



14. NOTICES OF MOTION

I, Councillor Andrew Bond, give notice that I intend to move the Motion outlined below at the Ordinary Meeting of Council on 16 August 2023:

Motion: Middle Park Hotel VCAT Decision Planning Implications

That Council:

1. Write to both the Victorian Minister for Planning, and Shadow Minister for Planning and inform them of the 13th April 2023 VCAT decision which recognises 'Existing Use Rights' at the Middle Park Hotel for the sale and consumption of liquor, which in turn allows the extension of the 'red line area' including to the proposed roof top.
2. In this letter, highlight that the implications of this decision by VCAT is to strip the City of Port Phillip of its previously held ability under the Planning Scheme to impose fair and reasonable conditions over some licensed venues, and other businesses and properties where Existing Use Rights are established as per the precedent set by aforementioned VCAT decision.
3. Requests that the State Parliament restore this planning power to Local Government through the legislative process available to it.

Supporting information:

Planning application **PDPL/0139/2021** was determined at Planning Committee meeting on 28 July 2022. The committee resolved to issue a Notice of Decision to grant a planning permit (NOD) for;

Partial demolition (external demolition), construction of buildings and works to create a roof top terrace to accommodate an additional 200 patrons, extension to the existing 'red line' area for the sale and consumption of liquor (to the roof top terrace) and waiver of the car parking and bicycle parking requirements.

It was resolved at the meeting, a majority of City Of Port Phillip Councillor's voted to issue Notice of Decision to Grant a Planning Permit (NOD) at the Middle Park Hotel (MPH), subject to conditions. In a motion I moved, the revised conditions included a limit on patron numbers to no greater than 200 (condition 11) and no live music on the proposed roof top deck (condition 7), hours for the sale and consumption of liquor on the proposed roof deck were limited to no later than 9pm Sunday to Thursday and 10pm Friday and Saturday under Condition 10 (a reduction of one hour from the officers recommendation).

Subsequently, objectors to the planning application appealed Councils NOD, and took the applicant and Council to VCAT for a review of this decision. Given that they were going to VCAT anyway, the applicant - MPH - decided they would also challenge Councils conditions.

Whilst the objector and conditions appeal were pending, the applicant lodged a further appeal to determine whether a planning permit would be required to extend the area allowed for the sale and consumption of liquor and to increase patron numbers and hours of operation for that purpose. This was separate to the merits hearing outlined above.

In doing so they argued the MPH benefited from 'Existing Use Rights' as the site had operated as a bar / hotel continuously on the site for more than 15 years, and therefore did not require a planning permit for the liquor licence extension to the roof top bar and subsequently amenity conditions placed on the NOD was no longer required. As part of their case they relied upon the context of another VCAT decision noted as *Kevak Hotels Pty Ltd v Darebin CC 2022*. The Kevak

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decision essentially ruled that a hotel premises, which has established existing use rights to operate as a hotel / bar and sell liquor, can extend/vary the restrictions of a Liquor licence without the need to apply for a planning permit.

Following on from the preliminary hearing under the MPH appeal, VCAT issued a decision on 14th of April. A brief summary of the decision is provided below.

There are essentially two parts to the VCAT ruling.

Firstly VCAT decided all of Council's conditions for the MPH proposed rooftop bar in the NOD with regards to alcohol service, operating hours, patron numbers, music etc are to be removed as conditions in the NOD as VCAT has determined that the MPH benefits from existing use rights which cover all of the existing Hotel's built form, including the proposed rooftop space. The implication of this VCAT ruling directly on Council's MPH decision is that the MPH were not required to apply for a planning permit for any of these specific use items, and any other items that are considered 'use' conditions, as these conditions have been determined to be 'as of right', and therefore do not require changes to a planning permit in order to be altered by the MPH. Of more immediate concern, is that whilst this decision directly impacts the MPH rooftop proposal, the precedent set by this VCAT ruling has ramifications for all of Port Phillip, as well as the rest of the state.

Basically, this ruling determines that every Pub and Hotel in Melbourne, so long as they have been continuously operating for 15 years or more, is no longer required to apply to their relevant Local Government authority in order to make alterations to their existing planning permit with regards to patron numbers, operating hours, and any other 'use' conditions that would previously require a planning permit be granted in order to be altered, so long as the hotel are not proposing to expand their trading area outside of their existing built form - including vertically - and that the existing built form now includes any existing rooftop space whether the Hotel rooftop has an existing rooftop bar or not.

This precedent could also have ramifications for other businesses, buildings, & planning applications in Port Phillip such as Supermarkets, Shops, Restaurants and Café's to name a few.

The second part is that the MPH still require a planning permit for the necessary building works associated with any rooftop bar proposal. The result of the two rulings effectively restricts the remaining VCAT hearing. This will result in a four day merits hearing to conclude in November 2023.

The only way this decision can be corrected is via a legislative change passed by State Parliament, and we request that the Government, and the Opposition work together to make this change and restore Councils ability to apply fair and reasonable conditions to its planning decisions, so it can continue to maintain a balance between an applicant's rights, and our resident's amenity as we see fit.

VCAT references.

[Kevak Hotels Pty Ltd v Darebin CC \(Corrected\) \[2022\] VCAT 318 \(31 March 2022\) \(austlii.edu.au\)](#)
[Phelan v Port Phillip CC \[2023\] VCAT 376 \(13 April 2023\) \(austlii.edu.au\)](#)