b)] and [46] of the Applicant's primary written submissions.

15 See [5] of the Applicant's Amended Statement of Grounds.

24 The relevant source of the implied obligations on Council to provide procedural fairness to the Applicant is contended by the Applicant to be "*the rule that procedural fairness requires (subject to clear manifestation of contrary statutory intention), a person be afforded a hearing that is fair and without bias before a decision which affect them as is made."*[16]

25 In particular, the Applicant contends that "*Council's decision to adopt the Revised Position potentially affected the Applicant's pecuniary interests and the bundle of rights that it had contracted to acquire."*[17]

26 Regarding the Panel's conduct, the Applicant contends that procedural fairness required the Panel to, in respect of its intention to put forward its recommendation to lower mandatory height limits applying to the land from 4 storeys to 3 storeys, –

a. afford the Applicant the opportunity to make written submissions;

b. afford the Applicant the opportunity to appear before the Panel to be heard,

before making that recommendation in the Panel report on the Amendment.[18]

27 The Applicant generally contends that if a Panel intends to recommend changes to an amendment which are different from an amendment exhibited under s 19 of the Act *or that endorsed by the planning authority,* the Panel must afford procedural fairness to owners and occupiers who would be materially affected by those changes, *and those in an equivalent position*.[19]

28 On the Applicant's case, it was a person to whom procedural fairness obligations were owed because if the Panel's recommendations were to be adopted by the Minister, this would result in the *Applicant's planning application* not being successful.

## PART D – COUNCIL'S RESPONSE TO THE APPLICANT'S CONTENTIONS

29 Council's complete response to the Applicant's contentions is succinctly summarised in its written submissions[20] as follows–

a. the question whether the Applicant was owed procedural fairness by either the Council or the Panel is to be resolved by interpreting the relevant statutory scheme;

b. the relevant statutory scheme contains an exhaustive code governing when notice must be given regarding a planning scheme amendment and when submissions may be made to Council and referred to the Panel;

---

16 See [13] of the Applicant's primary written submissions. The Applicant cites Aronson, Groves and Weeks, *Judicial Review of Administrative Act and Government Liability* (6th ed) at [7.10].

17 See [43] of the Applicant's primary written submissions referring to *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [66] citing *Kioa v West* (1985) 159 CLR 550 at 619.

18 See [54] of the Applicant's primary written submissions.

19 See [59] of the Applicant's primary written submissions.

20 See [3] of Council's primary written submissions.

c. the Applicant was not entitled to notice of the Amendment under s 19 of the Act and had no other statutory entitlement to notice and, as a result, the Applicant was neither owed, nor denied, procedural fairness by Council or the Panel;

d. the foregoing analysis does not change simply because Council may have had knowledge of the Applicant's interests, or because there may have been a particular position adopted by Council with respect to the Amendment in the course of its preparation and adoption.

30 In short, Council submitted that there has been no demonstrated failure to comply with any relevant statutory requirement regarding the preparation of the Amendment by either Council or the Panel; and neither Council nor the Panel were under an implied obligation to afford procedural fairness to the Applicant.

## PART E – FINDINGS OF FACT

31 The Amendment proposes to-

a. introduce a design and development overlay (**DDO16**) on a permanent basis to five precincts in Queens Parade, Fitzroy North. The measures proposed in DDO16 include a range of mandatory and preferred building heights, street wall heights and setbacks within the nominated precincts;

b. rezone certain land not the subject of this proceeding;

c. apply the Heritage Overlay to identified premises and amend existing heritage gradings, citations and the relevant Incorporated Document.

32 Land subject to proposed DDO16 is divided into five precincts along Brunswick Street and Queens Parade, Fitzroy North and Clifton Hill, between Alexandra Parade and Hoddle Street.

33 The land is included in Precinct 4 and the specific measure to be introduced by DDO16 is the proposed mandatory building height applicable to Precinct 4.

34 Between 1 October 2018 and 30 November 2018, Council formally exhibited the Amendment (the **exhibition period**). The Amendment as exhibited proposed a mandatory building height of 21.5 metres for Precinct 4. A building height of 21.5 metres is generally accepted as permitting buildings of up to six storeys.

35 Documentation regarding the Amendment was also made publicly available on the Council's website and on the Department of Environment, Land, Water and Planning website.[21]

36 During the exhibition period the registered owners of the land were Rita Bernardi and Antonino Calabrese (the **vendors**).

37 On 19 December 2018[22], a contract of sale for the land was entered into between the vendors and Plenty and Dundas Pty Ltd (signed by directors Pierre Bernardi

[21] See [9] of Council's primary written submissions; no issue was taken by the Applicant with this assertion.

[22] After the exhibition period.

and Mario Le Giudice). The purchaser under the contract of sale was identified as 'Plenty and Dundas Pty Ltd or a nominee'.[23]

38 The 'Vendor Statement' attached to the contract of sale included a copy of a planning certificate obtained by the vendors' solicitors, Scopamrin & Bernardi, that included the following information–[24]

| | |
|---|---|
| The land: | |
| - is included in a | COMMERCIAL 1 ZONE |
| - is within a | DESIGN AND DEVELOPMENT OVERLAY- SCHEDULE 20-3 |
| and a | HERITAGE OVERLAY(H0327) |
| A Proposed Amending Planning Scheme C238 and C231 has been placed on public exhibition which shows this property: | |
| - is within a | DESIGN AND DEVELOPMENT OVERLAY- SCHEDULE 16-4-C231 |
| and a | DEVELOPMENT CONTRIBUTIONS PLAN OVERLAY- SCHEUDLE 1-C238 |
| and a | AREA TO BE DELETED FROM A HERITAGE OVERLAY -C231 |
| and a | HERITAGE OVERLAY (HO330) – C231 |

39 The vendors were sent notice of the Amendment by Council.[25]

40 The vendors did not make a submission during the exhibition period.[26]

41 Plenty and Dundas Pty Ltd did not make a submission during the exhibition period.[27]

42 At its ordinary meeting held on 12 March 2019, Council considered a report prepared by its officers that identified the key themes arising from the submissions received during the exhibition period,[28] including the key issues expressed in submissions regarding Precinct 4. That report was included in the publicly available agenda papers for that meeting.

43 At a special meeting held on 12 March 2019, Council made the following resolution in respect to the Amendment–

> That Council:

---

23 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-3.

24 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-3.

25 There was no evidence before the Tribunal of any noncompliance with the notice requirements of s.19 of the Act.

26 This fact was accepted by both parties before the Tribunal but also see Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-18, Appendix A List of submitters; neither the vendors nor the occupiers of the land are included in that list.

