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 C 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**).

2. This Part C submission addresses and responds to the following matters:

   (a) the submissions and evidence of the University of Melbourne;

   (b) the submissions and evidence of Polis;

   (c) the submissions of other key parties;

   (d) access to modelling data; and

   (e) Council's final position on the Amendment.

B. RESPONSE TO UNIVERSITY OF MELBOURNE

Impact on development capacity

3. Council acknowledges that the University of Melbourne is a very important institution to Melbourne generally, and to the City North precinct specifically. That significance is recognised in the Melbourne Planning Scheme.

4. But that significance is only relevant to the Panel's consideration of the Amendment to the extent that it is established, through evidence, that the development aspirations of the University of Melbourne, and the "vision" for the Parkville NEIC, will actually be unreasonably "suppressed" if the Amendment is approved.

5. In the absence of evidence of unreasonable suppression of development, and consequential net community detriment, there is no basis for the Panel to conclude that there is any conflict between the Amendment and the policy objectives that apply to the University and Parkville NEIC.

6. Council notes that the University has not provided any evidence of the amount of floorspace required to achieve the growth ambitions for the University or the Parkville NEIC, or the timeframe over which that floorspace may need to be provided. It has also not provided any evidence that supports a submission that the growth ambitions for the NEIC and University cannot be met if the Amendment is approved. Given the considerable emphasis that the University places on the "suppression" of development it says would be the effect of the Amendment, this is surprising.

7. Strategic planning for the Parkville NEIC is at a very early stage, and as yet there is nothing in the Melbourne Planning Scheme that provides specific policy direction about the Parkville NEIC or how competing objectives in that area are to be balanced.[1]

8. The available documentation about the Parkville NEIC also highlights the importance of high quality parks to the amenity of the area, and the achievement of the vision for the Parkville NEIC. In Council's submission, protection of amenity in the parks in the Parkville NEIC is important to support optimisation of investment and employment opportunities. In cross examination, Mr Barlow accepted as a valid point that sunlight access in parks was a benefit in that it influenced the quality of the public realm and might attract students and workers, researchers (etc) to the Parkville NEIC. It is relevant to observe that one of the strategies for development of the NEICs in Clause 17.01-1R is to ensure that they "[H]ave a high level of amenity to attract business and workers". This strategy is in the same list as the two strategies extracted in the University's submissions but was left out by the University.

9. The only evidence of floorspace requirements that the University can point to is Mr Barlow's figure of 180,000 sqm of employment floorspace, which he said would be required for the whole of the City North precinct, and not just the University, over the next 10 – 15 years. It is clear from cross examination of Mr Barlow that the vast majority of that floorspace demand could be accommodated from only three sites owned by the University and the Melbourne Business School – and ignoring all other land in the precinct, most of which would not be impacted in any way by DDO8.

10. If the Panel has any residual doubt about whether the Amendment will prejudice development aspirations for the University or the Parkville NEIC, it can refer to the Built Form Study undertaken by SJB, and the GFA loss assessed for properties adjacent to University Square and Lincoln Square. That analysis indicates that while properties to the north of Lincoln Square will be more constrained[2] than properties to the east and west[3] – where GFA loss would be lower – it cannot be said that DDO8 will preclude development of those sites. In Council's submissions, what is demonstrated by the totality of the

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1 Accepting that City North has been earmarked as a central city precinct characterised by university, research and medical buildings since Amendment C196 gazetted in 2015.

2 32 Lincoln Square North is assessed to have a 25% loss in capacity; 701-703 Swanston Street is assessed to have a 26% loss in capacity: Built Form Testing Study, pg 100.

3 SJB assesses an 8% loss of capacity for the MBS owned properties at 200 Leicester Street. It identifies no loss of capacity for the Red Cross site at 163 Bouverie Street.

modelling that has been put to the Panel is that the development capacity impact from the Amendment will be felt by a very small number properties, that are predominantly to the north of, and immediately adjacent to, parks.

Strategic basis for winter solstice controls

11. To the extent that the University submits that there is no compelling strategic rationale for the proposed controls, that submission is not supported by the evidence, including the evidence of the University's own experts, and is specifically rejected by Council.

12. Both Mr Barlow and Mr Biles agreed that the preservation of winter sunlight in parks was a valid goal. Mr Barlow agreed that if winter solstice protection was desired it was necessary to be explicit in the policy and controls; he also agreed that a DDO was an appropriate mechanism.

13. In the context of the fact that all of the planning, urban design and open space experts agree or have accepted that winter solstice protection for sunlight to parks is a valid aspiration and is warranted, there does not seem to be any legitimate basis to a challenge to the strategic rationale for a shift to winter solstice based overshadowing protections as a general proposition.

14. Council acknowledges that there remains a challenge to the proposed hours of protection, and the use of mandatory controls in the DDO8.

"Equal value"

15. A key limb of the University's opposition to the Amendment is that it says that all parks are not equal, and should not be treated as such for the purposes of sunlight protection. There is no basis to the University's opposition to this approach, and it mischaracterizes the 'equal' proposition advanced by the Amendment.

16. Council does not suggest that there are not differences between parks – it is not suggested that the Shrine of Remembrance does not have a greater significance to the community generally than Macarthur Square. The central proposition is that when it comes to winter sunlight access all parks outside the excluded area should be treated equally, because

whatever the values that are ascribed to each park, in all cases those values are enhanced by sunlight access throughout the year.[4]

17. Ideally, all parks would be protected from additional shadow, including the Type 2 parks, but Council has recognised that would outcome needs to be tempered for growth areas – hence the balanced "typology" approach proposed in the Sunlight Access Report.

18. There is no inconsistency between the approach to winter sunlight protection in the Amendment and the park hierarchy established by the Open Space Strategy. Ms Thompson expressly disavowed any inconsistency, and both Ms Jordan and Mr Biles – the urban design witnesses called by opponents to the Amendment – specifically accepted that the OSS hierarchy was not related to any differential role played by sunlight access.[5] In Council's submission, the Amendment is highly compatible with the approach recommended by the OCC Technical Report.

Mandatory controls

19. In relation to the University's challenge to the use of mandatory controls, Council has already provided detailed submission about the risks inherent in using discretionary controls when seeking to protect a finite resource such as sunlight, as does not seek to reiterate those submissions here. Council's position is that it is not necessarily the individual exercise of discretion is problematic, rather the cumulative impact of successive decision to allow incremental shadow impacts over time that will ultimately undermine the purpose of the Amendment, if mandatory controls are not imposed.

