

24 February 2023

Submission on behalf of the Planning Authority

Amendment C385boro to the Boroondara Planning Scheme

Boroondara City Council submission: Part B

Introduction

1. This Part B submission supplements the Planning Authority's Part A submission dated 20 February 2023.
2. The Panel has asked that the Part B submission address the key issues raised in submissions, respond to any matters raised in evidence and Council's final position on the Amendment.
3. No evidence has been filed. There is therefore no need to respond to matters raised in evidence.
4. Council's final position remains as set out in the Part A submission, namely that no changes to the Amendment are sought.
5. This Part B is therefore confined to responding to matters raised in submissions. Many of those matters are common across a number of submissions and can therefore be addressed as a 'category' or 'theme' of submissions.

The subject land should be retained in public ownership for public use

6. A common theme of submissions is that the subject car park land (**subject land**) should not be disposed of by Council and should instead be retained as a car park or, alternatively, some other public use.
7. Council reiterates that a decision as to whether to sell or transfer the subject land has not been made or predetermined. No contract of sale has been entered into. The Council resolutions referred to in the Part A submission makes this clear.
8. Further, and perhaps to help explain the process Council has embarked on, there are 'rules' that a council is required to follow when considering whether to sell, transfer or exchange council land.
9. Those rules are embodied in the *"Local Government Best Practice Guideline for the Sale, Exchange & Transfer of Land"* (June 2009) (**Best Practice Guideline**).
10. While the Best Practice Guideline continues to reference the *Local Government Act 1989*, and the legal requirements of section 189 of that Act, the State Government expects councils to continue to follow the Guideline under the *Local Government Act 2020*. As the Guideline attests *"the general principles and best practice guidance is based on the "Policy and Instructions for the purchase, compulsory acquisition and sale of land dated August 2000 which must be used by all State Government agencies and authorities"* (see page 1 of 31).
11. The Best Practice Guideline is very clear as to:
 - (a) the need to give, a form of, public notice of a proposed sale or transfer (see pages 2 & 3 of 31),
 - (b) the obligation not to predetermine a proposed sale or exchange and to keep an open mind about whether or not to sell or exchange land (page 3 of 31), and

- (c) the community's right to make submissions and the council's obligation to consider those submissions (page 4 of 31).

12. The Best Practice Guideline includes sections on "*General Principles*" and "*Procedures for the Sale of Land*". Those sections relevantly read:

General Principles

1. All sales, exchanges and transfers of land must comply with the provisions of the Local Government Act 1989.
2. Sales should be conducted through a public process (i.e. public auction, public tender or by registration of expressions of interest) unless circumstances exist that justify an alternative method of sale, for example the sale or exchange of land by private treaty.⁹ A council should explain to its community the circumstances which led to its decision to use an alternative method of sale in the interests of probity, public accountability and transparency.
3. Sales, exchanges and transfers of land should be in the best interests of the community and provide the best result, both financial and non-financial, for the council and the community.
4. Generally, all sales and exchanges of land should occur at not less than the market value assessed by a valuer engaged by the council. However, in the event that land is sold for less than the market value or exchanged for land of a lesser value, the council should explain the circumstances, reasons or factors which led to the decision to accept a sale price that is less than market value or land on exchange with a lower value.
5. Prior to being offered for sale, property should be appropriately zoned. This will ensure that the ultimate use of the land is determined by that zone and the highest possible sale price is achieved.

Procedures for the Sale of Land

Councils should ensure that land is offered for sale in a manner that will ensure the maximum price is achieved while protecting both the council and the public interest. Land zoned for public purposes must be appropriately rezoned prior to public sale.

[underlining added]

13. The rezoning of public land prior to a decision being made as to whether to sell or transfer council land is therefore not only common but is required by the Best Practice Guideline.
14. The risk to a Council of not doing so was demonstrated by the Planning Panel appointed to consider and make recommendations with respect to Amendment C126 to the Macedon Ranges Planning Scheme (reported at *Austlii* [2020] PPV 91).
15. By that Amendment, Macedon Ranges sought to rezone a public car park zoned PUZ6 (PUZ – Local Government) to the Commercial 1 zone. The Council had already sold the land to ALDI and granted a planning permit to develop the land for a supermarket/public carpark and development had commenced. The Council's case to the Planning Panel was, in essence, that because the land was now in private ownership and being developed for a commercial purpose, it was no longer

appropriate to retain its public use zoning. The Panel recorded the way the council put its case as (in part)¹:

