

Date: 4 March 2024

**Bayside Planning Scheme
Amendment C192bays**

Part C Submission on behalf of Bayside City Council

Planning Panels Victoria

INTRODUCTION

1. These closing submissions are made on behalf of Bayside City Council (**Council**), the Planning Authority for Amendment C192bays (**Amendment**) to the Bayside Planning Scheme (**Planning Scheme**).
2. In accordance with the Panel's directions dated 21 December 2023 and 29 February 2024, these submissions:
 - 2.1. respond to new matters raised in other parties' submissions and expert evidence since Council presented its submissions and evidence; and
 - 2.2. outline Council's final position on the Amendment.
3. These submissions do not seek to:
 - 3.1. reiterate matters previously submitted by Council; or
 - 3.2. provide a comprehensive overview of the oral evidence given during the hearing.
4. The Council continues to rely on:
 - 4.1. Council's Part A and B submissions, the correspondence from Council dated 23 February 2024 responding to the late submission in respect of 7 Roosevelt Court, Brighton East and oral submissions made during the hearing; and
 - 4.2. the evidence of Mr Gard'ner and Ms Schmeder (including their supplementary written evidence and oral evidence) in the manner outlined in its Part A and B submissions.
5. Council reserves the right to make further closing submissions and provide further evidence from Mr Gard'ner on the Panel's alternative preliminary conclusion (and related issues) raised on the last day of the hearing in accordance with the Panel's directions dated 29 February 2024.

FINAL POSITION ON THE AMENDMENT

6. Council respectfully requests that the Panel recommend that the Amendment be adopted subject to the following post-exhibition changes:
 - 6.1. The removal of the following properties from the Amendment:
 - a. 13 Fifth Street, Black Rock;
 - b. 9 Wolseley Grove, Brighton;
 - c. 9 Bellaire Court, Beaumaris;
 - d. 175-177 Tramway Parade, Beaumaris;
 - e. 27 Bolton Avenue, Hampton;
 - f. 78 Scott Street, Beaumaris; and
 - 6.2. Amendments to the Statements of Significance and Citations in respect of the following Heritage Places:
 - a. The 'Bellaire Court Estate' group listing, to remove reference to 9 Bellaire Court, Beaumaris;

- b. 19 Haywood Street, Beaumaris, to include reference to the introduction of stacked stone cladding, and to replace reference to 'Brighton' with 'Beaumaris' in respect of Criterion D;
 - c. 82 Reserve Road, Beaumaris, to delete HERCON Criterion H and to reflect recent alterations to the property;
 - d. 15 Mariemont Avenue, Beaumaris, to reflect recent alterations to the property;
 - e. 1-4/ 16 Gillard Street, Brighton East, to reflect recent alterations to the property; and
 - f. 7 Roosevelt Court, Brighton East, to clarify the parts of the fencing that are significant.
7. Enclosed with these submissions is a consolidated version of the Amendment documents showing Council's proposed post-exhibition changes in response to issues raised in submissions. This consolidated set of documents comprises Council's 'Day 1' Amendment documents but with the superseded documents for 1-4, 16 Gillard Street, Brighton East and 7 Roosevelt Court, Brighton East substituted with the versions reflecting Mr Gard'ner's further recommended amendments, which were circulated on 23 February 2024.
8. As outlined at paragraphs 13-16 of Council's Part B submission, the enclosed documents do not reflect all of the changes that will be required to the exhibition documents to reflect the proposed post-exhibition changes due to the administrative complexity of showing such changes.
9. For completeness, we have also provided a post-exhibition amended version of the Citation for the 'Bellaire Court Estate' group listing, which corrects a typographical error identified by Submitter 12 (9 Bellaire Court) during the hearing by ensuring that all references to 9 Bellaire Court have been deleted. An amended version of the Citation for the 'Bellaire Court Estate' group listing reflecting Mr Gard'ner's recommended changes was attached to Mr Gard'ner's witness statement and he confirmed during his oral evidence that the remaining reference to 9 Bellaire Court in that amended citation was an oversight and should be deleted.

