



**6.1 REQUEST FOR MINISTERIAL AMENDMENT TO UPDATE  
DDO26 - ST KILDA ROAD NORTH PRECINCT**

**EXECUTIVE MEMBER: CLAIRE FERRES MILES, GENERAL MANAGER, PLACE  
STRATEGY & DEVELOPMENT**

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**1. PURPOSE**

- 1.1 To consider design outcomes being achieved through the implementation of Design and Development Overlay 26 (DDO26), including issues of concern to the local community arising from recent development approvals in the vicinity of the future ANZAC Station.
- 1.2 To discuss a potential request to the Minister for Planning to amend DDO26 to address the above, in addition to addressing drafting anomalies to provide clarity over whether design requirements are expressed as mandatory or discretionary controls.

**2. EXECUTIVE SUMMARY**

- 2.1 DDO26 of the Port Phillip Planning Scheme applies to the St Kilda Road North Precinct, the area covered by the *St Kilda Road North Precinct Plan* (the Precinct Plan).
- 2.2 DDO26 was approved in its current form via Port Phillip Planning Scheme Amendment C107 (Amendment C107) in June 2016 and has been in operation for approximately 18 months.
- 2.3 Changes made to the drafting of some of the provisions in DDO26 by the State Government prior to its approval in 2016 have created confusion within the community about whether some of the requirements are intended to operate as mandatory or discretionary controls. The State Government also changed a number of Council's adopted controls from mandatory to discretionary.
- 2.4 Since DDO26 was approved, the State Government has confirmed its plans to deliver ANZAC Station (a new underground metropolitan train station at the Domain Interchange) as part of the Melbourne Metro project and finalised *Plan Melbourne 2017-2050* (its metropolitan strategy). The 'St Kilda Road Precinct' (the area from Dorcas Street to the St Kilda Junction) is identified as a 'Key Precinct' in *Plan Melbourne 2017-2050*. The St Kilda Road Precinct in Plan Melbourne aligns with the area where DDO26 applies.
- 2.5 The State importance of the precinct and Council's principle that 'excellence in sustainable design, form and function of buildings, public spaces and landscapes contribute to a highly liveable neighbourhood' (articulated in the Precinct Plan), warrant planning controls that ensure high quality development outcomes are achieved.



- 2.6 The Council Plan 2017-27 specifically seeks to 'strengthen design and development controls in areas experiencing significant change'. It also identifies the need to 'create an urban design framework for the St Kilda Road North / Domain Station precinct and environs', which will complement updated planning controls managing private development.
- 2.7 During the past 18 months, the area in the direct vicinity of the future train station has experienced an influx of planning permit applications for apartment developments. A high percentage of these applications have been subject to decision or review at the Victorian Civil and Administrative Tribunal (VCAT).
- 2.8 VCAT's involvement in these matters has typically centred on adjudicating discretionary, performance based development requirements within DDO26. Matters of dispute have related to height, setbacks, access, car parking, and servicing arrangements.
- 2.9 Some members of the community have expressed concern about the quality of development outcomes that are being approved under DDO26.
- 2.10 Discussions with the Minister for Planning proposed that Council work with officers of his Department (Department of Environment, Water, Land and Planning) to identify minor changes to improve the development outcomes arising from DDO26. These changes could potentially be made through an amendment to the planning scheme under section 20(2) or 20(4) of the Planning and Environment Act 1987.
- 2.11 Through analysis of recent development proposals, including VCAT decisions in the area, potential changes have now been identified. The suggested changes focus on strengthening requirements which are not achieving the DDO's intended outcomes (i.e. the design objectives) and on improving the clarity of the drafting of the controls to make it clear whether controls are mandatory or discretionary.
- 2.12 The scope for the changes to be made through a section 20(2) or 20(4) amendment with exemption from section 19 notice requirements, rather than a full public exhibition process (which could take up to two years), as well as the justification required to apply mandatory controls, have also been assessed.
- 2.13 Any potential changes to DDO26 in response to the concerns of the community must also be considered in the context of other initiatives in the area including a public realm master plan, car parking study and community engagement on the identity of the precinct. However, these are not the focus of this report.
- 2.14 This report focusses on potential changes to DDO26 to address the current concerns in the context of the Minister's offer to consider minor changes.



