

Planning and Environment Act 1987

Panel Report

Nillumbik Planning Scheme Amendment C108

Diamond Creek Trail Extension

Front page

23 January 2017

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Panel Report pursuant to section 25 of the Act

Nillumbik Planning Scheme Amendment C108

Diamond Creek Trail Extension

23 January 2017



Rodger Eade, Chair



Katherine Navarro, Member

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List of Abbreviations

BMO	Bushfire Management Overlay
CFA	Country Fire Authority
DELWP	Department of Environment, Land, Water and Planning
DPO	Development Plan Overlay
EMP	Environmental Management Plan
EPBC Act	Environmental Protection and Biodiversity Conservation Act, 1999 (Commonwealth)
FFG Act	Flora and Fauna Guarantee Act, 1988
GRZ	General Residential Zone
LSIO	Land Subject to Inundation Overlay
PAO	Public Acquisition Overlay
PBN	Principal Bicycle Network
POS	Public Open Space
PPRZ	Public Park and Recreation Zone
RCZ	Rural Conservation Zone
RMA	Road Management Act 2004
SPPF	State Planning Policy Framework
VPP	Victoria Planning Provisions
WMO	Wildfire Management Overlay

Overview

Amendment Summary	
The Amendment	Nillumbik Planning Scheme Amendment C108
Common name	Diamond Creek Trail Extension
Brief description	Introduce Public Acquisition Overlay Schedule 4 and an Incorporated Document to facilitate the development of the Diamond Creek Trail Extension.
Subject site	12 private properties abutting the Diamond Creek
The Proponent	Shire of Nillumbik
Planning Authority	Shire of Nillumbik
Authorisation	A03359, 3 May 2016
Exhibition	28 July 2016 to 29 August 2016
Submissions	Number of Submissions: 38, including 1 late submission with 12 opposed and the remainder either supporting the Amendment, making no objection or seeking to impose conditions.

Panel Process	
The Panel	Rodger Eade (Chair) and Katherine Navarro
Directions Hearing	Nillumbik Shire Offices, Monday 17 October 2016
Panel Hearing	Nillumbik Shire Offices, 28-30 November and 1 December 2016
Site Inspections	Panel Chair on a part accompanied site inspection 6 December 2016 and Ms Katherine Navarro, unaccompanied on 7 December 2016 (accessing public land only)
Date of this Report	23 January 2017

Executive Summary

(i) Summary

Nillumbik Planning Scheme Amendment C108 (the Amendment) seeks to apply Public Acquisition Overlay Schedule 4 to 12 private properties abutting the Diamond Creek between Diamond Creek and Hurstbridge. It is further proposed to insert an Incorporated Document at Clause 81.01. The purpose of the PAO and Incorporated Document is to facilitate the acquisition and development of the land for a shared walking, bicycle and adjacent horse trail between the end of the existing trail at Luscombe Drive, Diamond Creek and the Council Reserve at Graysharps Road, Hurstbridge.

Council has been investigating options for the trail extension for around 10 years and has evaluated two main options, the roadside alignment and the creekside alignment. Council made a decision to pursue the creekside alignment which will be facilitated by the Amendment.

Some of the proposed trail extension will be accommodated within existing public land. It also passes through 12 private properties. A number of the owners of those properties oppose the proposed Amendment and only one of the impacted land owners has provided support for the Amendment.

Council received a total of 38 submissions, with 12 opposing the Amendment and the remainder either supporting it, offering no objection or proposing conditions on the approval of the Amendment.

Key issues raised by those opposing the Amendment included:

- an alignment which does not require the acquisition of all or some of the private land should be pursued
- the Amendment disrupts planning for 22 and 26 Herberts Lane and 142 Broad Gully Road, Diamond Creek
- a Public Acquisition Overlay should only be used for 'essential purposes' and the trail extension is not an essential purpose
- the Incorporated Document does not provide adequate regulation of the development of the trail extension and Council should not be exempted from its own planning requirements
- access to some properties as a result of the PAO and subsequent acquisition will be disrupted
- property boundary anomalies exist to the extent that the application of the Public Acquisition Overlay is both unclear and may be inadvertently applied to Crown land and additional properties
- the Amendment contravenes Council's responsibilities under some environmental protection legislation
- the land impacted by the trail extension may be exposed to fire risk and should not be developed unless there is a Fire Management Plan, approved by the Country Fire Authority, in place.

Only issues which can be considered by the Panel are listed here. Submitters raised many issues which the Panel cannot consider as these issues do not relate directly to the Amendment. Those supporting the Amendment mainly focussed on the recreation and health benefits of the trail extension.

The Panel has considered all submissions made to it and a range of other relevant material provided by Council, including significant strategic work, which supports the trail extension linking Diamond Creek and Hurstbridge.

The Panel has drawn the following main conclusions:

- that there is strategic support for the proposed Amendment in State, regional and Council policies and strategies
- the Public Acquisition Overlay and Incorporated Document are appropriate planning tools to use and are appropriately applied
- there are some mapping anomalies in respect of the affected properties' boundaries with the Diamond Creek and where possible these should be resolved before the Amendment is approved and gazetted or on the advice of the Department of Environment, Land, Water and Planning, at a later stage of the process.

(ii) Recommendations

Based on the reasons set out in this Report, the Panel recommends that Nillumbik Planning Scheme Amendment C108 be adopted as exhibited subject to the following:

- 1. Revise the Incorporated Document to include the Melbourne Water and Country Fire Authority conditions as set out in the Panel recommended version of the Incorporated Document at Appendix D.**
- 2. Resolve identified mapping anomalies where the boundary of the Public Acquisition Overlay is the Diamond Creek, preferably prior to approval and Gazettal, but on the advice of the Department of Environment, Land, Water and Planning, resolution may occur at a later stage.**
- 3. Consider revising the alignment of the Public Acquisition Overlay in locations where re-alignment of the trail extension closer to the Diamond Creek would result in reducing the amount of arable land being acquired for the shared trail.**

1 Introduction

1.1 The Amendment

(i) Amendment description

The Amendment proposes to:

- apply the Public Acquisition Overlay (PAO4) to land which the Nillumbik Shire Council wishes to acquire for the Diamond Creek Trail Extension
- insert a new Incorporated Document entitled *Diamond Creek Trail Extension (Diamond Creek to Hurstbridge - Incorporated Document (May 2016))*, which will exempt use and development associated with the Diamond Creek Trail Extension project, from the need for a planning permit.

(ii) Purpose of the Amendment

Amendment C108 to the Nillumbik Planning Scheme (the Amendment) proposes to enable future development and use of a public shared recreation trail for cyclists, pedestrians and horse-riders between Diamond Creek and Hurstbridge (the trail extension).

This results from work undertaken by Council over the past 10 years to find a feasible route to extend the Diamond Creek Trail between Diamond Creek and Hurstbridge. The *Nillumbik Trails Strategy, 2011* confirmed the intention to provide this trail extension noting that critical sections of land are in private ownership.

An assessment of trail alignment options led to Council:

- adopting a preferred alignment along the creek corridor in 2013
- endorsing the creek alignment in February 2016
- resolving in April 2016 to commence the Amendment.

(iii) The subject site

The Amendment applies to the following private properties:

- 142 Broad Gully Road, Diamond Creek
- 185 Main-Hurstbridge Road, Diamond Creek
- 22 Herberts Lane, Diamond Creek
- 201 Main-Hurstbridge Road, Diamond Creek
- 203 Main-Hurstbridge Road, Diamond Creek
- 86 Wilson Road, Wattle Glen
- 26 Herberts Lane, Diamond Creek
- 65-135 Wilson Road, Wattle Glen
- 673 Heidelberg-Kinglake Road, Hurstbridge
- 687 Heidelberg-Kinglake Road, Hurstbridge
- 675-685 Heidelberg-Kinglake Road, Hurstbridge
- 1 Mary Place, Hurstbridge.

The Amendment affects the following parcels of public land, which comprise Council reserves and Crown land:

- 666 Heidelberg-Kinglake Road, Hurstbridge
- 661 Heidelberg-Kinglake Road, Hurstbridge
- 137A Wilson Road, Wattle Glen
- 137 Wilson Road, Wattle Glen
- 50 Graysharps Road, Hurstbridge
- 183 Wadeson Road, Hurstbridge
- 55 Wadeson Road, Hurstbridge.

These parcels of public land will only be the subject of the Incorporated Document, as no PAO is required, whereas both the Incorporated Document and PAO will apply to the 12 private properties.

The land impacted by the Amendment is a long narrow strip broadly following the alignment of the Diamond Creek, between the end of the existing trail in Luscombe Drive, Diamond Creek to the Council reserve at 50 Graysharps Road, Hurstbridge. Five aerial photographs showing the land impacted by the PAO4 are shown in Appendix C.

1.2 Background to the proposal

The Shire of Nillumbik is a semi-rural municipality located approximately 25 kilometres east of the Melbourne CBD. The Australian Bureau of Statistics estimated the resident population at 62,872 in 2014.

The Shire has a number of significant waterways, including:

- the Yarra River, which defines much of the southern boundary of the Shire
- the Plenty River, which defines much of the western boundary of the Shire
- the Diamond Creek, which generally runs south through the middle of the Shire from its source in the Kinglake Ranges and passes through the townships of St Andrews, Hurstbridge, Diamond Creek and Eltham.

Much of the Shire comprises land which is of high environmental value, particularly the major waterways listed above. Further, there are expansive areas of forested hills in the north, north-east and east of the Shire and much of the Shire is part of one of Melbourne's designated 'green wedges'.

A considerable amount of the Shire's environmentally significant land is within Crown or Council conservation reserves, but also a significant amount is within private land.

The existing Diamond Creek Trail is a 12 kilometre shared-use, off road trail. It currently connects the Diamond Creek township to Eltham Lower Park (on the southern boundary of the Shire) along a creek corridor. At Eltham Lower Park, the trail crosses the Yarra River and connects to the Main Yarra Trail, which continues south-west to the Melbourne CBD. The existing trail is predominantly used for recreation purposes.

The existing trail provides connections to the train stations in both Eltham and Diamond Creek, which facilitates access to the trail from other parts of the metropolitan area. The trail currently provides links to community activity centres and sporting hubs at:

- Eltham Lower Park – Diamond Valley Miniature Railway, Eltham Horse and Pony Club, sports grounds (lacrosse and cricket) and regional playground

- Eltham Central – sports grounds (football, cricket and rugby), tennis club, library, community facilities, retail and other services
- Eltham North – sports grounds (soccer and cricket), community hall, regional play space, and Edendale Community Farm
- Diamond Creek – sports grounds (football and cricket), baseball club, tennis club, netball club and municipal playground, community facilities, retail and other services.

The Diamond Creek Trail is the most used trail in the Shire. It is estimated by Council that the total number of users of the trail in 2015 was 358,485, as calculated by GTA Consultants in the *Diamond Creek Trail Extension Trail Alignments Options Assessment Report (Feb 2016)*.

At its northern (Diamond Creek) end, the trail currently terminates at the south-west corner of 142 Broad Gully Road, Diamond Creek where a road (Luscombe Drive) stops at the property's boundary.

As indicated in section 1.1(ii), Council has been working for some 10 years to seek an appropriate alignment to extend the trail to Hurstbridge. During this time it has undertaken extensive background research and consultation with the community including investigation of alternative alignments for the trail. Council has chosen the Diamond Creek alignment as its preferred alignment.

1.3 Panel process

The Amendment was prepared by the Nillumbik Council as Planning Authority.

At its meeting of 6 September 2016, the Policy and Services Committee, acting under delegation from Council, resolved to refer the submissions to a Panel. As a result, a Panel to consider the Amendment was appointed under delegation from the Minister for Planning on 9 September 2016 and comprised Rodger Eade (Chair), and Katherine Navarro.

A Directions Hearing was held on 17 October 2016. The Panel then met in the offices of Nillumbik Shire Council on 28, 29 and 30 November and 1 December 2016 to hear submissions on the Amendment. Those in attendance at the Panel Hearing are listed in Table 1.

Table 1 Parties to the Panel Hearing

Submitter	Represented by
Nillumbik Shire Council	Paul Fyffe Senior, Strategic Planner, assisted by Chad Griffiths, Manager Strategic and Economic Planning and Naomi Paton, Manager, Leisure and Social Infrastructure, who called the following expert witness: <ul style="list-style-type: none"> - Dr Matthew Dell, of Ecology Australia on botany/ecology
Douray Pty Ltd and the Maino family	Hubert Algie, Graduate Lawyer of Kellehers Australia Pty Ltd, who called the following expert witnesses: <ul style="list-style-type: none"> - Brett Lane of Brett Lane and Associates on ecology - Graham Sutherland representing Rodney Aujard of Rodney

Submitter	Represented by
	Aujard and Associates on surveying - Richard O’Byrne of Richard O’Byrne Community Environment Planning on planning - William de Waard of Traffix Group Pty Ltd on traffic engineering.
Nathaniel Aly	
Carolyn Johnston	
Nillumbik Horse Action Group	Cath Giles
Christine Challis	
Nillumbik Ratepayers Association	Brian Murray
Mary McDonald	
Andrew Bean	
R J, K B and A M Stoneman	Anne Stoneman
Oriana and Ian Halliwell	Oriana Halliwell
A and C Borgolotto	Oriana Halliwell
Anthony and Nicky Bourne	Nicky Bourne
Maurice Legg	
Creek Trailblazers	Helen Legg
Dr Geoff Mosley	
Matthew Humphries	
Nillumbik Emus Orienteering Club	Rex Niven
Friends of Nillumbik	Greg Johnson
Sue McKinnon	Steven Katsineris
Colleen Hackett	

1.4 Procedural issues

The Panel notes that the expert evidence of Dr Dell and Mr Aujard did not conform to the relevant guidelines. The evidence of Dr Dell was a report previously prepared for Council and was notated as a ‘Council comments’ version. Mr Aujard produced plans as requested by his client but provided no written evidence or commentary on what they showed. Mr Aujard was not available at the time of the Hearing and because the circulated evidence was unclear, the Panel permitted Mr Geoff Sutherland of Mr Aujard’s office to present and explain the circulated survey plans. For these reasons both lots of evidence was given less weight than usual by the Panel.

At the conclusion of the Council's right of reply on Friday 1 December 2016, Hubert Algie for the Maino family claimed that the Council had introduced new material in its right of reply. Whilst no new material was immediately identified by the Panel, the Panel decided to allow three working days for any submitter to identify any new material introduced, and a further five working days for the Council to comment on any new material so identified. The Panel issued a Direction to this effect which was broadly complied with. The Panel is of the view that the further submission from Kellehers Lawyers did not confine itself to new matters raised by Council in its right of reply. Rather, Kellehers Lawyers included commentary on matters which the Panel regards as points of dispute with Council. This is not appropriate and where this has occurred the Panel has not had regard to these further submissions. It was not the intention of the Direction to provide an opportunity to restate a submitter's case nor to take further issue with Council's submission in reply.

1.5 Summary of issues raised in submissions

The key issues and points of contention raised in the submissions of the various parties are briefly summarised as follows:

(i) Planning Authority

The key issues for Council were:

- the Amendment is strategically justified and generates significant community benefits
- the application of PAO4 to 12 private properties is the appropriate planning tool
- the Incorporated Document, as exhibited, and slightly amended is appropriate for managing the implementation and development of the trail extension.

(ii) Individual submitters or groups of submitters who support the Amendment

The key issues by submitters were:

- the Amendment is strategically justified
- the planning tools proposed appropriately implement the trail extension
- the trail extension has significant health, wellbeing and recreation benefits for the community and will facilitate commuter cycling
- private land owners whose land is acquired should be appropriately compensated
- the trail extension is an important link into an existing trail network and planned extensions of that network.

(iii) Individual submitters or groups of submitters who object to the Amendment

The key issues by submitters were:

- an alignment which does not require the acquisition of private land or a reduced amount of private land to be acquired should be pursued
- the Amendment disrupts planning for 22 and 26 Herberts Lane and 142 Broad Gully Road
- the cost of the trail extension will be far in excess of what is proposed
- a PAO should only be used for 'essential purposes'

- the trail extension will attract illegal activities such as vandalism, trespassing and anti-social behaviour
- the Incorporated Document does not provide adequate regulation of the proposed development of the trail extension and Council should not be exempted from its own planning requirements
- access to some properties as a result of the PAO and subsequent acquisition will be disrupted
- property boundary anomalies exist to the extent that the application of the PAO is both unclear and may be inadvertently applied to Crown land and additional properties
- the Amendment contravenes Council's responsibilities under some environmental protection legislation
- the land impacted by the trail extension can be exposed to fire risk and should not be developed unless there is a Fire Management Plan in place.

1.6 Issues dealt with in this Report

The Panel considered all written submissions made in response to the exhibition of the Amendment; as well as further submissions, evidence and other material presented to it during the Hearing, and observations from site visits.

The Panel has reviewed a large volume of material. The Panel has had to be selective in referring to the more relevant or determinative material. All submissions and materials have been considered by the Panel in reaching its conclusions, regardless of whether they are specifically mentioned in this report.

This report deals with the issues under the following headings:

- Planning context
- Form of the Amendment
- Issues common to most or all properties as follows:
 - Property access
 - Property boundaries and Crown land
 - Ecological issues
 - Isolated land pockets
 - Diamond Creek Development Plan Area B
 - Viability of the proposed project
- Property specific issues

1.7 Limitations

A number of submissions raised issues which are not appropriate for the Panel to address, as they fall outside the scope of the Amendment. These include:

- detailed consideration or review of alternative trail alignments as the proposed trail extension alignment has been chosen as a result of a Council decision
- land acquisition and compensation issues (which are issues to be resolved at a later stage of the process under the terms of the relevant legislation)

- detailed trail alignment and design has not occurred (issues appropriately considered by Council in consultation with stakeholders at later stages of the implementation process)
- illegal activities including trespassing and vandalism associated with the future use of the trail.

Mr Brian Murray for the Nillumbik Ratepayers Association suggested changes to the Amendment, such as the way in which the purchase price for the private land is determined and agreements relating to access for construction works. These issues are not addressed in this report as they do not fall within the scope of the Amendment. Mr Murray also submitted that Council acquire landlocked properties which have a dwelling on them. The Panel understands that this will not occur, and in any event acquisition issues are beyond the scope of the Amendment.

The Panel does not deny the importance of a number of these issues, but notes that in each instance they are not factors that are immediately relevant to its consideration of the Amendment. They are matters for further consideration under relevant legislation or at the detailed design, construction and implementation stages of the trail extension. The Panel notes that Council expressed its willingness and intention to consult with affected land owners and the broader community on these matters at a later stage, where appropriate.

2 Planning context

Council provided a response to the Strategic Assessment Guidelines as part of the Explanatory Report and significantly expanded on this in its Part A submission.

