

**Darebin Planning Scheme Amendment C210dare
Open Space Contributions**

Panel Report

Planning and Environment Act 1987

24 September 2024

How will this report be used?

This is a brief description of how this report will be used for the benefit of people unfamiliar with the planning system. If you have concerns about a specific issue you should seek independent advice.

The planning authority must consider this report before deciding whether to adopt the Amendment.

[section 27(1) of the *Planning and Environment Act 1987* (the PE Act)]

For the Amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for Planning for approval.

The planning authority is not obliged to follow the recommendations of the Panel, but it must give its reasons if it does not follow the recommendations. [section 31 (1) of the PE Act, and section 9 of the *Planning and Environment Regulations 2015*]

If approved by the Minister for Planning a formal change will be made to the planning scheme. Notice of approval of the Amendment will be published in the Government Gazette. [section 37 of the PE Act]

Planning Panels Victoria acknowledges the Wurundjeri Woi Wurrung People as the traditional custodians of the land on which our office is located. We pay our respects to their Elders past and present.

Planning and Environment Act 1987

Panel Report pursuant to section 25 of the PE Act

Darebin Planning Scheme Amendment C210dare

Open Space Contributions

24 September 2024



Rodger Eade, Chair

Contents

	Page
Executive summary	6
1 Introduction.....	7
1.1 The Amendment	7
1.2 Background	7
1.3 The Panel’s approach	8
2 Strategic issues	10
2.1 Planning context.....	10
2.2 Strategic justification.....	10
3 Issue addressed by the Panel	12
3.1 Is the Amendment fair?.....	12
3.2 Open space contribution methodology.....	13
3.3 Level of contribution	14
3.4 Transitional provisions.....	14
3.5 Other issues.....	15
Appendix A Document list.....	17
Appendix B Planning context.....	18
B:1 Planning policy framework.....	18
B:2 Other relevant planning strategies and policies	19
B:3 Ministerial Directions	19

List of Tables

	Page
Table 1 Chronology of events	8
Table 2 Planning context.....	10
Table 3 Relevant sections of Plan Melbourne.....	19

Glossary and abbreviations

Council	Darebin Council
DTP	Department of Transport and Planning
PE Act	<i>Planning and Environment Act 1987</i>
Planning Scheme	Darebin Planning Scheme
POS	Public open space
Subdivision Act	<i>Subdivision Act 1988</i>
VCAT	Victorian Civil and Administrative Tribunal

Overview

Amendment summary

The Amendment	Darebin Planning Scheme Amendment C210dare
Common name	Open Space Contributions
Brief description	The public open space contribution requirements for subdivisions that create fewer than five additional lots to revert to the requirements under section 18 of the <i>Subdivision Act 1988</i>
Subject land	All land in the municipality excluding Preston market Precinct (excluding 30A Cramer Street and 102 St Georges Road Preston).
The Proponent	Darebin City Council
Planning Authority	Darebin City Council
Authorisation	12 January 2024 with conditions
Exhibition	22 February to 22 March 2024
Submissions	Number of Submissions: seven, with two that requested changes to the Amendment. Submissions were received from: - Darebin Appropriate Development Association - Nasir Choudary - Marion Attwater - Tim Holdsworth - Hunter Cullen - Merri-bek Council - Department of Energy, Environment and Climate Action

Panel process

The Panel	Rodger Eade, Chair
Directions Hearing	By video conference 19 August 2024
Panel Hearing	By video conference 16 September 2024
Site inspections	Not required
Parties to the Hearing	Darebin Council represented by Darren Wong of Planology. Darebin Appropriate Development Association represented by Chris Erlandsen.
Citation	Darebin Planning Scheme PSA C210dare [2024] PPV
Date of this report	23 September 2024

Executive summary

Darebin Planning Scheme Amendment C210dare (the Amendment) seeks to implement public open space (POS) contributions for subdivisions that create fewer than five additional lots by reverting to the requirements under section 18 of the *Subdivision Act 1988* (Subdivision Act). It does this by amending the Schedule to Clause 53.01 of the Darebin Planning Scheme.

Key issues raised in submissions included:

- the need for more and better open space
- the administration of open space funds collected
- the methodology for determining need in the open space strategy, *Breathing Space*
- transitional provisions
- governance matters relating to the delegated powers of the Planning Committee of Council.

