

Date: 20 April 2023

WHITEHORSE PLANNING SCHEME AMENDMENT C220whse

Residential Corridors Built Form

PART A SUBMISSION – WHITEHORSE CITY COUNCIL

INTRODUCTION

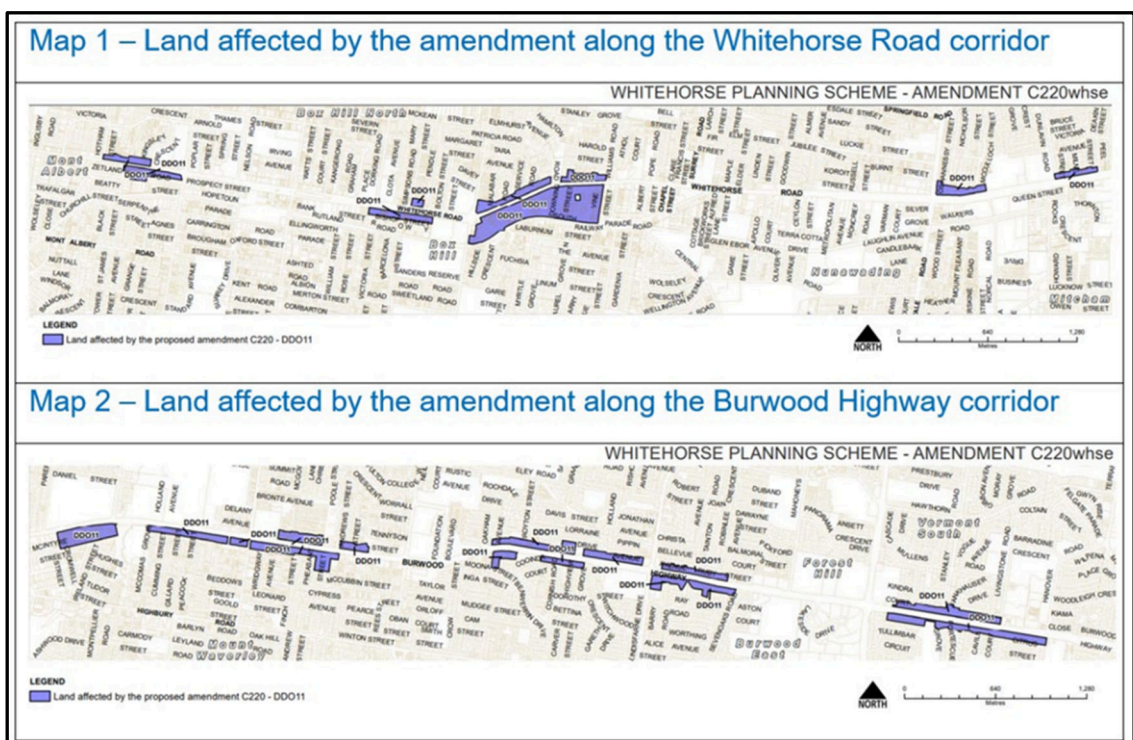
1. Whitehorse City Council (**Council**) is the planning authority for Amendment C220whse (**Amendment**) to the Whitehorse Planning Scheme (**Scheme**). Council has prepared, and is the proponent for, the Amendment.
2. The Panel has requested that Council provides its 'Part A' submission on 20 April 2023, prior to the commencement of the hearing.
3. The Amendment proposes to introduce planning controls to implement the recommended outcomes of the *Whitehorse Residential Corridors Built Form Study 2019* (**Corridors Study**).
4. Specifically, the Amendment proposes to:
 - 4.1 introduce Schedule 11 to Clause 43.02 (Design and Development Overlay) (**DDO11**) in to the Scheme;
 - 4.2 include the Corridors Study as a background document at clauses 21.06 and 22.03, and the schedule to clause 72.08;
 - 4.3 make minor policy changes to clauses 21.06 and 22.03 to reference the Corridors Study; and
 - 4.4 amend all of the Scheme maps by applying DDO11.
5. This submission responds to the Panel's directions under the following headings:
 - 5.1 Background to the Amendment;
 - 5.2 The Land Affected by the Amendment;
 - 5.3 Chronology of Events;
 - 5.4 Strategic context and assessment;
 - 5.5 Other matters raised by the Panel at the Directions Hearing; and
 - 5.6 Proposed changes to the Amendment.
6. Council's Part B Submission will address all other matters set out in the Panel's Directions dated 3 April 2023, including a response to the submissions received and identifying any permit applications that might be impacted by the Amendment.

