

PLANNING PANELS VICTORIA

IN THE MATTER of Amendment C278 to the Melbourne Planning Scheme

AFFECTED LAND: Land excluding the Central City, Southbank, Docklands and
Spring Street South.

PART B SUBMISSION OF THE MELBOURNE CITY COUNCIL

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A. INTRODUCTION

1. Melbourne City Council (**Council**) is the Planning Authority for Amendment C278 (**Amendment**) to the Melbourne Planning Scheme (**Melbourne Planning Scheme**). This Part B submission is made in accordance with the Panel Directions dated 2 March 2020, updated on 23 June 2020, 18 September 2020, and 26 October 2020.
2. This Part B submission addresses the following (and related) matters:
 - (a) the proposed shift in the policy setting;
 - (b) why parks are important;
 - (c) why winter sunlight access to parks is important;
 - (d) the consultation and other data used in the strategic assessment of the Amendment;
 - (e) the case for mandatory controls;
 - (f) the case for longer hours of protection;
 - (g) the social and economic effects of the Amendment; and
 - (h) the spatial modelling, including how DDO8 was mapped.
3. A number of the matters about which the Panel requested further information in Direction 16 have been addressed in these sections of the submission.
4. This submission also address the following matters referred to in Direction 16:
 - (a) an explanation of the inter-relationship between the ‘park types’ in the DDO8 and the park hierarchy in the Open Space Strategy 2012;
 - (b) an explanation of how the overshadowing controls in the DDO8 will interact with overshadowing controls in other parts of the planning scheme;
 - (c) an explanation of how the Amendment (in particular the revised policy at Clause 22.02) impacts on current and future structures within parks, including major sporting facilities such as the MCG, Punt Road Oval and Ikon Park;
 - (d) Council’s response to the issues raised in submissions; and
 - (e) Council’s response to expert evidence.
5. In relation to the balance of the matters referred to in Direction 16, Council intends to address those matters in its Part C submission, once the Panel has heard the balance of submissions and evidence.

B. SHIFT IN POLICY SETTING

6. The City of Melbourne is the only municipality that has a stand-alone sunlight to public places policy. Clause 22.02 has been in place since the new format Melbourne Planning Scheme was introduced more than 20 years ago. Since that time, Clause 22.02 has provided specific policy direction that recognises the importance of sunlight to public parks and other spaces, for reasons of public health and wellbeing, and of supporting trees and other plants. The policy also recognises that sunlight to public spaces is a fundamental feature of Melbourne's character, liveability, comfort and attractiveness.
7. The existing policy supports the various specific controls in the Melbourne Planning Scheme that impose built form requirements relating to overshadowing of public parks at specific times of the year, and for a specific range of hours. Generally, other than for a specific list of "key" open spaces, those controls have been discretionary, and applied equinox based controls for the hours of 11am to 2pm.
8. The central purpose of the Amendment is to adjust the policy setting in Clause 22.02 in order to change the way that the Melbourne Planning Scheme deals with sunlight access for public parks outside the Hoddle Grid and Southbank – to effectively reset the policy approach.
9. The changes to Clause 22.02 include noting the need for specific controls to prevent additional overshadowing and to maximise sunlight access throughout the year. The proposed DDO8 is intended to implement this shift in policy by providing winter sunlight protection to all parks outside the Hoddle Grid and Southbank.
10. The primary impetus for this shift in policy is the fact that over the last decade, in particular, there has been dramatic growth in the City of Melbourne, with significant increases in resident and worker populations, and significant intensification of development, including rapid increase in medium and higher rise developments around public parks, and in key growth areas. The Sunlight Access Report describes the context in this way:¹

Drivers of this policy review


The last comprehensive review of the Sunlight to Public Places policy occurred in 1999. The city has undergone transformational change since this time. This has included:

¹ Sunlight Access Report, pg 17.

- *A significant increase in residential population*
 - *A significant increase in the number of workers*
 - *A significant increase in the number of overall visitors to the municipality*
 - *A significant transition in the scale of developments delivered across the municipality, in regards to density and height of buildings, in particular within identified urban renewal areas*
11. This pattern of growth and intensification has followed, to a significant degree, from the structure planning processes that have been undertaken by Council for three key growth areas: Southbank, City North, and Arden-Macaulay. Council acknowledges that there are other key areas in which intensification through infill development has led to impacts and demands on public parks – developments around Fitzroy Gardens and along Wellington Parade and St Kilda Road are good examples of this.
 12. The population of the City is forecast to continue to rise steeply. With that rise will come continued, if not accelerated, demand for housing and employment opportunities.
 13. This growth will only increase the demand on public parks. This is specifically recognised in Council’s Open Space Strategy 2012 (**OSS**), as is the consequential need to provide new open spaces, and to upgrade, improve and expand existing public spaces, including public parks, in order to cater for and respond to these increases in demand, and ensure that current and future residents and workers in the City of Melbourne are able to continue to enjoy the public parks that are amongst the jewels in the City’s crown.
 14. The early city plans for Melbourne provided to the Panel in Mr Fergus’ presentation make good the proposition of the central role played by public parks in the City – the plan from 1869² shows Royal Park, Princes Park, Carlton Gardens, University Square, Lincoln Square, Argyle Square, Flagstaff Gardens, Parliament Reserve, Treasury Gardens, Fitzroy Gardens, the Botanical Gardens, Yarra Park and Fawkner Park. It will be easy for the Panel to imagine the extraordinarily different context within which those parks sat in the 19th century, compared with their setting today.
 15. The parks, and the way they are used, have evolved over time, with changes in demographics, technology, sports, vehicles and roads, and range of other factors. As a point of historical

² Fergus presentation, slide 7.

interest, the Panel may be amused by this article in *The Argus* on 18 December 1907³ and an extract from the Carlton Community History Group 2016 publication⁴ about the construction of the first children's playground anywhere in Victoria, in Lincoln Square. The article reads:

	<p><i>Fun and games in Lincoln Square</i></p> <p><i>In 1906 an irate resident wrote to the editor of The Age protesting about the 'scandalous' lack of public access to the square: 'It is reserved in the interests of a cow keeper, who may be observed almost daily cutting grass for his cattle. Year after year the same thing goes on, one crop of grass is removed and the gates are locked so that another may grow, and so on'. Meanwhile, he said, more than 350 children living nearby were forced to play in the streets. At the Fifth Annual Congress of the National Council of Women one speaker complained that Lincoln Square 'occupied three and a half acres right in the centre of Carlton and not a soul is allowed to make use of it'.</i></p> <p><i>These voices were heard and in 1907 Lincoln Square was in the headlines as the site of the first children's playground to be constructed anywhere in Victoria. (Sydney had one first.) A large and enthusiastic crowd including hundreds of children saw the Premier, Thomas Bent, officially open the playground just before Christmas 1907. According to the Age, "Many of the children took very little interest in the formal proceedings but made full use of the swings, maypoles and seesaws and very few of those present could hear the speeches owing to the noise." Photographs of the event published in The Weekly Times show a sea of hats, worn by both men and women, of</i></p>
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³ Available at: <https://trove.nla.gov.au/newspaper/article/10151579>

⁴ Available at: <http://www.cchg.asn.au/lincolnsquare.pdf>

	<p><i>course, but also by many of the children. In the background we can glimpse the houses which then surrounded the square. It was almost entirely residential with just a few corner shops and a couple of hotels.</i></p> <p><i>The playground was to be open from 10 in the morning until sunset (closed on Sundays, of course), no person over the age of 12 was to use the “appliances” (seesaws, two maypoles and four swings) and neither football nor cricket was allowed. But rules are made to be broken. In October 1912 The Argus reported that six youths had been fined 20 shillings each for playing football in Lincoln Square on a Sunday. Two-up was a popular form of gambling. Soon after the playground was opened, The Age, under the headline Two-up Sunday Schools, reported a court case. “Constable Beyens stated that at 2.45 p.m. on 12 July he came across about 50 men and youths playing the game in Lincoln Square. When the witness got within 20 yards of the crowd someone called out ‘Yow’ and there was a general scamper. Mr Sanders JP: “What is the meaning of ‘Yow’”? “It means here comes a policeman.” (Laughter)</i></p>
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16. Thankfully, times have changed and it is no longer frowned upon to kick a footy around the park.
17. The residents who fought hard for access to Lincoln Square in 1906 might have found it impossible to imagine a time, more than 100 years later, when Lincoln Square was surrounded by developments of more than four storeys, with not a cow to be seen in the whole of Carlton.
18. Equally, it is very difficult, if not impossible, for us to imagine what the area around Lincoln Square – and all other parks in the City – will look like in another 100 years; or the uses to which those parks may be put by future generations.
19. And that is the critical point. The key purpose of the Amendment, and the shift in policy that Council is seeking by amending Clause 22.02, is to preserve sunlight access to public

parks as much as is possible, in the context of competing built form controls, in order to maximise the amenity, character, useability, liveability, comfort and attractiveness of public parks for those future generations, as well as current residents and workers in the City.

20. Council is so concerned about this because once those parks are overshadowed by built form, it is effectively impossible to gain that sunlight back – it is lost forever. It is self-evident that public parks, and sunlight in public parks, are a finite resource. It is also trite to say that, given land values in the City, and competition for land, it is very difficult for Council to replace public parks if they are effectively ‘lost’ to overshadowing.
21. This is not to say that if public parks become overshadowed for all or significant parts of the day that they will no longer be used at all. But it almost goes without saying that being able to sit, play or walk in sunlight in a public park is a much more enjoyable experience, than doing so in a park that is covered by shadow from buildings – we all know this from our own experience. It is also beyond dispute that sunlight in public parks is more sought after in winter and the colder months, than it is in the heat of summer.
22. Council recognised the need for review of the policy setting in Clause 22.02 as early as 2009, (and later in 2014 and 2018).⁵
23. That review has now been undertaken through the strategic work that underpins this Amendment, and Council has determined that the policy should be amended to achieve the following outcomes:
 - (a) Express recognition that all public parks are equally of value and to remove the principle that different parks have different sunlight access requirements.
 - (b) Identification of the importance of providing opportunity to access and enjoy sunlight throughout the year, expressly in winter, and removal of the general reference to times of year when intensity of use is at its highest.
 - (c) Application of the policy across all land in the municipality, including City North, while maintaining differentiated treatment for places inside the Hoddle Grid and Southbank compared with parks outside that part of the Capital City.
24. Council acknowledges that, as Mr Barnes indicated, these outcomes represent a significant shift in policy. In Council’s submission, however, there is a strong strategic basis for that

⁵ Refer to footnotes 13, 14 and 15 in Council’s Pat A submission.

shift to occur, for the reasons addressed in the evidence put to the Panel, and further explored in these submissions.

25. Council acknowledges that the approach proposed in the Amendment departs from the approach that has been applied to parks outside the Hoddle Grid and Southbank for the last twenty years. including the approach taken in structure planning for City North, Arden-Macaulay and West Melbourne.
26. These structure plans have to be considered in the context of the policy setting established by Clause 22.02 at the time – equinox controls were the prevailing period for acceptability of shadow impacts, and there was no comprehensive review of Clause 22.02 on foot. Council could not realistically seek to apply winter solstice shadow protections in those areas, before the strategic work to support a change in policy had been undertaken.
27. The shift in policy heralded by this Amendment is part of an evolution which has been underway over recent years. Amendment C270 is one step in the evolution of built form and overshadowing controls as they apply to the Hoddle Grid and Southbank. Introduced in late 2016, DDO10 sets differential controls for parks and other open space in the Central City – including mandatory winter solstice controls for key parks and areas of open space; and ‘modified’ mandatory winter solstice controls for the “tier 2” public parks. The introduction of DDO10 represented, as Mr Barnes put it, a progression away from discretionary equinox controls, to a more stringent set of overshadowing controls for a broader range of parks than were otherwise protected under the previous Clause 22.02 and CCZ controls.⁶ Council notes that C270 provides a precedent not only for mandatory controls and winter solstice protection, but fixing the level of shadow in parks at that time as the maximum acceptable quantum of shadow.⁷
28. This Amendment does not seek to disturb the DDO10 controls – they are relatively recent, and were subject to detailed consideration through the C270 amendment process. There may come a time for DDO10 to be reconsidered, but that time is not now.

⁶ Panel Report, Melbourne Planning Scheme Amendment C270, Central City Built Form Review, [2016] PPV 133: A convenient summary the overshadowing controls prior to Amendment C270 is contained in Appendix E, pg 228-230.

⁷ [2016] PPV 133: See discussion and conclusions at pg 136 and 137 of 232.

29. This Amendment is a further evolution that seeks to respond to the changing needs and expectations of the community and the anticipated increase in pressure on parks from continued intensification and population growth.

C. WHY PUBLIC PARKS ARE IMPORTANT

30. There can be no doubt that open space is a defining element of the City of Melbourne. There can also be no doubt that the public parks that are the most substantial component of that open space are a highly valued component of what makes the City one of the most 'liveable' cities in the world.
31. This was recognized in the panel report for Amendment C209, which introduced the public open space contribution requirement under the schedule to Clause 52.01, and the related policy at Clause 22.26; and added the OSS and associated technical document (**OSS Technical Document**) as reference documents. The Panel stated:

There is no doubt that open space in the City of Melbourne, and particularly the Capital City and Regional level open space, is a defining element of Melbourne itself. The Panel does not consider it particularly useful to compare open space rates with surrounding municipalities as the form and function of Melbourne, and particularly the CBD, Southbank and other inner areas, is very different.

32. After considering the "relatively generous" per head provision of open space in the City, the Panel stated:

However, the Panel does not consider that this is a negative factor that should result in efforts to 'wind back' open space provision by providing less in future, but rather be seen as a valuable contributor to Melbourne's liveability that should be maintained and enhanced; particularly in the light of the acknowledged very significant increases in population and population density that are occurring.

33. The OSS sets out the factors that make open space so important:⁸
- (a) social connectedness;
 - (b) mental health and wellbeing;
 - (c) physical health and wellbeing;
 - (d) mitigation of urban heat;

⁸ OSS, pg 3 - 4.

- (e) biodiversity;
 - (f) cultural heritage and character;
 - (g) economics and tourism;
 - (h) events and arts.
34. The OSS identifies and maps each area of open space in the municipality, and classified the open space into a hierarchy defined by the role played by each open space “depending on its location, size, use and character”.⁹ The OSS states that “[e]ach open space has a unique role within the network”.¹⁰ The OSS also notes that a “key objective in planning the open space network is to provide open space within easy walking distance for the majority of the community”. The OSS uses a 500m distance for State, Capital City, Regional, Municipal and Neighbourhood open space, and a 300m distance for Local and Small Local open space.
35. The OSS then describes the forecast changes that may impact open space, including climate change, and significant population growth. In particular, the OSS states:¹¹
- The forecast population growth will mean more people living and working in higher density neighbourhoods. Increasing urban densities will result in more people needing to use open space to maintain their physical and mental health and wellbeing. This will place additional demand on existing open spaces and in some areas create the need to provide additional open space. Population growth is already occurring in areas lacking adequate or any open space. Growth will require improvement to the quantity, diversity, quality and natural features of open space to adequately cater to the increased population.*
36. The OSS sets out an overall direction for open space in the municipality, as well as directions for each suburb. As relevant to the Amendment, the steps for implementation set out in the OSS include:¹²
- *Continue to implement master plans for major parks including upgrade works.*
 - *Plan for and upgrade existing open spaces as identified in the precinct recommendations.*

⁹ OSS, pg 6.

¹⁰ OSS, pg 6.

¹¹ OSS, pg 7.

¹² OSS, pg 29.

37. The OSS is backed up by the OSS Technical Report. The Technical Report provides that the purposes of the OSS are to:¹³

- *Provide an accessible open space network where the majority of people live and work within a 10 minute walk of open space.*
- *Liaise with the Victorian Government so that additional major open spaces can be provided in the centres of future growth for Melbourne, reinforcing and expanding its role as the capital city of the State of Victoria.*
- *Provide a network of diverse neighbourhood and local open spaces as the population grows so that Melbourne continues to be one of the world's most liveable cities.*
- *Improve the quality and design of the existing open spaces where needed to cater to the existing and forecast population, biodiversity and urban heat mitigation.*
- *Provide a set of prioritised actions for open space within the municipal context.*
- *Provide a strategic basis for an open space contributions framework that delivers additional high quality open space for the forecast future population.*

38. Private open space does not, and cannot, replace the role played by public parks. This is expressly noted in the OSS Technical Report which states:¹⁴

Publicly accessible private open space can complement the public open space system. Examples of publicly accessible private open space are church grounds and private building forecourts. These are not relied on as a replacement for public open space where the City of Melbourne does not have direct control over them. These areas contribute to the quality of the urban landscape, can have some benefits in mitigation of the urban heat island effect associated with climate change, and contribute to the landscape character of an area, however they can be redesigned or replaced at any time at the private land owner's discretion. Public access to these spaces can also be restricted at any time and limitations on public use and behaviour can be imposed by the private owner. Therefore publicly accessible private open space may contribute to the character and amenity of the public realm but is not a replacement for public open space.

¹³ OSS Technical Report, 1.2, pg 5.

¹⁴ OSS Technical Report, 1.3.4, pg 7.

39. Those of us who are fortunate enough to have backyards, perhaps trampolines, pools or other elements of the Australian dream know that none of those things replace going to “the park”.
40. The issue is even more acute for those of us who live in apartments and have far more limited access to private open space, and will continue to do so, notwithstanding the proposed changes to the apartment standards, which, if made, will mandate minimum landscaped communal open space standards for all apartment developments. The *Better Apartments in Neighbourhoods Discussion Paper 2019*, explains the issue in this way:¹⁵

Apartment living is an increasingly common housing choice. Apartment buildings need to provide high-quality homes, and they need to maintain and improve neighbourhood amenity.

By 2051, Victoria’s population is forecast to increase by over four million people — that’s an estimated 1.9 million additional households. The Victorian Government is working to ensure Victoria’s growing population will be well-housed, including in better apartments.

Until recently, most apartment developments have been built in inner Melbourne, where there are some established planning practices to control external amenity impacts. As apartment developments are built in more diverse locations in Victoria, there is a greater need to ensure they help make streets and neighbourhoods pleasant places to live and visit.

In 2017, the government introduced the Better Apartments Design Standards in the Victoria Planning Provisions, to improve the internal design of new apartments and make them more liveable and sustainable. The standards were a response to concerns that some new apartment developments were not providing safe and healthy environments.

41. Further:¹⁶

Landscaping, particularly canopy trees, improves people’s well-being and helps cool the urban environment. Trees provide visual relief, connections with nature, shade for recreation and habitat for fauna. Their volume helps cool the urban environment. Canopy trees are particularly effective as they can be more-resilient than smaller plants.

There is evidence that despite the current Better Apartments Design Standards, landscaping is often an afterthought in the building design and planning process, and the intent of the current landscaping

¹⁵ *Better Apartments in Neighbourhoods Discussion Paper 2019*, pg 4.

¹⁶ *Better Apartments in Neighbourhoods Discussion Paper 2019*, pg 10.

standards is not always realised. There are rarely deep-soil areas for trees; mature trees are removed and new trees are too small. Landscaping is not being located optimally for solar access, and trees do not have adequate space for their canopy spread or soil volume.

Furthermore, apartment developments often provide limited landscaping along building frontages, which contributes to harder and less welcoming streetscapes and buildings.

The current Better Apartments Design Standards do not require smaller apartment developments to have communal open space, which means residents may not have access to a garden.

42. The passages above, and the proposed changes to apartment standards, highlight the critical importance played by public open space for residents of existing medium and high density developments, in particular. The existing standards have failed to ensure that apartment developments provide acceptable access to sufficient private green space for residents – and for many of those residents, public parks provide the only natural green outdoor space available to them.
43. The importance of parks is also reflected in the Municipal Strategic Statement. Clause 21.02-1 states:

The City's assets include its historic precincts, streetscapes and buildings, the public spaces and activities along the Yarra River corridor including the Sports and Entertainment Precinct, Southbank cultural precinct and river promenade, its ring of parks and gardens, well established, diverse and easily accessible business districts, and its attractive residential areas.

44. Clause 21.06 states:

Melbourne's character is defined by its distinctive urban structure, historic street pattern, boulevards and parks, heritage precincts, and individually significant heritage buildings. Heritage buildings, precincts and streetscapes are a large part of Melbourne's attraction and the conservation of identified heritage places from the impact of development is crucial.

The buildings in the private realm should be coordinated with the development of the streets, paths, parks and places in the public realm. Development must add positively to Melbourne's public realm and contribute to making it safe and engaging for users. Public and private open spaces should be able to support a range of uses including physical movement, communal exercising, social interaction, quiet enjoyment and connections to the natural environment.

Climate change is predicted to deliver reduced rainfall, rising sea level and more extreme flooding, intense storms, and heatwaves. The built environment must be designed to moderate and provide

protection from these disruptive climate impacts. This must be done in ways that do not exacerbate the problem.

45. Clause 21.06-1 contains the following objectives and strategies:

Objective 1 To reinforce the City's overall urban structure.

Strategy 1.5 Promote development that is compatible with the scale, character and amenity of public open spaces, and the environs of the Yarra River.

Objective 5 To increase the vitality, amenity, comfort, safety and distinctive City experience of the public realm.

Strategy 5.2 Ensure that the scale, bulk and quality of new development supports a high quality public realm.

Strategy 5.9 Ensure that development maximises solar access in public open spaces, and creates microclimatic conditions for a high level of pedestrian comfort.

46. Additionally, Clause 22.01 Urban Design within the Capital City Zone (CCZ 1, 2 and 3) states:

The State Planning Policy Framework (SPPF) and the Local Planning Policy Framework (LPPF) recognise the contribution that the following attributes make to the amenity, liveability and economic prosperity of the Central City:

- *design excellence*
- *appropriate building height, setback and scale*
- *public realm amenity*
- *internal building amenity*
- *sunlight*
- *wind conditions*
- *attractive publicly accessible spaces, streets, lanes and public parks and gardens.*

Melbourne's buildings, streets, open spaces and landscape features combine to give the Central City its unique appearance and feeling.

These elements have created a complex and attractive urban environment, giving Melbourne a grand and dignified civic centre filled with diverse activities and possessing unique charm, character and a pleasant street level environment.

47. Clause 22.17 Urban Design outside the Capital City Zone states;

Policy Basis

Melbourne's buildings, streets, open spaces and landscape features combine to give the municipality its unique appearance and feeling.

It is important that the valued aspects of the City's character are not lost through redevelopment. Where the built form character of an area is established and valued, new development must respect this character and add to the overall quality of the urban environment.

In areas where built form change is more substantial, a new and equally attractive environment must be created.

