

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P830/2016  
PERMIT APPLICATION NO. P1313/2015

#### CATCHWORDS

Port Phillip Planning Scheme; Section 79 of the *Planning and Environment Act 1987*; Mixed Use Zone; Design and Development Overlay DDO1; Eight Storey Mixed Use Building; Response to DDO1 Objectives and Outcomes; Building Form; Overshadowing of Foreshore; Interface with Abutting Residential Areas; Waiver of a Loading Bay; Car Parking; Pedestrian Safety; Public Realm Impacts.

<b>APPLICANT</b>	TAB Developments Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Port Phillip City Council
<b>REFFERAL AUTHORITIES</b>	Public Transport Victoria Melbourne Water
<b>RESPONDENTS</b>	Patricia Goldie, Keith Ince, Beacon Cove Neighbourhood Association Inc., Gerhard Correa, Ivan Masson, Jill Maddox and Ian Evans, Andrew Keller, Robert McKay Hare, Save Port Melbourne Gateway Inc., Mary Ferlin, Stephen Dillon, Jacqueline Knight, Helen Vines, Mark Adams, Judith Solomon, Carmel and Luke Dullard, Paul Sier, Brian Conway, Jillian Combey, John Harris
<b>SUBJECT LAND</b>	92 Beach Street and 2-4 Princes Street PORT MELBOURNE VIC 3207
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Margaret Baird, Senior Member Ann Keddie, Member
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	22, 23, 24, 25 and 26 August 2016
<b>DATE OF ORDER</b>	5 September 2016
<b>CITATION</b>	TAB Developments Pty Ltd v Port Phillip CC [2016] VCAT 1469



## ORDER

- 1 Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following persons are joined as a party to the proceeding:

Carmel and Luke Dullard, Paul Sier, Brian Conway, Jillian Combey,  
John Harris.
- 2 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the application is amended by substituting the following plans for the application plans:
  - Prepared by Decibel Architecture, drawing numbers:
    - TP-02, TP-03, TP-04, TP-05, TP-06, TP-07, TP-08, TP-09, TP-10, TP-11, TP-13, TP-20, TP-21, TP-22, TP-23, TP-38, TP-40, TP-43, TP-56, TP-61, TP-62, TP-63, TP-64, TP-65, TP-66, All Revision 2.
    - TP-01, TP-12, TP-15, TP-18, TP-19, TP-24, TP-25, TP-26, TP-27, TP-28, TP-29, TP-30, TP-31, TP-32, TP-33, TP-34, TP-35, TP-36, TP-37, TP-42, TP-57, TP-58, All Revision 2A.
  - Landscape concept plans prepared by Urbis drawing nos. LC-01 Revision A, LC-02 Revision A and LC-03 revision A, all dated 05.08.2016.
- 3 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the application is amended by modifying the description of the permit application as follows:
  - Reduce the number of restaurant patrons to 270.
  - Delete the application for a waiver of parking under clause 52.06.
- 4 In permit application no. P1313/2015, the decision of the responsible authority is affirmed. No permit is granted.

Margaret Baird  
**Senior Member**

Ann Keddie  
**Member**

## APPEARANCES

For TAB Developments Pty Ltd

Mr J Gobbo QC and Mr A Walker of counsel. They called the following expert witnesses:

- Mr A Biacsi, town planner.
- Mr M Sheppard, urban designer.
- Mr J Walsh, traffic engineer.
- Mr L Richardson, sustainable design consultant.

A statement of evidence by Mr C Goss, author of photomontages, was tendered. No party sought to cross-examine him.

For Port Phillip City Council

Ms T Bisucci, solicitor, Best Hooper. She called the following expert witness:

- Mr R McGauran, urban designer.

For Keith Ince, Ivan Masson, Andrew Keller, Robert McKay Hare, Stephen Dillon, Jacqueline Knight, Helen Vines, Mark Adams, Carmel and Luke Dullard, Paul Sier, Brian Conway, Jillian Combey, John Harris

Ms J Lardner of counsel. She called the following expert witness:

- Mr R Milner, town planner.

For Jill Maddox & Ian Evans, Save Port Melbourne Gateway Inc.

Dr J Maddox.

For Beacon Cove Neighbourhood Association Inc.

Mr W W Fisher, Secretary and Treasurer.

For Gerhard Correa

Mr G Correa.

For Patricia Goldie

Dr P Goldie.

For Ms M Ferlin

Ms M Ferlin.

## INFORMATION

Description of Proposal	Construction of an eight storey building comprising ground floor restaurant (450 square metres and 270 patrons) and 32 dwellings. The dwelling mix is 4 x one bedroom units, 17 x two bedroom units and 11 x three bedroom units. Three basement levels are proposed with 42 car spaces, six bicycle spaces, storage and other associated facilities. No on-site loading is proposed.
Nature of Proceeding	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>1</sup>
Zone and Overlays	<ul style="list-style-type: none"><li>• Mixed Use Zone [MUZ].</li><li>• Design and Development Overlay Schedule 1 [DDO1].</li><li>• Development Contributions Plan Overlay [DCPO].</li><li>• Environmental Audit Overlay [EAO].</li></ul>
Permit Requirements	<ul style="list-style-type: none"><li>• Clause 32.04-2 – to use the land for a restaurant with a floor area exceeding 150 m<sup>2</sup>.</li><li>• Clause 32.04-6 – to construct two or more dwellings on a lot.</li><li>• Clause 32.04-8 – to construct buildings and works associated with a section 2 use (restaurant).</li><li>• Clause 43.02 – to construct a building or carry out works.</li><li>• Clause 52.07 – to waive the requirement for a loading bay.</li><li>• Clause 52.34 – to reduce the requirement for bicycle parking (three spaces).</li></ul>
Scheme Policies & Provisions	Clauses 9, 10, 11, 12, 13, 15, 16, 18, 21, 22.06, 22.12, 22.13, 22.14, 32.04, 43.02, 52.06, 52.07, 52.34 and 65.
Land Description	The subject land is on the north-east corner of Beach and Princes Streets. It comprises three lots containing the London Hotel and offices at Nos. 2 and 4 Princes Street. The area <sup>2</sup> is 816 square metres with frontages to Beach Street and Princes Street of approximately 20 and 39 metres respectively.
Tribunal Inspection	22 August 2016 (accompanied) including three apartments in No. 90 Beach Street and one apartment in No. 10 Princes Street.

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<sup>1</sup> Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

<sup>2</sup> Noting that there is some inconsistency in the figures presented by the parties.

## REASONS<sup>3</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 TAB Developments Pty Ltd proposes an eight storey mixed-use building on a prominent corner lot in Port Melbourne. The proceeding arises because the Port Phillip City Council failed to make a decision with respect to the permit application. This has led the permit applicant to lodge an application for review with the Tribunal, seeking the issue of a permit.
- 2 Broadly, the applicant submits the proposal is an appropriate response to the site's context and outcomes sought for this location. It is a high quality architectural solution with a well composed, signature building, marking a prominent corner. It meets reasonable amenity expectations and has minimal impacts on the public realm.
- 3 Conversely, the responsible authority, respondent objectors, and other persons<sup>4</sup> oppose a permit being issued because the proposal fails to provide a net community benefit to counterbalance the negative impacts the proposal will create on the public and private realms.
- 4 The Tribunal must decide whether to grant a permit having assessed the proposal under the relevant provisions and policies of the Port Phillip Planning Scheme. Clause 10.04 of the scheme requires the responsible authority, and Tribunal when considering an application for review, to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
- 5 We must assess the proposal in the context of strong policy encouragement for the development of the land. That is a consequence of the zoning, the land's designation for substantial growth, and the built form controls within the DDO1. Our assessment is also in the context of urban design outcomes being pursued through the scheme and the proposal's relationship with the public and private realms. Other issues identified in submissions and evidence are also in balance, such as traffic, safety, privatisation of the public realm, equitable development, and the internal layout.
- 6 We set out our consideration of the matters in dispute in these reasons having regard to the relevant provisions and policies in the Port Phillip Planning Scheme (scheme). Our consideration is based on the substituted plans. It takes account of changes offered by

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<sup>3</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.

<sup>4</sup> They are not parties pursuant to clause 56(6) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* because they indicated that they did not intend to participate in the hearing of the proceeding. None appeared at the hearing before us. Their grounds have been taken into consideration and are addressed in these reasons.

the applicant through expert evidence<sup>5</sup> or changes it does not oppose (but does not concede are needed).<sup>6</sup>

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<sup>5</sup> Such as Mr Biacsi's recommendations shown in Revision 3 plans, Mr Sheppard's recommendations to narrow the balcony overhangs (at least along the Beach Street edge) and Mr Walsh's recommendations.

<sup>6</sup> Such as removing the feature frame on Level 7 to reduce dappled shadowing to the foreshore reserve, providing rebates adjacent to windows in No. 10 Princes Street, revisions to and additional privacy screening to some eastern balcony edges, and modifications to enhance daylight to some kitchens.

