

**PLANNING PANELS VICTORIA**

**IN MELBOURNE**

**IN THE MATTER OF AMENDMENT C231 TO THE YARRA PLANNING  
SCHEME**

BETWEEN:

**YARRA CITY COUNCIL**

Council

**OTHERS**

Submitters

**PART C SUBMISSION ON BEHALF OF YARRA CITY COUNCIL**

**INTRODUCTION**

1. This Part C submission addresses issues that have arisen during the course of the hearing by the submitters and their witnesses and issues that have been raised by the Panel during the hearing.
2. It is to be read in conjunction with the DDO16 – Part C Version dated 30 August 2019 which includes tracked changes to the Preferred DDO16 as well as brief comments addressing evidence and submissions made to the Panel.
3. Many submitters to the Panel have directly acknowledged the hard work of Council officers and the response by Council to submissions to the Exhibited Amendment. For example;
  - a) Queens Parade Heritage, Planning and Traders Group: *“it’s a big improvement over the exhibited version” .... “we’re pleased that Council has listened to the community”...<sup>1</sup>*

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<sup>1</sup> Doc #56

- b) Collingwood Historical Society, Inc: *“We support the City of Yarra’s preferred DDO 16 as a much better heritage outcome for Queens Parade than the exhibited DDO 16 and commend the City of Yarra on the work done on this.”*<sup>2</sup>
- c) Submitter #94:
- “Council Officers have done good work to present the Preferred DDO to the Panel:*
- a. Significant strategic work.*
- b. Incorporates community feedback.”*<sup>3</sup>
4. However, most submitters do not consider that the controls have “gone far enough” and seek further changes. For example:
- a) Queens Parade Heritage, Planning and Traders Group: *“but there’s some way to go yet”*<sup>4</sup>
- b) Royal Historical Society of Victoria: *“The Council’s revised proposals for a setback of 8 metres and building height or 4 storeys is a welcome improvement, but it still sets an arbitrary cut-off point that bears no relation to the form and function of the existing buildings”*;<sup>5</sup>
- c) The National Trust of Australia (Victoria): *“These modifications don’t go far enough...”*;<sup>6</sup> and
- d) Protect North Fitzroy Inc – *“The community craves greater certainty”*.<sup>7</sup>
5. Council has responded to the substance of most changes sought to the Amendment in the Part B submission and in the commentary attached to the DDO16 Part C Version. This Part C submission only addresses new or outstanding issues.

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<sup>2</sup> Doc #92

<sup>3</sup> Doc #94

<sup>4</sup> Doc #56

<sup>5</sup> Doc #53

<sup>6</sup> Doc #51

<sup>7</sup> Doc #72

## **3D MODELLING**

6. Many witnesses and submitters have acknowledged the importance and utility of the 3D modelling to test the DDO16 controls, and to assist in the formulation of the Preferred DDO16. Indeed, whilst the 3D modelling has been criticised in the joint submission for submitters #398 and #406, who go so far as to suggest Council has deliberately sought to create concern and misunderstanding through the use of the 3D modelling,<sup>8</sup> all witnesses before the Panel, including Ms Bell called by these same submitters, have found the modelling to be helpful in conceptualising the outcome of the DDO16 provisions, particularly when considering a precinct-wide scale and wider views, including oblique views, of built form.
7. Council appreciates the community's recognition of the time and resources that the 3D modelling has involved, and as stated in the Part B submission, submits that the modelling is a very instructive and useful tool.
8. Council submits that it has attempted to respond to requests to view the model and to model different scenarios where practicable. Obviously, the time and cost of modelling and re-modelling has been resourced by Council and although some submitters have complained that the model was only available after the directions hearing, Council has attempted to meet all requests in a fair and timely manner.

## **PROCEDURAL AND DRAFTING ISSUES**

### **Status of proposed changes to Exhibited DDO**

9. As outlined in the Part A and B submissions and the evidence of Council's witnesses, the differences between the Exhibited DDO16 and the Preferred DDO16 (particularly for Precinct 3 and 4) in response to submissions and the 3D modelling are material in some important respects.
10. In general terms, the Preferred DDO16, when compared to the Exhibited DDO16, results in a lesser impact on neighbourhood character, heritage and amenity, across all of the Precincts.

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<sup>8</sup> Doc #107 paragraph 64

11. Importantly, the Preferred DDO16 does not increase any building height, decrease any building setbacks or result in an increase in material detriment (compared to the Exhibited DDO16) by way of overlooking, overshadowing, visual bulk, or change in use.
12. Whilst the Preferred DDO16 does not address all the concerns raised in submissions – or in the manner requested in many submissions – it has in Council’s submission reached an appropriate balance between the protection of heritage, character and amenity and re-development opportunities.
13. From the competing perspective, the reduction in the permitted building envelopes under the Preferred DDO16 impacts those seeking to develop in the Amendment area, and a number of submissions to the Panel have drawn attention to these changes. For example:
  - a) Submitter # 406 opposes the reduction from a preferred 49m maximum height to a preferred 43m in Precinct 5C;
  - b) Submitter # 398 opposes the change from a preferred 18m maximum height to a mandatory 18m height in Precinct 3A; and
  - c) Submitter # 402 opposes the change from a preferred 1:1 “heritage street wall to new building form” to a mandatory 18m maximum height and the increase in the mandatory minimum upper level setback from 6m to 8m in Precinct 5B.
14. The rationale for these changes was explained in the Part B submissions and in the evidence of Council’s witnesses.
15. Having regard to procedural requirements for the processing and referral of submissions under the *Planning and Environment Act 1987 (PE Act)*, the Panel has drawn to Council’s attention a recent Tribunal decision in *Danaber v Whittlesea City Council* [2019] VCAT 552 in which the Tribunal found that, relevantly, Whittlesea City Council failed to comply with section 23 of the PE Act with regard to changes made to an amendment after exhibition. The Tribunal found that, on the facts of that case, the planning authority did not change the amendment in the manner requested by submissions, did not refer all the submissions to a panel and did not abandon the

amendment or part of the amendment. The Tribunal found that the Council “embarked on its own course of action in attempting to resolve the submissions by other means.”<sup>9</sup>

