

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NOS. P1335/2016 &  
P1753/2016  
PERMIT APPLICATION NO. P673/2015

**APPLICANT** Key Infrastructure Australia Pty Ltd

**RESPONSIBLE AUTHORITY** Port Phillip City Council

**SUBJECT LAND** 103 Beach Street & Part Lot O, Plan of  
Subdivision 406491Q  
PORT MELBOURNE VIC 3207

**WHERE HELD** 55 King Street, Melbourne

**BEFORE** Dalia Cook, Presiding Member  
Gregary Chase, Member

**HEARING TYPE** Hearing

**DATE OF HEARING** 21, 22, 23 November 2016

**DATE OF ORDER** 22 December 2016

**DATE OF CORRECTION** 21 March 2017

**CITATION** Key Infrastructure Australia Pty Ltd v Port  
Phillip CC (Corrected) [2016] VCAT 2172

**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: Key Infrastructure Australia
  - Drawing numbers: TPV-01 to TPV 25 (excluding TPV 04), TPV 33
  - Dated: 30 September 2016
- 2 The decision of the Responsible Authority is set aside.
- 3 The use and development of the land at 103 Beach Street & Part Lot O, Plan of Subdivision 406491Q, Port Melbourne pursuant to clauses 2.0 and 3.0 of Schedule 1 to the Comprehensive Development Zone are approved, generally in accordance with the plans to be endorsed under the planning permit granted in proceeding No. P1335/2016.

- 4 In permit application P673/2015 a permit is granted and directed to be issued for the land at 103 Beach Street & Part Lot O, Plan of Subdivision 406491Q, Port Melbourne in accordance with the endorsed plans and on the conditions set out in Appendix A. The permit allows:
- Construction of a building and carrying out of works in the Comprehensive Development Zone
  - Buildings and works for accommodation – pursuant to the Environmental Significance Overlay
  - Reduction of parking pursuant to Clause 52.06
  - Waiver of (on site) loading bay requirement pursuant to Clause 52.07.

Dalia Cook  
**Presiding Member**

Gregary Chase  
**Member**

## **APPEARANCES:**

For Key Infrastructure  
Australia Pty Ltd

Mr Tom Pikusa of Counsel, instructed by  
Harwood Andrews

He called the following expert witnesses:

- Mr Robert Milner, Town Planner, 10 Consulting Group
- Mr James (Jim) Holdsworth, Architect and Urban Designer
- Mr Andrew Hutson, Architect
- Mr Michael Marsicovetere, Traffic Engineer, Transport and Traffic Solutions Pty Ltd
- Mr Thad Patradoon, Landscape Architect, TT-Design.

The permit applicant also relied on the evidence of Mr Gary Wertheimer, Environmental Scientist, GIW Environmental Solutions Pty Ltd as filed with the Tribunal.<sup>1</sup>

For Port Phillip City Council

Ms Teresa Bisucci, Solicitor, Best Hooper

She called Mr Tim Biles, Town Planner, Message Consultants Australia Pty Ltd to give expert evidence.

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<sup>1</sup> He was not required to attend the hearing.

## INFORMATION

Description of Proposal	<p>Construction of a three storey building comprising a supermarket and café at ground floor with 14 apartments at first and second level. Basement car parking is proposed, in addition to at grade parking within and to the north of the subject land.</p> <p>A shared pedestrian/bike path is proposed to be provided within an undercroft arrangement on the eastern side of the property for a width of 5 metres at ground level.</p>
Nature of Proceedings	<p>Application under Section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time<sup>2</sup> (P1335/2016)</p> <p>Application under 149 of the <i>Planning and Environment Act 1987</i> – to review the responsible authority’s refusal to grant consent under various planning controls. (P1753/2016)</p>
Zone and Overlays	<p>Comprehensive Development Zone (Schedule 1) (CDZ)</p> <p>Environmental Audit Overlay</p> <p>Heritage Overlay (part)<sup>3</sup></p>
Permit Requirements	<p>Construction of a building and carrying out of works in the CDZ<sup>4</sup></p> <p>Buildings and works for accommodation - Clause 3.0 Environmental Significance Overlay</p> <p>Clause 52.06-3 to reduce on-site car parking</p> <p>Clause 52.07 to waive the requirement for an on-site loading bay</p>

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<sup>2</sup> Section 4(2)(d) of the *Victorian Civil & Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

<sup>3</sup> We were advised that a permit had been issued by Heritage Victoria on 26 November 2015 for the proposal in line with application plans at the time of the responsible authority’s determination. This will require some modification to accord with the plans to be endorsed under the planning permit but no separate permission is required under the Heritage Overlay in these circumstances.

<sup>4</sup> Aspects of the use do not require planning permission since the condition 1 requirement for the responsible authority to be satisfied with the provision of car parking is met. The uses of land may vary from the Concept Plan and Precinct Plan if in accordance with a plan prepared to the satisfaction of the responsible authority.

Consent Requirements	<p>Use to be in accordance with a plan prepared to the satisfaction of the Responsible Authority – Clause 2.0 of Schedule 1 to the CDZ</p> <p>Development to be in accordance with a plan prepared to the satisfaction of the Responsible Authority – Clause 3.0 of Schedule 1 to the CDZ</p>
Relevant Scheme, policies and provisions	<p>Clauses 10, 11, 15, 16, 17, 21 and 22.06 (Urban Design Policy for Non-Residential Development and Multi Unit Residential Development), 22.12 (Stormwater Sensitive Urban Design), 22.13 (Environmentally Sensitive Development) in addition to the matters in clause 65 of the Port Phillip Planning Scheme</p>
Land Description	<p>The land is an irregularly shaped block of 1,361 square metres in area, located at 103 Beach Street, Port Melbourne. It includes a portion of Crown Land known as Part Lot O on Plan of Subdivision 406491Q. The portion of Crown Land which requires works relates to the widening of the vehicular access point from Beach Street and the car parking area.</p> <p>The land is presently developed with a two storey building with a prevailing overall height of 8.7 metres. There is a supermarket at Ground Floor level, with offices at First Floor level. The associated tower element to this building has a height of 12.1 metres.</p> <p>The land fronts onto an area known as Waterfront Place.</p> <p>To the north, just outside the boundary of the Land, is Crown Land which is constructed as a carpark. To the west along Beach Street, is a three storey multi dwelling building. To the east is 1-7 Waterfront Place, for which Council has recently received an application for a tower/podium development of part 10 storeys. To the south is the foreshore, Station Pier (including the commercial operations of the Spirit of Tasmania and other cruise ships) and restaurants. Areas around the subject land are available for use by the public, including the Port Plaza to the immediate south.</p> <p>The tram line and historic station building are located to the immediate east, with a shared bicycle/pedestrian path connecting the Bay Trail with areas to the north, east and west.</p>
Tribunal Inspection	<p>We inspected the subject land on an accompanied basis midway through the hearing. We inspected the broader surrounds on an unaccompanied basis at the same time.</p>

## REASONS<sup>5</sup>

### INTRODUCTION

- 1 The Beacon Cove foreshore and surrounds provide significant recreational, tourism, commercial and residential opportunities. The subject land is opposite Station Pier, within an open setting surrounded by public land. This setting includes the tram line and heritage station to the immediate east, a public plaza circulating around the site and pedestrian/bicycle paths which form part of the Bay Trail.
- 2 The site is currently developed with a building constructed in the 1980's of predominantly two storey form with a clock tower element. It provides a supermarket, post office and offices at upper level. Crown land to the north is used for public parking in connection with the current use of the land. Loading occurs within a loading bay to the west of the building, which benefits from an easement of way in favour of the subject land.
- 3 The site is proposed to be redeveloped and modernised. A uniformly three storey building is proposed with flat parapet roof, to include a specialised supermarket and café/bakery at ground level with residences above.
- 4 The proposal would also involve the realignment of the existing pedestrian/bicycle path (shared path) to an undercroft on the eastern side of the building, by giving over a 5 metre wide strip of land at ground level for public use along the depth of the site. This arrangement would continue to the immediate north on the Crown Land. The realignment of the shared path would facilitate the duplication of the existing tram line, which we were advised is a short term priority of Public Transport Victoria/Yarra Trams.
- 5 A number of aspects of the use and development require permission under the zone and specific controls. In addition, consent is required from the responsible authority for both the use and development of the land because the use or development of the land was not in accordance with a plan that was prepared to the satisfaction of the responsible authority.
- 6 The proposed land uses were supported by the responsible authority but the overall design, presentation and function of the proposed building was the cause for concern. The responsible authority considered that this building should in effect be the centrepiece of the proposed Port Plaza, and that this site represented an opportunity for a high quality architectural response that did not eventuate.
- 7 Permission is also required for buildings and works under the Environmental Significance Overlay, but the proposal was non-controversial having regard to the objectives and decision guidelines of that overlay. Likewise, the parties agreed that issues under the Environmental Audit Overlay could be dealt with by permit conditions if the proposal was otherwise supported.

