

**FISHERMANS BEND PLANNING REVIEW PANEL
APPOINTED BY THE MINISTER FOR PLANNING
PLANNING PANELS VICTORIA**

**IN THE MATTER OF AMENDMENT GC81 TO THE
PORT PHILLIP AND MELBOURNE PLANNING SCHEMES**

SUBJECT LAND: 272-280 Normanby Road, South Melbourne

**SUBMISSIONS ON BEHALF OF
SAMMA GROUP AND
SPEC PROPERTY DEVELOPMENTS PTY LTD**

Introduction

1. These submissions are made on behalf of Samma Group and Spec Property Developments Pty Ltd (**Submitters**¹), in relation to land at 272-280 Normanby Road, South Melbourne (**Land**).
2. These submissions are supported by the expert evidence of:
 - (a) Mr Craig Czarny of Hansen Partnership Pty Ltd;
 - (b) Ms Julia Bell of David Lock Associates; and
 - (c) Ms Charmaine Dunstan of TraffixGroup.
3. As required by the Review Panel, the evidence filed on behalf of the Submitters is based upon the Review Panel Day 1 version of the proposed controls (document 66), and this is the version dealt with in these submissions.
4. The Minister's Part C Submissions version of the proposed controls (document 307) is addressed briefly at the end of these submissions, noting that the Submitters and their expert witnesses have not had sufficient time to review this version in full.

¹ Submitter no. 202.

Background

5. The Samma Group is a group of Melbourne-based businesses that operate in the property industry, covering development, construction, acquisitions, property management and building services. Spec Property Developments Pty Ltd is one of the companies that forms part of the Samma Group. SDJ Property Fifteenth Pty Ltd (as trustee for the SDJ Settlement Trust No. 15) (**SDJ**) is also part of the Samma Group.
6. In December 2017, SDJ entered into a binding contract of sale to purchase the Land. The sale contract was exchanged and the purchase of the Land finalised in January 2018.
7. As further explained below, the Submitters and SDJ proceeded with the purchase of the Land in reliance on representations by the Minister's advisors and officers of the Department of Environment, Land, Water and Planning (**DELWP**). Those representations were that the current planning application for the Land would be assessed on the basis of the current, not proposed, planning controls that apply to the Land.
8. A planning application for a 40-storey mixed-use development (**Permit Application**) was lodged with the Minister in May 2016 by the previous owner of the Land.
9. The Submitters formally took over the Permit Application when SDJ entered into the contract of sale for the Land. However, the Submitters had been in discussions with the Minister's advisors and DELWP officers prior to then, including as part of their due diligence prior to purchase of the Land.
10. Relevant events which occurred during the Submitters' management of the Permit Application include:
 - (a) a meeting on 30 November 2017 with a Senior Advisor to the Minister and the then Acting Director of Development Approvals within DELWP;

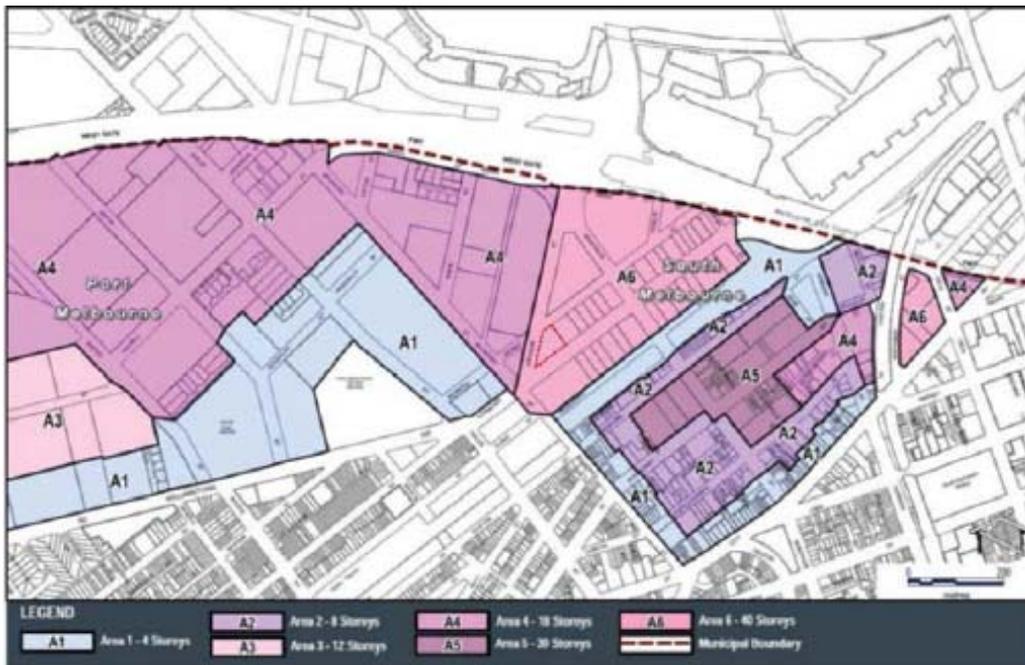
- (b) another meeting on 14 December 2017 with a Senior Advisor and an Advisor to the Minister and the then Acting Director of Development Approvals within DELWP;
 - (c) another meeting on 20 December 2017 with an Advisor to the Minister;
 - (d) another meeting on 12 January 2018 with an Advisor to the Minister, the Manager of Development Approvals in DELWP and a Planning Officer of DELWP, who made representations to the effect that they would finalise a recommendation to grant a permit and put this to the Minister by 31 January 2018, provided certain amendments were made to the Permit Application;
 - (e) the formal amendment of the Permit Application on 19 January 2018; and
 - (f) the receipt of various correspondences that make representations that the Planning Application was supported as assessed under the current planning controls for the Land.
11. The Planning Application was called-in by the Minister on 21 February 2018.
 12. The Minister has advised that the Permit Application will not be determined until Amendment GC81 is approved and a subsequent Advisory Committee process has been undertaken.

