



**Date:** 3 June 2022

**Amendment C203port to the  
Port Phillip Planning Scheme**

**Part B Submission on behalf of Port Phillip City Council**

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## 1. Introduction

1. This submission is made on behalf of Port Phillip City Council (**Council**). Council is the Planning Authority for Amendment C203port to the Port Phillip Planning Scheme (**Scheme**).
2. On 23 May 2022, in response to Direction #6 of the Panel's Directions dated 11 April 2022 (**Panel's Directions**), Council circulated its Part A submission. The Part A submission addressed the following themes:
  - 2.1 Background to the Amendment;
  - 2.2 Strategic Context and Assessment;
  - 2.3 Issues Identified in Submissions; and
  - 2.4 Suggested Changes to the Amendment in Response to Submissions.
3. This submission responds to Panel Direction #14 requiring Council to address a number of matters in its 'Part B' submission, including in relation to the following issues:
  - 3.1 Council's response to the issues raised in submissions;
  - 3.2 Council's response to submissions and response to evidence;
  - 3.3 Any further changes Council proposes to make to the Amendment in response to expert evidence or submissions; and
  - 3.4 Council's position on the Amendment.
4. This submission seeks to establish that the Amendment has a sound strategic basis and will produce a net community benefit.

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## 2. Strategic context

5. As set out in Council's Part A submission, the Amendment:
  - 5.1 revises and updates local planning policies in the Scheme by implementing the findings of the Port Phillip Planning Scheme Review (**Planning Scheme Review**) as contained in the *Port Phillip Planning Scheme Review Audit Report (23 May 2018)* (**Audit Report**) and other key pieces of strategic work undertaken since that time;
  - 5.2 facilitates the integration of Council's local policy into the PPF as required by Amendment VC148 and the Victorian Government's Smart Planning Program which seeks to simplify and modernise Victoria's planning policy, and to make planning schemes more efficient, accessible and transparent;
  - 5.3 updates the local heritage policy to implement new *Port Phillip Heritage Design Guidelines (City of Port Phillip, 2021)* (**Heritage Design Guidelines**) which address known gaps and issues, and introduce the new Heritage Design Guidelines as a background document; and
  - 5.4 introduces new local VicSmart planning provisions.
6. The strategic basis of the PPF translation is clear. The Victorian Government's Smart Planning program introduced reforms to the planning system, including a new integrated PPF and MPS structure which was implemented via Amendment VC148 to all Victorian Planning Schemes in July 2018.
7. The PPF translation is required to ensure that the Scheme complies with the new PPF and MPS format. In accordance with the requirements for the PPF and MPS, the PPF translation will result in the streamlining of local policy.
8. As explained in Council's Part A submission, the Amendment involves:
  - 8.1 a policy neutral translation of some policy content; and
  - 8.2 some new policy content.
9. The strategic basis of the Amendment in response to the PPF, relevant Ministerial directions and the *Planning and Environment Act 1987 (Act)* is also explained in Council's Part A submission. That detail is not repeated here, save to note that it is consistent with the following objectives of s 4(1) of the Act:

- a) *to provide for the fair, orderly, economic and suitable use, and development of the land;*
- b) *to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;*
- c) *to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;*
- d) *to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;*
- ...
- f) *to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);*
- fa) *to facilitate the provision of affordable housing in Victoria;*
- g) *to balance the present and future interests of all Victorians.*

10. Further, the Amendment has been prepared to comply with:

- 10.1 *Ministerial Direction – Form and Content of Planning Schemes;*
- 10.2 *Ministerial Direction No 9 – Metropolitan Planning Strategy;*
- 10.3 *Ministerial Direction No 11 – Strategic Assessments of Amendments;*
- 10.4 *Ministerial Direction No. 14 – Ports Environs;*
- 10.5 *Ministerial Direction No 15 – The Planning Scheme Amendment Process;*
- 10.6 *A Practitioner’s Guide to Victorian Planning Schemes;*
- 10.7 *Planning Practice Note (PPN) 01 – Applying the Heritage Overlay;*
- 10.8 *PPN13 – Incorporated and Background Documents;*
- 10.9 *PPN32 – Review of Planning Schemes;*
- 10.10 *PPN46 – Strategic Assessment Guidelines;*
- 10.11 *PPN61 – Licensed premises: assessing cumulative impact;*
- 10.12 *PPN74 – Availability of planning documents;*
- 10.13 *PPN77 – Pre-setting panel hearing dates;*
- 10.14 *PPN94 – Land use and transport integration;*

- 10.15 *Planning Advisory Note 55 – VicSmart Planning Assessment;*
- 10.16 *Planning Advisory Note 71 – Amendment VC148 – Planning Policy Framework; and*
- 10.17 *Planning Advisory Note 72 – Amendment VC148 – Victoria Planning Provisions (VPP) and Planning Schemes.*

as relevant to the scope and content of this Amendment.

- 11. The strategic background and context for the Amendment is addressed in the submissions below. The strategic background and context for the heritage aspects of the Amendment is further described in the evidence statement of Mr Jim Gard'ner.