27 This fact was accepted by both parties before the Tribunal but also see Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-18, Appendix A List of submitters; Plenty and Dundas are not included as a submitter on that list.

28 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-4.

(a) receives all written and verbal submissions to Amendment C231.

(b) extends its appreciation to all submitters and to those people presenting at this meeting.

(c) notes that a further report will be presented to an Ordinary Council meeting on 28 May 2019, that will:

(i) provide an officer report and a recommended response to the specific issues raised in submissions for Council consideration; and

(ii) enable Council to determine whether to refer Amendment C231 and all submissions to an independent Planning Panel to be appointed by the Minister for Planning.

44 Council's resolution of 12 March 2019 was made available on Council's website.

45 On 19 March 2019, G2 Urban Planning Pty Ltd (**G2 Urban Planning**) on behalf of Plenty and Dundas Pty Ltd lodged an planning permit application with Council in respect of the land (the **planning application**).[29] The application was accompanied by an 'urban context report' that generally describes the development proposed as a 'residential development comprising 15 townhouses over 4 levels'.[30] The 'urban context report' acknowledges proposed Amendments C238 and C231 and states that "*At the time of writing this report the amendments are not seriously entertained"*.[31]

46 On 15 April 2019, Council sent an information request to Plenty and Dundas Pty Ltd, care of G2 Urban Planning, in respect of the planning application.[32] One of the matters that Council requested further information about was the maximum overall building height above natural ground level. In addition, Council's information request directed the applicant's attention to a number of specified matters including the following–

- For further information regarding Amendment C231(Queens Parade Built Form controls) to the Yarra Planning Scheme, please contact Council's Strategic Planning Department.

47 At its meeting held on 28 May 2019, Council considered, in open session, a report prepared by Council officers in response to the submissions received during the exhibition period (the **May 2019 report**).[33] The May 2019 report was published in the agenda for the 28 May 2019 meeting. In that report, Council officers recommended a proposal to Council that, in summary provided that Council resolve to do the following–

a. request the appointment of an independent planning panel to consider all of the submissions received during the exhibition period;

---

29 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-5.

30 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-5 at section 3.1of the Urban Context Report at page 7.

31 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-5 at section 2.1 of the Urban Context Report at page 4.

32 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-6.

33 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-8.

b. refer all submissions, including late submissions, to an independent panel;

c. adopt a position of support for Amendment C231 generally in accordance with the officer's response to the submissions as contained in the officer's report to Council and attachments thereto;

d. submit to the planning panel that Amendment C231 should be recommended for approval subject to the highlighted changes made to the exhibited DDO amendment.

48 At paragraph 20 of the May 2019 report, the Council officers' proposal regarding suggested changes to the Amendment is described as follows-

> 20. Officers are proposing that the Council submission regarding the amendment outline a number of changes for consideration by the panel in response to the submissions. The recommended changes would improve the amendment in response to submissions and built form outcomes being sought by the DDO.

49 As regards Precinct 4, the May 2019 report at paragraph [38] under the heading 'Response to key issues' recommends that '*building heights are reduced from 6 storeys mandatory to 4 storeys mandatory…".* Reasons for this recommendation are given in the following paragraph [39]. This recommendation is what is referred to by the Applicant as the Council's 'Preferred Version'.

50 At its May 2019 meeting, Council made the following resolution (the **28 May 2019 resolution**) –

> That Council:
>
> (a) receives and notes submissions received following the exhibition of Amendment C231;
>
> (b) notes that there is/will be considerable development growth in precincts 2 and 5 of the DDO and at the former Gas Works site;
>
> (c) notes that the officer report and attachments in response to submissions on Amendment C231 and endorses the recommended changes to the amendment including the Preferred Version of the DDO schedule, conditional upon the following further amendments, to Schedule 16 to Clause 43.02 Design and Development Overlay (dated 20 May 2019):
>
> **2.9.4 Precinct 4 – Activity Centre Precinct**
>
> **Design requirements**
>
> (ii) revise the fifth requirement as follows, to include heritage fabric and Wellington Street:
>
> a. retain the visual prominence and heritage fabric of the return facades of heritage building that front Queens Parade, Delbridge, Gold , Michael and Wellington Streets:
>
> (iii) include a new requirement:

a. maintain service access from the laneways in order to facilitate commercial use of the properties fronting Queens Parade.

**Table 4 – street wall height, building height and setbacks for Precinct 4**

(i) Include a new preferred built form requirement:

a. Minimum rear setback (C1Z) – 3 metres above 11 metres;

(d) adopts as its submission to the panel the position of support for Amendment C231with changes as identified in (c) above;

(e) requests the Minister for Planning to appoint an independent planning panel to consider all submissions referred to in relation to Amendment C231 in accordance with Section 23 of the Planning and Environment Act 1987;

(f) refer all submissions, including late submissions and new or modified submissions in response to the further notice as in paragraph (g) below to the panel;

(i) writes to all landowners and occupiers directly affected by the revised DDO schedule and to all submitters to:

(ii) advise of Council's decision to proceed to panel;

(iii) advise of Council's position in support of the Preferred Version of the DDO; and

(iv) advise if they make a submission in relation to the recommended changes, the new or varied submission will be referred directly to the panel; and

(g) notes that officers will provide a further report to Council after the planning panel report is received from Panels Victoria to enable further consideration of Amendment C231 by Council.

51 The May 2019 resolution was recorded in the minutes for the 28 May 2019 meeting.[34]

52 By way of letters dated 29 May 2019, the then owners of the land (the vendors) and occupiers of the land (generally described as "The Occupiers) were informed of the outcome of the 28 May 2019 meeting as regards the Amendment.[35]

53 Both the Council officers' report to Council regarding the Amendment and the 28 May 2019 resolution were made publicly available from Council's website.

54 Neither the vendors nor the occupiers of the land made any submission to Council in response to notification of the Preferred Version.

[34] See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-9.
[35] See Affidavit of Amanda Elizabeth Haycock sworn 17 January 2020; exhibits AEH-1 and AEH-2.

55 By letter dated 26 June 2019, G2 Urban Planning replied to Council's further information letter of 15 April 2019. In its response letter, G2 Urban Planning confirmed the building height of the proposed development as four storeys–[36]

> It is important to acknowledge that the DDO contemplates greater heights for this site than being proposed in this Application. The DDO sets a mandatory maximum height of 21.5 metres for the subject site as being part of Precinct 4. The proposal attains a maximum height of 13.0 metres (15 metres to the top of the lift access to the roof terraces). This equates to a potential two or three additional storeys for the subject site over and above the four storeys proposed.

