

**Merri-bek (Moreland) Planning Scheme Amendment
C219more
42 St Phillip Street, Brunswick East**

Panel Report

Planning and Environment Act 1987

16 March 2023

How will this report be used?

This is a brief description of how this report will be used for the benefit of people unfamiliar with the planning system. If you have concerns about a specific issue you should seek independent advice.

The planning authority must consider this report before deciding whether or not to adopt the Amendment.
[section 27(1) of the *Planning and Environment Act 1987* (the PE Act)]

For the Amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for Planning for approval.

The planning authority is not obliged to follow the recommendations of the Panel, but it must give its reasons if it does not follow the recommendations. [section 31 (1) of the PE Act, and section 9 of the *Planning and Environment Regulations 2015*]

If approved by the Minister for Planning a formal change will be made to the planning scheme. Notice of approval of the Amendment will be published in the Government Gazette. [section 37 of the PE Act]

Planning Panels Victoria acknowledges the Wurundjeri Woi Wurrung People as the traditional custodians of the land on which our office is located. We pay our respects to their Elders past and present.

Panel Report pursuant to section 25 of the *Planning and Environment Act 1987*

Merri-bek (Moreland) Planning Scheme Amendment C219more

42 St Phillip Street, Brunswick East

16 March 2023



Sarah Carlisle, Chair

Contents

	Page
Executive summary	6
1 Introduction	7
1.1 The Amendment.....	7
1.2 Background	8
1.3 Procedural issues	8
1.4 Issues raised in submissions	8
1.5 The Panel’s approach	8
1.6 Limitations	9
2 Strategic issues	10
2.1 Planning context	10
2.2 Strategic justification	10
3 Removal of the Specific Controls Overlay	14
3.1 The issues	14
3.2 Circumvention of planning controls	14
3.3 Deterrent	16
3.4 Setting a precedent	17
3.5 Protecting amenity and neighbourhood character	17
3.6 Recommendation	19
Appendix A Submitters to the Amendment	20
Appendix B Background and chronology of events	21
Appendix C Document list	23
Appendix D Planning context	24
D:1 Planning policy framework.....	24
D:2 Other relevant planning strategies and policies	26
D:3 Planning scheme provisions	27
D:4 Ministerial Directions, Planning Practice Notes and guides	28

List of Tables

	Page
Table 1 Planning context	10
Table 2 Relevant parts of Plan Melbourne.....	27

List of Figures

	Page
Figure 1 Locality Plan.....	7
Figure 2 Housing framework plan	25

Glossary and abbreviations

Council	Merri-bek City Council (formerly Moreland City Council)
PE Act	<i>Planning and Environment Act 1987</i>
Planning Scheme	Merri-bek Planning Scheme
SCO4	Specific Controls Overlay Schedule 4
subject land	42 St Phillip Street, Brunswick
VCAT	Victorian Civil and Administrative Tribunal

Overview

Amendment summary	
The Amendment	Merri-bek (Moreland) Planning Scheme Amendment C219more
Common name	42 St Phillip Street, Brunswick East
Brief description	Remove the Specific Controls Overlay from 42 St Phillip Street, Brunswick East
Planning Authority	Merri-bek (formerly Moreland) City Council
Proponent	Owners of the subject land
Authorisation	1 August 2022
Exhibition	8 September to 14 October 2022
Submissions	Number of Submissions: 10 (including 7 late submissions) Opposed: 10 Refer Appendix A

Panel process	
The Panel	Appointed: Alison McFarlane (Chair) Reconstituted: Sarah Carlisle (Chair)
Directions Hearing	24 January 2023 by Video Conference
Panel Hearing	27 and 28 February 2023, Brunswick Town Hall
Site inspections	Unaccompanied, 24 March 2023
Parties to the Hearing	Merri-bek City Council represented by Rachel Grounds, Senior Strategic Planner Sandro and Xenia Bartucca (the Proponent) represented by Dominic Scally of Best Hooper Lawyers, who called expert evidence on planning from: - Patrick Brennan of Contour Consultants Ronnie and Steve Whitmore represented by Joanna Stanley ¹ , community planning advocate, who called expert evidence on planning from: - Dr Stephen Rowley of RCI Planning Kelvin Thomson
Citation	Merri-bek (Moreland) PSA C219more [2023] PPV
Date of this report	16 March 2023

¹ Ms Stanley was also a submitter to the Amendment (Submitter 4)

Executive summary

Merri-bek (Moreland) Planning Scheme Amendment C219more (the Amendment) applies to land at 42 St Phillip Street, Brunswick (subject land). The subject land is currently developed with a double storey dwelling and outbuildings.

The Specific Controls Overlay Schedule 4 (SCO4) restricts development and use of the subject land to one dwelling. The Amendment proposes to remove the SCO4.

Following exhibition of the Amendment, 10 submissions, including 7 late submissions were referred to the Panel. All submissions argued that the SCO4 should be retained because:

- it was applied in response to a perceived attempt by the Proponent to circumvent the planning controls that applied at the time
- it acts as a deterrent for others who may seek to circumvent planning controls
- its removal would set a precedent for removing other single dwelling covenants and restrictions
- it protects neighbourhood character and amenity.

There is no strategic justification for the continued application of the SCO4 to the subject land. There is no inherent reason why the subject land is not suitable for more than one dwelling. The continued application of the SCO4 is contrary to policies which support urban consolidation and infill development on suitable sites in areas that are close to jobs, services and transport.

The Proponent's motives for constructing the existing dwelling (including whether they intended to circumvent the planning controls that applied at the time) are not relevant planning considerations. The construction of the existing dwelling was lawful. There is no justification for retaining the SCO4 on the basis that it closes a 'loophole' in the planning controls, or acts as a deterrent to others who may be perceived as intending to circumvent the planning controls.

The SCO4 does little to protect neighbourhood character or amenity, and cannot address the character and amenity impacts of the existing dwelling on the subject land. The only mechanism for addressing the impacts of the existing dwelling would be a permit for a second dwelling, which the SCO4 prevents. If the SCO4 were removed, the existing planning framework would ensure that any proposal for a second dwelling properly addresses neighbourhood character and amenity impacts.