In response to submissions, Council submitted that:

- it does not consider the proposed rezoning an anomaly but a minor change to the Planning Scheme to reflect new land ownership and to keep a consistent single zoning on the site
- the land sale process had been finalised, a permit had been issued and construction on the site had commenced
- as part of the sale agreement Council committed to taking *“reasonable steps to rezone the land to reflect the change in land ownership”* and the *“rezoning is seeking to reflect that Council does now not own the land and that the land has since been consolidated into 45 Aitken Street, Gisborne”*
- as land title had been consolidated with adjacent land which is already zoned for commercial use, according to the Practitioner’s Guide a *“zone boundary should align with title boundaries or other clearly defined feature such as a road centreline or watercourse unless there is a deliberate reason not to”*.

16. Ultimately the Panel recommended that the Amendment, as it applied to the council’s car park, be abandoned for lack of a strategic planning basis. It did so with the following concluding words²:

Rezoning of land from Public Use Zone 6 (PUZ6) to Commercial 1 Zone (C1Z) is not a minor change as suggested by Council but represents a substantial change to the Planning Scheme that requires assessment and strategic justification.

Determination of a suitable land use zone should take into consideration the requirements of the Practitioner’s Guidelines, the objectives of planning, principles of net community benefit and sustainable development, as required by Clause 71.02-3 (Integrated decision making) and an assessment of risk to future land use change that may not be consistent with Council’s desired outcomes.

That the sequence of public land sale and consideration of rezoning is unconventional and does not represent planning best practice.

[underlining added]

17. The Practitioner’s Guideline referred to by the Panel in its concluding remarks is the **“Practitioner’s Guide to Victorian Planning Schemes”**. As it was required to do, the Panel assessed Macedon Ranges’ proposed Amendment against the Guide, which it summarised as³:

i) Application of a land use zone

In determining suitable application of a land use zone the Practitioner’s Guide provides the following guidance:

Zones are the primary tool for guiding the fair and orderly use and development of land. A zone sets expectations about what land use and development activity is or may be acceptable. Each zone broadly deals with a particular predominant land use theme, such as residential, commercial, industrial or public land uses. (Chapter 3.2)

¹ Page 12.

² Page 14.

³ Page 8.

[9154768:36488580_1]

The zone is the primary tool for guiding the use and development of land. All land (except Commonwealth land) must be included in a zone. The application of a zone to land needs to carefully consider the outcomes sought for the land expressed in the Municipal Planning Strategy (MPS) and local planning policies.

Before deciding which zone should be applied to land, consider:

- the land, including any particular physical characteristics, previous uses and the use and development of adjoining land, its ownership and management and the requirements of any other legislation that may apply to the land
- the intended planning outcomes for the land set out in the MPS and the Planning Policy Framework (PPF), as a consequence of a previous or current land use, or a particular physical characteristic of the land
- the purposes and provisions of the zone and the extent of local variation available in a schedule to the zone. (Chapter 5.1).

18. Planning Panels have consistently taken the view in planning scheme amendments of the type sought by Council (that is to rezone PUZ land to a commercial zone), it is not the role or task of the Panel to challenge the “political decisions” of the council made under the Local Government Act.
19. This can be seen from the Panel report on Amendment C76 to the Banyule Planning Scheme (reported at Austlii [2011] PPV 113).
20. In that case the council (Banyule Council) sought to rezone its service centre office and carpark from PUZ6 to Business 1 Zone to capitalise on the potential (and hence value) of the land. Among submissions made to the planning authority and the appointed Planning Panel were submissions opposing the council’s decision to not keep the land for public purposes. The Panel responded to these submissions in the following manner⁴:

Provided that strategic land use and development objectives are not undermined, it is not the Panel’s role to challenge the Council planning for the delivery of Council services in the municipality or to review the political decisions made by the Council under the provisions of the *Local Government Act 1989* to dispose of the land.

Rather, the focus of the Panel’s consideration is on the planning merits of the Amendment, including whether:

- The land use and development opportunities provided by the proposed planning framework would support and give effect to planning policy.
- The Amendment Site is suitable for the proposes envisaged by the zones proposed.