### 3. RECOMMENDATION

That the Planning Committee:

- 3.1 Recognises that some of the performance based controls within Design and Development Overlay 26 are not operating as intended, and as a result are not achieving the high quality design and amenity outcomes sought by the Precinct Plan, and are of additional importance given proximity of the precinct to the future ANZAC station.
- 3.2 Requests the Minister for Planning to prepare and approve Amendment C154 to the Port Phillip Planning Scheme, pursuant to section 20(4) of the *Planning and Environment Act 1987*, to amend Schedule 26 to Clause 43.02 - Design and Development Overlay (DDO26) in accordance with the changes reflected in Attachment 7.
- 3.3 Alternatively, endorses preparation of Amendment C154 and a request to the Minister for Planning to exempt Council, as the planning authority, from the notice requirements of sections 19 and associated regulations, pursuant to section 20(2) of the *Planning and Environment Act 1987*, should this be a preferred process by the Minister.
- 3.4 Resolves to progress Amendment C154 pursuant to section 20(4) or section 20(2) of the *Planning and Environment Act 1987*, on the basis that the changes to the scheme proposed have already been subject to significant consultation through the exhibition of Amendment C107 and the St Kilda Road North Precinct Plan (and the associated Independent Planning Panel process), or are minor in nature and will improve the clarity and transparency of the scheme.
- 3.5 Authorises the Chief Executive Officer (or delegate) to finalise the amendment documentation to form the basis of the request to the Minister for Planning.
- 3.6 Writes to community representatives advising of Council's decision, and thanking them for their suggestions and ongoing interest in the St Kilda Road North Precinct.

### 4. KEY POINTS/ISSUES

- 4.1 DDO26 was based on the outcomes of the St Kilda Road North Precinct Plan (2013, updated in 2015) and underwent a full public exhibition process, including consideration by an independent planning panel.
- 4.2 The St Kilda Road North Precinct is split into 6 sub-precincts. The sub-precincts are shown in Attachment 1.
- 4.3 Sub-Precincts 1, 2 and 4 are closest to the future train station, however Sub-Precinct 2 (bound by Wells Street, Kings Way, the rear of properties on Albert Road and Dorcas Street) is experiencing the greatest development pressure and is generating substantial concerns from the community about development outcomes. Redevelopment in this part of the precinct has been limited until recently.
- 4.4 The combination of the current remnant low rise development, the redevelopment opportunity permitted by DDO26 and the proximity to the future ANZAC Station mean



that Sub-Precinct 2 will be a focus of development in the St Kilda Road North Precinct. However, the fragmented subdivision and land ownership pattern in this area require careful management to ensure that development contributes to the area becoming a high quality urban renewal precinct.

4.5 The Minister for Planning approved substantial portions of DDO26 as adopted by Council, including the design objectives and mandatory building heights in many parts of the Precinct. However, a number of significant changes to Council's adopted position were also made. These changes included:

- Altering the way in which mandatory and discretionary controls in the DDO are expressed.

Generally, in DDOs, mandatory requirements are expressed using the word 'must' and discretionary controls use the word 'should'. In DDO26, some controls that Council intended to be discretionary (and others made discretionary by the Minister at approval) were re-worded with the verb 'must' but not followed with the phrase 'a permit cannot be issued to vary this requirement' (which is required to make a control mandatory). This has caused confusion for scheme users and the community, as there are discretionary controls which are applied using the term 'must'.

- Amending controls that Council sought to be mandatory, to discretionary controls, providing the scope to reduce standards such as minimum setbacks.

This change applies to side and rear boundary setbacks above the podium. Consequently, the mandatory minimum separation distances between towers adopted by Council were changed to be discretionary controls and the ability to build a blank wall to the boundary to allow adjoining narrow sites to directly adjoin each other was also removed.

*Note, the above does not apply to buildings fronting Sub-Precincts 5 and 6 (part of St Kilda Road and all of Queens Road) where entire buildings are required to be separated by 4.5 metres to the side boundary (a mandatory requirement).*

- Making maximum building heights in the areas along Queens Road (south of Arthur Street) and St Kilda Road, south of Albert Reserve (Sub-Precincts 5 and 6 respectively) discretionary.
- Making landscaped setbacks to Kings Way (Sub-Precincts 2, 3, 4, 5 and 6) discretionary.
- Increasing mandatory maximum building heights from 45 metres to 60 metres in the areas fronting Dorcas Street, Kings Way, Wells Street, Palmerston Crescent, Park Street, Cobden Street and Kings Place (i.e. all Sub-Precinct 2).



- Changing the mandatory maximum podium height from 18m to a discretionary maximum height of 40m for buildings fronting Kings Way (in Sub-Precinct 2).