The Panel has reviewed Council's response and the policy context of the Amendment, and has made a brief appraisal of the relevant zone and overlay controls and other relevant planning strategies.

2.1 Policy framework

(i) State Planning Policy Framework

Council submitted that the Amendment is supported by and implements the following clauses in the State Planning and Policy Framework (SPPF):

Clause 11.03-1: Open space planning - the objective of which is to assist creation of a diverse and integrated network of public open space commensurate with the needs of the community.

Clause 12.01-2: Native vegetation management - the objective of which is to ensure that permitted clearing of native vegetation results in no net loss in the contribution made by native vegetation to Victoria's biodiversity.

Clause 12.04-2: Landscapes - the objective of which is to protect landscapes and significant open spaces that contribute to character, and identity sustainable environments.

Clause 14.02-1: Catchment planning and management - the objective of which is to assist the protection and, where possible, restoration of catchments, waterways, water bodies, groundwater, and the marine environment.

Clause 17.03-1: Facilitating tourism - the objective of which is to encourage tourism development to maximise the employment and long-term economic, social and cultural benefits of developing the State as a competitive domestic and international tourist destination.

Clause 18.02-1: Sustainable transport - the objective of which is to promote the use of sustainable personal transport.

Clause 18.02-2: Cycling - the objective of which is to integrate planning for cycling with land use and development planning and encourage cycling as an alternative mode of travel.

Council listed these clauses in its Part A submission and provided a detailed analysis in response to the Strategic Assessment Guidelines as part of that submission. This included reference to a range of strategies under various clauses which the Council submitted were relevant. The Panel accepts that the Amendment is broadly consistent with these Clauses of the SPPF as set out in Council's analysis.

(ii) Local Planning Policy Framework

Council submitted that the Amendment supports the following parts of the Local Planning Policy Framework:

Clause 21.02: Municipal Overview & Regional Context - the Amendment is consistent with a statement in this Clause that:

The recreational trail along the Diamond Creek links to the Yarra River trail, which in turn provides a path through north-eastern middle and inner suburbs and into central Melbourne. It is intended that the trail will go to Wattle Glen and Hurstbridge

Clause 21.03: Municipal Profile and Key Influences - in relation to promoting tourism, the Amendment is consistent with a statement in this Clause that cycling trails are one of the key tourist attractions in the Shire.

Clause 21.05-3: Environment, Conservation and Landscape - the Amendment is consistent with Objective 1, to protect and enhance sites of environmental significance, and Objective 7, to protect and enhance conservation areas and identify opportunities to create and link areas of open space in accordance with the *Open Space Strategy 2005*.

Clause 21.05-4: Economic Development - the Amendment supports Objective 1, to facilitate environmentally sustainable economic development and Objective 5, to provide for land uses that expand tourism opportunities in the Shire and realise a potential for additional local employment.

Clause 21.05-5: Infrastructure - the Amendment is consistent with references in this clause to the *Open Space Strategy (2005)*, the *Recreation Strategy 2011-2019* and the *Nillumbik Trails Strategy (2011)*, and the aims and supporting actions within these documents to improve and enhance urban open space and to develop and extend rural open space and the trail network.

The Amendment is consistent with Objective 4, to provide equitable local recreational facilities and public open spaces to meet local community needs. The Amendment also implements Objective 5, to provide a network of public open spaces across the Shire and similarly a network of recreation trails throughout the Shire.

The analysis provided by Council in its Part A submission includes reference to a number of strategies in the Municipal Strategic Statement which implement the objectives listed above and which in a number of instances make specific reference to the trail extension.

Council lists three local policies at Clause 22 of the Planning Scheme which it submitted are of some relevance to the Amendment. These are:

Clause 22.04: Siting and Design Policy for Building and Works in Non-urban Areas - This policy generally applies to Shire land which is within non-urban zones, including land within the Rural Conservation Zone (RCZ), and is applied to much of the Amendment area. The purpose of the policy is to protect the character, amenity and quality of the Shire's non-urban land from inappropriate development.

Clause 22.05: Aboriginal Cultural Heritage Policy - This policy pre-dates release of the *Aboriginal Heritage Act (2006)* and is largely superseded by that Act. The purpose of the policy is to provide for the identification of sites of Aboriginal cultural significance, to provide an appropriate level of management in consultation with the local Aboriginal community

and to ensure new uses, developments and works do not impede on, or detract from, sites and features of Aboriginal cultural heritage and archaeological significance.

Clause 22.13: Wildfire Management Policy - This policy applies to all land within the Wildfire Management Overlay (WMO) (now the Bushfire Management Overlay (mapped as WMO or BMO)) and as such applies to much of the land within the Amendment area. The policy primarily aims to ensure development and uses are appropriate in response to the threat of wildfire.

The Panel does not consider any of these local policies as core to strategic support for the Amendment.

(iii) Other planning strategies or policies used in formulating the Amendment

Council has listed the following State and regional policies and strategies as providing strategic support for the Amendment:

Plan Melbourne

Plan Melbourne provides high level policy support for improved recreation and transport connections for active transport modes. A number of relevant initiatives and directions from *Plan Melbourne* are listed by Council.

Victoria's Cycle Tourism Action Plan 2011-2015

Victoria's Cycle Tourism Action Plan 2011-2015 has been developed by Tourism Victoria to position Victoria as the leading state for cycle tourism, as well as to outline how the Government will leverage and enhance opportunities in cycle tourism.

Parks Victoria: Linking People and Places 2002

Parks Victoria's *Linking People and Places* is a strategy and vision for the continued growth and improvement of our open space network.

VicRoads: Principal Bicycle Network

The Principal Bicycle Network (PBN) is a network of proposed and existing bicycle routes that provide access to major destinations in the Melbourne metropolitan area. The primary purpose of the PBN is to guide investment in bicycle facilities that support cycling for transport.

Victorian Health and Wellbeing Plan 2015

The *Victorian Health and Wellbeing Plan* outlines the government's key priorities over the next four years to improve the health and well-being of Victorians. Priorities relevant to the trail extension are listed.

Northern Regional Trails Strategy 2016

This strategy was developed by the seven Councils in Melbourne's North and funded by each of the Councils with funding assistance from the State Government. Six of the seven Councils, including the Nillumbik Shire Council, have formally endorsed the strategy. This regional strategy specifically refers to the proposed trail extension and lists a number of community benefits the trail extension will have.

This strategy included a cost-benefit analysis which considered the capital and operational costs and benefits associated with increased commuting on trails, recreation opportunities and tourism. The assessment also considered the benefits of constructing the trails in terms of additional job creation, measured as full time equivalent employees. The report estimated that the benefit /cost ratio of the trail extension would be in the order of 6.2 (for a three metre wide trail) over 30 years. In other words, for every one dollar spent, there will be a six dollar twenty benefit.

The Strategy states that trail extension is the highest priority for Nillumbik Shire Council in regards to its trail network and is a regional priority.

Council has listed the following policies, plans and strategies as providing strategic support for the Amendment:

Council Plan 2013-2017

This plan provides the statement of Council's priorities over a four-year period in response to the opportunities and challenges facing the Shire. It has broad reference to recreation trails but no specific mention of the trail extension.

Nillumbik Trails Strategy (2011)

This strategy aims to guide planning and decision making for providing recreational trails within the Shire. It outlines Council's key priorities for the expansion of the trail network and the proposed actions to achieve these objectives over the next ten years.

The strategy classifies the Diamond Creek Trail as a regional trail, which satisfies the following priorities:

- attracts interstate and intrastate visitors
- generates significant economic benefits for the region
- excellent quality experiential values
- significant contribution to the lifestyle, health and social wellbeing of the broader community
- trails traverse the Shire and aim to link to other Victorian regional and/or national trails.

The strategy lists extending the trail from Diamond Creek to Hurstbridge as one of the main recommendations for capital investment and planning in the regional trail network. However, the strategy recognises that the proposed trail extension between Diamond Creek and Hurstbridge is a complex project given the alignment options available and because critical sections of land along the Diamond Creek are in private ownership.

Nillumbik Recreation Strategy (2011-2019)

This strategy guides Council in its planning and decision making for providing recreational services and facilities. In regard to recreation trails, the strategy recommends that Council develop a Trails Strategy. The Recreation Strategy pre-dates the *Nillumbik Trails Strategy 2011*.

The Diamond Creek Trail Extension Trail Alignments Options Assessment Report (GTA Consultants, February 2016)

The consulting firm GTA was appointed by Council in September 2015 to undertake a strategic justification study for extending the Diamond Creek Trail to Hurstbridge. As part of this work the study analysed the alignment options as follows:

- Diamond Creek to Wattle Glen – a) an on road cycle lane, b) a road aligned (but off road) trail and c) a creek aligned trail.
- Wattle Glen to Hurstbridge – a creek aligned trail only. A road aligned trail was not deemed feasible due to there being insufficient space available to provide a recreational trail.

The subsequent report, *The Diamond Creek Trail Extension Trail Alignments Options Assessment Report* (the GTA Report), was finalised in February 2016. This provided the basis for Council's decision to pursue the creekside option which will be facilitated by the Amendment.

Open Space Strategy (November 2005)

The Open Space Strategy defines Council's vision and strategic direction for the development and management of open space. The recommendations of relevance to the Amendment are:

- No 17 – Extend the Diamond Creek Trail to Hurstbridge
- No 51 – Work in partnership with the State Government to prioritise resources and seek grants and other funding opportunities for major open space trail projects within the Shire. For example, extending the Diamond Creek Trail to Hurstbridge
- No 67 – As funds become available specified land and areas should be investigated for acquisition into the open space system. The Strategy then specifies that one of these is:
 - Land along the Diamond Creek to extend and continue regional open space along the Diamond Creek from Diamond Creek to Hurstbridge and to accommodate the Diamond Creek to Hurstbridge Trail.

Nillumbik Health and Wellbeing Plan 2013-2017

The Shire of Nillumbik *Health and Wellbeing Plan 2013-2017* outlines Council's vision for planning, protecting and promoting health and wellbeing within the municipality. The plan identifies the need for the trail extension, on the grounds that the extension will promote the benefits of healthy living and will provide access to a natural environment for people to walk, cycle and enjoy.

Nillumbik Green Wedge Management Plan (2009)

The *Nillumbik Green Wedge Management Plan* aims to direct the sustainable management of the Nillumbik green wedge in relation to all strategic planning and use of the non-urban areas of the Shire. The plan lists the extension of the trail extension as a 'People and Communities Action' with a high priority in the immediate to short term between 2010 and 2014.

In addition, the following Council plans and strategies are listed as relevant:

Picture Nillumbik (2012)

Diamond Creek Major Activity Centre Structure Plan and Leisure Facilities Plan (2006)

Nillumbik Economic Development Strategy (2011-2016)

Destination Management Plan (2015)

Destination Management Plan (2015).

Diamond Creek Major Activity Structure Plan (2006)

This plan was cited by Mr Algie as referencing other trail options but was not referred to by Council. The plan makes general reference to trail links both to the main Yarra trail and to Hurstbridge. It is a very early plan in terms of this Amendment and the lack of specific reference to the trail extension alignment is not surprising.

2.2 Planning scheme provisions

(i) Zones

The Amendment area is currently covered by the following zones:

Rural Conservation Zone

Much of the Amendment area is zoned Rural Conservation Zone Schedule 3 (RCZ3). The RCZ is the zone which covers most private land outside the Urban Growth Boundary within the Shire.

General Residential Zone

General Residential Zone Schedule 1 (GRZ1) is applied to land on three private properties within the Urban Growth Boundary within the Amendment area and a small part of 86 Wilson Road, Wattle Glen.

There are a number of other zones applied to land in the Amendment area including the Road Zone, Public Park and Recreation Zone (PPRZ) and the Public Use Zone. The PAO is not proposed in these zones.

Mr Fyffe submitted that once the trail is completed, the Council will rezone the land that it has acquired: most likely the PPRZ. The Panel makes no comment on this rezoning as it will be the subject of future processes.

(ii) Overlays

Environmental Significance Overlay

The Environmental Significance Overlay Schedule 1 (ESO1) applies to a large part of the Amendment area.

Environmental Significance Overlay - Waterways

Certain creeks in the Shire, including the Diamond Creek, are subject to the Environmental Significance Overlay Schedule 4 - Waterways (ESO4). ESO4 is applied to land within 30 metres of either side of a creek.

Land Subject to Inundation Overlay

The Land Subject to Inundation Overlay (LSIO) is applied to flood plain and applies to nearly all land in the amendment area.

Bushfire Management Overlay

The BMO applies to most of the Amendment area.

Development Plan Overlay Schedule 2 (Area B – Diamond Creek North)

There are four private properties within the Amendment area which have land within the Development Plan Overlay Schedule 2 (DPO2):

- 142 Broad Gully Road, Diamond Creek (all land)
- 22 Herberts Lane, Diamond Creek (all land)
- 26 Herberts Lane, Diamond Creek (all land)
- 86 Wilson Road, Wattle Glen (small part of land).

Development Contributions Plan Overlay Schedule 2

DCPO2 applies to all land in the DPO2 area and its purpose is to require the preparation of a Development Contributions Plan for the area.

2.3 Ministerial Directions and Practice Notes

(i) Ministerial Directions

Council submitted that the Amendment is consistent with the following Ministerial Directions:

- **Ministerial Direction No 9 - Metropolitan Strategy**
- **Ministerial Direction No 11 - Strategic Assessment of Amendments**
- **The Form and Content of Planning Schemes (s7(5))**

Council submitted that the Amendment is consistent with Ministerial Direction No 9 as it:

- *promotes and supports the 20 minute neighbourhood concept in Direction 4.1 by improving the walking and cycling opportunities to and between townships*
- *supports sustainable transport options*
- *implements Direction 3.4 to improve local travel options. Specifically, it supports initiative 3.4.1 to make neighbourhoods pedestrian friendly by connecting local areas within the Shire of Nillumbik and initiative 3.4.2 to create a network of high quality cycle links.*

2.4 Strategic justification of the Amendment

On behalf of the Maino family, Mr Algie submitted that there has been insufficient strategic justification provided for the particular trail extension option and therefore that is insufficient strategic justification for the Amendment. He supported this contention with the evidence of Mr O'Byrne of Richard O'Byrne Community Environment Planning who stated that:

Unfortunately, I find that the available information is incomplete, and that there has been inadequate consideration of issues at a strategic level.

Mr Algie did not submit that there is no strategic justification for a trail extension as such.

Mr Algie added that as the purpose of the Amendment is to acquire land for a trail extension, the Amendment goes well beyond this purpose because it is also acquiring land for use as open space and waterway management. He submitted that for these reasons the Amendment is not supported strategically and should be abandoned.

Mr Algie queried whether providing for a horse trail as part of the trail extension is strategically justified and should be provided for. He again led evidence from Mr O'Byrne to support this proposition and submitted that Council had not provided strategic justification for the provision for a horse trail as part of the trail extension.

2.5 Discussion

The Panel is of the view that the Amendment is consistent with State and local policy and that there is broad strategic support for the trail extension between Diamond Creek and Hurstbridge. This is also supported by extensive strategic work at the State, regional and local level over a number of years. It is clear to the Panel that the trail extension is part of a broader trail network which is supported by State, regional policy and local strategic work.

The Panel accepts Mr Algie's contention that the strategic work does not necessarily support the particular trail alignment that will be facilitated by the Amendment. Rather, the trail extension itself has strong strategic support. The Panel observes that the nature of strategic work is that it is just that, strategic by nature and in this case supporting a particular linkage. The Panel is firmly of the view that the strategic work does not need to support a particular alignment or option. That is a matter of detail which is mostly determined either through public processes or in this case by a policy decision of Council.

With respect to strategic justification for the proposed provision for a horse trail as part of the trail extension, the Panel repeats its above comment that the appropriate strategic justification is for a shared trail, not necessarily particular components of it. The final configuration of that trail and its components is a decision for Council in consultation with the various stakeholders, as is the provision of associated infrastructure to support horse riders.

The Panel observes that it could be inappropriate in some cases for strategic work which by its nature is sometimes relatively general, to concentrate on matters of detail such as a particular option, or particular users group as the broader strategic overview can be lost. The Panel understands that in this instance there are a number of submitters who disagree with the trail alignment selected by Council. However, that is a decision that has been made

by Council and it is not the role of the Panel to consider alternate alignments. What is critical is that the linkage is clearly supported by policy and the strategic work undertaken and the Panel concludes that there is strong strategic support for a shared trail between Diamond Creek and Hurstbridge.

The Panel notes that broad policy support for linkages is not unusual and that there are numerous instances where a road link or bypass is strategically supported but that the precise alignment is a matter of detail, subject to either policy or other processes.

As to the purpose of the Amendment for the trail extension, the Panel notes that with respect to the approximately 30 metre wide PAO, that whilst all of this cross section is not for the actual trail, that it is appropriate that it include land for buffers between trail components and between the trail and the creek.

The Panel notes that in some instances the proposed trail extension alignment moves away a significant distance from the creek. The Panel understands that this is proposed to ensure that the trail follows a more or less direct path and avoids an unnecessarily meandering path where the creek alignment meanders. The effect of this is that there is potential acquisition of land beyond what is needed for the trail extension or its buffers.

The Panel does not accept Mr Algie's contention that the Council is acquiring this extra land for other purposes, such as open space. Council's approach to acquiring land for the trail extension will potentially create some open space beyond the land needed for the trail but this is an attempt to mitigate the other consequences discussed above rather than acquiring land for another purpose. This issue is discussed further in section 4.5.

While it was contended by Council that would be a better waterway manager, it does not seem plausible that Council would require extra land just for this purpose and no evidence to support this contention was provided.

That said, the Panel has some sympathy for the position on the trail alignment put by Mr Algie and believes that in at least some instances it will be appropriate for the trail alignment to follow the creek more closely than is proposed and avoid the acquisition of additional land which Mr Algie submitted is excessive. While this will add to the cost of construction of the trail extension it has the twin advantages of retaining more of the land in private ownership for productive uses and reducing the cost to Council of land acquisition.

Where this might be applied is discussed further in section 4.5 and section 5.6 which consider this issue firstly at a general level and then relating to the relevant property.

2.6 Conclusion

The Panel concludes that the Amendment is supported by, and implements, the relevant sections of the State and Local Planning Policy Framework, and is consistent with the relevant Ministerial Directions. 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 the following chapters.

3 Form of the Amendment

3.1 The issues

Whether the use of the PAO and the Incorporated Document are the appropriate planning tools to achieve the Council's intended outcome and whether they have been appropriately prepared and applied to achieve the intended purpose.

3.2 Submissions and evidence

Council submitted that the PAO and the Incorporated Document are the appropriate planning tools for them to use for the Amendment. Council cited other planning scheme amendments such as Banyule C102 and Nillumbik C67 as examples where similar forms of Amendment including the use of an Incorporated Document were successfully utilised.