Nevertheless, the Panel notes that there is a body of work that illustrates an alignment between Council’s service delivery strategies and the proposed relocation of the functions currently located in Rosanna to Greensborough. It is also noted that Council has acknowledged that remedial works arising from the future development or sale of the Amendment Site may be necessary and could include:

- Consideration of the need for Council customer service arrangements in Rosanna;
- Works to ensure parking for the library and theatre is maintained; and

⁴ Pages 16-17.
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- Measures to maintain access to the theatre for people with disabilities.

It should also be recognised that Council has not finalised its plans for the Amendment Site and Council decisions relating to disposal of land and its future use have not yet been made. The strategic work undertaken to date does identify this precinct for a mix of uses, including community uses. This designation acknowledges the established focus of community uses in the area and may influence Council decisions about future uses to be supported on the site. The exhibited B1Z would enable the future use/development of the Amendment Site to incorporate a range of uses, including community uses, a Council service centre or car parking. Issues relating to parking and theatre access for people with disabilities are considered in Chapter 2.4.

[underlining added]

Regarding the impact on neighbourhood character that the future development may have, council submitted that it was not necessary for it to finalise its built form requirements for the Amendment site⁵:

Council advised that there are no current development proposals for the land. It is not Council's intention to establish specific requirements for built form at this time. Council considers future planning permit processes will deal with matters relating to building heights, footprints, floor level setbacks, landscaping, tree protection, existing and new infrastructure, on-site car parking and other aspects of the proposal.

This was accepted by the Panel, which stated:

Given the activity centre location, further change in the character of this area should be expected.

...

The Panel considers that the planning framework provided by planning policy and zone provisions, together with the planning permit process, are an appropriate basis for future planning decisions.

...

The B1Z specifies decision guidelines which specifically require consideration of effects on the character and amenity of the area; the interface with adjoining zones, especially the relationship with residential areas; the streetscape; the treatment of the fronts and backs of buildings and the landscaping of land adjoining a road. Further, under the B1Z development applications for the Amendment Site would be subject to notice and appeal rights that would not apply if the land was more than 30 metres from a residential zone added]

...

The Panel agrees with Council's submission that the permit process can deal with the range of development issues applicable to this site.

[underlining added]

21. The above Panel was later in time than the Panel Report on Amendment C41 to the Glen Eira Planning Scheme (reported at *Austlii* [2005] PPV 31). In that report the Panel (per Member Carew) said⁶:

⁵ Pages 21-23.

⁶ Page 6.

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The submissions in relation to the Amendment primarily raise issues which relate to the decision of the Council to sell the land, which to some extent go beyond the scope of the Amendment.

It is not the role of this Panel to concern itself with the reasons behind Council's decision to sell the site. The sale of the land is a separate process through Local Government. he Panel notes that since the site was occupied by the Bowling Club, the land has been managed by a private club and was not publicly accessible parkland. Once the land becomes privately owned it is inappropriate for it to remain under the Public Park and Recreation Zone.

Likewise it is not the role of the Panel to speculate on the form of future development of the site, though it notes that the Council resolution proposes a Section 173 Agreement to require the land to be used for aged care purposes. While the Panel agrees with the submitter that there is no guarantee that the land if sold will always be used for aged care, even with the use of a Section 173, this is not a reason which can be taken into account in considering this amendment.

The issues which this Panel must address are:

- What is the strategic basis for the amendment?
- Given that the site will no longer be publicly owned, what zone should apply to the land?
- Is the Environmental Audit Overlay appropriately applied?

[underlining added]

22. And was earlier in time than the Panel report on Amendment C299 to the Greater Geelong Planning Scheme (reported at *Austlii* [2014] PPV 60) where the Panel (per Member Hunichen) said⁷:

At the Directions Hearing, the Panel made clear its role in relation to this Amendment, as follows:

- The Panel is not considering the sale of the land, and
- The focus of the Panel is to consider the most appropriate zoning of the site if the sale is ultimately approved by Council in accordance with the proper statutory process.

The strategic basis for the Amendment

23. Council continues to submit that amending the zoning of the subject land from PUZ6 to C1Z is both logical and strategically supported.
24. It is logical given its location within a Major Activity Centre and the surrounding land zonings and uses.
25. It is strategically supported by the planning policy matrix referenced and commented upon in Council's Part A submission.
26. Submitter 28 describes the Glenferrie Structure Plan as “essentially expired”.

