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**Proposed Amendment C12  
Central Goldfields Planning Scheme  
Planning Permit Application No 116/06**

**Submission on behalf of Andrew Ong of Maryborough IGA**

**18 June 2007**

## Introduction

- 1 This submission is made on behalf of Andrew Ong of Maryborough IGA (IGA).
- 2 Mr Ong is the proprietor of the Maryborough IGA supermarket situated at the northern end of Nolan Street, adjacent to Maryborough-High Street.
- 3 The submission is made in respect of proposed Amendment C12 to the Central Goldfields Planning Scheme and Planning Permit Application No 116/06 which together seek to facilitate the redevelopment of the land at 92-96 Tuaggra Street and 57 and 59 Burns Street, being the former Maryborough knitting mill site and adjacent land (**Subject Land**).
- 4 The proponent, Pomersan Pty Ltd (**Proponent**), seeks to develop the Subject Land for the purpose of a standalone shopping centre. The proposed shopping centre would accommodate some 7,132m<sup>2</sup> of retail floor space including:
  - A Coles supermarket of 3,000m<sup>2</sup>.
  - A half-sized Kmart Discount Department Store of 3,155m<sup>2</sup>.
  - Speciality shops of 977m<sup>2</sup>.
- 5 The Shopping Centre proposed is to be separated from Tuaggra Street by an at-grade car park of 142 spaces (though it is noted that in fact it will be less than this due to a range of deficiencies in the proponent's plans) with access from the two adjacent streets, Burns Street and Burke Street.
- 6 The Subject Land is at the south-eastern end of an area of land within the Business 4 Zone. The provision of this zoning was endorsed by the planning panel appointed to consider the new format planning scheme in 1999 and confirmed since in the planning scheme review. As a consequence of this proposal, the proposed development will create an island of Business 1 Zone land surrounded by public use land to the south east and a large area of land within the Business 4 zone to the north west.
- 7 While, as a matter of general location (according to the Structure Plan contained in the Municipal Strategic Statement (MSS) this land is within the town centre of Maryborough, it is clear that the island created by Amendment C12 would be a distinct, standalone and non-integrated addition to the Maryborough retail areas.
- 8 It is IGA's position that the proposal fails to find strategic and economic justification for the rezoning and ultimately will jeopardise the proper provision of retail facilities for the Maryborough township and surrounds. Not only does the proposal not flow from a proper strategic review as a matter of proper process, nowhere has the relationship with the existing retail centre and the future of the surrounding zones and pedestrian and other linkages to the existing retail area been properly explored. This is not simply a matter of process. Without such review it is impossible to determine if the orientation and design of the centre is appropriate, leaving aside any debate as to its size and economic impacts.

**Summary of key issues**

- 9 It is IGA's position that the amendment should be abandoned. Put simply neither the Proponent nor Council have undertaken the necessary work to justify this development, or the subsequent shift in the Maryborough retail core it will stimulate.
- 10 The planning panel has heard from a Council eagerly pursuing an opportunity to introduce new major retail chains into the township.
- 11 The responsible authority has presented no evidence evaluating this proposal and has undertaken no independent assessment during the pre-application and pre-amendment phases and instead has informed its decisions through only the proponent's word and data. While it is acknowledged that the Kmart will add to the range of retail facilities in the town and assist in reinforcing the role of Maryborough in the retail hierarchy, the development of this site as proposed has not been assessed in terms of its implications for the structure of the town centre or the achievement of the objectives of the Urban Design Framework (even if varied to accommodate this project). The documents lodged with the application including the Cityplan report do little to address the key issues. Although the UDF gets a mention (Cityplan, p18) there is no analysis of how the proposal complies and no mention, for example, of the mid block link referred to in multiple plans of the UDF. There was no economic impact assessment or similar strategic report dealing with retail planning issues.
- 12 Council's submissions carefully noted that the only two submitters at the hearing are commercial competitors to the proposed supermarket component of the shopping centre. The inference appeared to be that this somehow gave that presence at the hearing less significance.
- 13 On behalf of the Proponent, we have heard argument in support of what represents an overdevelopment of the Subject Land. In evidence of this we point to 60 metre tilt slab walls at zero set back on Burns Street and Burke Street, the failure to accommodate or respond to the Urban Design Framework, the inability to accommodate even near adequate parking (a situation which will only become worse once the car plans are amended to reflect reality) and the other design deficiencies with the project.
- 14 The proponent relied upon Mr Milner who effectively dismissed the existing zoning pattern and sought to justify the subject site, not on the basis of its virtues but instead based on the difficulties of aggregating more suitable land within the Maryborough town centre. It is important to note that Mr Milner himself recommends Council undertake significant strategic review of its central business area, regardless of the Panel's recommendations. The Proponent also relies on Mr O'Brien who despite having been involved in the project for some time failed to provide accurate parking plans. No driveway crossovers, powers poles or specialty loading were depicted in his plans, the net effect of which would have been to force parking further from the Subject Land. IGA further submits that Mr O'Brien's proposed road cross section cannot properly be accommodated.
- 15 Finally the Proponent relies on Mr Haratsis. Mr Haratsis's role has been to provide retrospective justification for the what is the largest single retail development proposal