Council detailed the public purpose with which the PAO is designed to achieve, namely the trail extension and ancillary requirements such as fences and buffers. Council detailed the measures it has identified in order to be able to obtain the land required and determined that the PAO is essentially a measure of last resort, but one that can guarantee the land required for the trail extension. Council believes the Amendment together with its submission has sufficiently detailed the proposed application of the PAO to the Amendment area.

Mr Lascelles submitted that the compulsory acquisition on land should only be for essential services and not for recreation purposes. Mr Bean submitted that the acquisition would be for a frivolous project. In their written response to submissions, Council indicated that they had previously applied a PAO for land acquired for Council reserves. They further cite a recent amendment, Stonnington C184, where a PAO was placed over land to be acquired for a pedestrian link. In their written response to submissions Council stated:

A key test which is applied to a proposed application of the PAO is whether the intended benefit is sufficient in comparison to the impact on the affected property owners to warrant application of the PAO.

In its response to these submissions, Mr Fyffe on behalf of Council outlined a number of reasons why Council considered that this test was met in this instance.

Mr Fyffe submitted that Council is proposing to apply the PAO4 over land outside the UGB and to land within the UGB in an area to which Development Plan Area B (Development Plan) applies. Mr Fyffe submitted that Council seeks certainty over the parcels of land designated for public open space in the area covered by that Development Plan. Mr Fyffe submitted that the PAO would ensure certainty over these parcels of land and the PAO is an appropriate planning mechanism. Council was seeking to apply the PAO on a conservative approach and may not necessarily seek to acquire all of the land, but this cannot be determined at this point in time. Mr Fyffe confirmed that the application of the PAO will not impact on the relevant landowner's capacity to subdivide other parts of their land.

Mr Fyffe contended that the use of the PAO as a planning tool to reserve land for a public purpose has not been questioned by submitters, other than Mr Algie. The strategic justification and the extent of the application of the PAO appear to be the primary issues.

Mr Algie has a heading in his submission which suggests that he is questioning the use of the PAO, he appears to be questioning its application. Mr Algie's main concern appears to be about the application of the PAO on Crown land.

Mr Algie led expert evidence from the Mr Richard O'Byrne as support for his contention that the PAO is an:

... inappropriate planning tool as it points to the lack of even a precise understanding of the most fundamental aspect of the project ie that the PAO areas proposed can actually lawfully be acquired or whether they are already Crown land. A PAO is inappropriate where a project is insufficiently certain or proposed without adequate justification for its location.

Mr Fyffe submitted that the terms of the Incorporated Document provide clear planning approval for both use and development and the Amendment allows for the proper consideration of those requirements. He submitted that an Incorporated Document was used in both Banyule C102 and Nillumbik C67. The purpose of the Incorporated Document is to detail and guide the relevant matters and conditions Council need to account for as it moves through its detailed design and development process. Council noted the scale and complexity of the trail and considered the use of an Incorporated Document as an appropriate planning tool for such a large project. Mr Fyffe contended it drafted the Incorporated Document so as to ensure the key planning considerations, such as the protection of environmental values, minimisation of environmental impacts and flooding and flood plain management, that may arise in various individual planning permits are sufficiently captured. Mr Fyffe submitted that the Incorporated Document sets out the conditions that impose significant assessment of these key planning considerations in order for the use and development of the trail to proceed.

Mr Fyffe submitted that it had received and considered Melbourne Water's submission in relation to flood management issues and Country Fire Authority (CFA) requirements in relation to bushfire safety. Mr Fyffe confirmed to the Panel that these requirements have not been included in the exhibited version of the Incorporated Document in the terms proposed by the respective agencies.

The CFA submitted that the following conditions should be included in the Incorporated Document:

A Fire Management Plan must be developed for the walking trail. This Plan needs to consider the following:

- *community safety signage should be provided at each entrance to the track informing those using the track of the fire risk in the area and the actions persons should take if caught in a fire*
- *the signage should also strongly advise persons not to use the track on days of extreme fire danger*
- *indicative location signage should be provided along the track for users to clearly articulate their current location to emergency services*
- *access into and along the track for emergency service vehicles. This should include access from the adjoining roadways spaced no further*

than 0.5km apart, be all weather construction, 4 metres wide and 4 metres high clearance factors

- *the track itself should be a minimum trafficable width of 3.6 metres wide with a vegetation clearance factor to 4 metres and 4 metres height clearance of all-weather construction. Passing bays every 0.5km with an increased width to 6m wide x 20m long*
- *water supply points should be provided at each end of the designated track*

Any proposals to increase vegetation both along the designated track or adjacent land must not increase the potential fire risk exposure to the track users.

Melbourne Water submitted that the following conditions be included in the Incorporated Document:

- *A separate application must be made to Melbourne Water's Asset Services Team for the approval of any new or modified share paths near our existing waterways*
- *Council will be required to enter into an Agreement with Melbourne Water for the use of Melbourne Water land for the purpose of the shared path*
- *Melbourne Water requires the pathway to be constructed to AustRoads Standards – AustRoads Guide to Traffic Engineering Practice Part 14 – Bicycles (1999)*
- *The proposed path should be located above the 1 in 10 year ARI flood level*
- *If the above requirement cannot be achieved, Melbourne Water will require a package of safety measures to accompany the proposal eg flood warning signs shall be placed at sections that encroach within the floodway during certain events. Alternative routes shall be indicated during times of inundation of the pathway. Please see Melbourne Water's 'Shared Pathways Guidelines' for further details*
- *The path will need to be set into the natural surface level of the existing ground so that the hydraulics of the floodplain are not altered*
- *Any additional fill required for the pathway within the floodway shall require modification to maintain the cross sectional area to prevent an increase in flooding to surrounding properties. Detailed bulk earthwork plans indicating cut and fill sections shall be submitted to Melbourne Water for approval*
- *The path shall be designed to ensure that the surface runoff does not cause any erosion of the waterway/floodway embankments or pondage*
- *The path shall be designed to cater for Melbourne Water's maintenance machinery*
- *Following compliance with the above Melbourne Water conditions, Melbourne Water may require further conditions to be advised if they arise.*

Council supported the inclusion of the conditions from these agencies and requested guidance from the Panel on this.

Council led ecological evidence through Dr Matthew Dell of Ecology Australia in relation to a number of matters, including ensuring compliance with relevant Environmental Protection and Biodiversity Conservation Act, 1999 (EPBC Act) processes and whether additional conditions needed to be placed in the Incorporated Document. Dr Dell opined that the Incorporated Document already sufficiently set out the relevant EPBC Act requirements and triggers Council is bound to comply with.

Mr Algie submitted that both the PAO and Incorporated Document were left wanting both from environmental and planning perspectives. Mr Algie called evidence from Mr Brett Lane of Brett Lane and Associates who opined that the Incorporated Document was quite weak and did not provide the environmental certainties he would expect in such a document. Further, Mr Lane stated that he believes the Incorporated Document provides little, if any, environmental controls he would usually expect such a document to detail. In answering a question from Mr Fyffe, Mr Lane said that the Incorporated Document should commit Council to protecting the environmental values of the area and that currently it does not do this.

Mr Lane made no recommendations to include further or revised conditions in the Incorporated Document.

Mr Algie submitted that the trail extension was in its early stages of preparation and there was insufficient information in the Incorporated Document that appropriately covers off all of the discretionary matters that ordinarily would be detailed at each individual planning permit stage. Mr Algie noted a number of assessments that still need to be undertaken are listed as pre-conditions in clause 4 of the Incorporated Document, such as Aboriginal heritage, biological and ecological assessment. Mr Algie concluded that the degree of information contained in the Incorporated Document was insufficient to warrant the removal of the numerous individual discretionary planning controls that would ordinarily apply in absence of the Incorporated Document.

Mr and Ms Halliwell and Mr and Mrs Borgolotto expressed their concerns in relation to fire safety and the screening/fencing treatment Council may consider between the trail and their properties. Ms Halliwell made submissions as to whether the requirement to manage the risks of fire hazards arising out of the trail extension was and should be addressed in the Incorporated Document. These submitters also sought clarification as to the design of bridges to ensure emergency vehicle access throughout the trail as required and whether the CFA conditions were to be included as conditions in the Incorporated Document. Friends of Nillumbik also expressed their support for the inclusion of the CFA conditions into the Incorporated Document.

Mr Algie also contended that the currently drafted Incorporated Document is fundamentally flawed as it does not specify:

- *Precise alignment and contours of the trail line;*
- *Location, size and design of fencing and lighting;*
- *Access points, alternative access arrangements and emergency access;*
- *Funding, particularly for ongoing maintenance of the “project area” beyond the trail including frontage and riparian sensitivities, trail, native*

vegetation including weed and pest eradication and further vegetation removal to ensure perceived public safety; and

- *Environmental clearing and revegetation requirements*

Mr Algie disagreed with Council's submission that the proposed Incorporated Document is an appropriate planning tool for the trail extension, noting "*Council's submission appears to justify its exemption from the existing requirements for a planning permit by some vague argument a large project, with different sites and various stages of development. These arguments are specious*".

Mr Algie further submitted that:

the proper approach given the ID flaws, is for Council to be required, once it has actually done the required work to design and locate the project, to seek a permit for its entirety [sic]. Certainly, this will bring community scrutiny and possible VCAT review, but that is quite proper within the existing context of planning controls for a highly sensitive area, where the actual project is ill-defined and inadequately assessed (even on Council's own submissions) and where it is impossible for this Panel to assess it against these existing controls.

It substitutes the extensive existing planning requirements and discretionary factors for this sensitive land, with the unchecked discretion of Council. A Council that has not even got 6 maps right, it's [sic] environmental maintenance costs of the PAO area right, or even identified the access points over our client's land. It also circumvents appropriate and necessary public and private scrutiny as the details of the proposal evolve. Council's reasons for doing this are inadequate.

The ID is ultimately, in effect, 'trust us we're the Council'. With all existing discretionary guidelines and community consultation provisions in NPS waived – and Council giving itself untrammelled power to determine whatever detail it likes (or omit it) – and this without even the most basic [sic] site assessments or any preliminary design TML. This provides insufficiently for orderly and proper planning.

Mr Murray for Nillumbik Ratepayers' Association contended that the Incorporated Document was designed to avoid the usual planning permit process for a substantial period of time. Mr Murray expressed concern at the inability of landowners to object, comment or seek review of the appropriateness of the trail plans should the Panel recommend the adoption of the Amendment. Mr Murray stated that "*Council should be subject to the same 'restrictions' as landowners*".

3.3 Discussion

Council is required to comply with the statutory processes set out in the *Land Acquisition and Compensation Act 1986*, in order to compulsorily acquire land for the trail extension. This means that Council is required to reserve any such land by seeking to apply a PAO through a planning scheme amendment such as this.

The Amendment seeks to insert an Incorporated Document into the Planning Scheme in order to provide certainty over planning permission for the future use and development of the trail.

Without the ability to rely on the PAO process to compulsorily acquire the identified parcels of land for the trail extension, Council would be required to acquire land in a piecemeal fashion and over a significant period of time. Council runs the risk that particular parcels of land it has identified as necessary for the trail may never become available for purchase or through public open space contributions. The Victoria Planning Provisions (VPP) provide for the inclusion of a PAO into a planning scheme in order for Councils, affected landowners and acquiring authorities to be clearly able to determine what land will be reserved and for what public purpose it is reserved for. With respect to the purpose, the Panel accepts that the application of a PAO for the acquisition of land for the trail extension is appropriate and does not accept the proposition of Mr Lascelles.

The points of contention raised by submitters in relation to the PAO mainly focus on the strategic justification and the extent of the application of the PAO, rather than whether the PAO is an appropriate planning tool. In particular, Mr Algie sought to raise such issues in his written submissions under the heading of inappropriate planning tools. The Panel is of the view that this conflation of submissions under that heading is potentially misleading. Neither Mr Algie nor the other submitters effectively identified that the PAO is not an appropriate planning tool for the trail. Accordingly, the Panel concludes that the PAO is an appropriate planning tool to commence the process of acquiring land for this trail.

The Panel is of the view that the use of an Incorporated Document which sets out detailed conditions and requiring further assessment for a large project, such as the trail extension, is appropriate. The Panel agrees with Mr Fyffe that the use of such a planning tool is to avoid delays and inefficiencies that may otherwise occur if Council had to make various individual planning permit applications for different aspects and stages of the trail extension. The Panel disagrees with Mr Algie's various submissions that the Incorporated Document provides Council with unfettered discretion and that it should seek one single planning permit at the conclusion of all of the relevant assessments. The Panel notes that the use of an Incorporated Document has been used in previous instances cited; Banyule C102 and Nillumbik C67. No alternative planning tool was suggested by any submitter. The Panel does not accept that the use of the Incorporated Document gives Council unfettered powers as it imposes a number of conditions on Council which the Panel accepts as appropriate.

The Panel concludes that the Incorporated Document is a tool within the VPP which allows such documents to be including in the Planning Scheme at Clause 81.01 and is appropriate in this instance, as it can be designed to meet the specific requirements and issues for a large project such as the trail extension.

The Panel accepts Council's submission to include both Melbourne Water and CFA's conditions and requirements into the Incorporated Document, as these are matters that should be appropriately detailed in that particular document. The Panel disagrees with Mr Algie's submission and Mr Lane's and Mr O'Byrne's evidence that the Incorporated Document does not have sufficient environmental and planning controls detailed. The Panel is of the view that the Incorporated Document sets out in sufficient detail the particular environmental and planning requirements in order to ensure the impacts of the development of trail extension are sufficiently managed, mitigated and minimised. It is acknowledged that the Incorporated Document does not contain every single planning permit condition that may ordinarily be set out in a planning permit. The Panel concludes that the conditions of the exhibited Incorporated Document are sufficient and appropriate.

The Panel notes that the *Planning and Environment Act 1987* allows for the exhibited Amendment to be changed in response to matters that have arisen during the panel process. The Panel is of the view that including Melbourne Water and CFA conditions the Incorporated Document are appropriate revisions that can be made to the exhibited Amendment.

3.4 Conclusions

The Panel concludes:

- The form of the Amendment, namely the PAO and Incorporated Document are appropriate planning tools for this trail extension.
- The Incorporated Document should be amended to include the Melbourne Water and CFA conditions as set out in this chapter.

3.5 Recommendation

The Panel makes the following recommendation:

- 1. Revise the Incorporated Document to include the Melbourne Water and Country Fire Authority conditions as set out in the Panel recommended version of the Incorporated Document at Appendix D.**

4 Issues common to most or all properties

4.1 The issues

In considering the Amendment, the Panel has identified a number of issues which it regards as common to all or most of the properties over which the Amendment proposes to apply the PAO to part of. These issues are:

- can appropriate access be provided to property covered by each title over which the PAO is to be applied?
- can any property boundary anomalies identified and the potential that the exhibited Amendment is being inappropriately applied to Crown Land be adequately addressed in the Amendment?
- can the ecological values of the land over which the PAO is proposed to be applied be appropriately protected through the Amendment?
- are there or should there be 'isolated land pockets' created by the application of the PAO?
- Is the proposed trail extension viable?

These issues are discussed at a general level in this Chapter and then applied, as appropriate, to particular impacted properties in Chapter 5.

4.2 Property access

(i) Evidence and submissions

The Panel received a number of submissions querying the impact of the trail extension on the various property owners' capacity to continue to access their properties after the proposed acquisitions occur. These submissions will be considered in specific detail in the individual property specific sections in Chapter 5 of this report, where relevant. However, the common proposition of impact of the PAO to the level of access to properties is considered in this section.

One of the main objections to the Amendment of submitters such as the Maino family, Mr and Ms Stoneman, Mr and Ms Halliwell and Mr and Mrs Borgolotto was the uncertainty of ongoing access to their properties as a result of the application of the PAO, including the form this access would take and the timing of the provision of such access. Their key concerns can be generally summarised as:

- lack of clarity of alternative access or right of way easements to the public road network being provided by Council to account for the impacts of the PAO and at what stage this would occur
- access to individual titles within a landholding, including whether some properties would become landlocked.

Mr Fyffe acknowledged that the PAO seeks to apply to various parcels of land where current easements of carriageway exist. These carriageway easements generally provide access through other private properties to the public road network and are utilised by multiple landowners. Such access also includes private bridges and occupation crossings over VicTrack railway land.

Mr Fyffe acknowledged the impacts of the uncertainty and timing of the perceived “loss” of such access for the affected landowners, articulating that alternative access will be negotiated with the affected landowners and provided following the adoption of the Amendment. He submitted that Council will provide alternative access to any affected landowners as a result of the application of the PAO restricting or removing the affected landowner’s current access to the public road network. Mr Fyffe advised the Panel that it has identified a number of different options to ensure an alternative access is provided, such as the creation of right of way easements, which it will discuss with the affected landowners.

Mr Algie submitted that the trail extension proposes to essentially follow the existing informal access path that runs along from the south west to the north east of the Maino landholding across the three titles at 86 Wilson Road which provides access between them. In turn this provides access from this landholding to Wilson Road and connecting to Collard Drive. Mr Algie submitted that the effect of the trail extension will be that the existing vehicle track on his client’s land will be lost, which has a particular effect of the Maino family accessing the middle title holding. Mr Algie acknowledged that there are a number of ingress and egress points for 86 Wilson Road, but was particularly concerned as to his client’s ability to access individual titles within the one landholding along the route of the existing farm track.

Mr Fyffe acknowledged the Maino family’s concerns as expressed by Mr Algie, particularly in relation to the individual access to each title within the landholding. The Panel received detailed submissions from both Mr Fyffe and Mr Algie, with Mr Algie leading evidence from Mr William de Waard, of the Traffix Group, in relation to the various “pinch points” which may arise from the trail extension design and any remaining access points along the existing access track. These submissions are considered in greater detail in section 4.7 and 5.6 of this report. However, of relevance to this particular access issue, Council submitted that it received engineering advice that there are different options that can be articulated in the detailed design stage of the trail extension that will allow for the Maino family to access each individual title parallel to the trail extension. Council took the Panel through some preliminary concepts that Council’s engineers considered feasible.

(ii) Discussion

Section 9 of the *Road Management Act 2004* (the RMA) provides an owner or occupier of the land which adjoins a road a statutory right to access that public road from the land, with certain statutory or common law exemptions (that are not relevant to this Amendment).

Section 127 of the RMA provides statutory guidance as to whether compensation is payable to the affected landowner in certain circumstances where alternative access cannot be provided. The Panel does not believe that this is the case in this Amendment.

Council does not intend to close any public roads that adjoin affected landowners, nor does it seek to prevent affected landowners accessing the public road network. Rather, Council seeks to realign and appropriately protect all access interfaces of the affected landowners with the trail extension.

The Panel accepts Council's acknowledgment that it is required to provide the affected landowners with alternative access from their land to the public road network and that a form of right of way easement is a particular option available to it, where necessary.