20. Council notes that both Mr Barlow and Mr Biles agreed that mandatory controls have a role to play. Mr Biles, in particular, raised the example of the Shrine of Remembrance and agreed that the Shrine controls had only worked <u>because they were mandatory</u>. In relation to DDO8, Mr Biles stated that, to avoid having to update park maps under Mr Barlow's

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4 The values identified in the OSS Technical Report, through the municipal wide survey undertaken as part of that report were: trees, quiet and peaceful, being outside, place to relax and unwind, spacious, health and wellbeing, accessible, refuge for native plants/animals, natural character, safe, meeting people or friends, the knowledge that it's there, place for kids to play, historical character, feature garden bed planting, cultural activities, watching activity, playing casual games, major events, playing sport, other: see Appendix A, pg 5 - 6.

5 It is relevant to note that the recommendation made in the OSS Technical Report in respect of development adjoining open space, and sunlight access, is that the open space received a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter; and if that minimum is not met, the development must not create additional overshadowing of the open space: OSS Technical Report, pg 116.

'polygon' approach each time the shadow was increased under a discretionary approval, the polygon could be made "sacrosanct" but agreed that in order to do so mandatory controls would be required.

Hours of protection

21. The evidence of Mr Barlow and Mr Biles does not support a conclusion that the period of 10am – 3pm for protection of winter sunlight access in parks is inappropriate.

22. Subject to his comments about discretionary controls and the polygon approach, Mr Barlow's evidence was that sunlight between the hours of 11am – 2pm should be protected at the winter solstice, but that consideration should also be given in the assessment of permit applications to the "shoulder" hours of 10am – 11am and 2pm – 3pm for important areas of the park.

23. Mr Biles' evidence was that people should have choice in how and when they use parks. He accepted that the hours of 10am – 3pm represents an appropriate period for use of parks, and that visual enjoyment and attractiveness of parks, from sunlight, is a driver for use of parks throughout the year. In Council's submission that driver is equally relevant at 10am, as it is at 12pm.

Site-specific approach

24. The main thrust of the evidence of Mr Barlow and Mr Biles was that more information was needed about each park on a site-specific usage and facilities analysis.

25. Mr Barlow suggested that this analysis was required in order to identify a 'polygon' within each park in which sunlight access throughout the year, using the winter solstice, should be protected. That polygon should be contiguous, should protect priority facilities (with playgrounds, seating areas and open lawns[6]), but could move around during the protected period, provided that the protected attributes retained their useability.

26. Mr Biles' primary proposition was that people should have choice in how they use parks and access sunlight. Mr Biles stated that medium and larger parks allowed for that choice, because of their size, even if subject to overshadowing. Mr Biles nominated the figure of

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6 See [101], [119], [144] and [153], Barlow statement.

50% for the amount of a park that should be free from overshadowing throughout the year. However, he accepted that there was nothing scientific about that percentage.

27. Council notes that the University did not advance by way of submission or proposed alternative drafting a control based on Mr Barlow's polygon approach as an appropriate alternative to the DDO8 typology and "allowable shadow" approach. Further, Mr Biles did not endorse Mr Barlow's polygon approach – he said that he wasn't sure how it would work effectively.

28. In Council's submission, Mr Barlow's polygon approach is unworkable, would result in a far more complicated control than is proposed in the Amendment, and could only lead to an inequitable 'first mover' approach to development around parks. Council submits that Lincoln Square provides a very good example of why Mr Barlow's approach is unworkable, and generally why mandatory controls are appropriate for sunlight protection. This is particularly the case when one tries to also weave in Mr Biles' critical factor of providing choice.

29. Mr Biles' modelling for Lincoln Square demonstrates that, if the perimeter properties were developed to the discretionary heights in the DDO61, effectively the whole or majority of the northern section of the Square would be "lost" to shadow for the whole of the period 10am to 3pm. This is about one third of the park, and includes the main area of open grassed space in the north-west corner. This means that use of the Square, and the choices available to people (and the Council in managing and adapting the park in the future) are inherently confined.

30. This is before the limitations of Mr Biles' modelling are taken into account: his exclusion of development height above the discretion, the fact that the approved heights for 18 – 20 Lincoln Square North and 207 – 223 Bouverie Street were not modelled, and the fact that neither the current application nor any development of the Melbourne Business School site at 150 – 170 Pelham Street was not modelled.

31. When those factors are included, the overshadowing of Lincoln Square becomes even more extreme, and would extend across a much larger area of the park. This would include shadow over the location of the new playground, if a development of 150 – 170 Pelham Street as proposed by the MBS was ultimately approved. The area of the park that was in sun would fall well below the minimum 50% nominated by Mr Biles as the quantum of the park that should always be free of shadow, in order to provide adequate choice.

32. Council cannot see how it is possible, at all, to identify a contiguous polygon in Lincoln Square that covers

    (a) at least 50% of the park;

    (b) provides sunlight access between 10am and 3pm at the winter solstice;

    (c) protects the priority facilities identified by Mr Barlow;

    (d) provides the choice sought by Mr Biles;

    but also

    (e) permits development up to the maximum building height controls, let alone allowing for additional discretionary height.

33. No matter which way you try to cut that particular cake, or try to draft a control that provides the winter sunlight access that Mr Barlow and Mr Biles say should be protected, the amount of sunlight in the park, and the long term flexibility and adaptability of the Square will be fundamentally and irreversibly compromised. In Council's submission, the only way that it is possible to ensure the winter sunlight access outcome that all relevant experts agree is desirable, is to use mandatory controls.

34. Further, the fundamental flaw in the site-specific approach that is urged by the University is that it can only ever reflect how a park is used at a point in time. The historical example of Lincoln Square referred to in Council's Part B submission illustrates how use of that park has changed over the last century. Council's intention by this Amendment, is to maintain amenity, flexibility and adaptability in parks, through the medium of winter sunlight protection, so that, in another 100 years, residents can enjoy the same amenity, for whatever activities those people might choose to undertake at that time.

35. It is impossible to predict what those activities might be – Lincoln Square might become a market garden to provide locally grown food for residents, it might become a location for a small scale solar farm, it might be the primary outdoor space for thousands of students, workers, and apartment residents. This Amendment takes a far reaching and long term view, and seeks to draw a line in the sand now to protect these crucial, and finite, resources for future generations.

Northern edge of University Square

36. In relation to the buildings along the southern edge of the University's main campus along Grattan Street, Mr Purcell was invited by the Panel to advise of any development aspirations

for those buildings (including the Medical Building and the Engineering Building), and confirmed that the University has no current plans to develop those building. Both Mr Barlow and Mr Biles agreed that development heights for those buildings would likely be limited by the helicopter flight paths protected by DDO65 and DDO66 in any event.

37. Council acknowledges that Mr Barnes stated that it may be appropriate to apply a nominal street wall height along the Grattan Street interface of 24 metres to define an "allowable shadow" for the northern part of University Square.