The Panel notes that a number of the issues raised in submissions are beyond the scope of the Amendment and are not considered by it.

The Amendment is the first part of a to step process which Council stated would likely seek to implement a higher POS contribution rate for Darebin.

The strategic justification for the Amendment is found in State and local policy. The current situation where subdivisions that create between two and four extra lots make POS contributions on a sliding scale is considered by Darebin Council (Council) to be outmoded and anomalous. Council submitted that by reverting to the provisions of section 18 of the Subdivision Act which provides for a POS contribution of up to five percent is strategically justified. This contribution level aligns with the POS contributions required under Clause 53.01 of the Darebin Planning Scheme (Planning Scheme) where subdivisions create five or more additional lots.

The Panel concludes:

- The Amendment makes the system of POS contributions in Darebin fairer than currently.
- The proposal to collect POS contributions from subdivisions creating fewer than five additional lots through the section 18 of the Subdivision Act and from subdivisions creating five or more additional lots through Clause 53.01 of the Panning Scheme is appropriate.
- The quantum of the proposed POS contribution for subdivisions that create fewer than five additional lots is appropriate to the extent that it removes an anomaly.
- The Amendment should not include transitional provisions.
- No evidence was provided that appropriate processes were not followed by Council and its officers in seeking authorisation for and considering submissions to the Amendment.
- Issues which fall outside the scope of the Amendment cannot be considered.

Recommendations

Based on the reasons set out in this Report, the Panel recommends that Darebin Planning Scheme Amendment C210dare be adopted as exhibited.

1 Introduction

1.1 The Amendment

(i) Amendment description

The purpose of the Amendment is for POS contribution requirements for subdivisions that create fewer than five additional lots to revert to the provisions of section 18 of the Subdivision Act.

Specifically, the Amendment proposes to:

- Amend the Schedule to Clause 53.01 (Public Open Space and Subdivision) to delete the mandatory sliding scale for contributions where two, three, and four additional lots are created.

(ii) The subject land

The Amendment applies to all land in the municipality, excluding:

- Preston Market Precinct (excluding 30A Cramer Street and 102 St Georges Road, Preston).

1.2 Background

Darebin, like a number of Councils, is facing a significant gap between the costs of providing POS and related facilities and the funds that are collected through POS contributions. With the exception of the Preston Market Precinct, and where subdivisions create four additional lots or fewer, the current open space contribution rate in Darebin is five per cent. This rate is lower than that applied in a number of comparator municipalities.

Currently the Planning Scheme requires open space contributions according to a sliding scale of two to five per cent, based on the number of additional lots being created by a given subdivision: 2 percent for two additional lots, three per cent for four lots, four per cent for four lots and five per cent for 5 or more additional lots¹. As a result, for smaller subdivisions the sliding scale caps contributions at a lesser rate than the maximum of five per cent enabled through the state standard provisions of the Subdivision Act.

Council endorsed its open space strategy, *Breathing Space* in 2019 and subsequently prepared Amendment C186dare to increase the open space contribution rate to raise revenue to implement projects arising from the strategy. As a result of challenges to the strategy methodology it resolved to abandon that Amendment.

In September 2022, Council resolved to pursue a two-step approach to increasing the open space contribution rate as follows:

- Step1: Prepare a new planning scheme amendment to remove the stepped approach to contribution rates for smaller subdivisions embodied in Clause 53.01
- Step 2: Undertake further strategic work to underpin a review of the open space contribution rate.

¹ For ease of reference subdivisions creating two, three and four extra lots are referred to in this report as smaller subdivisions and subdivisions creating five or more extra lots are referred to as larger subdivisions

Council views this Amendment as a step towards a broader based Amendment that is likely to seek a larger open space contribution rate.

The chronology of events leading to this Amendment are in Table 1.