48. The importance of public spaces is also recognised in the Urban Design Guidelines for Victoria.¹⁷ *Element 3.1 Public spaces principles* states:

Public spaces accommodate a diversity of activities, and provide interest and amenity for people. Critical factors for successful public spaces are their location, size, dimensions and the interfaces with adjacent properties, the paths and arrangement of activities within the space. The area surrounding public spaces also influences how they are used and perceived. A functional system of public spaces offers direct connections to the surrounding pedestrian network and includes through-paths.

Why is it important?

Public space are essential for the wellbeing of everyone in the community. They provide opportunity for relaxation, recreation and socialising, and contribute to a neighbourhood's local character and sense of place. Active, safe and enjoyable public spaces draw people to them.

...

Parks and green spaces provide opportunities to relax, participate in active recreation and experience nature.

49. Element 3 includes the following objectives:

Objective 3.1.2 To achieve attractive and vibrant public spaces

3.1.2 a Include a diversity of activities in public spaces that extend the hours of use.

¹⁷ Referred to in clause 15.01 (Built Environment) of the Melbourne Planning Scheme.

→ TIP *Aim for a public space to be attractive to a diversity of users and at different times of the day. A café, play facilities or community uses can assist in activating public spaces.*

3.1.2 b *Locate features towards the centre of the public space to draw people into and through the space.*

→ TIP *Features could be a large shade tree, fountain or water feature, sculpture, play or performance space. They provide a focus that invites people into the space.*

Objective 3.1.3 *To establish and support activity at the edges of public spaces*

Edges are often the most populated parts of public spaces. People tend to gravitate to, and occupy, the edges of places because they provide good vantage points to view activities within the space as well as to the surrounding area.

Objective 3.1.5 *To ensure comfortable and enjoyable public spaces*

3.1.5a *Arrange paths, seating and main areas to catch the sun during winter and be shaded during summer.*

50. Element 3.3 Local Parks states:

Local parks are green public spaces up to one hectare in size and may include trees, grass, gardens and playgrounds. Some local parks also include water features, cafes or sports facilities. The location of a park in the movement network often influences its useability. Parks must connect directly to the pedestrian network and be located within easy reach of users.

The most valued parks will be those used by a range of people for a variety of reasons throughout the day. Parks with active uses adjacent to and fronting them are usually more popular than those surrounded by fences and blank walls. Parks can also support natural systems and habitat.

Why is it important?

Parks provide open space for relaxation, recreation and socialising. They also provide a space to be closer to nature, with relief from the noise, activity and hard surfaces of an urban environment. Parks also play an important role in enabling people to be more physically active and healthy. People prefer to use parks that are easy to reach and that feel safe and comfortable. Parks feel and become safer as more people use them. The success of parks is not just a question of scale or quantity, but where the park is located and how it is arranged.

51. What the Panel can conclude with absolute confidence is that public parks play a critical role in the lives of Melburnians, and the role played by each is diverse and unique, but equally

important – as emphatically noted by both Ms Hodyl and Ms Thompson in their responses to questions from the University of Melbourne in particular.

52. That role might be a special occasion trip to the Royal Botanic Gardens; an autumn walk around the Shrine of Remembrance to recall the sacrifice of a loved one; meeting friends for a monthly picnic in Carlton Gardens; kicking a footy around at JJ Holland Park; an international student taking a break between lectures in Lincoln Square to read under the majestic Moreton Bay figs and clear their head; or each one of us taking a daily or weekly walk, run, cycle, sit, or skate in our closest local park, with our kids, dogs, prams, basketballs, friends, eskies, to do whatever it is that we each of us does in those places closest to us, or dearest to us, that provide respite from the urbanized environment in which we choose to live.
53. As noted above, by shifting the policy setting and introducing the DDO8 to prevent parks from additional overshadowing beyond a defined extent, the Amendment seeks to protect the amenity, attractiveness, uniqueness and the different role played by each of the parks, for all current and future residents of Melbourne.

D. WHY IS WINTER SUNLIGHT ACCESS IMPORTANT?

54. It has been accepted for many years that sunlight access to public spaces, including parks, is a critically important planning objective. It should also not be controversial to say that people should be able to access sun in parks throughout the year. This is what the Amendment seeks to achieve as an ongoing outcome.
55. It is self-evident but useful to appreciate that the choice of the winter solstice does result in protecting sun only in June. The purpose of selecting the winter solstice is to ensure protection for the six months of the year that are effectively ignored if 22 March and 22 September are chosen.
56. The use of a winter solstice overshadowing control in the Amendment is not the first of its kind. Winter solstice controls have both historical and current precedent in the Melbourne Planning Scheme, and other planning schemes in Victoria,¹⁸ and the importance of winter sun has been recognised in numerous strategic planning documents and Panel reports over time.

¹⁸ Including the interim controls recently introduced for the Geelong central activities district by way of Amendment C396 to the Greater Geelong Planning Scheme.

57. As noted in Council's Part A submission, a policy and controls for equinox protection were introduced with the new format Melbourne Planning Scheme in 1999. Prior to that time, the Planning Scheme included mandatory controls prohibiting overshadowing of specified key parks and open spaces on the winter solstice, between 11am and 2pm.

58. The NFPS panel was critical of that shift, stating:

The overshadowing will occur not just at the winter solstice but will be spread across a three month period at a time of year when sunshine is of greatest value. It is wrong to suggest that people do not take advantage of the outdoors during winter months in Melbourne. Whatever may have been people's habits in the past, the provision of high-quality pedestrian environments served by restaurants, cafes, entertainment and retail facilities, such as Southbank, now attract people all year round. The presence, or lack of sunshine at this time of year, particularly during the critical lunchtime/ afternoon period, is arguably of more significance to the patronage and enjoyment of these areas than at any other time of day.

59. The new format Melbourne Planning Scheme expanded the ambit of protection to a wider range of parks and open space, but diminished the level of protection through the choice of the equinox.

60. The justification given at that time was the same as one of the key criticisms made by submitters, including the University of Melbourne, in this hearing – that spring and autumn are when public open spaces are best enjoyed outdoors, as there are a limited number of cloud-free days during winter. The NFPS panel specifically rejected that justification stating:

The Panel considers this justification is misleading. It agrees that spring and autumn are pleasant times for being outdoors in Melbourne, but 22nd March is in early autumn. There are over two further autumn months during which a greater level of overshadowing will occur. The justification ignores the fact that it is during this time and during winter that sunlight is most precious and most enjoyed. Using the number of 'cloud-free' days during winter as a criterion also ignores the fact it is hours of sunlight that are important, not entirely cloud-free days, which are comparatively rare. In fact, according to the Weather Bureau, Melbourne enjoys an average of 4.5 hours of bright sunlight per day during the winter months.

61. Ultimately, winter solstice controls were adopted for key open spaces in the CBD, and an equinox approach applied to other major parks and gardens.

62. When the Planning Scheme was reviewed in 2004, the Panel considering Amendment C60 again, very strongly, criticized the continued use of equinox controls, stating:¹⁹

In 1998, the planning authority argued that an equinox standard provided protection when it was most needed, in the spring, summer and autumn, and that there were a limited number of cloud free days in Melbourne in winter, when solar access could be enjoyed. However, the Panel and Advisory Committee was unable to perceive any strategic justification for this change affecting acknowledged 'peak' public open spaces. It responded by suggesting that an equinox measure leaves two clear months of (typically fine) autumn weather that could be exposed to additional overshadowing. Additionally, it cited the Melbourne Weather Bureau as authority for the view that even in winter months, Melbourne enjoys an average of 4.5 hours of bright sunlight per day. It took the view that access to this rarer but still reasonably occurrent winter sunlight was more enjoyed by many people than access to the hotter sunlight of summer. It recommended that the old format planning scheme standard be retained for the places listed above.

...

The former Panel and Advisory Committee went so far as to label the justification for the original change to the winter solstice solar access standard for these parklands 'misleading'. In this context, this Panel has few qualms in suggesting that the justification for keeping the equinox standard in the face of renewed submissions is in large part nonsense.

The solstice standard used to apply. Re-applying it now to a park to which it applied in 1999 does not appear onerous or untoward. The Panel notes that a 'grace period' could be offered to ensure that the 'rules' in relation to existing development projects and proposals are not arbitrarily changed, although this is when all is said and done an LPP, not a control. There is a clear strategic necessity for a proper solar access study for Birrarung Marr and such other significant public open space as has been created or significantly changed since 1999. Parliament Gardens, Queen Elizabeth Square and Treasury Gardens were not directly raised in submissions. The Panel considers that these places should be specifically identified as having high priority for such additional solar access work as may seriously be required to justify returning them to a winter solstice standard (although the Panel considers that relatively little substantive work would be required).

¹⁹ Panel Report for Amendment C60(i) - Replacement Municipal Strategic Statement and Local Planning Policy Review, pg 99 and 100 of 112.

However, with specific relation to Flagstaff Gardens, the issue raised in submissions, the Panel can see no reason why the 1999 winter solstice solar access standard could not be reinstated in the version of clause 22.02 shortly now to be adopted in response to submissions.

63. Council does not shy away from these criticisms of the approach taken by Council at those times. The context of the City of Melbourne was very different, the resident and worker populations throughout the municipality were far lower, and the extraordinary development and densification that has been experienced in Melbourne since that time had not yet occurred – the images on slides 10 and 11 of Mr Fergus’ presentation provide stark reminders of this scale of change. The context of the City now is very different.
64. It might be said that the NFPS panel and the C60 panel were prescient in recognising the importance of sunlight access to open spaces throughout the year – if only in respect of key public open spaces in and around the CBD.
65. The Panel does not have to look far to identify a range of controls that apply winter sunlight protection in the Melbourne Planning Scheme and other planning schemes, both to parks and streets:
 - (a) in the Melbourne Planning Scheme: DDO10, DPO11, DDO2, DDO40, DDO60;
 - (b) in the Port Phillip Planning Scheme: DDO6 (Fitzroy Street, The Esplanade, the Port Phillip Foreshore Reserve, Alfred Square Gardens, O’Donnell Gardens, Peanut Farm Reserve, Acland Street, Park Street); DDO8 (Clarendon Street, York Street, Coventry Street, Bank Street, Market Street); DDO16 (York Street and Market Street); DDO30 (Fishermans Bend, Montague Precinct), DDO32 (Fishermans Bend, Sandridge Precinct), DDO33 (Fishermans Bend, Wirraway Precinct) – all of which protect winter sunlight access to existing streets and existing or new public open spaces.
66. The Central City Built Form Review, Overshadowing Technical Report,²⁰ which provided the basis for the introduction of DDO10, recommended solar access for times when the mean maximum outdoor temperature in Melbourne is below 20 degrees – being from the end of April to the beginning of October. The Technical Report stated:²¹

²⁰ Referred to in Clause 22.02 and Schedule 2 to Clause 43.02 (DDO10) of the Melbourne Planning Scheme.

²¹ Central City Built Form Review, Overshadowing Technical Report, pg 22.

According to the Australian Bureau of Meteorology statistics (refer table overleaf), the mean maximum temperatures in Melbourne fall below 20°C from the end of April to the beginning of October. Direct sunshine during these times would be beneficial (to assist with temperature comfort) and overshadowing more problematic. Below 20°C is therefore considered to be an appropriate benchmark outdoor temperature for assessing overshadowing times.

67. Amendment C245 introduced winter solstice overshadowing protection to Flagstaff Gardens and the future open space at the Queen Victoria Market. The Panel agreed that winter solstice protection for Flagstaff Gardens was appropriate, and recognized the role that winter solstice overshadowing played in protecting future amenity, stating:²²

The Panel agrees that both the Flagstaff Gardens and the proposed QVM public open space warrant protection at the winter solstice between 11.00 am and 2.00 pm, and that it is appropriate for both DPO11 and DDO14 to include this as a discretionary control.

The Panel agrees that both the Flagstaff Gardens and the proposed public open space will be significant in terms of ongoing amenity provision for city residents, workers and visitors in this part of the City. This is particularly relevant in terms of expected numbers of increased residents and visitors as well as expected increased patron numbers to the QVM. As increased density (built form and population) is expected to rise in coming decades, and is indeed central to Government policy (Plan Melbourne, state and local policies), the requirement for protection of public open space overshadowing amenity is, in the view of the Panel, warranted. The Panel believes this is supported by the Government overshadowing technical report, the significance of the Flagstaff Gardens and the anticipated role the proposed public open space will have for the QVM patrons and surrounding residents, workers and visitors to this part of the city.

The eastern edge of the Flagstaff Gardens is a popular and much frequented walking track and with pause points that will already be negatively affected from an appreciable increase in overshadowing in the mornings of winter months by the recently approved development. The Panel views this outcome as unfortunate and views the proposed control will assist in ensuring future sunlight amenity receives greater protection during the winter months. While the Panel is not recommending mandatory measures, the discretionary provision should allow for a balance between development in the Precinct and the protection of sunlight to the Flagstaff Gardens during sunny winter mornings when it is most warranted.

²² Amendment C245 Panel Report [2016] PPV 81, pg 98 and 99 of 100.

68. The Advisory Committee Report on GC81 (Fishermans Bend) supported the use of the winter solstice for at least one park in each precinct, albeit on a hierarchical basis. It said,

Given how little open space is being provided on a per capita basis, it is essential that the open space is high quality and remains usable all year round. Sunlight access to open space will be key to ensuring that it remains high quality and highly functional.

The Review Panel supports a hierarchy of overshadowing protection for the open space in Fishermans Bend. It supports winter solstice protection for at least one park in each Precinct, with parks lower down in the hierarchy receiving equinox protection.²³

69. Whatever the criticisms that may be made of the approach taken in 1999 and 2004, Council is now seeking to act on the significant body of work that sits behind the Amendment and apply a winter solstice protection to all parks.
70. In Council's submission, there is a clear strategic basis to apply a winter solstice test to overshadowing protection.
71. Sunlight access in parks is important for a range of reasons. In Council's submission these reasons apply just as much to the period between 23 March and 21 September, as to the period from 22 September to 22 March.
72. The first reason is public health and wellbeing.
73. The community consultation undertaken by Council in 2016 (explained in detail at section G below) demonstrates that people value access to sunlight in public spaces, that they want to have the opportunity to enjoy the sun when it is out, and that the degree of sunlight available in parks is directly related to people's level of enjoyment of those parks. We know this from our own experience.
74. The value of being outside in the fresh air and sunlight is one of the specific factors identified in the OSS for why open space is important,²⁴ and the OSS Technical Report identifies sunlight as one of the factors relevant to the amenity and function of open spaces.²⁵
75. By maintaining the amount of sunlight that is available in parks in winter, in the manner proposed by DDO8, the amenity, useability and attractiveness of those parks will be

²³ Fishermans Bend Planning Review Panel [2018] PPV 110.

²⁴ OSS, pg 3.

²⁵ OSS Technical Report, pg 110, 116.

maintained into the future, and they will continue to draw people for exercise, relaxation, recreation and for all the reasons that people spending time in parks. This is an aspiration that is just as important for the colder half of the year, as for the warmer half.

76. The 2013 decision in *Australian Hotel Developments Pty Ltd v Melbourne City Council*,²⁶ which predates the introduction of DDO10, provides a good example of where the importance of winter sunlight access has been recognised. In relation to a development proposal that would have caused winter solstice overshadowing on part of the park on the north bank of the Yarra River, the Tribunal stated:²⁷

We accept that the additional winter solstice shadow would be limited to an area adjacent to the King Street Bridge for a short period of time. We also accept that this development would provide employment opportunities and additional dwellings within the CAD as sought by policy. However, we are not persuaded that these benefits have to be achieved with additional shadow over these important public spaces. We consider that the public space adjacent to the river is a highly valuable public place and its amenity should be retained.

...

Secondly, we consider that access to sunshine in Melbourne's grey and cold winter months is highly desirable. We think further reducing people's access to direct sunlight in these cooler times would adversely affect the opportunities for people who live, work and visit the city to enjoy some winter sunlight that provide some relief to this season.

...

Finally, we consider that other developments at the southwest of the CAD have constrained their height so they do not impose themselves on the river corridor. Approval of this development would establish a new approach that, over time, could encourage be incremental creep that could eventually diminish the amenity of these public spaces through a cumulative loss of sunlight along the river and its environs.

77. The more recent decision in *JW Land Development Pty Ltd v Moreland City Council*,²⁸ which related to the then proposed (now refused) development at 699 Park Street, which has been

²⁶ [2013] VCAT 852.

²⁷ [2013] VCAT 852, [32], [38], [41].

²⁸ [2019] VCAT 617. This was an interim decision in which the Tribunal provide the permit applicant with the opportunity to amend the proposal. The opportunity was taken, however the Tribunal

the subject of a large number of submissions to this Panel. The Tribunal made the following comment about winter shadowing of Princes Park:

The diagrams provided show shadow will be cast to Princes Park between 9am and 3pm at the winter solstice, with some of this shadow arising from the 12 storey tower. There is shadow extending onto the running track at 3pm and it is that shadow that the Melbourne City Council seeks to eliminate through an alteration to Building B. The development, as proposed, will not overshadow more than 50% of existing public space between 10am and 2pm at the equinox as sought in the public realm guidance contained in DDO18. We note that the rationale for including that guidance, as set out in the Sydney Road and Upfield Corridor Strategic Framework Plan, refers to protecting sunlight to public space in the fine-grain part of the activity centre north of Brunswick Road and makes no reference to Princes Park.

It is our view that public open space is increasingly valued and subject to greater demands as population grows. This is particularly the case in inner areas such as Brunswick. We agree with Mr Czarny that there is sound rationale for important public spaces, especially inner metropolitan parkland, to be protected from shadow in winter. Support for avoiding shadow to Princes Park is found in the public realm design objectives of DDO18 that say solar access to existing public open space is to be maintained. The UDGV support this view seeking buildings that are located and arranged in activity centres in a way that allows winter sun to penetrate key public spaces. At a higher level, the Planning Scheme requires the balancing of conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. The public realm of the site, in this location at one edge of the municipality, includes Princes Park and the design must respond appropriately to that context.

78. Access to sunlight throughout the year is also important as sunlight is the main way that our bodies generate vitamin D. The importance of vitamin D was explained in Professor Nowson's evidence, which refers to a position statement from 2012, co-authored by Professor Nowson and Professor Ebeling (among others), which states:²⁹

For most humans the main source of vitamin D is through skin exposure to sunlight.

ultimately found that the amended plans were an unsatisfactory response, and refused to grant a permit: see *JW Land Development Pty Ltd v Moreland CC* (Corrected) [2020] VCAT 354.

²⁹ Nowson Statement, pg 6.

79. Both Professor Nowson and Professor Ebeling agree that in winter around 49% of Victorians have vitamin D deficiency.³⁰
80. The position statement identified that fair skinned people in Melbourne needed to be exposed to sunlight for 6-8 minutes in December and January between 10am and 2pm, on most days, to maintain adequate vitamin D levels.³¹ For the winter months, an extended period of sunlight exposure is required – 25 minutes. Three to six times longer exposure is required for people with dark skin.³²
81. Professor Nowson acknowledged that the issue of vitamin D deficiency is unlikely to be fully resolved by maintaining sunlight exposure to parks in winter. Professor Ebeling appears to agree, and suggests that “a more pragmatic approach” would be for all Victorians to take daily vitamin D supplements. The obvious difficulty with that approach is that it is not realistic to mandate the taking of oral vitamin D supplements – there is not currently any law that allows that to occur, and Council is not aware of any proposal to change that position.
82. The point to make about vitamin D in context of the Amendment is that by maintaining sunlight access to parks in winter (and therefore throughout the year), the opportunity for people to get sun exposure, and therefore generate some vitamin D, as they walk to and from the park, and during the time they spend in the park, will be retained. Council does not suggest, and nor does the strategic work that sits behind the Amendment, that the planning system can increase sun exposure, or solve the vitamin D deficiency problem – it will simply assist in providing an option for gaining exposure to the sun.
83. It is relevant to note that the Cancer Council Australia has a current position statement about sun exposure and vitamin D, which has been also been endorsed by Australian and New Zealand Bone and Mineral Society, the Australasian College of Dermatologists, the Endocrine Society of Australia and Osteoporosis Australia.³³ That statement provides salient commentary on the current position in relation to the relevance of winter sunlight to

³⁰ Nowson Statement, pg 4; Ebeling Statement, pg 2.

³¹ Nowson Statement pg 7.

³² Nowson Statement, pg 7.

³³ The position statement can be accessed at: https://wiki.cancer.org.au/policy/Position_statement_-_Risks_and_benefits_of_sun_exposure#_ga=2.32103549.2143465419.1615806555-2128163991.1615806555

vitamin D. The statement make the following recommendation for the general adult population for the winter months when the UV index is below 3:

In late autumn and winter in those parts of Australia where the UV Index is below 3, sun protection is not recommended. During these times, to support vitamin D production it is recommended that people are outdoors in the middle of the day with some skin uncovered on most days of the week. Being physically active while outdoors will further assist with vitamin D levels.

84. Additionally, the Sunlight Access Report and Professor Nowson also refer to research about a range of other health benefits associated with sunlight, including:³⁴
- (a) greater engagement in healthy lifestyle behaviours;
 - (b) increased physical activity;
 - (c) decreased risk of metabolic and cardiovascular disease and various forms of cancer;
 - (d) increased bone health and muscle mass;
 - (e) improvements in mental health and depression; and
 - (f) potential metabolic and anti-inflammatory effects.
85. Sunlight is also important for ecological health. The Sunlight Access Report refers to three factors that are aided by sunlight:³⁵ biodiversity in urban environments; photosynthesis for plant growth; and direct sunlight as a key determinant of bee and butterfly species in urban environments.
86. As noted by Mr Callow, sunlight is a critical factor in plant growth and resilience. Sunlight access to parks through the colder months of the year assists in the growth of evergreen plants, which enables them to be more resilient and healthier throughout the year. In the case of grasses, sunlight in the colder and wetter months aids the grasses to dry out and recover from overuse.
87. Submissions made in opposition to the Amendment, including those from the University of Melbourne and Polis, suggest that the continued use of equinox based shadow controls strikes the right balance between development and shadow protection. Council's position is that equinox controls no longer reflect an appropriate balance, in the context of the strategic work that has now been undertaken. Continued use of the equinox controls,

³⁴ Nowson Statement, pg 12; Sunlight Access Report, pg 24.

³⁵ Sunlight Access Report, pg 25.

particularly in growth areas where ongoing intensification will incrementally increase shadowing, and continually increase the demand for and pressure on public parks, effectively assumes that solar access in winter is an optional nicety, rather than a necessary and unequivocally desirable feature of parks. Council now rejects that proposition, and submits that there is a sound strategic basis for the Panel to conclude that solar access in parks is important at all times of the year, and that the use of a winter solstice control as the benchmark is the appropriate way to ensure that year round sunshine is available.

