

26 October 2021

Submission on behalf of the Planning Authority

Amendment C337boro to the Boroondara Planning Scheme

Council's submission: Part A

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Introduction

1. This submission is made on behalf of Boroondara City Council (**Council**).
2. Council is the Planning Authority for Amendment C337boro to the Boroondara Planning Scheme (**Scheme**). Council has prepared and is the proponent of this Amendment. As exhibited, Amendment C337boro proposes to implement the recommendations of the *City of Boroondara Municipal Wide Heritage Gap Study (Volume 8: Ashburton)* (**Study**) prepared by Context Pty Ltd by applying the Heritage Overlay to 9 individual heritage places and one heritage precinct.
3. Submissions have been received for 1 Keyes Street, Ashburton and the Home Farm Estate and Environs Precinct and are noted at **Attachment 1**.
4. Council pursues Amendment C337boro as altered in response to submissions. The changes made to the Amendment as a result of submissions are shown in **Attachment 2**.
5. There are no substantive changes to the Amendment. A minor point of clarification is provided in the Statement of Significance for 1 Keyes Street, Ashburton stating the additions and alterations made after 1953 are not significant.

Panel directions

6. This submission responds to direction 2 of the Panel Directions issued on 5 October 2021 (**Panel Directions**) directing Council to circulate its 'Part A' submission by 12noon on Tuesday, 26 October 2021, and specifies the items to be included in its submission.
7. Accordingly, this 'Part A' submission includes the following items in accordance with the Panel Directions:
 - 7.1 Background to the Amendment including chronology of events;
 - 7.2 Strategic context and assessment;
 - 7.3 Issues identified in submissions; and
 - 7.4 Suggested changes to the Amendment in response to submissions.
8. In addition to this Part A submission, Council will, at the hearing:
 - 8.1 Present a Part B submission which will address the key issues raised in submissions, Council's response to the matters raised in evidence, and its final position on the Amendment; and
 - 8.2 Call evidence from Natica Schmeder of Landmark Heritage Pty Ltd (Gap Study methodology and Home Farm Estate and Environs Precinct) and Mark Stephenson of Trethowan Architecture (1 Keyes Street, Ashburton).

Background to Amendment

Heritage study and preliminary consultation

9. At its ordinary meeting on 25 July 2016, Council resolved to engage heritage consultancy firm Context Pty Ltd to prepare the *Municipal-Wide Heritage Gap Study* for the City of Boroondara.

10. The study sought to implement a priority action graded as 'High' in the *Heritage Action Plan 2016* (adopted by Council 2 May 2016) by identifying and protecting valued heritage properties and precincts through application of the Heritage Overlay.
11. Ashburton was the eighth suburb assessment as part of the *Municipal Wide Heritage Gap Study* and the *Ashburton Heritage Gap Study* (the subject of Amendment C337boro) was undertaken during 2019/20.
12. The *Draft Ashburton Heritage Gap Study (Draft Study)* recommended the application of the Heritage Overlay to 9 individual places and two heritage precincts on a permanent basis (including a mix of 'significant', 'contributory' and 'non-contributory' places).
13. The significance of the individual properties and precincts was assessed against the criteria set out in *Planning Practice Note 1: Applying the Heritage Overlay* (January 2018) (**PPN1**) and was considered to meet the requirements and threshold for local protection through the Heritage Overlay.
14. Preliminary consultation on the Draft Study was undertaken from 11 November to 9 December 2019 and took the following form:
 - 14.1 letters to all property owners and occupiers in Ashburton, including all affected properties, community groups and historical societies inviting feedback on the Draft Study and its recommendations;
 - 14.2 documentation was publicly available at Council's Camberwell office; and
 - 14.3 a study website with the Draft Study available for electronic download.
15. In response to the preliminary consultation, Council received feedback from 56 parties.
16. Council's heritage consultants and officers considered the feedback and recommended a number of changes to the Draft Study. These were presented at the Urban Planning Delegated Committee (**UPDC**) meeting on 6 July 2020.
17. At that meeting the UPDC resolved to:
 - 17.1 Receive and note the feedback received and outcomes of the preliminary consultation process undertaken on the Ashburton Heritage Gap Study.
 - 17.2 Endorse the officers' response to the preliminary feedback received and recommended changes to the Ashburton Heritage Gap Study outlined in Attachment 1, except for the recommendation related to High Street Commercial Precinct.
 - 17.3 Adopt the revised Ashburton Heritage Gap Study contained in Attachment 3 (as annexed to the Minutes) except for the recommendation to include the High Street Commercial Precinct in the Heritage Overlay and the citation.
 - 17.4 Defer consideration of the recommendation to include the High Street Commercial Precinct in the Heritage Overlay, and commission an independent peer review of the recommendation by a suitably qualified heritage consultant.
 - 17.5 Write to the Minister for Planning to request authorisation to prepare an amendment to the Boroondara Planning Scheme in accordance with Section 4B and 8A(4) of the *Planning and Environment Act 1987* to include properties identified in the Ashburton Heritage Gap Study in Attachment 3 (as annexed to the Minutes) in the Heritage Overlay.