BACKGROUND TO THE AMENDMENT

7. Council has prepared the Amendment and following exhibition received a number of submissions.
8. This Panel has been appointed pursuant to section 153 of the Act to consider the submissions that have been referred to it pursuant to section 23(1)(b) of that Act.
9. A more detailed description of the Amendment is contained in the Explanatory Report.

The land affected by the Amendment

10. The Amendment applies to land that is zoned either Residential Growth Zone – Schedule 1 (**RGZ1**) or Residential Growth Zone – Schedule 2 (**RGZ2**) along the Whitehorse Road and Burwood Highway, excluding land within the RGZ1 or RGZ2 that is covered by existing an structure plan and/or urban design framework, such as the Box Hill Transit City Activity Centre Structure Plan, Tally Ho Urban Design Framework and Burwood Heights Activity Centre Structure Plan (**Amendment Land**).
11. The Amendment Land interfaces with more traditional residential development in the Neighbourhood Residential Zone (**NRZ**) and the General Residential Zone (**GRZ**).



12. Under RGZ1 and RGZ2:
 - 12.1 the preferred maximum building height is 13.5 metres;
 - 12.2 there is no maximum building height specified in either schedule; and

12.3 there are various decision guidelines.

13. The Significance Landscape Overlay – Schedule 9 (**SLO9**) also applies to the Amendment Land.

Chronology of events

14. In October 2014, Amendment C160 to the Scheme introduced a suite of new residential zones.
15. As part of Amendment C160, Council had initially included a 3 storey (11 metres) mandatory maximum building height for land within the RGZ1 and a 4 storey (13.5 metres) mandatory maximum building height for land within the RGZ2.
16. The Minister for Planning removed these mandatory heights when approving Amendment C160. The current controls within the Scheme did not, and do not, reflect the Council's intentions.
17. Since the introduction of the new zones, concern has been raised about the planning outcomes within the corridors given the sensitive interface with more traditional residential development in the NRZ which is contemplated for limited change, and the GRZ that allows for moderate change.
18. Notwithstanding the express purpose of the RGZ '[t]o provide housing at increased densities in buildings up to and including four storey buildings', the Victorian Civil and Administrative Tribunal (**Tribunal**) has approved developments with heights up to 6 storeys, with unsympathetic built form and limited landscaping outcomes.
19. The failure to include a maximum building height, and setbacks to manage the built form and the sensitive residential interfaces has meant that both Council's and the community's expectations for the corridors have not been achieved. Both Council and the community have been required to spend considerable resources arguing these matters to the Tribunal.
20. In order to address these issues, Council commissioned Ethos Urban to undertake the Corridors Study in November 2017. A key aim for Council was to achieve an outcome where there was a better balance between increased building heights and the interface with the sensitive residential interfaces.
21. A key outcome of the Corridors Study was a recommendation for built form controls for the Amendment Land.
22. At its meeting on 29 January 2019, Council adopted the Study. The Council report outlined in detail the rationale for the guidelines and subsequent planning provisions.

Authorisation

23. Following Council's resolution and an extensive review of the proposed planning controls, officers requested authorisation to prepare the Amendment on 11 October 2019.
24. The then Department of Environment, Land, Water and Planning (**DELWP**) issued a request for further information on 16 December 2019, seeking:
 - 24.1 clarification of the intent of the DDO11;
 - 24.2 further strategic justification for the mandatory controls;
 - 24.3 consideration of how the application of the DDO11 will impact smaller development applications, particularly one or two dwellings on a lot; and
 - 24.4 consideration of how the Amendment addresses the need for consolidation of lots in order to achieve maximum development potential.
25. A meeting was held between Council and the Department on 7 January 2020 and a response to the further information request was submitted by Council on 24 January 2020.
26. A further meeting was held between Council and DELWP on 18 September 2020, where the issues of preferred versus mandatory maximum heights, lot consolidation and mandatory controls were discussed.
27. Council provided an additional response to these issues on 2 October 2020.
28. The Amendment was authorised by letter dated 17 February 2021 (**Authorisation Letter**), subject to two conditions, namely:
 1. Revise the drafting of the DDO11 to ensure that:
 - a) It is consistent with the Ministerial Direction on the Form and content of Planning Schemes.
 - b) The side and rear setback requirements are discretionary, not mandatory.
 - c) Provisions are worded consistently with the head provision.
 - d) The design objectives remove reference to equitable development rights and include an objective in relation to lot consolidation.
 - e) Permit exemptions for small scale buildings and works are included.
 - f) It is clear that the shadowing requirement relates to 'additional' shadowing of adjacent 'public' open space.
 2. Revise the drafting of the explanatory report to reflect the any changes made to the amendment in response to the authorisation conditions.

