

**Amendment C159: Rezone land at 1
Jacksons Road, Mulgrave and 636
Wellington Road Mulgrave**

**Submission by Planning Authority for Planning Panel -
Part B**

17 April 2020



**CITY OF
MONASH**

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1 INTRODUCTION TO PART B

1.1 STRUCTURE OF COUNCIL'S SUBMISSION

- 1.1.1 This submission has been prepared having regard to *Practice Note No. 46 - Strategic Assessment Guidelines for Preparing and Evaluating Planning Scheme Amendments, May 2017*.
- 1.1.2 The Panel Directions for Amendment C159 were sent to all parties on Tuesday 31 March 2020. The Panel Directions require Council to Submit a **Part A**, prior to the hearing on 8 April 2020. **Part A** was submitted to the Panel on 8 April 2020 and includes the following:
1. Introduction and overview;
 2. Background information;
 3. Policy context;
 4. Proposed Amendment C159 and authorisation
 5. Strategic assessment;
 6. Public exhibition;
 7. Submissions received (including issues raised in submissions); and
 8. Changes to the Amendment (in response to the issues raised in submissions).
- 1.1.3 **Part A** also includes the following information (in response to the Panel Directions dated Tuesday 31 March 2020):
- a) background to the Amendment including chronology of events and relevant dealings with the Department of Environment, Land, Water and Planning as to the form and content of the Amendment [**see Section 4**];
 - b) relevant planning controls or approvals for adjacent residential or other properties including the Waverley Park Estate [**see Section 2.2 and 2.3**];
 - c) a summary of key elements of the Monash Industrial Land Strategy 2014 and an update on its status [**see Section 2.5**];
 - d) a summary of key elements of the Monash Housing Strategy 2014 and an update on its status [**see Section 2.6**];
 - e) an assessment against the General Practice Note for Potentially Contaminated Land (DSE, 2005) and response to the matters raised in the submission of the Environment Protection Authority dated 14 November 2019 [**see Section 5.1.4**];
 - f) strategic context and assessment, including why the Design and Development Overlay is proposed instead of the Development Plan Overlay [**see Section 5 and 4.3**];
 - g) issues identified in submissions [**see Section 7**]; and
 - h) any suggested changes to the Amendment in response to submissions [**see Section 8**].
- 1.1.4 At the hearing, **Part A** will be taken as read by all parties.

1.1.5 This **Part B** submission will be delivered in writing for the Panel Hearing and contains the following information (as set out in the Panel Directions dated Tuesday 31 March 2020):

- a) Response to submissions and evidence.
- b) Council's final position on the Amendment, include any suggested changes in 'track changes' format.

2 ISSUES RAISED IN SUBMISSIONS

2.0.1 The following key issues were raised in the submissions relating to Amendment C159:

- Impacts on property values
- Negative impacts of the proposed building heights
- Increased traffic
- Impact on the flora and fauna
- Potentially contaminated land

2.1 OBJECT DUE TO IMPACTS ON PROPERTY VALUES

Outline of Issue

2.1.1 The two resident submissions were both concerned that the Amendment would negatively impact the value of their properties. Their reasoning for this was that the new buildings would be visible from their properties, and potentially cause overlooking and a lack of privacy, and would destroy their views. There was also concerns that the Amendment would create noise for the local Waverley Park residents, as well as dirt, dust and waste during the development stage.

Council Response

2.1.2 Property values are influenced by many factors not just changes to planning provisions. They are not a basis on which to object to a neighbouring development.

2.1.3 Future planning permit applications for development of the site would need to address the relevant planning scheme standards and objectives such as overlooking, overshadowing and the provision of private open space. Noise, dust and odour from construction would be managed through conditions on future permits, such as the requirement for a construction management plan. Monash Council's *Local Law No. 3* also specifies conditions for any building works in order to minimise disruption to neighbours. It is unreasonable to expect that no change will occur on this site.

2.2 OBJECT TO THE BUILDING HEIGHTS PROPOSED IN DDO SCHEDULE 16

Outline of Issue

2.2.1 The two resident submissions had an issue with the proposed four and six storey building heights that would be possible on the site. The submitters stated that the Amendment does not take into consideration a precedent set by the current building heights. They argue that the current buildings have been on the site for over 50 years and they should be protected as one of the last remaining spaces in the area yet to be developed.

2.2.2 The submissions stated that they purchased their properties knowing the current size and height of the buildings on the subject site and the little impact they have, being tucked away and of low rise. The maximum height of three storeys in Waverley Park was also mentioned as being an appropriate height.

Council Response

2.2.3 The current *Design and Development Overlay Schedule 1* (DDO1) which the Amendment proposes to replace, does not have a maximum height limit, nor does it take into account the topography of the land, and it has less generous setbacks than the proposed DDO16. Therefore under the current planning controls, a new building could be built higher than the present buildings on site or as proposed under this amendment.

