

**Nillumbik Planning Scheme Amendment C126nill
Rezoning at Bridge Street and John Street, Eltham**

Panel Report

Planning and Environment Act 1987

11 June 2021

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 and Environment Act 1987

Panel Report pursuant to section 25 of the PE Act

Nillumbik Planning Scheme Amendment C126nill

11 June 2021

A handwritten signature in black ink, appearing to read 'Gabby McMillan', with a long horizontal line extending to the right.

Gabby McMillan, Chair

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Glossary and abbreviations

Council	Nillumbik Shire Council
DELWP	Department of Environment, Land, Water and Planning
LG Act	<i>Local Government Act 1989</i>
MAC	Major Activity Centre
Ministerial Direction on Form and Content	Ministerial Direction on <i>The Form and Content of Planning Schemes</i>
MPS	Municipal Planning Strategy
MSS	Municipal Strategic Statement
NRZ	Neighbourhood Residential Zone
PE Act	<i>Planning and Environment Act 1987</i>
PPF	Planning Policy Framework
PPRZ	Public Park and Recreation Zone
Practitioner's Guide	<i>Practitioner's Guide to the Victorian Planning Schemes</i> (V 1.4)
VPP	Victoria Planning Provisions

Overview

Amendment summary

The Amendment	Nillumbik Planning Scheme Amendment C126nill
Common name	Rezoning at Bridge Street and John Street, Eltham
Brief description	The rezoning of the eastern end of Bridge Street and John Street, Eltham from Residential Zone Schedule 1 to Public Park and Recreation Zone.
Subject land	Eastern end of Bridge Street, Eltham and the eastern end of John Street, Eltham.
Planning Authority	Nillumbik Shire Council
Authorisation	13 November 2020
Exhibition	From 7 January until 18 February 2021
Submissions	Number of Submissions: 3 Opposed: 2 Richard Schurmann (supported and requested a change) Sue and Colin Cook (opposed) John Lordan (opposed)

Panel process

The Panel	Gabby McMillan
Directions Hearing	29 April 2021 (Video conference)
Panel Hearing	25 May 2021 (Video conference)
Site inspections	Unaccompanied, 23 May 2021
Parties to the Hearing	Nillumbik Shire Council, represented by Bea Guevara and Leigh Northwood Richard Schurmann Sue and Colin Cook, represented by Kieren Mihaly of Counsel assisted by Megan Copas Solicitor John Lordan, represented by Pat Weaver of Mosaic Project services
Citation	Nillumbik PSA C126nill [2021] PPV
Date of this report	11 June 2021

Executive summary

Nillumbik Planning Scheme Amendment C126nill (the Amendment) seeks to:

- partially rezone the eastern end of John Street, Eltham from Neighbourhood Residential Zone Schedule 1 to Public Park and Recreation Zone
- partially rezone the eastern end of Bridge Street, Eltham from Neighbourhood Residential Zone Schedule 1 to Public Park and Recreation Zone.

Key issues raised in submissions included:

- status of the subject land, including the relationship between the Amendment and the road discontinuance process
- impacts on landscaping and vehicle access
- potential extension of the Public Park and Recreation Zone at Bridge Street.

(i) Status of the subject land

The Amendment runs in parallel with a process to discontinue the road reserves at the eastern end of Bridge Street and John Street (the same land affected by the Amendment) under the *Local Government Act 1989* (LG Act). The road discontinuance is a separate process and outside the remit of the Panel. However, the discontinuance process is relevant to the extent that it affects the status of the subject land.

The purpose of the Public Park and Recreation Zone is to recognise areas for public recreation and open space. A logical precursor for the application of the Public Park and Recreation Zone is that the land needs to be 'public land'.

The Ministerial Direction *The Form and Content of Planning Schemes* (Ministerial Direction on Form and Content) specifies that a planning scheme may only include land in a public land zone if the land is Crown land, vested in or controlled by a Minister, government department, public authority or a municipal Council. The *Practitioner's Guide to the Victorian Planning Schemes* (Version 1.4)¹ (Practitioner's Guide) explains that public land zones are not intended to identify the legal status of land.

