



Planning Panels Victoria

Department of Environment, Land, Water and Planning

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21 September 2018

As addressed

Melbourne Planning Scheme Amendment C258: Heritage Revisions

Panel Advice and Directions

Background

1. The Panel Hearing for this Amendment commenced on 6 August 2018 and was adjourned on Day 13 of the Hearing on 5 September until Friday 21 September 2018. A further two and a half days of Hearing (inclusive of a drafting workshop) were scheduled for November 2018.

Metro Pol request

2. At the Hearing on 28 August, the Council provided a copy of correspondence sent by Best Hooper on 27 August 2018 to the Council on behalf of **Metro Pol Investment Pty Ltd** (Metro Pol) seeking to make a late submission in relation to the Amendment and present to the Panel. The letter explained that the land owned by Metro Pol at 263-267 William Street, Melbourne, had recently been included in a site specific Heritage Overlay under an interim amendment (Amendment C326) and was proposed for permanent heritage controls under a related amendment which would introduce new heritage overlays in the Central City area (Amendment C328). Metro Pol therefore had only then become interested in the content of the new Clause 22.04 heritage policy under consideration by the Panel as part of Amendment C258.
3. The Council conditionally agreed to accept this submission and it was referred to the Panel.
4. Metro Pol later appeared before the Panel on 31 August seeking to remove the constraints imposed on its presentation which the Council had requested in the interests of expediting the Hearing and which had been supported by the Panel. Metro Pol indicated that it wished to call evidence and have the four Council witnesses recalled for cross examination. After hearing from the parties, the time constraints earlier imposed were removed by the Panel. Directions were given concerning the supply of information to enable timetabling arrangements.
5. The Panel, however, declined to agree to Metro Pol's request adjourn the Hearing to see if further requests to be heard would arise from other properties proposed to be included in permanent heritage overlays by Amendment C328 and interim heritage overlays under Amendment C327. The Panel indicated that it would deal with any such requests if and when they arose.

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6. The Panel written Directions of 3 September relate.

Requests by other two Central City land owners

7. On 7 September 2018, the Panel received correspondence from Planning Property Partners on behalf of **Notron Nominees Pty Ltd** (Notron), owner of 243-249 Swanston Street, similarly seeking to be heard by the Panel on the basis that Amendments C327 and C328 would introduce a heritage overlay over that land.
8. Notron sought to make submissions, call evidence, and cross examine the Council witnesses.
9. Also, on 7 September, the Panel received correspondence from Rigby Cooke on behalf of **Bennett's Lane Custodian Pty Ltd** and six related companies (Bennett's Lane), owners of 17-23 Bennett's Lane and 134-148 Little Lonsdale Street. The submission expressed concern about the Clause 22.04 policy and the grading system proposed in Amendment C258.
10. The letter indicated that Bennett's Lane wished to make a submission to the Panel in relation to Clause 22.04 and call evidence if necessary. The letter anticipated that the Panel might call a Directions Hearing to deal with the matter.

Directions Hearing scheduled

11. The Panel in response to these requests, a Council letter of 4 September opposing the recalling of all of its witnesses, difficulties around available further days of Hearing, and an unrelated procedural concern raised by Melbourne Business School (which nevertheless had implications for further scheduled days of Hearing), determined to call a Directions Hearing about further progress of the Hearing on 18 September 2018. This was later changed to 19 September 2018.

Further requests to be Heard

12. On 18 September 2018, the Panel received correspondence from Planning Property Partners on behalf of three additional clients:
 - **Formax Superannuation Pty Ltd** (Formax), owner of 62-66 Little Collins Street;
 - **RMPH Holdings Pty Ltd** (RMPH) owner of 31-35 Flinders Lane; and
 - **Henvik Investments Pty Ltd** (Henvik), owner of 96-98 Flinders Street.
13. It was again indicated that these properties were affected by Amendments C327 and C328 of which notice had been given to the owners on 9 August. The letter indicated an intention to attend the scheduled Directions Hearing on 19 September and seek to be heard at that time.

The Directions Hearing

14. At the Directions Hearing on 19 September representatives of the above organisations requesting to be heard were present, together with the Council, the University of Melbourne and Melbourne Business School.

Council proposed further notice and Hearing arrangements

15. Rather than merely responding to the further particular requests to be heard, the Council pro-actively indicated that while not statutorily required to do so, it wished to afford any property owners affected by the introduction of heritage overlay controls arising from a

number of contemporaneous heritage amendments the same opportunity to participate in the Panel as Metro Pol.