The Land

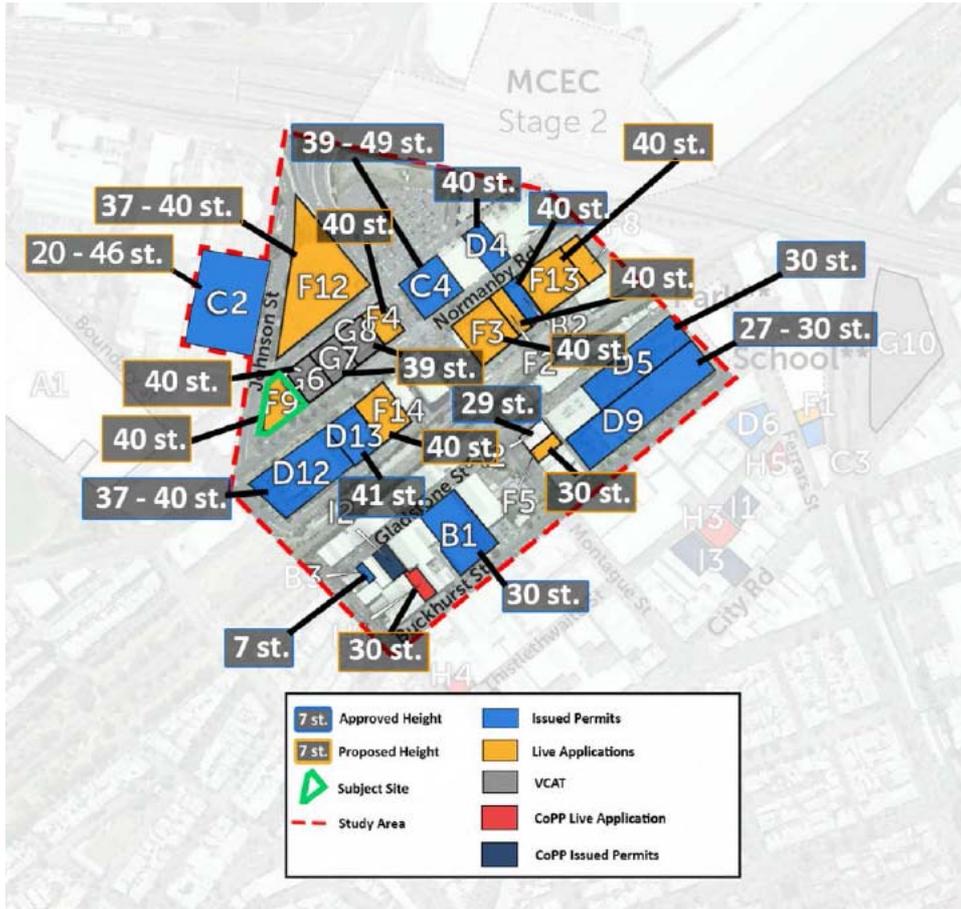
13. The Land is approximately 2,614m² in area and located in the “Montague Precinct” on the north-east corner of Normanby Road, Johnson Street and Munro Street as depicted below:



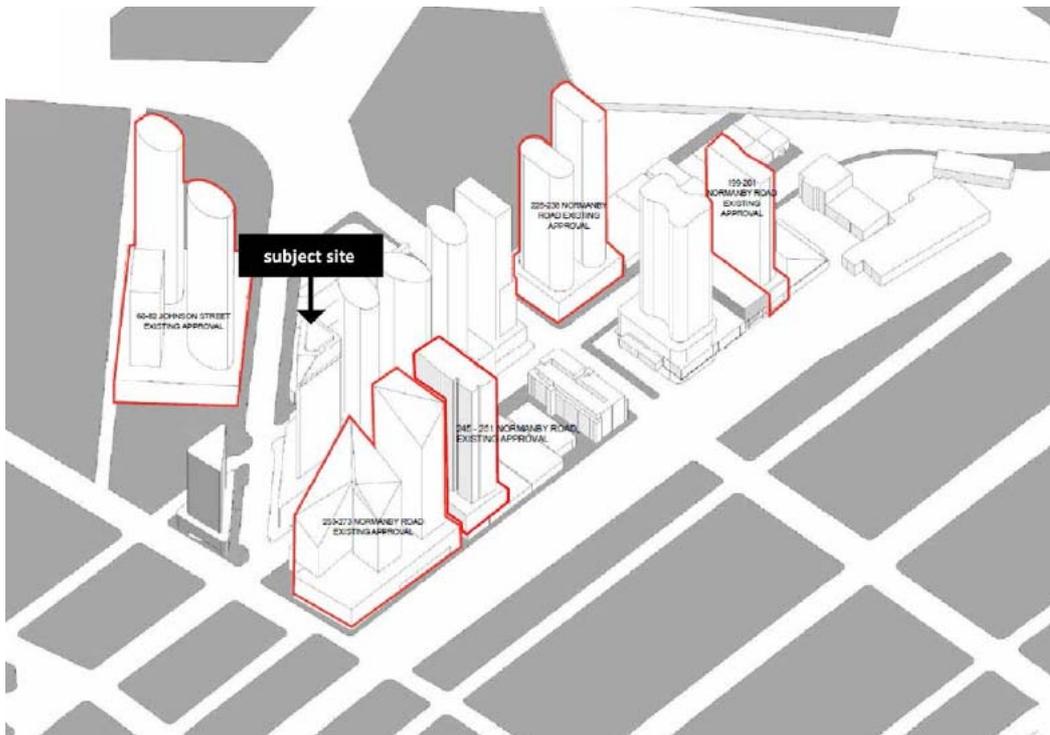
14. It is currently within Area A6 of DDO30 in the Port Phillip Planning Scheme, which allows the greatest height in Fishermans Bend (40 storeys) as depicted below:



15. The surrounding area has a number of development approvals and proposals as depicted below:



16. This is depicted in three-dimensional form, with approved envelopes highlighted in red, below:



17. The Permit Application is for a 40-storey mixed use development (depicted below) comprising:
- (a) A five-storey podium accommodating car parking skirted with retail, with a 35-storey tower above accommodating 289 apartments (56 x 1 bedroom, 176 x 2 bedroom and 57 x 3 bedroom);
 - (b) A 4.5m wide through block pedestrian connection from Normanby Road through to Munro Street at ground level along the eastern boundary;
 - (c) 215 car parking spaces; and
 - (d) A 10m setback to all boundaries above the podium.



Proposed Controls

18. The Land would be subject (relevantly) to:
- (a) a discretionary maximum building height limit of 67.8m or 20 storeys;
 - (b) a mandatory street wall height limit of 23m or six storeys;

- (c) a discretionary minimum setback of 10m and a mandatory minimum setback of 5m for buildings up to 68m in height, or a mandatory minimum setback of 10m for buildings above 68m in height;
- (d) a mandatory minimum side and rear setback 10m (or 5m for “non-amenity” walls above 30m and up to 68m in height);
- (e) a maximum car parking rate for dwellings of 0.5 spaces per dwelling;
and
- (f) an applied FAR of 6.1:1, with an additional non-dwelling FAR of 1.6:1, which must not be exceeded unless a public benefit is provided.