16. Council submits that, in contrast to the *Danaber* case, it has not fallen into error in the processing of this Amendment, and has taken a cautious and careful approach to its obligations. Council has undertaken extensive notification of the Exhibited Amendment and the Preferred DDO16.
17. Section 23 of the PE Act provides that after considering a submission which requests a change to the amendment, the planning authority must:
  - a) change the amendment in the manner requested;
  - b) refer the submission to a panel appointed under Part 8 of the Act; or
  - c) abandon the amendment or part of the amendment.
18. In this case, Council received over 400 submissions objecting to the Exhibited Amendment with most requesting, either expressly or by implication, that the Amendment be changed.
19. As detailed in the Council’s agenda and minutes of 28 May 2019, Council considered these submissions and resolved to refer all submissions to a panel pursuant to Section 23(1)(b). Council’s resolution was that it:
  - (a) *receives and notes submissions received following the exhibition of Amendment C231;*
  - (b) *notes that there is/will be considerable development growth in precincts 2 and 5 of the DDO and at the former Gas Works site;*
  - (c) *notes the officer report and attachments in response to submissions on Amendment C231 and endorses the recommended changes to the amendment including the Preferred Version of the DDO schedule, conditional upon the following further amendments to Schedule 16 to Clause 43.02 Design and Development Overlay (dated 20 May 2019):*  
  
*2.9.4 Precinct 4 – Activity Centre Precinct*  
  
*Design requirements*

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<sup>9</sup> Paragraph 134

- (i) *Revise the fifth requirement, as follows, to include heritage fabric and Wellington Street:*
  - a. *retain the visual prominence and heritage fabric of the return façades of heritage buildings that front Queens Parade, Delbridge, Gold, Michael and Wellington Streets;*
- (ii) *Include a new requirement:*
  - a. *maintain service access from the laneways in order to facilitate commercial use of the properties fronting Queens Parade.*

*Table 4 – street wall height, building height and setbacks for Precinct 4*

- (i) *Include a new preferred built form requirement:*
  - a. *Minimum rear setback (C1Z interface) - 3 metres above 11 metres;*
- (d) *adopts as its submission to the panel the position of support for Amendment C231 with changes as identified in (c) above;*
- (e) *requests the Minister for Planning to appoint an independent planning panel to consider all submissions referred to in relation to Amendment C231 in accordance with Section 23 of the Planning and Environment Act 1987;*
- (f) *refer all submissions, including late submissions and new or modified submissions in response to the further notice as in paragraph (g) below to the panel;*
  - (i) *writes to all landowners and occupiers directly affected by the revised DDO schedule and to all submitters to:*
  - (ii) *advise of Council's decision to proceed to panel;*
  - (iii) *advise of Council's position in support of the Preferred Version of the DDO; and*
  - (iv) *advise that if they make a submission in relation to the recommended changes, the new or varied submission will be referred directly to the panel;*
- (g) *notes that officers will provide a further report to Council after the planning panel report is received from Panels Victoria to enable further consideration of Amendment C231 by Council.*

20. Council did not formally change the Amendment at all, including by changing the Amendment in the manner requested.<sup>10</sup> It did not abandon the Amendment or part

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<sup>10</sup> Relevantly, Council did not fall into the error examined in *Shiel FCP Pty Ltd v Melbourne CC* [2017] VCAT 744 in which the Council referred all submissions to a panel and made changes to the exhibited amendment.

of the Amendment. It resolved to refer all submissions to a panel as it was permitted to do so under section 23(b).

21. The written notification of Council's resolution of 28 May 2019 to support the Preferred DDO16 to all people who made a submission to Council as well as all property owners within the Amendment area and all occupants of land in Precinct 4<sup>11</sup> was carefully considered and undertaken by Council in order to ensure that all interested persons were made aware of Council's position regarding the Amendment and to provide the opportunity to respond to the Preferred DDO16.
22. Late submitters and additional submissions that were erroneously not registered by Council until after 28 May 2019 were notified by email and called by Council if a telephone number was provided.
23. As is obvious from all the material before this Panel, all submitters were aware of Council's position regarding the Preferred DDO16. Further Council's Part B submission endeavoured to synthesise the evidence of all witnesses and to clearly inform the Panel (and submitters) of Council's position with regard to the recommendations of the various witnesses and submitters to date.
24. The Part C Version of the DDO16 also sets out the current position of Council officers with regard to evidence and submissions made during the Panel hearing.
25. With regard to the submissions to the Exhibited Amendment, there was only one submission [Submitter #6] that supported the Exhibited Amendment without seeking any changes. This submission was also referred to the Panel and the submitter was notified of Council's resolution of 28 May 2019. The submitter has not chosen to make further submissions to the Panel.
26. In terms of potential submitters that were notified of the Exhibited Amendment but did not make a submission on the basis that they were satisfied with the Exhibited

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<sup>11</sup> In response to Submitter 407 [Doc #83] that commercial occupants were not notified, Council advises that all occupiers of land in Precinct 4 were notified of both the exhibition of the Amendment and the Council's resolution of 28 May 2019. The majority of occupants in Precinct 4 were hand-delivered a notice by Council's Economic Development Unit.

Amendment, Council has notified all property owners in the Amendment area and all owners and occupants in Precinct 4, as well as providing the Council's resolution and agenda (and all attachments) of 28 May 2019 on its website together with a copy of the relevant reports, statements of evidence and 3D modelling.

27. Council submits that the processing of this Amendment has complied with Council's obligations under the PE Act.

### **Clause 2.2 Amendments to permits**

28. Submitters #398 and #406 argue that Clause 2.2 of the Preferred DDO16 is contrary to the law established in *Seventh Columbo Pty Ltd v City of Melbourne* [1998] VSC 7.

29. Clause 2.2 of DDO16 proposes inclusion of the following words:

*A permit must not be granted or amended (unless the amendment would not increase the extent of non-compliance) ...*

30. These words are the same as those in DDO15 for Johnston Street and are also found in DDO10 of the Melbourne Planning Scheme.

31. As far as Council is aware, the effect of the wording has not been tested by a Court or the Tribunal to date.

32. Without those words it would seem that there would be nothing to stop a person from adopting a deliberate strategy to obtain a permit that complies with the mandatory provisions, and then seeking to amend that permit to exceed the mandatory controls (arguing that they do not apply to a permit amendment). That outcome would be very unfortunate. The proposed words would prevent that mischief. It might be said that an amendment would be unlikely to be approved on the merits in such a circumstance but the Council seeks to exclude the possibility as both a matter of power and exercise of discretion.

33. Section 28(2)(e) of the *Interpretation of Legislation Act* 1984 operates to protect an accrued right, such as a permit, if the planning scheme under which the permit was granted is amended as follows:

(2) *Where a subordinate instrument or a provision of a subordinate instrument—*



(a) *is repealed or amended; or*

(b) *expires, lapses or otherwise ceases to have effect—*

*the repeal, amendment, expiry, lapsing or ceasing to have effect of that subordinate instrument or provision shall not, unless the contrary intention expressly appears—*

...

