The purpose of this report is to present combined Mornington Peninsula Planning Scheme Amendment C137 and Planning Permit CP09/004 for consideration by Council following the report of an Independent Panel. The Amendment proposes the removal of an existing covenant which restricts the commercial use of buildings on the site. The Amendment has been considered in conjunction with a permit application to allow an increase in the seating provided within the existing tea rooms/café from 20 seats to 70 seats.

It is recommended that Council adopts Amendment C137 and Planning Permit CP09/004 generally as recommended by the Panel, but with a number of additional conditions/requirements, including the retention of some limits on any future commercial use of the site through a Section 173 Agreement. The additional restrictions on future use have been supported by the Applicants.

While car parking and traffic management remain critical issues, it is considered that approval of the increase in the seating limit will enable improvements to be made to the operation of Heronswood and will also provide greater certainty for nearby landowners. Mitigation measures will be required to be implemented and maintained to reduce traffic related impacts. These improvements are detailed throughout the body of this report.

It is also proposed to incorporate all existing approvals into one permit document i.e. to create an ‘omnibus permit’, as recommended by the Panel. This should improve future clarity and enforceability.

BACKGROUND

Proposal

Heronswood is an historic property, with an area of approximately 1.79 hectares located on Latrobe Parade in Dromana. The site and the surrounding land are located within the Residential 1 Zone (R1Z). Since the early 1980s, the site has been used in conjunction with the operation of the ‘Diggers Club’, a mail order seed company, with the extensive gardens of Heronswood used to promote organic gardening. A tea room with a maximum seating of 20 was previously approved as part of this activity.

A number of special events are also held on the site each year and attract a considerable number of visitors. The primary parking area for the site is located on the Latrobe Parade road reserve, in the form of a service road and parking spaces, which have been partially constructed by the owners of Heronswood. The service road also provides access for four residential properties to the north of the Heronswood site.
BACKGROUND (CONT’D)

Proposal (Cont’d)

The proposal includes an application for Planning Scheme Amendment C137 to vary the restrictive covenant that affects the land and a concurrent Planning Permit Application CP09/004 to increase the seating of a 20 seat ‘tea rooms’ on the site to 70 seats, with recognition that the use is effectively that of a café/restaurant.

The proposal is more fully described in the documents relating to the Amendment which are available on the Department of Planning and Community Development’s (DPCD) website www.dpcd.vic.gov.au under ‘Planning Scheme Amendments online’.

The restaurant at Heronswood is currently operating with 70 seats under temporary provisions approved under Amendment C136, which is due to expire in November 2011.

PROCESS

Preparation and exhibition of the Amendment was authorised by the Minister for Planning on 20 December 2009 (Authorisation No. A01558). The authorisation was given subject to the condition that the Amendment be exhibited within 12 months of the date of authorisation. The Minister also retained the power of approval in relation to this Amendment.

The Amendment was then prepared and exhibited for more than one month (15 October, 2010 to 29 November, 2010) in accordance with the Minister’s authorisation and the requirements of the Act and its related regulations. Advertising included notices in the Mornington Peninsula Leader; display on the Shire’s website and individual notice sent to owners and occupiers who could be significantly affected.

During the exhibition period 905 submissions were received, with 849 in support of the proposal (many from members of the Diggers Club) and 53 opposed.

After exhibition of the Amendment, at the Council Meeting on 20 December, 2010, Council determined to refer all submissions that had been received to an Independent Panel and duly requested the Minister for Planning to appoint a Panel.

A three person Panel (Ms. Cathie McRobert – Chair, Mr Richard Horsfall – Member and Chris Banon – Member) was appointed on 21 January, 2011 to consider the submissions. The Panel subsequently conducted a hearing of submitters on 6 April to 8 April, 2011 and completed its Report on 21 June, 2011 (refer attachment 1).

In summary, the Panel’s recommendations are to:

Adopt Amendment C137 and the removal of the covenant which affects the land;

Recommend the approval of Planning Permit CP09/004, enabling the increase in seating to 70 seats subject to a range of conditions, particularly in regard to parking and traffic management; and

Consolidate all existing uses and planning permissions within the one (omnibus) permit.
PROCESS (CONT’D)

The next step in the process is for Council to consider the Panel’s report, as required under Section 27 of the Planning and Environment Act 1987, before deciding whether or not to adopt the Amendment with or without changes. Council also has an ability to abandon the Amendment or any part of it. If the Amendment is abandoned the concurrent permit application will also lapse.

A Council must not adopt an Amendment unless it is satisfied that it has complied with Divisions 1 and 2 of Part 3 of the Act which deal with exhibition and submission procedures.

If Council decides to abandon the Amendment, the decision is final and there is no appeal process available to the Applicant, although the Applicant may seek a subsequent Ministerial Amendment. If Council adopts an Amendment but rejects the recommendations of a Panel, it is also required to submit a Report explaining the reasons for varying from the Panel’s recommendations.

If Council determines to adopt the Amendment, it may then also resolve to recommend the exhibited planning permit for approval by the Minister, with or without changes.

CONSULTATION

Submissions

In total, 905 submissions were received. A break down of the original submission types and submitters views can be found below in Table 1 and Table 2. A list of submitters and their view is shown in Confidential Attachment 2. Councillors may view the submissions at the Rosebud Office (Councillors’ Office). Not all submissions are counted in Table 2 as some were more general expressions of support or opposition.

Table 1: Summary of Submission Types

<table>
<thead>
<tr>
<th>Submitters View</th>
<th>Number of Submissions that were Made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unclear</td>
<td>1 submission</td>
</tr>
<tr>
<td>No Objection</td>
<td>2 submissions</td>
</tr>
<tr>
<td>Against</td>
<td>53 submissions</td>
</tr>
<tr>
<td>For</td>
<td>849 submissions</td>
</tr>
<tr>
<td>TOTAL</td>
<td>905 submissions</td>
</tr>
</tbody>
</table>

Table 2: Summary of Submission Views

<table>
<thead>
<tr>
<th>Submitters’ Views</th>
<th>Number of Submitters With This View</th>
<th>Grounds of Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supports the Heritage of Heronswood</td>
<td>27 Submitters</td>
<td></td>
</tr>
<tr>
<td>Asset to Area</td>
<td>85 Submitters</td>
<td></td>
</tr>
<tr>
<td>Supports Tourism and Local Jobs</td>
<td>168 Submitters</td>
<td></td>
</tr>
<tr>
<td>Promotes Sustainability</td>
<td>109 Submitters</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Objections</strong></td>
</tr>
<tr>
<td>Lack of Car Parking</td>
<td>43 Submitters</td>
<td></td>
</tr>
<tr>
<td>Access and Traffic Issues</td>
<td>41 Submitters</td>
<td></td>
</tr>
<tr>
<td>General Amenity Loss – Noise etc</td>
<td>12 Submitters</td>
<td></td>
</tr>
<tr>
<td>Intensification of Commercial Use</td>
<td>17 Submitters</td>
<td></td>
</tr>
<tr>
<td>Loss of Covenant Protection</td>
<td>14 Submitters</td>
<td></td>
</tr>
</tbody>
</table>
Independent Panel Report

The Independent Panel’s report is contained in Attachment 1. The Panel recommendations may be summarised as follows.

