



**Merri-bek**  
City Council

## COUNCIL AGENDA

**Wednesday 7 December 2022**

**Commencing 7 pm**

**Council Chamber, Merri-bek Civic Centre  
90 Bell Street, Coburg**

### Language Link

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## 7.6 AMENDMENT C219MORE - 42 ST PHILLIP STREET, BRUNSWICK EAST - REMOVAL OF SPECIFIC CONTROL OVERLAY - DECISION GATEWAY 2

Director Place and Environment      Joseph Tabacco

### City Strategy and Economy

Council Meeting at its meeting on 9 November 2022 resolved that the matter be deferred to the meeting to be held on 7 December 2022.

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### Officer Recommendation

That Council:

1. Using its powers as a planning authority under section 23(1) of the *Planning and Environment Act 1987*, requests that the Minister for Planning appoint an Independent Planning Panel to consider submissions to Planning Scheme Amendment C219more.
2. Endorses the responses to submissions set out in Attachment 1 of this report to form the basis of Council's submission to an Independent Planning Panel.
3. Refers any late submissions to the Independent Planning Panel.
4. Authorises the Director Place and Environment to make minor changes to Planning Scheme Amendment C219more and to give direction on issues which arise in the course of the Panel hearing in response to expert evidence and submissions if required.

## REPORT

### Executive Summary

Amendment C219more proposes to remove the Specific Controls Overlay – Schedule 4 from 42 St Phillip Street, Brunswick East. The overlay was placed on the land in 2003 to restrict development and use of the land to one dwelling.

Council exhibited Amendment C219more from 8 September to 14 October 2022. The Amendment received four submissions during the formal exhibition period.

Key themes raised in the submissions relate to:

- Keeping the restrictions on the land
- Strategic justification of the Amendment
- Notification process
- Amendment costs.

This report recommends that Council requests the Minister for Planning appoint an Independent Planning Panel to consider the Amendment and submissions.

### Previous Council Decisions

**St Phillip Street 42, Brunswick – Planning Permit Application MPS 1999/0232 (P01506)**  
– 16 August 1999

*Council issue a Notice of Refusal for the construction of two attached houses (Dual Occupancy) at 42 St Phillip Street, Brunswick on the following grounds:*

1. *The proposed development is out of character with the area.*
2. *The proposed development will lead to unacceptable off-site impacts.*

**St Phillip Street 42, Brunswick – Determination of the Victorian Civil and Administrative Tribunal (P01506) – 20 December 1999**

*Receive and note the report.*

**Minutes of Council Meeting – 10 July 2000**

*Council received a question from a resident regarding development at 42 St Phillip Street, Brunswick.*

*Council resolved that:*

- 1. Council engage heritage consultants to conduct an urgent survey of the heritage and character of St Phillips Street, East Brunswick, and the consultants to speak to the residents of St Phillips Street to ascertain history and heritage issues.*
- 2. Council urgently write to the Minister for Planning and to the Department of Infrastructure outlining the history of the site, citing the VCAT decision and the precedent set by the previous Minister in the City of Whitehorse.*

**St Phillip Street 42, and Urban Character Issues (P01506) – 24 July 2000**

- 1. Council advise petitioners from St Phillip Street that the heritage significance of the street does not justify a heritage precinct.*
- 2. The Director City Strategy carry out a case study on 42 St Phillip St with the Department of Infrastructure and prepare a further report on the outcome.*
- 3. The issues raised in this matter be communicated to the Minister for Planning and Council request the Minister's clarification regarding protection of urban character given the lack of powers available to Council to intervene where no planning permit is required.*

