

*Planning and Environment Act 1987*

**Panel Report**

**Brimbank Planning Scheme Amendment C212brim  
Former Sunshine Landfills Environmental Audit Overlay**

**20 January 2021**

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### How will this report be used?

This is a brief description of how this report will be used for the benefit of people unfamiliar with the planning system. If you have concerns about a specific issue you should seek independent advice.

The planning authority must consider this report before deciding whether or not to adopt the Amendment. [section 27(1) of the *Planning and Environment Act 1987* (the Act)]

For the Amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for Planning for approval.

The planning authority is not obliged to follow the recommendations of the Panel, but it must give its reasons if it does not follow the recommendations. [section 31 (1) of the Act, and section 9 of the *Planning and Environment Regulations 2015*]

If approved by the Minister for Planning a formal change will be made to the planning scheme. Notice of approval of the Amendment will be published in the Government Gazette. [section 37 of the Act]

### *Planning and Environment Act 1987*

Panel Report pursuant to section 25 of the Act

Brimbank Planning Scheme Amendment C212brim

Former Sunshine Landfills Environmental Audit Overlay

20 January 2021



David Merrett, Chair



Catherine Wilson, Member

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## Glossary and abbreviations

2013 Audit Report	Environmental Audit of Energy Park and Carrington Drive Closed Landfills EPA Reference 68897-1, Mr Kenneth Mival of URS, February 2013
Act	<i>Planning and Environment Act 1987</i>
Amendment Act	Environment Protection Amendment Act 2018
Council	Brimbank City Council as the planning authority
DELWP	Department of Environment, Land, Water and Planning
EAO	Environmental Audit Overlay
EHS Review of Historical Document 2020	Review of Historical Documents – Former Sunshine Landfills prepared by EHS Support dated July 2020
EPA	Environment Protection Authority
Former Sunshine landfills	City of Sunshine and Hulett Street landfills
GHD 2020 Landfill Gas Risk Assessment	The Closed Sunshine Landfills – Landfill Gas Risk Assessment prepared by GHD dated January 2020
Golder report	518-528 Ballarat Road, Sunshine Phase 1 – Site History Assessment 2011
LFG	Landfill gas
MAC	Metropolitan Activity Centre
MD1	Ministerial Direction No. 1 (Potentially Contaminated Land)
MSS	Municipal Strategic Statement
PAN	Pollution Abatement Notice
Plan Melbourne	Plan Melbourne 2017-2050
PPN30	Planning Practice Note 30: Potentially Contaminated Land
SEPP	State Environment Planning Policy (Prevention and Management of Contaminated Land)

## Overview

Amendment summary	
<b>The Amendment</b>	Brimbank Planning Scheme Amendment C212brim
<b>Common name</b>	Former Sunshine Landfills Environmental Audit Overlay
<b>Brief description</b>	The Amendment applies the Environmental Audit Overlay to the former landfill areas and some surrounding industrial and residential land
<b>Subject land</b>	<ul style="list-style-type: none"> <li>• Sunshine Landfills located at 570 and 570A Ballarat Road and 27 Carrington Drive, Albion and 137A Denton Avenue, St Albans</li> <li>• residential land on Denton Avenue, Toora Court and Karen Place, St Albans</li> <li>• industrial land on Ballarat Road and Carrington Drive, Albion which comprises properties used and developed for industry and community/recreation</li> <li>• part of the M80 Western Ring Road</li> </ul>
<b>The Proponent</b>	Brimbank City Council
<b>Planning Authority</b>	Brimbank City Council
<b>Authorisation</b>	5 March 2020
<b>Exhibition</b>	25 June to 6 August 2020
<b>Submissions</b>	<p>11 Submissions: 9 opposed or conditional support, 2 in support</p> <ol style="list-style-type: none"> <li>1. Albion Polish Club</li> <li>2. Mr Khanh Ho</li> <li>3. Sica Consulting</li> <li>4. Mr Suresh Nadarajah</li> <li>5. Van Minh Nguyen and This Thao Tran</li> <li>6. Belle Deeds Pty Ltd</li> <li>7. Melbourne Water</li> <li>8. Environment Protection Authority</li> <li>9. Ms Sue Paeglitis</li> <li>10. Mr Milan Zukanovic</li> <li>11. Department of Transport</li> </ol>

### Panel process

<b>The Panel</b>	David Merrett (Chair) and Catherine Wilson
<b>Directions Hearings</b>	Video conference, 16 October and 26 November 2020
<b>Panel Hearing</b>	Video conference, 7, 8 and 9 December 2020
<b>Site inspections</b>	Unaccompanied, 4 December 2020

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**Parties to the Hearing**

- Brimbank City Council (as planning authority) represented by Mr Greg Tobin who called the following expert evidence:
  - land contamination from Mr Patrick Clarke of Senversa
  - planning from Mr John Glossop of Glossop Town Planning
- Brimbank City Council (as landowner) represented by Mr Stefan Fiedler of Russell Kennedy Solicitors
- Environment Protection Authority represented by Ms Trisha Brice
- Belle Deeds Pty Ltd represented by Mr Daniel Epstein of Counsel
- Ms Sue Paeglitis (withdrew prior to Hearing)
- Albion Polish Club represented by Mr Marek Swida
- Mr Milan Zukanovic represented by Mr Daniel Epstein of Counsel

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**Citation**

Brimbank Planning Scheme PSA C212brim [2021] PPV

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**Date of this Report**

20 January 2021

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## Executive summary

Brimbank Planning Scheme Amendment C212brim (the Amendment) seeks to apply the Environmental Audit Overlay to the former Sunshine landfills and some surrounding residential and industrial land. The Environmental Audit Overlay has been applied based on landfill encroachment onto private land. Landfill gas risk was not part of this consideration but may lead to further planning restrictions in the future.

The history of this land dates back many decades. It was one of the main waste disposal sites for metropolitan Melbourne in the 1970's and 1980's. The community was presented with over 20,000 pages of information prior to the exhibition of the Amendment. Council provided site specific information sheets to residents that outlined the source of information that addressed potential contamination. Various site audits, landfill gas risk assessments, historical reviews of documents, airphotos and evidence were provided to the Panel.

Eleven submissions were received with nine opposed or providing conditional support. The Environment Protection Authority was one of two submissions in support of the Amendment.

Key issues raised in submissions included:

- Landowners would suffer personal financial impacts such as additional development costs and loss of land value.
- There was no evidence that some private land was contaminated or potentially contaminated.
- The Environmental Audit Overlay should only be applied in part of the land to those areas with potential contamination.
- That a previous audit should be considered as satisfying the Environmental Audit Overlay requirement.
- The Environmental Audit Overlay should be deferred to a future request to rezone the land.

The Panel found that private financial impacts arising from the Amendment are not a relevant consideration at the Amendment stage. The public financial costs are relevant.

The test for the application of the Environmental Audit Overlay is potential for contamination and not evidence of contamination. It is the audit process that will determine the degree of contamination.

The Panel found that if there was evidence of potential contamination that the Environmental Audit Overlay was the appropriate Victoria Planning Provision statutory tool that has been tailored to address these issues. The Panel found its application to the whole of the site was the best approach as the source of risk, and its extent, is underground and not easily determined and therefore a precautionary approach should be taken to its application. This is generally consistent to its application in other areas of Melbourne and was supported by the Environment Protection Authority.

A residential subdivision to the north was developed in the 1970's that is partly over the former landfill. The Panel found that the application of the Environmental Audit Overlay in this area was appropriate but agreed with Council that 4 and 5 Toora Court, St Albans should not have the Environmental Audit Overlay applied as the evidence indicated that they were not built over land containing landfill.

The industrial areas to the south, in general, have had the Environmental Audit Overlay applied appropriately. The Panel found a high degree of caution needs to be exercised in considering areas of potential contamination. While there is limited landfill encroachment for 528A Ballarat Road and no encroachment for 19 Carrington Drive, the Panel found that there was sufficient doubt created by the review of airphotos that justified the application of the Environmental Audit Overlay.

The Panel found the application of the Environmental Audit Overlay to the M80 Western Ring Road reserve was appropriate and would not impact its function.

### **Recommendation**

Based on the reasons set out in this Report, the Panel recommends that Brimbank Planning Scheme Amendment C212brim be adopted as exhibited subject to the following:

- 1. Delete the Environmental Audit Overlay from 4 and 5 Toora Court, St Albans.**

# 1 Introduction

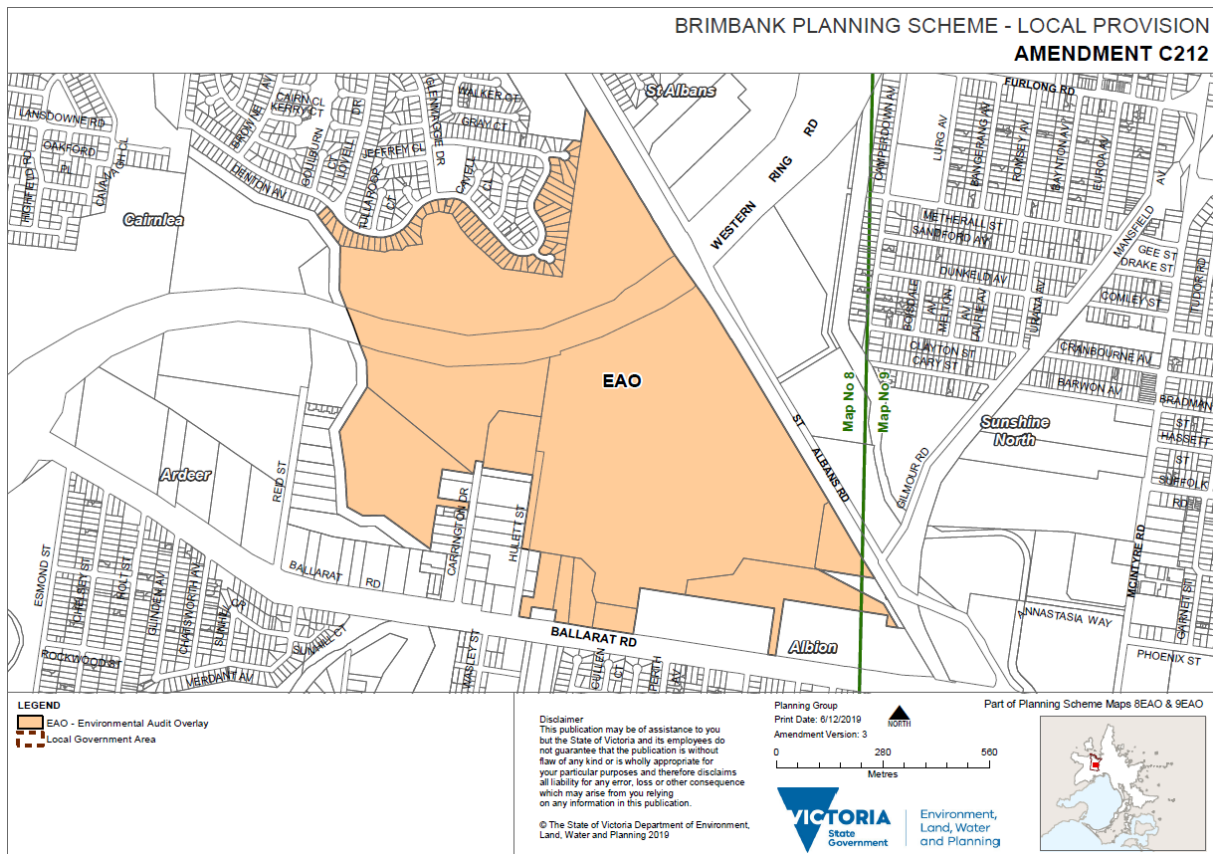
## 1.1 The Amendment

### (i) Amendment description

The purpose of the Amendment is to apply an Environmental Audit Overlay (EAO) to land that formed part of the closed City of Sunshine and Hulett Street landfills (former Sunshine landfills) and adjoining land, which may be potentially contaminated because of past activities associated with landfill operations and remediation.

The application of the EAO (Figure 1) ensures that a requirement for an environmental audit is met before the commencement of any sensitive use (residential use, childcare centre, pre-school centre or primary school) or before the commencement of construction or carrying out of buildings and works associated with a sensitive use.

**Figure 1 Proposed application of the EAO**



### (ii) The Amendment land

The Amendment applies to the following land shown in Figures 1 and 2:

- the Sunshine Landfills located at 570 and 570A Ballarat Road and 27 Carrington Drive, Albion and 137A Denton Avenue, St Albans including in part the M80 Western Ring Road
- residential land on Denton Avenue (Nos. 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 1/105, 2/105, 107, 109, 111, 113, 115, 117, 119, 121A, 121B, 121, 123A, 123B, 123,

125, 127, 129, 131, 133, 135, 137, 139, 141, 143), Toora Court (Nos. 4, 5, 6, 7 and 8) and Karen Place (Nos 1, 2, 3, 4, 5, 6, 7 and 8), St Albans

- industrial land on Ballarat Road (Nos. 576, 562-568, 556-560 and 528A and 528B) and Carrington Drive (Nos. 19 and 20), Albion which comprises properties used and developed for industry and community/recreation<sup>1</sup>.

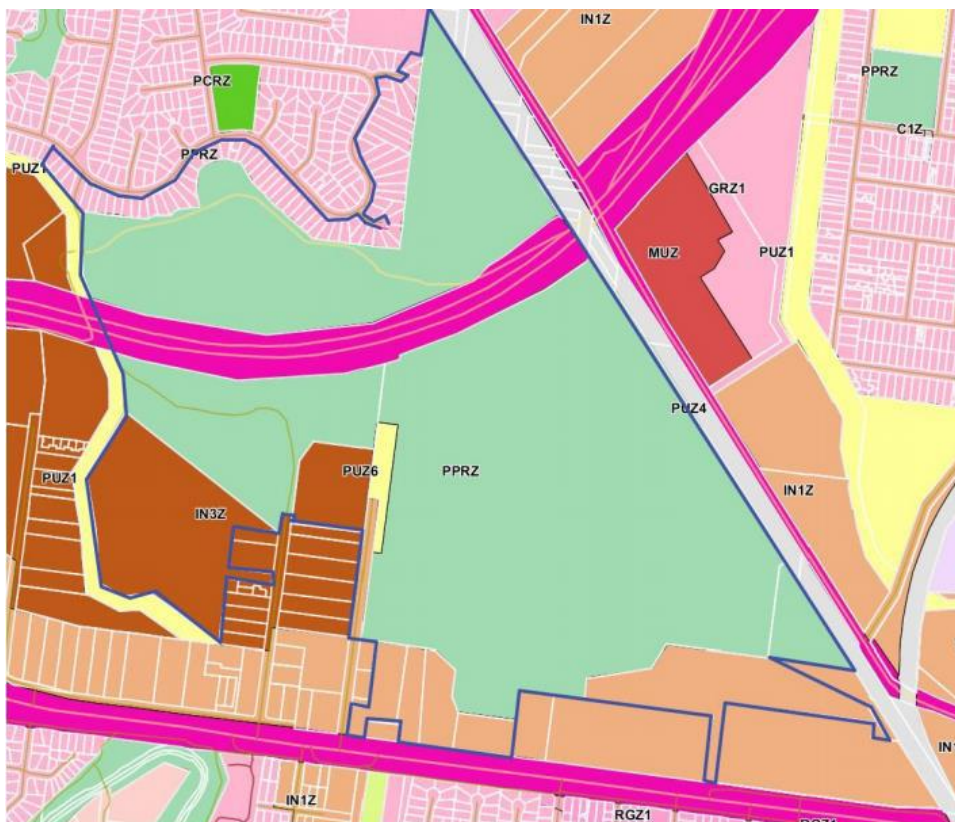
The Amendment land comprises 104.5 hectares<sup>2</sup>. The former Sunshine landfills that are owned by Council and zoned Public Park and Recreation Zone occupy 74.28 hectares of the overall Amendment land area. The balance comprises:

- the surrounding privately owned land (21.8 hectares)
- the M80 Western Ring Road (7.74 hectares)
- Hulett Street (0.54 hectare).