16. The amendments in questions referred to were:
 - Hoddle Grid Heritage Review (Amendment C328)
 - Guildford and Hardware Laneways Heritage Study 2017 (Amendment C271)
 - Southbank and Fishermen's Bend Heritage Review 2017 (Amendment C305).
17. It was indicated that the Council proposed to send letters to all owners of properties which are newly proposed to be included in heritage overlays under those amendments and provide information concerning Amendment C258 and inform them of the opportunity to make a presentation to the Panel.
18. The Council indicated that the Council would provide the late submissions to the Panel which then might accommodate any reasonable requests to be heard.
19. While proposing this course, the Council made it clear that it was not conceding that earlier notice was required to these landowners, nor that the Council is obliged to consider any late submissions received after the initial statutory notice period.
20. In proposing to refer any submissions received in response to this further non-statutory notice to the Panel, the Council said that the Panel's obligation would be to afford the new submitters a reasonable opportunity to be heard and not an unlimited or unconditional opportunity.
21. The Council also noted that even if the Panel formed the view that there had been some defect in the preparation of the Amendment or failure to comply with Division 1, 2, or 3 of Part 3 of the Act, it could continue to hear submissions and make its report. Similarly, even if there had been an obligation to give notice, a failure to do so would not prevent the adoption of approval of an amendment. It was further suggested that the Panel is empowered to continue to hear submissions and make its report; or adjourn the Hearing and make an interim report to the Council which would recommend the giving of notice.
22. The Council proposed, however, that the late submissions should be received and considered on condition that:
 - The significance of those properties had been or would be considered in the context of the amendment applying to the relevant area;
 - The scope of the submissions should be confined to Clause 22.04; and
 - Ms Brady and Ms Jordan would be the only Council witnesses recalled for cross examination, as the evidence of Messrs Butler, Helms and Hartley did not relate to Clause 22.04.
23. The Council sought the following Panel Directions:
 - By 5 October 2018, the informal notice is to be undertaken by the Council. It is to include an explanation of Amendment C258, a link to the exhibited version of Clause 22.04 and the latest Panel version incorporating changes by Ms Jordan and Ms Brady, and a link to the Panel Directions.
 - Responses to Council are to be required by 26 October 2018 – a written submission and a request to be heard must both be supplied.

- A Directions Hearing be held on 7 November 2018 to confirm the timetable for conduct of the remainder of the Hearing.
- All evidence (including any further Council evidence) be circulated by 2:00pm on 12 November 2018.
- The Panel Hearing continue from 26 November for 5 days including reserve dates on 3-4 December.

Bennett's Lane and Others' Propositions

24. Notwithstanding its letter of 7 September 2018 had indicated a wish to be heard by the Panel, Bennett's Lane argued at the Directions Hearing that the Council submissions had indicated that there had been a substantial failure in relation to notice and the current Hearing should be abandoned. It was recommended that the Panel should consider proceeding under s166(2) of the *Planning and Environment Act 1987* (the Act) to write an interim report to the Council indicating this failure and recommending that further statutory notice was required.
25. It was also submitted that in considering its response to this issue, the Panel should consider that a fair hearing could not be afforded to late submitters by the Panel, as even if every witness was to be recalled, the late submitters were not to know what oral evidence had earlier been given either to questions in chief or cross examination. It was said to be the best option that the Amendment should get 'a clean start'.
26. It was recommended that if the Panel was not immediately to abandon the Hearing, it should reject the confinement of procedure recommended by the Council but simply direct further notice and invite submissions. A Directions Hearing could then be held at which how to proceed could be considered.
27. Support for the Bennett's Lane position was given by Norton, Formax, RMPH and Henvik. It was said that there was a difficulty with these parties being given only a partial role in the proceeding and that fairness demands that the current process stop, and a fresh process be commenced. Section 166(2) was recommended as an appropriate basis for this way forward.
28. Metro Pol submitted that there was a measure of agreement that there should be further notice. However, it was said that consideration should be given to whether the notice should be given to occupiers as well as owners of affected land and about which versions of policy the notice should direct attention to. It was suggested that the notice should be given, and a Directions Hearing held, before further considering how to proceed. It was later submitted that section 166(2) is the only proper course.

Panel Consideration

29. The Panel makes no finding as to the correctness or otherwise of the Council view as to the identity of owners and occupiers of properties materially affected at the time notice was first considered under section 19 of the Act.
30. The Panel notes that it has in part been the only slow progress of Amendment C258 (including its part re-exhibition after initial submissions) that has led to a situation where it is appropriate and/or possible for notice to be given to others affected by the related heritage amendments.
31. The Panel notes the provisions of s166 to which reference was made, which are:

(1) A panel may continue to hear submissions and make its report and recommendations despite any defect, failure or irregularity in the preparation of a planning scheme or amendment or any failure to comply with Division 1, 2 or 3 of Part 3 in relation to the preparation of the planning scheme or amendment.