**St Phillip Street 42, Brunswick – Status Report (P015062) – 27 November 2000**

- 1. Council not proceed further with action to challenge the validity of the current building permit for the development at 42 St Phillip Street on the basis of the statutory and legal investigation undertaken to date.*
- 2. The affected residents of St Phillip Street be advised of Council's actions taken on this matter, the nature of this report and Council's resolution, and Council's continuing work in relation to urban character, including local area investigations.*
- 3. The Director City Strategy prepare a further report on the future character of the St Phillip St area as a pilot within the context of the overall Urban Character policy implementation.*
- 4. Council note the shortcomings of Rescode in addressing the issues raised by construction on the site and advise the Minister for Planning and the Rescode Advisory Panel.*
- 5. Council pay Kellehers Australia, Barristers & Solicitors for the advice provided to the residents of 40 St Phillip Street, Brunswick.*

**St Phillip Street 42, Brunswick (P01506) – 14 October 2002**

*Council resolve to write to the Minister for Planning, the Hon Mary Delahunty, seeking Ministerial intervention in the matter in accordance with the draft letter provided at Attachment 4 of the report.*

**St Phillip Street 42, Brunswick Application MPS 2002/0377 (P01506) – 19 May 2003**

*Council resolve that if it were in a position to determine the application, that a Planning Permit should be refused for development of the land for an additional single storey dwelling at 42 St Phillip Street, Brunswick on the grounds that:*

- 1. The landowner has circumvented the planning controls to achieve the first dwelling on the site, so as to avoid having regard to neighbourhood character (P01506, 18 October 2002).*

2. Council supports a restriction being placed on the land to the effect that only one building be allowed to be built on that site (CRFB6, 23 September 2002).

**Note:** Council wrote to the Minister for Planning, Mary Delahunty on 18 October 2002 requesting that she exercise her powers of intervention to restrict development of the site and determine the matter but have not received a response to date.

Council asks VCAT to consider whether this application is materially different from the previous application for this site, which it considered and refused in 1999.

### **Amendment C219 – 42 St Phillip Street, Brunswick East – Removal Of Specific Control Overlay – Decision Gateway 1 – 13 July 2022**

That Council:

1. Using its powers as a planning authority under ss8A and 8B of the Planning and Environment Act 1987, seek authorisation from the Minister for Planning to prepare Moreland Planning Scheme Amendment C219 more as detailed in Section 3 of this report and in Attachment 1.
2. Following receipt of the Minister's authorisation, exhibit the Amendment in accordance with Section 19 of the Planning and Environment Act 1987 as outlined in the Consultation section of this report.
3. Authorises the Director Place and Environment to make changes to the Amendment based on conditions imposed in any authorisation granted by the Minister for Planning and to make minor changes.

## **1. Policy Context**

### **Council Plan**

The *Council Plan 2021-2025* (Council Plan) aims to create an environmentally proactive City, a City that allows people to move and live safely in vibrant spaces and places. Key strategies of the Council Plan include:

- 4.3 – Design neighbourhoods to be safe, pleasant, inviting places for all to visit and live.
- 4.7 – Increase local affordable housing outcomes.
- 4.8 – Influence the delivery of better-quality private development.

### **Planning Policy Framework**

The Planning Scheme sets out that Council will manage increased housing by directing most of the growth to areas close to shops, services, and public transport. This includes directing infill development in residential areas outside of activity centres. To help direct growth, the Planning Scheme sets out different levels of housing change, including areas of 'Minimal Housing Growth'.

The Planning Scheme also sets out that improving the design quality of the built environment is a high priority in managing development associated with growth. This includes encouraging the design of development that responds to and contribute to its context. To help achieve this, the Planning Scheme includes policies on neighbourhood character.

### **Plan Melbourne 2017-2050**

*Plan Melbourne 2017-2050* (Plan Melbourne) is the overarching planning strategy for Victoria. Outcome 2 of Plan Melbourne seeks to provide housing choice in locations close to jobs and services. Policies to achieve this Outcome include delivering more housing close to jobs and public transport and providing greater choice and diversity of housing.

## 2. Background

### Site and surrounds

Land at 42 St Phillip Street, Brunswick East (the Subject Land) is located on the southern side of St Phillip Street, Brunswick East, approximately 223 metres east of Lygon Street. It has a frontage to St Phillip Street of 20.1 metres and a total area of 563 square metres. Extending along the rear (south) boundary is a right of way. The site contains no easements and there is no covenant on the title.