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### 3. Submissions

- 12. Council received nine (9) submissions in response to the public exhibition of the Amendment. Of these submissions:
  - 12.1 4 submissions were from agencies or government authorities which provided comment and/or did not object to the Amendment (one submitter); and
  - 12.2 5 submissions were from local residents/landowners.
- 13. A response to the issues raised by the submissions to the Amendment was set out in the Council Officer's report of 2 March 2022. Council adopts the responses set out in that report.
- 14. In summary, the key issues raised in submissions relate to:
  - 14.1 concern around Council's approach to heritage and assessing planning permit applications under the Heritage Overlay. Submitters request refinements to the Heritage Design Guidelines and proposed Clause 15.03-1L (Heritage) to address this;
  - 14.2 concerns that the proposed ESD policy has been weakened by the removal of references to best practice. Other changes to the ESD policy are also recommended by submitters;
  - 14.3 requests for the removal of exemptions to mandatory height controls in the Design and Development Overlay Schedule 26 (**DDO26**) relating to the St Kilda Road North Precinct; and

- 14.4 requests for the preparation of a stand-alone policy for rooming houses and social housing to manage amenity issues and regulate rents charged to tenants.
- 15. For the purposes of these submissions, the key issues are expanded upon and addressed under the following headings: Heritage; ESD Policy; Rooming houses; Other matters.

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## 4. Heritage

### What is the issue?

- 16. A number of submitters raised issues in relation to the heritage aspects of the Amendment, which include the following components:
  - 16.1 Introducing new Heritage Design Guidelines as a background document to the planning scheme, following consultation in 2019.
  - 16.2 Introducing a new Clause 15.03-1L (Heritage Policy) into the PPF.
  - 16.3 Updating the Schedule to Clause 43.01 (Heritage Overlay) to include application requirements and updates to reflect the Heritage Design Guidelines.
  - 16.4 Updating the *Fishermans Bend Estate Guidelines* and *Garden City Estate Guidelines* to align with the Heritage Design Guidelines.
- 17. Submitters made a number of suggestions to the heritage aspects of the proposal, including to:
  - 17.1 minimise duplication between the heritage policy and Heritage Design Guidelines by moving content to the Heritage Design Guidelines;
  - 17.2 amend the documents to support an interpretive approach rather than a contextual approach;
  - 17.3 strengthen demolition policies to discourage demolition by neglect and promote the adaptive reuse of heritage buildings;
  - 17.4 require that two structural bays be conserved when partially demolishing a commercial or industrial building;
  - 17.5 provide further direction around relocation;
  - 17.6 support adaptive reuse of buildings;

17.7 requiring the preparation of a heritage impact statement.

18. Council addresses these issues below.

**Clause 15.03-1L**

19. The key issues raised by submissions and evidence in relation to Clause 15.03-1L are addressed in the following section.

*Relationship between policy and the guidelines*

20. Submitter #5 suggests that amendments are needed to remove duplication between policy and the Guidelines. In particular, the submitter suggests amendments:

... restricting the Policy to more concise statements of the basic policies with the Guidelines as a follow-up and explanation of how the policies should be implemented, including specific recommended strategies, ie., identifying the constraints but without telling applicants how to achieve them.

21. To similar effect, the evidence of Mr Gard'ner is that:<sup>1</sup>

... aspects of the proposed Clause 15.03-1L, particularly the diagrams, are more appropriately included within the Heritage Design Guidelines as they demonstrate one or more ways in which a policy outcome can be achieved rather than being the only way in which it is intended that a particular strategy should be achieved.

22. Council does not agree that all figures should be moved to the Guidelines. It is longstanding planning practice to include illustrations and figures in Planning Schemes to assist understanding the provisions. There is nothing in recent directives or reforms, including in the Ministerial Direction on the Form and Content of Planning Schemes, *Practitioner's Guide to Planning Schemes* and various Planning Practice Notes to suggest that this is no longer appropriate, even in situations where a more detailed set of guidance is provided by way of a background document.

23. Diagrams have been included as examples on how to achieve the objectives of the Heritage Overlay and Heritage Policy. Some of the diagrams are positioned under the 'Policy Guidelines' section of the Heritage Policy. Consistent with the *Practitioner's Guide to Planning Schemes*, Council must take a relevant policy guideline into account when it makes a decision but is not required give effect to it. If Council is satisfied that an alternative approach meets the policy objective, the alternative may be considered. This is supplemented by the Heritage Design Guidelines that provide additional advice on the outcomes sought.

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<sup>1</sup> Evidence statement of Mr Gard'ner at [41].

24. Council also notes that clause 15.03-1L of the Boroondara Planning Scheme, recently gazetted in Amendment C354boro on 26 May 2022, contains diagrams under the heading 'Policy Guidelines'.

### *Strategies – Demolition and relocation*

25. Existing Clause 22.04-3 of the Scheme provides:

#### **Demolition**

Where a permit is required for demolition of a significant or contributory building, it is policy to:

- Refuse the demolition of a significant building unless and only to the extent that:
  - the building is structurally unsound;
  - the replacement building and/or works displays design excellence which clearly and positively supports the ongoing heritage significance of the area.
- Refuse the demolition of a contributory building unless and only to the extent that:
  - the building is structurally unsound, and either
  - the replacement building and/or works displays design excellence which clearly and positively supports to the ongoing heritage significance of the area, or
  - in exceptional circumstances the streetscape is not considered intact or consistent in heritage terms.

26. Proposed Clause 15.03-1L includes guidance on when demolition or relocation of buildings may be contemplated:

#### **Demolition and relocation**

Prioritise the conservation, restoration or adaptation of a heritage place over demolition.