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<sup>5</sup> We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. We do not recite or refer to all of the contents of those documents in these reasons.

- 8 Numerous aspects of the proposal were accepted by the responsible authority as appropriate, including the:
- scale of the building;
  - general consistency with the Beacon Cove Concept Plan No. 1 and Precinct Plan No. 1;
  - mix of uses proposed, including the provision of housing in a location with good access to services, recreation areas and public transport;
  - concept for the relocation of the shared pedestrian/bicycle path (shared path) on the eastern side of the subject land;
  - proposed three level form - aside from its overall height, which was opposed given overshadowing consequences; and
  - proposed residential access via Crown land and proposed reconfiguration of parking areas to the north of the subject land to facilitate the proposed development and use.
- 9 Notwithstanding, the responsible authority determined that it would have refused to grant a planning permit and refused relevant consents under the planning controls for the following reasons, in summary<sup>6</sup>:
- the proposal was inconsistent with policy and the CDZ;
  - the proposal represents an overdevelopment of the land and does not constitute orderly and proper planning;
  - the building design and architectural treatment does not draw on the site's prominent location and would fail to provide an appropriate urban design response to the public realm; and
  - it would result in unreasonable visual bulk and overshadowing impacts to the adjacent public realm.
- 10 The concerns of the responsible authority arose having regard to the context of the building in a prominent location, surrounded by public land. This was referred to throughout the hearing as the "heightened level of expectation" for a building on this site.
- 11 In this context, the responsible authority submitted that the layout, design and functionality of the building did not ensure an acceptable interface between the proposed building and its setting. It was particularly concerned with its affect on the future public realm of Port Plaza, which was intended to redefine Waterfront Place.
- 12 The permit applicant submitted that the proposal responded acceptably to its policy and physical context. To the extent that the responsible authority raised concerns with the proposal, it regarded these as going to matters of detail that were able to be the subject of conditions of any permit that may issue.

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<sup>6</sup> The ground relating to unacceptable internal amenity was withdrawn after consideration of the amended plans.

## CONSIDERATION OF THE APPLICATION

### Policy and site context

- 13 There are a number of planning controls and policies relevant to the proposal and to strategic goals for this part of the foreshore. They include the designation of various precincts via earlier concept and precinct plans.
- 14 The purposes of the CDZ include the implementation of the Beacon Cove Concept Plan No. 1 and the Beacon Cove Precinct Plan No. 1. The site is identified within Precinct 5, Commercial and Leisure Precinct in the Precinct Plan No. 1.
- 15 The role of public access to an attractive waterfront is emphasised in the purpose of the zone and the site is to be recognised as the prime maritime gateway to Melbourne. The purpose of the CDZ also seeks to provide an integrated, safe, low maintenance, high quality open space network connecting with existing open space and the waterfront. The creation of an efficient and attractive local street network is sought. Particular features of the setting (such as the former railway station building) are to be protected and enhanced.
- 16 We accept the responsible authority's submission that it is evident from the CDZ that the public environment and the interaction of any new development with public areas are key considerations when considering any redevelopment proposal. This is reinforced by state and local planning policies, including clauses 15.01-2 which provides urban design principles, clause 21.05 which addresses the interaction between the private and public realm, and the urban design policy in Clause 22.06.
- 17 In a policy sense, the site has characteristics of a substantial residential growth area. However, it has a minimal change policy designation to account for the applicable Heritage Overlay.
- 18 Clause 22.06 relevantly calls for consideration of street level frontages and encourages buildings to be designed to offer visual interest; provide social interaction, safety and shelter; and provide pedestrian entrances easily identifiable from public places.
- 19 Guidance is also provided in the Port Melbourne Waterfront Urban Design Framework 2013 (UDF), adopted by the responsible authority in November 2013<sup>7</sup> but not incorporated into the planning scheme in any form at present. This document is expressed to guide the enhancement and maintenance of public land in the area but specifically excludes private land in the precinct. The area is known as Precinct 3 and we have had regard to the future directions statement for this precinct in the UDF.
- 20 Diagrams and descriptions within the UDF explained that the public realm to the south of the site was underutilized, and should be established as "a new civic heart for Waterfront Place." Port Plaza is proposed to be upgraded, identified as an "important civic location and key terminus for

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<sup>7</sup> Being a document within the category of section 60(1A)(g) of the *Planning and Environment Act 1987*.

trams, ferries, and ships”. Its role in reinforcing the Bay Trail is prioritised in the document.

- 21 Sketch designs in the UDF show Port Plaza with a shade canopy over café terraces and informal seating; realigned light rail connections; an interactive water feature; new laneway passage; and café seating to the north side of the plaza with shading devices covering both seating and walkways.
- 22 In general, we find that the UDF provides an outline framework for the aspirations of the council and the community for the future of this precinct. In real terms, however, we find it of limited assistance to this proceeding since its objectives are quite broad-brush and guidance for spaces near the subject land is comparable to a draft schematic concept in urban design terms. It has also not been incorporated into the planning scheme with the level of specificity required for it to be most useful. Mr Biles advised that design guidelines are being prepared for this precinct with the intent to incorporate them into the planning scheme to give effect to the UDF.
- 23 A starting point for assessing the proposal is that the plans incorporated or referenced under the planning controls provide for a building of three storeys on this height, which accords with the proposal before us.
- 24 By way of background, the application was evaluated by the Office of the Victorian Government Architect (OVGA).<sup>8</sup> It generally supported the architectural approach and stately design, which was thought to be reminiscent of grand public architecture in Melbourne. At the same time, it suggested that the external facades were too driven by the internal layout and would call for reappraisal to respond to the differing urban conditions around the site.
- 25 Notably, the OVGA also recommended that a broader analysis of the site was required, that the proposal lacked the place-making potential of the site, and basically that “the proposal does not meet the objectives of the UDF and the potential of the site location in balancing the context as both a local and international gateway.”
- 26 Cases such as this involve inevitable consideration of a multitude of issues. This is focused by the relevant suite of planning controls that apply to the proposal. For the purposes of these reasons, we have focused principally on the issues in dispute between the parties in the proceeding and the evidence provided on these matters.

### **Summary of issues and opinions**

- 27 A fundamental concern of the responsible authority was the lack of responsiveness of the development proposal to its setting. It emphasised the subject land within a “strategically important location on Port Melbourne’s waterfront”, intended to contribute to a new civic heart or arrival point to Waterfront Place.

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<sup>8</sup> Which is an expert advisory body but not a referral authority under the planning controls.