The Subject Land and surrounding land are in the Neighbourhood Residential Zone – Schedule 1. The site is also affected by the Specific Controls Overlay – Schedule 4 (SCO4) and the Development Contributions Plan Overlay – Schedule 1 (DCPO1). A double storey dwelling and outbuilding are currently on the site.



The Subject Land is located within a residential area that mainly comprises single storey detached and semi-detached dwellings. Double storey and medium density development can be found throughout the wider area. This includes medium density development located at Mary Moodie Way (approximately 203 metres east of the subject land) and the construction of a double storey dwelling at 44 St Phillip Street. Dwelling styles range from post-War housing through to more contemporary styles. The Subject Land is also approximately 109 metres east of the boundary of the Brunswick Activity Centre.

## 3. Issues

The Amendment received a total of four submissions during the exhibition period. These submissions did not support the Amendment. Three of the submissions were in the form of a proforma letter. Key matters raised in submissions are outlined below with an officer response for each.

### ***Keep the restrictions on the land***

All submissions argued that the control should not be removed as it was applied as a result of the proponent's actions in seeking to develop the land and the control acts as a deterrent to others.

### *Council officer response*

The main issue that led to the application of SCO4 on the subject land was a perceived circumventing of the planning rules by the owner of the land.

Buildings and works for a single dwelling do not require a planning permit. This applies across the residential zones, provided no other planning controls exist on the land to limit development (such as a heritage overlay) and the land is over 300 square metres.

The proponents acted within the planning system when they chose to build a single dwelling on the land after their application for a dual occupancy was refused in 1999. A planning permit was not required and as a result, a neighbourhood character assessment under the planning scheme was not required.

Council officers are not aware of the SCO having been applied for the same reason anywhere else in Metropolitan Melbourne and the use of the SCO as a 'deterrent' to others to discourage development of their land has no basis in planning policy.

### ***Justification for the Amendment***

One submitter raised concerns with the strategic justification of the Amendment and that further work should have been done to support the removal of the overlay such as:

- Finding out the owner's intention with the land
- Measuring whether the amendment would send the wrong message to the development community
- An investigation of what other single-dwelling overlays and covenants across Merri-bek and Victoria would be at risk because of the Amendment.

### *Council officer response*

Appropriate strategic planning justification has been provided to support the Amendment as set out in the 13 July 2022 Council report and C219more Explanatory Report. Removal of the overlay is justified for the following reasons:

- The Amendment implements the objectives of planning in Victoria including providing for the fair, orderly, economic, and sustainable use and development of land.
- The Amendment supports Plan Melbourne, the Planning Policy Framework and the Planning Scheme by supporting new housing in locations close to jobs, services, and public transport.
- The Planning Scheme does not apply the Specific Controls Overlay in a similar way elsewhere in the municipality.
- Since the overlay was introduced the planning controls affecting the subject land have changed. The most significant change has been the introduction of ResCode and the new residential zones and Council's housing framework and neighbourhood character local policies. The planning controls in force today provide more clarity and certainty about the level of development expected and the need to consider neighbourhood character under ResCode.
- Other land within residential zones including land directly surrounding the subject site and land of a similar size within the same street can be developed for more than one dwelling provided the requirements of the zones, applicable overlays, and planning policies are met.
- If the overlay is removed and an additional house is proposed on the land, a planning permit would be needed.
- Any planning application would follow the standard statutory process. This includes notification to adjoining properties.

The Amendment is not expected to have any impact on the removal of single dwelling covenants or similar overlays across Merri-bek and Victoria. Any removal of overlays/covenants that may prescribe single dwelling restrictions will be assessed on the circumstances and merits of their removal.

A review of Metropolitan Melbourne Planning Schemes found that no other instances of the Specific Controls Overlay is being used to limit development to one dwelling on a lot. Generally, if development is to be limited it is because of other site constraints, such as environmental conditions.

