

IN PLANNING PANELS VICTORIA  
FISHERMANS BEND PLANNING REVIEW PANEL  
AMENDMENT GC 81

BETWEEN:

**MINISTER FOR PLANNING**

Planning Authority

and

**PORT PHILLIP CITY COUNCIL**

Responsible Authority

and

**SM253 PTY LTD**

Submitter

**FINAL SUBMISSIONS ON BEHALF  
OF SM253 PTY LTD**

**Background**

1. These final submissions are made on behalf of SM253 Pty Ltd (“SM253”) and in response to the Panel’s further directions.<sup>1</sup>
2. SM253 made submissions to the Panel on 4 May 2018 primarily addressing two issues:
  - (a) that SM253 has existing permits to use, develop and subdivide the land for a mixed-use development<sup>2</sup> which will be put to the market in 2018; and

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<sup>1</sup> Fishermans Bend Planning Review Panel’s direction 26, 17 May 2018.

<sup>2</sup> The development includes ground floor retail, apartments and a hotel, within a building which comprises a 5 storey podium, and two substantial towers above, the “L” shaped stage 1 tower of 32 storeys and the “I” shaped stage 2 tower of 35 storeys.

- (b) that, having regard to those permits and the possible need to amend those permits in the future, SM253 was concerned about some of the amendments to the controls proposed by the Minister for Planning in the Part B controls circulated on 29 March 2018<sup>3</sup>.
3. SM253 notes that the Minister has accepted that it is appropriate to provide a form of “transitional provision” for existing permits, and so that any amendments to existing permits:
- (a) are not assessed against:
    - (i) in relation to the use of land, the dwelling floor area ratio and floor area ratios set out in table 1 of schedule 1 to the Capital City zone (“CCZ1”);
    - (ii) in relation to the subdivision of land, the maps in the CCZ1;
    - (iii) in relation to an amendment application for buildings and works, the maps in the CCZ1;
  - (b) in relation to the schedule to the Design and Development Overlay, an amendment may be made which does not “increase the extent of non-compliance with the requirements” of the schedule.

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<sup>3</sup> Panel document 156a.

4. SM253 strongly supports the position taken by the Minister. The Minister's most recent drafts of the CCZ1<sup>4</sup> and Design and Development Overlay for the Montague precinct<sup>5</sup> appropriately include "transitional provisions" for amendments to existing permits.

### **The Minister's Part C controls**

5. SM253 has now had an opportunity to review the Minister's most recent drafts of the CCZ1, Design and Development Overlay for the Montague precinct, and the Minister's closing submissions made on 24 May 2018<sup>6</sup>.
6. Page 58 of the Minister's closing submissions addressed amendments to existing planning permits, and expressly acknowledged the submissions of SM253, noting that:

*"177. The Minister accepts that it is appropriate that amendments to proposals authorised by existing permits should be able to be considered without triggering the requirements for 'general accordancy' with the urban structure plans but should be subject to a requirement that the extent of non-compliance with the Floor Area Ratios is not increased in any amendment to such a permit.*

*178. To address this issue, the draft CCZ has been revised to provide express exemptions for permits issued before the commencement of Amendment GC81 in respect of use, subdivision and for buildings and works."*

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<sup>4</sup> As circulated on 14 May 2018 (Panel document 307, Attachment 1).

<sup>5</sup> As circulated on 14 May 2018 (Panel document 307, Attachment 3).

<sup>6</sup> Panel document 350.

7. The Minister's amendments to the CCZ1 therefore provide a form of "transitional provision" for those permits granted before the approval date of Amendment GC81. SM253 strongly supports the inclusion of those Ministerial amendments as outlined in Annexure A.
8. To comprehensively reflect the protections afforded to existing permits, SM253 submits that clause 22.XX, the Fishermans Bend Urban Renewal Area local planning policy, would be improved by the addition of a transitional provision in the following terms:

*This policy does not apply to a planning permit issued before the approval date of Amendment GC81. For such permits, the Municipal Strategic Statement and Local Planning Policy Framework, as it was in force immediately before the approval date of Amendment GC81, continue to apply.*

### **The City of Port Phillip's closing submissions**

9. In its closing submissions made on 24 May 2018<sup>7</sup>, the City of Port Phillip noted that:

*"33. While the Minister has made the State Government's position clear on this, Council also strongly resists the use of transitional provisions. The use of transitional provisions will result in the failure of the proposed planning framework and planning provisions to achieve the Vision. Therefore, the only reasonable response is that they ought to be rejected outright.*

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<sup>7</sup> Panel document 347.

*34. ...While the planning system must be fair, fairness is a matter that must be assessed in the context of fairness to the community as a whole rather than a group of individuals. Accordingly, Council strongly oppose transitional provisions."*

10. Despite this submission, curiously, at the "Drafting Roundtable" on 23 May 2018, the City of Port Phillip did not advocate for the removal of the transitional provisions included by the Minister for Planning in relation to existing permits and as outlined in Annexure A.
11. SM253 submits that the Minister's position should be preferred, and that the Panel recommend that the transitional provisions proposed by the Minister be included in the ultimate form of Amendment GC81.

