

Date: 9 September 2024

DAREBIN PLANNING SCHEME AMENDMENT C210dare OPEN SPACE LEVY

PART A SUBMISSION – DAREBIN CITY COUNCIL

INTRODUCTION

1. The Panel has requested that Darebin City Council (**Council**) provides its 'Part A' submission on 9 September 2024, prior to the commencement of the hearing.
2. Amendment C210dare (**Amendment**) to the Darebin Planning Scheme (**Scheme**) proposes to change the mechanism that Council will collect a public open space contribution (**POS Contribution**) for subdivisions that create fewer than 5 additional lots. The Amendment proposes to amend the schedule to clause 53.01 (Public Open Space and Subdivision) (**Schedule**) to remove the mandatory POS Contribution for these subdivisions. The consequence of the Amendment is that subdivisions of this type will have their POS Contribution determined under the provisions of section 18 of the *Subdivision Act 1988* (**Subdivision Act**). Section 18 allows Council to impose a POS Contribution up to 5% of the site value having regard to the criteria in section 18(1A) of the Subdivision Act.
3. The application of the Schedule with respect to the Preston Market Precinct, including 30A Cramer Street and 102 St Georges Road, Preston will remain unchanged.
4. Specifically, the Amendment proposes to:
 - 4.1 amend the Schedule to delete the mandatory sliding scale for a POS Contribution where 2, 3, and 4 additional lots are created.
5. The Amendment is supported by the C210dare Background Report (**Background Report**). The Background Report provides the primary strategic justification for the Amendment.
6. This submission responds to the Panel's request under the following headings:
 - 6.1 Summary of the physical context.
 - 6.2 Background to the Amendment.
 - 6.3 Chronology of events.
 - 6.4 Strategic context and assessment.
 - 6.5 Summary of submissions to the Amendment.
 - 6.6 Why did Council not seek to increase the POS Contribution rate in clause 53.01?
7. Council's Part B Submission will address all other matters set out in the Panel's Directions dated 19 August 2024, including a more detailed response to submissions and a final position on the Amendment.

SUMMARY OF THE PHYSICAL AND STRATEGIC CONTEXT

8. The Amendment affects all land in the municipality, except for the sites already specifically referenced in the Schedule.¹
9. Darebin is projected to house an additional 55,000 people by 2041 – a 35% increase over the next 18 years – to bring the total population to 215,000.² Without creating new open spaces, there will be a further reduction in open space per capita and an increase in the number and proportion of residents who do not have access to open space within 500 metres. Further, the projected increase in residents living in higher density development will mean that occupants have less private open space and rely more heavily on public open spaces for their recreational needs. Improvements are needed to make existing open space work harder and meet the needs of diverse users.
10. In response to this challenge, Council is preparing a body of strategic work as part of a full review of the Schedule. The Amendment forms one part of this broader body strategic work to modernise and update the Schedule and in turn the collection of POS Contributions.
11. POS Contributions are important because they help Council to purchase and improve public open space within the municipality. Appropriate and well located public open space is essential and it improves the quality of life of the community. Further, as the population increases and more houses are constructed within Darebin, it is important that each development provides a fair and proportionate contribution towards the provision of public open space.
12. Section 18 of the Subdivision Act and clause 53.01 are independent mechanisms for a council to collect public open space contributions. In Darebin, POS Contributions are currently collected under both the Subdivision Act and the Scheme. While the Amendment does not change this general structure, a POS Contribution will be collected under the Subdivision Act in more situations than is presently the case.
13. Within this context, the Schedule was first introduced into clause 52.01 by Amendment C050 on 12 August 2004, which was the predecessor to clause 53.01. The sliding scale has not changed in over 20 years.
14. Since that time the legal framework and the application of section 18 of the Subdivision Act has changed markedly. The Schedule does not reflect the current application of section 18. Further, Council adopted Breathing Space: The Darebin Open Space Strategy (2019) (**Breathing Space**) in September 2019. Breathing Space is Council's current adopted open space strategy. A key action of Breathing Space is to commence a planning scheme amendment to increase the rate of POS Contributions across the municipality.

¹ More specifically, the Preston Market Precinct, and 30A Cramer Street and 102 St Georges Road, Preston.

² id forecast, February 2024.