(e) *affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;*

34. As explained by the Tribunal in *Alkero Development Pty Ltd v Stonnington CC* (Red Dot) [2018] VCAT 1120:

43 *Just as section 28(2) of the Interpretation of Legislation Act 1984 can create an accrued right to use land under a permit in a way that is now prohibited, so it may create an accrued right to develop land in a way that is now prohibited.*

44 *Determining the extent of the accrued right of development allowed under a permit will depend on a careful analysis of the permit in question, including its conditions and any endorsed plans. Having identified the extent and nature of the accrued right, it must then be compared to the current planning controls to determine the extent to which it exceeds what is now permitted. Applying the reasoning from *Fosters Group*, we consider that amendments to the development that do not exceed the accrued right, even though still prohibited by the planning scheme, could be permitted, **but an amendment that exceeds or goes beyond the extent of the accrued right would not be permitted.** Whether the amendment could be permitted is, of course, different to whether the amendment should be permitted on its planning merits.*

45 *For example, the planning scheme may include a mandatory height control of 10 metres. A permit may allow a development with a height of 15 metres. We consider that the permit could be amended to change the height of the development so that it does not exceed 15 metres even though the height exceeds 10 metres and would be prohibited under the planning scheme if a new planning permit was applied for.*

46 *The same applies to other aspects of the permitted development such as setbacks or building envelope. **The general principle is that a development that remains within the limits of the rights granted under the permit can be changed, provided those limits are not exceeded.*** (emphasis added)

35. The words in the Preferred DDO16 are consistent with the Tribunal's interpretation of the protection of accrued rights. Accordingly, the provision is not repugnant to Section 28(2)(e) of the Interpretation of Legislation Act 1984.

36. The proposed words also assist permit holders who seek to make amendments to their permits. The proposed words make it clear (without permit holders needing to inform themselves of the principles of accrued rights) that the mandatory provisions only apply if the amendment seeks to increase the extent of non-compliance. In that way, they provide certainty and clarity.
37. Council submits that the Panel should be satisfied that Clause 2.2 does not breach established law, the PE Act or any other legislation.
38. Notably, the Amendment C220 panel heard the same argument on behalf of landowners in Johnston St but accepted the submissions of Council as set out above.<sup>12</sup>

### **Re-zoning of 245 Gold Street, Clifton Hill**

39. With regard to Council's resolution on 28 May 2019 to adopt a position of support for the Amendment generally in accordance with the officer's response which included a commitment to rezone 245 Gold Street, Clifton Hill to the Neighbourhood Residential Zone, Council has informed the Panel that it does not pursue this re-zoning as part of this Amendment as the re-zoning was not exhibited. Submitter #67 has been made aware of Council's position regarding the re-zoning and has made submissions to the Panel in response.<sup>13</sup>

### **Re-zoning from Commercial 2 to Commercial 1 and introduction of an Environmental Audit Overlay – Precinct 3A**

40. Whilst Submitter #398 has made submissions objecting to some of the provisions of the preferred DDO16, there is no objection from this submitter or any other to the rezoning of Precincts 3A and 3B to C1Z. It is also noted that all submitters and Ms Bell called on behalf of Submitter #398, consider that a DDO is appropriate for the rezoned land to guide its future redevelopment.

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<sup>12</sup> Amendment C220, Yarra Planning Scheme, Panel Report, section 6.5, page 47.

<sup>13</sup> Doc #91

41. Likewise, there is no objection to the introduction of an Environmental Audit Overlay over Precincts 3A and 3B, noting the additional statement provided by Ms Ancell.<sup>14</sup>

### **Changes to the Heritage Overlay**

42. The Amendment seeks to make seven changes to the Heritage Overlay provisions in the Yarra Planning Scheme.<sup>15</sup>
43. These have not been controversial, and accordingly, Council seeks that the Panel support the changes as requested.

### **Changes to the grading of buildings in Appendix 8**

44. A number of submitters to the Panel have made detailed submissions concerning the recommendations contained in the Heritage Analysis and the evidence of Mr Gard'ner.
45. In particular, they have questioned the suggested amendments to the gradings of individual buildings in Appendix 8 (which is an incorporated document in the Yarra Planning Scheme), for example:
- a) concerning the extent of the contributory fabric of 390A Queens Parade (Submitter #298);<sup>16</sup>

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<sup>14</sup> Doc #88

<sup>15</sup> These are conveniently set out in the explanatory report and involve:

- i. Introducing a site specific heritage overlay (HO496) to 57-87 Queens Parade (the St John's Church complex) to provide for internal heritage controls on the organ
- ii. Applying a site specific heritage overlay (HO504) to 205-211 Queens Parade (former Clifton Motors Garage)
- iii. Applying Heritage Overlay (HO498) to 472-484 Napier Street, Fitzroy North
- iv. Applying Heritage Overlay HO327 to the full extent of the Moderne façade of the former K.G. Luke factory site at 26 Queens Parade
- v. Applying the Heritage Overlay HO330 to include all of Raines Reserve
- vi. Deleting 201-217 Queens Parade and 10-12 Dummett Crescent from HO330
- vii. Deleting 390A Queens Parade and the rear of 304, 312 and 316 Queens Parade from HO327 (North Fitzroy Precinct) and including them in HO330 (Queens Parade Precinct) with a heritage grading

<sup>16</sup> Doc #82

- b) concerning the regrading of 7, 9 and 11 Queens Parade from contributory to not contributory (Collingwood Historical Society);
  - c) concerning many properties in Precinct 4 and the lack of internal heritage controls (3068 Group Inc);<sup>17</sup> and
  - d) seeking a peer review of Appendix 8 (Queens Parade Heritage, Planning & Traders Group).<sup>18</sup>
46. Mr Gard'ner was extensively cross-examined about these issues but did not alter his opinion with regard to his recommended changes to the gradings of various buildings.
47. Council relies on Mr Gard'ner's evidence and submits that the changes to the gradings as detailed in the Explanatory Report should be supported by the Panel.
48. Council seeks that the amended Appendix 8 be an incorporated document to the Yarra Planning Scheme.

**Yarra High Streets: Statements of Significance by GJM Heritage, October 2017 (updated November 2017)**

49. The Amendment seeks to add a new reference document to Clause 22.02 called "Yarra High Streets: Statements of Significance by GJM Heritage, October 2017 (updated November 2017) (**Appendix H**)."<sup>19</sup>
50. This reference document is 51 pages long and addresses 10 precincts of which Queens Parade Precinct, North Fitzroy/Clifton Hill (HO330) is the fifth.
51. In the context of this Amendment, the purpose of this document is to update the statement of significance for HO330 (Queens Parade) and to provide individual statements of significance for the properties within HO330 that are graded individually significant. It also includes statements of significance for individually

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<sup>17</sup> Doc #64

<sup>18</sup> Doc #56

<sup>19</sup> The document is found at Appendix H to the Heritage Analysis

significant properties within the study area that are included in HO330, HO317 (Clifton Hill West) and HO327 (North Fitzroy).

