

Planning and Environment Act 1987

Panel Report

Darebin Planning Scheme

Amendment C140

Cleeland and Edwardes Streets, Reservoir – Restrictive Covenant Removal

16 June 2014

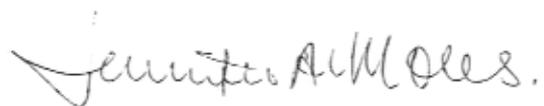


Planning and Environment Act 1987

Panel Report pursuant to Section 25 of the Act

Darebin Planning Scheme Amendment C140

Cleeland and Edwardes Streets, Reservoir – Restrictive Covenant Removal

A handwritten signature in dark ink, appearing to read 'Jenny Moles'.

Jenny Moles, Chair

Contents

	Page
1 Introduction.....	1
1.2 The subject land	1
1.3 The covenants	2
1.4 The Amendment.....	3
1.5 The Amendment process	3
2 Statutory and strategic context for decision making	6
2.1 Processes for removing a restrictive covenant	6
2.2 Clause 52.02 and matters to be considered	7
2.3 Strategic Planning Context	8
3 Consideration of the issues	11
3.1 Submission by owner of 273 Spring Street	11
3.2 Submission by the owners of 281, 283 and 285 Spring Street	12
3.3 Overall conclusion on covenant removal	15
3.4 Other matters	15
3.5 Recommendation	16

Appendix A List of Submitters

List of Tables

	Page
Table 1 Amendment Summary	ii
Table 2 Panel Process.....	ii

Amendment Summary

Table 1 Amendment Summary

The Amendment	Darebin Planning Scheme Amendment C140
Subject Site	2 and 4 Cleeland Street and 23, 23A and 25 Edwardes Street, Reservoir (as exhibited)
Purpose of Amendment	The Amendment proposes to amend Section 1 of the Schedule to Clause 52.02 of the Darebin Planning Scheme to effect the removal of two restrictive covenants applying to the subject land
The Proponent	Darebin City Council
Planning Authority	Darebin City Council
Exhibition	<ul style="list-style-type: none"> • Standard exhibition: 24 October to 28 November 2013 • Notification to properties at 277 Spring Street, Reservoir and 235 Spring Street, Reservoir: 10 February 2014 to 10 March 2014; and • Erection of a sign on the site: 7 April 2014 to 12 May 2014

Panel Process

Table 2 Panel Process

The Panel	Ms Jenny Moles
Directions Hearing	The Directions Hearing was held on 6 February 2014 at Darebin City Council
Panel Hearing	The Panel Hearing was held on 31 March 2014 at Planning Panels Victoria
Site Inspections	The Panel made an unaccompanied inspection of the subject land on 27 February 2014
Appearances	<ul style="list-style-type: none"> • Mr Darren Wong, Maddocks, lawyers, represented the Planning Authority. He was assisted by Mr Joerg Langeloh, Strategic Planner Darebin City Council • Mr James Lofting, HWL Ebsworth, lawyers, appeared for J and L Iakovidis, John Iakovidis, Love Iakovidis, Steven Iakovidis and Veronica Khan
Submissions	In response to public notice of the Amendment, two submissions were received
Recommendation	The Amendment be adopted as exhibited, subject to minor changes.
Date of this Report	16 June 2014.

1 Introduction

Amendment C140 (the Amendment) to the Darebin Planning Scheme (the Planning Scheme) was prepared by the Darebin City Council as Planning Authority. As exhibited, the Amendment proposes to amend Section 1 of the Schedule to Clause 52.02 of the Planning Scheme, effectively removing two restrictive covenants from the Amendment land.

1.2 The subject land

The land burdened by the covenants that are proposed to be removed is identified in the Explanatory Report as Lot 14 on PS20219 in Edwardes Street, Reservoir. The Explanatory Report also identifies the land as 2 and 4 Cleeland Street and 23, 23A and 25 Edwardes Street, Reservoir. It apparently forms part of a larger parcel of land owned by the Council running between Edwardes Street in the north and Cleeland Street in the south¹. The Panel was advised that the title to the land is contained in Title Volume 8175 Folio 225.

The subject land (or part of it) is currently developed with a civic centre (at 23 Edwardes Street²). There is an at-grade car park to the rear or south of the civic centre facing Cleeland Street³. A one-way laneway runs along the eastern side of the civic centre and the car park giving access to the car park from Edwardes Street and also providing access to the rear of the commercial properties which face Spring Street to the east⁴. Opposite the subject site on the southern side of Cleeland Street is conventional suburban housing. Housing also abuts the western boundary of the car park on the subject site except for a short abuttal to garaging for police vehicles.

