

INDEPENDENT PLANNING PANEL  
APPOINTED BY THE MINISTER FOR PLANNING  
PLANNING PANELS VICTORIA

IN THE MATTER of Amendment C258 to the Melbourne Planning Scheme

BETWEEN:

**MELBOURNE CITY COUNCIL**

Planning Authority

-and-

**VARIOUS SUBMITTERS**

**DIRECTIONS HEARING 19 SEPTEMBER 2018**  
**SUBMISSIONS OF THE PLANNING AUTHORITY**

**I. INTRODUCTION**

1. The City of Melbourne (**Council**) is the Planning Authority for Amendment C258 (the **Amendment**) to the Melbourne Planning Scheme (the **Scheme**).
2. Protection of Melbourne's heritage is a priority for Council. As previously explained to the Panel, Council is progressively rolling out an extensive program of heritage reviews and studies with associated planning scheme amendments to ensure the heritage assets of the City are appropriately protected and managed.
3. Notice of the Amendment was sent to all owners of properties within a heritage overlay (approximately 50,000 properties) in March 2017. A notice was also published in the government gazette and The Age newspaper, and three 3-hour community information sessions were held. The extent of notice provided exceeded the requirements of the *Planning and Environment Act 1987*.
4. While not statutorily obliged to do so, Council wishes to afford any property owners affected by the introduction of heritage overlay controls in reliance on the *Hoddle Grid Heritage Review 2018* (Amendment C328), the *Guildford and Hardware Laneways Heritage Study 2017* (Amendment C271) or the *Southbank & Fishermans Bend Heritage Review 2017*

(Amendments C305) the same opportunity to participate in the Panel that has been afforded to the owners of the Metropolitan Hotel. In this regard, Council proposes to send letters to all owners of properties which are newly proposed to be included in a heritage overlay pursuant to planning scheme amendments C271, C305 and C328, to provide information regarding the Amendment, and inform them of the opportunity to make a submission to the Panel.

5. To enable Council's heritage program to proceed, it is essential that any late submitters are heard in an efficient manner, such that the Amendment is not unnecessarily delayed.

## **II. ADDITIONAL PERSONS SEEKING TO BE HEARD BY THE PANEL**

6. In June 2018, independent heritage consultants Context completed a comprehensive review of heritage buildings within the Hoddle Grid, the '*Hoddle Grid Heritage Review 2018*'. This Review recommended that 64 individual places and six precincts be protected under the heritage overlay.
7. The *Hoddle Grid Heritage Review 2018* graded properties according to the 'significant', 'contributory' or 'non-contributory' categories, and pursuant to the definitions proposed by the Amendment.
8. Council has prepared the following planning scheme amendments to incorporate the recommendations of the *Hoddle Grid Heritage Review 2018*:
  - a) Amendment C328: Permanent heritage controls;
  - b) Amendment C327: Interim heritage controls; and
  - c) Amendment C326: Interim heritage controls over land at 263-267 William Street, the Metropolitan Hotel.
9. Amendment C326 was considered by Council in June 2017 and Amendments C327 and C328 were presented to Council in August 2018.
10. Amendment C326 was gazetted on 16 August 2017.
11. The interim protection sought under Amendment C327 has yet to be approved.

12. On 27 August 2018, Best Hooper Lawyers on behalf the owner of the Metropolitan Hotel advised of its request to make a submission to Amendment C258, by reason of gazettal of Amendment 326.
13. In its procedural ruling on 3 September 2018, the Panel indicated that if any other persons affected by Amendments C327 or C328 make future requests to be heard by the Panel these will be dealt with as they arise.
14. On 7 September 2018, the following letters were sent to the Council and the Panel:
  - a) Planning & Property Partners wrote on behalf of the owner of land at 243-249 Swanston Street, Melbourne.
  - b) Rigby Cooke Lawyers wrote on behalf of the owners of land at 17, 19, 21 and 23 Bennetts Lane and 134-148 Little Lonsdale Street.
15. On 18 September 2018, a letter was sent to the Council and the Panel from Planning & Property Partners on behalf of owners of land at 62-66 Little Collins Street, 31-35 Flinders Lane and 96-98 Flinders Street.
16. A heritage overlay is proposed to be applied to these sites via Amendment C327 (interim controls) and Amendment C328 (permanent controls). The representatives for the owners of 243-249 Swanston Street, Melbourne and 17, 19, 21 and 23 Bennetts Lane and 134-148 Little Lonsdale Street are seeking to be heard by the Panel, including through the making of submissions and calling of evidence.
17. The properties proposed to be included in the heritage overlay by Amendments C326 and C327 did not receive formal notice of the Amendment under section 19 of the *Planning and Environment Act 1987*.