E. MELBOURNE WEATHER ACROSS THE YEAR

88. The evidence of Mr Biles, on behalf of the University of Melbourne, agrees that access to sunlight to parks over the seasons of the year is a worthwhile aspiration.³⁶ However, Mr Biles suggests that the beneficial use of sunlight is tempered by Melbourne's weather patterns in winter, and that further work on the nexus between weather, land use and shadow for medium sized parks is required to justify the DDO8 controls.³⁷
89. Mr Biles states that the weather in winter influences how we use parks.³⁸ Council agrees.
90. However, the inference that Mr Biles invites by his inclusion of weather data, and his comment that the days in June are wet, cold, grey and short on daylight, is that it is essentially not worth bothering to protect sunlight to medium sized public parks in winter. Council rejects that inference, as it is not borne out by the data.
91. One of the key factors that draws people outside in winter is the sun shining. The attraction of a walk in the park when it is sunny in winter is a common and familiar experience. This attraction is all the greater when the proportion of sunny days is (slightly) lower in the winter months than the balance of the year. But the temperature certainly is lower, which is why being able to walk, sit or play in the sun is key.
92. A review of monthly climate statistics for Melbourne from the Bureau of Meteorology provides the following averaged statistics:³⁹

³⁶ Biles Statement, [6], pg 2.

³⁷ Biles Statement, [7], pg 2; [45], pg 5.

³⁸ Biles Statement, [49], pg 5.

³⁹ Available at: http://www.bom.gov.au/climate/averages/tables/cw_086071.shtml

Mean rainfall

Month	Mean rainfall	Days with more than 1mm of rain
January	46.8mm	5.6
February	48.0mm	5.1
March	50.1mm	6.1
April	57.3mm	7.9
May	55.7mm	9.7
June	49.5mm	9.4
July	47.5mm	9.7
August	50mm	10.4
September	58mm	10.4
October	66mm	10.2
November	60.3mm	8.3
December	59.1mm	7.2

Mean 'clear' and 'cloudy' days⁴⁰

Month	Clear days (\leq 2 oktas)	Cloudy days (\geq 6 oktas)
Jan	6.1	11.2 (36%)

⁴⁰ Measured in oktas which is scale for measuring the sky in 8 segments ranging from 0 which is completely clear sky to 8 which is completely cloudy sky.

Month	Clear days (\leq 2 oktas)	Cloudy days (\geq 6 oktas)
Feb	6.2	9.7 (34%)
March	6.0	13.3 (42%)
April	4.6	14.8 (49%)
May	3.0	18.1 (58%)
June	2.5	16.9 (56%)
July	2.6	17.3 (55%)
August	2.9	16.7 (53%)
September	3.1	15.9 (53%)
October	3.7	16.2 (52%)
November	3.6	15.1 (50%)
December	4.3	14.2 (45%)

93. Council makes the following general observations about this data:

- (a) mean rainfall in the winter months is lower than all other months, except January and February. The number of days with more than 1mm of rain, is highest in August, September and October;
- (b) for about half the days of the month in April to September, the sky is clear, or partly cloudy (meaning under 6 oktas).

94. This is broadly consistent with the data provided in Figure 4 of Mr Biles' Statement,⁴¹ which indicates that the number of clear, mostly clear or partly cloudy days for those months is (approximately):
- (a) April: 63%
 - (b) May: 57%
 - (c) June: 54%
 - (d) July: 60%
 - (e) August: over 60%
 - (f) September: over 60%
95. It follows that, for around half of the days in the months April – September, it is reasonable to expect that sunlight will be available for at least a portion of the day – ranging between a lot of sun or a little sun, with the amount of sunlight available depending on the 'oktas'.
96. Essentially, there is minimal substantive difference in the number of days between April and September when sunlight is available; and further, there is not a stark difference from the amount of sunlight available in the balance of the months of the year – other than a jump for January, February and March, which is to be expected.
97. Of course, what does change substantially is the mean temperature, and significantly, the angle of the sun in the winter months. Consequently, sunlight access becomes more important for thermal comfort as the Central City Built Form Review, Overshadowing Technical Report identified and taller built form has a much greater overshadowing impact on parks in the winter months than the balance of the year.

F. DATA THAT SUPPORTS INCREASED SOLAR ACCESS PROTECTION

98. One of the key criticisms made of the Amendment and the strategic work that sits behind it is that there is not enough data about patterns of actual use for the public parks, or links between sunlight in winter and use, to justify the imposition of the proposed mandatory controls. This is a common refrain for opponents of controls like this.
99. Council disputes the proposition that there is no data to support a conclusion that parks are used in winter (or between April and September), and that sunlight access throughout the

⁴¹ Biles Statement, pg 5.

year is not valued by the community. Park usage and demand was a central part of the strategic work preceding the Amendment.

100. In March and April 2016,⁴² Council undertook community consultation in order to better understand the importance of sunlight in public space to Melbourne's inner urban communities, as a basis for the proposal to update Clause 22.02.⁴³ The specific purposes of the consultation were as follows:
- (a) to better understand the importance of sunlight in public space to Melbourne's inner urban communities of residents, workers and visitors in order to provide the basis for a refresh of current planning policies;
 - (b) to develop a stronger understanding of community expectations around sunlight to open space, throughout the seasons, days of the week and various times of the day;
 - (c) to understand why sunlight to open space is important to the community;
 - (d) to understand when sunlight is important: time of day, seasons;
 - (e) to understand where the community goes to access sunlight; and
 - (f) to test a series of assumptions around the flaws in the current policy (Clause 22.02).
101. The consultation involved an online survey available on the Participate Melbourne website, drop in sessions at Flagstaff Gardens, site visits to a number of public spaces, and various forms of promotion of the consultation. The Participate Melbourne website include an animation of overshadowing of Gardiner Reserve resulting from existing and proposed (at that time) built form.
102. The survey questions were not specific to winter sunlight, but sought feedback about park usage and the desirability of sunlight access across the year.
103. A total of 275 people responded, with the greatest level of participation being by the 30-39 age group, with respondents living in a broad range of dwelling types. An additional 290 comments were posted to the City of Melbourne's Facebook page.

⁴² Council notes that Panel direction 16(f) requested further information about the community consultation undertaken by the City of Melbourne in 2016.

⁴³ See Sunlight to Public Spaces Policy Review Community Engagement Report, June 2016.

104. Times of park use ranged throughout the period 7am to 6pm, with a larger number of users between 12pm – 6pm, although more than 40 respondents indicated use at all of the hour periods (the lowest being 41 respondents selecting 9-10am).

105. Reasons for preferring a particular time varied significantly, and included:

Early morning

- *Walking the dog*
- *Training/ exercise*
- *Enjoying the quiet of the park before school*
- *Work commitments the rest of the day – enjoys the still of the park and the light which is more appealing*
- *Morning sun is peaceful-a great way to start the day*
- *Great time to enjoy the sun without the summer heat*

Mid- morning

- *Fits into work breaks*
- *Walking the dog*
- *Community activities in the park*
- *Taking children to the playground and park*
- *Best time for kids to play*
- *Walking on the way to meetings*
- *Enjoy the crisp air*
- *More relaxing than later in the day*
- *Relaxation in group exercise classes – stress relief and time for reflection*
- *Work from home-reason to get out of the house is to walk in the park*

Lunchtime

- *Lunchtime escape-place to eat my lunch in peace or with friends*
- *Only chance to get a break from work*

- *Chance to get out and get some sun and fresh air in the lunchbreak*
- *Excited to get outside –improves my mood and makes me happy in my lunchbreak*
- *Chance to escape from the urban environment*

Late afternoon

- *Fits into work breaks*
- *Fair skinned-looking for shade (dappled light under the trees)*
- *Sunnier and less crowded with commuters*
- *Playing competitive sport*
- *Best time to see the birds in the park*
- *Nice time to stretch out on the grass and relax/ sleep or read*
- *Makes me more alert for the remainder of the day*
- *Especially in the winter months, spending time outdoors in the sun to increase vitamin D levels and exercise for weight loss*

Evening

- *Exercise after work*
- *After work, walking home – relaxing, reflective time – time to unwind*
- *Great warmth from a summer's evening*
- *Walking the dog*
- *Great time to socialise*
- *Likes to enjoy the setting of the sun – relaxing*

106. In response to the question “How important is sunlight in public spaces in the inner city urban neighbourhood surrounding the Central City (ie Carlton, East Melbourne Nth Melbourne?)”, 273 respondents indicated that sunlight had a high degree of importance (using words like “extremely important/critical/essential/absolutely/immensely”). Comments included:

As a family of young children, we want to be able to enjoy the sun in the parks at any time and not restricted to a few short hours per day.

The amount of sunlight in the parks influences our decision to use the park ie we usually visit the playground at the Melbourne Museum because it has good access to sunlight even in winter.

Important for health and wellbeing, relaxation, vitamin D levels.

Important for mental health especially in winter and reducing obesity.

Vital. Place to meet friends, exercise, play, picnic, just to be on a green space is one of the important things to grow and build happiness which is based on the science of wellbeing. Counteracts the density of housing is increasing everywhere where people don't have their own garden areas.

Important for people to get out into the parks and feel like part of the community and engage with others.

Very important. Many of our inner city terraces and most mid and high-rise apartments have minimal private/communal open space. Accordingly, our public squares and grassed median strips require better protection from building shadows.

Pocket parks matter.

Sunlight is as important in inner city as it is in suburbs. Many people work in offices, often without direct light, so access to sunlight during breaks is important.

Plants need light. Plants are important.

107. In response to the question “How does your use of space change across the seasons (Summer, Autumn, Winter, Spring)?”, the key comments noted for the majority of responses were:

Minimal usage in cooler months, high rainfall months

Crave sun in autumn and spring early to mid afternoon

Summer - all day long through to evening

108. In response to the question “How does the presence of sunlight affect the likelihood of you spending time in public space?” the majority response was “significantly”. Key comments included:

It encourages me to remain in the space and enjoy the sunlight.

It greatly influences the likelihood of us spending time in a public space. We generally will not visit public spaces with a lack of sunlight due to overshadowing.

In winter it makes a huge difference - I am more likely to leave the office and sit outside if I know that I can sit somewhere sunny.

Greatly, when I was a student at RMIT the State Library lawn was my go to destination for lunch and sun shine.

It would mean choosing parks that have better sunlit areas over city of Melbourne parks.

I will seek out the sunlight.

109. The key findings that taken from the community consultation were as follows:

An overwhelming number of participants consider sunlight in public spaces as very important. They want access to sunlight irrespective of the time of day or the month of the year.

The most popular time to visit public spaces is between 12noon and 2pm but more than 50% of participants regularly enjoy our public spaces in the late morning, afternoon and early evening.

The amount of sunlight greatly influences the level of enjoyment and the likelihood of spending time in a public space.

Equal access to sun and shade from mature trees is important over the warmer months.

Most participants consider being in the fresh air and sunlight as vital for good physical health and mental well-being.

110. The Council strategic planning team determined that this consultation provided an indication that the basis of the existing Clause 22.02, and the focus on providing sunlight from 12-2pm at the equinox, may not be meeting the needs of open space users; and determined to undertake the following work:⁴⁴

- (a) a research report to establish the sunlight requirements for vegetation and human health and well being;
- (b) 3D modelling to identify the appropriate level of protection for public spaces;
- (c) draft planning provisions;
- (d) a cost/benefit analysis based on draft provisions;
- (e) further consultation with all sectors of the community.

111. This consultation led to the engagement of Harrison & White to undertake the initial cumulative shadow study in 2016, and the engagement of Hodyl & Co to prepare the Sunlight Access Report; and ultimately, the preparation of the Amendment.

⁴⁴ Councillor Briefing Paper dated 28 June 2016.

112. The Sunlight Access Report considered data for park use in a number of parks across the City. Detailed usage assessments were undertaken for Flagstaff Gardens, Carlton Gardens, Fawkner Park and Birrarung Park. Those assessments were undertaken in May and June 2017; they identified that those parks saw high usage at all times of day in the survey months, and in all areas of the park, for a wide variety of activities. These conclusions provide support for one of the key bases for the Amendment – that parks are used at all times of year, and across the whole day, for many different reasons.
113. The Sunlight Access Report also had regard to park usage data sourced from Google for Powlett Reserve, Royal Park, Ron Barassi Snr Park, University Square, Errol St Park and Fawkner Park.
114. Council acknowledges that detailed assessments have not been undertaken for all parks that will be affected by DDO8. However, in Council’s submission, undertaking detailed assessment of all parks is neither practical nor warranted. This is because the strategic basis for the Amendment is underpinned by previous strategic work that looked closely at usage patterns for all parks in the municipality – specifically, the OSS Technical Report.
115. The OSS Technical Report reviewed the availability of, and demands on, open space in the context of forecast growth in population and changing demographics, and used that assessment to classify all parks into the park hierarchy, and give detailed guidance of what actions were required to meet forecast demands on open space. Part of the research phase for the OSS included distributing a survey to all households in the City of Melbourne, with just over 1,400 surveys completed and returned. The OSS Technical Report summarises the results of the survey as follows:

The local community highly value open space, particularly for the choice and variety of open space, the close proximity of open space to their place of work or residence and the quality of the spaces. Residents nominate open space as one of the key reasons they choose to live in the City of Melbourne. The community is aware of continued development and growth in the municipality, and would like to ensure that all existing open space is retained and additional open space is provided to cater for population growth. The ability to access green, tranquil open space is noted as being of increasing importance as building density and height continues to expand.

Environmental sustainability is a key consideration raised by the community via the strategy household survey, especially sustainable water use including alternative water sources to maintain the trees and gardens in times of drought.

Trees are the most highly valued feature in open space, and watering trees was given the highest priority in relation to overall water use in open space via the 2009 Park Satisfaction Survey.

The intangible qualities of open space were important to more than 70 per cent of the household survey respondents. These qualities include open space as a place that is quiet and peaceful, an escape from the urban environment, a place to be outdoors in the fresh air, and as a place to relax and unwind. These were also supported by the outcomes of council's Park Satisfaction Survey that identified people visit open space so that they can be outdoors and to relax as a break from work. This direction was further supported in the feedback on the draft strategy included in Appendix B.

The most popular open spaces visited by the respondents to the strategy household survey include:

- *Royal Botanic Gardens (this may also include visits to The Tan and King's Domain)*
- *Fitzroy Gardens*
- *Royal Park*
- *Carlton Gardens*
- *Yarra Trail.*

The major reasons people visit open space include:

- *walking*
- *exercising*
- *jogging*
- *relaxation/ ambience*
- *dog walking*
- *travelling through on their way to somewhere else*

116. In addition, Dr Spiller's assessment included consideration of a "willingness to pay" survey, which asked participants to comment on a range of matters relevant to park usage and sunlight access – although Council acknowledges that the survey questions were not specifically directed to winter sunlight controls. The results of the survey show the value placed by the community on the protection of sunlight to parks. 84% of respondents noted that restricting height of developments to ensure existing sunlight in parks was maintained

was “important”. 92% supported the maintenance of sunlight in parks by limiting building heights near parks.⁴⁵

117. The vast majority of respondents agreed that parks were important to well-being and happiness, and health and fitness. The results also show that the majority of respondents visit parks close to home or work. 80% had visited a park close to home in the last 6 months; and 57% visit a local park either daily or weekly, and for a range of reasons.
118. The City of Melbourne acknowledges that finer detailed assessment of park usage in all, or key, parks could have been undertaken. But even if that assessment had been undertaken for each of the parks, it would simply have provided a snapshot of a point in time, and would not foretell how a park might be used in the future, or how the patterns of use might change in years or decades to come as the City of Melbourne continues to grow.
119. In the context of a policy shift that gives express recognition to the idea that parks are of equal importance, and that sunlight access in parks all year round should be provided for the benefit of both current and future residents and workers in the City of Melbourne, any approach that seeks to draw a line around particular parts of a park, or specific particular times of year as being more important, in terms of solar access, misses the mark.
120. It is not possible to get out the ruler and ledger and set the parameters for uses and activities for each park, and the areas of the park that those activities should occur in, or the extent of the park that is defined to receive sunlight between April and September. But this is effectively the exercise that the University, Polis, Mr Barlow and Mr Biles (and a number of other submitters) urge the Panel to adopt. They say that there is not enough data about park usage now, not enough research about whether winter sunlight is needed in parks – whether for ecological reasons, for health reasons, or even to encourage park usage. They say that each park should be looked at in isolation, and areas of use defined, location of facilities defined, and a decision made about the amount of overshadowing in winter from buildings that is acceptable.
121. There are inherent and insurmountable problems with that approach. Assessments of parks and park usage can only look at a point in time. If only current park usage, the current location for facilities, and the current extent of the park boundaries are used to (somehow) identify a specific percentage or area of the park that is to be protected from overshadowing

⁴⁵ See Spiller Statement, Appendix C, pages 19-20.

all year round, the consequence that necessarily follows is that the useability, flexibility and adaptability of that park in the future are limited or potentially removed.

122. For example:

- (a) If the current location of a children's playground is identified and that area specified to have a defined number of hours of sunlight on the winter solstice, but the balance of the park can be overshadowed, the location of that playground becomes fixed.
- (b) If overshadowing of the north, west and east perimeter of a park is allowed throughout the day in succession, with the consequence that the adjoining roads are also overshadowed, the possibility of expanding the park by the resumption of the roadway into the park boundary is limited – which is one of the easiest and therefore most common means of expanding and improving public parks in the municipality.
- (c) If it is determined that, at each hour of the day at least 50% of the park must have sunlight access, the unavoidable consequence of that is an inequitable first-in-best-dressed approach to development. The developer who gets in first is allowed to overshadow up to that 50%. Then next property may not be able to be developed at all, or to the full extent allowed by the built form controls, as it may tip over that 50% margin. If not the second development, than maybe the third, and so on.
- (d) If the metric chosen is that cumulatively across the day between 10am and 3pm, there must be at least 50% of the park in sun, that would require a cumulative shadow assessment. Any new development would not be allowed to tip the cumulative percentage of overshadowing over 50%. But this may mean that any one or more hours of the day the park was completely in shadow, provide that for an equivalent number of hours the park was in sun. There are many ways that this could be approached, but the consequence would always be that the usability of the park was confined in time and extent, and development rights allocated on a first-in-best-dressed basis.

123. Under each of those scenarios, the approach effectively dictates to park users the times and locations at which they are able to access sunlight in the park. It may also confine the activities or uses that could be made of the park – for example, it may limit the number of hours that the playground or another facility is in sun, increasing demand for those hours, or result in people not being able to use those facilities at the times that suit their needs. It might mean that at particular times there is not enough area in the sun for multiple groups of people to make use of the park for different types of activity at the same time.

124. Depending on the size of the park it would also be saying to people that they have to move frequently if they want to stay in the sun. Anyone who has spent any length of time in a park in the sun in the colder months of the year can appreciate how quickly the sun moves. This is clearly illustrated by the time lapse function available in Online Map 8 – there are big jumps in the shadows every 15 minutes.
125. The ‘detail’ and ‘data’ approach that seeks to carve up the parks into areas of sun and areas of shadow depending on use at a point in time also ignores the fact that people use parks differently and at different times of day. It is simply unfair, in the context of parks that serve many different functions now, and may perform new and different functions in the future, to confine the usability of the parks based on a discrete data set from a point in time.
126. The extent to which parks can change over time are illustrated by a series of park expansions that have been undertaken by Council since 2015 for the following parks:
- (a) Hawke and Adderley Street Park, West Melbourne;
 - (b) Railway Place/Miller Street Park and Stawell Street Park, North Melbourne;
 - (c) Gardiner Reserve, North Melbourne;
 - (d) Errol Street Reserve, North Melbourne;
 - (e) Eastwood and Rankins Road Reserve, Kensington;
 - (f) Lincoln Square, Carlton;
 - (g) University Square, Carlton.
127. An expansion is also planned for Bedford Street Reserve and Courtney Street Reserve in North Melbourne. Concepts for that expansion are currently being considered, with the final plan to be released in April or May this year.
128. The total cost of those expansions was around \$26.5 million (with an estimated additional budget of \$1.5 million for the Bedford Street Reserve and Courtney Street Reserve expansion).
129. The expansion projects demonstrate that Council acts on opportunities to improve and expand parks, for the benefit of the local communities, consistent with the guidance in the OSS Technical Report, by acquiring property adjacent to an existing park, and incorporating and repurposing adjacent roads, road reserves and medians. The utility in undertaking these expansion projects could be significantly undermined by overshadowing of the park and adjacent road areas.

G. CASE FOR MANDATORY PROTECTION

130. In Council's submission, when the purpose of the Amendment is considered – protecting sunlight access throughout the year, and into the future, for the finite resource that is public parks – the case in favour of mandatory controls is clear.
131. It is Council's position that the existing discretionary controls do not provide the certainty of outcome that is sought by the Amendment. A good examples of this is Gardiner Reserve. For this park, the existing policy setting, which requires consideration of shadowing at the equinox, has resulted in a series of incremental increases to overshadowing throughout the year – which has ultimately in Council's submission, undermined the useability of that park for six months of the year.
132. The issue with discretionary controls, when applied to a finite resource such as public parks, and specifically solar access in winter, is that it is very difficult for consecutive decision makers, considering separate development applications, to know where the line should be drawn – inevitably the decision is between incremental sacrifice of solar access for the benefit of the whole community, and refusal (or modification) of an individual development application. This leads to inequitable results – at some point the line will be crossed by one application (although different decision makers will have different views about when that line is crossed). And so the early applicants secure greater development opportunities than those later in time.
133. Ms Hodyl describes the issues with discretionary overshadowing controls in this way:⁴⁶

The subjective assessment of overshadowing is also problematic for the following reasons:

- *Park designs can change significantly over time. For example, University Square, one of Melbourne's original European parks has recently undergone a significant redesign. Similarly, the Errol St parkland has transformed from being effectively a traffic island to highly useable public space.*
- *We can't prescribe how people will use parks over the longer term. They are public spaces and the way people use them over time has and will continue to change. The focus should be on creating a resilience in the planning controls that protect park amenity to support changing patterns of behavior and use.*

⁴⁶ Hodyl Statement, [83], pg 32.

- *What is considered ‘acceptable’ to some is not acceptable to others. It is very difficult to provide specific guidance to guide this decision making considering the wide range of parks that are under consideration.*
- *Some parks which may seem insignificant can be much-used and loved by the community. This has been demonstrated through many of the submissions from residents which demonstrate how these smaller, locally distributed spaces are used. For example, two submissions comment on the park bounded by King, Miller, Curzon and Hawke Streets:*
 - » *‘This handkerchief of land was really important to the local community for afternoon and evening picnics...’ (Submission 11).*
 - » *‘People aged between cradle and grave use it to rest, read, eat lunch, picnic, play games, socialise & meet up’ (Submission 13)*

134. There are a number of additional reasons why Council considers that discretionary controls are not an appropriate mechanism to achieve the outcome sought by the shift in policy that the Amendment represents. These reasons include:

- (a) It is very difficult for decision makers to meaningfully consider cumulative shadow impacts in the case of individual decisions, especially in circumstances where discretionary height controls apply.
- (b) There is no straightforward way to determine what total future shadow in park might be because of uncertainty about future form of development.
- (c) There will be an arbitrary, and very subjective, threshold between the acceptable and unacceptable shadow extent – and when that threshold has been crossed. It will also be impossible for parties and decision makers to quantify that threshold.
- (d) It is inequitable (and contrary to principle of fairness in section 4 of the Act) to allow first-mover advantage when an individual project casts no greater shadow than its predecessor but is deemed unacceptable by virtue of cumulative impacts.
- (e) There is a real risk of inconsistent and arbitrary decision making as subjective judgements are made about how much shadow is too much shadow.