Council officers are aware of an attempt by Glen Eira in 2001 to introduce a local policy aimed at limiting the future development potential of residential sites where medium density was intended and a single dwelling had been constructed without a permit (Glen Eira Planning Scheme Amendment C15). This Amendment was later abandoned by Council after the introduction of ResCode which was considered to provide clearer guidance.

### ***Notification process***

One submitter raised concerns with the fairness of considering the letters of support that the proponent submitted with the Amendment. The submitter noted that it is unfair to other submitters that there was no opportunity for them to participate in a process prior to the exhibition of the Amendment. They believe the letters should not be given weight if they were in a proforma/petition format nor provided to the Planning Panel.

### ***Council Officer response***

Letters of support were provided by the proponent with the amendment request. They were not sought at the request of Council officers, and they do not form part of the formal submissions considered as part of the exhibition of the Amendment. If Council resolve to refer the Amendment to a planning panel, this information will be provided along with all documentation received to the amendment. The Planning Panel will determine how much weight to apply to these letters. They have not formed part of Council's assessment of the strategic justification of the amendment.

### ***Amendment costs***

One submitter noted that the amendment proponent should be paying for the Amendment, including officer hours, notice requirements and panel fees.

### ***Council officer response***

The *Planning and Environment (Fees) Regulations 2016* set out the fees for planning scheme amendments by the proponent - the person who requested the amendment (section 6). As detailed in the 13 July 2022 Council report, the Amendment proponent is responsible for paying all costs associated with the administration of the Amendment including exhibition costs and panel fees. The Amendment proponent must also pay amendment fees for the Planning Authority to consider submissions. This fee accounts for officer time spent administering the amendment.

### **Human Rights Consideration**

The implications of this report have been assessed in accordance with the requirements of the Charter of Human Rights and Responsibilities. The notification carried out as part of the Amendment do not limit or interfere with any Human Rights, in particular 'Section 13: The right to privacy and reputation', 'Section 18: The right to take part in public life', and 'Section 20: Property rights'.

The following is noted:

- Council utilises existing personal information held by Council to ensure owners of affected and adjoining properties are notified. This is required by the Planning and Environment Act 1987.

- Any person may elect to take part in the process by providing a submission to the Responsible Authority.
- No parties are deprived of any legal or proprietary interest in land, or the ability to use and develop that land in accordance with the planning regulatory framework.
- The changes enable the land to be developed for more than one dwelling, which will align with other residential land across the municipality. The Amendment is restoring the right of the owner to develop their property in line with current statutory controls.

It is considered that the proposed changes to the Planning Scheme as set out in this Report will not have a direct or significant impact on gender equality.

#### **4. Community consultation and engagement**

The Amendment was publicly exhibited from 8 September to 14 October 2022 as part of the formal statutory exhibition process for the Amendment. To support consultation the following occurred:

- Direct notice to owners and occupiers of sites adjoining the Subject Land to the east, west, rear and across the road.
- Direct notice to prescribed Ministers.
- Notice of the preparation of the Amendment in *The Age* Newspaper on 5 September 2022 and *Government Gazette* on 8 September 2022.
- A dedicated webpage on Council's corporate website.

Strategic Planning officers were also available during the public exhibition process to provide advice and answer queries.

#### **5. Officer Declaration of Conflict of Interest**

Council officers involved in the preparation of this report have no conflict of interest in this matter.

#### **6. Financial and Resources Implications**

The proponent will meet the statutory fees and costs associated with the Amendment. This includes all costs to exhibit, consider submissions and administer the Amendment. If Council resolves to refer the Amendment and submissions to a planning panel, these costs will also be met by the proponent.

#### **7. Implementation**

The following timelines for the Amendment are broken down into the key 'decision gateways.' The timeframes may change as it is subject to Panel timing and Ministerial approval times.

##### **Decision Gateway 1: Authorisation and Exhibition (Completed)**

##### **Decision Gateway 2: Submission Review and Panel Request (this report)**

- November 2022: seek Ministers appointment of Panel to consider submissions
- December 2022: Panel Directions Hearing
- January 2023: Panel Hearing
- March/April 2023: Panel Report provided to Council

##### **Decision Gateway 3: Review Panel report and consider adoption of the Amendment**

- May/June 2023: Report on the Panel's recommendations and consider adoption of the final version of the Amendment.