Planning Scheme Amendment C137:

“The Panel recommends that Amendment C137 to the Mornington Peninsula Planning Scheme should be adopted as exhibited but modified to delete condition (a) of the Covenant i.e. in effect completely removing the covenant.”

Planning Permit CP09/004:

“The Panel recommends that ‘omnibus’ permit be granted:

- For use and development of the land for the purpose of a mail order garden club, education centre and plant nursery inclusive of associated workshops (with a retail area of no more than 100 square metres, excluding external display beds and propagation areas), heritage building and garden visits, a 70 seat restaurant with an on premises liquor license, lopping of vegetation to maintain safe traffic conditions and construction of a car park in the road reserve and related removal of vegetations in accordance with the endorsed plans, and a car parking dispensation subject to the conditions set out in Appendix C.

Other Recommendations to Council

2. Revise the permit condition requiring a Section 173 Agreement to delete all provisions except the requirement for insurance and indemnity to protect the Responsible Authority against any liability arising from the use of the land and of the car park in the road reserve or arising from the operation of the Traffic and Parking Management Plan.

3. Carry out periodic but regular inspections and enforcement to ensure vehicles are parked legally.

4. Request VicRoads to reduce the speed limit in Latrobe Parade to 50 kilometres per hour in the vicinity of Heronswood or along its full length of Latrobe Parade if necessary.”

POLICY CONTEXT

The policy context is established by the State and Local Planning Policy framework of the Planning Scheme and the metropolitan strategy, Melbourne 2030, in addition to the Council’s Community Plan and Sustainability Framework.

The explanatory report for the Amendment sets out the detailed policy context for the Amendment. The explanatory report may be viewed on the Shire’s web site, the DPCD website or in hard copy at the Shire’s Mornington, Hastings or Rosebud offices.
POLICY CONTEXT (CONT’D)

It should be noted that Clause 10.04: Integrated Decision Making of the State Planning Policy Framework provides in part that:

“Planning authorities and responsible authorities should endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.”

OFFICER DIRECT OR INDIRECT INTEREST

No person involved in the preparation of this report has a direct or indirect interest requiring disclosure.

DISCUSSION

The proposal is required to be considered in two parts; Planning Scheme Amendment C137 and Planning Permit CP09/004.

The first step in the consideration of the proposal is to determine whether the proposed variation to the covenant is appropriate. The planning permit component of the proposal cannot be considered unless the variation to the covenant is first considered and passes the relevant tests relating to net community benefit.

The second part of the consideration is to assess the merits of the increase in the proposed seating from 20 seats to 70 seats and consideration of an omnibus permit and the proposed conditions.

Therefore the following sections of this report consist of:

1. Planning Scheme Amendment C137 (variation of covenant) – which includes the following matters:
   - Beneficiaries to the covenant;
   - Tests to be applied for the variation of restrictive covenants;
   - Interests of affected parties; and
   - Would the proposed changes to the covenant support planning policy and result in a net community benefit?

2. Planning Permit Application CP09/004 – which includes the following matters:
   - Existing operations;
   - Site capacity, special events and private functions;
   - Traffic management and car parking;
DISCUSSION (CONT’D)

- The number and the location of car spaces provided;
- Shuttle bus service;
- Access and egress to the car park;
- The bus bay;
- The impact of the car park on adjoining residents’ property access;
- Standard of construction of the car park and access way;
- Safety;
- Should future applications be limited by a Section 173 Agreement?; and
- The content and drafting of the proposed permit and Section 173 Agreement.

Planning Scheme Amendment C137

Amendment – Beneficiaries to the Covenant

Panel’s Comments

The Panel refers to the submission of Mr. Graeme Peake (Barrister representing the Applicant) which argues that there are not 10 covenant beneficiaries as originally submitted, but there are in fact only four beneficiaries (87 Latrobe Parade, 91 Latrobe Parade, 107 Latrobe Parade and 115 Latrobe Parade). The Panel agrees with this view as the covenant was created after six lots had already been transferred out of the subdivision and these six lots were therefore not entitled to legally benefit from the covenant.

Officer’s Comments

The original advice submitted by the proponent was that all 10 additional lots created within the subdivision were legally benefitting landowners and were subsequently notified. However, the opinion of the Panel and Mr. Peake is not disputed.

It is noted that of the legally benefitting landowners, one objected to the proposal (107 Latrobe Parade), one lot is owned by the Diggers’ Club (115 Latrobe Parade) and the remaining two did not make a submission (87 and 91 Latrobe Parade).

Arguably, the main significance of this clarification is that it means that control over the site through the covenant would be of direct benefit to a very limited number of adjoining owners, who would be the only ‘beneficiaries’ entitled to seek enforcement. This in turn suggests that the use of permit conditions or a Section 173 Agreement may be more effective.
DISCUSSION (CONT’D)

Planning Scheme Amendment C137 (Cont’d)

Amendment – Tests to be Applied for the Variation of Restrictive Covenants

Panels Comments

The Heronswood Panel notes that a number of Panels have concluded that the principles or criteria for considering the variation or removal of a restrictive covenant are as follows:

“First, the Panel should be satisfied that the Amendment would further the objectives of planning in Victoria. The Panel must have regard to the Minister’s Directions, the planning provisions, the Municipal Strategic Statement (MSS), Strategic Plans, Policy Statements, Codes or Guidelines in the Scheme, and significant effects the Amendment might have on the environment, or which the environment might have on any use or development envisaged in the Amendment.

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

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

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

The Heronswood Panel agrees with the above tests and considers that the following pertinent points should also be addressed:

- Does the Planning Scheme provide a suitable framework for future planning decisions relating to the site or are additional limitations warranted?, and

- Will the removal of the restrictive covenant lead to unacceptable expansion or intensification of commercial uses?

In this case, the Panel considers the covenant establishes a simplistic approach to managing use and development for the site as it lacks flexibility for change, accessible means of enforcement and the ability to resolve problems through detailed conditions.

In contrast, the Panel considers that the Planning Scheme provides a comprehensive framework for this site and locality. The Panel refers specifically to R1Z, which imposes substantial limits on the range of uses that can be considered; the Design and Development Overlay (DDO) which provides area specific development provisions and in some parts overlaps with the provisions of the covenant; and the Heritage Overlay (HO), noting that Heronswood is also included on the State Heritage Register.
DISCUSSION (CONT’D)

Planning Scheme Amendment C137 (Cont’d)

Amendment – Tests to be Applied for the Variation of Restrictive Covenants (Cont’d)

Panel’s Comments (Cont’d)

The Panel considers that because of these planning controls the planning framework provides a more sophisticated basis for determining the merits of proposals than the blanket prohibition applied under the existing covenant or the revised version of the covenant put forward by Council at the hearing (based on Council’s resolutions at the meeting the 21 February, 2011). The Panel notes that it is more common to provide greater discretion for heritage properties than would otherwise apply and the HO can, in some cases, enable the consideration of uses that are otherwise prohibited (although this is not applied to Heronswood).

Given these views, the Panel considers that removal of the covenant will not result in an undesirable intensification of the use of Heronswood and notes that all future proposals would be subject to scrutiny within the context of the site’s location within a residential area.