56 On 11 July 2019, Council sent a further information letter to Plenty and Dundas Pty Ltd, care of G2 Urban Planning, seeking further information regarding the planning application.[37] This letter did not inform Plenty and Dundas Pty Ltd of Council's May 2019 resolution.

57 On 24 July 2019, G2 Urban Planning responded to Council's further information letter of 11 July 2019.

58 On 31 July 2019, the Applicant became the registered proprietor of the land.[38]

59 On 5 August 2019, Council received notice of an acquisition of interest in the land showing the Applicant as the registered proprietor of the land.[39]

60 On 27 August 2019, public notice of the proposed development of the land was undertaken by way of a sign erected on the land. The sign described the proposed development as follows–

> FULL DEMOLITION OF EXISTING BUILDINGS AND CONSTRUCTION OF 15 FOUR STOREY TOWNHOUSE DWELLINGS PLUS ROOF TERRACES; USE OF THE LAND FOR DWELLINGS AND AN ASSOCIATED REDUCTION IN STATUTORY CAR PARKING REQUIREMENTS.

61 The planning permit applicant for the development application was identified in the public sign as 'Plenty and Dundas Pty Ltd'.

62 Commencing on 12 August 2019, the Panel conducted its hearing (over three weeks) regarding the Amendment.

63 Neither the vendors nor the occupiers of the land sought to appear before the Panel; nor did any representatives of Plenty and Dundas Pty Ltd nor the Applicant.[40]

64 The Panel Report on the Amendment dated 31 October 2019 makes the following recommendation–[41]

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

---

36 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-10.
37 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-11.
38 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-13.
39 See Affidavit of Amanda Elizabeth Haycock sworn 17 January 2020; exhibit AEH-3.
40 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-15, Appendix B.
41 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-15; at end of Executive Summary.

1. **Adopt Amendment C231 to the Yarra Planning Scheme as exhibited subject to:**

   a) **The Panel preferred version of Design and Development Overlay Schedule 16 as provided in Appendix E to this report.**

2. **Undertake further heritage assessment of the existing built form and associated structures located at 390A Queens Parade to establish whether other buildings and associated structures on this property would support or warrant a 'contributory' grading within the context of HO330.**

3. **Correct the spelling of Raines Reserve (from 'Rains' to 'Raines') and correct the street numbering for the St Johns Church complex in Appendix 8.**

65 The Panel's preferred version of DDO16 included a mandatory maximum building height applicable to the land of 10.5 metres.

## Findings of fact relevant to the Applicant's contentions in its Amended Grounds

66 The evidence in this proceeding establishes that–

a. During the exhibition period, the vendors were the registered owners of the land.[42]

b. The vendors did not make a submission regarding the Amendment during the exhibition period.

c. Plenty and Dundas Pty Ltd, acting through its professional consultant, G2 Urban Planning, lodged the planning application with Council on 29 March 2019.[43] Therefore I reject the contention that the Applicant lodged the planning application.

d. Council did not issue a further information letter to the Applicant on 11 July 2019. The evidence is that Council issued a further information letter dated 11 July 2019 to Plenty and Dundas Pty Ltd, care of G2 Urban Planning. [44]

e. At all material times, the planning permit applicant was 'Plenty and Dundas Pty Ltd'.[45]

f. At all material times, the planning application was for a residential development described as having a building height of 4 storeys.

g. At all material times Council did have knowledge of the planning application on behalf of Plenty and Dundas Pty Ltd.

---

42 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibits EJM-5 and EJM- 13.
43 See Affidavit of Eliza Jane Minney affirmed 6 December 2019, exhibit EJM-5.
44 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-11.
45 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibits EJM-5, EJM- 6, EJM-10, EJM-11, EJM-12, EJM-14 and EJM-16.

h. The planning application, and other communication regarding the planning application in evidence, did not identify any interest of the Applicant in the planning application, the proposed development or the land.[46]

i. Until 5 August 2019, Council was not aware of the Applicant's interest in the land.

j. At the time of making the May 2019 resolution-

   i. the vendors were the registered owners of the land; and

   ii. the Applicant was not the occupier of the land.

k. Council provided notice to the vendors of the May 2019 resolution by way of letter dated 29 May 2019 addressed to the vendors.

l. The vendors did not make a submission to Council following receipt of notice of the May 2019 resolution.

m. Council did not send correspondence at any material time to the Applicant informing the Applicant of its May 2019 resolution.

n. The May 2019 resolution was recorded in the publicly available minutes of the 28 May 2019 meeting. The May 2019 report was included in the publicly available agenda for the 28 May 2019 meeting.

o. There is no evidence that Council had any knowledge of the Applicant's interest in the planning application at any time prior to, or during, the Panel hearing into the Amendment; and Council does not admit that it knew that the Applicant's interests would be affected by the May 2019 resolution or other actions.[47] I accept that submission for the reasons set out herein.

p. The Panel did not invite the Applicant to make a written submission to it prior to, or during, the conduct of its hearing into the Amendment.

q. The Panel did not invite the Applicant to appear before it at the hearing regarding the Amendment.

r. I find that the Panel had no knowledge that the Applicant had any interest in the land or planning application at any time prior to, or during, the Panel hearing into the Amendment.

s. Neither the vendors nor any representatives of Plenty and Dundas Pty Ltd made a request to the Panel to either make a written submission or to appear before the Panel in respect of the Amendment.

[46] See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibit EJM-5.
[47] See [55] of Council's primary written submissions.

## PART F –THE TRIBUNAL'S JURISDICTION UNDER SECTION 39 OF THE ACT

67 Having brought this application under s 39 of the Act, the 'matter' that the Applicant has referred to the Tribunal consists of contentions that fall within two categories-

a. first, the Applicant submitted that Council and the Panel breached their respective implied obligations to afford the Applicant procedural fairness in relation to the proposal to make the Amendment to date; and

b. secondly, the Applicant submitted that the Panel has breached the express statutory obligation under s 161(1)(b) of the Act.

68 Given the breadth of the referred matter, it is useful to set out s 39 of the Act in full–

> **39 Defects in procedure**
>
> (1) A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.
>
> (2) In addition to any other party to the proceeding the parties to a proceeding before the Tribunal under this section are–
>
> (a) the person who referred the matter to the Tribunal; and
>
> (b) the Minister; and
>
> (c) the planning authority.
>
> (3) If a matter referred to the Tribunal under this section involves a failure by a panel to comply with Division 2 or this Division or Part 8 the panel (or a member of the panel authorised by the panel to act on its behalf) is entitled to make a written or oral submission to the Tribunal before the Tribunal completes the hearing of the matter.
>
> (4) The Tribunal may determine a matter referred to it under this section and may do any one or more of the following–
>
> (a) make any declaration that it considers appropriate;
>
> (b) direct that–
>
> (i) the planning authority must not adopt or approve the amendment or a specified part of the amendment; or
>
> (ii) the Minister must not approve the amendment or a specified part of the amendment–
>
> unless the Minister, planning authority or a panel takes action specified by the Tribunal.

