

## **Report to the Minister for Planning by the Friends of Chicquita Park on Amendment C25 to the Kingston Planning Scheme**

**1.** This report is a critique of the City of Kingston's justification for Amendment C25 to the Kingston Planning Scheme as expressed in two reports by the City of Kingston:

- The City of Kingston Amendment C25 Explanatory Report;
- The Council Officers' Report on Amendment C25 to the Special Council Meeting on August 1.

**1.1** The Friends of Chicquita Park believe that the case for approval of C25 has not been adequately made, that the reports are deficient in terms of the understanding of strategic planning considerations, contradict Council's own strategic planning framework, and are internally contradictory. We conclude that planning merit and nett community benefit are undermined by Amendment C25.

**1.2** Our critique follows the basic structure of the C25 Explanatory Report, and seeks to address the same questions that it does, but also raises some issues that are dealt with only in the Council Officers' Report. Only questions in the Explanatory Report that we believe are inadequately or wrongly dealt with are examined in this report.

### **2. How does the amendment address the environmental effects and any relevant social and economic effects?**

**2.1** The conclusion of the Explanatory Report in relation to the environmental effects is: "The amendment is therefore not expected to result in any significant environmental impacts".

**2.1.1** This is flatly contradicted by the studies conducted by consultants commissioned by the Council (Biosis Research) and in the Council Officers' Report. Section 14 of the Council Officers' Report makes the case for the Council's decision *not* to impose an Environmental Significance Overlay:

"In relation to the land which is proposed to be transferred to Council (ie the open space and Scout Hall Land) although this land parcel contains significant vegetation which would be transferred to Council it is not believed an ESO is warranted for the following reasons:-

Council's advice from Biosis Research is the high local level of ecological significance afforded to the land in totality is substantially compromised with only 40% of the site being retained. As such the basis for recognising the land as significant through an overlay control is most questionable."

The effect of the Amendment is clearly, as stated by the Council officers themselves, to "substantially compromise" the "ecological significance" of the site. How an opposite conclusion could have been reached is beyond our understanding. The destructive effect

on the ecological significance of the site by *any* development on the site was also recognized by the Planning Panel established by the Minister for Planning to assess the Planning Scheme Amendment, which recommended that no development be allowed.

**2.2** The Explanatory Report assesses the **social effects** in the following way:

“The amendment will facilitate the future use and development of the subject land for residential purposes and will enable a significant area of parkland and vegetation to be retained for ongoing community enjoyment and use. The establishment of a new residential community on the site is expected to generate community benefit by contributing to the diversity and choice of housing stock available in the Mentone area.”

**2.2.1** What this paragraph does is identify two elements of community benefit: parkland (with vegetation) and housing diversity. Let us deal with the second of these first. Other than the fact that the proposed housing for the site is largely not detached, there seems little evidence that any real housing diversity is proposed. There is certainly no proposal for diversity in housing prices or the provision of affordable housing. It appears from the sketchy proposals provided by the development proponent that the houses will be large (up to three storeys): certainly no smaller than most of the existing houses and substantially bigger than many units in the area. The private open spaces of the proposed residences may be small in comparison to the existing surrounding houses, but can this and the non-detached character of the housing – the only ways in which the development significantly diverges from the existing houses – really be considered to increase “housing diversity”?

**2.2.2** We certainly agree with the authors of the Explanatory Report that parkland is a community benefit. We fail to see, however, how an argument can be made that an Amendment provides community benefit in the provision of parkland by reducing existing parkland by over 50 percent. If parkland is a community benefit, as argued in the Explanatory Report, how can it be argued that community benefit is being increased by a decrease in the amount of parkland?

**2.2.3** What the quoted paragraph above says in reality is that for a dubious or non-existent housing diversity benefit, and in order to provide the benefit of parkland, an existing park must be reduced in size by more than 50 percent. But rather than this being seen as a community benefit, **there is clearly a nett loss in community benefit caused by the Amendment.**

### **3. The Amendment and the Metropolitan Strategy**

**3.1** Five questions are asked about the relationship between the Amendment and the Metropolitan Strategy in the Explanatory Report. Unfortunately the answers given consist of little more than assertion, with no detailed explanation at all. This lack of detail allows the Report’s author to ignore or obfuscate the real effects of the Amendment on the

Metropolitan Strategy. Anyone reading only the Explanatory Report would get a biased and inaccurate assessment of the Amendment's relationship to the Strategy.

