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Part B - Submission by the Planning Authority Moreland City Council

**Planning Scheme Amendment C174
Implementation of the Moreland Heritage Gap Study**



Moreland City Council

TRIM: D18/190542

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1.0 Introduction

1. This submission is made by Moreland City Council (**Council**). Council is the Planning Authority for Amendment C174 (**the Amendment**) to the Moreland Planning Scheme (**Planning Scheme**).
2. My name is Angela Schirripa. I am a Senior Strategic Planner at Moreland City Council (**Council**) and I will be presenting Council's submission to the Panel on Amendment C174.
3. I will be assisted throughout the submission by Kim Giaquinta, Unit Manager of Amendments at Moreland City Council, who has overseen the preparation and management of the Amendment, in her role as my direct supervisor.
4. Expert evidence in relation to the preparation of the Moreland Heritage Gap Study 2019 (**MHGS**) and application of the Heritage Overlay (**HO**) will be presented by David Helms of GHD Context Pty Ltd (**Context**) on day one (Monday) of this hearing.

Structure of submission

5. This submission forms Part B of Council's submission to the Panel. Part A was circulated as directed by the Panel on 29 April 2019 and provides the strategic justification for the Amendment and overview of the Amendment process undertaken.
6. Part B addresses submissions received as a result of the public exhibition of the Amendment and specific matters as directed by the Panel.
7. Council's Part B Submission will be presented in the following format:
 - 7.1 Brief overview of the Amendment.
 - 7.2 Key issues raised in submissions and response.
 - 7.3 Response to evidence tabled.
8. It is not Council's intention to run through the strategic justification and the process that was undertaken for the Amendment except where relevant to a key issue. A detailed assessment is contained within Council's Part A submission.

2.0 Overview

9. The Amendment seeks to implement the recommendations of the *Moreland Heritage Gap Study 2019 (MHGS)* and introduce the Heritage Overlay (**HO**) on a permanent basis to 78 individual sites, four heritage precincts, three serial listings and 10 precinct extensions in Brunswick, Brunswick East, Brunswick West, Coburg, Coburg North, Glenroy, Fawkner, Fitzroy North, Oak Park, Pascoe Vale and Pascoe Vale South.
10. The Amendment as exhibited proposed to:
 - 10.1 Amend the Schedule to Clause 43.01 of the Moreland Planning Scheme to apply the HO to 80 individual places, four heritage precincts, three serial listings and 10 precinct extensions.
 - 10.2 Amend the Schedule to Clause 43.01 of the Moreland Planning Scheme to rename two heritage precincts.
 - 10.3 Amend the Schedule to Clause 43.01 of the Moreland Planning Scheme to delete 39 heritage places.
 - 10.4 Introduce the *'The Moreland Heritage Exemptions Incorporated Plan 2017'* as an Incorporated Document under Clause 72.04 of the Moreland Planning.
 - 10.5 Amend Clause 22.06 (Heritage) of the Moreland Planning Scheme to make reference to *'The Moreland Heritage Gap Study 2017'*, and *'The Moreland Heritage Exemptions Incorporated Plan 2017'*.
 - 10.6 Rectify anomalies to correct minor errors in the Schedule to Clause 43.01 and Clause 22.06 of the Moreland Planning Scheme.
11. On 6 December 2017, Council resolved to write to the Minister for Planning to seek Authorisation to prepare the Amendment, and following receipt of the Minister's Authorisation, proceed to public exhibition in accordance with Section 19 of the *Planning and Environment Act 1987 (the Act)*.
12. On 30 October 2018, the Department of Environment, Land, Water and Planning (**DELWP**) confirmed that Council was granted authorisation to prepare and exhibit Amendment C174 subject to conditions.
13. The Amendment was exhibited from 22 November 2018 to 25 January 2019, in accordance with Section 19 of the Act.

14. A total of thirty-five (35) submissions were received in relation to Amendment C174 during the exhibition period.
15. On 13 March 2019, Council resolved to request the Minister for Planning to appoint a Panel in accordance with Part 8 of the Act to consider submissions.

3.0 Summary of issues raised in submissions

16. In total, thirty-five (35) submissions were received regarding Amendment C174 during the formal exhibition period.
17. Council will first address key issues which were raised across the submissions and are not related specifically to the heritage value of a particular site or precinct. The second part of our response to submissions will respond specifically to issues around heritage value, including a response to submitters to the panel process.

3.1 Key Issues

18. In general, submissions raised concerns specific to a particular site and circumstance, however there were consistent themes which emerged across submissions which can be addressed in broad terms.