The land forms part of the Reservoir activity centre which contains a variety of commercial and community facilities clustered around the complex road/rail intersection(s) at Spring, Edwardes and High Streets.

The Council intend to refurbish and develop the civic centre including by relocating the Reservoir library and a maternal child and health centre next to the civic centre in Edwardes Street, providing Council customer services, a function hall and a youth/music service. The Council indicated to the Panel that the Council services will vary over time and it is estimated that the redeveloped facility would attract up to 11,000 additional people to the area each year.

While the development project was being prepared, the Council became aware that two restrictive covenants apply to the site.

The subject site is zoned Public Use Zone – Schedule 6. The purposes of the zone include:

To recognise public land for public utility and community services and facilities.

¹ The street addresses provided in the Explanatory Report also appear to correspond with all of the larger parcel of land owned by the Council.

² As referred to in the Explanatory Report at 'Why is the amendment required?'

³ Some or all of this car park may be situated off the subject lot.

⁴ This appears to be R1 on PS20219.

To provide for associated uses that are consistent with the intent of the public land reservation or purpose.

The use and development of the land for local government purposes does not require planning permission.

1.3 The covenants

The two restrictive covenants affecting the subject land are contained in instrument of transfer no. 2201788 (first covenant) which dates from 1949 and instrument of transfer no A326370 (second covenant) dating from 1957.

The covenants have the following effects:

- *Prohibiting the owner of the subject land from constructing on the subject land any building other than a building comprising a picture theatre and one or more shops with usual outbuildings and fences (first covenant).*
- *Prohibiting the construction of any shops and the use of the subject land as a market or for the purpose of conducting any auction sales thereon or in any way using the land (and part thereof) or permitting the same to be used for wholesale or retail commercial trade purposes (second covenant).*

The Council submission to the Panel included that the subject land was originally owned by a picture theatre operator, and, when the land was sold, the covenants were not removed. They were overlooked, it was said, when the Council built the civic centre on the land at 23 Edwardes Street. Shops were later built on land that is affected by the second covenant.

The Explanatory Report for the Amendment indicated that current development is, and the new development would be, in breach of both the covenants. Later, at the Panel Hearing, however, the Council submitted that it was not clear that both covenants had been or would be breached (only the first) but it was convenient to remove both covenants given the Amendment was required for removal of at least one of the covenants.

The land benefitted by the covenants is:

- *Road R1 on PS 20219*
- *5 Viola Street, Reservoir, being Lot 21 on PS 7975*
- *251-253 Spring Street, Reservoir, being lots 1 and 2 on PS 20219 and Lot 2 on PS 344385G*
- *255-261 Spring Street, Reservoir, being lot 1 on PS 344385G*
- *263 Spring Street, Reservoir, being Lot 7 on PS 20219*
- *265 Spring Street, Reservoir, being Lot 8 on PS 20219*
- *267 Spring Street, Reservoir, being Lot 9 on PS 20219*
- *269-271 Spring Street, Reservoir, being Land in CP 102017*
- *273 Spring Street, Reservoir, being Lot 12 on PS 20219*
- *275 Spring Street, Reservoir, being Lot 2 on PS 37275*
- *277 Spring Street, Reservoir, being land in CP 159609V*
- *279 Spring Street, Reservoir, being Lot 1 on TP 104158W*
- *281 Spring Street, Reservoir, being Lot 3 on PS 113069*

- 283 Spring Street, Reservoir, being Lot 2 on PS 113069
- 285 Spring Street, Reservoir, being Lot 1 on PS 113069.

1.4 The Amendment

The exhibited Amendment proposed the following change to the schedule to Clause 52.02 of the Planning Scheme:

Insert the Council-owned land at 2 and 4 Cleeland Street, and 23, 23A and 25 Edwardes Street, Reservoir (Lot 14 on PS 20219 and Road R1 on PS 20219⁵) in column 1 of the table in the schedule, insert 'covenants' in column 2 and 'remove' in column 3.

1.5 The Amendment process

The Council initially attempted to seek agreement from all beneficiaries of the covenants for removal of the covenants but was not successful.

At its meeting of 15 July 2013, the Council resolved to proceed to exhibit a Planning Scheme amendment as a mechanism to remove the covenants.

The Amendment was authorised by the delegate of the Minister for Planning on 20 August 2013 and exhibition followed in October and November 2013.