- 17.6 Following receipt of authorisation from the Minister for Planning, exhibit the amendment in accordance with Section 19 of the *Planning and Environment Act 1987*.
- 17.7 Write to the Minister for Planning to request he prepare, adopt and approve an amendment to the Boroondara Planning Scheme under Section 20(4) of the *Planning and Environment Act 1987* to introduce interim heritage controls to properties recommended for inclusion in the Heritage Overlay in the Ashburton Heritage Gap Study in Attachment 3 (as annexed to the Minutes).
- 17.8 Notwithstanding resolution 5, provide delegated authority to officers to modify the amendment to downgrade properties to 'non-contributory' or remove properties from the precinct based on advice from Council's heritage consultant which have been legally demolished prior to exhibition of the amendment.
- 17.9 Provide authorisation to the Director City Planning to undertake administrative changes to the amendment that do not change the intent of the amendment or any changes required under the Minister for Planning's Authorisation prior to the commencement of exhibition.

Exhibited Amendment

- 18. On 16 July 2020, Council wrote to the Minister and sought authorisation to prepare and exhibit the Amendment.
- 19. By letter dated 27 October 2020, a delegate of the Minister authorised Council to prepare the Amendment subject to the following condition:
 - 55 Albion St, Ashburton must be removed from the Home Farm Estate and Environs Precinct and the amendment. This is because of its non-contributory grading combined with its location on the periphery of the precinct and its relationship to other contributory sites.
- 20. The Amendment was formally exhibited under section 19 of the Act from 6 May to 7 June 2021. Notice of the Amendment was:
 - 20.1 made available, including all exhibited documents on Council's website and on the Department of Environment, Land, Water and Planning (**Department**) website;
 - 20.2 sent to all affected and adjoining property owners and occupiers;
 - 20.3 sent to all parties who submitted feedback during the preliminary consultation period (including a note that the feedback previously submitted would not formally be considered as a submission to the Amendment);
 - 20.4 sent to key stakeholders, including local community groups, historical societies and traders associations and groups;
 - 20.5 sent to prescribed Ministers and public authorities; and
 - 20.6 published in The Age on 5 May 2021 and in the Victorian Government Gazette on 6 May 2021.
- 21. The Amendment documentation as exhibited comprised the following documents:
 - 21.1 the Explanatory Report;
 - 21.2 the Notice of Preparation of an Amendment;

- 21.3 the Instruction Sheet;
- 21.4 proposed clauses and schedules:
- Schedule to the Heritage Overlay (Clause 43.01);
 - Schedule to Clause 72.04 Documents Incorporated in the Planning Scheme, including the Statement of Significance for the proposed Heritage Overlays as exhibited Incorporated Documents; and
 - Schedule to Clause 72.08 Background Documents, including the *Ashburton Heritage Gap Study* as a Background Document;
- 21.5 revised maps to reflect the ordinance (16HO, 17HO, 18HO, 19HO).

Amendment C338boro – Interim heritage controls

22. On 16 July 2020, Council officers lodged a request to apply interim heritage controls to all affected properties in Amendment C337boro.
23. Amendment C338boro which applied interim heritage controls was approved on 19 January 2021, with the controls gazetted on 29 January 2021. The Minister (under delegation) made the following two changes.
- 23.1 the interim Heritage Overlay was not applied to 4 Dunlop Street as Council had previously granted full demolition consent and a permit for the construction of a new dwelling and garage;
- 23.2 the precinct boundary of the Home Farm Estate and Environs Precinct was adjusted to remove 55 Albion Road, Ashburton as the property was removed from Amendment C337boro as a condition of authorisation.

