

IN THE MATTER OF  
PROPOSED AMENDMENT GC81 TO THE MELBOURNE  
AND  
PORT PHILLIP PLANNING SCHEMES  
FISHERMANS BEND REVIEW PANEL

**OUTLINE OF SUBMISSIONS ON BEHALF OF  
THIRD STREET PTY LTD**

**Introduction**

1. These submissions are made on behalf of Third Street Pty Ltd, Submitter 217 to this Review Panel. (**Third Street**).
2. Third Street is the owner of a land at:
  - a) 320 Plummer Street, Port Melbourne
  - b) 365-391 Plummer Street, Port Melbourne
  - c) 17 Rocklea Drive, Port Melbourne
3. All three land parcels are in the Wirraway Precinct.

**320 Plummer Street, Port Melbourne**

4. This land parcel has an area of 7,450sqm with frontages to Plummer Street, Prohasky Street and Tarver Street.
5. Pursuant to the Proposed Amendment, 320 Plummer Street lies in the Wirraway Precinct with the northern half in the Core Area (FAR 4.1:1) and the southern half in the Non-Core Area (FAR 2.1:1 and 70% site coverage).
6. A maximum dwelling density per hectare of 131 (Non-Core) – 139 (Core) is proposed pursuant to Clause 22.XX (Doc #66D).
7. A preferred height of 35.8m to the north and 23m to the south is included in the DDO (Doc #66F) with a primary active frontage along Plummer Street as well as

neighbourhood park (width not specified) along this frontage (Map 3 Overshadowing DDO Doc #66F noting it is not shown in Map 3 CCZ Doc 156A)<sup>1</sup>.

8. Prohasky South Open Space lies to the west over Prohasky Road noting this is nominated as a District Open Space where no additional shadow between 11am and 2pm is permitted between 21 June and 22 September.
9. The land lies in the W2 Precinct pursuant to the proposed MSS Clause 21.06 (Doc #66C) noting it appears to be Precinct W3 in Doc #156B.
10. The site enjoys the benefit of a valid Planning Permit No. MPA14/0005 issued in 2015 for three residential towers of 15, 12 and 12 storeys comprising dwellings, retail and parking. The Permit was issued at the direction of the VCAT (compulsory conference). The Permit has been amended twice, once in October 2015 and once in October 2016 (by order of the VCAT). The commencement date for the Permit was extended by the Minister in May 2017.
11. Plans have been endorsed under the Permit, and the Permit has already been acted upon. Demolition has been completed. A construction contract has been executed, a builder engaged and piling works are well under way. It is anticipated that construction will be complete by first quarter of 2020 (with progressive completion of various elements from 2019).
12. 219 of the 323 residences in Towers 1 and 2 have been sold.
13. Once again, this project demonstrates the falsity of the Minister's assertions that permits that have been granted within Fisherman's Bend are speculative and/or unviable, and are being held merely to inflate land prices.

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<sup>1</sup> It is also noted that the Framework page 77 and Map 3 CCZ Doc #156A show "new public open space" along Traver Street which varies from Map 3 DDO Doc 66F. Further, the DDO controls with regard to overshadowing of this neighbourhood park in Table 7 appear to be repeated or potentially confusing (noting it is not clear whether the "Street" shadow requirement applicable to the "first 6 metres north of property boundary" refers to the existing property boundary or the property boundary after the neighbourhood park has been transferred to Council) and Map 3 does not include the nomination of the area as "D" although Table 7 appears to refer to this area. (see Docs #66F, #262B – noting #262A does not appear to have any Maps attached at all)

14. Further, it demonstrates why it is absurd not to take these approvals into account when considering the nature of any future built form controls, or the future character of the precinct.

### **365-391 Plummer Street, Port Melbourne**

15. This land parcel comprises of three lots with a total area of approximately 1.95 hectares with frontages to Plummer Street (161m) to the south and Tarver Street (120m) to the east.
16. Pursuant to the Proposed Amendment, 365-391 Plummer Street lies in the Wirraway Precinct with the southern portion in the Core Area (FAR 4.1:1) and the northern much smaller portion in the Non-Core Area (FAR 2.1:1 and 70% site coverage).
17. A preferred height of 42.2m to the south and 80.6m to the north is included in the DDO (noting a slither of land to the north also appears to lie in an area nominated as 23m)<sup>2</sup>.
18. A public open space area (W9) of 1,211sqm (17% of the site) is shown on the land known as 371 Plummer Street (Doc #99A).
19. A proposed 22m road is nominated generally along the northern edge of the three land parcels.
20. A 10m landscaped setback is located along the Plummer Street frontage which appears to also be a “proposed road” (see Maps 2 and 3 Doc #66E).
21. A primary active frontage is nominated to Plummer Street and Salmon Street with a secondary active frontage to the new road to the north.
22. The Framework shows two indicative laneways east-west and north-south through the site (page 77).
23. The Site lies with Precinct W2 in the proposed MSS Clause 21.06.