- 7 Ultimately we conclude that a high density, mixed use development on the subject land can make a significant and positive contribution to multiple outcomes sought by the scheme. Those outcomes include housing growth and diversity, activation of the public realm between Station Pier and Bay Street, and passive surveillance of the public realm. However, the building's impacts on the public and private realms are not acceptable. Although changes could be made to reduce amenity impacts on neighbours to an acceptable level, the extent of overshadowing of the foreshore reserve is such that we do not consider a net community benefit is achieved.

## **WHAT IS THE RELEVANT PHYSICAL CONTEXT?**

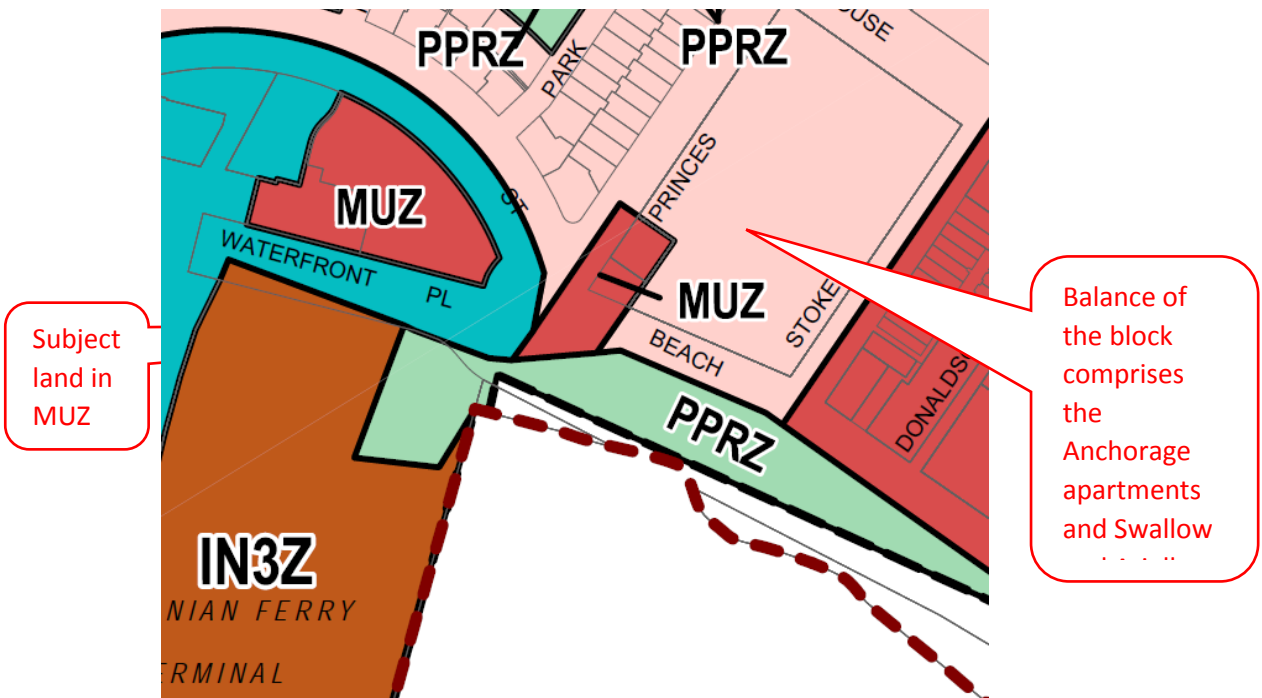
- 8 The subject land comprises the corner lot containing the two storey London Hotel and two adjacent three and four storey offices. The subject land faces the Port Phillip Bay foreshore and is opposite a large site, developed with now vacant buildings, known as Waterfront Place. This area is opposite Station Pier and the terminal for the Spirit of Tasmania and international cruising vessels. A bicycle path and separate pedestrian path are among the public infrastructure associated with the foreshore reserve.
- 9 The balance of the block bounded by Beach Street, Stokes Street, Princes Street and Rouse Street comprises the former Swallow and Ariell biscuit factory, and infill buildings, now used as dwellings. A large, high quality, central communal open space known as Capistrano Square, with associated recreation facilities, services these dwellings.
- 10 Immediately abutting the northern boundary of the subject land is No. 10 Princes Street. It comprises a six storey building that varies in height further north along Princes Street. An apartment at the top two levels has two fire-rated boundary windows serving a bathroom and living room that provide southerly bay views over the subject land. There is also a large balcony at the top floor that extends along the southern and western elevations of this two level dwelling.
- 11 To the east of the subject land, at No. 90 Beach Street, are apartments in a six level building that is part of the Anchorage apartments. Levels 4 and 5 in this development include apartments with balconies of varying sizes and positions abutting the common boundary with the subject land. These dwellings have bedrooms facing north with small balconies facing Capistrano Square. Some rear windows enjoy have city views.
- 12 Further west of Princes Street, north of Waterfront Place, is the low rise area of Beacon Cove. This area contrasts distinctly with the larger apartment buildings that the subject land is most closely associated with and most proximate to.

- 13 Princes Street is a bike route linking with the foreshore network.<sup>7</sup> A pedestrian crossing across Beach Street abuts the subject land. We are informed through submissions and Mr Walsh’s evidence of proposed changes to the profile of the roundabout at Princes/Beach Streets and southern alignment leading into the intersection from the east that will provide an additional traffic lane to improve vehicle movement.

## WHAT IS THE RELEVANT PLANNING CONTEXT?

### Zones and overlays

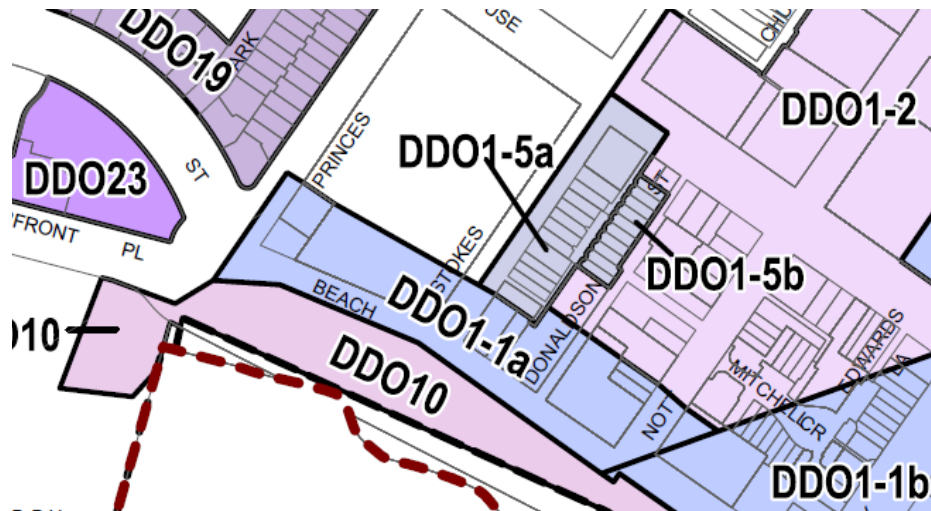
- 14 The subject land is within the Mixed Use Zone while the apartments to its north and east are within a General Residential Zone. The foreshore reserve is within the Public Park and Resources Zone while Waterfront Place is also Mixed Use. This is shown in the zone extract below.



- 15 Proposed Amendment C118 would rezone some nearby land on the west side of Princes Street from General Residential Zone [GRZ] to Neighbourhood Residential Zone. Land to the north and east of the subject land would remain GRZ. The Amendment has not been gazetted.
- 16 Design and Development Overlay 1 applies to the Port Melbourne Mixed Use Growth Area. As shown in the scheme extract below, the subject land and properties fronting Beach Street extending east to Nott Street are within area DDO1-1a.

<sup>7</sup> It is recognised in *Plan Melbourne* at Map 21 on page 93 as an existing key bicycle link and similarly on the sustainable transport framework plan at Clause 21.03.





- 17 That is, DDO1-1a applies across three street blocks between Princes and Nott Streets. The apartments at No. 10 Princes Street are outside DDO1. DDO10 applies to the foreshore and DDO23 applies to Waterfront Place. The provisions of the DDO1, including for each sub-precinct, work to implement the policy for the Mixed Use Area described in clause 21.
- 18 The Swallow and Ariell complex is on the Victorian Heritage Register and recognised through HO244. Other nearby land is within a Heritage Overlay. However, the subject land and abutting apartments are not within a Heritage Overlay.

### Permit triggers

- 19 We have set out the permit triggers for the proposal in the Information section of these reasons. A permit is required to use and develop the land for a restaurant, to develop the land for apartments, for buildings and works in DDO1, to waive a loading bay, and to reduce bicycle parking.
- 20 Consequent upon the amendment to the permit application to reduce the number of restaurant patrons, we accept the applicant's submission that no permit is required for a reduction in car parking. We address this matter later in our reasons.
- 21 There are no demolition controls applying to the subject land through the scheme. Therefore, no planning permit is required to demolish the London Hotel. We understand from submissions that a building permit has already been granted for the hotel's demolition. Although a number of statements of grounds refer to the value of the hotel in cultural and heritage terms, the appropriateness of demolishing the hotel is not a matter that is before us based on the applicable permit triggers and provisions in the scheme.
- 22 Ms Bisucci refers to proposed Amendment C133 and Amendment C134 that, on 9 August 2016, the Council resolved to prepare. These are proposed amendments to apply interim and permanent heritage controls over the London Hotel through a Heritage Overlay.