Easements allow one landowner to use another landowner's land without occupying it. For private easements, the terms and conditions of such easement are negotiated and registered on title. In instances where a landowner cannot agree to such an easement, and without an agreement could become landlocked, there are a number of common law principles available to that affected landowner. As Council has confirmed it will provide alternative access to affected landowners, the Panel does not believe that the affected landowners would have to resort to such common law principles. Further, the new easements will need to be registered in any subdivision plans for the land over which the PAO is proposed to be applied, setting out alternative access for affected landowners.

The Panel considers Council's commitment during the Hearing to identify and negotiate alternative access requirements with the affected landowners, should be sufficient to allay concerns of affected landowners being unable to access their land from the public road network.

The Panel notes that Mr Fyffe identified a number of options that can recognise or recreate existing carriageway easements, as well as any relevant treatment, signage and works to ensure safe crossing points for both trail extension users and persons seeking to access the relevant landholdings.

The Panel notes the concerns of the Maino family that the land proposed to form part of the trail extension will impact their individual access to the middle title of their landholding. However, the Panel considers that Council is able to determine alternative access arrangements within the detailed design process of the trail extension so as to provide the Maino family with ongoing access to its entire landholding broadly in the vicinity of the access points to the existing farm track. In addition to this detailed design response, Council can also negotiate with the Maino family, alternative access across its three titles, which can be secured through carriageway easements across land acquired for the trail extension. This issue is addressed further in section 5.6.

Given Council's commitment to provide alternative access for affected landowners to both the public road network and individual access within the landholdings, the Panel concludes that these possible impacts of the trail extension can be sufficiently mitigated and that there are no broad access issues that are reason enough for it not to support the Amendment.

(iii) Conclusions

The Panel concludes:

- Council can provide appropriate access to properties from the public road network.
- Council needs to liaise with affected landowners at a later stage to determine the preferred option of alternative access and negotiate the relevant right of way easements where required. The Panel concludes this can be adequately provided.
- Access between titles on a property where such access already exists can and should continue to be provided.

4.3 Property boundary anomalies and Crown land

(i) Evidence and submissions

The Panel received submissions from Mr Algie and Council on three key issues, namely:

- whether the boundaries of the PAO in the Amendment maps align with the Creek boundary
- whether small parcels of land on the opposite side of the Creek to the PAO are inadvertently covered by the exhibited PAO as a result of changes in the creek alignment over time
- whether Crown land is inadvertently covered by the exhibited PAO as a result of changes in the creek alignment over time

Council used survey data provided by a licensed surveyor in mapping the PAO for exhibition. In addition to exhibiting the Planning Scheme maps showing the application of the PAO, Council provided both affected land owners and the Panel with aerial photos of relevant landholdings marked up with the proposed trail extension, PAO affected land, title boundaries and access roads.

Mr Fyffe acknowledged the mapping discrepancies between the Diamond Creek boundary alignment/mapping in the Planning Scheme and the aerials/GPS set points that have become apparent during the exhibition of the Amendment. He submitted that these mapping anomalies due to the movement of the Creek alignment over time became evident when the proposed PAO alignment was applied to the aerial maps. However, Mr Fyffe contended the majority of these inaccuracies are minor technical differences in plotting the Creek alignment.

Mr Fyffe advised that Council had contacted the Department of Environment, Land, Water and Planning (DELWP) to seek advice on this mapping discrepancy, in particular how to respond and ensure the PAO is correctly mapped. He advised the Panel that DELWP had recently confirmed to Council that the Planning Scheme maps have not been updated for some time. Further, DELWP advised Council that it can request DELWP to update the Planning Scheme maps so as to ensure the correct alignment of the PAO is available.

Mr Fyffe further advised the Panel that it had sought advice on the mapping anomalies from two qualified surveying firms, whose advice can be summarised as follows:

- The cadastral maps are not an accurate representation of the title boundaries
- The only way to determine the correct, current position of the creek boundary is to conduct a survey of the boundary
- Such survey is generally undertaken at the stage a formal Plan of Subdivision or an application survey is lodged
- Where a title boundary abuts a water course, the cadastral is usually an approximation of the actual position, recognising that water courses expand or contract over time.

Council was clear in its submission that the PAO should align with the Creek boundary throughout the trail extension and generally apply the PAO along the Creek reserve, as it was trying to provide certainty to affected landowners as to the clear extent of the PAO.

Mr Fyffe submitted that these Creek alignment mapping anomalies can be corrected through new survey work indicating the current Creek alignment. Following the adoption of the Amendment, Mr Fyffe suggested Council could commence acquisition of relevant land under the PAO and prepare a Plan of Subdivision for such land. Any such survey work required would include defining the existing location of the Creek and bank in order to define that boundary to the relevant title. This survey work would capture any movement of the Creek alignment over the period of time since the cadastral mapping was last surveyed.

Mr Fyffe set out three possible outcomes of that survey work that can be summarised as follows:

- No corrective action is required, as the creek is in the same location
- No corrective action is required, however Council will reduce the amount of land that it seeks to acquire if the creek has receded and reduced the extent of the subject landholding
- Negotiate with the landholder to purchase any small additional area from the owner or seek a further PAO applying to that subject land, if the creek has moved and increased the size of the subject landholding so that the PAO does not cover all of the land to the creek leaving a small area of private land.

Council would then submit the new title to Land Use Victoria and DELWP to vary the cadastral map of the local area, which would then update the relevant planning scheme maps to accord with the new cadastral maps.

Mr Algie presented survey evidence from Mr Rodney Aujard of Rodney Aujard & Associates. As noted in section 1.4, Mr Aujard was not available at the Hearing and was represented by Mr Geoff Sutherland who was able to explain the three key issues relating to the mapping anomaly. Mr Sutherland detailed the investigations undertaken to plot the titles of the properties, as against the proposed application of the PAO. Mr Sutherland stated that a proper land survey for the Amendment is yet to be carried out. Mr Sutherland explained the minor variations in the titles and indicated that some gaps were in the range of normal resulting from accretion of the Creek alignment. However, Mr Sutherland opined that there were some more significant changes.

Mr Sutherland gave evidence that the PAO land side of the boundaries was very accurately described in the Amendment, with the Creek edge boundary being the substantive issue. Mr Sutherland agreed with Council that the relevant titles have been updated but that the cadastral maps have not been updated to reflect these changes. Rather, the cadastral maps are at least 20 years old and based on topographic maps that are out of date.

Mr Algie called Mr Richard O'Byrne to provide town planning evidence with a particular focus on the application of Crown land law to such planning issues. Mr O'Byrne detailed the analysis he undertook in order to determine whether the PAO proposed to affect any Crown land. Mr O'Byrne detailed relevant principles from the various iterations of the Victorian water legislation over the past 100 years as it relates to resumed beds and banks of creeks, as well as the doctrine of accretion. Mr O'Byrne gave evidence that it was unclear as to the level of application of that doctrine. Mr O'Byrne also highlighted the importance of clearly identifying the status of the land before a PAO can be applied so as to not inadvertently seek to apply the PAO to Crown land. In his answers to the Panel, Mr O'Byrne confirmed that the

issues relating to possible Crown land can be resolved one way or another before the Amendment is adopted. Mr O'Byrne suggested a re-establishment survey under the Surveyor-General's stewardship to determine the extent of any Crown land that is to be avoided by the PAO.

Mr Algie submitted that such new survey work should have occurred prior to the Amendment being publicly exhibited to provide affected landowners with certainty and clarity as to precisely the extent of the PAO. On that basis, Mr Algie submitted these discrepancies are major and the Amendment should be abandoned.

(ii) Discussion

It is important to ensure the reservation of a PAO is correct, as such a reservation allows the acquiring authority to acquire that relevant interest in the land. This reservation is set out as an overlay in the relevant planning scheme maps. The need to correctly identify the land which is to be reserved under the PAO is not only required for the purposes of the PAO, but also for the relevant acquiring authority in order for any use, development or subdivision of the land does not prejudice the purpose of the PAO. It also assists future landowners to identify and determine the extent to which their relevant land is affected by the PAO.

The Panel notes that Mr Fyffe conceded there are mapping anomalies between the title boundary and the alignment of the Creek in defining that relevant Creek boundary of the PAO. The question to resolve is whether the mapping anomalies are minor and easily remedied or are significant and require the Amendment either be delayed whilst they are resolved, or abandoned.

The Panel is of the view that the mapping anomalies are of a procedural nature that can be remedied either prior to adoption of the Amendment or during acquisition and subdivision of the acquired land. The Panel notes that Council does not intend to apply the PAO to either Crown land nor to land on the opposite side of the Creek to where the PAO is to be applied and that the cadastral maps are out of date. The Amendment as exhibited supports that proposition. As described earlier, Council has put forward suggested survey work to be carried out as part of the subdivision process of the acquired land which the Panel accepts could at least in part will resolve the mapping anomalies.

The mapping anomalies should be clarified and resolved prior to the Amendment being approved and gazetted. However, DELWP may advise that some of these anomalies can be resolved at a later stage of the process. The Panel would expect DELWP to assist Council in expediting this resolution of the anomalies to ensure that no Crown land or land on the opposite side of the Creek to the PAO is inadvertently captured as a result of the application of the PAO at the Creek boundary. The Panel is of the view that this should provide landholders with the appropriate level of certainty and that there is no case to abandon the Amendment.

(iii) Conclusions

The Panel concludes:

- The mapping anomalies are procedural in nature.
- Rectify the anomalies prior to the adoption and gazettal of the Amendment would provide greater clarity about boundary alignments.

4.4 Ecological issues

(i) Evidence and submissions

Mr Fyffe called expert evidence from Dr Matthew Dell of Ecology Australia, who stated that his firm had undertaken ecological assessments of the Council owned land and Crown land along the trail extension alignment, but not the private properties to which the PAO is proposed to be applied. In his written evidence and at the Hearing, Dr Dell identified the following development constraints:

- *Likely removal of some indigenous plant species, remnant native vegetation and habitat;*
- *Potential impacts to the EPBC Act listed River Swamp Wallaby-grass *Amphibromus fluitans* and the EPBC Act and FFG listed Matted Flax-lily *Dianella amoena* (targeted surveys are yet to be completed);*
- *Potential impacts of the trail and its construction on the FFG Act-listed Powerful Owl and Barking Owl (habitat and prey resources);*
- *Potential downstream impacts on Macquarie Perch population in the Yarra River and lower Diamond Creek via impacts to water quality (if appropriate mitigation measures are not implemented); and*
- *Potential impacts to Platypus and burrowing crayfish habitats, which directly occupy the streambank of the Diamond Creek.*

He listed a number of targeted surveys which should be undertaken at suitable times for a number of flora and fauna species including some EPBC Act listed species. These include River Swamp Wallaby Grass, and the Matted Flax Lily. He noted that nine EPBC Act listed fauna species had been previously recorded within five kilometres of the study area. He further identified the following fauna species as having a high likelihood of regular occurrence in the study area:

- barking owl
- powerful owl
- platypus
- river blackfish.

Dr Dell recommended that an Environmental Management Plan (EMP) be required, detailing how negative impacts on particular flora and fauna will be minimised or mitigated during the pre-construction and during and after construction of the trail. Most of the matters which Dr Dell recommended be addressed by the EMP are included in the proposed Incorporated Document as discussed in section 3.3.

In the initial submission, Mr Algie suggested that Council may be acting in contravention of the EPBC Act by proceeding with the Amendment without first referring the trail extension

as required under the EPBC Act. Mr Fyffe submitted that Council had been in contact with the Commonwealth Department of Environment and Energy which advised Council that any EPBC Act referral could be made at a later date if further work indicated the presence of EPBC Act listed species. Further, Council was advised that on the basis of existing information there was no requirement for an EPBC referral at this stage. Mr Fyffe further submitted that if EPBC Act listed species were identified following further work, there were options available to Council for managing this, for example mitigating works or a slight re-alignment of the trail extension.

Mr Lane's field assessment was confined to his client's property at 86 Wilson Road Wattle Glen. In other words, the field assessment of the two ecology experts did not overlap. No specific assessment has been undertaken on 11 of the 12 properties to which the PAO is to be applied.

Mr Lane concluded that three EPBC Act listed flora species are either likely to occur or have the potential to occur on the Maino property. These are:

- *Crimson Spider-orchid*
- *Rufous Pomaderris*
- *Round-leaf Pomaderris*.

In presenting his evidence, Dr Dell questioned the assessment of Mr Lane with respect to some of the flora species he listed as having the potential to occur and indicated that further targeted surveys should resolve some of these issues. Under cross examination by Mr Algie, Dr Dell acknowledged Mr Lane's methodology as appropriate.

Mr Lane listed 12 fauna species which are likely to occur or have the potential to occur.

Mr Lane undertook an analysis of the potential of the site to be registered as a privately owned offset site for removal of native vegetation both on-site and on other sites.

Mr Lane also undertook an analysis of the likely loss of native vegetation that may result from future subdivision of the Maino land and the need to provide access to those subdivided properties, most likely from Wilson Road to the north. This analysis was based on the assumption that the likely house sites resulting from future subdivision would be located on the escarpment overlooking the valley and would necessitate relatively long access roads from Wilson Road which wraps around the property. In cross examination, Mr Fyffe asked Mr Lane if he had had discussion with the CFA and Melbourne Water about their views on the subdivision potential of the Maino land and the acceptable location of dwellings. Mr Lane answered that he had not and that his assessment was very general in nature.

In leading Mr Lane's evidence, Mr Algie questioned him on appropriate management of the creek by private land owners and Councils. Mr Lane responded that some Councils are good land managers and others are not.

Dr Dell acknowledged that the calculation of required offsets for the removal of native vegetation had not occurred because there had not been access to the whole of the land to which the PAO would apply. Mr Katsineris for Ms McKinnon submitted that a number of the conditions of the Incorporated Document had not been met, including the failure to calculate required offsets.

(ii) Discussion

The Panel notes that the ecological assessments which have been undertaken at this stage are preliminary in nature and that, as recommended by Dr Dell, further work will need to be undertaken as part of later stages of the process should the trail extension progress. The experts have slightly differing views on the probability of the EPBC Act and *Flora and Fauna Guarantee Act (1988)* listed species occurring in the Amendment area. The Panel does not comment on this other than to say that further work should resolve this issue or at least determine if referrals to the appropriate authorities are required.

The Panel is satisfied that Council has taken appropriate steps to clarify its obligations under the EPBC Act at this stage. If EPBC referrals are required, the Panel is satisfied this can occur at a later stage. The Panel notes Mr Fyffe's comments that there are options available to Council to address the issues associated if EPBC Act listed species are identified in the Amendment area at that later stage.

The Panel makes no comment on the benefits of private versus public management of the creek as this is beyond the scope of the Amendment.

The Panel accepts Mr Lane's evidence with respect to the use of part of the Maino land for 'private offsets' but whilst an appealing idea, is not central to the Amendment.

The Panel notes Ms McKinnon's contention that the condition in the Incorporated Document with respect to the calculation of offsets has not occurred and that other conditions have not been met. The Panel notes that the intention of the Incorporated Document is for this to occur before development of the trail extension but not necessarily by this stage of the process.

The Panel further notes Mr Lane's evidence about possible loss of native vegetation as a result of future subdivision, but does not comment on this as it is beyond the scope of this Amendment. Further, the Panel is not aware of any active subdivision application. This is a matter for Council, the Maino family and later processes.

(iii) Conclusions

The Panel concludes:

- That no ecological issues have been identified at this stage that would prevent the Amendment from being approved
- If referrals are required under the EPBC Act, this can be determined and the referral can be made at a later stage of the trail extension development
- No evidence was provided that future EPBC Act referral may result in requirements that cannot be met and that there is no reason on this basis for the Amendment not to proceed or should be included as a condition of the Incorporated Document.

4.5 Isolated land pockets

(i) Evidence and submissions

Council submitted its concerns that an unintended consequence of the application of the PAO was that it could create isolated pockets of land in which affected property owners would then have to maintain. This would occur in limited circumstances where the trail

alignment cuts off a bow in the Creek resulting in an area of land being created on the Creek side of the trail, which is not actually required for the trail or its buffer. Managing these isolated pockets of land may be particularly difficult for affected landowners if access is prevented or made difficult through fencing being incorporated into the design of the trail extension in particular locations. Mr Fyffe further submitted that an additional benefit of this proposal means one and consistent land owner and manager of such parcels of land along the trail extension.

On this basis, Council detailed its intention to slightly increase the extent of the PAO alignment to incorporate these isolated pockets of land in the land which it will acquire for the trail. In one instance on the Maino land, the PAO covers a significant section of land arising from a “bow” in the Diamond Creek.

Some landowners expressed concerns as to accessing any such isolated pockets of land as a result of the PAO. In the case of 86 Wilson Road, Mr Algie submitted that the impacted land pockets included more productive parts of the Maino landholdings. For this reason, Mr Algie submitted that this proposal to extend the PAO to include such isolated pockets of land is inappropriate. Mr Algie submitted that the Amendment should not include more than the land that is required for the trail extension. To do so may render the Amendment unlawful, as it was seeking to apply to land not needed for the stated purpose of the Amendment.

(ii) Discussion

The Panel notes that PAOs usually extend beyond the immediate area of application so as to provide for construction requirements, setbacks and fencing. The Panel also notes the concerns of Mr Algie and other affected landowners of potential difficulty in maintaining the isolated pockets of land, particularly if fencing at certain locations prevents or hinders access to the land.

Whilst it is still technically possible for affected landowners to access these isolated parcels of land through the proposed trail extension, as it will be public land, the Panel notes this will mean there will need to be sufficient breaks in any requisite fencing in order to facilitate such access. Accordingly, this may increase the risk of users of the trail, deliberately or accidentally, trespassing onto private land. Council would need to negotiate this issue when determining any relevant fencing measures.

The Panel accepts Council’s submission and basis upon which it proposes to extend the PAO to incorporate these isolated parcels of land. The Panel also accepts Council’s strategic basis for doing so and disagrees with Mr Algie’s submissions that this is a “land grab”.

The Panel is of the view that in some circumstances it may be appropriate for the trail extension alignment to more closely follow the Creek alignment, thus reducing the need for these isolated pockets to be created and keeping more of the productive land within the land owner’s main landholding. Where relevant, this will be discussed further in Chapter 5.

(iii) Conclusions

The Panel concludes:

- There is sufficient strategic justification and it is appropriate for Council to include isolated pockets of land in the PAO

- Where possible, and in negotiation with land owners, the trail extension alignment should be moved closer to the creek to minimise the creation of isolated land pockets of arable land.

4.6 Diamond Creek Development Plan Area B

(i) Evidence and submissions

Mr Fyffe submitted that small sections of the PAO will impact areas of private land that have been identified as future public open space (POS) in the Diamond Creek Development Plan Area B (Development Plan) which is shown in the Nillumbik Planning Scheme as DPO2 in Map 10DPO. The Development Plan sets out the overall framework of the future development for that relevant area, including the objectives of any proposed POS contributions. The Development Plan applies to the relevant sections of private land in the Amendment which is located in GRZ.

