

3.3 10 Markham Avenue, Ashburton (Markham Estate) - Review of Planning Approval and development process - Amendment C321boro

Executive Summary

Purpose

The purpose of this report is to brief the Urban Planning Delegated Committee on the process for approval and development of the Markham Estate housing project by the State Government as facilitated by Amendment C321boro to the Boroondara Planning Scheme and to highlight the issues with the process.

Background

Public Housing was first built on the Markham Estate in the 1950's, consisting of nine double storey prefabricated concrete buildings. Over time the buildings deteriorated with many of the units becoming uninhabitable. In 2015 the State Government announced that the site would be redeveloped for new public housing and the following year the old buildings on the site were demolished.

The State Government embarked on a process to establish a suitable planning framework to facilitate redevelopment of the site with the drafting of Planning Scheme Amendment C251 in 2016 for 252 dwellings (62 public and 190 private) and then in 2018 Amendment C298 for at least 200 dwellings including 62 public housing dwellings. Both Planning Scheme Amendments failed to receive support in parliament following concerns being expressed by Boroondara Council and the community about the proposed development including the lack of public and affordable housing being provided.

Planning Scheme Amendment C321boro was then ultimately approved by the Minister for Planning on 24 September 2020. The Amendment inserted the Markham Housing Estate Incorporated Document, May 2020 into the Planning Scheme to facilitate redevelopment for 178 dwellings, including 111 public housing dwellings. The project was subsequently completed by Homes Victoria in late 2023 and residents have now moved in.

Key Issues

There are a number of key issues with the process to establish a suitable planning framework to facilitate the redevelopment of the Markham Estate along with concerns about the delivery of the final project. In particular, the report addresses the following issues:

- The preparation of a planning framework to facilitate the redevelopment without formal opportunity for Council and community input or an independent panel review to evaluate the proposal;
- The Department of Environment, Land, Water and Planning (DELWP) on behalf of the Minister for Planning, as the responsible authority for approval of documentation in accordance with the established planning framework for the project, which did not have a transparent process involving formal consultation or external scrutiny over the final approvals;
- The Minister for Planning, as the responsible authority, has wide ranging power to agree to the proposal as put forward by Housing Victoria;

- There was no clear enforcement oversight of the project to ensure it meets with approvals and the approvals were changed throughout the process with limited scrutiny;
- The process that has been established is not streamlined, timely, did not lead to better outcomes and required significant resource effort on behalf of Council and community to influence improvements.

Next Steps

Council to note the process used to facilitate the redevelopment raises a number of concerns in terms of achieving the best planning and development outcome in a timely way and to highlight this example to demonstrate the short comings of similar processes being put forward by the State Government as part of planning reform advocacy and submissions.

Officers' recommendation

That the Urban Planning Delegated Committee resolve to:

1. Note that the State Government housing development project at 2-18 Markham Avenue, Ashburton (known as the Markham Estate) is now complete, and residents have moved in.
2. Note that the process the Minister for Planning and the then Department of Environment, land, Water and Planning used to consider the approval of the development was uncertain, had no defined pathway, lacked transparency, forced Council and the community to advocate for improvements without any recovery of costs through application fees, has not resulted in a faster outcome to the delivery of housing and provided inadequate oversight of the project implementation with limited avenues for independent review to ensure compliance with approvals.

Responsible director: **Scott Walker, Director Urban Living**

1. Purpose

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2. Policy implications and relevance to community plan and council plan

Boroondara Community Plan 2017-27

The Boroondara Community Plan 2017-27 sets out the 10 year vision for Boroondara's future based on values, aspirations and priorities important to the community.

The amendment and development relate to Strategic Objective 4 of the Plan: Protect the heritage and respect the character of the City to maintain amenity and liveability while recognising the need for appropriate, well-designed development for future generations.

The following strategies are relevant:

Strategy 4.1 - Encourage the planning of well-designed new development that is appropriately located and does not negatively impact on established residential streets and valued neighbourhood character.

Strategy 4.2 - Advocate to the State Government and opposition parties for greater control over planning decisions.

Strategy 4.4 - Encourage development in and around our commercial centres, with an emphasis on increasing housing diversity by having the appropriate planning controls in the Boroondara Planning Scheme.

Strategy 4.5 - Introduce environmentally sustainable design policies and principles into the Boroondara Planning Scheme to facilitate sustainable development.