The land is located on land to the north west of the junction of Ballarat and St Albans Roads and east of Jones Creek.

The land under Council ownership is now used as the Sunshine Energy Park and Carrington Drive Reserve. The land is bisected by the Western Ring Road in an east-west direction. The Sunbury Railway line extends along the eastern boundary and further east is residential and industrial land.

**Figure 2** Amendment land (defined by blue line)



<sup>1</sup> Including the Albion Polish Social Club, Model Railway Club, St John's Ambulance Training Facility, Remote Control Car Club and Pidgeon Club

<sup>2</sup> Council's Part B submission referred to 47.1 hectares in error.

**(iii) Other actions**

Council indicated that this Amendment is one step in a package of actions for the former Sunshine landfills. These include:

- works to improve the capping, monitoring, infrastructure and rehabilitation of the Sunshine landfills
- continuing compliance with EPA Post Closure Pollution Abatement Notices
- gas and vapour monitoring in homes, businesses and community facilities (subject to the consent from landowners and occupants)
- an ongoing engagement program with a range of stakeholders including Government Agencies and consultation with directly affected landowners and occupiers and the wider community
- further evaluation of the landfill gas risk and vapour assessments prepared in 2019 and 2020, which found that the human health risk to residents and workers was low. These assessments have been circulated to the Panel and parties.

Council acknowledged that further planning controls may be required in the future to address issues such groundwater, landfill gas and vapour impacts.

**1.2 Land use history**

Council's Part A submission contained a detailed land use history.

The former Sunshine landfills occupy seven exhausted basalt quarry pits (Figure 3). The City of Sunshine landfill:

- comprised former quarries 1, 2, 3, 4 and 5
- operated between 1970 and 1978
- has an area between 17-20 hectares<sup>3</sup>, a depth between 12 and 22.5 metres and a volume of approximately 2 million cubic metres.

The Hulett Street landfill:

- former quarries 6 and 7
- operated between 1978 and 1988 or 1990 depending on the source information
- has an area of 20 hectares<sup>4</sup>, a depth between 20 and 22 metres and a volume of approximately 3.5 to 4.5 million cubic metres.

Council added<sup>5</sup>:

The Sunshine Landfills operated under EPA Licence Nos. HS641/5 and HS1275/5 which allowed the deposit of household, municipal and solid and liquid industrial waste. The types of liquid wastes that could be received were limited by the licence. Anecdotal evidence suggests that a range of other wastes were disposed of at the site, including medical wastes.

The Sunshine Landfills were not lined (consistent with common practice at the time).

During operation, the land on which the Sunshine Landfills were located was zoned for industrial purposes.

Following its closure:

<sup>3</sup> This area may be in error given the correction made by Council at the Hearing

<sup>4</sup> Ibid

<sup>5</sup> Council Part A submission, paragraphs 28-31

- The EPA licence was revoked in 1990 but records indicate that a Pollution Abatement Notice was never issued at that time. It wasn't until 2011 that a PAN was issued for the site requiring an Environmental Audit.
- Landfill gas extraction and power generation infrastructure was installed at the Hulett Street site in April 1992, with landfill gas collected from both sites. The power plant was converted to run on natural gas around 2002 with the flare continuing to manage landfill gas as part of the lease agreement. The power station was closed in 2009 with the landfill gas flare subsequently falling into disrepair.
- In 1994, part of the Sunshine Landfills sites was acquired from Council for the construction of the Western Ring Road.

**Figure 3** Sunshine Landfills quarry holes (defined by yellow line)



Council provided the following summary of key dates for the Amendment land (Table 1).

**Table 1** Key dates<sup>6</sup>

Date	Event
1969	The Commission of Public Health approved the City of Sunshine’s request to use the former basalt quarry for the disposal of municipal waste. No restrictions were imposed in relation to liquid waste
1970s	The residential rezoning (to Reserved Living Zone) and subdivision of the land to the north of the former Sunshine landfills was initiated by and

<sup>6</sup> Council Part A submission

	approved by the Victorian Government. This subdivision was known as the Nickson Estate and now forms part of St Albans
1970	Albion Reid (the quarry owner and operator which was acquired by Boral in 1976) leased the part of the site located to the west of Hulett Street at the end of Carrington Drive (the City of Sunshine landfill). The City of Sunshine landfill starts accepting waste
1973	The City of Sunshine applied to the Land Wastes Management Branch of the Commission of Public Health for a licence to dispose of wastes, including liquid wastes in at the City of Sunshine landfill
1974/1975	Three monitoring bores close to the City of Sunshine landfill were installed and monitored by the EPA and Mines Department
1975	In May 1975, the Land Wastes Management Branch issued Licence No. HS641/5 for the disposal of waste at the City of Sunshine landfill. The licence was limited to the disposal of solid, inert industrial, putrescible, and domestic garbage  Three appeals were lodged regarding the issue of Licence No. HS641/5. In July 1976, the final determination of the appeals by the EPA Appeal Board resulted in the granting of an amended licence allowing up to 5 million gallons of specified liquids. The licence stated that no liquid waste could be deposited after 31 March 1977
1976	Albion Reid leased to the City of Sunshine part of the quarry located to the east of Hulett Street for use as a landfill (the Hulett Street landfill)
1977	In June, Sunshine City Council applied for Licence No. HS1275/5 to operate Hulett Street landfill  In September, the EPA granted Licence No. No. HS1275/5
1978	The City of Sunshine landfill reached capacity and the Hulett Street landfill started accepting waste
1988 or 1990	Hulett Street landfill stopped accepting waste
1991-2010	Part of the Sunshine Landfills (Sunshine Energy Park) was leased by Council to the Victorian government for power generation purposes
1994	Part of the Sunshine Landfills sites was acquired from Council for the construction of the Western Ring Road  The former Cities of Sunshine and Keilor formed Brimbank City Council
2010-2014	GHD, on behalf of Council, conducted three phases of environmental assessment (resulting in the GHD Phase 1, 2 and 3 Reports), a landfill cap assessment, a hydrological assessment and landfill gas monitoring report in 2013  The former Sunshine landfills were also subject to an environmental audit (the 2013 Audit Report) in accordance with the <i>Environment Protection Act 1970</i>
13 October 2011	After Council advised the EPA of the GHD Phase 1 Report findings, the EPA issued a Post Closure Pollution Abatement Notice No. 9854, including condition 2 which required an environmental audit reports in accordance with section 53V of the Environment Protection Act 1970. Council appointed an environmental auditor in January 2011

2012-2019	Various works to improve landfill capping
15 May 2013	EPA issues two Pollution Abatement Notices (PAN). PAN No. 90003670 required a hydrogeological assessment and PAN No. 90003671 which required a Rehabilitation and Aftercare Management Plan. Both PANs were subsequently revoked once their requirements were met
February 2013	The 2013 Audit Report was completed
March 2014	The Aftercare Management Plan was completed
23 June 2017	EPA issues Post Closure PAN Nos. 900005541 and 900077618 which, in summary, requires control of contaminated water/leachate, dust, odour and landfill gas, carry out environmental monitoring accordance with the Aftercare Management Plan
December 2019	The GHD 2019 Vapour Risk Assessment was completed
January 2020	GHD 2020 Landfill Gas Risk Assessment was completed
July 2020	EHS Review of Historical Documents 2020 was completed

Mr Fiedler for Council (as landowner) provided a detailed history of the land that referred to Victorian Auditor-General Office reports<sup>7</sup>, parliamentary committee investigations<sup>8</sup>, the Victorian Landfill Register, events around the residential subdivision to the north (Nickson estate), types and volumes of waste and licences and ownership of various landfill pits.

The St Albans residential subdivision (Nickson Estate) to the north of the Carrington Drive Reserve was approved by the State Government in 1974 as part of a 688 lot subdivision. This subdivision contains land affected by the Amendment in Denton Avenue, Toora Court and Karen Court.

Mr Fiedler informed the Panel that it is possible that a class action may be initiated for the private landowners impacted by the former Sunshine landfills.

### 1.3 Background documents

There was an immense amount of material arising from the documents amounting to over 20,000 pages, many of which are highly technical. To assist the community to understand this body of work property specific summary sheets were provided to 75 private landowners in addition to presentations to community and at other meetings prior to (early 2020) and during exhibition (mid 2020) of the Amendment. 55 high resolution aerial photographs from 1951 to 1991 were used to identify land changes over time.

The technical assessments include:

- Report for Sunshine Energy Park and Carrington Drive Reserve – Preliminary Environmental Assessment (Phase 1) prepared by GHD dated September 2010
- Report for Sunshine Energy Park and Carrington Drive Reserve – Preliminary Environmental Assessment (Phase 2) prepared by GHD dated April 2012
- Sunshine Energy Park and Carrington Drive Reserve – Preliminary Environmental Assessment (Phase 3) prepared by GHD dated 25 January 2013

<sup>7</sup> For a site in Ballarat

<sup>8</sup> Parliamentary Committee of Hidden Defects in Land for land in Yarraville

- Environmental Audit Report - Energy Park and Carrington Drive Closed Landfills prepared by URS dated 7 February 2013 (2013 Audit Report)
- Sunshine Energy Park and Carrington Drive Reserve – Framework Rehabilitation Plan and Aftercare Management Plan prepared by GHD dated March 2014
- Review of Historical Documents – Former Sunshine Landfills prepared by EHS Support dated July 2020 (EHS Review of Historical Documents 2020)
- The Closed Sunshine Landfills – Vapour Health Risk Assessment prepared by GHD dated December 2019
- The Closed Sunshine Landfills – Landfill Gas Risk Assessment prepared by GHD dated January 2020 (GHD 2020 Landfill Gas Risk Assessment)
- Closed Hulett Street Landfill at Sunshine Energy Park - Vapour Health Risk Assessment prepared by GHD dated July 2020
- Closed Hulett Street Landfill at Sunshine Energy Park - Landfill Gas Risk Assessment prepared by GHD dated July 2020.

Appendix A contains a list of tabled documents.

#### **1.4 Council's role in the Amendment**

Council engaged legal advocates for the Hearing to make submissions in its dual role as:

- the planning authority
- all its other capacities (such as landowner and infrastructure provider) apart from the planning authority.

Mr Fiedler explained this further<sup>9</sup>:

The division of legal representation was established prior to initiating Amendment C212brim to ensure independence during the preparation of Amendment C212brim from the Council's various interests, including, but not limited to, land ownership, aftercare of the Closed Sunshine Landfills, successor in law to the former City of Sunshine and advocate for the local community of Brimbank and the west of greater metropolitan Melbourne more broadly.

Furthermore, to avoid any doubt, Mr Fielder adopted Council's Part A and Part B submissions and Mr Glossop's and Mr Clarke's planning and land contamination evidence.

#### **1.5 Proposed Interim controls**

Council applied to the Minister for Planning for interim planning controls (Amendment C221) in the form of the Specific Controls Overlay. This, and its associated incorporated document, Council submitted would operate in the same manner as the EAO. Council advised Planning Panels Victoria after the Hearing that the Minister for Planning refused to approve the interim controls.

#### **1.6 Post exhibition changes**

Council supported the deletion of the EAO from 4 and 5 Toora Court, St Albans.

Council advised the application of the EAO to the Amendment land is based on and supported by the findings in the 2013 Audit Report and Appendices.

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<sup>9</sup> Council submission (as landowner etc.), paragraph 3

After the preparation and exhibition of the Amendment, the EHS Review of Historical Documents 2020 was prepared to supplement the 2013 Audit Report. This review supports the application of the EAO to the Amendment Land except for 4 and 5 Toora Court, St Albans and 19 Carrington Drive, Albion.

Council submitted that *“Mr Mival does not support the application of a planning restriction on 4 and 5 Toora Court on the basis that there is no evidence of any landfill encroachment or presence of waste on these properties.”*<sup>10</sup> It accepted that *“further examination in the EHS Review of Historical Documents 2020 justifies exclusion of 4 and 5 Toora Court from the EAO. Mr Mival provides that a planning control is not justified.”*

Numbers 4 and 5 Toora Court, St Albans and 19 Carrington Drive, Albion are discussed in more detail in this report.

## **1.7 Procedural issues**

Planning Panels Victoria received a letter dated 16 November 2020 from some submitters that requested the:

- Panel inspect the site
- Hearing be conducted in person rather than online
- Hearing be rescheduled to July 2021 to allow soil testing which could not be undertaken due to COVID-19.

A further Direction Hearing was held on 26 November 2020 to consider the above requests and was attended by the main parties to the Amendment.

Having heard from the parties, the Panel rejected the requests for the Hearing to be in person and the Hearing to be rescheduled. The Panel’s consideration of these matters was outlined in a letter sent to all parties on 27 November 2020. The key reasons for rejecting the requests were that the parties had adequate warning to prepare as they had been advised about the Amendment in February 2020, the pre-set Hearing dates were advised in July 2020 and relevant consultants had been able to conduct soil tests since February 2020.

The Panel made an unaccompanied site inspection on 4 December 2020.

## **1.8 Summary of issues raised in submissions**

### **(i) Planning Authority**

The key issues for Council as the planning authority were:

- the onus of proof rests with Council as the former landowner and operator of the landfills but it does not require absolute evidence of contamination, just the potential for it
- Council has a duty of care and legal obligation to disclose the potential contamination of privately owned land
- Council has evidence of potential contamination through the 2013 Audit Report and the EHS Review of Historical Documents 2020
- there is an urgent need to act as land ownership is changing and more intensive forms of development proposed associated with sensitive uses

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<sup>10</sup> Author of the 2013 Audit Report and EHS Review of Historical Documents 2020

- the EAO is the appropriate tool to respond to land that may be potentially contaminated
- with the exception of 4 and 5 Toora Court, St Albans there are no changes to the Amendment.

**(ii) The Landowner**

The key issues for Council as the landowner are the same as above.

**(iii) Environment Protection Authority**

The key issues for the EPA were:

- it supports the Amendment
- the EAO is appropriate planning tool to identify land that may be potentially contaminated
- the EAO should be applied to all of the land
- the extent of the waste footprint, vapour risk and groundwater contamination has not been fully delineated at and from the closed landfills and further investigation and monitoring should take place alongside the management provided by the EAO
- the consideration of landfill gas risk is a matter this Amendment does not consider and that it will be considered in the future
- it is “reasonable” that 4 and 5 Toora Court, St Albans be deleted from the EAO and 19 Carrington Drive be retained in it.

There are no matters that are unresolved.

**(iv) Department of Transport**

The Department of Transport objected to the application of the EAO on the M80 Western Ring Road reserve as it would encumber an arterial road.

This issue has not been resolved.

**(v) Individual submitters**

The key issues by submitters were:

- the EAO should not be applied as there is no evidence of contamination
- the EAO could be partly applied to land
- the EAO should not be applied to land where an environmental audit was approved in support of a medium density residential development
- the EAO should not be applied as any potential contamination should be considered when the rezoning of the land is proposed
- Council should cover the cost of an environmental audit and clean up
- the EAO will impact on property values.

These issues have generally not been resolved.

## **1.9 The Panel’s approach**

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

The Panel considered all written submissions made in response to the exhibition of the Amendment, observations from the site inspection, and submissions, evidence and other material presented to it during the Hearing. It has reviewed a large volume of material and has had to be selective in referring to the more relevant or determinative material in the Report.