Mr Fyffe submitted that Council was seeking to acquire land that would be nominally within the proposed POS provisions as provided for under the Development Plan. He submitted that these proposed POS areas within the subject properties are unlikely to undergo residential development, as they are also subject to other planning controls such as the LSIO which restricts residential development.

Mr Fyffe advised that there would be minimal impact on the affected landowners in applying the PAO to the relevant proposed POS areas, as these landowners were always going to “lose” that land under the Development Plan POS requirements if they chose to subdivide.

On that basis, Council submitted that it is appropriate for it to seek to apply the PAO over land which is already designated POS under the Development Plan and is consistent with other such strategies employed in planning scheme amendments, such as Nillumbik C67 and Banyule C102.

Mr Algie submitted that the ongoing reference to POS confirms the ambiguity of the purpose of the Amendment and noted that the Development Plan was schematic. Mr Fyffe advised that the Development Plan was prepared by residents of the area as a guide to the possible development of the area and acknowledged that Mr Algie’s client was not involved in its preparation.

(ii) Discussion

The Panel notes that the Amendment proposes to apply the PAO to small parcels of private land which are proposed for POS under the Development Plan. Such POS land under the Development Plan is considered to be mainly within a flood plain land, largely devoid of trees and most likely unable to be developed for residential purposes. For example, the relevant section of land located at 22 Herberts Lane is unlikely to be residentially developed and is nominally within the Development Plan as possible POS.

The Panel is cognisant that the boundaries of the POS and title boundaries are not clearly outlined in the Development Plan and that this clarity won’t necessarily occur until subdivision has occurred. However, the Panel accepts Mr Fyffe’s submission that the PAO should apply to the relevant sections of proposed POS land under the Development Plan.

Further, the Panel accepts that this is land that the affected landowners are likely to have to provide to Council at some future point in time under the POS requirements of the DPO2. The Panel considers it an appropriate use of the Amendment to seek to include these areas of POS land within the PAO, so as to provide certainty of land acquisition for the purpose of the trail extension.

(iii) Conclusions

The Panel concludes:

- Including the relevant areas of POS as set out in the Development Plan Area in the PAO is strategically justified and appropriate.

4.7 Viability of the proposed project

It is not the role of the Panel to undertake a detailed viability assessment of the proposed trail extension. However, submitters have identified some factors which they claim make the trail extension unviable. Therefore, the application of the PAO at this stage is inappropriate and the Amendment should be abandoned. As part of its consideration of the Amendment, the Panel is of the view that it should assure itself that the trail extension cannot be regarded as fundamentally unviable.

The following factors have been identified by submitters as indicating that the trail extension is not viable:

- that it is not financially viable in that the Council is unable to ensure that the funds required to complete the project are available and or committed
- that it is not physically possible to construct the trail extension on its proposed 30 metre wide reserve through at least one and possibly more 'pinch points' on the Maino property
- mapping anomalies are such that the precise location of both property boundaries along the Diamond Creek and the possibility that the PAO is being inappropriately applied to Crown Land are such that the Amendment should be abandoned.

The third of these issues is addressed in section 4.3.

(i) Evidence and submissions

Ms Paton for Council submitted that Council has committed:

- \$500,000 in its 2015/2016 budget, which has been carried forward into the current year
- \$2 million in the 2016.2017 budget
- a forward commitment of \$1.25 million in the 2018/2019 budget
- an indicative allowance for external grants of a further \$1.25 million.

Mr Algie argued that:

The current proposal involves a greater direct financial cost, even on GTA's flawed estimates than other alternatives - more than \$2.12 m or approximately 24.2% ... It also involves significant indirect financial costs that do not appear to have been assessed at all or adequately ...

Mr Bean submitted that there are higher priorities for the use of available Council funds including basic local government services.

Mr de Waard, in giving evidence for the Maino family, identified three pinch points on the Maino land in which the application of the PAO would potentially cut off access at these three pinch points. These are illustrated in Figure 1. Mr de Waard stated that there were no alignments feasible at these three pinch points because of the steep terrain. The Panel requested that Council provide indicative concept plans to indicate whether the trail extension could be constructed through these pinch points and that access across the Maino properties could be retained. Concept diagrams prepared by Council engineers were tabled by Mr Fyffe on the last day of the Hearing. These concept diagrams showed that it would be possible to construct the path through each of the pinch points, but that the access track may need to be accounted for within the PAO alignment that is on the land acquired by Council. Mr Fyffe acknowledged that this would necessitate the Council granting a carriageway easement. He further acknowledged that consideration may need to be given to constructing short lengths of the path on an elevated boardwalk in at least one of these sections.

During the site visit, the Panel chair was able to observe each of these pinch points.

(ii) Discussion

The Panel notes the \$5 million commitment by Council, including the possibility of additional external grants. The Panel is aware that external grants from higher levels of government is not an unrealistic expectation for a project such as this. Although the Panel does not draw a firm conclusion about the likely availability of the total funds needed for this project, no evidence was presented to the Panel to enable it to conclude that the trail extension is likely to be financially unviable. The Panel notes Mr Algie's contention about the cost of alternative alignments but notes that this is not a factor in the Panel's considerations as Council has made a decision that the creek alignment is the preferred option. The Panel makes no comment on Council priorities as this is entirely a matter for Council.

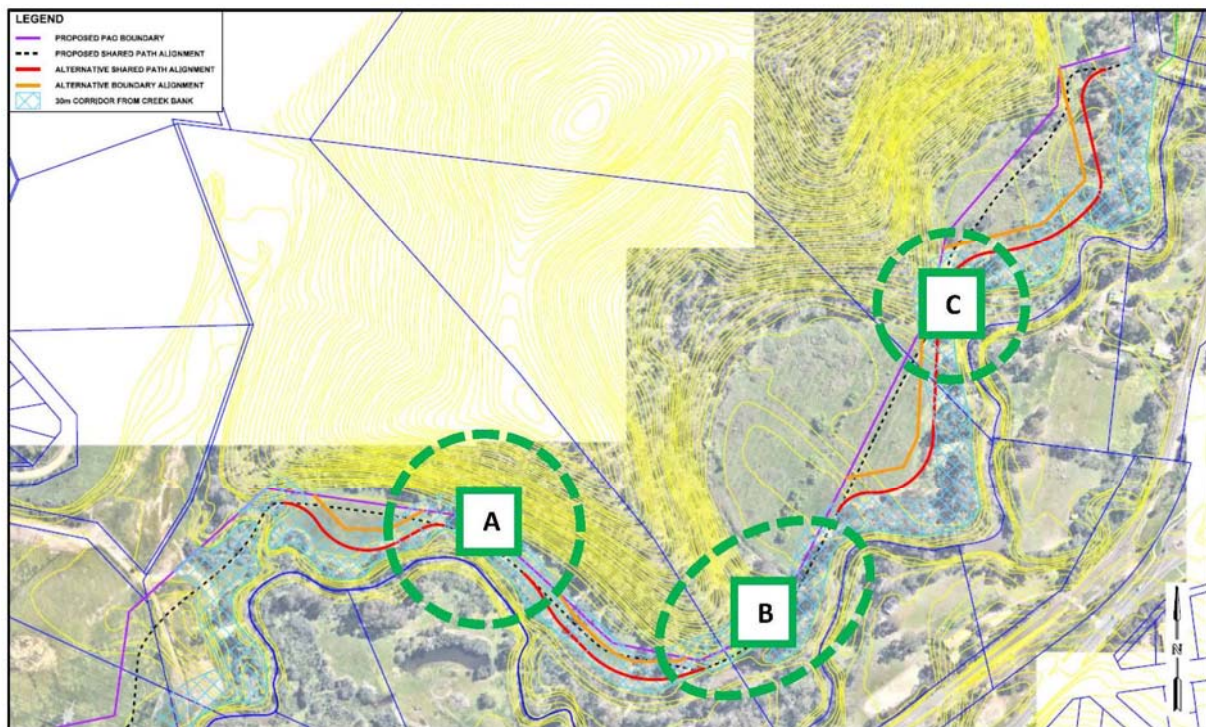


Figure 1 Pinch points on Maino land

Based on the evidence and observations, the Panel is of the view that constructing the path through these pinch points and possibly others along the length of the trail extension may present some construction challenges. The Panel observes that it may not be possible to maintain access across the whole of the Maino properties outside the acquired land and that a part boardwalk construction and/ or a carriageway easement across what may become public land would appear to be options that Council will need to be consider. However, there was no evidence to support claims that the construction of the trail extension through these areas and maintaining property access is not viable.

(iii) Conclusions

The Panel concludes:

- There was no submission or evidence that the trail extension is not viable.
- Council appears to have made an appropriate financial commitment to at least commence the development of the trail extension.

4.8 Recommendations

The Panel makes the following recommendations:

2. **Resolve identified mapping anomalies where the boundary of the Public Acquisition Overlay is the Diamond Creek, preferably prior to approval and Gazettal, but on the advice of the Department of Environment, Land, Water and Planning, resolution may occur at a later stage.**
3. **Consider revising the alignment of the Public Acquisition Overlay in locations where re-alignment of the trail extension closer to the Diamond Creek would result in reducing the amount of arable land being acquired for the shared trail.**

5 Property specific issues

This section of the report addresses a number of issues specific to the 12 private properties over which the Amendment proposes to apply the PAO and to which the Incorporated Document is intended to apply. The discussion of the property specific issues is informed by the conclusions which the Panel has drawn in Chapters 3 and 4 of this report. The issues raised by submitters vary between properties and are listed under the property headings below.

No issues were raised about the application of the Incorporated Document to the publicly owned land and these properties are not discussed here.

5.1 142 Broad Gully Road and 26 Herberts Lane, Diamond Creek

(i) The issues

Issues raised in the submissions which are addressed here include:

- the potential impact of PAO4 on current and future planning permit applications for both the affected properties
- extending PAO4 over identified developable land within the General Residential Zone
- seeking more detailed plans which clearly show the depth of the proposed PAO 4 into each site and the proposed alignment of the trail to determine the potential impacts on current and future planning permit applications.

(ii) Submissions

Mecone Pty Ltd, the submitters for these two properties, did not appear at the Hearing but relied on their written submission which raised the issues listed above. None of the issues raised were expanded upon in detail in the written submission. The submission notes that a planning permit application for development of the land is imminent and this was confirmed by Council.

In its written response to the submission, Council submitted that the parts of the properties to which it is proposed to apply PAO4, is similar to land identified for POS under the Development Plan, which currently applies to the properties. As previously described in section 4.6 of this report, DPO2 provides for certain land to contribute as POS as part of any future development process.

Council noted that the land at 26 Herberts Lane over which a PAO is proposed to be applied is largely under electricity easements and is adjacent to the creek on both properties "*which likely poses significant constraints for development*". Council advised the Panel that a proportion of the land which has restricted development opportunities will be impacted by the PAO is on an existing flood plain and has an LSIO applied. Council submitted that the extent to which the land to be acquired impacts on potentially developable land will be determined at the acquisition stage, if that eventuates, and compensation determined accordingly.

In respect of Mecone's request for more detailed plans, Council advised the Panel that Mecone had been provided with aerial photographs before exhibition which clearly showed the proposed extent of the PAO against identifiable features on the site but that Council had no further approach from Mecone.

(iii) Discussion

The Panel notes the PAO4 is being applied to these two properties to ensure that the land can be acquired by Council in the event that the land is not developed. This issue is addressed further at section 4.6.

Because Mecone did not attend the Hearing, the Panel is not aware of whether there is dispute remaining between Council and Mecone as to whether the PAO is proposed to be applied over what Mecone considers as developable land. If a development application proceeds, the negotiation between Council and Mecone over the extent of the land contributed for open space under the terms of DPO2 may mean that acquisition under the terms of the PAO is unnecessary. For this reason, the Panel comments no further on this issue other than to say that there is insufficient evidence to support any contention that the PAO should not apply to these properties.

(iv) Conclusions

The Panel concludes:

- The PAO should be applied to the properties as 142 Broad Gully Road and 26 Herberts Lane, Diamond Creek.

5.2 185 Main-Hurstbridge Road, Diamond Creek

There was no submission specifically in respect of this property. The PAO is applied in an area that broadly follows the creek alignment and through or directly abutting treed areas along the creek. It appears to have a minimal impact on the cleared areas, which, from the aerial photographs provided, appear to be used for agricultural purposes. The Panel has not identified any issues that are of concern to it with this property and offers no further comment other than to support the application of the PAO as exhibited to this property.

5.3 22 Herberts Lane, Diamond Creek

(i) The issues

Issues raised in the submissions which are briefly addressed here include:

- planning for residential development of the site is well advanced with Melbourne Water approval to fill some flood prone land
- compensation for use of the property for construction of a roundabout at the end of Luscombe Drive
- extensive work has been undertaken to accommodate future residential development
- acquisition of residential land will be costly.

Other issues raised are either addressed in the section of the report which addresses common issues or are issues identified by the Panel in section 1.7 as issues which whilst in

many instances are important and will need to be addressed at a later stage in the process, are not matters of direct relevance to the Panel's consideration of the Amendment.

(ii) Submissions

Mr Bontalik did not request to be heard at the Hearing and therefore did not expand on his brief submission he made at the Hearing. However, he was present for some of the Hearing and took the opportunity to discuss his concerns further with Council officers outside the Hearing.

In its written response to submissions, Council contended that the application of the PAO would not disrupt a subdivision proposal for the following reasons:

- *Irrespective of the DPO2 being applied to the site a planning permit application is still required for a subdivision to be permitted and no application has been lodged with Council, nor is Council aware of any preparations to lodge an application in the immediate future. The Development Plan has been approved since 2003.*
- *The approved Development Plan requires that any subdivision provides a corridor of public open space along the property's creek frontage. The proposed application of the PAO has a similar alignment to the proposed open space corridor, except that the PAO affects a notably shorter length of the site's creek frontage.*
- *The PAO is being applied to an area which is creek frontage and would unlikely therefore be suitable for residential development.*

(iii) Discussion

The Panel makes the same comment with respect to the impact of the application of DPO2 to this property as it made with respect to 142 Broad Gully Road and 26 Herberts Lane in section 5.1, and does not repeat that here.

The Panel is not aware of Mr Bontalik's intentions about an imminent application for the permit to develop his land but is cognisant of his claim that he has Melbourne Water approval to undertake some filling to facilitate development. The Panel is aware that some filling of flood prone land can be permitted to allow residential development to occur but was not given any information to enable it to understand whether this impacts the area to which PAO4 is proposed to be applied. The Panel is cognisant that some of this land is currently subject to a LSIO. Future development in this area is not a matter which the Panel can comment further on, other than to say that no evidence it has been presented to it that the PAO as exhibited should not be applied to this property.

The Panel makes no comment on the issue of compensation for the roundabout as it is not relevant to the Panel's consideration of the Amendment.

(iv) Conclusions

The Panel concludes:

- The PAO should be applied to the property at 22 Herberts Lane, Diamond Creek.

5.4 201 Main-Hurstbridge Road, Diamond Creek

(i) The issues

Issues raised in the submissions which are addressed here include:

- concerns about not having the same advantage as other groups in having their voice heard
- the proposed PAO places a burden and encumbrance on landowners for an extended period of time
- the Incorporated Document lacks transparency and aims to give the Council far-reaching powers
- the trail extension is not reasonably distant from the submitters' home and will impact on their privacy and way of life
- the trail extension will reduce the land available for horses and livestock
- the trail will result in unauthorised short cuts through the submitters' property
- the road option for the trail has never been fully investigated or considered
- the property at 201 Main Hurstbridge Road should be removed from the Amendment.

Other issues raised are either addressed in the section of the report which addresses common issues or are issues identified by the Panel in section 1.7 as issues which whilst in many instances are important and will need to be addressed at a later stage in the process, are not matters of direct relevance to the Panel's consideration of the Amendment.

(ii) Submissions

In response to Mr Ian and Ms Oriana Halliwell's submission that they had not had the same opportunity as other groups in having their voice heard, Council responded that it had carefully considered all submissions. The Panel advised submitters that the current Panel process is an opportunity for all submitters to put their case to the Panel, independent of Council's consideration of the matter.

With respect to the period of time over which the PAO will apply, Council responded that it will work towards acquiring the land for the proposed trail extension in a much shorter time frame than the PAO allows. It presented information to the Panel on the forward provisions in Council budget for the trail extension to support this proposition. Mr Murray also raised the extended timeline for the trail extension as a more general concern.

Mr and Ms Halliwell submitted that the Incorporated Document lacks transparency. While Council did not respond specifically to the Halliwells submission on this point they did defend the use of the Incorporated Document as an appropriate planning tool. The Panel has already addressed this issue in section 3.3 of the report.

With respect to the proximity of the trail to the Halliwells' home and the impact on their way of life, the Council responded saying that the PAO land is some 95-100 metres from the Halliwells' dwelling and that there will be a further setback of 8 metres to the trail. Council further submitted that there will be screen planting in the 8 metre setback between the extent of the acquired land and the trail. The Panel Chair visited the Halliwell property as

part of its site inspection and was able to appreciate the outlook that the Halliwells currently enjoy.

Council didn't respond directly to the loss of land for horses and livestock, nor did Council specifically respond to the Halliwells' request to remove their property from the Amendment.

With respect to illegal activity on the trail and the use of private land for short cuts to and from the trail, Council responded that this does not create a substantive issue on existing trails in Nillumbik. Council further indicated that if this does become a problem, that owners can request the Council as the manager of the public land to address the matter.

Mr and Ms Halliwell also raised the road alignment as an alternative alignment for the trail extension that should be explored but as noted previously this is not considered.

The Council did not specifically respond the request by the Halliwells to remove their property from the Amendment.

(iii) Discussion

The Panel understands the frustrations of submitters, such as the Halliwells, who will have some of their property acquired as a result of the Amendment, as opposed to those supporting the trail extension who, for the most part, will not have their property impacted. It is understandable that submitters such as the Halliwells will feel aggrieved at the Council decision to move ahead with the trail extension and seek to acquire private property. It is not the Panel's role to make a judgment on this but rather to ensure that the trail extension is strategically justified in line with relevant planning and Council policies and that the planning tools are being applied appropriately.

The Panel accepts that the period of the PAO is lengthy, but accepts that where possible Council will seek to acquire the relevant land earlier in the PAO period.

With respect to the transparency of the use of the Incorporated Document, the Panel understands that the concern is not with the transparency of the document as such, but rather with the fact that Council will be exempt from normal planning permit requirements under its terms. Given the level of community consultation which has occurred in relation to the trail extension both through this Panel process and previously, the Panel does not accept that there is a lack of transparency of the use of the Incorporated Document. The Panel also accepts that there are significant conditions and other requirements which the Incorporated Document imposes on Council. These issues have been discussed more broadly in Chapter 3.