Council submitted that the road discontinuance process is all but complete. Council submitted that the inclusion of the subject land in the Public Park and Recreation Zone would enable it to carry out its functions as a public land manager and allow for the consolidation of a public park network in this part of the Shire.

Some submitters disputed the legal status of the Amendment land. The submitted that it was not certain that the subject land would 'vest' in Council in the near future. They submitted that the Public Park and Recreation Zone should not be applied until the status of the subject land was resolved.

(ii) Landscaping and vehicle access

Submitters raised concerns in relation to vehicle access and landscaping were raised in written submission, however these concerns were not pursued at the Hearing.

¹ That replaced the content in Planning Practice Note 2 (Public Land Zones)

(iii) Extension of the PPRZ at Bridge Street

One submitter supported a change to the Amendment, being the extension of the PPRZ at Bridge Street, subject to that extra land being owned by Council.

(iv) Conclusions

The Panel concludes:

- The subject land must be Crown land or be vested in, or controlled by, Council (or another public body) before it is rezoned to PPRZ.
- It is not a matter for the Panel to determine the legal status of the subject land. The status of the land can only be resolved through separate processes outside the remit of this Panel.
- The Amendment will not result in any adverse impacts on existing vehicle access.
- The rezoning will enable Council to establish and maintain the proposed pocket parks as part of a broader open space network.
- That the extension of the PPRZ to the edge of Plumtree Close (at eastern end of Bridge Street) is a logical change to the Amendment, but such a rezoning proposal cannot proceed until the land is vested in or controlled by a Minister, government department, public authority or a municipal Council.

Recommendations

Based on the reasons set out in this Report, the Panel recommends that Nillumbik Planning Scheme Amendment C126nillnill be adopted as exhibited with changes subject to the following:

- 1. That Council satisfy itself that sufficient notice of the Amendment was provided in accordance with the requirements at section 19 of the *Planning and Environment Act 1987* before it decides whether to adopt the Amendment. If it is not satisfied, it must give notice of the Amendment in accordance with the *Planning and Environment Act 1987*.**
- 2. The subject land is not rezoned to Public Park and Recreation Zone until it is Crown land or is vested in or controlled by a Minister, government department, public authority or a municipal Council.**
- 3. An additional section of land (as shown in Figure 2) at the eastern end Bridge Street, Eltham (to the edge of Plumtree Close) be rezoned from Neighbourhood Residential Zone Schedule 1 to Public Park and Recreation Zone, once that land is vested in or controlled by a Minister, government department, public authority or a municipal Council.**

1 Introduction

1.1 The Amendment

(i) Amendment description

The purpose of the Amendment is to rezone land at the eastern end of Bridge Street and John Street, Eltham to Public Park and Recreation Zone (PPRZ) to formalise two pocket parks.

Specifically, the Amendment proposes to:

- partially rezone the eastern end of John Street, Eltham from Neighbourhood Residential Zone Schedule 1 (NRZ1) to PPRZ
- partially rezone the eastern end of Bridge Street, Eltham from NRZ1 to PPRZ.

(ii) The subject land

The Amendment applies to subject land shown in Figure 1. The subject land is proposed to be used as two pocket parks which form a larger network of parks and larger reserves in Eltham.

The part of the subject land at the eastern end of Bridge Street is currently being used as a pedestrian link through to Harlington Avenue. The part of the subject land at the eastern end of John Street is currently being used as a pedestrian link and informal vehicle access. Bollards were recently installed on part of this land to limit informal access.

Figure 1 - Subject land and existing access



1.2 Background

The Amendment has been prepared by Council in parallel with a road discontinuance process under the *Local Government Act 1989*. While the discontinuance process is outside the Panel's remit, it is relevant to the extent that it affects the status of the subject land (e.g. whether it is public land).

1.3 Procedural issue: Notice to owners

There was some dispute between the parties as to who the legal owner of the subject land was. During the Hearing submitters mentioned that the subject land was owned by the 'original developer' of the subdivision.

In response to these matters, the Panel issued further directions on 26 May 2021 and asked Council to confirm whether the owners of the land affected by the Amendment had been notified of the Amendment.

(i) Council submissions

Council provided a response on 1 June 2021.² It submitted that:

The relevant source of owner/occupier information to inform notification under Section 19 of the Planning & Environment Act 1987 of a Planning Scheme Amendment is Council's GIS system. Council's GIS aligns and draws directly from the Department of Environment, Land, Water and Planning (DELWP) database and Council's ratepayers database.

