

IN THE MATTER of the *Planning and Environment Act 1987* [the Act]

and

IN THE MATTER of Amendment C25
to the Port Phillip Planning Scheme
[the Amendment]

WRITTEN OUTLINE OF REPLY
ON BEHALF OF THE PLANNING AUTHORITY

1. The position of the City of Port Phillip as the Planning Authority for the Port Phillip Planning Scheme remains as expressed in its resolution of 2 May 2002.
2. It is the Council's submission that the evidence before the Panel supports the Amendment in the form contained in the resolution of 2 May 2002.
- 3.1 The Council submits that the Panel should place weight on the evidence of Mr Barlow in chief that design objectives need to achieve the matters which he specified.
- 3.2 That proposition necessarily accepts that there should be design objectives.
- 3.3 The first matter that Mr Barlow put in his evidence in chief as a design objective is that development on the site must acknowledge the Hotel in terms of scale and detailed architecture and be both respectful and recessive.

- 3.4 The second proposition was an acceptance that the Pollington/Victoria Street podium should vary between 2 and 4 levels responding to the Hotel and to the height of the other buildings in those streets.
- 3.5 Third that the podium level needs to be well detailed thereby responding to the grain of proximate development (which to the east and south-east are single and two storey, fine-grain and with perceptible side setbacks).
- 3.6 Fourth that the portions of the building above three levels should address The Esplanade alignment and, relative to the Pollington Street and Victoria Street podiums, be of simpler architecture.
- 3.7 Fifth that the total composition should constitute a landmark comparable to Arrandale and Bayview Heights (which must, it is submitted, be achieved by architecture as it necessarily cannot be achieved within the constraints accepted by all parties for height, which is equivalent to two-thirds the height of Arrandale, and setbacks).
- 3.8 Sixth that the development must be sufficiently modulated so as not to appear as a monolith.
- 3.9 Seventh that the building needs to be crowned so as to be the first point of reference preferably at or above 10 levels in a sculptured form (contrary to the opinion of Mr Fender).

- 3.10 It is submitted that each of these propositions, other than the issue of a sculptured top, is entirely consistent with what is intended to be achieved by the Amendment but which one cannot be assured of being achieved without a high level of detail in the Design and Development Overlay [DDO].
- 4.1 The Council welcomes the involvement of Fender Katsilidis as skilled and successful architects whilst recognising that all architects would seek to have the maximum amount of freedom to produce an architectural expression to achieve the client's development brief.
- 4.2 It is submitted however that the whole purpose of the DDO is to ensure, to the greatest degree possible by a statutory planning control, that the development within that Overlay fits and contributes to the urban design of the area within which it will sit for decades.
- 4.3 It is disappointing that Becton, through its Counsel, expressly disavowed any ownership of or commitment to the forms of examples of external expression contained in the studies exhibited by Mr Fender.
- 4.4 It is submitted that these examples demonstrated that good architects can provide a building that fits within the predominant scale and massing of its context reflected in the Council's envelope and a development that will enhance the landmark quality of the development on the site and mediate in terms of visual perception between the unfortunate developments immediately to the north and south of the western end of the site.

- 4.5 It is submitted that the development of the site within the Council's envelope can increase the physical dimension of the landmark quality of the site whilst respecting and indeed reinforcing the cultural heritage significance of the Esplanade Hotel itself and the social role played by the Hotel.
- 5.1 The Council submits that the result of its strategic analysis of the predominant massing of development on St Kilda Hill, with the consequential opportunity to partially fill the "gap" between Bayview Heights and Arrandale, gives to Becton what might be legitimately considered to be a windfall gain of potential additional storeys to a height of 8 to 10 levels, with the upper levels being those maximising the return from expansive elevated views.
- 5.2 It is a small price to pay if Becton wishes to take advantage of that opportunity to have a design that does not reflect a standard module maximising the number of apartments along the perimeter but which adopts a basically rectilinear form thereby increasing the length of perimeter per apartment, with the consequential benefits for internal amenity.
- 5.3 Mr Fender criticised the sketches undertaken by Mr McGauran to demonstrate that if one adopts a rectilinear form, or a more extended form in a curved design, one may still obtain desirable apartments.
- 5.4 Those criticisms need to be seen in the light that when the document "The Esplanade Site 2002" was circulated there was no indication that it was to be the subject of expert evidence as opposed to being a tool to be relied on in submission.