This Report deals with the issues under the following headings:

- Planning context
- Strategic justification
  - The use of the EAO
  - How should the EAO be applied?
- Residential land
  - Financial impacts
  - 57 Denton Avenue, St Albans
  - 7 Toora Court, St Albans
  - 4 and 5 Toora Court, St Albans.
- Industrial land
  - 19 Carrington Drive, Albion (Albion Polish Club)
  - 556-560 and 562-568 Ballarat Road, Albion
  - 528A and 528C Ballarat Road, Albion.

## 2 Planning context

### 2.1 Planning policy framework

Council submitted that the Amendment is supported by various clauses in the Planning Policy Framework, which the Panel has summarised below.

#### Victorian planning objectives

The Amendment will assist in implementing State policy objectives set out in section 4 of the Act by:

- providing for the fair, orderly, economic and sustainable use, and development of land (Objective a)
- securing a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria (Objective c)
- facilitating development (Objective e)
- balancing the present and future interests of all Victorians (Objective g).

#### Clause 13 (Environment risks and amenity)

The Amendment supports Clause 13.04-1S (Contaminated and potentially contaminated land) by:

- ensuring potentially contaminated land is suitable for its intended future use and development, and that contaminated land is used safely
- requiring applicants to provide adequate information on the potential for contamination to have adverse effects on future sensitive land uses
- facilitating the remediation of contaminated land.

The State Environment Planning Policy (Prevention and Management of Contaminated Land) (SEPP) and Ministerial Direction No. 1 (Potentially Contaminated Land) (MD1) are policy documents. The SEPP seeks to prevent the contamination of land and where pollution has occurred, adopt management practices that will ensure unacceptable risks to human health and the environment are prevented and pollution is cleaned-up or managed to protect beneficial uses. It refers to the role of MD1 and the obligations of section 60 of the Act regarding potentially contaminated land.

#### Clause 21 (the Municipal Strategic Statement - MSS)

The Amendment supports Clause 21.09 (Industrial land use) of the MSS which recognises the amenity impacts, including contamination that have resulted from poor past environmental management and the need to apply the EAO to areas which may be potentially contaminated.

### 2.2 Other relevant planning strategies and policies

#### (i) Plan Melbourne

*Plan Melbourne 2017-2050* (Plan Melbourne) sets out strategic directions to guide Melbourne's development to 2050, to ensure it becomes more sustainable, productive and liveable as its population approaches 8 million. It is accompanied by a separate implementation plan that is regularly updated and refreshed every five years.

Plan Melbourne is structured around seven Outcomes, which set out the aims of the plan. The Outcomes are supported by Directions and Policies, which outline how the Outcomes will be achieved. Outcomes that are particularly relevant to the Amendment are set out in Table 2.

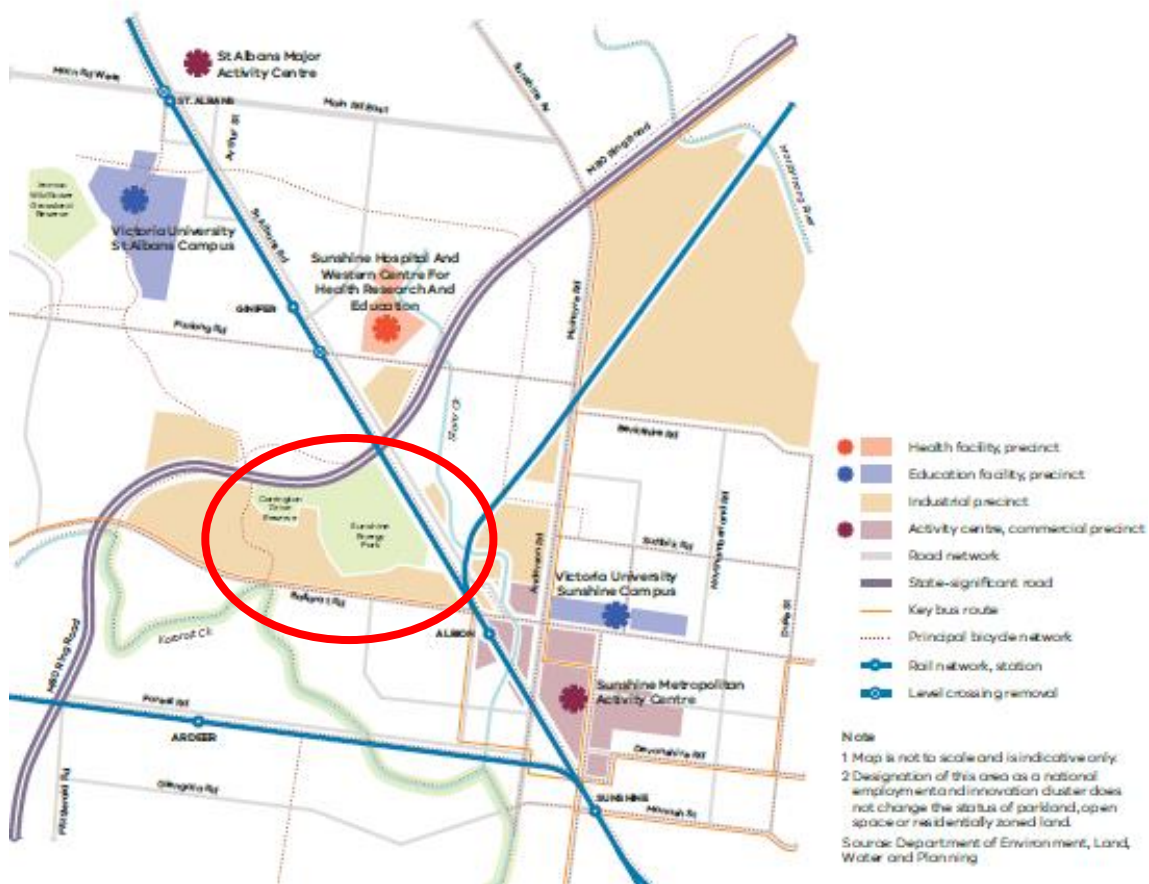
**Table 2 Relevant parts of Plan Melbourne**

Outcome	Directions	Policies
<p>Outcome 2</p> <p>Melbourne provides housing choice in locations close to jobs and services</p>	<p>Direction 2.4 recognises that many sites across Melbourne have legacy environmental contamination issues and that for some sites the cost of remediate may limited-use options</p>	<p>Policy 2.4.2</p> <p><i>Facilitate the remediation of contaminated land, particularly on sites in developed areas of Melbourne with potential for residential development</i></p>

The Plan Melbourne 2017-2050 Implementation Plan seeks to “improve the processes for assessing and remediating contaminated sites to reduce the uncertainty of clean-up requirements and bring land to market sooner.”

The Sunshine Energy Park, Carrington Drive Reserve, and the recreational and industrial land on the north side of Ballarat Road are identified on Map 10 of the Sunshine National Employment and Innovation Cluster (Figure 4).

**Figure 4 Sunshine National Employment and Innovation Cluster (landfills circled in red)**



Plan Melbourne identifies Sunshine as one of nine existing Metropolitan Activity Centres (MAC). MAC's are "*places of state significance that will be the focus of investment and growth.*" The land is close to but not considered part of the MAC.

## 2.3 Planning scheme provisions

A common zone and overlay purpose are to implement the Municipal Planning Strategy and the Planning Policy Framework.

### (i) Zones

The land is contained in various zones. The Amendment does not propose any changes to zones.

### (ii) Overlays

The only planning overlay that currently affects the land is the Development Contributions Plan Overlay (Schedule 2 – Brimbank Development Contributions Plan). The Amendment does not propose any changes to this overlay.

## 2.4 Ministerial Directions and Practice Notes

### Ministerial Directions

The Explanatory Report discusses how the Amendment meets the relevant requirements of *Ministerial Direction No. 11 (Strategic Assessment of Amendments)* and *Planning Practice Note 46: Strategic Assessment Guidelines*, August 2018. That discussion is not repeated here.

*Ministerial Direction No. 1 (Potentially contaminated land)* (MD1) seeks to "*ensure that potentially contaminated land is suitable for a use which is proposed to be allowed under an amendment to a planning scheme and which could be significantly adversely affected by any contamination.*"

MD1 defines:

- Potentially contaminated land as "*land used or known to have been used for:*
  - a) *industry*
  - b) *mining or*
  - c) *the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of the land).*"
- Sensitive uses as "*a residential use, a childcare centre, a pre-school centre or a primary school.*"

MD1 requires:

In preparing an amendment which would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of that land are or will be suitable for that use.

MD1 identifies two ways in which a planning authority can meet the above requirement. One option is to complete an environmental audit and the other is to require the environmental audit later but before a sensitive use or development commences. The second option is in effect the application of the EAO.

The Amendment accords with MD1 by applying the EAO to identify land which evidence suggests is potentially contaminated and will require an environmental audit before any sensitive use or developments commences.

*Ministerial Direction No. 19 (Preparation and content of amendments that may result in impacts on the environment, amenity, and human health)* puts the onus on and requires planning authorities to seek advice from the EPA and sets out four circumstances in which the advice of the EPA must be sought, including:

- Allow the use or development of potentially contaminated land, and/or trigger the requirements of Ministerial Direction No. 1 or State Environment Protection Policy (Prevention and Management of Contamination of Land)
- Allow the use or development of land that could result in water, noise, air, or land pollution impacts on the environment, amenity, or human health, including as defined by State Environment Protection Policies.

Council discussed the Amendment with the EPA prior to its exhibition. The EPA provided comment on 9 December 2019 and a formal submission during exhibition.

### **Planning Practice Notes**

*Planning Practice Note 30: Potentially Contaminated Land (June 2005)* (PPN30) is relevant to the Amendment. PPN30 sets out how potentially contaminated land is identified and what uses might have a high or medium potential for contamination. It identifies that land used for “*Landfill sites/waste deposits*” has a high potential for contamination.

PPN30 Table 2 (Assessment Matrix) identifies that where sensitive uses such as dwellings, residential buildings, childcare centres, pre-schools or primary schools are proposed in areas for high potential for contamination, the appropriate action is to:

Require an environmental audit as required MD1 or the EAO when a planning scheme amendment or planning permit application would allow a sensitive use to establish on potentially contaminated land.

## 3 Strategic justification

### 3.1 The issues

The issues are whether:

- the application of the EAO is consistent with the Planning and Environment Act 1987, State and Local planning policy
- the EAO should be applied to property boundaries or those areas individually that may be potentially contaminated.

### 3.2 The use of the EAO

#### (i) Evidence and submissions

Mr Glossop provided planning evidence on behalf of Council. He concluded the EAO was an appropriate planning control to identify land that was potentially contaminated. Mr Glossop considered:

This amendment is principally about the risk caused by this former land use to new uses given that the proposed control (the EAO) is not retrospective and cannot regulate existing use or development. The second issue is whether the planning authority has used to correct 'tool' to identify and manage this risk.

Mr Glossop submitted that the consideration of risk to human health was now commonplace in planning policy. He referred to policy for the protection of potable water catchments, bushfire risk and flooding risk as examples. Regarding the EAO, he considered:

In the planning profession, the concept of risk management and our capacity to accept risk is demonstrated by our approach to developing potentially contaminated land. In these situations, the application of the EAO requires either a Statement or Certificate of Environmental Audit whenever there is a change of land to a sensitive use, regardless of the history of the site, the type of development proposed or whether such a requirement is 'reasonable' or not. In addition to the requirements for a Statement or Certificate of Environmental Audit, the application of the EAO affords an awareness to current and potential landowners (among others) of the risk of that potential contamination, through its visibility in the planning scheme and (in turn) on a Section 32 vendor statement.

Mr Glossop submitted the Amendment was more reactive than proactive as the existing zones already allow, with a planning permit, some sensitive uses. In the Industrial 3 Zone this includes a caretaker's house, a childcare centre and pre-school centre (kindergarten). These are also permissible uses in the General Residential Zone that applies to the St Albans land north of the landfills.

Mr Glossop concluded:

- There is clear strategic support in the Brimbank Planning Scheme for the intensification of land use and development in those parts of the Amendment site within the NEIC. To a real extent, this strategic picture (which is facilitative of redevelopment at scale) paints this amendment in a different light to land of lesser significance
- The Brimbank Planning Scheme, the SEPP and Ministerial Direction No. 1 all seek to identify potentially contaminated land and facilitate the remediation of contaminated land to ensure it can be used safely
- The EPA Guidance considers that separating landfills from sensitive uses should be the primary method of managing landfills and sensitive uses. Where separation

cannot be achieved, there is a potential health and safety risk to sensitive uses, which continues after the closure of the landfill

- PPN30 identifies that landfills have a high potential for contamination
- PPN30 recommends that where a sensitive use is proposed in areas with a high potential for contamination, an environmental audit should be undertaken.

Mr Glossop considered *“this context encourages a prudent and proactive approach to managing the risks associated with potentially contaminated land and closed landfills”* and *“this context should be determinative in considering whether the historical context and audits for the land have identified the potential for contamination.”* These matters are considered further in Chapters 4 and 5.

Council considered it had an obligation to act on the evidence of potential contamination. Mr Tobin for Council submitted<sup>11</sup>:

The Council is in receipt of information prepared by independent experts which has then been peer reviewed by Mr Clarke that suggests parts of privately held land is situated over a former land fill. It is a very serious issue. It raises potential implications relating to the health, safety and wellbeing, including financial wellbeing, of the current community of the area and the future community of the area.

Armed with this information, Council regards the only proper response to discharge its duty is to examine the need for, and implement, appropriate planning controls.

The planning control that regulates potentially contaminated land is the EAO. Properly construed the EAO regulates but does not prohibit the use of land. It regulates the use of land by ensuring that appropriate investigations are undertaken to ensure that land classified as potentially contaminated is examined having regard to the proposed use and development of land.

Mr Tobin considered *“there is no doubt that the EAO is the commonly understood tool that will give effect to, in a satisfactory matter, the examination of land prior to any new sensitive use.”* He added:

While imperfect, it is the tool that the VPPs currently provide us and it would not be appropriate to prevaricate in the hope that a better tool might be introduced at some time in the future. That is because the need to identify the land as contaminated is now. The housing stock is turning over and the kind of re-development encouraged under *Plan Melbourne* in respect of urban densities is now occurring in this area.

Mr Fiedler confirmed that Council (as the landowner) supported the application of the EAO on the basis that it:

- identifies and recognises the land impacted by or containing the closed Sunshine landfills
- provides public disclosure of the land impacted by or containing the Closed Sunshine Landfills, in a manner consistent with sound planning practice, which is accessible by any person
- ensures disclosure in any sale of land transaction via a planning certificate forming part of the vendor’s statement
- reinstates information lost from the mapping of the Brimbank Planning Scheme on commencement of the new format planning scheme on 29 July 1999
- remedies the partial disclose via the Priority Sites Register and the Victorian Landfills Register
- remedies the non-disclosure of the environmental audit issued on 13 November 2019 for 57 Denton Avenue.

<sup>11</sup> Council Part B submission, paragraphs 12 (in part), 13 and 14

The EPA conceded the Amendment may not be entirely consistent with PPN30 as its application to private land does not respond to a proposed development and that it is used to raise awareness. PPN30 states “... the EAO is not simply a means of identifying land that is or might be contaminated and should not be used for that purpose. Previous zoning is not sufficient reason in itself to justify application of an EAO.” The EPA position was<sup>12</sup>:

It may be that the proposal by Council does not strictly accord with the intended use of the Overlay as set out in PPN30, however EPA does not object to its use in this context. This is because the application in this instance is informed by assessment that the land is potentially contaminated and goes beyond a consideration of the zoning of the land.