52. Neither of the statements of significance for HO317 and HO327 have been updated as part of this Amendment. HO317 applies to around 600 properties and HO327 applies to around 3,500 properties and accordingly, their statements of significance are more general in nature. Appendix H supplements the existing statements by providing specific guidance for individually significant properties within these heritage overlay areas.
53. Each of the property owners with an updated statement of significance received written notification of the Amendment on two occasions – first, at exhibition stage and secondly when Council wrote to submitters, land owners and occupiers of Precinct 4 to advise them of Council’s decision to refer submissions to a panel where a preferred version of the DDO would be supported.
54. As has been examined in detail by many submitters, the Statement of Significance for Queens Parade in Appendix H updates and differs from the other four Statements of Significance for Queens Parade found in studies referenced in the Yarra Planning Scheme, being:
  - a) *North Fitzroy Conservation Study, Jacob Lewis Vines Architects 1978;*
  - b) *Collingwood Conservation Study, Andrew Ward and Associates 1989;*
  - c) *City of Yarra Heritage Review, Volumes 1-4, Allom Lovell and Associates 1998; and*
  - d) *City of Yarra Review of Heritage Overlay Areas 2007 (Graeme Butler and Associates) [Appendix 7 includes Statements of Significance].*
55. Particularly, many submitters have drawn attention to the absence of text in the proposed Statement of Significance in Appendix H to the following effect: “*picturesque shop-row skyline, visible from across Queens Parade.*” These words are currently found within the “City of Yarra Review of Heritage Overlay Areas 2007 (Graeme Butler and Associates) [Appendix 7 includes Statements of Significance]” but not in the other three, earlier Statements of Significance for Queens Parade.

56. Mr Gard'ner addresses this issue in his statement of evidence<sup>20</sup> and was cross-examined extensively about it by many submitters. Mr Gard'ner did not change his opinion about this matter, and Council does not support the inclusion of the words “*picturesque shop-row skyline, visible from across Queens Parade*” or similar into Appendix H.
57. Procedurally, whilst the whole document was exhibited with the Amendment, Appendix H includes Statements of Significance for not just Queens Parade but many other high streets in Yarra. Persons that may have an interest in other high streets in Yarra have not been notified of the new statements of significance as part of this Amendment.<sup>21</sup>
58. Therefore, Council does not seek to include the whole of Appendix H as a reference document to Clause 22.02 as part of this Amendment.
59. Councils seeks that the Panel recommend a new reference document into Clause 22.02 which consists of the statements of significance for the HO330 and for individually significant places within HO330, HO317 and HO327

*Statements of Significance for Queens Parade Precinct, North Fitzroy/ Clifton Hill (HO330) and individually significant places within HO330, HO317 and HO327: as contained within the Yarra High Streets: Statements of Significance by GJM Heritage, October 2017 (updated November 2017)*

## Reference documents

60. With regard to other reference documents, the Preferred DDO16 includes the following reference documents:
- a) *Queens Parade, Clifton Hill Built Form Review* prepared by Hansen Partnership – December 2017; and

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<sup>20</sup> Pages 8, 33, 37, 38 and 42

<sup>21</sup> Appendix H has also been exhibited as part of Amendment C191 for the Swan Street activity centre, but no other amendment has notified potentially interested persons of the changes to the totality of the 10 high streets covered by Appendix H.

- b) *Queens Parade Built Form Heritage Analysis and Recommendations* prepared by GJM Heritage – December 2017.
61. The DDO16 Part C Version dated 30 August 2019 includes the following additional reference document:
- a) *Traffic Engineering Review: Amendment C231 of the Yarra Planning Scheme, Queens Parade Activity Centre, Clifton Hill* prepared by Traffix Group Pty Ltd – August 2019
62. Consistent with Council’s practice with regard to reference documents, as evident for example in Clause 22.02, all documents used as background material to the preparation of DDO16 should be included as reference documents.
63. Council submits that given the important role that the 3D Modelling of Ethos Urban played in informing the Preferred DDO10 provisions, an additional reference document documenting this modelling should also be a reference document to the DDO16. Council envisages that this document would include screen shots of the Exhibited and Preferred controls for the various precincts and an explanation of how the 3D model was developed.

### **Standing of community groups**

64. A submission was made by Submitters #406 and #398 disputing the standing of community groups to make submissions. The PE Act provides for any person to make a submission. Person is defined in section 38 of the *Interpretation of Legislation Act* 1984 to mean “body politic or corporate as well as an individual”. Thus, groups of individuals which have been incorporated under the *Corporations Act* 2001 or the *Associations Incorporation Reform Act* 2012 are persons for the purposes of the PE Act. To Council’s knowledge, the following groups fall within the definition: National Trust of Australia (Victoria), 3068 Group Inc, Royal Historical Society of Victoria Inc, Protect North Fitzroy Inc, Fitzroy Residents’ Association Inc and Collingwood Historical Society Inc. In the case of the Queens Parade Heritage, Planning and Traders, Council understands it to be an unincorporated association of groups and individuals which formed in April 2019 to present an organised, unified and coordinated response to the Amendment. The background to the formation of the group is found in document #55 presented by Ms Anne Horrigan Dixon, which she

described as presented on her own behalf and on behalf of the group. Document #54 is a statement signed by representatives of the various incorporated associations and individuals which have each lodged submissions to the Amendment, endorsing the proposed changes to the Preferred DDO16 to be presented by the Queens Parade Heritage, Planning and Traders. If the Panel requires a list of people on whose behalf Mr Young speaks, it can request such a list. In Council's submission, the community groups ought to be commended rather than criticised for their efforts to present to the Panel in an organised and streamlined fashion.

### **The nature of a preferred control**

65. Council has elected to describe the discretionary built form controls in the tables as “preferred”. In Council's submission, there is a subtle but important difference between a discretionary control and a preferred control in terms of its implementation. In the former case, the discretionary control is set on the basis that it is one possible metric which satisfies the built form outcomes or objectives identified and allows for a discretion to be exercised to show that a different outcome can also meet those goals; it functions as a general numerical guide which does not necessarily fix an expectation or a “starting point” about the future built form. In the latter case, the built form requirement represents not just a possible outcome but one which is the preferred outcome. This signals that the outcome is not just one which is available or open to a decision maker but one which is preferred by the decision maker over other available outcomes. This is particularly important in crafting the preferred controls for Precinct 5C where the planning authority is not simply leaving open the possibility of departing from a particular metric but expressing a preference for a particular outcome.

## **GENERAL ISSUES**

### **Verandahs**

66. Submitter 259 (Royal Historical Society of Victoria) queried why verandahs were not specifically mentioned in the new Statement of Significance for Queens Parade in Appendix H.
67. Council agrees that this was an omission and that the Statement of Significance should be amended to correct this error.