Financial Implications and Property Values

19. A number of submissions raised concerns that the application of the HO would result in a decrease of their property values and an increase in insurance and/or maintenance costs.¹
20. Council acknowledges that financial aspects and conditions are of considerable concern to property owners. However, the question is whether they are a valid consideration when identifying heritage places and protecting them through the introduction of the HO.
21. Council submits that the private financial impacts for property owners (such as those raised by submitters) are not relevant economic matters when considering an amendment to the Planning Scheme. Financial implications are more appropriate considerations when seeking an application for a planning permit.
22. This matter has been considered by various Panels previously who have consistently reached the conclusion that the particular private financial circumstances should not be considered at the time of identifying a heritage place but at the planning permit application stage. The comments by the Panel in Amendment C58 to the Ballarat Planning Scheme are instructive in this regard:²

Panels have consistently held that whenever there may be competing objectives relating to heritage and other matters, the time to resolve them is not when the Heritage Overlay is applied but when a decision must be made under the Heritage Overlay or some other planning scheme provision. The only issue of relevance in deciding whether to apply the Heritage Overlay is whether the place has heritage significance.

¹ Submission Nos. 3, 5, 10, 14, 17, 18, 19, 20, 22, 23, 24, 26, 27, 29, 32 and 34.

² Page 51.

23. This approach is also consistent with the views of the Panel in C129 to the Moreland Planning Scheme, where the Panel noted under the heading ‘Property Ownership and Land Values’:³

What is the issue?

The principal issue is the personal financial impact of inclusion of an owner’s property in the Heritage Overlay. For some owners the issue plays out in a number of ways:

- a perception that property value will be diminished;
- a perception that future use or development of the property will be restricted or not be allowed;
- a perception that owners will be obliged to restore their properties to something approaching original condition entailing extra expenditure on repairs, maintenance or other works; and, consequently,
- a perception that controls are not equitable.

...

Discussion

In relation to financial impacts, in its decision on Frankston Amendment C53 (June 2010) the Panel held that:

Panels have repeatedly ruled that such issues are not material to this stage of the planning process – a position supported by Practice Notes and numerous VCAT decisions. This view maintains that it is appropriate for the responsible authority to consider all the objectives of the Planning and Environment Act 1987 - including fair, orderly, economic and sustainable use, and development of the land”(s.4(1)(a)) ... and ... to balance the present and future interests of all Victorians” (s.4(1)(g)). However, the question of personal economic impact or potential constraint on development are seen as matters for the next stage of the planning process i.e. at the time a permit is applied for.

The Frankston C53 Panel also noted that:

This approach has the merit of separating two distinct issues – assessment of the significance of the place; and, the question of its conservation, adaption, alteration or demolition. This conforms to proper heritage conservation practice including the Australia ICOMOS Charter for the Conservation of Places of Cultural Significance (the ‘Burra Charter’), and mirrors the processes of the Victorian Heritage Act 1985.

It reflects the desirability of considering long term matters (if we accept that heritage significance is likely to be somewhat enduring, if not immutable) at one point in time; and shorter term matters (personal desire, financial considerations and economic

³ Pages 10-13.

circumstances) when they are most relevant. The so-called 'two-stage' process also underlines the proposition that heritage assets (unlike some other aspects of planning) are often irreplaceable. It is important that neither the Planning and Environment Act 1987 nor the Frankston Planning Scheme envisage their loss on the basis of personal whim or desire in continually changing economic or financial environments.

In addition, as noted in Moreland C78 and reiterated in this report, the Southern Grampians C6 Panel reasoned:

The Panel takes the view that that there is a two stage planning process in relation to management of heritage places – the objective identification of heritage significance (the current stage); and, second, ongoing management of the place having regard to such matters such as the economics of building retention and repair, reasonable current day use requirements etc. (consideration of permits for development).

24. More recent panels have also endorsed this approach as seen in Amendments C266 and C274 (Part 2) to the Boroondara Planning Scheme. The Panel in Amendment C266 stated:⁴

The Panel recognises the concerns of the submitters but PPN1 and judicial authority cited by Council make it clear that the key issue at the amendment stage is the heritage significance of the property. Private economic issues of a personal or property specific nature are not relevant at this stage. Council may consider those matters when presented with a planning permit application.

[Emphasis added]

25. It is noted that s12(2)(c) of the Act was amended in February 2013 and now states that a planning authority 'must take into account its social effects and economic effects' when preparing a planning scheme amendment.
26. The Panel in Amendment C207 to the Melbourne Planning Scheme, in considering the amendment to s12(2)(c) of the Act, addressed whether the private cost implications for property owners was now a relevant consideration by the Panel.
27. The Panel held that while public costs were a proper consideration in relation to a planning scheme amendment, private economic impacts, such as impact upon land values or the private financial circumstances of the land owner, were not:⁵

The Panel agrees with Mr Morris, relying on Gantidis, that the social and economic effects most likely to be relevant at the Amendment stage are those of a broad

⁴ Page 23.