Maryborough has seen. His evidence is flawed, based on retail expenditure in Maryborough above regional averages despite the low household incomes, and a dogmatic application of 'RTD's' – retail turnover figures derived for all populations applied to a local retail economy that has spending well below Victorian averages. Mr Haratsis' evidence has also been demonstrated for what he has failed to expressly reveal.

- 16 Mr Haratsis was engaged to prepare a report in May/June 2007. This is an example of how this proposal has put the cart before the horse. The economic justification for this proposal has been completed after the fact. A proposal was prepared, presented to Council and then Council decided to exhibit the amendment and draft the permit. One wonders if there would have been any proper examination had IGA and Woolworths not forced this matter to a Panel hearing.
- 17 Finally we note that the Proponent has declared the proposal indivisible. It is said that Maryborough cannot obtain the Kmart it needs without the introduction of Coles. This aspect of the development has not been the subject of any evidence and the Panel should reject being presented with a fait accompli in this form.
- 18 By the Proponents own submission the shopping centre will introduce a Kmart store sized at the extreme small end of the range. It will have a range of the goods one would normally associate with a Discount Department Store (DDS) but will ultimately, as indicated by the proponent, include a smaller sample of the overall regular Kmart offer. Mr Haratsis could not specifically identify the extent of the range to be offered. To the extent that there is a DDS market in Maryborough, the trade area population will still need to go to larger regional centres. The proposal cannot therefore comprehensively deal with the reduction of escape expenditure.
- 19 The shopping centre will also house a Coles brand of supermarket of some 3,000m<sup>2</sup>. This supermarket will add no new offer to the Maryborough township. It will replicate the two existing supermarkets and it will shift some expenditure from those supermarkets, but at the end of the day it will only be another supermarket. Instead, in addition to the Kmart, perhaps the only new thing the supermarket gives the retail catchment area of Maryborough is an extraordinary 63% overabundance of supermarket floor space compared with regional Victoria. Each economic expert has confirmed that the supermarket will do little to reduce escape expenditure. Even if neither of the existing supermarkets close, Maryborough will have three supermarkets significantly undertrading leading to reductions in choice, reduced turnover and poorer quality selections than can be supported by vibrant high turnover facilities.
- 20 The Panel has the role of evaluating this shopping centre development in terms of the rezoning and the draft permit. It must first look at the strategic justification for rezoning an isolated area of land. Strategic justification which is not there.
- 21 It is within the Panel's discretion to consider the longer term effects of the proposal and the pressure that will come on Council for adjacent commercial opportunities. This rezoning will be the catalyst for change in Maryborough. But no-one has stopped to ask what change - of what type, in which direction?

- 22 If the Panel is minded to agree that the land should be rezoned, it then has the discretion to recommend a permit be granted under the Central Goldfields Planning Scheme so amended. This means an evaluation of the proposal itself, its response to the constraints of the Subject Land and the how it relates to Council strategic documentation - in particular the Maryborough Urban Design Framework (UDF). It must also determine whether this use will produce net benefits to the community. It is IGA's position that it does not and that it will produce long lasting and possibility permanent negative impacts on the centre. The Panel must recognise that once rezoned the Business 1 zone allows shop and other uses as of right, subject only to a buildings and works permit. Third party notice is limited.

