

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2915/2012
PERMIT APPLICATION NO. TP-2012-388

CATCHWORDS

Section 79 of the *Planning & Environment Act* 1987; Melbourne Planning Scheme; Commercial 1 Zone; Design and Development Overlay; Restaurant; Sale and consumption of liquor; Car parking; Amenity.

APPLICANT	Project Domain Pty Ltd
RESPONSIBLE AUTHORITY	Melbourne City Council
RESPONDENTS	B & V MacNamee and Others
SUBJECT LAND	157-159 Domain Road, South Yarra
WHERE HELD	Melbourne
BEFORE	Bill Sibonis, Member
HEARING TYPE	Hearing
DATES OF HEARING	13, 14, 15, 16 & 17 May 2013 and 19, 20, 21 & 22 August 2013
DATE OF INTERIM ORDER	2 October 2013
DATE OF ORDER	3 January 2014
CITATION	

ORDER

1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act* 1998, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

- Prepared by: John Wardle Architects
- Drawing numbers: TP0200 *Existing Conditions*; TP0201 *Existing Side and Rear Elevations*; TP0202 *Existing Side Elevation*; TP0203 *Demolition Plan*; TP1000 *Basement Plan*; TP1001 Revision A *Ground Floor Plan*; TP1002 Revision A *First Floor Plan*; TP1003 Revision A *Second Floor Plan*; TP1004 *Roof Plan*; TP3000 *Existing*

*North Elevation, Proposed North Elevation;
TP3001 North Elevation; TP3002 East
Elevation; TP3003 South Elevation; TP3004
South Elevation; TP3005 West Elevation;
TP3500 Section A; & TP3501 Section B.*

- 2 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by modifying the description of the proposal to read:

Demolition of the existing buildings and construction of a new three-storey building comprising a café/shop, and two separate restaurants (each licensed) and a waiver of car parking and loading requirements.
- 3 Pursuant to Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, Peter and Anne Greenham are joined as parties to the proceeding.
- 4 The decision of the Responsible Authority in relation to permit application no. TP-2012-388 is set aside.
- 5 A permit is granted in relation to land at 157-159 Domain Road, South Yarra. The permit will allow:
 - Demolition of the existing building; and
 - the construction of a building and the construction and carrying out of worksin accordance with the endorsed plans.
 - Use of the land for the sale and consumption of liquor (Restaurant and Café Licence pursuant to the *Liquor Control Reform Act 1998*).
 - A reduction (to zero) of the car parking requirement associated with the use of the land for restaurant and shop.
 - A waiver of the loading and unloading requirements.
 - A reduction of the bicycle parking requirements.
- 6 The permit is subject to the conditions contained in the Appendix to these reasons.

Bill Sibonis
Member

APPEARANCES

For Project Domain Pty Ltd	<p>Mr A Finanzio SC and Ms E Porter, both of Counsel, instructed by Planning and Property Partners. Evidence was called from:</p> <ul style="list-style-type: none">• Mr S Hunt, Traffic Engineer of Cardno.• Mr J Walsh, Traffic Engineer of Traffix Group Pty Ltd.• Mr R Milner, Town Planner of 10 Consulting Pty Ltd.• Ms E Hui, Acoustic Engineer of Marshall Day Acoustics.• Mr R Burton, Acoustic Engineer of Burton Acoustic Group.
For Melbourne City Council	<p>Mr D Song, Town Planner of Song Bowden Planning Pty Ltd.</p>
For B & V MacNamee and Others	<p>Mr J Gobbo QC, instructed by Best Hooper Solicitors. Evidence was called from:</p> <ul style="list-style-type: none">• Mr D Iles, Town Planner of Hansen Partnership Pty Ltd.• Ms D Donald, Traffic Engineer of O'Brien Traffic Pty Ltd.• Mr D Growcott, Acoustic Engineer of Watson Moss Growcott Acoustics Pty Ltd.• Mr S Johnson, Project Manager of Wastech Services Pty Ltd.• Mr E Hart, Liquor Licensing Consultant of EAH Strategic Business Service Pty Ltd.• Mr P Ramsay, Engineer of Peter J Ramsay & Associates Pty Ltd.• Mr J Zita, Registered Building Surveyor of Approval Systems Pty Ltd.
Dr S Gold and Ms A Dodds	<p>Both in person.</p>
For Mr B & Ms M Capp	<p>Mr B Capp.</p>

For P & A Greenham	Mr M Bartley, Solicitor of HWL Ebsworth Lawyers.
For the Royal Botanic Gardens Pty Ltd	Mr L Sayer, Town Planner of WSC Planning Pty Ltd.
For the Melbourne South Yarra Group Inc.	Mr A Walker of Counsel by direct brief (Days 1–5).

INFORMATION

Description of Proposal	Demolition of the existing building and the construction of a three-storey building accommodating shop and restaurants.
Nature of Proceeding	Application under Section 79 of the <i>Planning and Environment Act 1987</i> .
Zone and Overlays	Commercial 1 Zone (C1Z). Heritage Overlay – Schedule 6, South Yarra Precinct (HO6). Design and Development Overlay – Schedule 15, Royal Botanic Gardens Area 1 (DDO15A1).
Permit Requirements	Cl. 34.01-4 (construction of a building and the construction or carrying out of works on land in C1Z). Cl. 43.01-1 (demolition; construction of a building; and the construction or carrying out of works on land in HO6). Cl. 43.02-2 (construction of a building and the construction or carrying out of works on land in DDO15A1). Cl. 52.06 (a reduction (to zero) of the car parking requirement associated with use of the land for restaurant and shop). Cl. 52.07 (waiver of the loading and unloading requirement). Cl. 52.27 (use of land for the sale and consumption of liquor). Cl. 52.34 (reduction of the bicycle parking requirements).
Key Scheme policies and provisions	Cl. 11.01, 13.04, 15, 15.01, 15.02, 17, 18, 21 ¹ , 22.05, 22.17, 22.22, 34.01, 43.01, 43.02, 52.06, 52.07, 52.27, 52.34 and 65.

¹ Amendment C162 to the Melbourne Planning Scheme was gazetted after the completion of the hearing. The Amendment replaced Clause 21 Municipal Strategic Statement with a new Clause 21 Municipal Strategic Statement. By order dated 2 October 2013 the parties were provided with the opportunity to make further submissions addressing any implications for the proposal arising from the introduction of the new Municipal Strategic Statement. I have considered the submissions which were provided in response to the orders and, in terms of the content, only the matters that were relevant in the context of my directions.

Land Description	The review site is located on the southern side of Domain Road in South Yarra, between Park Street and Millswyn Street. It is opposite the Royal Botanic Gardens. The land has a frontage of 11.04 metres, a maximum depth of 40.95 metres, and an overall area of approximately 450 square metres. Occupying the property is a two-storey building accommodating a shop and café at ground level and two dwellings above. To the west is a five-storey residential (apartment) development. To the east is the Botanical Hotel. To the south (rear), the site adjoins a residential property comprised of a former warehouse premises that has been converted into a number of dwellings.
Tribunal Inspection	An accompanied site inspection was undertaken on 20 August 2013. Further unaccompanied inspections were undertaken after the hearing.
Cases Referred To	<i>Newmarket Property Group v Port Phillip CC</i> [2006] VCAT 153 <i>Cornerstone Hotels Pty Ltd v Melbourne CC</i> [2008] VCAT 609

REASONS²

What is this proceeding about?

- 1 In July 2012 a planning application was made to the Melbourne City Council for a permit to demolish the existing building on the review site, and construct a three-storey building accommodating a ground floor “café/shop”, first floor tavern and second floor restaurant. A combined patron capacity of 650 was proposed. The planning application also sought permission for the reduction of the Planning Scheme’s car parking requirement to zero and a waiver of the Planning Scheme’s loading and unloading requirement.
- 2 Notice of the application was given and 352 objections were received.
- 3 As the Council did not decide the planning application within the prescribed period, this Application was lodged with the Tribunal for a review of the Council’s failure to grant a permit.
- 4 Subsequently, the Council considered the planning application. Consistent with the recommendation of its officers, the Council resolved to oppose the proposal on grounds that refer to policy, amenity impacts, car parking and non-compliance with mandatory requirements of the Design and Development Overlay (DDO15A1) that affects the site.
- 5 In March 2013, the Applicant gave notice of its intention to seek the leave of the Tribunal to amend the Application in the following manner:
 - Amend the permit application to apply for:
Demolition of the existing buildings and construction of a new three-storey building comprising a café/shop, and two separate restaurants (each licensed) and a waiver of car parking and loading requirements.
 - Reduce the patron numbers in the ground floor “café/shop” from 200 to 160.
 - Change the use of the first floor from tavern to restaurant, and reduce the patron numbers from 250 to 130.
 - Reduce the patron numbers in the second floor restaurant from 200 to 130.
- 6 In addition to the changes to the plans, the “*Statement of Changes pursuant to Clause 12(a)(iii) of PNPE9*”³ identifies the following details of the application:
 - The proposed hours of use are:

² I have considered all submissions presented by the parties although I do not recite all of the contents in these reasons.

³ Exhibit A3.

- 6.00am – 11.00pm (internal) and 7.00am – 7.00pm (courtyard) for the ground floor.
- 10.00am – 11.30pm for each of the first and second floors.
- An On-premises Licence for the ground floor.
- An On-premises Licence / Restaurant and Café Licence for each of the restaurants on the first and second floor⁴.

7 The Council's officers assessed the amended proposal and recommended that it be supported, subject to conditions. Contrary to this recommendation, the Council resolved to oppose the amended proposal on the basis that the car parking demand generated will have an adverse impact on the existing on-street parking spaces in the area; the total number of patrons is excessive and will result in unreasonable amenity impacts on surrounding residents by way of noise and other disturbances; and the development does not comply with the mandatory height control specified in DDO15A1.

8 At the commencement of the hearing, there being no objection from any of the parties, I amended the permit application and the Application for Review pursuant to Section 127 and Clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* to include the above changes.

9 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Melbourne Planning Scheme, I have decided to grant a permit. My reasons follow.

What planning permissions are required?

10 The reasons why a planning permit is required form an important part of the background to the assessment and determination of this Application, as they establish the statutory framework within which discretion is to be exercised and a decision made.

11 The use of the review site for Retail Premises (which includes Food and Drink Premises) and Shop is not subject to planning permission as these land uses are listed in Section 1 in the Table of Uses at Clause 34.01-1 (Commercial 1 Zone). Pursuant to Clause 31.01, a use in Section 1 does not require a permit provided any condition opposite the use is met⁵.

⁴ During the course of the hearing, the Applicant advised that it would accept a Restaurant and Café Licence for all levels.

⁵ There is no condition opposite 'Retail Premises'. The condition opposite 'Shop' is met as there is no maximum leasable floor area for a shop specified in the Schedule to Clause 34.01.

Pursuant to Clause 74⁶, the land use term 'Food and Drink Premises' includes 'Restaurant', which is defined as:

Land used to prepare and sell food and drink, for consumption on the premises. It may include:

- a) entertainment and dancing; and
- b) the supply of liquor other than in association with the serving of meals, provided that tables and chairs are set out for at least 75% of patrons present on the premises at any one time.

It does not include the sale of packaged liquor.