Table 1 Chronology of events

Date	Event
9 October 2023	Planning Committee of Council resolved to commence Amendment C210 dare
9 November 2023	Council sought authorisation to prepare the Amendment
21 November 2023	Department of Transport and Planning (DTP) sought a review of information
23 November 2023	Council responded to request for review
12 January 2024	Amendment authorised subject to conditions
6 February 2024	Council provided a revised Amendment to meet the conditions of authorisation
8 February 2024	DTP advised that subject to minor changes the conditions of authorisation had been met
22 February to 22 March 2024	Amendment exhibited
22 July 2024	Council considered submissions and resolved to request that an independent Planning Panel be appointed
9 July 2024	Panel appointed
19 August 2024	Directions Hearing held
23 August 2024	Public Hearing held

Source: Council Part A submission and PPV documents

1.3 The Panel's approach

Key issues raised in submissions were:

- the need for more and better open space
- the administration of open space funds collected
- the methodology for determining need in the open space strategy, *Breathing Space*
- transitional provisions
- governance matters relating to the delegated powers of the Planning Committee of Council.

The Panel notes that a number of issues raised by submitters are beyond the scope of the Amendment and cannot be considered by the Panel. In particular, the Amendment does not include a review of *Breathing Space*. The Panel advised submitters of this at the Directions Hearing.

The Panel has assessed the Amendment against the principles of net community benefit and sustainable development, as set out in Clause 71.02-3 (Integrated decision making) of the Planning Scheme.

The Panel considered all written submissions made in response to the exhibition of the Amendment, submissions, and other material presented to it during the Hearing. It has reviewed the material before it and has had to be selective in referring to the more relevant or determinative material in the Report. All submissions and materials have been considered by the Panel in reaching its conclusions, regardless of whether they are specifically mentioned in the Report.

This Report deals with the issues under the following headings:

- Planning context
- Strategic issues
- Issues addressed by the Panel.

2 Strategic issues

2.1 Planning context

This chapter identifies planning context relevant to the Amendment. Appendix B highlights key imperatives of relevant provisions and policies.

Table 2 Planning context

	Relevant references
Victorian planning objectives	- section 4 of the <i>Planning and Environment Act, 1987</i> (PE Act)
Municipal Planning Strategy	- Clause 2 Vision
Planning Policy Framework	- Clause 11 Settlement - Clause 12 Environmental and landscape values - Clause 15 Built environment and heritage - Clause 19 Infrastructure
Other planning strategies and policies	- Plan Melbourne Directions 2.1, 5.1, 5.2, 5.4, 6.4, and 6.5 - Breathing Space
Ministerial directions	- Ministerial Direction on the Form and Content of Planning Schemes - Ministerial Direction 9 (Metropolitan Planning Strategy) - Ministerial Direction 11 (Strategic assessment of amendments) - Ministerial Direction 15 (The planning scheme amendment process)
Planning practice notes	- Planning Practice Note 46: Strategic Assessment Guidelines, September 2022

2.2 Strategic justification

(i) Evidence and submissions

Council submitted that the Amendment is strategically justified and that it is based on the relevant clauses of the state and local sections of the Planning Scheme. It further stated that the Amendment is consistent with the vision in the Municipal Planning Strategy (MPS) at Clause 2 of the Planning Scheme.

While some submitters either questioned aspects of the underpinning open space strategy, *Breathing Space*, or on where in the municipality open space contributions collected could be expended, no submitter directly questioned the strategic basis of the Amendment.

In addition, Council submitted that the approach it is taking to the Amendment, that is revising the Schedule to Clause 53.01 to remove reference to open space contributions for smaller subdivisions and reverting to the provisions of section 18A of the Subdivision Act, is justified. This issue is considered in Chapter 3.2.

(ii) Discussion

The Panel accepts that the Amendment is strategically justified through State and local policy and provisions and notes that no submitter disagreed with this. The Panel considers that the

Amendment delivers net community benefit and sustainable development as required by Clause 71.02-3.

(iii) Conclusions

For the reasons set out in this report, the Panel concludes that the Amendment:

- is supported by, and implements, the relevant sections of the Planning Policy Framework
- is consistent with the relevant Ministerial Directions and Practice Notes
- is well founded and strategically justified.

3 Issue addressed by the Panel

3.1 Is the Amendment fair?

(i) The issues

The issue is:

- does the proposed Amendment increase the fairness in the way open space is funded in Darebin?