Recommendation

Based on the reasons set out in this Report, the Panel recommends:

- 1. Merri-bek (Moreland) Planning Scheme Amendment C219more be adopted as exhibited.**

1 Introduction

1.1 The Amendment

(i) Amendment description

The purpose of the Amendment is to remove the Specific Controls Overlay Schedule 4 (SCO4) from land at 42 St Phillip Street, Brunswick East (subject land). Specifically, the Amendment proposes to:

- delete the SCO4 from the subject land
- delete the Incorporated Document “*City of Moreland Residential at Development at 42 St Phillip Street, Brunswick East, 23 May 2003*” from the Schedule to Clause 45.12 (Specific Controls Overlay) and the Schedule to Clause 72.04 (Documents Incorporated in this Planning Scheme).

(ii) The subject land

The subject land is shown in Figure 1.

The subject land is located on the southern side of St Phillip Street, Brunswick East, approximately 220 metres east of Lygon Street. It has a frontage to St Phillip Street of around 20 metres and a total area of 563 square metres. Extending along the rear (south) boundary is a right of way (laneway). There are no easements or covenants on the title. The land is developed with a double storey dwelling and outbuildings.

The subject land and surrounds are zoned Neighbourhood Residential Zone Schedule 1 and included in Development Contributions Plan Overlay Schedule 1.

Figure 1 42 St Phillip Street, Brunswick East



Source: Explanatory Report

1.2 Background

Appendix B sets out the background to the Amendment, and a chronology of events leading up to the application of the SCO4 to the subject land in 2003. Key points are:

- The SCO4 was applied by Moreland Planning Scheme Amendment C44, gazetted in May 2003.
- Before Amendment C44 was approved, the owners of the subject land (who remain the owners today) sought a permit for two dwellings on the subject land, which was then in two separate titles with each lot being less than 300 square metres.
- Council refused the application for two dwellings. The Victorian Civil and Administrative Tribunal (VCAT) upheld Council's refusal, primarily on neighbourhood character and amenity grounds.
- The owners subsequently consolidated the land into a single lot of 563 square metres and constructed a single dwelling on the consolidated lot.
- The single dwelling did not require a planning permit (only a building permit). Therefore there was no consideration of neighbourhood character or offsite amenity under the planning scheme (only the building permit).

1.3 Procedural issues

During the Directions Hearing, Council advised it had received late submissions on the Amendment. The late submissions were referred to the Panel after the Directions Hearing, consistent with Council's resolution of 7 December 2022. The Panel invited late submitters to participate in the Hearing. There were no requests to be heard from late submitters.

1.4 Issues raised in submissions

All submissions referred to the Panel opposed the Amendment. Key issues were:

- the SCO4 was applied in response to a perceived attempt by the Proponent to circumvent the planning controls that applied at the time
- the SCO4 acts as a deterrent for others who may seek to circumvent planning controls
- removal of the SCO4 would set a precedent for removing other single dwelling covenants and restrictions
- the SCO4 protects neighbourhood character and amenity.

1.5 The Panel's approach

The Panel's task is to consider the merits of the proposal to remove the SCO4, having regard to the strategic planning context and current planning controls that apply to the subject land, and to issues raised in submissions. It is not the Panel's task to reconsider the merits of Amendment C44, which applied the SCO4 to the land in 2003.

The Panel has assessed the Amendment against the principles of net community benefit and sustainable development, as set out in Clause 71.02-3 (Integrated Decision Making) of the Merri-bek Planning Scheme (Planning Scheme).

The Panel considered all written submissions referred to the Panel, observations from its site visit, and submissions, evidence and other material presented to it during the Hearing. All submissions

and materials have been considered by the Panel in reaching its conclusions, regardless of whether they are specifically mentioned in the Report.

This Report deals with the issues under the following headings:

- Strategic issues
- Removal of the Specific Controls Overlay.

1.6 Limitations

Some submitters raised concerns that the building permit for the construction of the existing single dwelling on the subject land was invalid. This issue is not relevant to the Amendment, and has not been further considered by the Panel.

2 Strategic issues

2.1 Planning context

This chapter identifies the planning context relevant to the subject land and the Amendment. Appendix D highlights key imperatives of relevant provisions and policies.

Table 1 Planning context

	Relevant references
Victorian planning objectives	- section 4 of the <i>Planning and Environment Act 1987</i> (PE Act)
Municipal Planning Strategy	- Clause 02.03-1 Settlement - Clause 02.03-5 Housing
Planning Policy Framework	- Clause 11.02-1S Supply of Urban Land - Clause 11.03-1S Activity Centres - Clause 15.01-5S Neighbourhood Character - Clause 15.01-5L Minimal and Increment Change Areas - Clause 16.01-1S Housing Supply - Clause 16.01-1R Housing Supply – Metropolitan Melbourne - Clause 16.01-1L Homes in Moreland
Other planning strategies and policies	- Plan Melbourne Outcome 2
Key Planning Scheme provisions	- Neighbourhood Residential Zone - Specific Controls Overlay - Clause 55 (Two or more dwellings on a lot and residential buildings)
Planning scheme amendment	- Moreland Planning Scheme Amendment C44
Ministerial directions	- Ministerial Direction on the Form and Content of Planning Schemes - Ministerial Direction 9 (Metropolitan Planning Strategy) - Ministerial Direction 11 (Strategic Assessment of Amendments)
Planning practice notes	- Planning Practice Note 46: Strategic Assessment Guidelines, January 2023 - Practitioners Guide to Victoria’s Planning Schemes, April 2022

2.2 Strategic justification

(i) Evidence and submissions

Council submitted that Plan Melbourne, the Planning Policy Framework and the Planning Scheme encourage new housing in locations that are close to jobs, services, and public transport (such as the subject land). It submitted that the Amendment:

... will positively contribute to social and economic impacts through the potential to provide additional housing to the local area, which increases housing supply, affordability, and diversity, should an application for more than one dwelling be considered acceptable.

