

# PLANNING PANELS VICTORIA

## AMENDMENT C192 TO THE BAYSIDE PLANNING SCHEME

### 21 DUDLEY STREET, BRIGHTON

#### SUBMISSION ON BEHALF OF [REDACTED]

#### Introduction

1. This submission is made on behalf of [REDACTED] owner and occupier of 21 Dudley Street, Brighton (**the subject site**).
2. [REDACTED] opposes the application of the Heritage Overlay on a permanent basis to the subject site as proposed via Amendment C192 to the Bayside Planning Scheme (**the Amendment**).
3. In April 2016, [REDACTED] purchased the subject site with the intention to demolish the existing dwelling (**the subject building**) and replace it with a contemporary dwelling. At this time, the Heritage Overlay did not apply to the subject site (the interim Heritage Overlay introduced by Amendment C193 to the Bayside Planning Scheme was gazetted some years later on 25 November 2022).
4. The intention of [REDACTED] to demolish the subject building is demonstrated by the lodgement of a planning permit application to construct a new dwelling on the subject site in August 2018, which was subsequently issued by Bayside City Council (**Council**) on 23 January 2019 (Council Ref: 5/2018/517/1). Refer attachment. We note that the planning permit has recently expired (in January 2024) however the opportunity remains to seek a further extension of time within six months of the expiry date of the permit.
5. A roof deck that formed part of the proposed new dwelling triggered the need for a planning permit under Schedule 1 to the Design and Development Overlay of the Bayside Planning Scheme. As there was no permit trigger associated with demolition, the planning permit does not explicitly grant permission for the demolition of the subject building, however this is clearly necessary in order for the new dwelling to be constructed.

6. Architectural drawings for the new dwelling were endorsed by Council on 24 January 2019. Refer attachment. Subsequently, [REDACTED] preceded to engage the project architect to prepare construction (working) drawings and to engage engineers for geotechnical investigations, structural and civil drawings all of which were prepared by mid-2019. Copies are available on request.
7. The COVID-19 pandemic caused significant delays to the commencement of the project, and a builder was not appointed until September 2022. At this point, [REDACTED] was made aware of the impending Heritage Overlay by a demolition contractor (which was introduced on 25 November 2022 via the gazettal of Amendment C193 to the Bayside Planning Scheme) and its implications for the proposed demolition of the existing building and construction of the new dwelling.
8. The gazettal of Amendment C193 has therefore had major financial implications for [REDACTED] given that it has delayed commencement of construction of a new dwelling for his family for a period of approximately 18 months and the uncertainty regarding whether the Heritage Overlay will be applied on a permanent basis has made investment in the existing dwelling imprudent.
9. The permanent application of the Heritage Overlay would therefore have significant implications for [REDACTED] long held intentions for the site, notwithstanding that it would not in and of itself prohibit full or partial demolition of the existing dwelling.
10. While a Heritage Overlay does not constitute a prohibition on demolition, the application of a site specific Heritage Overlay as proposed would create a significant barrier to full demolition of the existing dwelling and may well result in full demolition not being possible. The likely implications of the overlay are (arguably) more pronounced given a site specific (rather than precinct) Heritage Overlay is to be applied.
11. The low height single storey of the dwelling is such that it is highly unlikely that significant additions (i.e. more than one storey in height) would be possible to the rear of the dwelling noting also that the siting of the dwelling close to the rear boundary would also likely significantly physically constraint the potential for any rear additions to a very small area.
12. The likely limitation of any additions or alterations to the dwelling to a single storey in height and to a location to the rear of the central living space would highly constrain the ability of our client to adapt the house to contemporary living standards.
13. We submit that the inclusion of the subject site in the Heritage Overlay via the Amendment would be highly impactful on [REDACTED] given the circumstances outlined above.