Submissions

24. Council received 14 submissions in response to the exhibition of the Amendment. Of the 14 submissions received:
- 24.1 6 submissions supported the Amendment;
- 24.2 2 submissions partially supported the Amendment; and
- 24.3 6 submissions objected to the Amendment

Consideration of submissions and request to the Minister

25. Council's officers and Council's heritage consultants considered the submissions and did not recommend any substantive changes to the Study or the Amendment.
26. Council's heritage consultants and officers did, however, recommend a minor text change to the Study and the Amendment in relation to 1 Keyes Street, Ashburton. This change is shown as tracked changes in Attachment 2 to the UPDC report of 6 September 2021.
27. On 6 September 2021 Council's UPDC resolved to (amongst other things):
- 27.1 Receive and note the submissions to Amendment C337boro (Attachment 1) to the Boroondara Planning Scheme and the Ashburton Heritage Gap Study in accordance with Section 22 of the *Planning and Environment Act 1987*.

- 27.2 Endorse the officers' response to submissions and recommended changes to Amendment C337boro and the Ashburton Heritage Gap Study as shown at Attachment 2.
- 27.3 Request that the Minister for Planning appoint a Planning Panel under Section 153 of the *Planning and Environment Act 1987* to consider unresolved submissions to Amendment C337boro.
- 27.4 Refer the amendment and submissions to a Planning Panel in accordance with Section 23(1) of the *Planning and Environment Act 1987*.
- 27.5 Authorise the Director Urban Living to undertake administrative changes to Amendment C337boro that do not change the intent of the amendment prior to a Panel Hearing.
28. The summary of all submissions and the corresponding Council officers' response (as endorsed by Council), as well as the tracked change version of the revised Study have been provided to the Panel (see Attachments 1 and 2 to the Council UPDC Agenda report).

Chronology of Events

29. A chronology of events is set out below.

Date	Event
25 July 2016	Council resolved to engage Context Pty Ltd to prepare the <i>Municipal Wide Heritage Gap Study</i> for the City of Boroondara
11 November 2019 to 9 December 2019	Preliminary consultation period for <i>Draft Ashburton Heritage Gap Study</i>
6 July 2020	<p>Council's UPDC resolved to (amongst other things):</p> <ul style="list-style-type: none"> Endorse the officers' response to the preliminary feedback received and recommended changes to the Ashburton Heritage Gap Study outlined in Attachment 1, except for the recommendation related to High Street Commercial Precinct. Adopt the revised Ashburton Heritage Gap Study contained in Attachment 3 (as annexed to the Minutes) except for the recommendation to include the High Street Commercial Precinct in the Heritage Overlay and the citation. Write to the Minister for Planning to request authorisation to prepare an amendment to the Boroondara Planning Scheme in accordance with Section 4B and 8A(4) of the <i>Planning and Environment Act 1987</i> to include properties identified in the Ashburton Heritage Gap Study (as annexed to the Minutes) in the Heritage Overlay. Following receipt of authorisation from the Minister for Planning, exhibit the amendment in accordance with section 19 of the Act. Write to, and request the Minister prepare, adopt and approve an amendment to the Scheme under s 20(4) of the Act to introduce interim heritage controls to the properties recommended for inclusion in the Heritage Overlay in the revised Ashburton Heritage Gap Study.

Date	Event
16 July 2020	Council wrote to the Minister and sought authorisation to prepare Amendment C337boro
16 July 2020	Council requested the Minister prepare, adopt and approve Amendment C338boro to introduce interim heritage controls to the properties recommended for inclusion in the Heritage Overlay in the revised <i>Ashburton Heritage Gap Study</i>
27 October 2020	Minister authorised Council to prepare Amendment C337boro
29 January 2021	Minister gazetted Amendment C338boro which applied interim heritage controls to affected properties in Amendment C337boro.
6 May to 7 June 2021	Amendment C337boro formally exhibited
6 September 2021	<p>Council's UPDC resolved to:</p> <ul style="list-style-type: none"> ▪ receive and note the submissions received in accordance with s 22 of the Act; ▪ endorse the Council officers' response to submissions and recommended changes to the Amendment and the <i>Ashburton Heritage Gap Study</i> (as exhibited); and ▪ request the Minister appoint an independent Planning Panel under s 23 of the Act to consider the unresolved submissions received in response to the Amendment.
4 October 2021	Directions Hearing
5 October 2021	Directions issued by the Panel.