Discourage the complete demolition of any building or feature that contributes to the significance of a heritage place unless the building or feature is structurally unsound and the defects cannot be rectified.

Avoid demolition where it would result in the retention of only the faced and/or external walls of a Significant or Contributory building.



...

27. Submitter #5 proposes a number of amendments and new strategies under this heading. As noted by Mr Gard'ner, many of these amendments would duplicate requirements under the Schedule to Clause 43.01-1.<sup>2</sup> Mr Gard'ner proposes two amendments in response to this submission, each of which Council supports.
  
28. The submitter also seeks to introduce a new strategy for 'demolition by neglect', commenting that "If there isn't a local law that deals with this, there should be". Mr Gard'ner's opinion is that the matter is more appropriately deal with under a Local Law.<sup>3</sup> Council acknowledges the intent behind the submission, but considers the existing strategy appropriate. If a building or feature is structurally unsound, and "cannot be rectified", it is not clear that there would be any heritage benefit in refusing demolition because the owner (or a previous owner) had allowed the building to fall into disrepair. Rectification would not be possible, however that situation had arisen.
  
29. The above submission is not to say that further protections against 'demolition by neglect' are not possible, either in the planning scheme or a local law. However, any further protection would require careful consideration independently of this Amendment.
  
30. Mr Gard'ner's evidence is that the proposed threshold beyond which demolition is discouraged — that the building or feature "cannot be rectified" — is unreasonably onerous, as reconstruction would be possible in almost any situation, assuming unlimited resources. He suggests the following changes:
 

Discourage the complete demolition of any building or feature that contributes to the significance of a heritage place unless the building or feature is structurally unsound and ~~the defects cannot be rectified~~ and rectification is unreasonable on financial or heritage grounds.
  
31. Council does not share Mr Gard'ner's concerns, because the policy directive is to "discourage" complete demolition, not to prevent it, avoid it, or (per the existing policy) "refuse" it. To discourage demolition where rectification is not possible does not amount to a requirement to rectify a structurally unsound building, wherever theoretically possible and whatever the cost.
  
32. The existing policy to "refuse" demolition has not been applied to require unreasonable rectification of unsound buildings. As noted by the Tribunal in *Ford v Port Phillip CC* [2017] VCAT 1348 at [23]:

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<sup>2</sup> Evidence of Mr Gard'ner at page 17.

<sup>3</sup> Evidence of Mr Gard'ner at page 17.

The non-compliance with the policy is a highly relevant and influential consideration, but it is not determinative. The discretion must still be exercised having regard to the specific facts and circumstances of the case, the site's physical and strategic context, and within the decision-making framework which seeks acceptable planning outcomes and net community benefit.

33. In that case, the relevant factors considered (although it was ultimately found that the building was not structurally unsound) included the extent and cost of the remedial works required, the extent and value of the heritage fabric that might be retained, and the broader heritage context.
34. In Council's submission it is better to include in the policy a requirement that "defects cannot be rectified" than to try to prescribe some or all of the particular reasons why a defect might validly be unable to be rectified. Those reasons, be they financial or practical, can be assessed on a case-by-case basis in the usual manner.
35. Finally, to the extent that the exhibited policy might be said to set a high bar (acknowledging that the policy cannot be a 'bar' or 'threshold'), Council says that this is appropriate. As acknowledged at paragraph 15.3 of the Burra Charter 2013 the demolition of heritage fabric is generally not acceptable. Council does not shy from the fact that its proposed policy seeks to ensure that demolition is appropriately justified.

*Strategies – Conservation*

36. The Clause 15.03-1L strategies for conservation include the following:

Encourage accurate ('like for like') replacement of features, details, materials or finishes that contribute to the significance of heritage places if they are damaged and cannot be repaired.

Encourage the accurate restoration or reconstruction of heritage places to a known earlier state, particularly publicly visible features such as:

- Verandahs, balconies and awnings.
- Doors and windows.
- Wall materials and details.
- ...

37. Submitter #5 proposes deletion of the reference to 'like-for-like' replacement of features, which is said to be:

... dangerous, because there needs to be a distinction between what exists, which may not be original or appropriate and the detail that would originally have been used.

38. Council does not share the submitter's concerns regarding the strategy to encourage 'like-for-like' replacements, because the strategy is limited to features "that contribute to the significance of heritage places". There is no real danger that the strategy might inadvertently encourage like-for-like replacement of features that are not appropriate.
39. The evidence of Mr Gard'ner suggests that the reference to 'like-for-like' replacement should be deleted and replaced by the words "or reinstatement" for a different reason: because like-for-like replacement would not require a permit.<sup>4</sup> Council does not agree that like-for-like replacement of a feature would not require a permit. Replacement of a roof, for example, would require a permit, even if it were in the same materials. Council's position is that no amendments to this strategy are warranted.
40. Mr Gard'ner's evidence proposes various other amendments to the conservation strategy, in response to Submitter #5.<sup>5</sup> Council supports Mr Gard'ner's proposed amendments, for the reasons given in his evidence.

#### *Strategies – Additions*

41. Existing Clause 22.04-3 of the Scheme includes the following policy and 'performance measure':

An upper storey addition is sited and massed behind the principal facade so that it preferably is not visible, particularly in intact or consistent streetscapes (see Performance Measure 1).