There were no submissions that considered the EAO was not the appropriate planning tool to identify potentially contaminated land. The residential submitters did not deny their land could be contaminated. The key concern of some industrial landowner submitters was that the EAO should not be applied as there was no evidence of contamination. This matter is considered in Chapters 4 and 5.

The Department of Transport did not support the application of the EAO on the M80 Western Ring Road reserve.

## **(ii) Discussion and conclusion**

The Panel agrees with Council and the EPA that the use of the EAO to identify land that may be potentially contaminated is commonplace in Victoria. It is a tailored planning overlay control that, despite its deficiencies, is the only planning control that is currently fit for purpose.<sup>13</sup>

There are legislative changes afoot - in July 2021, the Environment Protection Amendment Act 2018 (the Amendment Act) will come into effect that will amend the Environment Protection Act 2017 and revoke the Environment Protection Act 1970. The EPA advised “*that there will be corresponding updates to Victoria’s planning system to ensure there is effective integration between the environment protection framework and the Victorian planning system; subject to approval by the Minister for Planning. EPA understands that this will include updates to the EAO, MD1 and PPN 30.*” The detail of these changes is not clear however Council advised that the EAO will be retained as the primary statutory control but possibly with the ability of a preliminary site assessment to meet the requirements of the EAO. The Panel has not considered the impact of future policy changes and restricted its consideration to legislation, planning controls and policy of the day.

The Panel notes the concern of the EPA that the application of the EAO in the Amendment is not entirely consistent with the PPN30. The Panel however does not have any concern with this. Council is armed with evidence of potential contamination to private land. The Panel agrees with Council that it has a duty of care to act on this, particularly to convey to private landowners of the potential risk to human health arising from the former landfills. Prior to the exhibition of the Amendment potential purchasers of land in Denton Avenue, for example, would have been unaware of this risk. Mr Nadarajah submitted that he was unaware of the risk when he purchased a property in 2015 in Denton Avenue. Given the risk to human health the Panel accepts that in the circumstances of this Amendment where there is evidence of

<sup>12</sup> EPA submission, paragraph 70

<sup>13</sup> It has been criticised for setting too high a bar for compliance via an Audit or Certificate for any buildings and works in association with existing sensitive uses, no matter how small the proposal is

potential contamination (for example, landfill pits on private land that were filled with waste) it is acceptable that one of the benefits of the EAO application is to raise awareness of this risk to current and future landowners and for landowners to respond accordingly.

The use of the EAO is also consistent with its application to other former landfills in City of Brimbank. The former Reid Street landfill to the west of the Amendment land has the EAO applied.

The Department of Transport did not appear at the Hearing. The Panel agrees with Council that road infrastructure is not a sensitive use of land and the application of the EAO to the M80 Western Ring Road reserve will not have any impact on its functions. The EAO is required as the road is constructed over the former landfills.

For the reasons set out in the following chapters, the Panel concludes that the Amendment is supported by, and implements, the relevant sections of the PPF, and is consistent with the relevant Ministerial Directions and Practice Notes. The Amendment is well founded and strategically justified, and the Amendment should proceed subject to addressing the more specific issues raised in submissions as discussed in Section 3.3 and the following chapters.

### **3.3 How should the EAO be applied?**

#### **(i) Evidence and submissions**

In all circumstances the Amendment applies the EAO to the property boundary, and not to parts of the land that are considered potentially contaminated. Mr Tobin and Mr Fiedler both confirmed the application of the EAO should be to the property boundary. Mr Glossop, Mr Clarke and the EPA agreed that this is the usual approach.

In discussing the industrial land Mr Glossop stated<sup>14</sup>:

- There is an inexact science to identifying potentially contaminated land. Unlike flooding overlays, where topography influences risk, there is no certainty that land beyond the known (or inferred) extent of the former landfill is not contaminated or underlain by waste
- The SEPP encourages the adoption of the precautionary principle to the identification and management of potentially contaminated land. Given that it cannot be said with certainty that the balance of land is not contaminated, a cautious (and precautionary) approach should be adopted
- In the case of this particular submitter's land<sup>15</sup>, the land is zoned Industrial. Of the sensitive uses identified in the Ministerial Direction, only a childcare centre, caretaker's house and pre-school are permissible within this zone.

Mr Clarke stated:

Where there is doubt about the extent of waste or fill in contact with waste on a property and the location of any sensitive developments on those properties cannot be known at this time, I believe it is a reasonable and prudent approach to include the entire property in the EAO.

Council conceded a part application could occur and referred to a circumstance where the EAO was applied to part of a site. It submitted<sup>16</sup>:

<sup>14</sup> Mr Glossop evidence statement, paragraph 119

<sup>15</sup> Referring to the Albion Polish Club

<sup>16</sup> Council Part B submission, paragraph 63

In Brimbank C134, the Panel recommended that the EAO apply to only part of a site the subject of a Statement of Environmental Audit rather than to the title boundaries. The amendment in that case concerned the proposed rezoning of the site for mixed residential and commercial purposes. The Panel's recommendation was made notwithstanding that it acknowledged that it would be difficult to ascertain the precise limits of the land affected by the EAO and in circumstances where the extent of contamination was limited to the area of the site subject to the Statement of Environmental Audit.

The EPA conceded there is a lack of guidance on how to apply the EAO. It submitted:

The term 'land', and particularly the quantifiable area of 'land' to which an EAO should be applied, is not defined in the Victorian Planning Provisions, nor the framework for potentially contaminated land. To EPA's knowledge, there is no specific policy direction or guidance regarding the 'land' to which an EAO should be applied, other than to the 'land' must be potentially contaminated.

In its closing submission<sup>17</sup> Council submitted:

- The notion of a partial EAO finds no support in the evidence in this matter. Just because it is technically possible does not make it a good idea and it would run directly counter to the approach advocated for by both independent experts.
- This is sensible. Contamination boundaries are inferred and there is a real risk that the adoption of arbitrary lines will create risks that could be readily avoided.

The EPA submitted there are examples in Victoria where it has been applied to part of the land but agreed with Council the usual approach is to apply it fully to the land. This was because<sup>18</sup>:

- Where the boundary of the potential contamination is unclear or in the absence of identification of areas of potential contamination, a precautionary approach should be adopted by applying the EAO to the to the cadastral area boundary. This is because there is still uncertainty on the extent of land that is potentially contaminated.
- The requirements of the EAO are triggered based on 'use' of the land meaning that establishment of a sensitive use (including building and works associated with a sensitive use) will trigger the requirement to complete an environmental audit. If the sensitive use is intending on commencing on the land, then the audit may be required to be completed across the whole land parcel. Therefore, the application of the EAO to part of a site will not necessarily correspond to a reduction in the area subject to environmental audit.
- The audit process can respond to the likelihood of contamination at a site. Investigations undertaken as part of the environmental audit may focus on areas where potentially contaminating activities have occurred and involve a site history-based sampling plan. As such, investigation, and assessment of areas with a lower likelihood of contamination requires less investigation (and associated resources) than those for areas with a higher likelihood of contamination.

The EPA considered that *"should the planning authority consider applying the EAO to part of a site, they should be satisfied that there is sufficient information to identify all the areas of potential contamination, including groundwater, across the site."*

Mr Epstein submitted on behalf of Belle Deeds Pty Ltd (528A and 528C Ballarat Road Albion) and Mr Zukanovic (556-560 Ballarat Road Albion and 562-568 Ballarat Road Albion). Mr Epstein conceded the EAO should be applied to the vacant 562-568 Ballarat Road land – but only in part.

<sup>17</sup> Paragraphs 23 and 24

<sup>18</sup> EPA submission, paragraph 88

Mr Swida submitted on behalf of the Albion Polish Club. Mr Swida requested the application of the EAO be modified to apply to a 30 metre buffer from the north eastern boundary of the site rather than the entire land.

**(ii) Discussion and conclusion**

The Panel has restricted its consideration to the principle of how the EAO should be applied. It does this to establish a benchmark, particularly considering the lack of information on how it should be applied in PPN30. The Panel does however accept that land context, characteristics and size for these individual properties deserve further examination. The property specific matters in the industrial zone are considered in Chapter 5.

Along with other risks that the Victorian planning system seeks to address, it is the underground risk that is not readily apparent, and which is the most problematic. Whether land is contaminated or potentially contaminated cannot be judged just with a site inspection. It is unlike areas at risk of flooding or bushfire where the source of the risk presents above ground and a reasonable assessment could be made from visual inspections. The source of land contamination is below ground and without further investigation the land may present like other land that is not contaminated. Past management practices, while at the time considered appropriate, have left a legacy across many areas of Melbourne that today's generation need to deal with. The planning system does this by allowing for existing uses to continue to operate (whether they are considered sensitive or not) but with the application of the EAO a further level of investigation is required if a sensitive use or buildings and works in association with an existing sensitive use is proposed. For landfills the potential impacts may play out for many decades after closure. The protection of human health is the key consideration and when the source of risk is underground a precautionary approach needs to be taken. This includes the extent to which the EAO is applied to the land.

The Panel concludes that as a matter of general principle, it agrees with Council (in all its capacities) and the EPA that it is appropriate to apply to the EAO to all the land, unless otherwise recommended in this Report.

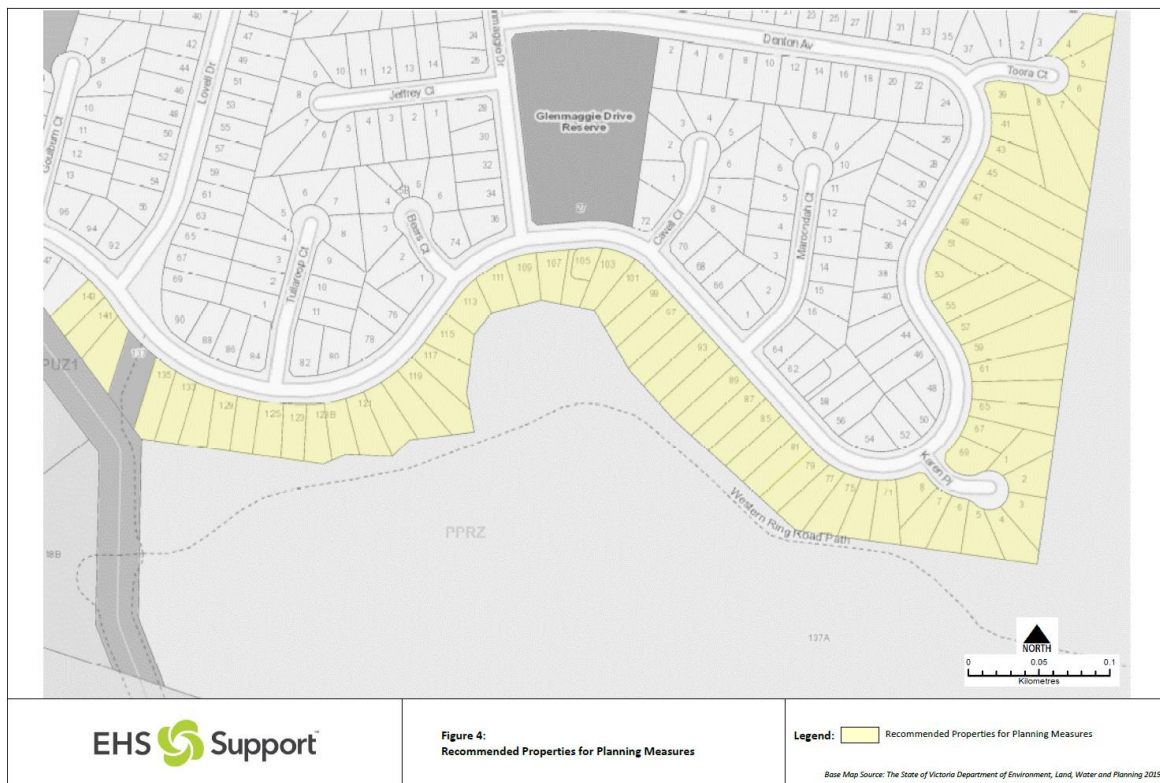
## 4 Residential land

### 4.1 The issues

Council engaged Mr Mival of EHS Support to undertake a review of the many historical documents related to residential and industrial properties adjacent to the former Sunshine and Hulett Road Landfills. Mr Mival provided preliminary findings to Council in November 2019<sup>19</sup>.

Mr Mival’s recommendations on properties that are either contaminated or potentially contaminated with underlying landfill waste and require planning controls is shown in Figure 5.

**Figure 5 Preliminary recommended properties for planning controls**



These findings informed the exhibited Amendment which applied the EAO to 79 residential properties.

The EHS Review of Historical Documents 2020 included documents dating from at least 1960<sup>20</sup>. It estimated the approximate boundary of the landfills as shown in Figure 66 and considered that there was insufficient evidence that 4 and 5 Toora Road, St Albans was impacted by landfill waste.

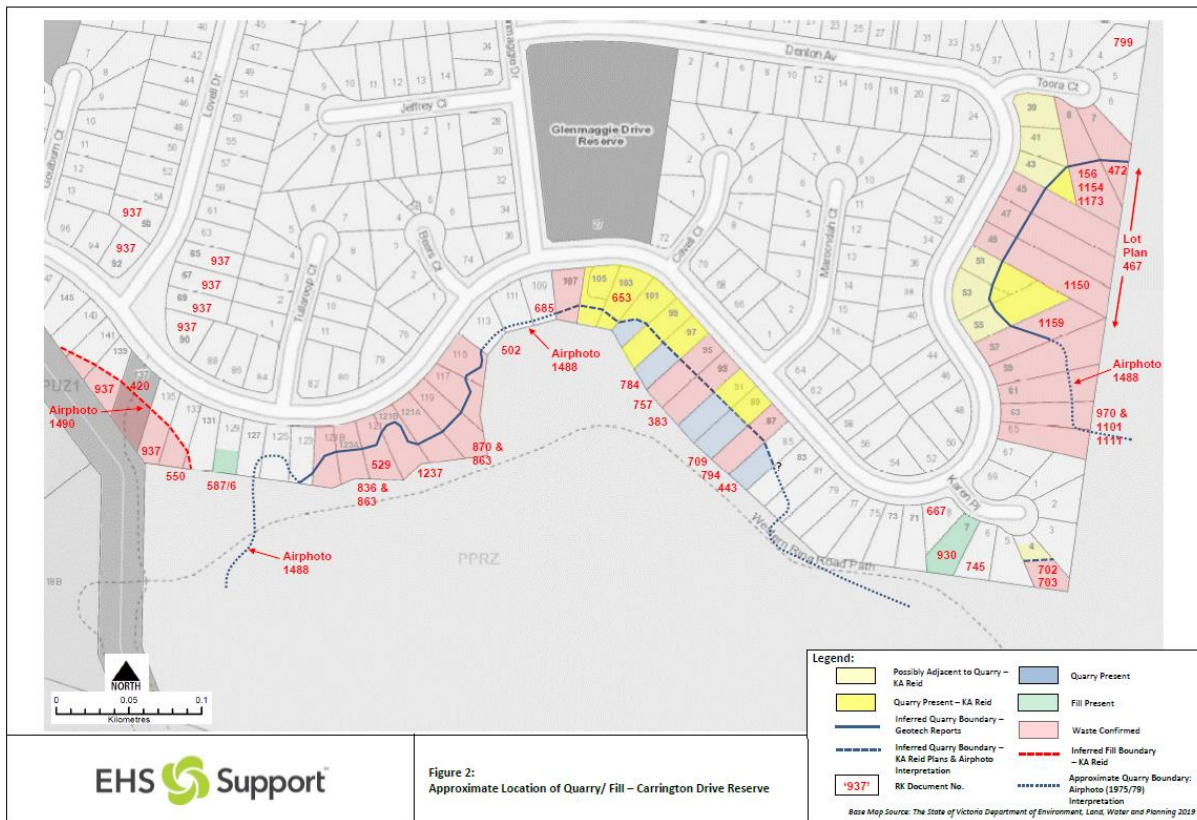
Four submissions<sup>21</sup> were received from owners of residential properties, three of which objected to the EAO on their property with the fourth giving conditional support.