The one opposing submission was received in response to the initial exhibition of the Amendment, which had included direct notice to beneficiaries. That submission was from the owner of a property which benefits from the covenant at 273 Spring Street, Reservoir (Sara and Frank Marafioti on behalf of Super Three Stars Pty Ltd). This is one of the commercial properties in Spring Street which abut the accessway along the eastern side of the subject site. The submission raises the following issues:

- Concerns previously raised about the exact nature of the proposed works have not been fully addressed.
- The works will have a negative impact on existing businesses.

At its meeting of 16 December 2013, Council resolved to refer the submission to a Panel. As a result, a Panel to consider the Amendment was appointed under delegation from the Minister for Planning on 24 January 2014. Ms Jenny Moles comprises the Panel⁶.

The Panel conducted a Directions Hearing on 6 February 2014. At that Hearing, the Council sought to have the main Hearing deferred from the intended date to allow further notice to be given to the owners of two properties that benefit from the covenant, being 277 and 235 Spring Street. The Council's view was that the notice had been inadequate for reasons set out in the letter to the Panel from Maddocks, the Council's lawyers, of 5 February 2014. The Panel agreed to this further notice and to defer the scheduled Hearing, directing that the notified beneficiaries should be advised that the Panel Hearing was now scheduled for 31 March 2014 and that they might request to be heard.

⁵ As noted earlier, R1 is the accessway providing vehicle access from Edwardes Street to the rear of the shops in Spring Street and the car park south of the civic centre.

⁶ Mr Richard Horsfall was originally appointed as the Panel on 9 January 2014, however, due to illness, his appointment was cancelled and the Panel was reconstituted.

Further notice was given on 10 February 2014 and there were no additional submissions or other correspondence received from these properties as a result of the further notice.

On 17 February 2014, however, the Panel received a further letter from the original submitter from 273 Spring Street expressing concern about the proposed closure of the laneway from Edwardes Street to vehicular traffic.

This was referred to the Council. Their lawyers advised on 27 February 2014 that the Council considered this to be a submission concerning the separate matter of closure of the laneway under section 223(b) of the *Local Government Act 1989* (Local Government Act). The letter nevertheless acknowledged that the proposed laneway closure forms part of the Council's broader plan to redevelop the civic centre precinct.

Also, on 24 March 2014, the Council forwarded a late submission to the Panel. This had been received on 13 March 2014 and was from persons who had originally received notice being the owners of 281, 283 and 285 Spring Street (J and L Iakovidis Pty Ltd, John Iakovidis, Love Iakovidis, Steven Iakovidis and Veronica Khan). Maddocks' correspondence indicated that the Council consented to the Panel hearing from those persons at the scheduled Hearing.

Further particulars of the submitters' objection were set out in a letter to Maddocks of 21 March 2014 which was provided to the Panel. The submitters' lawyers, HWL Ebsworth, indicated that their clients oppose the removal of the covenants on the basis that:

- *only one of the two Covenants affecting the land at 2 & 4 Cleeland Street and 23, 23A and 25 Edwardes Street, Reservoir ("Council Land") appears to have been breached;*
- *the covenants still provide benefit to our Clients' land;*
- *the removal of covenants as contemplated by the Amendment will result in real and perceived detriment to our Clients' land by allowing for unencumbered development;*
- *there is no sound planning reason to support the removal of the covenants in the absence of a proposal accompanying the covenant removal application, including detail of the proposed development's relationship to benefitted land; and the removal of both covenants is not necessary for the development of the land as a library or civic centre.*

The Panel was later advised that these objecting submitters' properties, which also abut the accessway running along the eastern side of the current Council car park, are rented out for business purposes - with the first floor rear of 281 Spring Street and the rear of 283 Spring Street used for accommodation.

The Panel conducted a Hearing at the offices of Planning Panels Victoria on 31 March 2014 where a presentation was made on behalf of the Council and the late submitters.

As a result of a Panel query at the Hearing about the completeness of the public notice of the Amendment, it became apparent that there had been no notice displayed on site in compliance with section 19(2A) of the *Planning and Environment Act 1987* (the Act). After the Hearing, Maddocks wrote to the Panel on 3 April 2014 requesting deferral of its decision

until this further advertising had been undertaken and any new submissions would be considered and submitters heard if necessary.

Maddocks wrote again to the Panel on 20 May 2014, advising that a notice had been erected on site on 7 April for 28 days and that no further submissions had been received. It was requested that the Panel proceed to prepare its report.

In reaching its conclusions and recommendations, the Panel has read and considered the written submissions received by the Council and the other material presented at the Panel Hearing.

The following chapter of this report sets out the procedure relating to removal of a restrictive covenant via a planning scheme amendment and the strategic context for decision making. The issues raised in the submissions and at the Panel Hearing relating to the Amendment are discussed in Chapter 3 which also includes the Panel's conclusions and recommendation.