Strategic context and assessment

30. The strategic context and assessment of the Amendment is set out in the Explanatory Report exhibited with the Amendment and provided to the Panel. This section provides an overview of the strategic basis of Amendment C337boro.
31. Amendment C337boro is consistent with State and Local policy.
32. Section 4 of the Act sets out the objectives of planning in Victoria. Relevant to this Amendment is:
 - (1)(d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
33. The Amendment will meet this objective by ensuring the heritage significance of the properties it applies the HO to will be considered in future development proposals. The HO is the appropriate planning mechanism to protect the heritage values of the precincts and individual properties as a permit will be required for building and works, including demolition that could affect the significance of the precincts and individual properties.

Plan Melbourne

34. The Amendment also supports the outcomes and directions sought by *Plan Melbourne* 2017-2050. Direction 4.4 'Respect Melbourne's heritage as we build for the future' notes that:

Heritage will continue to be one of Melbourne's competitive strengths, contributing to its distinctiveness and liveability and attracting visitors, new residents and investors. Heritage is an important component of Victoria's tourism industry and benefits the economy.

35. Policy 4.4.1 'Recognise the value of heritage when managing growth and change', notes that:

There will need to be continuous identification and review of currently unprotected heritage sites and targeted assessments of heritage sites in areas identified as likely to be subject to substantial change.

Planning Policy Framework

36. The strategic justification for the Amendment is grounded in the Planning Policy Framework.

37. The Amendment implements the objectives and strategies of Clause 15.03 Heritage by including properties that contribute to the heritage significance of Boroondara.

38. Clause 15.03-1S Heritage conservation of the Scheme seeks as its main objective:

To ensure the conservation of places of heritage significance.

39. Clause 15.03-1S (Heritage conservation) seeks to ensure the conservation of places of heritage significance through the following strategies:

- Identify, assess and document places of natural and cultural heritage significance as a basis for their inclusion in the planning scheme.
- Provide for the conservation and enhancement of those places which are of, aesthetic, archaeological, architectural, cultural, scientific, or social significance, or otherwise of special cultural value

Local Planning Policy Framework

40. The Municipal Strategic Statement (**MSS**) further acknowledges the importance of heritage protection as a significant contributor to preserving Boroondara's character.

41. The Amendment is consistent with and implements Clauses 21.04-5 (Built Environment and Heritage) and Clause 22.03-2 (Heritage Policy), which seek to:

identify and protect all individual places, objects and precincts of cultural heritage, aboriginal, townscape and landscape significance

...

preserve 'significant' heritage places, protecting all significant heritage fabric including elements that cannot be seen from the public realm'.

42. The Amendment implements the objectives and strategies of both Boroondara's MSS and Local Planning Policy Framework.

Council Plan 2017-2021

43. The Amendment is consistent with the City of Boroondara *Council Plan 2017-2021* strategic objective under Theme 4 - Neighbourhood Character and Heritage to:

'Protect the heritage and respect the character of the City to maintain amenity and liveability whilst recognising the need for appropriate, well-designed development for future generations'.

44. Specifically, it assists in implementing Council's commitment to:

'Preserve the City's history and protect heritage properties and precincts by undertaking a municipal wide heritage review and introduce heritage overlays in the Boroondara Planning Scheme' (Strategy 4.3).

45. The Amendment will further assist Council in fulfilling its major initiative commitment to:

'protect the City's heritage by continuing a municipal wide heritage assessment of all areas not currently subject to a heritage overlay in the Boroondara Planning Scheme'.

Minister's Directions

46. The Amendment complies with the requirements of the following Minister's Directions:

- 46.1 the Ministerial Direction on the Form and Content of Planning Schemes;
- 46.2 Ministerial Direction 9 on the Metropolitan Planning Strategy;
- 46.3 Ministerial Direction 11 on the Strategic Assessment of Planning Scheme Amendments; and
- 46.4 Ministerial Direction 15 the Planning Scheme Amendment Process.