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<sup>2</sup> It is submitted that it is not clear where the controls and maps align with regard to the property boundaries.

24. Planning Application No. PA1700209 was lodged in March 2017 for three residential towers of 12, 18 and 18 storeys comprising dwellings, retail and parking.
25. In October 2017 an appeal was lodged at VCAT and in February 2018, the application was called in by the Minister.

### **17 Rocklea Drive, Port Melbourne**

26. This land parcel comprises of an area of approximately 3,169sqm with a curved frontage to Rocklea Drive of 113m (to the east and south). The site abuts land associated with the Westgate Freeway to the north-west.
27. Pursuant to the Proposed Amendment, 17 Rocklea Drive lies in the Wirraway Precinct in the Non-Core Area (FAR 2.1:1 and 70% site coverage).
28. A preferred height of 23m is included in the DDO.
29. An elevated freight link and future pedestrian bridge located to the west of the site are included in the Framework although no details are provided.
30. The Site lies with Precinct W1 in the proposed MSS Clause 21.06.
31. Planning Application No. PA1700210 was lodged in February 2017 for an 18 storey tower comprising of dwellings, retail and parking.
32. In October 2017 an appeal was lodged at VCAT and in February 2018, the application was called in by the Minister.

### **The Proposed Amendment and the Third Street Land**

33. The evidence of Mr McGurn provides a summary of the existing and proposed planning controls affecting the Site.
34. The Wirraway Precinct evidence of Mr Sheppard provides an urban design overview of the Precinct, with his specific assessment of the Site included at pages 36-49.
35. In response to the exhibition of this Proposed Amendment, Third Street made a submission to the Minister dated 15 December 2017 (Submission 217). The submission raised numerous matters of concern including:

- a) Proposed heights are not justified and do not consider land ownership;
- b) Significant change from current controls;
- c) With regard to 320 Plummer Street:
  - (i) Apartments sold within development with reference made to existing height controls, being 12 storeys to east; and
  - (ii) Should be subject to less restrictive height designation, being corner site afforded by separation of 3 street frontages;
- d) With regard to 365 Plummer:
  - (i) Height of 12 storeys at corner of Plummer and Salmon Street does not provide opportunity for more intensive development given importance – shown as town centre in Wirraway Vision;
  - (ii) Encouraged to provide highest form on corner, transitioning to the north and west, in early pre-application discussions with DELWP prior to GC50; and
  - (iii) Unreasonable to prioritise minimisation of shadow over effective urban design outcomes;
- e) Setbacks are ambiguous, confusing inconsistencies and drafting errors and too many variables
- f) Built form controls should be performance based and not mandatory, as mandatory controls reduce architectural creativity and innovative design
- g) Floor area ratios will result in significant underutilisation of land and are at odds with designated heights;
- h) FAR will undermine vibrancy, activity and diversity of housing;
- i) Implementation of floor area uplift (FAU) is unclear and confusing;

- j) Proposed commercial floor area ratio of 1:9:1 in Wirraway Precinct unreasonably high, as area does not contain benefits of CBD in terms of transport connections and appeal for workers, being an urban renewal area;
- k) Dwelling densities grossly inadequate for significant urban renewal precinct; applying preferred dwelling density:
  - (i) 320 Plummer: 60 dwellings, compared with 497 as approved;
  - (ii) 365 Plummer: 271 dwellings; 917 less than proposed; and
  - (iii) 17 Rocklea: 41 dwellings; 383 less than proposed;
- l) Developments would not be commercially viable;
- m) Land would be significantly underutilised;
- n) Proposed mandatory car parking rate of 0.5 spaces per dwelling unreasonably low in absence of commitment for public transport infrastructure and will compromise travel to Fishermans Bend given there is currently no adequate alternative means of transport;
- o) Bridge upgrades affecting 17 Rocklea will be at odds with vision of Wirraway and will have significant implications on proximate residential developments;
- p) Location of identified public open space and new roads altered substantially from current controls;
- q) Public Open Space Strategy lacks justification as to why land identified for open space for example, new neighbourhood park proposed within north of 365 Plummer Street adjoining new 22 metre wide road, with 2 indicative laneways through site;
- r) There is no apparent offset benefits or uplift potential for contributions; and should consider potential uplift opportunities for sites burdened by mandatory requirements;