Officer’s Comments

The tests used by the Panel to consider whether or not the restrictive covenant should be removed or varied are considered to appropriate and have been applied in a number of cases.

However, the critical point is the extent to which the interests of affected parties, including beneficiaries to the covenant, may be adversely affected. Covenants may be ‘simplistic’ but they are also certain, while the Planning Scheme provisions are open to interpretation over time.

The beneficiaries of the covenant and surrounding owners who have been aware of the covenant, arguably have a reasonable expectation of some definite limits to the commercial use of this site. Many of the submissions received during the exhibition period were concerned that the removal of the covenant would open the door to further commercial uses being undertaken on the land.

While the existing covenant is arguably too inflexible and has not been enforced, some alternative that recognises the special circumstances that apply to the Heronswood property is still considered to be appropriate.

In this context, following the Panel hearing and submission of the Panel Report, the owners of Heronswood have advised in writing that that they are prepared to enter into a Section 173 Agreement which restricts future commercial uses on the land, prohibiting a hotel, tavern or reception centre. This would effectively address substantial concerns in regard to potential future use applications.

Amendment – Interests of Affected Parties

Panel’s Comments

The Panel notes that through the implementation of the temporary provisions (C136 and C154) the impact of operations of Heronswood with a 70 seat restaurant have been able to be directly observed.
DISCUSSION (CONT’D)

Planning Scheme Amendment C137 (Cont’d)

Amendment – Interests of Affected Parties (Cont’d)

Panel’s Comments (Cont’d)

Submissions made to the Panel raised amenity issues and these were considered by the Panel to demonstrate unacceptable impacts on the amenity of the immediate area due to parking and traffic at busy times. However, the Panel considers that these impacts can be minimised with appropriate mitigation measures, conditions on operations and effective enforcement.

The Panel also points out that, outside the event days and busy weekends, the use does not appear to cause significant amenity concerns to neighbours, with the exception of effects on properties abutting the restaurant e.g. noise and problems relating to odour and the installation of fans, which the Panel considers can be controlled through permit conditions. The Panel therefore considers that non-residential uses can operate from the site satisfactorily.

In addition to this, the Panel has made a point of recognising that Heronswood also makes a positive contribution to the amenity enjoyed by the legal beneficiaries and other properties in the immediate area. The Panel comments:

“ Its extensive gardens with mature trees are part of a ‘green back drop’ to residential areas that makes an important positive contribution to the visual amenity of the immediate area. For surrounding properties, particularly those immediately to the north and east, Heronswood and the adjoining reserve add to the sense of space enjoyed from the properties. If the use of the land was limited to residential purposes there could be pressure for development, and this could reduce the amenity enjoyed by the beneficiaries to the Covenant (and of the locality).”

Officer’s Comments

The Heronswood operations do at times have a negative impact on the amenity of the covenant beneficiaries and other surrounding residents. This is particularly true when the large event days are held on the site or other busy days over the summer period. The primary flow-on effects that arise are traffic congestion, access and car parking issues.

However, it should be noted that the covenant restriction relates to the use of buildings which are constructed on the land after 6 August, 1973, specifying that these buildings must be used only for residential purposes. The Covenant restriction therefore does not apply to the use of the land outside of the buildings and non residential uses may be permitted within buildings constructed prior to 6 August, 1973.

Accordingly, the covenant does not guarantee the legal beneficiaries the exclusion of commercial activity from the land, only from buildings constructed after 6 August, 1973. This is important in considering whether the current ‘package’ of covenant removal and the concurrent planning permit application provides for a greater level of protection of residential amenity.
DISCUSSION (CONT’D)

Planning Scheme Amendment C137 (Cont’d)

Amendment – Would the Proposed Changes to the Covenant Support Planning Policy and Result in a Net Community Benefit?

Panel’s Comments

The Panel provides a summary of the submissions presented at the hearing and lists a number of the benefits and disbenefits.

Benefits:

- Conservation and enhancement, support for architectural, historic and cultural heritage values;
- Tourism, support in promotion, regional critical, and the provision of additional infrastructure;
- Education, the provision of information and workshops directed to the domestic production of healthy food;
- Economic, related to the direct employment and skills training on site, and the indirect impact on the wider tourism sector;
- Heronswood is privately owned, receives no public funding and depends entirely on the goodwill of the proponents, which is substantial. The non-residential activities have enabled the proponents to expend substantial funds on the restoration and maintenance of the historic building and on the planting and upkeep of its significant gardens;
- The combination of activities on the site creates an additional level of attraction and a recreational opportunity that is of significant value; and
- Heronswood and its gardens contribute to the landscape quality and amenity of the locality, particularly when compared to other options for the site. For example, the most likely alternative form of development under the existing provisions of the Planning Scheme (and covenant) would, arguably, be a residential subdivision into approximately 11 lots.

Disbenefits:

- Increasing traffic of visitors and suppliers approaching the site along Latrobe Parade;
- Increased parking in surrounding streets;
- Inconvenience created by additional movements within the parking area located in the service road used to provide access to properties at 85-95 Latrobe Parade;
- Noise resulting from the increased use of the site;
- Emissions (odour, dust and the like), again a result of increased activity on the site; and
- Property valuation impacts potentially accruing from adverse amenity impacts.
Amendment C137 and Planning Permit CP09/004 Heronswood – 105 and 107 Latrobe Parade, Dromana
Consideration of Amendment Post Panel Report

Item No. 2.4

Discussion (Cont’d)

Planning Scheme Amendment C137 (Cont’d)

Amendment – Would the Proposed Changes to the Covenant Support Planning Policy and Result in a Net Community Benefit? (Cont’d)

Panel’s Comments (Cont’d)

The Panel considers that the conforming and non-conforming uses of Heronswood cannot be separated when determining any net community benefit and concludes that the variation of the covenant, as exhibited, will provide a net community benefit.

The Panel argues that varying the covenant will provide:

- Benefits to the broader community associated with the conservation and access to a place of recognised heritage significance;
- Economic and social benefits to the broader community from tourism and recreation uses and the promotion of sustainable gardening and food production to a wide audience; and
- Benefits to the local community associated with the contribution Heronswood and its gardens make to the amenity and character of the neighbourhood.

These potential benefits need to be balanced against potential adverse impacts on the amenity and any disbenefit associated with reduced certainty about the use and development allowed on the site.

Officer’s Comments

The impact of a proposal in terms of net community benefit is not easily judged, particularly as there may be widespread but relatively low level benefits to a large group, but with more substantial negative impacts on a smaller group.

In this case removal of the covenant will in effect legitimise the existing uses of the land, which will provide a benefit to Heronswood and provide general benefits identified by the Panel. However, it is important to note that the variation of the covenant will also allow the current application to be considered, which in turn will enable Council to apply conditions and require Heronswood to undertake mitigation measures, with the purpose of improving outcomes for owners and residents immediately surrounding the Heronswood site.

Amendment C137 – Conclusions and Recommendation

Panel’s Comments

The Panel considers that restrictive covenants have significant limitations as the basis for long-term planning controls.