#### **Performance Measure 1**

Upper storey additions may meet the above policy for siting and massing if the following measures, as appropriate, are achieved:

- They are sited within an "envelope" created by projecting a sight line from 1.6 metres above ground level (this being the eye level of an adult person of average height) to the front parapet or gutter on the main façade and taken from a point where the footpath meets the property line directly opposite the site, where the property has a frontage to a narrow street (5 metres or less) or laneway (illustration 1), or

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<sup>4</sup> Evidence of Mr Gard'ner, Annexure II, at page 5.

<sup>5</sup> Evidence of Mr Gard'ner at page 17 and at Annexure II pages 5-6.

- They are sited within an “envelope” created by projecting a line of 10 degrees from the height of the base of the front parapet or gutter line on the main façade and extending to the rear of the heritage place (illustration 2 or 3), or
- In exceptional cases where the heritage place is located in a diverse streetscape and the design of the proposed addition is considered to be an appropriate contextual response, they are sited within an “envelope” created by projecting a line of up to 18 degrees from the height of the base of the front parapet or gutter line on the main façade of the heritage place.

42. Proposed Clause 15.03-1L includes the following strategy:

Support additions that are:

- Fully or substantially concealed if the associated building is within a heritage streetscape with a consistent scale or is a Significant place.
- Partially concealed if the associated building is within a heritage streetscape with a diverse scale and is not a Significant place.

Additions to buildings situated on corner sites (including to a laneway) should respond to the host building and the heritage character of both the primary street and side street or lane.

...

43. Proposed Clause 15.03-1L also includes the related ‘Policy Guidelines’:

Consider as relevant:

**Additions**

Additions to a residential heritage place should be contained within the following sightlines:

- A 10 degree sightline as shown in Figure 3 if the associated building is within a heritage streetscape with a consistent scale, or is a Significant place.
- An 18 degree sightline as shown in Figure 4 if the associated building is within a heritage streetscape with a diverse scale and is not a Significant place.
- A sightline taken from across the street in a narrow street less than 5 metres (Figure 5) or for the building types shown in Figure 6.
- Additions to a commercial heritage place should be contained within a sightline taken from across the street as shown in Figure 7 and Figure 8.

- Additions higher than one storey should have the same or greater side setbacks than those of the host building.

...

44. Submitter #5 proposes a near-total redrafting of the proposed strategies for Additions, as well as the introduction of extensive new strategies.
45. The evidence of Mr Gard'ner considers the submission and recommends several amendments in response.<sup>6</sup> Except as noted below, Council supports the amendments described by Mr Gard'ner for the reasons given by him, but otherwise does not support the amendments proposed by Submitter #5.
46. One of the amendments proposed by Submitter #5 is the deletion from Clause 15.03-1L of the policy guidelines that additions should be contained behind (depending on the circumstances) a 10 degree sightline, an 18 degree sightline, or a sightline taken from across the street. The deletion is proposed to be replaced by a reference to sightlines "illustrated in the *Heritage Design Guidelines*" because:

There seems to be little point in providing in the policy only a part of the detailed recommendations of the guidelines. Better to ensure that the applicant refers to the Guidelines. ...

47. Council submits that the sightline provisions should be retained in the Scheme because:
- 47.1 as described in the Victorian Government's *Practitioner's Guide to Planning Schemes*, policy guidelines can be helpfully included in planning policy:
- A planning policy may include policy guidelines. Policy guidelines indicate how an objective can be met and how a strategy can be implemented. A responsible authority must take a relevant policy guideline into account when it makes a decision, but is not required give effect to it. If the responsible authority is satisfied that an alternative approach meets the policy objective, the alternative may be considered.
- 47.2 the 'sightline' policy guidelines are among the most commonly-used in the existing Planning Scheme, and generally well understood;<sup>7</sup> and
- 47.3 the sightline policy guidelines illustrate how the heritage policy might be achieved, but also assists users of the Scheme to understand the intent of the policy without having to refer to background documents, external to the Scheme.

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<sup>6</sup> Evidence of Mr Gard'ner, at pages 16-18 and Annexure II page 6-7.

<sup>7</sup> As discussed later in these submissions.

48. The evidence of Mr Gard'ner suggests that the Additions strategy should be amended as follows:<sup>8</sup>

Support additions to residential buildings that are:

- Set back a minimum depth of two rooms to retain original or early fabric including the principal façade and primary roof form; and
- Respectful of the scale and massing of the heritage place; and
- Visually recessive against heritage fabric; and
- ~~Fully or s~~ubstantially concealed when viewed at natural eye-level from the opposite of the street if the associated building is within a heritage streetscape with a consentient scale or is a Significant place.
- ~~Partially concealed if the associated building is within a heritage streetscape with a diverse scale and is not a Significant place.~~

49. Mr Gard'ner also suggests that the related sightline policy guidelines and figures be deleted, for the reasons that:

The terms 'fully', 'substantially' and 'partially' concealed are not defined and it is my view that different levels of visibility or concealment should not be based on the grading of individual buildings.

Further, I note that setting new development back behind the front two rooms is consistent with the 'Demolition' guidance contained within the Heritage Design Guidelines.

While consistent with the existing Heritage Policy, the 10 degree and 18 degree angular plane diagrams do not appear to be based on a particular visibility (or concealment) outcome such as a natural eye-level view from within the heritage precinct. The diagrams included within Clause 15.03-1L should, in my view, be removed and included within the Heritage Design Guidelines to demonstrate one way of achieving "substantial concealment" along with a diagram that reflects a view/sight-line taken from the opposite footpath at natural eye level.