- May/June 2023: If adopted, submit the Amendment to the Minister for Planning for approval.
- August/September 2023: Anticipated approval by the Minister for Planning.

### **Attachment/s**

1 [↓](#) C219 - Summary of Submissions D22/461444

MERRI-BEK PLANNING SCHEME AMENDMENT C219MORE – 42 ST PHILLIP STREET, BRUNSWICK EAST – REMOVAL OF SPECIFIC CONTROLS OVERLAY

OCTOBER 2022

SUBMITTER NUMBER	SUBMISSION TYPE	SUMMARY OF SUBMISSION	THEMES	COUNCIL OFFICER RESPONSE TO SUBMISSION	RECOMMENDATION
<b>Submitter Reference Number</b>	Submissions have been classified as:  <b>Supportive</b> (Submission expresses general support for the amendment and no changes are requested)  or  <b>Supportive and change requested</b> (Submission expresses general support for the amendment but requests a change)  or  <b>Not supportive</b> (Submission does not support the amendment but no changes are suggested)  or  <b>Not supportive and change requested</b> (Submission does not support the amendment and changes to the amendment are suggested)	Submissions have been summarised into their key points and include any specific requests for changes to Amendment C219more.  Summaries do not list all arguments in support of key points and requests for change.  Individual submissions should be referred to for further detail.	The following key themes have been identified from submissions received:  <b>Need for overlay</b>  <b>Notification process</b>  <b>Justification for the Amendment</b>  <b>Amendment costs</b>	Council Officer response to each submission.	Council Officer recommendation to Council in response to each submission.
<b>STANDARD RESPONSES TO COMMON ISSUES RAISED IN SUBMISSIONS</b>					
<p><b>Standard Response 1. Need for the Specific Controls Overlay to remain.</b>                      The main issue that led to the application of SCO4 on the subject land was a perceived circumventing of the planning rules by the owner of the land. This meant they did not need to consider neighbourhood character when they constructed the single dwelling. This is because the single dwelling did not require a planning permit.</p> <p>The proponents acted within the planning system requirements when they choose to build a single dwelling on the land after their application for a dual occupancy was refused in 2000. This was an option open to anyone who found themselves in a similar situation back in 2000. It is still the case today as a single dwelling does not require a planning permit across the residential zones, provided no other planning controls exist on the land to limit development (such as a heritage overlay) and the land is over 300m2.</p> <p>Similarly, it is open to anyone to decide to redevelop their land for an additional dwelling if a dwelling already exists on the land, provided they receive planning permission.</p>					