## Key Issues

14. The key issues before this Panel are whether the subject site (inclusive of the subject building and its gardens) is of sufficient heritage significance to warrant protection by a Heritage Overlay and whether such a control results in net community benefit.
15. The purpose of the Heritage Overlay is not to commemorate history but to protect significant built fabric that clearly tells the story of the municipality's development over time.
16. *Planning Practice Note 1 – Applying the Heritage Overlay (August 2018)* (**‘the Practice Note’**) requires the process of identifying a place to clearly justify its significance as a basis for its inclusion in the Heritage Overlay.
17. The statement of significance must clearly establish the importance of the place and address specific heritage criteria.
18. The Practice Note provides circumstances when a place should be included in the Heritage Overlay, including places identified in a local heritage study, provided the significance of the place can be shown to justify the application of the overlay.
19. In terms of threshold and gradings, the Practice Note advises that thresholds to be applied should be either of ‘State significance’ and ‘Local significance’.
20. ‘Local significance’ includes those places that are important to a particular community or locality. In order to address these threshold issues, comparative analysis is required to substantiate the significance of each place. The comparative analysis should draw on other similar places within the study area, including (but not limited to) those that have previously been included in a heritage register or other Heritage Overlays.
21. One must be careful to not draw the catchment too narrowly in order to avoid the risk of assigning rarity or significance to something that if considered in a somewhat wider context would be seen as one of many and not more than a modest example of something.
22. The argument put forward in this submission is that the subject building does not meet the criteria and relevant threshold of local significance and it fails on an appropriate comparative analysis.
23. In having regards to this matter we submit that consideration needs to be given to the Victoria Planning Provision principle of ‘proportionality’ and the planning scheme application rules

(Rule 4)<sup>1</sup> which require planning scheme provisions (including the Heritage Overlay) to be applied in a manner that is necessary and proportional to address the planning risk. This rule seeks to avoid provisions imposing unnecessary costs and administrative burden on the community.

24. We submit that the subject building is a modest example of an early 1970s dwelling of which there are countless examples throughout Melbourne and in the City of Bayside.

25. We submit that applying a Heritage Overlay to a particular property is a significant step that should not be taken lightly. As stated by the Panel in the report for Amendment C387 to the Melbourne Planning Scheme:

*The Panel considers that when contemplating applying the Heritage Overlay an appropriate threshold must be met. Applying a Heritage Overlay is an encumbrance that should only be applied where there is sound justification. The bar should not be set so low as to allow places that are of marginal interest or value. This diminishes the contribution made by buildings that are significant and important, impacts on other policy objectives and the objectives of the PE Act, does not provide net community benefit and can lead to future decision making that considers heritage as a peripheral matter, rather than as a matter of serious consideration, commensurate with the significance of the place... A place should be significant in its own right...*

26. We submit that the dwelling which occupies the subject site is by no means a high quality exemplar of Post War Modern Design and is in fact of marginal interest and value and does not meet the test of being significant in its own right or important as identified as the relevant test in the Practice Note.

27. Before applying the Heritage Overlay, a threshold must be met as to significance. The criteria in question should be met not just in a simple or generic manner but to a degree that is comparable to other examples that are subject to the Heritage Overlay.

28. Council relies on Criteria A, D and E from the Practice Note to justify the inclusion of the subject site in the Heritage Overlay.

<sup>1</sup> See A Practitioner's Guide to Victorian Planning Schemes (version 1.4, April 2020) at page 25.

29. These Criteria are as follows (emphasis added):
30. Criterion A: **Importance** to the course or pattern of our cultural or natural history (historical significance).
31. Criterion D: **Importance** in demonstrating the principal characteristics of a class of cultural or natural places or environments (representativeness).
32. Criterion E: **Importance** in exhibiting particular aesthetic characteristics (aesthetic significance).
33. We submit that none of these criteria is met.
34. We submit that it is not sufficient for a place to be part of history, rather it needs to be important from a heritage perspective to meet each of the criterion identified above and alleged by Council to have been met.
35. Furthermore we submit that for a place to meet the criterion it needs to be important to a specific era, not just to reflect that era. To meet the criterion the place needs to be above ordinary and undistinguished.
36. We acknowledge that the subject building is intact and is not in a dilapidated condition and thus do not seek to rely on these considerations as justification for its exclusion from the Heritage Overlay.
37. However we submit that just because the subject building was constructed in a particular period and is intact does not mean that it passes the threshold to warrant application of the Heritage Overlay.
38. We submit that the subject building in this case is a good example of a typical early 1970s dwelling which exhibits features typical of that period, however this is not sufficient to elevate its significance to the level required to support an individual Heritage Overlay being applied to the land.
39. We submit that it cannot be sufficient (to justify the application of the Heritage Overlay) that the subject building be an interesting example of an early 1970s dwelling.
40. The subject building may be interesting or reveal something but this does not mean it meets the threshold of importance.