2.2.4 The existing buildings on the site are old and generally redundant with no unique characteristics. They have not been identified in any heritage study completed by Council and there are no proposals to include this site in the *Heritage Overlay*. The site is currently underutilised, especially for its size, and has the strategic justification to be developed in the future for a range of uses.

2.2.5 Proposed DDO16 addresses the issue of building height by proposing that building heights around the periphery of the site have regard to the 3 storey maximum height in these adjacent areas. Figure 2 below shows one of the interface areas and how a four storey building on the site will be no higher than two to three storeys in the adjacent residential areas, due to the difference in site levels. In addition, higher levels of the building would be required to set back further from the boundary.

2.2.6 Proposed higher built form and the six storey height areas are located towards the centre of the site, some 20 metres from the western and southern boundaries of the site.

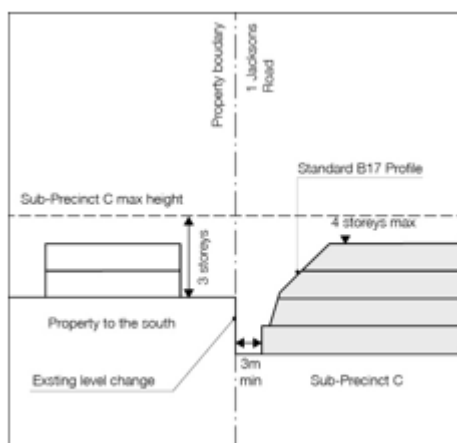


Figure 1 Example built form requirements (Precinct C)

2.2.7 It is unreasonable to expect that large low scale development will be maintained and no changes will occur on this site.

2.3 OBJECT TO THE INCREASE IN TRAFFIC.

Outline of issue

- 2.3.1 Submitters were concerned that the Amendment would result in an increase in traffic. They were concerned that it would put more stress on the road and bus infrastructure without any ability to mitigate the stress. Current traffic volumes in Jacksons Road are high, and adding another set of traffic lights less than 100 metres from the current set of lights on Wellington Road would exacerbate the problem. Thought needs to go into the widening of Jacksons Road to alleviate congestion.

Council Response

- 2.3.2 As part of the amendment request, the proponents submitted a *Transport Impact Assessment* undertaken by GTA Consultants. The assessment was based on the traffic impacts of possible uses that may develop on the site as outlined in the *Mixed Use Zone (MUZ)*.
- 2.3.3 The Report concluded that the two northern site access intersections on to Wellington Road would continue to operate successfully. The anticipated traffic levels were expected to have a small impact on the operation of the signalised intersection of Wellington Road / Jacksons Road. However, if the site is fully redeveloped in the future, the existing un-signalised Jacksons Road access to the site may need to be upgraded with traffic lights to improve the overall operation of the intersection to a 'good' level of service.
- 2.3.4 As both Jacksons Road and Wellington Road are VicRoads controlled roads, advice would need to be sought on any changes to access to these roads. This would occur through any planning permit sought for development.
- 2.3.5 The impact on bus services of future development on the site would be assessed through future planning permit application processes.

2.4 FLORA AND FAUNA

Outline of issue

- 2.4.1 The destruction of trees from development of the site was a concern for the resident submitters. They stated that the habitat of the local wildlife, such as birds, will be significantly impacted from tree removal on the site.

Council Response

- 2.4.2 As a long standing industrial site, with predominantly lawns and manicured shrub gardens in the private realm and introduced large canopy trees in the public realm, the site provides minimal habitat for local wildlife. The *Design and Development Overlay Schedule 16 (DDO16)* requires existing high value trees to be retained and protected, and development should incorporate a variety of landscaping and new canopy trees with a mature height of 20 metres or more. These outcomes aim to have a minimised impact on the local wildlife.

- 2.4.3 This will be assessed via a planning permit application and the requirement for a Landscape Plan.

2.5 POTENTIALLY CONTAMINATED LAND

Outline of issue

- 2.5.1 The Environmental Protection Authority Victoria (EPA) submission indicated that they were generally supportive of the proposed Amendment and highlighted the importance of the EPA's early involvement in strategic land use planning, as noted in *Ministerial Direction No 19*. They advised that the previously contaminating activity on the land is not clear. Council must satisfy themselves that the land is potentially contaminated in accordance with the *General Practice Note for Potentially Contaminated Land* (DSE, 2005). They encouraged Council to explore this before seeking to apply the EAO given the cost of completing an Audit.

Council Response

- 2.5.2 The land may be potentially contaminated in accordance with *Ministerial Direction No. 1 – Potentially Contaminated Land* as a result of its previous commercial and industrial land uses. The site is currently in a Commercial 2 Zone which allows for uses such as offices, manufacturing and industry, and other business and commercial uses. Number 1 Jacksons Road contains a 47-year old office warehouse that predates most of the surrounding housing. The building on 636 Wellington Road was constructed in the 1990s and has also been used for office and warehouse use. It is therefore appropriate to apply the *Environmental Audit Overlay* to the site. This will ensure that any contamination issues are dealt with prior to the commencement of sensitive uses on the site.