### Operation of DDO26

- 4.6 Amendment C107 has now been in operation for approximately 18 months. In that time, planning permit applications for 29 sites (including both new and amended proposals) have been received / decided. 10 of these applications have been within Sub-Precinct 2, and 8 within Sub-Precinct 3. The rest are in Sub-Precincts 4, 5 and 6. Refer to Attachment 2 for a list and map of approved and pending planning applications for major redevelopment proposals in the St Kilda Road North Precinct.
- 4.7 70% of the applications decided in Sub-Precinct 2 following DDO26 coming into operation have been reviewed / mediated, or are scheduled to be, by VCAT. This compares to only 7% of planning application decisions in the rest of Port Phillip that were subject to review / mediation by VCAT in 2016/2017. Refer to Attachment 3 for more detailed information about VCAT reviews and decisions in the St Kilda Road North Precinct, compared to the City of Port Phillip.
- 4.8 Analysis of the planning applications in Sub-Precinct 2 has been undertaken to identify design requirements to which development proposals are seeking a variation, primarily being to side setbacks and setbacks above a podium which impact significantly on building separation distances (refer to Attachment 4 for detail). This has shown:
- 6 out of the 10 applications do not comply with the minimum discretionary side and rear setback requirements (separation distances).
  - 8 out of the 10 applications do not comply with the minimum discretionary upper level setback requirements above the podium.
  - 8 out of the 10 applications are proposed to be at the mandatory maximum height limit (the rest are below).
  - All applications are seeking some form of reduction in the car parking requirements.
- 4.9 A significant change between Council's exhibited and adopted DDO26, and the final version that was approved by the Minister, was an increase in the extent of design requirements expressed as discretionary controls. This provides the opportunity for development proponents to propose building designs that vary from the standards expressed in requirements, such as an increase in height or a reduction of setbacks. It is some of these discretionary elements which are resulting in designs which are impacting on the amenity of the area and raising community concern.
- 4.10 It is noted that the independent Planning Panel, in its report considering whether controls should be discretionary rather than mandatory (as exhibited), commented that: "an applicant should not expect any variation from the provisions unless they meet the relevant design objectives. This means that there can only be a limited degree of variation before the objectives can no longer be met."





- 4.11 In effect however, development proposals are seeking significant variations to the design requirements which are impacting on the achievement of design objectives for the area, particularly in relation to public realm and internal amenity.
- 4.12 Over the past year, some residents have made a series of representations to the Minister for Planning and the Council, highlighting concerns about the approved outcomes in Sub-Precinct 2.
- 4.13 The key concerns raised by local residents over the past 12 months are summarised below:
- General lack of certainty about interpretation of discretionary DDO controls.
  - Insufficient separation distances between buildings.
  - Lack of protection for the amenity of the public realm.
  - Concern around internal apartment amenity.
  - Peak hour traffic congestion.
  - Accessibility of narrow laneways for cars.
  - Lack of convenient access to visitor car parking.
- 4.14 In particular, local residents have expressed the need to strengthen DDO26 by increasing the extent of requirements that are expressed as mandatory controls that cannot be varied to provide certainty about development outcomes. Refer to Attachment 5 for a complete list of issues and suggested solutions raised by local residents, as well as the proposed response from Council officers.
- 4.15 In addition to the concerns raised by local residents a further key issue that had emerged during the operation of DDO26 is the workability of the overshadowing controls which apply the Memorial Gardens and the Shrine of Remembrance.
- 4.16 The overshadowing controls in DDO26 which apply to the Shrine Memorial Gardens are more stringent than the controls which apply immediately to the north of Dorcas Street in the City of Melbourne. In 2014, while Amendment C107 was being developed, the Shrine of Remembrance Trust reviewed the planning scheme controls which protect the Shrine and its surrounds. This review considered the impacts of surrounding development on the Shrine and its gardens and proposed changes to the Port Phillip and Melbourne Planning Schemes.
- 4.17 The inconsistency appears to have arisen because of timing. The Shrine Controls were finalised after the exhibition of DDO26, however no change to align DDO26 to the recommendations of the Shrine Trust was considered as part of the adoption or approval of DDO26. This is an oversight and should be corrected separately with the written agreement of the Shrine Trust.