Strategy 4.6 - Engage with owners and developers to achieve a balance between development and protection of neighbourhood character, heritage and amenity.

Strategy 4.7 - Advocate to the State Government and opposition parties to review the current suite of zones and overlays to ensure they provide opportunities for new residential infill in appropriate locations and limit development in inappropriate locations.

3. Background

Planning Scheme Amendment C321boro was approved by the Minister for Planning on 24 September 2020. The Amendment inserted the Markham Housing Estate Incorporated Document, May 2020 into the Schedule of Clause 72.04 of the Boroondara Planning Scheme. The Incorporated Document

facilitated approvals for the redevelopment of the former Markham Estate for 178 dwellings, including 111 public housing dwellings, in accordance with conditions set out in the document.

The approved plans were prepared on behalf of Homes Victoria in accordance with conditions set out in the Markham Housing Estate Incorporated Document, May 2020. These plans were submitted to the Minister for Planning (via the Department of Environment, Land, Water and Planning) for endorsement and the Markham Estate redevelopment was subsequently delivered by Homes Victoria. The redevelopment was completed in late 2023 and residents have now moved.

The site has an extensive history in terms of the approval process for the redevelopment which is outlined below:

September 2015: Minister for Housing announces redevelopment of Markham Avenue public housing estate for “around 240 units, including a 10% increase in social housing onsite.” (Minister for Housing’s Media Release, “Markham Avenue Estate Planning Gets Underway”, 7 September 2015). The previous public housing units at the Markham Housing Estate had long been under-utilised with the majority of the units being uninhabitable. Public housing was built on the site in the 1950’s, consisting of nine double storey buildings constructed using prefabricated concrete (containing 56, 2-bedroom dwellings).

January 2016: The existing 56 public housing dwellings on the land are demolished. Only 10 had been inhabited at the time due to their run-down condition.



Above: October 2015 aerial photo of the site, prior to demolition



Above: February 2016 aerial photo of the site, after demolition

October 2016: Amendment C251 submitted to Council, proposing to:

- Make the Minister for Planning the responsible authority for the land;
- Redevelop the land for 252 dwellings (62 public housing plus 190 private dwellings), including:
 - Construction of six (6) buildings ranging in scale from 2-storeys (Building A - 8.21m in height) to 7-storeys (Building D - 21.42m in height) above a basement car park;
 - A 2-lot subdivision;
 - Removal of 76 of 82 trees located on the land; and
 - Reduction of the car parking requirements associated with dwelling residents (public housing only) and dwelling visitors.

Amendment C251 did not go through the usual exhibition and independent panel process, as the Minister exempted himself from the requirement to exhibit the amendment. Instead, “community engagement” was conducted by Places Victoria.

19 December 2016: Urban Planning Special Committee (UPSC) resolves to inform the Ministers for Planning and Housing, the Department of Health and Humans Services (DHHS) and Development Victoria (previously Places Victoria) that it opposed the proposed development.

22 December 2016 and 2 February 2017: Amended plans submitted to Council, incorporating only minor changes, decreasing the overall number of dwellings by two, to 250 (62 public housing, plus 188 private dwellings).

20 February 2017: The UPSC again resolves to inform the Ministers and Department of their opposition to the proposal.

5 October 2017: Amendment C251 gazetted. The approved Amendment introduced the “Markham Housing Estate Incorporated Document, August 2017” into the Boroondara Planning Scheme. The Incorporated Document allowed the development of the land for “no more than 225 dwellings”. The Incorporated Document failed to nominate a minimum number of public housing dwellings required to be provided.

16 November 2017: The Legislative Council votes to revoke approval of Amendment C251. The effect of the revocation was immediate. The key matters of debate at the time were:

- The density of the redevelopment.
- Impacts on traffic conditions, including pedestrian and cycling conditions.
- Impacts on adjoining open space and Gardiners Creek.
- Impacts on neighbourhood character.
- The overall decrease in the capacity of the public housing units.
- The Minister for Planning being made the responsible authority for the land.
- Consultation with council and the local community.
- The proportion of public housing provided within the redevelopment.
- The government's Public Housing Renewal Program.
- The sale of public land that has been set aside for public housing.
- The removal of native vegetation.
- The contribution of the redevelopment to housing choice and affordability.