- 28 The responsible authority submitted that the proposal has not capitalised on the designation of the area surrounding the land as the “Port Plaza”. It emphasised its purportedly inadequate spatial relationship with the public realm, compounded by the design response created by the ill-defined entrances and interfaces of the building.
- 29 It submitted that the architectural expression and treatment of the building did not befit the site’s prominent location. It also highlighted that no onsite landscaping was proposed and that there was a consequential reliance on adjoining Crown land to provide a transition to important public spaces.
- 30 We accept that the subject land can be described as unique. All experts regarded it as effectively an island site of private land surrounded by public land, making it visible ‘in the round’ and giving it prominence.
- 31 The responsible authority and Mr Biles referred to the site as constituting the terminating view from Station Pier, which in the responsible authority’s view, would qualify it as “an architectural centrepiece in that view cone and in the future Port Plaza”.
- 32 We do not regard the location and role of this site as elevating it to this level of significance. Having regard to our findings throughout this decision, we do not consider that the site itself or the planning scheme policies and controls dictate that a prominent or iconic building is warranted, or that this would necessarily be an appropriate outcome for the site.
- 33 The test before us is one of acceptability having regard to the physical and policy setting.<sup>9</sup>
- 34 With respect, even after reflecting on the submissions and evidence, we find it difficult to pinpoint what the responsible authority is seeking in terms of the particular architectural design and presentation of a building on this site. In any event, we agree with Mr Milner that it does not appear to us that these aspirations are reflected in the underlying planning controls or policies, which are couched in more general terms for this site and surrounds.

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<sup>9</sup> This was confirmed as the test in the decision of *Rozen v Macedon Ranges SC & Anor* [2010] VSC 583, rather than ‘ideal outcomes’.

- 35 We prefer the assessment of Mr Holdsworth and Mr Hutson, that the site has various public exposures but that there is no particular impetus for prioritising the north-south axis along Station Pier to the subject land above other viewlines.
- 36 We also accept Mr Holdsworth's opinion, which corresponds almost directly with that of Mr Hutson that the architectural response, styling and materials will contribute to a refined, elegant building of suitable proportions and a somewhat stately presentation.
- 37 We agree with Mr Hutson that the proposal is a generally well considered architectural outcome that would not overwhelm the public spaces around the building. Significantly, we find that a building with these characteristics would represent a comfortable fit within the Port Plaza environs and would also provide an important backdrop within which other features of the setting could be appreciated in line with policies in the CDZ.
- 38 We are therefore not persuaded that the design response would undermine the strategic vision for the area or that it would represent a lost opportunity to provide for an engaging and enticing public place.
- 39 Without downplaying the need for acceptable development of the subject land, the property itself needs to be understood as but one of a number of integrated components that define and give character and functionality to the Port Plaza and its surrounds. It is influenced similarly by development which frames the edges of the plaza and continues towards Station Pier or to the higher components of Beacon Cove to the west. This influence will expand as new development on 1-7 Waterfront Place emerges.
- 40 The presentation of the site is also significantly influenced by the layout and design of the public realm, amongst other things such as transport/movement opportunities and the location of parking. At present, it is the latter which is underperforming compared with its potential. We adopt the approach of Mr Holdsworth that a positive aspect of the proposal is that it has adopted a relatively neutral architectural approach and styling, such that it leaves the 'place-making' largely to the public realm.
- 41 We are conscious that clause 22.06 encourages landscaping to be used to integrate new buildings and pedestrian spaces as well as to provide an attractive outlook. We note that the current building on the subject land does not provide any meaningful onsite landscaping. The new building design for the most part follows site boundaries and does not incorporate planting at ground level along the peripheries of the building - with the exception of the green wall proposed on the western side near the loading bay, and the scope for planting beside the shared path subject to council preference.
- 42 This would be supplemented by planted areas adjacent to the entryways to the north (enhanced by permit condition), as well as a consistent presentation of trailing potted succulents from all residential balconies. We regard this as acceptable, bearing in mind that the immediate setting

(as distinct from other conventional residential areas of Beacon Cove) is not characterised by generous or notable in-situ landscaping (either in a physical or policy sense) and the environment is a relatively exposed and harsh one.

- 43 We now turn to each of the main alleged deficiencies in the design response as identified by the responsible authority in the proceeding.

### **Acceptability of the location and design of building entrances**

- 44 The responsible authority submitted that the pedestrian spaces proposed are awkward, narrow and that they would be unable to be properly identified from the public realm. Mr Biles was of the opinion that this pivotal site needed to improve circulation through the area and reduce points of conflict as a key objective.
- 45 The responsible authority and its expert witness Mr Biles also took issue with the proposal for three entrances and three lift cores to the residential apartments, as well as the proposed main supermarket/café entry near the south eastern corner of the building. It submitted that these entries were unsuitably located and lacked adequate design definition.
- 46 It sought the consolidation of all dwelling access points to a single access point that would be clearly identifiable on the approach to the building and expressed in its architectural response.
- 47 In our opinion, a significant benefit of the three residential lift cores is the ability to provide north-south orientated apartments as has been configured on the uppermost level. This provides dual outlook, cross ventilation and a range of living opportunities.
- 48 We note, however, that this opportunity has not been taken up for the residential apartments on the central level which could possibly have been serviced by a single lift core with wider passageways. We find that this arrangement is acceptable, since we regard the three residential entries at ground level as suitably functional and reasonably dimensioned and laid out, and that the two differently configured levels provide a variety in apartment layouts.
- 49 To some extent, we share the concerns of the responsible authority that these entries are insufficiently well designed in terms of their external presentation. This is compounded by the fact that the central residential entry would present beneath an undercroft arrangement, accessed via a relatively narrow entry between at-grade parking spaces.
- 50 However, the subsequent plans provided in response to our preliminary order have substantially demonstrated that a suitable design and treatment could be achieved by way of amended plans (generally in line with the computer renderings tendered at the hearing). This would principally involve deleting an at grade car space on either side of the entry to the central residential lobby, and providing improved landscaping to this area.
- 51 We turn to the south east entry for the supermarket and café. Having heard the submissions and evidence and supplemented by our site inspection, we find that this is an appropriate and logical point of entry.

We accept that it may have been possible to design a central entry for the southern façade, which would have been more aligned with the direct axis to Station Pier and the centre of the Port Plaza.

- 52 However, we agree with Mr Hutson and Mr Milner and find that the south eastern entry would better respond to pedestrian connectivity and the more popular paths of travel, which centre around the tram line and bicycle/pedestrian path on the eastern side of the property. This is expected to be perpetuated and consolidated with the duplication of the tram line and realignment of the shared path.
- 53 We agree with the responsible authority that the internal ‘walkway’ is unlikely to constitute a public accessway through the building for pedestrians who are not customers of the ground floor uses. It is also unclear whether this access would be trafficable outside standard business hours, however during regular hours it would provide a more sensible and direct route from one side of the building to the other. We regard this as sufficiently functional.
- 54 We consider the presentation of the southern elevation to the plaza and surrounds subsequently in these reasons.

### **Internal layout**

- 55 The responsible authority originally had concerns with the layout of various apartments at levels 1 and 2 of the building. These centred on access to daylight and outlook.
- 56 The amended plans sought to address these concerns, principally by shifting ‘inboard’ bedrooms orienting towards central lightwells, to the perimeter of the building. This would provide direct sunlight to all bedrooms, supplemented by internal light courts for additional light to open studies near the centre of the building.
- 57 These measures generally satisfied the responsible authority that an adequate level of internal amenity would be provided for future residents. At the same time, the redesign of the floorplates has resulted in a notable narrowing of the external outlook living/dining rooms where views to the city or foreshore are an important site opportunity. While this is somewhat regrettable, we ultimately regard this as a legitimate choice for the permit applicant.

### **Presentation of the southern elevation**

- 58 If a permit was granted, the responsible authority sought to impose a condition requiring increased glazing to the southern façade, with requirements to prevent the windows from being obscured (by shopfittings or the like).
- 59 The permit applicant had originally proposed an integrated canopy projecting above the ground floor into the adjacent public plaza. The responsible authority had required the deletion of this structure since it considered that it was not appropriate to allow a protrusion into this public space, particularly when the ultimate layout and design of that space had not been finalised.