With respect to the distance that the dwelling on the Halliwell property is likely to be from the trail extension, the Panel accepts that the distance between the house and trail will be significant. It is clear to the Panel that there may be some impact on the Halliwells' enjoyment of their outlook, the Panel considers that with appropriate screen planting the impact should be minimal once this is planting becomes well established.

The Panel acknowledges that there will be loss of land that could be used for horses and livestock, however the value of the loss to be compensated is a matter that will occur at a

later stage in the compulsory acquisition process and is not a matter the Panel can comment on.

Whilst not a matter of relevance to the consideration of the Amendment, the Panel understands the concerns of the Halliwells and other submitters about a potential increase in illegal activities impacting their properties arising from the construction of the trail extension. The Panel notes Council's response that if this does occur, the onus is on the Council to manage this issue. The Panel further understands the scepticism which may be engendered by such a response and acknowledges that such anti-social behaviour is not easy to manage and police, particularly if it is fleeting and intermittent. That said, this is not a matter which the Panel believes should have great weight in its consideration of the Amendment, as it is a matter to be addressed if, or when, it becomes a problem at a later stage.

With respect to removing the Halliwell property from the Amendment, the Panel understands this sentiment from the Halliwells and other submitters who have made similar requests. The Panel requested that submitters who made such requests should identify, if possible, other alignment options for the Panel to consider. It made this request on the basis that local knowledge may be able to suggest slight deviations of the route of the trail extension which the Council had not identified and which could result in a reduction in the acquisition of private property. It was not an invitation to re-prosecute the case for a completely different alignment, such as the road alignment. The Halliwells did not suggest any alternative deviations.

As the Panel set out in section 1.7 of this report, it does not see its role as evaluating or reviewing the alternative alignments for the trail extension as that is a decision for Council to make. The Panel understands that some submitters do not accept this decision, but it is not the Panel's role to comment on this decision.

(iv) Conclusions

The Panel concludes:

- Mr and Ms Halliwell had an appropriate opportunity to put their case through the current Panel process
- The likely impact the trail extension will have on the Halliwells' enjoyment of their property, is not significant enough for the Panel to not support the Amendment
- No viable alternative alignment for the trail extension in the vicinity of the Halliwell property has been suggested
- There is insufficient evidence to prevent the PAO from being applied to the property at 201 Main Hurstbridge Road, Diamond Creek.

5.5 203 Main-Hurstbridge Road, Diamond Creek

(i) The issues

Issues raised in the submissions which are addressed here include:

- the trail extension will be an obstruction to the use of the land for livestock
- the trail extension will result in unauthorised short cuts through the submitters' property and there is already illegal access to the nearby VicTrack land

- the proposed PAO places a burden and encumbrance on landowners for an extended period of time
- the Incorporated Document can seriously disadvantage land owners in many ways for an extended period of time
- the Incorporated Document is open to misuse
- the property at 203-217 Main Hurstbridge Road should be excluded from the Amendment.

Other issues raised are either addressed in the section of the report which addresses common issues or are issues identified by the Panel in section 1.7 as issues which whilst in many instances are important and will need to be addressed at a later stage in the process, are not matters of direct relevance to the Panel's consideration of the Amendment.

The submission from Mr and Mrs Borgolotto was made by Ms Oriana Halliwell who represented them at the Hearing. A number of the issues raised by Mr and Mrs Borgolotto are the same or similar to issues raised by Mr and Ms Halliwell. To the extent that they are similar to the Halliwells' submission, they are not reported or addressed again in this section and the Panel's conclusions on those issues are the same as those set out for the Halliwells' property.

(ii) Submissions and discussion

With respect to illegal use of private land, the issue has been addressed previously. The Panel notes that during its site inspection it did observe a group of school children walking along the train tracks inside the VicTrack land and so accepts that such illegal activity can be an issue. However as indicated previously, potential for such activity is not reason enough not to support the Amendment.

(iii) Conclusions

The Panel concludes:

- The issues raised with respect to the property at 203 Main Hurstbridge Road, Diamond Creek are not significant enough for the Panel to not support the application of the PAO to this property.

5.6 86 Wilson Road, Wattle Glen

(i) The issues

Issues raised in the submissions which are addressed here include:

- the creek side boundary of the PAO contains a number of anomalies
- access to the property from both Wilson Road in the north and the connection to Collard Drive in the south west has not been appropriately provided for
- access between the three titles on the land in the vicinity of the existing informal track over which the PAO will apply has not been provided for
- the trail extension is a lost opportunity to provide a direct link to schools
- the creek side trail extension will require significant earthworks along parts of the route on the Maino property

- the amount of land proposed to be acquired is in excess of that required if other trail options were pursued
- trailhead facilities for horse riders are not catered for
- personal impact on the Maino family.

(ii) Evidence and submissions

Mr Algie presented two detailed submissions to the Panel over the two days of the Hearing at which he presented his case. These submissions are a combination of very broad issues such as case law which sets out private property rights and a number of specific details. In responding to issues raised by Mr Algie, the Panel has not responded to issues such as the importance of private property rights as it accepts the concept Mr Algie sought to make. Other of the more general points raised by Mr Algie are addressed in Chapter 4 as they have wider applicability to other properties. He questioned the use of the PAO and Incorporated Document as planning tools and this is addressed in Chapter 3. The submissions by Mr Algie on the creek side mapping anomalies have been addressed in section 4.3 and are not repeated here.

In addressing Mr Algie's submission, the Panel has generally concentrated on the issues which are more pertinent to the exhibited Amendment. As with a number of other submitters, Mr Algie raises some issues that will need to be addressed at a later stage in the process and are not matters of direct relevance to the Panel's consideration of the Amendment.

Mr Algie submitted that the PAO applies over the main access points to the Maino property, in particular the existing access track which traverses the property in a broadly north south direction at Wilson Road near the creek in the north and connecting to Collard Drive in the south west. Council submitted that continued access can be provided in each of these locations. Mr Algie submitted a map with contours overlaid on it which show that realigning the existing access track outside of the PAO alignment in the south west of the landholding will be difficult in the vicinity of its crossing Scrubby Creek due to the steep terrain in that area. The Panel visited that area during the site visit and understands that the terrain in this area is difficult.

Mr Algie led evidence from Mr de Waard that continued access along the existing access track which provides access across the three titles in the landholding would be particularly difficult at the three identified pinch points, as there is only a very narrow corridor between the creek bank and the steep terrain to the west. These pinch points have been identified in Figure 1. Pinch point C is particularly difficult. The Panel noted this on its site visit.

In giving evidence, Mr Lane indicated that accessing the land near or overlooking the creek through new roads from the west would be undesirable because of the impact that the construction of new access tracks would have on native vegetation. At the request of the Panel, Council produced concept drawings to demonstrate that continued access could be provided through each of these pinch points, albeit possibly requiring part of the trail extension to be provided on a boardwalk and / or a carriageway easement being granted over the future public land to allow continued access across the Maino landholding. This issue is discussed further in section 4.2.

Mr Griffiths responded to the issue of access across the three Maino titles in Council's right of reply by stating that access to the three titles could be obtained from Wilson Road which wraps around these titles. He acknowledged that this would have environmental consequences. Mr Griffiths also questioned the development potential of the areas in the flood plain nearest the creek and therefore the need for access across the titles. Despite this, Council produced indicative concepts indicating access could be achieved across the three pinch points identified by Mr de Waard.

The Panel Chair visited that area, including the three pinch points, during the site visit and accepts that the terrain in these areas is difficult. This will be a matter for the Council's engineers to determine the appropriate design response of the trail extension.

Mr Algie submitted that the trail extension alignment is a lost opportunity to provide a direct link to schools, so that children accessing the schools could use that alternative alignment. Matthew Humphries submitted that he would use the trail extension to keep fit and to access his school that was some distance away.

Mr Algie submitted:

The rising Creekside slopes of the current line on the Maino Land and steep areas along other parts of this route will necessitate significant earthworks. This poses an immediate risk of erosion and, again, adverse water quality impacts on both creeks.

Mr Algie submitted that Council plans to acquire 10.175 hectares of the Maino land, which comprises nearly a half of all of the privately owned land proposed to be acquired for the trail extension. He added that this is excessive and that the land proposed to be acquired comprises a significant proportion of the farmable land on the Maino property. In his submission, Mr Algie referred to what he termed Council vacillation over a number of years on the alternative route option. He submitted that an alternative trail extension alignment would mean a significant reduction in the amount of land that would need to be acquired.

At the Hearing, Mr Algie questioned the need for the trail extension to cut off 'bows' in the creek, particularly between pinch points B and C; pinch point A and Scrubby Creek and a small area between pinch point C and the northern access point to the Maino property. The effect of the trail extension alignment following more or less a straight line in these areas, rather than more closely following the actual alignment of the creek waterway, creates pockets of arable land Council would acquire so as to not create small pockets of privately owned land between the trail extension and the creek waterway. Mr Fyffe conceded that in at least in the case of the area between pinch points B and C it would be possible to change the alignment of the trail extension to bring it closer to the actual alignment of the creek waterway. This would then reduce the amount of the Maino land that would need to be acquired.

Mr Algie, led evidence from Mr O'Byrne to support the proposition that there is no provision of trailhead facilities for horse riders using the trail. In particular, he highlighted that at the southern end of the trail in Luscombe Drive, Diamond Creek, there is no available land for such facilities. However, submitters including Ms Carolyn Johnston and Ms Cath Giles for the Nillumbik Horse Action Group, explained that horse riders would use the proposed trail as

part of a broader circuit using other back roads. Further, informal trails and that the lack of space for horse related infrastructure at the trail's southern end was not a matter for concern.

Mr Algie submitted that the Amendment will have a personal impact on the Maino family.

(iii) Discussion

The Panel notes the issue of creekside boundary anomalies has been addressed and conclusions drawn on it in section 4.3.

The Panel is of the view that continued access needs to be provided at or near each of the two main access points to the existing access track. The Panel expects these details will be discussed further between Council and the Maino family once the land acquisition in each of these two locations is finalised. The Panel is of the view that it is a reasonable expectation of the Maino family that a similar access track across the property in the broad location of the existing access track continues to be available. It was clear to the Panel Chair on the site visit that whilst not heavily trafficked, the existing access track is used.

The Panel acknowledges that a realignment of the existing access track to keep it north of the PAO in the area near the Scrubby Creek crossing could be difficult and could involve significant earthworks which may be regarded as undesirable. As the precise details of the land acquisition are unknown at this stage, it is difficult to be more definitive. The Panel notes that in order to provide continued access through this area, Council may need to create a carriageway easement through what will then be the public land buffer to the trail. Council may consider this to be a preferable alternative to significant earthworks.

The Panel accepts Council's position that there is alternative access to the three Maino titles from Wilson Road and that the development potential of the open flood plain area may be limited. Access to the middle of the three titles along a new track from the west would not be desirable due to the ecological values identified by Mr Lane, as well as the impact of any construction on native vegetation. For this reason, access across the three titles in the broad location of the existing access track should be able to be provided.

The Panel accepts that access through the pinch points will be difficult, but is of the view that the solutions suggested by Council mean that continued access for the Maino family through these pinch points is feasible. The Panel expects the detailed design stage of the trail extension will seek to identify and resolve these access issues.

With respect to lost opportunity to provide alternative access to schools, the Panel notes that Mr Algie did not provide any evidence to support that contention. The Panel accepts that alternative links with schools are desirable, but no information was provided as to the extent to which an alternative trail alignment would in fact provide for significant school commuting opportunities. As previously indicated by the Panel, it is not reviewing alternative trail alignment options and makes no further comment on this issue. The Panel notes Matthew Humphries submitted that he would use the trail to keep fit and to access his school.

The Panel notes that the possible significant earthworks Mr Algie highlighted is an issue that can be managed during the detailed design and construction phase of the trail extension.

However, the Panel comments on this issue here as acknowledged in the discussion of the trail extension alignment through the identified pinch points that some earthworks may be required. No evidence has been produced to support Mr Algie's contention that 'significant' earthworks will be required and that these will necessarily directly impact on the two creeks through or abutting the Maino land.

With respect to Mr Algie's submission, about the excessive amount of the Maino land needed to be acquired, the Panel makes no further comment on the Council processes over a period of time to consider alternative route options. The Panel accepts that there is a significant amount of the Maino property is proposed to be acquired: mostly the more productive parts of the property. The Panel is of the view that every effort should be made to minimise the amount of land that is to be acquired both on the Maino property and others, particularly where the land proposed to be acquired is productive or potentially productive farmland. This may mean that the trail alignment will need to be designed to more closely follow the actual creek waterway alignment, particularly between pinch points B and C on the Maino property. In that particular instance the Panel concludes that there is a net community benefit in a slightly increased trail length. For this reason, the Panel encourages the Council to minimise the acquisition of productive land rather than cutting off bows in the creek. The Panel notes that there are some bows in the creek where the land cut off by the trail extension appears from aerial photographs to be native vegetation and the Panel considers the land acquisition in these instances to be appropriate. There is a significant bow in the creek cut off by the proposed trail on the Bourne property at 675-685 Heidelberg-Kinglake Road but the Bourne's support the Amendment and from an examination of the aerial photos, the impacted land appears to be significantly vegetated. The Panel has no difficulty with the trail alignment in this location.

The Panel does not believe that this is an issue that will delay or negates the approval of the Amendment. There are instances in which re-aligning the trail extension closer to the actual creek waterway alignment to protect productive land from acquisition appear to be very limited and may be limited to the three areas identified on the Maino land.

Whilst not being in a position to definitively identify other locations where this may be an issue, a brief review of the aerial photos provided has not lead the Panel to believe that there are other locations outside the Urban Growth Boundary where there is potentially a case for slight realignment of the trail.

The Panel acknowledges that the size of the proposed acquisition contemplated under the Amendment will have a significant impact on the Maino property and therefore on the Maino family. The Panel agrees with Mr Algie's submission that the acquisition of private property is not a matter to be taken lightly and the Panel is cognisant of its responsibilities in this regard. However, as the Panel has indicated in section 2.4, it is of the view that the Amendment is strategically justified and should proceed. The Panel acknowledges that the acquisition process will include determining commensurate compensation to the Maino family as provided for under the *Land Acquisition and Compensation Act (1986)*.

No submissions were presented to the Panel to substantiate the proposition that provision could not be made for horse users of the trail and that the Amendment should not proceed for this reason.

(iv) Conclusions

The Panel concludes:

- Existing access from the main local roads to the Maino property and to individual titles can continue to be provided
- Access across the three Maino titles in the broad location of the existing access track, whilst difficult in a couple of locations, can and should continue to be provided
- The location of the proposed trail extension should be moved closer to the actual creek waterway alignment at least between pinch points B and C, and possibly in other locations on the Maino property where it can significantly increase the amount of arable land which remains in private ownership
- Subject to minor realignments, the exhibited PAO should be applied to the property at 86 Wilson Road, Wattle Glen.

5.7 65-135 Wilson Road, Diamond Creek**(i) The issues**

Issues raised in the submissions which are addressed here include:

- Council already has an existing reserve that can accommodate a creek side trail
- the compulsory acquisition removes a large section of the most arable land on this property
- the PAO will restrict access to the remaining creek flats
- the PAO is for a frivolous project that has not been properly planned or costed
- licensing agreement for municipal reserve at 137A Wilson Road, Wattle Glen, conditional on funding the trail
- future management of the creek side of the trail extension
- Council may not be able to get appropriate liability insurance for the trail
- the trail extends 1.5 kilometres through the submitters' property with no access proposed other than at each end
- future viability of the property.

Other issues raised are either addressed in the section of the report which addresses common issues or are issues identified by the Panel in section 1.7 as issues which whilst in many instances are important and will need to be addressed at a later stage in the process, are not matters of direct relevance to the Panel's consideration of the Amendment.

(ii) Submissions

Mr Bean set out six reasons why the alternative alignment 'closer to the road' is preferable. Mr Bean acknowledged in his submission before the Panel that he understood that it is not the Panel's role to review the alternative roadside option, as that is a decision that was taken by Council. Council submitted in its written response to submissions that the existing creekside reserve is too narrow to provide the trail corridor and maintain a suitable, environmentally sensitive setback from the Diamond Creek.

He further submitted that the PAO removes a large section of his most arable land and restricts his future access to the creek flats. Council responded that future compensation processes will take into account the productive capacity of the land which is acquired.

Mr Bean submitted that in 2011 Council vested the title to 137A Wilson Road, Wattle Glen but after mediation through VCAT, Mr Bean was granted a 10 year licence to use the land, subject to funding being available for the trail extension. Mr Bean raised the issue of the future viability of his property in his submission at the Hearing. He further submitted that the Council may not be able to get liability insurance for the trail extension due to the large amount of expensive infrastructure associated with the trail extension which may be damaged by fire and flood. Mr Griffiths responded in Council's right of reply by providing details of the third party liability insurance which it has for Council owned properties.

Mr Bean submitted that the trail extends for a length of 1.5 kilometres though his property with the only access provided being at each end of this section. He submitted that this is *"dangerous and not inclusive"*. Mr Bean further explained that a fire pushed by northerly winds could trap trail users because of this extensive trail length without access points.

In his initial submission on the Amendment, Mr Bean described the trail extension as frivolous and not well planned. He followed this up at the Hearing by submitting that this should not be a Council priority and that *"Roads, Rates and Rubbish"* are where Council's priorities should be. He further outlined examples within the Shire where money needs to be spent on roads and related infrastructure.

(iii) Discussion

The Panel notes that Mr Bean gave a detailed explanation of two generations of his family's stewardship of the property, including the management of the creek side environment.

The Panel repeats again that its role is not to evaluate and consider the two main trail alignment options. The Panel acknowledges that abutting the roadside between Diamond Creek and Hurstbridge there is a Council reserve that may accommodate part of the trail extension which is keeping it away from the on-road option. The Panel has not investigated this option in any detail but understands that Council did investigate a part road and part creek side option and rejected it.

The Panel notes that the PAO through Mr Bean's three lots covers some 2.65 hectares and as Mr Bean submitted, a length of some 1.5 kilometres through his property. The Panel was not requested to visit this property during the site inspection. It appears from the aerial photographs provided to the Panel that the PAO impacts some of the arable land on the property, but in the main it directly abuts existing creek side vegetation. The Panel notes Council's assurance that the value of any arable land lost through compulsory acquisition will be taken into account during the compensation process. The Panel further acknowledges the loss of creek access that will be suffered and notes Council's response to other submitters that this is a factor which can be taken into account through the compensation process.

The Panel notes the existing licence allows Mr Bean to continue to use the land at 137A Wilson Road until 2021. The Panel acknowledges that some of that land is required for the

trail extension, however the matter of the future ownership and use of that land is a matter between Council and Mr Bean and offers no further comment.