### **III. GUILDFORD & HARDWARE LANEWAYS, AND SOUTHBANK & FISHERMANS BEND HERITAGE REVIEWS**

18. Council has identified that landowners affected by the *Guildford and Hardware Lanesways Heritage Study 2017* and the *Southbank & Fishermans Bend Heritage Review 2017* may also seek to be heard by the Panel.

19. Council has prepared the following planning scheme amendments to incorporate the recommendations of the *Guildford and Hardware Laneways Heritage Study 2017*:
  - a) Amendment C271: Permanent heritage controls;
  - b) Amendment C301: Interim heritage controls.
20. Amendments C271 and C301 propose *inter alia* to apply a heritage overlay to seven individual places and two precincts. Ninety-three properties that are not currently affected by a heritage overlay would be subject to a new heritage overlay under these amendments.
21. The panel hearing for Amendment C271 which implements the *Guildford and Hardware Laneways Heritage Study 2017* undertaken by Lovell Chen has recently been completed, though the panel report has not yet been considered by Council. Interim protection via Amendment C301 was sought for all properties which were not already affected by a heritage overlay, but which were proposed to be included in a heritage overlay via Amendment C271. Amendment C301 has not yet been approved.
22. The *Guildford and Hardware Laneways Heritage Study 2017* graded properties according to the ‘significant’, ‘contributory’ or ‘non-contributory’ categories, and pursuant to the definitions proposed by the Amendment.
23. Page 4 of the ‘*Guildford & Hardware Laneways Heritage Study - Methodology Report*’ provides:

## **1.2 Property gradings**

*Council provided the consultants with an excel spreadsheet of properties within the study area. This included property addresses and existing property gradings, as per the A, B, C, D alphabetical gradings system. The gradings are referred to in the precinct and property citations as ‘previous’ gradings.*

*No new alphabetical grading, coming out of this assessment, is identified in the study documentation. Rather, Lovell Chen has assessed the relative level of heritage significance/ value for each property using the ‘significant’, ‘contributory’ or ‘non-contributory’ categories.*

*The significant, contributory or non-contributory definitions are from a separate heritage study and review, undertaken by Lovell Chen for the City of Melbourne in 2015 and 2016. This study, which is documented in the Methodology Report for the City of Melbourne Heritage Review: Local Heritage Policies and Precinct Statements of Significance (September 2015), included the following definitions:*

*A significant heritage place:*

*A 'significant' heritage place is individually important at state or local level, and a heritage place in its own right. It is of historic, aesthetic, scientific, social or spiritual significance to the municipality. A 'significant' heritage place may be highly valued by the community; is typically externally intact; and/or has notable features associated with the place type, use, period, method of construction, siting or setting. When located in a heritage precinct a 'significant' heritage place can make an important contribution to the precinct.*

*A contributory heritage place:*

*A 'contributory' heritage place is important for its contribution to a precinct. It is of historic, aesthetic, scientific, social or spiritual significance to the precinct. A 'contributory' heritage place may be valued by the community; a representative example of a place type, period or style; and/or combines with other visually or stylistically related places to demonstrate the historic development of a precinct. 'Contributory' places are typically externally intact, but may have visible changes which do not detract from the contribution to the precinct.*

*A non-contributory heritage place:*

*A 'non-contributory' place does not make a contribution to the heritage significance or historic character of the precinct.*