(5) In exercising its jurisdiction under this section the Tribunal cannot vary a decision made in relation to a matter referred to it or set aside that decision and make a decision in substitution for the decision so set aside.

* * * * * *

(7) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division or Part 8.

(8) Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved.

69 The Applicant submitted that s 39(1) confers a jurisdiction on the Tribunal *'akin to a judicial review jurisdiction'*[48] and the Applicant contends for *'a limited recognition of procedural fairness obligation arising in the specific circumstances'.*

70 Council submitted that s 39(1) is only concerned with failure to comply with the express statutory requirements in Division 1, 2, or 3 of Part 3, or Part 8 of the Act. In reply, the Applicant contended–[49]

a. Council's position was rejected by Deputy President Dwyer in *Coastal Estates Pty Ltd v Bass Coast SC & Ors*[50] because in that decision he confirmed that "*on a proper construction of s 39, breach of the rules of natural justice is a relevant 'failure to comply' with Divs 1 or 2, or Part 8 that the Tribunal can review and determine under s 39"*; and

b. The High Court's decision in *Kioa v West*[51] confirmed that the scope of natural justice is not 'at large' but is instead discernible from the statutory framework.

## The extent of the Tribunal's jurisdiction

71 The jurisdiction of the Tribunal is derived entirely from statute. The Tribunal does not have any inherent jurisdiction.

72 The Tribunal does not possess a judicial review jurisdiction.[52]

73 Therefore the power conferred on the Tribunal to consider the lawfulness of the conduct of a planning authority, a panel or the Minister, when an amendment to a planning scheme is undertaken is derived solely from s 39 of the Act as there are no other statutory powers in the Act or any other Act permitting enquiring into such conduct.

---

48 See [4(a)] of the Applicant's reply submissions.
49 See [4(b)] of the Applicant's reply submissions.
50 (includes Summary) (Red Dot) [2010] VCAT 1807.
51 (1985) 159 CLR 550.
52 *Director of Housing v Sudi* (2011) 33 VR 559.

74 Section 39 of the Act does not confer a review jurisdiction on the Tribunal.[53]

75 As a result, when exercising its jurisdiction under s 39 of the Act, the Tribunal is exercising original jurisdiction.[54]

76 In *Freeman v Knox CC* Morris J observed–[55]

> [36] In my opinion, when a proceeding is brought pursuant to section 39 of the Act, the first task is to identify whether there has been a failure to comply with the relevant parts of the Act and the nature of that failure. Having identified a failure to comply, the second task is to consider whether an applicant has been substantially or materially affected by that failure.

77 In *East Melbourne Group v Minister for Planning*[56] Justice Morris considered the legislative history of s 39 of the Act and observed at paragraph 95–[57]

> When the Planning and Environment Act was amended in 1989, so as to recast section 39, the Minister observed that:
>
> "The Act provides a separate mechanism of review of amendments by an independent panel, and amendments ultimately require the Minister's approval. The Tribunal does have an important role in resolving disputes of a procedural nature – that is specifically set out in the revised section 39 of the Act. The proposed amendments make this quite clear, and set out the range of disputes to be resolved by the Tribunal."

78 As to the extent of the Tribunal's power under s 39 of the Act, Deputy President Dwyer in *Coastal Estates* found that there were three primary reasons for holding the view that the section only covers procedural defects non-compliance, but not substantive errors. In short, those three reasons were–

a. The conclusion by majority of the Court of Appeal in *East Melbourne Group v Minister for Planning*[58] that s 39(7) of the Act *"only addresses non-compliance with procedural requirements"* and *"does not apply to decisions that are tainted by jurisdictional error*". Deputy President Dwyer considered that this conclusion was equally applicable to s 39(1) of the Act given the similarity in language used in both subsections.[59]

b. When read as a whole and properly construed, s 39 of the Act is intended to distinguish between 'procedural defects' that can be dealt with by the

---

53 *Coastal Estates Pty Ltd v Bass Coast SC & Ors* (includes Summary) (Red Dot)[2010] VCAT 1807 at [21].

54 See section 41 of *Victorian Civil and Administrative Act* 1998 (the **VCAT Act**).

55 [2007] VCAT 414 at [36].

56 [2005] VSC 242.

57 Morris J examination and recount of the legislative history of s 39 of the Act was met with approval by the majority of the Court of Appeal in *East Melbourne Group Inc v Minister for Planning and Anor* (2008) 23 VR 605 at [370].

58 [2008] VSCA 217 at [370].

59 [2010] VCAT 1807 at [30]-[31].

Tribunal under s 39 of the Act and 'substantive errors' that fall outside s 39 of the Act.[60]

c. The legislative history and context of s 39 of the Act supports the view that the operation of the section is intended to be limited to procedural non-compliance rather than substantive error.[61]

79 The limited power of the Tribunal under s 39 was recently described by Deputy President Dwyer in *Danaher v Whittlesea CC* [62]at [21] as follows–

> By reference to other parts of s 39, and relevant case law, VCAT's powers under s 39 are limited. VCAT is essentially looking at whether there has been a defect in certain specific statutory procedures in relation to an amendment that has not been approved, and the steps that might reasonably be taken to address that defect before the amendment is approved. VCAT is not undertaking a review of the merits of the amendment, nor can it vary or substitute a substantive decision made in relation to an amendment.

80 Adopting the approach of the foregoing case law with which I agree, I conclude that the Applicant is only entitled to relief if it can demonstrate that-

a. there has been a failure to comply with Division 1, 2, or 3 of Part 3, or Part 8 of the Act; and

b. the Applicant is a person that is substantially or materially affected by the failure to comply.

81 Therefore, in order for the Applicant, on its case, to successfully demonstrate that there has been a failure to comply with Division 1, 2, or 3 of Part 3, or Part 8 of the Act, the allegedly implied obligations to afford the Applicant procedural fairness that Council and the Panel allegedly owed and breached must form part of, or be necessarily read into, Division 1, 2, or 3 of Part 3, or Part 8 of the Act. I will now consider this.

## Does the Tribunal's jurisdiction extend to consideration of failure to comply with the alleged implied obligations to accord procedural fairness?

82 In short, I conclude that the Tribunal's jurisdiction under s 39 of the Act does not extend to consideration of whether there exists any implied obligation on Council or the Panel to afford the Applicant procedural fairness as alleged by the Applicant. In my view, whether or not there exists any implied obligation or duty on either Council or the Panel as alleged by the Applicant, is a matter that falls outside the Tribunal's jurisdiction under s 39 of the Act.