General position on the Amendment

19. The Submitters adopt the submissions made by Mr Canavan, Mr Tweedie and Ms Sharp on 12 April 2018 (document 252) in relation to the proper scope of the Review Panel’s task under the Terms of Reference. The Submitters also adopt the submissions made by Mr Canavan, Mr Tweedie and Ms Sharp on 19 April 2018 (document 253), and the submissions made by Ms Collingwood on 30 April 2018 (document 276), in relation to the general deficiencies of the Amendment. Together, these submissions are referred to as the Landowners’ Submissions.
20. In particular:
 - (a) The population target of 80,000 lacks a sound strategic basis and cannot properly inform the Amendment, and particularly the built form controls;
 - (b) The proposed discretionary maximum heights lack a sound rationale, as they are derived from a maximum population target of 80,000 residents;
 - (c) The Amendment is premature because:
 - (i) The State has not committed to fund key infrastructure, such as public transport;

- (ii) The State has not identified the metro rail route and stations within Fishermans Bend;
 - (d) The Amendment inappropriately uses the proposed FAR/FAU regime as a density control, without strategic justification; and
 - (e) Even if the use of the FAR/FAU regime is acceptable in principle, the numerical FARs adopted are unjustified and have the potential to suppress development.
21. The Amendment is inappropriate and the Review Panel should advise the Minister accordingly.

Built form controls in search of a rationale

22. The Submitters rely on the expert evidence of Ms Bell as to the absence of an urban design rationale for the proposed height limit and FAR.
23. Tower heights in Montague North were reduced for two known reasons, namely, to:
- (a) align with revised density targets; and
 - (b) increase the amount of sunlight reaching the southern side of streets, particularly Normanby Road.²
24. To set height limits based on an arbitrary set of density targets to achieve an arbitrary overall population target amounts to a policy or political decision, rather than a decision motivated by urban design considerations. Urban design should not be concerned with population control or social engineering, but with creating great urban places to live, work and visit.
25. The decision to set an overall population target and reverse-engineer a set of built form controls back from that target should be understood as a political decision absent any strategic basis or transparency. Further, metropolitan population growth is beyond the Minister's or even the State's control: the population that cannot be accommodated in this part of the Central City will have to be accommodated elsewhere. This is contrary to strategic policy

² Urban Design Strategy, p 88.

that seeks to optimise the development potential of well-located, well-serviced Central City land of State significance.

26. The use of an overall population target and precinct-specific density targets to determine built form controls should be rejected for all of the reasons set out in the Landowners' Submissions.
27. As for sunlight penetration to Normanby Street, a 20-storey building would overshadow the southern side of Normanby Street between 12pm and 2pm at the equinox.
28. Sunlight penetration cannot be a sensible basis for setting a discretionary height limit of 20 storeys.
29. The 20-storey height limit is not justifiable based on other urban design considerations such as adjacency to a sensitive low-rise or heritage area, lack of access to public transport or off-site amenity. In fact, the Land has few urban design constraints.
30. Ms Bell's analysis demonstrates that, aside from having no urban design rationale, the 20-storey height limit will result in built form that is out of character with surrounding approvals.
31. Further, the mandatory street wall height limit and side and rear setbacks will deprive the Land of the opportunity to accommodate a building that appropriately marks this important corner location, and will inhibit a flexible design response.

A case study

32. The Minister has submitted that the called-in applications, including the Permit Application, "are not relevant to the Review Panel's deliberation".³
33. One reason the Permit Application is relevant is that it provides a case study for the kind of development that the Department's and Minister's advisors – in consultation with the Minister - considered to be acceptable less than six months ago, that would now be prohibited by the Amendment.

³ Minister's Supplementary Submissions to Part B Submissions, 28 March 2018, para 83.

34. In that context, it is relevant to note that the existing controls are similar to the Amendment in that they mandate:
 - (a) a street wall height of 20m/5 storeys (compared with 23m/6 storeys as proposed);
 - (b) a setback of 10m above street wall (this is proposed to remain the same in respect of buildings greater than 68m in height); and
 - (c) a tower separation of 20m (this is proposed to remain the same).
35. The critical difference is the mandatory height of 40 storeys is proposed to change to a discretionary height of 20 storeys, with a mandatory maximum FAR.
36. Mr Czarny has undertaken an urban design assessment of the Permit Application, not against the existing or proposed planning controls but in the context of the approved urban morphology surrounding the Land and the Urban Design Guidelines for Victoria.
37. His assessment is that:
 - (a) The Land is a strategically important intersection on the approach to the CBD that holds 'pride of place' as a location, which is both visually prominent and important to the legibility of the district;
 - (b) It is not appropriate to curtail the design response to this important corner site, which deserves a bespoke landmark design response;
 - (c) Montague North is appropriate for the extension of the Central City urban design language and the realisation of an urban form that sits marginally below the Central Hoddle Grid skyline;
 - (d) The profile of the streetscape will largely be defined by the arrangement of tall 40-storey podium and tower forms when viewed from the west; and
 - (e) The Permit Application sets a high urban design benchmark, employing a tapering building top that rakes away from the corner in a manner that is both visually interesting and dynamic in the viewshed.