Please see Attachment 2 for a map of ratepayers (owners) and occupiers that were notified for Amendment C126nill. This plan demonstrates that the Amendment site cannot be selected as it is identified in Council's GIS with no ownership details due to its road status.

When a road is private, for example, resulted from a development of multiple parcels, this road may be clicked on in Council's GIS system and information on the parcel and its ownership will appear.

The Amendment site roads were created in the 1850's and the title remains in the ownership of the original developer. This is a consequence of pre *Subdivision Act 1989*, where it was usual for road reserves to be retained in the name of original landholder's name as the sub-divider. There were no agreements in place, just a default outcome of the subdivision process. Once the road was included in Council's road register, ownership by another person is irrelevant.

In its response Council also referred the Panel to the notification requirements in the PE Act. The Panel has reviewed the relevant sections of the Act.

Section 19(1) and 1(A) of the PE Act states that:

- (1) A planning authority must give notice of its preparation of an amendment to a planning scheme—
 - (a) to every Minister, public authority and municipal council that it believes may be materially affected by the amendment; and
 - (b) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land that it believes may be materially affected by the amendment; and

² Document 10

- (1A) Subject to subsection (1C), the planning authority is not required to give notice of an amendment under subsection (1)(b) if it considers the number of owners and occupiers affected makes it impractical to notify them all individually about the amendment.

Section 19(1C) states that subsection (1A) does not apply in relation to the giving of notice to an owner of land of an amendment which provides for the reservation of land for public purposes or the closure of a road.

Section 19(5) provides that the failure of a planning authority to give notice under section 19(1) does not prevent the adoption or approval of the Amendment. However, section 19(6) of the PE Act goes on to state that section 19(5) does not apply to a failure where the Amendment provides for the reservation of land for public purposes or the closure of a road.

(ii) Discussion

The Panel does consider that the number of owners or occupiers make it impractical to notify the Amendment. This is not a circumstance where the notice exemptions at section 19(1A) could be used.

Accordingly, the Panel considers that Council is required to give notice to *'owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietor of an estate in fee simple) and occupiers of land that it believes may be materially affected by the amendment'* in accordance with section 19 (1) of the PE Act. It is open to Council to conclude that the underlying owner is not materially affected by the Amendment.

The Panel understands the practical difficulty in identifying the owner of the subject land in Council's GIS system. The Panel understands that the subject land was, up until recently a 'road reserve' and therefore managed by Council. It is not clear whether the Council (in its capacity as manager of the road reserve) was given direct notice of the Amendment. However, officers within Council and Councillors were clearly aware of the Amendment.³

Council did not clearly explain its notification process in its submissions or response of 1 June 2021.⁴ In the latter response, Council alluded that notice was given in the Herald Sun on 8 January 2021 and in the Government Gazette on 7 January 2021. However, it is not crystal clear whether that was notice of the Amendment or something else.

The Panel considers it would be prudent for Council to confirm that sufficient notice of the Amendment is given before it decides whether to adopt the Amendment.

The Panel recommends:

- 1. That Council satisfy itself that sufficient notice of the Amendment was provided in accordance with the requirements at section 19 of the *Planning and Environment Act 1987* before it decides whether to adopt the Amendment. If it is not satisfied, it must give notice of the Amendment in accordance with the *Planning and Environment Act 1987*.**

³ Based on the number of reports to Council in relation to the Amendment and associated road discontinuance process.

⁴ Document 10

1.4 Summary of issues raised in submissions

(i) Planning Authority

The key issue for Council was the strategic justification for applying the PPRZ to the proposed pocket parks.

(ii) Individual submitters or groups of submitters

The key issues raised by submitters were:

- Status of the subject land, including the relationship between the Amendment and the road discontinuance process
- Impacts on landscaping and vehicle access
- Potential extension of the PPRZ at Bridge Street.

The submissions remain outstanding.

1.5 The Panel's approach

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 Planning Scheme.