#### **The status of commercial competitors**

- 23 The Panel has heard submissions regarding the position of IGA and Woolworths as commercial competitors. As we understand it, the purpose of these references is to indicate that IGA's evidence is coloured and has less weight than it would otherwise be afforded. This is clearly against the established principles of planning law in Victoria.
- 24 It is worth considering what the outcome of proposed Amendment C12 to the Central Goldfields Planning Scheme and Planning Permit Application No 116/06 would have looked like were it not for the presence of these 'commercial competitors'.
- 25 Council's submission indicates that it 'wholly supports' the proposal. Yet this view is formed without the benefit of any independent analysis testing and justifying the proposed development. In the absence of the commercial competitors, this development would have proceeded without a workable traffic solution, without economic justification, without, at the very least, necessarily being a stimulus for strategic review.
- 26 For instance, looking just at parking and traffic issues, the proposed truck access does not physically work. The on street parking design does not reflect the current as built condition on the street. The car parking that extends beyond the Subject Land could most certainly look different because as we have seen from Mr Robertson's evidence the plan that was submitted and the plans that were exhibited do not reflect the current conditions.
- 27 It is also worth noting the potential effect of such inaccuracies in the exhibited plans. The Proponent seems to have carefully convinced the township on the basis of these inaccurate plans, and has no doubt explained how in his view how the proposal is the once in a lifetime opportunity that will be the lifeblood of the town. We acknowledge that the Proponent has sought to accommodate adjacent land users and that this has brought minor improvements to the proposed development, for instance the gates on the loading bays and, as we understand it, some skylights to address overshadowing issues for some of the adjacent land users, fencing and security lighting.
- 28 However the proponent had not published any significant justification for the proposal until the status of the development was challenged. The planning report supplied with the application provided a limited assessment only of the Planning Scheme provisions and the UDF.

29 Putting aside the deficiencies in the rezoning and the lack of need for a development of this sort for one moment, we would urge it upon the Panel to consider readvertising amended plans that address the changes and deficiencies highlighted over the course of this Panel hearing. This would give any person who did not object or who withdrew objections a chance to review the proposal in realistic terms. This is particularly relevant to adjacent and nearby landowners who either withdrew submissions or did not submit on the basis of the exhibited plans or undertakings from the Proponent regarding the extent of on-street parking or other aspects of the development.

30 The status of commercial objectors has been noted in a range of Tribunal decisions throughout the years, but it has perhaps been most clearly enunciated in the tribunal's decision in *Country Wide Retail Management Pty Ltd v Yarra Ranges Shire Council* 1997/21808 where the Tribunal stated that:

*'[o]ver the years the community has been saved from bad proposals because of the actions of objectors including objectors who have had commercial interests ... The fact that an objector has or may have a commercial interest does not by any means establish that its objections on town planning issues lack merit.'*

31 It is respectfully submitted that the presence of Woolworths Limited and IGA at this hearing reflects the fact that these are two of the larger commercial entities in town and that they therefore have adequate funds to seriously evaluate the proposed shopping centre and are independent of the politics of a major new project in a small town. Their presence is therefore legitimate and desirable. Their location in the town gives them a genuine interest in the future structure and health of the existing retail area beyond any more competition issue.

#### **Scope of the Panel's discretion**

32 Division 5 of the *Planning and Environment Act 1987 (PE Act)* considers the combined permit and amendment process utilised by the proponent and Council in this matter. Division 5 of the PE Act and Part 3 'Amendment of Planning Schemes' therefore enliven the Panel's discretion.

33 Section 25(2) of the PE Act states that a planning panel may make any recommendation it sees fit. 'Any recommendation' - the language could not be broader.

34 Turning to Division 5 of Part 4 of the PE Act, Section 94E of the PE Act states that a panel can recommend that a permit be granted under this Division for any purpose which the Planning Scheme as amended would require a permit to be obtained, whether or not an application has been made under that Division has been made for a permit. These words also highlight the breadth of a Panel's discretion.

35 The Proponent is seeking planning permission to develop a shopping centre which is detailed in the application as including a supermarket, a Kmart store and a range of specialty shops. If it wished, the Panel could recommend that a different mix or configuration of uses occur or ultimately that for the time being no use occurs at all. It is not IGA's intention today to put forward a range of proposals or argue other uses

for the land in any detail. Quite to the contrary, IGA considers this proposal so devoid of strategic basis that it should be rejected outright.