- s) Controls regarding no overshadowing at equinox is unreasonable, with open space being located to south of adjoining land, comprising 12 storey height designation;
- t) Overshadowing controls should not be mandatory, as this will affect future redevelopment;
- u) No apparent means to acquire land for identified parks and roads;
- v) This increases developer's uncertainty regarding commercial viability of projects in Fishermans Bend;
- w) Mandatory prohibition on crossovers from Plummer and Salmon Streets (except where new streets/laneways identified) could have unforeseen implications on future redevelopment;
- x) Location of crossovers should be based on detailed traffic assessments at time when development is proposed;
- y) Future population estimates for Fishermans Bend and Wirraway Precincts grossly underestimated;
- z) Will create urban renewal area that does not adequately respond to Melbourne's increasing population;
- aa) Will place unnecessary pressure on established residential areas of Melbourne/greenfield land;
- bb) No commitment to delivery of public transport or notable proposed infrastructure; therefore, no potential for delivery of public transport services for more than 5 years after expected completion of 320 Plummer Street;
- cc) Given lack of government commitment, Fishermans Bend will remain disconnected from Hoddle Grid, minimising appeal of area for residents and workers;

- dd) The drafting is ambiguous; for example the setback controls within DDO30, confusing mandatory and discretionary provisions, incorrect references to clauses and tables;
- ee) Lack of procedural fairness;
36. With respect to issues of procedural fairness, Third Street said (amongst other things) this:
- The way in which planning controls have been implemented since the rezoning of the land in 2012 raises concerns regarding procedural fairness.
- The rezoning demonstrated the Government's vision to transform Fishermans Bend from its industrial past to an active, mixed-use area. Notably, Plan Melbourne identifies Fishermans Bend as an expansion of the Central City.
- We purchased the sites based on an understanding of the development potential at the time, which was naturally, informed by current controls. With the introduction of Amendment GC50, without any forewarning and with no transitional provisions, we were required to fundamentally redesign the proposals for both 365 Plummer and 17 Rocklea.
- Both projects were at an advanced design stage and this resulted in substantial cost and timing implications to Third Street.
- Proposed Amendment GC81, if implemented without transitional provisions, would render both active planning applications for 365 Plummer and 17 Rocklea prohibited. The controls would have significant implications on the viability of the two developments.
- If the controls were to be approved, in the objective of fair and orderly planning, the provisions must contain transitional provisions be in place to protect existing permits and applications lodged before the approval date.
37. Third Street repeats and adopts those submissions and the oral and written submissions already presented to the Review Panel on behalf of the Landowners by Mr Canavan QC, Mr Tweedie SC and Ms Sharp, together with the evidence of the various witnesses called by the Landowners.
38. It agrees with the conclusions of Mr Milner that the proposed Amendment is fundamentally flawed.
39. It agrees with the evidence of Mr Shipp as to the inadequacies of the proposed funding arrangement for infrastructure, and agrees that the proposed Amendment should not proceed until a more suitable (and lawful) mechanism has been identified and prepared.

40. It adopts the additional submissions made by Morris QC as to the illegality of the mechanism proposed to acquire private land for public purposes without compensation.
41. With regard to the specific issues affecting Third Street properties, the evidence of Mr McGurn and Mr Sheppard is relied upon.