The Panel considered all written submissions made in response to the exhibition of the Amendment, observations from site visits, and submissions, evidence and other material presented to it during the Hearing. It has reviewed a large volume of material, and has had to be selective in referring to the more relevant or determinative material in the Report. 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:

- Planning context
- Public land status
- Landscaping and access
- Extension of the rezoning proposal in Bridge Street

1.6 Limitations

The road discontinuance process under the LG Act, possible adverse possession claims and a determination on the legal status of the subject land are outside the remit of the Panel.

The Panel notes submissions on these matters for context only. It does not have authority to make any formal determination on these matters; these matters can only be resolved through separate legal processes.

2 Planning context

2.1 Planning policy framework

Council submitted that the Amendment is supported by various clauses in the Planning Policy Framework, which the Panel has summarised below.

Clause 12.05 (Significant Environmental and Landscapes)

The Amendment supports Clause 12.05-2S (Landscapes) by:

- Protecting open spaces that contribute to the character, identity and sustainability of urban environments
- Improving open space linkages.

Clause 19.02 (Open space)

The Amendment supports Clause 19.02-6S by:

- Ensuring that open spaces are linked through the provision of walking and cycling trails
- Ensuring land identified as critical for open space links is transferred to open space purposes.

Clause 21.05 (the Municipal Strategic Statement)

The Amendment supports the MSS by:

- Environment, Conservation & Landscape (21.01) (Objective 6) by protecting and enhancing opportunities to create and link areas of open space in accordance with the Open Space Strategy.

Council's Open Space Strategy (2005) (referenced at Clause 21.08 of the Planning Scheme) identifies Eltham as part of an open space system. The strategy recognised that a broader range of open space and recreational facilities needs to be provided in Eltham.

2.2 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.

Relevant policies in Plan Melbourne include:

- Direction 5.4 (Policy 5.4.1) aims to develop a network of accessible, high-quality, local open spaces.
- Direction 6.4 (Policy 6.4.1) supports a cooler Melbourne by greening urban areas.
- Direction 6.4 (Policy 6.4.2) seeks to ensure Melbourne's growing population is provided with and has access to quality open space.

(ii) Eltham Major Activity Centre Structure Plan

The Eltham Major Activity Centre Structure Plan provides guidance for the development of the Eltham Major Activity Centre (MAC). The subject land is located approximately 900 metres from the Eltham MAC.

Council submitted that, while the subject land is outside of the MAC, the Amendment is consistent with Vision at 4.4⁵ in the structure plan which seeks:

... to provide continuously accessible pathways within the Activity Centre and connecting to surrounding suburbs.

2.3 Ministerial Directions and Practice Notes

Ministerial Directions

The Ministerial Direction *The Form and Content of Planning Schemes* (Ministerial Direction on Form and Content) specifies that a planning scheme may only include land in a public land zone if the land is Crown land, vested in or controlled by a Minister, government department, public authority or a municipal Council.

The *Practitioner's Guide to the Victorian Planning Schemes* (Version 1.4)⁶ (Practitioner's Guide) explains that public land zones are not intended to identify the legal status of land. Section 5.1.1 of the Practitioner's Guide states that public land manager should be able to use and develop public land for any purpose under the relevant land management legislation without the need for a permit.

2.4 Discussion and conclusion

The purpose of the Amendment is to include the subject land in a zone which reflects its role as a pocket park. The submitters opposed to the Amendment did not dispute the strategic justification during the Hearing. Instead, the key issue in dispute was whether the subject land was 'public land' and therefore capable of being zoned for a public purpose.

The Panel considers that, subject to confirming the status of the subject land, there is a strategic basis for rezoning the land. If the subject land is controlled by Council, the PPRZ would enable Council to manage the land for open space purposes without the need for a planning permit for a range of activities. It is considered that the rezoning would facilitate the creation and maintenance of an open space network which is consistent with Clause 12.05-2S (Landscapes) of the Planning Scheme, Clause 19.02-6S of the Planning Scheme, Plan Melbourne and Council's *Eltham Major Activity Centre Structure Plan*.

For the reasons set out in the following chapters, the Panel concludes that the Amendment is strategically justified in principle,⁷ and implements, the relevant sections of the PPF. If the subject land is deemed public land, the Amendment would be consistent with the relevant Ministerial Directions and Practice Notes. The Amendment is well founded and strategically justified, and the Amendment should proceed subject to addressing the more specific issues raised in submissions as discussed in the following chapters.