2 Statutory and strategic context for decision making

2.1 Processes for removing a restrictive covenant

As outlined in Council's meeting minutes of 15 July 2013, covenants are legally enforceable and might be removed by the following means:

- **Agreement** – by obtaining the agreement of all persons who benefit from the restriction.

While the Council attempted to pursue this course of action in 2013, the Council was unable to obtain agreement from two of the fourteen beneficiaries of the covenant(s). Later the owners of 281, 283 and 285 Spring Street also withdrew their earlier consent.

- **Supreme Court order** – by application to the Supreme Court pursuant to section 84 of the *Property Law Act* 1958.

Such an application can be made to the Supreme Court if it can be established that the covenants are obsolete or would have an impact on the reasonable use of the subject land. The Council elected to not pursue this option due to the high costs involved.

- **Planning permit** – by the grant of a planning permit pursuant to Clause 52.02 of a planning scheme and section 60(5) of the Act.

Section 60(5) of the Act provides that:

The responsible authority must not grant a permit which allows the removal or variation of a restriction referred to in subsection (4) unless it is satisfied that—

(a) the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer any detriment of any kind (including any perceived detriment) as a consequence of the removal or variation of the restriction; and

(b) if that owner has objected to the grant of the permit, the objection is vexatious or not made in good faith.

The Council took the view that it would be likely to be unsuccessful in this course '...as a single objection would place Council in a situation where the planning application must be refused'.⁷

- **Planning scheme amendment** – by an amendment to the schedule to clause 52.02 of a planning scheme.

This has been the course adopted by the Council because it was seen to be efficient in terms of time and costs and, compared to other options, had the highest chance of success.

⁷ Council meeting minutes 15 July 2013, p32.

2.2 Clause 52.02 and matters to be considered

Clause 52.02 of the Planning Scheme has the following stated purpose:

To enable the removal and variation of an easement or restrictions to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

The clause provides so far as is relevant here:

A permit is required before a person proceeds:

- *Under Section 23 of the Subdivision Act 1988 to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant.*
- ...

This does not apply:

- *If the action is required or authorised by the schedule to this clause.*
- ...

The schedule to Clause 52.02 includes a table relating to restrictions under Section 23 of the *Subdivision Act 1988* (Subdivision Act) which allows the affected land to be inserted together with the identified easement or restriction and the requirement to be applied, such as 'remove' or 'vary' (as specified).

There are no particular matters set out in the Act or the regulations guiding the decision as to whether a property might be added to the schedule to Clause 52.02 in the manner proposed.

The general considerations relating to amendments apply. These are set out at section 12(2) of the Act as follows:

In preparing a planning scheme or amendment, a planning authority—

- (a) must have regard to the Minister's directions; and*
- (aa) must have regard to the Victoria Planning Provisions; and*
- (ab) in the case of an amendment, must have regard to any municipal strategic statement, strategic plan, policy statement, code or guideline which forms part of the scheme; and*
- (b) must take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment; and*
- (c) must take into account its social effects and economic effects.*

2.2.1 Previous panel reports

Both parties to the Panel Hearing referred to previous Panel reports which discuss the matters to be considered when removing a covenant by scheme amendment.

Notably, the report of the panel considering Amendment C46 to the Mornington Peninsula Planning Scheme was said to set out the relevant principles adopted by subsequent panels, such as that considering Amendment C143 to the Boroondara Planning Scheme. The Mornington Peninsula C46 panel report included:

This Panel therefore concludes that the principles or criteria for considering an Amendment that would enable the variation or removal of a restrictive covenant are:

First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. The Panel must have regard to the Minister's Directions, the planning provisions, MSS, strategic plans, policy statements, codes or guidelines in the Scheme, and significant effects the Amendment might have on the environment, or which the environment might have on any use or development envisaged in the Amendment.

Second, the Panel should consider the interests of affected parties, including the beneficiaries of the covenant. It may be a wise precaution in some instances to direct the Council to engage a lawyer to ensure that the beneficiaries have been correctly identified and notified.

Third, the Panel should consider whether the removal or variation of the covenant would enable a use or development that complies with the planning scheme.

Finally, the Panel should balance conflicting policy objectives in favour of net community benefit and sustainable development. If the Panel concludes that there will be a net community benefit and sustainable development it should recommend the variation or removal of the covenant.

With respect to these principles Mr Wong noted that a net test was involved, that some detriment would not necessarily be fatal to the Amendment and that the effects for the beneficiaries or their concerns should not be given greater weight than that of others in the community,

including non-beneficiaries.