Council submitted the planning controls affecting the subject land had changed since the SCO4 was applied, including the introduction of new residential zones and Council's housing framework and neighbourhood character local policies. It submitted the planning policies and controls in force today provide more clarity and certainty about the level of development expected and the need to consider neighbourhood character than those in place when the SCO4 was applied by Amendment C44.

Council submitted that the SCO is designed to achieve a particular land use and development outcome in extraordinary circumstances. It submitted the SCO4 is unnecessary given:

- the subject land is zoned Neighbourhood Residential Zone, and any application for more than one dwelling on the subject land would be considered against the zone, relevant planning policy and decision guidelines
- current policy supports increased housing growth and diversity in appropriate locations and on appropriate sites.

The Proponent submitted the Amendment is strategically justified in the context of the Planning Scheme, and there is no particular land development outcome or extraordinary circumstance applying to the subject land to warrant the continued application of the SCO4.

Mr Brennan gave expert planning evidence for the Proponent. He supported the Amendment and noted at paragraphs 94 and 95 of his evidence:

The existing [SCO4] is unnecessary and unwarranted in my view, having regard to the current planning framework and other relevant contemporary planning considerations.

There is sufficient guidance within the Merri-bek Planning Scheme to ensure an appropriate land use and development outcome for the land if SCO4 were to be removed, and removal of SCO4 will not in itself lead to any unreasonable adverse outcome to neighbourhood character or neighbouring amenity.

Mr Brennan pointed to a range of policies in the Planning Scheme which support increasing the supply of diverse and affordable housing, appropriate infill developments in established and well located residential areas, and compact 20 minute neighbourhoods.

He highlighted a range of provisions in the Planning Scheme that would guide the exercise of discretion as to whether a permit should be granted for more than one dwelling on the land, including:

- the Planning Policy Framework, which requires consideration of neighbourhood character, built form and design and amenity (in addition to matters relating to urban consolidation, housing supply and the like)
- the purposes, requirements and decision guidelines of the Neighbourhood Residential Zone
- the ResCode standards in Clause 55 of the Planning Scheme, which provide guidance on (among other things) neighbourhood character, setbacks, building height and site coverage.

Mr Brennan stated:

I cannot identify any particular characteristics or circumstances associated with the land which I consider to be 'extraordinary' to warrant the use of the [SCO] in such a way and for such a purpose.

Mr Thomson submitted that the removal of the SCO4 (which would allow a permit for a second dwelling) is not strategically justified. He submitted:

... the case for urban densification is growing weaker over time. Its negative effects, such as biodiversity loss and deteriorating housing affordability, are becoming increasingly apparent.

He submitted that climate change effects are now worse than when the SCO4 was applied, demonstrating the benefit of less dense urban development and maintaining trees and green spaces.

(ii) Discussion

Appendix D contains a detailed discussion of the key parts of the Planning Policy Framework relevant to the subject land. Having had regard to the relevant parts of the framework, the Panel finds that there is no policy support for restricting development on the subject land to only one dwelling.

The subject land is in a minimal change area in Council's housing framework plan (refer to Figure 2 in Appendix D), and is zoned Neighbourhood Residential Zone. The purposes of the Neighbourhood Residential Zone include (as relevant):

- To implement the Municipal Planning Strategy and the Planning Policy Framework.
- To recognise areas of predominantly single and double storey residential development.
- To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.

The Amendment will ensure the planning controls that apply to the subject land are brought into alignment with other residential land zoned Neighbourhood Residential Zone. The Panel notes there is no restriction in the zone which would prevent multiple dwellings on one site.

There is significant policy support for urban consolidation and infill development in locations close to jobs, services, and public transport – including in minimal change areas – provided neighbourhood character and offsite amenity impacts can be appropriately managed. The continued application of the SCO4 will prevent potential of the subject land to support policies that encourage additional housing supply, housing diversity and the supply of more affordable housing.

No environmental or locational constraints have been identified that make the subject land unsuitable for more than one dwelling. It is a large lot in the context of its surrounds, with a wide frontage to St Phillip Street and rear access through the laneway to the rear. It is well located to surrounding services and amenities including public transport, active transport links and the shops, amenities and services in Lygon Street. There is no inherent reason why a second dwelling should not be permitted on the land.

A second dwelling will require a permit. The Panel is satisfied that there is sufficient guidance in the Planning Scheme, including (but not limited to) Clause 55 (ResCode), to ensure the merits of any subsequent proposal to construct a second dwelling on the land will be properly tested. Third parties who may be affected by any such proposal will have the opportunity to object.

The Panel accepts the Proponent's argument that the continued application of the SCO4 would need to be justified by the ongoing existence of 'extraordinary circumstances'. The Panel agrees with the Boroondara C143 Panel that extraordinary circumstances in this context are:²

... so out of the ordinary that it had not been conceived of and cannot be accommodated within the planning framework; something that is strongly supported by the objectives of planning in Victoria, however, cannot be accommodated within the standard framework.

² Boroondara C143 Panel [2012] PPV 5

The Panel does not consider that any such extraordinary circumstances apply. There is no strategic reason why the subject land should be restricted to a single dwelling, and any proposal for more than one dwelling is able to be managed within the standard planning framework.

Both the Proponent and Council made extensive submissions highlighting a number of changes in the policy framework that have occurred since the SCO4 was applied. In the Panel's view, not much turns on this. The Panel must consider whether the continued application of the SCO4 is consistent with the contemporary policy and planning framework that applies to the land. For the reasons set out above, the Panel finds that it is not.

(iii) Conclusions

There is no strategic planning reason to retain the SCO4 on the subject land.

The question is then whether there any other reason why the SCO4 should be retained. This is explored in the following chapter.

3 Removal of the Specific Controls Overlay

3.1 The issues

The substantive issue is whether the SCO4 should be retained or removed. Reasons put forward in submissions opposing its removal included:

- the original purpose of the SCO4 was to address the owners' attempt to circumvent the planning controls that applied at the time
- retaining the SCO4 would continue to serve as a deterrent to others considering circumventing the planning system
- removing the SCO4 would set a precedent for the removal of other single dwelling covenants and restrictions
- removing the SCO4 would adversely impact neighbourhood character.