3 COUNCIL'S RESPONSE TO THE EVIDENCE TABLED

3.0.1 Two expert evidence reports have been prepared on behalf of the proponent:

- Monash Planning Scheme Amendment C159 – Town Planning Report by Bernard McNamara of BMDA Development Agency. (**Planning Report**)
- Monash Amendment C159 – Economic Expert Statement by Justin Galey of Deep End Services. (**Economic Report**)

3.0.2 Both expert evidence reports are largely supportive of the Amendment as exhibited. Council is therefore in general agreement with the thrust of both evidence reports; although we wish to comments on matters as outlined below:

- Questions for Bernard McNamara in response to the Planning Report (**See Section 3.1**)
- Questions for Justin Galey in response to the Economic Report (**See Section 3.2**).
- The wording of the second objective in proposed mixed use zone schedule 2 (**See Section 3.3**)
- The use of a mandatory building height in Precincts A, B and D of Design and Development Overlay Schedule 16 (DDO16) (**See Section 3.4**)

3.1 QUESTIONS IN RESPONSE TO THE BERNARD MCNAMARA TOWN PLANNING REPORT

3.1.1 Section 2.3 of the Council Part A sets out the details of the *Neighbourhood Character Overlay Schedule 1 (Waverley Park Neighbourhood Character Area)* (**NCO1**) that applies to the properties adjacent to the western and southern boundaries, and modified Res Code Clauses 54 and 55. Section 2.3 also outlines the context for the NCO1 as set out in the *Waverley Park Concept Plan 2002* (**Concept Plan**) and outlines the visual framework to be considered from that site. The planning report does not refer to either NCO1 or the Concept Plan.

Is there a reason why the NCO1 and Concept Plan have not been referred to and how would a reconsideration of your evidence having regard to these documents influence your evidence to not support Mandatory Height controls?

3.1.2 Section 1.2 in the Executive Summary of the Planning Report notes outlines that a site visit was undertaken prior to completing the report.

Can Mr McNamara provide further advice on the site visit including what locations he went to (on a map) and whether this included a visit to the Waverley Park Estate? Can Mr MacNamara provide his summary of conclusions from the site visit? To get to the site did Mr McNamara use public transport, and if not, why not?

- 3.1.3 The planning report has not provided a response to submissions. Council has received submissions from residents that oppose the heights on the site.

How does Mr McNamara consider that discretionary heights will address the impacts on adjoining residents in the context of the Councils application of mandatory heights in order to mitigate impact on adjoining neighbours?

- 3.1.4 In Table 2 of the Planning Report, the assessment notes that the exhibited documents do not include an urban design assessment as part of the strategic justification.

Can Mr McNamara point to any strategic justification or other work that has subsequently been prepared as evidence of heights higher than six storeys being appropriate on the site?

- 3.1.5 The contour map provided as Figure 3 (p9) of the Planning Report does not appear to be accurate and does not highlight the significant topographical issues and level differences between both sites. To compare Council has provided a contour map from the Council mapping system.

Can you advise on the accuracy of Figure 3 in the Planning Report, reproduced below? Is it possible that this is an older contour map that precedes development on the sites?



Figure 2 (Contour map provided as Figure 3 in the Planning Report)



from the subject site. While there are moderately frequent transport options at peak travel times to these stations at around 10 to 20 minute frequency; not all of these are direct services and require more than one bus to be taken. Travel to Glen Waverley can take between 25 and 45 minutes, Dandenong around 40 minutes and Caulfield around an hour. The services are also more limited in the weekends.

- 3.2.3 The Economic Report at Paragraph 47 state that “the Melbourne-wide trend is for apartments to be developed in suburbs which are further out than more traditional locations in response to affordability issues, planning policies and changing demographics”.

Can Mr Galey provide any substantiated evidence as to what this claim is based on?

- 3.2.4 At Paragraph 48 the Economic Report states that “Wheelers Hill has already become a focus for higher-density living, with 443 of 612 dwelling approvals being for apartments between 2017 and 2019”.

Can Mr Galey provide more background to this statement to be able to make this summation? Do the figures quoted include the large aged care accommodation being completed adjacent to the Brandon Park Shopping Centre in Ferntree Gully Road?

Council does not believe that this statement is accurate, as across the geographical extent of Wheelers Hill, the predominant development is for new and replacement houses and infill development, including town houses and villa unit suburban development. It is acknowledged that there are a number of retirement or aged care facilities in Wheelers Hill, which would likely provide for the bulk of apartment development. If these developments were removed it is considered that statistics for new dwellings approvals would be similar to Mulgrave, where the subject site is located.