2.3 Strategic Planning Context

2.3.1 Objectives of planning

The objectives of planning in Victoria as referred to in the first consideration above are set out in section 4 of the Act so far as is relevant as follows:

(a) to provide for the fair, orderly, economic and sustainable use, and development of land;

(b) ...

(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

(d) ...

(e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

2.3.2 State Planning Policy Framework

In relation to the policy context for decision making, the Council provided a response to the Strategic Assessment Guidelines as part of the Explanatory Report and again as part of its submissions at the Panel Hearing. There was no disagreement on behalf of the submitters about the relevant components of the policy framework.

The Council submitted, and the Panel agrees, that key parts of the State Planning Policy Framework (SPPF) for the purposes of considering the Amendment are:

- Clause 11 – Settlement which indicates that planning is to facilitate sustainable development and take advantage of existing settlement patterns and investment in transport, service utilities and community infrastructure.
- Clause 11.01-2 – Activity centre planning which provides that activity centres should provide a focus for business, shopping, working, leisure and community facilities.
- Clause 16 – Housing which supports housing diversity, with new housing having access to services and planned for long term sustainability including walkability to schools, activity centres and transport.
- Clause 19.02-2 – Education facilities, which includes a strategy to develop libraries as community based learning centres.
- Clause 19.02-3 – Cultural facilities which encourages a wide range of arts and cultural facilities in activity centres as well as other locations.

2.3.3 Local Planning Policy Framework

Council submissions and the Explanatory Report jointly indicated, and the Panel agrees, that the Amendment should be assessed having regard to the following local planning policies:

- Clause 21.04-3 – Framework Plan which identifies the subject land as being in the Reservoir Major Activity Centre.
- Clause 21.05-1 Element 1: Sustainability which identifies activity centres as key locations for increased housing and development activities in the foreseeable future.
- Clause 21.05-2 Element 2: Housing which identifies a vision for locating housing within easy proximity to community facilities, services and public transport.
- Objective 1 of Clause 21.05-6 Element 6: Activity Centres – which identifies the need for community facilities to be located within or close to activity centres.
- Clause 22.03 – Activity Centres – which encourages a mix of activities in activity centres.

2.3.4 Other planning strategies

At the Hearing, Mr Wong referred to the Reservoir Structure Plan of 22 August 2012. There was some discussion at the Panel Hearing about the status of that Structure Plan document. While some of the text identifies it as a draft document, as Mr Lofting submitted, Mr Wong advised that the Council had adopted it as policy; and Amendment C138 to the Planning Scheme (which is awaiting a panel report) would include the plan as a Reference Document of the scheme and implement aspects of it through local policy. A later amendment is proposed, he said, which would introduce other implementing scheme requirements. In the circumstances the Panel has had regard to that proposed Structure Plan which is seriously entertained.

The Structure Plan is a 20 year centre-wide plan for the Reservoir Major Activities Area. It recognises the significant community facilities already in the area including the civic centre and library and notes that the civic centre role would be further strengthened when the library is redeveloped within that site. Clause 2.3.4 identifies the civic centre car park of 2989 square metres as a site with *'potential for high quality development to diversify the mix of uses within the centre'*. It notes at Clause 2.3.6 that the civic centre is the only recognisable civic space in the Reservoir centre and that *'it is limited in size and not suitable for public events of a substantial nature'*.

The subject site is included within Precinct 2 of the Structure Plan referred to as Reservoir Village. Section 5.3 identifies the civic centre and redeveloped library as key community uses in the precinct. It also includes the upgrading of the Edwardes Street public realm, in part by provision of active frontages to the library and along Edwardes Street, and activation of a plaza area and the laneway east of the civic centre. It includes:

*Activation of the existing laneway at the rear of the Edwardes Street shops with a **new plaza space whilst maintaining access to existing properties for servicing.***

Clear access arrangements for vehicles, loading and pedestrians within the car park.

Options which consider the consolidation of the car park with adjoining properties.

Support the 'Revitalise Reservoir' project which proposes streetscape improvements to the laneway to the east of the Civic Centre and encourage adjoining land uses to activate the laneway (Panel emphasis).

The precinct plan indicates the future for the subject site and general surrounds (except further west in Edwardes Street) as for *'retail/hospitality/community uses with residential/office above ground floor.'* Three to five storey development is envisaged. What appears to be part of the Council car park is identified as a 'key redevelopment site'.

3 Consideration of the issues

In considering the Amendment, the Panel discusses each of the two submissions separately and then draws conclusions concerning the Amendment overall.