Planning Practice Note 1: Applying the Heritage Overlay

47. Finally, the Amendment is consistent with Planning Practice Note 1: *Applying the Heritage Overlay* (PPN1). PPN1 provides guidance about the application of the Heritage Overlay.

48. The Amendment and the citations meet the requirements of PPN1, in that:

- 48.1 the recognised criterion has been adopted in the assessment of the heritage values of each place;
- 48.2 detailed comparative analysis has been undertaken to substantiate the significance of the places;
- 48.3 for each of the heritage places, a statement of significance has been prepared using the three-part format of 'What is significant?'; 'How is it significant?' and 'Why is it significant?'

Identification of the issues raised in submissions and Council's response

49. The common issues raised in submissions are summarised as follows:

49.1 Property values and financial implications¹;

49.2 Future development opportunities²;

49.3 Poor structural integrity of buildings³.

50. The site-specific issues raised in submissions are:

50.1 Individual property/precinct level of significance/threshold issues⁴;

51. Council's response to the submissions has been provided to the Panel.

Property values and financial implications

52. A number of submitters raised concerns about the potential impact of the heritage controls on property values and the maintenance costs of individual properties.

53. Council submits the private financial impacts for property owners (such as those raised by submitters) are not relevant matters to take into account in the assessment of appropriate heritage controls. PPN01 identifies the criteria for assessing the heritage significance of a heritage place and refers only to matters of a heritage nature.

54. While Council acknowledges financial impacts may be considered if they overlap with, or translate into public economic effects, it is evident that the financial matters raised in the submissions are expressed on a site-by-site basis (that is to say how the Heritage Overlay affects the submitter personally) and not at a broader community level.

55. Council's approach to these submissions is consistent with the views of various planning panels and judicial authority set out below.

56. In Amendments C91, C101 and C103 to the Stonnington Planning Scheme, the Panel specifically considered the potential impacts of a Heritage Overlay on property values. Under the heading 'Economic and Personal Factors', the Panel stated:

A number of submissions – written and at hearing – dealt with perceptions that the Heritage Overlay process would:

- reduce the value of the property; and/or
- Impede owners' freedom to repair, renovate or replace the building.

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. It is not the purpose of this comment to re-confirm the (very appropriate) rationale for this position.

[emphasis added]

¹ Submission Nos. 8 and 11.

² Submission Nos. 5 and 11.

³ Submissions No. 5.

⁴ Submission Nos. 2-5, 7, 8, 11-14 (including supporting submissions)

57. This approach is also consistent with the views of the Panel in Amendment C129 to the Moreland Planning Scheme. To this end, the Panel observed under the heading 'Property Ownership and Land Values':⁵

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 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.

⁵ Pages 10-13.

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).

58. The Panel concluded in Amendment C129 that while it is appropriate for a planning panel to consider the 'fair, orderly, economic and sustainable use, and development of land' in accordance with the objective set out under s 4(1)(a) of the Act, 'personal' financial circumstances (amongst others) are not the type of economic matters envisaged by this objective:

This Moreland C129 Panel takes the view that it is appropriate for the planning authority to consider all the objectives of the *Planning and Environment Act 1987* and, accordingly, it is quite appropriate to consider fair, orderly, economic and sustainable use, and development of the land and to balance the present and future interests of all Victorians; and it is open to the Panel to similarly balance these matters with heritage considerations, based on the evidence submitted to it.

This Panel, however, adopts the position that personal financial (and other) circumstances are not the *economic* matters envisaged in s.4(1)(a) - which the Panel takes to refer to the economy in its usual broad community sense. By way of example, the Panel may consider conflict with policies regarding the location of a new airport as a relevant matter. Again, for the Amendment to meet the other tests of *fair ... orderly ... sustainable use ... and development of the land*, the Act requires the Panel to satisfy itself that the Amendment has been:

Developed, documented and exhibited in accordance with the Act – rigorously, transparently and with equal access to process; and

That there is no evidence submitted that establishes that there is no sustainable use for the property.