### **Specific Matters affecting Third Street**

42. The properties owned by Third Street are affected by the Proposed Amendment in varied ways. On the whole, however, the overall effect of the proposed Amendment on the land owned by Third Street would be significantly negative.
43. The controls would drastically reduce the development potential of that land.
44. In this regard, Third Street cannot be considered to be a party that has experienced a “windfall gain” as a result of the re-zoning in 2012. Instead, it is one of the many current landowners whose land would be significantly devalued as a consequence of the impact of the proposed Amendment were it to be adopted in its current form.
45. Third Street are a land development company. They purchased the relevant land at a time when it was zoned Capital City, and located in an Urban Renewal Precinct of State significance. They had a legitimate expectation that they will be able to develop the land in accordance with the relevant planning controls as they existed at the time they purchased the land. They had a legitimate expectation that, should those controls be changed that:
  - a) this would only occur after a fair process that included meaningful consultation notification, exhibition, and independent scrutiny; and
  - b) that existing permits and permit applications would not be disadvantaged by the introduction of new controls, but judged against the controls that existed at the time the permits were obtained, or the applications made.
46. In part, those expectations arose as a consequence of representations made publically by government that this would occur.

47. It must be born in mind that the realisation of **any** gain through the redevelopment of land involves, at the outset the expenditure of significant money by developers, and perhaps more importantly the acceptance of significant risk. Obtaining a commercial return on land development is neither easy, nor automatic. If Fishermans Bend is to realise its potential (even the absurdly limited potential ascribed to it by this proposed Amendment) it will require developers like Third Street to be prepared to spend that money and take that risk.
48. And no developer in their right mind would continue to assume these risks in a constantly shifting landscape of controls, where every change in government brings about a new change in the controls which appears to be designed (in part at least) to make a political statement about the old government.
49. Further, no developer would be prepared to undertake a project that is not commercially viable. The proposed Amendment does not propose controls that make development viable, far less attractive. They do not encourage developers to spend the money necessary to create exceptional built form outcomes (such as engaging leading architecture firms. They do not allow developers the latitude to work in partnership with planning authorities to deliver public benefit or public infrastructure by agreement rather than prescription.
50. The Third Street properties represent an obvious and concrete example of the absurdity of the density and built form provisions being proposed by Ms Hodyl. And perhaps no better example is 17 Rocklea Drive. There is simply no good reason that has been presented why the community requires the development potential of that land to be lowered so dramatically, or indeed any of the Third Street land.

### **320 Plummer Street**

51. With regard to 320 Plummer Street, in addition to general issues already raised, the main issues are:
  - a) First, as an existing Planning Permit exists for the site, the operation of Clause 3.0 and 4.0 of CCZ is of grave concern to Third Street noting submissions to this Review Panel that these provisions are proposing to unlawful constraints on the power of the responsible authority to amend a permit pursuant to Section

72 of the Act<sup>3</sup>. Further, these provisions may result in amendments to the existing permit being extremely problematic having regard to potential new permit triggers and the mandatory nature of the controls;

- b) Secondly, as an existing Planning Permit exists, transitional provisions should be provided having regard to any amendment to the Permit or extensions of time and to provide for certainty and fairness to an existing permit holder;
- c) Thirdly, the FAR and built form controls do not align with the existing Planning Permit and the future character of the area has not taken into account the built form which is already being lawfully constructed pursuant to the Permit;
- d) Fourthly, the built form controls (and the mandatory nature of many of the controls) do not promote a built form outcome that emphasises taller built form at key locations such as the site's location on three corners;
- e) Fifthly, the location of the site across Core and Non-Core areas and the differences between the (mandatory) FAR, height and site coverage requirements for these areas is artificial and unnecessary having regard to the location of the site with regard to the Plummer Street activity centre and the future tram route and metro train route;
- f) Sixthly, the mandatory nature of the overshadowing controls to Prohansky South Open Space is onerous and unnecessary given the layout of the park is not yet determined; and
- g) Lastly, the inconsistencies between the Framework, the CCZ and the DDO and hasty drafting of the proposed controls having regard to the potential neighbourhood park/public open space along Plummer Street/Tarver Street and the mandatory overshadowing controls.

52. Having regard to the existing Permit, both Mr Sheppard and Mr McGurn identify that the development approved under the Permit would be prohibited under the Proposed Amendment because of:

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<sup>3</sup> *Seventh Columbo Pty Ltd v Melbourne City Council* [1998] VSC 7.

- a) the application of the FAR controls; and
  - b) the location of the proposed neighbourhood park along Plummer Street.
53. It is submitted that there is no evidence or indeed submissions made to this Review Panel that the development approved under the Permit would adversely impact on Fishermans Bend or fail to deliver a net community benefit.
54. There is no good reason why controls should be drawn which would effectively preclude this kind of development outcome, or make it conditional upon the exercise of onerous and unnecessary built form and shadow controls and a poorly defined, unreviewable and arbitrary FAU decision by the Minister.
55. Further, even if this were not the case, the failure of the Proposed Amendment to recognise, or protect, existing permits is a significant flaw. It is fundamentally unfair not to do so, as well as being bad planning.