A question of fairness

38. Another reason the Permit Application is relevant relates to an objective of planning in Victoria to provide for the fair development of land.⁴
39. It has long been a principle of planning law that a permit application falls to be determined in accordance with the provisions of the planning scheme as at the time of the decision.⁵ Had the Permit Application been determined within the statutory time frame, it would have been determined based upon the existing planning scheme. The Minister has subverted this process by calling-in the Permit Application.
40. In preparing amendments to planning schemes, planning authorities frequently recognise the potential for unfairness where an application for a planning permit was lodged prior to, but not determined by, the date on which the relevant scheme is amended. In order to prevent the retrospective application of a scheme amendment on a permit application, scheme amendments commonly contain transitional provisions, particularly where they will result in changes to planning controls as opposed to planning policy, and where they will introduce mandatory planning controls.
41. There are multiple examples of such transitional provisions in the Port Phillip Planning Scheme, including in the:
- (a) Mixed Use Zone;
 - (b) Residential Growth Zone;
 - (c) General Residential Zone;
 - (d) Neighbourhood Residential Zone;
 - (e) Commercial 1 Zone;
 - (f) Special Use Zone;
 - (g) Comprehensive Development Zone;
 - (h) Capital City Zone;

⁴ *Planning and Environment Act 1987*, s 4(1)(a).

⁵ *Ungar v City of Malvern* [1979] VR 259.

- (i) clause 52.16; and
 - (j) clause 52.17.
42. Indeed, Amendment C270 to the Melbourne Planning Scheme - upon which the Minister and many of his witnesses have placed weight - included transitional provisions (see for example the Capital City Zone Schedule 1).
43. In this case:
- (a) the Permit Application had been prepared and lodged based on the existing planning scheme provisions;
 - (b) the Submitters purchased the Land based upon representations by the Minister's office and DELWP that the Permit Application would be assessed based on the existing planning scheme provisions;
 - (c) the Submitters amended the Permit Application based on representations by the Minister's office and DELWP that it would be assessed against the existing planning scheme provisions and recommended for approval; and
 - (d) the Submitters did not exercise their right to apply for review of the Minister's failure to determine the Permit Application based on those same representations by the Minister's office and DELWP.
44. In those circumstances it is particularly unfair for the Minister to propose an Amendment with no transitional provisions to protect the legitimate expectations of existing permit applicants.

An onerous and premature car parking rate

45. The Submitters rely on the expert evidence of Ms Dunstan that:
- (a) the proposed parking rate set out in the Parking Overlay, limiting car parking provision to only 0.5 car spaces per dwelling (compared to 1.0), is more onerous than would apply to other Capital City zoned land that is better served by public transport;

- (b) there is not sufficient certainty regarding when public transport services, particularly metro rail, will be extended into Fishermans Bend to support such a low rate of provision; and
- (c) 0.5 car spaces is substantially too low for dwellings of 3 or more bedrooms.

Implications of Minister's Part C version of the Amendment

- 46. The definition of "Public Benefit" in the Capital City Zone schedule and local policy now only includes social housing as defined in the *Housing Act 1983*. It previously included community facilities, open space and affordable housing, all of which were included in the Permit Application. This change is inconsistent with the guidance note 'How to Calculate Floor Area Uplifts and Public Benefits in Fishermans Bend' and with the draft Fishermans Bend Framework.
- 47. The local policy now seeks provision of 20% affordable housing, of which 6% is Social Housing. The explanatory table suggests this is in response to City of Port Phillip submissions and to achieve consistency with the draft Framework. However, neither Social Housing nor the figure of 20% is referred to in the Framework.
- 48. These changes will have a significant effect on the ability of any landowner to access a FAU.

Conclusion

- 49. The Review Panel should advise the Minister that the Amendment is inappropriate and should be abandoned.
- 50. Alternatively, the Review Panel should advise the Minister to rewrite the Amendment having regard to the Landowners' Submissions and in particular to the evidence called by the Submitters.
- 51. The Review Panel should advise the Minister that any scheme amendment relating to Fishermans Bend should contain transitional provisions to

protect existing permit applicants from the retrospective operation of that amendment.

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Instructed by Minter Ellison

18 May 2018