38. Mr Barlow did not give a figure, but suggested that it should be higher than 24 metres. Mr Barlow agreed, however, that if development on the main campus had offsite impacts it should be subject to planning controls.

39. Mr Biles was not willing to say what he considered would be appropriate in that regard, although noted that it may be appropriate to allow overshadowing to the southern edge of Grattan Street road reserve, and perhaps some extent of additional overshadowing to the area at the north of University Square that will house infrastructure for the Metro Rail tunnel.

40. In Council's submission there is no clear basis on which to identify an appropriate 'nominal' street wall height for the southern part of the main University campus.

Examples of cumulative assessment requirements under the Melbourne Planning Scheme

41. The University offers clause 52.27 as an example of where the Melbourne Planning Scheme directs decision makers to consider cumulative impacts. Clause 52.27 provides a permit trigger for applications to use land for licensed premises. Relevantly, the decision guidelines include the following consideration:

> *The cumulative impact of any existing licensed premises and the proposed licensed premises on the amenity of the surrounding area.*

42. The University referred generally to Tribunal decisions that addressed that decision guidelines, and that determined to refuse a permit on the basis of cumulative impacts. No specific decisions were referred to.

43. Council notes that the cumulative impact assessment required by Clause 52.27 is of a fundamentally different character, and directed to a fundamentally different purpose, than the cumulative impact assessment that would be required for winter sunlight overshadowing.

44. The cumulative assessment required by Clause 52.27 is essentially directed to harm that may be caused to the community from anti-social behaviour associated with the consumption of

alcohol, and the adverse amenity impacts that are the consequence. The decision in *Swancom Pty Ltd v Yarra City Council* (Red Dot) [2009 VCAT 923], relating to the Corner Hotel on Swan Street, provides a useful summary of the background to Clause 52.27 and the reasons for the introduction of the cumulative impact decision guideline. Those reasons included the lack of co-ordination between planning and liquor licensing applications, and the fact that planning applications historically did not adequately deal with broader social or off-site impacts as licensing applications (rather than planning applications) purported to deal with amenity issues arising from alcohol use and abuse – but did not do so on a cumulative basis.[7]

45. What is clear from review of the Tribunal's reasons is that there was very strong evidence of saturation of licensed premises in Swan Street, and low levels of existing amenity from anti-social behaviour. The Tribunal found that allowing the expansion of patron numbers and hours of operation at the Corner Hotel would exacerbate those issues and therefore refused a permit.

46. There are various points of distinction between cumulative impact from licensed premises and shadow impact, not least that the first concerns land use and the second development, and that predicting with certainty the impacts of human behaviour is much more challenging than mapping shadow impact. A further critical point of distinction between the assessment of cumulative impacts from licensed premises, and loss of amenity from overshadowing of parks, is that amenity impacts from anti-social behaviour associated with alcohol consumption are not fixed or immutable. For example, if permit is granted for a new licensed premises because a decision is made that the cumulative impacts are acceptable, and it later turns out that the cumulative impacts are unacceptable, there are numerous avenues for affected persons to seek recourse:

    (a) if there is a breach of the permit, enforcement action can be undertaken pursuant to the P&E Act;

    (b) if there is a breach of the venue's liquor license, that license can be revoked;

    (c) if the amenity impacts relate to noise, there are legal avenues for Council, the EPA and the public to address those impacts;

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7 [2009] VCAT 923, [48] – [57].

(d) if the amenity impacts relate to anti-social behaviour or violence, the police may get involved, and/or additional requirements imposed on the venue to control that behaviour.

47. Any or all of those avenues could address the amenity impact and reverse or reduce the harm caused to the community. In that way, if the subjective cumulative assessment made by the responsible authority got it wrong, there is no permanent loss of amenity.

48. When it comes to successive licensed premises applications for a particular area, cumulative impact will be considered at a point in time, and there may be numerous reasons why the amenity of the area has changed, for better or worse, since the last application considered.

49. By contrast, where the amenity impact is the loss of sunlight to a public park from an approved development, that loss is permanent. There are no avenues for affected persons to later challenge the decision, even if the balance was struck incorrectly, and no way to regain the lost amenity. A building constructed in accordance with an approved permit cannot simply be demolished, if it is later decided that the level of overshadowing impact from that building is unacceptable because, for example, it limits the scope for the land manager to upgrade the park to meet community needs, or because it is determined that too much of the park is overshadowed.

50. In that way, the example of Clause 52.27 proffered by the University just doesn't work for overshadowing protection.

51. As a further example, Council notes that Schedules 49 – 54 to the DDO, which have applied to land in Docklands since 2008, all contain a decision guideline that requires the responsible authority to consider:

> *The orientation and design of a development and whether it will cause significant overshadowing individual or as part of a cumulative effect on the public realm.*

52. While not specific to parks, the amenity issues in Docklands from overshadowing are well known.[8] The Panel may infer that cumulative overshadowing assessment required for developments in Docklands has not been successful in preventing significant overshadowing of the public realm.

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8 Five Docklands parks are identified as "lost" for the purposes of sunshine protection. See Sunshine Access Report, page 54 and Map 9, page 55.

53. In Council's submission, the finite nature of sunlight access, in context of developments that last for many decades into the future, and when replaced are almost never replaced with lower scale form, provides one of the best examples of where mandatory controls ought to be adopted. Once the sunlight is gone, it is gone forever. And an inevitable consequence of successive discretionary decisions for individual applications that will all seek "just a small amount" of additional overshadowing, even if a cumulative assessment is required, will be irreversible loss of amenity, flexibility, and adaptability for parks.

Applications under DDO10

54. DDO10 was introduced in November 2016, and subsequently there were a number of permit applications that caused overshadowing of protected open spaces which had the benefit of the transitional provisions.

55. Council is aware of three permit applications with the potential to cast shadow to key public spaces since the provisions of DDO10 became operative.

56. One application at 13 Spring Street cast no additional shadow at the solstice between 10-2pm on Birrarung Marr or Treasury Gardens between 22 April and 22 September; although it cast a small amount of additional shadow on Wellington Reserve at 1pm and 2pm at the equinox, the level of impact was considered acceptable having regard to the current policy protection afforded to unnamed parks.

57. Another application at 134 - 144 Lonsdale Street demonstrated that no new shadow was cast to the main forecourt of the Wesley Church between 11am - 2pm and the additional shadow cast to the front forecourt was acceptable having regard again to the current policy protection afforded to privately owned plazas accessible to the public.

58. A third application at 118 City Road cast additional shadow over the Australian Centre for Contemporary Art Forecourt on 22 April for 5 minutes between 1.55pm and 2pm (being the end of the protected period); it was judged that the additional shadow would not unreasonably prejudice the amenity of the space and was therefore considered acceptable.