3.1 Submission by owner of 273 Spring Street

As earlier noted, the written submission to the Council from the owner of 273 Spring Street raised a concern that the exact nature of the proposed civic centre works had not been fully divulged, but nevertheless, at the same time, argued that those works would have a negative impact on existing businesses.

As the submitter did not attend the Panel Hearing, it is not clear what is intended by these initial written submissions concerning unspecified works and their negative impacts. Given the later letter from the submitter, however, it would seem that the concerns may relate to continuation of access to car parking at the rear of the submitter's property or the general availability of car parking for commercial facilities in the area, as may be affected by the Council works.

The Panel agrees with the lawyers for the Council that the access issue is strictly a matter to be considered in the context of the laneway closure under section 223(b) of the Local Government Act and that separate process may lead to the road closure irrespective of the outcome of the Amendment process.

To the extent that it is appropriate that the Panel considers this matter, it is noted that removal of access to car parking and car parking areas, are not proposed as part of the Amendment, as was submitted by Mr Wong. Also the Structure Plan for the Reservoir activity centre, as quoted above, specifically recognises the need for access to parking areas at the rear of the Spring Street properties in its provisions relating to Precinct 2. It is clear that this will be a consideration in the detailed planning of the precinct. It is therefore not something that will necessarily be precluded by any development of the subject land for civic purposes which is intended to follow this Amendment.

Also, while access and parking arrangements in the immediate vicinity may change and it is possible that some Spring Street business owners may consequently suffer a measure of inconvenience in these respects (though this is not certain), the activation of the area to the rear of the civic centre and along the laneway at the rear of the Spring Street properties, as envisaged in the Precinct 2 elements of the Reservoir Structure Plan, should see existing businesses benefitted by enhanced custom. In this respect, it was Mr Wong's submission at the Hearing that the proposed civic centre services would provide an important anchor in the centre, attracting additional visitors and adding vitality to the commercial area with natural and positive flow on effects to local businesses including those in Spring Street.

In the Panel's view, the potential enhanced benefit to these landowners in terms of custom would combine with the benefits to the wider community of the centrally located improved community facilities and the public realm enhancement to offset any detriment to the submitter in terms of changed access arrangements.

3.2 Submission by the owners of 281, 283 and 285 Spring Street

These submitters, whose land is benefitted by both covenants, were represented at the Panel Hearing by Mr Lofting of HWL Ebsworth, lawyers. They own the properties at 281 Spring Street; 1st Floor Rear 281 Spring Street; 283 Spring Street; Rear Ground Floor 283 Spring Street; 285 Spring Street; and numbers 1,3 and 5 Edwardes Street.

Mr Lofting elaborated on his clients' earlier general written concerns. In summary it was his submission that:

- *Only one of the covenants affecting the Council Land appears to have been breached;*
- *The covenants still provide benefits to our Clients' Land;*
- *The removal of the covenants as contemplated by the Amendment will result in real and perceived detriment to our Clients' Land;*
- *There is no sound planning reason to support the removal of the covenants in the absence of a full development proposal for the Council Land; and*
- *The removal of both covenants is not necessary for the development of the Council Land as a library or civic centre.*

Mr Lofting identified the first covenant as applying to the land upon which the civic centre is currently sited and the second covenant as applying to land next door to it where the library is proposed.

Mr Lofting submitted that the Council's use of the subject land as a civic centre has been in breach of the first covenant, which limits its use to a picture theatre, for some time. It was acknowledged by him that this covenant is unnecessarily restrictive and he indicated that his clients agreed that the restriction should be removed.

Concerning the second covenant, Mr Lofting noted its restriction on shop construction and commercial uses, and said that the proposed library would not fall foul of the covenant. He said that accordingly there is no need to remove or vary the second covenant and, indeed, that retention of the second covenant would help ensure that the land is used for community rather than commercial purposes. He said that the existing covenant does not preclude the achievement of policies such as those at Clause 19.02 – Cultural facilities and Clauses 21.05-6 and 22.03 – all as quoted above.

In reference to the tests set out in the panel report for Mornington Peninsula Planning Scheme Amendment C46, he said:

- The Council had failed to demonstrate how the removal of the second covenant would further the objectives of planning in line with relevant Council policies and strategies.
- His clients and other beneficiaries who operate commercial properties that abut the subject site would be negatively affected if the covenant was removed and private ventures were undertaken on the land.
- Removal of the covenant would 'open the door' for potential use of the land for other than public purposes.
- The covenant removal would be inconsistent with the objective of planning at section 4 of the Act which recognises the value of public facilities.

- There are broad community benefits to the retention of the covenant; in particular he said that the covenant provides a clear and unambiguous limitation on the scope of uses on the land thus giving community certainty about public use.