RESPONSE TO NEW MATTERS

Evidence before the Panel

Submitters represented by planning or legal advocates

10. The Panel has had the benefit of the expert evidence of Mr Gard'ner who prepared the Heritage Study and Ms Schmeder, who provided a comprehensive independent peer review of the Heritage Study.

27 Bolton Avenue

11. In respect of 27 Bolton Avenue, Submitter 23 also filed expert evidence from Mr Raworth. In light of the fact that Mr Raworth, Mr Gard'ner and Ms Schmeder all agreed that the property should be removed from the Amendment, there was no need to call evidence from Mr Raworth in respect of this property and the submitter withdrew from the hearing. Council understands that the Panel accepts the recommendations of the experts and Council's position that the property should be removed from the Amendment.

9 Wolseley Grove

12. In respect of 9 Wolseley Grove, Submitter 14 also called expert evidence from Mr Raworth. Mr Raworth and Mr Gard'ner both recommended the property be removed from the Amendment as a result of the impact of the recent alterations to the dwelling. Ms Lennon on behalf of

Submitter 14 questioned Ms Schmeder on her view that the property should be retained in the heritage overlay. It is ultimately a matter for the Panel to determine which expert opinion it prefers having heard the evidence, however, Council supports Mr Gard'ner's recommendation to remove the property from the Amendment.

21 Dudley Street

13. In respect of 21 Dudley Street, while Council acknowledges that Mr Dunn put questions to Mr Gard'ner and Ms Schmeder on behalf of Submitter 31, in Council's submission, their responses demonstrated their firmly held and shared opinion that the property was of heritage significance and warranted inclusion in the Heritage Overlay. Council also notes that the submitter did not call any contradictory expert evidence in support of its submissions. Council submits that the evidence of Mr Gard'ner and Ms Schmeder in relation to 21 Dudley Street should be given great weight by the Panel.

9 Bellaire Court

14. In respect of 9 Bellaire Court, Ms Baker's evidence was taken as read and not tested on the basis that:
 - 14.1. Mr Gard'ner and Ms Schmeder agree with Ms Baker's conclusions, that the property at 9 Bellaire Court should be removed from the Amendment;
 - 14.2. Council relies on the evidence of Mr Gard'ner and Ms Schmeder on the retention of the Bellaire Court Estate group listing more generally; and
 - 14.3. Submitter 12 does not appear to seek to agitate for the removal of other properties from the Bellaire Court Estate group listing despite Ms Baker's evidence raising concern with the broader merits of the group listing and no submitter sought to challenge Mr Gard'ner or Ms Schmeder's evidence on the broader group listing.
15. Council submits that on the basis that no other party sought to challenge the evidence of Mr Gard'ner and Ms Schmeder in respect of the Bellaire Court Estate group listing, their evidence with respect to the group listing should be given great weight by the Panel. Council also understands that the Panel accepts the recommendations of the experts and Council's position that 9 Bellaire Court should be removed from the Amendment.

16 Gillard Street

16. In respect of 16 Gillard Street, Mr Gard'ner and Ms Schmeder both gave evidence in support of the retention of the property in the Amendment and Heritage Overlay. Mr Forrester on behalf of Submitter 2 sought to challenge this evidence through cross-examination. Submitter 2 also called evidence from Mr Raworth who, while agreeing with Mr Gard'ner and Ms Schmeder that the building was largely externally intact, recommended that the property be removed on the basis that it was not of local heritage significance.
17. Council submits that the evidence of Mr Gard'ner and Ms Schmeder ought to be preferred on the basis that they have assessed the property in accordance with PPN1 and best practice, whereas Mr Raworth has assessed the Heritage Study against standards that are neither required by PPN1 nor commonly adopted by heritage practitioners. Council makes further submissions in respect of the differences between the experts' approach to comparative analysis further below.
18. Council further submits, it is uncontroversial that a property need only satisfy one of the HERCON criterion to be of local significance and warrant inclusion in the Heritage Overlay. Accordingly, while Council submits that Criteria A, D and E have been satisfied on the basis of the evidence of Mr Gard'ner and Ms Schmeder, if the Panel is satisfied that even one of the criterion has been satisfied, it should recommend that the property be included in the Heritage Overlay with the necessary modification to the Statement of Significance.