50. Council does not share Mr Gard'ner's concerns or consider that the 10 degree and 18 degree sightlines should be deleted from Clause 15.03-1L.

51. As noted by Mr Gard'ner, the policy guidelines do no more than demonstrate one way in which the policy — that additions be fully, substantially or partially concealed, depending on the context — can be achieved. The policy guidelines do not have the force of rules or strict

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<sup>8</sup> Evidence of Mr Gard'ner, at pages 18 and Annexure II page 6-7.

requirements that must be met. Rather, the policy guidelines (formerly called a ‘performance measure’) are an attempt to guide discretion.

52. The Tribunal has considered these provisions in several proceedings and generally found the ‘performance measure’ or policy guideline a helpful guide as to the degree of visibility that will ordinarily be acceptable. In *Ganly v Port Phillip CC* [2003] VCAT 1722 the Tribunal noted:

[32] The intention of the 10° rule is clear enough, and indeed, is expressed in the text of cl.22.04 and the Performance Measure 1. It is intended that any first floor addition should be sufficiently low and sufficiently far back as to not be visible from the front, or, at any rate, only to be visible but to a minor and unobtrusive extent. It is not easy to have a first floor addition to a single storey house of this scale, even set to the rear, without some part of it being visible, at any rate on oblique views.

[33] Nevertheless, I consider that the 10° rule produces a result where the addition, if visible, is kept to a minor and acceptable degree of visibility. This was illustrated in a series of photographs produced of single storey heritage area buildings that have had first floor rear additions that comply with that formula. Photographs of other, much less satisfactory results where the 10° was exceeded, were also produced.

53. Similarly, the Tribunal commented on these provisions in *Belokozovski v Port Phillip CC* [2015] VCAT 1046:

[61] The responsible authority, and its planning officer, were criticised on the basis of a suggestion of having elevated the Performance Measure 1 from a guideline into a prescriptive rule. I see no justification for such an assertion. The responsible authority, and its officers, are entitled to point to Performance Measure 1 and to regard it as the maximum intrusion that will ordinarily be allowed, rather than a starting point from which further intrusions are invited to encroach.

[62] As a guide, Performance Measure 1 is not an absolute rule. Its third proposition recognises the possibility of exceptional cases where, it suggests, sight lines might go up to 18 degrees. Even then, it is a guideline.

...

[65] If the standard was visibility or invisibility there could be a ‘yes’ or ‘no’ answer. Performance measure 1 admits of aggradation rather than a ‘black and white’ solution. Invisibility is acceptable, in the absence of other reasons for resisting demolition and rebuilding parts of a building not readily viewable from the street. From invisibility the gradation might pass through a hazy

zone where views might differ into an area where first floor additions would be clearly unacceptably intrusive.

[66] In my view the responsible authority is right to be caution and conservative in relation to its heritage areas, particularly ones as valuable and important (locally and on a metropolitan scale) as this area. Even Performance measure 1 might be too much in some contexts, but it appears as a maximum for ordinary circumstances in such as context as this one. ...

54. Submitters #5 and #6 recognise that the strategies proposed generally apply to a residential rather than commercial or industrial context. In response, Mr Gard'ner proposes the inclusion of a new strategy addressing additions to commercial and industrial buildings. For the reasons given by Mr Gard'ner, Council supports his proposed amendments.

#### *Strategies – Signage*

55. The proposed strategies in relation to signage are to:

Encourage the conservation of historic signs.

Encourage signs to be in traditional locations on heritage buildings, as depicted in Figure 1.

56. Consistently with his evidence as outlined above, Mr Gard'ner proposes deletion of the reference to Figure 1. Council does not agree that deletion of the Figure is appropriate, as it does more than elaborate on the ways in which a strategy might be achieved, but is important in understanding the meaning of the provisions.

#### **Clause 43.01 Heritage Overlay**

##### *Monuments and memorials*

57. The Amendment proposes to amend the schedule to clause 43.01 to include a number of decision requirements, relevantly including:

For applications for development in proximity to a monument or memorial with identified heritage value a report prepared by a suitably qualified person

58. Mr Gard'ner recommends against inserting this requirement, on the basis that the requirement for a condition or structural assessment of the potential impacts on a monument or memorial from nearby development may go beyond the relevant considerations under the Act.<sup>9</sup>

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<sup>9</sup> Evidence of Mr Gard'ner at [44], ninth dot point.



59. Council does not agree. The requirement is properly based in the considerations of the Act and the Scheme, including:
- 59.1 by providing for the fair, orderly, economic and sustainable use and development of land, which is an objective of planning in Victoria under the Act;<sup>10</sup>
  - 59.2 in the head clause of the Heritage Overlay which seeks to (among other things) to conserve and enhance heritage places of natural or cultural significance, elements that contribute to the significance of heritage places and to ensure that development does not adversely affect the significance of heritage places;
  - 59.3 clause 65.01 that requires a responsible authority to consider (among other things) the orderly planning of the area and the effect of a proposal on the environment, human health and amenity of the area.
60. The requirement is also given voice in the ‘Public realm and infrastructure guidelines’ of the Heritage Design Guidelines when its states:<sup>11</sup>

Avoid development that would:

- Obstruct views of a memorial or monument.
- Result in the removal of trees or other features that contribute to its setting.
- Require its removal or relocation
- Potentially impact upon its condition or structural integrity (for example, due to construction being carried out in close proximity).