83 The purpose of s 39 of the Act is limited and it does not permit a broader review of Council's conduct or that of the Panel. This is so even when the conduct complained of is described as a failure to accord 'procedural' fairness. This approach is consistent with the overall purpose of the VCAT Act which is to

60 [2010] VCAT 1807 at [33]-[36].
61 [2010] VCAT 1807 at [37].
62 [2019] VCAT 552.

establish the Tribunal as a forum for speedy and inexpensive resolution of specific kinds of disputes.[63]

84 Apart from the allegation that the Panel failed to comply with s 161(1) of the Act, the conduct complained of by the Applicant is reliant on implied obligations which fall within the judicial review jurisdiction of the Supreme Court and not within the Tribunal's jurisdiction under s 39 of the Act.

## Further consideration of *Coastal Estates*

85 I do not find any support in the reasons provided in *Coastal Estate* that the Tribunal's jurisdiction under s. 39 of the Act extends to a consideration of a breach of an obligation to afford natural justice or procedural fairness not provided for in Division 1, 2, or 3 of Part 3, or Part 8 of the Act.

86 In *Coastal Estates*, the applicant contended for a broad interpretation of the expression 'failure to comply'. Insofar as it is relevant to this proceeding, that broad interpretation included the failure to accord procedural fairness to the applicant by the relevant panel. In considering this allegation, Deputy President Dwyer considered whether allegations that the relevant panel in that matter had failed to accord the applicant procedural fairness in the conduct of the panel's hearing fell within the 'procedural defects' that the Tribunal had jurisdiction to consider under s 39 of the Act or whether those allegations fell outside the Tribunal's jurisdiction because the subject matter amounted to a 'substantive error'.

87 In arriving at his decision that the allegations in that matter fell within the Tribunal's jurisdiction, Deputy President Dwyer found that–[64]

- the ordinary distinction between substantive error and procedural non-compliance is subject to a limited exception where a breach of natural justice is alleged, because it is potentially both a 'procedural' failure to comply (for the purposes of s 39) and a jurisdictional error;
- the exception is limited because the obligation to provide a reasonable opportunity to be heard (under s 24(a)) and to accord natural justice (under s 161(1)(b)) only arise in relation to a panel making findings and recommendations within the amendment process, rather than the actions of a planning authority or Minister making the ultimate decision;
- the obligation to provide a reasonable opportunity to be heard and to accord natural justice is also limited, in context, by other statutory provisions governing panel procedures.

88 Later in that decision, Deputy President Dwyer identifies relevant statutory provisions in Part 3 and Part 8 of the Act, other than s 161, that required the panel

63 *Director of Housing v Sudi* (2011) 33 VR 559.
64 Accepting submissions on behalf of the Panel and the Minister – see [42] of [2010] VCAT 1807

to comply with the rules of natural justice. Those identified provisions that, considered in their totality, required a panel to accord with natural justice are–

- must consider all submissions, not just those of parties attending the hearing (s 24);
- must consider late submissions referred to it (through a combination of s 22(2), s 23(1)(b) and s 24);
- may make any recommendations it thinks fit (s 25(2));
- must conduct its hearing in public, subject to limited exceptions (s 160(1));
- must act according to equity and good conscience, and without regard to technicalities or legal forms (s 161(1)(a));
- is not required to conduct the hearing in a formal manner (s 161(1)(c));
- is not bound by the rules or practices to evidence but inform itself on any matter in any way it thinks fit, and without notice to any person who has made submission (s 161(1)(d));
- may regulate its own proceedings (s 167);
- may take into account any matter it thinks relevant in making its report and recommendations (s 168).

89 I find that there is nothing in the above extracts or any other part of the reasons given in *Coastal Estates* that supports the Applicant's submission that on proper construction of s 39 of the Act, a breach of an implied obligation to accord procedural fairness or natural justice amounts to a procedural defect within the Tribunal's jurisdiction under s 39 of the Act. I therefore reject the submission.

## The Supreme Court's decision in *Winky Pop*

*90* The Applicant submitted that, in determining this application under s 39 of the Act, I am bound by the decision of Kaye J in *Winky Pop Pty Ltd v Hobsons Bay Council*[65] which the Applicant submitted supports the proposition that 'the rules of procedural fairness can be implied into the process for amendment of a planning scheme under the P&E Act'.[66]

91 The proceeding before the Supreme Court in *Winky Pop* was one that was commenced in that court's inherent jurisdiction for relief by way of certiorari and declaration that two resolutions of the relevant council made in respect of an amendment to its planning scheme were invalid. It was not a proceeding in which the extent of the Tribunal's power under s 39(1) of the Act was examined. Indeed, s 39 of the Act was referred to by Kaye J in that decision on only two occasions–

65 (2007) 19 VR 312.
66 See [6(c)(ii)] of the Applicant's Reply Submissions.

a. the first, in the section of the decision summarising the statutory framework for the approval and implementation of planning schemes under the Act;[67] and

b. the second, in response to a submission that the Court should not grant the relief sought because there were alternative rights available to the plaintiffs, including the right to bring a proceeding before the Tribunal under s 39 of the Act or to lobby the Minister. In response to that submission, Kaye J held -

> [94] I do not consider that the potential availability of either alternative recourse is a proper basis for denying the plaintiffs' relief by way of certiorari, if they are otherwise entitled to it. Without expressing any concluded view on the matter, there is at least some room to doubt whether, under s 39(1) of the Act, the plaintiffs would be entitled to relief at the Victorian Civil and Administrative Tribunal on the basis on which relief is sought in this Court. Further, the question whether the plaintiffs will have the opportunity to "lobby" the Minister is entirely speculative. In the event that they do have that opportunity, it could not be sensibly equated with the rights of the plaintiffs to the relief claimed in this case, if the plaintiffs are otherwise entitled to that relief.

92 Therefore the Supreme Court's decision in *Winky Pop* is not binding on me when determining the extent of the Tribunal's jurisdiction under s 39 of the Act because it does not examine the extent of the Tribunal's jurisdiction but rather examines the Supreme Court's judicial review jurisdiction as is relevant to issues involving procedural fairness and natural justice relevant to the facts of that matter.

## The Tribunal's decision in *Danaher*

93 In its primary written submissions, the Applicant submitted that *Danaher v Whittlesea CC*[68] considered, amongst other issues, the applicability of principles of procedural fairness to the statutory procedures in the Act.[69] In its reply submissions, the Applicant asserts that *Danaher* specifically held that the obligations of procedural fairness can be implied into the amendment provisions of the Act,[70] however, no specific reference was given to support this general submission.