Response to matters raised at paragraph 70 of the University's submissions

59. In relation to the matters raised at paragraph 70 of the University's submissions, Council responds as follows.

Notch effect

60. Council acknowledges that a consequence of the way that the definition of "allowable shadow" operates is that there will be no shadow allowance for a hypothetical street wall or building height extending across intersections, such as the Pelham Street and Bouverie Street intersection.

61. This will be a sunlight benefit that accrues to the park as a consequence of the break in built form occasioned by adjacent roads, which will have to be taken into account by development proponents in the design of proposed buildings.

Differential treatment for the Parkville NEIC

62. As above, there is no evidence before the Panel that the Amendment will unreasonably suppress development capacity in the Parkville NEIC; in fact the evidence before the Panel is that the impacts on development capacity for properties in the Parkville NEIC will be relatively limited. As such, in Council's submission there is no basis for differential treatment between the Type 2 parks in the Parkville NEIC and the other growth areas.

Differential height control regimes

63. The differential street wall and building height controls set by the various DDOs around Type 2 parks are designed to achieve a range of built form outcomes that extend beyond (and in some cases do not address) overshadowing. These include outcomes related to street width, scale, attractive pedestrian environments, character, heritage and the like.

64. As above, the ideal outcome would be no additional overshadowing of Type 2 parks, but that would not be a balanced approach. The choice made by Council, consistent with the Sunlight Access Report, has been to allow additional overshadowing that results from those existing controls in order to respect the balance of the built form outcomes sought through those DDOs, and the strategic work that sits behind them. There is nothing arbitrary about that approach. It has a sound strategic basis.

Co-extensive operation of DDO10 and DDO8

65. Council's Part B submissions acknowledged that land around the Queen Victoria Market that is subject to the DDO10 needs to be excluded from DDO8. The images below show the properties to be excluded:

(a) Figure 1 is the DDO8 as it is currently.

(b) Figure 2 is the DDO10 map for the same area.

(c) Figure 3, in red, shows the 'overlap' properties to be excluded from the DDO8.

Figure 1

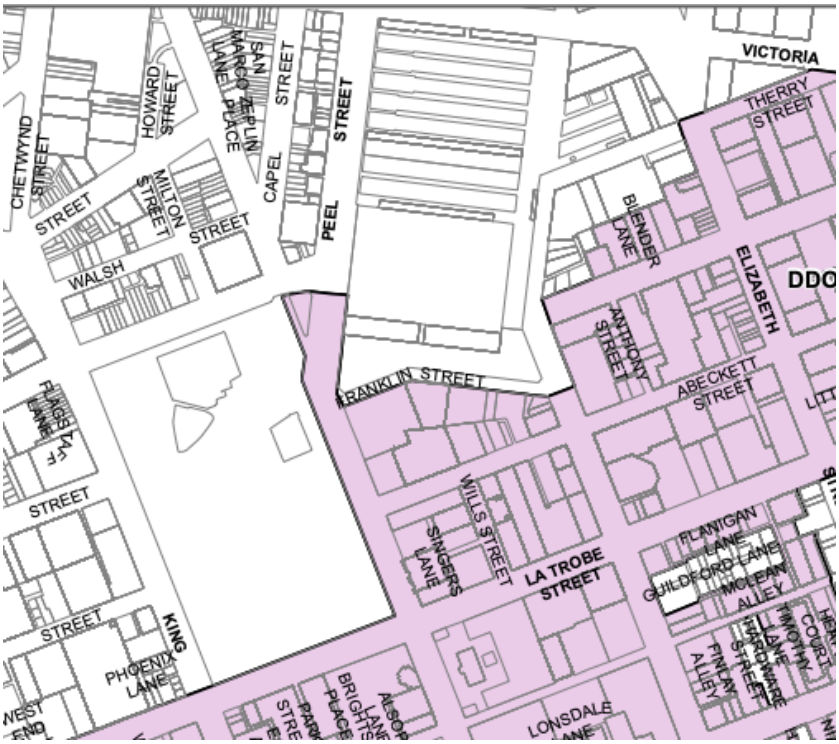

Figure 2

Figure 3

Differential treatment between DDO10 and DDO8

66. Council acknowledges that the effect of DDO8 and DDO10 will be that, for four parks only, there will be overlapping shadow protections for the parks (although not for the land that is the subject of the two DDOs) – in terms of hours of protection and the defined period of protection (albeit that the winter solstice is protected either directly or indirectly in both DDOs). Those parks are:

    (a) Parliament Reserve;

    (b) Treasury Gardens;

    (c) Flagstaff Gardens; and

    (d) the Shrine of Remembrance and its northern forecourt (a smaller extent is protected under DDO10 then will be protected by DDO8).

67. This is a consequence of a number of factors:

    (a) the relatively recent strategic work in Amendment C270 undertaken by the Department and the Minister as Planning Authority, which Council has not sought to disturb, and which was expressly excluded from the Sunshine Access Report and the authorisation for the Amendment; and

    (b) the strategic direction for the Hoddle Grid and Southbank to support much greater intensification as the core of the Capital City, with associated buildings of the greatest height in the municipality and greatest consequential shadow potential.

68. In terms of the proper characterization of the DDO10 shadow control as it applies to the 'tier 2' parks, the relevant provision reads:

> *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:*

69. Council considers that there is a confined discretion for the responsible authority to determine whether the shadow will "unreasonably prejudice the amenity of the space" – with the effect that the responsible authority is permitted to grant a permit where a development would cause additional overshadowing that does not unreasonably prejudice amenity.

70. However, if the responsible authority determines that it will unreasonably prejudice amenity, discretion is entirely removed at that point, and the provision operates as a mandatory

control. The responsible authority does not have discretion to conduct a broader balancing exercise and determine that, even if the overshadowing will unreasonably prejudice amenity, nonetheless the community benefits warrant approval. If the control was a simple "4 hour discretionary control" as suggested by the University, that would be possible. But it is not possible under the terms of the "tier 2" park provision. In Council's submission, this is an important distinction that colours how DDO10 operates and has practical implications for how developers approach compliance with DDO10.

71. In Council's submission, while it might be argued that the effect of the 'overlap' for those four parks is anomalous, it is not the case that the overlap raises any issue of inconsistency in the application of the two DDOs, or confusion about which overshadowing control will apply to any given parcel of land. This is because, as accepted by the University, the two controls will not be co-extensive in respect of the land to which they apply.[9]

<u>The 'tidy-up' exercise</u>

72. In Council's submission, where the DDO8 controls are mandatory and when regard is had to the actual scope of the 'tidy-up' exercise that will follow from adoption of DDO8, it is apparent that the exercise is straightforward, and the University's fears of inconsistency and confusion are unfounded.