⁵ Page 24, 27.

community nature rather than of a personal kind. Personal economic and social impacts, as against effects for the community as a whole, are generally not matters taken into account in planning decisions. This is also recognised in the Panel report on Amendment C50 to the Campaspe Planning Scheme at Section 5.10.

...

The Panel recognises that the changes to s.12(2)(c) of the Act in relation to preparing amendments have implications for the manner in which various social and economic matters raised in relation to heritage amendments are to be treated. Where the social and economic effects raised in submissions are of a community nature, they may well be relevant matters. To meet the requirements of the Act, planning authorities and Panels will have to endeavour to consider those matters when preparing an amendment along with other relevant issues.

[Emphasis added]

28. Subsequent panels have agreed with the views of the C207 panel including Amendment C149 to the Moreland Planning Scheme and Amendment C89 to the Glenelg Planning Scheme. The Panel in Amendment C149 to the Moreland Planning Scheme stated:⁶

The Panel agrees with the views of the C207 panel that private financial impacts are not appropriate economic matters to take into account when considering an amendment unless they overlap with or translate into public economic effects of some kind.

The financial matters raised in the present Amendment have generally not been expressed as translating into public effects.

29. In Amendment C89 to the Glenelg Planning Scheme, the Panel concluded:⁷

Section 12(2)(c) of the Planning and Environment Act 1987 requires a planning authority, when preparing an amendment, to take into account its social effects and economic effects. Council addressed this in the Amendment's explanatory report. However, the economic effect is generally considered in relation to the broader community rather than individual circumstances.

30. While Council acknowledges financial impacts may be considered if they overlap with, or translate into public economic effects, it submits the financial matters raised in the submissions are expressed on a site-by-site basis and not at a broader community level.

Development Restrictions

31. Eleven (11) submissions raised concerns that the HO would unfairly restrict redevelopment or renovation opportunities on sites where it is proposed to be applied.⁸

⁶ Page 9.

⁷ Pages 19-20.

⁸ Submission Nos. 9, 10, 16, 17, 18, 20, 22, 23, 24, 29 and 34.

32. Council acknowledges the HO introduces another layer of control for property owners by imposing additional permit triggers and relevant considerations to a future planning permit application.
33. However, Council contends that this is necessary to ensure that those places of identified heritage value are recognised and that any new buildings or alterations or additions to existing buildings do not detrimentally impact on the identified heritage significance of a particular place.
34. Council also submits that any concerns relating to future redevelopment opportunities of heritage properties are immaterial to this stage of the planning process and more appropriately considered at the planning permit application stage.
35. Council's approach to these submissions is consistent with the views of various planning panels. In Amendment C14 to the LaTrobe Planning Scheme, the Panel commented:⁹

Panels have repeatedly ruled that such issues are not material to this stage of the planning process – a position supported by Practice Notes and numerous VCAT decisions. This view maintains that although it is appropriate for the responsible authority to consider all the objectives of the Planning and Environment Act 1987 - including, inter alia, fair, orderly, economic and sustainable use, and development of the land (s.4(1)(a)) ... and ... to balance the present and future interests of all Victorians (s.4(1)(g)) – the question of personal economic impact or potential constraint on development are matters for the next stage of the planning process i.e. at the time a permit is applied for.

This approach has the merit of separating two distinct issues: assessment of the significance of the place, and the question of its conservation, adaptation, alteration or demolition. This conforms with proper heritage conservation practice and mirrors the processes of the Victorian Heritage Act 1985. It reflects the desirability of considering long term matters (if we accept that heritage significance is likely to be somewhat enduring, if not immutable) at one point in time; and, shorter term matters (personal desire, financial considerations and economic circumstances) when they are most relevant.

The Panel observed that in the long life of many heritage properties economic uses can rise and fall – sometimes with no impact on owners, sometimes with substantial impact. In many cases threats to continuing economic viability may be mitigated by permit allowances or use changes. In other cases, personal situations change. In some cases demolition may be an appropriate response. In all these situations it would seem highly desirable for all parties that consideration is: (a) based on clear understanding of significance; and (b) at a time when action is real and current, not conjectural.

⁹ Page 17.

The so-called two-stage process also underlines the proposition that heritage assets (unlike some other aspects of planning) are often irreplaceable and it is important that neither the Planning and Environment Act 1987 nor the Latrobe Planning Scheme envisage their loss on the basis of personal preference or desire in a continually changing economic or financial environment.