**3.2** Under the question, **What aspects, if any, of the Metropolitan Strategy are relevant?**, the Explanatory Report lists:

- Policy 5.2 *Recognise and protect cultural identity, neighbourhood character and sense of place.*
- Policy 7.7 *Protect native habitat and areas of important biodiversity through appropriate land use planning*
- Policy 9.1 – *achieve better planning decisions.*

It should not be sufficient to simply list these aspects without any explanation. If this is all that DSE requires from Planning Authorities, how does the Department ensure that proper planning processes are being carried out? In fact, any attempt to explain how the Amendment facilitated these aspects of the Metropolitan Strategy would have been doomed to failure.

**3.2.1** In relation to Policy 5.2, all studies, and the Planning Panel, have recognized the importance of Chicquita Park – especially its unstructured nature – to neighbourhood identity and sense of place. This is being destroyed by the Amendment.

**3.2. 2** In relation to Policy 7.7, as indicated above, Kingston Council's own studies show that the park's biodiversity values can only be properly protected by the preservation of the whole park. Again, the Amendment facilitates the destruction of these values.

**3.2.3** In relation to Policy 9.1, the Friends of Chicquita Park could be excused for harbouring some cynicism. Frankly, to suggest that the Amendment helps to achieve better planning decisions is simply laughable. The Friends of Chicquita Park have participated in the entire planning process in good faith, and had all our arguments about the need to preserve the Park in its entirety justified by the Council's own studies and the Planning Panel. **There is no, repeat no, sound planning argument for the development of any of Chicquita Park.** This is indisputable. No-one is able to provide a planning study of any kind that argues for the Park to be developed. The Amendment does not proceed from a basis of planning merit, but is motivated purely by a refusal, for whatever reason, of governments at all levels to ensure the proper planning processes are backed by financial will.

**3.3** Under the question **How does the Metropolitan Strategy affect the amendment?**, the Explanatory Report lists the following:

- Encouraging improved working relationships with the community and other stakeholders
- Working with stakeholders facilitates effective and efficient planning processes about land-use planning issues and processes in the planning system that relate to planning scheme amendments

- Encouraging the redevelopment of large residential opportunity sites to incorporate the protection of significant native vegetation fundamental to the biodiversity of the site
- Supporting the redevelopment of large residential opportunity sites to respond and contribute to the existing sense of place and cultural identity
- Strengthening planning tools to ensure the redevelopment of large residential opportunity sites respond to their context in terms of built form, landscape character and cultural identity.

Again, the Explanatory Report simply parrots these goals without demonstrating how the Amendment actually contributes to their realization. Again, we can show how the Amendment in fact works against the realization of these goals.

**3.3.1** In relation to dot points one and two, the reality is that the local community's needs have not been met, and there is a very strong feeling that many of Kingston's Councilors, but more importantly Council officers, have been working against the local community on this issue. A total of more than 800 submissions were made to the Council on the Planning Scheme Amendment, all except maybe 5 opposing any development on the Park. The ward councilor covering Chicquita Park, elected on a very strong platform of protecting the park, was continually excluded from negotiations over the Park's future since 2004. At least one other councilor was in direct contact with the proponent of development of the Park. One Council officer, in charge of the planning process for the Park, was found to have written a submission in a private capacity opposing Council's (then) policy on Chicquita Park. The fact that the local community participated in good faith in the whole planning process only to find that the planning merit of the case would not determine the outcome has completely disillusioned us. Why participate in planning processes in future if there is no guarantee that their recommendations will be honoured? Why not find alternative means to oppose inappropriate development, such as more direct action and political strategies to embarrass the relevant government authorities?

**3.3.2** In relation to dot point 3 it should be noted that Chicquita Park does not fit Kingston's own definition of a 'large residential opportunity site'. The Kingston Municipal Strategic Statement defines such sites in the following way:

**“Large Residential Opportunity Sites**

In recent decades, housing growth in Kingston has primarily been a result of new housing construction on greenfield sites in Dingley, Aspendale Gardens, Chelsea Heights and the like. The remaining designated large development sites within Kingston such as the Waterways and The Heath will continue to supply significant numbers of new housing over the coming 3-5 years. It is also anticipated that potential sites such as the Gas and Fuel Site (Nepean Highway) will become available for new housing in coming years. In future, all large residential opportunity sites will provide an integrated mix of lot sizes and housing types, and medium density housing will become a more important housing element on these sites.”