59. Since the release of the Panel's report on Amendment C129, s 12(2)(c) of the Act has been amended and now states that a planning authority, in preparing a planning scheme amendment, 'must take into account its social effects and economic effects'.
60. In Amendment C207 to the Melbourne Planning Scheme a question arose as to whether the private cost implications for property owners was a relevant consideration by a panel or planning authority in the context of considering the 'economic effects' of an amendment.
61. The panel distinguished private costs of this kind from public costs and benefits. Public costs were identified as a proper consideration in relation to planning scheme amendment matters while the panel held private economic impacts fell outside the scope for consideration. It was suggested however that the private costs (or at least the economics of building retention versus demolition) **might be** matters which were relevant if a planning permit triggered by the overlay were later to be considered:⁶

The Panel agrees with Mr Morris [who appeared for an objecting submitter], relying on *Gantidis*, that the social and economic effects most likely to be relevant at the Amendment stage are those of a broad community nature rather than of a personal kind. 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...

⁶ Pages 22, 27.

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]

62. The Panel's report in Amendment C207 was considered by the Victorian Supreme Court per Garde J in *Dustday Investments Pty Ltd v Minister for Planning* [2015] VSC 101. In response to extensive submissions from the Plaintiff, Justice Garde found that the Plaintiff had failed to show any legal error on the part of the Panel which heard Amendment C207 to the Melbourne Planning Scheme.

63. In relation to the question of social and economic effects, Justice Garde determined:⁷

Where planning authorities are directed to consider conservation or heritage matters, or social and economic effects, consideration must inevitably be given as to the stage in the planning process that has been reached, and the nature of the consideration that is to be given to these matters or effects at that stage.

64. In Amendment C149 to the Moreland Planning Scheme, the Panel agreed with the views of the Amendment C207 Panel, stating:⁸

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.

65. In Amendment C266 to the Boroondara Planning Scheme, the Panel again confirmed 'private economic issues of a personal or property specific nature are not relevant' to the amendment stage, stating:⁹

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.

66. In Amendment C274 to the Boroondara Planning Scheme, the Panel again confirmed 'individual or personal economic effects are not a matter for consideration by the Panel', stating:¹⁰

The Panel agrees with the view expressed by other panels that, with respect to section 12(2)(c) of the Act, the economic effects considered as part of an Amendment should be of a broader or community nature and not individual circumstances. The Panel acknowledges that the Amendment should deal with the significance of the place or precinct and whether it is suitable for inclusion in the Heritage Overlay. A permit application is the appropriate stage for the consideration of individual issues concerning the conservation, alteration, adaption or demolition of the place, including the economic implications for the individual concerned.

⁷ Paragraph 101.

⁸ Moreland C149 [2014] PPV (14 May 2014).

⁹ Page 23.

¹⁰ Page 84.

67. Council submits in accordance with the above Panel reports and judicial authority, social and economic considerations of a personal or property-specific nature are not to be taken into account at the planning scheme amendment stage.

Future development opportunities

68. A number of submitters raised concerns that the Heritage Overlay would limit redevelopment opportunities and make altering and maintaining these properties too onerous.
69. Council acknowledges that the Heritage Overlay introduces another layer of control for property owners by imposing additional permit triggers and relevant considerations to a future planning permit application.
70. However, in Council's submission, this is necessary to ensure those places with the requisite level of heritage value are recognised and appropriately managed within the municipality.
71. In Amendment C14 to the Latrobe Planning Scheme, the Panel commented, under the heading 'Economic and Personal Factors'¹¹:

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.

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]

72. Further, in Amendment C266 to the Scheme, the Panel recognised provisions within the Boroondara Planning Scheme restricting land use and development are not uncommon and that alterations to heritage properties are possible. It stated:¹²

¹¹ Latrobe C14 (PSA) [2010] PPV 53 (19 May 2010).

¹² Page 26.

The Boroondara Planning Scheme has many provisions that restrict or enable land use and development in different circumstances. The Heritage Overlay gives Council the ability to assess certain permit applications in response to the heritage place, including applications to demolish or remove a building.

The extent of further development will vary depending on each property's individual characteristics including positioning of the building on the lot, the design and configuration of the significant building, location of buildings abutting the property and the aspirations of each land owner.

Most of the exhibited properties are in the Neighbourhood Residential Zone or the General Residential Zone which restricts development through mandatory maximum building heights and mandatory garden area requirements. Clause 54 and 55 provisions (commonly referred to as ResCode), policy and overlays might also restrict a property owner's development plans.

Many buildings in the Amendment have been altered and modernised while retaining heritage significance, which demonstrates that heritage properties can be altered and modernised.