- 12 The Application proposes a café at the ground floor. At the hearing, I raised the issue of this land use's definition, questioning whether it could be properly defined as a restaurant. Having considered the parties' responses, and with regard to the definitions in Clause 74, I have formed the view that, given the nature of the use, the ground floor café is appropriately defined as a restaurant. As I understand it, the Applicant does not oppose the adoption of this definition for the purposes of this Application, and will proceed on this basis⁷.
- 13 The provisions of the Commercial 1 Zone⁸, Heritage Overlay (HO6)⁹ and Design and Development Overlay (DDO15A1)¹⁰ all require planning permission to be obtained for the construction of a building and for the construction and carrying out of works. In addition, pursuant to the provisions of the Heritage Overlay, a permit is required for demolition.
- 14 In accordance with Clause 52.27¹¹, a permit is required to use the land for the sale and consumption of liquor as a licence is required under the *Liquor Control Reform Act 1998* ('the LCR Act').
- 15 Finally, permission is needed for a reduction (to zero) of the car parking requirements pursuant to Clause 52.06-3; for the waiver of the loading and unloading requirement of Clause 52.07; and for a reduction of the bicycle parking requirements of Clause 52.34.
- 16 In view of this matrix of the required permissions, there are some inherent limitations on the extent to which the implications arising from the proposed use of the land can (or should) be taken into account. My analysis has been undertaken within the framework of these limitations.

⁶ Land Use Terms.

⁷ All the car parking evidence has been prepared on the basis that the use is a restaurant, and has utilised the corresponding car parking rate specified in Clause 52.06-5.

⁸ Clause 34.01-4.

⁹ Clause 43.01-1.

¹⁰ Clause 43.02-2.

¹¹ Licensed Premises.

What is the relevant policy context and does the proposal respond acceptably to it?

- 17 The Municipal Strategic Statement (MSS), at Clause 21.08, includes a map titled *Figure 3: Economic Development Map*. Amongst others, this map identifies what it refers to as the municipality's *Local Centres*. The subject land is included in the South Yarra – Domain Road local centre.
- 18 Clause 21.03 articulates the Vision for the municipality as “*a bold, inspirational and sustainable city*”. The Clause then sets out the key issues underpinning this vision, that direct land use planning. With respect to Economic Development, it states:
- The City of Melbourne makes an important contribution to the economic prosperity of the state through the provision of its local, corporate and global businesses, its strong retail, major cultural, sporting and tourism industry, and its significant industrial uses.
- 19 Relevant to this proposal is Clause 21.08, Economic Development. It states:
- There is a need to support the provision of local shops to serve the residential and working communities in local centres. A proliferation of eating and entertainment uses should not undermine the character and range of services offered in these local centres.
- 20 An objective is to support the Central City and local retail uses. A related strategy is:
- Ensure that a proliferation of eating and entertainment establishments in local centres does not undermine the viability of their convenience retailing.
- 21 The MSS divides the municipality into several Local Areas and provides the spatial and built form directions for each. The review site and surrounding land to the east, west and south are included in the ‘St Kilda Road and South Yarra Local Area’¹². It identifies South Yarra as an area of stability with minimal potential for new development, and notes that residential amenity has been maintained and the area’s historic character and features have been preserved.
- 22 A relevant strategy is to ensure Domain Road shopping area maintains its role for convenience shopping, neighbourhood facilities and as a neighbourhood focus. A further strategy is to protect the Royal Botanic Gardens by limiting the height of development around the Gardens.
- 23 To the north, on the opposite side of Domain Road is the Sports and Entertainment Area, which includes the Royal Botanic Gardens, Shrine of Remembrance, Kings Domain, Government House, Sidney Myer Music Bowl, Olympic Park and Melbourne Park, amongst others. It is envisaged that this area’s development will continue to provide Melbourne with

¹² Clause 21.16-1.

world class recreational, entertainment and leisure facilities¹³. The beauty, cultural values and functionality of the Royal Botanic Gardens and Domain Gardens and the institutions within them are to be maintained.

- 24 The Local Planning Policy Framework (LPPF) contains specific policy addressing heritage¹⁴ and urban design¹⁵. I will address these policies, as appropriate, in the section of the reasons where I assess the proposed built form.
- 25 In summary therefore, and of relevance to this proposal, the policy framework identifies the Domain Road shopping area as one of the municipality's local centres. Policy seeks to have this centre maintain its role for convenience shopping and as a neighbourhood focus. Policy also seeks to ensure that a proliferation of eating and entertainment establishments does not undermine the viability of the centre's convenience retailing. Development is to respect the local heritage character and avoid an unacceptable impact on the Royal Botanic Gardens by way of height.
- 26 Submissions argued that the development of the land for a large restaurant use is inconsistent with the clear policy direction that the centre is to retain its local convenience role and neighbourhood focus. Particular mention was made of the strategy of avoiding a proliferation of eating establishments.
- 27 A significant difficulty in implementing this strategy is the fact that the use of the land for a restaurant is not subject to a planning permit, given the Commercial 1 zoning of the land. Under the provisions of the previously existing Business 1 zoning, there existed the ability to specify in the Schedule land upon which a restaurant use could not be established without a permit. The Council had not nominated any land within the municipality in the Schedule. With the change of zone, the ability to include this requirement has disappeared. As no permit is required for the use, it is difficult to understand how the strategy relating to the 'proliferation' of eating establishments can be implemented in a land use sense. The regulatory tools necessary to give effect to the Council's aspirations for this centre, as expressed in this specific strategy, do not form part of the suite of controls which apply in this case.
- 28 The parties agreed that it is open to a decision maker, within the discretion afforded by the Planning Scheme controls in this case, to consider the extent to which the proposed building is suitable for its intended purpose. That may be true, but this does not necessarily extend to regulating whether the land should be used for a restaurant. That said, while submissions questioned the desirability of having three restaurant tenancies on the land with reference to logistical issues such as access, storage, waste collection,

¹³ Clause 21.15-3.

¹⁴ Clause 22.05 – Heritage Places outside the Capital City Zone.

¹⁵ Clause 22.17 – Urban Design outside the Capital City Zone.

exhaust systems etc, to the extent that these are relevant planning considerations, the evidence is that they can be addressed by permit conditions to achieve an acceptable planning outcome. I have not been persuaded that a building of the design proposed here could not be used for restaurant purposes.

- 29 The issue of the building's overall scale was also raised in submissions – not in terms of its external three-dimensional form, but its capacity. It was submitted by the parties opposing the proposal that the 420 patron capacity is not in keeping with the local convenience role of the centre as recognised in policy. The issue of the 'intensity' of the use is appropriately considered within the context of why a planning permit is required. Specifically, the two key Planning Scheme provisions which are of relevance are Clause 52.06, which addresses car parking, and Clause 52.27, which addresses the use of the land for the sale and consumption of liquor. Taken together, the assessments under these provisions can act to regulate the proposed 'intensity' of the restaurant use, with a conclusion to be drawn as to whether the proposal will represent an acceptable planning outcome within its context. The fact that this is a small retail centre manifests in a development and land use pattern, and an amenity, which have a bearing on whether the capacity of the proposal is acceptable. I undertake this analysis in later sections of these reasons.

Is the proposed use of the land for the sale and consumption of liquor acceptable?

- 30 Pursuant to Clause 52.27, a permit is required to use land to sell and consume liquor if a licence is required under the LCR Act.
- 31 Those opposing the Application expressed concerns regarding the proposed on-premises licence for the ground floor tenancy, as this type of licence allows for the consumption of alcohol with the food offer being "*almost an ancillary element*". It was submitted that all tenancies should have a Restaurant and Café Licence.
- 32 According to Section 9A of the LCR Act, a Restaurant and Café Licence authorises the licensee to supply liquor on the licensed premises during ordinary trading hours¹⁶ (or other times determined by the Victorian Commission for Gambling and Liquor Regulation) for consumption on the licensed premises where the predominant activity carried out at all times on the premises is the preparation and serving of meals to be consumed on the licensed premises.
- 33 Section 9A(2) of the LCR Act states that a Restaurant and Café Licence is subject to a number of matters/conditions, one of which is at Section 9A(3) and reads:

¹⁶ A definition of 'ordinary trading hours' is provided at Section 3 of the LCR Act.

- (a) tables and chairs must be placed in position on the licensed premises so as to be available for at least 75% of the patrons attending the premises at any one time; and
- (b) the licence must not permit-
 - (i) the live performance of any musical works; or
 - (ii) the playing of any recorded musical works-
on the premises at higher than background music level¹⁷ at any time outside ordinary trading hours.

34 The Applicant's submission is that, in respect of the risks associated with the sale and consumption of alcohol, restaurants are generally regarded as being amongst the lowest risk. The reasons for this can be best explained by reference to the characteristics of 'at risk' venues. Such characteristics, include vertical drinking, the absence of a substantial food offering, and late night trading. By contrast, in the proposed restaurants the greater proportion of the patrons will be seated; the predominant activity will be the preparation and serving of meals; and the sale and consumption of liquor will cease at 11.30pm. Further, the Applicant also submitted that, due to the nature of the operation, the restaurants will effectively limit the time exposed to the consumption of alcohol; food will be provided when alcohol is consumed; and the capacity for vertical drinking patrons will be minimised.

35 Although the Application discloses that the ground floor is proposed to operate under an 'On-premises' licence, the Applicant's submission is that it will in all likelihood operate in a manner consistent with the Restaurant and Café Licence conditions. Notably, in oral submissions the Applicant indicated that a condition could be included on any permit that issues to specify that the sale and consumption of liquor must be pursuant to a Restaurant and Café Licence.

36 When discussing conditions toward the conclusion of the hearing, I asked whether the type of liquor licence should be specified in the permit preamble¹⁸, or in a condition. In response to Mr Gobbo's preference for the preamble to detail the nature of the liquor licence, the Applicant suggested that the words "*the sale and consumption of liquor (Restaurant and Café Licence pursuant to the Liquor Control Reform Act 1998)*" could be included.

37 The purpose of Clause 52.27 is:

To ensure that licensed premises are situated in appropriate locations.

To ensure that the impact of the licensed premises on the amenity of the surrounding area is considered.

¹⁷ According to Section 9A(5) of the LCR Act: "*background noise level, in relation to a premises, means a level that enables patrons to conduct a conversation at a distance of 600mm without having to raise their voices to a substantial degree*".

¹⁸ That part which states what the permit allows.

- 38 In addition to the decision guidelines at Clause 65, the following decision guidelines must be considered (as appropriate) before deciding on an application to use land for the sale and consumption of liquor:
- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
 - The impact of the sale or consumption of liquor permitted by the liquor licence on the amenity of the surrounding area.
 - The impact of the hours of operation on the amenity of the surrounding area.
 - The impact of the number of patrons on the amenity of the surrounding area.
 - The cumulative impact of any existing licensed premises and the proposed licensed premises on the amenity of the surrounding area.
- 39 A specific policy for licensed premises that require a planning permit is found at Clause 22.22 of the LPPF. Its objectives include identifying appropriate locations and trading hours for licensed premises; managing the operation of licensed premises to minimise adverse impacts on the amenity of the area; and ensuring that cumulative impacts of licensed premises are assessed where venues are clustered in one location.
- 40 The proposal to cease using the land for the sale and consumption of liquor at 11.30pm is a reasonable response to the site's context, given its location in a lower order centre and proximity to residential land use. None of the experts called to give evidence on behalf of any party raised any concerns regarding the proposed operation of the use until this time.
- 41 The policy at Clause 22.22 states that the hours of operation of a licensed premises in a business zone should be limited to 11.00pm if the premises is within 30 metres of a residential zone. In this instance, the site is in the centre of a Commercial 1 Zone and situated opposite an extensive Public Park and Recreation Zone. While the land is within 30 metres of a residential zone, that zone is located to the south, at the rear of the property. Dwellings in that zone are removed from the frontage of the land and from any amenity impacts that may arise as patrons leave the premises. The sale and consumption of liquor in the rear courtyard will cease at 7.00pm, and the first floor terrace is positioned at the front of the building, with an outlook to Domain Road and parkland beyond. I have not been persuaded that the proposal to operate the use until 11.30pm time will unacceptably impact on the amenity of residents in the adjoining residential zone.
- 42 It is true that dwellings are accommodated within the adjoining development to the west. That land, though, is also within the Commercial 1 Zone and occupants should reasonably anticipate that their amenity should not necessarily be commensurate with what residents within a

residential zone could expect. This is not to say, however, that the amenity of these adjoining dwellings is not important.