- 60 As indicated at the hearing, we would have preferred a canopy treatment to this façade to provide improved definition between the ground level commercial uses and the residential uses at its upper levels. However, we respect the decision made by the responsible authority in its capacity as land manager.
- 61 We find that a sufficient design gesture could be achieved in line with design sketches provided in response to our preliminary order showing a 500mm high x 300mm deep recess between Ground and First Floor Level at the southern elevation, with a charcoal Alucobond insert running horizontally.
- 62 Whilst it may have been possible to incorporate a centrally positioned southern entry point, it is difficult for this permit applicant to envisage the future interface with the redesigned plaza layout. In practise, an ongoing direct path of travel is not guaranteed since the future layout of the Port Plaza is at this point in time unknown. A side entry would provide far greater flexibility for the future redesign of this public space which is an essential part of the works contemplated by the UDF, without constraints arising from the development of private land.

### **General Treatment of the Glazing Systems and External Façade**

- 63 There was discussion at the hearing about more detailed aspects of the design, largely at our instigation. As mentioned earlier, the context of the site means that the building will have a prominence and a presence in its setting that needs to be managed carefully via its design (including fenestration) and external materials/finishes.
- 64 This includes the character of the dropped portico entries to the residential lobbies, the exposed aggregate finish, typical internal/external windows, the glazed balustrades over planter boxes, and the vertical garden features on external columns.
- 65 Subsequent drawings were provided at our request after the hearing finished, which clearly indicated both in description and by drawings the probable treatment for these areas of concern. Capral or similar charcoal alloy frames were to be provided to the Ground Floor supermarket glazing. Typical internal/external frameless glass bifold doors were proposed along the building façade, with framed sliding doors to habitable rooms. Murray River red gum timber slats were to separate balconies, and ‘vertical gardens’ fixed to tensile or mesh supports would frame external concrete columns. We support the inclusion of these design features, and recommend they be included via permit conditions requiring amended plans to be submitted for approval.
- 66 Given the need for care in the implementation of aspects of detailed design and external materials, we have imposed a permit condition specifying the ongoing contribution and oversight of this project by a qualified and registered architect. This was not opposed by the permit applicant.
- 67 Any future application for the erection and display of advertising signage would need to be carefully assessed to ensure that it was adequate for its

purpose whilst being sufficiently sensitive in terms of its scale, location and design.

### **Realignment of the shared path and interface with the proposed building**

- 68 The responsible authority submitted, in effect, that the proposal to accommodate the realignment of the shared path was a ‘necessity’ in circumstances where the tram line would be duplicated and the shared path would otherwise be interrupted.
- 69 With respect, we take a different view. We agree with Mr Milner that there is no legal requirement for the shared path to be provided on the subject land. Likewise, no provision has been made for it on title to the land or in the planning controls, such as by easement or a Public Acquisition Overlay.
- 70 We consider that the continuation of the shared path on the subject land is a factor to be balanced in assessing whether the proposal as a whole provides for sustainable development and net community benefit in line with clause 10 of the scheme.
- 71 In reality, the permit applicant’s offer to continue the shared path on its land will facilitate the dual outcome of the duplicated tram line whilst maintaining the important connection of the shared path in this location. This is in the context of inadequate public land having been set aside for both. We regard this as a significant public benefit provided on private land.
- 72 We have considered the mechanism by which the realignment of the shared path should be secured. The permit applicant can elect to secure the future provision of the shared path via an agreement under section 173 of the *Planning and Environment Act 1987* or alternatively, via the creation of an easement on title applying to the ground level.
- 73 Much discussion and evidence at the hearing concerned the proposed interface between the eastern façade and the shared path. The responsible authority submitted that the location of the path below the building overhang would distort the visual connectivity with the path to the north or south.
- 74 We consider that it is appropriate to seek to confine entry/exit points to the cafe along the shared path as proposed at single points to the north and south to avoid conflicts between pedestrians and bicycles. This would be supported by the treatment of the eastern elevation which would provide folding doors with a plinth treatment or intervening customer benches.
- 75 The combination of these design measures would provide an opportunity for direct surveillance/visual interaction between people inside the building and on the path.
- 76 It is not unusual for bicycle paths or pedestrian paths to include at least minor portions in an undercroft or under-bridge arrangement and this can also have some positive shading relief. With respect, we are not overly concerned about the impact of realigning the shared path via an undercroft arrangement to the east of the building. The undercroft has

been designed with a height of 5 metres above finished floor level, and the level above has been chamfered to allow for regulated tram line clearance. The length of the undercroft would only extend some 22 metres. This arrangement which would be open to one side would not in our opinion detract from the obvious alignment of the path past the site.

- 77 In our opinion, we agree with the experts for the permit applicant that the main north-south viewline to be preserved is that which aligns with the tramline and creates spacing between the subject land and the heritage station building. This would be maintained irrespective of the proposal.

### **Adequacy and functionality of car parking**

- 78 The responsible authority accepted that the proposal provided sufficient car parking for the use of the land for a shop, convenience restaurant and dwellings, making these land uses as-of-right in the Comprehensive Development Zone (CDZ). We accept this assessment having regard to site conditions, the nature of the uses, the provisions of clause 52.06 and the officer assessments in this regard.
- 79 Likewise, access via part Lot O to the north of the subject land was accepted in principle by the responsible authority, as was the design and functionality of this access as proposed in the application plans.
- 80 The issue in dispute centred around the provision of car parking to the north of the subject land, partly within the title to the property and extending into Crown Land which is currently used for car parking and accessways.
- 81 During the hearing, the responsible authority submitted that it would be preferable for the six car parking spaces within the northern building undercroft to be deleted and replaced with improved landscaping and entry treatments.
- 82 Proposals such as this always involve a balance between issues of design and functionality. In this case, we accept the evidence of Mr Marsicovetere that there is an empirical demand for 17 car parking spaces<sup>10</sup> to service the retail and food and drink premises within the building (18 were proposed in the amended plans, with 12 on Crown land and 6 mostly within the subject land). There is also extremely limited car parking availability in the immediate area within convenient walking distance, although public transport is at the site's doorstep.
- 83 There is a need to balance parking policies which seek to ensure that adequate on site parking is provided for commercial uses, with policies that seek to ensure an appropriate presentation of buildings and service areas to the public realm.
- 84 In this case, we consider that the balance should be struck by deleting the two car parking spaces within the undercroft closest to the central residential entry on the northern side of the development. This would facilitate a widened and improved entry and landscape treatment which would be more commensurate with the treatment of the residential entries

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<sup>10</sup> At a rate of 2.6 spaces per 100 square metres.

to either side. It would also maintain the majority of these spaces for use in connection with the commercial tenancies. It would result in an empirical shortfall of a single space, which would be acceptable given public transport links, increasing residential populations within walking distance of the subject land and the relatively high turnover of spaces within the car park.

- 85 In arriving at this decision, we have also had regard to the nature of the northern interface. It directly abuts a car park, with conventional residential development further north. We consider that this part of the building at ground level will not meaningfully impact on one's experience when travelling along the tram line or the shared path.
- 86 To the extent that it will be visible to passing pedestrians or from the wide landscaped street verges, the building will present acceptably at upper levels with its understated design and subdued mix of materials and the entry design at the lower level will be refined to a level of acceptability.
- 87 We consider that it is important to secure the ongoing availability of the car parking spaces for the supermarket on Crown Land to the north of the subject land. This finding was reinforced by the traffic engineering evidence. To avoid any doubt, we consider it vital to impose a requirement that the car parking spaces on public land to the north continue to be available to service the commercial tenancies.
- 88 However, that land is not under the control of the permit applicant. Evidence of a lease or licence in favour of the permit holder (for access and car parking) would need to be demonstrated before the development could commence and this would need to be maintained throughout the life of the approved use and development.
- 89 We are not proposing to impose a permit condition requiring the committee of management to not unreasonably withhold its consent or the like since this would go well beyond the Tribunal's power in the current proceeding. In any case, we were advised that the council was prepared to enter into a long term licence to facilitate this parking on an ongoing basis.
- 90 It is important for the physical construction of the car parking and landscaping areas within Crown Land to the north to match the application plans in order to suitably service the use and development of the subject land. The responsible authority indicated that it would permit the physical works to the carpark and associated landscaping to align with the development proposal (viewed in integrated plan form on TPV-02). This will be the subject of separate agreements between the permit holder and the responsible authority. A permit condition will require the access to be constructed before the uses can commence.