Unrepresented submitters

19. While Council acknowledges that the Panel hearing process can be intimidating to unrepresented submitters that have not had previous experience in the forum, it is disappointing that many of the unrepresented submitters did not put questions to Council's expert witnesses but elected to make detailed submissions on heritage matters that relate to the heritage expertise of Council's witnesses. As such, Council submits that the Panel should put limited weight on the submissions with regard to heritage matters made by these submitters.
20. In particular, the submission of Mr Campbell (Submitter 25 – General issues) and the submission of Submitter 4 (82 Reserve Road) raise a number of questions and criticisms of the Heritage Study that were never put to either Mr Gard'ner or Ms Schmeder for comment. Council submits that the Panel should place little to no weight on these submissions. Council relies on the expert evidence of Mr Gard'ner and the independent peer review expert evidence of Ms Schmeder with respect to the Heritage Study and the proposal to include 82 Reserve Road in the Heritage Overlay.
21. Similarly, the submission/presentation made by Mr Mollar (Submitter 15 – 28 Towers Road) made various submissions about the design and construction of Post-War Modernist dwellings as compared to other eras of housing. Council submits that:
 - 21.1. these matters went beyond the scope of the submission originally made with respect to 28 Towers Road, which focused on the condition of the dwelling at the property;
 - 21.2. were not put to Mr Gard'ner or Ms Schmeder for comment; and
 - 21.3. are not supported by any expert evidence led by the submitter.
22. Submitter 15 relied on advice from Mr Nik Wallis on the condition of the dwelling and cost of repair. The advice was provided with the submission and supplemented with verbal commentary at the hearing. As clarified by Council at the commencement of the hearing, Mr Wallis did not prepare expert evidence in accordance with the Panel's practice note nor was it suggested that Mr Wallis was providing independent expert evidence on building condition. On this basis, Council submits that the Panel should afford the commentary provided by Mr Wallis on the condition of the building the same weight that is afforded to a submission.
23. Paragraphs 40-47 of Council's Part B Submission outlined Council's response to submissions regarding building condition, extent of alterations and intactness. Council submitted that:
 - 23.1. the condition of a building is only relevant when determining whether a place is of local heritage significance if it can be demonstrated that the structural condition of a building is so poor that demolition is inevitable; and
 - 23.2. condition is relevant at the planning permit stage.
24. The Panel has indicated that it accepts this submission.
25. When answering questions from the Panel on whether he thought the demolition of the dwelling at 28 Towers Road was inevitable, Mr Wallis answered 'maybe or maybe not' and suggested the dwelling was not 'worth' fixing. Council submits that the personal preference or subjective views of individual property owners on whether the cost of restoring and conserving a place of heritage significance is worthwhile was not the relevant enquiry before the Panel. Council submits it is clear on the submitter's own submission and building advice, that the structural condition of the dwelling is not so poor as to make demolition inevitable.
26. Mr Wallis had previously included items in his costings such as double-glazed windows, in response to which Ms Schmeder had commented it was not necessary to upgrade existing elements of the house to meet current National Construction Code (NCC) requirements unless the alterations enlarge the house by more than 25%. When the Panel questioned Mr Wallis about this, he conceded that Ms Schmeder was correct with respect to energy standards but

that standards applying to materials would override the NCC so that glass would be replaced with toughened glass, for example. Accordingly, Council submits that the scope and cost of required maintenance could vary considerably depending on the scope of works and personal preferences of the owner.

27. Council sympathises with Submitter 15 that the current state of dilapidation of the dwelling has resulted from the personal circumstances of the current owner and occupier, but it submits that the ongoing lack of maintenance of a property cannot be a reason to refuse to protect its heritage significance.
28. The Panel has afforded Mr Gard'ner an opportunity to make submissions on whether issues of building condition may play out differently for Post-War Modernist dwellings at the planning permit stage. Regardless of the view that the Panel ultimately expresses on this issue, Council submits that the condition of the building at 28 Towers Road is not a basis on which to exclude the property from the Amendment.
29. Council notes that Submitter 9 (15 Mariemont Avenue) and Submitter 16 (1 Reid Street) also raised heritage issues in their submissions but elected not to put these matters to Mr Gard'ner or Ms Schmeder. Council submits that limited weight should be placed on these submissions and it relies on the evidence of Mr Gard'ner and Ms Schmeder with respect to these properties.