- 43 Patron behaviour is a particularly relevant consideration in the assessment of proposals that seek to use land for the sale and consumption of liquor. Notwithstanding the inherently lower risk associated with restaurant uses as compared with, say, a tavern, the Applicant has volunteered the inclusion of a condition that a patron management plan be developed and implemented to address patron behaviour¹⁹. Amongst others, such a management plan would address queuing, the prohibition of smoking on the land, the management of patrons in the outdoor areas, and the departure/dispersal of patrons as they leave the premises. In combination with the proposal to cease using the land for the sale and consumption of liquor at 11.30pm, (7.00pm for the ground floor level courtyard), and other conditions addressing matters such as noise and the operation of the use, this would assist in ensuring that there is not an unacceptable impact on the amenity of the area.
- 44 Some concern was expressed that patrons leaving the restaurants may elect to proceed next door to the Botanical Hotel to continue their night out, rather than making their way home. This is a potential outcome regardless of the closing time of the restaurants and the number of patrons. Any impacts that may arise as a consequence of persons ‘migrating’ in this manner are likely to be short-lived, given the Botanical Hotel’s 1.00am closing time. I tend to agree with the Applicant’s evidence that the majority of patrons will likely go home, with less electing to extend their evening by having a drink at the Hotel. I also agree that those seeking a significantly later night would go elsewhere where there are venues with later closing times.
- 45 In respect of any cumulative impact, the Applicant’s evidence is that the site is located within a cluster of licensed premises, having found that there are six existing such premises within 500 metres of the land, each of which has either a General Licence or an On-premises Licence. These are the Botanical Hotel, Baccash Restaurant, the Albany Hotel, 181 Domain Café Bar, Fawkner Park Tennis Club and the Royal Botanic Gardens. Three venues have an 11.00pm closing time; the remainder close no later than 1.00am. Additional licensed premises have either a Limited Licence or a Restaurant and Café Licence.
- 46 I agree with the assessment undertaken by Ratio Consultants and attached to Mr Milner’s evidence which concluded that the proposal would not create an unreasonable cumulative impact in the area for the following reasons:

¹⁹ This offer responds to the written evidence statement of Mr E Hart (Exhibit G59), who was not called to give evidence. One of the reasons that he was not called was that the Applicant would accept a condition requiring the preparation of a patron management plan.

- There are no ‘at risk’ venues in the vicinity of the site which operate after 1.00am.
- The provision of meals aids in reducing alcohol consumption as patrons attend for the purpose of dining and having drinks with their meals, rather than solely for the purpose of drinking alcohol.
- The separation of the site from late night venues suggests that it is unlikely that patrons will walk along residential streets on their way to other venues.
- Given the size of the restaurants, it is unlikely that queuing on Domain Road will occur.

47 To this I would add the cessation of the use at 11.30pm; the operation under a Restaurant and Café Licence; and the implementation of the patron management plan as further factors why an unreasonable impact on the amenity of the area as a consequence of permission to use land for the sale and consumption of liquor is unlikely to result.

Is the proposed built form an acceptable response to its context?

- 48 The proposed built form is a relatively uncontroversial element of this Application. There are no heritage concerns arising as a consequence of the proposal. The existing building on the land is a relatively non-descript cream brick structure with no evident heritage qualities. Its demolition will not adversely affect local heritage values. Similarly the submissions and evidence did not oppose the proposed building on heritage grounds. The heritage policy at Clause 22.05 has an objective of ensuring that new development makes a positive contribution to the built form and amenity of the area and is respectful of the architectural, social or historic character and appearance of the streetscape and the area. It contains a number of policy statements to guide the exercise of discretion when assessing the design of new buildings. In summary, these address the form, façade pattern, colours, materials, details, siting and height, and are directed at achieving the objective of the policy in respect of respectful outcomes.
- 49 The immediate context of the review site is comprised of buildings dating from various eras, with diversity in form, scale, design and overall appearance. Upon my inspection, there are no apparent unifying heritage characteristics. A contemporary, well-designed building of relatively simple form and modern appearance such as that proposed here will sit comfortably within this context without adversely affecting the character of the broader heritage overlay.
- 50 In respect of urban design, the policy at Clause 22.17 has a number of objectives that in some ways mirror the matters referred to in the heritage policy, albeit within the context of an urban design outcome. Reference is made to development complementing the scale, massing and bulk of

adjoining and nearby built form; ensuring that the height relates to the prevailing height and scale of existing development; reducing unacceptable bulk; activating the pedestrian environment; and making a positive contribution to the public realm. With the exception of the projecting skylight element, which I will address shortly, the submissions did not oppose the development with respect to its presentation in the streetscape. I have considered the policy statements at Clause 22.17 and have formed the view that the development achieves an acceptable level of compliance, such that it will represent an appropriate urban design outcome.

- 51 Specific concerns regarding the building, expressed by both the Council and the residents, however, need to be addressed.
- 52 The Council's submission states that it has no complaint in relation to the urban design and architectural qualities of the building. The Council's concern is that the development will breach the mandatory 12 metre height specified in DDO15A1. Pursuant to Clause 2.0 of the Schedule, a permit cannot be granted to vary this maximum building height. This Clause also states that the building height is the vertical distance between the footpath or natural surface level of the site frontage and the highest point of the building with the exception of architectural features and building services.
- 53 To the top of the proposed skylight, the building has an overall height of 14.0 metres and is therefore 2.0 metres higher than the mandatory height limit. The debate between the parties is essentially whether the skylight is an architectural feature and therefore exempt from the mandatory requirement.
- 54 In the Council's view, the skylight is not an architectural feature as it is a functional part of the building.
- 55 Both planning witnesses are of the opinion that the skylight qualifies for the exemption from the mandatory height limit. I agree. Instrumental to my conclusion is the design of the feature, and its role in the overall composition of the building. It is not a conventional clerestory form one might commonly see projecting above the roof of buildings. Rather, it is an integral component of the sheet-metal element that frames the façade, projects outward beyond the site boundary as an angled eave, and wraps up and over the roof of the building. Viewed holistically, it is a contemporary architectural form that provides a level of visual interest to the façade of the building. I have not been persuaded that, within the context of this building's design, the inclusion of glazing to the south and east sides of the part of the feature that projects above the roof, giving it a functional role, disqualifies it from the exemption in the Planning Scheme.
- 56 Having formed this view, I turn to consider the Design Objectives, Built Form Outcomes and decision guidelines of the DDO15A1, to assess whether the development achieves a satisfactory level of compliance.

- 57 In summary, the Design Objectives refer to preserving the amenity of the Royal Botanic Gardens; ensuring the enjoyment of the Gardens is not diminished by visual intrusion or overshadowing; and ensuring that the development is compatible with the existing scale and character of buildings and the area. The protection of residential amenity is a further objective. The Built Form Outcomes similarly refer to matters of visual intrusion, overshadowing, scale and character.
- 58 I am satisfied that, subject to the modification of the rear elevation detailed below, the development achieves the Design Objectives and Built Form Outcomes of DDO15A1. The three-storey scale is consistent with the existing scale of development in Domain Road and the wider neighbourhood, within both the commercial and residential zones. Being on the south side of Domain Road, the development will not cast any shadows on the Gardens. The scale of the building and its separation from the Gardens will ensure that it will not visually intrude on the Gardens or diminish their enjoyment. In respect of the site's relationship with the Gardens, the building is an acceptable response.
- 59 The Design Objectives include protecting residential amenity. Concerns were expressed regarding amenity impacts of overlooking, overshadowing and visual bulk.
- 60 On the issue of overlooking, the south elevation will have windows on all levels. The ground floor level is not a concern as the existing boundary treatment of a 3.0 metre high wall with trellis above is sufficient to prevent overlooking from this level. At the first floor and second floor level are banks of windows which are annotated as being fitted with "*glass with frit pattern (25% transparency)*". This treatment appears to reflect that specified in Clauses 54.04-6 and 55.04-6²⁰ which apply to residential development and whose respective standards A15 and B22 refer to a maximum 25% transparency for screening devices. This, however, is not a residential development and the objective of 'limiting' (rather than preventing) views is not applicable here. In order to protect the privacy of the adjoining land to the south, I will include a condition which requires the windows to be fitted with fixed obscure glazing.
- 61 The Applicant provided overshadowing diagrams for 22 September at 9.00am – 3.00pm. What these show is that the shadow impact on the property at 112 Millswyn Street (both Ms Dodds' courtyard and the communal swimming pool area) is relatively minor. Up until 10.00am, Ms Dodds' courtyard is in shadow from the building which she occupies. Although at 11.00am her courtyard receives some sunlight, it is relatively limited and confined to the northern end of this area. By 12 noon most of the courtyard is in sunlight and the shadow from the proposed building is restricted to the northern end. In the afternoon period, the development will

²⁰ The objectives of both Clause 54.04-6 and Clause 55.04-6 refer to limiting views into existing secluded private open space.

not cast any shadow in this space. In terms of the communal swimming pool area, at all times except 9.00am, the majority (or all) of the pool will be in sunlight. Of course, during the summer period, when greater use of the pool would be expected, the shadows will be less, manifesting as a more confined impact.

- 62 On the basis of this information and analysis, I am unable to conclude that the proposal will unacceptably overshadow the adjoining residential properties.
- 63 The remaining issue is that of visual bulk. The building will be highly visible from the communal open space area of 112 Millswyn Street. It is a relatively slender building, given the width of the review site, and has significantly less height and mass when compared with the adjoining five-storey apartment building. It is, however, sited closer to the southern boundary than this adjoining building. For most of its width, the proposed building is sited opposite the blank boundary wall of the Millswyn Street development. That part of Ms Dodds' courtyard closest to the common boundary with the review site will to an extent be visually shielded from the development by the boundary wall and trellis structure. Further south into the courtyard, the building will become increasingly visible, but will be further removed from the occupants of this space. Importantly, the courtyard's interface is for a length of 2.0 metres, and given its elongated north-south orientation, its principal outlook is to the west, where the communal swimming pool is located.
- 64 I have concerns regarding the visual impact of the development on the open space area of 112 Millswyn Street. At a 3.6 metre setback at its closest point, the development will be noticeably closer to this boundary than the apartment development next door. It would present a level of visual bulk which I consider should be moderated in recognition of the sensitive nature of the adjoining space to the south. I consider that the upper level should be positioned a minimum of 6.7 metres from the southern boundary to match the setback proposed at the south-eastern corner of the building. This would achieve a staggered rear profile, with the siting being reflective of that displayed by the apartment building. I will include a condition requiring this change.