3.3 THE WORDING OF THE SECOND OBJECTIVE IN PROPOSED MIXED USE ZONE SCHEDULE 2.

- 3.3.1 Mr McNamara queries in paragraphs 122 to 125 the wording of the second objective of proposed Mixed Use Zone Schedule 2 (MUZ2). The objective currently states:

“To encourage a diversity of land uses, with a focus on health and community services, in easily accessible locations for the broader community.”

- 3.3.2 Mr McNamara considers this should be reworded to the following to recognise that some retail and commercial uses are also anticipated as part of the renewal:

“To provide opportunities for health, community, commercial, and retail land uses, in easily accessible locations for the broader community.”

- 3.3.3 The objective was written by Council as exhibited to recognise the primary intent and vision for the site as outlined in the proponents original planning scheme amendment application, which promotes community health and wellbeing opportunities and recognises uses currently occurring on the site. It also recognises the vision for the site that is set out in Mr Galeys evidence at Paragraph 15:

“Essentially, the new hub is intended to be predominantly residential with potential complementary uses including health and aged care services, a childcare centre, ongoing community market, and other potential uses including small-scale office and retail space.”

- 3.3.4 It is considered appropriate to encourage these activities, which are different to the primary objectives set out in the VPP *Mixed Use Zone* (MUZ). It is considered that the wording proposed by Mr McNamara is essentially providing little further guidance or direction for the site than what is currently included in the VPP MUZ.
- 3.3.5 Council accepts Mr McNamara’s point about the potential for small or modest scale residential on the site (See also Mr Galey’s Economic Report at Paragraph 15 and 17). It also accepts that the statement “in easily accessible locations for the broader community” should be clarified. The intent of this statement is to ensure that uses, such as retail health and community facilities, would be sited at accessible locations on the site so that they are visible and easily located by the public. Council therefore considers that the second objective should be amended as follows:

To encourage a diversity of land uses, ~~providing opportunities for with a focus on~~ health and community services ~~and small scale retail and commercial uses~~, in easily accessible locations ~~on the site for the broader community~~.

3.4 THE USE OF A MANDATORY BUILDING HEIGHT IN PRECINCTS A, B AND D OF DESIGN AND DEVELOPMENT OVERLAY SCHEDULE 16.

- 3.4.1 The planning expert witness report concludes that there is no justification under a performance based planning system for the imposition of mandatory building heights over those sections of the site which do not directly abut residential property boundaries (Precincts A, B and D).
- 3.4.2 Mr McNarama contends that from a review of the surrounding context, relevant provision of the planning policy framework and *Planning Practice Note 59: The Role of Mandatory Provisions in Planning Schemes (PPN59)* there is no need for mandatory controls.
- 3.4.3 Council strongly disagrees with this position and considers that the application of mandatory building heights across the entire site is a key aspect in the preparation of

Design and Development Overlay Schedule 16 (DDO16) and the approach taken to justify mandatory provisions is strategically sound and recognises the circumstances of this isolated site that is surrounded by predominantly low density residential development and the basis behind this is set out in detail below.

- 3.4.4 Council notes that no submission was provided by the proponent during the exhibition period to advise of any concerns with mandatory heights.

History of the preparation of the DDO16.

- 3.4.5 As set out in Section 4.2 and Table 3 of the Council Part A submission, the preparation of this amendment that took around five years to complete. During this time there was a significant amount of discussion between the proponents and Council to arrive at an agreed position on the Amendment that was able to be supported by the Council, particularly in terms of the scale of development and mitigating impacts on adjoining residential areas. A key aspect of this was the use of mandatory provisions for building height.

- 3.4.6 Mandatory provisions will provide certainty to the surrounding residential properties that the heights are not discretionary and would likely be increased in the future. Given that there has been only a limited number of objections, Council considers that the effort that has been put in to developing DDO16 and the inclusion of mandatory building heights and setbacks is therefore justified.

- 3.4.7 During the community ‘drop-in’ session for the Amendment held on Wednesday 6 November 2019 as part of the exhibition process, there was significant interest in the community being involved in future planning permit processes. Many considered this future process to be more important than the change of zoning. One of the most common issues that was raised during these sessions was the issue of building height, and Council officers advised residents that the heights had been proposed as mandatory provisions that would go towards addressing their concerns.

- 3.4.8 If the Panel was of a mind to support discretionary heights, Council considers that this would require the Amendment to be re-exhibited as further community input would be required. The mandatory heights included in DDO16 are considered fundamental to achieving an acceptable outcome on the site, and were the basis of the community response to the Amendment. To introduce further discretion or aspirations for additional heights without further exhibition would not be appropriate.