1 February 2018: Amendment C298 gazetted. The Amendment introduced the "Markham Housing Estate Incorporated Document, December 2017" into the Boroondara Planning Scheme. The Incorporated Document allowed the development of the land for "no more than 200 dwellings" and stipulated "at least 62 of the dwellings in the development must be for social housing." The Minister for Housing's media release stated, in addition to the 62 social/public housing apartments, one-third of the 200 apartments approved in the development would be comprised of "affordable housing" (Minister for Housing's media release, "More Social Housing as Markham Revamp Takes Shape", 1 February 2018). Of this, 20 would be part of a State-sponsored shared equity scheme. No details were provided as to how the other apartments would consist of genuine "affordable housing". No commitment or obligation in relation to any form of affordable housing was enshrined into the Incorporated Document.

28 March 2018: The Legislative Council again votes to revoke the Minister's approval of the redevelopment of Markham Estate. The key matters of debate included:

- The lack of changes made to the redevelopment proposal since Amendment C251 was revoked.
- Lack of engagement with Boroondara City Council and the community.

In 2019, the DHHS (as it was known at the time) made an application to the Minister for Housing to facilitate redevelopment of the Markham Avenue public housing estate for the construction of 178 dwellings, adopting "a mixed tenure approach" and including "approximately 111... dwellings... to be used for public housing". The dwellings were to be contained in five buildings, ranging between 2-4 storeys in height.

Officers formed the view there were seven critical omissions in the 2019 Incorporated Document:

1. Definitions of "mixed tenure" and "public housing";
2. An ongoing obligation to maintain the public housing as such, or provisions regulating reinvestment of profit in local public housing in the event of the public housing being sold on the private market;
3. Anything to regulate or require the provision of on-site car parking;
4. Details of the protection/retention of any trees, including a Tree Protection Plan;

5. The localised widening of Markham Avenue adjacent to the site frontage to facilitate two-way vehicle movement and consequential relocation of the Gardiner's Creek Shared Trail to partially within the subject land;
6. A requirement to make an open space contribution in accordance with Section 18 of the Subdivision Act 1988, equal to 5 percent of the site value of all of the land, to be paid to Council prior to the issue of a Statement of Compliance under the Subdivision Act 1988;
7. A requirement for any plans for endorsement to be submitted to Council for assessment and comment, prior to being given to the Minister for Planning for approval.

17 February 2020: Council resolves to inform the Minister for Planning and DELWP it recommends a number of changes to the proposed Incorporated Document. Council's submission sought amendments to address concerns relating to various issues, including off-site amenity impacts, traffic congestion and tree removal/retention.

2 July 2020: Minister for Energy, Environment and Climate decides to exercise power of intervention to facilitate the revised proposal for the redevelopment of the Markham Housing Estate by exercising powers of exemption in accordance with Section 20(4) of the *Planning and Environment Act 1987* exempting the Minister from the notification requirements of sections 17, 18 and 19 of the *Planning and Environment Regulations*.

24 September 2020: Planning Scheme Amendment C321boro approved by the Minister for Planning inserting the Markham Housing Estate Incorporated Document, May 2020 into the Schedule of Clause 72.04 of the Boroondara Planning Scheme and making the Minister for Planning the responsible authority for the land. The majority of Council's recommendations were not adopted.

12 April 2021: Council report highlighting issues and concerns with documentation prepared for Homes Victoria for endorsement by the Minister to enable the Markham Housing Estate development to commence construction.

Late 2021: Homes Victoria appoints Built Pty Ltd as the builder and the Markham Estate project commences construction.

9 October 2023: Victorian Civil and Administrative Tribunal decision to refuse Ashburton Residents Action Group Inc. (ARAG) Application for a declaration pursuant to s149B of the *Planning and Environment Act 1987* raising concern with the process leading to the redevelopment of the land, and the design and height of the redevelopment.

4. Outline of key issues/options

Planning Framework established by Planning Scheme Amendment C321boro

Amendment C321boro to the Boroondara Planning Scheme made changes to the planning approval framework, similar to, but not entirely consistent with streamlined approval processes introduced to planning schemes for a range of developments which the State Government is seeking to support. In terms of the Markham Estate the planning framework has the following key components:

- The use of a Specific Control Overlay (SCO5). The SCO is aimed at achieving a specific land use and development outcome in extraordinary circumstances as outlined in an incorporated document.
- The Markham Estate Incorporated Document, May 2020 which applies to the land and was brought in as part of Planning Scheme Amendment C321boro and which also made the Minister the Responsible Authority for the land.
- Various controls, conditions and requirements for the approval of plans as well as an overriding requirement that the use and development as approved are not to be altered except as otherwise agreed by the responsible authority.