The Panel explains that whilst covenants may be popular in the public eye, they are in fact blunt planning instruments reflecting mainly the private concerns of the initial subdividers at that time. Covenants were a precursor of Planning Schemes but have been overtaken by a more effective framework for managing land use and development.
Amendment C137 and Planning Permit CP09/004 Heronswood – 105 and 107 Latrobe Parade, Dromana
Consideration of Amendment Post Panel Report

DISCUSSION (CONT’D)

Planning Scheme Amendment C137 (Cont’d)

Amendment C137 – Conclusions and Recommendation (Cont’d)

Panel’s Comments (Cont’d)

In this case, the Planning Scheme provides a particularly comprehensive framework for planning decisions and better enforcement processes are available under the Planning and Environment Act 1987.

The Panel argues that the use of covenants represent a ‘belts and braces’ approach resulting in unnecessary duplication of planning provisions.

The benefits from non-residential uses must be balanced against disbenefits, particularly adverse impacts on the amenity of residents and reduced certainty about the nature of activities on the site.

Submissions to the Panel have demonstrated that non-residential activities at Heronswood have caused adverse impacts on local amenity but the Panel considers that these impacts can be minimised with appropriate mitigation measures, conditions on operations and effective enforcement of those obligations.

The Panel is satisfied that non-residential uses on the Site can produce a net community benefit but only if impacts on the amenity of local residents are minimised. The benefits to the broader community do not provide ‘carte blanche’ for any form of use and development.

The Panel also emphasises that a greater enforcement effort is required to ensure that the residents’ reasonable amenity expectations are protected. The Panel argues that this should be a central consideration in the evaluation of proposals for the site, including the evaluation of Permit Application CP09/004.

Heronsworth is a site of strategic significance and the Panel is satisfied that the exhibited variation of the covenant should be adopted but with the deletion of the remaining condition (a), effectively deleting the covenant in its entirety.

Revisions to the covenant proposed by Council are not supported by the Panel for the reasons outlined above.

Officer’s Comments and Recommendation

The submissions objecting to Amendment C137 were generally not concerned with the variation or deletion of clauses (a), (b), (d) or (e) but rather concentrated on clause (c) which prevents buildings built after 6 August, 1973 being used for non-residential purposes.

With the proponent now agreeing to restrict future uses through a Section 173 Agreement, the removal of the covenant is not considered to be a significant risk and will in fact enable a more comprehensive and enforceable set of controls to be applied. It is therefore recommended that the covenant be removed entirely, including the deletion of provision (a), in accordance with the Panel’s recommendation.
Amendment C137 and Planning Permit CP09/004 Heronswood – 105 and 107 Latrobe Parade, Dromana
Consideration of Amendment Post Panel Report

ITEM NO. 2.4

DISCUSSION (CONT’D)

Planning Permit Application CP09/004

Permit – Introduction

The permit application is for the use and development of 105 and 117 Latrobe Parade, Dromana (including road reserve) for the purpose of a 70 seat tearooms (restaurant) and a car parking dispensation.

The draft planning permit exhibited as part of the Amendment process included conditions which:

- Indicated that the conditions contained on Planning Permit P99/0565 (issued in 1999) shall continue to have force and effect save for the additional seating associated with the tearooms (restaurant);

- Restrict the restaurant’s hours of operation to 8:30 a.m. – 5:00 p.m. (must be closed by 6:00 p.m.), except with the written permission of the Responsible Authority and to provide for no more than two functions per year outside of those time limits;

- Require submission and approval of a Traffic and Parking Management Plan (TPM Plan) to protect the levels of service and safety of Latrobe Parade; to discourage unlawful parking, facilitate the orderly and efficient movement of traffic including efficient use of associated car parking areas. The following are required:
  - Car parking provision and other works in accordance with the TPM Plan;
  - Measures to discourage blockage of the service road access to houses to the north, including a ‘Keep Clear’ and ‘No Stopping’ signs; ‘zebra’ lines across the hammerhead turning area; and a ‘locked open’ gate at the entry to the service road;
  - Signage providing advance warning of entry and exit points;
  - Measures for meeting the demands associated with the different uses on the land, including staff parking, buses, garbage collection and delivery vehicles;
  - Identification of possible risks of additional parking demand and the response measures to be implemented;
  - Day to day parking and traffic management procedures including measures for the direction of vehicles to the parking area on the land;
  - A trigger for when a sign that is legible to motorists would be displayed at the entrance to the land to indicate that the restaurant was full or that Heronswood was otherwise at full capacity; and
  - Procedures for monitoring and regular review.

- Specify a generic amenity condition plus conditions to manage noise impacts;
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Introduction (Cont’d)

• Require a Section 173 Agreement which:
  — Ensures consent will not be sought for alterations which would reduce the car parking provision or substantially increase the floor area of the restaurant;
  — Limits future applications to:
    o Be consistent with the existing agreement and the continuing use of Heronswood as a heritage site, gardens and nursery with associated visitor facilities and restaurant; and
    o Preclude reception centre, hotel or tavern uses.

• Require establishment of a community consultative committee; and

• Indicate the permit expires if the land is subdivided, the Diggers Club ceases on-site operations or the Heronswood house and garden are no longer open to the public.

When Council considered the matter (21 February, 2011) it proposed further conditions, with additional revisions presented on the final day of the Panel Hearing. The draft permit with Council’s additional conditions are set out in Attachment 3. The revisions proposed by Council relate to:

• The erection of signage indicating that vehicles blocking access may be removed;

• Provision for traffic marshalling by appropriately trained staff on all weekends and special events, with particular regard to ensuring access to residential properties;

• A designated bus parking area that does not block the egress of vehicles;

• Measures to direct that buses must not park on Latrobe Parade or in nearby residential streets;

• The location of additional car parking onsite;

• A maintenance program to ensure sight lines to and from the service road car park are maintained to safe standard;

• An ability to require increased parking provision or to further regulate use of the land and total visitor numbers to the site at any one time if necessary to ensure that there is no unreasonable loss of amenity to the surrounding neighbourhood;

• A shuttle bus must be used to transport patrons to and from the Site in conjunction with open days and ticketed events i.e. events where pre-booking or pre-organisation of attendance is required. This must be the sole method of vehicular access on such days;
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Introduction (Cont’d)

- Provision for the management of total visitor numbers on site in conjunction with the issue of car parking, to the satisfaction of the Responsible Authority;
- Measures to ensure the adequacy of insurance policies held by the Applicant both on private title and on other land utilised by the Applicant for car parking and other purposes; and
- A time limit of two years (probation period) with provision for extension by the Responsible Authority.

Permit – Existing Operations

Panel’s Recommendations

The Panel identified from the submissions of residents that, in addition to traffic, a number of off-site impacts affected properties in the immediate locality. These were described as:

- Odour from food (exhaust fan);
- Odour from sewerage;
- Noise from restaurant patrons (and children) and from plant/equipment; and
- Functions.

The Panel has recommended that the following additional permit conditions be added to CP09/004

“Within three months of the issue of the Permit, the following must be undertaken to the satisfaction of the Responsible Authority:

- External plant and equipment associated with the buildings used for restaurant and educational purposes must be acoustically treated or placed in sound proof housing to reduce noise;
- An acoustic fence must be erected along the northern boundary adjoining the restaurant and the associated outdoor seating area of the Site. The design of the fence must be prepared by a suitably qualified acoustic consultant, having regard to the views of the owners of the adjoining residential properties;
- Other noise attenuation measures recommended in a report by a suitably qualified acoustic consultant must be implemented; and”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Existing Operations (Cont’d)

Panel’s Recommendations (Cont’d)

“● Measures to address odours from the sewerage system must be investigated. Any measures identified that are practical to implement on the Site should be implemented within six months of the date of the Permit.”