The neighbourhood context

- 3.4.9 Changing the zone of the site and applying the MUZ shows a clear intent to allow for residential development to occur on the site. The preparation of the MUZ2 and DDO16 has sought to recognise the context of the surrounding residential area and determine what is appropriate for a site that is relatively isolated from employment and other services. The surrounding neighbourhood is characterised by low level residential development and includes land in the *General Residential Zone Scheduled*

3 and *Neighbourhood Residential Zone Schedule 4*. Both MUZ2 and DDO16 recognise this through the application of the following objectives:

MUZ2 Design Objective 1:

“To provide a range of medium density housing opportunities...”

DDO16 Design Objective 1

“To provide for the development of a medium rise built form character with moderate building height that transitions in response to the variable topography across the site”

3.4.10 Mr McNamara notes at Paragraph 64 that in established urban areas with good access to employment and services, development opportunities should be optimised and not be overly constrained by existing conditions. Indeed both Mr McNamara (Paragraph 65) and Mr Galey (Paragraph 44) make statements in their evidence about the site being well located and with very good public transport links, presumably to justify the potential for high density and future unlimited building heights.

3.4.11 Council considers that this is not the case. The site is located around 25-30 minutes walk from the nearest shopping centres (Waverley Park Shopping Centre or Wheelers Hill Shopping Centre) and there are no other areas of concentrated employment within the 20 minute Neighbourhood envisaged by Plan Melbourne. As was noted in Section 3.2 above there are bus links provided, but these cannot be considered a very good and frequent service with major transport hubs being located 8 kilometres or more from the site. Ultimately the residents on the site are going to be reliant on private vehicles, which recognises the suburban context of the subject site.

Strategic justification and strategic basis

3.4.12 Mr McNamara notes that Council has not undertaken an urban design assessment to provide the strategic justification for the mandatory height limits. Council considers that this is not necessary for the site and has undertaken a sound approach in determining the application of mandatory provisions. In contrast there has been no evidence provided by the proponents at any stage, either prior to exhibition or post exhibition to provide their evidence to support higher heights that would occur with discretionary provisions. This was not even raised as a submission during the exhibition of C159. The position of Mr McNamara appears to be a philosophical one that seeks to support an ‘aspiration’ for more height in the future and is not appropriate to the specific circumstances of the subject site.

3.4.13 In Section 2.3 of the Part A submission, Council noted that the Waverley Park Concept Plan 2002 outlines the future character of the Waverley Park Development, which has been included in the Monash Planning Scheme as *Neighbourhood Character Overlay Schedule 1 (NCO1): Waverley Park Neighbourhood Character Area*. **The concept plan sets out the following for the visual framework at Section 4.3.3:**

“Views are an important historic element of the site and they contribute to a sense of legibility and place. Heritage Victoria has nominated a range of views and vistas and the subdivision masterplan will weave these into the visual framework and legibility of the site. These views will include the focus upon the grandstand from the main entrance at Wellington Road and through the site from Jacksons Road.

3.4.14 One of the key views that is highlighted are views toward Mt Dandenong, which are seen through the subject site. The *Waverley Park Concept Plan* is therefore an important strategic consideration that should be taken into account when determining appropriate controls for future development.

3.4.15 In preparing the Amendment, other strategic considerations were made in determining appropriate building heights for each precinct:

- For Precinct C, which directly extends along the western and southern boundaries of the site, it was determined that the heights not be more than the potential maximum heights that would be allowed in the adjoining residential zone; which would be three storeys. Precinct C may allow for four storeys in some areas due to the significant drop between the site and adjacent residential areas.
- There are significant changes of topography across the site with a fall of the site to the northeast and a significant drop of about 8 metres between 636 Wellington Road to the west and 1 Jacksons Road. In developing built form guidance for Precinct D (the precinct in the centre of the site), the potential maximum heights of adjoining residential areas to the south and west were used to estimate the impacts of building height in Precinct D that would be seen externally to the site. It was determined that 6 storeys was an appropriate building height that would allow adequate future development whilst minimising the impact on adjoining properties. The diagrams in Table 1 of DDO16 adequately demonstrate the impact of the proposed mandatory building heights.
- Sub precincts A and B have a four storey height limit to ensure that buildings are designed to be visually unobtrusive to Jacksons Road and Wellington Road, and to respect the residential character of the surrounding residential areas. More than four storeys in this location would have a major impact on the residential character of the area.
- The Council approach to heights across the site also recognises the challenging topography of the site and the potential for significant domination of buildings when viewed from Wellington Road, particularly when viewed from the east of the site.
- Separation distances are required between buildings of 12 metres and 18 metres above the fourth floor height.
- The subject site is located towards the top of an escarpment that is visible from many kilometres to the east, northeast and south east.

3.4.16 The five design objectives proposed in DDO16 have been prepared to recognise the above strategic considerations.

Poorer design outcome and trees.