### **365-391 Plummer Street**

56. If the proposed Amendment were to be approved in its current form, the proposed development of this land submitted to DELWP and now called in by the Minister would be prohibited as a result of:
- a) the application of the FAR controls;
  - b) the location of the proposed open space to the north;
  - c) the 6m road widening along the Plummer Street frontage;
  - d) the location of the proposed new road to the north (different location and width between the proposed controls and that shown in the planning application);
  - e) the indicative laneway east-west through the site; and
  - f) the indicative laneway north-south through the site (different location and width to the proposed controls and that shown in the planning application).
57. Significantly, although the mandatory nature of the proposed controls means that the application is prohibited, the planning application before the Minister already

provides a number of similar public benefits that are sought through the Proposed Amendment including:

- a) A road to the north from Salmon Street for access to the site car parking;
- b) A landscaped north-south-west link through the site;
- c) A landscaped east-west link which meets up with the north-south link;
- d) No vehicle crossovers to Plummer Street or Salmon Street;
- e) Car parking effectively “hidden” from view;
- f) Active frontages to Plummer Street and Salmon Street with proposed retail and supermarket uses; and
- g) Accommodation use to street frontages.

58. All of these desirable elements of the proposal have been provided through the application of the existing discretionary controls.

59. It is submitted that this is an example of where performance-based controls effectively provide public benefits and good urban design outcomes. It is submitted it is simply unnecessary to include onerous mandatory controls as in this Proposed Amendment to achieve a net community benefit.

60. Whilst the application does not involve the “gifting” of land (the three roads/laneways and the open space of 1,211sqm) to Port Phillip City Council through transferral without compensation, as already submitted to the Review Panel on numerous occasions, the Landowners submit the Proposed Amendment is unlawful in this regard. The oral and written submissions of Mr Canavan Qc, Mr Tweedie SC and Ms Sharp are relied upon.

61. Having regard to the specific issues associated with 365-391 Plummer Street, Third Street draws attention to the following issues:

- a) The large area of the site that is required to be gifted to Port Phillip City Council under the Proposed Amendment, noting that all of these elements will provide

broader benefits than just to the site and accordingly the “cost” of the land and construction should be properly shared amongst beneficiaries including landowners (with regard to the new road and laneways), Vicroads (with regard to the Plummer Street road widening) and Port Phillip City Council (with regard to the new public open space);

- b) The FAR of 4.1:1 and density of 131-139 dwellings per hectare that applies to the site notwithstanding its location within an Activity Centre in an Urban Renewal Precinct on a future tram and train route; and
- c) The lack of transitional provisions for existing lawfully-made planning applications.

## **17 Rocklea Drive**

62. Regarding 17 Rocklea Drive, aside from the issues raised above and in the Landowners Overarching oral and written submissions, Third Street raises the following specific issues:

- a) The isolated nature of the site having regard to any sensitive interfaces and the opportunity this offers for substantial redevelopment in an urban renewal area that is potentially squandered through this Proposed Amendment because of the preferred height of 23m, the proposed density of 131 dwellings per hectare, the low FAR 2.1:1 and the unlawful and arbitrary FAU scheme;
- b) The interface of the site to the north-west to the Westgate Freeway and freight link which is unresolved in terms of route and detail but which may offer an opportunity for substantial height to reduce noise and wind effects into the precinct; and
- c) The lack of transitional provisions in the Proposed Amendment noting the significant difference between the existing controls and the existing planning application.

63. Finally, having regard to the parking provisions, Third Street relies on the evidence of Ms Dunstan noting her opinion that the rate for dwellings should be a maximum of

1 space per dwelling, not 0.5 per dwelling. The Landowners overarching submissions also address this issue.

### **Conclusion**

64. For the above reasons, together with overarching submissions and evidence provided to the Review Panel, and in reliance of the site-specific evidence of Mr Sheppard and Mr McGurn, it is submitted that the Review Panel should recommend that the proposed Amendment not proceed in its current form.

**10 May 2018**

**Nick Tweedie**

**Jane Sharp**

Instructed by Norton Rose Fulbright Australia