- 23 At the time of the hearing, no response to either the request for interim heritage controls or authorisation for Amendment C133 had been granted to the Council from the Minister for Planning. These steps toward the inclusion of heritage protection for the London Hotel follow previous heritage assessments for the property that have led to the current situation where there is no heritage protection under the scheme. We must take the situation as we find it. At the date of our decision, we are not aware that either Amendments C133 or C134 have progressed to any point that should have a bearing on how we assess the planning context for this application.
- 24 No permit application is made for outdoor seating in the public realm. This is a matter for the Council under relevant local laws. Despite that, the application plans include a substantial canopy over the footpath and details of works such as seating, weather protection, screening and landscaping.

### **Strategic planning context**

- 25 The State and Local Planning Policy Frameworks identify strategic issues of importance and long term directions for the use and development of land. These are matters that we must take into account and policy to which we must give effect in deciding on any permit application.<sup>8</sup> The themes are reflected more broadly through other relevant policy guidelines, such as the *Design Guidelines for Higher Density Residential Development*.<sup>9</sup> The current draft of a *Better Apartments Design Guide* is not at a point in its formulation or adoption that can carry influential weight in this proceeding.
- 26 As we have observed, decisions about permits often require balancing of relevant considerations. The most relevant policy considerations and strategic directions of the Port Phillip Planning Scheme can be distilled into subjects that we identify below. It is fair to say that these matters and directions are not contested, rather, the parties in this case disagree about the balancing of outcomes and the achievement of a net community benefit.

### **Substantial growth and intensification**

- 27 The subject land has important attributes that underscore its designation in a substantial growth area for higher density residential development and intensification.<sup>10</sup> It is close to the Bay Street Major Activity Centre<sup>11</sup>, proximate to public transport including light rail and buses, opposite the key recreation and cycling corridor along the Port Phillip

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<sup>8</sup> Clause 10.

<sup>9</sup> Clause 15.

<sup>10</sup> Clause 21.04-1.

<sup>11</sup> And within the Study Area identified in clause 22.14.

foreshore, and related to a major tourist node focused on Station Pier and the foreshore.<sup>12</sup>

- 28 The subject land is part of the Port Melbourne Mixed Use Growth Area. This is one of the key areas to accommodate a large proportion of Port Phillip's new housing growth. Others include Fishermans Bend.
- 29 The extent of redevelopment that has occurred over several decades has seen substantial change in this locale. In addition to the low rise area of Beacon Cove and extensive waterfront development further to the west of Station Pier, there are the multi-level forms surrounding and further east of the subject land.
- 30 This area has developed in accordance with the aims of the scheme that recognise the capacity of this locality for change. The scheme continues to support new residential development and development at higher densities in the mixed use precinct south of Graham Street and housing opportunities in the wider Bay Street precinct.<sup>13</sup>
- 31 The subject land is a strategic development site.<sup>14</sup>

### Urban form, structure and character

- 32 The scheme seeks to "*Protect and reinforce the key elements of Port Phillip's urban structure including; the foreshore, places and precincts of heritage significance, traditional linear retail strips, key boulevards, and the network of parks and open spaces*".<sup>15</sup> It distinguishes the low rise character of established residential areas, and heritage precincts, from the growth areas that have a new built form character.
- 33 Substantial residential growth areas are where a new built form character is expected and envisaged compared with areas designated for limited growth. Design and Development Overlays are one of the mechanisms used to identify a preferred future character.<sup>16</sup> We refer to DDO1 further below.
- 34 Taking into account the extent of development that has occurred in the Port Melbourne Mixed Use Growth Area, the scheme seeks to recognise and consolidate that contemporary high rise character.<sup>17</sup> This contrasts with other locations, such as Beacon Cove, where the scheme seeks to "*maintain the structural elements that contribute to the neighbourhood character of Beacon Cove*" and a low rise outcome is sought.<sup>18</sup>

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<sup>12</sup> Map at clause 21.02.

<sup>13</sup> Clauses 21.02 and 22.14.

<sup>14</sup> Clause 16.01-3.

<sup>15</sup> Clause 21.01. A similar position is described in clause 21.05.

<sup>16</sup> Clause 21.05.

<sup>17</sup> Clauses 21.06 and 22.14.

<sup>18</sup> Clause 21.01.

- 35 New higher density development is to be responsive to the existing scale and form of neighbouring sites. It is policy to achieve a graduation in building scale and massing between areas of medium and higher density development within activity centres to the traditional low rise, fine grain scale of established residential areas. It is also policy to ensure that new development at increased densities provides a transition in scale to any adjoining lower-rise development.<sup>19</sup> As we discuss below, there is also a focus on protecting the values associated with the foreshore in new development, as guided by the DDO.

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<sup>19</sup> Clause 21.05.

## Activation and surveillance of the public realm

- 36 There is an overall direction to maintain and enhance the qualities of the public realm and, in mixed use locations such as the subject land, encourage active street frontages<sup>20</sup> and active land uses at ground level that encourage pedestrian activity.<sup>21</sup> DDO1 includes a design objective for Beach Street that built form “*complements the water edge environment, and a public domain attractive to people experiencing the area on foot, on bicycles and by means of other non-motorised forms of transport*”.
- 37 The benefit of passive surveillance is recognised through the *Design Guidelines for Higher Density Residential Development*<sup>22</sup> and, in the Port Phillip Planning Scheme, the ambition for improved safety and passive surveillance includes ensuring “*new development provides passive surveillance of the bicycle network identified on the Sustainable Transport Framework Plan*”.<sup>23</sup>

## Role of the foreshore and linkages

- 38 The tourism, recreational and cultural values of Melbourne’s foreshore are recognised in *Plan Melbourne*<sup>24</sup> and the role of sunlight access to public spaces is a relevant matter in the *Higher Density Residential Development Guidelines*.<sup>25</sup>
- 39 The St Kilda and Port Melbourne foreshore are identified as having a “*capital city function*”<sup>26</sup> and key tourist attractors.<sup>27</sup> Station Pier / Port Melbourne foreshore is identified as a key visitor destination. It is policy to establish priority walking routes within and / or to this location (and other locations)<sup>28</sup> and to improve and encourage walking and cycling linkages within Port Melbourne, particularly between Station Pier, Bay Street and the foreshore.<sup>29</sup>
- 40 The scheme includes strategies and controls to “*protect important public realm areas from overshadowing in mid winter including the foreshore, Bay Street and Rouse Street in Port Melbourne and the Esplanade and Fitzroy Street in St Kilda*”.

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<sup>20</sup> Clause 21.05.

<sup>21</sup> Clause 21.04.

<sup>22</sup> Objective 2.8.

<sup>23</sup> Clause 21.03.

<sup>24</sup> Initiative 4.2.4.

<sup>25</sup> Objective 2.3.

<sup>26</sup> Clause 21.01.

<sup>27</sup> Clause 21.02.

<sup>28</sup> Clause 21.03.

<sup>29</sup> Clause 21.06.

- 41 It is policy to ensure the built form of development along the foreshore enhances its significance as a natural, recreational and tourism asset. Associated strategies include:<sup>30</sup>

Ensure that new development preserves and enhances the predominant low-rise scale of the foreshore, excepting where higher built forms are consistent with any approved Design and Development Overlay or Urban Design Framework.

Ensure there is no overshadowing of any part of the foreshore between 10.00am and 4.00pm on 22 June (Winter Solstice).

- 42 The various schedules to the DDO manage overshadowing considerations differently. For example, DDO23 has a mandatory provision relating to overshadowing beyond the southern kerbline of Waterfront Place between 9am and 3pm at the equinox whereas DDO1-1a as it applies to the subject land is different and is a discretionary control. We refer to this below.

### Residential amenity

- 43 The scheme has a strong focus on residential amenity. That is both in terms of the relationship with new land uses and as a consequence of development:

- Ensuring new residential development does not compromise the heritage, neighbourhood character and amenity values of established residential areas.<sup>31</sup>
- Ensuring new development minimises any detrimental impacts on neighbouring properties and does not unreasonably affect the amenity of adjoining properties by way of overshadowing, privacy, or visual bulk.<sup>32</sup>
- Creating attractive residential areas which are desirable places to live, and where the impacts of new land uses on residential amenity are minimised.<sup>33</sup>

- 44 On and off-site amenity considerations are also addressed through the *Design Guidelines for Higher Density Residential Development* that we have considered but do not recite here.