3.2 Circumvention of planning controls

(i) Context

Amendment C44 was a Ministerial Amendment that was approved using powers of intervention under section 20(4) of the PE Act. The Minister's reasons for intervention for Amendment C44 state:³

- Council and surrounding residents requested the intervention
- Council advised that it was (at the time) of the opinion that the owner has *"circumvented the planning controls to achieve a first dwelling on the site, so as to avoid having regard to neighbourhood character"*
- Council requested intervention on the grounds that the matter *"raises issues of fairness or public interest where the mechanics of the planning process have created a situation that is unjust, unreasonably causes hardship, or is clearly in error"*
- the Minister considered the matter *"raises concerns with the process to achieve medium density housing, creating mistrust within the community and reducing confidence in the planning system"*.

(ii) Evidence and submissions

Submitter 4 submitted that the SCO4 should be retained because the owners consciously chose to *"build by stealth, proceeding with one house and hoping for a second permit at a later stage"*.

Submitter 5 submitted:

This is a case which also demonstrates how a determined developer of a site can attempt to circumvent the requirements of the planning scheme over time, again undermining the important, long-term integrity of the planning scheme.

Relying on the evidence of Dr Rowley, the Whitmores submitted that Council had failed to grapple with the legitimacy of the regulatory action (namely Amendment C44) taken to remedy a 'planning loophole', and that this Amendment *"fails to address any impacts of the advantage gained by the proponent from the circumvention"*.

³ Attachment 1Q to Council's Part A submission.

Dr Rowley's evidence was:

It is my view that despite the lack of an explicit statement of purpose [in the Incorporated Document], it is clear that the provision exists to prevent the circumvention of the usual planning regime for small lots and multi-dwelling development. Essentially, it exists to close a planning loophole.

His evidence was that it is a legitimate planning objective to close loopholes to prevent a landowner from avoiding a planning assessment in a situation where an assessment is intended.

Dr Rowley was careful to point out that he was not making any assumptions about the motives of the owners, or asserting there had been improper conduct. However he pointed to the fact that the land in its original configuration (as two separate lots) would have required a permit for a single dwelling, given both lots were under the minimum size at which a dwelling could be constructed without a permit. When the land was consolidated into a single lot over 500 square metres, no permit was required for the single dwelling, and therefore a neighbourhood character assessment under the Planning Scheme was avoided.

In oral submissions, the Proponent emphasised the owners had not breach any planning controls by consolidating the land and constructing a single dwelling without a permit. They submitted that the absence of a requirement (then or now) for a planning permit for a single dwelling on a lot of more than 500 square metres is not a 'loophole', but rather a deliberate decision of the planning system (and society more broadly) not to regulate the construction of single dwellings on large lots on residentially zoned land.

Council submitted that the Proponent acted within the planning system when they chose to build a single dwelling on the land after their application for the dual occupancy was refused.

Council submitted that the use of the SCO to close so-called loopholes is not a legitimate use of the control. It provided an example in Glen Eira in 2001⁴ where the Glen Eira Council sought to introduce a local policy aimed at limiting the future development potential of residential sites where a single dwelling had been constructed without a planning permit, and where it was evident that the proponent intended to construct a second or subsequent dwelling in circumstances where it would have been unlikely that planning permission for a multi-dwelling development would have been granted. That amendment was not supported by the Panel, and was ultimately abandoned. Council submitted:

The Panel that considered Glen Eira C15 found that any conflicts or 'loopholes' within State planning provisions for residential development are best resolved by systematic reform at the State tier, and that a proponent's choices between lawful planning process and intentions in exercising those choices are not of themselves relevant planning considerations and are not a valid subject of local planning policy.

(iii) Discussion

There is nothing in the SCO parent provision or *A Practitioner's Guide to the Victorian Planning System* to suggest that 'closing loopholes' or addressing a perceived circumvention of the planning rules is a legitimate use of the SCO. Further, it is not clear that this was the purpose of the SCO4 (while the reasons for intervention suggest that this may have been a factor, the Incorporated Document has no statement of purpose).

⁴ Glen Eira Planning Scheme Amendment C15.

In any event, the original purpose of the control is of limited relevance. The more pertinent question is whether the continued application of the SCO4 remains consistent with the contemporary planning framework applying to the subject land. For the reasons set out in Chapter 2, the Panel finds that its continued application is not consistent with the contemporary planning framework.

The planning system does not regulate the construction of single dwellings on larger lots. The owners were entitled to build the existing dwelling without a planning permit. No neighbourhood character assessment was (or is) required in these circumstances. The Panel does not consider this is a 'loophole' – it is a feature of the planning system. It is one of the many forms of use and development of residentially zoned land that the planning system does not regulate.

The Panel does not consider that the continued application of the SCO4 constitutes fair and orderly planning. It was neither unfair nor disorderly to consolidate the lots and lawfully construct the single dwelling without a planning permit. Nor would it be fair and orderly to continue to restrict the development of a second dwelling on the subject land in the absence of any strategic justification for doing so, and in circumstances where no other land in the municipality is subject to a similar restriction (at least in the form of a SCO).

If the owners (or any subsequent owner of the subject land) want to construct a second dwelling, or to re-subdivide the land and construct a single dwelling on the new lot, a planning permit will be required, and neighbourhood character considerations will apply.

(iv) Conclusions

There is no justification for retaining the SCO4 on the basis that it 'closes a loophole', or was applied for the purpose of addressing a perceived circumvention of the planning controls.

3.3 Deterrent

(i) Evidence and submissions

Several submitters, including Mr Thomson and the Whitmores, submitted that the SCO4 should remain in place as it acts as a deterrent or disincentive for others who may be considering circumventing the planning system.

Council submitted that the use of the SCO as a deterrent has no basis in planning policy. Officers conducted an extensive search of Victorian planning schemes, and were not able to identify any cases of the SCO being applied for this reason anywhere else in Victoria.