[Emphasis Added]

36. More recently, the Panel in Amendment C89 to the Glenelg Planning Scheme reiterated this view, stating:¹⁰

The Heritage Overlay allows permit applications for additions, works and demolition through the planning permit process. Future development will vary depending on factors such as the owner's development aspirations, proposed design, property size, other existence planning policy and provisions, and how the building is positioned. Other planning policy and provisions such as zones and overlays specify circumstances where development needs to be sympathetic to neighbourhood character and respond to neighbouring amenity.

The Panel considers that the Heritage Overlay does not unreasonably restrict future development. Rather, it ensures that heritage matters will be considered as part of a future development. Any impact on future development, whether perceived or real, can be considered at the planning permit stage when details are known.

...

The Panel agrees with Council that any potential restriction on future development is not relevant when assessing whether the heritage place meets sufficient local threshold significance for the Heritage Overlay.

[Emphasis Added]

37. Importantly, the HO does not prohibit the construction of new buildings or alterations to existing buildings nor does it preclude demolition. Council's local heritage policy (at Clause 22.06 of the Scheme) supports demolition of 'non-contributory' places provided there is a replacement building as well as supporting new buildings, alterations and additions provided they do not adversely affect the heritage significance of the existing heritage place.
38. Council is also proposing to introduce an Incorporated Plan into the Moreland Planning Scheme as part of the Amendment which will streamline and allow exemptions from planning permit requirements for heritage properties in regard to buildings and works.

¹⁰ Page 18.

Maintenance and repairs of heritage places

39. Nine (9) submissions raised concerns that the HO would impact on their ability to undertake maintenance and repairs on their properties or that maintenance and repairs would be costly.¹¹
40. Council submits that the heritage overlay does not place a statutory obligation on an owner to upkeep and maintain the heritage building to a particular heritage standard. A planning permit is also not required for works, routine repairs or maintenance that do not change the appearance of the heritage place and use the same materials and specifications.
41. As stated by the Panel in Part 2 to Amendment C74 to the Whitehorse Planning Scheme:¹²

With regard to the need for planning permits to undertake repairs and restoration, we note that the HO does not require permits for routine repairs and maintenance, providing the same materials and design details are used. Amendment C74 Part 2 does not propose to apply external paint controls, other than those included in the HO itself relating to painting of unpainted surfaces or painting that constitutes an advertisement. Internal alteration controls are proposed for only one property (with the owners' consent), and tree controls for two properties.

Furthermore, application of the HO does not require owners to undertake repairs or restoration of their property. Rather, it sets out certain expectations if such repairs or restoration are to be undertaken, ie. that they will use the same materials and details as the existing structure, or else will be subject to permit.

42. The Amendment does not propose any external paint controls, nor does it propose any internal alteration controls. Council's Heritage Policy at Clause 22.06 also makes it clear that external alterations and extensions to heritage-listed places can still occur, providing they do not adversely affect the heritage significance of the place, particularly in relation to the front façade and the view from the public realm.
43. Furthermore, an Incorporated Plan is also proposed to be introduced into the Moreland Planning Scheme as part of this Amendment. The Incorporated Plan will enable owners to make minor changes to their properties without requiring planning permission depending on the heritage grading of their property.

¹¹ Submission Nos. 5, 9, 10, 13, 16, 19, 23, 26, and 27.

¹² Page 25.

Policy Issues

44. Two (2) submissions raised concerns that the application of the heritage overlay on their properties conflicted with current local planning policies and controls.¹³

Submission No. 17 – Conflict of the HO with Schedule 18 to the Design and Development Overlay

45. Submission No. 17 raised the concern that the application of the HO to 233-239 Brunswick Road, Brunswick conflicted with Schedule 18 to the Design and Development Overlay (DDO18) that affects these properties, consequently impacting on their future development potential.
46. DDO18 was introduced into the Moreland Planning Scheme through Amendment C134 and applies to the Brunswick Activity Centre – Sydney Road and Upfield Corridor. The DDO specifically references that heritage streetscapes and buildings are a major contributor to the character and feel of Brunswick.
47. This heritage character forms one of the guiding principles of the Brunswick Structure Plan which contains several objectives in relation to heritage and built form, including Strategy 4.5.28 around the integration of heritage buildings into new developments, where appropriate.¹⁴
48. Furthermore, as noted by the Panel for Amendment C134:¹⁵

The Heritage Overlay informs decision makers what is significant, but not how development should respond to that significance by way of a built form response. This is an obvious role for the DDO, and the case of Sydney Road and Lygon Street where heritage does form part of the character and existing built form, DDO18 and DD019 can appropriately provide guidance.

49. Council's heritage expert also noted during this Panel that DDO18 was generally consistent with Clause 22.06 of the Moreland Planning Scheme, however recommended changes to the mapping for DDO18 to identify individually significant heritage places as well as remove building heights and street wall guidance for these heritage properties.