29. In addition to the conditions, Council was encouraged to consider:
- The extent to which DDO11 encourages developments of greater than 5 storeys, when it is council's intention that normal ResCode standards apply to development four storeys and under. During the amendment process council could model the development yield scenarios comparing a ResCode compliant 4 level development against a DDO11 compliant 5 and 6 level development on a range of unconsolidated lot sizes and consolidated lot sizes to determine whether the requirements of DDO11 make development of unconsolidated sites feasible.
 - Whether the DDO11 can encourage a 4-storey preferred height for buildings on Burwood Highway, east of Springvale Road, when the requirements of the overlay do not apply to development of 4 storeys or less. To overcome this issue council may consider whether a different way of expressing preferred and mandatory requirements in a table is required.
 - Better Apartments Design Standards will shortly implement changes to Clause 58. Council is encouraged to review how any proposed changes to the Clause 58 will influence the proposed controls in the DDO.
30. In addition to the Authorisation Letter, DELWP provided Council with a marked up DDO11 to assist with meeting the conditions.
31. Despite working very closely with DELWP, the conditions of authorisation were not acceptable to Council officers.
32. At its meeting on 20 September 2021, Council considered a report responding to the authorisation conditions. The report explained the Council officers' concerns that the authorisation conditions requiring the side and rear setbacks to be discretionary and the deletion of the reference to 'equitable development' were unacceptable. The Council report included the following table which outlined the concerns:

Minister's condition	Officer response
1. Revise the DDO11 to ensure that:	
a) It is consistent with the Ministerial Direction on the Form and Content of Planning Schemes.	<p><u>Condition addressed</u></p> <p>Officers have reviewed the draft controls to ensure it is consistent with all relevant Ministerial Directions.</p> <p>Council officers engaged a legal practitioner to undertake a review of the proposed changes to the DDO in response to Minister's conditions of authorisation. The legal review concluded that the updated DDO is written according to the Minister's Direction on the Form and Content of Planning Schemes.</p>
b) The side and rear setback requirements are discretionary, not mandatory.	<p><u>Condition not supported</u></p> <p>Tall buildings with no spacing between buildings would be very imposing along the narrow RGZ corridors, both limiting long distance views to the east, as well as dominating the immediate low rise development in the adjoining residential zones and potentially appearing as an almost continual and dominating built form to those interfaces. Increased side and rear setbacks will make buildings less imposing along the corridor and to adjoining land.</p> <p>Mandatory setbacks allow for greater opportunities for deep soil planting, landscaping and space between buildings to minimise</p>

	<p>the need for screening measures and resulting poor built form outcomes. If consistently applied through mandatory controls, a minimum 4.5 metre side setback equates to 9 metres between buildings. This is generally considered sufficient for privacy without needing screening, which could be considered a compromised built form outcome.</p> <p>The use of consistent setbacks will provide certainty to landowners and neighbouring properties and remove the possibility of inequitable setbacks impacting on future developments. The mandatory separations will also facilitate sizeable tree planting, and more successful tree retention, between buildings and to rear interfaces with other zones, which in itself will improve privacy and outlook.</p> <p>Mandatory controls are only proposed where deemed necessary to prescribe a strategically justified built form outcome. The proposed mandatory controls will apply to a relatively small percentage of land in the municipality affected by the RGZ along these corridors, which will provide certainty for landowners along the corridor. As such, Council officers do not recommend any changes to the mandatory controls.</p>
<p>c) Provisions are worded consistently with the head provision.</p>	<p><u>Condition addressed</u></p> <p>Officers have reviewed the draft provisions to ensure they are consistent with the head controls.</p>
<p>d) The design objectives (i) remove reference to equitable development rights and (ii) include an objective in relation to lot consolidation.</p>	<p><u>Condition (i) not supported; Condition (ii) addressed</u></p> <p>Equitable development rights are an important concept that has been approved in other DDOs, including DDO10 in the Melbourne Planning Scheme, where a design objective states “to ensure that new buildings provide equitable development rights for adjoining sites and allow reasonable access to privacy, sunlight, daylight and outlook for habitable rooms”. This was included through Amendment C270melb in 2016.</p> <p>The legal review also concurred with officers that equitable development rights are an important concept and the design objective should be retained. As such, Council officers do not recommend removing the reference to equitable development rights in the design objectives.</p> <p>It is acknowledged that consolidated sites have potential to achieve better built form and amenity outcomes and that a number of new developments in the corridors have assembled adjoining sites. An objective supporting consolidation of lots therefore has merit and it is recommended that an objective relating to lot consolidation be added.</p>
<p>e) Permit exemptions for small scale buildings and works are included.</p>	<p><u>Condition addressed</u></p> <p>As discussed at a meeting with DELWP on 7 January 2020 and included in the subsequent written response provided on 24 January 2020, Council officers do not have any concerns with exempting smaller applications for minor buildings and works e.g. outbuildings, however DELWP suggested that the proposed DDO exempts development 4 storeys and under. Officers do not consider such development to be small scale buildings and works. Officers recommend that developments 3 storeys and under are exempt from the permit requirements of the DDO11. This means that developments 3 storeys and under would be assessed against ResCode.</p>