<sup>19</sup> Preliminary findings and advice Mr Kenneth Mival, 10 November 2019, email from K Mival to Stefan Fiedler

<sup>20</sup> Many of the documents reviewed are undated

<sup>21</sup> Submissions 2, 4, 5 and 9

**Figure 6 Revised recommended properties for planning controls**



Of the four submissions the common issue related to the personal financial impacts of the EAO. Financial impacts are discussed below followed by specific issues raised by submitters 2 and 9; and consideration of the EAO to 4 and 5 Toora Court.

## 4.2 Financial impacts

The issue is whether the private financial impacts are relevant.

### (i) Evidence and submissions

A common issue for submitters was that the EAO will have a financial impact on the landowner.

The owners of 61 Denton Avenue and 7 Toora Court<sup>22</sup> considered it unfair that the costs associated with an audit, as required by the EAO, should be borne by the landowner. The owners of 61 Denton Avenue who purchased their property in 2015 and proposed to develop it, called for Brimbank City Council to pay for all the audit costs. They said they would not have bought if they had known about the landfill and the possible contamination.

Landowners of 61 Denton Avenue and 43 Denton Avenue<sup>23</sup> submitted the imposition of the EAO was expected to reduce the market value of their properties.

Council in its various submissions and reports<sup>24</sup> acknowledged that when land subject to an EAO is developed there will be additional costs that could extend to undertaking an

<sup>22</sup> Submitters 4 and 9

<sup>23</sup> Submitters 4 and 5

<sup>24</sup> Officer’s report to Council September 2020

Environmental Audit, possible additional permit application fees, potentially extra construction costs and ongoing management costs if these are required because of the audit.

Council submitted that costs related to remediation of a site and potential devaluation of land are separate matters and these financial matters are not a relevant consideration to the Amendment which is a position which has been affirmed in many Planning Panel Reports. Council submitted<sup>25</sup>:

More generally, Council submits that private financial impacts (such as those raised by submitters) are not relevant economic considerations when assessing an amendment to the Scheme. Financial impacts may be relevant if they translate into public economic effects but, in the submissions to the Amendment, the financial impacts are expressed on a site-by-site basis and not broader community level impacts.

Council highlighted that the EAO will provide transparency about the potential contamination of the land and will ensure that the proper steps are taken if development of a site is for a sensitive use<sup>26</sup>.

Mr Clarke, an EPA appointed auditor, supported the requirement for an audit on land potentially contaminated. He also speculated that when the Environment Protection Amendment Act 2018 (Amendment Act) comes into force on 1 July 2021, the approach taken to environmental audits will be more targeted and less onerous than currently the case although it will still require the engagement of an environmental auditor. Mr Clarke's comments are based on his work with EPA on the development of the new approach to environmental audits.<sup>27</sup>

## **(ii) Discussion and conclusion**

Other Planning Panels have considered financial impacts resulting from an Amendment. In many of these matters, a distinction has been drawn between private or public financial impacts. Private financial impacts are not considered a relevant consideration at the time of a planning scheme amendment, whereas the public financial impacts are considered relevant. The principle established by *Gantidis*<sup>28</sup> is relevant to this Amendment where submitters are concerned about private financial impacts, not public financial impacts more generally.

The Panel accepts that there may be additional financial impacts to landowners, whether it be additional development costs or land value. This needs to be weighed against the net community benefit of effectively managing potentially contaminated land and particularly the protection of human health. This is consistent with Clause 71.02-1 of the Brimbank Planning Scheme which states:

The Planning Policy Framework seeks to ensure that the objectives of planning in Victoria (as set out in section 4 of the Act) are fostered through appropriate land use and development planning policies and practices that integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.

The Panel therefore considers personal financial impacts associated with the Amendment must be considered against the net community benefit provided by it. On this issue the Panel

<sup>25</sup> Council Part submission, paragraph 133

<sup>26</sup> Council Officer's Report, Response to submission 5, September 2020

<sup>27</sup> Mr Clarke expert witness statement section 3.2.4

<sup>28</sup> *Kentucky Fried Chicken Pty Ltd v Gantidis [1979] HCA 20*

agrees with Council that it is net community benefit that should prevail and that personal financial impacts are more appropriately considered at the permit application stage, not the Amendment stage.

The Panel concludes that the net community benefit of the Amendment outweighs any person financial impacts associated with it.

### **4.3 57 Denton Avenue, St Albans**

#### **(i) The issue**

The issue is whether the EAO is required if an environmental audit has already been approved.

#### **(ii) Submissions**

Gray Kinnane, on behalf of Submitter 2 advised:

- the property at 57 Denton Avenue contains a single dwelling and is an irregular shape and is on the eastern side of Denton Avenue (Figure 77)
- it was purchased by the current owner in 2013 and has a Planning Permit (P147/2017) to construct 5 double storey townhouses
- it was a requirement that before the planning permit was issued an environmental audit was required and that, pursuant to section 53Z of the Environment Protection Act 1970
- the owner was required to implement any recommendations made by the auditor.
- the audit was completed in November 2019.<sup>29</sup>

The Auditor found there are:

- major quantities of below ground waste within the eastern portion of the site including some asbestos
- the groundwater has been impacted
- low levels of methane and levels of carbon dioxide that exceed the EPA's Action level in the bore close to the site boundary and low risk landfill gas (LFG) was detected on site
- the landfill cap is inadequate
- the edge of the old landfill is likely to occupy more than half of the 57 Denton Avenue property.

Based on the above the Auditor stated<sup>30</sup>:

The condition of the site is detrimental or potentially detrimental to any (one or more) beneficial uses of the site. Accordingly, I have not issued a Certificate of Environmental Audit for the site in its current condition,

The Auditor issued a Statement of Environmental Audit which contained several conditions including:

- that the 5 townhouses must be constructed to the building plan and drawings on which the audit was based and that any modifications to the plans and drawings must be assessed by an EPA appointed auditor and lodged in writing with the EPA and the Planning Authority

<sup>29</sup> VCAT case Ho v Brimbank CC [2020] VCAT 917 related to car parking and is not relevant to this Amendment.

<sup>30</sup> Page 3

- LFG protective measures are required and must remain in place and be repaired if damaged.

Figure 7 57 Denton Avenue, St Albans (outlined in yellow)



For a Certificate of Environmental Audit to be issued the Auditor specified that the eastern portion of the land needs to be remediated including the removal of asbestos and that there be further investigation of the LFG risk.

Gray Kinnane submitted that:

- In these circumstances there is simply no purpose to be achieved in applying the EAO on this land as its application would be superfluous given that the purpose and requirements of the EAO have already been satisfied.

In response to the above, Council added that the Audit is specific to the development proposed at the time. The Auditor made it clear that if the plans changed then there would be a need for the Auditor to reassess the new proposal. Council reinforced that the benefit of the EAO is that irrespective of the sensitive use and development proposed, it was transparent to current or future landowners that an Audit would be required prior to development for a sensitive use. Mr Glossop supported this outcome. Mr Glossop added that *“if the permit is not acted upon or is amended, a new environmental audit may be required.”*

From the EHS Review of Historical Documents 2020 it was determined that the inferred quarry boundary bisects 57 Denton Avenue and the presence of fill on the property has been

confirmed through various investigations such as recent work by GHD and the onsite audit investigations.

Council submitted in its Part A and B submissions if the permit is not acted upon and the EAO not applied then there would be no planning control providing notice of the potential contamination risk or requirement to complete an environmental audit.<sup>31</sup>

### **(iii) Discussion and conclusion**

It is clear from the evidence that a significant portion of 57 Denton Avenue is contaminated because of past landfilling and this is reflected in the conditions in the Statement of Environmental Audit. The conditions include obligations on future owners of the townhouses that require that the LFG abatement system be maintained in working order.

The Auditor also specified that only when 57 Denton Avenue is free of asbestos and the filled area remediated that a Certificate of Environmental Audit can be issued, which will need to be approved by an EPA appointed auditor. It is only when an auditor has issued a Certificate on Environmental Audit that the planning scheme can be amended to delete the EAO from the property. Until that occurs the EAO remains.

The EAO gives future owners clarity that the land is potentially contaminated and that, if the conditions of the Audit are met, is suitable for the defined sensitive use. This type of notice has not been given to the current owners of the land subject to this Amendment.

The Panel does not agree with the submitter that any Audit issued for the land applies to any current or future proposal. The Audit is specific to the development assessed.

The Panel concludes that the EAO should be applied to 57 Denton Avenue, St Albans.

## **4.4 7 Toora Court, St Albans**

### **(i) The issues**

The key issues are:

- why was the residential development permitted on land where there was a landfill?
- can a statement be added to the land title that the land is developed to its full potential?

### **(ii) Submissions**

The owners of 7 Toora Court bought their property, part of the Nickson estate, 38 years ago (Figure 98) and were apparently, it was submitted, told at the time of purchase that a small part of their land had been quarried and if they attempted to build on that part the foundation costs could be prohibitive. They submitted that they did not know and had not been told by Council that the land was contaminated but had their suspicions. The owners supported the EAO as it would ensure the contamination would be managed however, they wanted to know how the development was allowed in the first place.

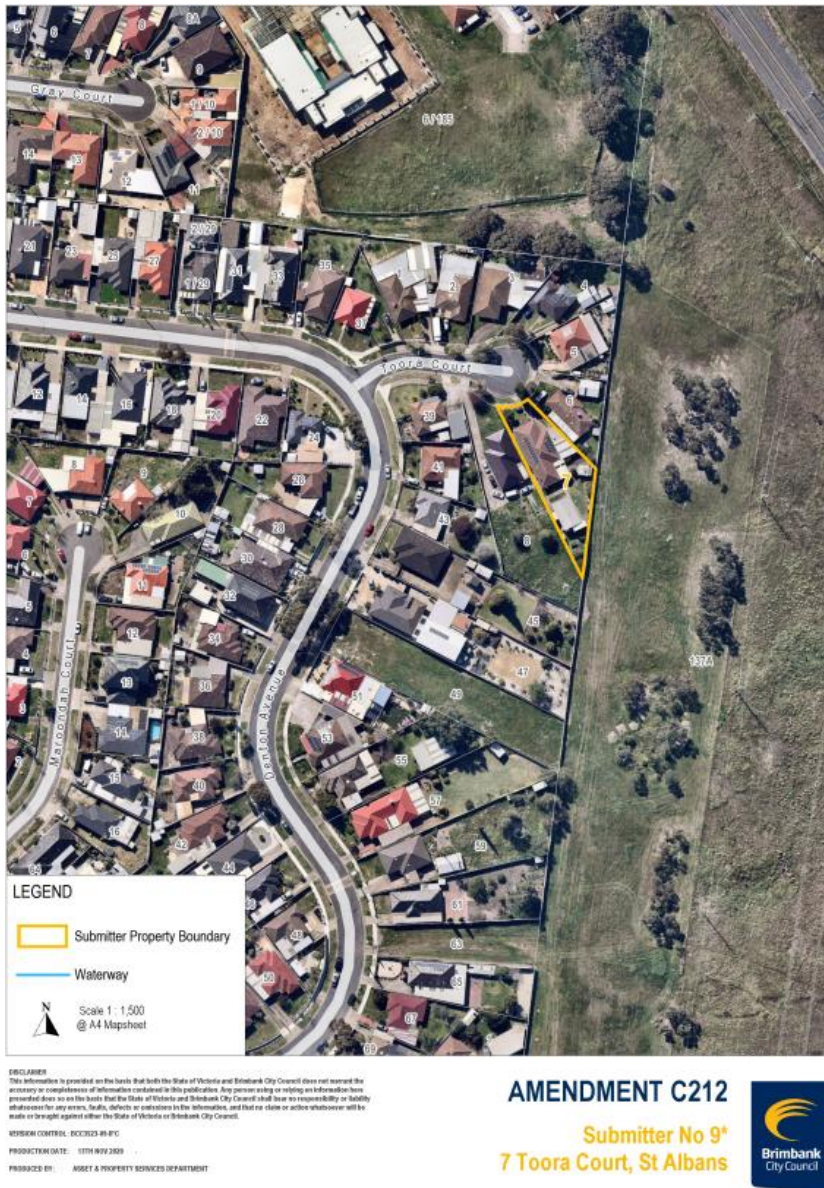
Council could not clarify the circumstances which led to the approval of the residential subdivision, only that the Nickson estate 688-lot subdivision was approved by the Victorian

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<sup>31</sup> Council (landowner) submission and Council Part B submission, paragraph 86

Government in the 1970s, not the former City of Sunshine. Council as the landowner revealed that when a building permit was granted for 7 Toora Court by the City of Sunshine on 8 March 1983 appended to the permit is a certified plan which has an unexplained dashed line. Mr Fiedler said that the dashed line is consistent with the extent of a quarry pit on the southern portion of 7 Toora Court. However, Mr Fielder also found that there was no similar disclosure of the presence of the quarry in the purchase documents when the owners acquired 7 Toora Court on the 15 June 1983.<sup>32</sup>

**Figure 8** 7 Toora Court, St Albans (outlined in yellow)



Additionally, the EHS Review of Historical Documents 2020 notes the City Engineer’s report of February 1978 identified that the lots in Toora Court and Karen Place were developed on quarried land.

<sup>32</sup> Council (landowner) submission, paragraphs 148-149

In relation to the request by the owners of 7 Toora Court's that in addition of the EAO that a statement ("*Property is developed to its full potential*") be added to the property title, Council submitted the planning scheme does not provide a mechanism to do this and this would undermine proper and due process. It considered that the EAO provided sufficient notification that the land is potentially contaminated and a requirement for an audit triggered if further development is proposed<sup>33</sup>.

### **(iii) Discussion and conclusion**

This residential land has a long and complex history. From the EHS Review of Historical Documents 2020, it was known that some of the Nickson estate subdivision was developed on land that had been quarried but unfortunately none of the documents disclose why the subdivision was allowed. This is not a matter that is material to the Panel and does not impact whether the EAO should be applied or not.

The Panel does not agree that a statement on title that states the land is developed to its full potential is an alternative to the application of the EAO. This impacts not only many other properties but impacts common property rights and would undermine the provisions of the planning scheme.

The Panel concludes:

- It cannot provide the owners with answers as to why the subdivision was allowed apart from the approval being granted by the Victorian Government, as it is not a matter that is currently before it.
- The EAO is the only mechanism available that is tailored to address potentially contaminated land.

## **4.5 4 and 5 Toora Court, St Albans**

### **(i) The issue**

The issue is whether the EAO should be applied to 4 and 5 Toora Court, St Albans.

### **(ii) Evidence and submissions**

Council submitted that the 2013 Audit Report concluded that the extent of the landfill on the 4 and 5 Toora Court (Figure 9) was unclear.<sup>34</sup> However, in the EHS Review of Historical Documents 2020 which included the recent 2019 and 2020 investigations undertaken by GHD<sup>35</sup>, it confirmed there was no evidence from any source of the encroachment or presence of wastes extended to 4 and 5 Toora Court.<sup>36</sup> Table 9-1 (Level of Impact to Potentially Encroached Properties Adjacent to Carrington Drive Reserve) summarises the evidence for each property and shows there is no direct evidence that these two properties have been impacted by landfilling.