Reforming the planning process

30. Mr Campbell (Submitter 25 – General issues) made submissions (predominantly in writing) which raised various issues regarding the planning system and the need for reform. While Submission 25 raised concerns about process, the submission tabled at the Panel hearing expanded significantly on the range of issues raised in the submission. Council continues to rely on its response to this submission in its Part B submission and submits that the determination of the merits of reform to the broader planning system as it applies to heritage matters is beyond the scope of this Amendment and this Panel.

Fairness in removing properties from the Amendment

31. Some submitters, including Submitter 16 (1 Reid Street) and Submitter 5 (19 Haywood Street – written submissions only) raised issue in respect of the fairness of their properties having been identified for inclusion in the Amendment while others were excluded.
32. As outlined at paragraph 43 of Council's Part A submission, at its meeting on 19 July 2022, Council determined to seek authorisation for the Amendment for properties identified in the Heritage Study other than certain properties specified by Council. Council's resolution stated that the properties 'do not meet the relevant threshold for inclusion in a heritage overlay' but details on the basis for the deletion of these properties were not provided.
33. Council has not sought to advance the proposition that the decision to exclude properties was for heritage reasons. The Heritage Study recommended that these properties be included in the Amendment and Council's heritage experts still support that view.
34. As discussed at the hearing in response to questions from the Panel, the letter of authorisation from the Minister included the following comments that encouraged Council to consider undertaking a further planning scheme amendment in the future to apply the heritage overlay to the properties excluded from the Amendment:

It is noted that at its meeting on 19 July 2022 your council resolved not to apply the Heritage Overlay to 28 properties identified as being of local heritage significance in the Post-War Modern Residential Heritage Study 2022. The Department of Environment, Land, Water and Planning (DELWP) acknowledges the significant strategic work undertaken in the preparation of the Post-War Modern Residential Heritage Study 2022 and your council is encouraged to consider undertaking a further planning scheme amendment in the future to fully implement the study to provide

certainty to land owners and ensure the comprehensive protection of heritage places consistent with the objectives of the Planning and Environment Act 1987.

35. As outlined at paragraph 76-78 of Council's Part B submission, Council submits that the Panel's task is to consider submission in respect of properties that are affected by the Amendment and make recommendations on whether such properties are of local heritage significance and warrant inclusion in the heritage overlay.
36. In Council's submission, while some property owners may feel that it was unfair that their property was retained within the list of properties affected by the Amendment when others were excluded, Council submits that those properties may be the subject of a future amendment and more importantly, their exclusion is not relevant to whether the properties affected by the Amendment are of local heritage significance and warrant inclusion in the heritage overlay.
37. Similarly, Mr Campbell's (Submitter 25 – General issues) written submission tabled at the Panel hearing raised various concerns about the scope of the Heritage Study being limited to Post-War residential properties constructed in the Modernist style. Council submits that this Panel is tasked with considering submissions in respect of this Amendment, not additional work that should be completed in respect of other properties that are not the subject of the Amendment.