- 5.5 It was only two business days before Mr McGauran was to be called to give his evidence that advice was received that the document "The Esplanade Site 2002" was to be changed that the Council was informed that it was to be the subject of evidence by Mr Fender.
- 5.6 Mr McGauran was given minimal time, subject to his other commitments, to provide some sketch diagrams to simply indicate that the module at the basis of Mr Fender's document was not the only model that was available whilst acknowledging that apartments with more external perimeter would result in a loss of yield if measured in terms of the numbers of apartments.
- 5.7 There has been no evidence on the part of any party as to the likely return from different types of apartments, particularly at the upper levels.
- 6.1 It is submitted that whilst the effect of expanding the envelope in the way sought by Becton may not have a dramatic impact at the lower levels if the expansion is effectively shielded by the podium, but the way in which it is shielded in turn depends on the extent to which the articulation and modulation within the podium, particularly at the street frontage, is handled.
- 6.2 If, consistent with Mr Barlow's advice, the predominant scale on the eastern frontage is two storeys rising to three or perhaps even four storeys closer to where the podium meets the tower, then the height at which the visual impact of an extension of the envelope at the eastern end of the RL 41 envelope would occur would be lower than with a consistent higher facade on the property boundary.

- 6.3 It is submitted that where not shielded by the podium the impact of the wider envelope is significant.
- 7.1 It is submitted that the contention of Mr Fender that a larger building envelope would not be filled and producing examples which did not fill the envelope should be viewed by the Panel as unconvincing because of his resistance to the suggestion that there should be some proportional volumetric constraint.
- 7.2 Further it needs to be remembered that what we are dealing with here is a DDO that relates to the land and there can be no certainty that either Becton or Fender Katsilidis will be involved in the ultimate development and thus expressions of intention or desire on behalf of Mr Fender can carry no material weight in setting the parameters of a DDO applying to the Subject Land.
- 7.3 It is submitted the Panel should be satisfied that there needs to be articulation and modulation of any new development on the Subject Land and that in the absence of express provision that that is to be within the building envelope the commercial pressures will be to fill the building envelope to a high degree and to push the boundaries to the extent that the planning control provides that opportunity.
- 8.1 Becton has submitted that the building design objectives should all be deleted.
- 8.2 It is submitted however that Becton's own town planning witness advocates almost all of the critical criteria contained in the building design objectives under Council's 2 May 2002 resolution.

- 9.1 Notwithstanding that it is attributed to a request by the Panel it is submitted that Becton's suggested "purpose" provision for Schedule 12 is less than helpful given that it would have the effect of confusing rather than clarifying.
 - 9.2 A purpose clause in a DDO would be inconsistent with the DOI Practice Note on the Form and Content of Planning Schemes.
 - 9.3 The purpose of the DDO is to implement the MSS policies and are expressed in the objectives.
 - 9.4 The purpose suggested by Becton only encapsulates the effect of the building envelope and ignores the qualitative and contextual constraints and is therefore unbalanced.
 - 9.5 Based on its own town planning evidence the scale of development within the proposed envelope is comparable to that already established on other sites within the Residential 1 Zone fronting The Esplanade but needs to be crafted also to be appropriate to the lower scale development in other parts of the same Residential 1 Zone.
 - 9.6 In urban design terms the envelope recognises the opportunity for the site to be developed at an intensity greater than typical established residential areas of the municipality.
10. The following responses are made in respect of Becton's proposals in respect of clause 1.0 in Schedule 12.

10.1.1 In assessing Objective 1 the Panel is reminded of the opinions of Mr Lovell and Mr Barlow that landmark qualities do not solely relate to visual presence or dimensions.

11.1.2 It is submitted that the concept of a landmark is appropriate and is to be found in a number of Planning Schemes in addition to the other references to that concept within the Port Phillip Planning Scheme.

11.2.1 It is submitted that the form of development on the site does have the potential to enhance the pedestrian experience specifically in proximity to the site as part of the links between The Esplanade and Fitzroy and Acland Streets and the St Kilda foreshore.