3.4.17 Mr McNamara (Paragraph 20, 142 and 143) contends that the application of mandatory controls will result in a poorer design outcome than performance-based controls, allowing for higher buildings and better protection of trees that can be balanced against the design objectives. It is not clear what is meant by this and indeed how building height directly impacts on the retention of trees. High quality designed buildings occur across Victoria at many different building heights. The ability to design a quality building, and indeed protect vegetation, is not constrained by height. A concentration of taller buildings in one area, may lead to smaller buildings in other areas of the site. It could also simply lead to an overall increase in density across the site.

3.4.18 The appropriate scale that is intended for the site is set out clearly in the objectives to the MU22 and DDO16, which provide for significant flexibility for good design in the context of medium rise, moderate building height.

Glen Eira C155 example.

3.4.19 Mr McNamara provides the example of *Amendment C155* to the *Glen Eira Planning Scheme* (Paragraph 147 and 148) relating to the East Village, which supported the use of mandatory height limits along sensitive interfaces; but did not support the use of mandatory height controls in the central area of the urban renewal project.

3.4.20 Mr McNamara uses the conclusions of Glen Eira Amendment C155 to support applying mandatory height controls in Precinct C, but not to precincts A, B and D.

3.4.21 It is considered that the East Village urban renewal precinct is a completely different context and scale to the subject site. It is a 25 hectare site that is supporting major redevelopment, including 3,000 dwellings, commercial development and a town centre. It is also not a small isolated site located within a predominantly low level suburban area, with challenging site conditions. East Village is well located to other jobs, activity centres and services. The landscape characteristics of East Village are also different. East Village is located entirely on the flat, whereas the subject site is located on an escarpment that is visible from many kilometres away and due to the topography of the site the taller the buildings are, the greater the impact.

3.4.22 Based on the size of East Village (5 times the size of the subject site) it is easy follow the logic that there would be areas on the site that have a sensitive interface, and other areas that do not. This is not the case for the subject site. Based on the context and circumstances of the subject site outlined in this statement the entire site is considered sensitive.

3.4.23 Glen Eira Amendment C155 does provide strong justification for applying mandatory heights on the subject site.

Planning Practice Note 59 Assessment

3.4.24 As Mr McNamara notes in Paragraph 146, *Planning Practice Note 59* (PPN59) establishes the criteria for when considering whether mandatory controls should be applied. The key point is that under the VPP for most development there should be discretion in planning decisions with decisions tested against objectives and performance outcomes. Council considers that for the reasons set out in this report mandatory provisions are appropriate due to the context and circumstances of the subject site. The assessment of Mr McNamara and the Council assessment is provided in the table below:

Table 1. Planning Practice Note 59 – Mandatory height controls criteria / assessment

PPN Criteria	Mr McNamara Assessment	Council Response/ Assessment
Is the mandatory provision strategically supported?	<p>The exhibited documents do not include an urban design assessment to provide strategic justification for the mandatory height limits.</p> <p>I have not seen any evidence as to why a building in excess of 6 storeys may not be appropriate on central sections of the Site.</p>	<p>A strategic approach has been taken to determine the need for mandatory provisions.</p> <p>The Amendment is Strategically supported by promoting a medium density and medium rise built form scale to recognise the character of the surrounding neighbourhood, the generally isolated nature of the site and the context of the Waverley Park Concept Plan 2002.</p> <p>The Amendment considers the impacts and expectations of the adjoining property owners as well as the site topography to determine appropriate heights.</p>
Does the proposed measure have a sound strategic basis having regard to the planning objective to be achieved and the planning policy framework generally?	<p>The mandatory controls will deliver a medium density, built form character as identified in the objectives of DDO16. However, a more varied built form would also deliver a medium rise character while providing opportunities to achieve design objectives such as improved public realm and retention of canopy trees.</p>	<p>Yes. See comments above.</p>
Does the proposed mandatory measure clearly implement a policy or achieve an objective rather than just being a prescriptive tool?	<p>The height controls applying to sub-precinct C can be said to be aimed at managing the interface between the Site and the adjoining properties. I see no such rationale for the other Sub-Precincts.</p>	<p>Yes. See comments above.</p> <p>In addition, Council has prepared clear objectives in MUZ2 and DDO16 that outlines Council's strategic intent and vision for the site.</p>