## **Chimneys**

68. Whilst Appendix H includes references to “*decorative chimneys (some with pots)*” and “*prominent, often highly decorative brick chimneys*” in the Statement of Significance, the Preferred DDO16 has not included a specific reference to chimneys.
69. The reference to chimneys has been included in the heritage requirements for upper level setbacks at Clause 2.8 in the DDO16 Part C Version.

## **Queens Parade Elms**

70. The 3068 Group Inc made submissions concerning the extent of HO330 and the protection of trees along Queens Parade, Heidelberg Road, Raines Reserve and Mayors Park.
71. Council advises that, at present, tree controls apply in:
  - a) HO93 – Queens Parade Elms; and
  - b) HO94 – Darling Gardens.
72. Tree controls do not apply in:
  - a) HO330 – Queens Parade;
  - b) HO317 – Clifton Hill Western Precinct; and
  - c) HO316 – Clifton Hill Eastern Precinct.
73. Council advises that Amendment C245 is currently on exhibition which relevantly seeks to widen the coverage of HO93 and extend it to Delbridge Street.
74. At present Council does not intend to extend tree controls to Heidelberg Road, Raines Reserve and Mayors Park but notes that the parks are public spaces which are under Council’s care and control.

## **MFB Access**

75. In the Part B submission, Council referred to *Ciullo v Yarra CC* [2016] VCAT 912 in which the Tribunal addressed the question of emergency services access via laneways off Queens Parade. The Tribunal said:

*Access by emergency services*

23. *While I appreciate the concern of objectors to ensure that there is safe access to the site by emergency services vehicles such as the fire brigade, with respect, I regard these concerns as overstated and unproven in the planning process.*
24. *I also note that there are more direct processes by which this issue can be considered. In any event, even if I was to seek to apply the guidelines referred to by objectors (which sit outside the planning scheme and are administered by a specialist authority), there is a process by which consent could be given by the relevant authority even if the preferred parameters were not met.*
25. *In these circumstances, I do not regard this allegation as a reliable reason to refuse to grant a planning process in the absence of a clear indication from the relevant authorities that the site is not accessible to fire fighting apparatus, especially when the site is within an existing urban area, is accessed via a 3 metre bluestone surfaced laneway, is proximate to nearby formed roads and does not exhibit any greater than average susceptibility.*
26. As a result of the *Ciullo* case, Council's Acting CEO wrote to the secretary of the Department of Environment, Land, Water and Planning (**Department**) in May 2017 to request that the Department include access provisions for emergency vehicles to be a mandatory requirement for development in the (then) State section of the planning scheme. The Department noted Council's request but explained that "due to priorities associated with the 112 actions in the recently released Plan Melbourne 2017-2050, your request is not expected to be considered in the short term."
27. In Council's submission, any decision to include MFB Guidelines as a relevant planning consideration should be undertaken on a State wide basis not for a single DDO in a single planning scheme.
28. In any case, the MFB Guidelines set preferred parameters for emergency vehicle access and are not expressed in mandatory terms. If the sole access to a property is via a narrow laneway, below the width preferred by the MFB, alternative fire safety arrangements will need to be made during the building permit process.
29. In Council's submission, a lack of access for fire trucks in laneways is not a reason to prohibit development along Queens Parade.

**PRECINCTS 1 & 2**

76. With regard to Precincts 1 and 2, there are no issues that have arisen through submissions and evidence to the Panel that have not been addressed in the Part B submission or in the commentary to the DDO16 Part C Version.

77. In relation to the proposition that because a permit has issued for a building at 34m on a site in Precinct 2C, the height across the whole precinct should be increased to reflect the approved height, Council submits:
- a) The preferred height of 28m reflects an appropriate relationship between the Gasworks site at a maximum of 10 storeys (or approximately 31m) and the two-storey heritage Elizabeth Terrace dwellings in Precinct 2B;
  - b) That a permit was granted which permits a variation from the preferred height (in place as an interim control) reflects the proper operation of the exercise of discretion rather than a deficiency in the metric selected as the preferred height;
  - c) The prospect of a subsequent application to increase the height of the approved building to exceed 34m is not fanciful and should be avoided;
  - d) A height of 34m may not be appropriate (or preferred) across the whole of Precinct 2C, particularly at the direct interface with Precinct 2B;
  - e) Council is seeking to avoid site by site height and other built form controls.

### **PRECINCT 3**

78. The principal issues that have arisen with regard to Precinct 3A<sup>22</sup> both in evidence and various submissions are:
- a) The viewing point for the DDO16 having regard to St John the Baptist Church belfry and spire;
  - b) The street wall height metric for 15-33 Queens Parade and whether it should be mandatory or discretionary;
  - c) Whether the upper level setback should be 6m or 4m and whether it should be mandatory or discretionary;
  - d) Whether the maximum building height at 18m should be mandatory or discretionary; and

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<sup>22</sup> There have been no new issues raised with regard to Precinct 3B

- e) The rear interface provisions, including the appropriateness of a modified B17 envelope, the nature of suitable modifications, and whether the provisions should be mandatory or not.
79. The question of the mandatory/discretionary 18m maximum height was addressed in the Part B submission and through the evidence of Mr Parsons, Mr Gard'ner and Ms Bell (all of whom were cross-examined).
80. Likewise, the question of mandatory/discretionary rear interface is also addressed in Part B and through the tested evidence of the witnesses.
81. The viewing point for the views to St John's spire and belfry is a new issue that arose through the evidence to the Panel (and cross-examination) of Mr Gard'ner and the submissions of Submitters #199 and #398.
82. Council has provided the Panel with Doc #98 (which updates Doc #46) showing the various viewing points to St John's spire and belfry from the corner of Queens Parade and Smith Street.
83. These various viewing points and the submissions to the Panel illustrate:
- a) Views to St John's spire and belfry are clearly evident from a viewing point within the "pedestrian refuge on the south-west corner of the intersection of Queens Parade and Smith Street" as described in Clause 2.9.3. This is shown in View 2 of Doc #98.
  - b) A viewing point from a location waiting for the traffic lights to change at the northern edge of the "pedestrian refuge on the south-west corner of the intersection of Queens Parade and Smith Street" does not show a view of St John's spire and belfry as traffic infrastructure obscures the spire;<sup>23</sup>
  - c) There a range of views to St John's spire and belfry from the south-west including on the south-west corner of Smith Street (shown as View 4 in Doc #98) and the centre median (View 5 in Doc #98); and
  - d) The closer the viewing point gets to the building line along Queens Parade, the narrower the view of St John's spire and belfry becomes, to the point

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<sup>23</sup> See Submitter #199, Figure 17 Doc #100

where it is obscured by buildings on Queens Parade. This is shown in Views 1 and 3 in Doc #98.