11.2.2 The Hotel is not "... a pedestrian and vehicular promenade."

11.3 Objective 3 is derived from the current DDO6 and is consistent with the LPPF.

11.4.1 It is submitted that a development of the site is, on the evidence, appropriately required to respond to the character and amenity of the local residential area (essentially to the east)

11.4.2 Development on the site is appropriately required to respond, inter alia, to existing residential amenity of the area generally to the east including outlook, views, vistas and access and the relationships with the higher density development fronting The Esplanade and through to the foreshore.

- 11.5.1 It is submitted that it would be particularly inappropriate to seek to introduce an objective seeking a response to the Bayview and Arrandale apartment buildings in the context of the trenchant and uniform criticisms of those buildings in urban design terms.
- 11.5.2 The need for a contextual response is clear from clauses 19.03 and 22.05.
- 11.5.3 If an additional objective was seen to be needed it would need to both recognise the site's opportunities and the constraints arising from the site's context.
- 11.6 It is submitted that the Panel should expressly find that within the building envelope proposed on behalf of Council a well designed building both can and should strengthen and consolidate the prevailing predominant massing profile of the Esplanade.
- 11.7 The seventh objective is derived from the current DDO and there is a general acceptance that the relationship with the foreshore is of critical importance.
- 11.8 It is submitted that the preponderance of expert evidence before the Panel supports the front facade and main section of the Esplanade Hotel being read legibly against a development behind it as a relevant and important criterion.
- 11.9 There is no issue in respect of objective 9.
- 11.10.1 The evidence of Mr Lovell would support a criterion that if a permit was given to demolish the Baymor flats under the Heritage Overlay that any replacement building

should respond to the contribution that those flats have made to the form and imagery of the relevant streetscape.

11.10.2 The issue of demolition of the Baymor flats is a matter to be considered only under the Heritage Overlay above and accordingly a DDO relating to urban design should not seek to introduce additional criteria or considerations into that decision.

11.10.3 It is submitted this follows from the decision of the Supreme Court in *Sweetvale Pty Ltd and anor v City of Melbourne* [2001] VSC 426 and is consistent with the view of the Tribunal, for example, see the decision in respect of 402 Barkly Street *Evangelidis v City of Port Phillip* P51989/2001 (copies of which are tendered to the Panel).

11.10.4 The 402 Barkly Street decision is also consistent with the submission that the expression "design excellence" is simply so generic as to be unhelpful in actually determining decisions in relation to particular proposal (esp para. 64).

11.11 It is submitted that Objective 11 remains justifiable in terms of avoiding building out views of the heritage buildings on the site.

11.12 It is submitted that in the light of the evidence and submissions on behalf of nearby residents, in addition to the expert evidence before the Panel, the requirement for appropriate responses to the character and setting of residences in the smaller streets whilst contemplating higher density development relating to the Esplanade context remains entirely appropriate.

11.13 It is submitted that the heritage evidence called on behalf of Becton does not support the proposition that Objective 13 be deleted.

11.14 It is common ground that objective 14 be deleted.

11.15 It is submitted that the issue of access being maintained to facilitate the incubator music and comedy activities within the hotel remains appropriate being one of the issues regarding co-existence of the Hotel with a future residential development on the site.

11.16.1 It is submitted that the shadowing criterion on the kerbside of Jacka Boulevard provides clarity, is consistent with the mandatory controls applying elsewhere along the Port Phillip foreshore and should not be watered down given the regional and metropolitan importance of the foreshore and the comparable provision elsewhere along the foreshore.

11.16.2 It is submitted that the overshadowing criterion is essential and would only require limited modulation of the western facade at the upper levels.

11.17 It is a common position regarding objective 17.

11.18 The dispute in respect of objective 18 is more in wording rather than intent.

11.19 It is submitted that the envelope plan approach to development control is only appropriate if there are appropriate buildings and works criteria within the DDO and

that the thrust of the criteria sought by the Council is supported by the evidence called on behalf of Becton.

10.20.1 One specific matter is the issue of balconies.

10.20.2 The Council is not opposed to a permit being granted for a balcony that would constitute a minor building element but that its concern is to avoid any argument that can lead to the effect of balconies having a visual bulk impact comparable to a substantial shifting of a significant component of a facade.

10.20.3 A suggested design objective could be to the following effect:

"To ensure that any balcony for which a permit is sought within any setback area only comprises a minor building element that makes a positive contribution to the articulation and design of the building and does not appear as a substantial component of any face of the building."