Is the mandatory provision appropriate to the majority of proposals?	No The mandatory height controls have an important role along the boundaries with the residential areas. This is a minor section of the Site.	Yes. The measure is appropriate to all future proposals for the site. The site is a relatively small 5.4 hectare site. It is likely that there will only be one or two development proposals for the site.
Has the scope of the proposed mandatory provision been carefully considered to ensure that it will be appropriate in the vast majority of cases to limit the unnecessary loss of the flexibility and opportunity available in a performance-based system?	From the exhibited documents, I do not consider that alternate development outcomes have been fully considered.	Yes. As noted above this is a relatively small site.
Will the considered application of planning policy to be implemented by the proposed measure lead to the outcome prescribed by the measure in the vast majority of cases or is it merely one of a number of possible outcomes?	Good, and aimed for planning policy outcomes may be achieved with mandatory or discretionary building height controls	Yes. Agree there are always other approaches. However, this is considered the best approach to ensure a good outcome for the community.
Does the mandatory provision provide for the preferred outcome?	The mandatory height control provides for a uniformly, stepped development outcome across the entirety of the Site. I consider that the controls will discourage more creative design outcomes across the Site.	Yes. It delivers the preferred outcome for the design objects of DDO16 and the intended scale for the site; as well as to mitigate impacts on adjoining property owners.
Does a proposed mandatory provision resolve divergent opinions within the community as to a preferred outcome when a consistent outcome is necessary?	The existing DDO1 applying to the Site (to be removed by the proposed Amendment) only limits heights in terms of boundary setbacks to be achieved. Despite this lack of limitation, development on the Site has only been developed at low heights. I note that third party and notice and appeal rights are maintained under the provisions of DDO16, allowing adjoining residents to object to a proposal or appeal a permit for buildings that are not considered appropriate.	Yes. Not providing this outcome will actually result in divergent opinions in the community.
Does a proposed mandatory provision avoid the risk of adverse outcomes in circumstances where there is likely to be constant pressure for	Not to my knowledge.	Yes. The discretionary controls are aspirational and will result in additional development pressure that is not anticipated by the community and DDO16.

development inconsistent with planning policy?		
Is there real evidence of development exceeding the proposed control?	Not to my knowledge.	By their very nature the discretionary controls will provide for an expectation to exceed the controls. This would not be the case for mandatory controls.
Will the majority of proposals not in accordance with the mandatory provision be clearly unacceptable?	No. The maintenance of mandatory building heights controls along the boundary areas with the residential interfaces will mean that any variations in height above the maximum (e.g. 6 storey) levels will be separated from the sensitive areas, by probably at least 30-35 metres, allowing for landscaping (3m), Sub-Precinct -C (20m) and internal roads etc.	Yes. This would not be acceptable to the community and impact on the residential character of the surrounding area.
Will the majority of proposals not in accordance with the requirements fail to meet the objectives of the control?	The design objectives nominated at sub-clause 1.0 of DDO16 could be achieved by a variety of midrise building forms, some of which may not be in accordance with the mandatory height control.	Yes. The purpose of the objective will not meet with the DDO16 design objectives, which are to maintain medium rise built form character and the promotion of views through the site to mitigate impacts on the surrounding community.
Will the mandatory provision reduce administrative costs? Will the proposed mandatory provision reduce costs imposed on councils, applicants and the community to the extent that it significantly outweighs the benefit of a performance-based provision?	Not to my knowledge.	No.

4 COUNCIL'S FINAL POSITION ON THE AMENDMENT

4.0.1 Having considered all submissions, the issues directed by Panel and the evidence submitted, Council wishes to proceed with Amendment C159 as exhibited, with the exception of the following:

- Changes to the second objective of the Mixed Use Zone Schedule 2 (see section 4.1).
- Changes to DDO16 and MUZ2 that Council wishes to make subsequent to the conditions of authorisation (see section 4.2).

4.1 CHANGES TO THE SECOND OBJECTIVE OF THE MIXED USE ZONE SCHEDULE 2.

4.1.1 As outlined in Section 3.2 of this statement Council considered that MUZ2 should be amended as follows:

To encourage a diversity of land uses, ~~providing opportunities for with a focus on~~ health and community services ~~and small scale retail and commercial uses~~, in easily accessible locations ~~on the site for the broader community~~.

4.1.2 A tracked changes version of MUZ2 is tabled as Document 1.

4.2 CHANGES TO DDO16 AND MUZ2 THAT COUNCIL WISHES TO MAKE SUBSEQUENT TO THE CONDITIONS OF AUTHORISATION.

4.2.1 Council outlined the process for authorisation by DELWP in Section 4.5 of the Part A submission.

4.2.2 On 16 August 2019 the Minister for Planning authorised Council to prepare the Amendment, subject to the following conditions:

- *In proposed Schedule 16 to the Design and Development Overlay:*
 - *Amend the headings in tables 1a, b and c to use the words 'Built form requirements' instead of 'Maximum building height'.*
 - *Amend tables 1a, b and c by deleting the words 'above existing ground level at 1 January 2019'. Amend tables 1a, b and c by expressing maximum building heights as specific measurements (number of metres/storeys), rather than as a range, unless the lower part of the range is intended to be a mandatory minimum height (in which case further redrafting will be necessary). In decision guidelines, delete the words 'The staging of development' from the second dot point.*
 - *In decision guidelines, delete the third, fourth, sixth and seventh dot points.*