Substitute Condition 8 of the draft permit with the following condition:

“● No external sound amplification equipment or loudspeakers are to be used for the purpose of announcement, broadcast, playing of music or similar purpose.”

Officer’s Recommendations

The proposed additional permit conditions are considered to reasonably address noise and food odour issues. However, the condition relating to the odours resulting from the sewerage system should be widened to include any wastewater system as sources of odour, which could include the sewerage system or restaurant’s grease trap system. The new condition (refer to Attachment 7) would then read:

“13. Measures to address odours from the wastewater systems must be investigated. Any measures identified that are practical to implement on the site should be implemented within six months of the date of the permit.”

Investigation into the emission of odours and enforcement (where necessary) is usually undertaken by the Shire’s Environmental Health Department, South East Water or even the Environmental Protection Agency regardless of whether a planning permit condition exists. However, the following general amenity conditions would be useful to ensure a clear standard of operation exists:

“14. The use and development of the land must be managed so that the amenity of the area is not detrimentally affected through the:

A. Transport of materials, goods or commodities to or from the land;

B. Emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil;

C. Presence of vermin; or

D. By other circumstances.

17. All wastewater must be disposed of to the satisfaction of the relevant authority.”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

**Site Capacity, Special Events and Private Functions**

Panel’s Recommendations

The Panel notes (page 8) that there has been some ambiguity in the previous approvals relating to the intended level of public access to the site. The existing agreement, for example, limits the number of open days but does not specify a limit on public access at other times or the number of visitors at any one time. Originally, it appears that the intention may have been to limit access to Diggers Club members, and a site entry fee is usually applied to non members, but there are no requirements in the existing approvals which provide any clear limits on visitor numbers. In this context, Council did recommend to the Panel that there should be a condition (to form part of the Section 173 Agreement) to ensure the management of total visitor numbers on site in conjunction with the issue of car parking, to the satisfaction of the Responsible Authority.

However, the Panel has not supported this requirement and has focused on the issue of special events, with a proposed condition stating:

“Except with the written consent of the Responsible Authority no more than three special events (each over two days), may be held in any one year. In this permit a special event means an organised occasion advertised to the public at which, in the opinion of the Responsible Authority, a significant public attendance is expected. Examples are the current Harvest Festival, the Spring Festival and the Food and Wine Festival.”

The proposed permit also provides that Council may approve two functions (not special events) outside of the daytime operating hours permitted for the restaurant, which the Panel supports as a reasonable limit.

The Panel notes (page 38) that there were submissions from residents that ‘private functions’ could undermine the intent of this condition.

The Panel comments that it is entirely understandable that family and close friends would want to celebrate special occasions at Heronswood and that this is a normal activity that is not controlled by the planning system. Accordingly, the Panel does not propose any additional conditions in this regard, but notes that a function centre (which is not approved) is defined in the Planning Scheme as ‘land used by arrangement, to cater for private functions, and in which food and drink may be served’. The Panel states that the proponents should expect active enforcement by Council or residents if the frequency and nature of functions for family and friends extend beyond those reasonably associated with the dwelling.

**Officer’s Recommendations**

The designation of ‘special events’ is consistent with existing approvals, but leaves open the issue of other activities and smaller events that are conducted on the site, including private functions.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Site Capacity, Special Events and Private Functions (Cont’d)

Officer Recommendations (Cont’d)

It is noted that the conditions in relation to car parking and the TPM Plan do provide for ongoing assessment of the adequacy of car parking, and it is important to ensure that the conditions indicate that additional requirements may be applied if in future parking demand clearly exceeds supply.

Given the centrality of the parking requirements it is considered appropriate to reinforce these through the provisions of the Section 173 Agreement. While there is no ‘cap’ on the number of visitors to the site, the Panel (page 41) notes that:

“... the Heronswood operators need to appreciate that, while their operations are important and worthwhile, they have obligations to ensure that resulting car parking and traffic management issues are managed and controlled so that not only is the residential amenity of the area protected but in addition the operations are safe and well managed. While the operators of Heronswood do not have the power to legally enforce rules on public road reserves, they do have a responsibility to ensure that appropriate facilities are in place to manage traffic caused by their operations.”

In addition, on page 47 the Panel comments:

“... the appropriate solution (in terms of car parking) is clearly dependent on the number of occasions a shortfall arises and the extent of the shortfall... if it is judged to occur too frequently and too severely then there are clearly not enough spaces. What should then happen is that there should be more spaces or demand should be reduced in some way.”

These comments highlight that if the future car parking is clearly inadequate then other measures may be necessary.

In regard to private functions, it is recognized that this is a difficult issue to address. The Panel’s comments highlight that, in this regard, Heronswood needs to be treated like any other residential property. In this context, it is suggested that an appropriate balance may be to prevent the use of the restaurant for private functions (except with the approval of Council), given that the restaurant is not ‘ancillary’ to the dwelling and therefore is not expected to be associated with ‘private’ use of the site. Council would still retain discretion to allow private use of the restaurant facilities, with the opportunity to also consider parking and related amenity issues.

Permit – Traffic Management and Car Parking

The Panel Report provides an accurate overview of the circumstances and issues relating to traffic management and car parking. The relevant section of the Panel Report states:

“The traffic management and car parking issues associated with Heronswood encompass the varying conditions that prevail during open days, busy weekends and more routine days throughout the year.”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Traffic Management and Car Parking

“The issues include:

- The approach to car parking and traffic management;
- The number of car spaces provided and their location;
- Access and egress to the car park;
- Whether a dedicated bus bay should be provided;
- The impact of the car park on adjoining residents’ property access; and
- The standard of construction of the car park and access way.

The road reserve outside Heronswood provides approximately 34 customer car parking spaces.

This car park consists of a sealed access (service) road with partially constructed angle parking on both sides. The service road continues to the north where it provides the only vehicular access to four residential properties through the Heronswood car park. The current car parking arrangement in this car park is not well delineated or controlled and is accordingly somewhat hazardous, with cars frequently being inappropriately parked to varying degrees. This uncontrolled parking results in:

- Poor visibility for access and egress to the service road (car park);
- Blocking of access to the properties to the north;
- Interference with traffic movement in the car park; and
- Reduction in the potential number of car parking spaces.

During special event days overflow parking on the foreshore reserve is provided and parking marshals are hired by Heronswood.

In addition to the above it is noted that the staff car park at 117 Latrobe Parade contains between 16-20 car parking spaces.”

Panel’s Recommendations

The Panel’s view is that it is important that all of the traffic management and car parking issues associated with all the uses should be addressed holistically rather than separating the individual components, being:

1. Restaurant.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Traffic Management and Car Parking (Cont’d)

Panel’s Recommendations (Cont’d)

2. Diggers Club Activities.

3. Heritage Open Days.

4. Garden Inspections.

5. Purchase of Nursery Products.


The Panel agreed that it was evident that dangerous traffic situations had occurred in the past with both traffic management and car parking. The Panel also recognised that the traffic car parking management for the special event days on 25 and 26 March 2011 was better than on previous occasions and this was attributed to the presence of trained traffic marshals and some reduction in patron numbers.