The Markham Estate Incorporated Document states at 4.1:

4.1 EXEMPTION FROM PLANNING SCHEME REQUIREMENTS

Despite any provision to the contrary or any inconsistent provision in the planning scheme, no planning permit is required for, and no provision in the planning scheme operates to prohibit, control or restrict, the use or development and subdivision of the land for the purposes of the redevelopment of the Markham Housing Estate in accordance with the conditions in Clause 4.2 of this document, except as otherwise agreed by the responsible authority.

The Building envelope plan provided at page 9 of the Incorporated Document is shown below:

BUILDING ENVELOPE PLAN



The development is not to exceed the preferred maximum number of residential storeys and the preferred setbacks from boundaries shown on the Building Envelope Plan.

Boroondara Council considered a report in regard to Planning Scheme Amendment C321boro and a draft incorporated document at its Urban Planning Special Committee on 17 February 2020. The report highlighted some of the specific concerns with the proposed development, but it also outlined concerns with the process for subsequent approval of detailed plans. In regard to the Amendment the report notes that:

“If approved in the format proposed by DHHS, there would be no public notice (exhibition) of the amendment, no independent panel hearings and no third-party review rights. Following approval of the amendment, no planning permits will be required for the development or subsequent subdivision. Any plans for endorsement arising from the conditions in the proposed

Incorporated Document are required to be prepared to the satisfaction of the Minister for Planning, not to Council's satisfaction."

The report and subsequent submission to the State Government at the time clearly identified that there is no reasonable basis for the removal of Council in its ordinary role as responsible authority and that the proposed use of section 20(4) of the Act to by-pass the usual public notice (exhibition) and independent scrutiny (panel hearing) is inappropriate and a denial of natural justice.

The report also identified specific concerns about the relative expertise needed for the assessment of detailed and complex residential apartment proposals of the type being proposed at the Markham Estate. In particular the report notes that:

"On review of the amendment documents, officers have noted a number of errors and misstatements relating to DHHS' claimed compliance with the Standards of Clause 55 (ResCode). It is the officers' experience assessing applications against the requirements of Clause 55.07 is complex and requires detail, which is lacking from the amendment documents. Officers are of the view the Boroondara Statutory Planning Department has the necessary experience and expertise to undertake the assessment. For this reason, the recommendation to make the Minister for Planning the responsible authority is not supported as it removes opportunities for independent scrutiny and third-party involvement. Third parties are an important and valued part of the Victorian Planning System. Community consultation conducted by Council does not absolve the Department or Minister from independently fulfilling their statutory obligations in relation to public notice and the provision of a fair hearing."

In response to a formal request by the Department of Health and Human Services the State Government formally intervened to exempt Planning Scheme Amendment C321boro from the usual third-party public notification requirements in accordance with Section 20(4) of the Planning and Environment Act 1987. The intervention was justified with an explanation of the community benefit as follows:

"The main benefit of the exemption is that it will enable a prompt decision to be made on the adoption and approval of an amendment which facilitates the timely delivery of much needed social housing renewal in an area that is close to public transport, open space, shops and community facilities.

The exemption of the amendment from the requirements of sections 17, 18 and 19 of the Act and the regulations will mean the benefits of the redevelopment are able to be delivered sooner, and the social consequences of delaying the delivery of the redevelopment are avoided."

The benefit outlined by the State Government suggests that the project would be able to be delivered faster and that this benefit outweighed the benefit and need for the usual processes. It is considered that this is blatantly not the case.

VCAT Review by ARAG

The Ashburton Residents Action Group Inc. (ARAG) has been a key community advocacy group throughout the Markham Estate Project. ARAG has raised significant concerns with the project including the approval, development and enforcement process over that time with the State Government, Homes Victoria, the Builder and Council. ARAG felt that many of the issues raised over that time were not adequately responded to or answered and therefore took the matter to the Victorian Civil and Administrative Tribunal (VCAT) whilst the project was still under construction in early 2023.

