TP LEGAL
solicitors

PO BOX 685
NORTHCOTE VIC 3070
[redacted]
Website: www.tplegal.com.au

To	Victorian Planning Authority
Email	[redacted]
From	Patrick Doyle
Email	[redacted]
Our Ref	[redacted]
Subject	**Wonthaggi North East PSP and DCP**
Pages	5 (including this page). The information in this email is confidential. If you are not the intended recipient, you must not disclose or use the information contained in it. If you have received this email in error, please telephone us immediately.
Date	20 December 2021

Dear Sir / Madam,

We write to make this submission in relation to the Wonthaggi North East PSP and DCP, and the associated amendment to the Bass Coast Planning Scheme, on behalf of our client, Wentworth Pty Ltd.

Our client is the owner of land located at Wentworth Road and Heslop Road, identified as [redacted], and identified by parcel identification number 6 in the PSP and DCP.

By letter dated 30 November 2020, we made a submission in relation to this matter, on behalf of our client. We have since reviewed the documents published by VPA from 22 November 2021, as directed by the Standing Advisory Committee.

From the outset we wish to record our client's position that the modifications to the VPA's proposal, as indicated in the documents published from 22 November 2021, represent a significant improvement, in relation to our client's concerns relating to the DCP. Our client commends the VPA on its recognition of existing permits that are in place within the proposed PSP/DCP area, and its recognition of existing infrastructure obligations that are in place via s 173 agreements. Those circumstances apply to our client's land – land which has long been zoned for residential purposes, and is currently in the process of a staged residential subdivision pursuant to a planning permit, contingent on our client making the necessary infrastructure contributions in accordance with the permit and related s 173 agreement. Despite our client's remaining concerns, as set out below, our client seeks to be clear in its strong support for the overall thrust of changes now proposed by the VPA, particularly in relation to treatment of land already subject to development contribution obligations.

We make the following submissions on behalf of our client, in response to the published material:

- Consistent with our submission of 20 November 2020, our client's primary position remains that our client's land should be excluded from the DCP area, for all the reasons set out in that earlier submission, relating to the long-standing agreement that the development contributions required for the development of our client's land have been secured by way of s 173 agreements, with the clear intent to exempt Parcel 6 from this kind of DCP. We quote from s 173 agreement, dated 26 November 2020, which applies to Parcel 6:

> 2.5 No further Development Contributions Payable
>
> The Parties to this Agreement covenant and agree that in the event that a Development Contributions Plan for the Subject Land is approved after the date of this Agreement, the payment of the contributions as set out in this Agreement will be deemed to have satisfied the requirements of the Development Contributions Plan and no further development contributions would be required.

In addition to those reasons referred to in our submission of 20 November 2020 in this regard, we add the following points:

  - Firstly, the residential development Parcel 6 is in no way dependent on the approval of the PSP. Parcel 6 has long been zoned for residential purposes. It is currently in the General Residential Zone and was in the Residential 1 Zone before that. The proposed PSP does not propose to rezone our client's land, and there is no need to do so. This is distinct from other parcels of land, where the PSP would apply the Urban Development Zone. The more orthodox, and fair, approach is to impose this kind of DCP on land as a kind of corollary of the benefit to be conferred by way of a favourable rezoning (in colloquial terms, attaching a 'price' to a rezoning which facilitates development).

  - Secondly, to the extent that Parcel 6 might derive some degree of benefit from the infrastructure to be funded via the DCP, the nature and extent of any such benefit is significantly less than other land in the DCP area, which is not yet zoned to facilitate development. Rather, the nature and extent of any benefit that may accrue to Parcel 6 is more closely comparable to any such benefit that might accrue to other existing residential land in the north-eastern part of Wonthaggi that is ***not*** *included* in the DCP area. On that basis equity favours excluding Parcel 6.

  - Thirdly, it would be a simpler matter, both in terms of legal drafting, and also in terms of future administration of the DCP, including accurate projection of levies collected, to simply remove our client's land from the DPC (rather than leaving it within the DCP area, but exempting it from contributions in most circumstances).

If that change is made – to remove Parcel 6 from the DCP area – the following submissions would fall away. However the following submissions are made in the effect that our client's primary position, as set out above, is not adopted.