⁵ At page 28 of the Structure Plan.

⁶ That replaced the content in Planning Practice Note 2 (Public Land Zones).

⁷ Subject to the subject land being vested or controlled by Council (or another public authority).

3 Public land status

3.1 The issues

The issues are:

- whether the subject land needs to be public land before it can be included in a public zone
- whether the subject land is vested in or controlled by Council.

3.2 Direction and guidance

3.2.1 Ministerial Directions

As outlined in Chapter 2, the Ministerial Direction on Form and Content specifies that a planning scheme may only include land in a public land zone if the land is Crown land, vested in or controlled by a Minister, government department, public authority or a municipal Council.

3.2.2 Practitioner's Guide

The Practitioner's Guide replaces Planning Practice Note 02 (Public Land Zones). The Practitioner's Guide (Section 5.1.1) includes the following guidance in relation to the application of public land zones:

- Public land zones are not intended to identify the legal status of the land or indicate the existing land use. They are intended to set out appropriate statutory requirements that apply to the use and development of the land in addition to the relevant land management legislation.
- Land should not be automatically included in a public land zone just because it is public land. There will be situations where a public land zone is not the most appropriate zone, such as a road or remnant parcel of public land in a rural area.
- A useful test in considering if a public land zone is appropriate is to determine if a public land manager needs some level of flexibility, protection or exemption that is different from the surrounding zone provisions because of the special nature of the public land or asset and its control (in a land use or management sense) under another Act. For this reason, public land zones should be applied in consultation with the relevant public land manager.

3.3 Background and context

3.3.1 Road discontinuance process

In February 2020 Council resolved to commence the procedure to remove the road reserve status from the subject land and to rezone the land to PPRZ. Since that time, the Amendment and the road discontinuance process under the *Local Government Act 1989* (LG Act) have run in parallel.

The road discontinuance is outside the remit of the Panel. However, the discontinuance process is relevant to the extent that it affects the status of the subject land.

Council submitted that the road discontinuance process is all but complete. It provided the Panel with copies of the documentation regarding that process, including Council's resolution from its meeting on 23 March 2021 that:

Acting under section 206 and clause 3 of Schedule 10 of the Local Government Act 1989 (Act), and having complied with sections 207A and 223 of the Act, and being of the opinion that the sections of the road reserve shown hatched on the plan are not reasonably required for public use (road), discontinue the road and take ownership of the resultant land.

The road discontinuance notice was posted in the Victorian Government Gazette on 8 April 2021.

Council advised that the final step in the process is for Council to lodge plans with the Titles Office. Council submitted that once the plans are registered at the Titles Officer, the land will be transferred to Council and this will complete the discontinuance process.

3.3.2 Potential adverse possession claim

Mr Mihaly, on behalf of Sue and Colin Cook submitted that there was a pending adverse possession claim over part of the subject land, being the part immediately to the north of 86 John Street.

The adverse possession claim is outside the remit of the Panel. The Panel notes Council's submission that it was not aware of the pending adverse possession claim until it was raised at the Hearing.

3.3.3 Public land manager status

The existence of a public land manager is relevant when considering the implications of applying the PPRZ on privately owned land. The PPRZ is structured in such a way that many uses are prohibited unless they are 'conducted by or on behalf of the public land manager'.

At the Hearing Council indicated that it was already acting as the public land manager of the subject land. The Panel asked Council to confirm whether it was the public land manager in further directions issued on 26 May 2021.

In its response to further directions dated 1 June 2021, Council submitted that:

The road reserve status has been removed pursuant to a road discontinuance process undertaken by Council, resulting in the land now being unencumbered. Relevantly, the land will be shortly owned by Council as a lodgement is in progress to the Titles Office which is a formality of the process. Accordingly, Council's status as a land manager is irrelevant as noted above, pursuant to the Gazetteal, the road reserve status has changed.

In accordance with the further directions, Mr Mihaly submitted⁸ that Council did not answer the question of whether it was the public land manager. He submitted that:

The Shire's submission does not answer this question, remarkably submitting that the Panel's question is irrelevant.