61. In Council’s view, the requirement should be retained.

**Schedule to Clause 59.15 – Local VicSmart Applications**

62. As described in Council’s Part A submission, one of the primary purposes of the Amendment is to introduce local VicSmart application types into the Scheme. More specifically, it introduces two new Schedules to Clause 59.16 (Information requirements and decision guidelines for local VicSmart applications) to set out information requirements and decision requirements for specific classes of VicSmart applications:

- 62.1 applications under a Heritage Overlay; and
- 62.2 applications for licensed premises in the Commercial 1 Zone;

<sup>10</sup> *Planning and Environment Act 1987* s 4(1)(a).

<sup>11</sup> Heritage Design Guidelines (revised February 2021) page 75.

63. As described in the *Introduction of Local VicSmart provisions: Strategic Assessment Report* (October 2021), those categories are all intended to be for minor applications that are (with one exception<sup>12</sup>) already processed under Council's 'Fast Track' service.
64. In his evidence, Mr Gard'ner expressed some concern with three of those classes of application:<sup>13</sup>
- Externally alter a building if the alterations are located to the rear or side of the building and are not visible from the street (other than a lane) or public park.
  - Externally alter a roof, if the alterations are not visible from a street (other than a lane) or public park.
  - Construct or carry out works normal to a dwelling, including accessways, pedestrian paths or similar.
65. It appears that Mr Gard'ner's concern is that such works might be more than minor in scale, and so potentially lead to poor outcomes. Mr Gard'ner does not consider that introducing an explicit qualification that the alterations or works be 'minor' would be sufficiently clear.
66. An important requirement for eligibility to be processed under Council's existing Fast Track process is that applications are minor in nature.<sup>14</sup> The proposed VicSmart categories have been designed to capture those applications that are currently processed through Council's Fast Track;<sup>15</sup> that is, those that are minor in scale. Council considers that this is implicit in the drafting of the categories, for example, that alterations to a building or roof not be visible from a street.
67. However, Council would not object if this intention was clarified by the addition of an express qualification to each of the three categories that the alterations or works be "minor". Council does not consider that there would be any difficulty in determining whether any particular application was 'minor', and notes that its officers regularly make such assessments under the existing Fast Track process. Should this be preferred, Council suggests the following wording of the three categories:
- 67.1 ~~Externally alter~~ Minor external alteration of a building if the alterations are located to the rear or side of the building and are not visible from the street (other than a lane) or public park.

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<sup>12</sup> For licenced premises.

<sup>13</sup> Evidence of Mr Gard'ner at [46].

<sup>14</sup> See *Introduction of Local VicSmart provisions: Strategic Assessment Report* (October 2021) at 3.3.

<sup>15</sup> *Strategic Assessment Report*, at 8.

67.2 ~~Externally alter~~ Minor external alteration of a roof, if the alterations are not visible from a street (other than a lane) or public park.

67.3 Construct or carry out minor works normal to a dwelling, including vehicle accessways, pedestrian paths or similar.

68. Council also notes that any VicSmart application for works in the Heritage Overlay will continue to be referred to Council's heritage advisor to ensure proposals achieve appropriate heritage outcomes.

## The Heritage Design Guidelines

### *Strategic basis of the Heritage Design Guidelines*

69. At the outset, Council submits that the Heritage Design Guidelines are strategically sound; they are the product of extensive internal and external consultation and the detailed review of local heritage guidelines in Victoria and internationally.

70. As a background document to the Scheme the Heritage Design Guidelines will not form part of the planning scheme and accordingly, do not carry statutory weight in the same way that incorporated documents do. The Heritage Design Guidelines will provide background and explanation to the local heritage policy.

71. The Heritage Design Guidelines are intended to provide user-friendly guidance on what heritage outcomes are sought by Council and how they can be achieved. They seek to ensure that permit applicants and Council are on the same page when it comes to the appropriate heritage outcomes within the municipality and that there is greater consistency in how heritage values are addressed in planning decision making. In Council's view, this will be beneficial to all users and lead to more appropriate planning outcomes.

72. Mr Gard'ner agrees that the Heritage Design Guidelines are appropriately proposed to be included as a Background Document to the Scheme, serving as 'a valuable communication tool as to how the strategies within the heritage policy can be achieved'.<sup>16</sup>

### *Demolition guidelines*

73. Submitter #6 and Submitter #8 suggested that the demolition guidelines be updated with respect to places that do not have a Statement of Significance. Council recognises that many places graded as Significant do not have a Statement of Significance, and amended the Panel Version in response to read:

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<sup>16</sup> Evidence of Mr Gard'ner at [52].



addition is less than recommended by the Heritage Design Guidelines, again noting that the Heritage Design Guidelines are a background document and would not carry the same statutory weight as an incorporated document to the Scheme.

80. The evidence of Mr Gard'ner proposes other minor amendments to the Guidelines. Council supports those amendments for the reasons given by Mr Gard'ner.