94 In *Danaher*, the Tribunal was concerned with alleged failures to comply with s 23, s 24 and s 161 of the Act. In its consideration as to whether there had been the alleged failure to comply under s 23 there is no discussion about implying obligations of procedural fairness. Similarly, in the discussion regarding the failures to comply with s 24 and s 161, the *Danaher* decision does not specifically

---

67 (2007) 19 VR 312 at [10].
68 [2019] VCAT 552.
69 See [34] of the Applicant's primary written submissions.
70 See [7(b)] of the Applicant's reply submissions.

discuss 'implying' the obligations of procedural fairness. The decision discussed whether, on the facts of that matter–

a. Mr Danaher, as a submitter, was afforded a reasonable opportunity to be heard by the panel as is expressly required under s 24; and

b. The panel in that matter, when hearing submissions, acted in accordance with the rules of natural justice as is expressly required under s161(1)(b). In this part of its consideration, the Tribunal did consider what is meant by the conduct of a 'fair hearing' and in that context did find that where a body is expressly bound by the rules of natural justice, "*the obligations of procedural fairness lie not just with the body conducting the hearing, but also with the parties appearing before it. That requires a party to have reasonable notice of the case it is required to meet*."[71]

95 The decision in *Danaher* properly construed does not provide support for the proposition that obligations of procedural fairness can be implied into the Act; rather that decision examines whether, on the facts of that matter, there had been a failure to comply with the express obligations in s 24 and s 161 of the Act.

## Conclusion on the extent of the Tribunal's power under s 39 of the Act

96 The Applicant also referred me to a number of other authorities,[72] including High Court decisions, in support of its general contention that upon consideration of the text and statutory context of the provisions found in Divisions 1, 2 and 3 of Part 3 and Part 8 of the Act, the Tribunal should find that the implied obligations contended for, exist.

97 In reaching my decision on the Tribunal's jurisdiction I have considered these authorities. None of these additional authorities dealt directly with the Tribunal's jurisdiction under s 39 of the Act. The first question regarding the task I am required to undertake in determining an application brought under s 39 of the Act is the extent of the Tribunal's jurisdiction under that section, not whether there should be implied into Divisions 1, 2 and 3 of Part 3 of Part 8 implied obligations to afford procedural fairness to the Applicant.

98 In conclusion, I find that the Tribunal does not have jurisdiction under s 39 of the Act to consider alleged breaches of any implied obligations on Council or the Panel as set out in paragraph 9 of the Applicant's Amended Grounds and–

a. particularised in paragraphs 10 and 11; and

b. further particularised in paragraph 26 of the Applicant's primary written submissions.

99 I do, however, address the alleged failures to comply with the express provisions of Division 1, 2, or 3 of Part 3, or Part 8 of the Act below as raised in the

71 [2019] VCAT 552 at [150].
72 See [15] –[25], [36],[42], [48],[55] and [61] of the Applicant's primary written submissions.

Applicant's written submissions to ensure that all such allegations are addressed in these reasons.

## PART G - HAS THERE BEEN A FAILURE TO COMPLY WITH DIVISION 1, 2, OR 3 OF PART 3, OR PART 8 OF THE ACT?

100 Although the Applicant did not raise any issue in its written submissions with compliance with section 19 of the Act,[73] the notice requirements under this section are an important part of the scheme amendment process.

101 Section 19 provides–

> **19 What notice of an amendment must a planning authority give?**
>
> (1) A planning authority must give notice of its preparation of an amendment to a planning scheme—
>
> (a) to every Minister, public authority and municipal council that it believes may be materially affected by the amendment; and
>
> (b) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land that it believes may be materially affected by the amendment; and
>
> (c) to any Minister, public authority, municipal council or person prescribed; and
>
> (ca) to owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land benefited by a registered restrictive covenant, if the amendment provides for the removal or variation of the covenant; and
>
> (d) to the Minister administering the Land Act 1958 if the amendment provides for the closure of a road wholly or partly on Crown land.
>
> (1A) Subject to subsection (1C), the planning authority is not required to give notice of an amendment under subsection (1)(b) if it considers the number of owners and occupiers affected makes it impractical to notify them all individually about the amendment.
>
> (1B) A planning authority which does not give notice under subsection (1)(b) for the reasons set out in subsection (1A) must take reasonable steps to ensure that—

[73] See [1] of the Applicant's reply submissions.

(a) public notice of the proposed amendment is given in the area affected by the amendment; and

(b) that notice states that owners and occupiers of land referred to in subsection (1)(b) are entitled to make submissions in accordance with sections 21 and 21A.

(1C) Subsection (1A) does not apply in relation to the giving of notice to an owner of land of an amendment which provides for—

(a) the reservation of that land for public purposes; or

(b) the closure of a road which provides access to that land.

(2) A planning authority must publish a notice of any amendment it prepares in a newspaper generally circulating in the area to which the amendment applies.

(2A) A planning authority must cause notice of an amendment providing for the removal or variation of a registered restrictive covenant to be given by placing a sign on the land which is the subject of the amendment.

(3) On the same day as it gives the last of the notices required under subsections (1), (2) and (2A) or after all other notices have been given under this section, the planning authority must publish a notice of the preparation of the amendment in the Government Gazette .

(4) Any notice must—

(a) be given in accordance with the regulations; and

(b) set a date for submissions to the planning authority which, if notice of the preparation of the amendment is given in the Government Gazette, must be not less than one month after the date that the notice is given in the Government Gazette.

(5) The failure of a planning authority to give a notice under subsection (1) does not prevent the adoption or approval of the amendment by the planning authority or its submission to or approval by the Minister.

(6) Subsection (5) does not apply to a failure to notify an owner of land about the preparation of an amendment which provides for—

(a) the reservation of that land for public purposes; or

(b) the closure of a road which provides access to that land.

(7) A planning authority may take any other steps it thinks necessary to tell anyone who may be affected by the amendment about its preparation.

102 The Applicant submitted that the exhibition and submission provisions in Division 1 and 2 of Part 3 "*are clearly drafted with the purpose of ensuring that persons potentially affected by a proposed amendment to a planning scheme are provided with an opportunity to do so and be heard*."[74]

103 It is clear that direct notice of a proposed amendment is not be given at large to persons that may be 'potentially affected by a proposed amendment to a planning scheme' but only to those owners and occupiers that the planning authority believes may be materially affected by the proposed amendment. All other persons including those who may be potentially affected are not required to be directly notified, however may inform themselves of the proposed amendment via the public notice required under s 19(2) of the Act.