Council (in all its capacities) and Mr Clarke supported the deletion of the EAO from 4 and 5 Toora Court St Albans. In Mr Clarke's assessment landfilling of Quarry Hole 4 occurred more

<sup>33</sup> Council's Part B submission, paragraph 80

<sup>34</sup> Page 75

<sup>35</sup> For example, Carrington Drive Reserve – North Central and East Boundary Investigations report, GHD, November 2019

<sup>36</sup> Page 45

than 20 metres from the rear boundary of these properties.<sup>37</sup> The EPA deferred the decision regarding these properties to Council and the Panel with the caveat that should further information become available this position should be reviewed.

**Figure 9** 4 and 5 Toora Court, St Albans (outlined in yellow)



**(iii) Discussion and conclusion**

The Panel supports the deletion of the EAO from the land given the general consensus and evidence from Mr Clarke and information contained in the EHS Review of Historical Documents 2020.

The Panel concludes that the EAO should be applied to 4 and 5 Toora Court, St Albans.

**(iv) Recommendation**

The Panel recommends:

- 1. Delete the Environmental Audit Overlay from 4 and 5 Toora Court, St Albans.**

<sup>37</sup> Mr Clarke evidence statement, paragraph 3.3.2

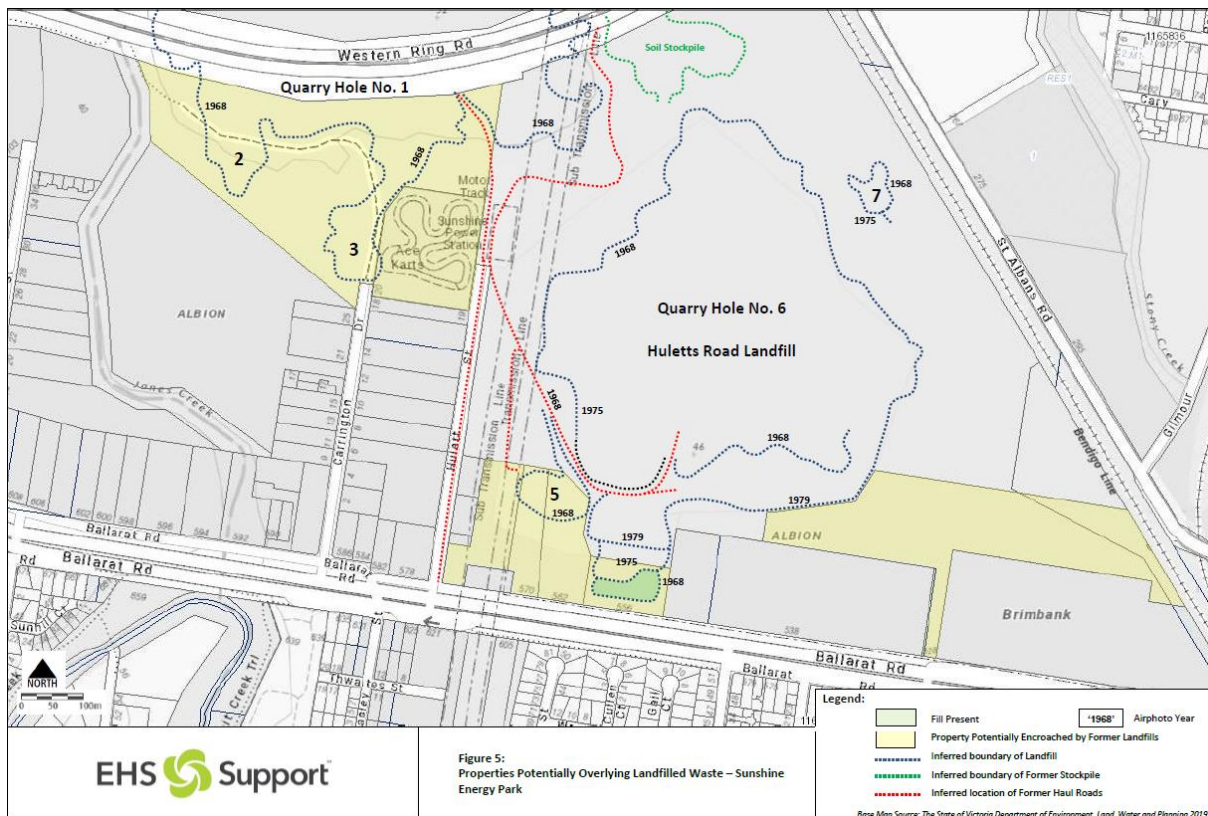
## 5 Industrial land

### 5.1 The issues

Figure 5 (Figure 10 in this Report) of the EHS Review of Historical Documents 2020 provides a summary of its findings for the industrial land south of the landfills. It shows the properties that are potentially encroached by the former landfills, the inferred boundary of the landfill pits and inferred boundary of former stockpiles. Table 3 in the EHS Review of Historical Documents 2020 report addressed each property individually and made recommendations as to whether a planning control was appropriate or not to address potential contamination. The following properties were identified for a planning control:

- 528A and 528C Ballarat Road, Albion (Boral Concrete)
- 556 Ballarat Road, Albion (Action Motor Industries)
- 562 Ballarat Road, Albion (vacant land)
- 570 Ballarat Road, Albion (industrial sheds)
- 576 Ballarat Road, Albion (Sunshine Roofing)
- 20 Carrington Drive, Albion (Ace Go Karts)
- 27 Carrington Drive, Albion (Western Pigeon Federation and Bocce Club).

**Figure 10 Properties potentially overlying landfilled waste**



The EHS Review did not recommend a planning control for the Albion Polish Club at 19 Carrington Drive Albion, however it noted “a small part of the land abutting Carrington Drive used by the club but belonging to No. 27, may be encroached by landfilling.” However, the Amendment proposes to apply the EAO to this land.

Three submissions were received<sup>38</sup>; all of which objected to the application of the EAO. The issues raised are considered in the following sections.

## 5.2 19 Carrington Drive, Albion (Albion Polish Club)

### (i) The issues

The issues are whether the EAO should be applied to land and to what extent.

Figure 11 shows the context of the Albion Polish Club land.

**Figure 11** 19 Carrington Drive, Albion (outlined in yellow)



<sup>38</sup> Submissions 1, 6 and 10

**(ii) Evidence and submissions**

Mr Swida, on behalf of the Albion Polish Club, objected to the application of the EAO but submitted that if this was not supported by the Panel then its application to a 30 metre buffer from the landfill pit would be supported.

Mr Swida prior to the Hearing provided a soil testing report dated 30 November 2020 undertaken by Soil Test Melbourne. Three bore hole tests were conducted, and it found that:

The EPA Screen Test IWRG 621 found that sample locations 1,2 and 3 produced results to categorise the sample as clean fill. Hence the site can likely be labelled as **Clean Fill**.

Mr Swida considered this confirmed the land was not contaminated.

Mr Swida also referred to the EHS Review of Historical Documents 2020 which concluded the land was not impacted by the landfills and that a planning control was not required. It concluded:

Whilst No 19 Carrington Drive, the Polish Club and sports grounds, are adjacent to the former quarry holes 2 and 3, the property is unlikely to be encroached. However, the 1975 and 1979 airphotos do show some areas of shallow scrapes extending onto the property that appear to be where soils were obtained for capping of the landfills that was being undertaken at the time. The scrapes do not appear to be deep and there is no indication from the airphotos of their being used for municipal landfilling. On balance, No 19 has therefore not been included as requiring planning restrictions.

The EHS Review of Historical Documents 2020 also commented:

Whilst there is evidence from the airphotos of some spoil scraping into No 19 Carrington Drive, there is no evidence of basalt quarrying or deposition on wastes, so it is not included in the recommendations for planning restrictions.

Mr Tobin referred to Table 3 of the EHS Review of Historical Documents 2020. He considered Table 3 did cast some doubt as it indicates that it cannot confirm that the land is or is not contaminated, only that it has not been encroached by a landfill or quarry (and there is not any historic use such as industry that would warrant concern).

Council (in all its capacities) considered the EAO should be retained on the land as the EHS Review of Historical Documents 2020 retained some doubt as to its potential contamination. It was uncertain as to potential contamination (marked as NK - not known) with the following general commentary provided<sup>39</sup>:

There remain a number of properties to the south of Sunshine Energy Park which are uncertain as to the potential for encroachment or contamination as their history is not fully known, or even what activities are currently being undertaken. It is also possible that current activities do not represent past usage of the land. If more certainty is required as to the level of potential encroachment of these properties, or the potential risks from industrial occupation of them, a full history search on individual properties would be required to eliminate or add in properties listed as uncertain or Not Known (NK) in **Table 3**. These should then be separately considered for some planning restriction due purely to their industrial history.

Council referred to the scraping of soil from the site and other airphotos that show stockpiling that could be landfill waste or fill. Mr Fiedler referred the Panel to airphotos 1487 (Figure 12)

<sup>39</sup> EHS Review of Historical Documents 2020, page 19

and 1500 (Figure 13) that, Council submitted, showed the scraping of the site and stockpiling of waste and fill, respectively.

Regarding the soil test provided by Mr Swida, Council submitted it had several concerns<sup>40</sup>:

- It is not in the form of expert evidence, including no details regarding instructions, the authors qualifications and experience and the author has not made the relevant disclaimers
- It appears the author is not being called to give oral evidence and thus the contents of the letter cannot be tested
- The locations of the three boreholes selected are not where contamination is most likely to be present (i.e. closer to the northern boundary of the site)
- The locations of the three boreholes selected are adjacent to existing buildings where alterations to soil are more likely to have occurred during construction process
- The depth of the boreholes, at 300mm, is inadequate when waste has been found metres below ground level
- The results are incomplete. The bore logs attached to the letter do not describe the material collected from each borehole. Therefore, we have no understanding of whether the material is imported fill or natural material. Imported fill being a potential pathway for landfill gas migration.

Council (as the landowner) and the EPA also shared these concerns.

**Figure 12** Airphoto 1487 (1975) of 19 Carrington Drive, Albion



Mr Clarke accepted the review of Mr Mival but went further in his consideration<sup>41</sup>:

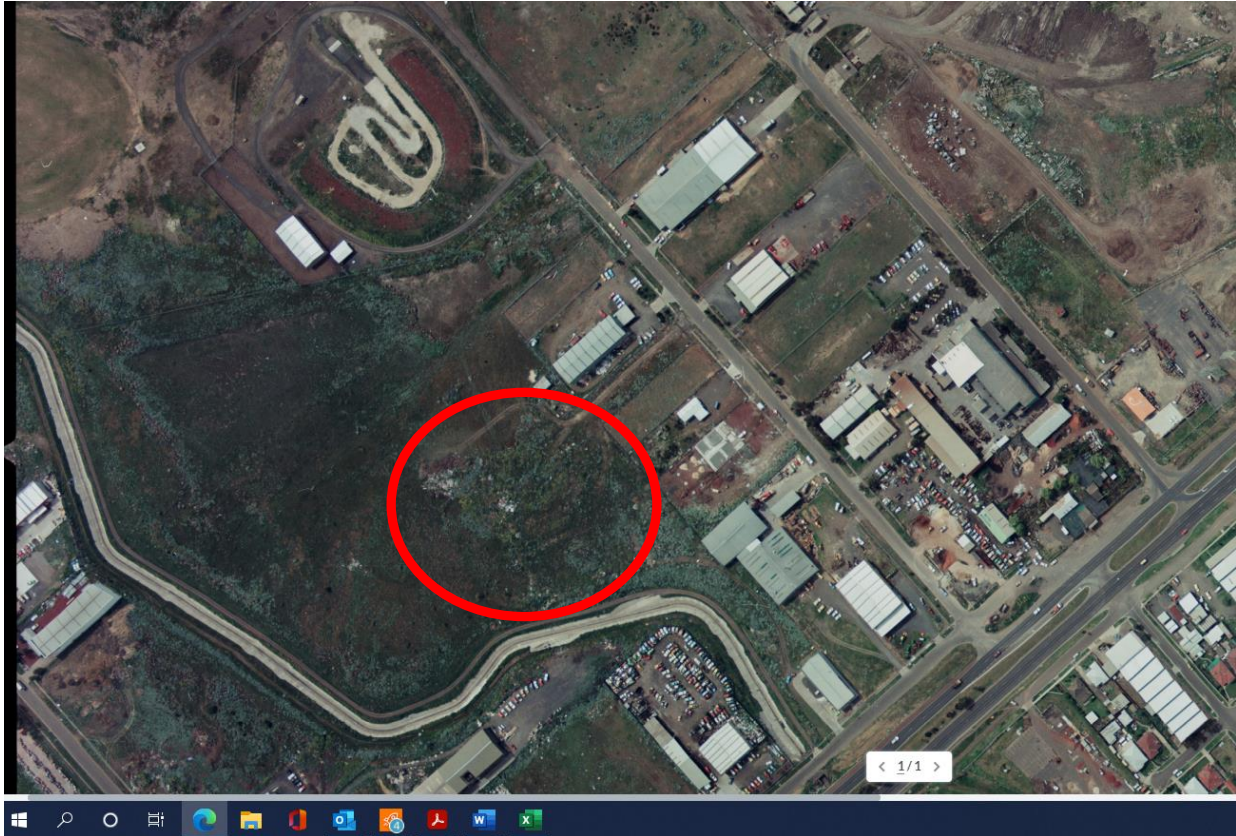
However, there was evidence that surface soil was scraped from the site and it appears likely that some fill was imported to the site prior to, or as part of, the current

<sup>40</sup> Council Part B submission, paragraph 46

<sup>41</sup> Mr Clarke evidence statement, section 3.3.1

development of that site. In the absence of information on the source of any fill and the compaction control applied during its placement, it seems reasonable to conclude that fill may be present beneath at least part of the site and may act as a pathway for landfill gas and toxic vapour migration.

**Figure 13** Airphoto 1500 (1987) of 19 Carrington Drive, Albion



### (iii) Discussion

The Albion Polish Club provides facilities for its community including soccer fields, social club rooms, a restaurant, language classes and a pre-school or childcare facility. Mr Swida also referred to future improvements that could include an aged care centre for the community. The land is large enough to provide for further expansion opportunities. It is a facility that provides an important focus for the Polish community.

Whether the EAO should be applied to 19 Carrington Drive should be guided by the submissions and evidence that has been provided during the Hearing. Summing this up for the landfill and quarry encroachment, the Panel considers:

- there does not seem to be sufficient evidence that the land contains either a quarry pit or landfill pit, despite the submission<sup>42</sup> from Council that it did. The Panel has compared Figures 7-1, 4-1 and 6-6 of the 2013 Audit Report with the exhibited EAO map and, while the landfill is close by the available evidence indicates that the landfill does not appear to encroach onto the land
- the lack of encroachment has been used by Council as a reason for excluding land from the EAO at 4 and 5 Toora Court, St Albans. It would seem consistent then that

<sup>42</sup> In Council Part B submission at paragraph 49 it states "the 2013 Audit Report indicated that landfill cells encroached onto 19 Carrington Drive and it was on that basis the site was included in the Amendment Land."

this test be applied to all Amendment land. However, the evidence that the landfill has not encroached 4 and 5 Toora Court is backed up by testing

- the impacts of LFG as referred to by Mr Clarke are not a consideration in this Amendment. This was confirmed by Council (in all its capacities). This is an issue that is under further consideration by Council beyond this Amendment and may justify other planning actions in the future.