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## 5. ESD Policy

### What is the issue?

81. Two submitters, Yarra City Council (#4) and the *Council Alliance for a Sustainable Environment (CASBE)* (#9), raise issues in relation to Council's proposed ESD policy at clause 15.02-1L (ESD). In particular, the submitters recommend that Council pursue a revised version of clause 15.02-1L that incorporates changes including:
- 81.1 the addition of a definition of best practice;
  - 81.2 amendments to the expiry clause, to replace the word 'comparable' with 'equivalent'; and
  - 81.3 addition of a policy guideline relating to consideration of ESD plan or framework.
82. Council addresses these issues in the strategic context of the ESD policy, discussed below.

### Strategic basis for the ESD policy

83. Council is a member of the *Council Alliance for a Sustainable Environment (CASBE)*, a collaborative alliance of Victorian councils committed to the creation of a sustainable built environment. CASBE's focus is applying widely accepted ESD principles to the built environment through the Victorian planning system, including through consistent planning controls.
84. CASBE worked proactively with DELWP to prepare a draft local ESD policy in the new PPF format. However, CASBE and DELWP did not agree on all aspects of the draft translated policy, with a key issue for CASBE being the removal of a definition of 'best practice' by DELWP.
85. The version of clause 15.02-1L (ESD) as adopted by Council on 7 July 2021, was consistent with CASBE's position on the drafting.

86. As a condition of authorisation of the Amendment, the Minister for Planning required Council to change the drafting of the proposed ESD policy at clause 15.02-1L. In particular, Council was required to update Clause 15.02-1L to be consistent with the Department of Environment, Land, Water and Planning (**DELWP**) standard template for local ESD policies provided to council officers via email on 29 September 2021.
87. Accordingly, Council's proposed clause 15.02-1L was amended to accord with DELWP's standard template for ESD policies.
88. CASBE has made a submission to the Amendment (as Submitter #9). CASBE was concerned that the removal of the definition of 'best practice' left the term 'open to interpretation'.
89. CASBE submitted that the term 'best practice' must be 'very clearly communicated within the body of the policy'. However, CASBE recognised that the new format of the PPF does not allow for this and therefore recommended a revised strategy be included in Clause 15.02-1L as follows:

*Achieve Best Practice environmentally sustainable development that:*

- *Is relevant to the type and scale of development;*
- *Responds to site opportunities and constraints;*
- *Utilises a combination of locally available techniques, methodologies and systems that have been demonstrated to achieve optimum ESD outcomes; and*
- *Encompass the full life of the build.*

90. CASBE also recommended that:

90.1 the word 'comparable' in the sunset clause be amended to 'equivalent' in accordance with the original policy; and

90.2 under the heading 'Policy Guidelines' insert the following as the final guideline:

*In determining an application, the responsible authority will consider as appropriate:*

*- Whether an ESD plan or framework has previously been approved by the responsible authority.*

91. A submission was also lodged by Yarra City Council (as Submitter #4) which mirrored CASBE's concerns about the ESD policy.

92. The revised strategy and sunset clause requested by CASBE above was recently considered by a panel in the report for Amendment C131 to the Hobsons Bay Planning Scheme.<sup>19</sup> The C131 panel stated:

**3.8 Environmentally sustainable development**

*(i) The issue*

*Should the proposed Clause 15.02-1L (Environmentally sustainable design) be changed to align with the CASBE and DELWP agreed wording?*

*(ii) Discussion*

*CASBE (submission 31) requested that Council reword the exhibited version of Clause 15.02-1L (Environmentally sustainable development) to align with the CASBE and DELWP agreed version of the policy.*

*These changes include rewording the strategies to focus on best practice and amending the sunset clause to align with the wording of seventeen of the eighteen other councils that have this policy in their schemes. Council was supportive of these changes. The Panel is too.*

*(iii) Recommendation*

*The Panel recommends:*

*At Clause 15.02-1L (Environmentally sustainable development) reword the clause to reflect the preferred Council Alliance for a Sustainable Built Environment and Department of Environment, Land, Water and Planning wording as set out in Chapter 1.3.*

93. Chapter 1.3 stated:

Council pursued the Amendment in accordance with the following ‘post-exhibition’ changes made in response to submissions:

- Amend the strategies under Clause 15.02-1L (Environmentally sustainable development) as follows:
  - ~~Facilitate development that minimises environmental impacts.~~
  - ~~Encourage environmentally sustainable development that:~~
    - ~~• Is consistent with the type and scale of the development. Responds to site opportunities and constraints.~~
    - ~~• Adopts best practice through a combination of methods, processes and locally available technology that demonstrably minimise environmental impacts.~~
- Achieve Best Practice environmentally sustainable development that:
  - Is relevant to the type and scale of development;
  - Responds to site opportunities and constraints;
  - Utilises a combination of locally available techniques, methodologies and systems that have demonstrated to achieve optimum Environmentally Sustainable Development outcomes; and
  - Encompass the full life of the build.
- Amend the wording of the sunset clause under Clause 15.02-1L (Environmentally sustainable development) as follows:
 

This policy will expire when it is superseded by an equivalent provision of the Victoria Planning Provisions

<sup>19</sup> Hobsons Bay C131hbay (PSA) [2021] PPV 63 (9 August 2021).