10.21.1 It is submitted that it is significant that in the evidence on behalf of the Applicant whilst complexity and conflict were alleged, no specific examples of the alleged conflict was drawn to the Panel's attention.

10.21.2 Accordingly, it is submitted, the allegation of complexity or conflicting objectives should be treated as mere rhetoric except in the case of the purpose sought by Becton to be introduced into the Schedule by Becton and the effect of the objectives sought

by Becton to be added to Objective 5 in clause 1.0 in the proposed Schedule 12 to the DDO and the modified Objective 6 sought by Becton.

- 12.1 There is common ground on the provisions for height under clause 2.0.
- 12.2 There is common ground on the setback provisions save for balconies
- 12.3 The differences in clause 2.0 regarding overshadowing remain in issue.
- 12.4 The Council's building design criteria are directed to matters supported by the evidence of Mr Barlow and Mr Lovell as well as Council's witnesses.
- 12.5 It is now agreed the clause 2.0 Additional Decision Guidelines should be deleted.
- 12.6 It is accepted that the Table to Schedule 12 can be deleted if most of the outcomes are carried over to the Building Design provisions.
- 12.7 The Council's height/setback plan is justified on the relevant criteria, namely, urban design considerations particularly the predominant massing in The Esplanade, filling the gap between Arrandale and Bayview Heights, responding to the scale of development to the rear and responding to the cultural heritage significance of the Hotel.
- 12.8 The plan is an urban design tool and should be annotated to the effect that it is not a relevant plan under the Heritage Overlay. Council would accept that a reference to clause 43.01 might be more specific than referring to the Heritage Overlay.

- 12.9 An application for a replacement building would need to be assessed under the Heritage Overlay as well as under the DDO.
- 13.1 The Council submits that there is a general acceptance of the social importance of the Hotel the only issue by Mr Lovell being the relative weight to be given to that aspect as a component of cultural heritage significance.
- 13.2 The changes to the MSS in the Amendment in clauses 21.03-6, 21.04-6, 21.05-1, 21.05-2 and 21.05-6 seek to articulate this importance in the neighbourhood, St Kilda vision, Residential land use, Foreshore, and Tourism contexts to which it is relevant and where it reinforces the policy base for decision making as well as expressing some of the basis for specific provision being made for the subject site.
- 14.1.1 Mr Barlow put 6 tests against which he said the Amendment provisions should be assessed.
- 14.1.2 It is submitted that the Amendment satisfies those tests.
- 14.2.1 Does the objective/provision add further clarity to the achievement of the LPPF?
- 14.2.1.1 Whilst there have been allegations of verboseness of objectives and provisions, it is necessary to look at the intent, and each specifically addresses a relevant aspect.
- 14.2.1.2 A strategy is a means to achieve a desired outcome in accordance with policy. This is what the Amendment focuses on achieving.

- 14.2.1.3 Planning controls go from the general to the specific (SPPF to LPPF to DDO and other applicable zone and heritage overlay controls for the site) with the DDO being the most specific and therefore the most detailed definition of the outcomes sought.
- 14.2.1.4 The Amendment is consistent with the LPPF and provides a refinement and clarification of policy and potential outcomes (not a singular outcome) for the site. As such, the Amendment provides further clarity to the LPPF.
- 14.2.1.5 There is no repetition or unnecessary complexity given the range of relevant considerations.
- 14.2.1.6 The prescriptive aspects of the Amendment are limited to the plan (noting that there is common agreement for mandatory maximum height controls) and the foreshore overshadowing provision.
- 14.2.1.7 The Amendment is relatively consistent in its detail and specificity with, for example, the Port Melbourne foreshore DDO 1, St Kilda DDO 6, and Amendment C36.
- 14.2.1.8 In the absence of a design concept or detailed plans, the DDO offers the most appropriate direction to a potential design and development outcome for the site.
- 14.2.2 Does the objective lead to the achievement of the broader strategy for the precinct?