The Panel considers that the soil tests presented by the Albion Polish Club do not confirm there is no contamination or potential contamination because the pit testing was too shallow, and the bore holes were too far away from the source of risk.

The Panel considers that on the above assessment the EAO has not been sufficiently justified. This, on the surface is consistent with Table 3 of the EHS Review of Historical Documents 2020 which indicates the EAO was not required. However, Mr Mival's inclusion of NK ("not known") in Table 3 does indicate doubt. Furthermore, Mr Mival provided an additional caveat that *"it should be noted that a small part of the land abutting Carrington Drive used by the club but belonging to No 27, may be encroached by landfilling"* and that a full search history should be completed to determine whether the land is potentially contaminated. The Panel was not presented with this history review and considers this matter is unresolved.

For the Panel to make a complete judgement it also needs to consider submissions that were made on the airphotos interpretation.

Mr Mival's opinion on the scrapes was that it was removing soil from the site, not depositing potentially contaminated soil. Mr Mival considered the scrapes were shallow in depth. Mr Clarke was concerned that the fill was imported on to the site.

The Panel considers that interpretation of airphotos which are snapshots at various times over decades show some detail of land context. They are a relevant source of information. The airphotos do show some activity on the land that could be associated with the landfills (e.g. scraping of the land, potential stockpiling and access that could be associated with the landfills).

The Panel is required to take a precautionary approach and to consider whether the land is potentially contaminated particularly as the source of risk is underground and the extent of contamination will only ever be completely apparent once an audit has been completed if one is required. On the balance of the material presented the Panel considers there is enough doubt as to whether the land is potentially contaminated, a matter that Mr Mival considered unresolved, and that the EAO should be applied.

The Panel has not reached this finding lightly. The Panel believes there is a sufficient level of doubt and has elected to err on the side of caution. The Panel acknowledges this will be an imposition for the Albion Polish Club with its future plans. While the land is large (5 hectares), the Panel is reluctant to recommend a partial application of the EAO to ensure there is a consistent approach to its application.

#### **(iv) Conclusions**

The Panel concludes:

- The land is not encroached by the former Sunshine landfills.
- It is uncertain whether the scrapping of the land for soil is related to its removal, or deposition which would have a higher risk of contamination

- The Amendment needs to be applied consistently and the lack of encroachment of landfill and quarry as justification for not applying the EAO to 4 and 5 Toora should apply here.
- The aerial photos raise a sufficient level of doubt as to whether the landfill operation extended beyond the location of the pits
- LFG risk is not part of the justification for the Amendment, however this may require future planning intervention
- On balance and applying the precautionary principle, the EAO should be retained in full on 19 Carrington Drive, Albion.

### 5.3 556-560 and 562-568 Ballarat Road, Albion

#### (i) The issues

556-560 & 562-568 Ballarat Road, Albion are in the Industrial 1 Zone. 562-568 Ballarat Road contains a car repair business, Action Motor Industries. Most of 556-560 Ballarat Road is vacant land. It is located south of the Sunshine Energy Park. Figure 14 shows the context of the land.

The issues are whether:

- there is any evidence that the land is contaminated
- the boundary of the EAO is arbitrary.

#### (ii) Evidence and submissions

Submitter 10 (Mr Zukanovic) considered the land was not contaminated and that the boundary of the EAO was arbitrary.

Council submitted the EHS Review of Historical Documents 2020 confirmed 556-560 Ballarat Road was encroached by Quarry Hole 6 and was later used as a landfill, that it was potentially contaminated, it was a candidate for a planning restriction and should be included in the Amendment. Likewise, for 562-568 Ballarat Road it confirmed the land was encroached by Quarry Hole 5, it was not known whether it was potentially contaminated, it was a candidate for a planning restriction and should be included in the Amendment. Figure 15 is taken from the EHS Review of Historical Documents 2020 and shows an inferred landfill boundary as a blue dotted line from a 1975 airphoto. The green inlier marks a stockpile taken from the 1968 airphoto shown in Figure 17.

Mr Clarke agreed with the EHS Review of Historical Documents 2020 findings and Council's assessment of the submission.

Mr Epstein agreed the test is potential contamination and not absolute proof of contamination and that the EAO should be applied to the northern part of 556-560 Ballarat that contains the former quarry hole (Figure 17 - 1968 airphoto interpretation). Mr Epstein considered that further investigation should be conducted by Council to confirm the extent of the EAO. Mr Epstein referred to the EPA submission that stated at paragraph 89 that *"it is possible to conduct an environmental audit on part of a site."*

Figure 14 Airphoto of 556-560 and 562- 568 Ballarat Road, Albion (outlined in yellow)

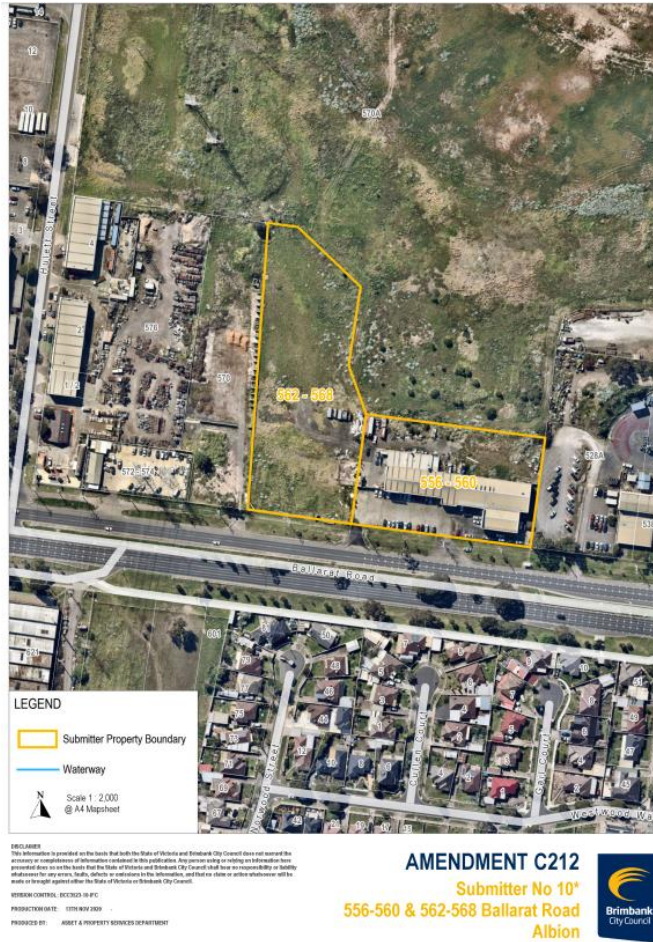
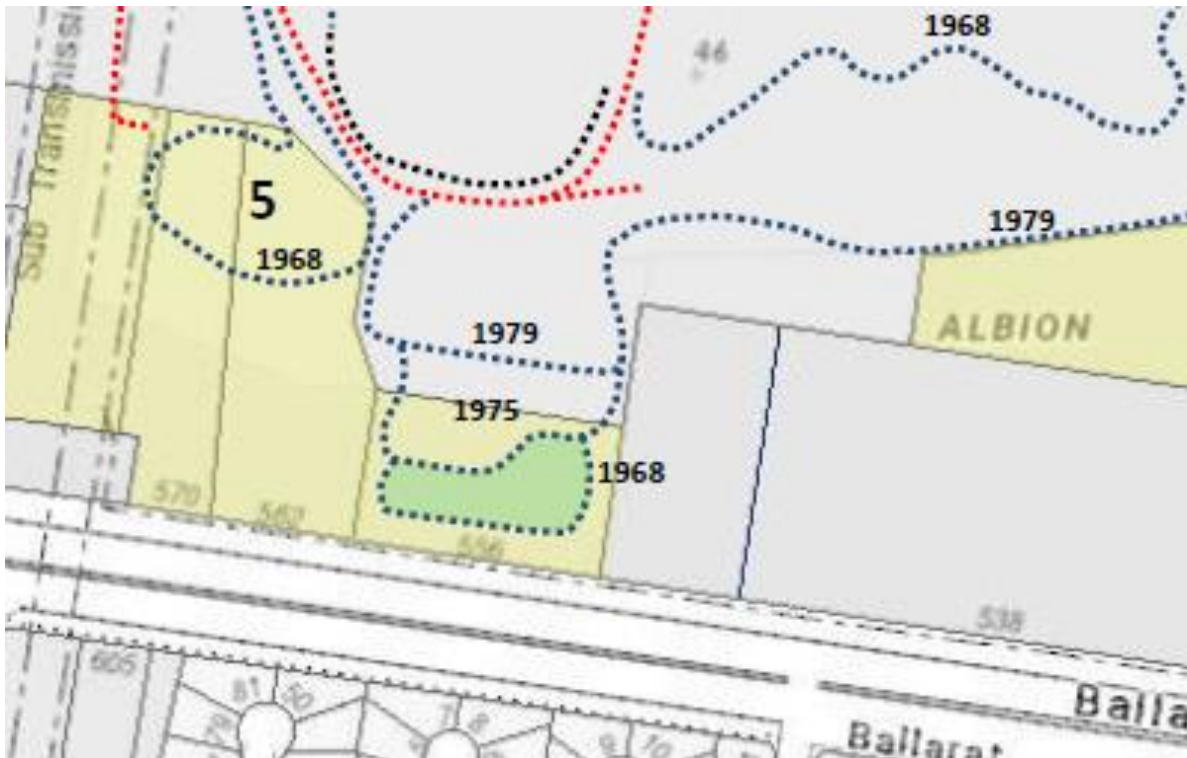


Figure 15 Inferred landfill boundary (blue dotted line) for 556-560 and 562-568 Ballarat Road, Albion



For the other land, including the Belle Deeds land considered in Section 5.4, Mr Epstein considered “... *the extent of the landfill, and its migration into private landholdings in particular, is speculative at best.*” Mr Epstein referred to Figure 11 on page 39 of the GHD Landfill Gas Risk Assessment that he considered did not show the encroachment of the landfill on to the land. Figure 16 below contains an excerpt of this figure.

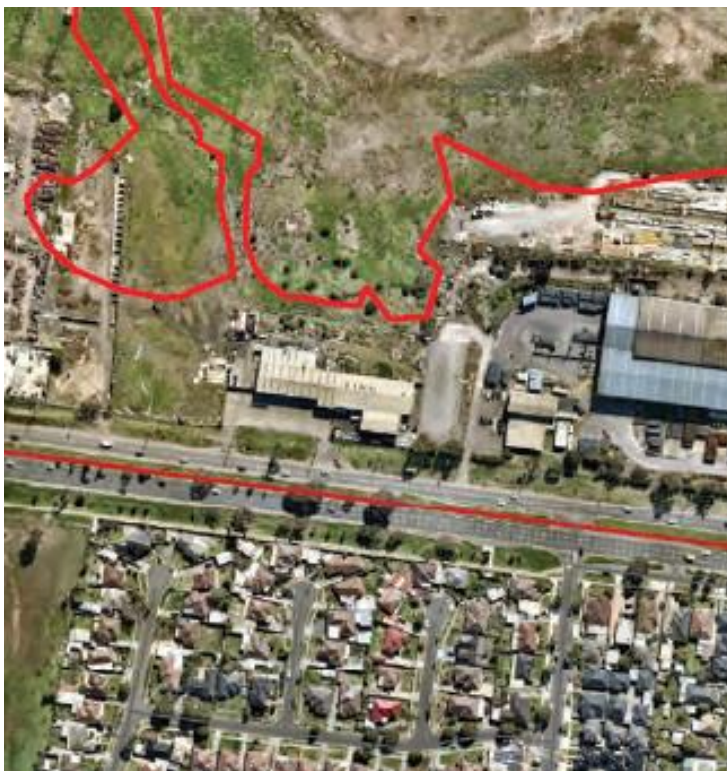
Mr Epstein submitted that, if the Panel was inclined to apply the EAO, then it should only apply it in part to 556-560 Ballarat Road in “*a discrete area immediately adjacent to the former landfill.*”

A further concern raised by Mr Epstein was a recommendation in the GHD Landfill Gas Risk Assessment that sought:

That Council prohibit the construction of enclosed buildings on the currently vacant lots of 562-568 Ballarat Road, and portions of 570 and 576 Ballarat Road where the inferred waste boundary underlies part of the allotments.

To identify the inferred landfill boundary Mr Epstein referred to the landfill gas risk assessment. However, Mr Epstein considered that referring to landfill gas and using this to infer the landfill boundary “*is beyond the scope of the planning scheme Amendment*” and “*on that basis the recommendation should be disregarded and struck out.*”

**Figure 16** Excerpt from Figure 11 of GHD Landfill Gas Risk Assessment



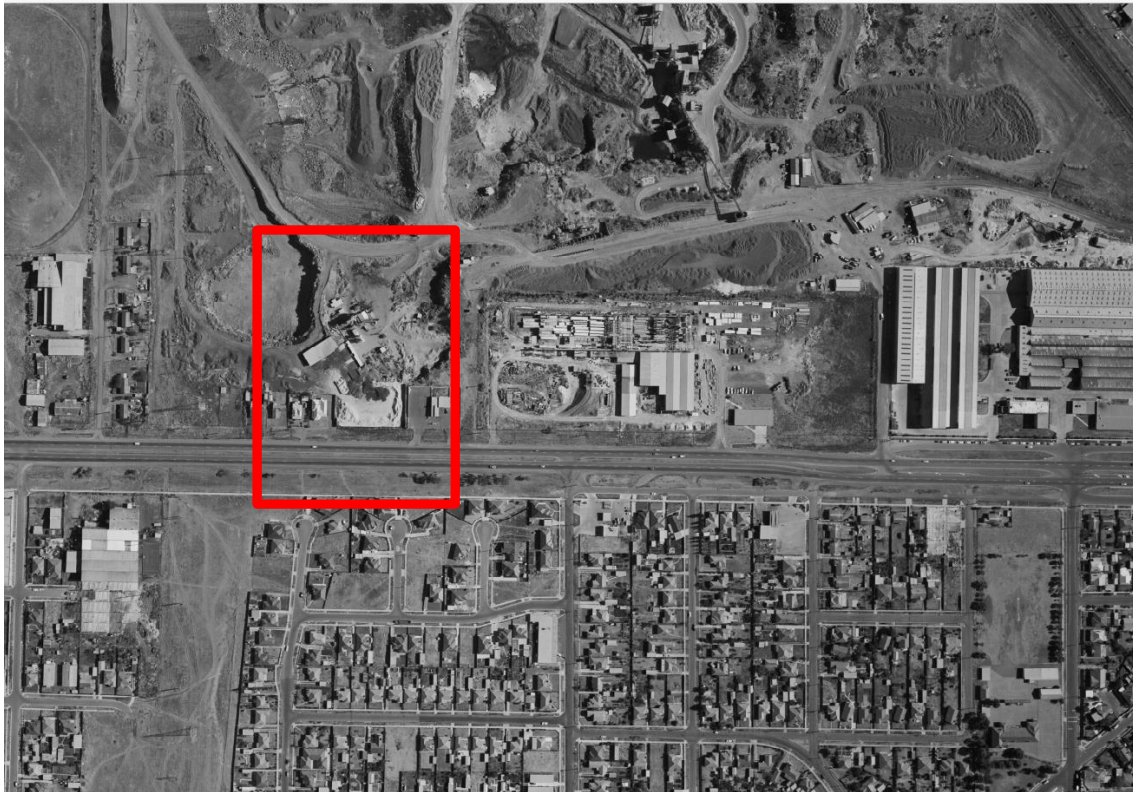
### (iii) Discussion and conclusion

The Panel notes the landowner’s acceptance that the EAO should be applied in part to the vacant land. The Panel has considered part application in Section 3.3 and concluded as a general principle that the EAO should be applied to a whole site. Placing the onus back on Council to define how the EAO should be applied in part is not helpful and the Panel considers the landowner has missed an opportunity through this Hearing to provide the Panel with

sufficient information to make a judgement. The Panel has not had the benefit of this information and therefore defaults to its in-principal position that the EAO should apply to the whole of 556-560 Ballarat Road.