Although this is rather a loose definition, Chicquita Park cannot be compared with any of the sites mentioned, and a relatively small site such as it is was clearly not intended to be covered by this paragraph in the MSS. It should also be noted in relation to this dot point that the Council Officer's Report made it clear that the development would actually effectively lead to the destruction of the Park's ecological values, not their protection. Dot point 4 refers to sense of place and cultural identity. As was made clear at the Panel Hearings and was accepted by the Panel, Chicquita Park is a fundamental component of local identity, for people of all ages and with varying needs. In particular, its unstructured bushland character is fundamental to its sense of place. It is precisely this that is to be destroyed by the Amendment.

**3.3.3** Dot point 5 refers to urban design and urban character issues. It should be noted that the Park abuts an area of covenanted single dwelling properties and otherwise largely detached, single storey housing. The proposed development made possible by the Amendment, however, provides for attached houses up to three storeys. We have already noted how the Amendment fails to respect the landscape character of the Park. The built form that it encourages also fails to respect the surrounding built character. This is an issue we analyse below in relation to Local Policy.

**3.4** We next move on to the question: **Is the amendment consistent with any directions or policies in the Metropolitan Strategy?** The answer given in the Report is:

“The amendment is consistent with relevant directions and policies of the Metropolitan Strategy because it provides a mechanism for protecting the integrity and amenity of Chicquita Reserve and the adjoining residential area.”

This answer is flawed in several respects. First, it doesn't really answer the question. Second to suggest that the “integrity and amenity of Chicquita Reserve” is “protected” by reducing it in size by more than 50 percent and destroying its fundamental character is frankly bizarre. The answer also ignores several ways in which the Amendment is in fact **inconsistent** with the Metropolitan Strategy:

- *Melbourne 2030* places great emphasis on public open space, recognizing that ‘local public open space is a vital component of the urban fabric’ (*Melbourne 2030*, p. 103). Policy 5.6 states:

‘Improve the quality and distribution of local open space and ensure long-term protection of public open space’ (*Melbourne 2030*, p. 103).

- *Melbourne 2030* emphasises the protection of native vegetation, and the environmental significance of Chicquita Park must be seen in this context. Policy 7.7 of *Melbourne 2030* states:

‘The protection and enhancement of native vegetation communities are fundamental to State and regional biodiversity...Native habitat is threatened by the clearing of indigenous vegetation, intensification of land use and

development, and sedimentation arising from soil disturbance and construction' (*Melbourne 2030*, p. 139).

Initiative 7.7.2 requires the implementation of

'the native vegetation management framework to protect remnant vegetation in the metropolitan area through the planning and development process' (*Melbourne 2030*, p. 140).

- The proposed development site is not within a designated Activity Centre under *Melbourne 2030*, and the intensity of the proposed development is thus not supported: this conclusion was supported by the Planning Panel.

The reality is that the Amendment directly undermines several policy directions of the Metropolitan Strategy. If the policy is to have any integrity the Amendment should not be allowed to proceed. Thus, the answer to the question, **Does the amendment support, give effect to or assist the implementation of the Metropolitan Strategy or can it reasonably be modified to do so?**, should be **"NO, it does not"**.

**4. Under the question, How does the amendment support or implement the State Planning Policy Framework?**, we find the claim:

"The amendment is consistent with key thrusts of the State Planning Policy Framework, specifically in relation to objectives for conservation of native flora and fauna, open space and urban consolidation.

In particular Clause 15.09 of the SPPF encourages planning authorities to have regard for the conservation values of national parks and conservation reserves, and to protect any habitats or vegetation communities which may potentially be threatened or endangered. Whilst the Chicquita Reserve has never been formally reserved for parkland or conservation purposes, it is considered to have inherent ecological value and contains vegetation which is significant to the region. The provision of a dedicated 40% open space area will enable the retention of this vegetation within a protected, managed environment, consistent with the objectives of the SPPF."

Yet, as we have already shown, Kingston's own Council Officer's Report admits that the ecological values of the site are to be substantially damaged by the Planning Scheme Amendment. We reproduce the relevant text again:

"In relation to the land which is proposed to be transferred to Council (ie the open space and Scout Hall Land) although this land parcel contains significant vegetation which would be transferred to Council it is not believed an ESO is warranted for the following reasons:-

Council's advice from Biosis Research is the high local level of ecological

significance afforded to the land in totality is substantially compromised with only 40% of the site being retained. As such the basis for recognising the land as significant through an overlay control is most questionable.”