### **Overshadowing public spaces**

- 91 A purpose of the CDZ seeks to create attractive public areas and an appropriate environs for an entry point to Port Melbourne and its waterfront. Clause 22.06 directs our consideration to impacts of overshadowing on the public realm and the need to protect and enhance

public spaces. Policy directs a proposal to “maximise access to sunlight from key public, recreational and open space areas through sensitive design and siting of new development”.

- 92 Aside from this policy guidance, we note that there are no specific or quantitative policies in the planning scheme that seek to protect this particular area of public open space (i.e. the Port Plaza) from the impacts of overshadowing, compared with those policies in other local planning schemes such as those applying to the Yarra River.
- 93 The responsible authority conceded that a three level building would necessarily increase the extent of overshadowing to the south. At the same time, it was dissatisfied with the *extent* of overshadowing that would result to the Port Plaza area directly to the south of the subject land. It submitted that this would compromise the vision for the area as contained in the UDF.<sup>11</sup>
- 94 The plans (even with a reduction in total building height from 14.7 to 13.5 metres) show that this extent of overshadowing would be reasonably significant for much of the day measured at the equinox between 9am and 3pm.
- 95 However, given the dimensions and the north-south orientation of the site, we regard it as inevitable that a building (even of three storeys) would cast significant shadows on the plaza.
- 96 The question in this case is whether the building height or footprint of the upper level should be reduced to commensurately reduce the extent of overshadowing to the plaza.
- 97 The responsible authority submitted that if a permit was granted, the overall building height should be reduced to a maximum height of 12 metres, with the upper level southern elevation (above 8 metres) set back at least 5 metres from the southern boundary.
- 98 The amended plans provide for a ground floor to ceiling height of 5 metres, which we regard as important for the functionality of the supermarket and also provides a generous public presentation of the building in this setting. Floor to ceiling heights for the apartments are 3 and 3.2 metres respectively which would reflect the intention to provide a quality residential offer.
- 99 We have had regard to the multiplicity of areas of public open space around the subject land, and the fact that the ultimate configuration and redesign of the Port Plaza is entirely ‘at large’ at the current time. We also agree with the concession by Mr Biles and Mr Milner that the UDF potentially contemplates some form of shading within and adjacent to the plaza to improve the public experience given its currently high level of sun exposure. We would regard the provision of sun protection in some areas as a suitable design aspiration.

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<sup>11</sup> We note that this was not regarded as a major concern by Mr Biles, who considered that there was a prospect of the building being re-shaped if required to improve the management of shadowing.

- 100 In this context, we are not persuaded that a level of shadowing adjacent to the building to the south would compromise the future plans for the redesign of these public spaces or would unreasonably detract from the enjoyment of these spaces by the public. We are therefore of the view that it would be unnecessary to reduce the height of the building or to pare back the upper level floorplate to its south elevation to achieve a reduction in overshadowing to this space. We think that such an excision would compromise the integrity of the overall design which exhibits a cohesiveness to all elevations and contributes to a uniform overall presentation.
- 101 As discussed at the hearing, we had considered potential gains by removing the roofing from the upper level balconies to the south elevation, but have found that this would also detract from the integrity and consistency of the overall building design.
- 102 We have explained why we have come to the view that the height and floorplates of the building are acceptable and why the multiple entry/lift concept is suitable. We have deleted suggested conditions that would seek to rework these aspects of the building.
- 103 We accept that it is reasonable for a site in this location and for a development of this scale to be required to provide integrated urban art, in line with council policy in clause 22.06 (notwithstanding the contribution to the shared path which is a very different type of community benefit).
- 104 We would have had significant reservations about attaching a minimum contribution by way of land or project value, but regard the re-worded condition circulated by the responsible authority as appropriate. If there is any dispute about the provision of artwork, the Tribunal could be requested to determine the matter since it has been expressed to be ‘to the satisfaction of the responsible authority’.

## **RESTRICTIVE COVENANT**

- 105 The covenant attaching to the land requires the consent of Mirvac to the proposed demolition, use and development of the property. We were advised that discussions between the permit applicant and Mirvac are progressing but, to some extent, are pending the outcome of these proceedings.
- 106 We accept the position adopted by the parties (supported by legal advice on behalf of each party) that the restriction in Instrument of Transfer No. X354973K is not a type of restriction that would prevent the grant of a permit under section 60(5) of the *Planning and Environment Act 1987*. The grant of the permit would not of itself ‘authorise anything which would result in a breach of the covenant’, so long as the requirement for consent before demolition, use or development was preserved by a condition of the permit.
- 107 We find it appropriate to impose a permit condition to require this consent to be obtained before any buildings or works commence under the permit so that there would be compliance with this restriction on title. As an

alternative, at the Tribunal's initiative, the condition has been expanded to allow for the removal of the covenant before works commence.<sup>12</sup>

## **CLAIM FOR REIMBURSEMENT OF FEES**

108 Section 115C of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) provides that:

- (1) Subject to subsections (2) and (3), an applicant to the Tribunal under section 79 of the *Planning and Environment Act 1987* is entitled to an order under section 115B that the responsible authority reimburse the applicant the whole of any fees paid by the applicant in the proceeding. . .

109 This creates a rebuttable presumption. The legislation specifies considerations relevant to the Tribunal's determination whether to decline to require the reimbursement of fees:

- (3) Subsection (1) does not apply if the responsible authority satisfies the Tribunal that there was reasonable justification for the responsible authority to fail to grant the permit before the application to the Tribunal, having regard to—
  - (a) the nature and complexity of the permit application; and
  - (b) the conduct of the applicant in relation to the permit application; and
  - (c) any other matter beyond the reasonable control of the responsible authority. [Tribunal emphasis.]

110 At the conclusion of the hearing, the permit applicant made a claim for reimbursement of the whole of the application fee in both proceedings and for all daily hearing fees.<sup>13</sup> This was on the basis that the responsible authority failed to determine the application within the statutory timeframe and a review proceeding was lodged under section 79 of the *Planning and Environment Act 1987* and that the section 149 proceeding was 'necessarily consequential'.

111 The application was lodged with the responsible authority on 29 June 2015. We were advised that there were numerous pre-application discussions with council officers before that time. Further information was received from the applicant on 11 January 2016, although it was considered by the permit applicant that the requests for further information did not 'stop the clock' because they did not meet statutory requirements. Notification concluded on 17 February 2016.

112 Based on the applicant's calculation accompanying the application for review, the failure proceeding was lodged with the Tribunal after 161 days (compared with the 60 day timeframe for a decision to be made by the responsible authority). The application to review the failure of the responsible authority to consent to plans being to its satisfaction was

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<sup>12</sup> Recognising that the Tribunal recently granted a permit for such removal for land at 1-7 Waterfront Place and that this may be a possibility for the subject land.

<sup>13</sup> Totalling \$15,138.80. The responsible authority drew our attention to the provisions of section 115CA(2) which would mean that the standard application and daily hearing fee (totalling \$4,962.70) would be potentially claimable, rather than the 'uplifted' fee for the application to be dealt with in the Major Cases List. This would appear to be more accurate.

lodged some weeks after this. We consider that the claims pertaining to both proceedings relate to the same set of facts, albeit there is no statutory presumption for an award of fees in the proceeding brought under section 149 of the *Planning and Environment Act 1987*.