135. As expressed by Mr Barnes in his oral evidence, the fundamental principle for the Amendment is to prevent overshadowing of parks, beyond a set extent of additional shadow

set by reference to existing built form controls, or the exemptions otherwise embedded in DDO8. Fundamental to the achievement of that principle is the use of mandatory controls.

136. Mr Barnes was firm in his view, in cross-examination, and in response to questions from the Panel, that in the context of a long term objective of protecting solar access to parks, the use of an updated policy in Clause 22.02, coupled with discretionary shadow controls, raised the risk of an increase in overall detriment to parks over time as a consequence of incremental changes to overshadowing.
137. The Amendment seeks a level playing field – as much as is possible given that the sun draws a specific arc around the sky, which differentially impacts properties at different cardinal direction around a park – by specifying exactly the extent of additional overshadowing that is permitted. Any development that falls within that line is permitted, no matter when in time the application is made. This avoids the inequity of a first-in-best-dressed approach and the tyranny of death by a thousand cuts.
138. Council acknowledges that DDO8 will result in differential impacts on some properties which will be more impacted by others. The relevant question for the Panel is not, however, whether the community benefit of certainty in solar access across the year is outweighed by the detriment, by way of lost development potential, to a comparatively small number of private landowners. The question that the Panel must consider is whether the disbenefits to the community at large outweigh the benefits. The issue of social and economic effects is addressed in section J of these submissions.
139. Council also acknowledges that DDO8 will essentially render the operation of some existing discretionary height controls mandatory. However, this will only be the case for the limited sub-set of properties that are:
 - (a) developable;
 - (b) to the east, north or west of a park;
 - (c) adjacent to the park, or in very close proximity (depending on the proposed building height);
 - (d) proposed to be developed to a height that would lead to “additional” overshadowing beyond that permitted by DDO8.
140. The Panel considering Amendment C220 to the Yarra Planning Scheme specifically addressed the issue of certainty of outcome for sunlight protection, in the context of the

Johnston Street footpath. In relation to the “death by a thousand cuts dilemma” the Panel stated:⁴⁷

The Panel agrees that sunlight to the footpath is a desirable outcome in an Activity Centre, especially around a station where there is likely to be a higher level of pedestrian activity.

Southern side footpaths are an important component of the public realm and the sun currently reaches the southern footpath throughout the year. Taller development will inevitably reduce the amount of sun during winter months and restricting the amount of overshadowing to the September equinox is a common measure to reduce the overall impact of taller buildings.

The Panel supports the use of the equinox as the right measure for solar access for a footpath in an Activity Centre. This is in contrast to some open space areas that warrant protection all year round.

The Panel agrees with the Fishermans Bend Planning Review Panel (Advisory Committee) which discussed the ‘death by a thousand cuts’ dilemma in Fishermans Bend (in relation to overshadowing of parks), where Mr Sheppard had opposed mandatory controls. The Advisory Committee stated:^[95]

Mr Sheppard suggested that the ‘death by a thousand cuts’ problem could be overcome by introducing decision guidelines requiring cumulative shadow impacts to be considered. The Review Panel is not entirely satisfied with this solution. It creates the potential for a ‘first in best dressed’ scenario that would not, in the Review Panel’s view, represent fair and orderly planning. ...

On balance, and having considered the principles outlined in Practice Note 59, the Review Panel considers that mandatory winter solstice controls are justified for the key open spaces in each Precinct, given their importance in the open space hierarchy.

Given the vision of a relatively consistent street wall and overall height it seems to the Panel that each site can be treated in a similar fashion. This implies avoiding a ‘first in best dressed’ approach to overshadowing. Considering the overall suite of controls, the extra quantum of development that could be delivered with a building that overshadowed the footpath is not so great as to trade off the solar access.

Clearly the control is ‘absolutely necessary’ if you want to ensure sun access.

The Panel concludes:

⁴⁷ [2019] PPV 11, pg 57.

- *the solar access provisions are appropriate*
- *the mandatory solar access control is necessary.*

141. Additionally, Amendment C191 to the Yarra Planning Scheme related to the Swan Street Activity Centre, and introduced among other things, built form controls that sought mandatory protection from overshadowing for the southern footpath of Swan Street. The Panel report for C191 notes the following submission made by the Yarra City Council:⁴⁸

Council submitted that the importance of public streets and maintenance of the quality of the streets is, in principle, not a controversial objective or indeed, a particularly unusual one. It said that there was a very real risk that the southern footpath could be continuously shadowed because:

- *it has an east-west orientation*
- *of the length of blocks along Swan Street and the narrowness of side streets*
- *of the intensity of development anticipated for the Activity Centre.*

Council submitted that public places with solar access are a finite and highly valued resource and irreplaceable once lost. It said these places were very vulnerable to cumulative impacts where site specific planning applications are decided on an individual basis and any one proposal only results in a small amount of additional shadow. It submitted that:

Unless one applies the “first in best dressed” principle and only the first few applications are permitted to cast shadow, solar access to public places is very vulnerable to “death by a thousand cuts”. There is no clear threshold at which a tipping point is reached and shadow which was deemed acceptable in a previous application is regarded as unacceptable in a subsequent application.

142. In recommending mandatory equinox shadow controls, the Panel stated:⁴⁹

The Panel agrees that solar access to footpaths is critical to the success of the Activity Centre, particularly as retail, hospitality and residential uses intensify. Limited dedicated open spaces near the centre means that the footpaths are particularly important.

⁴⁸ Yarra Planning Scheme Amendment C191, Swan Street Activity Centre, [2020] PPV 79, pg 78 of 193.

⁴⁹ [2020] PPV 79, pg 81 of 193.

The Panel agrees that it is important to protect the amenity of the southern footpath. Overshadowing from tall development on the north side of Swan Street would have a significant and irreversible impact on the southern footpath.

The Panel considers the equinox to be reasonable for measuring solar access for footpaths in the Activity Centre.

The Swan Street Framework provides a satisfactory justification for applying mandatory provisions on the southern footpath. The Panel considers it is appropriate to apply a consistent mandatory overshadowing provision across the entire length of Swan Street. Mandatory provisions will help avoid the ‘death by a thousand cuts’ scenario discussed by Council. It is clear to the Panel that mandatory provisions are absolutely necessary along Swan Street.

143. It is appropriate for the Panel to have regard to accepted criteria for assessing whether mandatory provisions outweigh any loss of opportunity and the flexibility of a performance based system, as set out in Planning Practice Note 59. Council’s responses to those criteria are set out below.

Is the mandatory provision strategically supported?

144. There is an extensive body of work in the Sunlight Access Report, which provides the strategic basis for the use of mandatory controls. Mr Barnes’ evidence is that the Sunlight Access Report “provides a well researched strategic justification for the controls proposed”.⁵⁰ Mr Barnes supports the application of mandatory controls, and states:⁵¹

There is a need for a long term view in terms of protecting the amenity and the attractiveness of parks in the central municipality of a major metropolitan area, such as Melbourne.

The concept of a ‘death by a thousand cuts’ has been recognised in previous in planning hearings.¹⁷ The overshadowing of parks within areas where planning allows for taller built form, can incrementally lead to cumulative impacts which do not become apparent until well into the future.

How parks are used and landscaped, and the existence of buildings and structure within them, can change considerably overtime. It is important that planning decisions about the overshadowing of parks undertaken today do not prejudice the future use and development of

⁵⁰ Barnes Statement, [197], pg 35.

⁵¹ Barnes Statement, [208] – [21], pg 37.

parks and reduce the options to redesign and reconfigure those parks in years to come, for the benefit of the community.

Generally the key outcome for a park when discretion exists, is for a greater level of overshadowing than otherwise identified in planning controls. There is no benefit to the amenity or to the ecological values of a park from discretionary controls.

In my opinion, the mandatory form of the controls proposed is appropriate for the overshadowing of parks in the City of Melbourne, outside of the Central City.

145. The Panel has been provided with a series of maps in the Sunlight Map Book (Folder 8, Document 7), which show the shadow conditions in each of the parks. The Panel also has access to Online Map 8, which can be used to show current and anticipated shadow impacts for each park, as well as the change in shadow condition between 2015 and 2020. The tools demonstrate that, for a number of the affected parks, overshadowing has increased between 2015 and 2020 – albeit to varying levels of severity.

Is the mandatory provision appropriate to the majority of proposals?

146. In respect of Type 1 and Type 3 parks, the purpose of the mandatory control is to prevent any additional overshadowing of those 3 parks. As such, the mandatory provisions are appropriate to all proposals.
147. In respect of Type 2 parks, the purpose of the mandatory controls is to prevent any additional overshadowing, other than an amount of additional shadowing determined by the existing built form controls. As such, the mandatory provisions are appropriate to all proposals.

Does the mandatory provision provide for the preferred outcome?

148. As above, the preferred outcome is embedded in the mandatory ‘no additional overshadowing’ control. If introduced into the Planning Scheme, the outcome will be achieved.

Will the majority of proposals not in accordance with the mandatory provision be clearly unacceptable?

149. In Council’s submission, the answer to this question is clearly yes, because any proposal that does not meet the overshadowing requirements will reduce the level of sunshine available to the park, contrary to the purpose of the control and thereby unacceptable. Taken collectively, if a majority of proposals do not meet the shadow requirements, the park will

eventually be shadowed across the course of the whole day, thereby materially diminishing the attractiveness and amenity of the park.

Will the mandatory provision reduce administrative costs?

150. In Council's submission, the effect of the mandatory overshadowing provision will be to significantly reduce debate on case by case basis about the extent of shadow which is judged to be subjectively 'acceptable'. Council, the community, and developers will have certainty about what extent of additional shadow is permissible, which will ultimately reduce administrative costs.

151. In coming to his view that mandatory controls were justified in this case, Mr Barnes also considered the guidance provided in Planning Practice Note 60 Height and Setback Controls for Activity Centres. Mr Barnes was taken to that document in cross examination.

152. In his written evidence, Mr Barnes states:⁵²

Whilst not technically relevant to those parts of the municipality that are not within an activity centre, comments and directions contained in that document add to an understanding of situations in which mandatory planning controls may be appropriate.

153. In relation to the use of height and setback controls, PPN60 states:⁵³

Height and setback controls can be appropriate so long as they are not aimed at restricting the built form, but at facilitating good design outcomes.

Proposed height and setback controls must be soundly based on the outcomes of strategic research and background analysis that demonstrates consistency with state and regional policy and includes a comprehensive built form analysis.

...

Height controls must not encumber a centre's ability to accommodate community requirements for retail, commercial, housing, community, health, educational and other essential requirements, as consistent with state and regional development policy in the VPP.

⁵² Barnes Statement, [198], pg 36.

⁵³ PPN60, pg 2.

A council will need to be able to demonstrate that there is sufficient land and capacity available to meet forecast demand and projected population growth over at least a 15-year period, and beyond this to a 30-year horizon, including how an activity centre contributes to this need.

154. PPN60 states that height and setback controls must be based on “identifiable objectives or outcomes”, and must follow from comprehensive built form analysis that achieves as relevant:

- *identifies significant opportunities for change within an activity centre and explores alternative built form objectives and outcomes to accommodate this change*
- *includes an analysis of visual and amenity impacts, solar access and overshadowing impacts and any impact on environmental conditions within the centre, including in respect of wind*
- ...
- *selects appropriate heights and built form outcomes at a precinct level through evaluation of built form objectives, land use outcomes and economic growth consistent with state and regional policy.*

155. In relation to the use of mandatory controls, PPN60 states (emphasis added):

*Mandatory height and setback controls (that is, controls that cannot be exceeded under any circumstance) will only be considered where they are supported by robust and comprehensive strategic work **or** where exceptional circumstances warrant their introduction.*

Mandatory height or setback controls should only be applied where:

- *exceptional circumstances exist; **or***
- *council has undertaken comprehensive strategic work and is able to demonstrate that mandatory controls are appropriate in the context, and*
- *they are absolutely necessary to achieve the preferred built form outcomes and it can be demonstrated that exceeding these development parameters would result in unacceptable built form outcomes.*

156. It is important to note that PPN60 does not mandate that exceptional circumstances must exist in order for mandatory controls to be justified. The first two dot points in the extract above are alternatives: there must be either exceptional circumstances or comprehensive strategic work undertaken to demonstrate that mandatory controls are appropriate.

157. While a debate might be had about whether exceptional circumstance exist, the Panel need not go down that path. Here, the comprehensive strategic work that is required to support mandatory controls has been undertaken; and further, as explained above, mandatory controls are absolutely necessary in order to provide certainty of solar access in parks into the future.
158. One of the challenges made by opponents of the mandatory nature of the DDO8 is that it will put significant pressure on Council to approve “mediocre”⁵⁴ ‘wedding cake’ designs that satisfy the solar plane setbacks. Council does not agree with the general premise that the introduction of DDO8 will lead to mediocre design outcomes. The balance of the urban design policy and built form provisions of the Melbourne Planning Scheme will continue to apply, and will continue to encourage design excellence. That will not change.
159. What will change is that for comparatively small numbers of properties around the perimeter of Type 2 parks in particular, proposed developments will likely adopt a stepped form in order to meet the solar plane constraints inherent in a winter solstice overshadowing control.
160. However, as was noted by the two qualified architects who have given evidence in this proceeding, Mr Fergus and Mr Fulwood, built form constraints such as those proposed in DDO8 encourage architects to “do their best work”. Mr Fulwood’s response to a question from the Panel was to the effect that any good architect can achieve excellent design whether or not there are mandatory built form controls in place.
161. The Panel report for Amendment C220 to the Yarra Planning Scheme⁵⁵ explored the relationship between mandatory controls and good architecture, in the context of mandatory street wall, sunlight and upper level setback controls for Johnston Street. The Panel report provides the following summary of submitters’ and Council’s positions:

Concerns were expressed that mandatory built form controls would restrict site responsive design.

Council adopted the evidence of Mr de Keijzer, namely that it is part of an architect’s skill to work within the constraint of the controls that they are given, and that where mandatory controls are necessary, they do not affect quality.

Mr de Keijzer’s evidence is consistent with the observations of the Melbourne C240 panel:

⁵⁴ Biles Statement, [117], pg 12.

⁵⁵ Yarra C220 [2019] PPV 11, pg 36.

So far as the argument that mandatory height controls inappropriately restrict site responsive design is concerned, it is acknowledged that site responsive design is a desirable approach to development and one which is complementary to performance based decision making such as underpins the VPP. Site responsive design should be fostered wherever possible. The Panel considers, however, that where an absolute height is strategically justified and is applied, that height limit is capable of being viewed as another site constraint to be taken into account by a designer.

The Panel notes that similar concerns about stifling the creativity of designers were expressed by submitters to the Melbourne C270 panel. In its Report, that panel recorded:

While some submitters ... and witnesses ... supported discretionary controls on the basis that they would enable more site responsive and creative designs by architects, other designers indicated that they could work within set built form controls. Indeed, the Australian Institute of Architects ... supported defined mandatory limits on the basis that it would assist a designer in persuading a client not to overdevelop a site. Professor Rob Adams in his evidence for the Minister expressed the opinion under cross examination that mandatory controls would not stifle architectural creativity. Rather, he said, "most creative architecture comes from the most constrained environments".

De Luca Property Group devoted much their submission to an appeal to the talent of designers and planners to deliver good planning outcomes without the unnecessary fetter of prescriptive planning controls and an inference that the Council doubted these talents.

The Council submitted that it has faith:

... in the ability of designers and planners to conceive of high quality projects which fit within the proposed mandatory controls and realise the outcomes sought for Johnston Street.

162. In its discussion about this issue, the Panel stated:⁵⁶

The purpose for applying DDO15 to this part of Johnston Street is to provide greater certainty in the face of current and future development pressure and to ensure appropriate built form outcomes for both heritage and non-heritage parts of the street.

The Panel acknowledges that that there is an expectation from sections of the community for greater certainty in the Scheme regarding future development outcomes, particularly in Council's heritage rich

⁵⁶ Yarra C220 [2019] PPV 11, pg 37.

activity centres. Mandatory controls offer an opportunity to provide that certainty, provided the controls are justified. Justification requires:

- *comprehensive strategic work or exceptional circumstance*
- *a judgement that the controls are ‘absolutely necessary’.*

The Panel shares Council’s faith in the ability of designers to conceive of high quality projects that fit within the proposed mandatory controls. Clearly mandatory controls will affect the amount of development that can be included on a site, but within those limits they do not constrain the creativity of the designer.

The Panel also considers that Johnston Street is exceptional in a metropolitan context. While typical in many ways of strip commercial development associated with Melbourne’s cable car and tramway network, Johnston Street did not develop at the same intensity as other inner urban commercial strips. This makes the street more susceptible to development undermining its heritage character.

163. In Council’s submission, the Panel should not be concerned about the prospect of a sudden flurry of ‘wedding cake’ buildings around parks in the municipality. Council accepts that the DDO8 control will have an impact on building design particularly around Type 2 parks – that is an unavoidable consequence of addressing a solar plane restriction. But the Panel can be confident that the DDO8 control, together with the totality of urban design guidance in the Melbourne Planning Scheme, will provide development proponents with the opportunity to allow architects to do their best work. The examples provide in Appendix 1 of Mr Fergus’ statement illustrate the excellent design outcomes that can be realized in the context of sloping plane controls. Council understands that the Eastbourne development at 280 Albert Street, to the north of Fitzroy Gardens, and the Collins Arch development at 447 Collins Street depicted in the Appendix to Mr Fergus’ presentation are both examples of built form that reflects an 18 degree sloping plane.

H. CASE FOR EXTENDED HOURS

164. Currently, Clause 22.02 and most of the existing DDOs seek to prevent overshadowing of public spaces between 11am and 2pm (whether the relevant time of year is the winter solstice or the equinox). The hours of protection in DDO10 vary from 11am – 2am, 11am – 3 pm, and 12pm – 2pm, depending on the open space in question.
165. The Amendment proposes to extend these hours of protection for all parks outside the Hoddle Grid to:

- (a) between 10am and 3pm for Type 1 and Type 2 parks;
- (b) between 10am and 2pm for Type 3 East parks; and
- (c) between 11am and 3pm for Type 3 West parks.

166. The justification for these hours of protection (with the exception of Type 3 West parks), comes from the Sunlight Access Report which includes: Priority 3: Maximise opportunities for people to access sunlight throughout the day for a variety of uses. The Report sets out the basis for the expansion in hours:⁵⁷

Evidence base - park usage data

An analysis of existing park usage data demonstrates that people choose to use parks in a variety of ways throughout the day. The importance of sunlight will vary between activities and between different people undertaking the same activity as a result of personal comfort preferences.

The highest levels of park usage were recorded between 10am and 6pm. Usage varied between the weekday and weekend and was related to the design of the park and the types of facilities within the park (refer to Appendix B).

Evidence base - modelling

The modelling demonstrates, however, that providing sunlight access between 10am and 6pm is not realistic. The modelling shows that this would have a significant impact on development opportunities across the municipality. An analysis of shadow direction and length in winter demonstrates that there is a significant increase in overshadowing before 10am and after 3pm when the sun is much lower in the sky. While peak usage spans from 10am to 6pm, the proposed sunlight access controls are between 10am and 3pm to address this need for a balanced approach (see Figure 5 and Figure 6).

The orientation of existing street grids has a direct effect on the amount of sunlight reaching each park throughout the day. St Kilda Road is approximately aligned with angle of the sun at 2pm in winter.

This means that the large parks east of St Kilda Road - Alexandra Gardens, Queen Victoria Gardens, The Domain and Botanical Gardens, are effectively protected from overshadowing up to 2pm. After this time, the shadows from significant buildings in Southbank begin to fall across these parks. Considering the scale of development already in and anticipated for Southbank, it wouldn't be reasonable to require protection from overshadowing after this 2pm period.

⁵⁷ Sunlight Access Report, pg 10.

167. In summary, the reason that longer hours of protection are sought is to maximise the hours of the day that people are able to access sunlight in parks. Based on the park usage data reviewed in the Sunlight Access Report, the optimal time for sunlight access is between 10am and 6pm. However, the hours of protection were reduced as protecting sunlight access after 3pm (and before 10am) was considered to have an unreasonable impact on development potential around parks.
168. The reduced hour of protection proposed for the Type 3 East parks (2pm from 3pm), reflects the location of those parks in relation to the taller built form in the Central City and along St Kilda Road.
169. Flagstaff Gardens is the only Type 3 West park. The proposed hours of protection for Flagstaff Gardens reflect its location on the western edge of the Central City. Council has proposed the hours of 11am to 3pm to allow a greater extent of shadowing in the morning, while protecting the park from afternoon overshadowing. The same length of time for protection is used as for Type 3 East parks, but with the hours modified to reflect the position of the Gardens west of the Central City.
170. Ms Hodyl recommends that the hours of protection for Flagstaff be further reduced to 12pm to 3pm. Council seeks a specific recommendation from the Panel about this, given that the hours of protection will impact land owned (or shortly to be owned) by Council at the southern edge of the Queen Victoria Market, which Council intends to develop.
171. Council notes that the (generally) uniform approach to hours of protection reflects the longer hours of park use identified in the Sunlight Access Report, and is consistent with the 'flat' approach to park protection that is sought by the Amendment.
172. It is important to note, however that the existing policy in Clause 22.02 that will continue to apply to other public open spaces, is proposed to retain the 11am to 2pm equinox provision.

I. IMPORTANCE AND RELEVANCE OF THE SPATIAL MODELLING

173. As set out in Mr Smith's statement, a range of spatial modelling has been undertaken to assist in the strategic work that underpins the Amendment, to determine the area to which the DDO8 is to be applied, and to assist in the preparation of evidence for this proceeding.