### Environmental sustainability

- 45 Promoting sustainable economic growth and making decisions with a focus on environmental sustainability underpin the vision for Port Phillip. This is advanced through local policies including clause 22.13.

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<sup>30</sup> Clause 21.06.

<sup>31</sup> Clause 21.04.

<sup>32</sup> Clause 21.05.

<sup>33</sup> Clause 21.01.

## Equitable development

- 46 This is recognised as a relevant matter through the *Higher Density Residential Development Guidelines*.<sup>34</sup>

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<sup>34</sup> Objective 2.3.

47 In the current case, dwellings on abutting lots borrow amenity from the subject land with their on-boundary window and balcony positions. They were not developed with consideration of future development on the abutting land. They constrain the development of the subject land.

### **Vision and challenges for Port Melbourne and Garden City**

48 Considering the above and other strategic issues geographically, the scheme identifies key planning challenges as:

- Establishing a new planning control framework for the now completed area of Beacon Cove, to ensure future development contributes to its established and consistent neighbourhood character.
- Managing the increasing number of visitors within the foreshore area and Station Pier.
- Enhancing the integration of the Bay Street Activity Centre in order to strengthen its activity mix, place identity, accessibility and sense of community.
- Strengthening linkages between the foreshore area and Bay Street Activity Centre.

49 These considerations are directly relevant to the matters before us.

### **Design and Development Overlay DDO1 Port Melbourne Mixed Use Growth Area**

50 The most specific design guidance is provided through local policy at clause 22.06 and DDO1.

51 DDO1 includes the following design objectives:<sup>35</sup>

- To protect and enhance the environment of the Port Melbourne foreshore as an important natural, recreational and tourism asset for the metropolitan Melbourne.
- To encourage a built form that responds to the area's significant development opportunities at the same time as respecting those elements that make this area special and distinct from other parts of the municipality such as its seaside ambience, open sky views along Bay Street between Rouse and Beach Street and low rise built form at the street frontage.

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<sup>35</sup> As relevant to the matters before us.



- To preserve solar access in mid winter to the foreshore including associated bicycle and pedestrian paths, and to Bay Street and Rouse Street.
- To achieve a built form that responds to the existing characteristics of Port Melbourne (which include the diversity of lot sizes, built form, design features and the complex grain of the urban fabric).
- To achieve an acceptable balance between the opportunity for increased built form, bulk and height and maintaining a reasonable level of residential amenity. To encourage pedestrian movement and promote active street frontages in the areas between Station Pier and Bay Street Shopping Centre by:
  - Requiring flexible building layouts at ground level capable of accommodating a mixture of uses.
  - Ensuring that ground floors of new developments at street level are easily accessible and relate well to the street.
- To achieve a built form along Beach Street that complements the water edge environment, and a public domain attractive to people experiencing the area on foot, on bicycles and by means of other non-motorised forms of transport.

52 DDO1 does not give specific emphasis to the prominence and gateway role that the subject land has with respect to the waterfront, the intersection of key bike routes, or the relationship with the ferry terminal and Station Pier. We do accept, however, the applicant's point about the prominence and strategic importance of the site. We do not consider this is in dispute. We note DDO1 does, however, address corner sites, as we discuss later.

53 Buildings and works provisions are at clause 2.0. There is a mandatory absolute maximum height while other provisions, such as those relating to setbacks, overshadowing and building design, are discretionary. We refer to these matters again below as relevant to the dispute before us.

54 We have considered the decision guidelines in clause 43.02. Again we do not recite all of the provisions but have considered them as relevant to the matters before us. Notable are the following:

- The design objectives of the relevant schedule to this overlay.
- The provisions of any relevant policies and urban design guidelines.

- Whether the bulk, location and appearance of any proposed buildings and works will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area.

55 We refer to the urban design policy for multi-unit residential development below, as it applies in this proceeding. It contains policies with respect to (among a range of matters) the public realm, street level frontages, landmark, views and vistas, energy and resource efficiency, building design, landscape, private and communal open space, residential amenity, loading and site facilities.

### **IS THE USE OF THE LAND FOR A RESTAURANT ACCEPTABLE?**

56 Before turning to development matters, we briefly refer to the proposed land uses. No permit is required to use the subject land for multiple dwellings.

- 57 The ground floor of the proposed development is to be occupied by a restaurant with a maximum of 270 patrons. The restaurant would replace the current commercial use “Mr Lawrence” and rely on the existing liquor licence that allows operation to 3am. The restaurant use and development are contentious because of the proposed patron numbers (up to 270 persons), potential impacts arising from late night trading such as noise and patron behaviour, and the type of infrastructure provided in the public realm including a large canopy and seating that is perceived as privatising the public realm. We consider these matters next.

### **Privatisation of the public realm**

- 58 In this mixed use location, and also being mindful that a hotel has historically and continues to operate on-site, the proposed land use components are suitable and consistent with policy outcomes that we have outlined above. DDO1 says the design objectives are met if the building includes visual interaction between ground floor activity and pedestrians. This outcome is achieved here. Further, clause 22.14 includes a policy to “*encourage proposals that leverage off the Port Melbourne waterfront as a visitor destination (i.e. foreshore / bike trails / cruise shipping), in particular supporting proposals for hospitality uses that support visitation to the activity centre, including after hours and at weekends*”. While the subject land is not within the Major Activity Centre, it is proximate to it, being part of the identified Study Area. The subject land is a designated tourist and visitor location. The ground floor restaurant would support and attract visitors in addition to being available to the local community.

### **Hours of operation and patron numbers**

- 59 Neither Mr McGauran nor Mr Milner, presenting evidence for the Council and some respondents respectively, express concern about the restaurant *per se*. Valid concerns do, however, arise through Mr Milner’s evidence and residents’ submissions and grounds with respect to the scale of activity associated with the restaurant if a 3am finish is allowed through a planning permit for the restaurant use.
- 60 The applicant suggests hours of 11pm on Monday to Wednesday, midnight on Thursday and 1am (the following morning) on Friday, Saturday and Sunday. We consider this to present a reasonable balance and observe that occupants of the proposed dwellings would be among the first to be impacted should issues arise from the restaurant use.
- 61 We are less persuaded that there are legitimate concerns that the restaurant will “privatise” the public realm. To the extent that this matter is before us, we note that Mr McGauran does not raise a concern in his commentary on the design, however, Mr Milner refers to the size of the outdoor area, and the large and dominant canopy, as implying private ownership of public space. His opinion is this is contrary to clause 22.06. A number of submissions support that position.

- 62 Putting to one side legitimate questions about pedestrian safety and visibility, to which we refer below, the principle of providing outdoor dining and weather protection in this location cannot, we say, be challenged.
- 63 We have set out the relevant policy considerations earlier and do not consider the canopy over a wide kerb outstand would be too dominating or overly imply private ownership of the public space as discouraged by clause 22.06. Further, the Council is the approval body for outdoor seating and furniture on the footpath. It would have the ability to ensure that this infrastructure is designed and sited to avoid undue physical dominance, safety issues arising from any screening, and ensure a proportionate area of space is retained for pedestrian movement. We note Mr Walsh's evidence that the footpath structures and screening should allow better vision of the pedestrian crossing.

### **IS THE BUILT FORM OUTCOME ACCEPTABLE IN TERMS OF POLICY AND DDO1?**

- 64 The design<sup>36</sup> comprises an eight storey form rising to the maximum allowable height of 25.5 metres at the south-west (street) corner. It adopts a consistent architectural expression through the design with details such as freestanding columns and projecting slab edges to define the form.
- 65 Along the Beach Street façade, the building is six storeys as it presents to the street with setbacks at a minimum of 2 metres increasing to a maximum of 14 metres above. Along its northern elevation, the building is constructed to the boundary to Level 5 and then steps back by 2.5 metres. Along the Princes Street elevation, the building adopts a singular wall plane to Level 4 with Level 5 tapered while maintaining a consistent outer edge as a consequence of the balcony positions. The taper at Levels 6 and 7 increases in depth towards the northern interface with No. 10 Princes Street.



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<sup>36</sup> The image is from the application plans and assists us to describe the concept.

- 66 The applicant submits the proposal is acceptable and well composed. It submits the design responds to the form of developments on abutting lots that do not adopt a podium-tower treatment and rely on balcony overhangs. Mr Gobbo QC further submits the building appropriately marks a prominent corner site in a manner that follows the local development pattern. Setbacks increase at Level 5 and above, thereby reinforcing the hard edge street wall at lower levels. Mr Sheppard and Mr Biacsi address the character, urban design and built form considerations in their evidence.
- 67 The responsible authority and objectors do not support the permit application because they consider the building is an overdevelopment of the subject land. They submit the building's horizontal architectural expression, encroachments over the title boundary, and broad canopy over the ground level are incongruous and disrespectful elements of the design. Moreover, they say the lack of a podium treatment and adequate upper-level setbacks result in a building that is out of scale and has unacceptable impacts on abutting units and the public realm particularly overshadowing the foreshore bike path and pedestrian path. Evidence by Mr McGauran and Mr Milner address character, urban design and built form matters.
- 68 We set out our findings on the submissions and evidence below. Although we have set out our findings under a number of headings for ease, we have considered the presentation and impacts of the design response and built form holistically.