104 The evidence in this proceeding is that–

a. During the exhibition period, the vendors were the registered owners of the land;[75]

b. The vendors did not make a submission regarding the Amendment during the exhibition period; and

c. Neither Plenty and Dundas Pty Ltd nor the Applicant made a submission during this period.

105 On the evidence before me, I find that there has not been any failure on the part of Council, as the planning authority, to comply with s 19 of the Act.

## Section 23

106 Section 23 of the Act provides-

**23 Decisions about submissions**

(1) After considering a submission which requests a change to the amendment, the planning authority must—

(a) change the amendment in the manner requested; or

(b) refer the submission to a panel appointed under Part 8; or

(c) abandon the amendment or part of the amendment.

(2) A planning authority may refer to the panel submissions which do not require a change to the amendment.

(3) Subsection (1) does not apply to a submission which requests a change to the terms of any State standard provision to be included in the planning scheme by the amendment.

74 See [40] of the Applicant's primary written submissions.
75 See Affidavit of Eliza Jane Minney affirmed 6 December 2019; exhibits EJM-5 and EJM- 13.

(4) Despite subsection (3), subsection (1) does apply to a submission which requests that a State standard provision be included in or deleted from the scheme.

(5) Subsection (1) does not apply to a submission which requests a change to—

(a) any land credit amount or land equalisation amount specified in an infrastructure contributions plan that is to be incorporated into a planning scheme by the amendment; or

(b) any estimate of the value of public purpose land (within the meaning of Part 3AB) on which the amounts referred to in paragraph (a) are based.

107 The Applicant submitted that the obligation on a planning authority to do one of the three things set out in s 23(1) of the Act only after it 'considers' the submission. Further it is 'inherent' in the process of considering a submission is testing what results that submission would have on *any* person who might be adversely affected, and, in appropriate cases, providing that person with an opportunity to express their views.[76] I reject that construction of s 23(1) of the Act. The requirement on a planning authority under section 23(1) of the Act to 'consider' a submission is only so that it can determine which of the three alternative options under that section it will choose. There is no fourth alternative option such as testing the results of the submission on any person who may be adversely affected and providing further opportunities for submissions to be made.

108 The May 2019 resolution -

a. referred the submissions to the Panel in accordance with s 23(1)(b) of the Act;

b. did not change the Amendment in the manner requested by the submissions received by Council;

c. did not abandon the Amendment or part of the Amendment.

109 Accordingly, Council resolved to undertake one of the three alternative options available to it thereby fulfilling its mandatory obligation under s 23(1) of the Act.[77] That Council understood its statutory obligation under s 23(1) of the Act is evident from the officer report to Council that stated–[78]

13. Under Section 23 of the Planning and Environment Act 1987, Council must either:

(a) Change the amendment in the manner requested; or

(b) Refer the submissions to an independent panel; or

(c) Abandon the amendment or part of the amendment.

---

[76] See [37] of the Applicant's primary written submissions.
[77] See *Lend Lease Apartments (Armadale) Pty Ltd v Stonnington CC [2013] VCAT 1663*
[78] See Affidavit of Eliza Jane Minney affirmed 6 December 2019, exhibit EJM-8 at [13].

110 I find that the May 2019 resolution, insofar as it adopts as its submission to the panel changes recommended by its officers (including the Revised Position), does not amount to a change to the Amendment under s 23(1)(b) of the Act. It is clear from the report to Council and from the language of the resolution that recommended changes were for the purposes of Council's submission before the Panel.

111 Therefore, I find that there has not been any failure on the part of Council, as the planning authority, to comply with s 23 of the Act.

**Section 24 and section 161**

112 Section 24 of the Act provides–

> **24 Hearing by panel**
>
> The panel must consider all submissions referred to it and give a reasonable opportunity to be heard to—
>
> (a) any person who has made a submission referred to it;
>
> (b) the planning authority;
>
> (c) any responsible authority or municipal council concerned;
>
> (d) any person who asked the planning authority to prepare the amendment;
>
> (e) any person whom the Minister or the planning authority directs the panel to hear.

113 The Applicant does not contend that there has been any failure with an express requirement of s 24 of the Act, nor can it be given that neither it nor any of the persons apparently related to it, made submissions regarding the Amendment or sought to be heard before the panel at any time.

114 The purpose of a panel hearing is evident from s 24 of the Act itself; it is to consider all the submissions before it (being those submissions referred to it by the planning authority under s 23(1)(b)) and provide those persons identified (in s 24 (a)-(e)) an opportunity to be heard.

115 The Applicant contends that s 24(e) of the Act should be interpreted as containing an implied obligation on Council to inform and direct the Panel to hear a person who could be materially affected by Council's Revised Position.[79] That is, upon Council deciding to take its advocated position to the panel hearing, Council was under an implied obligation to consider who may be affected by the content of its submission to the Panel and inform the Panel of those persons and direct the Panel to hear from those persons.

116 The language of s 24(e) of the Act is clear and unambiguous. It imposes an obligation on a panel to hear from a person that the Minister or planning authority directs that panel to hear. Section 24(e) does not impose an express obligation on a planning authority to direct a panel to hear any person.

[79] See [46] of the Applicant's primary written submissions.

117 The evidence in this matter is that–

a. neither the Minister nor Council directed the Panel to hear the Applicant (or Plenty and Dundas Pty Ltd);

b. the Panel heard from those persons identified in Appendix B of the Panel Report (which did not include the Applicant or Plenty and Dundas Pty Ltd).

118 There is no evidence in this matter that the Panel did not consider all the submissions referred to it or did not give a reasonable opportunity to be heard to any of those persons identified in s 24(a)-(e) of the Act.

119 The Applicant contends that the express obligation under s161(1)(b) that the Panel is bound by the rules of natural justice in conducting its hearing, imposed on the Panel an obligation to afford procedural fairness to persons who may be adversely affected, in a direct way, by a proposed change to an amendment to a planning scheme.[80] It is this alleged obligation that the Applicant submitted required the Panel to provide the Applicant an opportunity to be heard.

120 Section 161 of the Act sets out the requirements for the hearing of the submissions referred to a panel appointed under Part 8 of the Act and provides–

**161 General procedure for hearings**

(1) In hearing submissions, a panel—

(a) must act according to equity and good conscience without regard to technicalities or legal forms; and

(b) is bound by the rules of natural justice; and

(c) is not required to conduct the hearing in a formal manner; and

(d) is not bound by the rules or practice as to evidence but may inform itself on any matter—

(i) in any way it thinks fit; and

(ii) without notice to any person who has made a submission.

(2) A panel may require a planning authority or other body or person to produce any documents relating to any matter being considered by the panel under this Act which it reasonably requires

(3) A panel may prohibit or regulate cross- examination in any hearing.