Modelling that informed the Sunlight Access Report

174. The Sunlight Access Report was informed by the 3D sunlight study undertaken by Harrison & White in 2016 (red map), and the later modelling undertaken in-house by Council's GIS team, and Mr Smith in particular (the blue and grey maps).
175. As Mr Smith explained in his evidence, the key differences between the red map, and the blue and grey maps are:
- (a) the different software tools used to run the models;
 - (b) the different time period: the red map shows 9am – 4pm, and the blue and grey maps show 10am – 3pm;
 - (c) the fact that the Council modelling allowed each half hour increment to be shown separately.
176. Mr Smith also explained that the blue map and grey map were derived from the same model, with the blue map the cumulation of each of the grey map increments.
177. Ms Hodyl's evidence was that she used both the Harrison & White and City of Melbourne model outputs in her assessment of overshadowing impacts to parks in the municipality. The Sunlight Access Report sets out how the modelling was used, and the findings that followed from assessment of those models. In summary, the modelling enabled Hodyl & Co to identify the extent of overshadowing of public parks throughout the municipality – at least on the basis of the data that was available at that time.
178. That information was used in the Sunlight Access Report to categorise the parks by reference to their status as being:⁵⁸
- (a) 'Lost' parks already significantly overshadowed;
 - (b) 'Vulnerable' parks partially overshadowed; or
 - (c) "Naturally protected" parks with high levels of sunlight access.
179. That categorisation was then used to determine the sunlight access controls applied to each park, in the context of the built form controls that applied to land around those parks, as shown in Map 13 of the Sunlight Access Report.⁵⁹

⁵⁸ Sunlight Access Report, pg 54.

⁵⁹ Sunlight Access Report, Map 13, pg 85.

180. Those sunlight access controls became the park typologies used in DDO8.

How the DDO8 area was identified

181. Identifying the area to which the DDO8 is to apply has been a challenging exercise.

182. Ideally, the DDO8 would only be applied to those properties that, if developed, would actually cause overshadowing of the relevant public parks. The typical approach to identifying shadowing impacts is to model the extent of shadow cast by existing or proposed structures. However, in order to use that approach to identify the specific properties that, if developed, have the potential to overshadow public parks outside the exclusion area, it would be necessary to predict the ultimate built form adopted for development of those properties. Clearly, that is an impossible task, which is compounded by the mix of mandatory and discretionary controls, in some cases the absence of any building or street wall height controls, and the potential for future subdivisions, amalgamations and demolitions.

183. Alternatively, Council could have chosen to apply the DDO8 to the whole municipality. However, Council determined that this was not a practical or reasonable option, due to the fact that DDO8 would then apply an additional permit requirement to a very large number of properties that had no prospect of ever causing overshadowing on public parks.

184. The approach adopted by Council was to undertake GIS modelling to identify properties that had the potential to overshadow parks, based on the intersection of two ‘volumes’. It is these properties to which DDO8 is proposed to apply.

185. The two volumes are:

- (a) the ‘park solar volume’ for each park, which was identified on the basis of the airspace that needs to be preserved, between 10am and 3pm (or modified hours for the Type 3 parks) on 21 June – this is best understood by reference to by Figures 5.2 – 5.4 in Mr Smith’s statement;⁶⁰ and
- (b) the ‘maximum developable volume’ for each property outside the excluded area (Central City), defined by the property boundary on the ground extended up to the ‘maximum developable height’ for each property.

⁶⁰ Smith Statement, pg 17 – 18.

186. The use of the property boundary to determine the ‘maximum development volume’ is a conservative approach as it draws a line around the property boundary and extends that line up to the ‘maximum development height’, without accounting for setbacks or other planning restrictions that might affect the developable extent of a property.
187. The ‘maximum developable height’ for each property was determined by a set of principles given to Mr Smith by Council’s strategic planning team. Those principles are set out at paragraph [40] of Mr Smith’s statement, but it is worth restating them:
- (a) if a mandatory height control exists, that control was applied;
 - (b) if a mandatory height control exists, but the control is part of a residential zone (GRZ, NRZ, RGZ), 30% was added to the height to account for possible non-residential development in those zones;
 - (c) if a discretionary height control exists, the maximum height cap of 320 metres was applied. The 320-metre cap was based on the approximate height of Australia 108 (115-131 City Road and 70 Southbank Boulevard), which at the time of modelling was the highest approved built structure in the municipality and represents a height at which air safety regulations become relevant;
 - (d) if no height control exists, the maximum height cap (320 metres) was applied; and
 - (e) all heights were rounded to the nearest whole number.
188. Those principles cast a wide net, by reason of the 320m height cap – clearly, there are many locations in the municipality where it is fanciful to expect a 320m tall building would be built, even in the most unusual scenario. However, the alternative to adopting the 320m height cap was to set a lower arbitrary height limit for areas with a discretionary limit, or no limit. That approach encounters two key issues:
- (a) the effect of performance based discretionary controls is that it is not possible to identify to define a maximum amount above a discretionary height limit that is always and necessarily ‘acceptable’; and
 - (b) adopting an arbitrary height – for example 60 metres – would have the consequence that a building of 61 metres in height that would overshadow the relevant park on the solstice would not trigger a permit under DDO8. The risk in that approach is that the outcome sought by DDO8 would not be met, as DDO8 would not capture applications with the potential to overshadow parks in winter.

189. The tradeoff is that applying a 320m cap means that a permit will be triggered under DDO8 for development proposals that will not overshadow a park on the winter solstice. Council notes however, that this has been accounted for in the drafting of DDO8, as clause 5.0 Application Requirements includes the “as appropriate, to the satisfaction of the responsible authority” limitation explained earlier.

Development capacity modelling

190. It is important to note the different role played by the assumptions in paragraph [[40] of Mr Smith’s statement, than the assumptions set out at paragraph [57] of Mr Smith’s statement.
191. As noted above, the former were used to identify the ‘maximum development volume’ of each relevant property, in order to identify those properties which, if developed to that extent, would protrude above the relevant ‘park solar volume’ – and therefore the properties to which DDO8 should be applied.
192. The assumptions in paragraph [57] in Mr Smith’s statement were used to identify a subset of properties that might suffer a loss in development height at the boundary, by reason of DDO8. That is, to identify which properties would protrude above the park solar volumes, if developed to the ‘maximum development height’ set by the assumptions in paragraph [57].
193. It is also appropriate to set out the revised set of assumptions in full:
- (a) Where a mandatory height control exists, this control is applied.
 - (b) Where a mandatory height control exists, but the control is part of a residential zone (GRZ, NRZ, RGZ), add 30% to the height to account for the possible non-residential development in these zones.
 - (c) Where a discretionary height control exists, add 30% to the height to account for discretion/uncertainty.
 - (d) Where no height control exists, but the property is within the Capital City Zone (CCZ) or Docklands Zone (DZ) ,set the maximum height to be 80 metres.
 - (e) Where no height control exists for properties outside of the zones above, set the maximum height to be 40 metres.
 - (f) All heights are rounded to the nearest whole number.
194. The Panel will note that the differences between the two sets of assumptions relate to (c) – (e) above:

- (a) where a discretionary height controls exists, a 30% exceedance allowance was added, rather than using the 320 metre height cap;
 - (b) where no height control exists:
 - i) for the CCZ or DZ, the maximum height was set to 80 metres, rather than 320 metres; and
 - ii) otherwise, a maximum height of 40 metres was set, rather than 320 metres.
195. The reason these revised assumptions were applied was to apply a more realistic set of assumptions of what development around parks might look like – for the reasons explained above the 320 metre height cap does not provide a realistic development outcome.
196. The purpose of that modelling was to identify the subset of properties, based on the more ‘realistic’ development scenario, that may see a reduction in maximum developable height due to DDO8. This modelling was, as Mr Smith described it, a ‘re-purposing’ of the modelling used to determine the land to which DDO8 would be applied. The output of this model was the “Property Height Reduction at Boundary” map that was circulated to the Panel and parties on 12 March.⁶¹
197. That map was provided to Dr Spiller in February 2020.⁶² However, as noted by Dr Spiller in his oral evidence, he did not use the information in that map in his cost benefit analysis, except to the extent that the map was used as the base set of properties to which Dr Spiller’s “sieving” exercise was applied in order to identify the number of properties in the DDO8 area that were affected by DDO8 and were considered “developable” by the application of the assumptions used in the Housing Needs Analysis – which were used by Dr Spiller to identify the amount of floorspace that would be “lost” as a consequence of DDO8. The output of that sieving exercise, which was relied on by Dr Spiller, is the map at Appendix B of Mr Smith’s statement, and the histogram that is Figure 3 of Dr Spiller’s statement.⁶³ The cost benefit analysis undertaken by Dr Spiller is addressed in section J of these submissions.

⁶¹ Panel Document #62.

⁶² Notwithstanding Dr Spiller’s lack of recollection about receiving that map, it was sent to him by email from the City of Melbourne on 25 February 2020: See Panel Document #62.

⁶³ Spiller Statement, pg 11.

2020 Comparative modelling

198. The final modelling undertaken was the comparative 2015/2020 modelling. This modelling utilized updated aerial imagery to identify changes in built form and shadow impacts since 2015. The key purpose for this modelling was as an aid in understanding for the Panel in this process.

J. DEMONSTRATED ENDEAVOUR TO ACCOUNT FOR ECONOMIC EFFECTS

199. Council accepts that the social and economic effects of the Amendment are relevant considerations in the Panel's consideration of the Amendment.⁶⁴ Consistent with established principle and with the evidence of Dr Spiller, Council submits that the principal inquiry is directed to the *public* social and economic effects rather than *private* effects. This principle is enshrined in the context of the economic effects of retail development by virtue of the High Court's decision in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675. It was the subject of consideration in the context of heritage planning by the Amendment C186 panel⁶⁵ and the Supreme Court on review in *Dustday Investments Pty Ltd v Minister for Planning* [2015] VSC 101. At [43], the Court recorded:⁶⁶

[T]he panel agreed with Senior Counsel for Dustday that the social and economic effects most likely to be relevant at the amendment stage are those of a broad community nature rather than of a personal kind.⁶⁷ Personal economic and social impacts, as against effects on the community as a whole, are generally not matters taken into account in planning decisions. The panel then referred to some of the considerations listed in the guidelines as suggestive of the types of broad effects that might need to be considered at the amendment stage. The panel agreed that personal or private social and economic effects may overlap with public effects and in this way they may become relevant.

At [45]-[46], the Court further recorded:

As to the fourth issue, the panel commented that while social and more particularly economic effects were raised by submitters to persuade the panel that the heritage controls should not be applied, there could be offsetting positive social or economic effects. Property values can be enhanced by heritage

⁶⁴ Section 12, *Planning and Environment Act 1987*.

⁶⁵ Melbourne C186 [2012] PPV 79.

⁶⁶ [2012] PPV 79, pg 22 - 23.

⁶⁷ Following *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675.

character when recycling industrial buildings or warehouses for residential use when compared with a modern rebuild noting that a private economic effect would have to be capable of translating into a community-wide benefit.⁶⁸ In many instances, the positive effects, particularly the social effects are qualitative and not capable of quantification such as adding character, appeal and interest to the city or affording a sense of place or providing a physical key to an understanding of past values and practices.⁶⁹

As to the balancing of effects, the panel considered that the qualitative nature of many of the considerations, especially those that support heritage listing, meant that it will always be a matter of judgment as to how the relevant factors are to be weighed. The panel then referred to the guidelines which state:

The normal way of assessing social and economic effects is to consider whether or not the amendment results in a net community benefit.

200. Articulation of the social and environmental benefits of the Amendment in qualitative terms is relatively straightforward even if the weight to be given to those benefits is contested, but quantifying impacts is inherently challenging. It is evident from the modelling investigations documented in the Sunlight Access Report⁷⁰ and the Built Form Testing Study commissioned by Council for the purposes of this hearing⁷¹ that Council has been concerned to understand the implications of the Amendment for development opportunity, particularly in urban renewal areas, in order to satisfy itself that the strategic objectives for those areas are not unacceptably compromised by lost development potential caused by the Amendment. As submitted above, identifying lost development opportunity on any particular site will not be the determinative question; rather, a proper inquiry is directed to the extent to which development opportunity might be lost across a renewal area or the municipality as whole such that it can no longer fulfil its designated purpose for housing and employment growth; even then a public purpose might be met, the benefits of which override the lost opportunity.

⁶⁸ The panel gave the illustration of increased rate revenue.

⁶⁹ [2012] PPV 79, pg 23 - 24.

⁷⁰ Sunlight Access Report, Figures 26-34, pages 78 - 81; see also supplementary images of model at Figure 32.

⁷¹ SJB Built Form Testing Study, 30 November 2020.

201. As the Panel observed, quantifying (including by giving a monetary value to) planning impacts is a complicated and contested exercise. Nonetheless, Council was concerned to attempt this exercise and to that end, engaged Dr Spiller to undertake a net community benefit analysis, or in his terminology a cost benefit analysis. As an experienced economist who undertakes these analyses routinely in the context of major infrastructure projects, his approach requires a monetary value to be attributed to both the costs and the benefits of the project or regulatory intervention in question.
202. In terms of costs, it should be accepted that the principal cost arises from lost development potential. Although some submitters have claimed that the cost of preparing shadow diagrams to illustrate compliance with the proposed control is a material additional impost, the reality is that all development applications are routinely accompanied by shadow diagrams; all that will change for most proponents is that they are prepared at the winter solstice rather than the equinox. For Type 2 parks, the diagrams will include an additional layer of allowable shadow, but it is apparent from the work undertaken by Mr Fulwood, Ms Hodyl and Mr Biles that a SketchUp model can be employed for this purpose.⁷²
203. As to lost development potential, the data as to affected properties is summarized as follows:
- (a) There are 14,360 base properties in the Melbourne municipality,⁷³ of which 12,363 are outside the exclusion area of the Amendment;⁷⁴
 - (b) Applying the criteria in [40] of Mr Smith's statement, there are 4,071 properties which are proposed to be subject to DDO8;⁷⁵
 - (c) Applying the criteria in [57] of Mr Smith's statement, there are 1,730 properties where there is predicted to be a reduction in height at the property boundary;⁷⁶
 - (d) These 1,730 properties are depicted in the map attached to Panel Document #62;

⁷² It is true that if the control were discretionary and a predictive cumulative shadow analysis were required, considerably greater speculation would be involved in forecasting the shadow cast by surrounding development sites.

⁷³ Smith Statement, [61].

⁷⁴ Instructions from Council.

⁷⁵ Smith Statement, [49]

⁷⁶ Smith Statement, [61].

- (e) The average height reduction at the property for the 1,730 properties is just over 30%;⁷⁷
 - (f) Overlaying the criteria from the Council Housing Needs Analysis set out at paragraph 63 of Dr Spiller's report results in:
 - i) 1,462 development properties in the Melbourne municipality;⁷⁸
 - ii) 1,210 developable properties outside the exclusion area of the Amendment;⁷⁹
 - iii) 428 properties subject to the DDO;⁸⁰
 - iv) 198 properties are predicted to experience loss of development potential upon application of the criteria in [57] of Mr Smith's statement;⁸¹
 - v) The average % height impact at the boundary for 198 properties is 30%.⁸²
204. What this data reveals is that 28% of all properties in the municipality will be subject to the DDO and 33% of all properties outside the area excluded from the Amendment will be subject to the DDO. Of these properties, 1,730 or 14% of all properties outside the exclusion area are predicted to have a height reduction at the boundary according to Attachment A of Panel Document 62. These figures can be compared with Dr Spiller's analysis which shows that of the 1,462 developable properties in the municipality, 13.5% are predicted to experience loss of development potential; or of the 1,210 developable properties in the municipality, 16.36% are predicted to experience loss of development potential.⁸³
205. Even if one does not accept all the exclusion criteria used in the Housing Needs Analysis at [63] of Dr Spiller's report, it is reasonable to proceed on the basis that not all land in the municipality or the Amendment area is available for redevelopment. In particular, land which is substantially redeveloped already, parkland, land in multiple ownership or land which has a permit for significant redevelopment seem obvious candidates to remove from the pool of developable land. As Dr Spiller explained, if other land which was excluded

⁷⁷ Panel Document #62.

⁷⁸ Smith Statement, [68]; Table 3, Spiller Statement.

⁷⁹ Smith Statement, [69]; Table 3, Spiller Statement.

⁸⁰ Smith Statement, [71]; Table 3, Spiller Statement.

⁸¹ Smith Statement, [72]; Table 3, Spiller Statement.

⁸² Figure 3, Spiller Statement.

⁸³ Figure 3, Spiller Statement.

from the Housing Needs Analysis is reinstated into the pool of developable land, this increases the quantum of developable land; consequently, even if more land than the 198 lots he has counted is subject to loss of development potential, there will remain a proportionate relationship between the total pool and the affected lots. As outlined above, a comparison of that proportionate relationship can be found by using Mr Smith's original figures of 1,730 affected properties against the total number of properties in the exclusion area which shows that 14% of properties will be affected; this compares with Dr Spiller's 16.36% from Table 3.

206. As is apparent from the evidence of Mr Smith and Dr Spiller, it is not possible to quantify with precision the quantum of development opportunity lost as a result of the Amendment in the context of a performance based planning scheme with mostly discretionary development controls. Absent a design of buildings on all affected sites, all of which could accommodate a wide range of development outcomes, one is necessarily required to make informed assumptions about potential development capacity. Council sought to provide guidance about such assumptions based on the following judgements:
- (a) An allowance of 30% above discretionary heights, representing the judgement of Council's statutory planning officers about the maximum extent of exceedance which can still achieve an acceptable outcome having regard to the design objectives for any given DDO area;⁸⁴
 - (b) Within the CCZ, buildings within DDO10 require increased side and rear setbacks above 80m and heights within City North range between 24m and 60m
 - (c) Areas outside the Capital City zone typically contemplate building scale ranging from 6-12 storeys (or up to approximately 40m): see for example DDO21 for East Melbourne (12m to 46m)⁸⁵; DDO45 for Carlton (9 storeys); DDO63 for Arden Macaulay (4, 6, 8 and 12 storeys); DDO33 for West Melbourne (40m).
207. Further, as a check of whether Dr Spiller's 13% average development capacity loss (and 20% and 25% sensitivity analyses) is a reasonable assumption, the development capacity

⁸⁴ This figure accords with a discussion about using a fixed proportional relationship to define a mandatory height limit with reference to a preferred height in Measurable criteria to assess development applications exceeding preferred heights: Analysis and recommendations, MGS Architects, August 2018, pages 38, 40-41. The MGS report was prepared in the context of the pilot project into better height controls in activity centres conducted by the Department in 2018.

⁸⁵ With the exception of the Hilton Hotel site which has a height limit of 70m.

loss derived by Mr Fulwood can be compared with Mr Smith's map of height reduction at property boundary contained in Attachment A to Panel Document 62, recalling that Mr Fulwood has modelled sites from which submissions have been received, which might reasonably be thought to represent disproportionately sites on which development capacity may be adversely affected:

	Site	Doc 62 Map – Property Height Reduction at Boundary	SJB Built Form Testing Study – GFA percentage difference
1.	2 &10 Wellington and 1071-1081 Hoddle St	<ul style="list-style-type: none"> - 1071-1081 Hoddle: no impact - 2 Wellington: 80% - 12 Wellington: 40% 	2 &10 Wellington and 1071-1081 Hoddle: -28%
2.	407-415 King St	≤20%	-1%
3.	200 Leicester St	≤40%	-8%
4.	701-713 Swanston St	≤80%	-26%
5.	163-175 Bouverie St	≤20%	No impact
6.	70 Jolimont St	≤80%	No impact
7.	86-88, 90-94 Jolimont St	≤80%	No impact
8.	364-366, 370 Albert St	≤40%	No impact
9.	23-37 Boundary Rd, 222-232 & 234-244 Macaulay Rd	≤20%	-5%
10.	330 St Kilda Rd	No impact	No impact
11.	336 Albert St	≤40%	No impact
12.	100 Wellington Pde	≤20%	No impact

	Site	Doc 62 Map – Property Height Reduction at Boundary	SJB Built Form Testing Study – GFA percentage difference
13.	32 Lincoln Sq Nth	≤50%	-25%
14.	77-81 Boundary Rd	≤80%	-2%
15.	369-379 King St	≤20%	No impact
16.	QVM sites	≤Part Site 1 only: 80%	No impact
17.	509 St Kilda Rd	≤40%	No impact

208. As Dr Spiller explained, demand for employment floorspace was taken into account by identifying the original demand for 4.21million sqm of floorspace, one quarter of which is for non-residential purposes. In terms of supply of employment floorspace, he indicated that separate SGS research on employment floorspace demands in the Parkville NEIC confirmed that there was ample supply to meet forecast demand. He also reinforced the importance of offering very high amenity for employment floorspace in knowledge economy and research precincts, which is what the Amendment will protect for the Parkville NEIC. Dr Spiller did not ascribe a cost to any displacement of employment to outer areas for two reasons: first he considered the costs of delivering housing on the urban fringe are the higher costs, and second, in the event that jobs are pushed further out, closer to where people live, this is traditionally identified as a planning benefit.

209. Dr Spiller also explained how the benefits of the Amendment can be costed using willingness to pay and choice modelling. Whilst these methodologies are commonplace in Cost Benefit Analysis, Council accepts that they are unfamiliar in the planning context. Nonetheless, they provide another technique (in addition to community consultation, expert analysis and independent research) for establishing the value attributable to benefits not easily reduced to a quantitative figure.

210. Council accepts that an exercise of the kind undertaken by Dr Spiller is not a perfect science and is subject to the all the vagaries of economic modelling associated with the reliability of assumptions which are input into the model. Whilst there will no doubt be criticism of his assumptions and methodology, Council notes that no other party has sought to undertake

an alternative analysis of this kind or produced material which fundamentally undermines the assumptions which underpin Dr Spiller's work. The virtue of undertaking this exercise is that it removes some of the subjectivity and hidden assumptions which characterise a planner's net community benefit analysis, where the weight given to competing considerations can simply be a matter of preference or ideology or opinion.

211. Ultimately, the panel will have to make a similar judgment to that undertaken by Council, namely to assess whether the goal of this Amendment to secure solar access into parks for current and future generations prevents or indeed scaffolds the realisation of Melbourne's other goals for people, prosperity, creativity, knowledge, connection and sustainability.⁸⁶

K. COMPLIANCE COST

212. Council acknowledges that there will be compliance costs for developers as a result of DDO8.
213. The DDO8 will create a new permit trigger for developments over 9 metres in height. The purpose of this trigger is to ensure that Council is made aware of applications that have the potential – even if very remote – to overshadow a park.
214. However, the key application requirement is the obligation in clause 5.0 to provide a 3D model that shows the existing shadows on the park, the extent of allowable shadow, and the extent of proposed shadow.
215. As explained by Ms Hodyl, the tools required to provide that 3D modelling are readily available, and already commonly in use. Where the modelling demonstrates compliance with the applicable DDO8 requirement, nothing further is required.
216. Additionally, clause 5.0 includes the limitation that the 3D modelling must “accompany an application, as appropriate, to the satisfaction of the responsible authority”. The effect of this limitation is that the responsible authority has a discretion to not require a permit application to provide 3D modelling, in the situation where it is apparent that the proposed development has no prospect of causing overshadowing of a park. Mr Smith explained the tools available to the City of Melbourne to aid in it undertaking that confirmation exercise. Online Map 6, which provides the park solar volumes for each park provides an example of the tools that are available to the City of Melbourne.