73. In addition, in Amendment C274 to the Boroondara Planning Scheme, the Panel concluded that:¹³

The application of the Heritage Overlay may restrict the development potential of a property, but this is not a justification for recommending against the application of the Heritage Overlay.

74. The above Planning Panels have correctly understood and applied the right 'test'. If a property or precinct display the requisite levels of significance, this warrants heritage protection by application of a heritage overlay.
75. Future redevelopment opportunities of heritage properties are immaterial to this stage of the planning process. They are properly considered at the time a planning permit is applied for.
76. Council considers this approach correctly recognises the importance of prioritising enduring and long term matters such heritage protection and conservation over matters of development potential, building condition, economic matters and planning approvals which are, by contrast, short-term in nature.
77. Importantly, Council submits the introduction of the Heritage Overlay does not preclude buildings, works or demolition to a property altogether. Council's local heritage policy (at Clause 22.03-3.2 of the Scheme) generally supports the demolition of 'non-contributory' graded buildings provided their removal does not compromise significant built fabric.
78. While the full demolition of 'significant' or 'contributory' buildings is generally discouraged, the partial demolition of 'significant' or 'contributory' buildings may be allowed provided the partial demolition, additions and alterations will not adversely affect the cultural heritage significance of the place and will assist the long term conservation of the building.
79. Further, where a development proposal necessitates a number of different planning permits (eg. a multi-unit development in a residential zone), the permit application falls to be assessed against a range of policy considerations.¹⁴

Poor structural integrity of buildings

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

¹³ Page 85.

¹⁴ *Boroondara CC v 1045 Burke Road Pty Ltd* [2015] VSCA 27.

81. The Advisory Committee on the *Review of the Heritage Overlay Provisions in Planning Schemes*¹⁵ made the following remarks about this issue:

...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.

Issues with individual property/precinct level of significance/threshold and the content of the heritage citations

82. A number of issues raised in submissions are specific to the level of significance/threshold of individual properties/precincts. These are:

Individual Properties

- 1 Keyes Street, Ashburton (Submission 10).

Heritage Precinct

- Home Farm Estate and Environs Precinct¹⁶.

83. Generally speaking, Council notes that the justification for the application of the Heritage Overlay has been established by a rigorous heritage study, which included community consultation prior to the preparation of the Amendment.
84. Council's response to these individual submissions is set out in the detailed response to submissions which was presented to the UPDC on 6 September 2021 and has been provided to the Panel.
85. Council's witnesses will address the property/precinct specific submissions in their expert evidence.
86. Council will further address the property/precinct specific issues raised in submissions in detail in Council's Part B submissions.

List of Attachments

Attachment 1 – List of heritage places and precincts affected by Amendment C337boro

Attachment 2 – Proposed changes to the exhibited Amendment C337boro documents

¹⁵ p.2-46.

¹⁶ Submission Nos. 2-5, 7, 8 and 11-14.

Attachment 1 – List of heritage places and precincts affected by the Heritage Overlay proposed under Amendment C337boro

Place or precinct	Property address	Criteria	HO number (Interim Heritage Overlay)	Submission No.
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Individually significant places

Ashburton Uniting Church	3-7 Ashburn Grove, Ashburton	A, D, E, G	HO919	N/A
House	9 Donald Street, Ashburton	D, E	HO920	N/A
Ashburton Primary School	10A Fakenham Road, Ashburton	A, D, E, G	HO921	N/A
St Michael's Parish Hall	268 High Street, Ashburton	A, D, E, G	HO922	N/A
St Michael's Memorial Church	270 High Street, Ashburton	A, D, E, G	HO923	N/A
House	1 Keyes Street, Ashburton	D, E	HO924	10
Victorian house	10 Marquis Street, Ashburton	A, B	HO925	N/A
Pyrus Park	7 Vears Road, Ashburton	A, B	HO926	N/A
House	45 Yuile Street, Ashburton	D, E	HO927	N/A

Precinct

Home Farm Estate and Environs Precinct	57-79 & 52-96 Albion Road and 1-13 & 2-6 Dunlop Street	A, D, E, H	HO918	2, 3, 4, 5, 7, 8, 11, 12, 13, 14
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Attachment 2 – proposed changes to the exhibited Amendment C337 documents¹⁷

Clause 72.04 (Schedule to Clause 72.04 Documents Incorporated in this Planning Scheme), including Statements of Significance for the following properties where changes are proposed since being exhibited:

- House, 1 Keyes Street, Ashburton

Clause 72.08 (Schedule to Clause 72.08 Background Documents) including the *City of Boroondara Municipal-Wide Heritage Gap Study Volume 8: Ashburton* (Context Pty Ltd, July 2020) for the following properties where changes are proposed since being exhibited

- House, 1 Keyes Street, Ashburton

¹⁷ Only documents with proposed changes since exhibition are included in this attachment.