- 113 The claim for reimbursement of fees in the second proceeding is made under section 115B of the VCAT Act. Relevant considerations include nature of, and issues involved in, the proceeding, the conduct of the parties and the result of the proceeding.
- 114 The applicant relied on the following factors in support of its claim for fees:
- The delays in processing the application were unreasonable, especially following substantial pre-application discussions;
  - Council was in error about the restrictive covenant being an obstacle to processing the permit application;
  - Its requests for further information did not ‘stop the clock’;
  - The application was not complex and the matters of concern to the responsible authority could have been addressed by permit conditions;
  - The responsible authority should not have relied on the OVGA report in the manner it did and its use of the UDF was overstated;
  - There was no conduct of the permit applicant that contributed to the delay and all matters of timing were within the control of the responsible authority.
- 115 The responsible authority resisted the claim for reimbursement of costs. We address salient aspects of its submissions below.
- 116 As to section 115C(3)(a), we accept that the matter was more complex than a conventional planning permit application since it involved:
- direct interactions with public land, whereby it was reasonable of the responsible authority and the permit applicant to concurrently negotiate arrangements for the relocation of the shared bike path, duplication of the tram line and permissions and access/layout works associated with the parking to the north of the subject land;
  - a permit being required from Heritage Victoria; and
  - a two stage process of assessment by the Office of the Victorian Government Architect given the significance of the site at a public entry point to Port Melbourne and its prominence in public views. This was undertaken with the consent of the permit applicant,
- 117 Distilling the material and submissions provided by the parties, it appears to us that processing of the permit application stagnated somewhat at two junctures for the following key reasons (in summary). The first was when the responsible authority communicated its position that the application was invalid because the consent of Mirvac had not been obtained for demolition or for the proposed development.

- 118 The second reason was that the responsible authority was not satisfied that the proposal was exempt from the need for a mandatory Cultural Heritage Management Plan.<sup>14</sup> The responsible authority therefore submitted that ‘time did not start to run’ for the purposes of section 79 of the *Planning and Environment Act 1987* until it was confirmed that the land in its entirety had been subjected to significant ground disturbance, such that no CHMP was required.
- 119 In broad terms, we can understand the concerns expressed by the responsible authority about each of these matters in light of the relevant statutory regime. Given our experience with these matters both within the profession and from the perspective of local government, we are of the view that the ‘hold up’ for each of these reasons could have been alleviated by prompt action by the permit applicant. This is relevant to considering the conduct of the applicant under section 115C(3)(b).
- 120 For one reason or another, it took the permit applicant some time before obtaining legal advice as required to refute the suggestion that the application was invalid due to lack of consent from Mirvac. This was then confirmed by independent legal advice (properly) sought by the responsible authority. This was an integral matter for resolution since a permit could not be issued that would contravene a registered restrictive covenant.<sup>15</sup> In our view, this explained some of the associated delays in processing the permit application in the ordinary course.
- 121 Although the responsible authority would have had knowledge of the reasoning of the Tribunal in the proceeding relating to 1-7 Waterfront Place and issues of the covenant<sup>16</sup>, this reasoning would not have automatically been determinative about the opportunity to grant a permit in the current application, which did *not* seek to vary or remove the covenant in the manner proposed in the earlier proceeding.
- 122 Similarly, it took months for the permit applicant to confirm to the responsible authority’s satisfaction that no CHMP was required. We regard the latter in particular as a matter beyond the reasonable control of the responsible authority, since it is a responsibility which the permit applicant must demonstrate to overcome the need for a mandatory CHMP (which would stop time from running under section 79 if it was required).<sup>17</sup>
- 123 We were provided with numerous items of correspondence between the responsible authority and permit applicant’s team, as well as a chronological list of attendances by the responsible authority in

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<sup>14</sup> Pursuant to section 52 of the *Aboriginal Heritage Act 2006*, it was not permitted to grant a statutory authorisation until this matter was resolved in line with the legislation and regulations.

<sup>15</sup> Pursuant to section 61(4) of the *Planning and Environment Act 1987*.

<sup>16</sup> *Waterfront Place Pty Ltd v Port Phillip CC (Red Dot)* [2014] VCAT 1558.

<sup>17</sup> By operation of Note 4 to section 52 of the *Aboriginal Heritage Act 2006*. See, for example, the reasoning in *Stanley Pastoral Pty Ltd v Indigo SC & Ors (Red Dot)* [2015] VCAT 36, including [52]. For what it is worth, we are not persuaded that time only started to run for processing the application when it was concluded that no CHMP was required due to an exemption applying (i.e. significant ground disturbance). Rather, time would not run under Regulation 32 of the *Planning and Environment Regulations 2015* if a mandatory CHMP was required but had not been provided, which was not the case here.

processing the permit application. This included numerous attendances associated with actions/inquiries in the course of pre-application discussions.

- 124 On the whole, we consider that the responsible authority for the most part acted diligently and in a generally timely way to deal with all relevant matters pertaining to the permit application, especially once relevant 'preconditions' for processing the permit application had been addressed by the permit applicant.
- 125 In the section 149 application, we are also conscious that our decision has been to confirm our approval of the relevant plan pursuant to the zone controls. It follows that the outcome of the proceeding benefits the permit applicant by the grant of a permit.
- 126 For these reasons read as a whole, we find that the facts before us demonstrate that there was reasonable justification as to why the responsible authority failed to grant a permit for this particular application within time and that it is not otherwise appropriate to order the reimbursement of fees in either proceeding.

## **CONCLUSION**

- 127 We accept the design impetus and architectural treatment adopted for the proposal in its physical and policy context. We consider that it will respond suitably to its public interfaces and would not prejudice their enhancement over time. We consider that the proposal represents an understated, yet acceptable approach to its setting which is suitably conscious of its civic role.
- 128 The proposed development would be sufficiently functional and well-presented subject to permit conditions discussed in these reasons. It would also provide a notable public benefit by providing for the realignment of the shared path which, in turn, would facilitate the duplication of the tram line.
- 129 For these reasons, we have determined to grant a permit.

Dalia Cook  
**Presiding Member**

Gregary Chase  
**Member**

## APPENDIX A

<b>PERMIT APPLICATION NO:</b>	P673/2015
<b>LAND:</b>	103 Beach Street & Part Lot O, Plan of Subdivision 406491Q
<b>WHAT THE PERMIT ALLOWS:</b> <ul style="list-style-type: none"><li>• Construction of a building and carrying out of works in the Comprehensive Development Zone</li><li>• Buildings and works for accommodation – pursuant to the Environmental Significance Overlay</li><li>• Reduction of parking pursuant to Clause 52.06</li><li>• Waiver of (on site) loading bay requirement pursuant to Clause 52.07.</li></ul> in accordance with the endorsed plans.	

## CONDITIONS

### Amended Plans Required

- 1 Before the development starts, amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and two copies must be provided. The plans must be generally in accordance with the advertised plans, but modified to show:
  - (a) The overall building height, excluding the plant material and lift overrun reduced to a maximum of 13.500 metres above natural ground level;
  - (b) A minimum 6m<sup>3</sup> storage space dedicated for each apartment within the basement level;
  - (c) All plan and elevation drawings to be fully dimensioned, including natural ground level, floor levels, and incremental and total wall and building heights and lengths, with heights to be expressed to Australian Height Datum (AHD) and/or reduced levels;
  - (d) Any changes required by condition 12 (Sustainable Management Plan);
  - (e) Any changes required by condition 13 (Water Sensitive Urban Design);
  - (f) Any changes required by condition 16 (Waste Management Plan);
  - (g) Any changes required by condition 17 (Landscape Plan);
  - (h) Any changes required by condition 32 (Environmental Audit Overlay);
  - (i) Any changes required by condition 36 (Noise Attenuation for Apartments);

- (j) A full schedule of materials, finishes and paint colours, including colour samples (colour samples in a form that is able to be endorsed and held on file), generally in accordance with Sample Boards 1/2 and 2/2 in addition to Plan numbers TPV-01, Rev A; TPV-08, Rev A; TPV-09, Rev A; TPV-41, Rev A; TPV-201, Rev A; TPV-202, Rev A; TPV-203, Rev A; TPV-204; and Rev A must be submitted to the satisfaction of and approved by the Responsible Authority;
- (k) Remove car parking spaces 16 and 17 located to the north of the building and provide details of a replacement landscape treatment for this area that allows for safe and pleasant pedestrian access around the building and to residential entry(s);
- (l) Provide clear glazing for the full extent of the supermarket frontage to the south with a maximum of 50% of the glazed area permitted to be covered or obscured by branding, advertising or internal shelving to maximise engagement with the public realm;
- (m) Provide full details of indicative internal supermarket layout including location of shelving, aisles and checkouts and relationship with the internal arcade generally in accordance with Dwg. SK-001;
- (n) Provide full details of the proposed internal arcade walkway and relationship with the café and supermarket, maximising opportunities for visual permeability and engagement;
- (o) Provide full details of all internal and external levels, including the RL's for the building ground floor relative to surrounding external areas and pedestrian spaces;
- (p) Design differentiation between the Ground and First Floors of the southern elevation, generally in accordance with Dwg. TPV-203 Rev A; and
- (q) Double glazing to all external windows of the dwellings.