That irreverent attitude is predicated on the submission that the Relevant Land [being the land subject to a possible adverse possession claim] has vested in the Shire and the Shire will shortly be registered as its proprietor. The correctness of that submission is fundamentally in dispute and has been the subject of extensive submission during the hearing. The panel ought not accept the Shire's submission as to the Public Land Manager Question when it is based on a disputed fact outside the jurisdiction of the hearing.

⁸ In letter dated 7 June 2021 (Document 11)

For that reason, the identity of the public land manager is relevant. It is relevant to determining what prejudice may flow, if the Relevant Land is rezoned as part of the Amendment only for it to be eventually determined that the Cooks are its true owners (and not the Shire).

Mr Mihaly went on to submit that in the circumstances the Panel should proceed on the basis that Council is the relevant public land manager.

3.4 Submissions

3.4.1 Council

Council submitted that the subject land is now unencumbered, following the completion of the road discontinuance process. It submitted that the former 'road reserve' status of the subject land ended on 8 April 2021.

Council submitted that the road discontinuance process, which it acknowledges as a separate process, has been properly completed. It submitted, subject to the completion of the registration process at the Titles Office that the subject land:

... will be shortly owned by Council as a lodgement is in progress to the Titles Office which is a formality of the process.

3.4.2 Submitters

Mr Mihaly, on behalf of Sue and Colin Cook submitted that the legal status of the subject land was still unknown. He submitted that this was a key issue, given the PPRZ could only be applied to public land.

Mr Mihaly submitted that the 'owner' of the majority of the subject land was the Crows (that is, the original developer who subdivided the estate).

Mr Mihaly disputed Council's submission that ownership would transfer to Council shortly. Mr Mihaly submitted that it was not a foregone conclusion that the whole of the subject land would 'vest' in Council on the titles register. He submitted that the Cooks would have a right to intercede in that process if it was decided, by a Court, that they were the true owners of part of the land (that is, the part immediately to the north of 86 John Street).

In addition, Mr Mihaly submitted that it would not be appropriate to rezone privately owned land to PPRZ. He submitted that if the Cooks were the true owner of part of the subject land, the PPRZ would restrict the ability of the Cooks to use and develop their land. This is because the PPRZ restricts or prohibits many uses if they are not done by the 'public land manager'.

Mr Weaver, on behalf of Mr Lordan submitted that the road discontinuance process had not been properly completed and therefore the status of the subject land was uncertain. He submitted that the subject land could still be a 'road reserve'. He submitted that the road discontinuance process must be resolved before the Amendment could proceed.

In conclusion Mr Weaver submitted that:

- If the subject land remained a 'road reserve' that it cannot be rezoned to PPRZ.
- If the subject land is no longer a 'road reserve' then Mr Lordan had no concerns with the proposed rezoning. He submitted that the rezoning would make it easier for Council to undertake landscaping and maintenance works.

Mr Schurmann's submissions did not focus on the legal status of the road. However, Mr Schurmann submitted that it would be necessary for any land to be 'owned' by Council before it could be rezoned to PPRZ.

3.5 Discussion

There is dispute between the parties regarding the status of the subject land. The resolution of the legal status of the subject land is outside the scope of the Panel's remit.

Relevantly for this Amendment, the Ministerial Direction on Form and Content and Practitioner's Guide make it clear that:

- The Planning Scheme may only include land in a public land zone if the land is Crown land, vested in or controlled by a Minister, government department, public authority or a municipal Council.
- Public land zones are not intended to identify the legal status of the land.

The Panel considers that the subject land must be 'public land' before it can be rezoned to PPRZ. At the time of the Hearing, Council advised that the subject land was not vested in or controlled by Council.

The Panel accepts the submissions of Mr Mihaly that it would not be appropriate to apply the PPRZ over privately owned land. This is because several land uses are prohibited under the PPRZ unless they are done by or on behalf of the public land manager. The Panel is unclear as to whether a public land manager has been appointed, however, for the purpose of the rezoning the key issue is whether the subject land is vested or controlled by Council.

While it is not for the Panel to decide the legal status of the subject land, it is for the Panel to consider whether Amendment is consistent with Ministerial Directions. According to Ministerial Directions, the land must have vested in or be controlled by Council before the rezoning can proceed. The Panel considers that it would be premature to rezone the subject land to PPRZ before the land has vested in or is under the control of Council (or another public body).