15. Council prepared Amendment C186dare to implement this action which was exhibited in 2019. However, Council did not proceed with the amendment due to various challenges to the methodology underpinning the strategic work and the findings of the Planning Panel in 2020 considering Amendment C148 to the Monash Planning Scheme.
16. On 12 September 2022, the Planning Committee resolved to:
 - (1) Note submissions received through the second round of public exhibition of Amendment C186dare
 - (2) Resolve not to refer the additional submissions received to the Panel and to inform the Panel of this decision.
 - (3) Further investigate the projected open space needs within Darebin for a longer period than previously modelled (through to at least 2041).
 - (4) Note the need to undertake further work on the implementation plan and costings methodology and to prepare an open space contribution rate based on this revised strategic work.
 - (5) Refer consideration of funding for this further strategic work to the 23/24 financial year budget.
 - (6) Immediately commence a new planning scheme amendment to remove content within the schedule to Clause 53.01.
 - (7) Receives a report at a future Planning Committee meeting to formally request the Minister for Planning to authorise a new planning scheme amendment to remove the content within the schedule to Clause 53.01.
 - (8) Write to all submitters and thank them for their submissions and advise of Council's proposed next steps.
 - (9) Write to the Minister for Planning outlining the difficulties faced by Darebin and other councils in preparing an open space amendment, and the lack of any meaningful guidance from Panels or the State as to the methodology for establishing an open space levy and the impact of this on councils in regard to costs and infrastructure planning.
17. This resolution established the broader context for the Amendment, namely, to pursue a comprehensive review of the applicable POS Contribution rates in the Schedule for all subdivisions, and, importantly, as an 'interim' arrangement pursue an amendment where the POS Contribution for subdivisions that create fewer than 5 additional lots are assessed under the Subdivision Act. The 'interim' step of preparing the Amendment was deemed appropriate given the likely timeframes and complexities in undertaking the further strategic work.
18. While not directly relevant to the Amendment, Council is progressing the necessary strategic work to undertake a more comprehensive amendment.

BACKGROUND TO THE AMENDMENT

19. Council, in its capacity as the planning authority under the *Planning and Environment Act 1987 (P&E Act)*, has prepared the Amendment.

20. The Panel has been appointed pursuant to section 153 of the P&E Act to consider the submissions that have been referred to it pursuant to section 23(1)(b) of the P&E Act.
21. A detailed description of the Amendment is outlined in the Explanatory Report and accompanying Background Report.

CHRONOLOGY OF EVENTS

22. The chronology below needs to be read within the framework of the strategic context outlined above.
23. On 9 October 2023, the Planning Committee decided to commence the Amendment. It unanimously resolved:

That Council:

- (1) Requests under section 8A (2) and (3) of the Planning and Environment Act 1987 that the Minister for Planning authorise Darebin City Council to prepare Amendment C210dare to the Darebin Planning Scheme.
- (2) When authorised by the Minister for Planning, exhibit Amendment C210dare for a period of one month and/or in accordance with notice requirements under section 19 of the Planning and Environment Act 1987.
- (3) Seeks community and stakeholder feedback as part of the exhibition period, on the proposed changes to the planning scheme.
- (4) Authorises the Manager City Futures to make alterations, corrections, and additions, as necessary to, Amendment C210 material as attached at Appendix A prior to lodgement of the authorisation request with the Minister for Planning and/or exhibition period.

Authorisation

24. On 9 November 2023, Council submitted the Amendment to the Department of Transport and Planning for authorisation.
25. On 21 November 2023, Council received a further review letter from the Department of Transport and Planning, under delegation, requesting consideration of the following matters and further information, namely:
 - 25.1 Clarification regarding the retention of the 5% contribution rate for subdivisions that create 5 or more additional lots.
 - 25.2 Requirement for exhibition of a supporting Rationale Background Report.
 - 25.3 Clerical amendments to documentation.
26. On 23 November 2023, Council provided a response to the further review letter.

27. On 12 January 2024, the Minister for Planning authorised the Amendment subject to the following conditions:

- 1) Amend the explanatory report in the following manner:
 - a) Updating the amendment description and land affected by the amendment.
 - b) Updating the Explanatory Report to the new format.
 - c) Updating the strategic assessment highlighting the relevance to Plan Melbourne directions under Outcomes 2 and 4.
 - d) If the Local Planning Policy Framework is replaced with a new Municipal Planning Strategy and modified Planning Policy Framework prior to exhibition, addressing the relevant provisions of the scheme.
- 2) Amend the proposed Schedule to Clause 53.01 deleting the applicable rows and figures in line with Ministerial Direction - The Form and Content of Planning Schemes.
- 3) Provide a document that supports the amendment and sets out how it justifies the proposed changes to the planning scheme. The document should be separate from the explanatory report and must:
 - a) Be prepared to the satisfaction of the Department of Transport and Planning. This document must be reviewed by the department prior to the council giving copies of the amendment to the Minister under section 17(1)(c) of the P&E Act. This may be an amended form of the Rationale Report which accompanied council's authorisation request or a similar document.
 - b) Include the additional information and justification provided by council on 23 November 2023 relating to the proposed retention of the mandatory 5% public open space contribution.
- 4) The supporting document must be made publicly available during exhibition to support the amendment.