**4.1** It is extraordinarily disappointing that the Explanatory Report should be so wrong in relation to the Local Planning Policy Framework. Below is the Report’s response to the question, **How does the amendment support or implement the Local Planning Policy Framework?:**

“The amendment is consistent with clauses 21.05, 21.09 and 21.11 of the Council’s Municipal Strategic Statement, which set out Council’s preferred strategic directions in relation to residential land use, environmental management and open space.

The application of the Development Plan Overlay is particularly appropriate in the context of Council’s proposed changes to Clause 21.05 of the Municipal Strategic Statement, as put forward in the proposed Amendment C8 to the Kingston Planning Scheme. The proposed changes to the MSS establish strategic direction for the development of ‘large residential opportunity sites’ (greater than 2000m<sup>2</sup>), and specifically require that Development Plans be prepared for such opportunity sites to ensure that the site design process is underpinned by a comprehensive and holistic approach.”

**4.1.1** In fact, clauses 21.05 and 21.09 provide no support for the Amendment. The City of Kingston Residential Landuse Framework Plan shows that Chicquita Park is in an “Area for Incremental Housing Change”. This is defined at Clause 21.05.1 of the MSS in the following way: “The type of housing change anticipated in these areas will take the form of extensions to existing houses, new single dwellings or the equivalent of new two dwelling developments on average sized lots. The existing single dwelling character of these areas is to be retained.” The proposed Amendment clearly does not fit with this definition. Part of the problem here seems to be that Kingston’s planners have chosen to see Chicquita Park as a “large residential opportunity site” only, and therefore suitable for intensive development (although where the “greater than 2000m<sup>2</sup>” definition comes from remains a mystery to us – there is no mention of such a figure in the Planning Scheme). In fact, if the Park must be viewed as a site for development (which we, of course, reject) it should be viewed as a site within an Incremental Housing Change Area, and therefore unsuitable for development of a kind other than that defined at Clause 21.05.1.

**4.1.2** Similarly, Clause 21.09 provides no support for the Amendment. Clause 21.09 Objective 3 states:

To maintain the diversity of flora and fauna habitats and promote opportunities for reinstating local native flora.

**Strategies**

Strategies to achieve this objective include:

- Support the enhancement, restoration and re-creation of pre-settlement vegetation communities and landscapes.
- Protect identified areas of botanical or zoological significance from further degradation.
- Ensure that new development does not reduce the extent or integrity of significant indigenous vegetation and provides for the reinstatement of native vegetation and/or the creation of wildlife corridors where development is proposed adjacent to areas of environmental sensitivity.
- Promote the values and significance of existing flora and fauna habitats, and support initiatives that aim to protect and restore the integrity of these.

Given the Council's own acknowledgement that the Amendment will fundamentally reduce the ecological value of the site, it is remarkable that the Council would claim that this Clause supports the Amendment.

**5.** We move now to an examination of some issues not covered in the Explanatory Report but included in the Council Officers' Report on Amendment C25 to the Special Council Meeting on August 1, an important document since it is the information upon which Councillors were expected to form their opinions prior to voting on acceptance of the Amendment.

**5.1** The section on how the Council has responded to the Panel's recommendations is flawed. The Panel required the open space and regeneration studies to be conducted in a way that they fed into the decision about whether or not to retain the park. Indeed, the Panel recommended that a Public Acquisition Overlay be applied to the whole site unless the studies found that was not necessary or feasible. The studies, to the contrary, found the Park was valuable open space which could only be properly protected by retention in its entirety, and that was both necessary and feasible. The Council agenda report proceeds from the presumption that the Park won't be retained in full, and therefore dismisses the studies, even though they were adopted by the Council. There is no attempt to address the planning merit of the case as expressed in the open space and regeneration reports.

**5.2** Section 9, p. 23 states: "A requirement of Council's consideration of Planning Scheme Amendment C25 (as it is for all Amendments) is to determine the appropriate planning controls to be applied to the subject land. This decision needs to be informed by balancing a number of factors including the recommendations of the Panel, community comment, the feasibility of acquiring open space, the implications of the land owner advancing its existing legal proceedings and the likelihood of the Minister for Planning supporting Council's adopted position."