24. The *Southbank & Fishermans Bend Heritage Review 2017* undertaken by Biosis, was presented to the Future Melbourne Committee on 19 September 2017.
25. Council has prepared the following planning scheme amendments to implement the recommendations of the *Southbank & Fishermans Bend Heritage Review 2017*:
  - a) Amendment C305: Permanent heritage controls;
  - b) Amendment C304: Interim heritage controls;
  - c) Amendment C276: Interim heritage controls applying to 107-127, 129-133 and 133 Queens Bridge Street and to 45-99 Sturt Street, Southbank.
26. Amendments C276 and C304 (interim controls) and C305 (permanent controls) propose, *inter alia*, to apply an individual heritage overlay to 17 individual places, one group listing of substations comprising four properties and one precinct. 61 properties that are not currently affected by a heritage overlay would be subject to a new heritage overlay properties, together with the properties which are the subject of Amendment C276.
27. Amendment C276 was gazetted on 8 February 2018. Amendment C304 has not yet been approved.
28. Public exhibition of Amendment C305 closed on 29 July 2018. A panel hearing regarding Amendment C305 is currently scheduled for December 2018.

29. Page 21 of the *Southbank & Fishermans Bend Heritage Review 2017* provides:

#### **2.2.4 Amendment C258 (heritage policies review)**

*The City of Melbourne was authorised by the Minister for Planning to prepare Amendment C258 for the Melbourne Planning scheme. The amendment includes revision of local heritage policies at Clause 22.04 (Heritage places within the Capital City Zone) and 22.05 (Heritage places outside the Capital City Zone). It also proposes replacing the current A to D heritage significance grading system with the 'Significant/Contributory' grading system as recommended by Practice Note Number 1.*

*Biosis prepared the draft planning scheme amendment documentation for the permanent heritage controls in accordance with the revised grading system proposed by Amendment C258.*

30. The *Southbank & Fishermans Bend Heritage Review 2017* graded properties according to the 'significant', 'contributory' or 'non-contributory' categories pursuant to the following definitions:

- *Significant heritage places are individually-important places of state, municipal or local cultural heritage significance. They are listed individually in the Schedule to the Heritage Review. They can also be places that, when combined within a precinct, form an important part of the cultural heritage significance of a precinct. Places may be both individually significant as well as significant in the context of the heritage precinct.*
- *Contributory heritage places are places that contribute to the cultural heritage significance of a precinct. They are not considered to be individually important places of state, municipal or local cultural heritage significance, however, when combined with other significant and/or contributory heritage places, they play an integral role in demonstrating the cultural heritage significance of a precinct.*
- *Non-contributory places are places within a heritage precinct that have no identifiable cultural heritage significance. They are included within a heritage overlay because any development of the place may impact the cultural heritage significance of the precinct or adjacent 'significant' or 'contributory' heritage places.*

31. The properties proposed to be included in the heritage overlay by the *Guildford and Hardware Laneways Heritage Study 2017* and the *Southbank & Fishermans Bend Heritage Review 2017* did not receive formal notice of Amendment C258 under section 19 of the *Planning and Environment Act 1987*.

32. Each of these heritage reviews was referenced in the Council's Part A submission at paragraph 36:

36. *Heritage reviews which have recently been completed and are the subject of current planning scheme amendments include:*
- (a) *the West Melbourne Heritage Review 2016 (Amendment C258);*
  - (b) *Guildford and Hardware Laneways Study 2017 (Amendment C271) and*
  - (c) *Southbank and Fishermans Bend Heritage Review 2017 (Amendment C305).*

#### **IV. IS COUNCIL REQUIRED TO NOTIFY LANDOWNERS AFFECTED BY AMENDMENTS C271, C305 AND C328 OF THE AMENDMENT?**

33. Section 19(1)(b) of the Act provides that a planning authority must give notice of its preparation of an amendment to a planning scheme to the owners and occupiers of land that it believes may be materially affected by the amendment.
34. Section 32 of the Act empowers the Minister to require further notice of a planning scheme amendment in certain circumstances.
35. These clauses, read together, make clear that the requirement to give notice is not an ongoing obligation, but rather an obligation which arises at the time of preparation of a planning scheme amendment.
36. Accordingly, the obligation to provide notice arose at the time of preparation of the Amendment.
37. At this time, only landowners of properties within a heritage overlay (or proposed to be included in a heritage overlay by virtue of Amendment C258) had the potential to be materially affected by the Amendment. Council was under no statutory obligation to give notice of the Amendment to landowners of properties which were not subject to a heritage overlay or proposed to be included in a heritage overlay by a planning scheme amendment under preparation at this time.