⁸⁶ See Council's vision at Clause 21.03.

217. Accordingly, in Council's submission, in the context of the purpose of the Amendment and the outcome sought, the additional permit trigger and the requirement to provide 3D modelling will not create an unreasonable burden on permit applicants.

L. RELATIONSHIP BETWEEN PARK TYPES AND PARK HIERARCHY IN THE OPEN SPACE STRATEGY

218. The park typology adopted for DDO8 does not intersect with, and is not related to, the park hierarchy in the OSS. The park typologies in DDO8 relate to the scale of development around parks that has been deemed appropriate through the introduction of existing built form controls.

219. The OSS adopts a 'hierarchy' of open space in the City of Melbourne. The OSS Technical Report states:

The open space hierarchy and classification for this strategy defines the types of open space in the municipality. It is used to document the character, intended use and distribution of the existing open space, and assess what types of open space are required in the future.

The hierarchy describes the level and use of an open space, and the classification defines the character of the space which is described later in Section 3.3.

The hierarchy has been assigned to all individual open spaces based on the existing use and in some cases its size. The Capital City, State and Regional open space is not necessarily based on size given that these roles can be fulfilled by any size of open space. The other hierarchy types of Municipal, Neighbourhood, Local and Small Local open space are more closely linked to size, as this is about the physical area available to accommodate the different levels of use.

220. Ms Thompson confirmed that the hierarchy was not set up to guide what level of winter sunlight access was appropriate for different types of public open space. Ms Thompson's evidence was that winter sunlight access is important for all types of open space, in order to "make it attractive to use, maximise its adaptability and function now and in the future and for it to be practical to maintain".⁸⁷

221. As noted by Ms Thompson, the OSS was prepared in 2012, before the introduction of PN70. Nonetheless, the OSS and Technical Report closely align with the approach sought by PN70, including by reason of:

⁸⁷ Thompson Statement, pg 20.

- (a) the detailed background research that underpinned the OSS;
 - (b) the classification of parks within the municipality in the identified hierarchy;
 - (c) the inclusion of an assessment of current and likely future demand for open space.
222. PN70 explicitly recognizes the need to plan for the future, and to preserve existing parks (as a subset of open space) to allow flexibility to adapt to change in community needs. This is precisely what the Amendment seeks to achieve for all of the identified public parks.
223. PN70 states:

Public open space provides significant benefits to communities. These benefits include protecting biodiversity, improving psychological health and wellbeing, improving physical fitness, facilitating social interaction and cohesion, promoting community pride, and enhancing child development through play. Open space also provides a location for participating in civic life.

The importance and value of open space is likely to increase over time as a result of emerging pressures of population growth, demographic change, urbanisation and climate change. Urban change means access to private open space may alter over time and appropriately located, well designed and maintained public open space will become more important for future communities. Preserving existing open space is also important as it can be modified over time to perform different open space roles in response to changing community needs. Land that may appear to be of marginal benefit to one generation may be of critical importance to the next.

224. In relation to the classification of open space, PN70 states:

There are various ways to decide on an open space classification system that suits the needs of your OSS. A classification system generally covers the catchment (who will use the open space), landscape character (what the open space looks like) and function (the role of the open space), but can also include settlement type (the environment the open space sits in). A classification system provides the framework for analysing existing open space, potential future needs, and determining the future open space requirements of the study area.

225. As explained by both Ms Thomson and Ms Hodyl in their evidence, there is no conflict between the ‘flat’ approach to protection of sunlight access to parks proposed in the Amendment, the classification approach sought by Planning Practice Note 70, and the park hierarchy identified in the OSS.
226. In explaining the intersection between the OSS hierarchy, and the ‘flat’ approach taken to protection of parks by the Amendment, Ms Thompson was clear in her evidence that the

purpose of the hierarchy is to assist Council to understand who is using open space, and for what purposes, and to assist in decision making about the provision of facilities to open spaces, and what changes may be appropriate for each open space in the future.

227. Ms Thompson's evidence, including her responses to questions in cross examination that sought to make a distinction between different classes of park, provides emphatic confirmation to the Panel, from the author of the OSS, that solar access to all parks, irrespective of classification, cultural values, size, use (etc), is entirely consistent with recognition that although parks may have different values, equal solar access protection is warranted: parks are different, but of equal value in terms of the benefits of sunshine.
228. Similarly, Ms Hodyl, in cross-examination strongly resisted the suggestion put to her by the University that different parks – for example the Shrine forecourt and Macarthur Square in Carlton – had different levels of significance, and therefore different levels of overshadowing control should be applied. As with Ms Thompson, Ms Hodyl was very clear in her view that all parks have role to play and are equally important.

M. HOW DDO8 WILL OPERATE WHERE THERE ARE EXISTING OVERSHADOWING CONTROLS

229. The City of Melbourne acknowledges that as a consequence of the introduction of DDO8, there will be certain circumstances in which there will be a conflict between overshadowing controls.
230. This arises in two ways:
- (a) some developable land will be subject to two shadow controls - one in a precinct wide DDO and one in DDO8; and
 - (b) some parks will be protected by two different shadow standards depending on whether the developable land is inside or outside the Hoddle Grid or Southbank.
231. In the first case, DDO8 will 'trump' all of the existing overshadowing controls in the general DDO (for example DDO61 in City North, DDO21 in East Melbourne, and DDO63 in Arden Macaulay), and the Planning Scheme will need to be read to resolve the inconsistency by preferring the specific mandatory control over the discretionary controls, by reason of section 7(4) of the Act.
232. This raises an important point for the Panel to note. In the event that DDO8 imposed a discretionary rather than mandatory control, the responsible authority would be faced with

a difficult task in determining which of two discretionary controls ought to be preferred – one protecting sun at the equinox, and the other protecting sun at the winter solstice. That conflict would not be easily resolved. It would be necessary to have regard, of course, to the policy direction in Clause 22.02 which, if made as proposed by Council would create an objective “to protect, and where possible increase the level of winter sunlight access to public spaces” – but this would not resolve the conflict between two discretionary controls. One can imagine the need to argue before the Tribunal that DDO8 should be preferred because it is later in time; to which the proponent would respond that the earlier, general DDO addressed a broader range of built form considerations, only one of which was overshadowing, and the net community benefit lay in preferring the equinox standard.

233. Council acknowledges that it is not ideal to have conflicting overshadowing controls in the Planning Scheme, and that if DDO8 is introduced, it will be appropriate, in due course, to remove the conflicting discretionary overshadowing provision from the ‘overlapping’ DDOs.
234. In relation to the second issue, land in the Capital City Zone, Schedules 1, 2 and 3 is governed by overshadowing provisions in DDO2, DDO10, DDO40 and DDO60 – all of which have overshadowing controls. However, with the exception of a number of parcels to the south and east of the Queen Victoria Market which are subject to DDO10, no land in these DDOs will be subject to DDO8.
235. Council notes that the line of questioning put to Ms Hodyl by the University of Melbourne, in relation to the Shrine of Remembrance, seemed to suggest that there would be conflict between DDO10 and DDO8 that may be difficult to resolve – although when clarification was sought by Council as to the premise of that line of questioning, it was acknowledged by the University that there would not be land that would be affected by both overshadowing controls that would apply to the Shrine.
236. Council accepts that the introduction of the DDO8 will create a somewhat anomalous outcome in that a number of parks – the Shrine of Remembrance, Treasury Gardens, Parliament Reserve and Flagstaff Gardens – will have different levels of protection under DDO10 and DDO8 depending on where the relevant development site is located.
237. However, Council submits that this reflects the different policy context for development sites in the Hoddle Grid and Southbank, where there are expectations for a greater degree of intensification. Given the nature of the Central City, there is a fundamental logic to the

Central City shadow provisions being different from the balance of the municipality because building heights in the Central City are expected to exceed all other areas.

238. To take the specific example of the Shrine of Remembrance:

- (a) DDO10 and DDO60 both impose a mandatory control that prohibits additional overshadowing of the Shrine and forecourt between 11am and 3pm, 22 April to 22 September. This functions to afford at least the same level of protection as a winter solstice control.
- (b) DDO8 will impose a mandatory control that prohibits additional overshadowing of the whole of the Shrine park area (including the Shrine and forecourt) between 10am and 2pm on 21 June.

239. There is no land that would be subject to both DDO10 or DDO60 and DDO8 that has the potential to overshadow the Shrine of Remembrance or its forecourt – given the extent of the park solar volume for the Shrine parkland, which does not extend to the land around the Queen Victoria Market.⁸⁸ As such, any permit application for a development that had the potential to cause additional shadowing to the Shrine or forecourt, would only have to satisfy one of the mandatory controls.

240. In relation to the ‘exception’ area around Queen Victoria Market, Council acknowledges that there is land to which the DDO10 applies around the Market, that is also shown as covered by the DDO8 mapping. That land has been included in error, and should be removed from the DDO8 mapping.

241. However, that is not the case for the Queen Victoria Market land that is subject to DPO11. Council’s intention is for DDO8 to apply to that land (which it owns, or will soon own), and apply the more stringent mandatory overshadowing control in DDO8 over the top of the current discretionary control in the DPO11. However, given that Council is the landowner, responsible authority, and likely developer of that land, Council seeks specific guidance from the Panel about the appropriateness of this approach, and the application of the Type 3 West typology to Flagstaff Gardens in that context.

⁸⁸ Refer to Online Map 6, and the Park Solar Volume for “Melbourne Parklands”.

242. Ultimately, Council submits that the Amendment creates greater alignment between the protection of Capital City parks, which are now protected in winter months (albeit for shorter hours), and parks outside the Hoddle Grid and Southbank.
243. If an approach was adopted that gave preference to particular ‘more significant’ parks like the Shrine, and gave a higher degree of protection to those parks (be it hours of overshadowing, time of year assessed, or extent of additional overshadowing allowed), over the small or medium size parks that perform a function for a smaller catchment area, or are currently used for only for minor passive recreation – that would be doing a disservice to the people who use those smaller, local parks, and who value the amenity and benefits provided by sunlight access throughout the year.

N. **IMPACT ON STRUCTURES WITHIN PARKS**

244. A number of submitters have raised issue with the implications of the Amendment for development of structures within parks.
245. DDO8 only applies to land outside parks, and will not have any relevance to development within parks.
246. However, the proposed revisions to Clause 22.02 do have implications for development within parks. The exhibited version of Clause 22.02 proposes the following addition:

Public Parks Outside the Hoddle Grid and Southbank

Development must not cast additional shadow on any public park at key times and dates identified in the planning scheme.

247. Effectively, the revised Clause 22.02 creates a baseline ‘tier’ of protection (rather guidance) which applies to any development that could overshadow parks, including structures within the park.
248. Council notes that both Ms Hodyl and Mr Barnes support Clause 22.02 applying to development within parks.⁸⁹
249. Ms Hodyl recommends including guidance that aligns with the principles of the OSS Technical Report. Ms Hodyl’s recommendation four is that the wording of Clause 22.02 be

⁸⁹ Barnes Statement, section 10, pg 38-39; Hodyl Statement, pg 33 – 34.

updated to clarify that the mandatory requirement does not apply to new or altered buildings within parks. Ms Hodyl has suggested the following re-drafting:

Public Parks Outside the Hoddle Grid and Southbank

- *Development outside of a public park must not cast additional shadow on any public park at key times and dates identified in the planning scheme.*
- *Development within a public park should be designed to minimise any negative impact that an increase in overshadowing may have on the use and value of the open space.*

250. Mr Barnes recommends revising the policy to provide that

Development on land within the boundaries of a park should not unreasonably reduce the amenity of the park by casting additional shadows on the park between 10.00 am and 3.00 pm on 21 June, to the satisfaction of the Responsible Authority.

251. Council submits that it is appropriate for the guidance in Clause 22.02 to apply to development within parks, as those developments equally raise the possibility for unreasonable overshadowing impacts at the winter solstice. Council accepts Ms Hodyl's recommendation, and broadly agrees with her drafting recommendation, although not necessarily the precise wording suggested by Ms Hodyl.

252. Council will also propose drafting to provide further guidance for new or altered buildings within parks.

253. Amended drafting for Clause 22.02 will be provided with, and explained further in closing submissions, once Council has had the opportunity to consider the submissions made by the balance of the parties.

O. RESPONSE TO ISSUES RAISED IN SUBMISSIONS

254. A total of 178 submissions have been received in relation to C278:

- (a) 119 were received during the exhibition period; and
- (b) an additional 59 were received after the exhibition period.

255. All submissions have been referred to the Panel for consideration.

256. Council notes that the majority of the submissions received support the shift to winter solstice overshadowing controls for all parks across a broader range of hours. Eighty nine

of the original tranche of 119 submissions supported the intent of C278.⁹⁰ These submissions were received from individuals and from community groups. The Panel should take note of this significant degree of support for stronger protection for solar access to parks.

257. Of the remaining 59 submissions, 52 related to the development at 699 Park Street Brunswick, in the City of Moreland. While those submissions raised concerns about overshadowing of Princes Park, that concern was generally specific to the overshadowing impact of the then proposed Park Street development. The Victorian Civil and Administrative Tribunal refused a permit for that development in April 2020.⁹¹
258. Submission 173 (MAB) and Submission 174 (Development Victoria) seek confirmation that Docklands is not included in Amendment C278. Council notes that Dockland is not proposed to be subject to DDO8, and Clause 22.02 does not (and is not proposed to) apply to the Docklands Zone.
259. The remaining 34 submissions opposed or raised issues with C278.
260. A number of the topics raised in submissions have been addressed in detail above. In respect of the outstanding topics Council's substantive response is as follows.

Transitional provisions

261. In Council's submission, transitional provisions should not be included in DDO8.
262. The Amendment has been the subject of a lengthy assessment process, including as a result of the delays to commencement of the hearing as a result of COVID-19. The Amendment was exhibited in August and September 2019, more than 18 months ago, and there has been ample opportunity for permit applicants to have proposals considered under the existing policy settings and applicable discretionary controls.
263. Council is concerned that any further delay in introducing the new controls has the potential to undermine the purpose of the Amendment. This concern is made good by the following

⁹⁰ See for example, submissions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 29, 30, 31, 32, 33, 35, 36, 37, 41, 42, 43, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66, 67, 68, 69, 70, 71, 72, 73, 80, 81, 82, 84, 85, 96, 98, 104, 109, 111, 115, 116, 117, 123, 164, 165, 166, 167, 168, 169, 170, 171, 172, 178.

⁹¹ *JW Land Development Pty Ltd v Moreland CC* (Corrected) [2020] VCAT 354.

permit applications that, if approved, will cause significant overshadowing of public parks at the winter solstice:

- (a) the Melbourne Business School application for 150 - 154 Pelham Street, Carlton (Lincoln Square);⁹²
- (b) the Polis application for 1071 - 1081 Hoddle St and 2 - 10 Wellington Parade, East Melbourne (Weedon Reserve);⁹³
- (c) 122 - 130 Wellington Parade, East Melbourne (Yarra Park);⁹⁴
- (d) 94 - 96 Wellington Parade, East Melbourne (Yarra Park);⁹⁵
- (e) 207 Kensington Road, West Melbourne (Wildlife Sanctuary).⁹⁶

264. Council is also concerned that transitional provisions would lead to unnecessary complication in the interpretation and operation of DDO8, in conjunction with the revised Clause 22.02 – which may also undermine the purpose of C278, in a similar fashion as has occurred due to the transitional provisions included in DDO10.⁹⁷

P. RESPONSE TO SPECIFIC SUBMISSIONS

Friends of Moonee Ponds Creek Inc (submitter #38)

265. This community group seeks inclusion of future open spaces in the Amendment.

266. However, due to the requirement to map protected parks for the purpose of inclusion in DDO8 and the absence of precise delineation of those future open spaces, it is not possible to include future open spaces at this time.

267. Nonetheless, the updated policy framework in clause 22.02 will inform future structure planning for new urban renewal areas with new parks so that the need for additions to protected parks in DDO8 and the application of DDO8 to new areas will be considered at that time.

⁹² TPM-2019-19, referred to Council on 25 June 2019.

⁹³ TP-2020-502, lodged with Council on 28 July 2020.

⁹⁴ TP-2018-80, lodged with Council on 16 October 2018, advertising commenced 11 September 2019.

⁹⁵ TP-2020-518, lodged with Council on 3 August 2020, on behalf of PSC Insurance Pty Ltd (Submission 175).

⁹⁶ TP-2018-512, lodged with Council on 26 June 2018 (currently on hold).

⁹⁷ See *63 Exhibition Street Pty Ltd v Minister for Planning* [2020] VCAT 498.

Friends of Royal Park (submitter #39)

268. This community group opposes the exemption from DDO8 for buildings in parks, citing examples such as the Royal Children's Hospital, the zoo, and the State netball and hockey centre as examples which require regulation.
269. Council has previously addressed the intended operation of the policy in relation to buildings within protected parks and does not agree to the extension of DDO8 to buildings within parks.

Sequiris Pty Ltd 45 Poplar Road, Parkville (submitter #36)

270. The site is in the Industrial 1 zone, is occupied by a building on the State Heritage Register and not subject to any height controls.
271. It is directly north of wetlands and playing fields in Royal Park.
272. Given the size of the site at 11.4ha and its direct adjacency to the parkland, it is entirely possible for significant redevelopment opportunities on the site to be explored which avoid additional shadow to the park. Some limited existing buildings cast existing shadow onto Royal Park which may provide further limited opportunity for redevelopment but large areas of the site sit above the 50 AHD solar plane, providing ample scope for significant redevelopment of the site unimpeded by DDO8.

Carlton Residents Association (submitter #40)

273. CRA argues that the land within DDO47 for Carlton is not properly characterised as a growth area, given the extent of its overlap with the precinct wide HO1 for Carlton and the DDO47 design objectives for low scale development; accordingly, CRA says that Argyle Square should not be a Type 2 park.
274. Council acknowledges a number of differences between University Square and Lincoln Square on the one hand and Argyle Square on the other:
- (a) the first two parks are surrounded by land in the CCZ5 not the Mixed Use and Commercial 1 zones;
 - (b) the first two parks are surrounded by land in DDO61 with a discretionary height limit of 40m and the eastern edge of Lincoln Square is in DDO45 for Swanston Street with a discretionary 9 storey height limit. By contrast, DDO47 around Argyle Square has

a discretionary 4 storey height limit, with a contemplation of 14-14.5m residential development and 16m non-residential development;

- (c) Lincoln Square has individual heritage buildings or heritage precincts near it but unlike University Square and Argyle Square is not contained in the precinct wide HO1 for Carlton; and
- (d) the scale of development around the first two parks is already greater than that around Argyle Square.

275. Notwithstanding these differences, Council is satisfied that Argyle Square should be treated in the same way as University Square and Lincoln Square:

- (a) they are of comparable size;
- (b) they are all designated as neighbourhood open space in the Open Space Strategy Technical Report;
- (c) the surrounding zoning anticipates a greater mix of uses and greater scale than the residential land in the residential zones further to the northeast.

276. In order to consistently apply the principle that parks in areas with future heights of four and more storeys should be characterised as Type 2 parks, it is appropriate for Argyle Street to retain its Type 2 classification.

277. CRA has also questioned the utility of the DDO8 control over land in the GRZ2 (sic). Land in the GRZ1 to the north is subject to a mandatory 11m height limit for residential buildings and land in the NRZ3 to the north is subject to a mandatory 8m height limit for residential buildings. These areas are also subject to HO1. Because there is opportunity for non-residential development to exceed these height limits, it is desirable to retain the land in the DDO8 to ensure that non-residential development is tested for its winter shadow impacts on nearby parks.

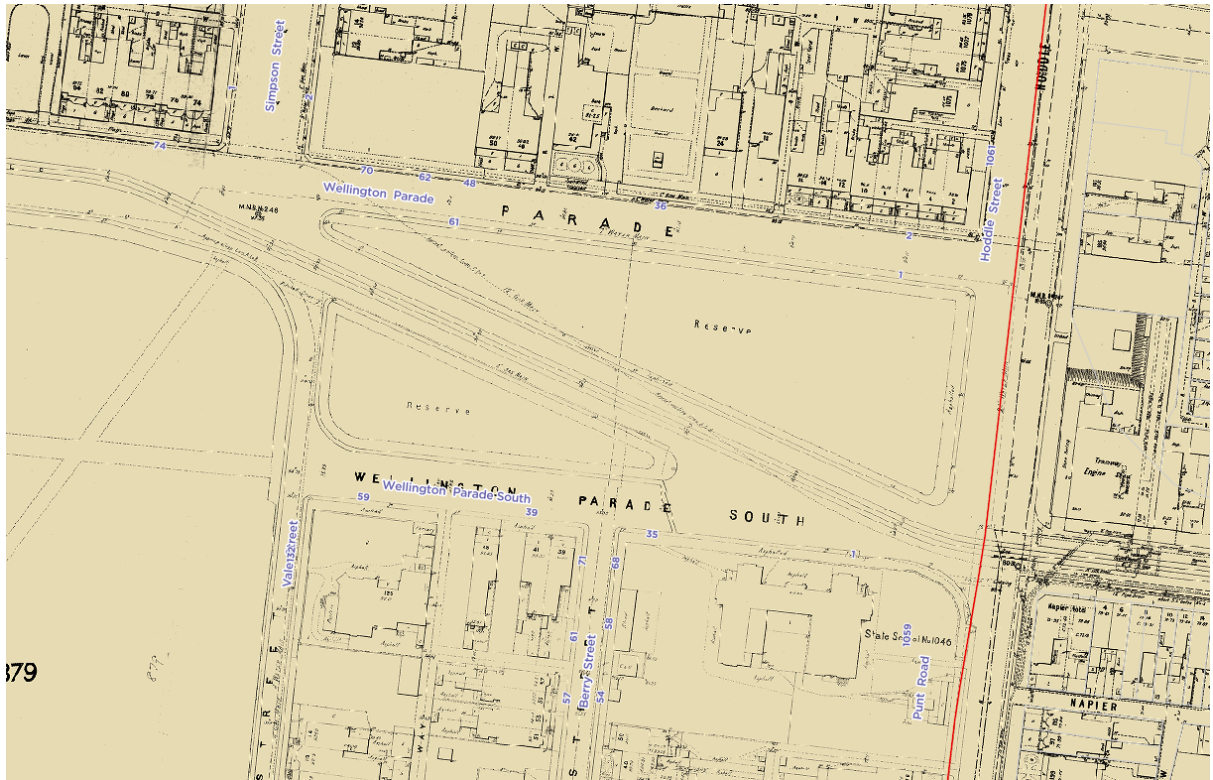
Polis Pty Ltd 2, 10 Wellington Parade and 1071-1081 Hoddle Street, East Melbourne (submitter #64)

278. Council has accepted the recommendation of Ms Hodyl to reclassify Weedon Reserve as a Type 2 park. Consequently, allowable shadow from the discretionary height of 24m can be cast over the park. Although this reduces the amount of winter solar access presently enjoyed by the Reserve, it enables all three parts of the park to retain a degree of solar access

while enabling the development potential identified by the height control in DDO20 to be realized.