73. Council has identified the following DDOs which will need to be amended:

    (a) DDO9 (Fawkner Park Area);

    (b) DDO15 (Royal Botanic Gardens);

    (c) DDO20 (Victoria Parade and Albert Street Area);

    (d) DDO21 (Wellington Parade and Clarendon Street);

    (e) DDO22 (Yarra Park Area);

    (f) DDO33 (CBD Fringe);

    (g) DDO45 (Swanston Street);

    (h) DDO47 (Central Carlton South);

    (i) DDO61 (City North);

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9 With the exception of land around the Queen Victoria Market which is addressed further below.

(j) DDO71 (2 St Andrews Pace, East Melbourne (Former Peter Maccallum Cancer Centre Site).

74. In most cases, the amendment will be simple and it will only be necessary to delete a reference to equinox shadow protection. For example, see DDO33, DDO45, DDO47.

75. In some cases, where the only existing built form outcome relates to equinox shadow protection, adjustment to the built form outcomes may be needed to cross-refer to allowable shadow under DDO8 – this is a consequence of the need to retain the existing maximum building heights for Type 2 parks. DDO21 is an example of this.

C. RESPONSE TO POLIS

76. Polis' primary submission is that Weedon Reserve should be excluded from the Amendment. Alternatively, Polis submits that Weedon Reserve should be a Type 2 park, with discretionary overshadowing controls at the equinox, and not the winter solstice.

77. Council has already noted that it accepts Mr Hodyl's recommendation that Weedon Reserve by classified as a Type 2 park.

78. In Council's submission, the evidence and submissions made on behalf of Polis do not provide any proper basis on which the Panel can recommend that Weedon Reserve be excluded from DDO8. Council notes that Polis' submissions and evidence focus almost exclusively on Weedon Reserve north. In response to a question from the Panel, Mr Cicero stated that the whole of the Reserve should be excluded from the Amendment. However, none of the evidence given on behalf of Polis engaged at all with the issue of whether the whole of Weedon Reserve should be excluded.

79. Relevantly, the current policy in Clause 22.02 applies uniformly to all parks (and other public spaces) outside the Hoddle Grid and Southbank, and the proposed amended Clause 22.02 and proposed DDO8 will also apply uniformly to all parks outside the Hoddle Grid and Southbank.

80. Council notes that Polis' position on the continued use of the equinox as the benchmark, and the use of discretionary controls is not supported by the evidence called on its behalf.

81. Ms Jordan, in response to questions in cross examination, agreed that people had access to "highly valued winter sunlight" in other East Melbourne parks, without access to Weedon Reserve; and further, agreed that she had assessed those other parks as being worthy of winter sunlight protection. She expressly agreed that she supports the protection of winter

sunlight in those other parks. As such, Ms Jordan's evidence does not support, as a general proposition, the continued use of equinox controls, rather than the winter solstice, for shadow protection in public parks.

82. Critically, in relation to Weedon Reserve north, Ms Jordan also accepted that if the Polis properties were developed to a height taller than 24m, Weedon Reserve north would not receive what she considered to be an adequate level of winter sunlight. Ms Jordan also agreed that if the outcome sought was to protect the key gathering spaces in Weedon Reserve north it was necessary to limit height on the Polis properties to 24 metres.

83. In Council's submission, Ms Jordan's evidence provides no support for the use of discretionary controls; rather her evidence supports the need for mandatory controls in order to protect sunlight access to Weedon Reserve north.

84. Ms Dunstan and Mr Tardio provide evidence relevant to current conditions and amenity in the park, but it is relevant to observe that neither suggest that Weedon Reserve, either the northern section, or the southern sections, should not be subject to the Amendment.

85. Both Ms Dunstan and Mr Tardio also agreed that there are numerous other parks in the municipality, including numerous other parks that are proposed to be subject to DDO8 that are adjacent to one or more arterial roads, or other declared roads. Accordingly, there is nothing unique about Weedon Reserve, in relation to noise or traffic impacts, that justifies different treatment from the other parks in a similar context. For the benefit of the Panel, there are at least 29 other parks that are subject to DDO8 and that are immediately adjacent to one or more arterial or declared roads.[10] Council notes that it is also not the case that the utility of playgrounds is removed or undermined by proximity to arterial roads. An example of this is Eades Park, which is located adjacent to King Street. As shown in the photos below, there is a playground in close proximity to King Street, separated from the footpath by a fence. For the Panel's reference the playground is approximately 25 metres in from the footpath.

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[10] Flagstaff Gardens, Alexandra Gardens, Queen Victoria Gardens, Kings Domain, Shrine of Remembrance Reserve, Stapely Parade Reserve, Fitzroy Gardens, Yarra Park, Jolimont Reserve, Wellington Park, Royal Park, Princes Park, The Avenue Reserve, Canning and Neil Street Reserve, Carlton Gardens, North Melbourne Recreation Reserve, Gardiner Reserve, Clayton Reserve, Canning Street and Macaulay Road Reserve, North Melbourne Community Centre, Curzon Street Reserve, Ievers Reserve, Kensington Hall Reserve, Newmarket Reserve, Riverside Park, Westgate Park, King and Victoria St Reserve, Hawke & King Street Reserve.

86. Council acknowledges that the current context of Weedon Reserve is constrained by its location adjacent to Hoddle Street and Wellington Parade, but this does not mean that it is "fanciful" as put by Polis to suggest that Weedon Reserve will never be upgraded, or that the future context of the Reserve will not change such that it useability will increase.

87. Weedon Reserve is recommended for upgrading by the OSS and OSS Technical Report.[11] The OSS Technical Report also identifies the importance of Weedon Reserve as a local open space for the immediate catchment within a 300m walking distance on the north side of Wellington Parade – without the need to cross primary or secondary arterial roads.[12]

88. Council is actively taking steps to regularize its status as a park, including by changing its underlying legal status as a government road. It has also been a park for more than 120 years, and has been zoned PPRZ since the new format Planning Scheme was introduced in 1999. Ms Dunstan was completely unaware of all three of those matters. In this context,

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11 The OSS includes the following recommendation: *Investigate the potential to improve accessibility and use of Weedon Reserve for people north of Wellington Parade*, pg 16. The OSS Technical Report provides the following recommendation: *Prepare a design plan to guide future upgrade of Weedon Reserve including investigating the potential to improve accessibility and use of Weedon Reserve for people north of Wellington Parade*, pg 294.

12 OSS Technical Report, figure 8.2~3, pg 284.

and where Polis' urban design witness considers Weedon Reserve to be a park, it is simply incorrect, as Ms Dunstan sought to do, to characterise Weedon Reserve as a road median.