(ii) Discussion

The Panel does not consider it is appropriate for the SCO4 to continue to apply on the basis that it may deter others who may be considering circumventing the applicable planning controls. As noted above, the single dwelling on the land was lawfully constructed. There is no justification for a specific control that seeks to deter a lawful action. Further, there is nothing in the parent provision of the SCO that suggests its use as a deterrent is appropriate.

(iii) Conclusion

There is no justification for retaining the SCO4 on the basis that it acts as a deterrent for those who may be considering circumventing the planning system.

3.4 Setting a precedent

(i) Evidence and submissions

Several submitters, including the Whitmores, submitted that the removal of the SCO4 would set a precedent for the removal of other single dwelling covenants in metropolitan Melbourne.

Submitter 2 submitted that removing the SCO4 would “*set a precedent that developers can do what they want with a bit of persistence*”. Submitter 9 said that the removal of the control would set a “*worrying precedent*”. Brunswick Residents Network submitted that removal of the control:

... sends an unfortunate message to developers. We are concerned that some may seek to use such a decision as a legal precedent before planning panels, at VCAT or the Supreme Court, and encourage [Council] to maintain this planning control.

Council responded that the Amendment is not expected to have any impact on the removal of single dwelling covenants or similar across Merri-bek and Victoria, and that any removal of overlays or covenants with single dwelling restrictions will be assessed on the circumstances and merits of their removal.

(ii) Discussion

Council’s review of metropolitan and regional planning schemes found no other instances of the SCO being used to limit development to one dwelling on a lot. There is little prospect that removal of the SCO4 will set a precedent for the removal of other similar specific control overlays, because (based on Council’s research) there presently are none.

The removal of the SCO4 will not set a precedent for the removal of single dwelling covenants that are registered on title. The processes for removing registered covenants are governed by strict legislative criteria, or principles developed by successive panels. Each proposal to remove a registered covenant would be assessed on its merits, against the statutory criteria or accepted principles.⁵ In the case of a covenant proposed to be removed by a planning scheme amendment, this would require an assessment against the planning framework that applied at the time of the proposed removal.

(iii) Conclusion

There is no justification for retaining the SCO4 on the basis that its removal would set a precedent for the removal of other single dwelling restrictions.

3.5 Protecting amenity and neighbourhood character

(i) Evidence and submissions

Several submitters submitted the SCO4 should be retained as it still has work to do in protecting neighbourhood character and amenity of the neighbouring sites.

Relying on the evidence of Dr Rowley, the Whitmores submitted that the existing dwelling is noticeably bulkier and more of a departure from streetscape character than the dual occupancy proposal rejected by VCAT in 1999, and that these issues remain unresolved.

⁵ See, for example, Banyule PSA C153bany [2020] PPV and Manningham PSA C112 [2017] PPV.

Dr Rowley's evidence was that the existing dwelling has several negative impacts on amenity and neighbourhood character, including a driveway onto St Philip Street instead of rear access, added shadow in the morning, overlooking and visual bulk. He considered the retention of the SCO4 would go some way to preventing further impacts that could arise from the construction of a second dwelling on the subject land. He considered the establishment of a garden with canopy trees on the part of the subject land that is currently occupied by outbuildings would go some way to improving neighbourhood character, by softening the appearance of the existing dwelling.

Dr Rowley's opinion was that the removal of the SCO4 should be "*dependent on a scheme for remedying the situation that exists on site now*". He noted the request for an amendment could have been accompanied by a development proposal that "*demonstrated an appropriate two-dwelling response*" that addressed the concerns expressed by VCAT about the previous dual occupancy proposal. He considered this would require "*substantial modification of the existing building*".

Mr Thomson submitted that the SCO4 should be retained as it reduces the practical impact of the existing dwelling by limiting further development on the subject land, reducing the number of visible crossovers and garages, and reducing the visual bulk of the single building (which he submitted is less than would be the case if both sides were developed). Mr Thomson was not representing the Whitmores, but submitted:

I invite the Panel – indeed I invite the Council and the property owners – to put themselves in the shoes of Steve and Ronnie Whitmore, who live next door to this site, as they did at the time. If you live in a street in democratic Brunswick, in democratic Australia, you have a reasonable expectation that you will get a say in whether a large dwelling, just about on your fenceline, that impacts on your amenity and quality of life, is built. Steve and Ronnie were denied that. They had no say in the building that is there now. The Specific Control Overlay was put on 42 St Phillip St for good reasons, and there are good reasons why it should continue to stay there.

Council and the Proponent submitted there is sufficient guidance in the planning policies and controls that apply to the subject land to ensure any future development proposals on the subject land appropriately responds to neighbourhood character and protects the amenity of surrounding sites. Mr Brennan gave evidence for the Proponent to similar effect (see Chapter 2 for more detail).

(ii) Discussion

A second dwelling on the subject land could involve demolition of the existing dwelling and construction of two new dwellings, or the construction of a second dwelling while retaining the existing dwelling.

Either way, neighbourhood character and offsite amenity impacts would be thoroughly considered in any future proposal for two dwellings on the subject land, pursuant to:

- the purpose of the Neighbourhood Residential Zone "*to manage and ensure that development respects the identified neighbourhood character...*"
- the standards in Clause 55 (Two or more dwellings on a lot and residential buildings)
- the strategies in Clause 11.02-1S (Supply of Urban Land)
- the objectives and strategies in Clause 15.01-5S (Neighbourhood Character) and Clause 15.01-5L (Minimal and Incremental Change Areas)
- the strategies in Clause 16.01-1L (Homes in Moreland).

Appendix D provides more detail in relation to these key policies and controls.

The continued application of the SCO4 cannot address the neighbourhood character or amenity implications of the existing dwelling on the land. Dr Rowley conceded as much in paragraph 114 of his evidence:

... an application for a planning permit for the second dwelling on the land made under standard provisions cannot now achieve an outcome that accords with the VCAT decision, or the likely outcome of undertaking a ResCode assessment of both dwellings.

Nor can the continued application of the SCO4 achieve an outcome where a garden with canopy trees is established on the vacant part of the subject land.