With respect to Mr Bean's contention that Council may not be able to get liability insurance the Panel notes that Mr Bean provided no evidence to support his contention. The Panel acknowledges Council's submission confirming and detailing the existing insurance policy which it understands will be amended to include the trail extension.

With respect to safety issues resulting from the long length of trail on Mr Bean's property with access only at each end the Panel notes the late submission from the CFA and their requirements for conditions to be inserted into the Incorporated Document. The Panel accepts that CFA position and requirements with respect to this matter and as indicated in section 3.3 supports the inclusion of the CFA conditions into the Incorporated Document.

With respect to the future viability of Mr Bean's property, the Panel is not in a position to assess or comment on this. The Panel notes Council's previously reported comment that any loss of arable land will be taken into account in compensation processes.

It is not appropriate for the Panel to comment on Council priorities. This is a matter for Council, but it is noted that Mr Bean does not share the Council's priorities in this matter. With respect to this being a frivolous project that is not well planned, the Panel cannot accept Mr Bean's contention on this. The Panel is of the view that there is clear evidence of a lot of planning behind the project, extending over many years and a significant amount of external advice commissioned by Council. The Panel understands, however, that Mr Bean and others do not accept the trail extension.

(iv) Conclusions

The Panel concludes:

- Issues associated with any loss of arable land and creek access are not matters for this Amendment and will be considered as part of compensation processes
- The issue of appropriate insurance coverage being obtained for the trail extension has been satisfactorily addressed by Council
- It is not able to offer any comment on the future viability of Mr Bean's property
- It does not consider this to be a frivolous project
- The exhibited PAO should be applied to the property at 65-135 Wilson Road, Diamond Creek.

5.8 673 Heidelberg-Kinglake Road, Hurstbridge

(i) The issues

Issues raised in the submissions which are addressed here include:

- access to the property will be landlocked by the proposed PAO and subsequent acquisition
- all land owned by R J and K B Stoneman be excluded from the Amendment
- no consideration has been given to how land will be accessed for construction purposes
- it is proposed to carry out works without the necessity for a planning permit.

Other issues raised are either addressed in the section of the report which addresses common issues or are issues identified by the Panel in section 1.7 as issues which whilst in many instances are important and will need to be addressed at a later stage in the process, are not matters of direct relevance to the Panel's consideration of the Amendment.

(ii) Submissions

Mr and Ms Stoneman submitted that their land would become landlocked as a result of the acquisition of land under the PAO. Currently, they have a carriageway easement over the neighbouring property at 675-685 Heidelberg-Kinglake Road. Mr Fyffe stated that Council would grant a carriageway easement to the Stonemans to allow them to continue to access their property. A further issue at this location is the future status of the private bridge across the Diamond Creek on the property at 673 Heidelberg-Kinglake Road. Ms Stoneman asked who would have future responsibility for the bridge when the land it is on is acquired for the trail extension. Mr Fyffe submitted that the Council had no intention to acquire the bridge.

In their written submission Mr and Ms Stoneman indicated that they wished to have their land excluded from the Amendment. They made no suggestions about a viable alternative alignment for the trail extension in the vicinity of their property.

Ms Stoneman further submitted that no details had been provided about accessing the property for construction purposes. Council responded saying that the Incorporated Document has regard for planning matters relevant to construction.

Mr and Ms Stoneman submitted that it was not appropriate for Council to carry out the works required for the trail extension without a planning permit.

(iii) Discussion

The Panel notes the assurance given by Council that a carriageway easement across the land acquired for the trail extension would be granted to Mr and Ms Stoneman and notes that this should resolve this matter. The issue of future responsibility for the bridge once the land on which it sits is acquired by Council is not a matter that is of direct relevance to the Amendment. However, the Panel is of the view that this issue is a matter that needs to be resolved between Council and the owners of 675-685 Heidelberg-Kinglake Road, that is the owners of land each side of the creek.

With respect to removing the property at 673 Heidelberg-Kinglake Road from the Amendment, no convincing case was made for this to occur, as there do not appear to be viable alternatives in the vicinity of the property.

Access to the land, including possibly across the land owned by the Stonemans for construction purposes, is not a matter of direct relevance to the Amendment. The Panel further notes that this is a matter for later consideration and is provided for in clause 12 iii of the Incorporated Document.

With respect to requiring a planning permit, which is addressed in section 3.3, the Panel is satisfied that its recommended version of the Incorporated Document provides satisfactory conditions to guide future development of the trail extension.

(iv) Conclusions

The Panel concludes:

- Access can continue to be provided to the Stonemans' property through a carriageway easement across the future public land
- No convincing case was made to remove the property at 673 Heidelberg-Kinglake Road, Hurstbridge from the Amendment.

5.9 Other properties

There were no submissions in respect of properties at 687 Heidelberg-Kinglake Road, Hurstbridge and 1 Mary Place, Hurstbridge. The owners of 675-685 Heidelberg-Kinglake Road, Hurstbridge, Nicky and Anthony Bourne, submitted that they are in favour of the Amendment.

The Panel concludes that the PAO should be applied to these properties.

Appendix A Submitters to the Amendment

No.	Submitter
1	Dieter Bontalik
2	VicTrack
3	Nathan Panzerra
4	Geoff Mosley
5	Sandra Lucas
6	Wattle Glen Residents Association
7	Nillumbik Bicycle User Group
8	Wayne Lascelles
9	Hurstbridge Traders Association
10	Carolyn Johnston
11	Nillumbik Horse Action Group
12	Helen Legg
13	Sharon Turner
14	Graham Skinner
15	Andrew Bakos
16	Public Transport Victoria
17	Christine Challis
18	Sarah Shine
19	Chris Ingram
20	Nicky and Anthony Bourne
21	Nillumbik Ratepayers Association
22	Andrew Moharic
23	Colleen Hackett
24	Anne Stoneman
25	R J and K B Stoneman
26	Mecone Pty Ltd
27	Damien and Elizabeth Murray
28	Melbourne Water
29	Andrew Bean
30	Ian and Oriana Halliwell

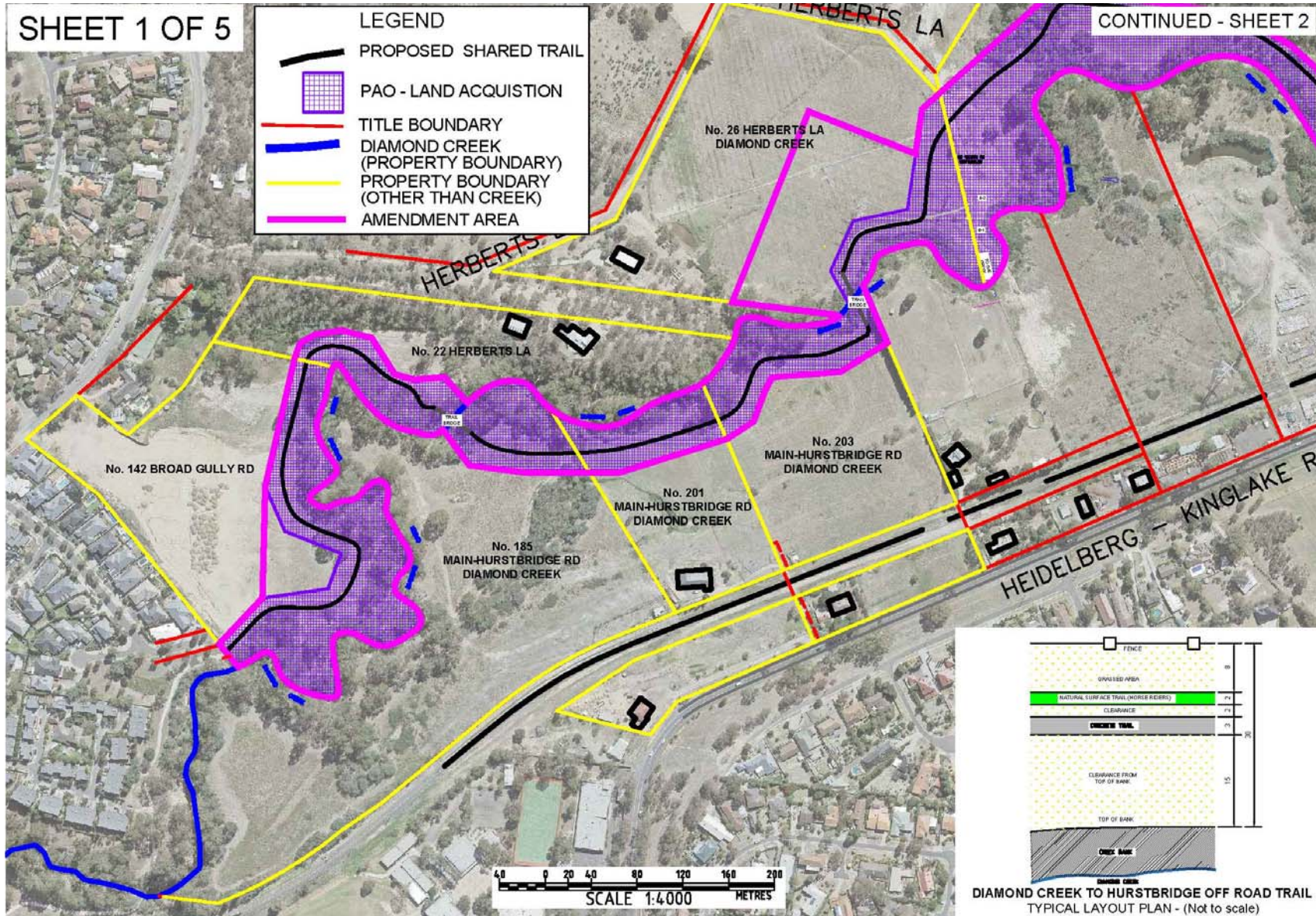
31	A and C Borgolotto
32	Sue McKinnon
33	Douray Pty Ltd and the Maino family
34	Country Fire Authority
35	Nathaniel Aly
36	Matthew Humphries
37	Nillumbik Emus Orienteering Club
38	Maurice Legg

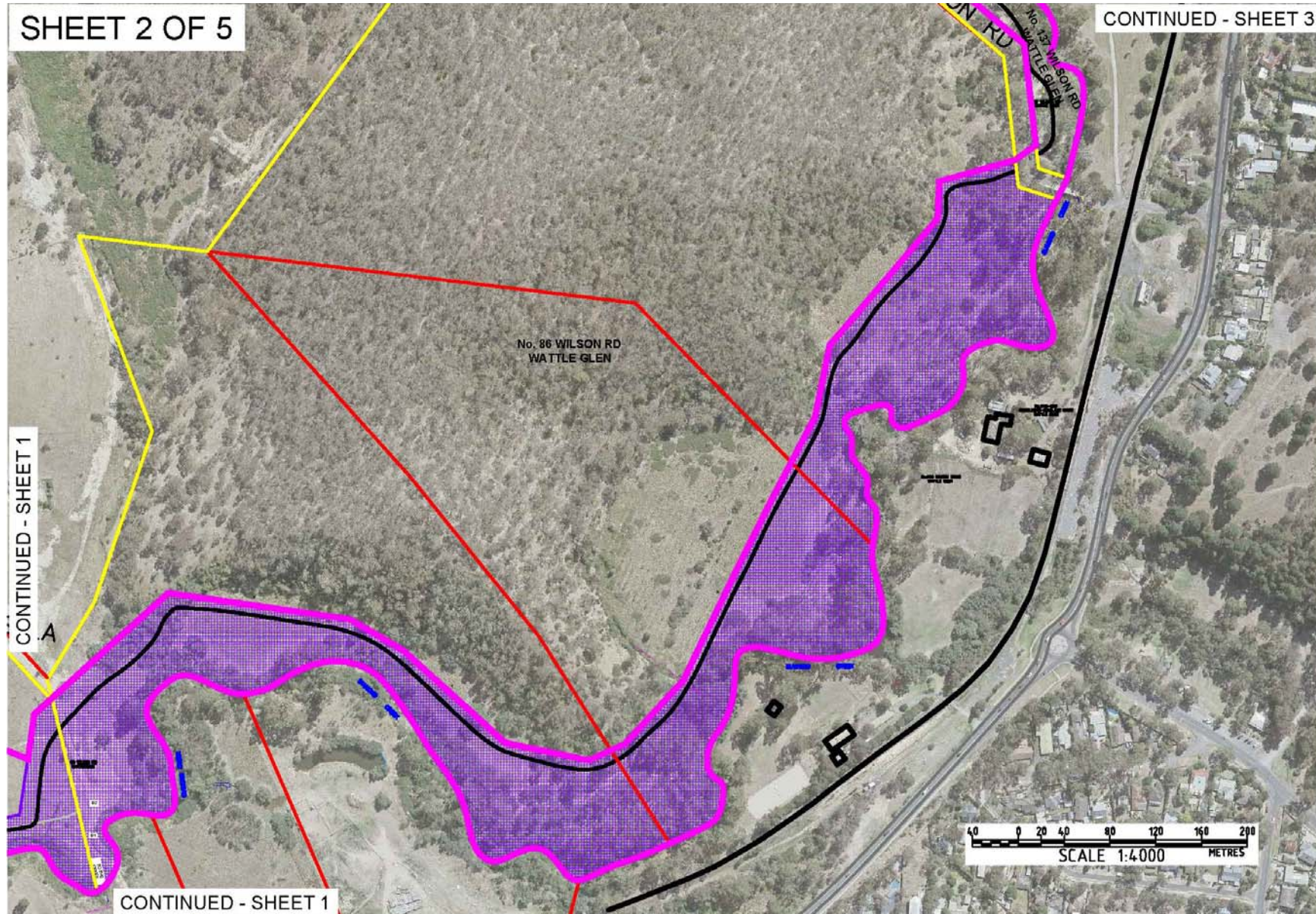
Appendix B Document list

No.	Date	Description	Tabled by
1	28/11/2016	Council's Part B submission	Council
2	28/11/2016	Written submission on behalf of the Maino family	Hubert Algie
3	28/11/2016	PAO4 Plan showing Creek boundary	Mr Algie
4	29/11/2016	Mr Algie's written submission – Part 2	Mr Algie
5	29/11/2016	Various Plans	Mr Algie
6	29/11/2016	Further Plans A3	Mr Algie
7	29/11/2016	Letter from Mr Algie to Commonwealth Minister for the Environment and Energy dated 22/09/2016 and response in return dated 11/10/2016	Mr Algie
8	29/11/2016	Extracts from Nillumbik Planning Scheme	Mr Algie
9	30/11/2016	Written submissions – Carolyn Johnston	Carolyn Johnston
10	30/11/2016	Written submissions – Nillumbik Horse Action Group	Cath Giles
11	30/11/2016	Written submissions – Nillumbik Ratepayer's Association	Brian Murray
12	30/11/2016	Written submissions – Brian Murray/Mary McDonald	Brian Murray/Mary McDonald
13	30/11/2016	Written submissions – Christine Challis	Christine Challis
14	30/11/2016	Written submissions – Andrew Bean	Andrew Bean
15	30/11/2016	Written submissions – Anne Stoneman	Anne Stoneman
16	1/12/2016	Plans – 201 and 203 Main Hurstbridge Road	Oriana Halliwell
17	1/12/2016	Photos - 201 and 203 Main Hurstbridge Road	Ms Halliwell
18	1/12/2016	Written submissions - Oriana Halliwell	Ms Halliwell
19	1/12/2016	Plans – 185 and 201 Main Hurstbridge Road	Ms Halliwell
20	1/12/2016	Written submissions – Creek Trailblazers	Helen Legg
21	1/12/2016	Written submissions – Nicky Bourne	Nicky Bourne
22	1/12/2016	Written submission – Maurice Legg	Maurice Legg
23	1/12/2016	Written submissions – Geoff Mosley	Geoff Mosley
24	1/12/2016	Written submissions – Matt Humphries	Matt Humphries

No.	Date	Description	Tabled by
25	1/12/2016	Written submissions – Nillumbik Emus Orienteering Club	Rex Niven
26	1/12/2016	Written submissions – Colleen Hackett	Colleen Hackett
27	1/12/2016	Written submissions – Sue McKinnon	Mr Steven Katsineris
28	1/12/2016	Written submissions – Friends of Nillumbik	Greg Johnson
29	1/12/2016	Written submissions in reply - Council	Chad Griffiths
30	1/12/2016	Plans	Mr Griffiths

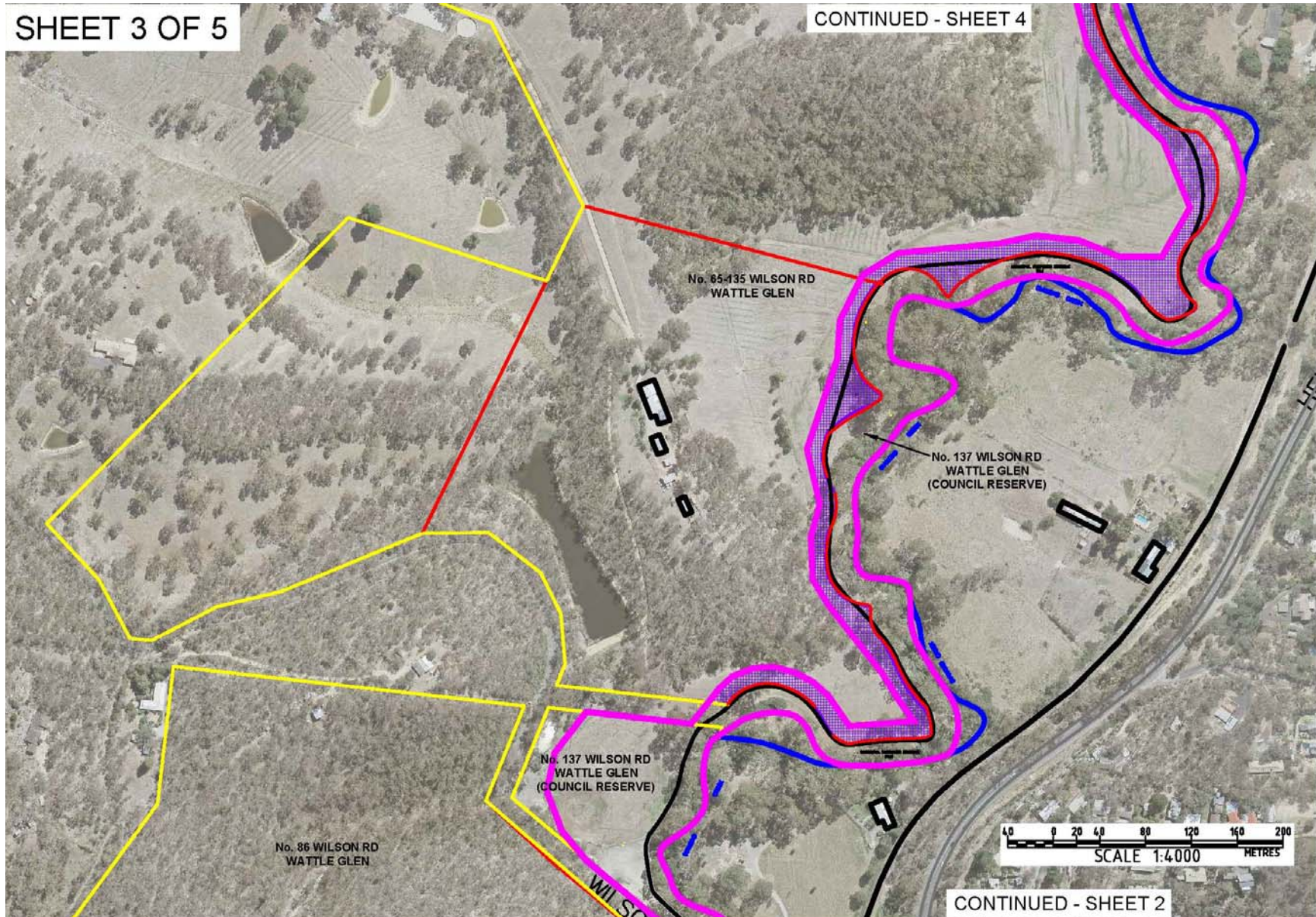
Appendix C Land to which the PAO is to apply