(4) A panel may hear evidence and submissions from any person whom this Act requires it to hear.

[80] See [9(a)] of the Applicant's Amended Statement of Grounds.

(5) Submissions and evidence may be given to the panel orally or in writing or partly orally and partly in writing.

121 The requirements of s 161 are not stand-alone requirements, that is, these requirements have no meaning or role unless considered in the overall context of Part 8 of the Act. Part 8 of the Act provides for the appointment of panels by the Minister for the purpose of conducting hearings on submissions under Part 3 and Part 4 of the Act.[81] For the purposes of this application, the requirement to conduct a hearing on submissions received in respect of an amendment to a planning scheme is found in s 24 of the Act. It is s 24 that identifies the persons that a panel must give a reasonable opportunity to be heard and it is s 161 that sets out the procedures that are required to ensure that a 'reasonable opportunity to be heard' has in fact been extended by the panel. There is nothing in s 161 of the Act or the other provisions in Part 8 that identify additional persons to whom the reasonable opportunity to be heard must be extended under s 24 of the Act.

122 The Applicant referred me to the Tribunal's decisions in *Danaher* as support for its contention that by operation of s 161 of the Act there exists a broader obligation of procedural fairness than simply hearing from all submitters. I reject this.

123 The decision in *Danaher* does not stand for the general proposition advanced by the Applicant. Deputy President Dwyer in *Danaher* found that the panel in that matter had failed to afford Mr Danaher, a submitter appearing before that panel, with natural justice in the conduct of its hearing because the panel was aware that Mr Danaher did not have the same knowledge as other parties appearing before the panel regarding the planning authority's post exhibition changes to the relevant amendment and regarding the position of other submitters appearing before the panel. Acknowledging that in the pre-panel phase the planning authority in *Danaher* was under no '*formal obligation to abide by principles of natural justice as between submitters (save perhaps generally under the local government charter). However, once submissions had been referred to a panel, both the Council and the panel were obliged to provide a level or procedural fairness commensurate with the nature of the matter before the panel'*.[82] Moreover, the panel in *Danaher* had been appraised of the shortcoming in the way that Mr Danaher had been treated by the planning authority and despite this there was no evidence that the panel sought to investigate or to do anything to rectify that shortcoming or investigate how the implications of the complaint on the conduct of a fair hearing. [83] The finding of Deputy President Dwyer is consistent with application of s 161(1)(b) of the Act on the specific facts before him in that matter.

124 The obligations under s 161 of the Act impose on a panel appointed under Part 8 to hear submissions referred to under s 23(1)(b) of the Act do not include a requirement that a panel must identify all the persons who may be affected,

---

81 See Divisions 5 and 6 of Part 4 of the Act.
82 *Danaher v Whittlesea CC* [2019] VCAT 552 at 154.
83 *Danaher v Whittlesea CC* [2019] VCAT 552 at 174.

whether materially or not, by submissions referred to it on the contents of a planning scheme amendment and to invite those persons to make submissions before the panel at its hearing. A panel appointed under Part 8 has no investigative role into the identification of potential submitters. The role of a panel conducting a hearing under s 24 of the Act is to consider all the submissions referred to it under s 23(1)(b) of the Act, provide a reasonable opportunity for persons specified in s 24(a)-(e) of the Act and to conduct such a hearing in accordance with the requirements of s 161 of the Act.

125 Therefore, I find that there has not been any failure on the part of –

a. Council, as the planning authority, to comply with s 24(e) of the Act; or

b. the Panel, to comply with s 24 of the Act; or

c. the Panel, to comply with s 161 of the Act.

## Section 25

126 Section 25 provides-

> **25 Report by panel**
>
> (1) The panel must report its findings to the planning authority.
>
> (2) In its report, the panel may make any recommendation it thinks fit.
>
> (3) A panel must not make a recommendation that an amendment be adopted with changes to the terms of any State standard provision to be included in the planning scheme.
>
> (4) Despite subsection (3), a panel may make a recommendation that an amendment provide for a State standard provision to be included in or deleted from the planning scheme.
>
> (5) A panel must not make a recommendation that an amendment be adopted with a change to—
>
> (a) any land credit amount or land equalisation amount specified in an infrastructure contributions plan that is to be incorporated into a planning scheme by the amendment; or
>
> (b) any estimate of the value of public purpose land (within the meaning of Part 3AB) on which the amounts referred to in paragraph (a) are based.

127 The Applicant's complaint against the Panel under s 25(2) of the Act is that the Panel was required to afford the Applicant procedural fairness in the form of providing it an opportunity to make submissions and be heard, before recommending the Further Revised Position. In advancing this complaint, the Applicant does not point to any conduct that it alleges amounts to a failure of the express requirements of s 25, rather it again relies on an alleged implied obligation to afford procedural fairness because it alleges the Panel's actions have the potential to adversely affect the legal rights and broader interests of

individuals. As I have found, the Tribunal does not have jurisdiction to consider any matters not directly arising from a failure to comply with an express requirement of Division 1, 2, or 3 of Part 3, or Part 8 of the Act. I therefore reject this contention.

128 After conducting its hearing in accordance with the requirement of s 161 of the Act, a panel is permitted to make any recommendation it sees fit[84] and may take into account any matter it thinks relevant in making its report and recommendations.[85]

129 The Panel in this matter having–

a. considered all the submissions referred to it under s23(1)(b) of the Act;

b. conducted a hearing under s 24;

c. heard from all the persons it was required to hear from under s 24(a)-(e);

d. conducted its hearing in accordance with the requirements of s 161;

provided the Panel Report that contained the Further Revised Position.

130 The 'Further Revised Position' is more accurately described as the Panel's recommendation for mandatory building heights in Precinct 4 within which the land is located. From the Panel Report, it is apparent that this recommendation was made after consideration of the matters raised in the submissions referred to it and after hearing from the planning authority and those submitters appearing at the hearing before the Panel. [86] There is no basis to find that the matters contained in the Panel Report regarding Precinct 4 are not based on matters considered to be relevant by the Panel.

131 Therefore, I find that there has not been any failure on the part of the Panel to comply with s 25 of the Act.

## CONCLUSION

132 For the reasons given above, the application under s 39 of the *Planning and Environment Act* 1987 is dismissed.

**Picha Djohan**
**Member**

84 Section 25(2) of the *Planning and Environment Act* 1987; subject to the limitations in s 25(3) and s 25(5) of the Act.
85 Section 168 of the *Planning and Environment Act* 1987.
86 See Affidavit of Eliza Jane Minney affirmed 6 December 2019, exhibit EJM – 15; pp 66-75