**Process to amend DDO26**



- 4.18 In the context of community concerns, discussions with the Minister for Planning has proposed that Council work with officers of his Department (DEWLP) to identify minor changes to improve the development outcomes arising from DDO26.
- 4.19 Council will need to determine whether to make a request to the Minister for Planning to exercise his powers pursuant to section 20(2) or 20(4) of the Planning and Environment Act 1987 to update DDO26. If accepted, the Minister would exempt himself or Council from the standard public exhibition process for amendments, allowing for a more timely change to the controls.
- 4.20 In considering whether ministerial intervention is warranted, any proposal must be assessed against the General Practice Note on Ministerial Powers of Intervention in Planning and Heritage Matters (Victorian Government, 2004) (the Guidelines).
- 4.21 Council officers consider that a request for exemption from giving notice of the amendment in this instance would meet the following criteria in the Guidelines:
- “The matter will give effect to an outcome where the issues have been reasonably considered and the views of affected parties are known” (Criteria 2). This is because the changes proposed to DDO26 are matters which have been extensively considered as part of the exhibition and Panel hearing process for Amendment C107.
  - “The matter will raise issues of fairness or public interest, where anomalous provisions apply and the valid intent is clearly evident or simple inconsequential correction is required” (part of Criteria 4). This is because some provisions are essentially written as mandatory controls when the intent was to make them discretionary.
  - “The matter will raise issues of fairness or public interest, where there is a need for urgency and the public interest would be served by immediate action” (part of Criteria 4). This is because public and private amenity is being compromised by the recent development proposals / approvals.
- 4.22 Additionally, in assessing whether mandatory controls are warranted, Council must consider Planning Practice Note 59 – the Role of Mandatory Provisions in Planning Schemes (Victorian Government, 2015) (referred to herein as the Practice Note).
- 4.23 Council officers consider that the proposed changes meet the general tests in the Practice Note because:
- adequate strategic justification is provided;
  - the proposed mandatory provision is likely to lead to appropriate outcomes in most cases;
  - most proposals are not in accordance with the provision and fail to meet the objectives of the control; and
  - mandatory provisions will substantially reduce administrative costs.



### Proposed changes to DDO26

4.24 Officers have identified potential changes to DDO26 with an associated rationale. These have been grouped under the following categories:

- Administrative changes to address issues resulting from the expression of controls that are causing confusion for the community. These changes fit within the scope of Criteria 4 of the Guidelines for Ministerial Intervention and include:
  - Changing the word 'must' to 'should' throughout the DDO where the requirement is not intended to be mandatory to improve transparency and consistency with other DDOs, remove confusion and manage community expectations.
- Changes which implement an element of the adopted Precinct Plan. These changes build on an existing strategically justified concept of providing through-block pedestrian links by translating the Landscape Linkages Map from the adopted Precinct Plan (refer to Attachment 8) into DD026. These changes fit within the scope of Criteria 4 for Ministerial Intervention and include:
  - Showing the preferred location of through-block pedestrian linkages in the DDO and including a requirement to provide new pedestrian links that are attractive, accessible, identifiable, well-connected and safe.
- Changes which strengthen existing controls where the intended outcome is not being achieved on a consistent basis. These changes fit within the scope of Criteria 2 and 4 in the Guidelines and are consistent with the Practice Note for mandatory provisions. They include:
  - Reinstating the minimum side and rear setback controls as mandatory (in line with Council's exhibited and adopted DDO26).
  - Requiring an additional mandatory setback of 2.2 metres at ground floor level and level 1, where buildings adjoin lanes of less than 3.5 metres in width, to ensure the functionality of lanes.
  - Making on-site storage and screening of waste materials mandatory.
  - Making existing discretionary on-site loading and service-vehicle parking requirements mandatory.
  - Making existing discretionary requirement to locate exhaust stacks from underground car parks away from main pedestrian areas mandatory.

Refer to Attachment 6 for further detail regarding the above and to Attachment 7 for a proposed revised DDO26 (tracked changes version).





- 4.25 While many of the concerns raised by residents are recommended to be addressed through changes to DDO26, some proposals are considered beyond the scope of the guidelines for Ministerial Intervention. Generally, these would require a significant change to the planning controls and / or a departure from controls as exhibited / adopted by Council, and therefore have not been 'tested' through a public process to date.
- 4.26 These proposals and the reasons why they are not recommended are listed in Table 2 at Attachment 5. Several the outcomes sought by the community can however, be achieved through other mechanisms such as the new Better Apartment Design Standards.

#### **Next steps / options in the process**

- 4.27 The following options are available to Council in relation to possible changes to DDO26:
- **Option 1:** Request a Ministerial amendment under Section 20(2) or 20(4) of the *Planning and Environment Act 1987*, exempting the need for full public exhibition of the amendment. This option is **recommended** as it will provide flexibility as to whether the Council or the Minister is the planning authority, in order to achieve the broadest range of proposed changes to DDO26. It will also clarify the expectations of the local community, make the intent of the DDO clearer to avoid future confusion and improve planning and urban design outcomes. Further, the Minister has informally indicated that his Department would consider this option subject to the detail and justification provided.
  - **Option 2:** Do nothing. This option is **not recommended**. The current issues being experienced with development applications will continue and the local community will continue to raise concerns about the quality of outcomes being delivered in the area.
  - **Option 3:** Seek authorisation from the Minister for Planning to prepare a Planning Scheme Amendment via the standard process that contains a wider range of changes to the DDO. This option is **not recommended** as it would require a substantial lead time to establish the strategic justification to overhaul the current controls (such as an updated Precinct or Structure Plan) and a year to eighteen months to then undertake a full amendment process. There is also no guarantee that at the end of such a process, that the outcome would be improved compared to those proposed under Option 1. There is also a risk that the new ANZAC Station could be used to justify an increase in development heights and density, beyond the current controls.