89. Weedon Reserve is an attractive and well maintained park – this was acknowledged by Ms Jordan in response to questions from the Panel. Ms Jordan stated her view that the value of Weedon Reserve was as green relief; but she accepted, albeit reluctantly, that one of the valuable aspects of Weedon Reserve was that it enjoys sunlight access at the equinox and in winter.

90. In Council's submission, there is no basis, arising from the evidence before the Panel, to exclude Weedon Reserve from the DDO8, or to treat it any differently than the balance of the Type 2 parks.

D. FLEMINGTON RACECOURSE

91. In response to the issues raised by the Victoria Racing Club, Council has proposed an additional exemption that is specific to Flemington Racecourse (ie land within the SUZ1), to allow temporary buildings and works related to events. In Council's submission, all other forms of development should be subject to DDO8.

E. VICTORIAN PLANNING AUTHORITY

92. Council notes that the position of the Victorian Planning Authority is that:

    (a) Arden: Clayton Reserve (33), North Melbourne Recreation Reserve (37), Railway Place and Miller Street park (55), and Stawell Street Park (56), be removed from the DDO8, as overshadowing protection will form part of the future planning scheme amendment for the Draft Arden Structure Plan.

    (b) Dynon: Maribyrnong River Bike Trail (2), Shepherd Bridge Reserve (7) and Wildlife Sanctuary (8), be removed from the DDO8, as the impact of overshadowing should be considered at a later stage when strategic planning for that precinct is undertaken.

    (c) Parkville NEIC: It does not object to the application of the DDO8 to the parks in the Parkville NEIC.

93. In relation to the Draft Arden Structure Plan, Council instructs that it is advocating for the inclusion of winter solstice overshadowing controls for parks in that precinct, for consistency with this Amendment. It is Council's position that the four parks identified by the VPA should be subject to the DDO8.

94. In the context of the philosophy that underpins the Amendment, and the fact that the DDO8 is unlikely to unreasonably constrain development in the Dynon precinct while strategic planning for that precinct advances, it is appropriate for the DDO8 to apply to those parks to preserve sunlight amenity given the lack of existing overshadowing controls for those parks. This is Council's primary position on those parks.

95. Council notes that, in the event that the Dynon parks were excluded from the DDO8, the effect of the proposed drafting revisions for Clause 22.02 is that the policy would not apply to those parks. This is because there are no "key times and dates identified in the planning scheme" for overshadowing protection for those parks. This would leave a policy gap that would need to be filled. In Council's submission, if exclusion of the Dynon parks was entertained (which Council does not support), it would be necessary to add an additional sentence to the "Public Parks Outside the Hoddle Grid and Southbank" provision to ensure that there was not a policy gap, as follows:

> *If key times and dates are not identified in the planning scheme, development outside a public park must not cast additional shadow on any public park between 10am and 3pm on 21 June.*

F. CARLTON RESIDENTS ASSOCIATION

Misunderstanding of the application of the DDO8

96. In part, the issues raised by the CRA result from a misunderstanding of how the properties to which the DDO8 will apply were identified.

97. The DDO8 only applies to specified existing parks, zoned as PPRZ, and it does not apply to other open space areas, such as the Palmerston Street reserve, Elgin Street median, and the median along Drummond Street.

98. In respect of the application of the DDO8 to residential zoned land that is subject to mandatory height controls, Mr Smith explained that a 30% above the mandatory residential zone heights was applied as an allowance for non-residential uses in residential zones; further, a height of 320m was assumed for non-residential zones without height controls. As such, in many instances a 320m height limit was assumed for Mixed Use and Commercial zoned land.

Argyle Square

99. The CRA questioned why Argyle Square was nominated as a low-scale area, rather than a growth area, in the Sunlight Access Report.

100. In her statement of evidence, Ms Hodyl clarified that the Type 1 typology was applied to parks in low-scale areas of 3 storeys or less, and that the reference in the Sunlight Access Report to low-scale areas being "4 storeys and below" was incorrect.

101. As such, in Council's submission, Argyle Square is appropriately nominated as a Type 2 park, as the land surrounding the Square is subject to DDO47 which specifies a discretionary 4 storey maximum building height limit.

Station Street Park

102. Council notes that the model outputs referred to in the Sunlight Access Report (red map and blue map), and the online maps provided for this proceeding, do not show any existing shadow (as at 2015) for buildings to the north and north-west of Station Street Park.

103. This is an error arising from the photo captures taken of the Carlton area. The May 2015 photo captures, used for the modelling, were a complete recapture of the central city, but only a partial re-capture for some areas outside the central city where there had been limited built form changes since the previous photo capture. This included parts of Carlton, and specifically the buildings to the north and north-west of Station Street Park. As a consequence, shadow from those buildings is not shown, despite the fact that those buildings had been constructed by May 2015.

104. The imagery for the balance of the parks that are subject to DDO8 has been reviewed, and no other errors of this type have been identified.

105. The CRA also questioned why Station Street Park was not treated as a Type 2 park given that the development plan approved under DPO8 (Carlton Housing Precincts), which applies to the public housing land around the immediate vicinity of the park, allowed development up to 12 storeys.

106. Council notes that, in accordance with the typologies identified in the Sunlight Access Report, Type 2 was predominantly applied to parks in growth areas with building height controls that allowed four storeys or more on land abutting parks.

107. Relevantly, in terms of identifying existing building heights allowed for that land by the planning scheme, the DPO8 itself does not specify building heights, and the development plan approved by DPO8 was not considered.[13] The Carlton Housing Precincts are not

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13 This is also the case for Keppel Street Park, and Reeves Street Park.

growth areas *per se*, but have special status given their use for public housing. Council notes, however, that the land around the park has already been developed, and the park is subject to significant overshadowing as a consequence. Council considers that Station Street Park should be retained as a Type 1 park.

DDO48 precinct (Central Carlton North)

108. The CRA questioned why the DDO8 is proposed to apply to properties around Lygon Street, which are subject to the mandatory maximum height of 10.5 metres pursuant to DDO48. Council has investigated this issue and identified that there was in error in how the assumptions used for the modelling were applied to those properties. The 10.5 metre maximum height was applied as a discretionary rather than mandatory height limit. This meant that the 320 metre cap was applied to set the maximum developable height for those properties. To be clear, however, this was a human error, and not an error with the model. Council is not aware of any other such errors in the application of the assumption used in the modeling.

109. Council agrees that those properties should not be subject to DDO8 and should be removed from the DDO8 map, as shown in the figures below:

    (a) Figure 4 is the DDO8 as it is currently.

    (b) Figure 5 is the DDO48 map for the same area.

    (c) Figure 6, in red, shows the 'overlap' properties to be excluded from the DDO8.