### **Building form and architectural composition**

- 69 The building meets the mandatory absolute height of 25.5 metres.
- 70 More contentious are the architectural composition and the fact that the proposal does not adopt the podium-tower format that would result from the application of Table 1 in DDO1-1a comprising a preferred maximum height less than 5 metres from any road boundary of 10.5 metres and the following outcome in DD01-1a:

Development incorporates a 2 - 3 storey podium, built to the street boundary.....

- 71 Outcomes specified in DD01-1a include:

Development is [sic] responds to the traditional low rise, hard edged, 'solid' character of the area's built form. Vibrant pedestrian-oriented precinct with active ground floor uses supporting pedestrian movement to Station and Princes Piers.

Development incorporates a 2 - 3 storey podium, built to the street boundary, with a simple form, masonry finish, active edge at ground level and 'punched' openings above, and weather protection of the footpath.

Upper levels to a maximum total height of 8 storeys are distinct from the podium through setbacks, a more expressive and heavily articulated form and nautical references.

- 72 Ms Lardner and Mr Milner comment on the role that retention of the London Hotel building would have in creating a better defined and robust podium. They say it would enable a more distinct architectural upper-level. It would also comply with the street wall and upper level setbacks in DDO1 and respond to the heritage character and historical references. They are critical of the lack of a discernible street wall, stating that setbacks sought by the Overlay would mitigate many of the adverse amenity consequences.
- 73 Conversely, Mr Sheppard supports the unified form in the site's context. The proposal will mark a prominent corner. He notes the strongly emphasised horizontality of the façades is offset by columns that reference the horizontal and vertical built form expression of the development at No. 90 Beach Street. Incorporation of operable louvered screening to the street façades will give the building a dynamic quality, in Mr Sheppard's evidence. A contemporary character is consistent with the existing contemporary development character. Mr Sheppard's opinion is that the unified form and consistent architectural expression is to be preferred to the solid masonry sought by the DDO for the lower storeys of developments within it.
- 74 Neither does Mr McGauran express any concern with the contemporary design language adopted by the proposal. Rather, he is concerned with the amenity impacts generated by the built form. As we discuss below, he refers to issues with the extent of balcony projections. This is another design element that is also disputed by other parties.
- 75 Despite the obvious prominence and significance of the subject land, DDO1 does not expressly identify the gateway attributes and role of the subject site. DDO1 does, however, refer to corner lots more generally where it says that the height of new development on corner sites is to be consistent with the built form character of each street. Tall buildings should step down in height along the side frontage toward adjacent low-rise development.
- 76 We find that the built form and architectural response seek to make an appropriate statement in a location where contemporary design prevails and is predominant. It is an appropriate character response. It is also reasonable for it to mark this corner and we broadly accept that the design had sought to transition from the solid street wall associated with No. 90 Beach Street (within DDO1) and No. 10 Princes Street (outside DDO1). Each of these abutting developments has a street wall that is higher than 2-3 storeys cited in DDO1. This existing condition gives a fair basis to proceed with a design that does not strictly accord with a 2-3 storey street wall and instead has a higher street wall before setting back at the upper levels. As a consequence of the manner in which the proposal responds to the abutting buildings, we do not consider the building will dominate the lower scale setting of the remainder of Beach Street. The character of this area will further evolve, such as through the Waterfront Place development.

- 77 As indicated, Mr Milner criticises the lack of any meaningful interpretation of the past in the architectural response. This is in reference to heritage structures such as corner hotels, although we have already stated that there is no requirement in the scheme to retain the London Hotel.
- 78 There may be many design scenarios for the subject land that adopt a solid podium treatment and have less horizontality in the architectural treatment than the proposal. The simplicity of the materials in the proposal may not be preferred in some circumstances. However, when one considers the Beach Street streetscape, within DDO1, we find the form and composition achieves an acceptable response to DDO1's design objectives<sup>37</sup> even though a podium-tower form is not adopted.
- 79 We therefore accept an argument to depart from the podium-tower on this site but the fundamental issue we have with the building envelope (including its setbacks and balcony projections) is the impact on the foreshore reserve. We address this matter below. We expect that a design that did accord with the podium-tower form as demonstrated through Mr McGauran's evidence, or simply had greater setbacks at the upper level, would have less impact on the foreshore reserve.
- 80 We are not persuaded by the applicant's submission that it is unreasonable to restrict the extent of development in order to accommodate policy regarding overshadowing of the foreshore reserve. We consider that a building configuration with an envelope that acknowledges both the opportunities and the constraints of the site can be achieved by the applicant's skilled architects.

### **Overshadowing the foreshore at the solstice**

- 81 Earlier in these reasons, we have referred to State and local policy with respect to the role of the foreshore.
- 82 Through DDO1:
- The relevant design objective is *"To preserve solar access in mid winter to the foreshore including associated bicycle and pedestrian paths, and to Bay Street and Rouse Street"*.
  - Clause 2.0 of DDO1 states that all buildings and works should be designed to avoid casting shadows beyond the kerblines on the southern side of the road reserve after 10am on 22 June.
  - An outcome in Table 1 for DDO1-1a is *"The foreshore including associated bicycle and pedestrian paths enjoys good solar access in mid winter"*.
- 83 It is also relevant to our assessment that:

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<sup>37</sup> Considered separate from public realm impacts on the foreshore.

- Unlike other parts of the foreshore, there is no mandatory requirement to prevent any additional shadow being cast on the southern side of Beach Street in the Port Philip Bay foreshore reserve at the winter solstice or another designated time.
- The bicycle path and pedestrian path are not fully parallel with the subject land noting the pathways are shaped and divert adjacent to and west of the roundabout. The bike path is closer to the street than the pedestrian path.
- We have referred to the fact that the southern alignment of Beach Street is expected to change as a consequence of roadworks leading into the roundabout at the intersection of Beach and Princes Streets. We were told that the positions of the pedestrian and bicycle paths would, however, remain as we find them today.

84 Based on information provided by the applicant, on 22 June:

- The proposed development will cast shadows beyond the existing kerblines on the southern side of the road reserve on 22 June from 10am to 1pm.
- The pedestrian path would be affected from 10am to noon by the building and framing element.
- The bicycle path would be in shadow from 10am to 1pm.
- A cross-section provided through Mr Sheppard's evidence<sup>38</sup> shows that the shadow would extend to knee height at 11am on the pedestrian path. As the bicycle path is closer to the kerblines, it would be fully shaded at this time.
- Removal of the framing element, as recommended by Mr Sheppard, would reduce the dappled shadow this element casts.

85 The section lines used in some of the material do not define the section point<sup>39</sup> – this being relevant to the varied pathway positions (from parallel) when drawing sections. In addition:

- There are no shadow diagrams or evidence confirming when the shadow would no longer extend beyond the kerblines on 22 June.
- There are no shadow diagrams on other dates to demonstrate how shadowing would reduce in duration and extent beyond the southern kerblines (in its existing or modified kerb position), so as to ascertain with some certainty the actual extent of shadowing throughout a year.

86 Undesignated images in the Revision 3 drawing set were said by the applicant to relate to the equinox. They do not clearly show if shadows would be cast beyond the kerblines on this date, at any time on this date.

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<sup>38</sup> Figure 7 on page 17.

<sup>39</sup> We asked a number of questions to ascertain information from expert witnesses on this matter.



- 87 The applicant's case criticises a lack of proper assessment of the impact of overshadowing by the Council's and objectors' experts. That is true. However, we also do not find any empirical or detailed analysis in expert evidence for the applicant that addresses the use of the foreshore pathways and associated infrastructure such as the Melbourne Bike Share station with a long row of bicycle bays, and monuments. Rather, we have been provided with assertions as to the wind and weather conditions in winter, the amount of time a bike rider would be in shadow, and an estimate by Mr Biacsi that the shadow would be cast for 20-30 days a year. None of the assertions are documented.
- 88 Dr Maddox was the only person to attempt to provide some evidence about the microclimate, referring to data about wind speeds throughout the year from the St Kilda Royal Melbourne Yacht Squadron.
- 89 We accept the applicant's submission that achieving the maximum building envelope of 25.5 metres, without a 2-3 storey street wall and without 5 metre tower setbacks, would be expected to cast shadows. A design that provides such setbacks would reduce the developable area.
- 90 We further agree that the scheme contemplates the possibility of some shadowing. However, the site is in a location where scheme weight is given to the role of the foreshore and the protection of its values. We accept submissions by the Council and residents that it is highly valued by local users and the wider community. The land is at a key safe road crossing point to the foreshore for both cyclists and pedestrians.
- 91 The fact that the abutting Anchorage development already casts shadows and submissions that there would remain some 11 kilometres of unshaded foreshore do not persuade us that the extent of shadowing that arises is acceptable. The extent and duration of shadow that we are able to discern from our best endeavours is simply too great to achieve the design objective of DDO1 and relevant design outcomes. More broadly, we find this impact of the proposal places it directly at odds with the key strategic outcomes sought by State and local policy because of the manner in which key components of the foreshore reserve would be compromised.