(ii) Submissions

Submitter 1 raised the issue of fairness of the Amendment and was the only submitter to explicitly do so. The issue was raised in respect of where in the municipality revenue raised through POS contributions is spent and whether the criteria for prioritising expenditure are fair.

Council addressed the issue of fairness more broadly. It focussed on whether it was fair to impose up to the same percentage contributions for open space on smaller subdivisions as is currently imposed on larger. It submitted that it is fair to do so.

Council submitted that its approach through this Amendment is to make the POS contributions regime fairer than currently but a subsequent Amendment which is described as Step 2 would make the system fair.

To support its case, it referred the Panel to two Victorian Civil and Administrative Tribunal (VCAT) cases where the tribunal determined that a subdivision that created only a small number of extra lots should make the same contribution as a subdivision creating a larger number of lots.

Council quoted former Senior Member Byard² as saying that one subdivision creating 20 extra lots would likely have the same impact as 10 subdivisions creating two extra lots each. For this reason, it is fair that each subdivision should make POS contributions at the same rate. It further quoted a determination of former Deputy President Gibson where the fairness of the cumulative impacts of subdivisions were considered.³

Council submitted that the sliding scale of contributions as currently imposed under Clause 53.01 of the Planning Scheme is outdated. It stated that this sliding scale is a legacy of VicCode 2 which was in operation in the mid-1990s and is now superseded.

(iii) Discussion

The Panel notes that fairness in the use and development of land is one of the objectives in the PE Act.

The Panel agrees with Council that there is no remaining logic to necessarily imposing a lower rate of POS contribution on smaller subdivisions. The Panel agrees that in an environment where there are clear policy drivers to increased densification of residential development and consequently increased demand for public open space, all or most extra lots created should contribute equally to the provision of open space.

² Agnew v Yarra CC [2008] VCAT 489

³ Stupak v Hobsons Bay CC [2011] VCAT 618

In saying this, the Panel is well aware of existing inequities and unfairness in the current system where major development may not involve subdivision and therefore there is no trigger for the collection of POS contributions. It is beyond the scope of this Amendment to comment further on this. The Panel is aware that a review of how public open space is funded is currently in train.

(iv) Conclusion

The Panel concludes:

- That the Amendment makes the system of Public Open Space contributions in Darebin fairer than currently.

3.2 Open space contribution methodology

(i) The issue

The issue:

- is the approach of collecting open space contributions for smaller subdivisions through the Subdivision Act and from larger subdivisions through Clause 53.01 of the Planning Scheme appropriate?

(ii) Submissions

The Panel asked Council why it proposed to collect open space contributions from smaller subdivisions through the Subdivision Act and for larger subdivisions through Clause 53.01 of the Planning Scheme.

The Panel expressed concern that this may be confusing for some users of the system where they did not have familiarity with the legislative context.

Council responded:

- it wished to retain discretion to charge less than the Subdivision Act maximum of five percent for smaller subdivisions if the particular case warranted a lesser contribution
- that the current Clause 53.01 provisions already allow for reverting to the Subdivision Act in two circumstances where the Schedule does not specify a contribution rate
- the potential for confusion between the two mechanisms for charging contribution should be mitigated by subdivision requiring the certification by a licensed surveyor. A professional surveyor will be familiar with the legislative base that applies.

(iii) Discussion

The Panel notes that Planning Schemes are being revised to a format where state, regional and local policy are being located together to make Planning Schemes more user friendly. That said, the Panel is aware that the current situation of numerous sources of funding of public open space and in this context it considers that the current Amendment does not add significantly to complexity. Further, the Panel accepts Council's wish to retain some discretion for smaller subdivisions so that it can charge a lesser rate if it considers that the subdivision will not give rise to proportional extra demand for POS. The Panel notes that there is no clear guidance for the exercise of discretion and that this is undesirable from the perspective of transparent processes.

(iv) Conclusion

The Panel concludes:

- The proposal to collect POS contributions from subdivisions creating fewer than five additional lots through the section 18 of the *Subdivision Act 1988* and from subdivisions creating five or more additional lots through Clause 53.01 of the Panning Scheme is appropriate.

3.3 Level of contribution

(i) The issue

The issue:

- is the maximum open space contribution for subdivisions that result in fewer than five additional lots, appropriate?