279. In terms of some expectation by Polis that a height exceeding the discretionary height on the land to the north should be regarded as a likely or preferable development outcome, the Panel should be aware that the Tribunal has previously refused a permit application for a building of 33m at 10 Wellington Parade in *10 Wellington Parade Pty Ltd v Melbourne CC* [2015] VCAT 1322. Although overshadowing of Weedon Reserve did not figure in the Tribunal's decision, the exceedance of the preferred maximum height by about 30% was considered unacceptable in terms of creating a consistent scale of development on Wellington Parade between Hoddle Street and Simpson Street: see [19]. In *Salkob Holdings Pty Ltd v Melbourne CC* [2018] VCAT 1458, the Tribunal granted a permit for development of a 7 storey building at 1071-1081 Hoddle Street, on the basis that it did not exceed the 24m height limit: see [1] and condition 1(b) of Permit TP-2016-1015.
280. To the extent that Polis continues to pursue an argument to this effect, Council does not accept that Weedon Reserve should be excluded altogether from the suite of protected parks in DDO8.
281. All of Council's witnesses who were asked indicated that they had visited the park within the last few months and all supported both its protection by DDO8 and its potential for improved amenity with relatively modest measures.
282. Weedon Reserve has been earmarked as a reserve since the early subdivision of Melbourne and is shown as a reserve in the 1895 MMBW plan below. It has been zoned PPRZ at least since the introduction of the new format Melbourne Planning Scheme in 1999. It was included in the Open Space Strategy in 2012 and remains the only local park within a 300m catchment of the properties on the north side of Wellington Parade in DDO20 east of Simpson Street.⁹⁸ There is no proper basis on which to exclude it from the Amendment.

⁹⁸ Council acknowledges that Yarra Park is within 300m, but it is a higher order park under the OSS (classified as a 'State' open space), and is not always available for local users.



283. There are many parks adjacent to busy roads (including Mr Fergus' example of the park next to the Fitzroy Pool), the amenity of which is highly valued, and many public spaces which have historically been dominated by adjoining roads which have evolved over time into safe, attractive and valued local parks.
284. The primary character classification of Weedon Reserve in the OSS Technical Report as "significant road reservation" recognizes the presence of major roads, but as Ms Thompson explained there are locations within the larger, northern section of the park where the influence of the busy roads is lessened. As she explained in her evidence, the existing design and use of the reserve is restricted by the difficulty of access to it from the north and the lack of facilities and design elements that reduce the influence of traffic movement and noise on the reserve; all of these shortcomings are able to be overcome by upgrades to the park and the OSS specifically references measures to improve accessibility and use, particularly for people to its north. There are a range of measures available to improve the qualities of the park, enhance its connectivity to the north and introduce measures to reduce the noise, safety and visual impact of traffic on the park. That measures have not progressed in the 9 years since adoption of the OSS (or 5 years since the implementation of the OSS via Amendment C309) does not signal that they will not occur at all, especially in the context of a strategy with a lifespan of 15 years and an indication that actions with a medium

priority⁹⁹ will be progressed in 8-11 years.¹⁰⁰ Once the recommended works are undertaken, the character classification of the reserve would be expected to change to list “significant road reservation” as a secondary rather than primary classification.

285. As Ms Thompson indicated, recent steps have been taken by Council to remove the road status from Weedon Reserve,¹⁰¹ with no objection from DEWLP as landowner, confirming that action is underway to regularize the park status of Weedon Reserve and progress its upgrade.
286. The current permit application for a residential building of 35.6m and a commercial building of 33.7m provide an illustrative example of how the current shadow controls would fail to provide adequate protection to Weedon Reserve and compromise further measures to improve the qualities of the park.
287. Weedon Reserve exemplifies the need to consider the future possibility of parks, as well as their current condition.

Iglu Pty Ltd 407 - 415 King Street (submitter #65)

288. The site is in the Mixed Use zone and in a site specific Heritage Overlay 842, and subject to DDO33 which contains a 40m height limit.
289. In 2017, the Tribunal refused a 70m proposal on the site in *DCF 407 King Street Developing Entity v Melbourne CC* [2017] VCAT 423, though found no shadow of Flagstaff Gardens between 11am and 2pm at 22 September or 22 June: [32].
290. A permit was granted for an 81.6m building on the site but an amendment application was subsequently lodged seeking approval of a taller building on the site.
291. At section 4.9 of the Built Form Testing Study, SJB modelled an 11 storey office on this site and found a 1% impact from the proposed DDO8, requiring an additional setback of 3.8m at the top level to avoid shadow at 3pm.

⁹⁹ As is the case for Weedon Reserve, see OSS Technical Report, page 294.

¹⁰⁰ See OSS Technical Report, page 356.

¹⁰¹ On 22 November 2018, the landowner (DEWLP) provided no objection to Council initiating a road discontinuance process to repurpose the Government roads known as Weedon Reserve, request that the subsequent land be reserved for ‘public park’ purposes and appoint Melbourne City Council as committee of management.

292. This extent of impact in order to preserve existing solar access in Flagstaff Gardens represents a very minor impost on the development opportunity contemplated by DDO33. This case is another illustration that the exercise of discretion in relation to building heights under a precinct based DDO needs the further qualification of the mandatory operation DDO8 to preserve winter sunlight in parks.
293. Although the submitter argues that Flagstaff Gardens should not be included in the Amendment as a Type 1 park, its protection at the winter solstice is already established by Amendment C245 and there is no reason to treat it differently from other CBD fringe parks which are also protected by the Amendment.

Melbourne Business School 200-214 Leicester Street, 150-154 and 160-170 pelham Street, 168-180 Leicester Street, 183-189 and 195-195 Bouverie Street (submitter #74)

294. The site is in the Capital City Zone Schedule 5, subject to DDO61 Area 4.1 which contains a 40m height limit. It is also subject to a number of Heritage Overlays, including HO1 for the Carlton Precinct, HO1130 for the former Baptist Kindergarten and HO1121 for the Little Pelham Street precinct.
295. At section 4.11 of the Built Form Testing Study, SJB modelled an 11 storey office on this site and found an 8% impact from the proposed DDO8, requiring progressive upper level setbacks above the streetwall to the east and west. Mr Fulwood accepted that a further corner setback would be required at the southwest corner of the site to accommodate the break in allowable shadow from the intersection of Pelham and Bouverie Street. The impact of the break in allowable shadow is shown in the Sunlight Access Report at Figure 32¹⁰² and is clearly illustrated in the supplementary extracts of images from the model.
296. A permit application for this site has been made to the Minister for Planning for an educational building of more than 80m in height. The shadow plans accompanying the application show 538m² of shadow across Lincoln Square at 2pm and 2,554m² of shadow across Lincoln Square at 3pm. The shadow diagrams do not show the shadow cast by the building under construction at 18-20 Lincoln Square, nor do they appear to show the shadow cast by the approved addition at 207 Bouverie Street. The shadow analysis does not provide any information about development potential of other sites around Lincoln Square to enable a prospective cumulative analysis to be undertaken. The shadow from this proposal has not

¹⁰² Sunlight Access Report, pg 79.

been included in Mr Biles' modelling and if approved, would appear to result in as much as three quarters of Lincoln Square in shadow at 3pm at the solstice.

297. The circumstances of Lincoln Square provide stark demonstration of the urgency of this Amendment if winter sunlight access to this park is to be preserved. They illustrate the hazard of incremental decision making which is inevitably concerned with one-off decisions about the impact of shadow from a single proposal and is unable to take into account the cumulative impact of shadow impacts on parks over time.

University of Melbourne, various land in Parkville and South Carlton (submitter #83)

298. The University of Melbourne plays an essential, anchoring role in the Parkville NEIC and is a significant landholder within that cluster. It is also a beneficiary of the legacy of the original layout of the parks of Melbourne and of Council's ongoing maintenance and care for those parks.
299. It appears from the evidence on which the University of Melbourne relies and the nature of questions put by it in cross examination that its position in relation to this Amendment is not specific to its landholdings but represents a fundamental opposition to mandatory controls, winter solstice protection, uniform park protection outside the Hoddle Grid and Southbank, and an extension of hours of protection. Accordingly, much of the response to the University's submission can be found throughout the totality of this Part B submission.
300. In terms of the specific circumstances of the University's landholdings, Council submits that the success of the Parkville NEIC will depend upon the quality of the public realm, including the quality of parks within it. As sunshine including winter sunshine is an essential ingredient of the amenity of parks, the protection of sunshine to the parks is a critical building block of the Parkville NEIC. The land use and development ambitions for the Parkville NEIC do not "trump" the sunshine protection to parks and in any case, should not be regarded as a conflicting ambition, but a mutually reinforcing one.
301. University Square and Lincoln Square are the main public parks that serve the University catchment area. They are among the first parks that were set aside as public parks in the City. City North is developing very quickly, and density is increasing. There is a large population residing predominantly in apartments around the two squares.

302. The ambitions for the NEIC in terms of the quality of the public realm are reinforced by multiple strategic documents. For example, the Project Update for the Parkville NEIC Framework Plan published in August 2018 states that one of the issues to be addressed is:¹⁰³

Utilising public spaces - The NEIC includes a range of parks, forecourts and other spaces where people can sit, relax and meet others – but these are under-utilised. Vibrant public areas are as important as high-quality buildings. These spaces knit the institutions together and offer respite for workers and residents.

303. One of the themes being developed to underpin the Parkville NEIC Framework Plan includes:¹⁰⁴

- *Design places for people – The Framework Plan will help create an attractive place for people who want to work, live and invest in the cluster.*

304. Implicit in these themes – and explicit in the list of issues to be addressed – is recognition that public open spaces, including parks, are a critical component of a vibrant precinct – equally as important as high-quality buildings, and intensification in built form to support growth in employment and activity.

305. Another recent strategic document published by Council is the Melbourne Innovation District City North Opportunities Plan 2020 which identifies the role of the public realm as a key driver of the success of the MID. Its vision is:¹⁰⁵

City North will become a world class urban district and environment that supports and develops next generation Melbourne, a place designed to leverage emerging technologies and innovation and build on our city's unique characteristics to enhance education and economic outcomes, create new knowledge and city experiences and enrich inclusion and public amenity.

306. Its first urban realm objective is:¹⁰⁶

¹⁰³ Parkville National Employment & Innovation Cluster, Project Update – August 2018, pg 2.

¹⁰⁴ Parkville National Employment & Innovation Cluster, Project Update – August 2018, pg 2.

¹⁰⁵ Melbourne Innovation District City North Opportunities Plan 2020, pg 4.

¹⁰⁶ Melbourne Innovation District City North Opportunities Plan 2020, pg 34.

Enhance the amenity and function of the district's built environment, streetscapes and open spaces to make a great place for people.

This objective aims to create places that attract people to live, work and play through a coordinated and holistic approach to placemaking.

307. These examples including the State Government's Biomedical Precinct Strategic Plan of 2018 are replete with maps and images depicting the attraction of parks within the NEIC.
308. The extent of investment by Council in the public parks around the University campus is evidenced by the University Square Master Plan 2016 which details the extensive consultation process associated with its preparation, the expansion and upgrade of the park, the extent of growth anticipated around the park and the influence of the new Parkville Station which will see students , including potential implications for conditions in Grattan Street.
309. The physical expansion of University Square into Barry Street and Leicester Street needs to be understood because of the way the parks in DDO8 have been mapped and in turn the depiction of the park in the shadow modelling undertaken by SJB. The parks in DDO8 are defined by reference to the land identified in Maps 1-10 of DDO8. The maps rely on Council's GIS data which largely conforms to the extent of land zoned PPRZ. However where parks have been expanded (included University Square to the east and west, and Lincoln Square to the north and south) and these expansions not yet translated into the GIS system, the maps do not depict (and hence do not protect) the full extent of the park. Accordingly, in the SJB modelling, which was based on Council's GIS system, these new portions of the parks are not depicted. Specifically in the case of University Square, the so-called "sliver" of park which is shown in shadow at 10am from the modelled development on the Melbourne Business School site will in fact have a much larger impact on the park on the ground.
310. The same condition is true in Lincoln Square, where the extent of the park shown in Map 7 of DDO8 does not include the extensions to the north and south.
311. Consequently, it needs to be understood that the area of these parks is larger than depicted in the maps in DDO8 and the extent of the shadow over the park is greater than depicted in the SJB modelling.
312. The University's land to the north of Grattan Street is contained within the PUZ. Subject to compliance with the requirements of the HO for individual buildings on the campus and

the requirements of the ESO for individually significant trees on the campus, the University enjoys considerable freedom from the scrutiny of the planning system. Where the development of the campus has the potential for appreciable off-site impacts in the nature of shadowing to public parks, it is entirely appropriate that it should be subject to controls directed to serving the public use of nearby parks. While the University has benefitted from the absence of built form controls over its principal Parkville campus, it now identifies a disadvantage in the operation of DDO8 as it relates to allowable shadow cast by buildings to the north of Grattan Street on University Square. Council is considering Mr Barnes' suggestion in response to questions that a street wall height be imputed to the Parkville campus north of Grattan Street; one option would be to adopt a similar approach to that Ms Hodyl recommended for the northern edge of the Fitzroy Gardens.

313. One of the University's principal redevelopment sites in City North is the City Ford site on the corner of Elizabeth and Pelham Street which was affected by inclusion of Haymarket as a protected park in the exhibited version of DDO8. With the removal of Haymarket from DDO8, the development constraint on that site has been lifted.
314. Other University owned sites around the perimeter of University Square and Lincoln Square will be subject to DDO8 and as first row properties will experience some lost development yield on the edge closest to the parks. Some of these impacts have been modelled by SJB in its Built Form Testing Study.
315. What is evident is that DDO8 does not render any of the University properties modelled undevelopable. It will limit the overall height of some buildings and require setbacks to avoid additional shadowing beyond the allowable shadow. But in Council's submission, the loss of some floorspace from the affected properties does not prevent the NEIC as a whole from achieving its intended function or the University as an important player within the NEIC from making a significant contribution to that function.
316. In considering the shadow impacts, considerable reliance appears to be placed on the extent of vegetation in Lincoln Square.

317. Even with dense vegetation, there is an important difference between the shade cast by trees and the shadow cast by buildings. This was explored in the context of Birrarung Marr in *SDA v Minister for Planning* [2001] VCAT 1447¹⁰⁷ where the Tribunal observed at [216]:

Whilst the shadow cast by the communications pole at the top of the 101 Collins Street is the only substantive shadow cast by a building along this section of the river, a row of trees running along the northern bank also cast shadows which extend beyond the north bank. These trees are of varying height and spread. They also appear to vary in age and health and at least some appear to be deciduous. Although these trees cast shadows, none the less we consider that they cast a shadow which is somewhat different to that cast by a building. Tree canopies, because of branch structure and leaves, inevitably have gaps within them which can allow filtered or dappled sunlight to penetrate to the ground. The gaps in the tree canopies that allow for filtered sunlight to penetrate through to the surface of the river are readily seen in the aerial photographs tendered by Ms Brennan (Ex B51). In our view, the shadows cast by trees, which can allow for dappled or filtered sunlight to penetrate through to the ground do not take away from the amenity derived from a river in parkland. Such shadows add to, rather than detract from, the attractiveness and amenity of a parkland setting.

318. The other University interest identified by Mr Biles concerns International House and the scope for shadowing onto Clunies Ross Reserve to its west. His concern about shadow to this small pocket of park on the east side of The Avenue is partly addressed by the proposed 9m adjustment to the allowable shadow condition, but it also the case that this small reserve separated from Royal Park by the Avenue affords a more proximate and more closely associated area for the students and visitors to International House.

Australian Red Cross, 163-175 Bouverie Street Carlton (submitter #86)

319. This site has recently been purchased by Melbourne University, illustrating the University's appetite and capacity for property acquisition of available development sites within City North.
320. The site is in the Capital City zone Schedule 5, subject to DDO61 Area 4.1 which contains a 40m height limit.

¹⁰⁷ This case is also of interest for the direction it gave two decades ago for the proper process for applying a more rigorous solar protection to a city park. At [238] the Tribunal said:

...Although Ms Brennan submitted that we should depart from the standards set out in the controls and policies because the inclusion of explicit protection for Riverside Park beyond the equinox standard was "an oversight in the preparation of the new format scheme", we had no evidence that this is the case. If the Riverside Park is, as the Council asserts, a major park that warrants winter solstice protection, then the appropriate course is to seek an amendment to the planning scheme so that this standard is reflected in both the statutory control and the planning scheme's policies. On this issue, we were somewhat disturbed by Mr Niven's comments when he indicated that a planning scheme amendment has not been pursued because of the anticipated opposition to the introduction of more stringent shadow controls. We suggest that a planning scheme amendment process is a far more appropriate way of reviewing the relevant standard to be applied rather than the arbitrary position which he put to us in his evidence.

321. At section 4.22 of the Built Form Testing Study, SJB modelled a 12 level residential building, the shadow from which fell within the allowable shadow caused by the street wall height at 3pm and accordingly, concluded that development opportunity within the existing discretionary height was not affected.
322. This case study demonstrates that development opportunity contemplated by DDO61 will not necessarily be reduced by DDO8, even for sites with a frontage to the park, reinforcing that there are ample opportunities throughout the Parkville NEIC to achieve its land use aspirations.

VPA (submitter #75)

323. Council is working in partnership with the State government and the VPA to prepare updated structure plans for Arden and Macaulay. Council continues to advance the case that winter solstice protection should be afforded to new and existing parks. The current draft of the Arden Structure Plan provides for winter protection to the new park, but refers to equinox protection for Clayton Reserve and the North Melbourne Recreation Reserve, both of which the Amendment seeks to protect at the winter solstice. The current draft does not reflect Council's position in relation to these parks.
324. In the same way as other urban renewal areas, including City North and Parkville, which depend upon the quality and amenity of their parks, Council maintains that new urban renewal areas should be planned in accordance with the updated policy position advanced in amended clause 22.02, namely to provide protection to parks at the winter solstice.
325. The designation of Clayton Reserve and the North Melbourne Recreation Reserve as Type 2 parks means that planning for the scale of development around these parks can take account of the concept of allowable shadow in crafting appropriate street wall and/or overall building heights.

QVM (submitter #76)

326. QVM is the operator of the Queen Victoria Market, a place of State heritage significance owned by Council. QVM argues either for exclusion of the Market from DDO8, on the basis that it was considered as part of Amendment C245, or for inclusion of Flagstaff Gardens as a Type 2 park. It supports the existing winter control for the Flagstaff Gardens, but seeks to maintain its discretionary status.

327. The Market land is zoned CCCZ1 (and PPRZ in the location of future public open space on the existing carpark) and parts of the Market land are subject to a range of overlay controls, including HO7 and DPO11. DDO10 does not apply to the Market land. DPO11 contains an approved Framework Plan but requires preparation and approval of a development plan.
328. Flagstaff Gardens is a heritage protected 7.335 ha park to the northwest of the city, bounded by CCZ1 land to the east and south and MU land to the north and west.
329. DPO11 provides a discretionary no additional shadow control between 11am - 2pm on 22 June. DPO11 includes a requirement that

New development should not cast a shadow across the Flagstaff Gardens or the proposed public open space in Figure 1 between 11.00 am and 2.00 pm on 22 June, unless the Responsible Authority considers the overshadowing will not significantly prejudice the amenity of the open space.

330. In supporting a discretionary winter shadow control over the Flagstaff Gardens, the C245 Panel said:¹⁰⁸

The eastern edge of the Flagstaff Gardens is a popular and much frequented walking track and with pause points that will already be negatively affected from an appreciable increase in overshadowing in the mornings of winter months by the recently approved development. The Panel views this outcome as unfortunate and views the proposed control will assist in ensuring future sunlight amenity receives greater protection during the winter months. While the Panel is not recommending mandatory measures, the discretionary provision should allow for a balance between development in the Precinct and the protection of sunlight to the Flagstaff Gardens during sunny winter mornings when it is most warranted.

331. Land to the south of the Market land is to the east of the Flagstaff Gardens and is covered by DDO10. DDO10 provides a qualified mandatory no additional shadow control over the Flagstaff Gardens between 11am - 2pm on 22 June, as follows.

A permit must not be granted for buildings and works which would cast any additional shadow across a space listed within Table 2 to this schedule during the hours and date(s) specified, unless the overshadowing will not unreasonably prejudice the amenity of the space.

¹⁰⁸ Melbourne C245 [2016] PPV 91, pg 99.

332. This is an existing example in the planning scheme of two controls applying a shadow control in subtly different language to the same park.
333. As a Type 3 west park, DDO8 would provide a mandatory no additional shadow control between 11am - 3pm on 22 June.
334. The extended window to 3pm on 22 June has no impact on the QVM site which is located to the east of Flagstaff Gardens. The precondition to the exercise of a discretion to allow additional shadow is removed and there is no qualification to the mandatory control.
335. As discussed above, Ms Hodyl supports a reduced period of time from 12 noon - 3pm, but the Council does not consider the reduced window to be appropriate, having regard to the approach it has adopted for parkland to the east of the city where sunlight protection has been reduced by one hour (rather than two hours) having regard to the scale of existing and future development in the CCZ1.
336. At section 4.47 of the Built Form Testing Study, SJB has modelled a series of mixed use towers across two parcels of the Market land, showing the potential form of future development which responds to the proposed mandatory shadow control from 11am. The modelling demonstrates that towers of significant height up to 100m can be provided on the Market land, with a significantly stepped form rising to 84m at the eastern edge of the Market land closest to the Flagstaff Gardens. If future development complies with the existing discretionary shadow control, there is no development capacity lost.

Carlton Football Club, Ikon Park in Princes Park (submitter #77), Richmond Football Club, Punt Road Oval (submitter #89), AFL, Yarra Park and Princes Park (submitter #95), Melbourne Cricket Club (submitter #97)

337. The issue of shadows cast by buildings within parks is addressed in section N of these submissions.
338. Council considers it appropriate to allow appropriate development associated with park use within parks, and as such a mandatory no additional shadow prohibition would be unworkable. It is necessary for policy to guide the exercise of discretion in relation to buildings within parks and Clause 22.02 should be adjusted to provide greater direction for these circumstances. For consistency with the protection afforded to the parks by the Amendment, Council considers that the winter solstice should be the relevant testing period for buildings within parks.