### **Other public realm considerations**

- 92 The other main issues arising with respect to the impact of the design in the public realm focus on:
- The form of the arched and curved canopy.
  - Balcony protrusions beyond the title boundary.
  - The screen around roof-top plant and the lift overrun.

### **Canopy**

- 93 Mr McGauran and Mr Milner do not oppose the principle of weather protection.

- 94 In addition to concerns about the scale and form of the wide solid roofing, some parties oppose the arches and curvature that, they say, add to the heavy presence, sense of enclosure and may cause inconvenience to pedestrians.
- 95 Mr Sheppard says that the architecturally integrated canopy provides meaningful weather protection to pedestrians and the proposed street trade, a characteristic of the City of Port Phillip. Mr Milner, whilst acknowledging the intention of the canopy to provide weather protection, ascribed this to a desire to characterise the footpath as part of the restaurant. Mr McGauran described the canopy as “large but interesting”. He supported the integrated art strategy and proposed landscape element as appropriate on an important civic corner such as this one – he sees it as an acceptable outcome.
- 96 We agree with Mr McGauran and Mr Sheppard. The scheme gives weight to fostering an attractive pedestrian environment and weather protection is part of this. The broad canopy adds emphasis to the horizontality of the design and, with balcony projections, the manner in which the building might be perceived as extending into the public realm. Ultimately, we consider that this treatment is generally acceptable but it could be modified in a future design iteration.
- 97 We consider the podium planting is an attractive inclusion in the composition.
- 98 We also find that the utilisation of the underside of the canopy for public art is appropriate.

### Balconies

- 99 The upper levels of the development include continuous balcony projections over the footpath on both street elevations at Levels 1- 5, and, to a minor extent, Level 6. The projections are 500mm beyond the title boundary. The 500mm projections result in an estimated additional floor area of some 120 square metres.
- 100 The extent to which balconies should be fully within the title boundary, or some projection would be acceptable, varies in submissions and expert evidence. This includes the following material presented to us:
- Mr Sheppard's opinion is that the overhangs should be reduced to 300mm, although in his oral evidence he said 500mm may be acceptable along the Princes Street frontage. He did not assess the reduced balcony depth or the need for any additional modifications to the building to ensure workable balcony spaces for the dwellings. On this point, Mr Biacsi said if the overhang was reduced, the wall plane should be revised to achieve a 1.6 metre wide balcony adjacent to living rooms. Mr Gobbo did not agree this would be required noting the excellent access to public open space.

- The Council, through Mr McGauran's evidence, submits the continuity and extent of balconies is not typical nor comparable with the adjacent properties and streetscapes. Mr Milner and respondents expressed similar concerns. Some submit that the extent and depth adds to the canopy form and works together to present a dominating form.

101 We note that it remains unresolved what the changes to the projections would mean for the balance of the design to ensure sufficient balcony widths to 1.6 metres based on Mr Biacsi's evidence.

102 Clause 22.06 includes the following policy:

Encourage new balconies/terraces to be contained wholly within the site boundary. Projections outside the site boundary are discouraged unless they follow a local pattern, contribute positively to the design outcome and to the safety of public spaces, are discreet rather than prevailing elements of the building's design, and do not extend more than 500mm beyond the property line and no more than 2.5 metres in length if fully cantilevered.

103 There is an existing pattern of balcony projections associated with developments fronting Beach Street to the east of the subject land and No. 10 Princes Street. The form of those balconies is quite different from the proposal given the French provincial style of those adjacent buildings. The projections on adjacent buildings are up to 1.2 metres but they are small and detached. This contrasts with the continuity of the proposal.

104 While well integrated with the horizontality of the architectural response, we agree that the projections add to the presence and dominance of the form. As a consequence of the design envelope, they have some impact on shadowing over the foreshore reserve. However, there may be an argument to allow the projections to, in some way, 'compensate' for building envelope reductions required to significantly lessen impacts in the foreshore reserve. We are not in a position to prescribe what these built form changes might be, noting the applicant's submission that rearrangement of the building is not a simple exercise.

## Screen

105 The rooftop includes a 1.5 metre high curved screen to limit views to rooftop plant, such as condenser units, and the lift overrun. The extent to which this screen might add to visual bulk given its setbacks from the east and the west elevation is a concern to the Council.

106 An outcome for DDO1-1a is "*The roof form contributes to a visually interesting skyline*". The proposed screen is desirable to minimise the visibility of plant and offers a much better outcome than a design without a screen which is into the architectural composition. There appears to be scope for the screen to be set back further from the east and west elevations and this would be appropriate. It is a matter that would need to be informed by spacing and number of rooftop items.

107 We have assumed this could be readily resolved by a permit condition on any future approval.

## Conclusion

108 We find the proposal is acceptable with respect to its response to DDO1 and local policy at clause 22.06 in many aspects. The overall height and architectural composition can be accommodated in this prominent corner location and, subject to scaling back at its key interfaces to reduce off-site amenity impacts (as we discuss below) can achieve an acceptable transition to the adjacent high rise forms within and outside DDO1.

109 However, we find the proposal fails to meet the outcome sought for DDO1-1a in its extent of shadowing of the foreshore reserve including the bike and pedestrian paths. The design has not sufficiently acknowledged the importance of the foreshore. This public realm impact is not resolvable by only removing the upper frame. It requires a different design approach to ensure that the opportunities of the site are fully exploited but without the extent of overshadowing this proposal causes.

110 Consequently, we find the proposal fails to achieve State and local policies with respect to protection of the foreshore values as well as the following design objectives in DDO1:

- To encourage a built form that responds to the area's significant development opportunities at the same time as respecting those elements that make this area special and distinct from other parts of the municipality such as its seaside ambience, open sky views along Bay Street between Rouse and Beach Street and low rise built form at the street frontage.
- To preserve solar access in mid winter to the foreshore including associated bicycle and pedestrian paths, and to Bay Street and Rouse Street.

## ARE POTENTIAL OFF-SITE AMENITY IMPACTS ACCEPTABLE?

111 The Council and objectors do not support the permit application because they consider (among other things) that the building will have unacceptable off-site amenity impacts for abutting apartments. We have assessed those submissions, the applicant's reply, and expert evidence called by the parties on these matters. A number of changes were suggested or offered through expert evidence that we have also considered.

## Provisions and policy

112 The consideration of off-site amenity impacts is relevant through clause 32.04, including clause 32.04-9, local policy at clause 22.06, DDO1 and the *Design Guidelines for Higher Density Residential Development*.

- 113 The latter makes reference to clause 55 in relation to overlooking<sup>40</sup> as well as sunlight and daylight access.<sup>41</sup>
- 114 The meaning of clause 32.04-9 was the subject of submissions particularly by Ms Lardner and Mr Gobbo. This clause states:
- Any buildings or works constructed on a lot that abuts land which is in a General Residential Zone, Residential Growth Zone, Neighbourhood Residential Zone or Township Zone must meet the requirements of Clauses 55.04-1, 55.04-2, 55.04-3, 55.04-5 and 55.04-6 along that boundary.
- 115 These clause 55 “requirements” address side and rear setbacks, walls on boundaries, daylight to existing windows, overshadowing to open space and overlooking. Based on the operation of clause 55, the “requirements” are (inter alia) that:
- A development:
- Must meet all of the objectives of this clause.
  - Should meet all of the standards of this clause.
- 116 Ms Lardner and Mr Gobbo generally reached the same position - that this clause is a relevant matter including the Rescode objectives. We agree that clause 32.04-9 is a relevant matter. Although the proposed development is more than five storeys (excluding basements) and therefore clause 55 does not apply<sup>42</sup>, the *Design Guidelines for Higher Density Residential Development* also refer to clause 55 in relation to overlooking<sup>43</sup>, sunlight and daylight access<sup>44</sup>. Clause 32.04-9 is consistent with this concept. Even if we were to be wrong on this matter, and the provision does not apply, the general principles and a consideration of the interface condition are important through the application of State and local policy and the DDO. An appropriate level of amenity is required for both existing dwellings and the proposed dwellings.

## Views

- 117 Another consideration to which we refer is with respect to views. There is no doubt that the amenity of abutting apartments at Nos. 10 Princes Street and 90 Beach Street is influenced by the commanding, multi-aspect views enjoyed by these properties. Having

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<sup>40</sup> Design Suggestion 2.9.1.

<sup>41</sup> Design Suggestion 2.6.2.

<sup>42</sup> Based on clause 55 under ‘Application’ and clause 32.04-6.

<sup>43</sup> Design Suggestion 2.9.1.

<sup>44</sup> Design Suggestion 2.6.2.

regard to the principles usually applied through decisions such as *Healy*<sup>45</sup>, it is relevant to the weighting to be given to the loss of views in this case that DDO1 nor other specific policies or provisions give scheme weight or protection to private views.