- 14.2.2.1 The Amendment is part of a network of planning policies and controls for the Port Phillip foreshore and environs area.
- 14.2.2.2 In relation to design and development, the Amendment provides the appropriate level of specificity, consistent with the broader policy framework, and therefore provides reasonable direction on how to interpret policy and achieve an appropriate outcome for this site.
- 14.2.3 Does the objective/provision assist in understanding whether a proposal is likely to be supported or not?
- 14.2.3.1 All submitters agree that mandatory maximum heights are essential for the site and that it is a significant site.
- 14.2.3.2 It appears accepted that there should not be an expectation that there is an entitlement to fill a building envelope (e.g. Mr Barlow's suggestions that two storeys may be an appropriate scale at the frontage to Pollington Street - east). There is therefore a need for a description of outcomes to modulate development within the building envelope.
- 14.2.3.3 There is agreement that there should be a foreshore overshadowing provision and only Becton resists a mandatory control. A mandatory control assists in understanding what will be acceptable.
- 14.2.4 Does the objective address an issue that needs to be given greater specificity or control?

- 14.2.4.1 A balance between prescription and providing adequate direction needs to be struck, because there is no design or detailed plans for the site provided to the Council.
- 14.2.4.2 In absence of detailed provisions it would be difficult to resist a proposal utilising the whole volume of the envelope, therefore design objectives and provisions are necessary to guide not only the designer in preparing a development proposal, but also the Council in its exercise of discretion.
- 14.2.4.3 The level of detail reflects the range of issues identified by the Esplanade Hotel Working Group.
- 14.2.4.4 Becton's submission states, "In May 2001 the Council resolved to prepare Am C25 notwithstanding there was no agreement between the respective parties as to the detailed form and content of the Amendment" (first para, page 5). Rather, Council took the initiative to prepare the Amendment and invited Becton to respond to every version of the draft amendment and the Council has also responded to both of Becton's submissions. On the other hand Becton have waited until the Panel hearing to put forward a design and development rationale for the site but not to commit to any concept.
- 14.2.5 Is the objective complementary with other objectives in the Overlay?

- 14.2.5.1 Becton's witnesses essentially agreed to the substance of the design objectives and provisions for the site although A Olszwescki said that that objectives need to be more specific to guide a design outcome.
- 14.2.5.2 Each objective addresses a particular topic of design relevance and attempts to state, in the broadest possible terms, what should be achieved.
- 14.2.5.3 The objectives are a distillation of the design and development issues arising from various planning processes since 1997 (Becton's orginal amendment) and the more recent Esplanade Hotel Working Group).
- 14.2.5.4 The Council submits that each objective is relevant and that there are no conflicting objectives.
- 14.2.5.5 It is submitted that reducing the number of objectives will not clarify but only muddle separate topics or topics of design relevance will be lost altogether - making objectives more specific will only limit the range of potential outcomes to those that meet the policy expectations.
- 14.2.6 Is the objective/provision consistent with the LPPF?
- 14.2.6.1 The Amendment is consistent with the LPPF. No specific inconsistency with the LPPF has been identified by Becton.

- 15.1 It has been suggested or inferred that the Council's position in respect of this Amendment has been clouded by emotion or passion.
- 15.2 Passion in this case has not only been on the side of those supporting the Amendment.
- 15.3 Whilst "icon" is an expression used in putting Becton's case, for example, it is a term used by Mr Olszewski its use was passionately attacked on behalf of Becton.
- 15.4 It is rhetorically asked where does the word "icon" appear in the form of the Amendment supported by the Council before the Panel?
- 15.5 It is submitted that Becton's attack on the Amendment has not been a product of analysis of the Amendment in the form now supported by Council but rather has sought to limit, to the greatest degree possible, constraints on its development options.
- 15.6 By contrast the Council has transparently sought to provide a detailed framework responding to the issues identified by the Working Group and it has positively responded to submissions which do not erode the intent of the Amendment.

CONCLUSION

The Council in its role as the Planning Authority requests that the submissions and evidence led on its behalf be taken into consideration by the Panel and awaits the Panel's report for consideration when deciding whether to adopt the Amendment.

20 May 2002
01040120


**I McP Pitt SC
of Best Hooper
Solicitors on behalf of the Planning Authority**

IN THE MATTER of the *Planning and Environment Act 1987* [the Act]

and

IN THE MATTER of Amendment C25
to the Port Phillip Planning Scheme
[the Amendment]

WRITTEN OUTLINE OF REPLY
ON BEHALF OF THE PLANNING
AUTHORITY

BEST HOOPER
Solicitors
563 Lt. Lonsdale Street
MELBOURNE 3000

Tel: (03) 9670 8951
Fax: (03) 9670 2954
Ref: IP:MF:01040120