339. Ms Hodyl recommends application of the principles in the OSS to inform the exercise of discretion.

340. In chapter 6.2, the OSS Technical Report addresses the quality of existing and new open space. Its first recommendation in relation to community sport and recreation provides at recommendation 6.2.2(a)(i) on page 104,

Upgrades and replacement of existing facilities

Prior to each upgrade and replacement of facilities, assess the use levels and need for the facility relative to other competing uses. If it is assessed as still being required, then ensure the upgrade meets best practice design principles, and integrates multiple-use objectives for structured and unstructured recreational use where feasible.

341. In relation to major sport and major event venues, recommendations 6.2.2.f(i) and (ii) provide:

Loss of open parkland to built form in the Capital City and State open space

The City of Melbourne is to advocate to the Victorian Government to minimise further loss of open parkland to built form in the Capital City and State open space. This includes careful analysis of the need for additional built facilities, options regarding their location outside of open space and options for modifications to existing built form to increase capacity without expansion of building footprint in open space.

Loss of open parkland to car parking

The City of Melbourne is to continue to advocate for improvements to public transport as the primary form of transport to reach major events. Where car parking is proposed for the major event venues, minimise its provision at ground level in public open space.

342. Accordingly, decision guidelines in Clause 22.02 for buildings within parks should include whether the facility is a major sports and event venue, whether there is a need for additional facilities, whether facilities can be provided outside the park and whether capacity can be increased without expanding building footprint or increasing shadow.

Urbanest student accommodation 701-713 Swanston Street (submitter #78), Andavol Pty Ltd 701-713 Swanston Street (submitter #91)

343. The site is in the Capital City zone Schedule 5, subject to DDO61 Area 4.1 which contains a 40m height limit. It is also subject to DDO66 for the outer helicopter flight path.

344. The site is currently occupied by a 4 storey residential hotel, Rydges on Swanston. Although the submission dated 5 September 2019 refers to proposed redevelopment of the site for a 13 storey building (comprised of 9 levels of hotel and 4 levels of residential apartments), no permit application has been progressed in the intervening 18 months.
345. At section 4.17 of the Built Form Testing Study, SJB modelled an 11 storey office on this site and found a 26% impact from the proposed DDO8, reducing the number of storeys from 11 to 8 and requiring progressive setbacks above the street wall at levels 7 and 8.
346. As a “first row” property, it is unsurprising that this site experiences a relatively high degree of impact on its development capacity. Although it is no doubt considered a significant impost on the individual landowner, the greater benefit is served by the protection of solar access to Lincoln Square. This is particularly so in the face of multiple development sites with active or prospective applications around the Square which reinforce the need for a mandatory control which prevents a succession of single applications incrementally increasing shadow on the park without an appreciation of the cumulative effects of such shadow.
347. This case is another illustration that the exercise of discretion in relation to building heights under a precinct based DDO needs the further qualification of the mandatory operation DDO8 to preserve winter sunlight in parks.

Royal Society of Victoria (submitter #90)

348. In February 2020, Council resolved to propose a modification to the Amendment to remove the Royal Society land from the protected parks in DDO8 on the basis that although parts of its land are made available for public use, it is in private ownership.

Village Park Consortium Pty Ltd, former Commonwealth Games Village (submitter #92)

349. This site is governed by SCO10 and has been redeveloped in accordance with the site specific incorporated document Games Village Project, Parkville, September 2015. While most of the Games Village has been developed with low to medium rise buildings, the incorporated document contemplates buildings up to 17 storeys in some parts of the site near the Freeway: see clause 10.4 and the indicative site layout plan at clause 15.
350. As contemplated by clause 45.12, land affected by the SCO may be used or developed in accordance with a specific control which may exclude any other control in the scheme.
351. Pursuant to clause 1 of the incorporated document:

The controls and provisions in the Melbourne Planning Scheme, other than this incorporated document, do not apply to the subdivision, use or development of the Land for any purpose associated with the Games Village project, except for clauses 54, 55 and 56 of the Melbourne Planning Scheme, which apply only to the extent provided for in this incorporated document.

- 352. As a consequence, DDO8 will not apply to the subdivision, use or development of the Games Village Site.
- 353. Clause 13.2 requires provision of shadow diagrams to open space at the equinox. Construction of the taller buildings in the Freeway Apartment Precinct since 2015 has cast significant additional shadow onto Galada Reserve at the winter solstice: see Folder 8, Document 7, PDF pg 241.
- 354. Clause 14 of the incorporated document provides that the site specific control expires on 31 December 2021. Pursuant to Clause 45.12-2, upon expiry of the specific control, the land may be used and developed only in accordance with the provisions of the scheme.
- 355. Hence, although the redevelopment of the Games Village would not be subject to DDO8 for the duration of the incorporated document, upon its expiry at the conclusion of 2021, it is necessary for the protection of the parks shown on Map 6 of DDO8 (namely parks 57, 58, 60-61, 63, 64, 65 and 67, including Galada Reserve and Royal Park) that the Games Village site is included in DDO8.

HIA, 70 Jolimont Street (submitter #93)

- 356. The site is in the Commercial 1 zone, subject to DDO22 Area 11 which contains a 9m height limit and also subject to a Heritage Overlay.
- 357. The existing building on the site is approximately 22m.
- 358. At section 4.24 of the Built Form Testing Study, SJB modelled a 6 storey residential development on this site, the shadow from which fell within the allowable shadow caused by the existing building and accordingly, concluded that development opportunity within the existing discretionary height was not affected.

Nuvolink Pty Ltd 86-88 and 90-94 Jolimont Street, East Melbourne (submitter #94)

- 359. The site is in the Commercial 1 zone, subject to DDO22 Area 16 which contains a 12m height limit and also subject to a Heritage Overlay.

360. At section 4.27 of the Built Form Testing Study, SJB modelled a 3 storey residential development on this site, the shadow from which fell within the allowable shadow caused by the 12m height limit and accordingly, concluded that development opportunity within the existing discretionary height was not affected.
361. In 2020, a permit issued for redevelopment of the site for a 7 storey office building of 29.3m in height which cast a narrow shadow on the edge of Yarra Park at the equinox: *Nuvolink Pty Ltd v Melbourne CC* [2020] VCAT 541 and *Nuvolink Pty Ltd v Melbourne CC* [2020] VCAT 811. The Tribunal discussed the operation of the existing equinox controls, the hierarchy of protection in the existing policy and the different views about the impact of the shadow at [106]-[131] of its interim decision.

Orchard Piper Pty Ltd 364-370 Albert Street, East Melbourne (submitter #99)

362. The site is in the Commercial 1 zone, subject to DDO22 Area 43 which contains a height limit based on a 22 degree angle and is also subject to Heritage Overlay 2 for the East Melbourne and Jolimont area.
363. At section 4.28 of the Built Form Testing Study, SJB modelled an 8 storey residential development on this site, the shadow from which fell within the allowable shadow caused by the 22 degree angled height limit and accordingly, concluded that development opportunity within the existing discretionary height was not affected.
364. In 2020, the Tribunal issued an interim decision in *Sun Valley Constructions Pty Ltd v Melbourne CC* requiring deeper setbacks to respond to the 22 degree plane in DDO20 and in *Sun Valley Constructions Pty Ltd v Melbourne CC* [2021] VCAT 182, the Tribunal directed the grant of a permit for a 9 storey building with a stepped form rising from behind the heritage buildings on Albert Street to the maximum height at the rear of the site. The decisions contain no discussion of solar access impacts on the Fitzroy Gardens.

Princes Park residents concerned about development of 699 Park Street, including residents of Moreland (submitters 121-122, 124-163, 165-172)

365. *JW Land Development Pty Ltd v Moreland CC* [2019] VCAT 617 and *JW Land Development Pty Ltd v Moreland CC* [2020] VCAT 354 concerned development of 699-703 Park Street, 188-192 Brunswick Road and 2-4 Sydney Road, Brunswick. The site is located within the City of Moreland.
366. In its final decision in April 2020, refusing to grant a permit, the Tribunal said at [91]-[93]:

We do not agree with respondents that the height should be further reduced to eliminate all winter solstice shadow to Princes Park. We made findings on this issue in our interim decision that recognised the public advantage gained by reduced shadow to parkland. We reached the conclusion that the reduced height required for the tower and Building B would result in an acceptable level of shadow to the park. Our examination of the shadow diagrams in the Amended Plans confirms that conclusion.

Amendment C278 to the Melbourne Planning Scheme, as exhibited, proposes to include Princes Park under Design and Development Overlay, Schedule 8 (DDO8) that would prohibit granting of a permit for buildings and works that cast additional shadow to Princes Park between 10am and 3pm on 21 June. Although this amendment has progressed since our interim decision, it does not change our view in relation to shadows.

We consider there is considerable uncertainty about the final form of the amendment, given there has been no assessment by an independent panel nor consideration by the Minister for Planning. In any event, the provisions of DDO8 would not apply to the review site as Amendment C278 applies only to land covered by the Melbourne Planning Scheme. We agree with the applicant that there are mechanisms for planning scheme amendments to apply to more than one municipality. This has not been sought in relation to Amendment C278.

367. Council respectfully agrees with the Tribunal that DDO8 only applies to land covered by the Melbourne Planning Scheme and cannot be determinative of any application within the Moreland municipality.

Lendlease (submitter #100)

368. Lendlease is a landowner within the Melbourne Quarter and Victoria Harbour precincts in Docklands. It seeks clarification about whether the Amendment applies to development within Docklands that casts shadow on parks outside Docklands.
369. The current policy in Clause 22.02 is clearly expressed not to apply to Docklands. This is unchanged in the proposed amended policy.
370. Notwithstanding the submissions received seeking protection of Docklands parks,¹⁰⁹ the inclusion of Ron Barassi Oval in the Sunlight Access Report and the recommendation of Ms Hodyl in her evidence to the panel, Council does not support the inclusion of Docklands parks, including Ron Barassi Oval as protected parks. Accordingly, no land within

¹⁰⁹ See submissions 54, 105, 106, 107, 108, 112.

Docklands will be subject to DDO8 and no park within Docklands will be identified in or protected by DDO8.

371. Council's position is that it is not necessary to add any additional words to clause 22.02 to make this clear.

MAB Corporation (submitter #173), Development Victoria (submitter #174)

372. MAB Corporation and Development Victoria are also concerned that the Amendment should not be changed to include Docklands. They support adoption of the Amendment generally in accordance with the version referred to the panel, considered by Council on 4 February 2020.

373. Council repeats the submissions made in relation to the Lendlease submission.

374. None of the drafting changes proposed by Council will result in inclusion of Docklands in the Amendment.

23-37 Boundary Road, 222-232 and 234-244 Macaulay Road, North Melbourne (submitter #101)

375. The site is in the Commercial 1 zone, subject to DDO63 Area 8 which contains a mandatory maximum height limit of 12 storeys.

376. At section 4.30 of the Built Form Testing Study, SJB modelled a 12 storey commercial and residential development on this site and found a 5% impact from the proposed DDO8, reducing the number of storeys from 12 to 10 in the south tower and increasing the upper level setback of level 10 to 7m.

377. This extent of impact in order to preserve existing solar access in Canning Street & Macaulay Road Reserve and Clayton Reserve represents a minor impost on the development opportunity contemplated by DDO63. Notably, SJB modelled the maximum mandatory height available on the site rather than the preferred discretionary height of 9m. Notably, clause 2 of DDO63 provides that all developments that exceed the preferred maximum height in table 1 must demonstrate each of a series of criteria, including "good solar access to the public realm". Consequently, it is debateable whether this site had a reasonable expectation of achieving the absolute maximum height of 12 storeys across the totality of the site in any case.

63 Exhibition Street Pty Ltd, 63 Exhibition Street (submitter #102)

378. A permit has issued for 183m high building which casts shadow over Birrarung Marr.
379. Two Tribunal decisions relate to this site: *63 Exhibition Street Pty Ltd v Minister for Planning* [2018] VCAT 861, which was appealed to the Supreme Court, and *63 Exhibition Street Pty Ltd v Minister for Planning* [2020] VCAT 498.
380. The cases illustrate the difficulty with interpretation and operation of transitional provisions where DDO contains transitional provisions but policy operates as at the time of the decision.
381. The cases also illustrate the challenges associated with the exercise of discretion in relation to shadow controls. In that case, no shadow fell over the park at Birrarung Marr at the equinox (which was determined to be the relevant time for the purposes of the shadow control), but at the solstice shadow fell over parts of the park from 1.30pm. While the Tribunal considered the impact at the winter solstice and received evidence in relation to the extent of shadow cast by other buildings over the park at that time, it ultimately determined that the percentage increase in the shadow to the park from the proposal was acceptable. for example, at [113], the Tribunal recorded the evidence from the permit applicant as follows:

Mr Barlow considers this adverse shadow impact is acceptable because it is transitory, as it sweeps across the sunlit space. He indicated the impact would be more likely to be unacceptable if the relevant one hour of sunlight was completely removed. Mr Biacsi described the character of the Park as having fingers of shadow exposure that create a patterning of shadow movement. He thinks this approved tower is consistent with that existing pattern of shadowing. Mr Barlow also pointed out this adverse shadow impact occurs at a time of year when the grassed Embankment is not likely to be well used, because it may be moist grass. These observations are fair, but we remain concerned that this proposal will result in the fragmentation of what is otherwise likely to be a reasonably rare occurrence of uninterrupted sun access in the middle of winter to a grassed passive open space area during part of its likely peak time of usage.

382. At [114] the Tribunal continued:

If the considerations before us required a focus upon the winter months of the year, the importance of this concern would be elevated. Some of the witnesses made passing reference to Amendment C278 to the Melbourne planning scheme. Mr Biacsi described this amendment as including changes to the policy basis and the objectives of Clause 22.02 so that references to the intensity of use are removed

and winter sunlight references are included. Again, if such a policy with a focus upon winter shadow impacts was in the planning scheme, the importance of this concern would be elevated

383. Ultimately, the Tribunal focused only on the extent of shadow cast by the proposed building and the additional 4% impact to the park, finding that although the adverse impact was unfortunate and not ideal, it was acceptable: see [115].
384. The case illustrates the way in which the focus on the impact of the shadow cast by a single building can result in adverse but apparently unavoidable impacts to a park which together with shadow cast by other buildings can result in significant deterioration to the amenity of a park unless it has the kind of protection proposed to be afforded by the Amendment.

Cricket Australia, 60-62 Jolimont Street, East Melbourne (submitter #119)

385. This site is contained within the Commercial 1 zone, precinct wide HO2 for East Melbourne and Jolimont and DDO22 Area 11 which has a discretionary height control of 9m.
386. This submitter raises a drafting concern with the Amendment and seeks to ensure that the aggregate of existing and allowable shadow will be allowed for Park Type 2. As identified in Council's Part A submission at 115(a), Council agrees that where the combination of existing and allowable shadow is greater than either in isolation, the intention is to allow additional shadow within the combined footprint of existing and allowable shadow.
387. As foreshadowed in Panel Document 61, the Part C version of the proposed DDO8 control will include this clarification.

Wolf Group 509 St Kilda Road, Melbourne (submitter #118)

388. The site is in the Commercial 1 zone, subject to the Shrine Vista control in DDO17 and to DDO19 Area 42 which contains a mandatory maximum height limit of 60m and a Floor Area Ratio of 4:1. It is also subject to DDO56 for the helicopter flight path for the Alfred Hospital.
389. An application for a 60m office tower building (over podium) has been made for this site (TPM-2020-55).
390. At section 4.50 of the Built Form Testing Study, SJB modelled a 24,000m² office building which is the maximum FAR for a site of 6000m². The floor area was contained in a 6 storey commercial office development. The shadow on Fawkner Park at 2pm fell within the existing shadow of the neighbouring building and hence there was no impact on the development capacity of the site.

391. Notwithstanding the submitter's claim that DDO8 would result in a loss of 5900m² NLA, this is not borne out by the modelling undertaken by SJB.

PSC Insurance 96 Wellington Parade, East Melbourne (submitter #175)

392. The site is in the Commercial 1 zone, which is within precinct wide HO2 for East Melbourne and Jolimont and subject to DDO21 Area 4 which contains a discretionary height limit of 24 metres.
393. An application for a 47m residential building has been made for this site (TP-2020-518).
394. At section 4.37 of the Built Form Testing Study, SJB modelled a 7 storey residential development on this site and found no impact from the proposed DDO8, because all shadow fell within existing shadow on Yarra Park.
395. This case is another illustration that the exercise of discretion in relation to building heights under a precinct based DDO needs the further qualification of the mandatory operation DDO8 to preserve winter sunlight in parks.

Royal Agricultural Society (submitter #177)

396. As illustrated in the course of Mr Smith's evidence, the Showgrounds is included in the Amendment due to the outcome of modelling the Park Solar Volume which reaches a very small corner of the Showgrounds site.
397. For the purposes of identifying the land to be subject to DDO8, Council included all land which was within the Park Solar Volume applying the assumptions at [40] of Mr Smith's evidence. It included the whole of the land parcel even if the Park Solar Volume covered only part of the parcel. Council did not interfere with any of those results even in circumstances where the land included could not on any reasonable view cast shadow on a protected park.
398. Council is unaware of any other site on which the results are as extreme as for the Showgrounds.
399. Council accepts that due to the small area of the Showgrounds land which is within the Park Solar Volume applies and the extreme height at the edge of the Park Solar Volume of 320 AHD, there is no reasonable prospect of development on the Showgrounds land casting shadow on a protected park. Accordingly, it would not oppose a panel recommendation that the Showgrounds be excluded from the Amendment based on a judgment that is impossible for development of the Showgrounds to impact on any protected park.

VRC (submitter #176)

400. By contrast with the Showgrounds land, the extent of area within the Flemington Racecourse land which is within the Park Solar Volume and the scope for redevelopment of land within the Flemington Racecourse land to cast shadow on protected parks if redeveloped at heights above 55m AHD means that it is appropriate to include the land within the Amendment.
401. Consistent with the approach taken across the whole of the Amendment area, Council has applied DDO8 to the whole parcel within the title boundary rather than limiting it to the area covered by the Park Solar Volume. Council submits that this practice is consistent with mapping conventions preferred by the Department and use of title boundaries provides greater certainty about the application of controls rather than applying a control over part of a lot.
402. To the extent that the VRC is not presently subject to planning scrutiny of its redevelopment other than in relation to heritage considerations, Council submits that the position is the same as for the University: namely, redevelopment of the Racecourse land has the potential for off-site impacts in the nature of shadowing to public parks, it is entirely appropriate that it should be subject to controls directed to serving the public use of nearby parks.

Q. RESPONSE TO EXPERT EVIDENCE

Response to recommendations made by Council's experts

403. Council's responses to recommendations from Ms Hodyl, Mr Barnes and Mr Fergus are set out Panel Document #61.
404. Ms Thompson has also made a number of recommendations in relation to parks in her statement. Council's response to those recommendation is as follows:
- (a) To the extent that Ms Thompson recommends that additional parks (Burston Reserve, Gordon Reserve, Parliament Place, Melbourne Park, Olympic Park) be included in the DDO8, Council agrees that those parks warrant protection. However, since park solar volumes have not been prepared for those parks, the DDO8 mapping as exhibited did not include those parks, and affected landowners were not notified, Council does not consider it appropriate for those parks to be subject to DDO8 the at this time. The Panel may wish to include a recommendation about whether those parks ought be considered for inclusion at a later date.

- (b) Queen Victoria Market Reserve (roundabout) – Given that the framework plan in DPO11 anticipates development of the land on which the roundabout is located, Council does not support inclusion of the reserve in the DDO8.
- (c) Queen Victoria Market car park – A development plan has not yet been approved under DPO11 although the land has already been rezoned PPRZ.
- (d) Royal Park – Council agrees with Ms Thompson that the extent of Royal Park on the City of Melbourne GIS base map incorrectly identifies 35 Poplar Road (Orygen site) as being within Royal Park. Accordingly, Council agrees that this site should be removed from the Royal Park boundary.
- (e) Royal Exhibition Buildings – Council acknowledges that not all parks (or extent of parks) affected by DDO8 are currently zoned PPRZ. This is proposed to be rectified by Amendment C380, with all non-PPRZ land with parks to be rezoned to PPRZ.¹¹⁰
- (f) William Haines Court – This site is part of St Andrews Place Reserve and is already captured by DDO8.
- (g) Toorak and St Kilda Road Reserve – Council does not consider that this reserve should be included in DDO8, as it is not considered to be a usable space for a park given its location and size.
- (h) Government House – The approach taken for the Amendment has been to map parks in their entirety and not exclude developments within parks, noting that DDO8 applies to land outside parks, although Clause 22.02 will apply to developments within parks. Council does not consider that it is necessary to remove Government House from the mapping.

Response to other parties' evidence

405. Council has addressed some of the issues raised in other parties' evidence in the sections above. Council intends to make further comments in its Part C submission, once the totality of that evidence has been heard by the Panel.

¹¹⁰ Submissions have been received for Amendment C380, and it is expected to proceed to a Panel in mid-2021.

R. OTHER MATTERS

Public open space contributions

406. The Panel requested information about public open space contributions collected by the City of Melbourne. The following tables provide a summary of the contributions collected over the last five years.

Year	Land and money contribution	Land only
2015		2
2016		1
2017		
2018		1
2019		
2020	1	

City of Melbourne Municipality	
Year	Amount paid
2015	\$5,606,000.00
2016	\$14,121,575.00
2017	\$12,125,490.00
2018	\$20,604,393.00
2019	\$21,426,250.00
2020	\$17,715,601.20

City of Melbourne Municipality	
TOTAL	\$91,599,309.20

Excluding suburbs Melbourne, Southbank, Docklands	
Year	Amount paid
2015	\$2,088,500.00
2016	\$4,030,095.00
2017	\$4,284,610.00
2018	\$7,269,465.00
2019	\$11,038,450.00
2020	\$1,604,551.20
TOTAL	\$30,315,671.20

Information from David Callow

407. In response to questions in cross examination, Mr Callow has provided the following information.

(a) Breakdown of area of publicly managed land.

	Area (m²)	% of publicly managed land
Road Reserve	11292351.27	70.87
Parks	4640496.56	29.13

(b) Number of parks that are subject to heritage restrictions.

	Number of parks
Potential for additional tree planting	82
No significant change due to heritage requirements ¹¹¹	14

S. MATTERS THAT COUNCIL WILL ADDRESS IN PART C SUBMISSIONS

408. Council has foreshadowed its intention to provide revised drafting for Clause 22.02 and DDO8 together with its Part C submission on the final day of the hearing, once the balance of submissions and evidence has been heard.
409. Council will also provide its final position on the Amendment in its Part C submission.

Susan Brennan

Jordan Wright

Counsel for the Planning Authority

17 March 2021

¹¹¹ Examples include: Carlton Gardens North and South, Fitzroy Gardens, Kings Domain, The Shrine Reserve and Flagstaff Gardens.