In response to the submission, at the Hearing, Mr Wong confirmed that the first covenant now serves no useful purpose and has been breached at least since the 1990s. He submitted that the covenant is redundant and should be removed in order to *...remove the remote chance that one of the fourteen beneficiaries to title could challenge Council's non-compliance with the restrictive covenant.*⁸

In relation to the second covenant, Mr Wong said that even though that covenant does not need to be removed to facilitate the proposed civic development, the Amendment represents a convenient time for its removal since it has become outdated and would allow the subject land to further fulfil the objectives of the Planning Scheme. He also said that if the second covenant was removed and if the land were used for shops this could not be viewed as causing unreasonable detriment to the submitters in the context of an activity centre. Any detriment which might be suffered by the submitters would only be minimal or negligible in the context that the primary nature of the activity on the subject land would not alter. He also said that any such detriment needed to be balanced against the positive aspects of the proposal, being the use of the land in accordance with the policies and provisions of the Planning Scheme including the policy intents for a major activity centre. He further said that it was self evident that a community facility which includes library facilities, youth services and function facilities will confer a considerable community benefit. The economic benefits discussed above would also apply.

Overall, Mr Wong argued that when the covenants are removed, the uses that take place at the civic centre would be formally legalised and the new library could be built for the benefit of the community. He said that the Amendment does not propose or approve any development work on the land but removes a 'technical hurdle' to certain development which would be undertaken in accordance with the Planning Scheme and its policies.

As discussed above, the Panel needs to take into account the interests of the beneficiaries as well as others in the community and is required to determine whether a net community benefit would result from the removal of the covenants.

In relation to the arguments presented by Mr Lofting and the Council submissions in response to submitter arguments, the Panel finds:

- There is a potential utility to removal of the second covenant, as was discussed at the Hearing, as even if the land to the east of the existing civic centre were only used as a library, it would allow a café to be included as part of that development. A library café might be an ancillary use in terms of Clause 64.01 of the Planning Scheme, but would likely fall foul of the covenant given the 'plain language' approach to covenant interpretation.⁹

⁸ Reference was to both covenants in Council meeting minutes 15 July 2013, p33.

⁹ See discussion in *Coridas v Monash CC* (1998/09018) [1998] VIC CAT 523 (13 May 1998).

With respect to potential commercial uses of the land, the Panel also notes the intention expressed in relation to this Precinct 2 of the Structure Plan of activating street frontages including along the accessway east of the civic building and around the proposed plaza area at the rear of the civic centre/library. It is only to be expected that the activation of the frontages would likely include some commercial uses. This again supports the utility of removal of the second covenant.

The Panel further notes that the use of the burdened land (or the plaza portion of it) for a farmers' or community market which commonly take place on public land, and which would enliven the precinct, would, as was submitted by Mr Wong, also appear to be precluded by the covenant despite its essentially being a public use.

- Even if there was no direct need for removal of the second covenant, the convenience of its removal in concert with the first covenant's removal is a public administrative benefit especially given it is a covenant which limits the future ability to respond in a flexible way to the policy intents for development of a major activity centre.
- The Panel does not agree with the argument advanced by Mr Lofting that retention of the second covenant would help ensure that only community uses would eventuate on the land. The covenant precludes wholesale and retail activities only: a range of other uses might occur on the burdened land in addition to community uses such as a library – including offices and professional services.
- In any case the intended use of the subject land for community uses is not dependent on this covenant. It is clearly expressed in the Structure Plan for the centre, which is proposed to be given more detailed planning effect in the future. In this respect, as indicated above, the Panel does not agree with Mr Lofting's assertion that the Structure Plan should be treated as a draft only.

Nor does the Panel agree that the plan it is unclear with respect to the future of the subject site. The fact that part of the site is identified as a key redevelopment site does not presuppose its use (either entirely or in part) for other than community uses.

- The Panel agrees with the Council submission that any shop development which might accompany the community centre development could not be viewed as causing unreasonable detriment to the submitters in the context of an activity centre.

There was some discussion of possible disturbances to the residential use of the rear of the submitters' properties by new commercial uses. It would seem unlikely, however, that any such detriment would be significantly more problematic than the present potential disamenity of abuttal to a vehicle accessway and shopping centre car park (which *inter alia* services two restaurants).

Overall, with respect to the submitter case advanced by Mr Lofting, the Panel notes the submitters' acceptance that the first covenant can be removed. So far as the second covenant is concerned, the Panel is satisfied that there is utility to its removal; its removal will assist in achieving outcomes on the burdened land appropriate to the planning intents for the activity centre; the covenant will not ensure community uses occupy the land but rather this outcome is the Council's express planning intent; the neighbouring submitters will not be unreasonably affected by the covenant removal and any commercial uses which might eventuate in this part of the activity centre.