- *Confirm that map and table references refer to the correct maps and tables.*
- *In proposed Schedule 2 to the Mixed Use Zone:*
 - *Delete all application requirements. Transfer the following application requirements to Clause 5.0 (Application requirements) in Schedule 16 to the Design and Development Overlay: ‘An Arboricultural Assessment...’ and the following three sub points, and ‘A Landscape Plan...’ and the following six sub points.*
 - *In decision guidelines, delete the second two dot points.*

Changes to MUZ2

- 4.2.3 Council agreed that it would make changes to the amendment to respond to all the conditions imposed in the DELWP letter, prior to exhibition of the Amendment.
- 4.2.4 Council incorporated all the changes required in the DELWP letter, with the exception of the last dot point highlighted in yellow above (bullet two, point two). The reason that the highlighted condition was not changed as requested is due to an oversight. It is proposed that this be addressed through this Panel Hearing by making changes to the decision guidelines of MUZ2 as follows:

Decision guidelines

The following decision guidelines apply to an application for a permit under Clause 32.04, in addition to those specified in Clause 32.04 and elsewhere in the scheme which must be considered, as appropriate, by the responsible authority:

- Whether the intensity of development proposed is consistent with the site context and provides for an appropriate level of dwelling diversity.
- ~~The appropriateness of the land use with consideration of its context having regard to transport movement networks, surrounding land uses and interfaces with publicly accessible areas.~~
- ~~Whether a high standard of diverse residential amenity is achieved having regard to ResCode and the Better Apartment Design Standards as applicable.~~

- 4.2.5 A tracked changes version of MUZ2 is tabled as Document 1

Changes to DDO16 - ‘Above ground level’

- 4.2.6 In regards to the condition highlighted in green (bullet one, point two), Council determined that it would revisit this matter during the Panel process.
- 4.2.7 As Council outlined in the letter to DELWP dated 16 September 2019 (see Appendix E of the Part A submission) Council had concerns over the deletion of this statement. As has been previously established there is significant historical cut and fill undertaken on the two sites for the construction of existing buildings. As a result there is a steep fall of 8 metres between the two properties on the site and a steep

fall at various points along the western boundary that adjoins with residential properties. The location of the ground level, as it exists at present, is critical in determining appropriate heights for future development and determining the potential impact on the adjoining residential properties.

4.2.8 All the background work that had been undertaken to arrive at the built form requirements in Tables 1a, b and c is based on topographic assessments of the land in its existing, heavily modified state. Removal of this statement simply adds an additional element of uncertainty to any future planning application.

4.2.9 Under Clause 73.01 of the planning scheme ‘ground level’ is defined as “the natural level of a site at any point”; and ‘building height’ is defined as “the vertical distance from natural ground level to the roof or parapet at any point”. There is, however, no definition of natural ground level and differing views at VCAT as to what constitutes “natural ground level”. It is important to clear about what is “natural ground level”, as building heights are subsequently measured from that point. A recent article by Best Hooper Lawyers has highlighted the different interpretations that VCAT have been taking for ground level. This has significant implications for C159.
<https://www.besthooper.com.au/Insights-library/ground-level-what-is-natural/>

4.2.10 In this they note:

Prior to the decision in Faversham Mews Pty Ltd v Boroondara CC [2016] VCAT 1954 (‘Faversham Mews’), NGL was generally understood be taken as the existing ground level of the site at the time the planning permit application was made.

This was reconsidered in the Faversham Mews decision which considered a site containing an existing multi-storey apartment building where surveyors were called as witnesses to give evidence regarding site level prior to the existing development. The decision addressed a different approach to NGL in the context of a site which had been subject to significant past earthworks. The Tribunal held that it was important to take account of:-

- 1. The site levels immediately before the application;*
- 2. The site levels before disturbance for development.*

The ultimate findings in Faversham Mews was that the NGL of the land was the level about 60 years ago before it was disturbed to construct the existing apartment building. The Tribunal held that these were the spot levels and contours shown on the applicant’s plan of levels with the necessary interpolations for disturbance within the footprint of the building and within footprint of any surrounding outbuildings.

4.2.11 The Best Hooper article is tabled as Document 2.

4.2.12 DELWP subsequently advised Council in their 1 November 2019 letter (see Appendix E of the Part A submission) that it does not object to the proposal to identify the base ground levels from which heights are measured. It does, however, need to be done in a clear and unambiguous way. They advised that a better approach would be to specify the existing ground levels, possibly in the form of AHD figures, as part of the amendment and allow them to be interrogated through exhibition so in the future there is no question as to their accuracy.

4.2.13 Council agrees to this approach and considers that the heading for the column “Maximum Building Height” in Table 1a, 1b, 1c of DDO16 should each be changed to read:

Maximum Building Height Above Existing Ground Level at 1 January 2019

4.2.14 A tracked changes version of DDO16 is tabled as Document 3.

4.2.15 The Panel should also make a direction that requires Map 1 of DDO16 to be changed to include existing ground levels in the form of the Australian Height Datum (AHD).