- 118 Mr Milner referred to the two primary outlooks designed into these dwellings. That is correct, but the acceptability of intrusions into these views must have regard to legitimate expectations about retaining those views. Legitimate expectations are influenced by the policies, zoning and development controls that apply to land that is proposed to be developed and properties whose view might be affected. In this case, the prospect of an eight storey mixed-use development on the subject land.

## Equitable development

- 119 Issues about the impacts of the proposal on equitable development opportunities arise through Mr Milner's evidence and some residents' submissions. This is with respect to the adjacent communal open space and apartments. Several proposed units, at the north-east of the proposed building, have balconies and windows and are closely positioned to the title boundary. They are designed to enjoy an aspect over Capistrano Square, as other apartments in the abutting developments do. Some persons argue that these dwellings will impact on equitable development rights relating to these adjacent properties and land. We address this concern below.
- 120 Another limb to this topic is the fact that some abutting dwellings have been constructed in a manner, by today's standards, that fail to respect the legitimate equitable development rights of the London Hotel and land within DDO1 where there is an expectation of multi-storey development. The notable examples are the on-boundary balconies in Units C401 and 501 in No. 90 Princes Street and the two upper level boundary windows and upper level balcony at Unit 506/606 in No. 10 Princes Street. None of these adjacent properties are, to our knowledge, the subject of any section 173 agreement as might be the case in locations such as central Melbourne where boundary windows have been allowed with an agreement pertaining to their future removal. No party disagreed with the proposition that the design response needs to deal with the situation as it is found, notwithstanding there is inequity in the current situation.

## Relationship with No. 90 Beach Street

### Setback

- 121 The expert evidence is consistent on the point that the development needs to be set back further from the balconies and dwellings at levels 4 and 5 of No. 90 Beach Street.<sup>46</sup>

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<sup>45</sup> *Healy and Ors v Surf Coast SC* [2005] VCAT 990; *Wright v Greater Geelong CC* [2013] VCAT 2092; *Burl v Moyne SC* [2014] VCAT 874.

<sup>46</sup> The floorplans for these dwellings, shown in Tab 2 of exhibit RA1, also show that the floor level of the balconies are slightly lower than the floor level of the interior of each dwelling.

The experts depart on the extent of setback required to achieve an acceptable outcome with respect to outlook, visual bulk, views, and shadowing. For example, Mr Biacsi's recommendations are shown in Revision 3 plans whereas both Mr McGauran and Mr Milner seek much more significant setbacks, in the order of around 5 metres, consistent with the preferred setbacks in DDO1.

- 122 Our assessment takes into account level differences between the proposed development and adjacent apartments. We are also mindful that the adjacent dwellings have small balconies facing into the communal courtyard, some of which gain a city view. These are associated with bedrooms and not the primary private open space for the dwellings.
- 123 We do not consider the outcome as shown in the substituted plans is acceptable with respect to the impact on the abutting dwellings to the east. The combination of the wall and minimal setbacks would overpower the east-facing balconies and we therefore agree with the consistent position in expert evidence that changes would be required to achieve an acceptable interface condition.
- 124 We do not consider the modification shown in the Revision 3 plans go far enough because of the shadowing apparent at the equinox. That shadowing is additional to shadowing caused by the apartment development itself. Even though these balconies may not be secluded private open space the development would significantly and negatively impact on the amenity of the balconies and particularly the balcony at level 4 which is the primary open space for this dwelling.
- 125 The Revision 3 plans reduce the loss of view compared with the substituted plans. The dwelling at Level 5 has the benefit of a balcony facing the foreshore and we are less concerned about the impact on this dwelling than the unit at Level 4.
- 126 It is self-evident that increasing the setbacks from the eastern boundary will reduce impacts on the abutting apartments.

### Screening

- 127 There was much discussion over the course of the hearing about the need for screening and form of screening necessary to limit inter-viewing between occupants of the proposed development and the upper dwellings at No. 90 Beach Street that have a direct interface with the subject land.
- 128 Inconsistencies between elevations and floorplans added to the complication already arising from factors such as level differences.
- 129 Given our ultimate conclusion in this proceeding, we do not need to resolve the extent or form of screening. Suffice to say that the parties agree that the ability to view between dwellings needs to address the reasonable amenity needs of existing and proposed apartments.

### **Relationship with No. 10 Princes Street Apartment B506/606**

- 130 No. 10 Princes Street is not within DDO1. The land is zoned General Residential and there are reasonable expectations that the amenity of the existing dwellings will be protected.



- 131 What is 'reasonable' must take into account the design objectives, preferred and maximum outcomes under DDO1 that apply to the abutting land. There must be an expectation of a high density mixed use building on the subject land potentially up to eight storeys. Based on the DDO and related scheme policies and provisions, we consider setbacks at the upper levels are reasonably part of this expectation to respond to the boundary interfaces.
- 132 The lower levels of the multi-storey building at No. 10 Princes Street present a blank wall to the subject land. The top two levels are part of one apartment abutting the common boundary with the subject land. As already indicated, there are two south-facing, fire-rated, boundary windows. One services a bathroom and the other a living room. The south-facing living room windows are however, secondary, with the primary aspect of the dwelling and a large balcony provided to the west. This view is over Princes Street and beyond. In addition, this two level dwelling has an expansive balcony and windows at Level 6. The balcony wraps around the western and southern elevations. The balcony abuts the boundary of the subject land to the south.
- 133 We again note level differences between the proposed floor levels and existing apartments and have taken these into account in our assessment. There is a level difference of approximately 1.6 metres between the lower level apartment balcony and proposed Level 5.
- 134 Two matters arise from submissions in terms of impact on the abutting apartment.
- 135 First is the impact on lower-level boundary windows.
- 136 By the end of expert evidence, the experts again agreed that changes are required to set the building back from these windows. Mr Biacsi emphasises that this is necessary only for the bathroom to achieve adequate ventilation whereas Mr McGauran and Mr Milner recommend larger setbacks, of 2.5 metres or more and a setback of the western elevation to allow views and outlook from the south-facing living room windows.
- 137 Our inspection confirms that the boundary windows are secondary elements, notwithstanding that they afford views to the bay and ferry terminal. We accept the applicant's position that a setback for the bathroom window to achieve ventilation is appropriate and we consider that a setback could readily be achieved by a permit condition.
- 138 Second is the relationship with the upper level of the adjacent apartment.
- 139 The proposed Levels 06 and 07 are set back close to 3 metres from the upper level of the adjacent apartment. While Mr McGauran's evidence would result in the top level of the building being removed and therefore reduce the impact on the apartment at No. 10 Princes Street, we note Mr Milner's approach was essentially to recommend setbacks in accordance with DDO1 at the upper levels.

- 140 Taking into account the level difference, a large setback from Princes Street or to the northern elevation would allow for daylight and, subject to the amount of setback, some outlook, however, views would be affected. Given the position of the balcony and other living room windows with expansive views, we do not consider the loss of view to the south-facing upper living room windows to be unacceptable.

### **Relationship with Capistrano Square and other apartments in No. 10 Princes Street**

- 141 The Council and respondents express concern about the impact of the proposed development on this Square. This includes shadowing to the communal open space and the extent to which several apartments at the north-east of the proposed development borrow their amenity from the adjacent Square. Several residents are concerned about overlooking to the communal courtyard of the adjacent residential development.
- 142 Mr Milner expresses significant concern about the interface with this Square and, like Mr Correa, suggests that the proposed dwellings that have an outlook and rely on daylight from the communal courtyard will impact on development opportunities associated with the abutting site. Mr Correa also refers to issues arising for the proposed dwelling should the Owners Corporation plant mature trees close to the boundary of the subject land.
- 143 Mr McGauran's evidence includes changes to Apartments 06, 12, 18 and 24 to reduce shadowing to lower level private open spaces and the communal open space. The changes are also sought to improve the amenity of the apartments including reducing the need for privacy screening.
- 144 In response, the applicant's case is that it is fanciful to suggest that the communal courtyard will be redeveloped. It sits above a communal basement carpark and is the subject of an Owner's Corporation with a very large number of members who would need to agree to redevelopment of the attractive open space and associated facilities.
- 145 We accept the applicant's submission that the likelihood of the adjacent communal open space being redeveloped in close proximity to the subject land is remote and not a significant issue in influencing the outcome of this proceeding. Individual apartments near to the subject land may seek modifications to their layout but it seems unlikely that there would be significant changes with respect to the interface between the north-east section of the subject land and abutting properties.
- 146 We further accept the applicant's submission that it is not unreasonable for the proposed development to borrow, to an extent, from the aspect provided and that the development can do so without unduly prejudicing the amenity of the private open space. Our finding is influenced by the extent of substantial built form facing other parts of the courtyard. The proposal would essentially fill in a small pocket of the south-west of the adjacent open space replacing a currently blank boundary wall.