ARAG sought from VCAT a Section 149B declaration. The specific concerns raised by ARAG were with:

1. The lack of consultation with the community;
2. Changes in the scheme;
3. Incorrect information from the Minister and Homes Victoria; and
4. Alleged breaches of the development with the Incorporated Document.

In the written decision on the matter VCAT notes that it is clear from ARAG's submission that it is not satisfied with the approval process and says the decision to exempt C321 from notice was based on inaccurate information particularly in regard to the height of the development. However, there was, and is no challenge in the appropriate forum with respect to the Minister's decision to exempt C321 from public notification.

On the basis of the above commentary from VCAT, the ARAG challenge at VCAT was always going to be problematic, but they felt that there was no other forum to raise their concerns. Council officers were aware of and considered the ARAG review at VCAT and at the time concluded that there was no opportunity to seek a declaration of the type being sought. That is not to say, however, that officers disagreed with many of the concerns of ARAG but rather that there was no legal recourse to address many of those concerns through VCAT.

In commenting on the general submissions by ARAG the Tribunal notes in their decision that:

"There is no doubt in my mind the residents surrounding the land have endured and continue to endure serious impacts associated with a large development in a residential context."

The VCAT summary of the position put by Homes Victoria about their view on the extent of power of the responsible authority in this matter is also very informative. VCAT notes that:

Put simply, Homes Vic contends the proper construction of clause 4.1 of the Incorporated Document provides the responsible authority a broad discretion in assessing the merits of the plans which is consistent with a planning control that overrides the usual planning process.

Accordingly, having regard to the control in this proceeding, the bar is set high for establishing legal error in the exercise of the responsible authority's discretion.

Even if ARAG establishes the endorsed plans were not consistent with clause 4.2 of the Incorporated Document, it must establish the variation permitted by the responsible authority was 'legally defective'.

VCAT also clearly outlines their general conclusions and observations regarding consultation, lack of process, changes in the scheme over time and incorrect information as follows:

"Whilst it is trite to say, I must apply the scheme at the time of my decision and not at some previous time. Whilst the planning history of the land is clearly of importance to ARAG, and sets the context and background to this application, it cannot distract me from the task of applying the scheme as I find it. Therefore, to the extent ARAG relies on previous amendments such as C251 and C298 and what was said about these that was accurate or inaccurate, is of little consequence to the determination of this application.

Further, information regarding the residential zone reforms is not relevant to a consideration of declaratory relief that is sought.

Having said that, I acknowledge that a lack of clarity and focus about such a large development causes confusion, frustration and general distrust of the process, particularly for those who live in close proximity to the development.

I understand ARAG's frustration at the various sets of endorsed plans, although I hasten to add that it is common for a project of this magnitude. There is often a refinement of development as it progresses through to and throughout construction. I also note the timing of the last amendment to the plans was in February 2023 sometime after this proceeding was commenced.

Further, I understand that ARAG believes there has not been any formal independent consultation with residents and therefore it believes that residents have simply been told about the outcome for the development on the land. However, I do not consider that to be an accurate and or objective assessment of the process leading to the gazettal of C321.

It is abundantly clear from the material relied upon by the parties, there has been correspondence and dialogue between council, residents, and various representatives from government and Homes Vic. For example, in response to request for feedback for C251, 240 responses were received from the local community. These responses raised concerns with scale, density, design, amenity, traffic, construction impacts and community consultation process. Council was given a formal opportunity to respond to C251 as well. Further, ARAG has detailed the history of actions from October 2014 with respect to the redevelopment of the land.

However, I accept that the process under s 20(4) of the PE Act to exempt C321 from public notification has prevented the residents from actively participating in the amendment process. Having said that, on 9 January 2020 council wrote to surrounding residents inviting submissions about C321. Having received those submissions, council collated these and provided a summary of these at its Special Committee meeting on 17 February 2020. The issues raised included building heights, setbacks, car parking, tree retention, traffic, overshadowing, overlooking and visual bulk.

I accept ARAG's submission that reference to a reduction in height in the Minister's 'Reason for Decision to Exercise Power of Intervention' for the proposal in C321 compared to C251 and C298 may not be entirely accurate but this really turns on which of the previous proposals was being referred to in those reasons. In any event, the accuracy or otherwise of the 'Reason for Decision to Exercise Power of Intervention' is not a matter that is open to me to consider in this proceeding. Nor is it open to me to make any findings or comment on the process followed by the Minister with respect to C321. Indeed, any challenge to that process and any alleged defect was for a different forum at the time C321 was being considered for introduction into the scheme.