- As we understand it, the proposed form of DCP would exempt our client's land from development contributions in the event that the land is developed in accordance with the existing permit, namely [redacted], issued on 21 February 2018. It is submitted that a fairer and more appropriate position would be to exempt our client's land from development contributions under the DCP so long as the applicable contributions are made in accordance with the existing s 173 agreement (executed on 26 February 2020). Again, that is consistent with clause 2.5 of the s 173 agreement, as quoted above. Our client is current acting on the permit, and does not intend to let it expire. However, if the DCP would effectively apply to our client's land in the usual way, in the event that our client's permit was to expire, this would impose a disproportionate burden on our client, which cannot be justified, particularly given that the infrastructure needs of our client's land are relatively modest (as compared to the infrastructure needs of the broader DCP area). The existing s 173 agreement was plainly executed in contemplation of a DCP being proposed and approved in due course, and, by clause 2.5 of that agreement, the parties agreed that the payment of contributions required by the agreement would be deemed to have satisfied the requirements of any such future DCP, and that no further development contributions would be required. In the event that the permit was to expire, and a different permit sought in due course, and if that different permit approved some form of use or development which necessitated different or greater infrastructure provision than the s 173 agreement requires, it would be open to the responsible authority to require development contributions – and potentially a replacement s 173 agreement – by way of permit condition in those circumstances (rather than necessitating reliance on the DCP).

- On a similar note, it is not entirely clear from the published documents whether an amendment to our client's permit might be regarded as an opportunity for the imposition of a condition to seek to apply the 'default' DCP contributions on our client's land. Our client does not intend to seek to amend the permit, but in a project of this scale it is not possible to have assurance that no amendment will be required, for some unforeseen reason. We are conscious that s 73(2) of the Act imposes certain constraints on the kinds of conditions that might be imposed upon the amendment of a permit. However we are also conscious that s 46N of the Act might be relied on in support of the imposition of such a condition – a result we would argue to be an inequitable and disproportionate response to an amendment to the permit.

- It is not entirely clear whether VPA intends to seek (or 'require') any changes to our client's s 173 agreement. The 'summary of changes' document, published by VPA, refers to this concept under the heading 'Option 4 – VPA proposal'. We gather from parts 2.5 and 5.3.1 of the draft DPC that this concept is confined to circumstances

where there is no 'live' permit in place, which authorises the development of the relevant land (with any new permit being the 'trigger' to revisit a pre-existing s 173 agreement). We seek clarification as to whether the draft DCP, and associated published documents, are premised on any potential amendment to our client's s 173 agreement, in the event that Parcel 6 continues to be developed pursuant to our client's existing permit. We do not think that is the intent, but in case we are mistaken, we record that our client would oppose such a proposal.

- Putting aside those questions as to the policy position to be implemented via the DCP, we also respectfully suggest that there is scope for drafting improvements, within both the DCP and the Schedule to the DCP Overlay (**DCPO**). Although clause 4.3.1 of the DCP is clearly expressed, in terms of exempting land from the DCP obligations if a s 173 agreement imposes infrastructure contribution charges on that land, it appears preferable that a similar provision be included within both clause 5.3 of the DCP and clause 4.0 of the Schedule to the DCPO. Given the central, operative role of clause 5.3 within the DCP, we consider it important that this clause make it clear that compliance with the 'development contributions' requirements of applicable s 173 agreements be deemed to fulfil the requirements of the DCP, and that the DCP will not impose any further changes where such agreements are in force. In respect of the Schedule to the DCPO, it is preferable, in the interests of certainty and transparency, that the same exemptions be listed in this document, as well as in the DCP itself.[1] Our client seeks the following modifications to clause 4.0 of the Schedule to the DCPO (with equivalent modifications also sought within clause 5.3 of the DCP:

  Development of the following is exempt from the provisions of this overlay:

  - existing or approved dwelling.
  - non-government school.
  - housing provided by or on behalf of the Department of Health and Human Services.
  - **land that is subject to any of the s 173 agreement agreements registered by the following dealing numbers; AT823177H, AS373799K, AU665007E, AT579736E, AJ913506B, AJ338595E, AJ534369V, AJ6677735D.**

- Further in relation to clause 5.3 'Payment of contributions and payment timing', it is curious that '5.3.1 Development Infrastructure' includes a discussion of the intent to exempt land affected by existing relevant s 173s (albeit a discussion which we regard as inadequate, as discussed above), whereas '5.3.2 Community Infrastructure Levy' does not include any such statement at all. This seems to give rise to an implication that the community infrastructure levy in the DCP would apply to our client's land in the same way it applies elsewhere. We assume this cannot be the intent, firstly because it appears contrary to the intent expressed elsewhere in the documents, including in part 4.3.1 of the DPC, and secondly noting that our client's s 173 agreement, dated 26 November 2020, includes a clear 'community infrastructure levy' equivalent, at clauses 2.1(b) and 13, with clause 13 explicitly discharging our client from any community infrastructure levy that may be imposed pursuant to Part 3B of

[1] The latter submission is consistent with the recommendation of the Panel at page 23 in the report relating to Amendment C115 to the Banyule Planning Scheme.

the Act. It would obviously be inequitable for the DCP to impose such a levy on top of the community infrastructure levy already in force via the s 173 agreement.

Please do not hesitate to contact Patrick Doyle if you would like to discuss any aspect of this matter.

Yours faithfully
TP LEGAL

Patrick Doyle
Consultant