Submitter 14 (9 Wolseley Grove) - David Helms heritage advice

38. In giving oral evidence, Ms Schmeder made reference to heritage advice from David Helms obtained by Council in respect of the proposed development at 9 Wolseley Grove, Brighton. Council subsequently produced and circulated a copy of this letter dated 3 August 2022.
39. Council confirms that a copy of this letter of advice was not previously provided to the owners of the land at 9 Wolseley Grove, Brighton, although officers had summarised the contents of the advice in an email sent to the landowners in August 2022.
40. Council confirms that the advice was obtained:
 - 40.1. following the completion of the Heritage Study and the Council resolution to seek authorisation for the Amendment; and
 - 40.2. before an interim Heritage Overlay was applied.
41. As outlined at paragraph 104 of Council's Part A, the planning permit for the recent additions and alterations to the dwelling at 9 Wolseley Grove was issued on 18 November 2022. Council further confirms that, as outlined in Attachment 3 to Council's Part A, while the interim Heritage Overlay was proposed to apply to the land as part of Amendment C193bays, that Amendment was approved on 1 November 2022 but only gazetted on 3 May 2023. Accordingly, an interim Heritage Overlay did not apply to the land at 9 Wolseley Grove at the time that the planning permit was issued.
42. Council therefore confirms that it does not rely on the advice of David Helms in relation to its response to Submitter 14. Council relies on the advice of Mr Gardner that:
 - 42.1. in the absence of heritage controls and heritage permit conditions, it is not possible to know to whether the heritage advice was implemented as part of the approved works; and
 - 42.2. the property should be removed from the Amendment.

Submitter 31 (21 Dudley Street) - Visibility of a dwelling

43. Mr Dunn on behalf of Submitter 31 put questions to each of Council's witnesses relating to the visibility of the dwelling from the street.

44. Council relies on the evidence of Mr Gard'ner and Ms Schmeder that the visibility of a dwelling from the street is not a relevant test in the context of this Amendment and moreover, that the visibility of a heritage place is rarely a relevant factor to whether a place warrants heritage protection.

Comparative analysis – Submitter 31 (21 Dudley Street) and Submitter 2 (16 Gillard Street)

45. During the hearing, Mr Dunn, on behalf of Submitter 31, made submissions which sought to criticise the Heritage Study for failing to provide details of 'typical' places for the purpose of the comparative analysis contained within the Citations. Mr Forrester on behalf of Submitter 2 also made similar submissions and lead evidence from Mr Raworth on this issue.
46. It was the evidence of Mr Gard'ner and Ms Schmeder that details of 'typical' places are not commonly included in a comparative analysis. Rather, the comparative analysis should compare the subject property against other, 'better than typical' places.
47. In preparing the Heritage Study, GJM Heritage undertook a comparative analysis of each place against other comparable places which are (a) already included within the Heritage Overlay or (b) assessed as warranting inclusion in the Heritage Overlay. These places can be described as 'better than typical' examples of the relevant class of place – Post-War Modernist houses in the City of Bayside.
48. Council submits that it would be non-sensical for the comparative analysis to purport to include hundreds or thousands of examples of properties that do not fall within that class of place and are merely 'typical'. Council further submits that identifying even one or two of the 'typical' examples from the larger group of 'typical' examples considered for each place is not something that is required by PPN1 nor common practice and is particularly onerous in a municipal wide study.
49. This is consistent with the guidance contained in PPN1, which provides that:

To apply a threshold, some comparative analysis will be required to substantiate the significance of each place. The comparative analysis should draw on other similar places within the study area, including those previously included in a heritage register or overlay. Places identified to be of potential state significance should undergo analysis on a broader (statewide) comparative basis.

[emphasis added]

50. As noted in Council's Part B submission, it is Ms Schmeder's evidence that the threshold of local heritage significance has been determined on the basis of extensive comparative analysis against (a) places already affected by the Heritage Overlay in the City of Bayside and (b) places recommended for inclusion in the Heritage Overlay by the Heritage Study. In Ms Schmeder's opinion, this is a common approach, and due to the small number of Post-War residential places currently affected by the Heritage Overlay in the City of Bayside, this approach provides a rigorous basis to determine which places are of local significance.
51. As highlighted by Ms Schmeder, the Panel in relation to Amendment C387melb considered the issue of comparative analysis in the context of Post-War places which have few comparators already included in the Heritage Overlay. The Panel found that:

"The Panel agrees that a comparative analysis is a fundamental and critical step in determining whether the threshold of heritage significance is reached. It enables an understanding and qualitative assessment of the relative quality and value of a place and whether it stands out or compares favourably with similar in terms of architectural quality, remaining intactness and integrity, and their ability to demonstrate key characteristics or stylistic and technical developments of a period. It requires therefore more than just a list of places or services of photos of similar period or classes of building to serve this task.