Further, for reasons which follow, I do not agree that reference to buildings with a height of 2 – 4 storeys on the land in statements from Homes Vic, reports from DELWP or in memoranda to the Minister for EEC is inaccurate in any event.

Notwithstanding the above, I do consider it necessary to note that ARAG was required to obtain copies of endorsed documents under the FOI Act. Whether that process is correct or not, it has led to ARAG's sense of justified frustration in the planning process and delay in bringing this proceeding. The reason for the delay may have been relevant, if I considered a declaration was appropriate.

I agree with the Minister and Homes Vic that the application as filed and then as amended does not properly state the declaratory relief that is sought. Notwithstanding that, given ARAG's submissions at the hearing, I have proceeded on the basis that ARAG says the decision to approve plans was:

- an unreasonable decision that no reasonable decision maker would have made; or*
- not open; or*
- failed to take account of a relevant matter."*

Whilst the VCAT review sought by ARAG was ultimately unsuccessful, it has highlighted some key issues with the overall process for this project. In particular that:

- There appeared to be a lack of clarity and focus about the development, particularly for residents nearby;
- Various sets of endorsed plans were approved throughout the project;
- The responsible authority oversaw variations of the incorporated documents;
- The process to exempt the planning scheme amendment from the public notice process prevented the residents from actively participating in the amendment process;
- VCAT was unable to make any findings on the process that lead to the planning scheme amendment or reasons for notification exemptions. The VCAT jurisdiction was in regard to the planning scheme as it currently stands;
- There is no clear pathway for challenging the approval and development process for the project.

Responsible Authority for approving the Development Plan

Amendment C321boro established a planning framework in the Planning Scheme through an incorporated document which at face value has considerable rigour and requirements for quite detailed plans to be approved before the project commences. However, the Minister for Planning (as the responsible authority) has the power to approve and amend those plans without being accountable to a public process which can scrutinise the plans and ensure they meet the stated objectives and requirements of the incorporated plan.

The State Government set up Homes Victoria to engage consultants to prepare documentation for approval which was submitted to the then Department of Environment, Land, Water and Planning for approval on the Minister's behalf. Any subsequent amendments to the plans approved under the incorporated document also underwent a similar process through DELWP.

In effect a "closed shop" has been created in which the State Government:

1. approved the Planning Scheme Amendment without any formal public notification process, which set up a planning framework for approval of the overall project;
2. set up an agency (Homes Victoria) to prepare documents in accordance with the planning framework that had been prepared;
3. approved documents submitted to itself through DELWP (as responsible authority) against the planning framework without any independent review or scrutiny;
4. approved amendments to documents (as responsible authority) where changes to the project were needed without independent review or scrutiny;

The "third party" review right, which has been a fundamental feature of the planning system in Victoria, was removed from the process leaving Council and residents with little recourse where they felt that approvals did not meet the requirements. Moreover, even when discrepancies between the incorporated plan requirements and the various plans approved could be identified, there was no avenue to address those issues if the responsible authority (i.e. Minister) is satisfied that there is no issue because the planning framework gives power to the responsible authority to agree where the framework is not met. Alternatively, the plans could be amended and then approved by the responsible authority anyway and this is what happened on multiple occasions.

This effective "closed shop" approval process is what frustrated residents and narrowed the remit for VCAT upon the attempted review by ARAG. ARAG was likely to fail in their efforts at VCAT because the structure of the planning framework has been set up so that such a review would not be possible or at least would be ineffective. The only avenue would be for a party to demonstrate at the appropriate forum that the Planning Scheme Amendment was unlawful or at VCAT that the approval of the plans in accordance with the incorporated plan was unlawful.

The structure of the planning framework and limitations on challenges to the approval of plans under that framework was something that was clearly known to DELWP and Homes Victoria as evidenced by their submissions to VCAT. VCAT note at paragraph 89-94 of their decision as follows:

89. Importantly, Homes Vic submits the approval of plans by the Minister ‘discharges’ any inconsistent condition of development.