3.6 Conclusions and recommendations

The Panel concludes:

- The subject land must be Crown land or be vested in, or controlled by, Council (or another public body) before it is rezoned to PPRZ.
- It is not a matter for the Panel to determine the legal status of the subject land. The status of the land can only be resolved through separate processes outside the remit of this Panel.

The Panel recommends:

- 2. The subject land is not rezoned to Public Park and Recreation Zone until it is Crown land or is vested in or controlled by a Minister, government department, public authority or a municipal Council.**

4 Landscaping and access

4.1 The issues

The issues are whether the rezoning:

- will adversely impact on access to existing properties
- is necessary to enable Council to undertake landscaping and other works on the subject land.

4.2 Relevant policy and guidance

The relevant planning policy in relation to open space is outlined in Chapter 2 of this report. The Planning Scheme supports the development of open space networks and pedestrian linkages in Eltham.

Section 5.1.1 of the Practitioner's Guide states that a public land manager should be able to use and develop public land for any purpose under the relevant land management legislation without the need for a permit.

4.3 Submissions

Mr Lordan raised concerns in his written submission about the ability to access land at 91 John Street, in particular his proposal to create an additional vehicle crossover. In response Council submitted that the Amendment would not impact on the existing crossover to the property. It submitted that the application to create an additional crossover had been considered through a separate process and was not supported.

In written submissions Mr Weaver, on behalf of Mr Lordan questioned the necessity of the rezoning. He submitted that if Council controlled the subject land, it could undertake the required landscaping and works under the current zoning. In response Council submitted that the Amendment would ensure the zoning properly reflected the open space purpose of the land.

4.4 Discussion

The Panel considers that the rezoning is strategically justified if the subject land is deemed public land. The rezoning would enable Council to establish and manage the pocket parks without the need for planning permits.

The rezoning is considered to be consistent with Clause 12.05-2S (Landscapes) of the Planning Scheme, Clause 19.02-6S of the Planning Scheme, Plan Melbourne and Council's *Eltham Major Activity Centre Structure Plan*.

The Panel notes submissions in relation to the vehicle crossover. The Panel concludes that the Amendment will not impede existing vehicle access to adjoining properties.

4.5 Conclusions and recommendations

The Panel concludes:

- The Amendment will not result in any adverse impacts on existing vehicle access.

- The rezoning will enable Council to establish and maintain the proposed pocket parks as part of a broader open space network.

5 Extension of the rezoning proposal in Bridge Street

5.1 The issue

The issue is whether the non-trafficable land at the eastern end of Bridge Street should also be rezoned to PPRZ.