84. Council submits that the nominated viewing point in the Preferred DDO16 Map 3 (shown in View 2 of Doc #98) is the appropriate viewing point for the purpose of the DDO16 mandatory Design Requirement of Precinct 3 to *“maintain views of the belfry and spire of St John’s church and maintain clear sky between the belfry and spire and new development when viewed from the pedestrian refuge on the south-west corner of the intersection with Queens Parade and Smith Street”*.
85. The submissions of submitter #398 and the evidence of Ms Bell (as changed through her addendum Doc #104) argue that the mandatory building height, street wall height and upper level setbacks in the Preferred DDO16 are not necessary to protect the valued views and that the street wall should be 14m for 11-33 Queens Parade, the upper level setback should be a preferred 4m and the maximum height a preferred 18m.
86. Council maintains that mandatory provisions are necessary for Precinct 3A for the following reasons:
  - a) The view of St John’s spire and belfry is only one reason why mandatory street wall height, upper level setback and height are proposed. As agreed by all witnesses, the view protection provisions will ensure that these views are retained. A certainty of outcome will be provided, noting that debate about the extent of “clear sky between the belfry and spire and new development” and about the maintenance of the “visual prominence” of the spire and belfry and the “primacy of the St Johns church landmark”<sup>24</sup> will be avoided through the mandatory controls;
  - b) The evidence and modelling by Ms Bell focused on 11-33 Queens Parade only and did not consider the implication of a 14m street wall for the properties at 35-41 Queens Parade which are closer to St John’s Church;
  - c) The extension of a 14m street wall for all the properties between 1-33 Queens Parade (which totals approximately 80m along Queens Parade) does not

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<sup>24</sup> All of which are design objectives and requirements with which Ms Bell took no issue.

achieve the design requirement of Precinct 3A to “emphasise *the corner* of Queens Parade and Smith Street with a higher street wall”;

- d) Nor does a 14m street wall at 11-33 Queens Parade create “an effective transition” to the residential area in the NRZ to the east along Queens Parade;
  - e) Discretionary street wall provisions for 1-33 Queens Parade but not for other properties is inconsistent with the preferred character of “a consistent street wall”;
  - f) A preferred upper level setback of 4m throughout Precinct 3A will not create a clear distinction between the street wall and upper level building (particularly given the width of Queens Parade and extensive long range views) and will allow for upper level intrusions into the setback which will not achieve the consistency as desired; and
  - g) A mandatory height provision not only creates certainty and consistency in a streetscape and character sense but, as submitted in the Part B submission, creates certainty for residential properties abutting the precinct to the south. In this regard, it is noted that building height is the only metric which provides certainty for this residential interface, noting discretionary rear setbacks are proposed. Council considers that an 18m/5-storey interface to the rear of the Hodgkinson Street properties already signals a significant change to the amenity of those properties; in Council’s opinion, it represents the *upper most* limit of the reasonable expectations for development in a neighbourhood with a southern abuttal to relatively shallow, narrow, heritage protected NRZ lots.
87. With regard to the rear interface, Council does not seek mandatory controls despite the evidence of Mr Parsons and submissions from several submitters (such as Submitter #414) that mandatory controls should be provided.
88. Council does not agree with Ms Bell that the 3m ground level setback contemplated by the modified B17 envelope proposed in Preferred DDO16 is unreasonable, particularly in circumstances where she has recommended use of a 3m ground level setback to manage visual bulk in a similar interface location. Council submits that the interface of the NRZ properties in Hodgkinson Street is a sensitive one which needs a careful approach, including a physical separation between rear gardens and new development where there are no laneways. This is an approach which has been

employed at the commercial/residential interface in various neighbourhood activity centres around metropolitan Melbourne.

89. Council does not accept that overshadowing provisions in isolation acceptably address visual bulk issues, noting that although Ms Bell suggested that gaps between buildings and articulation may address visual bulk, she advanced no provisions directed to building separation or side setbacks. In Council's submission, the retention of the 18m mandatory height is an important tool to assist in limiting the visual bulk to abutting neighbours.

#### **PRECINCT 4**

90. With regard to Precinct 4, the principal submissions and evidence before the Panel remain concerned with the mandatory maximum 14m building height and the mandatory minimum 8m upper level setback.
91. Whilst most submissions and evidence did not call for a mandatory "visibility test" for all new development behind buildings in Precinct 4, a number of submitters sought varying provisions for buildings depending on whether they are individually significant, contributory or non-contributory. Other submissions also sought different provisions for development on lots depending on the size and depth of the lot. The demand for a more nuanced approach to the built form provisions for Precinct 4 was a consistent theme in submissions.
92. Council recognises that all properties in Precinct 4 are not the same and that a site responsive design solution and built form outcome will be required for each site, on a case by case basis. However, Council submits that it is neither practical nor appropriate for a precinct-wide DDO to address each property or type of property in a site specific manner.
93. It is Council's expectation that, in practice, the nuanced approach to each site as sought by submitters will occur as part of a planning permit application, noting the permit requirements under the heritage overlay, the C1Z and the DDO, as well as other potential permit triggers such as a car parking, change of access to a main road and use permissions, if required.
94. All of these controls provide the appropriate parameters for the assessment of development proposals in Precinct 4. The mandatory maximum height and minimum upper level setback ensure that the "outer most points" for assessment are

established, and the remaining provisions of the DDO16 ensure that an individual assessment of all other elements then occurs. Importantly, Clause 2.8 Heritage Design Requirements, the Preferred Character and the Design Requirements ensure that character and heritage aspects will be considered, including whether an upper level should be set back further than the minimum mandatory 8m on the basis of the retention of important heritage roof form and chimneys.

95. Council does not support DDO provisions in Precinct 4 that are tailored to the gradings of buildings, existing roof forms, chimneys, depths of properties or visibility of new development.
96. With regard to the evidence called by the Queens Parade Heritage, Planning and Traders Group, Council submits that whilst both Mr Holdsworth and Mr Lewis appeared to support mandatory height limits in Precinct 4, neither were clear or consistent as to what height they considered should be the maximum, or indeed whether that height should apply to all sites in Precinct 4 or only some. The evidence varied within, and between, the witnesses:
- a) Mr Lewis proffered 2 storeys on corner sites;<sup>25</sup> 10m;<sup>26</sup> 10.5m;<sup>27</sup> 11m;<sup>28</sup> 12.5m/4 storeys on sites “*where it can be demonstrated that these locations would not be an adverse heritage impact, because they are not widely exposed or sensitive*”;<sup>29</sup> 13.5m;<sup>30</sup>
  - b) Mr Holdsworth proffered 10.5m;<sup>31</sup> maximum 11m street wall;<sup>32</sup> “maximum height” (by necessary inference higher than 10.5m).<sup>33</sup>
97. Putting aside the significant internal inconsistencies, it is submitted that there is a more than 4 metre variation in the heights put forward in this evidence. This makes it extremely difficult to establish exactly what mandatory height is being suggested by the expert witnesses for the Queens Parade Heritage, Planning and Traders Group,

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<sup>25</sup> Mr Lewis Statement of Evidence, Page 13

<sup>26</sup> Mr Lewis did correct his written statement and advised that (on page 5) 10.5m should refer to 10m.