<p>f) It is clear that the shadowing requirement relates to 'additional' shadowing of adjacent 'public' open space.</p>	<p><u>Condition addressed</u> DELWP stated that 'public' open space should be added to distinguish the type of open space. They also recommended to add 'additional' as it is quite impossible to not have any overshadowing to the west facing open space during the time specified (being between 12pm and 2pm on 22 September). The DDO has been updated to reflect this condition.</p>
<p>2. Revise the drafting of the explanatory report to reflect any changes made to the amendment in response to the authorisation conditions.</p>	<p><u>Condition addressed</u> The updated explanatory report is at Attachment 1.</p>

33. After considering the report, Council resolved to submit a revised planning scheme amendment to the Minister for re-authorisation. The revised DDO11 and the associated Amendment documents were submitted for authorisation on 4 October 2021 as Amendment C239.
34. On 21 December 2021, DELWP refused to authorise Amendment C239, and Council was advised that the following three matters were considered:
- The inadequate strategic basis for the proposed schedule to the Design and Development Overlay, and failure to satisfy the guidelines set out in Planning Practice Note 59: The role of mandatory provisions in planning schemes.
 - The Victoria Planning Provisions, the objectives at section 4 of the Planning and Environment Act 1987, and the current Ministerial Directions.
 - The effect of the proposed schedule and its mandatory setbacks on development opportunities, including the decrease in the expected yield within nominated growth areas in key road corridors.
35. Further clarification received from DELWP explained that using mandatory rear and side setback requirements in DDO11 will limit narrower sites to be able to develop to their full capacity and undermine opportunities to use alternative site responsive design options where needed.
36. With regards to 'equitable development rights', DELWP highlighted that the concept is not yet available within the Victoria Planning Provisions (**VPP**) and speculative future developments should not be used to limit proposed developments.
37. DELWP officers also indicated that they were otherwise satisfied with the improved drafting of revised DDO11 submitted with C239, however those two outstanding conditions must be addressed.
38. DELWP suggested that the Amendment could be re-authorised under the initial Amendment C220 by submitting the revised DDO11 subject to the two outstanding conditions being addressed.

39. At its meeting dated 8 August 2022, Council considered a further report which proposed to amend DDO11 to meet the two outstanding conditions of authorisation.
40. On 26 August 2022, DELWP advised that it was satisfied that the revised DDO11 met the conditions of authorisation and the Amendment could proceed to public exhibition.

Formal Exhibition

41. Council exhibited the Amendment between 29 September 2022 to 31 October 2022 by:
 - 41.1 direct notification by mail to landowners and occupiers of land affected by the Amendment;
 - 41.2 direct notification to statutory authorities;
 - 41.3 publishing a notice in the Government Gazette on 29 September 2022;
 - 41.4 publishing a full copy of the amendment documentation on DELWP's and Council's websites; and
 - 41.5 having a copy of the Amendment available for public viewing at the Planning Counter at Council's Nunawading Office; and
 - 41.6 posting Council's 'Your Say' platform, at the commencement of the exhibition period.
42. In response to the exhibition, Council received 16 submissions.

Planning Committee meeting – 27 February 2023

43. On 27 February 2023, Council considered the submissions and resolved to:
 1. Note the submissions received for Planning Scheme Amendment C220whse in Attachment 1, and response to the submissions in Attachment 2
 2. Note the revised Schedule 11 to the Design and Development Overlay (DDO11 – post exhibition changes) in Attachment 3 in response to the relevant concerns raised in submissions
 3. Having considered all submissions under Section 22 of the Planning and Environment Act 1987 (the Act) in relation to Amendment C220whse, request the Minister for Planning to appoint an Independent Planning Panel to consider the amendment and all the submissions received in accordance with Section 23 of the Act.
 4. Advise all the submitters of Council's request for an Independent Planning Panel.
44. After carefully considering the submissions, Council resolved that the Amendment should be changed to include mandatory side and rear setbacks.