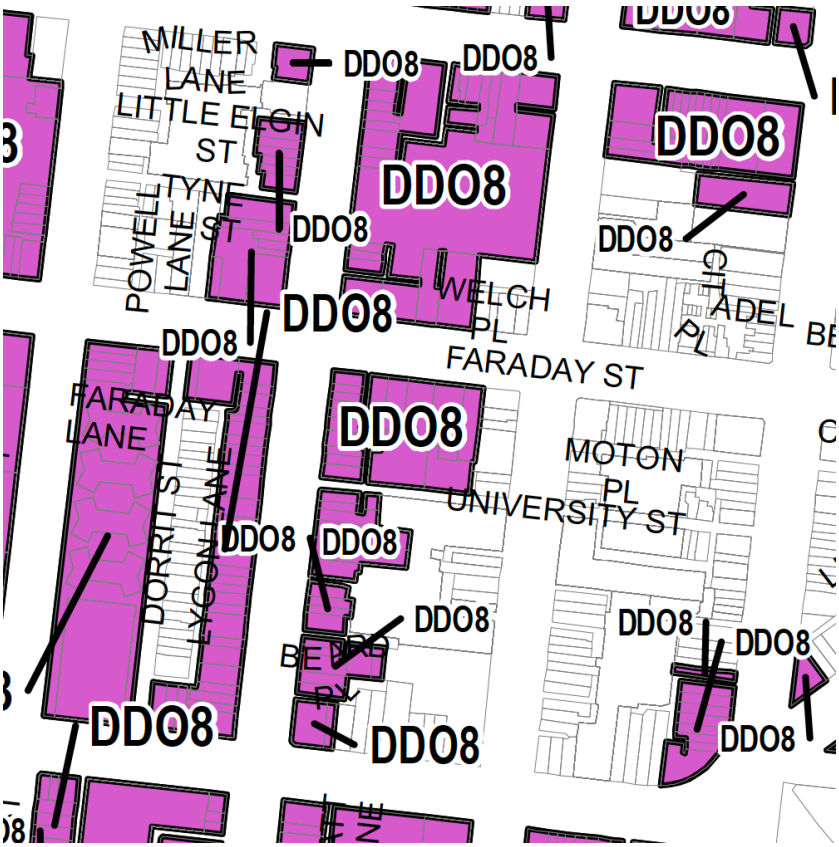

Figure 4

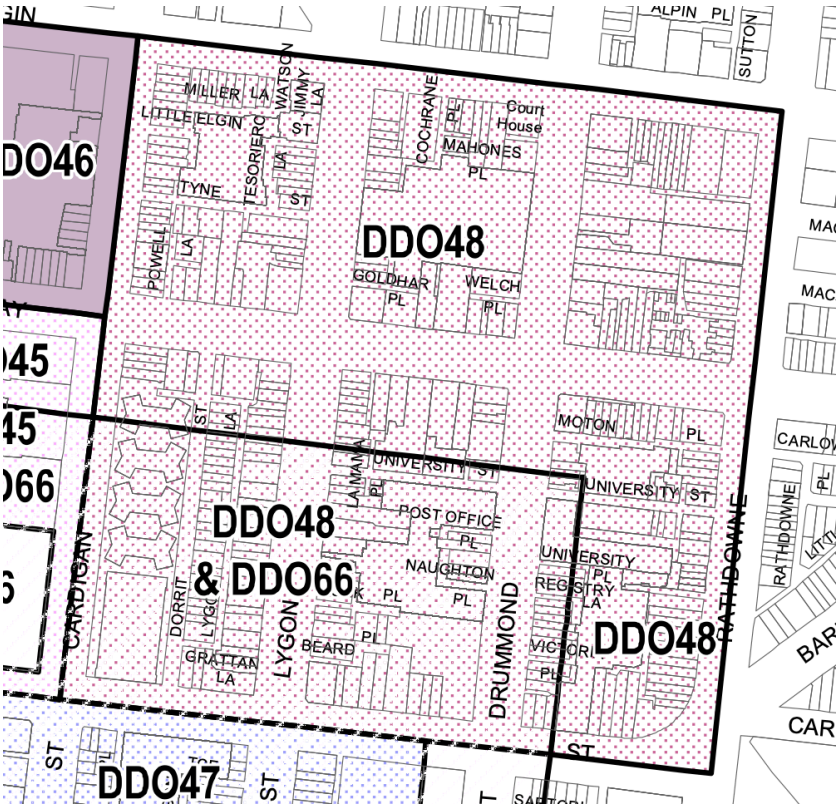

Figure 5

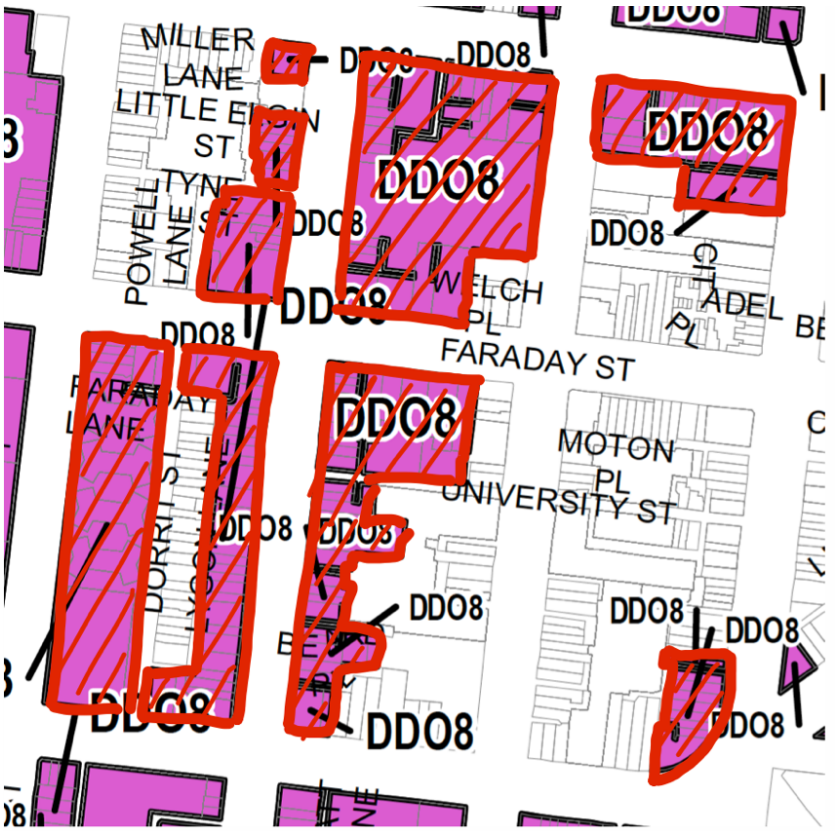

Figure 6

G. PROTECT PARK STREET PRECINCT

110. In relation to the submission made by Protect Park Street Precinct about cross-border controls, Council notes the following:

(a) Council is the planning authority for the planning scheme in force in its municipal district only.[14]

(b) Council cannot prepare an amendment for another municipal area without the express authorisation of the Minister.[15] No authorisation was sought from or given by the Minister in respect of cross-border controls as part of the Amendment.