<sup>27</sup> Mr Lewis Statement of Evidence, Page 13

<sup>28</sup> Mr Lewis Statement of Evidence, Page 5

<sup>29</sup> Mr Lewis Statement of Evidence, page 5

<sup>30</sup> Mr Lewis Statement of Evidence, page 4 (by reference to the Lygon Street Action Plan)

<sup>31</sup> Mr Holdsworth Statement of Evidence, pages 10, 11 and 12

<sup>32</sup> Mr Holdsworth Statement of Evidence, page 11

<sup>33</sup> Mr Holdsworth Statement of Evidence, page 12 – corrected in Doc #68



even though the Group itself now seeks a 10.5m height; in response to a question from the Panel, Group members indicated an apparent preference for deeper setbacks rather reduced heights if compelled to choose one or the other.

98. With regard to Mr Lewis's opinion that 4 storeys can be contained within a 12.5m maximum height and that this appropriate for some sites within Precinct 4, Council makes the following comments:
- a) Council does not agree that 12.5m allows for adequate floor to floor ceiling heights for a commercial use with 3 residential storeys above, noting the range of floor-to-floor heights at ground level in Queens Parade in recently approved development is typically 3.5-4m and that it is common practice to allow at least 3-3.5m floor-to-floor heights for residential development. Council supports the retention of suitable commercial floor-to-floor heights as set out in Clause 2.6 of the Preferred DDO16 and a high level of internal amenity for residential apartments is strongly promoted in the planning scheme, for example in Clause 58.
  - b) Mr Lewis did not identify in his evidence which sites in Precinct 4 are suitable for a 10.5m height limit and which are suitable for 12.5m height limit, noting that when questioned, he did not give definitive parameters for the assessment of the suitability of sites;
  - c) Mr Lewis agreed under cross-examination that when he was involved in shaping controls for Lygon Street in the 1970's, he suggested 13.5m heights, not 12.5m heights, for 4 storey buildings;
  - d) The only example of development in Queens Parade with 4 storeys within a 12.5m height that Council is aware of is at the rear of 302-304 Queens Parade which has 3 residential floors with a covered roof top terrace;<sup>34</sup>
  - e) Council does not consider a staggered floor plate between retained heritage buildings and new development behind is necessarily a likely or desirable outcome.
99. Council submits that a mandatory height limit must be "not too high" but "not too low" and that, in this case, the 14m height limit strikes the right balance allowing for

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<sup>34</sup> Included in folder entitled "Surrounding Plans", Tab # 10

generous ground level commercial space and a good standard of amenity for residential development behind and above. This is supported by the 3D modelling and evidence of Mr Gard'ner, Mr Helms and Mr Parsons.

100. With regard to the upper level setback, it is submitted that the proposed mandatory 8m minimum setback together with Clause 2.4 Upper Levels Requirements and Clause 2.8m Heritage Design Requirements in the Preferred DDO16 will provide an appropriate framework for decision making in Precinct 4 and that consideration of, for example, the particular physical details of an existing building (such as principal roof depth, chimneys) and the appropriate feature of site responsive design (including matters such as side elevations and placement of balconies) will properly occur at the permit application stage.
101. With regard to the visibility of upper levels above the street wall, it is noted that neither Mr Lewis<sup>35</sup> nor Mr Holdsworth<sup>36</sup> supported submissions that upper level development should be invisible from across Queens Parade, and both accepted that a view of a heritage street wall with upper level building was an acceptable heritage outcome – although the extent of built form was not agreed upon.
102. Mr Lewis accepted that heritage streetscapes are a palimpsest of architectural evolution<sup>37</sup> and agreed that this involves the concept of layering with a dominant street façade and a layer of visible and recessive new development behind.
103. Council relies on its Part B submission and evidence of its witnesses with regard to the visibility of new development.

### **Corner sites and the former ANZ Bank**

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<sup>35</sup> Mr Lewis Statement of Evidence, page 10, and under cross-examination

<sup>36</sup> Mr Holdsworth Statement of Evidence, page 10 and under cross-examination

<sup>37</sup> This expression was used in *The University of Melbourne v Minister for Planning* (includes Summary) (Red Dot) [2011] VCAT 469, where the Tribunal said at [81]:

“Yet cities must be regarded as palimpsests: they must be capable of growth and adaptation to meet new needs. Over times the buildings of one era will invariably require replacement or adaptation to meet these needs. ...”

104. Mr Holdworth, Mr Lewis and a number of submitters (such as the 3068 Group Inc<sup>38</sup> and the Queens Parade Heritage, Planning and Traders Group<sup>39</sup>) raise the issue of corner sites in Precinct 4, such as ANZ Bank and the Bakers Delight building, and the role that these sites play in the heritage streetscape.
105. Council agrees that corner sites have more exposure than mid-block sites and that development on these sites needs to be managed, noting of course that corner sites also offer an good opportunity for redevelopment given two street (or sometimes three street frontages) and fewer sensitive residential interfaces.
106. Council submits that the Preferred DDO16 provisions have appropriately addressed development on these sites, having regard to Clause 2.5 Corner Site Requirements and the Precinct Table requirements.
107. Council does not agree that all corner sites should be restricted to a two-storey height as suggested by Mr Lewis as some corner sites have the opportunity to support higher development, as the redevelopment of the bank on the northwest corner of Queens Parade and Delbridge Street illustrates.
108. With regard to the corner elevations of the ANZ Bank, Council submits that the Preferred DDO16 provisions including the mandatory “key view-line and visual prominence of the former ANZ building” requirement in Clause 2.9.4 will ensure that the principal views to the building are protected and the Part C version has an amended map for Precinct 4 which shows the viewline referred to in the text.

#### **Sideages to rear residential boundaries**

109. Text has been added to the DDO Part C version to address the handful of instances where a residential property in the NRZ has a rear boundary with the side boundary of a property within the DDO (eg 2 Michael Street).

#### **Services**

110. A number of submitters raise the issue of services at ground and upper levels and how services will visually affect the significance of the heritage place.