## **5. CONSULTATION AND STAKEHOLDERS**

5.1 The views of stakeholders have been heard through:

- Public consultation during the development of Council's adopted Precinct Plan.



- The full public exhibition process undertaken for Amendment C107, which included consideration of submissions by Council and an independent planning panel appointed to consider the amendment.
- Submissions made to Council on proposed developments and planning applications in Sub-Precinct 2 and the surrounding area.
- Letters received from, and recent meetings with residents.

## **6. LEGAL AND RISK IMPLICATIONS**

- 6.1 The risk of doing nothing is that some sub-standard planning outcomes will continue to be approved.

## **7. FINANCIAL IMPACT**

- 7.1 Pursuing greater certainty through changes to DDO26 is likely to reduce VCAT costs by outlining clearer development parameters and increasing certainty about appropriate development outcomes.

## **8. ENVIRONMENTAL IMPACT**

- 8.1 By enhancing the amenity of the Precinct, particularly the attractiveness of buildings, the spaces between them and their accessibility for pedestrians, sustainable modes of transport will become more attractive and have a positive environmental impact.

## **9. COMMUNITY IMPACT**

- 9.1 The proposed amendment supports the 'Great Places and Precincts' priority of Council's Community First Strategy through strengthening the amenity objectives and controls for the St Kilda Road North Precinct.
- 9.2 The local community, including through representation by residents have expressed strong concern that the implementation of the current controls, given their discretionary status, are not delivering on Council's design intent. An amendment would seek to address issues raised.

## **10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY**

- 10.1 Direction 4 – 'We are growing but keeping our character' of the *We Are Port Phillip Council Plan 2017-2027* contains priority actions for the first 4 years that are directly relevant to the St Kilda Road Precinct. These are:
- Outcome 4.1 – Liveability in a high-density City: to 'implement planning scheme amendments that strengthen design and development controls in areas experiencing significant change' under, and
  - Outcome 4.2 – A city of diverse and distinctive neighbourhoods and places: to 'create an urban design framework for the St Kilda Road North / Domain Station precinct and environs'.



## 11. IMPLEMENTATION STRATEGY

### 11.1 TIMELINE

11.1.1 If Council determines to request an amendment to the planning scheme the amendment documentation will be forwarded to the Minister for Planning as soon as practicable.

### 11.2 COMMUNICATION

11.2.1 Community representatives will be advised of Council's decision at this meeting, thanked for their suggestions and ongoing interest in the Precinct and will continue to be informed of the progress of Amendment C154.

11.2.2 The decision will be communicated on the Council website and in the media.

11.2.3 The key messages:

- Amendment C154 will update Design and Development Overlay 26.
- This will make the intent of the DDO clearer to avoid future confusion.
- It will also clarify the expectations of the local community and improve planning and urban design outcomes.
- The Minister has informally indicated that his Department would consider this option subject to the detail and justification provided.
- Changes proposed to DDO26 respond to:
  - Issues of concern to the local community arising from recent development approvals in the vicinity of the future ANZAC Station.
  - Drafting anomalies to provide clarity over whether design requirements are expressed as mandatory or discretionary controls.

## 12. OFFICER DIRECT OR INDIRECT INTEREST

12.1 An officer involved in the preparation of this report has a direct interest in the matter by way of ownership of an apartment in the Precinct.

### TRIM FILE NO:

**66/02/272**

### ATTACHMENTS

1. Map of St Kilda Road North Precinct and Sub-Precincts
2. Approved and pending planning applications in the St Kilda Road North Precinct



3. **VCAT involvement in planning applications - St Kilda Road North Precinct compared to the rest of CoPP**
4. **Analysis of approved and pending planning applications in Sub-Precinct 2**
5. **Community concerns and proposals**
6. **Potential changes to DDO26**
7. **Revised DDO26**
8. **'Landscape Linkages Map', St Kilda Road North Precinct Plan 2013 (Updated 2015)**