- 36 However, if the Panel was minded to recommend a different proposal or an altered proposal, it should not feel encumbered nor restrained by the scope of the planning permit application presented by the proponent. Were this so the words of the Act would be very different and would not use the language of 'any use permitted'.
- 37 The scope of the panel's discretion became a live issue at the recent planning panel considering Amendment C96 to the Greater Geelong Planning Scheme. There, incorrectly in our view, a Panel formed the view that it had been appointed 'only to consider the merits of the application (and the amendment) before it and agrees that its role does not extend to assessing the merits of alternative options'. These comments were made in circumstances where a submitter, again IGA, produced alternative plans demonstrating the relative ease with which an unconstrained site could accommodate a range of development options. The applicant in that case, Woolworths, successfully sought to narrow the scope of the Panel's discretion by arguing that once a rezoning was accepted, the Panel's discretion was no broader than that of the responsible authority in assessing a permit application. This assertion was made in closing comments by counsel for the proponent. There was no opportunity for debate on the issue and indeed when IGA submitted comments to the panel on this matter after the panel hearing they were expressly rejected without consideration.
- 38 We submit this approach is wrong. It artificially constrains the language of the PE Act, that being the document that gives rise to the Panel's powers, and reads down the provisions. If only as a matter of statutory interpretation it is the words of the Act that take primacy over the provisions of the planning scheme (such as the decision guidelines under clause 65). We respectfully urge the Panel to give full effect to the scope of its appointment by the Minister for Planning.
- 39 As a Panel considering a planning scheme amendment, you have before you a broad policy landscape. You may recommend adoption as exhibited, modification or abandonment. In the case of modification, it is a question of degree as to whether modification justifies further exhibition or some other process. It is also not a case of the permit automatically following the rezoning decision. You may recommend changes to the scope or form of the development either as a precondition to rezoning or in relation to the plans as proposed. This is a course frequently followed by VCAT in the context of the design of proposals.
- 40 In one such recent case at Churchill, *Fabcot Pty Ltd v Latrobe City Council* [2007] VCAT 354, despite the site being zoned Business 1, VCAT refused to issue a building and works permit for a Safeway supermarket on grounds essentially related to the impact on the structure of the centre despite argument in favour of net community benefit from the development of a second supermarket in the town. In that case the proposed site (a disused hotel) was some 150 to 200 metres from existing retail development and there were no proposals for pedestrian linkages to provide an active centre. The Tribunal found it would create a second separate centre and despite the zoning rejected the proposal. In doing so it followed a strong line of authority including Osborn J. in *Burnsbridge Services v Greater Bendigo City Council & Ors*

[2005] VSC 422 where the court held that in certain circumstances broader policy and strategic use considerations are relevant in the context of development applications.

- 41 As a Panel you may recommend some other actions should take place before the development proceeds. Here the natural option would be a comprehensive review of zoning and the effect of this proposal on the retail axis of the town. The Proponent's own expert has urged the zoning review upon you.

#### State Policy Planning Framework (SPPF)

- 42 We now turn to the relevant State Planning Policies. We note that many of these policies have already been discussed by the parties and so we do not propose at this late stage of the hearing to extract, or read them in full.

- 43 Under *Clause 11, Introduction, goal and principles, 11.03-1, Settlement* it states that planning is to anticipate and respond to the needs of existing and future communities through the provision of zoned and serviced land for housing, employment, recreation and open space, commercial and community facilities and infrastructure. Planning is to recognise the need for, and as far as practicable, contribute towards:

- Health and safety.
- Diversity of choice.
- Adaptation in response to changing technology.
- Economic viability.
- A high standard of urban design and amenity.
- Energy efficiency.
- Prevention of pollution to water, land and air.
- Protection of environmentally sensitive areas and natural resources.
- Accessibility.
- Land use and transport integration.

- 44 Under *11.03-5, Economic well being*, it is policy that '*planning is to contribute to the economic well being of communities and the State as a whole by supporting and fostering economic growth and development by providing land facilitating decisions and resolving land use conflicts, so that each district may build upon its strengths and achieve its economic potential*'.

- 45 *Clause 12 Metropolitan development* states that the objectives and strategies of that clause also influence municipalities beyond the Melbourne metropolitan area and should be taken into account where relevant. Under clause 12.01-2, *Strategies Activity Centres*, indicates that it is policy to ensure that activity centres are developed in a way that:

- Reduces the number of private motorised trips by concentrating activities that generate high numbers of (non-freight) trips in highly accessible locations.
- Encourages economic activity and business incentives.
- Improves access by walking, cycling and public transport to services and facilities for local and regional populations.