Permit – The Number and the Location of Car Spaces Provided

The Panel referred to the traffic evidence discussed at the hearing by the traffic engineer experts and noted that:

- There was agreement between the traffic experts (and Council traffic engineers) that additional car spaces could be provided in the existing (road reserve) car park. The number of extra spaces that could fit was not agreed upon, with the minimum number agreed upon being nine extra (as proposed on the original Ratio car park design submitted on behalf of the proponent);

- There was disagreement between the traffic experts on the amount of car parking generated by the extra 50 seats in the restaurant, the figures varied between 4-20 extra spaces. Ratio’s revised car park plan provides for a total of 47 car spaces (being 13 extra car spaces). The reason for the variation in views of the traffic experts is due to:

  — Deciding whether the rate of parking demand is 0.4 or 0.5 car spaces per extra restaurant seat; and

  — Applying discount rates of 20% or 80% to the extra spaces required to compensate for the combined or shared uses on the site.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – The Number and the Location of Car Spaces Provided (Cont’d)

The Panel’s view is that the proponent’s proposed extra 13 car spaces in conjunction with better traffic management are ‘reasonably likely’ to be adequate in meeting the demand generated by an additional 50 seats. However, due to the differing expert opinions the Panel has recommended that the traffic management plan be reviewed after 12 months and that a review, including the use of traffic surveys during peak times, also be carried out every three years to determine whether the extended car park is coping with demand. Council would also have the option of requiring a review at any time in the event that parking appears to be inadequate. The Panel goes on to give examples of how it believes the adequacy of the extended Latrobe Parade car park should be assessed, refer Attachment 1 (pages 48–51).

The Panel considers that the use of trained marshals is an essential part of the traffic management, during the designated special events and also during peak periods such as the summer months. In particular they consider trained parking marshals should be:

- Available to take charge and direct traffic and parking at anticipated time of peak demand on Saturday and Sundays between the hours of 12 noon and 3:00 p.m. from December to February inclusive;
- Available at other times when high demand for parking is expected; and
- ‘On call’ should a bigger crowd than expected arrive.

Officer’s Recommendations

The provision of additional car parking and the requirement for traffic marshalling is considered to be an appropriate outcome. As noted previously, the Panel has not supported a cap on the total number of visitors that may be present on the site e.g. in the garden area, at any one time, and therefore a provision to ensure that car parking is provided to meet demand, which may vary over time, is critical.

The TPM Plan will also identify the level of traffic marshalling to be provided and this can be refined over time due to the on-going nature of the Plan. The use of traffic marshalling is also considered to be an effective measure in the prevention of parking in the unsealed service lane to the north of the car park, in front of the residential properties at 89-95 Latrobe Parade.

Council engineers consider the proposed increase in car park numbers to be satisfactory in offsetting the increase in seating at the restaurant.

Permit – Shuttle Bus Service

Panel’s Recommendation

The Panel does not consider that all access to the site, or even for special events, ticketed events etc, should be limited to arrival by shuttle bus. The Panel appears to consider that a shuttle bus system could be a worthwhile way to manage parking demand but does not go so far to require it.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Shuttle Bus Service (Cont’d)

Officer’s Recommendation

The Panel indicated that the shuttle bus may be a useful mechanism for reducing traffic and parking demand, particularly on event weekends. However, the Panel does not go so far as requiring a shuttle bus to be implemented unless the TPM Plan identifies the need for one.

It is recommended that the TPM Plan go further and that provision of a shuttle bus service should form a mandatory component of the Plan – initially on event days only, although this may be reviewed over time.

A subclause to Condition 3 to require the use of a shuttle bus is recommended to be worded as follows:

“3. J Provision for a shuttle bus service, providing a pick-up and drop-off service, for patrons of Heronswood on all nominated event days, to the satisfaction of Responsible Authority. Unless with the further written permission of the Responsible Authority the off-site collection point is to be the Mornington Peninsula Visitor Centre car park in Dromana.”

Permit – Access and Egress to the Car Park

Panel’s Recommendation

The Panel indicates that, with a speed limit of 60 kilometres per hour, expert evidence indicated that a setback of approximately 4 metres is necessary between the car parking spaces and the kerb line of Latrobe Parade, to provide better visibility from the exit. A setback of 2-3 metres would be acceptable if the speed limit is reduced to 50 kilometres per hour. Accordingly, the Panel proposes a condition requiring a plan to provide:

“1) e) iii) The maximum possible offset between the front of car parking spaces and the kerb line in Latrobe Parade.”

The Panel also recommends that Council should approach VicRoads in an attempt to have the speed limit lowered to 50 kilometres per hour along the frontage of Heronswood.

Officer’s Recommendation

The Panel view regarding the setback of the parking area from the kerbline is supported.

However, it is recommended that the permit condition be amended to include reference to the car park and access road and not just the car parking spaces, to make it clear that movement of the entire car park is expected. The suggested revised condition is as follows:

“1. e) iii) The maximum possible distance between the westernmost car parking spaces and the kerbline in Latrobe Parade by relocating the car spaces and access roadway to the east.”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Access and Egress to the Car Park (Cont’d)

Officer’s Recommendation (Cont’d)

The proposed request for a reduced speed limit on Latrobe Parade, within the vicinity of ‘Heronswood’, is also supported.

Permit – The Bus Bay

Panel’s Recommendation

The advice from the traffic experts at the hearing was that provision of a bus bay would result in the loss of 8-10 parking spaces. The proponent advised that there were 22 buses booked to visit Heronswood in 2011 which would result in 44 visits and 5-10 minutes each visit to unload and load passengers.

The Panel considers that the number of visits does not warrant the use of a dedicated bus bay. The Panel recommends the use of a temporary bus bay that may be used as car parking spaces on the days when buses are not booked in to visit the site. This would be governed by the traffic management plan.

Officer’s Recommendation

The position of the Panel on a temporary bus bay is considered to be reasonable. This is based on the condition that a designated ‘bus marshal’ or employee of Heronswood meets with the bus driver off-site prior to entering the car park and then escorts the bus off the site, away from nearby residential streets. Without direction from an employee it is reasonable to assume that a bus driver may not know where to park and may still park within the car park access road. Condition 3 d) of the draft permit requires a measure to ensure buses are not left unattended and do not park on Latrobe Parade or nearby street. It is anticipated that this condition could be met through the use of a ‘bus marshal’.

In addition to the Panel’s recommendation, it is recommended that the area designated for the ‘temporary bus bay’ be fully constructed and sealed.

Permit – The Impact of the Car Park on Adjoining Residents’ Property Access

Panel’s Recommendation

The four properties to the north of the service lane car park are only able to access their properties via the service lane. The Panel is of the opinion that there is no practical way of changing this access arrangement. However, the Panel agrees with the expert view that the existing access should be upgraded.