### **No alterations**

- 2 The layout of the site and the size, levels, design and location of buildings and works shown on the endorsed plans must not be modified for any reason without the prior written consent of the responsible authority, unless the Port Phillip Planning Scheme exempts the need for a permit.

### **Architectural input and supervision**

- 3 The permit holder must retain a suitably qualified and registered architect to the satisfaction of the Responsible Authority to oversee the preparation of the amended plans to be submitted for approval under this permit. The architect who has been retained must ensure completion of the detailed design shown in the endorsed plans during construction until construction is completed in accordance with the permit.

### **Covenant**

- 4 The uses and development approved by this permit must not commence until the relevant written consents are obtained from Mirvac (Beacon

Cove Pty Ltd) or its nominee pursuant to Restrictive Covenant X354973K registered on the title of the Subject Land OR the requirement for consent by Mirvac or its nominee is removed from Restrictive Covenant X354973K.

If the requirement for consent persists in the covenant, prior to the endorsement of plans the written consents of Mirvac or its nominee must be provided to the Council.

### **Licence over Crown Land**

- 5 Prior to the commencement of the development, the applicant must provide evidence in writing to the satisfaction of the responsible authority that it has secured a lease or licence pursuant to the *Crown Land (Reserves) Act 1975* with the responsible authority in its capacity as committee of management for access to and use of Part Lot O on Plan of Subdivision 406491Q to the north of the subject land to the satisfaction of the responsible authority.
- 6 The permit holder must maintain a licence or lease over the access point and car parking land to the north of the subject land to the satisfaction of the responsible authority throughout the duration of the uses and development allowed by this permit.

### **Car parking for non residential uses**

- 7 The use of the supermarket and food and drink premises (or any potential future retail or commercial use) depicted on the endorsed plans must not commence until the northern vehicular access to the subject land is constructed in accordance with the endorsed plans. This access point must be maintained thereafter on an ongoing basis to the satisfaction of the responsible authority.
- 8 The supermarket and food and drink premises (or any potential future retail or commercial use) depicted on the endorsed plans must at all times be provided with access to and use of a minimum of 16 car parking spaces to the satisfaction of the responsible authority, in addition to the car parking spaces provided within the basement of the development.
- 9 If access to and use of the 16 car parking spaces cannot be provided at any time, or ceases to be made available to the supermarket and food and drink premises (or any potential future retail or commercial use), then the use of the subject land for the supermarket and food and drink premises depicted on the endorsed plans must cease immediately and must not recommence unless this permit is amended or the car parking spaces are provided.

### **Shared bicycle/pedestrian path**

- 10 Before any aspect of the use of the land starts, the permit holder must either:
  - (a) create an easement of way on title to the subject land, or
  - (b) enter into an agreement with the responsible authority under section 173 of the *Planning and Environment Act 1987* in a form to the

satisfaction of the responsible authority and at the permit holder's expense, to be registered on title to the subject land. The agreement must include a requirement to maintain relevant public indemnity insurance and undertake ongoing reasonable maintenance of relevant parts of the building;

allowing the public free, safe and unhindered access to a 5 metre wide strip at ground floor on the eastern side of the building for the purpose of a shared bicycle and pedestrian path to be constructed to the specifications of the responsible authority at its expense.

### **Walls on or facing the boundary**

- 11 Prior to the occupation of the building(s) allowed by this permit, all new or extended walls on or facing the boundary of adjoining properties and/or the laneway must be cleaned and finished to a uniform standard. Unpainted or unrendered masonry walls must have all excess mortar removed from the joints and face and all joints must be tooled or pointed to the satisfaction of the responsible authority. Painted or rendered or bagged walls must be finished to a uniform standard to the satisfaction of the responsible authority.

### **Sustainable Management Plan**

- 12 Before the development starts (other than demolition or works to remediate contaminated land) an amended Sustainable Management Plan that outlines proposed sustainable design initiatives must be submitted to, be to the satisfaction of and approved by the responsible authority. When approved, the Plan will be endorsed and will then form part of the permit and the project must incorporate the sustainable design initiatives listed.

### **Water Sensitive Urban Design**

- 13 Before the development starts (other than demolition or works to remediate contaminated land) a Water Sensitive Urban Design Report that outlines proposed water sensitive urban design initiatives must be submitted to, be to the satisfaction of and approved by the Responsible Authority. The report must demonstrate how the development meets the water quality performance objectives as set out in the Urban Stormwater Best Practice Environmental Management Guidelines (CSIRO) or as amended.

When approved, the Report will be endorsed and will then form part of the permit and the project must incorporate the sustainable design initiatives listed.

### **Maintenance Manual for Water Sensitive Urban Design Initiatives (Stormwater Management)**

- 14 Before the development starts (other than demolition or works to remediate contaminated land) a Maintenance Manual for Water Sensitive Urban Design Initiatives must be submitted to and approved by the responsible authority. The program must include, but is not limited to:
  - (a) inspection frequency

- (b) cleanout procedures
- (c) as installed design details/diagrams including a sketch of how the system operates

The WSUD Maintenance Manual may form part of a broader Maintenance Program that covers other aspects of maintenance such as a Building User's Guide or a Building Maintenance Guide.

### **Site Management Water Sensitive Urban Design**

- 15 The developer must ensure that:
- (a) No water containing oil, foam, grease, scum or litter will be discharged to the stormwater drainage system from the site;
  - (b) All stored wastes are kept in designated areas or covered containers that prevent escape into the stormwater system;
  - (c) The amount of mud, dirt, sand, soil, clay or stones deposited by vehicles on the abutting roads is minimised when vehicles are leaving the site.
  - (d) No mud, dirt, sand, soil, clay or stones are washed into, or are allowed to enter the stormwater drainage system;
  - (e) The site is developed and managed to minimise the risks of stormwater pollution through the contamination of run-off by chemicals, sediments, animal wastes or gross pollutants in accordance with currently accepted best practice.

### **Waste Management**

- 16 Before the development starts (other than demolition or works to remediate contaminated land), an amended Waste Management Plan based on the draft "Best Practice Guidelines for Kerbside Recycling at Multi-Occupancy Residential Developments (Sustainability Victoria June 2006) must be prepared by a Waste Management Engineer or Waste Management Planner to the satisfaction of the responsible authority and endorsed as part of this permit. The Plan must include reference to the following:
- (a) The private collection of rubbish from the basement.
  - (b) The estimated garbage and recycling generation volumes for the whole development.
  - (c) The garbage and recycling equipment to be used and the collection service requirements, including the frequency of collection.
  - (d) The location of, proximity, screening of and space allocated both to the garbage and recycling storage areas and collection points.
  - (e) The path of access for both users and collection vehicles.
  - (f) How noise, odour and litter will be managed and minimised.
  - (g) Approved facilities for washing bins and storage areas.
  - (h) Who is responsible for each stage of the waste management process.

- (i) How tenants and residents will be regularly informed of the waste management arrangements.