- 147 Having said that, we consider the extent of boundary development at this north-east part of the subject land should be reduced. We accept recommendations made by Mr McGauran to provide setbacks at this interface primarily to enhance internal amenity and to reduce impacts on abutting dwellings. The types of changes recommended would improve the amenity of the proposed dwellings that have an interface with this area, particularly by reducing the need for privacy screening. The setbacks also potentially reduce the extent of shadowing to lower-level adjacent balconies, notwithstanding that these are secondary private open spaces to adjacent apartments. There may be other ways to better resolve this north- east part of the development for reasons relating to internal amenity and off-site amenity impacts, but not for questions relating to future equitable development opportunities.
- 148 To the extent that proposed dwellings would or could overlook the adjacent communal open space, we are not persuaded that the outcome is unacceptable when taking into account the many windows and balconies that currently look into and enjoy the amenity of the communal courtyard. We find this to be the case in the circumstances, notwithstanding that the proposed dwellings relate to a different site.

### **IS THE WAIVER OF A LOADING BAY ACCEPTABLE?**

- 149 The permit application seeks approval for the waiver of a loading bay for the restaurant under clause 52.07. Policy relating to the design of loading facilities is included in clause 22.06. No loading bay is required for dwellings under this clause.
- 150 Many people opposing the proposal, and the Council, do not support a waiver of a loading bay. They refer to the lack of on-street loading facilities and safety issues resulting from large trucks and vans loading from the street. They submit on-site loading is necessary given the size and likely frequency of deliveries to the restaurant.
- 151 Relying on the evidence of Mr Walsh, the applicant submits the existing commercial use of the land has no on-site loading and, as the proposed restaurant has a smaller floor area and fewer patrons, loading is expected to occur in a similar manner with vans and some trucks. The plans show three on-street spaces including a disabled parking space adjacent to the subject land around the location where existing crossovers would be removed. Mr Walsh suggests that the three spaces be converted to two parallel bays with signage allowing daytime loading. A disabled space would be able to remain.
- 152 We accept the expert evidence on this matter. Service vehicles associated with the use of the size proposed are typically vans and small trucks. It would be most unusual to require an on-site loading bay in the circumstances. It is relevant to our finding on this matter that we have regard to the weight of policy that seeks to avoid service loading bays from facing public streets and spaces.

153 If there are issues in relation to on-street loading and deliveries, it is open to the Council (as road manager) to introduce a loading bay on-street. Signing on-street parking is the responsibility of the Council. The Tribunal cannot direct parking restrictions to be changed. However, we consider the suggestion of an on-street loading bay is sensible, allowing loading during the day and parking at other times.

### **IS THE WAIVER OF BICYCLE PARKING ACCEPTABLE?**

154 The substituted plans show six bicycle parking spaces, a shortfall of three spaces based on clause 52.34. Mr Walsh's evidence is that up to 15 spaces could be accommodated in the allocated area, although clause 52.34 only required nine spaces.

155 We accept submissions by those opposing a waiver of bicycle parking. The policy context we have explained in these reasons gives a strong emphasis on encouragement of the use of the bicycle network and additional policies that we have not recited address the encouragement of alternative transport modes, recreational activities and sustainability. The subject land is a key location in the metropolitan bicycle network and, at least, the minimum on-site provision should be met.

156 Mr Biacsi refers to the ability to accommodate more bicycles within the proposed bicycle storage facility. We consider this to be an appropriate recommendation having regard to the site's location at an intersection of two major bicycle routes based on Plan Melbourne and the obvious attraction of the locality for cycling.

### **IS THE INTERNAL LAYOUT ACCEPTABLE?**

157 Messrs McGauran and Milner raise many issues about the internal layout of the development, some of which we have commented upon or referred to earlier in this decision.

158 The applicant presented detailed submissions in response, including offering possible changes to the development (although not conceding all or any of the changes are necessary based on the submissions and expert evidence upon which it relies). These matters include:<sup>47</sup>

- The width of internal corridors adjacent to lifts.
- Relocation of the entry doors to Apartments 2, 8, 14 and 20.
- Removing the 'double doors' between Apartments 5 & 6, 11 & 12, 17 & 18 and 23 & 24.
- Having regard to Mr Richardson's evidence, relocating several kitchens to provide better access to daylight and better achieve best practice.

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<sup>47</sup> Noting that these are helpfully outlined in the written submission marked as exhibit "A27".

- Relocating the master bedroom for Apartment 19 to provide more internal light.
- Revisions to the form of privacy screening including bathrooms at the interface with No. 90 Beach Street.
- Revisions to the wall and outlook from the private ground level dining room having regard to the interface with the basement ramp.

159 We accept these modifications could be made to the plans by way of permit conditions. If we had been minded to grant a permit, they are changes that we would have been likely to adopt to achieve a better outcome in terms of environmental sustainability and internal amenity, other than removing the option of double doors to several apartments and relocation of kitchen joinery.

## ARE TRAFFIC AND CAR PARKING IMPACTS ACCEPTABLE?

### Parking

160 There are currently no on-site car spaces for the London Hotel and 24 spaces for the offices at Nos. 2-4 Princes Street. The development proposes car parking for each dwelling and no on-site parking for residential visitors or the restaurant. A total of 42 car spaces are provided within three basement levels. One car space is provided for one and two bedroom units. Ten of the 11 three bedroom units would have two car spaces.

161 Mr Walsh's evidence<sup>48</sup> calculates that the existing statutory requirement for the hotel and offices is 157 spaces and the same is the case for the proposed land uses. His evidence states that the floor areas include outdoor areas (that are not the subject of the permit application).

162 The applicant relies on clause 52.06-3A in support of its position that no permit is required for car parking. That clause states:

Unless a schedule to the Parking Overlay specifies otherwise, a permit is not required under Clause 52.06-3 if:

.....

- the number of car parking spaces currently provided in connection with the existing use is not reduced after the new use commences.

163 No Parking Overlay applies to the land. As the proposed on-site parking will not be reduced, the exemption applies based on the floor areas included in expert evidence.

164 Mr Walsh's evidence includes a car parking demand assessment even though his evidence is that no permit is required to reduce car parking.

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<sup>48</sup> Table 1 on page 13.

- 165 Parties and other persons in their statements of grounds express concern about any shortfall in resident parking and residential visitor parking. They question various aspects of the expert evidence including the survey times which are out of peak season.
- 166 We accept the permit applicant's position that no planning permission is sought to reduce car parking. Questions of on-site car parking provision and waiver are therefore not before the Tribunal. Even if there is some doubt about this, it is relevant that the London Hotel has no on-site parking and the proposed restaurant has a reduced patron capacity. The dwellings are compliant with clause 52.06 except for one larger unit. We also observe that there is a significant emphasis in local policy on alternatives to the motor vehicle which we have not explored further because no planning permission is sought under clause 52.06.

## **Traffic**

- 167 The proposal will add to traffic in an area that is busy at particular times, such as when ships arrive and depart the ferry terminal and Station Pier. We have already referred to modifications to the roundabout and its eastern approach being undertaken by the Council. This is to improve the operation of the roundabout at busy times.
- 168 The planning framework that applies to the development of the subject land and locality contemplates higher density development. This will bring additional traffic notwithstanding that the area is busy because of the proximity to facilities such as the ferry terminal. We accept the expert traffic evidence that the additional traffic generated by the proposal can be accommodated on the road network. The Council has not indicated that the traffic impacts of the proposal should cause a permit to be refused.

## **WHAT IS THE TRIBUNAL'S CONCLUSION?**

- 169 There is no doubt that the redevelopment of the subject land for a substantial mixed use building on this prominent corner lot has strategic support.
- 170 The eight storey scale of the building is acceptable, as is the architectural presentation, taking into account its abutting building forms, notwithstanding the debate about the extent of balcony overhang. We find a restaurant at ground floor, and waiver of a loading bay, are acceptable. Bicycle parking can be increased, as is appropriate in this location.
- 171 The positive outcomes associated with this permit application are not, however, outweighed by the negative impacts upon the public and private realms that would result if this development is approved in its current form. We are not satisfied that the outcomes and design objectives of DDO1 are met nor State and local policies that emphasise the important civic role of the foreshore and its pathways.

- 172 Most specifically, we find the extent of overshadowing of the foreshore (including the bicycle and pedestrian paths) and the loss of amenity to abutting dwellings, particularly No. 90 Beach Street, to be unacceptable impacts from the proposal.
- 173 Modifications offered by the applicant during the course of the hearing could assist to resolve some of these issues satisfactorily, particularly with respect to greater building setbacks to reduce impacts on dwellings at Nos. 10 Princes Street and 90 Beach Street. Modifications may reduce the extent of shadowing to the foreshore by removing the framing element but there remains a significant impost on the foreshore reserve that we find to be of such concern to warrant refusal of a permit.
- 174 For the reasons explained above, the decision of the responsible authority is affirmed. No permit is granted.

Margaret Baird  
**Senior Member**

Ann Keddie  
**Member**