(ii) Submissions

As indicated in Chapter 1.1, Council proposes that open space contributions for subdivisions that create fewer than five additional lots revert to the provision of section 18 of the Subdivision Act. This provides for a contribution of up to five per cent. Council submitted that in most cases the maximum contribution rate of five percent is likely to be justifiable and successfully defended at VCAT. Council further submitted that the existing sliding scale contribution rate is outdated.

Submitter 1 supported a flat five percent POS contribution. Submitter 5 supported the highest possible rate and stated that they understood that to be five percent currently. Submitter 7 noted the maximum rate of five percent in the exhibited Amendment and that it had no objection to the Amendment.

(iii) Discussion

As noted in Chapter 1.2, Council stated that the Amendment is the first step towards a more comprehensive review of the open space contribution rate in Darebin. The Panel accepts that the differential between the rates for smaller and larger subdivisions is anomalous. The Panel further notes that the existing open space contribution rate of five percent is now at the lower end of that charged by comparator municipalities, particularly those facing significant population growth pressures. Based on Council submissions and the lack of objections to the proposed maximum rate of up to five percent, the Panel supports the proposed quantum of the POS contribution.

(iv) Conclusion

The Panel concludes:

- The quantum of the proposed public open space contribution for subdivisions that create fewer than five additional lots is appropriate to the extent that it removes an anomaly.

3.4 Transitional provisions

(i) The issue

The issue:

- is it appropriate to include transitional provisions for applications under consideration at the time of consideration of the Amendment?

(ii) Submissions

Submitter 2 stated that the proposed charges should not apply to their current application for subdivision which has been submitted and is under consideration by Council.

Council responded that the process for consideration of an Amendment is a lengthy one and that there is an opportunity for current applicants to resolve their application before the Amendment is gazetted. Council submitted that this time period is the only transitional period that will be provided and that no other transition provisions are provided. It further noted that similar Amendments in other municipalities have not provided transitional provisions.

At the Hearing, Council advised that the application made by Submitter 2 has now been determined by Council and as such its open space contributions will be assessed under current provisions.

(iii) Discussion

The Panel agrees with Council that there should be time to resolve existing applications and that transitional provisions are not normally provided in similar situations. The Panel agrees that the appropriate implementation date is and should be the date of gazettal of the Amendment. The Panel notes that transitional provisions, if included, would be administratively complex and a cutoff point complex to define.

(iv) Conclusion

The Panel concludes:

- The Amendment should not include transitional provisions.

3.5 Other issues

(i) The issues

The issues:

- does the Planning Committee of Council have the delegated power to seek authorisation to prepare an Amendment?
- is the use of revenue raised and the location in which it is spent appropriate?
- is the methodology that underpins the open space strategy, *Breathing Space* flawed?

(ii) Submissions

Submitter 3 questioned whether the legal basis of the preparation of the Amendment is sound. In response, Council submitted that section 188 of the PE Act does not prohibit Council delegating a decision to seek authorisation or consider submissions. It submitted that the Planning Committee of Darebin has delegated power to seek authorisation and in this case submissions to the Amendment were considered by the Council.

Submitter 1 questioned the methodology underpinning *Breathing Space* and also the location where funding had been spent within the municipality. Submitter 4 questioned whether the use

of funds collected through POS contributions can be legitimately used in works at the Northcote pool.

(iii) Discussion

Council did not table the instrument of delegation to support its contention that seeking authorisation for the Amendment had been appropriately approved. However, the Panel is aware that delegation of authority is very regularly provided to Committees of Council and senior officers. The Panel notes that no evidence was provided that processes followed are not legally based.

As stated in Chapter 1.3, some issues raised by submitters fall outside the scope of the Amendment and the Panel does not comment on these. These include both the methodology used in *Breathing Space* and the expenditure of funds raised through POS contributions.

(iv) Conclusions

The Panel concludes:

- No evidence was provided that appropriate processes were not followed by Council and its officers in seeking authorisation for and considering submissions to the Amendment.
- Issues which fall outside the scope of the Amendment cannot be considered.