Will noise emanating from the review site have an unacceptable impact on the amenity of the area?

- 65 The Applicant's submission²¹ acknowledges that "*noise emanating from the proposed building is a matter which must be considered both in the context of Clause 52.27 and in the context of the buildings and works control under the zone*". The submission goes on to identify the relevant inquiry under Clause 52.27 as being the noise from patrons within the venue consuming

²¹ Exhibit A88.

alcohol; and the possibility of noise disturbance from patrons in outdoor areas.

- 66 In addition to patron noise, music noise and noise from the operation of plant and equipment are also relevant considerations. This is common ground amongst the parties. Significantly, the residents advised that they have historically experienced both plant noise and music noise impacts from the operation of the Botanical Hotel. Reference was also made to noise from the courtyard on the western side of the Hotel building, which also functions as an outdoor smoking area. They are very concerned that the proposal would add to these impacts with a consequential detrimental impact on the amenity of their properties.
- 67 Noise from plant and equipment is required to comply with State Environment Protection Policy (Noise from Commerce, Industry and Trade) No. N-1 (SEPP N-1). In this respect, concerns were expressed by Mr Growcott regarding the means to achieve compliance with SEPP N-1, given the existing noise associated with the rooftop plant of the adjoining Botanical Hotel.
- 68 Put simply, the assessment of noise under SEPP N-1 at the nearest residential receptor is a cumulative one that takes into account noise from any other existing premises. It considers the combined noise from multiple venues. What this means is that, if the plant and equipment noise from the Botanical Hotel presently meets SEPP N-1 when measured at the nearest relevant residence, then the proposed plant and equipment will need to be attenuated to achieve a noise output (measured at the same receptor) that is lower than what would be required to meet SEPP N-1 in circumstances where these other noise emissions did not exist.
- 69 Mr Growcott's evidence is that the Botanical Hotel already has non-compliant noise from plant when measured at 155 Domain Road, being the apartment development adjoining the review site to the west. His evidence is that the required level of noise attenuation for the proposed plant is unlikely to be achieved utilising conventional roof-top equipment and noise control, and that custom-made noise attenuation measures would need to be adopted – at some significant cost.
- 70 Ms Hui stated that there are a number of ways in which noise from the roof-top plant and equipment can be attenuated. These include utilising 'typical' equipment and providing a high level of attenuation or, alternatively, selecting plant and equipment with a lower noise output and employing a correspondingly lesser level of attenuation. Ms Hui indicated that the western wall and roof of the plant enclosure may need to be solid (with the remaining sides being permeable, but with suitable attenuation) in order to adequately shield the adjoining dwellings to the west from noise. Ms Hui went on to state that the proposed mechanical plant will be subject to detailed design at the documentation stage and appropriate measures necessary to secure compliance with SEPP N-1 will be determined at that

time. In her view, the required level of attenuation can be achieved, irrespective of whether the existing noise emissions from the Botanical Hotel meet SEPP N-1, but that it is a matter of design and cost.

- 71 I have not been persuaded that it is fair, practical or, indeed, helpful to specify the noise level of the proposed roof-top plant by reference to a number of decibels below the SEPP N-1 limit as a contingency, in response to the influence of noise from the Botanical Hotel. This is appropriately a matter for further assessment when detailed design and equipment selection is being undertaken. The fact is that compliance with SEPP N-1 must be achieved. The necessary measures to ensure this occurs must be incorporated into the proposal. This may well mean adopting custom-made solutions at a greater cost than the conventional equipment, but that is a matter for the Applicant and not one that needs to be specified in any planning approval. Cost does not influence my decision. A condition requiring compliance with SEPP N-1, together with a requirement for an acoustic assessment demonstrating compliance, is satisfactory.
- 72 Music noise emissions from entertainment venues are controlled by State Environment Protection Policy (Control of Music Noise from Public Premises) N-2 (SEPP N-2). As with SEPP N-1, compliance with SEPP N-2 is mandatory and it is apparent from the evidence of all three acoustic witnesses that this compliance can be achieved, subject to setting the music level to an appropriate volume/level. Importantly, no live or amplified music is to be played on the land. Only background music will be provided. That being so, and subject to the installation and use of a noise limiting system, there should be no difficulty in meeting SEPP N-2.
- 73 In addition to the use of a noise limiting device, Ms Hui recommended the provision of a structural separation between the proposed building and the neighbouring apartment development to the west to avoid the transfer of noise. Mr Burton also recommended that any speakers on the first floor terrace be orientated to face the internal area of the restaurant and commented that the absorbent wall and ceiling lining recommended by Ms Hui in this area would also assist in reducing any music noise emissions from the terrace. Mr Growcott's evidence refers to the provision of sound lock access to the courtyard area to control internal noise escape. He also recommended a similar feature to the first floor terrace to maintain control of internal noise levels.
- 74 On the basis of the evidence I am satisfied that compliance with both SEPP N-1 and SEPP N-2 can be achieved, and note that conditions requiring this compliance were included in the draft conditions discussed at the hearing. These have been included in this order.
- 75 The significantly more difficult issue is that of patron noise. There are no guidelines or controls that can be applied to assess this noise in external areas. Patron noise is commonly an area of contention in the consideration of licensed venues, and its assessment is not assisted by the fact that there

lacks agreement amongst acoustic engineers as to how this noise impact should be addressed. This case is a clear example of this absence of a consistent approach.

- 76 Mr Growcott utilises the methodology of SEPP N-1 to assess patron noise. His justification for doing so is that the ‘babble’ noise which is created during restaurant/hotel patron social chatter when assessed at nearby residential locations, has noise character which is suitably assessed using SEPP N-1. Mr Growcott described patron noise as a ‘quasi-steady’ noise, not dissimilar to commercial and industrial noise, stating that SEPP N-1 had ‘stood the test of time’ and also protects night-time values, including sleep. He stated that he does not know of any better methodology. The use of Mr Growcott’s method results in a noise limit equivalent to 3dB(A) above the background noise level. Mr Growcott measured the background noise levels used in his assessment of the proposal during 11 – 16 April 2013.
- 77 Mr Growcott recommended restricting patron numbers in the external areas at noise sensitive operating times to control noise emissions.
- 78 Ms Hui explained that SEPP N-1 explicitly states that it is not to be used for patron noise. She also referred to difficulties in establishing a national criteria if SEPP N-1 methodology is used as it does not apply in other states. Ms Hui utilised a patron noise criteria comprising an average noise level that is the higher of 40dB or the background noise level plus 5dB(A), whichever is the higher, and a maximum noise level of 60-65dB. The background noise levels used in Ms Hui’s assessment were measured in the week before Christmas 2011.
- 79 Ms Hui’s evidence statement explains that the quasi-steady component generally provides limits similar to those which would apply if the SEPP N-1 methodology were followed, and the maximum noise levels address sleep disturbance. According to Ms Hui, the sleep disturbance criteria are derived from the New South Wales Environment Protection Authority, developed for motor vehicle pass-bys but as it was formulated in a laboratory (what she referred to as a ‘synthetic environment’) it is a good indication of the level at which people are affected by noise.
- 80 To achieve the noise limits established using her methodology, Ms Hui recommended the following:
- In addition to the proposed 3.0 metre high acoustic wall to the southern and western boundaries of the rear courtyard, a 1.2 metre wide, 3.0 metre high canopy should be provided in the south-western corner. The canopy is to extend from the cantilevered level 1 (overhang) and abut both the southern and western property boundaries. Absorptive treatment is to be applied to the canopy’s underside.
 - At least 50% of the underside of the level 1 overhang in the courtyard should be provided with absorptive treatment.

- At least 50% of the underside of the first floor terrace ceiling should be provided with absorptive treatment.
- The proposed bi-fold glazed doors in the terrace be utilised to close off the outdoor dining area if required.

- 81 Acknowledging that patron noise levels are excluded from assessment under both SEPP N-1 and SEPP N-2, and noting that there are no Victorian Environment Protection Authority guidelines or regulations addressing voice noise levels, Mr Burton utilises a criteria that is similar to that of Ms Hui. That is, 5dB(A) above the background noise levels. His evidence states that this is derived from an earlier edition of Australian Standard AS 1055 *Acoustics – Description and Measurement of Environmental Noise* which noted that when the disturbing noise level is 5dB(A) or less above the background noise level, annoyance is likely to be marginal. Mr Burton’s evidence statement notes the use of sleep disturbance criteria by Ms Hui, but makes no comment about the appropriateness or otherwise of utilising such a measure.
- 82 While there are divergent approaches in the assessment of patron noise, what emerges from the above is that the difference between the criteria established by Mr Growcott and that established by Ms Hui (and accepted by Mr Burton) is 2dB(A). However, what is concerning is that application of the criteria to the proposal results in noise limits with a difference that exceeds 2dB(A). Indeed, the difference ranges between 3dB(A) and 8dB(A), with Ms Hui’s being the higher. When questioned about this discrepancy, Mr Burton stated he was surprised that Ms Hui’s limits were that much elevated above those of Mr Growcott and that the only reasonable explanation was the time of year at which the background noise measurements were taken. He stated that given this variation, it would be necessary to determine more accurate noise measurements, and suggested that school holidays and the Christmas/post-Christmas period be avoided when measuring background noise levels.
- 83 On the basis of the evidence, it appears that the emission of patron noise from the premises can be managed to ensure that an unreasonable impact on the amenity of the adjoining properties is avoided. I agree with Mr Burton that the discrepancy in the background noise levels needs to be resolved, and that this should be done by taking further measurements of background noise. Insofar as setting the applicable limit once the background noise level is established, I am persuaded that the limit should be at the lower end. The reason for this is that, as a consequence of the land use pattern – particularly the presence of the Royal Botanic Gardens opposite – the area is very quiet during the late evening period. In my view, this contributes to the amenity of this locality and should be respected. I have therefore concluded that the patron noise, as measured at the adjoining residential properties (the balconies at 155 Domain Road and the courtyard of 5/112 Millswyn Street), should not exceed 3dB(A) above the background noise

level. This is based on the facts and circumstances of this case, notably the context of the review site and the existing level of amenity, which in part is influenced by the low level of activity in the latter part of the evening and night.

- 84 I consider that acoustic considerations can be adequately addressed by permit conditions. These include a requirement for an acoustic report which establishes the background noise level, sets the relevant limits (specifically and/or by reference to the relevant State Environment Protection Policy) and nominates the required treatments and/or measures to ensure the limits are met. An assessment six months into the operation of the premises will also need to be undertaken to determine whether the established noise limits are being met. Should this latter assessment disclose non-compliance, then appropriate measures/works will be required to be undertaken to address this.
- 85 Based on the evidence, subject to the conditions addressing noise emissions from the land, I have concluded that the proposal should not unreasonably impact on the acoustic amenity of the area.

Is the proposed reduction of the car parking requirement to zero justified?