Once submitted and approved, the waste management plan must be carried out to the satisfaction of the Responsible Authority

### **Landscape Plan**

17 Before the development starts (other than demolition or works to remediate contaminated land), a detailed Landscape Plan must be submitted to, approved by and be to the satisfaction of the responsible authority, generally in accordance with plan No. TPV 01 and TPV 01 Rev A prepared by TT-Design. When the Landscape Plan is approved, it will become an endorsed plan forming part of this Permit. The Landscape Plan must incorporate:

- (a) A survey plan, including botanical names, of all existing vegetation/trees to be retained;
- (b) Buildings and vegetation (including botanical names) on neighbouring properties within 3m of the boundary;
- (c) Significant trees greater than 1.5m in circumference, 1m above ground;
- (d) All street trees and/or other trees on Council land;
- (e) A planting schedule of all proposed vegetation including botanical names; common names; pot sizes; sizes at maturity; quantities of each plant; and details of surface finishes of pathways and driveways;
- (f) Landscaping and planting within all open space areas of the site;
- (g) Water sensitive urban design;
- (h) An automatic watering system for all vegetation;
- (i) Deletion of the landscaping depicted on the plans for the areas adjacent to the shared bicycle and pedestrian path.
- (j) Trees must not be sited over easements. All species selected must be to the satisfaction of the responsible authority.

### **Completion of Landscaping**

18 The landscaping on the subject land as shown on the endorsed Landscape Plan must be carried out and completed to the satisfaction of the responsible authority before the occupation of the development and/or the commencement of the use or at such later date as is approved by the responsible authority in writing.

### **Landscaping Maintenance**

19 The landscaping as shown on the endorsed Landscape Plan must be maintained, and any dead, diseased or damaged plant replaced in accordance with the landscaping plan to the satisfaction of the responsible authority.

## **Urban Art Plan**

- 20 Before the occupation of the development allowed by this permit, an urban art plan generally in accordance with Council's Urban Art Strategy 2002 (or subsequently adopted strategy) must be submitted to and approved by the responsible authority. Urban art in accordance with the approved plan must be installed on the subject land prior to the occupation of the development to the satisfaction of the responsible authority.

## **Number of Dwellings**

- 21 Without the written consent of the responsible authority, no more than 14 dwellings may be constructed on the land.

## **Parking and Loading Areas must be available**

- 22 Car and bicycle parking and loading areas and access lanes must be developed and kept available for those purposes at all times and must not be used for any other purpose such as storage to the satisfaction of the responsible authority

## **Vehicle Crossings**

- 23 Before the occupation of the development allowed by this permit, vehicle crossings must be constructed in accordance with Council's current Vehicle Crossing Guidelines and standard drawings to the satisfaction of the Responsible Authority. All redundant crossings must be removed and the footpath, naturestrip, kerb and road reinstated as necessary at the cost of the applicant/owner and to the satisfaction of the responsible authority.

## **Applicant to pay for Reinstatement**

- 24 Before the occupation of the development, the applicant/owner must do the following things to the satisfaction of the responsible authority:
- (a) Pay the costs of all alterations/reinstatement of Council and Public Authority assets necessary and required by such Authorities for the development.
  - (b) Obtain the prior written approval of the Council or other relevant Authority for such alterations/reinstatement.
  - (c) Comply with conditions (if any) required by the Council or other relevant Authorities in respect of alterations/reinstatement.

## **Public Services**

- 25 Before the occupation of the development, any modification to existing infrastructure and services within the road reservation (including, but not restricted to, electricity supply, telecommunications services, gas supply, water supply, sewerage services and stormwater drainage) necessary to provide the required access to the site, must be undertaken by the applicant/owner to the satisfaction of the relevant authority and the responsible authority. All costs associated with any such modifications must be borne by the applicant/owner.

### **Car Parking Allocation**

- 26 Without the further written consent of the Responsible Authority car parking for the approved development must be allocated on any Plan of Subdivision as follows:
- (a) two car spaces for each dwelling
  - (b) two visitor spaces held in common property;
  - (c) storage spaces (where applicable) must be allocated to the apartments at the ratio approved.

### **On-site Bicycle Parking**

- 27 Before the development is occupied, bicycle racks must be provided on the land to the satisfaction of the responsible authority.

### **No equipment and services**

- 28 No equipment, services and exhausts other than those shown on the endorsed plan must be erected above the roof level of the building unless otherwise agreed to in writing by the responsible authority.

### **Lighting baffled**

- 29 All lighting of external areas must be suitably baffled so as not to cause nuisance or annoyance to nearby properties or roads.

### **Privacy screens must be installed**

- 30 Prior to the occupation of the building(s) allowed by this permit, privacy screens as required in accordance with the endorsed plans must be installed, and maintained thereafter to the satisfaction of the responsible authority.

### **SEPP N1**

- 31 All air conditioning and refrigeration plant must be screened and baffled and/or insulated to minimise noise and vibration to ensure compliance with noise limits determined in accordance with State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade) No. N-1 to the satisfaction of the responsible authority.

### **Environmental Audit Overlay**

- 32 Before the commencement of construction or carrying out of buildings and works pursuant to this permit, or any works associated with a sensitive use, either:
- (a) A Certificate of Environmental Audit for the land must be issued in accordance with Section 53Y of the Environment Protection Act 1970 and provided to the responsible authority;
  - (b) A Statement of Environmental Audit for the land must be issued in accordance with Section 53Z of the Environment Protection Act 1970 that the environmental conditions of the land are suitable for the use and/or development that are the subject of this permit and this statement must be provided to the responsible authority.

## **Compliance with Statement of Environmental Audit**

- 33 Where a Statement of Environmental Audit is issued for the land, the buildings and works and the use(s) of the land that are the subject of this permit must comply with all directions and conditions contained within the statement.

Where a Statement of Environmental Audit is issued for the land, before the commencement of the use, and before the issue of a Statement of Compliance under the *Subdivision Act 1988*, and before the issue of an occupancy permit under the *Building Act 1993*, a letter prepared by an Environmental Auditor appointed under Section 53S of the *Environment Protection Act 1970* must be submitted to the responsible authority to verify that the directions and conditions contained within the statement have been satisfied.

Where a Statement of Environmental Audit is issued for the land, and any condition of that statement requires any maintenance or monitoring of an on-going nature, the owner(s) must enter into an agreement with the responsible authority pursuant to Section 173 of the *Planning & Environment Act 1987*, which must be executed before the commencement of the permitted use and before the certification of the Plan of Subdivision under the *Subdivision Act 1988*. All such expenses related to the Section 173 Agreement including drafting, negotiating, lodging, registering and execution of the Agreement, including those incurred by the responsible authority, must be met by the owner(s).

## **Visitor Car Parking**

- 34 The number and location of visitor car parking spaces as shown on the endorsed plans may only be altered with the written consent of the responsible authority. Prior to the occupation of the building, all visitor car parking spaces must be line marked and designated as visitor car parking to the satisfaction of the responsible authority and must be designated as common property on any plan of subdivision.

## **Loading/Unloading**

- 35 The loading and unloading of goods from vehicles in association with the retail and food and drink premises on the subject land must only be carried out within the designated loading bay, as detailed on the endorsed plans, and must be conducted in a manner which does not cause any interference with the circulation and parking of vehicles on the land to the satisfaction of the responsible authority.

Vehicles using the loading bay must not exceed an 8.8 metre long medium rigid vehicle.

## **Noise report for attenuation for apartments**

- 36 A report prepared by a suitably qualified acoustic specialist outlining appropriate measures to ensure noise levels in bedrooms do not exceed 30 dBA and 45 dBA in living areas when the port facilities are in operation.

### **Time for starting and completion**

37 This permit will expire if one of the following circumstances applies:

- (a) The development is not started within two (2) years of the date of this permit.
- (b) The development is not completed within two (2) years of the date of commencement of works.

The responsible authority may extend the periods referred to if a request is made in writing before or within 6 months after the permit expiry date, where the use or development allowed by the permit has not yet started; and within 12 months after the permit expiry date, where the development has commenced lawfully under the permit.

**– End of conditions –**