90. Clause 4.1 of the Incorporated Document is the operational provision and provides that all requirements contained in condition 4.2 apply, ‘except as otherwise agreed by the responsible authority’. As such, Homes Vic says that any ‘non-compliance’ with any condition in clause 4.2 of the Incorporated Document cannot have the effect of invalidating the approval of the responsible authority. Or put another way, the conditions of clause 4.2 are entirely subject to the discretion of the responsible authority and if it exercises discretion and approves plans under c4.2.15 it has provided its agreement.

91. Put simply, Homes Vic contends the proper construction of clause 4.1 of the Incorporated Document provides the responsible authority a broad discretion in assessing the merits of the plans which is consistent with a planning control that overrides the usual planning process.

92. Accordingly, having regard to the control in this proceeding, the bar is set high for establishing legal error in the exercise of the responsible authority’s discretion.

93. Even if ARAG establishes the endorsed plans were not consistent with clause 4.2 of the Incorporated Document, it must establish the variation permitted by the responsible authority was ‘legally defective’.

94. Homes Vic does not concede there is any inconsistency in any event.

As outlined earlier, these contentions of Homes Victoria were confirmed by the VCAT decision.

Delivery of the Project by Homes Victoria

Homes Victoria was set up by the State Government as a new agency in 2020 to work across government, industry and the social housing sector to deliver growth in and manage existing public housing. At the time they were to manage the planning and construction of more than 15,000 new homes over the subsequent 4 year period which later became part of the \$5.3 billion dollar “Big Housing Build” for new social and affordable houses over 10 years.

Homes Victoria sits within the Victorian Government Department of Families, Fairness and Housing under the responsibility of the Minister for Housing. Homes Victoria has the primary responsibility for the planning and delivery of social housing projects, with Markham Estate being one of their key early projects given that at the time Homes Victoria was established the project had already been significantly delayed. The process that Homes Victoria has adopted for these projects is to:

1. Engage architects and professional consultants such as town planners, traffic engineers, arborists and landscape architects to prepare documents for approval.

2. Once approved, the project would be put out to tender, and a builder appointed to deliver the project in accordance with the approved plans.
3. When complete Homes Victoria would then pass the project back to the Department of Families, Fairness and Housing to either directly manage or engage a Community Housing Association to manage the housing as public or social housing.

The structure of Homes Victoria has changed on a number of occasions throughout its short history with numerous changes to staff throughout that time. This has created significant difficulties for Council and residents in maintaining communication with Homes Victoria on the Markham Estate Project (and any other Homes Victoria project such as Bills Street for that matter). There is simply no Homes Victoria corporate memory to provide any reliability that commitments given at meetings and in discussions will be kept or followed through. As staff change confusion has also been created regarding the responsibility for the project and the associated approval processes. Homes Victoria staff often have little understanding of the role of the consultants they have engaged, the builder, Homes Victoria itself, Department of Families, Fairness and Housing, The Minister for Planning or Council. These difficulties have meant that many requests to Homes Victoria have been left unanswered, deferred to other parties such as consultants and the builder or taken considerable time to respond to.

Responsible Authority for enforcement of the Development Outcome

A builder (Built Pty Ltd) was appointed by Homes Victoria to deliver the Markham Estate project in 2021. Responsibility for ensuring that the community was kept informed throughout the construction phase and to manage construction issues and complaints was primarily given to the builder. When things are going well and the issues being raised by the community relate to day to day site management issues then this is probably an appropriate approach to take. However, some of the issues being raised by community members and Council were at the time quite fundamental and required potential intervention in a timely way to ensure they didn't become irreversible problems. Examples included concerns about impacts on trees required to be retained and siting of buildings.

In the first instance, project complaints would be made to the builder. Where these were not satisfactorily responded to complaints were escalated to Homes Victoria. Homes Victoria would eventually respond or pass the issue back to the builder or consultants such as the arborist for concerns about impacts on trees. Some matters were attempted to be escalated to DELWP and the Minister, but these were then generally passed back through to Homes Victoria as the agency responsible for delivering the project anyway. Irrespective, the planning framework enabled the Minister (as responsible authority) to agree to matters outside the plans approved. In other words, if the Minister was satisfied with what was being built in accordance with the approved plans, then there is no breach of the approved plans to be enforced. Further, amendments could be approved to the plans to subsequently make them comply anyway and it was Homes Victoria that was responsible for coordinating the amendments.