We do not believe that any explicit or implicit threats of legal action by land owners are a valid consideration for Planning Scheme Amendments. Certainly they are not listed as such in the Planning and Environment Act. We believe that these legal threats were a major factor shaping the Council's actions on Chicquita Park. Furthermore we believe on the advice of our own lawyers that they were empty threats, with virtually no chance of success. If the developer really thought a court would allow him to develop all but 5 %

of the park, he would no doubt have insisted on a hearing and not acceded to repeated adjournments.

**5.3** One of the areas in which the Council's arguments are most clearly self-contradictory is in relation to overlay controls. Section 13 on Overlay controls makes the case for the imposition of a DPO rather than a DDO:

“It is submitted that the DDO is inappropriate in this case because the purpose of the DDO is to ‘identify areas which are affected by specific requirements relating to design and built form of development’. The DDO only deals with built form. The purpose would not allow for controls to protect and enhance the significant ecological (floral) values of the subject land.

The DPO is appropriate because the subject land is a greenfields site. Accordingly the planning controls need to provide for an exercise of master planning to inform any use and development of the subject land. The master planning in this case can be appropriately carried out by the preparation of a Development Plan as required by a DPO. The Development Plan must have regard to the proposed built form on the subject land, but also must have regard to the need to protect the identified ecological values of the subject land. Accordingly, the DPO is the most appropriate control in this circumstance.”

**5.3.1** However, if the land to be retained as open space is to be subject to a Public Park and Recreation Zone and transferred to Council ownership (as this agenda report recommends), the issue *is* one of built form on the remainder of the site. A DPO will not be necessary to plan what happens on the site subject to a PPRZ. But a DDO is necessary precisely to deal with the built form issues on the rest of the site. This is confirmed in the first paragraph of Sect 14 and is used to justify not using an ESO:

“The Victorian Planning Provisions provide for a number of planning overlay tools which can be used to protect or recognise significant vegetation. The Panel considering Planning Scheme Amendment C25 have recommended that if it is not feasible for Council to address the outcomes of its strategic studies the subject land be provided with an Environmental Significance Overlay (ESO). Such an overlay triggers the need for a Planning Permit for buildings and works undertaken on any component of the subject land. Based on the plans the owner of the land has submitted for consideration there is a clear demarcation between the land to be provided to Council and the land to be developed. The land which is proposed for development does not include for retention any of the trees identified previously by Council's experts as being of significance. On this basis it is not appropriate that an ESO be applied to the developable land given the lack of any significant vegetation on it.”

**5.3.2** Given its proximity to surrounding residential properties, the site is in no real sense a ‘greenfields site’, and a DDO is necessary to deal with built form issues on site and integration with surrounding built form.

**5.3.3** It appears clear to us that the main reason the Council seems to want a DPO is because it is scared of the developer's threats:

“The land owner has made it clear that if Council were to introduce a Design and Development Overlay it would continue to pursue its Supreme Court and VCAT proceedings and would not be agreeable to providing Council anymore open space than that required following the outcome of these legal proceedings. Scenarios in this case for Council include a 25% open space contribution or a possible scenario that a figure equal to or less than 5% as provided for under the Subdivision Act 1988.”

However, the Council is required to judge this issue on planning merit, not the threats of a developer, particularly when we understand Council's legal advice from Mark Dreyfus QC concurred with our legal advice that there was no substance to these threats.

**6.** In conclusion, we believe that the Amendment submitted to the Minister is not justified in the way that Kingston Council asserts it is. Indeed, it is contrary to State and local policy in several areas. This critique of Kingston's justification for the Amendment, we believe, indicates how poorly the planning process has been conducted by the Council. The Council's reports are self-contradictory, poorly informed and lack detail. We believe that three courses of action could be taken by the Minister:

1. given the Amendment under consideration is sufficiently different to the original the Minister could, under Section 34 of the Act, recall the original planning panel to consider it.
2. the Minister could take the Amendment out of the hands of the Council and determine an appropriate Amendment himself, after careful consideration of the Planning Panel's findings and Recommendations.
3. The Minister could undertake further investigations into the shape and form of Amendment C25 and of the process which led to its adoption by Council and could require an independent planner to be employed to rework the amendment to:
  - remedy some of the flaws in the plans
  - improve the amenity for present and future residents
  - enhance the prospects of conserving and regenerating the remnant vegetation by improving the location and amount of open space to be preserved.

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Dr Colin Long  
(Lecturer in Heritage Planning Law, Deakin University)  
Friends of Chicquita Park