PPN01 confirms the role of the comparative analysis, identifying that to apply a threshold:

... some comparative analysis will be required to substantiate the significance of each place. The comparative analysis should draw on other similar places within the study area, including those previously included in a heritage register or overlay.

PPN01 does not identify what level of analysis is required, nor does it limit the analysis to just those places within a Heritage Overlay. In the context of postwar buildings in the Hoddle Grid, the Panel is of the view that the approach adopted by the Heritage Review to consider the comparative analysis other places in the study area and in the VHR (in a measured way), is entirely reasonable. This is particularly the case when looking at places that have not been comprehensively covered before. In some instances, it is also reasonable to consider comparators outside the Hoddle Grid but still within the City of Melbourne.

The process of comparative analysis for local level significance does not require places to be better than others but they should compare at least as well as others that are similar phase, era or class). This is important to ensure the integrity of existing places included in the Heritage Overlay is not diminished. It also ensures that it is not just the grand and landmark buildings that are identified but also allows for the humbler places to be recognised as contributing to the heritage significance of a city, town or precinct

...

...While the Panel appreciates the positions expressed by some parties and experts that the Heritage Review's comparative analysis is somewhat simplistic and generic, it is not required to be an exacting exercise or an exhaustive and detailed analysis...

...

...It is clear to the Panel that in this instance a comparative analysis has been undertaken and completed in a manner consistent with PPN01. It is considered adequate to inform decisions regarding threshold and does not curtail wider analysis and assessment.”¹

52. GJM Heritage's approach to comparative analysis is consistent with the approach that was taken in respect of the Hoddle Grid Heritage Review and endorsed by the Panel in relation to Amendment C287melb. Moreover, GJM Heritage's approach has been peer-reviewed by Ms Schmeder, who has confirmed that it provides a rigorous basis to determine which places are of local significance.
53. In circumstances where there are limited comparative examples (such as 16 Gillard Street), Council submits that the detailed work undertaken by GJM Heritage in preparing the Heritage Study provides a sound basis for the application of the Heritage Overlay and this has been affirmed by the evidence of Ms Schmeder.
54. For the reasons outlined above, Council submits that GJM Heritage's approach to comparative analysis is consistent with best practice and the guidance contained in PPN1, and ought to be accepted by the Panel on that basis.
55. Council acknowledges that there are differences in opinion between Mr Gard'ner, Ms Schmeder and Mr Raworth on how the building at 16 Gillard Street compares to any of the relevant comparators and the Panel will need to determine which opinion it prefers having regard to all relevant considerations and the evidence as presented. However, Council submits that the evidence of Mr Gard'ner should be preferred as the author of the Heritage Study, who has undertaken an extensive investigation of post-war modernist dwellings within the City of

¹ Pages 42-43 of the Panel report.

Bayside as part of preparing the Heritage Study and whose work has been carefully and comprehensively reviewed by an independent expert. Council submits, as has been demonstrated throughout this hearing, Mr Gard'ner has continuously reflected on his work in response to submissions and as new information about a property has come to light and conceded to changes to his recommendations where warranted. However, he continues to recommend the inclusion of 16 Gillard Street and does not resile from his view that the building is of local heritage significance.

CONCLUSION

56. Council submits that the Amendment is well-founded and strategically justified having regard to:
 - 56.1. the background and supporting documents to the Amendment;
 - 56.2. Council's Part A, B and C submissions, including Council's response to submissions; and
 - 56.3. the evidence of Mr Gard'ner and Ms Schmeder.
57. The Act, the Planning Policy Framework and Plan Melbourne seek to protect places of heritage significance in Victoria. The Amendment achieves these statutory and policy objectives.
58. The evidence called by Council demonstrates that the Heritage Study has been prepared in a manner which accords with current best practice, and that the Amendment, in turn, is an appropriate and necessary implementation of the Heritage Study (in part).
59. On that basis, Council respectfully requests that the Panel recommend adoption of the Amendment, subject to the proposed post-exhibition changes shown tracked on the enclosed Amendment documentation.
60. This concludes Council's Part C submissions.

4 March 2024

HARWOOD ANDREWS
on behalf of
Bayside City Council