This includes the following changes:

- Moving the bus bay to the south;
- Widening the access driveway to allow passing of vehicles at the north end; and
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DISCUSSION (CONT’D)

Planning Permit Application CP09/004  (Cont’d)

Permit – The Impact of the Car Park on Adjoining Residents’ Property Access  (Cont’d)

Panel’s Recommendation (Cont’d)

- Altering and improving the signage at the north end of the car park to clearly indicate that the
  turning areas are a tow away zone for illegally parked cars.

Officer’s Recommendation

The relocation of the temporary bus bay further to the south is agreed to be beneficial to the residents,
by reducing congestion and blockages.

It is noted that the second dot point (above) referring to the widening of the access road to allow
passing of vehicles at the north end was mentioned at page 55 of the Panel Report, however it appears
that this recommendation it was not included in the Panel’s recommended omnibus planning permit
conditions. It is considered that the access should be widened at the northern car park end and in
addition the whole northern car park section is recommended to be fully constructed and sealed due to
the steeper gradient at this end of the car park.

It is therefore suggested that the following condition be altered from:

“  1.e)(i)2) The car parking bays constructed to an unsealed porous standard including
appropriate methods of designation of each parking bay.”

to:

“  1.e) i) 2) The car parking bays to the north of the northern crossover must be constructed  to a
sealed standard, the remaining car parking bays to be constructed to an unsealed
porous standard including appropriate methods of designation of each parking bay.”

And the following new condition be added:

“  1. e) vii) The sealed access way between car spaces 36-43 and 9-1 must be widened by shifting
car spaces 1-9 as close as practical to the common boundary line with 105 Latrobe
Parade.”

The suggested use of signage by the Panel is supported.

Permit – Standard of Construction of the Car Park and Access Way

Panel’s Comments

The Panel is of the view that the following should occur:

- Fully construct the access ways and part of the designed parking bays closest to the access way;
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Standard of Construction of the Car Park and Access Way (Cont’d)

Panel’s Comments (Cont’d)

- Delineate the car spaces by permanent markings on the access road end and some fixed markings at the other extremity. The short edge of the car space should be marked with a full line adjacent to the road to prevent parked vehicles blocking the access way; and

- Use some form of porous unsealed construction such as a gravel pavement or ‘grasscrete’, for the part of the car spaces.

The Panel advised that it did not have enough information on the health of trees to make comment on vegetation removal for the purpose of creating extra car park spaces. It does say however that it would be more desirable to retain a tree than gain an extra car space.

Officer’s Recommendations

The recommendation of the Panel to fully construct the access ways is supported. The partial construction (sealing) of the car spaces is supported with the exception of the car spaces 36-43 and 1-9 and in the location where the temporary bus park is proposed. Conditions addressing this have already been discussed earlier in this report.

The method of delineating the spaces proposed by the Panel is considered to be satisfactory. The use of porous materials for the sections of the car spaces not specifically required to be sealed is considered to be satisfactory.

Permit – Safety

Panel’s Recommendation

During the Panel hearing, a number of safety risks were raised, such as natural disasters, medical emergencies and the proximity of Heronswood to areas within the Wildfire Management Overlay (WMO). The Panel noted that Council had raised issue of the adequacy of insurance policies on private and other land.

The Panel recommended that conditions requiring the following should be included:

- All activities at Heronswood to be closed to the public on days of extreme fire hazard, such as ‘Code Red days’; and

- The Section 173 Agreement to provide for insurance and indemnity protection of the Responsible Authority against any liability arising from the use of the land and of the car park in the road reserve or arising from the operation of the TPM Plan.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Safety (Cont’d)

Officer’s Recommendation

The Panel’s recommendation for the closure of Heronswood, during ‘Code Red’ days is considered to be reasonable. It is noted that all of Heronswood’s designated event days, are generally outside the summer period and unlikely to fall on a ‘Code Red’ day.

The Panel’s position that the Section 173 Agreement to provide insurance and indemnity protection for the Responsible Authority is also considered to be reasonable and should be supported.

Permit – Consultation, Complaints and Enforcement

Panel’s Recommendation

The Panel endorses the draft permit conditions requiring a consultative committee to provide for ongoing communication between the operators of Heronswood, neighbouring owners and the Council. The Panel also recommends that a Complaints Management Plan be required through condition of permit (see Attachment 5).

Officer’s Recommendation

The recommendations made by the Panel are considered appropriate. The retention of the consultative committee will enable ongoing communication between all parties, particularly in relation to the effectiveness of the TPM Plan.

Permit – Should Future Applications be Limited by Use of a Section 173 Agreement?

Panel’s Recommendation

The Panel is of the view that the Planning Scheme and planning framework provides an appropriate basis for evaluating the range of proposals that could be put forward in the future. The Panel also notes that future applications will be constrained by Heronswood’s residential context, policy supporting the protection of the heritage place and parking and traffic management issues.

The Panel therefore recommends:

“Delete the requirement to limit future applications in the Section 173 Agreement required by condition 16 of the draft permit.”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004  (Cont’d)

Permit – Should Future Applications be Limited by Use of a Section 173 Agreement?  (Cont’d)

Officer’s Recommendation

The draft condition which the Panel has not supported was worded as follows:

“ 16. (c) Future applications must be limited to use and development generally consistent with the existing agreement and consistent with the continuing use of Heronswood as a heritage site, gardens and nursery with associated visitor facilities and restaurant. It must be specified that there will be no future application for the use of a reception centre, hotel or tavern.”

Despite the Panel’s recommendations, Heronswood have written to advise that they are prepared to support this permit condition being included in the planning permit.

The purpose of the condition was to ensure that any future applications would be consistent with the existing uses and that no other new, commercial uses would be applied for, once the Covenant had been removed or varied.

It is recommended that the condition be included in the omnibus permit. It would therefore be moved to condition 17. (c). However it is suggested that the wording of the condition be sharpened to the following:

“ 17. (c) Future applications must be limited to use and development generally consistent with the existing agreement and consistent with the continuing use of Heronswood as a heritage site, gardens and nursery with associated visitor facilities and restaurant. It must be specified that the land will not be used as a reception centre, hotel or tavern.”

Permit – Omnibus Permit

Panel’s Recommendation

The Panel recommends that an omnibus permit be issued which would encompass all previously issued permits and existing use rights. The Panel believes that this will result in easier enforcement of permit conditions as it will not be necessary to delve into the complicated history of approvals and existing use rights of Heronswood.

The Panel recommends that the permit would allow:

“ Use and development of the land for the purpose of a mail order garden club, education centre and plant nursery inclusive of associated workshops (with a retail area of no more than 100 square metres, excluding external display beds and propagation areas), heritage building and garden visits, a 70 seat restaurant with an on premises liquor licence, lopping of vegetation to maintain safe traffic conditions and construction of a car park in the road reserve and related removal of vegetations in accordance with the endorsed plans, and a car parking dispensation.”
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Omnibus Permit (Cont’d)

Officer’s Recommendation

The idea of transferring all existing permissions into a single permit is supported, especially considering the complicated planning history of the site. It is considered that this has the potential to allow greater clarity of the requirements which apply to Heronswood for the operators and their staff, surrounding residents and Council officers. The process is intended to be ‘statutory neutral’ i.e. without alteration to the nature of past permissions.

Permit – Are the Remaining Proposed Permit Conditions Appropriate?