In fact, by preventing an application for a second dwelling, the SCO4 effectively prevents a mechanism available for addressing the impacts of the existing development – either by requiring modifications to the existing dwelling (as conditions on a permit for construction of a second dwelling), or by allowing a new two dwelling proposal that replaces the existing dwelling.

Nor could the continued application of the SCO4 prevent a new single dwelling being constructed on the subject land without a neighbourhood character assessment. Consideration of neighbourhood character and offsite amenity is only required where a planning permit is needed. Neither the SCO4 nor the Neighbourhood Residential Zone require a permit for the construction of a (new) single dwelling if the existing dwelling were to be demolished and the subject land were to remain in a single lot over 500 square metres.

The Panel therefore does not agree that the continued application of the SCO4 is effective in protecting neighbourhood character or amenity.

The Panel acknowledges Dr Rowley's suggestion of an alternate remedy whereby the SCO4 should only be removed once a well resolved proposal for a two dwelling development is put forward (and the restriction is lifted on the basis that a second dwelling is only permitted in accordance with the new development proposal). However, removing the SCO4 effectively achieves the same objective. The second dwelling would require a permit, and a permit is the appropriate mechanism to assess and test the appropriateness of any second dwelling on the subject land, including any modifications that may be required to the existing dwelling.

(iii) Conclusions

The SCO4 does little to protect neighbourhood character and cannot remedy the impacts of the existing dwelling on the subject land. There is no justification for its continued application on neighbourhood character or amenity grounds.

3.6 Recommendation

The Panel recommends:

- 1. Merri-bek (Moreland) Planning Scheme Amendment C219more be adopted as exhibited.**

Appendix A Submitters to the Amendment

No.	Submitter
1	Stephen and Ronnie Whitmore
2	Leanne Casarotto and Glenn Pickersgill
3	Submission withdrawn
4	Joanna Stanley
5	Leanne Casarotto
6	Brunswick Residents' Network
7	Kelvin Thomson
8	Kirsty Low
9	Kaye Marion
10	Lucy Sussex
11	Glenyse Hampson

Appendix B Background and chronology of events

Date	Event
1999	Planning Permit Application MPS/1999/0232 was lodged for the construction of two attached houses on the subject land.
16 August 1999	Council refused Planning Permit Application MPS/1999/0232 on grounds of character and off-site amenity impacts.
November 1999	<p>VCAT upheld Council's decision to refuse Planning Permit Application MPS/1999/0232.</p> <p>The Tribunal noted:</p> <p>The proposal is totally out of character with the street in terms of its scale and design. It is too high, too bulky and with the two front vehicle access points is such as to spoil the area. The dual occupancy opposite does nothing for the street and should not be permitted to be repeated in either single or double storey proportions as they too are out of keeping with the character of the street.</p> <p>It should be possible with careful design to produce a dual occupancy that is responsive to the streetscape and area with single storey outlook at the front, rear vehicular access and not offering amenity loss to adjacent neighbours as this proposal does.</p>
2000	Landowners applied for a building permit to construct a double storey dwelling on the land.
July 2000	<p>Council wrote to the owners advising a planning permit <u>was required</u> to construct one dwelling on the subject land because it comprises two lots, each with an area less than 300 square metres.</p> <p>Landowner applied to consolidate the two lots into one.</p>
24 July 2000	Council wrote to the Minister for Planning to obtain clarification on the protection of neighbourhood character where Council does not have the ability to intervene.
August 2000	Council approved the Plan of Consolidation. A planning permit was no longer required for the construction of the single dwelling on the land.
7 August 2000	Council requested the Minister for Planning to intervene to protect neighbourhood character by applying a site specific requirement to the subject land restricting its development to a single dwelling.
6 October 2000	<p>The Minister for Planning declined to intervene for the following reasons:</p> <ul style="list-style-type: none"> - A planning permit for a single dwelling is not required in a Residential 1 Zone. The use and development of land for such a purpose is consistent with the primary purpose of the zone. Aspects of development were also controlled by the <i>Building Act 1993</i> and <i>VicCode 1</i>. - Any second dwelling would need a planning permit, meaning neighbourhood character would be considered. - The Victorian Government was proposing changes to the planning controls for residential development which would introduce new requirements for single dwellings (ResCode).
May 2002	Council received Planning Permit Application MPS/2002/377 to construct an additional single storey dwelling on the subject land.

Date	Event
14 October 2002	Council resolved to write to the Minister for Planning to seek ministerial intervention to restrict development of a second dwelling on the subject land.
October 2002	Landowner applied to VCAT for a review of Council's failure to decide on Planning Permit Application MPS/2002/377.
24 April 2003	Council requested the Minister for Planning to intervene to restrict development of the land to a single dwelling.
19 May 2003	Council rejected an officer recommendation to approve Planning Permit Application MPS/2002/377 and refused the application on the grounds the landowner bypassed planning controls to build the first dwelling and avoided consideration of neighbourhood character.
22 May 2003	The then Department of Sustainability and Environment advised Council the Minister had decided to intervene because the matter raised issues of fairness or public interest with the process to achieve medium density housing.
May 2003	Moreland Amendment C44 was gazetted.

Appendix C Document list

No.	Date	Description	Presented by
1	20/2/2023	Council Part A submission including attachments	Merri-bek City Council
2	“	Expert witness statement – P Brennan	Proponent
3	“	Expert witness statement – S Rowley	R and S Whitmore
4	27/2/23	Council Part B submission including attachments	Council
5	“	Submissions for the Proponent, including attachments	Proponent
6	“	Submissions for K Thomson	K Thomson
7	“	Submissions for R and S Whitmore, including attachments	R and S Whitmore
8	28/2/23	Clause 32.01 Residential 1 Zone, including schedule	Proponent
9	“	Clause 32.09 Neighbourhood Residential Zone, including schedule	“
10	“	<i>McMillin v Mornington Peninsula Shire Council</i> [2014] VCAT 1417	“
11	“	Extract from Victorian Planning Reports on orderly and proper planning	“
12	“	Extract from Part 6 of the <i>Planning and Environment Act 1987</i>	“
13	“	Closing submission	Council

Appendix D Planning context

D:1 Planning policy framework

Victorian planning objectives

The following objectives set out in section 4 of the PE Act are relevant to the Amendment:

- a) To provide for the fair, orderly, economic and sustainable use and development of land.
- f) To facilitate development in accordance with objectives set out in paragraphs (a), (b), (c), (d) and (e).
- fa) To facilitate the provision of affordable housing in Victoria.
- g) To balance the present and future interests of all Victorians.