(c) Council did not have any discussions with the City of Moreland about cross-border overshadowing provisions.

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14 P&E Act, section 8A(1).

15 P&E Act, section 8B(2).

(d) The submission from the City of Moreland,[16] while supportive of the Amendment, notes that the City of Moreland is undertaking its own project to further investigate solar access to public parks. Its position cannot be said to constitute consent[17] to cross-border application of the Amendment.

H. AFL, MCC AND MCG TRUST AND RICHMOND FC

111. The importance of the key sport and entertainment precincts is recognized in the Planning Policy Framework.[18] Council also acknowledges that the MCG in particular is a very significant asset to Melbourne. However, the significance of the MCG and other sporting facilities in public parks does not mean that development of those facilities should be exempt from the policy in Clause 22.02.

112. Discussion about development of the MCG in the Advisory Committee report for the 2006 Commonwealth Games, referred to in the submissions made on behalf of the AFL, MCC, MCG Trust and Richmond FC (**Clubs**), highlights the importance of including sunlight protection as <u>one</u> of the numerous broader policies that are relevant to development of key sporting and entertainment venues in parks. That Advisory Committee report had regard to Clause 22.02 as it was at the time, and the "localized community disbenefits" from the development, which included overshadowing of Yarra Park, and nonetheless concluded that the net community benefit favoured development.

113. This is precisely the approach that Council considers to be appropriate where development of facilities within parks is proposed. The importance of sunlight access throughout the year should be one of the factors considered as part of a net community benefit analysis. This is what is proposed by Council in the revised Clause 22.02, in response to the recommendations made by both Ms Hodyl and Mr Barnes.

114. In relation to the MCG specifically, it is relevant for the Panel to be aware that the MCG is the subject of the *Melbourne Cricket Ground Act 2009* (Vic), which among other things expressly exempts from the P& E Act and Melbourne Planning Scheme, development and

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16 Submission 178.

17 For purposes of section 6(6)(d) of the P&E Act.

18 See for example clause 21.15-3.

use of any spectator stand at the MCG, and the replacement, removal, refurbishment or upgrade of the MCG's floodlight towers.[19]

115. When one considers the type of development at the MCG that is mostly likely to result in additional overshadowing of Yarra Park, development of the spectator stands and floodlight towers would represent a principal focus of redevelopment.

116. If, however, the MCG Trust or MCC determined to develop, for example, a new stand-alone restaurant facility for MCC members, a planning permit was required, and that restaurant would cause additional overshadowing of Yarra Park, Council submits that the policy guidance in Clause 22.02 should be a factor in the responsible authority's decision on that permit application. The same example can be applied to all other facilities in public parks.

117. There is also no basis for the Clubs' opposition to the policy directing consideration to winter solstice shadow rather than the equinox for development within parks – it has been accepted by all relevant experts in this proceeding that protection of winter sunlight access as a general proposition is appropriate.

118. Council's position on the application of Clause 22.02 to development within parks was expressly addressed in both its Part A and Part B submissions, with the general approach intended by Council, including the additional guidance proposed, set out in its Part B submission. The Clubs had the opportunity to respond to those criteria, and did not do so. In the context of the further opportunity provided by the Panel for all parties to respond in writing to Council's Part C version of Clause 22.02, it cannot be said that any issue of procedural fairness arises.

I. HUMAN HABITATS

119. Human Habitats suggests that the typology used in DDO8 is inconsistent with the balanced site-by-site approach advocated in the Sunlight Access Report, identified in that Report in "Priority 2: Balance winter sunlight access to parks with the need to support development intensification." Council notes that this submission fails to recognise the site-by-site assessment undertaken in the Sunlight Access Report, and the balanced typology approach recommended in that Report, which has directly translated into the Park types in DDO8. It

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19 *Melbourne Cricket Ground Act 2009*, sections 28 and 29.

also ignores the fact that the primary author of the Sunlight Access Report has given evidence in this proceeding and supports the Amendment.

120. The differential values for different areas of a park identified by the Human Habitat submission – it refers to benches, barbeque areas, the playground etc - demonstrate that different stakeholders ascribed different levels of importance to different areas and facilities. This highlights the difficulties with the use of discretionary controls for overshadowing. Park users may take a very different view from developers about what is important and why. A specific example is the playground in Yarra Park which will be overshadowed by the proposed development at 96 Wellington Parade at 10am. Human Habitats says that this overshadowing should be considered acceptable. Mr Barlow, by contrast, said that play areas "rank at the top" of areas that should be protected from overshadowing.

J. ACCESS TO MODELLING

121. The Panel has requested clarification about what Council data about parks and terrain and surrounding development is available publicly.

122. Council confirms that while some of Council's city model data is available publicly, the detailed terrain data used in the modelling for the Amendment is not currently publicly available. Specifically, the online maps that have been made available as part of this Panel process are not currently available to the general public.

123. However, Council instructs that the data for parks could be made available in response to particular requests from a developer. This is effectively what was done to enable SJB to undertake the Built Form Testing Study – Council provided SJB with the relevant data for each park for which SJB undertook built form modelling.

124. Council also refers to Mr Biles's comments that the information required for the modelling undertaken for his evidence was publicly available from other sources.

125. In Council's submission, the data required to enable developers to undertake the 3D modelling that will be required by the DDO8, including in relation to Type 2 parks, is either publicly accessible already, or can be made available to developers on request to Council, such that the modelling requirement in DDO8 does not impose an unreasonable burden on development proponents.

K. COUNCIL'S FINAL POSITION ON THE AMENDMENT

126. Council has provided its preferred Part C version of Clause 22.02 and DDO8.

127. Council respectfully requests that the Panel recommend adoption of Clause 22.02 and DDO8 in that form, subject to the following mapping changes in respect of DDO8:

(a) removal of Haymarket and the Royal Society of Victoria Park from DDO8, and the DDO8 maps be redrawn accordingly;

(b) classification of Weedon Reserve classified as a Type 2 park in Map 8 in DDO8;

(c) removal of DDO8 from land included in DDO48;

(d) removal of DDO8 from land included in DDO10.

Susan Brennan

Jordan Wright

Counsel for the Planning Authority

29 March 2021