¹³ Submission Nos. 17 and 33.

¹⁴ *Brunswick Structure Plan Reference Document 2018.*

¹⁵ Page 29.

50. This change was supported by the Panel for Amendment C134. As such, the mapping for DD018 is proposed to be revised as part of Amendment C174 to ensure 233-239 Brunswick Road is consistently shown as other individually significant heritage places affected by DDO18.
51. Furthermore, application of the Heritage Overlay is not a prohibition on development. The intention is to ensure that any new buildings or alterations or additions to existing buildings do not detrimentally impact on the heritage significance of the particular place or features identified as having heritage significance.
52. Any impact on development, whether perceived or real, can be considered at the planning permit stage when further built form details are known.

Submission No. 33 – Conflict of the HO with the Moreland Industrial Land Strategy 2015-2030

53. Submission No. 33 argued that the inclusion of nos. 159-165 Donald Street, Brunswick East in the HO conflicts with the intention of Council to allow the surrounding area to redevelop for urban renewal. The submission argues that the HO will stifle the renewal opportunities that have already been identified.
54. Nos. 159-165 Donald Street, Brunswick East are identified as a 'Category 3: Transition-Residential Area' within the *Moreland Industrial Land Strategy 2015-2030* (MILS). The purpose of MILS is to guide planning decisions about the future use of Moreland's industrial land.
55. The MILS identify 'Category 3' areas as facilitating a transition to quality residential environments which contribute to Moreland's housing supply and sets out a number of applicable zones that could be considered for sites within this category such as the Mixed-Use Zone (MUZ) or a residential zone.
56. It is noted that nos. 159-165 Donald Street are currently being utilised for employment purposes and are included in the Industrial 3 Zone. The application of the HO to these properties will not prohibit development applications consistent with this zone. Future rezoning of the land and subsequent development applications are not a matter for consideration as part of this Amendment.

57. This is a position consistently adopted by previous panels. The Panel in Amendment C99 to the Boroondara Planning Scheme provide a convenient summary of the panel's approach:¹⁶

Panels have generally been consistent in their view that consideration of matters beyond the issue of whether or not an individual site or a precinct has the requisite level of local significance, lie outside the proper scope of the assessment of a proposal to apply a Heritage Overlay.[1] These views have normally been expressed in response to submissions about personal disadvantage to the submitter as a result of the heritage listing such as such as economic consequences for a landowner, costs of repair of a building in poor condition, a desire to demolish and rebuild, and the like.

It is our view, however, that even when the competing issues raised are broader and of a public nature such as urban consolidation, they remain outside the proper scope for consideration in relation to the matter of whether a Heritage Overlay should be applied.

The decision as to whether a planning scheme overlay which signals and regulates particular characteristics of land should apply to any site is not a decision which is normally taken having regard to 'trade-offs' against other competing objectives and controls of a scheme. Places are not excluded from the Environmental Significance Overlay, for example, because the planning authority wishes to see the land developed. The consideration of application of that overlay is based on whether or not the land has significance. Similarly areas are included or not included within flooding overlays purely on the basis of whether flood liability applies. In the same way, when a Heritage Overlay is proposed to be applied to a property or area, the consideration should be whether or not it has local heritage significance.

[Emphasis Added]

58. This was a view also adopted by the Panel in Planning Scheme Amendment C150 to the Boroondara Planning Scheme, where the Panel considered the potential conflict of the HO with housing diversity objectives. The Panel stated:¹⁷

The need to balance apparently competing objectives is not uncommon in planning. It is seldom required that one objective must be abandoned to allow another to be achieved. There are many instances where, through careful design and a flexible approach, satisfactory compromises can be reached that respect all objectives. In particular, the redevelopment of non-contributory sites within heritage precincts can provide an opportunity for sensitively designed new housing that increases the diversity of existing stock.

The Panel is satisfied that the proposed provisions would not prevent new housing being developed in the precincts that would both contribute to housing diversity policies and the heritage values of the area. Applying the Heritage Overlay decision guidelines and the Clause 22 policy would enable all relevant objectives to be considered when determining the most appropriate outcome for planning applications.

¹⁶ Pages 13-15.

¹⁷ Pages 9-11.

While we have commented on this issue in the context of the amendment - given that the Council and submitters both addressed it, it should be noted that Panels have consistently held that where competing planning objectives are involved, the time to resolve them is not when the Heritage Overlay is applied but when a decision must be made on a planning permit application. The Panel's view is that the issue of relevance in deciding whether to apply the Heritage Overlay is whether the place has heritage significance.