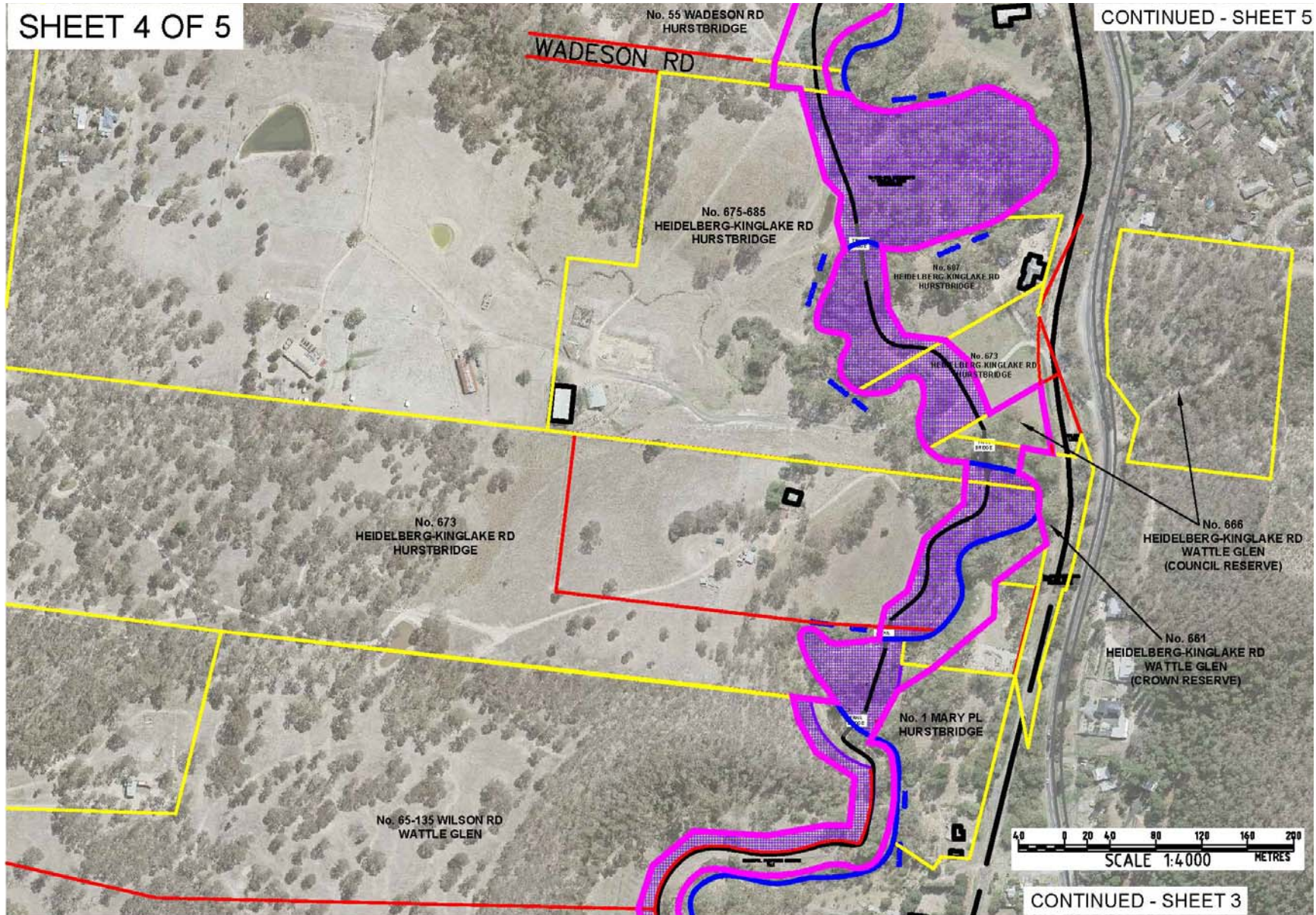


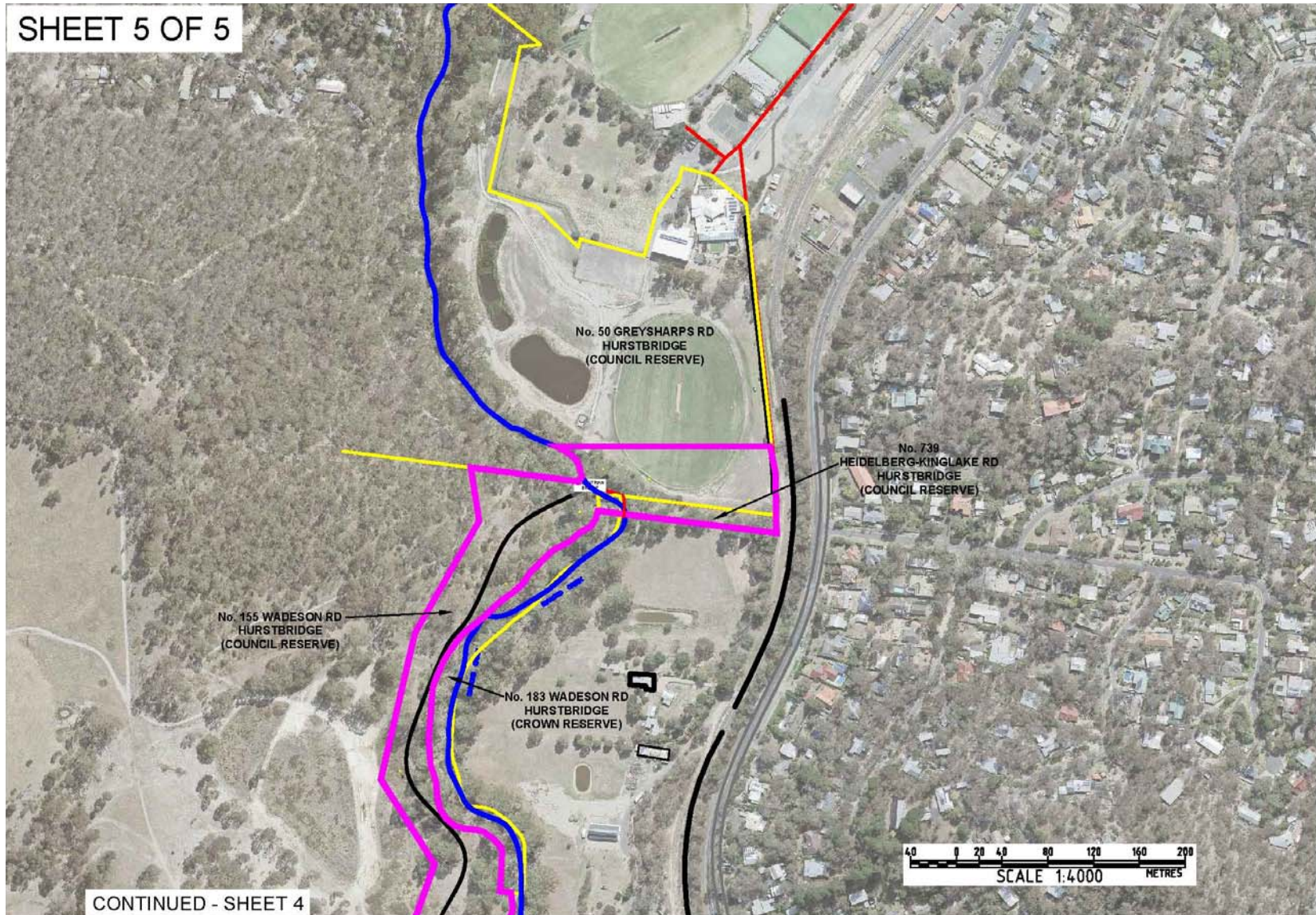
SHEET 3 OF 5

CONTINUED - SHEET 4



CONTINUED - SHEET 2





Appendix D Panel recommended version of the Incorporated Document

**Diamond Creek Trail Extension
(Diamond Creek to Hurstbridge)
Incorporated Document**

**As incorporated by Amendment C108 to the Nillumbik Planning
Scheme**

~~May 2016~~ January 2017

1. Introduction

This document is incorporated in the Nillumbik Planning Scheme, pursuant to section 6(2)(j) of the *Planning and Environment Act 1987* and Clause 81.01 of the Nillumbik Planning Scheme, as the Diamond Creek Trail Extension (Diamond Creek to Hurstbridge) Incorporated Document (May 2016).

The Schedule to Clause 52.03 of the Nillumbik Planning Scheme provides that requirements relating to use and development of specific sites may be included in an incorporated document.

This incorporated document sets out the use and development requirements which apply under the Nillumbik Planning Scheme to the land required for the Diamond Creek Trail Extension – Diamond Creek to Hurstbridge.

The control in this document applies to land within the “Project Area” as shown by Figure 1 of this document.

2. Project

This incorporated document applies to the construction of an off-road shared use trail between Diamond Creek and Hurstbridge, following the Diamond Creek (the “Diamond Creek Trail Extension – Diamond Creek to Hurstbridge”). The Diamond Creek Trail Extension – Diamond Creek to Hurstbridge includes, but is not limited to the following works:

- Construction of an approximately 3.0m wide off-road shared use trail and separate horse trail.
- Construction of bridges and culverts over the Diamond Creek.
- Construction of access for users and service vehicles to the trail.
- Removal of vegetation within the trail corridor,
- Landscaping,
- Drainage infrastructure,
- Trail furniture (e.g. seating),
- Fencing,
- Signage,

3. Permitted use, development and related matters

Despite any provision to the contrary or any inconsistent provision in the Nillumbik Planning Scheme, a planning permit is not required for the use and development for, and in connection with, the Diamond Creek Trail Extension – Diamond Creek to Hurstbridge. This includes any vegetation removal or lopping, demolition, subdivision or other buildings and works required for, or in association with, the project.

This clause is subject to the conditions in Clause 4 of this document.

4. Conditions

- 4.1 The development or use of land, including demolition, subdivision and vegetation removal in Clause 4 of this document must be for, or associated with, the use and construction of the Diamond Creek Trail Extension – Diamond Creek to Hurstbridge.

Without limiting the scope of works for, or associated with, the use and construction of the Diamond Creek Trail Extension – Diamond Creek to Hurstbridge, this includes:

- a) The construction of a shared trail and separate horse trail, including earthworks, associated structures, culverts, kerbs, channels, cuttings, batters and fill etc.
- b) Landscaping.
- c) Drainage works.
- d) Removing, destroying, pruning and lopping of vegetation, including native vegetation.
- e) Demolition.
- f) Construction and use of temporary site workshops, storage, administration and amenities buildings and associated vehicle parking.
- g) Fencing.
- h) Constructing temporary access roads, diversion roads and vehicle parking areas.
- i) Subdivision.

Environmental Conditions

- 4.2 The following must occur before the development (including vegetation removal and lopping) starts:

- a) A response must be provided to the satisfaction of the Responsible Authority to the biodiversity assessment guidelines of Clause 52.17 of the Nillumbik Planning Scheme.
- b) An ecological assessment must be prepared and approved by the Responsible Authority. The assessment must:
 1. Undertake a flora, fauna, aquatic and habitat assessment.
 2. Identify significant flora and fauna species and ecological communities and document their location.
 3. Document the current condition of the trail corridor and adjacent riparian zone (e.g. document the presence and extent of pest animals and weeds).
 4. Document the likely and potential impacts associated with the development.
 5. Identify any ecological constraints and mitigation measures.
 6. Consider impacts to adjacent waterways and riparian land.

7. Identify opportunities for the rehabilitation of any degraded riparian land in association with the proposed trail.
 8. Provide an accurate account of the implications under Commonwealth policy and State legislation.
- c) An Environmental Management Plan (EMP) must be prepared and approved by the Responsible Authority. The EMP must have regard for the response to Conditions 4.2 (a) and (b) above and must include:
1. Details of the location of new or replacement planting and fencing.
 2. Details of planting proposed to satisfy any requirement for native vegetation offset planting, revegetate disturbed areas and/or to provide adequate screen planting for nearby properties.
 3. A planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, and quantities of each.
 4. Planting intended to satisfy any requirement for a native vegetation offset.
 5. Planting to revegetate disturbed areas at the completion of trail and any bridge construction.
 6. Dates of planting.
 7. Identification of any vegetation to be removed and details of how any impacts on remnant vegetation, fauna habitats and adjacent areas of ecological and environmental significance are to be reduced.
 8. Measures to control the spread of environmental weeds.
 9. Measures for the protection of trees retained within the project area.
 10. The control of sedimentation and pollution within the project area and in the adjacent areas during development.
 11. The ongoing environmental management for the area.
 12. Details of construction management including:
 - i. An overall construction program.
 - ii. Protection measures for site features to be retained (e.g. fencing, structures, trees).
 - iii. Access points to the construction.
 - iv. Traffic management measures for access of works.

The environmental and construction management measures shown on the approved plan must be carried out and completed to the satisfaction of the Responsible Authority.

- 4.3 The removal, destruction, pruning or lopping of native vegetation must be the minimum reasonably necessary for the construction of the project.
- 4.4 In order to offset the removal of remnant vegetation and/or scattered trees a native vegetation offset is required that meets the following requirements and is in accordance with the "Permitted Clearing of Native Vegetation – Biodiversity Assessment Guidelines" and the "Native Vegetation Gain Scoring Manual".

The offset must:

- a) contribute gain of the calculated general biodiversity equivalence units.

- b) be located within the Shire of Nillumbik or the Port Phillip & Westernport Catchment Management Authority Boundary.
- c) have a strategic biodiversity score of at least 80% of the strategic biodiversity score of the clearing site.

The offset provided must be to the satisfaction of the Responsible Authority and may be calculated for each stage of the project.

- 4.5 Prior to the removal of any vegetation, evidence that an offset has been secured for that vegetation must be provided to the satisfaction of the Responsible Authority. This offset must meet the offset requirements set out in this incorporated document and be in accordance with the requirements of the “Permitted Clearing of Native Vegetation – Biodiversity Assessment Guidelines” and the “Native Vegetation Gain Scoring Manual”. Offset evidence must include one of the following:
- a) a security agreement, to the required standard, for the offset site or sites, including a 10 year offset management plan.
 - b) a credit register extract from the Native Vegetation Credit Register.
- 4.6 The development and use of the Diamond Creek Trail Extension – Diamond Creek to Hurstbridge must be conducted in accordance with the requirements of the *Aboriginal Heritage Act 2006*, including any requirements pertaining to a Cultural Heritage Management Plan.

Country Fire Authority Conditions

- 4.7 A Fire Management Plan must be developed for the walking trail. This Plan needs to consider the following:
- a) community safety signage should be provided at each entrance to the track informing those using the track of the fire risk in the area and the actions persons should take if caught in a fire.
 - b) the signage should also strongly advise persons not to use the track on days of extreme fire danger.
 - c) indicative location signage should be provided along the track for users to clearly articulate their current location to emergency services.
 - d) access into and along the track for emergency service vehicles. This should include access from the adjoining roadways spaced no further than 0.5km apart, be all weather construction, 4 metres wide and 4 metres high clearance factors.
 - e) the track itself should be a minimum trafficable width of 3.6 metres wide with a vegetation clearance factor to 4 metres and 4 metres height clearance of all-weather construction. Passing bays every 0.5km with an increased width to 6 metres wide x 20 metres long.
 - f) water supply points should be provided at each end of the designated track.
- 4.8 Any proposals to increase vegetation both along the designated track or adjacent land must not increase the potential fire risk exposure to the track users.

Melbourne Water Conditions

- 4.9 A separate application must be made to Melbourne Water’s Asset Services Team for the approval of any new or modified share paths near our existing waterways.

- 4.10 [Council is required to enter into an Agreement with Melbourne Water for the use of Melbourne Water land for the purpose of the shared path.](#)
- 4.11 [Melbourne Water requires the pathway to be constructed to AustRoads Standards – AustRoads Guide to Traffic Engineering Practice Part 14 – Bicycles \(1999\).](#)
- 4.12 [The proposed path should be located above the 1 in 10 year ARI flood level.](#)
- 4.13 [If the above requirement cannot be achieved, Melbourne Water requires a package of safety measures to accompany the proposal eg flood warning signs shall be placed at sections that encroach within the floodway during certain events. Alternative routes shall be indicated during times of inundation of the pathway. Please see Melbourne Water's 'Shared Pathways Guidelines' for further details.](#)
- 4.14 [The path needs to be set into the natural surface level of the existing ground so that the hydraulics of the floodplain are not altered.](#)
- 4.15 [Any additional fill required for the pathway within the floodway shall require modification to maintain the cross sectional area to prevent an increase in flooding to surrounding properties. Detailed bulk earthwork plans indicating cut and fill sections shall be submitted to Melbourne Water for approval.](#)
- 4.16 [The path shall be designed to ensure that the surface runoff does not cause any erosion of the waterway/floodway embankments or pondage.](#)
- 4.17 [The path shall be designed to cater for Melbourne Water's maintenance machinery.](#)
- 4.18 [Following compliance with the above Melbourne Water conditions, Melbourne Water may require further conditions to be advised if they arise.](#)

5. Expiry

This document expires if any of the following circumstances applies:

- The development is not started by 31 December 2025.
- The development allowed by the control is not completed by 31 December 2030.
- The use allowed by this control is not started by 31 December 2030.

The Minister for Planning may extend the periods referred to if a request is made in writing before the incorporated document expires, or within three months afterwards.

Figure 1 – Project Area