Appendix A Document list

No.	Date	Description	Provided by
1	19 Aug 2024	Panel Directions and Timetable (version 1)	Planning Panels Victoria (PPV)
2	9 Sep 2024	Council Part A submission and six attachments	Council
3	11 Sep 2024	Darebin Appropriate Development Association Submission	Mr Erlandsen
4	13 Sep 2024	Council Part B Submission and two attachments	Council

Appendix B Planning context

B:1 Planning policy framework

Council submitted that the Amendment is supported by various clauses in the Planning Policy Framework, which the Panel has summarised below.

Victorian planning objectives

The Amendment will assist in implementing the following State policy objectives set out in section 4 of the PE Act:

- 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.

Clause 2 (Municipal Planning Strategy)

The Amendment supports the Vision of the Municipal Planning Strategy by providing funding to assist in providing accessible open space.

Clause 11 (Settlement)

The Amendment is consistent with the objective of this Clause to anticipate and respond to the needs of existing and future communities through provision of zoned and serviced land for housing, employment, recreation and open space, commercial and community facilities and infrastructure.

The Amendment supports this Clause by requiring new subdivisions to contribute to the future open space needs of the municipality.

Clause 12 (Environment and Landscape values)

The Amendment is consistent with the following objectives:

- Clause 12.01L which seeks to ‘maintain a cohesive network of linked natural spaces and corridors to provide havens and corridors for wildlife and enhance water quality in the creeks’.
- Clause 12.03-1L which seeks to ‘protect and enhance Darebin’s major creek systems and creek environs as a waterway and open space corridor’.

The Amendment achieves this by funding improvements to protect the municipality’s important natural assets and facilitate the creation of new open spaces.

Clause 15 (Built Environment)

The objective at Clause 15.01-3S subdivision design is ‘to ensure the designs of subdivision achieves attractive, safe accessible, diverse and sustainable neighbourhoods’. The Amendment supports this clause by providing the funding to create a network of open spaces and by protecting and enhancing native habitat.

Clause 19 (Infrastructure)

The objective at Clause 19.02-6S Open space is ‘to establish, manage and improve a diverse and integrated network of public open space that meets the needs of the community’. The objective at

Clause 19.02-6R Open space – Metropolitan Melbourne is to strengthen the integrated metropolitan open space network’. The Amendment supports this clause by providing for funding to improve and acquire new open spaces that meet the needs of the community.

B:2 Other relevant planning strategies and policies

i) Plan Melbourne

Plan Melbourne 2017-2050 sets out strategic directions to guide Melbourne’s development to 2050, to ensure it becomes more sustainable, productive and liveable as its population approaches 8 million. It is accompanied by a separate implementation plan that is regularly updated and refreshed every five years.

Plan Melbourne is structured around seven Outcomes, which set out the aims of the plan. The Outcomes are supported by Directions and Policies, which outline how the Outcomes will be achieved.

Table 3 Relevant sections of Plan Melbourne

Outcome	Directions
2. Housing choice	2.1 Supply of new housing
4 Distinctive and liveable city	Increased open space
5. Inclusive vibrant neighbourhoods	5.1 20 minute neighbourhoods 5.2 Safe neighbourhoods that support healthy lifestyles 5.4 Deliver local parks and green neighbourhoods
6. Sustainable and resilient city	6.4 Make Melbourne cooler and greener 6.5 protect and restore natural habitats

ii) Breathing Space

Breathing Space is the adopted open space strategy for the City of Darebin. It sets out broad strategic directions for the provision of POS. It is accompanied by *Implementing Breathing Space*, which nominates projects and project areas and includes indicative costings.

B:3 Ministerial Directions

Ministerial Direction No. 9 Metropolitan Planning Strategy

Metropolitan planning strategy, *Plan Melbourne* is discussed in B:2.

Ministerial Direction No. 11 Strategic Assessment of Amendments

The Explanatory Report discusses how the Amendment meets the relevant requirements of Ministerial Direction 11 (Strategic Assessment of Amendments) and *Planning Practice Note 46: Strategic Assessment Guidelines*, August 2018 (PPN46). That discussion is not repeated here.

Ministerial Direction No. 15 The Planning Scheme Amendment process

Council stated that the requirements of Ministerial Direction No. 15 are addressed through complying with the specified planning scheme amendment process and associated timeframes.

The Amendment is consistent with the Ministerial Direction on the form and content of Planning Schemes.