The “closed shop” process referred to earlier became even more apparent in the construction phase for the project as ultimately wherever complaints were directed, they ended up with Homes Victoria who in effect was overseeing themselves without an avenue of recourse for anyone that felt they were not taking appropriate action. This became an even greater problem as staff changed at Homes Victoria and at times there was no one to contact that had responsibility for the project.

As one example of the extended timeframes and difficulties in pursuing issues of the concern with the project, towards the end of the project construction ARAG raised significant concerns with Homes Victoria in June 2023 about compliance with plans, tree impacts, finished ground levels, drainage and building debris on the site. ARAG did not receive satisfactory responses and raised their issues with Council. Many of these issues had already been raised with Homes Victoria on behalf of the community throughout March, April and May, however, Council officers reviewed the issues again in July 2023. Council Officers met with Homes Victoria staff after attending the site in early August 2023 with assurances being provided by those staff that the issues would be followed up and addressed. Council formally wrote to Homes Victoria outlining the issues on 16 August 2023. A response was finally received on 8 December 2023 (almost 4 months later) providing assurances that there are no issues with the completed project including the site levels being confirmed as complying with the plans, although no evidence was provided by Homes Victoria about such compliances despite evidence such as finished level surveys being requested by Council.

Whilst the project is now deemed by Homes Victoria as complete and a majority of residents have moved in, ARAG and nearby residents continue to identify various issues where they allege breaches of approved plans.

Process

It is considered that the process carried out in relation to this project by the State Government, various Ministers including the Minister for Planning, and the State agencies responsible lacks certainty, rigour, fairness and transparency. Officers note the following elements of the process:

- The basis for Ministerial intervention to prepare, adopt and approve the amendment for a residential redevelopment could have been considered under a standard planning scheme amendment process or at a minimum involve review of resident and Council submissions at an independent Advisory Committee appointed by the Minister. There was not sufficient justification to avoid these formal steps.
- The appointment of the Minister as the responsible authority to approve the development plan and a lack of commitment to meaningful community involvement in the process enabled the project to proceed and be delivered with very little accountability for the delivery of a compliant project which met expected outcomes.
- The process to approve the development proposal and construct the development has taken nearly 8 years. This is hardly a streamlined approval and development process and does not justify a process which removes or significantly reduces community and Council involvement.
- The process placed Council and the community in a position where it had to put considerable time and effort in to influencing an improved planning outcome and scrutinise delivery compliance during construction. This

came at considerable expense to Council but without any fees being received to subsidise those costs because the proposal was managed through the then DELWP rather than Council. This is a cost shift to Council and the community.

5. Consultation/communication

No formal consultation has been undertaken with respect to this report. However, information has been provided by ARAG and individual residents which has assisted in an understanding of the approval and development process from a community input perspective.

6. Financial and resource implications

There are no direct financial impacts arising from this report.

7. Governance issues

No officers involved in the preparation of this report have a general or material conflict of interest requiring disclosure under chapter 5 of the Governance Rules of Boroondara City Council.

The recommendation contained in this report is compatible with the Charter of Human Rights and Responsibilities 2006 as it does not raise any human rights issues.

8. Social and environmental issues

The delivery of additional social housing will provide a significant benefit to the community and is a welcome addition to assist in addressing the current housing crisis, particularly for affordable and public housing. However, the process to approve and deliver the project undermined the foundations and principals of the Victorian Planning system in terms of community input. The project has had a significant impact on residents nearby in terms of their wellbeing after being subjected to the process pursued by the State Government. There is also an impact as a result of the substantially higher density development within the local low density residential setting.

9. Conclusion

The overall process for the approval and development of the Markham Estate housing project by the State Government as ultimately facilitated by Amendment C321boro to the Boroondara Planning Scheme has been lengthy and arduous for Council and the community.

The process to consider the approval of the development was uncertain, had no defined pathway, lacked transparency, forced Council and the community to advocate for improvements without any recovery of costs through application fees, has not resulted in a faster outcome to the delivery of housing and provided inadequate oversight of the project implementation with limited avenues for independent review to ensure compliance with approvals.

The Markham Estate project demonstrates a clear example of why purported State Government streamlined approval processes to deliver housing outcomes are fraught and often do not deliver on faster or better housing outcomes.

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