- 86 Car parking is one of the key matters in this proceeding. The Applicant has applied for a reduction of the car parking requirement to zero, pursuant to Clause 52.06-3, and therefore seeks to rely entirely on the on-street parking in the locality. At a rate of 0.4 space to each patron permitted, the proposal generates a car parking requirement of 168 spaces.
- 87 According to Clause 52.06-6, an application to reduce (including to zero) the number of car parking spaces required under Clause 52.06-5 must be accompanied by a Car Parking Demand Assessment. Relevantly, Clause 52.06-6 states:

The Car Parking Demand Assessment must address the following matters, to the satisfaction of the responsible authority:

- The likelihood of multi-purpose trips within the locality which are likely to be combined with a trip to the land in connection with the proposed use.
- The variation of car parking demand likely to be generated by the proposed use over time.
- The short-stay and long-stay car parking demand likely to be generated by the proposed use.
- The availability of public transport in the locality of the land.
- The convenience of pedestrian and cyclist access to the land.
- The provision of bicycle parking and end of trip facilities for cyclists in the locality of the land.

- The anticipated car ownership rates of likely or proposed visitors to or occupants (residents or employees) of the land.
- Any empirical assessment or case study.

Before granting a permit to reduce the number of spaces below the likely demand assessed by the Car Parking Demand Assessment, the responsible authority must consider the following, as appropriate:

- The Car Parking Demand Assessment.
- Any relevant local planning policy or incorporated plan.
- The availability of alternative car parking in the locality of the land, including:
 - Efficiencies gained from the consolidation of shared car parking spaces.
 - Public car parks intended to serve the land.
 - On street parking in non residential zones.
 - Streets in residential zones specifically managed for non-residential parking.
- On street parking in residential zones in the locality of the land that is intended to be for residential use.
- The practicality of providing car parking on the site, particularly for lots of less than 300 square metres.
- Any adverse economic impact a shortfall of parking may have on the economic viability of any nearby activity centre.
- The future growth and development of any nearby activity centre.
- Any car parking deficiency associated with the existing use of the land.
- Any credit that should be allowed for car parking spaces provided on common land or by a Special Charge Scheme or cash-in-lieu payment.
- Local traffic management in the locality of the land.
- The impact of fewer car parking spaces on local amenity, including pedestrian amenity and the amenity of nearby residential areas.
- The need to create safe, functional and attractive parking areas.
- Access to or provision of alternative transport modes to and from the land.
- The equity of reducing the car parking requirement having regard to any historic contributions by existing businesses.
- The character of the surrounding area and whether reducing the car parking provision would result in a quality/positive urban design outcome.

- Any other matter specified in a schedule to the Parking Overlay.
 - Any other relevant consideration.
- 88 Evidence was called from three experienced traffic engineers in support of the parties' respective cases. Although there were some similarities between the experts in respect of their findings and conclusions, there remains disagreement regarding pivotal matters, being the level of demand which will be generated by the restaurants, the locations in which patrons and staff would park, and the availability of car parking to meet the demand.
- 89 As a context for the analysis of this issue, it is useful to briefly summarise the evidence of each expert. I do this by firstly looking at the demand calculations, followed by the supply analysis.

Demand

- 90 Ms Donald adopted a car parking rate of between 0.3 and 0.4 space per patron. The 0.3 rate was referred to as a 'typical rate' used in the assessment of such proposals, while the 0.4 rate is that specified in the Planning Scheme. The application of these rates means that the proposal is expected to generate a parking demand of between 126 and 168 spaces. Ms Donald did not consider that a lower rate for the lunchtime period is appropriate in this instance as the location is not in a group of offices, there are limited workplaces nearby, and the site is located some 800m from the nearest major employment precinct (St Kilda Road). She estimated it would take in the order of 13 minutes to walk from St Kilda Road to the site, making it less likely that workers would walk rather than drive. Ms Donald also stated that, based on her observations during a visit to the Domain Café, there is unlikely to be a lower occupancy at lunchtime as compared to dinner.
- 91 In assessing the likely demand for car parking, Mr Walsh utilised a car parking rate of 0.22 space per patron, which was derived from restaurant patron surveys at the Botanical Hotel on a Friday and Saturday evening in May 2006. The surveys disclosed the proportion of drivers as 22% of the restaurant patrons surveyed. Acknowledging that a portion of the actual car parking demand is also attributable to staff, Mr Walsh presumed that there would be one employee for every 10 patrons, resulting in a maximum of 42 staff when fully occupied. Mr Walsh reviewed the ABS Journey to Work Data for South Yarra, which shows that 39% of employees drive to their place of employment within the suburb. He then adopted what he referred to as a conservative 50% driver ratio, equating to a demand for 21 spaces. When added to the patron demand of 92 spaces (based on 0.22 space per patron) it resulted in a demand for 113 spaces, which equates to a rate of 0.27 space per patron.

- 92 In contrast to Ms Donald, Mr Walsh's evidence is that there is a distinction between lunchtime and dinner in terms of the car parking demand. His evidence is that within activity centres, the demand for parking during lunchtime is typically 50% of that experienced during the evening. This is based on a lesser patronage and a greater level of walk-up trade from other businesses in the centre and surrounding area. Mr Walsh is of the view that the proposed restaurants will experience a greater level of walk up trade during the day than during the evening from St Kilda Road, the Royal Botanic Gardens and other nearby land uses. In response to his view that there will not be a significant reduction in patronage at lunchtime during the weekend (due the visitation to the Royal Botanic Gardens), Mr Walsh adopted a peak lunchtime demand of 50% – 75% of the evening peak demand. What this means is that, according to Mr Walsh, the proposal will generate a peak evening demand of 113 spaces and a peak lunchtime demand for 57 – 85 spaces. If the existing demand of the café/retail tenancy and dwellings that occupy the review site is deducted (between 15 and 19 spaces), the peak lunchtime demand would reduce to 42– 66 spaces.
- 93 For his assessment of the car parking demand, Mr Hunt relied upon the same restaurant patron survey data from the Botanical Hotel as Mr Walsh, ie a rate of 0.22 space per patron. His evidence provided an explanation of how this data was collected. The surveys of restaurant patrons were conducted at the Botanical Hotel between 7.00pm and 1.00am, and patronage peaked at 197 patrons. On both evenings, the restaurant was effectively at capacity and patrons were waiting for tables.
- 94 As with Mr Walsh, Mr Hunt assessed staffing levels at 1 staff member per 10 patrons, equating to 42 staff. However, differently to Mr Walsh, Mr Hunt utilised the 2011 ABS Journey to Work data that shows 34% of the employees in the municipality drive to work. Combining the patron and staff demand for parking leads to an overall parking demand of 0.26 space per patron. When this is applied to the proposal, the peak parking demand is 109 spaces.
- 95 For the lunchtime period, Mr Hunt stated that restaurants typically experience two-thirds of the evening demand, ie 67%. This calculates to a lunchtime parking demand of 73 spaces. To allow for the potential popularity of the restaurants at lunchtime on weekends, given their proximity to the Royal Botanic Gardens and other attractions, Mr Hunt adopted a car parking demand of 73-109 car spaces for this period. With respect to the parking demand for the existing uses (estimated at up to 23 spaces) Mr Hunt did not deduct this from the anticipated demand but, rather, stated that it would have contributed to the occupancies observed during the parking surveys.
- 96 In reviewing and considering the evidence of the three experts in respect of the anticipated parking demand of the proposals, I have come to the following conclusions:

- I do not see that there is much debate between the experts that the rate of 0.3 space per patron should be adopted as being at the upper end of what can be reasonably anticipated in terms of parking demand, noting that in cross-examination, Ms Donald indicated that she was content to rely on a rate of 0.3 provided it applied to all tenancies and at both lunch and dinner.
- The rates of 0.26, 0.27 and 0.3 are not vastly dissimilar, with the resultant difference in actual parking demand being in the range of 13 and 17 spaces.
- I think it is reasonable to expect that there would be some reduction in the parking demand experienced at lunchtime compared with dinner when allowance is made for patronage from visitors to the Royal Botanic Gardens and other nearby attractions who will already be in the area, and also from employees in nearby locations. I agree, however, that given the area's popularity on weekends during the warmer times of the year, it would be reasonable to estimate the lunchtime demand will be up to 75% of the evening demand.
- When applied to the proposed 420 patron capacity, the rates adopted by the experts, allowing for the variation in lunchtime trade, results in the following car parking demand:
 - Lunch: 82 – 94 spaces;
 - Dinner: 109 – 126 spaces.

Supply

97 Mr Hunt and Mr Walsh utilised, and relied upon, survey data collected by GTA Consultants at the following times:

- Friday 4 May and Saturday 5 May 2012: 10.00am to midnight (within approximately 400m of the site).
- Friday 24 August 2012: 10.00am to midnight (within approximately 400m of the site).
- Saturday 1 September 2012: 10.00am to midnight (within approximately 400m of the site).
- Friday 15 February and Saturday 16 February 2013: 6.00pm to midnight (within approximately 500m of the site).
- Friday 12 April and Saturday 13 April 2013: spot surveys at noon and 2pm (within approximately 500m of the site).
- Friday 19 April and Saturday 20 April 2013: 6.00pm to midnight (within 500m of the site).

- 98 These surveys revealed a minimum of 100 available spaces at lunchtime (noon, Friday 24 August 2012)²² and 160 available spaces in the evening (10.00pm, Saturday 1 September 2012), all within a 400m distance of the review site. Spaces adjacent to residential frontages in Park Street and Domain Road were included.
- 99 Ms Donald advised that, in preparing her evidence, she reviewed the GTA survey data and was not satisfied that parking surveys undertaken in late autumn were representative of parking conditions in the area at peak times in the milder weather conditions. Her firm, therefore, commissioned parking surveys in the area for the following times:
- Thursday 21 March 2013: 6.00pm to 10.00pm.
 - Friday 22 March 2013: 11.00am to 11.00pm.
 - Saturday 23 March 2013: 11.00am to 11.00pm.
 - Thursday 28 March 2013: 8.00pm to 9.00pm.
- 100 Ms Donald stated that the survey area expanded that adopted by GTA to include the residential area south of the review site, given that this area includes spaces with parking restrictions that would allow restaurant patrons to park there. The survey also extended west along Domain Road and along Dallas Brooks Drive and Birdwood Avenue. The consequence of this enlarged survey area is that Ms Donald's surveys contained more spaces than the GTA surveys. Notably, Ms Donald's surveys only included spaces that were subject to a time restriction of at least two hours. In her oral evidence she explained that one-hour parking spaces do not, in her view, allow sufficient time for patrons to attend the restaurants. In support of this, she referred to the time taken to walk from the car to the venue (which could be a distance of up to 500m), place an order, sit at a table and eat in a relaxed way, pay and then walk back to the car.
- 101 Ms Donald's surveys revealed a peak parking demand at 1.00pm on Saturday 23 March 2013, when 104 car spaces were available. This survey covered an area generally within 400m of the site, although it extended to 500m in a westerly direction to include parking along Dallas Brooks Drive and parts of Domain Road and Birdwood Avenue. Parking spaces adjacent to residential frontages were included and Ms Donald advised that, if these spaces were excluded, the number of available spaces reduced to 51.
- 102 None of the surveys relied upon by the experts included a weekend lunchtime during the summer period, a matter which I comment on later in these reasons.
- 103 There are obvious inconsistencies in the approach adopted by the traffic engineering firms who have been involved in this project. These

²² This survey included one-hour parking spaces, of which 15% were available for use. I consider it reasonable to include such spaces as they can cater for those patrons/customers who wish to either have a short lunch, a coffee & cake, or purchase their lunch to consume part or all of it elsewhere.

inconsistencies include the extent of the geographic area surveyed, the time restrictions applying to the surveyed spaces, and the inclusion or otherwise of spaces adjacent to residential frontages. This makes a direct and fair comparison of the results very difficult.