Regarding 562-568 Ballarat Road, Council provided airphotos that showed a stockpile in 1968 (Figure 17) and the encroachment of the landfill in 1975 (Figure 18). The Panel considers that the inferred boundaries of the landfill taken from Figure 15 are more accurately reflected in the airphotos than that identified in the GHD report referred to by Mr Epstein. On this basis, the land is encroached significantly by the former landfill and associated activities and it is appropriate for the EAO to be applied to all the land.

**Figure 17** 1968 airphoto of 562-568 Ballarat Road, Albion



**Figure 18** 1975 airphoto of 562-568 Ballarat Road, Albion

Impacts arising from landfill gas risk are not part of the Amendment. The Panel agrees with Mr Epstein that it is beyond the scope of this Amendment and therefore it cannot comment on the recommendation to prohibit construction on enclosed buildings on 562-568 Ballarat Road, Albion.

The Panel concludes that it is appropriate for the EAO to be applied to the 556-560 and 562-568 Ballarat Road, Albion.

#### **5.4 528A and 528C Ballarat Road, Albion**

##### **(i) The issues**

528A and 528C Ballarat Road are in the Industrial 1 Zone. 528A is contained in two portions and 528C is in the north east corner of the site adjacent to the railway line. A concrete manufacturing facility is located on the land. Figure 19 shows the context of the land.

Submitter 6 (Belle Deeds Pty Ltd) opposed the application of the EAO on the land.

The issue is whether there is sufficient evidence of potential contamination to justify the application of the EAO.

##### **(ii) Submissions**

The exhibition submission refers to a proposed rezoning of this land and others (522 and 538 Ballarat Road) under Amendment C149 to a residential zone. Golder Associates prepared the 518-528 Ballarat Road, Sunshine Phase 1 – Site History Assessment (Golder report) in 2011 which recommended the EAO be applied to the land. Submitter 6 considered the application of the EAO should be deferred to the future rezoning process.

Figure 19 528A and 528C Ballarat Road, Albion (outlined in yellow)



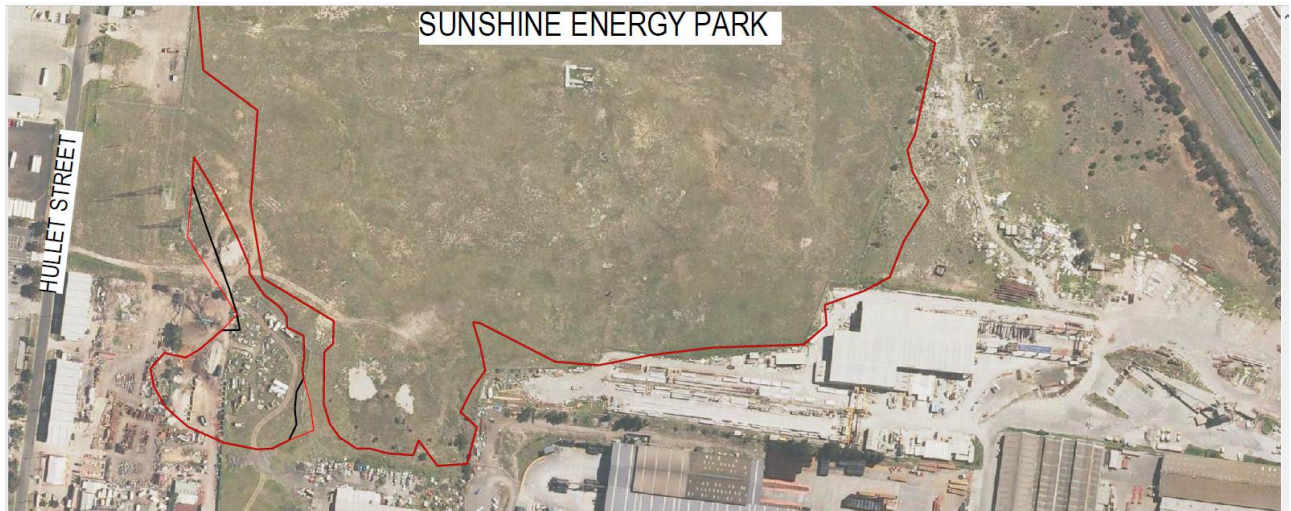
Mr Epstein also made submissions on behalf of Belle Deeds. Mr Epstein provided a copy of an audit completed for the site in 2002. It related to 528A Ballarat only and responded to a clean-up notice from the EPA that required the removal of a considerable quantity of deposited industrial waste and as Mr Fiedler pointed out was not a statutory environmental audit. Mr Epstein considered *“given that there has been no landfill waste placed in the vicinity of the Belle Deeds Land since this clean up, it follows that the land is not contaminated.”*

Similar to Mr Zukanovic’s land, Mr Epstein submitted that, if the Panel was inclined to apply the EAO, then it should only apply it in part to 528A and 528C Ballarat Road in *“a discrete area immediately adjacent to the former landfill.”*

Council did not support the deferment of the EAO as the Golder report found there was:

- a high likelihood of potentially contaminated soil due to fill material
- a high likelihood of potentially contaminated groundwater due to the offsite landfill
- a high, moderate, or low to moderate likelihood of potentially contaminated soil at different parts of the site due to activities that previously (or currently) occurred on the site (including concrete manufacturing).

Mr Tobin referred to Figure 1-2 of the 2013 Audit Report which indicated the land was encroached by the landfill. Figure 20 contains an excerpt of this.

**Figure 20** Inferred landfill boundary for 528A and 528C Ballarat Road, Albion

The EHS Review of Historical Documents 2020 found there was possible encroachment of quarry and landfill, it was potentially contaminated and should have the EAO applied. Mr Clarke supported this view.

### **(iii) Discussion and conclusion**

The inferred landfill boundary indicates there is some encroachment into 528A Ballarat Road however on the current evidence this is minor in the context of the overall land size. It seems that 528C Ballarat Road is not impacted directly by the former landfill. The Panel prefers to address the land unit consistently as its use as a concrete fabricator occupies the whole site.

Irrespective of a potential future rezoning request, the Panel has submissions and information before it that indicate the land is encroached by the former landfill in part and on that basis, it does not support the deferment of the EAO. The Panel found in Section 3.3 that in principle the EAO should be applied to the whole site. It retains this position in respect of this land.

While not part of this Amendment, it would be appropriate, as has been accepted by the landowner, that the EAO be applied for a rezoning that would allow a sensitive use.

The Panel concludes it is appropriate to apply the EAO to 528A and 528C Ballarat Road, Albion.

## Appendix A Document list

No.	Date	Description	Presented by
1	23/9/2020	Letter from PPV - directions hearing & potential hearing dates (emailed to parties)	Planning Panels Victoria
2	5/10/2020	Letter and submission on behalf of K Ho (emailed)	Gray Kinnane
3	21/10/2020	Letter Directions and Timetable (emailed)	Planning Panels Victoria
4	27/10/2020	Preliminary Findings and Advice Mr Kenneth Mival November 2019	Russell Kennedy
5	27/10/2020	Review of Historical Documents Former Sunshine Landfills – Carrington Drive and Hulett Street, Sunshine, Victoria, July 2020	Russell Kennedy
6	27/10/2020	Vapour Health Risk Assessment Carrington Drive GHD Dec 2019	Russell Kennedy
7	27/10/2020	Carrington Drive Reserve Landfill Gas Risk Assessment (superseded) GHD Dec 2019	Russell Kennedy
8	27/10/2020	Landfill Gas Risk Assessment Carrington Drive Reserve GHD Jan 2020	Russell Kennedy
9	12/11/2020	Environmental Audit Report, 57 Denton Avenue, Ground Consulting 13 Nov 2019	Russell Kennedy
10	13/11/2020	Sunshine Energy Park and Carrington Drive Reserve Framework Rehabilitation Plan and Aftercare Management Plan (March 2014)	Russell Kennedy
11	13/11/2020	PC PAN 90005541 for Carrington Drive Reserve (23 June 2017)	Russell Kennedy
12	13/11/2020	PC PAN 90007761 for Sunshine Energy Park (23 June 2017)	Russell Kennedy
13	16/11/2020	Closed Hulett Street Landfill - Sunshine Energy Park Landfill Gas Risk Assessment, July 2020, GHD	Russell Kennedy
14	16/11/2020	Closed Hulett Street Landfill at Sunshine Energy Park Vapour Health Risk Assessment, July 2020 GHD	Russell Kennedy
15	16/11/2020	Location of Submitters to Amendment C212brim	Russell Kennedy
16	16/11/2020	Proposed Environmental Audit Overlay Area	Russell Kennedy
17	16/11/2020	Aerial Photographs Sub No 1 - 19 Carrington Drive Sub No 2 - 57 Denton Avenue Sub No 3 - 103 Reid Street Sub No 4 - 61 Denton Avenue Sub No 5 - 43 Denton Avenue	Russell Kennedy

No.	Date	Description	Presented by
		Sub No 6 - 528 Ballarat Road	
		Sub No 7 - 7 Toora Court	
		Sub No 8 - 556-560 Ballarat Road	
18	16/11/2020	Council Part A Submission	Harwood Andrews
19	16/11/2020	518-528 Ballarat Road - Phase 1 - Site History Assessment prepared by Golders (18 August 2011)	Harwood Andrews
20	17/11/2020	Signed letter to Planning Panels Victoria (emailed)	Mr Zukanovic
21	17/11/2020	Email to Panel	Mr Swida, Albion Polish Club
22	18/11/2020	Letter to Panel re: adjournment request (emailed)	Harwood Andrews
23	19/11/2020	Email to Panel	Mr Swida, Albion Polish Club
24	19/11/2020	Planning Panels Victoria Letter re: adjournment request/2 <sup>nd</sup> Directions hearing (emailed)	PPV
25	20/11/2020	Various email re: request for interpreter	Ms Kellenbach for Mr Halse (prior to the engagement of Mr Epstein as advocate for Mr Zukanovic)
26	26/11/2020	Adjournment response submission (emailed to parties)	Harwood Andrews
27	26/11/2020	Letter post directions hearing (emailed)	Harwood Andrews
28	26/11/2020	Adjournment submission (emailed)	Harwood Andrews
29	26/11/2020	Soil sampling requests (emailed)	Ms Kellenbach for Mr Halse
30	26/11/2020	Energy Park drone imagery	Brimbank City Council
31	26/11/2020	Information sent to owners and occupiers February 2020 (18 files)	Harwood Andrews
32	26/11/2020	Outline of Submissions for the Brimbank City Council	Russell Kennedy
33	26/11/2020	Various emails re: site inspection	Mr Swida, Albion Polish Club
34	26/11/2020	Submission	Russell Kennedy
35	26/11/2020	Adjournment request submission	Russell Kennedy
36	27/11/2020	Letter to the Panel re: information circulated by Council February 2020 (emailed)	Harwood Andrews
37	27/11/2020	Response to adjournment request (emailed)	Planning Panels Victoria
38	27/11/2020	M Zukanovic – Lay evidence statement (emailed)	Mr Zukanovic

No.	Date	Description	Presented by
39	1/12/2020	3 emails regarding conduct of Hearing and replacement of Chair	Mr Swida, Albion Polish Club
40	2/12/2020	Copies of February 2020 information pack re: 19 Carrington Drive (emailed)	Brimbank City Council
41	2/12/2020	Contamination report 19 Carrington Drive, Albion (emailed)	Mr Swida Albion Polish Club
42	2/12/2020	Aerial photos 1951 to 1991	Brimbank City Council
43	3/12/2020	Carrington Drive Reserve, North Central and East Boundary Investigations Report, GHD, November 2019	Brimbank City Council
44	3/12/2020	Email withdrawal from hearing	Ms & Mr Paeglitis
45	3/12/2020	Expert Witness Statement of Mr John Glossop of Glossop Town Planning	Harwood Andrews
46	3/12/2020	Expert Witness Statement of Mr Patrick Clarke of Senversa	Harwood Andrews
47	4/12/2020	Submission	Environment Protection Authority
48	4/12/2020	Council Part B submission	Harwood Andrews
49	4/12/2020	Environmental Audit – 57 Denton Avenue	Brimbank City Council
50	7/12/2020	Submissions on behalf of Belle Deeds Pty Ltd and M Zukanovic emailed	Mr Epstein
51	7/12/2020	2003 08 15 EPA Westkon Clean Up Report 2002, emailed	Mr Epstein
52	7/12/2020	Expert witness presentation of Mr John Glossop	Harwood Andrews
53	7/12/2020	Clause 13-04-1S Contaminated and Potentially Contaminated Land	Harwood Andrews
54	7/12/2020	Clause 45-03 Environmental Audit Overlay	Harwood Andrews
55	7/12/2020	Ministerial Direction No.1 Potentially Contaminated Land	Harwood Andrews
56	7/12/2020	Planning Practice Note 30 Potentially Contaminated Land	Harwood Andrews
57	7/12/2020	Preliminary Findings and Advice Mr Ken Mival	Harwood Andrews
58	7/12/2020	Planning and Environment Act 1987 – Version No. 145	Harwood Andrews
59	7/12/2020	Environment Protection Act 1970 – Version No. 214	Harwood Andrews
60	8/12/2020	Managing Landfills – VAGO Report (September 2014)	Russell Kennedy

No.	Date	Description	Presented by
61	8/12/2020	Document 1316 – First Report – Hidden Defects 81 (1981)	Russell Kennedy
62	8/12/2020	Document 1317 – Second Report – Hidden Defects 81 (1981)	Russell Kennedy
63	8/12/2020	Submission	Russell Kennedy
64	8/12/2020	Reform of Victoria’s Environment Legislation	Russell Kennedy
65	8/12/2020	Reform of Victoria’s subordinate environment legislation	Russell Kennedy
66	8/12/2020	Contaminated Land - Integration of planning and environmental regulation	Russell Kennedy
67	8/12/2020	Borehole Log – GB44-rev2 (GHD)	Russell Kennedy
68	8/12/2020	Borehole Log (Environmental) GB1 (GHD)	Russell Kennedy
69	8/12/2020	GB1 and GB44 historical LFG bore results - September 2020	Russell Kennedy
70	8/12/2020	CDR LFG Bore Plan - Site Location Plan A3L Rev 1	Russell Kennedy
71	8/12/2020	Landfill Sites and Best Practice Environmental Management Buffers	Russell Kennedy
72	8/12/2020	Land Policy (Consolidated)	Russell Kennedy
73	8/12/2020	Transfer of Land	Russell Kennedy
74	8/12/2020	Memo re Area of Amendment Land	Harwood Andrews
75	8/12/2020	EPA Initial Response – 20 November 2019	Environment Protection Authority
76	8/12/2020	EPA Further response – 9 December 2019	Environment Protection Authority
77	8/12/2020	EPA Publication 759	Environment Protection Authority
78	9/12/2020	Almia PL v Port Phillip CC (Red Dot) [2020] VCAT 163	Russell Kennedy
79	9/12/2020	Victorian Government Gazette 190892 - page 3388 extracted	Russell Kennedy
80	9/12/2020	Council Part C submission	Harwood Andrews
81	9/12/2020	Sports Facility Development Plan	Harwood Andrews
82	9/12/2020	Supplementary Submission	Environment Protection Authority