59. The Schedule to Clause 43.01 also proposes to include that prohibited uses may be sought. Clause 22.06 of the Moreland Planning Scheme enables consideration of prohibited uses and the adaptive re-use of heritage buildings.
60. Adaptive re-use of heritage buildings is also supported by Policy 4.4.3 of Plan Melbourne which states 'Regeneration of heritage assets through adaptive reuse can deliver unique and exciting places that can be used well into the future. Rehabilitating old buildings and places also creates opportunities for new investment and jobs'.

Infringement on Property Rights

61. Five (5) submissions raised concerns that the HO would be an unreasonable infringement on their rights as property owners.¹⁸ Submitters were concerned with losing control over what happens to their properties or being told what they could/could not do with them.
62. The planning system is a long-established part of government regulation of land use and development in Victoria. The submitters land is already subject to planning controls under the Moreland Planning Scheme, such as zone and overlay controls that require permission for certain uses and development of land.
63. Council submits that the application of the HO is an accepted practice in Victoria regarding the regulation of land use and development under statutory planning schemes.
64. This is a view supported by previous Panels, including the Panel in Planning Scheme Amendment C50 to the Campaspe Planning Scheme who commented:¹⁹

The Panel would comment that the Heritage Overlay (including its earlier incarnations) is an accepted planning tool in the statutory planning system. Planning schemes in turn are a long-established component of the package of legislation in the State which regulates how people use land. That package also includes health and building regulations, traffic and parking rules. Planning schemes seek to regulate land use and development in the interests of broad social, economic and environmental objectives set in part at State and

¹⁸ Submission Nos. 5, 13, 16, 26 and 27.

¹⁹ Page 71.

in part at local government level. Individual landowners are both subjected to planning restrictions on the use and development of their land in the furtherance of those objectives and at the same time benefit by restrictions on the use and development of land by others.

65. The proposed application of the HO on these properties does not prohibit future development. Council is also proposing to introduce an Incorporated Plan that will exempt minor works from requiring a planning permit.

Public Exhibition and Consultation

66. Two (2) submissions raised concerns with the public consultation process for the Amendment, namely that it occurred over the Christmas/New Year period.²⁰ The exhibition process was previously detailed in the Part A Submission.
67. The exhibition process and period of notification for all planning scheme amendments is strictly defined by the requirements of the Act. The Act does not specify the times of the calendar year that notification should or should not occur, similarly considerations for public holidays are also not addressed by the Act.
68. Council considers that a fair, proper and adequate consultation process was undertaken. Exhibition of the Amendment commenced on Thursday, 22 November 2018 and closed on Friday, 25 January 2019. This is an additional five weeks of exhibition as required by the Act to take into account the holiday season.
69. Notification letters were accompanied by a two-page, colour information factsheet outlining the amendment and responding to frequently asked questions relating to the application of the HO. An additional brochure was also included on Council's website, libraries and citizens service centres that provided further information on the Amendment and the HO. This information is above the standard requirements stipulated in the Act and is considered to have provided valuable assistance to the community to understand the proposed planning scheme amendment.
70. Furthermore, all owners and occupiers of properties proposed to be included in the HO were directly notified and invited to attend one-on-one consultation sessions held in early December 2018. Each consultation session ran for 30 minutes and offered an opportunity to discuss the Amendment and what it would mean for their property, as well as find out more about the planning scheme amendment process.

²⁰ Submission Nos. 14 and 30.

71. Council believes that it has made every effort to inform affected property owners of the amendment and provide them with the opportunity to participate in the democratic, statutory process to challenge the proposal.

3.2 Heritage Specific Issues

72. This section of Council's submission deals with the heritage specific issues raised in submissions, namely issues of local significance threshold and building condition and intactness.
73. Each submission was referred to Context for their expert review and comment. In considering the submissions Context undertook further site inspections and research as required.
74. This review informed the response by the Council Officer to all submissions set out in the 13 March 2019 Council report. A copy of this Council report has already been provided to the Panel.
75. A general response to these issues is provided below. The expert heritage evidence prepared by Council's expert witness, Mr David Helms of Context, will provide a specific response to the submissions where the submitter has requested to be heard at the panel hearing.

Level of Heritage Significance

76. Fifteen (15) submissions raised concerns that their properties did not meet the thresholds of local significance to warrant heritage protection or that there were already better comparative examples within the HO.²¹
77. Council's heritage consultants followed the approach to applying the HO set out in *Planning Practice Note 1: Applying the Heritage Overlay*, Victorian Planning Provisions (Practice Note) to identify the significance of the places included in the Amendment. To satisfy the requirements of the Practice Note, Council's heritage experts have:
- 77.1 Used the recognised HERCON criteria to assess the heritage value of places and precincts;
- 77.2 Prepared detailed comparative analyses to substantiate the significance of places and precincts; and

²¹ Submission Nos. 1, 7, 12, 13, 14, 15, 17, 19, 23, 25, 27, 28, 29, 32, 33.