### **The City of Port Phillip's closing submissions on the Montague precinct**

12. In its closing submissions for the Montague precinct<sup>8</sup>, the City of Port Phillip observed that:

*"[28]...Again, we say that it is just remarkable that not a single case has been presented to this Review Panel which has informed the Review Panel of any advance sales, off the plan sales, or anything in relation to the many thousands of "ghost" apartments contained within the numerous permits issued which contribute to the supposedly emerging character. Yet, the expert evidence called by the Taskforce made it clear that proposals generally do not get finance until they are 80% sold.*

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<sup>8</sup> Panel document M42.

*[29] Suggestions that these permits will translate to buildings within the relatively short life spans of the relevant permits is fanciful at best. Therefore, the Review Panel should reject these permits as an influencing factor in determining character and instead rely on the Vision and the policy. At best a few might be built, but not a quantum which should be an influencing factor or set a so called emerging character."*

13. The Council repeated this theme in its closing submissions made on 24 May 2018 where it stated:

*"81. Very few have gone to market as far as we can tell, let alone achieving the benchmark 80% pre-sales that would typically be required to attract bank lending. None seem to have building approval, construction drawings or the like which might otherwise indicate an advanced stage of preparation for actual construction. So much for the 'emerging' character.*

*82. With this in mind, we urge the Review Panel to be very careful about accepting that existing permits should be afforded any significant weight in determining the so called emerging character of an area...."*

14. The Panel should be extremely cautious in supporting the submissions of the Council. A planning permit is an accrued right under the *Interpretation of Legislation Act 1984* (Vic). It is not and has never been a recognised principle that a permit is of questionable value until a developer can show that 80% of the approved development has been sold.
15. SM253's use and development permit was only issued in December 2017, after the Framework was released *and* with the consent of the Minister for

Planning and the City of Port Phillip. It would never have been in a position to advance to the Panel in May 2018 that 80% of its development was sold, given how recently the permit was issued. However, it has already taken significant steps in reliance on the permit. Extensive design work is being undertaken in order to obtain endorsed plans, a statement of environmental audit will be issued in July 2018, contracts of sale have been prepared with sales agents approached and marketing strategies prepared and negotiations with the construction contractors are underway.

16. It is anticipated that the development will be put to the market in 2018 and will form part of the character of the Montague precinct.

### **Conclusion**

17. It is respectfully submitted that the Panel should recommend that the Minister adopt the changes to the Amendment documentation outlined in this submission which have the effect of providing transitional provisions for existing permits granted before the approval date of Amendment GC81.

13 June 2018

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Instructed by Herbert Smith Freehills

## Annexure A

Control	Amendment
Schedule 1 to the Capital City Zone (Port Phillip), Clause 1.0	Deletion of the condition relating to exceedance of the residential FAR in the section 2 use table for "Accommodation" and "Dwelling"
Schedule 1 to the Capital City Zone (Port Phillip), Clause 2.0	<p>Inclusion of a new provision for Land Use as follows:</p> <p><i>These requirements do not apply to an application for the use of land in accordance with a planning permit for buildings and works issued before the approval date of Amendment GC81.</i></p>
Schedule 1 to the Capital City Zone (Port Phillip), Clause 3.0	<p>Inclusion of a new provision for Subdivision as follows:</p> <p><i>This requirement does not apply to an application for the subdivision of land in accordance with a planning permit for buildings and works issued before the approval date of Amendment GC81</i></p> <p>Inclusion of a new provision for Subdivision that in respect of the requirement for car parking to be contained in a consolidated title:</p> <p><i>These requirements do not apply to a subdivision of land in accordance with a planning permit for buildings and works issued before the approval date of Amendment GC81</i></p>
Schedule 1 to the Capital City Zone (Port Phillip), Clause 4.0	<p>Inclusion of a new provision for Buildings and Works as follows:</p> <p><i>This requirement does not apply to an application to amend a permit issued before the approval date of Amendment GC81</i></p>

	<p>Deletion of the prohibition on the "amendment" of permits in respect of no cross over roads and FAR.</p> <p>Inclusion of a new provision that a permit must not be granted which would exceed the FAR unless:</p> <p><i>For a permit amendment, the extent of non-compliance with the floor area ratios in Table 1 is not increased</i></p>
<p>Schedule XX to the Design and Development Overlay (Port Phillip), clause 2.0</p>	<p>Inclusion of a new provision that the requirements specified in the DDO for an application for buildings and works do not apply to:</p> <p><i>An application to amend an existing permit granted before the approval date which does not increase the extent of non-compliance with the requirements</i></p>