- 104 Nonetheless, what can be derived from the survey data is that, at times, the locality experiences a high demand for car parking, particularly during the daytime period. This demand is variable throughout the year and is dependent on matters such as the weather and the existence or otherwise of events in the Royal Botanic Gardens (for example, Moonlight Cinema)²³. According to the data, there is sufficient car parking during the evening period to accommodate the demand generated by the proposal, no matter which estimate is adopted. It is the adequacy of the car parking supply during the daytime (lunch) period that is of concern.
- 105 As observed by the parties and their witnesses, a relevant ‘gap’ in the data is the absence of survey information for the weekend daytime period during the summer months, which is a time of peak demand for this area. Both Mr Walsh and Mr Hunt confirmed their view that it would have been desirable or beneficial to have this data. Ms Donald made reference to the absence of this data in her evidence, inferring that it is an important omission.
- 106 Concerns were expressed by those opposing the proposal that, at times, patrons would absorb all the available on-street parking in the area. Ms Donald also referred to this concern in her evidence. Mr Walsh and Mr Hunt, in response to questions, indicated that there could well be occasions at the peak period when all the spaces within the survey area would be utilised as a consequence of the proposal. Mr Hunt was not concerned about this outcome as it will only occur on a limited number of days and persons unable to find a parking space would leave and go elsewhere.
- 107 On this issue, parties referred to the Tribunal’s decision in the matter of *Newmarket Property Group v Port Phillip CC* [2006] VCAT 153²⁴ where the Tribunal was not persuaded that the proposal in that case was appropriate given that it would absorb up to 82% of the available car spaces over a distance of some 300 metres from the site. While acknowledging that the peak occupancy would be confined to a one-hour period between 8.30pm and 9.30pm, the Tribunal said:

[52] ...an occupancy of that magnitude does provide a strong indication that the proposal at the intended scale and intensity of use, places an excessive reliance on on-street parking and the ability of the available parking to adequately

²³ In this respect, I note what the Tribunal said in the matter of *Cornerstone Hotels Pty Ltd v Melbourne CC* [2008] VCAT 609 at paragraph 32 that the surveys provided in that case showed that during the peak summer months when the activities within the Royal Botanic Gardens are busiest, all available on-street parking within reasonable proximity to the subject land (being the adjacent Botanical Hotel) is heavily utilised.

²⁴ Exhibit G48.

accommodate the proposal is likely to be very sensitive to fluctuations in parking demand generated by other uses in the locality and to fluctuations in the parking demand generated by the proposal itself.

- 108 The Tribunal commented that the impact of that proposal would be to increase the competition for on-street parking to a point whereby at peak times, such parking would not be available in the survey area. The Applicant in that case urged the Tribunal to adopt the “centre based approach” to the consideration of the car parking issue, summarised in the following extract of the Supreme Court’s decision in *Sansmark Pty Ltd v City of Boroondara*²⁵:

The basic approach in these decisions is that in important activity centres car parking considerations should not be determinative, instead the land use mix in a centre should arise from a combination of strategic planning and the economic forces at work in the centre, car parking issues have a part in this but should not dominate. At the level of the individual site where there is a change of use or an extension to an existing building in most circumstances car parking shortfalls should be waived if it is consistent with the strategic plan for the centre, firstly because the most equitable solution is to deal with carparking on a centre wide basis, and secondly because even in saturated car parking conditions a balance will occur between the level of activity and the car parking supply.....

- 109 While agreeing in principle with the centre-based approach, the Tribunal in the *Newmarket Property Group* case was not persuaded that it was properly applied in the context of the site in the Application before it, as the land was not located in an activity centre. The Tribunal formed the view that the proposal in that case was not consistent with the strategic plan for the locality and, as a consequence:

[57] ... the waiving of car parking for a development which will contribute to a circumstance in which a single use will effectively consume all available on-street parking at peak operating times is not supported by the policy framework of the Planning Scheme.

- 110 I have similar reservations about the applicability of the centre-based approach here given the particular, and perhaps unique, characteristics of this small centre. Amongst these are its lower order nature being a local centre which falls outside of the activity centre hierarchy provided in the SPPF, its limited physical extent, the small number of constituent properties, and an apparent absence of opportunities for the creation of additional public car parking.
- 111 In response to this issue of the high car parking demand, the Applicant made submissions addressing the circumstance where the end result of the

²⁵ 22 AATR 103.

proposal was that parking in the area would be “tighter” than it has been to date. The submissions were:

- What is the strategic planning merit in either requiring parking to be provided on the site in the first place; or alternatively rejecting an otherwise meritorious application on the basis that it will place greater demand on what is a public resource?
- Where is it said that those who presently avail themselves of a public resource like on-street car parking have the right to exclude a new entrant?
- One of the purposes of Clause 52.06 is “*to ensure the provision of an appropriate number of car spaces having regard to the demand likely to be generated, the activities on the land and the nature of the locality*”. The provision of car parking is intended to achieve the strategic planning aspirations for a particular area. In this area there is already a high degree of variability in demand and close to the subject land.
- Residents most likely to be affected by any increased demand are unlikely to notice the difference²⁶.
- Any increase in activity is good for the centre.
- The suggestion that additional parking demand would make any difference whatsoever on days when the surrounding entertainment uses generate an absolute peak demand is ludicrous.
- Whether taking into account the survey numbers or stepping back to take the broader view, the conclusion which should be drawn is that the proposed development, at the scale proposed, is acceptable in parking terms.

112 Having regard to the submissions and evidence, I have not been satisfied that the car parking implications associated with a 420 patron capacity are such that a restriction on patron numbers should not be applied in this case. It is not the evening car parking demand which troubles me. Based on the evidence, there are sufficient parking spaces to accommodate the evening demand irrespective if one adopts a rate of 0.26, 0.27 or 0.3 space per patron. This includes the evening period during the summer months, being a time of peak demand, as indicated by the survey data for 15 and 16 February 2013. Even with the parking demand generated by the proposal, there will still be spaces available for use by patrons or customers of other activities in the locality.

²⁶ I take this to be a reference to the existence of parking restrictions within the nearby residential streets (such as Millswyn Street) which limit the use of on-street parking spaces by patrons/customers of the commercial centre.

- 113 What does concern me is the impact the proposal will have on the available car parking during the lunchtime period. It is apparent from the survey data available that parking at this time is heavily utilised, as compared with the evening period. What has been suggested through the submissions and evidence of the parties is that this demand is not generated solely from the land uses within the retail centre but also from visitors to the nearby regional attractions – in particular, the Royal Botanic Gardens.
- 114 The on-street parking in the vicinity of the Gardens represents a valuable public resource which is relied upon by those visiting the area, whether it be to provide patronage to one of the eating establishments in the centre; visit the Gardens for passive recreation purposes; attend a private function at the Gardens; or visit the Shrine of Remembrance or other nearby attractions. These are important attractions for Melbourne. In my view, it is in the interests of good planning to avoid a situation where one use effectively consumes all (or a substantial proportion of) available on-street parking within a reasonable walking distance of the site. Based on the evidence and submissions, there is the potential that the proposal may well do this, albeit only at selected times of the year, and for a defined period of time.
- 115 The Applicant's evidence is incomplete and has not been sufficient to convince me that the development will not have a similar result to that which the Tribunal referred to in the *Newmarket Property Group* case. That is, that it would not consume, if not all, then a high proportion of the available car parking proximate to the site at a peak time for this and other uses in the area during the day. Should this occur, visitors and patrons would then be forced to park further away, beyond the 400m – 500m distance which is generally considered to be a reasonable or comfortable walking distance for most people.
- 116 In its submission, responding to the absence of survey data for the weekend lunchtime period during the peak, the Applicant suggested that I could assume a worst-case scenario, being that there exists close to capacity utilisation of car parking in the surrounding area. It was submitted that this would depend on a finding that, notwithstanding the high utilisation at absolute peak times, new development could occur. It was further submitted that there is very little utility in a 'numbers' assessment in peak times because of the high variability experienced.
- 117 I agree with the Applicant that new development can occur within this centre, even though the locality experiences a high car parking demand. In the circumstances, I consider that an approach which recognises the demand and reliance placed on the available parking by established uses in the area is appropriate. What this means is that patron numbers should be restricted during lunchtime. Indeed, in its submissions, the Applicant advanced its primary position that the car parking implications did not justify a limitation on patrons but, should I be 'uncomfortable' with the 420 patron capacity

during the lunchtime period, then I have the discretion to alter the patron numbers for this time.

118 On the information available to me I have reached the following conclusions:

- There is a case for limiting the patron numbers at lunchtime.
- The survey data shows a minimum availability of 100 on-street spaces within 400m at lunchtime, outside of the peak period. The surveyed spaces do not include those adjacent to residential properties (other than in Domain Road and Park Street) but do include spaces subject to a one-hour time limit. The number of available spaces is likely to be less during the warmer months of the year when the area experiences its highest level of activity.
- In the absence of survey data for the peak summer lunchtime period, I consider it appropriate to limit patrons in order reduce the proposal's impact on the public car parking in the area. To this end, I have decided to restrict the daytime operation to the ground floor only, thereby limiting the overall patron capacity to 160.
- Even with this limitation, the proposal may potentially absorb the available parking within 400m – 500m of the review site during the peak period, with the consequence that both patrons of the establishment and other visitors would need to park further afield. In a location such as this, with its concentration of various regional (and international) attractors, it would not be unreasonable to have to expect to park some distance from a destination during the times of the year when the area is at its busiest. There is a balance to be struck. However, the distance people would need to park would be reduced by limiting the daytime patron numbers on this site.

119 My decision has been based on the evidence and submissions of the parties – noting the absence of survey data for the weekend lunchtime during the peak summer period. I have had to make a judgement based on the information available to me and mindful of the desirability of achieving a sharing of the available car spaces with the other uses in the locality.

120 In undertaking this assessment, I have considered the proximity of residential streets to the centre, and the availability of on-street parking in these areas. I find it reasonable that car spaces adjacent to residential properties in Domain Road and Park Street be utilised by patrons, as this continues the existing pattern of use. These spaces are highly accessible and, while subject to time restrictions which facilitate their use by members of the public, are not regulated by 'permit zone' restrictions which would set the spaces aside for sole use by residents. Further, Domain Road is a key thoroughfare connecting St Kilda Road and Punt Road, carrying commensurate levels of traffic. Both Domain Road and Park Street

represent a relatively more robust environment than the surrounding residential streets (due to the existence, in part, of the tram route), making them potentially less sensitive to impacts arising from use of the on-street parking.