Panel’s Recommendation

The Panel has recommended a range of new of permit conditions, as outlined in Attachment 4.

Officer’s Recommendation

In general terms, it is considered that the conditions of the omnibus permit put forward by the Panel provide a good base, however, as discussed earlier in the report, it is recommended that further conditions and clarifications should be included.

These suggested changes are outlined throughout the body of this report. A copy of the suggested omnibus permit with all the recommended conditions is included in Attachment 5. The changes to the Panel conditions proposed by officers are highlighted in bold text.

In particular it may be noted that Condition 21 of the Panel’s omnibus permit states:

“21. Within three months of the date of this permit or within such further period as the Responsible Authority may allow in writing on the written application of the permit holder the permit holder must make the necessary application to the Victorian Civil and Administrative Tribunal to cancel Planning Permit P99/0565 and must prosecute that application. Until Permit No. P99/0565 is cancelled the provisions of this permit prevail if there is any inconsistency between the permits.”

The legality of the final sentence:

“Until Permit No. P99/0565 is cancelled the provisions of this permit prevail if there is any inconsistency between the permits.”

is questioned and the officer’s recommendation is to remove the sentence from the condition.
DISCUSSION (CONT’D)

Planning Permit Application CP09/004 (Cont’d)

Permit – Is the Proposed Section 173 Agreement Appropriate?

Panel’s Recommendation

As noted above the Panel does not support the use of a Section 173 Agreement to regulate future use of the site and recommends:

“…the deletion of all provisions except the requirement for insurance and indemnity to protect the Responsible Authority against any liability arising from the operation of the Traffic and Parking Management Plan.”

Officer’s Recommendation

The Panel recommendation on this matter is not supported. It is considered necessary that the following additional provisions should be included in the Section 173 Agreement:

- Provisions to prevent the land being used for a reception centre, hotel or tavern; and
- The approved TPM Plan linked to the Section 173 Agreement to allow for the continuing review of the Plan to the satisfaction of the Responsible Authority.

The enforceability of Condition 5, which provides for the ongoing review of the TPM Plan may be open to future dispute and reinforcing this condition within the Section 173 Agreement ensures the TPM Plan can continue to be reviewed after the permit is acted upon.

It is therefore proposed to Insert a new condition 17.d) (following on new condition c) as follows:

“17. d) Review the approved Traffic and Parking Management Plan in accordance with Condition 5 of the planning permit.”

Permit Application No. CP09/004 – Overall Conclusions and Recommendations

As outlined in this report, the Panel has supported the approval of an increased seating limit subject to appropriate conditions to protect the amenity of adjoining and nearby owners. The Panel has gone further to propose the consolidation of all requirements that apply to the Heronswood site in an ‘omnibus permit’. This approach is generally supported, however, it is considered that a number of additional conditions, safeguards and provisions are required, as indicated in Attachment 5.

The following recommendations of the Panel which do not form part of the Amendment or permit are also supported:

“Carry out periodic but regular inspections and enforcement to ensure vehicles are parked legally.”

This will primarily be addressed through the TPM Plan and through the use of traffic marshals engaged by the operators of Heronswood. Formal enforcement will remain an option but other approaches are preferred.
DISCUSSION (CONT’D)

Permit Application No. CP09/004 – Overall Conclusions and Recommendations (Cont’d)

“Request VicRoads to reduce the speed limit in Latrobe Parade to 50 kilometres per hour in the vicinity of Heronswood or along its full length of Latrobe Parade if necessary.”

This recommendation is supported but is ultimately dependent on VicRoads.

COMMUNITY PLAN

The proposed Amendment, subject to proper resolution of the issues raised by objectors, should not prejudice the implementation of any part of the Community Plan and will directly help to implement

“Outcome 1.5: Recognised and protected heritage.

1.5.1: To identify places and mechanisms for the protection of natural and cultural heritage.”

FINANCIAL ISSUES

There are fees and costs associated with the Amendment processing and the proponent is expected to pay these before the Amendment, if adopted by Council, is submitted to the Minister for Planning for approval.

SUSTAINABILITY IMPLICATIONS

Subject to the range of conditions proposed, the Amendment is not expected to have any adverse environmental, economic or community outcomes and should in fact result in significant benefits. Further detail is provided in the Explanatory Report that accompanies the Amendment.

CONCLUSION

It is apparent that the activities conducted on the Heronswood site have changed and grown over time and that while these changes have provided a wider community benefit they have, at times, also had a significant adverse impact on the amenity of the surrounding area.

Heronswood is located within a Residential Zone and therefore a high standard of operation is expected. There is also a limit to the level of activity that can be conducted on any site before it falls into the category of ‘over-development’.

However, in this case it is considered that the proposed Amendment and permit should be supported as it addresses key issues relating to the existing and future use of the Heronswood site.

The Panel comments (page 42) that:

“It is important to get acceptable solutions now. This will require a collaborative approach between the operators of Heronswood and the council, with input from the residents through the proposed consultative committee.”
CONCLUSION (CONT’D)

In this context, the Amendment and permit will enable requirements relating to mitigation of traffic, car parking and amenity issues to be implemented and reviewed on an ongoing basis. With the inclusion of Section 173 Agreement restricting future uses on the land, the proposal effectively confirms the current operation at Heronswood whilst providing a safeguard in regard to future expansion.

In conclusion, it is considered appropriate for Council having considered all submissions and having complied with relevant legislative requirements, including consideration of the matters addressed in the explanatory report, to adopt Amendment C137 in accordance with the recommendations of the Independent Panel and to submit the Amendment to the Minister for Planning for approval. Planning Permit CP09/004 should also be recommended to the Minister, with the modifications outlined in this report and as indicated in Attachment 7.

RECOMMENDATION

1. That under Section 29(1) of the Planning and Environment Act 1987 (the Act), Council, in its role as Planning Authority having complied with Divisions 1 and 2 of the Act and having considered:
   - All submissions made to Mornington Peninsula Planning Scheme Amendment C137 in accordance with Section 22(1) of Act; and
   - The Independent Panel’s report under Section 27(1) of the Act,
   adopts Mornington Peninsula Planning Scheme Amendment C137 as shown in Attachment 6, being Mornington Peninsula Planning Scheme Amendment C137 as exhibited, subject to the following change:
   - Remove in its entirety, the covenant contained in Transfer G150027 in the Register of Titles.

1. Under Section 96G of the Planning and Environment Act 1987 (the Act), Council in its role as Planning Authority, having adopted Mornington Peninsula Planning Scheme Amendment C137, complied with division 4 of the Act and considered the Independent Panel’s report under Section 96F of the Act; and being of the view that it is appropriate for a permit to be granted under Division 4 for a purpose for which the Planning Scheme as amended would require a permit to be obtained recommends to the Minister for Planning that a permit be granted in the form of the attached document CP09/004 (Attachment 7).

3. That Council formally requests VicRoads reduce the speed limit to 50 kilometres per hour within the vicinity of 105-117 Latrobe Parade, Dromana.

4. That the Council resolves that Attachment 2 to this report, being submissions which include personal information, be retained as a confidential item pursuant to Section 77(2)(a) and (b) of the Local Government Act 1989 and be placed in a separate minute book for confidential items.