House, 1 Keyes Street, Ashburton Statement of Significance

Heritage Place: House, 1 Keyes Street
Ashburton

PS ref no: HO924



What is significant?

The house at 1 Keyes Street, 1950, is significant. Its garage, front fence and garden setting contribute to its significance. [Additions and alterations made after 1953 are not significant.](#)

How is it significant?

1 Keyes Street is aesthetically and architecturally significant to the City of Boroondara.

Why is it significant?

The house at 1 Keyes Street is a significant example of a post-war house in Boroondara that sought aesthetic refinement through Waterfall styling, crafting the suburban 'dream home' within the limitations imposed by post-war restrictions. (Criterion D)

The house at 1 Keyes Street is a fine and early example of aesthetic characteristics of Waterfall home design, reflecting post-war 'dream home' optimism tempered by building restrictions. The house exhibits curves in its triple fronted plan, corner glazing, chimney details, and a pitched tiled roof with projecting corner eaves forming an entrance porch. The cream brick construction is accented by dark manganese brick and dark brown painted metalwork and window frames. The simple, restrained design is planned to address its corner site and is enlivened by the waterfall

chimney, metal lacework, crazy paving steps and fence, and matching garage. 1 Keyes Street retains its original appearance, setting and details, and provides an outstanding example of Waterfall style, post-war housing in Boroondara. (Criterion E)

Primary source

City of Boroondara Municipal-Wide Heritage Gap Study Volume 8: Ashburton (Context Pty Ltd, [February-July 2021](#))

This document is an incorporated document in the Boroondara Planning Scheme pursuant to section 6(2)(j) of the *Planning and Environment Act 1987*

31/07/2018 --/--/----
 V6148 Proposed C337boro

SCHEDULE TO CLAUSE 72.08 BACKGROUND DOCUMENTS



1.0

Background documents

20/04/2021 --/--/----
 V6197 Proposed C337boro



Name of background document	Amendment number - clause reference
<i>City of Boroondara Municipal-Wide-Heritage Gap Study Volume 3: Hawthorn</i> (Context Pty Ltd, 20 July 2020)	C284boroPt1boro - Clause 43.01
<i>City of Boroondara Municipal-Wide Heritage Gap Study Volume 4: Kew, Revised Report 11 June 2020</i>	C294boroPt2boro - Clause 43.01
<i>The Lower Yarra Concept Plan - Dights Falls to Punt Road</i> (Melbourne Metropolitan Board of Works, 1986)	VC197 - Schedule1 to Clause 42.03
<i>Lower Yarra River Study - Recommendations Report</i> (Department of Environment, Land, Water and Planning, 2016)	VC197 - Schedule 1 to Clause 42.03 VC197 - Schedule 31 to Clause 43.02
Methodist Ladies' College Heritage Citation, June 2020	C305boro - Clause 43.01
<i>The Middle Yarra Concept Plan - Dights Falls to Burke Road</i> (Melbourne Parks and Waterways, 1990)	VC197 - Schedule 1 to Clause 42.03
Red House Heritage Citation, May 2020	C305boro - Clause 43.01
Wentworth Heritage Citation, May 2020	C305boro - Clause 43.01
<i>Yarra Bend Park Strategy Plan</i> (Parks Victoria, 1999)	VC197 - Schedule 1 to Clause 42.03
<i>City of Boroondara Municipal-Wide Heritage Gap Study Volume 5: Kew East and Mont Albert</i> (August 2020)	C306boro - Clause 43.01
<i>City of Boroondara Municipal-Wide Heritage Gap Study Volume 8: Ashburton</i> (Context Pty Ltd, July 2021)	C337boro - Clause 43.01