- 121 On-street parking spaces adjacent to the residential frontages in Millswyn Street have largely been excluded from the surveys, and this is appropriate. The reason for this is not only the abuttal to residential use, but also the nature of the restrictions in the street. These include 'permit zones' on the eastern side and time restricted spaces on the western side. The time restrictions extend to 11.00pm on Thursday, Friday and Saturday in response to the greater demand from patrons to the commercial centre at these times.
- 122 Submissions expressing concerns regarding the use of on-street spaces in Fairlie Court were also made. This court is located off Anderson Street, opposite the Royal Botanic Gardens. The parking spaces in Fairlie Court are not subject to time restrictions in the evening, and have not been included in the surveys. This is not to say that patrons will not elect to park in this location. Should this occur, and manifest in unreasonable impacts on the residents, then it is open to the Council to consider imposing parking restrictions in the evening period, as exist in Millswyn Street.
- 123 In conclusion, therefore, subject to the occupation of the development being restricted to the ground floor only during the daytime period, I consider that the car parking demands of the proposal can be accommodated by the on-street spaces in the vicinity of the review site without unreasonably affecting the amenity of the area or the availability of car spaces for use by visitors to other nearby attractions.
- 124 In the discussion of conditions, Mr Gobbo submitted that, as the number of patrons is in issue between the parties, it would not be appropriate that the condition regulating patron numbers have the ability to be amended utilising the 'secondary consent' process. Mr Gobbo submitted that this could be a condition that can only be amended by the Tribunal. The Applicant did not oppose this. I agree that the condition should not allow for amendment through a secondary consent process, as such a process does not carry with it the obligation to notify potentially affected persons.
- 125 Notwithstanding the agreement of the parties, I do not consider that the condition warrants a limitation that means it can only be amended by the Tribunal. The notification and review provisions of the *Planning and Environment Act 1987* ('the Act') apply in instances where an application is made to the Council to amend a permit pursuant to Section 72 of the Act. This would provide the opportunity for affected persons to participate in the decision-making process. There is nothing to indicate that the Council would not ensure that this occurs. Alternatively, should the Applicant elect to make an Application to the Tribunal to amend the permit pursuant to

Section 87A of the Act, then affected persons would be given the opportunity to be heard.

Other matters

126 A number of other matters were raised in the submissions and evidence of those opposing this Application. I have considered these and concluded that none represent a sufficient basis for refusing a permit. My conclusions on these follow:

Waste Management and Loading/Unloading

127 It is true that the absence of a rear abuttal to a laneway, as exists for commercial tenancies to the east, represents a constraint in respect of waste collection from the premises. Concerns were expressed regarding the practicalities of having waste collection occur from the Domain Road frontage using the existing on-street loading zone, with mention being made of the potential conflict with the use of the footpath for outdoor dining.

128 It is proposed to store all the bins within the basement area. A Waste Management Plan prepared by Leigh Design was provided with the planning application. This document was peer reviewed by Mr Johnson, who gave evidence in respect of waste management. Aside from observing that there may be a potential conflict if outdoor dining is applied for, the Council's Principal Engineer did not object to the Leigh Design Waste Management Plan, noting that it complied with the Council's Waste Guidelines²⁷. The Principal Engineer recommended a condition that requires the waste storage and collection arrangements be in accordance with the Leigh Design Waste Management Plan.

129 The evidence of Mr Johnson is that at collection times, the bins would be transported one at a time via the lift, be wheeled to the footpath, be emptied into the parked waste collection vehicle, and then returned to the storage area. He estimated that the expected time to collect the waste from the premises would be in the order of 40 minutes per collection. Some reduction in the collection time could be achieved if compacting equipment and bottle crushers are used. Collections are to be performed by a private contractor six times a week.

130 In summary, Mr Johnson's evidence is that waste storage and collection associated with the proposal can be appropriately managed, and he supported the inclusion of a permit condition which requires the preparation and submission of a waste management plan to the Council for approval.

131 Given Mr Johnson's evidence, and the support of the Council's Engineer, I do not see that the collection of waste and recyclables from the premises can reasonably form the basis for either a refusal of a permit or a restriction

²⁷ Exhibit RA29

on the restaurant use. I do, however, accept that it is very important that a waste management plan be prepared and implemented to ensure that this activity is conducted in an efficient manner, with the minimum possible disruption to the amenity of the area. The Applicant's suggested permit condition addresses the relevant matters in this respect and has been included in conditions.

- 132 The on-street loading zone is directly adjacent to the site's frontage. The evidence of Mr Hunt and Mr Walsh is that this space is sufficient to cater for the loading/unloading requirements of the proposal, and it is also utilised by other existing businesses in the centre for this purpose. There was no evidence to the contrary. I consider that the use of the designated loading zone by the proposed development would represent a reasonable outcome.

Odour

- 133 The residents submitted that they have experienced impacts on the amenity of their dwellings as a consequence of odours from the kitchen of the Botanical Hotel. They are concerned that similar odour impacts may be generated by this proposal. Mr Ramsay recommended the inclusion of detailed permit conditions requiring the installation of both a filtration system to remove grease and an odour control system to remove odours. A further recommended condition would require a vertical discharge to the atmosphere at a point and velocity which would ensure compliance with State Environment Protection Policy (Air Quality Management) (SEPP (AQM)).
- 134 The evidence is that the development will need to comply with Australian Standard AS1668.2-2012, *The use of ventilation and air conditioning in buildings – Part 2: Mechanical ventilation in buildings*. The requirements of the Australian Standard are triggered at the building permit stage of the approvals process. This includes an analysis of the emissions from the ventilation stack. Emissions from the development must comply with SEPP (AQM) to ensure that beneficial uses of the air environment (which include life, health and wellbeing of humans) are protected at all times. Compliance with SEPP (AQM) is enforced by the Environment Protection Authority.
- 135 Based on the evidence, if the development's ventilation system is designed and installed in accordance with the Australian Standard, but is not then maintained, compliance with SEPP (AQM) will not be achieved. The Applicant's suggested permit condition responds to this concern by requiring that the system be maintained. Should there be a breach of the SEPP (AQM), then this is a matter which is appropriately addressed by the Environment Protection Authority. The Applicant also suggested the inclusion of a 'standard' amenity condition which amongst others requires that smell, fumes, vapour and steam emissions arising from the use of the

development do not adversely affect the amenity of the neighbourhood. As it has been volunteered by the Applicant, and not opposed by any other party, I have included this condition.

- 136 The issue of the required height of the proposed ventilation stack was also raised during the course of Mr Ramsay's evidence and cross-examination. Without detailed design, it is not possible to determine how tall such a stack would need to be in order to effectively disperse emissions to achieve compliance with SEPP (AQM). Mr Ramsay indicated that detailed mathematical modelling would need to be undertaken, and that other factors such as the source of the odours, the efficiency of the filtration system and the velocity of the emissions would all need to be considered in determining the height of the stack. A condition requiring the stack to be shown on the plans submitted for endorsement is required, enabling the Council to assess the siting, height and visual impact of this element to ensure that it represents an acceptable built form outcome having regard to the context of the review site.
- 137 Given the regulation which occurs through the building permit process, and through the role of the Environment Protection Authority in enforcing compliance with SEPP (AQM), I consider that the Applicant's suggested conditions are adequate for the planning permit stage in order to regulate odour emissions from the review site.

Building Considerations

- 138 Mr Zita's evidence considered a range of building-related issues such as fire safety, width of accessways, toilet facilities, disabled access and fire rating. Several areas of potential non-compliance were identified. These are all matters that would need to meet the Building Code of Australia (BCA) in order to obtain a building permit. An assessment of their adequacy or otherwise in this respect is appropriately left to the Building Approvals process. Should modifications to the building be required in order to meet the BCA, then an amendment to the planning permit would need to be sought at that time. Importantly, Mr Zita did not identify any specific matter that could not be addressed through compliance with either the BCA's prescriptive requirements or its performance-based objectives.

Bicycle Parking

- 139 It is proposed to provide eight bicycle parking spaces for staff in the basement. No bicycle parking for patrons is to be provided on the land. Given the basement is the only location on the site where such parking can be accommodated, I do not think it would be practical to require this provision, as patrons will not have access to this part of the building. I agree with the Applicant's evidence that patrons are able to utilise the hoops in Domain Road to park their bicycles, and that a reduction of the requirement is acceptable. In respect of shower facilities for employees, I

note Mr Hunt's evidence that there appears to be sufficient space in the basement to accommodate these. I consider that showers should be provided to encourage employees to cycle to the site. I will include a condition to this effect.

Conclusion

140 For these reasons, my conclusion is that a conditional permit should be granted for the proposal. The decision of the Responsible Authority is set aside. The permit is subject to the conditions contained in the Appendix.

Bill Sibonis
Member

APPENDIX

PERMIT APPLICATION NO:	TP-2012-388
LAND:	157-159 Domain Road, South Yarra
WHAT THE PERMIT ALLOWS:	<ul style="list-style-type: none"> • Demolition of the existing building; and • the construction of a building and the construction and carrying out of works <p>in accordance with the endorsed plans.</p> <ul style="list-style-type: none"> • Use of the land for the sale and consumption of liquor (Restaurant and Café Licence pursuant to the <i>Liquor Control Reform Act 1998</i>). • A reduction (to zero) of the car parking requirement associated with the use of the land for restaurant and shop. • A waiver of the loading and unloading requirements. • A reduction of the bicycle parking requirements.

CONDITIONS

- 1 Before the development and use starts, two copies of plans drawn to scale must be submitted to, and approved by, the Responsible Authority. The plans must be generally in accordance with the plans identified as TP0200 *Existing Conditions*; TP0201 *Existing Side and Rear Elevations*; TP0202 *Existing Side Elevation*; TP0203 *Demolition Plan*; TP1000 *Basement Plan*; TP1001 *Revision A Ground Floor Plan*; TP1002 *Revision A First Floor Plan*; TP1003 *Revision A Second Floor Plan*; TP1004 *Roof Plan*; TP3000 *Existing North Elevation, Proposed North Elevation*; TP3001 *North Elevation*; TP3002 *East Elevation*; TP3003 *South Elevation*; TP3004 *South Elevation*; TP3005 *West Elevation*; TP3500 *Section A*; & TP3501 *Section B*, prepared by John Wardle Architects dated May 2012 but amended to show:

- (a) a canopy in the south-west corner of the rear courtyard as shown at Figure 2 on page 17 of the report of Ms Elizabeth Hui of Marshall Day Acoustics dated 19 April 2013. The canopy must extend eastward to adjoin the boundary wall of the building at 112 Millswyn Street. The canopy must also adjoin the first floor level building overhang;
- (b) the second floor level set back a minimum of 6.7 metres from the southern boundary;
- (c) the ventilation stack associated with the exhaust systems of the development;
- (d) all external plant and equipment, including screening and noise attenuation devices;
- (e) the provision of shower facilities in the basement, to the satisfaction of the Responsible Authority;
- (f) any changes required by the approved Noise Management Plan (refer to Condition No. 7 of this permit);
- (g) any changes required by the approved Waste Management Plan (refer to Condition No. 16 of this permit);
- (h) the ground floor level labelled as 'restaurant/shop';
- (i) deletion of all references to 'tavern';
- (j) the first floor level and second floor level south-facing windows fitted with fixed obscure glazing;
- (k) a comprehensive schedule of construction materials, external finishes and colours, including colour samples (refer also to Condition No. 20 of this permit).

These amended plans must be to the satisfaction of the Responsible Authority and, when approved, will be the endorsed plans of this permit.