94. Council is unaware that CASBE and DELWP have an agreed version of the policy as referred to in the C131 Hobsons Bay panel report; however, it relies on the version endorsed by CASBE as attached to its submission and the Hobsons Bay panel.
95. The same issues were discussed in the Panel Report for Amendment C269yara.
96. In relation to CASBE's proposed addition of a 'best practice' definition, the C269yara Panel concluded that the 'definition' of best practice recommended by CASBE explains how best practice ESD will be achieved, rather than defines best practice. On this basis, and consistently with the *Practitioner's Guide*, it was entirely appropriate for the definition to be retained in the strategy, with the effect of explaining how the objective will be achieved.<sup>20</sup>
97. In relation to concerns about the use of the word 'comparable', the Panel stated:<sup>21</sup>
- The sunset clause is a trigger for updating or replacing the policy. The Panel acknowledges the concerns of Council and CASBE that the word 'comparable' does not lock in an equivalent standard of ESD policy. It is not the role of the expiry clause to specify what the substitute policy must constitute, and this will be determined through a separate process.
98. The C269yara Panel ultimately recommended that (among other things):
- Proposed Clause 15.02-1L (Environmentally Sustainable Development) should be amended to align with the CASBE preferred version subject to using the verb 'encourage' instead of 'achieve' in the strategy relating to best practice, and retaining the word 'comparable' in the expiry clause.
99. As a member of CASBE, Council considers it is important to ensure its local ESD policy is consistent with the approach taken by CASBE and other CASBE councils. Accordingly, while acknowledging that it is bound by the conditions of the Ministerial Authorisation, Council's preference is to proceed with the version of the policy as presented to DELWP at authorisation.

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## 6. Other matters

### *Mandatory height controls in Design and Development Overlay Schedule 26 (DDO26)*

100. The Amendment proposes to delete a number of incorporated documents from the Scheme, on the basis that they have been given effect to and are out of date. One of these is an

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<sup>20</sup> Panel Report into Amendment C269yara, page 153.

<sup>21</sup> Panel Report into Amendment C269yara, page 154.



incorporated document under the Design and Development Overlay Schedule 26 (**DDO26**), which relates to 414-418 St Kilda Road and provides that:

A permit is not required to construct a building at 414-416 St Kilda Road Melbourne provided that the building height does not exceed 65 metres, ...

A permit is not required to construct a building at 418 St Kilda Road, Melbourne provided that the building height does not exceed 70 metres, ...

101. The site has now been developed, such that the incorporated document is redundant. The land is to remain within DDO26 sub-precinct 4E, which imposes a 65m height limit on development.
102. Submitter #1 identifies that the Amendment proposes changes to planning controls applying to the land at 414-418 St Kilda Road, Melbourne however makes no reference to the neighbouring land at 412 St Kilda Road, Melbourne.
103. In particular, the submitter is concerned about exemptions to mandatory height controls in the DDO26, following VCAT's decision to grant a permit for the land at 412 St Kilda Road authorising construction of a 75m building. A 65m mandatory height limit applies to the site at 412 St Kilda Road. The submitter requests that exemptions to mandatory heights be removed and that the definition of building height be revised to read: 'the height of the outer most parapet of the structure'.
104. In response, Council notes that the Amendment is not a wholesale review of all local planning and policy objectives and controls. Council has not undertaken a review of DDO26 or the zoning or other controls that apply to these properties. Council acknowledges the submitter's concerns and encourages them to raise these in any future review of DDO26, but considers the concerns to be beyond the scope of the present Amendment.

#### *Rooming house policy*

105. Submitter #3 requests that Council prepare a standalone policy for rooming houses, to ensure: the intensity and scale of developments will not adversely impact surrounding amenity; social housing is evenly dispersed and in locations with demonstrated need; and rents charged remain affordable.
106. Council notes the submitter's concerns, but considers them beyond the scope of the Amendment. Further strategic work would be required to for the changes proposed, which will be investigated in the course of preparing Council's upcoming Housing Strategy.

#### *Site-specific submissions*

107. Submitter #2 is a resident of Port Melbourne and has raised concerns regarding works on a neighbouring property including with regard to the way heritage sightlines were applied, the

possibility that the house will be painted black, and the possibility that it will be allowed to fall into disrepair.

For the reasons given earlier in these submissions, Council considers that the current approach to development within the Heritage Overlay is generally appropriate. It notes that the land in question is within the Heritage Overlay, such that a permit under Clause 43.02 would be required to paint the property. Finally, Council refers to its earlier submission regarding demolition by neglect, in response to submitter #5.

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## 7. Changes to the Amendment

108. In addition to the changes described throughout Council's submission above, Council has made a number of administrative changes to the Amendment that in Council's view, do not alter the substance of the Amendment. These administrative changes are:
- 108.1 a new map at Clause 11.03-6L-01 (St Kilda Foreshore) to more accurately convey the St Kilda Triangle site;
  - 108.2 corrections to the Heritage Design Guidelines, including:
    - 108.2.1 grammatical corrections to spelling errors and missing words;
    - 108.2.2 amendments to improve clarity of guidelines. For example, in figure 3.8 and 3.9, the word 'lower' in some guidelines was amended to 'no higher than' to clarify that the addition can be the same height or lower than the existing form, in accordance with the intent of the guideline;
    - 108.2.3 deletion of some words and paragraphs to reduce unnecessary duplication; and
    - 108.2.4 formatting changes to ensure readability.
  - 108.3 administrative changes required in response to the gazettal of Amendment VC204 to clause 18 (Transport) following advice from DELWP, including:
    - 108.3.1 renumbering and repositioning of some of the local policies under clause 18 to align with the new clause 18 structure;
    - 108.3.2 subsequent changes to the Explanatory Report and Instruction Sheet to reflect the renumbering and repositioning;