3.3 Overall conclusion on covenant removal

Having regard to the factors discussed above, the Panel finds that a net community benefit would be achieved by the removal of both covenants as proposed by the Amendment.

3.4 Other matters

3.4.1 The accessway

As noted earlier the subject land from which the covenants are proposed to be removed is identified at the start of the Explanatory Report as Lot 14 on Plan of Subdivision 20219. That land is also identified as 2 and 4 Cleeland Street as well as 23, 23A and 25 Edwardes Street.

The Explanatory Report also indicates, however, that the change which is to be made to Schedule 1 to Clause 52.02 is to not only insert Lot 14 into the schedule but also Road 1 (R1) on Plan of Subdivision 20219. This would apparently remove one or other of the restrictions from that roadway - being the accessway at the rear of the Spring Street shops. This in turn is inconsistent with the Instruction Sheet for the Amendment which refers only to Lot 14 being added to the schedule.

When this matter was raised by the Panel at the Hearing, Mr Wong acknowledged that the Explanatory Report was in error and no covenants apply to the accessway.

The Explanatory Report requires correction in this respect. It would appear that this correction is not something that would require any further formal or informal notice.

3.4.2 The description of the burdened land

LP20219 was provided to the Panel at the Hearing by the Council. Lot 14 as shown on that lodged plan does not extend as far south as Cleeland Street - rather the land between Lot 14 and Cleeland Street is shown as occupied by Lots 16 and 17 which abut Cleeland Street and by part of the L-shaped Lot 15, which also has Edwardes Street frontage west of Lot 14.

It was Mr Lofting's written submission that the first covenant from 1949 applies to Lots 15 and 17 and the second covenant to Lots 14 and 16 on the plan. It was nevertheless later agreed that Lot 14 is affected by both covenants consistent with the Council view.

Mr Wong advised, however, in relation to the identity of the subject land, that Lots 16 and 17 as shown on the LP20219 had later been consolidated and the civic centre was partly on land shown as Lot 14 and partly Lot 15. He maintained that Lot 14 is correctly identified as the subject land. In his concluding remarks Mr Wong also said that no covenant applies to Lot 16 and that Lots 15 and 17 together with the roadway remained in the parent title to the land as originally subdivided.

The Panel has also reviewed the minutes of the Council meeting of 15 July 2013 at which it was resolved to commence the Amendment process. These minutes were included amongst the background material supplied to the Panel by the Council. Appendix B to those minutes contains maps showing the subject Lot 14 and properties benefitted by each of the covenants. These show the same pattern of lots as on LP20219 including that Lot 14 does

not extend to Cleeland Street. The maps suggest that accessway (R1) and Lots 15 and 17 are benefitted by the covenants.¹⁰

The information on those maps is also consistent with the mapping of the lots and beneficiary properties provided in the notification letter to affected persons sent by the Council on 21 October 2013, a copy of which was provided to the Panel pre-Hearing. That letter refers only to the removal of the covenant from '*23 Edwardes Street (Lot 14 on Plan of Subdivision 20219)*'.

Given the above, the Panel remains confused as to the exact identity of the subject land: Lot 14 is clear enough, but it is difficult to believe that the street address for Lot 14 is other than 23 (or perhaps 23, 23A and 25) Edwardes Street. It may be, however, that lot consolidation has resulted in an address in Cleeland Street, though this seems unlikely. The Panel queries whether the land said to be affected by the Amendment has been wrongly given the street addresses for the wider Council parcel.

The Panel suggests that the street address(es) for the subject land should be rechecked and corrected if necessary. It would seem, however, that if the street description is not correct, any person viewing the Amendment would have believed the covenant removal was to be **more** extensive than actually proposed. It is unlikely that re-exhibition would result in further submissions. Re-exhibition would not appear to be warranted if this is truly a mistake.

3.5 Recommendation

The Panel recommends:

The Amendment should be adopted as exhibited subject to correction of the description of the change to the schedule to Clause 52.02 as described in the Explanatory Report to exclude the accessway (R1 on Plan of Subdivision 20219); and confirmation, and if necessary correction, of the street address(es) of the affected land.

¹⁰ As well as lots along Spring Street and in Viola Street.

Appendix A List of Submitters

No.	Submission
1	Sara and Frank Marafioti on behalf of Super Three Stars Pty Ltd
2	J and L Iakovidis Pty Ltd, John Iakovidis, Love Iakovidis, Steven Iakovidis, and Veronica Khan