28. On 6 February 2024, Council provided the Department of Transport and Planning an altered Amendment in response to the authorisation conditions.

29. On 8 February 2024, the Department of Transport and Planning advised that subject to some further minor changes the authorisation conditions were satisfied. Council incorporated these further minor changes into the Amendment.

Formal Exhibition

30. Council formally exhibited the Amendment between 22 February and 22 March 2024 by:

- 30.1 sending letters to the prescribed Ministers and authorities, relevant local members of parliament and adjoining municipalities;
- 30.2 publishing a notice in the Government Gazette;
- 30.3 publishing notice of the Amendment in The Age newspaper;

- 30.4 publishing a full copy of the Amendment documentation on the Department of Transport and Planning's and Council's websites;
- 30.5 having a copy of the Amendment available for public viewing at the Planning Counter at Council's Preston Office;
- 30.6 posting across Council's social media channels about the Amendment at the commencement of the exhibition period; and
- 30.7 direct notification of contacts for active development permits that were likely to subdivide following development.

Submissions

- 31. As a result of exhibiting the Amendment, Council received 7 submissions. Of these submissions, two submissions supported the Amendment, three submissions were neutral and two submissions requested changes to the amendment and Breathing Space.

Council Meeting – 22 July 2024

- 32. On 22 July 2024, Council considered a report assessing the submissions received to the Amendment which included a recommendation to refer all submissions to a panel.
- 33. After considering submissions, Council resolved:
 - That Council:
 - (1) Formally considers all written submissions received in response to Amendment C210dare to the Darebin Planning Scheme.
 - (2) Endorses the officer's response to submissions outlined in this report and attached at Appendix B.
 - (3) Requests that the Minister for Planning appoint an independent Panel under Part 8 of the Planning and Environment Act 1987 to consider submissions to Amendment C170dare to the Darebin Planning Scheme.
 - (4) Refers all submissions to the Panel to be appointed by the Minister for Planning.
 - (5) Writes to all submitters to thank them for their contribution and inform them of Council's decision to proceed to the Panel stage.

STRATEGIC CONTEXT AND ASSESSMENT

Why is the Amendment required?

- 34. The Amendment will support more and better public open space to meet the needs of the growing Darebin community.

Objectives of Planning in Victoria

35. The Amendment supports the objectives of planning in Victoria contained in section 4(1) of the P&E Act.
36. In particular, the Amendment supports the following objectives:
- To provide for the fair, orderly, economic and sustainable use and development of land;
 - To provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
 - To secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria.
37. Further discussion on how the Amendment supports these objectives is contained within the Explanatory Report.

Ministerial Directions

38. The following Ministerial Directions are relevant to the Amendment.

Form and Content of Planning Schemes

39. The Amendment is consistent with the Ministerial Direction on the Form and Content of Planning Schemes (section 7(5) of the Act).

Ministerial Direction No. 9 – Metropolitan Planning Strategy

40. The Amendment has had regard to the Metropolitan Planning Strategy, and the Explanatory Report discusses the relevant matters identified in this Ministerial Direction.

Ministerial Direction No. 11 – Strategic Assessment of Amendments

41. Ministerial Direction No. 11 seeks to ensure a strategic evaluation of a planning scheme amendment and the outcomes it produces.
42. The preparation of the Explanatory Report and exhibited Background Report has fulfilled the requirements of this direction.

Ministerial Direction No. 15 – The Planning Scheme Amendment Process

43. The Amendment has complied with the directions contained in this Ministerial Direction.

Planning Policy Framework (PPF)

44. The following clauses of the PPF are relevant to the Amendment:
- 44.1 Clause 11 – Settlement
 - 44.2 Clause 12 – Environmental and Landscape Values

44.3 Clause 15 – Built Environment and Heritage

44.4 Clause 19 – Infrastructure

45. The Amendment will implement these clauses of the PPF for the reasons set out in the Explanatory Report.

Municipal Planning Strategy

46. The Amendment is consistent with the vision of the Municipal Planning Strategy which emphasises the protection of natural assets and ecosystems in response to the climate emergency and for the benefit of the community.

Strategic assessment guidelines

47. The strategic justification for the Amendment has been addressed under the questions that form the Strategic Assessment Guidelines as part of the Explanatory Report. Council adopts that assessment as part of this submission.