(2) A panel may adjourn the hearing of submissions and make an interim report to the planning authority if it thinks there has been a substantial defect, failure or irregularity in the preparation of a planning scheme or amendment or any failure to comply with Division 1, 2 or 3 of Part 3 in relation to the preparation of the planning scheme or amendment.

(3) The interim report may recommend that the planning authority give notice of the planning scheme or amendment to a specified person or body.

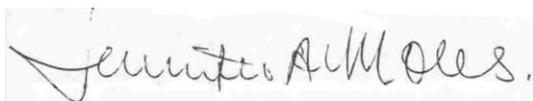
32. The Panel considers that both ss 166(1) and (2) are enabling provisions rather than provisions which place an obligation on the Panel to adopt either course.
33. The Panel also notes the provisions of ss 161, 165 and 167 of the Act. These allow a Panel to regulate its own proceedings and amongst other things adjourn proceedings, subject always to acting in accordance with good conscience and equity and affording natural justice. The latter requirement is determined according to the broader statutory framework and the particular circumstances at hand.
34. The Panel considers that the circumstances now faced are such that further notice of Amendment C258 should be given to owners of properties now proposed to be included in heritage overlays across the city under Amendments 271, 305 and 328. There indeed appeared to be agreement about this.
35. The Panel considers that the notice should also advise of the current Panel process which should continue. It should indicate that materially affected landowners are afforded the opportunity to make submissions to the Panel concerning the Amendment.
36. The Panel has considered the submissions set out in paragraph 25 concerning the fairness of participation by latecomers to the Hearing but notes that, in the decision in *Thomson v Stonnington CC [2003] VCAT 813* (30 June 2003), the Tribunal accepted that a latecomer to a panel proceeding could be afforded a fair hearing - assuming witnesses were recalled and other procedures implemented.
37. The Panel also considers that a balance must be struck between the interests of potential new submitters and those of existing parties who have presented over a 13 day period. The Panel considers at this stage that this balance is correctly struck by continuing the present Hearing rather than abandoning it in favour of a new process.
38. The Panel does not consider appropriate at this stage to constrain the responses to further notice in terms of matters which can be addressed, particular timeframes beyond a Directions Hearing to progress the matter etc.
39. The Panel nevertheless agrees with the Council submissions that the primary matter of concern to would-be submitters logically must be the revised policy at Clause 22.04. The Panel has, however, not confined submissions to this component of Amendment C258. The Panel also observes that while it was suggested that the notice should refer to the revisions made to the policy by the Council Committee in February 2018, this is a matter about which submissions were made at the Hearing which suggest that the change reflected removal of a

duplicated provision rather than an intent to remove a component of policy entirely. A link to the Council Committee report and minutes would suffice.

Panel Directions

- 1. By 5 October 2018, the Council must provide information about the Amendment and the Panel Hearing to the owners of those properties which were not affected by a heritage overlay at the time the Amendment was originally exhibited but are now proposed to be included in a heritage overlay under Amendments C271, C305, and C328. The notice is to indicate that the notified persons may seek to be heard by the Panel.**
- 2. The information in the notice must include an explanation of the Amendment and a link must be provided to the exhibited documents and to the most recent version of the Clause 22.04 policy incorporating the changes recommended by Ms Brady and Ms Jordan. A link to the Council Committee meeting minutes of February 2018, and to these Panel Directions and submissions and evidence circulated during the Panel process to date, must also be provided. A link to the Panel document list is also to be provided (to follow).**
- 3. The notice must indicate that by no later than 26 October 2018, any notified person who wishes to be heard by the Panel must provide to the Council a written submission and a request to be heard with an indication of the length of time that they request to present to the Panel.**
- 4. The notice must indicate that a Directions Hearing will be held by the Panel on 7 November 2018 at Planning Panels Victoria (address and PT access to be given) at 10 am to consider how to further progress the remainder of the Panel Hearing and indicate a preference by the Panel for further Hearing days commencing at the end of November 2018. Persons wishing to present to the Panel are to be invited to attend the Directions Hearing.**
- 5. The notice should include the usual contact address, email and phone numbers for Planning Panels Victoria (per Joseph Morrow) to facilitate enquiries.**
- 6. The Council is to copy the Panel with all received responses to the notice and RTBHs and a summary of the latter by no later than 1 November 2018.**

If you have any queries, please contact Joseph Morrow at Planning Panels Victoria on 03 8392 5137 or email: joseph.morrow@delwp.vic.gov.au

A handwritten signature in black ink that reads "Jenny Moles". The signature is written in a cursive style and is positioned above the printed name.

Jenny Moles

Panel Chair

This letter has been copied to all parties on the updated distribution list (version 4) below:

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