- 77.3 Prepared statements of significance using the three-part format of ‘What is Significant’, ‘How is it Significant?’ and ‘Why is it Significant?’
78. Submissions raising concerns about the level of significance of a place were further considered by Council’s heritage experts in responding to submissions. This resulted in the following recommendations (which Council resolved to adopt at their 13 March 2019 meeting) to:
- 78.1 Remove 2 McLean Street, Brunswick West from the Amendment.
 - 78.2 Remove 32 Passfield Street, Brunswick West from the Amendment.
 - 78.3 Change the heritage grading of 18 Lowan Street, Brunswick East to ‘non-contributory’.
 - 78.4 Change the heritage grading of 281 Glenlyon Road, Brunswick East to ‘non-contributory’.
79. Council submits the remainder of all proposed places are of heritage significance and application of the HO is warranted.

Building Condition and Intactness of a Heritage Place

80. Seventeen (17) submissions raised concerns about substantial alterations to their houses and/or condition of the property and that the alterations/condition meant the application of HO was not appropriate.²²
81. Whilst structural integrity or condition and intactness of a heritage place are important considerations, these are quite separate concepts and need to be considered at different stages.
82. This is a view that has been adopted by previous Planning Panels, including the Panel to Amendment C129 to the Moreland Planning Scheme, where the Panel stated:²³

A number of submissions (addressed throughout section 6) raised the poor condition of their property and questioned the reasons for Heritage listing. The Panel and Council acknowledge that financial aspects and conditions are of considerable concern to property owners. However, the question is whether they are a valid consideration when identifying heritage places and protecting them through the introduction of the HO. The Panel agrees with Council in that:

²² Submission Nos. 2, 4, 5, 8, 9, 10, 11, 13, 15, 18, 20, 21, 23, 23, 24, 28, 33.

²³ Page 13.

Structural integrity and intactness of heritage places are important considerations in heritage places but are quite separate concepts and need to be considered at different stages.

[Emphasis added]

Intactness

83. The intactness of a heritage place is a key consideration when assessing the heritage value of a particular place and grading a building. The central question in this regard is whether alterations to a place have significantly compromised the heritage value.
84. Most of the properties subject to Amendment C174 were constructed in the late nineteenth/early twentieth centuries. It is reasonable to expect that these properties would have undergone some change since construction to accommodate changing living requirements. The key issue is whether the changes have compromised the identified heritage significance of the place.
85. Based on the assessment of an experienced heritage expert, Council submits that the properties proposed for inclusion in the HO are sufficiently intact and are of sufficient local heritage significance to warrant inclusion in the HO.
86. Council acknowledges that while in many instances places have been altered, those changes to the fabric are considered to be superficial and largely inconsequential to the heritage value. Often these non-sympathetic alterations to the fabric may even be reversible and if removed or replaced with sympathetic features, the visual appearance and heritage value would be enhanced (e.g. cladding, verandahs, window frames etc.).
87. It should also be noted that intactness becomes less critical if a particular place has historical rather than aesthetic/architectural significance. This view is confirmed by the Heritage Overlay Advisory Committee when they stated:²⁴

Managing places with social or historic values that have little or no heritage fabric poses a particular problem for the planning system. As we have earlier commented, planning is about management of the environment and changes to it, and an appropriate 'threshold' that a heritage place should be required to pass is that it has something to be managed. This 'something' is usually tangible fabric but it may, for example, be a significant absence of built form, special spatial characteristic or a pattern of ownership. If such things are present, then however ephemeral they are, there will be something to manage. If not, a commemorative plaque is the appropriate way of signifying the importance of the place to the local community.

[Emphasis Added]

²⁴ *Review of Heritage Provisions in Planning Schemes*, Advisory Committee Report, August 2007, 2-89 - 2-90.

Structural integrity or condition

88. The issue of structural integrity is one that is irrelevant to determining whether a place has heritage significance. It is a matter for heritage management and not identification and therefore needs to be considered at the planning permit stage.

89. The Advisory Committee on the *Review of the Heritage Overlay Provisions in Planning Schemes* made the following remarks about this issue:²⁵

"[...] structural integrity or condition should not be a criterion in assessing heritage significance. It would be contrary to the fundamental principle in the Burra Charter that ...the consideration of significance should not be coloured by consideration of the management consequences of listing. There are also good policy reasons why condition should not affect the assessment of criteria: if it were to be a factor, it would encourage owners of heritage properties who were opposed to listing to allow them to fall into disrepair."