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<sup>38</sup> Doc #64, page 44

<sup>39</sup> Doc #56, page 10

111. In response, Council has included an additional requirement in Clause 2.6 Ground Floor Design Requirements in the DDO16 Part C Version:

*Building services and service cabinets should not be located on the street frontage of heritage facades, where possible. Where unavoidable, they should be designed and located so they do not dominate the street frontage or detract from the character and appearance of the heritage building.*

## **Balconies**

112. Mr Lewis and Mr Holdsworth raise the issue of the visual intrusion of upper level balconies above the street wall.
113. In response, Council has added an additional requirement in Clause 2.4 Upper Level Requirements:

*ensure balconies at upper levels do not dominate the solid façades of heritage street walls*

## **Depth of commercial space**

114. Submitter #407 makes submissions to the Panel on behalf of a number of traders that “Regarding setbacks, 6m – or even the so-called compromise of 8m – would cut our spaces in half or worse. My store would be reduced to a quarter of its current footprint....”.<sup>40</sup>
115. Council submits that this is clearly a misunderstanding of the manner in which the Preferred DDO16 will operate as there is no provision that seeks to reduce commercial floor space at all. The minimum upper level setbacks do not affect ground level floor space and do not create any obligations to reduce floor space. They are to guide new development at the upper levels, provided the minimum setback is not reduced, they do not dictate a setback.<sup>41</sup>

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<sup>40</sup> Doc #83

<sup>41</sup> In its response to submissions, Council noted that the loss of ground level shop floor spaces was “not an issue the DDO could easily address. Approvals at 101 Queens Parade and 388 Queens Parade show deep ground floor floorplates (ie 30m and 20m respectively) (noting these are wide sites in the Queens Parade context.) Any retail space that is reconfigured as a result of development will need to be commercially viable. It is not specifically a planning consideration but the commercial reality for developers is that their retail spaces must be viable in order for them to be sold/leased. The Amendment includes a requirement that ground floors are designed with a floor to floor

## PRECINCT 5

116. With regard to Precinct 5, the principal issues that have arisen during the Panel hearing are:
- a) The applicability and suitability of DDO provisions for sites on the VHR;
  - b) The mandatory nature of the height and setbacks for 201-215 Queens Parade;
  - c) The height of the street wall along Dummett Crescent to the east of 215 Queens Parade in Precinct 5B;
  - d) Pedestrian activation of Dummett Crescent;
  - e) The preferred 43m maximum building height in Precinct 5C; and
  - f) The preferred upper level setback for Precinct 5C.
117. Most of these issues have already been addressed in the Part B submission and the evidence called by witnesses. However the street wall along Dummett Crescent needs clarification as does the reasoning behind the preferred 43m height in Precinct 5C.
118. With regard to the street wall height along Dummett Crescent to the east of 215 Queens Parade, Council acknowledges that the Preferred DDO16 is not clear as to what is intended. Council also acknowledges that the 3D modelling incorrectly showed (in some screen shots) the street wall height at 215 Queens Parade at 11m, not “matching the parapet height of former Clifton Motors Garage” (approximately 7.6m) as required. The 3D modelling then shows the street wall to the east rising to 11m after a setback of 8m from the corner. The modelling of Ms Heggen shows the Queens Parade street wall matching the height of the former Clifton Garage for the whole of the site at 201-215 Queens Parade with the street wall along Dummett Crescent rising to a height of 18m after an 8m setback.
119. The DDO16 Part C Version clarifies Council’s position with regard to the proposed requirements as:

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height that is suitable to accommodate commercial activity. Rear vehicle access will still be available for traders. The Amendment will not take that away. Access to properties will be determined as part of individual planning permit applications.”

- a) A mandatory maximum street wall for the whole of the site at 201-215 Queens Parade to match the parapet height of the former Clifton Motor garage and the eaves of the former UK Hotel:
  - b) A mandatory minimum 8m upper level setback for 201-215 Queens Parade; and
  - c) A mandatory maximum street wall height along Dummett Crescent of the parapet height of former Clifton Motor Garage for 8m then rising to a height of 11m;
  - d) Preferred 6m upper level setbacks to Dummett Crescent;
  - e) A mandatory height of 18m for 201-215 Queens Parade; and
  - f) A preferred 28m height for the remainder of Precinct 5B.
120. The rationale for these heights is set out in the Part B submission. Council submits that these controls will provide the appropriate setting for the VHR listed building in Sub-precinct 2B whilst allowing for higher development behind.
121. Submissions and evidence regarding the transition across Precincts 5C, 5B and 5A have been put to the Panel, noting Council's position that the metrics proposed in the Preferred DDO16 suitably respond to existing heritage fabric and newly constructed development.
122. With regard to the 11m street wall to Dummett Crescent, Council submits that this maximum height limit will ensure that the street wall along Dummett Crescent does not overwhelm or enclose the street, noting that a number of submitters (such as Submitter #145) raised the issue of pedestrian use of Dummett Crescent and its safety and amenity. In this regard, the 11m maximum street wall will assist in retaining light and amenity to the street.
123. Having regard to Precinct 5C, the main area of debate was the preferred 43m height limit proposed in the Preferred DDO16 noting that the Exhibited DDO16 included a preferred 49m height limit. In this regard, some submitters sought to increase the preferred height to 49m (Submitter #406) whilst others submitted that the 43m height limit should be mandatory (Submitter #145).
124. Council submits that the 43m preferred height limit reaches the appropriate balance for Precinct 5C because:

- a) It applies to the whole Precinct 5C, not just 267-271 Queens Parade, and therefore its suitability must be assessed having regard to the possibility that all sites in Precinct 5C could potentially seek to be developed to this level;
- b) It is discretionary and therefore the merits of each proposal will be assessed on its own facts;
- c) The 43m is justified having regard to a 14-storey building (with 4m floor-to-floor ground level and 3m floor-to-floor for 13 levels of residential above) noting the discretionary limit allows for some additional floor-to-floor height and the ground floor design requirement seeking commercial ground floor use; and
- d) The setting of a “not too high” and “not too low” benchmark is important as it will invariably be sought to be exceeded through permit application or amendments to existing permits (as is evidenced by the 68m permit application for 267-271 Queens Parade currently before VCAT). Council does not consider that the “starting point” should be 49m.

125. Having regard to the street wall height in Precinct 5C, Council relies on its Part B submission and the evidence of Mr Parsons. Council does not a building of 49m built to the street without any upper level setback to be a *preferred* outcome, which would be the result of Ms Bell’s evidence. Retaining a 6m preferred setback enables the exercise of discretion for a reduced setback in the context of a specific design, but a 0m preferred setback creates an expectation for future designers and permit applicants that there should be a tower built to the street. This is a strong mischaracterisation of the outcome Council is seeking for sites in Precinct 5C, including the three undeveloped sites at the northeastern end of the precinct.

## **CONCLUSION**

126. In conclusion, Council respectfully requests the Panel to recommend that the Amendment be adopted subject to the changes noted in the submissions above and the DDO16 Part C Version.

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Instructed by Maddocks Lawyers

2 September 2019