STRATEGIC CONTEXT AND ASSESSMENT

Why is the Amendment required?

45. The Amendment is required to implement the recommendations of the Corridors Study.

Objectives of Planning in Victoria

46. The Amendment will support and assist with implementing the objectives of planning in Victoria as outlined in Section 4 of the Act.

47. In particular, the Amendment will implement the following objectives:

- (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
- (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
- (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
- (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);
- (g) to balance the present and future interests of all Victorians.

Ministerial Directions

48. The following Ministerial Directions are relevant to the Amendment.

Form and Content of Planning Schemes

49. The Amendment will need to comply with the required Form and Content of Planning Schemes. The Amendment was prepared having regard to this Ministerial Direction.

Ministerial Direction No. 9 – Metropolitan Planning Strategy (Amended 30 July 2018)

50. The Amendment has had regard to the Metropolitan Planning Strategy, and the Explanatory Report discusses the relevant matters identified in this Ministerial Direction.

Ministerial Direction No. 11 – Strategic Assessment of Amendments (Amended 30 July 2018)

51. Ministerial Direction No. 11 seeks to ensure a strategic evaluation of a planning scheme amendment and the outcomes it produces.

52. The preparation of the Explanatory Report has fulfilled the requirements of this direction.

Ministerial Direction No. 15 – The Planning Scheme Amendment Process (Amended 30 July 2018)

53. The Amendment has complied with the directions contained in this Ministerial Direction.

Practice and Advisory Notes

54. The Amendment is consistent with the following Practice and Advisory Notes:
- 54.1 PPN46 – Strategic Assessment Guidelines;
 - 54.2 PPN59 – The Role of Mandatory Provisions in Planning Schemes (**PPN59**); and
 - 54.3 PPN77 – Pre-setting Panel Hearing Dates.
55. The Amendment’s response to PPN59 is expected to be a matter that will be subject to submissions and evidence during the course of the hearing. Council will address the Amendment’s response to PPN59 in its Part B Submission and through the evidence.

Planning Policy Framework (PPF)

56. The following clauses of the PPF are relevant to the Amendment:
- 56.1 Clause 15 – Built Environment and Heritage and in particular clause 15.01-1S – Urban design;
 - 56.2 Clause 16.03 – Housing and in particular clause 16.01-1R – Housing supply – Metropolitan Melbourne; and
 - 56.3 Clause 18 – Transport and in particular clause 18.01-1S – Land use and transport planning.
57. The Amendment will implement these clauses of the PPF for the reasons set out in the Explanatory Report. Council adopts that assessment as part of this submission.

Local Planning Policy Framework (including MSS)

58. The following clauses of the LPPF are relevant to the Amendment:
- 58.1 Clause 21.05 – Environment;
 - 58.2 Clause 21.06 – Housing; and
 - 58.3 Clause 22.03 – Residential development; and
 - 58.4 Clause 22.04 – Tree Conservation.
59. The Amendment will implement these clauses of the LPPF for the reasons set out in the Explanatory Report. Council adopts that assessment as part of this submission.

Strategic assessment guidelines

60. The strategic justification for the Amendment has been addressed under the questions that form the Strategic Assessment Guidelines as part of the Explanatory Report. Council adopts that assessment as part of this submission.

MATTERS RAISED IN THE PANEL'S DIRECTIONS DATED 3 APRIL 2023

A summary of the strategic context

61. A summary of the strategic context relevant to the planning controls and policies is provided above.

Other recently proposed or approved amendments

62. Amendment C230whse (**Amendment C230**) relates to the former Australian Road and Research Board site at 490-500 Burwood Highway, Vermont South (**ARRB Site**) which is now privately owned. Amendment C230 proposes to rezone the ARRB Site from the Transport Zone to the RGZ and apply the DDO Schedule 6 (**DDO6**), vegetation overlays and the Environmental Audit Overlay, make minor policy changes at Clauses 21.06 and 22.03 and update the existing Heritage Statement of Significance.
63. Amendment C230 facilitates new use and development of the ARRB Site. The DDO6 will guide future built form and manage sensitive interfaces and those parts of the site for more intensive development. Given the location of the former ARRB Site on Burwood Highway, Amendment C220 has provided guidance in the preparation of Amendment C230 on aspects such as building height. The Panel report has been received but is yet to be considered by Council.
64. Council also notes Amendment C241whse (**Amendment C241**) which proposes to introduce a Development Contribution Plan Overlay over all land within the municipality. Submissions to Amendment C241 are currently being considered by a planning panel.
65. Amendment C241 is of contextual relevance as it applies to the Amendment Land.