- 46 Under *Clause 12.05-2, Strategies, Urban Design*, it is policy to require 'development to respond to its context in terms of urban character, cultural heritage, natural features surrounding landscape and climate'.
- 47 Under *Clause 12.08-2 Walking and Cycling*, it is policy 'to give more priority to walking and cycling, planning and urban development and in managing the road system and neighbourhoods.....'
- 48 Under *Clause 14 settlement*, *Clause 14.01-1 Objective*, it is an objective to 'facilitate the orderly development of urban areas'.
- 49 Under *Clause 14.01-2 General implementation* it states that 'planning authorities should facilitate the orderly development of developing urban areas through the preparation of structure plans. The plans should take into account the strategic and physical context of the location, provide for the development of sustainable and liveable urban areas in an integrated manner, facilitate the development of walkable neighbourhoods and facilitate the logical and efficient provision of infrastructure'.
- 50 Under *Clause 17 Economic development, clause 17.01-2 General Implementation* it states that activity centres should be planned to minimise the effects of commercial development on the amenity of residential and parkland areas, for example as a result of traffic congestion, noise or overshadowing.
- 51 Under *Clause 18 infrastructure, 18.02-2 General Implementation*, it is policy that responsible authorities in allocating or requiring land to be set aside for carparking should:
- Have regard to the existing and potential modes of access including public transport, the demand for off street carparking, road capacity and the potential for demand management of carparking.
  - To encourage the efficient provision of carparking through the consolidation of carparking facilities.

#### Local Planning Policy Framework (LPPF)

- 52 Under *Clause 21.01 of the Municipal Strategic Statement (MSS)* it is policy that major reviews at three yearly intervals will ensure that the key strategic documents being the Central Goldfields Strategy Plan and the MSS will remain relevant.
- 53 Under *Clause 21.02, Municipal Profile, 21.02-11 Retail and Commerce*, it is stated that Maryborough has a 'strong retail sector' and that there is approximately 34,000 square metres of ground floor retail and commercial space in Maryborough. The MSS estimates that there is 17,000 people in the primary catchment area.
- 54 Under *Clause 21.03 Key Influences*, maintaining population and service levels of urban centres it is stated that 'Maryborough is not expected to experience significant population growth over the next 10 years'.
- 55 Under *Clause 21.03 Key Influences, Regional Co-ordination* the MSS states that Council will 'need to maintain and strengthen links and partnerships with other

- municipalities and regional organisations in a range of areas including economic development....'.
- 56 Under *Clause 21.04, Vision and strategic framework, 21.04-1 Central Goldfields Shire Corporate Plan 1998-2003* it is policy to facilitate the expansion of the local economy, whilst protecting and enhancing the Shire's environmental cultural and lifestyle values.
- 57 Under *Clause 21.04-2 Strategic planning themes*, eight broad themes are outlined. The most relevant being 'strengthening the regional role of Maryborough'.
- 58 Under *Clause 21.04-3 Strategic land use framework plan* Maryborough is described as a 'major centre for employment retailing services and administration. Identity defined by forest setting heritage and compact central area'.
- 59 Under clause 21.12 Strengthening the regional role of Maryborough, the overview states that '*in recent years the central business area (CBA) has enjoyed relatively low floor space vacancy rates and stable trading patterns. Maryborough's central shopping centre has been progressively transformed into an attractive pedestrian orientated more vibrant shopping experience. Previous strategies for the Centre have provided the planning and urban design base for these and more recent improvements.*' It further states that '*the future planning however should allow for likely CBA expansion. Based on existing population trends and population household growth, floor space additions in the order of 3,370 square metres (10% increase on the current size) would be required within the next 15 years.*'
- 60 Clause 21.12 also identifies issues facing Maryborough which include:
- Leakage of retail expenditure larger retail centres such as Ballarat and Bendigo.
  - Compact form, pedestrian scale and heritage character features of the Maryborough CBA.
  - Good opportunities for expansion to the south and east of the CBA, however existing business zoning can cater for longer term forecasted additions to retail and commercial floor space.
- 61 Under Clause 21.12 it is objective 1 to 'encourage well planned and integrated urban development of Maryborough to enhance its qualities as a place to live, work, invest and visit'.
- 62 Under *Clause 21.12 Objective 2* is to encourage and promote Maryborough Central Business Area as a sub-regional centre for retail, business and community services.
- 63 Under *Clause 21.12 Objective 3* is to 'maintain and enhance the character and qualities of the Maryborough CBA by *retaining its compact urban form, pedestrian scale and heritage character.*
- 64 Under *Clause 21.12 Implementation* it is said that these strategies will be implemented by the application of a Business 1 Zone covering the Maryborough CBA.