Clause 2 (Municipal Planning Strategy)

Clause 02.03-1 (Settlement) provides that Council will seek to manage growth by:

Directing most of Moreland's growth to areas with access to shops, services and public transport, including:

- Intensification of development in activity centres.
- Infill development in other residential areas.

Managing growth in accordance with the 20-minute neighbourhood principle; where communities can 'live locally' and access many of their daily needs within a 20-minute walk, cycle or public transport trip from their home. This will facilitate:

- Sustainable neighbourhoods.
- A healthy community.
- Increased community interaction.
- Support of the local economy.

Clause 02.03-5 (Housing) states:

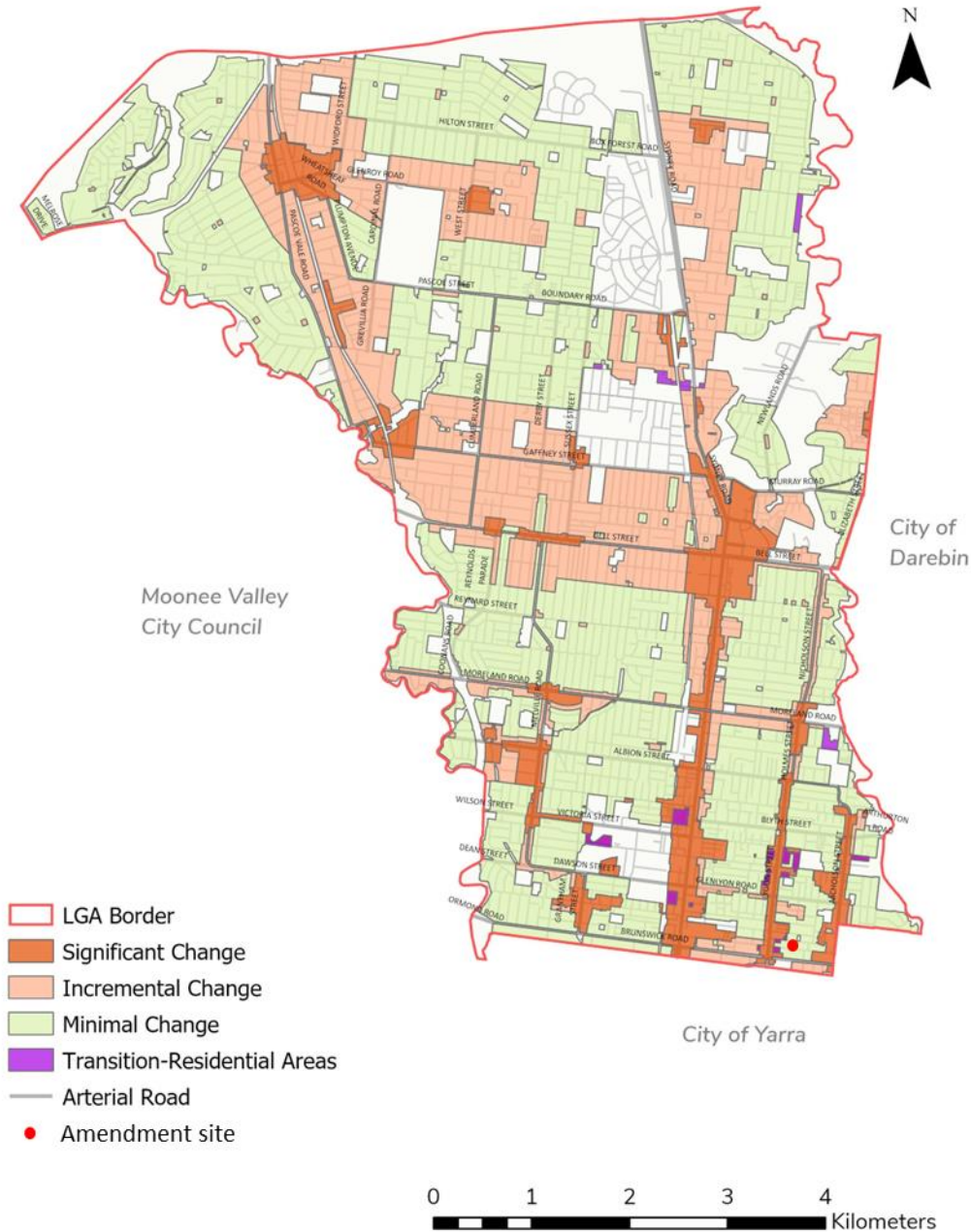
Moreland is experiencing a shift towards smaller households, and this is expected to continue, with more than 50 per cent of new households in 2036 to consist of only one or two people. While housing density is increasing, most of the housing stock in Moreland is suitable for larger households. With population growth across all ages also expected, there is an ongoing need for a diverse range of dwellings throughout the municipality.

In planning for population growth and diversity, Council seeks to:

- Facilitate housing growth and change in accordance with the Housing Framework shown on the Strategic Framework Plan: Housing at Clause 02.04. [See Figure 2 below]
- Encourage a diversity of housing that meets the needs of different sectors of the community.
- Encourage housing that is designed to meet the changing needs of occupants over their lifetimes.
- Facilitate housing that is affordable in relation to purchase price, rental price and ongoing living costs (utilities, transport) associated with the design and location of housing.
- Encourage student accommodation that is located close to transport and services, that respects existing neighbourhood character and responds to the preferred future character of the area.

The subject land is located in a "minimal change area" as identified on the Housing Framework Plan at Clause 02.04 (see Figure 2 below).