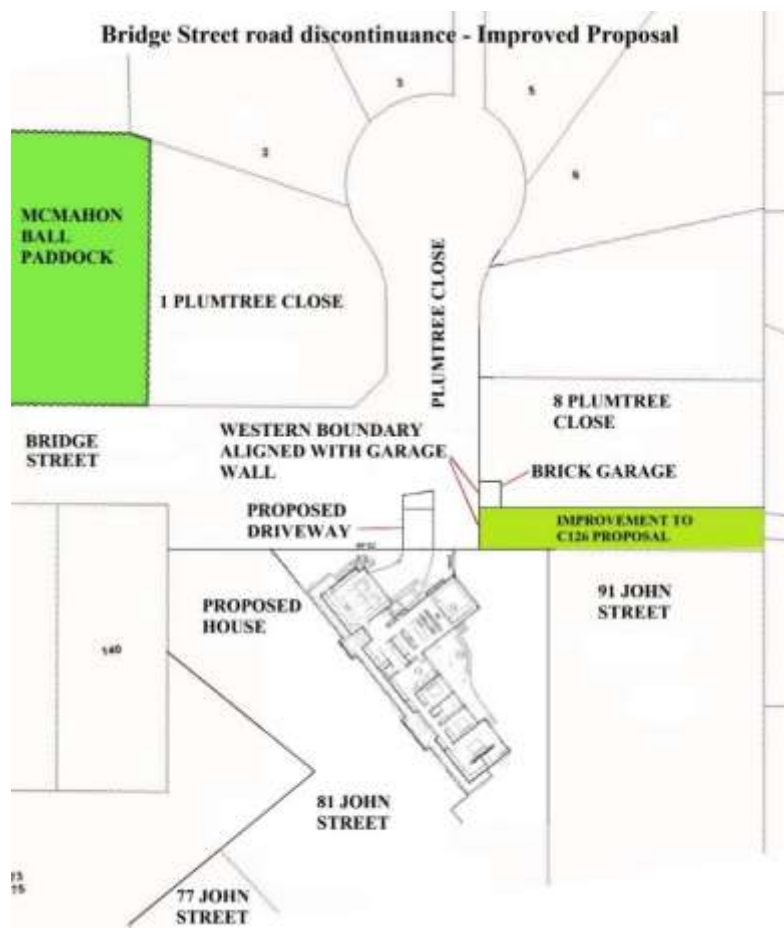
5.2 Relevant policies

The relevant planning policy in relation to open space is outlined in Chapter 2 of this report. The Planning Scheme supports the development of open space networks and pedestrian linkages in residential areas, such as Eltham.

5.3 Submissions

Mr Schurmann supported the Amendment in principle but requested a change to the Amendment. He submitted that the non-trafficable section at the eastern end of Bridge Street should also be rezoned to PPRZ (see Figure 2). Mr Schurmann submitted that the only reason the extra land was not rezoned was because the road discontinuance process did not apply to that extra land (that is, that the land was not yet public).

Figure 2 – Suggested extension to rezoning



Mr Schurmann submitted that the inclusion of the additional land in the PPRZ would be consistent with Council's desire to create an open space network with suitable pedestrian access to Eltham MAC.

Council submitted that it supported the change in principle but noted that the land in question was not controlled by Council. At its meeting on 23 March 2021 Council resolved to commence a road discontinuance process over that land to rectify the ownership issues:

Requests Officers commence a separate process to discontinue the road, at the Bridge Street end, between the north-western corner of 91 John Street and the south-western corner of 8 Plumtree Close, being an area of approximately 58 square metres.

5.4 Discussion

The Panel considers that the extension of the PPRZ to the edge of Plumtree Close is logical. However, as outlined in section 3 of this report the land cannot be included in a public land zone until it is vested or controlled by Council. Subject to the completion of the relevant statutory processes, the Panel supports the requested change to the Amendment.

5.5 Conclusion

The Panel concludes:

- That the extension of the PPRZ to the edge of Plumtree Close (at eastern end of Bridge Street) is a logical change to the Amendment, but such a rezoning proposal cannot proceed until the land is vested in or controlled by a Minister, government department, public authority or a municipal Council.

The Panel recommends:

- 3. An additional section of land (as shown in Figure 2) at the eastern end Bridge Street, Eltham (to the edge of Plumtree Close) be rezoned from Neighbourhood Residential Zone Schedule 1 to Public Park and Recreation Zone, once that land is vested in or controlled by a Minister, government department, public authority or a municipal Council.**

Appendix A Document list

No.	Date	Description	Provided by
1	17/5/21	Preliminary submissions on behalf of Mr Lordan	Mr Weaver on behalf of Mr Lordan
2	17/5/21	Email from Mr Schurmann clarifying Panel's remit	Mr Schurmann
3	18/5/21	Email from Panel to parties confirming its remit	Panel Chair
4	18/5/21	Council's Part A submission and attachments	Ms Guevara on behalf of Nillumbik Shire Council
5	19/5/21	Email from Mr Lordan regarding Panel's remit	Mr Lordan
6	24/5/21	Final submissions on behalf of Mr Lordan	Mr Weaver on behalf of Mr Lordan
7	24/5/21	Final submissions on behalf of Colin and Sue Cook	Ms Megan Copas on behalf of Colin and Sue Cook
8	24/5/21	Council's Part B submission and attachments	Ms Guevara on behalf of Nillumbik Shire Council
9	24/5/21	Supplementary material for the Hearing	Mr Schurmann
10	1/6/21	Council's response to further directions and attachments	Ms Guevara on behalf of Nillumbik Shire Council
11	7/6/21	Cook's response to Council's response to further directions	Ms Megan Copas on behalf of Colin and Sue Cook