#### **A. PROGRESS OF THE AMENDMENT**

38. On 5 July 2016, the Future Melbourne Committee resolved to seek authorisation from the Minister for Planning to prepare and exhibit the Amendment. This authorisation request was sent on 11 August 2016. On 21 December 2016, the Council received authorisation from the Department, under delegation from the Minister, to prepare the Amendment, subject to several conditions:

*a) Prior to exhibition of the amendment:*

- i. Modifications to the amendment documentation to include the changes proposed to be made by Melbourne Planning Scheme Amendment C272 (permanent heritage controls sought by the West Melbourne Heritage Review), using the*

*significant/contributory system to identify significance for all properties affected by Amendment C272, as agreed to by council officers. Council is also encouraged to abandon Amendment C272.*

- ii. The local policies be modified to include reference to the Statements of Significance.*
- iii. The Explanatory report be updated to address the policy changes proposed for the Capital City Zone (excluding Capital City Zone, Schedule 5), as a result of the changes proposed to Clause 22.04 – Heritage Places within the Capital City Zone.*

*b) As the proposed amendment affects Crown land, Native Title Services Victoria should also be given notice of the amendment.*

39. The Amendment was exhibited from 20 March 2017 to 12 May 2017. At this time, none of the above heritage amendments was sufficiently progressed, such that Council was aware of the properties for which interim protections would be sought in the future.

#### B. PROGRESS OF THE GUILDFORD AND HARDWARE LANEWAYS HERITAGE STUDY 2017

40. In February 2016, Lovell Chen commenced work on the *Guildford and Hardware Laneways Heritage Study*.

41. On 18 April 2017, Council resolved to request that the Minister prepare and approve Amendment C301 to introduce interim heritage controls. Council also resolved to seek clarification regarding the extent of one proposed heritage overlay. Subject to any updates proposed by that clarification, Council resolved to seek authorisation from the Minister to prepare and exhibit Amendment C271.

42. On 26 April 2017, an application for preparation of Amendment C301 was submitted to the Minister.

43. On 25 July 2017, a request for authorisation to prepare Amendment C271 was submitted to the Minister.

44. From 12 October 2017 to 23 November 2017, Amendment C271 was exhibited.

#### C. PROGRESS OF THE SOUTHBANK & FISHERMANS BEND HERITAGE REVIEW 2017



45. In October 2016, Biosis commenced work on the *Southbank & Fishermans Bend Heritage Review* 2017.
46. On 21 February 2017, Council resolved to request that the Minister prepare the interim controls sought by Amendment C276, and to seek authorisation from the Minister to prepare and exhibit Amendment C280.
47. On 6 March 2017, a request for authorisation to prepare planning scheme Amendment C280 and an application to the Minister to prepare planning scheme Amendment C276 was submitted to the Minister.
48. On 30 May 2017, the Department granted authorisation to Council to prepare Amendment C280, subject to conditions. Council complied with the conditions, with the intention of progressing Amendment C280 to public exhibition.
49. On 8 February 2018, Amendment C276 was approved. It applied interim heritage controls to two properties as requested by Council. One of these properties forms part of a consolidated landholding of the University of Melbourne which is already affected by two separate heritage overlays and which received notice of the Amendment. The other site did not receive notice of the Amendment.

#### D. THE REQUIREMENT TO PROVIDE NOTICE AND CONSIDER LATE SUBMISSIONS

50. Council maintains that it was not required to give notice of the Amendment to any landowners potentially affected by C271, C276, C301, C304, C305, C326, C327 and C328.<sup>1</sup>
51. Council maintains that it is not required to consider any submission made after the date set for submissions in the gazette, being 12 May 2017, including any submissions made after the commencement of this Panel hearing.<sup>2</sup>

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<sup>1</sup> Section 19.

<sup>2</sup> Section 22.