⁷ Page 5.
[9154768:36488580_1]

27. Whatever 'label' one seeks to place on the Structure Plan, or what further strategic work the Planning Authority is doing with respect to the Glenferrie Major Activity Centre, the Glenferrie Structure plan is neither "expired" nor "essentially expired".
28. The Glenferrie Structure Plan (full name: "Glenferrie Heart of Hawthorn Structure Plan (City of Boroondara 2010, Updated December 2011)") is a referenced background document in the schedule to clause 72.08 for the purposes of clause 11.03-1L. It is part of the clause 11.03-1L policy that, in determining whether to grant a permit, Council is required to consider the Glenferrie Structure Plan.
29. While the Glenferrie Structure Plan is not referenced in DDO 15, a comparison between DDO 15 and the Structure Plan confirms that the Structure Plan has heavily dictated the objectives for and outcomes sought by DDO15.
30. In any application for planning permit for use or development of land within the Glenferrie Structure Plan, the Tribunal is required to give it the same weight as any other relevant planning policy or control.
31. While submitter 28 points to certain aspects of the Structure Plan which the submitter suggests does not support the Amendment (see for example the submitter's reference to page 34 of the Structure Plan), Council submits that when read globally (that is to say, read with an eye to the overall objectives and outcomes sought for the Glenferrie Activity Centre) there is a clear and traceable support in the Structure Plan and the planning scheme for the rezoning of the subject land to a C1Z.
32. The draft Glenferrie Place Plan would not on the other hand be accorded weight in an application for planning permit that was to come before Council or the Tribunal. This is by reason of its early stage of formulation and the fact that Council is currently reviewing the draft Plan for likely future stakeholder engagement and consultation.
33. The draft Glenferrie Place Plan is nevertheless an indication of Councils "current thinking" for the Glenferrie Activity Centre and, to that extent, has relevance if the Plan evidences a material shift in Council's 'thinking' for the Glenferrie Activity Centre or if its contents are inconsistent with or conflict with the Glenferrie Structure Plan or the planning scheme more generally. Council submits that the draft Plan is neither in conflict with nor inconsistent with the objectives of and outcomes sought by the Structure Plan or broader planning scheme policies.

Retaining the status quo

34. A number of submissions have advocated for retention of the status quo – that is to say, to retain the subject land for a carpark and as a means of access to the train station. They say also that development of the subject land with a building and uses contemplated by the C1Z and DDO 15 will result in adverse impacts on the amenity of the properties the border or look across the subject land.
35. While these are understandable desires and concerns, it is possible that they are being expressed by those who do not fully appreciate what the PUZ6 currently accommodates in terms of land use and development.

36. As PUZ6 land in Council ownership, Council can use and/or develop the land in any way that it considers desirable without the need for a planning permit. The only 'rider' is that the land is used and/or developed by or on behalf of Council and for a 'local government' purpose. Council would still be bound by DD015 but otherwise can use or develop the land for any local government purpose that it determines for the subject land.
37. Council is under no planning scheme or local government obligation to retain the subject land as a carpark or access point or to refrain from constructing a building of any substance.
38. Council stresses that it has no current plans to change the use or to develop the subject land. This submission is not being made to suggest otherwise. But it does reflect the reality of the current planning controls. The 'before' and 'after' scenario (the PUZ6 to C1Z) is not as dramatic or as protective of their outlook and amenity as some submitters might understand.

Probity and other issues

39. Matters to do with governance, probity and the history of land acquisition and funding (which are raised in a number of submissions) are not matters that Council seeks to shut down. They are, to a greater or lesser extent (depending on relevance), matters that can be raised as part of the procedure for selling or exchanging the subject land. Council is required to transparently and carefully consider those matters at the appropriate time.
40. They are not however matters that the Panel has authority to consider and/or make recommendations upon.

Conclusion

41. Council submits that for the above reasons and those set out in its Part A submission, Amendment C385 to the Boroondara Planning Scheme warrants adoption and approval in the form exhibited and trusts that the Panel makes a recommendation to that effect.

Subject to reserving Council's right to respond to submissions filed with the Panel by other parties, this concludes Council's Part B submission.

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Maddocks for the City of Boroondara

24 February 2023