Current applications that may be impacted by the Amendment

66. Consistent with the email from Ms Laura Agius of Planning Panels Victoria dated 5 April 2023, Council will provide this information with its Part B Submission.

Conditions of authorisation

67. The table extracted above from the Council report 20 September 2021 provides an overview as to how all but two of the conditions were met. The remaining two conditions were satisfied by making the side and rear setbacks discretionary and deleting reference to equitable development.

Council's consideration of the further matters

68. The matters DELWP requested Council to give further consideration were discussed in the Council report dated 20 September 2021 immediately following the discussion on meeting the conditions.

Determination of study area boundary in the Corridors Study

69. The rationale for the study area boundary is described in section 1.2 of the Corridors Study.

Differences between the controls proposed in the Corridors Study and DDO11

70. Council considers that the Amendment is consistent with the recommendations of the Corridors Study. The table below provides a summary.

	Corridors Study	DDO11 (following 23 February)	Comment
Scope of control	Applied to all development	Does not apply to development up to 3 storeys	Amended in response to authorisation condition
Design objectives	The second design objective sought to achieve equitable development	The reference to equitable development has been deleted, together with other changes	Amended in response to authorisation condition
Building height	Preferred maximum height of 4 (13 metres) and 5 storeys (16 metres) Mandatory maximum height of 6 storeys (19 metres)	Mandatory maximum height of 19 metres and 6 storeys	No preferred maximum height proposed
Front setback	Minimum 5 metres with an additional 3 metres to upper level above 4 storeys (mandatory)	Minimum 5 metres with an additional 3 metres to upper level above 4 storeys (mandatory)	Amendment is identical to Corridors Study
Side setbacks	Minimum of 4.5 metres with an additional 4.5 metres to upper levels above 4 storeys (total of 9 metres) (mandatory)	Minimum of 4.5 metres with an additional 4.5 metres to upper levels above 4 storeys (total of 9 metres) (mandatory)	Amendment is identical to Corridors Study
Rear setback	Minimum of 9 metres (mandatory)	Minimum of 9 metres (mandatory)	Amendment is identical to Corridors Study
Pedestrian Interfaces	Four discretionary requirements	Four discretionary requirements	Different drafting – same effect
Overshadowing	No additional shadowing to	No additional shadowing to	Different drafting – same effect

	Corridors Study	DDO11 (following 23 February)	Comment
	adjacent public open space between 12pm and 2pm on 22 September – discretionary	adjacent public open space between 12pm and 2pm on 22 September – discretionary	
Landscaping	Provide for a minimum deep soil area relative to tree height which is a minimum depth of 800mm (for small trees) to a minimum of 1200mm (for large trees)	Provide a minimum deep soil area relative to tree height, which is a minimum depth of 800mm (for small trees), 1000mm (for medium trees) and 1200mm (for large trees).	Different drafting – same effect

71. Aside from the changes required by the Authorisation Letter, the Amendment is consistent with the Corridors Study.

Summary of main issues in the submissions

72. A detailed summary of, and response to, the submissions received in response to exhibition forms part of Council's meeting agenda dated 27 February 2023.
73. The key issues raised in the submissions are summarised as:
- 73.1 overlooking, overshadowing and amenity impact;
 - 73.2 green character and neighbourhood character;
 - 73.3 impacts on commercial and community infrastructure;
 - 73.4 increased density and constant change;
 - 73.5 potential increase of traffic and on-street car parking; and
 - 73.6 potential flooding.
74. Council will respond in more detail to these issues in its 'Part B' submission.

Further changes to the Amendment

75. Other than the changes Council resolved to adopt at its meeting on 23 February 2023, it does not propose further changes to the Amendment at this time. Following receipt and consideration of the evidence, further changes may be proposed during the hearing.

Other strategic material

76. There is no additional strategic material that Council intends to rely on in presenting its primary case at the hearing.

CONCLUSION

77. This completes Council's Part A Submission.

Planology
Lawyers for the Whitehorse City Council
20 April 2023