- 2 The first floor level restaurant and second floor level restaurant must not operate before 5.00pm every day (excluding staff).
- 3 The maximum number of patrons on the premises must not exceed the following:
 - ground floor level restaurant/shop including the rear courtyard: no more than 160 at any one time
 - first floor level restaurant including the outdoor terrace area: no more than 130 at any one time
 - second floor level restaurant: no more than 130 at any one time.
- 4 The sale and consumption of liquor is only permitted between the following hours:

- ground floor level restaurant/shop: between 10.00am and 10.30pm every day
 - ground floor level rear courtyard: between 10.00am and 7.00pm every day
 - first floor level restaurant, including the outdoor terrace area: between 5.00pm and 11.30pm every day
 - second floor level restaurant: between 5.00pm and 11.30pm everyday.
- 5 Excluding the shop use, the predominant activity carried on at the premises during all trading hours must be the preparation and serving of meals for consumption on the premises.
- 6 Excluding the shop use, tables and chairs must be placed in position so as to be available for at least 75% of patrons on each level at any one time.
- 7 Before the development starts (excluding any demolition or bulk excavation), a Noise Management Plan prepared by a suitably qualified acoustic engineer must be submitted to, and approved in writing by, the Responsible Authority. The Noise Management plan must:
- (a) set out the applicable State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2) music limits for the day, evening and night-time periods;
 - (b) provide details of allowable internal music noise levels in each of the ground floor level restaurant, ground floor level courtyard, first floor level restaurant, first floor level terrace, and second floor level restaurant;
 - (c) provide details of the building envelope and materials (including the acoustic qualities of the glazed bi-fold doors and the glazed sliding doors) required to achieve the allowable internal music noise levels;
 - (d) provide details of measures/treatments to provide structural isolation from the eastern boundary wall of the building at 155 Domain Road;
 - (e) provide details of the acoustic fence/wall in the ground floor level courtyard;
 - (f) specify any music noise limiting devices required to achieve the allowable internal music noise levels;
 - (g) specify the type and location of all mechanical services equipment and any noise attenuation treatments required to ensure that noise emissions from that equipment do not exceed State Environment Protection Policy (Noise from Commerce Industry and Trade) No. N-1 (SEPP N-1); and
 - (h) specify the absorptive treatment, with a minimum noise reduction coefficient of 0.7, required in order to minimise patron noise, to

- i) the underside of the canopy in the south-west corner of the ground floor level courtyard;
- ii) at least 50% of the underside of the first floor level building overhang in the ground floor level courtyard area; and
- iii) at least 50% of the underside of the covered area to the first floor level terrace.

The approved Noise Management Plan must be implemented to the satisfaction of the Responsible Authority.

Any works required by the approved Noise Management Plan must be implemented before the commencement of the use of the land for the sale and consumption of liquor to the satisfaction of the Responsible Authority.

- 8 No later than 14 days from the commencement of the use of the land for the sale and consumption of liquor, written confirmation of the date this use commenced must be provided to the Responsible Authority, to its satisfaction.

Within 6 months of the commencement of the use of the land for the sale and consumption of liquor, an Acoustic Report prepared by a suitably qualified acoustic engineer, to the satisfaction of the Responsible Authority, must be submitted to the Responsible Authority for written approval. The Acoustic Report must:

- (a) assess whether the allowable internal music noise levels specified in the approved Noise Management Plan (refer to Condition No. 7 of this permit) are exceeded. If any of those levels are exceeded, the Acoustic Report must specify what measures must be taken (and within what time frame) to ensure the allowable internal music noise levels are not exceeded, including any re-setting of any music noise limiting devices;
- (b) assess whether patron noise from the premises (including from the ground floor level courtyard and the first floor level terrace, both separately and in combination) exceeds 3dB(A) above background noise, to be measured from the following locations:
 - i) the centre of the closest and most exposed residential balconies on the northern and southern elevations of the adjoining building at 155 Domain Road (or, in the event that access to the balconies is not available, another location to the satisfaction of the Responsible Authority); and
 - ii) the centre of the courtyard area of 5/112 Millswyn Street (or, in the event that access is not available, another location to the satisfaction of the Responsible Authority).

If this noise level is exceeded, the Acoustic Report must specify what measures, including any management measures, must be taken (and

within what time frame) to ensure that patron noise from the premises does not exceed 3dB(A) above background noise when measured in these locations;

- (c) assess whether noise emissions from any mechanical services equipment exceed State Environment Protection Policy (Noise from Commerce Industry and Trade) No. N-1 (SEPP N-1). If SEPP N-1 is exceeded, the Acoustic Report must specify what measures must be taken (and within what time frame) to ensure those levels are not exceeded;
- (d) assess whether music noise emissions exceed State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2). If SEPP N-2 is exceeded, the Acoustic Report must specify what measures must be taken (and within what time frame) to ensure those levels are not exceeded.

The requirements/recommendations of the approved Acoustic Report must be implemented to the satisfaction of the Responsible Authority.

Any measures specified in the approved Acoustic Report which require a change to the operation of the premises must be included in the Operational Management Plan (refer to Condition No. 19 of this permit) to the satisfaction of the Responsible Authority

- 9 Deliveries to the development must not occur outside the hours of 7.00am to 10.00pm Monday to Saturday, and 9.00am to 10.00pm on Sundays and public holidays.
- 10 Noise emissions from the premises must comply with State Environment Protection Policy (Noise from Commerce Industry and Trade) No. N-1 (SEPP N-1) and State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2), as applicable.
- 11 No amplified live music or entertainment is permitted on the premises. Background music (at a level that enables patrons to conduct a conversation at a distance of 600 millimetres without having to raise their voices to a substantial degree) may be played.
- 12 No loudspeaker, amplifier, relay or other audio equipment may be installed or used outside the building, including the first floor level terrace, at any time.
- 13 Use of the development must not detrimentally affect the amenity of the neighbourhood, including through the:
 - (a) transport of materials, goods or commodities to or from the land;
 - (b) appearance of any building, works or materials;
 - (c) emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil;

to the satisfaction of the Responsible Authority.

- 14 A clear sign must be attached to an internal wall in a prominent position adjacent to the entry/exit point on the ground floor level to advise patrons to leave in a quiet and orderly fashion, to the satisfaction of the Responsible Authority.
- 15 Any ventilation, air conditioning and kitchen & basement exhausts required for the development must be designed, installed and maintained in accordance with AS1668.2 - 2012, to the satisfaction of the Responsible Authority.
- 16 Before the development starts, a Waste Management Plan must be submitted to, and approved in writing by, the Responsible Authority. The Waste Management Plan must:
 - (a) be prepared with reference to the *City of Melbourne Guidelines for Preparing a Waste Management Plan 2012* and section 5 of the *Noise Control Guidelines* (EPA publication 1254 October 2008);
 - (b) detail waste generation, storage and collection arrangements, which must be designed to minimise impacts on the amenity of adjoining premises;
 - (c) require the provision (within the basement) and use of one automatic bin press with a minimum compression strength of 3 tonnes, to be operated by appropriately trained staff; and
 - (d) require the provision (on each of the ground, first and second floor levels of the development) and use of a stationary bottle crushing unit designed for medium to high volumes of glass bottles, with quiet operation.

The storage and collection of waste and recyclables from the land must be undertaken in accordance with the approved Waste Management Plan to the satisfaction of the Responsible Authority.

- 17 All garbage and waste material must be stored in the basement. No goods, garbage, packing material or similar material must be left outside the building on adjoining footpaths or roads. Bins must be returned to the garbage storage area immediately after garbage collection.
- 18 Waste and recyclables collection from the development must not occur outside the hours of 7.00am to 6.00pm Monday to Saturday.
- 19 Before the development is occupied, an Operational Management Plan to the satisfaction of the Responsible Authority must be submitted to, and approved in writing by, the Responsible Authority. The Operational Management Plan must specify:
 - (a) that patrons will not be permitted to smoke anywhere on the subject land;

- (b) any management measures required by the approved Noise Management Plan (refer to Condition No. 7 of this permit);
- (c) emergency management procedures for the evacuation of patrons and staff in the event of fire or other emergency;
- (d) the ways in which staff are to be made aware of the conditions of this permit;
- (e) a Restaurant and Café Licence pursuant to the *Liquor Control Reform Act 1998* as the applicable liquor licence, and details of this licence;
- (f) a complaints handling process to be put in place to effectively manage complaints received from neighbouring and nearby businesses and residents. This must include details of:
 - i) a contact person for the lodgement of complaints;
 - ii) a Complaints Register to be kept at the premises;
 - iii) the complaint received, any action taken and the response provided to the complainant;
- (g) details of the management methods to be employed to minimise queuing at the entrance to the building, and to allow the safe entry and egress of patrons to and from the first floor and second floor levels;
- (h) details of the management of patrons in outdoor areas to minimise impacts on the amenity of adjoining and nearby properties;
- (i) measures to address the dispersal of patrons and the management of intoxicated persons.

The use of the land for the sale and consumption of liquor must be in accordance with the approved Operational Management Plan, to the satisfaction of the Responsible Authority.

The approved Operational Management Plan must be amended, with the written consent of the Responsible Authority, to accord with any requirements/recommendations of the approved Acoustic Report (refer to Condition No. 8 of this permit).

- 20 Before the development (excluding any demolition or bulk excavation) starts a schedule and samples of all external materials, colours and finishes including a colour rendered and notated plan/elevation must be submitted to, and approved in writing by, the Responsible Authority.
- 21 Before the development (including demolition or bulk excavation) starts a detailed Construction and Demolition Management Plan must be submitted to, and approved in writing by, the Responsible Authority. The Construction and Demolition Management Plan must be prepared in accordance with the *City of Melbourne – Construction Management Plan Guidelines* and must consider the following:
 - (a) public safety, amenity and site security;

- (b) operating hours, noise and vibration controls;
- (c) air and dust management;
- (d) stormwater and sediment control;
- (e) waste and materials reuse;
- (f) traffic management.

The development must be undertaken in accordance with the approved Construction and Demolition Management Plan to the satisfaction of the Responsible Authority.

- 22 The development as shown on the endorsed plans must not be altered or modified unless with the prior written consent of the Responsible Authority.
- 23 No architectural features, plant and equipment or services other than those shown on the endorsed plans are permitted above roof level, unless with the prior written consent of the Responsible Authority.
- 24 Glazing materials used on all external walls must be of a type that does not reflect more than 15% of visible light, when measured at an angle of 90 degrees to the glass surface, to the satisfaction of the Responsible Authority.
- 25 The minimum clearance to the underside of the awning over the footpath surface in Domain Road must be a minimum of 2.7 metres. The awning must be set back a minimum distance of 750mm from face of the footpath kerb.
- 26 With the exception of the architectural features shown on the endorsed plans, any projection over the title boundaries (excluding the awning on ground floor level) must not project more than 300mm beyond the boundary.
- 27 All projection over the street alignment must be drained to a legal point of discharge in accordance with plans and specifications first approved by the Responsible Authority.
- 28 Before the development (excluding demolition and bulk excavation) starts the owner of the subject land must construct a drainage system, incorporating water sensitive urban design, within the development and make provision to connect this system to the City of Melbourne's stormwater drainage system in accordance with plans and specifications first approved by the Responsible Authority.
- 29 The existing footpath/road levels in Domain Street must not be altered for the purpose of constructing new pedestrian entrances without first obtaining the written approval of the Responsible Authority.
- 30 All pedestrian ramps must be designed and constructed in accordance with AS 1428:2009 Design for Access and Mobility and be fitted with Tactile Ground Surface Indicators. The design of Tactile Ground Surface

Indicators must be approved by the Responsible Authority prior to installation.

- 31 No advertising signs must be erected, painted or displayed on the land without the written permission of the Responsible Authority, unless in accordance with the exemption provisions of the Melbourne Planning Scheme.
- 32 This permit will expire if one of the following circumstances applies:
 - (a) The development is not started within two years of the date of this permit.
 - (b) The development is not completed, or the use is not started, within four years of the date of this permit.

An application may be made to the Responsible Authority for an extension of the periods referred to in accordance with Section 69 of the *Planning and Environment Act 1987*.

--- End of Conditions ---