NO.	SUBMISSION TYPE	SUMMARY OF SUBMISSION	THEMES	COUNCIL OFFICER RESPONSE TO SUBMISSION	RECOMMENDATION
1	Not supportive	1. The control to restrict the development of the land to one dwelling was applied due to the proponent's blatant disregard and abuse of the planning system to try and circumvent VCAT's ruling on a dual occupancy development in 2000. The control should not be removed as the situation has not changed and it acts as a deterrent to others thinking they do not have to work within VCAT and Council decisions.	Need for overlay	1. See Standard Response 1.	No change proposed.  Refer submission to an Independent Panel.
2	Not supportive	1. The control to restrict the development of the land to one dwelling was applied due to the proponent's blatant disregard and abuse of the planning system to try and circumvent VCAT's ruling on a dual occupancy development in 2000. The control should not be removed as the situation has not changed and it acts as a deterrent to others thinking they do not have to work within VCAT and Council decisions.	Need for overlay	1. See Standard Response 1.	No change proposed.  Refer submission to an Independent Panel.
3	Not supportive	1. The control to restrict the development of the land to one dwelling was applied due to the proponent's blatant disregard and abuse of the planning system to try and circumvent VCAT's ruling on a dual occupancy development in 2000. The control should not be removed as the situation has not changed and it acts as a deterrent to others thinking they do not have to work within VCAT and Council decisions.	Need for overlay	1. See Standard Response 1.	No change proposed.  Refer submission to an Independent Panel.
4	Not supportive	<p>1. The Amendment should not be allowed for the current owner, nor should it be allowed after any transfer of land. The current owner was the original of the land. They acted against the public interest and created an unfair outcome towards the broader community by avoiding the requirements to address neighbourhood character in designing two side-by-side houses.</p> <p>2. If Council insists on removing the overlay, it should first seek to encumber the title through an instrument such as a single dwelling covenant or other restrictive mechanism so to maintain the status quo.</p> <p>3. The letters of support included in the request for the amendment should be made available to other submitters if the letters are pro-forma/petition style. If so, they must not be given weight so Council is consistent across processes. It is unfair to the other submitters that there was no opportunity for them to participate in a process prior to the exhibition of the amendment. They should not be provided to Planning Panels as no process had begun.</p> <p>4. The July 2022 Council report does not provide justification for the amendment. Further work should have been done including ascertaining the owner's intention with the land, a measure of the capacity of the amendment to send a message to developers that it is now ok to circumvent the planning system and the capacity for the loss of single-dwelling overlays and covenants across Merri-bek and Victoria because of this amendment.</p> <p>5. The landowner should be paying for the amendment including officer hours, notice requirements and panel fees.</p>	<p>Need for overlay</p> <p>Notification process</p> <p>Justification for the Amendment</p> <p>Amendment costs</p>	<p>1. See Standard Response 1.</p> <p>2. Council officers consider that there is a strategic justification for the land to be able to be developed with consideration to Clause 55 (ResCode) and the neighbourhood character policy of the planning scheme, consistent with other properties in the Neighbourhood Residential Zone. On this basis there is no need for a restriction limiting the number of dwellings, whether that be through the SCO or an encumbrance on the title.</p> <p>3. Letters of support were provided with the amendment request. These do not form part of the formal submissions considered as part of the exhibition of the Amendment. The Planning Panel will determine the weight that is given to the letters. They have not formed part of Council's assessment of the strategic justification of the amendment.</p> <p>4. Appropriate strategic planning justification has been provided to support the Amendment as set out in the 13 July 2022 Council report and explanatory report. Removal of the overlay is justified for the following reasons:</p> <ul style="list-style-type: none"> <li>▪ The Amendment implements the objectives of planning in Victoria</li> <li>▪ The Amendment supports Plan Melbourne, the Planning Policy Framework and Municipal Planning Strategy</li> <li>▪ This Overlay is not applied in this way elsewhere in the municipality or across Metropolitan Melbourne.</li> <li>▪ Since the overlay was introduced the planning controls affecting the subject land have changed.</li> <li>▪ Other land within residential zones can be developed for more than one dwelling provided the requirements of the zones, applicable overlays, and planning policies are met.</li> <li>▪ If an additional house is proposed on the land, a planning permit would be needed.</li> <li>▪ Any planning application would follow the standard statutory process. This includes notification to adjoining properties.</li> </ul> <p>The requirements of the <i>Planning and Environment Act</i> have been followed as part of the administration of this amendment.</p> <p>The Amendment is also not expected to have any impact on the removal of single dwelling covenants or similar overlays across Merri-bek and Victoria given that the Overlay has not been used in a similar way elsewhere. Removal of covenants occur through the planning permit application process that would include notice to other beneficiaries and are treated on their own merits.</p> <p>5. As detailed in the July 2022 Council report, the Amendment proponent is responsible for paying all costs associated with the Amendment including exhibition costs and</p>	No change proposed.  Refer submission to an Independent Panel.

NO.	SUBMISSION TYPE	SUMMARY OF SUBMISSION	THEMES	COUNCIL OFFICER RESPONSE TO SUBMISSION	RECOMMENDATION
				panel fees. The Amendment proponent must also pay amendment fees to Council at different stages of the Amendment process. These fees account for officer time spent considering the Amendment.	