90. The relevance of building condition in relation to the proposed application of the HO was also discussed by the Panel in Amendment C207 to the Melbourne Planning Scheme. The Panel, in citing previous Panel decisions including Amendment C99 to the Boroondara Planning Scheme and Amendment C140 to the Whitehorse Planning Scheme, commented:²⁶

In all we were not persuaded by the arguments presented on this issue that the nature of the decision-making framework, including the limitations applying to decisions on permits, is such that condition should normally be taken into account at the listing stage.

Having said this we do acknowledge that condition may sometimes be relevant in extreme cases of dilapidation where demolition is an inevitable outcome. In such circumstances, the case for demolition would have to be irrefutable and the community-wide costs and benefits of the demolition versus conservation outcomes would have to be clearly identified.

As Mr O'Farrell submitted:

It is conceivable that there could be an amendment that presents sufficient negative environmental, social and economic effects that a Panel might find that the amendment results in a net detriment to the community.

He suggested that it might be found that it would be a waste of community resources to go to the permit stage to consider the whether demolition should be allowed. He nevertheless said that there would have to be a very high certainty threshold to be passed to make the decision at the amendment stage. We agree that the case for demolition would have to be unassailable.

We also consider that it is possible that condition may become relevant in the circumstances where the necessary renovations of a building, which is being considered for listing/retention, are so extensive that the original fabric of the building is in large measure lost and the form and nature of the heritage place would no longer be

²⁵ Pages 2-46.

²⁶ Pages 26-27.

able to be appreciated. In that way, the significance of the place would be degraded. Again we would expect that the certainty threshold would be a very high one.

[Emphasis added]

91. In Amendment C274 (Part 2) to the Boroondara Planning Scheme, the Panel stated:²⁷

The structural integrity of a building is a matter that is relevant to whether it can or should be retained. In the Panel's view this assessment should be undertaken by a suitably qualified professional and appropriately undertaken as part of the detailed assessment of a planning permit application.

92. Council submits that the external alterations and building condition raised by submitters are not extensive or of such an extreme case of dilapidation to detract from the heritage significance or integrity of that place.

93. As such Council considers the application of the HO in each of these instances is still warranted, subject to the following recommendations of Council's expert witnesses (which Council resolved to adopt at their meeting 13 March 2019) to:

93.1 Remove 36 King Street, Fitzroy from the Amendment.

93.2 Reduce the extent of the HO for 273 Victoria Street, Brunswick.

Specific Heritage Issues to be addressed in Expert Witness Statement

94. The next part of Council's submission will be provided by Mr Helms as part of his expert evidence. From the outset Council adopts the evidence of Mr Helms.

95. Mr Helm's expert witness statement addresses the study methodology used for the MHGS and the background to the study. The statement also sets out Mr Helm's response for each submission where the submitter is appearing at the panel hearing. The response provides:

95.1 A summary of the significance of the place.

95.2 A response to the heritage issues raised by submissions, including the evidence provided by Bryce Raworth for 63 David Street, Brunswick.

95.3 Conclusions and recommendations for changes to Amendment C174, or the place or precinct citation, where relevant.

96. In addition, Mr Helm's statement of evidence provides a response to the submissions where the submitter is not appearing at the Panel Hearing.

²⁷ Page 86.

4.0 FINAL POSITION ON THE AMENDMENT

97. Amendment C174 seeks to implement the recommendations from the MHGS prepared for Council by expert heritage consultants Context.
98. Implementation of the recommendation of this study is part of Council's ongoing commitment to identify and protect the municipality's heritage fabric for current and future generations.
99. It further fulfils Council's statutory obligations as a responsible authority to implement the objectives of the Planning and Environment Act 1987, and to implement the objectives, strategies and policies in the Planning Policy Framework, Plan Melbourne, the Municipal Strategic Statement and local policy as well as relevant guidelines and practice notes.
100. In Council's view, the MHGS provides a comprehensive and robust analysis of the identified heritage significance of buildings and precincts within the municipality. In undertaking that exercise, a rigorous assessment of the identified heritage elements of each place has been very carefully documented.
101. Council appreciates the submissions that contest the heritage significance of the places recommended to be included in the HO. These submissions have assisted Council and its heritage consultants in providing a further assessment of the various sites and more rigorously applying the criteria of heritage significance.
102. In a number of cases it has resulted in the review of citations which further support and highlight the heritage value of the various buildings, the removal of some properties from the Amendment or a change in the heritage grading of others. It is noted that in most of the cases where there has been a submission contesting the HO, it is Mr Helm's professional expert opinion, supported by Council that the heritage place should still be included in the HO.
103. It is respectfully submitted that the Panel recommend approval of Amendment C174 with changes as supported by Council proposed in this submission.