52. Council maintains that the Panel is not required to consider any submission which has not been referred to it and that no person has a right to be heard by the Panel if a submission has not been referred to it.<sup>3</sup>
53. Even if Council refers a late submission to the Panel, the obligation on the Panel is to give a reasonable opportunity to be heard and not an unlimited or unconditional opportunity to be heard.
54. Even if the Panel forms the view that there has been some defect, failure or irregularity in the preparation of the Amendment or any failure to comply with Division 1, 2, or 3 of Part 3 of the Act, it may continue to hear submissions and make its report.<sup>4</sup>
55. Similarly, even if there were an obligation to give notice, a failure to do so does not prevent the adoption or approval of the Amendment.<sup>5</sup>
56. While Council submits that there has been no failure to notify any person now seeking to make a submission to the Panel, it submits that even had such a failure been apparent, the Panel is empowered to:
- a) continue to hear submissions and make its report; or
  - b) adjourn the hearing and make an interim report to Council, which may recommend the giving of notice.

**V. SHOULD FURTHER INFORMATION ABOUT AMENDMENT C258 BE PROVIDED?**

57. Notwithstanding the absence of any statutory obligation to notify landowners affected by Amendments C271, C305 and C328 of the Amendment, to avoid further delay and enable the Amendment to progress with confidence that all landowners potentially affected have been informed of the Amendment and afforded an opportunity to be heard by the Panel, Council proposes to provide these persons with information about the Amendment by way of informal notice.

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<sup>3</sup> Section 24.

<sup>4</sup> Section 166.

<sup>5</sup> Section 19(5).

58. The provision of information about the Amendment would aim to inform all potentially affected landowners of the possibility of making a late submission, which Council would provide to the Panel. The Panel would then be empowered to accommodate any reasonable request to be heard.

## **VI. RECEIPT AND CONSIDERATION OF ADDITIONAL SUBMISSIONS**

59. Council submits that it is appropriate in the circumstances that any and all late submissions provided to or received by the Panel are provided and considered on the following basis:

- a) The significance of all properties proposed for inclusion in a heritage overlay has been or will be considered in the course of the planning scheme amendment for each area and is not properly the subject of the Panel hearing for this Amendment;
- b) As all properties potentially affected are located within the Capital City Zone, the scope of submissions should be confined to Clause 22.04;
- c) Only Ms Brady and Ms Jordan will be recalled to give evidence before the Panel. Mr Butler, Mr Helms and Mr Hartley will not be required as their evidence could not reasonably be regarded as relevant to the substantive provisions of Clause 22.04. No expert called on behalf of any other party will be required to be recalled.

## **VII. DIRECTIONS OF THE PANEL**

60. The Council submits that it is appropriate that the Panel make the following directions:

- (a) By 5 October 2018, Council shall provide information about the Panel hearing for the Amendment to owners whose properties were not affected by a heritage overlay at the time the Amendment was originally exhibited, but who are now proposed to be included in a heritage overlay under Amendments C271, C305 and C328. The information shall include an explanation of the Amendment, and a link to the exhibited version of clause 22.04, to the version of the policy incorporating the changes recommended by Ms Jordan and Ms Brady, and to

these directions of the Panel. The information shall also include a link to the submissions and evidence circulated during the Panel hearing.

- (b) By 26 October 2018, persons so informed who wish to be heard by the Panel shall provide Council with a written submission and a request to be heard with an indication of the time they request.
  - (c) On 7 November 2018, a directions hearing will be held to confirm the timetable for conduct of the remainder of the Panel hearing.
  - (d) By 2.00pm on 12 November 2018, any evidence, including any evidence upon which Council wishes to rely in response to further submissions, must be circulated.
  - (e) On 26 November 2018, the Panel hearing shall resume for 5 days, including reserve dates on 3-4 December.
61. In Council's submission, this approach strikes a reasonable, fair and proper balance of the Panel's obligations to act according to equity and good conscience without regard to technicalities or legal forms, to comply with the rules of natural justice and to regulate its own proceedings, and the interests of any potentially affected land owners who wish to be heard in relation to the revised policy settings for the Capital City zone.

**Susan Brennan**

**Carly Robertson**

**Counsel for the Planning Authority**

**19 September 2018**