SUMMARY OF ISSUES RAISED IN SUBMISSIONS

48. Seven submissions to the Amendment were received in the formal Exhibition period.
49. Two submissions supported the Amendment, two submissions sought changes, and three submissions were neutral.
50. The key issues arising from submissions are summarised as follows:
- 50.1 The need for more and better open space in Darebin.
 - 50.2 Concerns with the administration of open space contribution funds, including the use of open space funds to deliver projects such as the Northcote Aquatic and Recreation Centre (NARC).
 - 50.3 Concerns regarding Breathing Space and its methodology for the determination of need and the potential for it to result in inequitable distribution of investment in open space across the municipality
 - 50.4 Transitional provisions for developments which would incur an open space contribution higher than that under the existing contribution rates.
 - 50.5 Governance matters relating to the instrument of delegation and the capacity of the Planning Committee to make decisions on planning scheme amendments.

WHY DID COUNCIL NOT SEEK TO INCREASE THE POS CONTRIBUTION RATE IN CLAUSE 53.01?

51. The Panel has asked Council to explain why it has chosen to increase the POS Contribution rate through the Subdivision Act rather than through clause 53.01.
52. The answer to this question will have some overlap with the submissions Council is likely to make in its Part B Submission. However, given the Panel's direction, Council addresses this specific question now.
53. Before answering the question, Council observes that the question assumes that the change to the Schedule will increase the POS Contribution for subdivisions creating fewer than 5 additional lots. However, Council considers that this assumption is not correct from a legal perspective, even though in practice such subdivisions will likely be subject to a higher POS Contribution.
54. This is because under the Subdivision Act the applicable POS Contribution rate is a rate up to 5%. It is not a flat rate of 5% that will automatically apply to all subdivisions that create fewer than 5 additional lots. Therefore, if the Amendment is approved, a subdivision creating fewer than 5 additional lots might be liable for a POS Contribution between 0% and 5%. Council, in its capacity as the responsible authority, (and the Tribunal on review) will need to determine the actual POS Contribution rate on a case by case basis.
55. Therefore, in Council's view, it would not be correct, from a legal perspective, to consider the submissions, and in turn the Amendment, on the assumption that subdivisions creating fewer than 5 additional lots will automatically be subject to a POS Contribution rate of 5% under the Subdivision Act, and in turn will always be subject to a higher rate than is currently in the Schedule.
56. Having said that, in very general terms, Council does expect that the POS Contribution will likely increase for most subdivisions that create fewer than 5 additional lots. The reasons for this conclusion and the acceptability of this outcome will be addressed in Council's Part B Submission.
57. Further, for reasons that will be explained in more detail in Council's Part B Submission, even if many or most subdivisions creating fewer than 5 additional lots will be subject to a higher POS Contribution Rate, that outcome is not a poor planning outcome. Importantly, what such an outcome would demonstrate is that these subdivisions are not currently paying a fair and proportionate contribution towards public open space.
58. Putting aside the above issues, Council accepts that it could have sought to amend the Schedule to increase the POS Contribution rate. However, that process would have involved a very different strategic justification. This work will form part of the strategic work

that Council will prepare when it prepares the ultimate planning scheme amendment which is currently expected to change the POS Contribution rate for all subdivisions.

59. In the present case, Council has identified that a sliding scale for POS Contributions which is linked to the number of additional lots being created as being outdated and no longer fit for purpose. The sliding scale included in the Schedule has its origins from Vic Code 2. The sliding scale in 'Vic Code 2' has been described as follows:³

Therefore, three units in lieu of an existing house was a net gain of two units and therefore a 2% levy would apply. This was the approach that was included in "Vic Code 2" up until the mid-1990's but, not surprisingly it was dropped for want of any sound rationale.

60. Given this observation was made some 13 years ago, there should be little doubt that the sliding scale is outdated and no longer fit for purpose.⁴ Therefore, to remove provisions of the Scheme that, to adopt the words of the Tribunal, have no 'sound rationale', amounts to a sound planning basis. Accordingly, rather than delaying a change to the Schedule with respect to subdivisions creating fewer than 5 lots and to roll it into Council's broader review, which is likely to be some time away, Council considers that it is both responsible and efficient to remove this outdated provision from the Scheme with minimal delay.

61. The Amendment should be understood in this context.

CONCLUSION

62. This completes Council's Part A Submission.

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Planology
Lawyers for the Darebin City Council
9 September 2024

³ *Parry v Bass Coast SC* [2011] VCAT 1977 at [50].

⁴ Noting the underlying basis for a sliding scale is now over 30 years old.