41. Additionally, the subject building may have been designed and built by a highly regarded designer and builder of the era in Alastair Knox, but this also does not mean it meets the threshold of importance.
42. We submit that the application of the Heritage Overlay seeks to achieve a common good by recognising and protecting heritage places that contribute to the community's understanding of the past.
43. The appreciation of a building from the public realm, where the broader community is able to benefit from the ongoing presence of a heritage building, should therefore be a key consideration.
44. The particular characteristics of the dwelling which diminishes its contribution to local heritage include the high front boundary wall which has concealed the dwelling from the street from its original date of construction (to the best of our knowledge). Refer photographic study.
45. We note that this front wall collapsed in early 2022 prior to the application of the interim Heritage Overlay and has been replaced with a temporary plywood wall of a similar height.
46. Notwithstanding the longstanding concealing effect of the front boundary wall, the front elevation of the dwelling when viewed from inside the site is dominated by the carport which projects considerably further forward than the balance of the dwelling.
47. The view of the dwelling even from within the front setback of the subject site is largely limited to building fascia and shadowed windows, noting the significant front setback. Refer photographic study.
48. The dwelling has therefore never had a meaningful presence in the streetscape and public realm given the presence of the high front wall, very deep setback (circa 14 metres measured closest point of the dwelling behind the carport), its low overall height and the projection of the carport further forward than the balance of the dwelling.
49. The construction in 2015 of a large dwelling at 20 St Ninians Road (a corner lot) to the immediate west of the subject site also diminishes any presence that the existing dwelling might have from the public realm (when viewed from the north west) even if a front wall was not present. This dwelling has been constructed at ground level to the common boundary with the subject site with an approximate front setback from Dudley Street of 6 metres to a large two storey form.

50. We submit that there are many dwellings of a similar ilk to the subject dwelling throughout the City of Bayside and that this dwelling does not exhibit any exemplary elements that would accord it a level of importance or warrant its recognition with a site specific Heritage Overlay.
51. We submit that this particular dwelling is a good example of an early 1970s dwelling of which there are countless examples throughout Melbourne.
52. Practice Note 1 identifies that a comparative analysis of a building with other buildings of a similar phase, era or class is a key step in determining whether the threshold of heritage significance has been reached such that the Heritage Overlay should be applied. In this respect we note that the Panel Amendment C387 to the Melbourne Planning Scheme states:
- The Panel agrees that a comparative analysis is a fundamental and critical step in determining whether the threshold of heritage significance is reached. It enables an understanding and qualitative assessment of the relative quality and value of a place and whether it stands out or compares favourably with similar in terms of architectural quality, remaining intactness and integrity, and their ability to demonstrate key characteristics or stylistic and technical developments of a period. It requires therefore more than just a list of places or services of photos of similar period or classes of building to serve this task...*
- The process of comparative analysis for local level significance does not require places to be better than others but they should compare at least as well as others that are similar phase, era or class). This is important to ensure the integrity of existing places included in the Heritage Overlay is not diminished...*
53. We submit that there are much more highly credentialled examples of post war modern dwellings from this period. We understand that this particular dwelling was not identified in *The Modern House in Melbourne, 1945-1975* by Dr Phillip Goad and are not aware of any other specific recognition of this dwelling in the press or magazine publications (having undertaken a literature review), which we submit is reflective of it being a lesser example of homes of this period (we do accept however that the lack of formal recognition is not determinative in this regard).
54. We submit that there is a much more highly credentialled example of a post war dwelling designed and constructed by Alastair Knox in close proximity to the subject site at 25 Chatsworth Avenue, a property which is also the subject of the Amendment.
55. The dwelling at 25 Chatsworth Avenue provides the most useful comparator to the dwelling at the subject site. This is acknowledged in the *Post-War Modern Residential Heritage Study Final Report Volume 3* prepared by GJM Heritage which states in the comparative analysis for 25 Chatsworth Avenue:

*The house that is most comparable to 25 Chatsworth Avenue, Brighton in form, detailing and age of construction is the following residence, also designed by Alistair Knox: 21 Dudley Street, Brighton (Alistair Knox, 1971).*

56. We submit that the dwelling at 25 Chatsworth Avenue exhibits features that warrant its inclusion in the Heritage Overlay, features which are not shared with the subject site including:
  - 56.1. a significant presence in the public realm by virtue of its two storey element, reduced (relative to the subject site) front setback, absence of front fencing and garden setting which can be appreciated from the public realm
  - 56.2. garage which does not project forward of the main dwelling and reads as a minimal element in the front elevation
  - 56.3. distinctive skillion roof form and projecting two storey element.
57. Whilst we acknowledge that there is a desire in various parts of Melbourne to add dwellings from the post war modern era to local heritage overlays, and that this is understandable given the period that has transpired since such dwellings were constructed and appreciation of this era has grown, we submit that decisions regarding the inclusion of specific properties must consider whether the individual merits of a property are sufficient to warrant inclusion.
58. The subject building was designed by a well-known and highly regarded building designer in Alastair Knox, however this designer is much better known for his mudbrick dwellings constructed in the Shire of Nillumbik. The association of the site with this well-known designer and builder is likely to have influenced its inclusion in the proposed Heritage Overlay, even though this association is not explicitly acknowledged in the citation as contributing to its significance.
59. We submit that the association of a well regarding designer and builder with the subject building should not tip the scales in favour of its inclusion given that the designer is associated with a different type of dwelling construction in a different part of the Melbourne metropolitan area.



60. We also note that Alastair Knox was a somewhat prolific designer and builder, having designed over 1000 houses and built in the order of 350 houses.<sup>2</sup>
61. We submit that the application of a site specific Heritage Overlay would clearly be highly impactful on our client given the circumstances outlined above and this step should only be taken for a building that very clearly satisfies the recognised heritage criteria set out in Practice Note 1, which we submit is not the case for the subject building.
62. We submit that it should be abundantly clear that a dwelling does in fact have local heritage significance for it to be recognised via the application of a site specific Heritage Overlay and that this test has not been satisfied in this case.
63. The application of the Heritage Overlay to this property would in our submission diminish the value of the Heritage Overlay in the eyes of the public by applying it to a building that is not worthy of such recognition.
64. We also note that in the context of a housing crisis as currently being experienced in Melbourne that applying a Heritage Overlay to a building with limited heritage value would set at undesirable precedent by acceding to a low threshold (notwithstanding that the subject site has limited potential to accommodate additional dwellings).

### **Proposed Changes**

65. We request that the Heritage Overlay not be applied to the subject site as currently proposed in the Amendment.

### **Summary of Submission & Key Issues**

66. We submit that the subject site does not meet the criteria under State and local policy for inclusion in the Heritage Overlay via the Amendment. We further submit that the inclusion of the subject building in the Heritage Overlay would be significantly impact our client's long held intentions for the site.
67. We submit that the subject site is not of local heritage significance and is not an important example of Post War Modern Design.

<sup>2</sup> Source: <https://alistairknox.org>

68. While designed by a highly regarded design and builder in Alastair Knox, this particular style is not what has brought this well regarded designer broad recognition.

69. We request that this property is removed from consideration for inclusion in the Heritage Overlay.

Michael Dunn

Director

Metropol Planning Solutions Pty Ltd

25 February 2024