Figure 2 Housing framework plan
Hume City Council



Clause 11 (Settlement)

The objective of Clause 11.02-1S (Supply of Urban Land) is:

To ensure a sufficient supply of land is available for residential, commercial, retail, industrial, recreational, institutional and other community uses.

Relevant strategies are:

- Plan to accommodate projected population growth over at least a 15 year period and provide clear direction on locations where growth should occur. Residential land supply will be considered on a municipal basis, rather than a town-by-town basis.
- Planning for urban growth should consider:
 - Opportunities for the consolidation, redevelopment and intensification of existing urban areas.
 - Neighbourhood character and landscape considerations.

- The limits of land capability and natural hazards and environmental quality.
- Service limitations and the costs of providing infrastructure.

Clause 15 (Built environment and heritage)

The objective of Clause 15.01-5S (Neighbourhood Character) is:

To recognise, support and protect neighbourhood character, cultural identity, and sense of place.

Relevant strategies are:

- Support development that respects the existing neighbourhood character or contributes to a preferred neighbourhood character.
- Ensure the preferred neighbourhood character is consistent with medium and higher density housing outcomes in areas identified for increased housing.
- Ensure development responds to its context and reinforces a sense of place and the valued features and characteristics of the local environment and place by respecting the:
 - Pattern of local urban structure and subdivision.
 - Underlying natural landscape character and significant vegetation.
 - Neighbourhood character values and built form that reflect community identity.

Relevant strategies of Clause 15.01-5L (Minimal and Incremental Change Areas) are:

- Design development to provide an appropriate transition in building height where an increase above the prevailing building height is proposed.
- Design development in rear yards to respect an existing character of open rear yards and garden outlooks.
- Create or enhance a landscape character by designing and siting new development to integrate generous landscaping through the retention of existing canopy trees (where practical) and the planting of new canopy trees and vegetation.

Clause 16 (Housing)

The objective of Clause 16.01-1S (Housing Supply) is:

To facilitate well-located, integrated and diverse housing that meets community needs.

The relevant strategy is:

Ensure that an appropriate quantity, quality and type of housing is provided, including aged care facilities and other housing suitable for older people, supported accommodation for people with disability, rooming houses, student accommodation and social housing.

The relevant strategy of Clause 16.01-1R (Housing Supply – Metropolitan Melbourne) is:

Allow for a range of minimal, incremental and high change residential areas that balance the need to protect valued areas with the need to ensure choice and growth in housing.

The relevant strategy of Clause 16.01-1L (Homes in Moreland) is:

Encourage a mix of single dwellings and lower density multi-dwelling developments that contribute to a low density, open and landscaped character in areas identified as 'Minimal Housing Growth' on the Strategic Framework Plan: 'Housing' at Clause 02.04.

D:2 Other relevant planning strategies and policies

i) Plan Melbourne

Plan Melbourne 2017-2050 sets out strategic directions to guide Melbourne's development to 2050, to ensure it becomes more sustainable, productive and liveable as its population approaches 8 million. It is accompanied by a separate implementation plan that is regularly updated and refreshed every five years.

Plan Melbourne is structured around seven Outcomes, which set out the aims of the plan. The Outcomes are supported by Directions and Policies, which outline how the Outcomes will be achieved.

Table 2 Relevant parts of Plan Melbourne

Outcome	Directions	Policies
2 Melbourne provides housing choice in locations close to jobs and services.	2.1 Manage the supply of new housing in the right locations to meet population growth and create a sustainable city.	2.1.2 Facilitate an increased percentage of new housing in established areas to create a city of 20-minute neighbourhoods close to existing services, jobs and public transport.
		2.1.3 Plan for and define expected housing needs across Melbourne's regions.
		2.1.4 Provide certainty about the scale of growth in the suburbs.
	2.2 Deliver more housing closer to jobs and public transport.	2.2.3 Support new housing in activity centres and other places that offer good access to jobs, services and public transport.
	2.5 Provide greater choice and diversity of housing.	2.5.1 Facilitate housing that offers choice and meets changing household needs.

D:3 Planning scheme provisions

A common zone and overlay purpose is to implement the Municipal Planning Strategy and the Planning Policy Framework.

i) Neighbourhood Residential Zone

The land is zoned Neighbourhood Residential Zone. The purposes of this zone are:

- To recognise areas of predominantly single and double storey residential development.
- To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
- To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.

The neighbourhood character objective to be achieved is:

- To promote a preferred neighbourhood character where the design and siting of new dwellings include generous landscaping through the retention of existing canopy trees (where practicable) and the planting of new canopy trees and vegetation.

ii) Overlays

The subject land is subject to the SCO4. The purposes of this overlay are:

- To apply specific controls designed to achieve a particular land use and development outcome in extraordinary circumstances.

The subject land and surrounds are included in Development Contributions Plan Overlay Schedule 1 (Moreland Development Contributions Plan Overlay). The purposes of this overlay are:

To identify areas which require the preparation of a development contributions plan for the purpose of levying contributions for the provision of works, services and facilities before development can commence.

D:4 Ministerial Directions, Planning Practice Notes and guides

Ministerial Directions

The Explanatory Report discusses how the Amendment meets the relevant requirements of Ministerial Direction 11 (Strategic Assessment of Amendments) and *Planning Practice Note 46: Strategic Assessment Guidelines*, August 2018 (PPN46). That discussion is not repeated here.

Other Ministerial Directions relevant to the Amendment are:

- Ministerial Direction Form and Content of Planning Schemes
- Ministerial Direction 9 (Metropolitan Planning Strategy).

Practitioner's Guide

A Practitioner's Guide to Victorian Planning Schemes Version 1.5, April 2022 sets out key guidance to assist practitioners when preparing planning scheme provisions. The guidance seeks to ensure:

- the intended outcome is within scope of the objectives and power of the PE Act and has a sound basis in strategic planning policy
- a provision is necessary and proportional to the intended outcome and applies the VPP in a proper manner
- a provision is clear, unambiguous and effective in achieving the intended outcome.

The guide recognises the SCO as a tool for use in exceptional cases or to achieve a particular land use and development outcome that is consistent with a major issue of policy and is necessary to achieve the planning objectives of Victoria.