

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P11355/2021  
PERMIT APPLICATION NO. PLN19/0426

### CATCHWORDS

Section 79 *Planning and Environment Act 1987*; Yarra Planning Scheme; Commercial 1 Zone; Heritage Overlay; Neighbourhood activity centre; Demolition; Multi-level development; Heritage; Policy; Amenity impacts; Internal amenity.

### APPLICANT

ASHWICK (VIC) 52 PTY LTD

### RESPONSIBLE AUTHORITY

Yarra City Council

### RESPONDENTS

Adrian Campbell

Alice Coates

Allison Louise Kenwood

Andrew Geoffrey Trollope

Andrew Keith Hopkins

Angela Moran

Anne Horrigan-Dixon

Barry Giddings

Barry Kenneth Dyson

Carol Diane Jasen

Colin George Hocking

Crina Virgona

David Balcombe

Eileen Chapman

Gary Andrew Martin

Georgina Sue McKay

Harry Anthony Lewis

Jacqui Kinder

Jane Margaret Herington

Jennifer Berensen

Jillian Wheeler

Julian Golby

Julie Christine Mitchell

Justin Gregory Francis

Kerry H Smith



Kim Kingston  
Lin Padgham  
Melinda Helene O'Donnell  
Michelle Jepp  
Neville Bradley Miles  
Peter John Moore  
Peter Siapikoudis  
Ray Tonkin  
Richard Gordon Scott  
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Rosemary Christina Cresswell  
Ryan Baxter  
Sue Lewis  
Susan Gabrielle Hunt  
Terence Nott  
The 3068 Group Inc.  
Thomas Andrew Coller  
Virginia Noonan  
Zena Michele Helman  
Andrew Murray Lloyd & Gail Lynn Lloyd  
Catherine Margaret Lewis & Harry  
Anthony Lewis  
David Samuel Levin & Norma Levin  
Krina Smith & Sotiria Elliott  
Mark Plackett & Andrea Allan  
Sarah Couper & Joshua Reid  
Vassi & Efthalia Apostolou

**SUBJECT LAND**

35-41 Spensley Street  
CLIFTON HILL VIC 3068

**HEARING TYPE**

Hearing

**DATES OF HEARING**

11, 16 & 21 March 2022, 23, 26, 27, 28 &  
29 September 2022, 3, 4, 5, 6 & 7 October  
2022 and 9 & 10 February 2023

**DATE OF ORDER**

26 April 2023



**CITATION**

Ashwick (vic) 52 Pty Ltd v Yarra CC  
[2023] VCAT 455

**ORDER**

- 1 In application P11355/2021 the decision of the responsible authority is affirmed.
- 2 In planning permit application PLN19/0426 no permit is granted.

Bill Sibonis  
Senior Member

S P Djohan  
Acting Senior Member

Tracey Bilston-McGillen  
Member



## APPEARANCES

For Ashwick (Vic) Pty Ltd

T Cincotta, Lawyer of Best Hooper Lawyers.  
Evidence was called from:

- B De Waard, Environmentally Sustainable Development Consultant
- K Stapleton, Architectural Visualiser of Pointilisim Pty Ltd
- L Furness, Traffic Engineer of Traffix Group Pty Ltd
- A Brady, Heritage Consultant of Anita Brady Heritage
- M Negri. Town Planner of Contour Consultants Australia Pty Ltd

For Yarra City Council

J Rantino, Lawyer of Maddocks Lawyers.  
Evidence was called from:

- R Riddett, Architectural Historian and Heritage Consultant of Anthemion Consultancies

For V & E Apostolou, D  
Balcombe, R Baxter, J  
Berenson, A Campbell, E  
Chapman, A Coates, T  
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Giddings, L Harper, Z  
Helman, J Herington, C  
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Horrigan-Dixon, C Jasen, A  
Kenwood, K Kingston, N  
Levin, C & H Lewis, S  
Lewis, A Lloyd, G Lloyd, G  
Martin, G McKay, J Mitchell,  
P Moore, A Moran, V  
Noonan, M O'Donnell, L  
Padgham, R Scott, P  
Siapikoudis, K Smith, J  
Tonkin, R Tonkin, A  
Trollope, C Virgona, J  
Wheeler and R Williams

Mr G Gale, Town Planner of Gareth Gale  
Town Planning and Advocacy. Evidence was  
called from:

- N Lewis, Conservation Architect of Nigel Lewis Pty Ltd



For The 3068 Group Pty Inc. C Goodman  
For S Couper & J Reid J Reid  
S Hunt, J Golby, M Jepp, D All in person  
Levin, N Miles, T Nott, M  
Plackett, A Allan

## INFORMATION

Description of proposal Demolition and the construction of a multi-storey building accommodating dwellings, wine bar and associated car parking.

Nature of proceeding Application under section 79 of the *Planning and Environment Act 1987* – to review the failure to grant a permit within the prescribed time.<sup>1</sup>

Planning scheme Yarra Planning Scheme (**Planning Scheme**)

Zone and overlays Commercial 1 Zone (**C1Z**).  
Heritage Overlay – Schedule 316, Clifton Hill Eastern Precinct (**HO316**).  
Environmental Audit Overlay (**EAO**).  
Development Contributions Plan Overlay Schedule 1 (**DCPO1**).

Permit requirements Cl. 71.03-1 & Cl. 34.01-1 (use of land in C1Z for a dwelling where the ground floor frontage exceeds 2 metres).  
Cl. 34.01-4 (the construction of a building and the construction or carrying out of works on land in C1Z).  
Cl. 43.01-1 (demolition; the construction of a building; and the construction and carrying out of works on land in HO316).  
Clause 52.06-3 (reduction of the car parking requirement).

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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.



Key scheme policies and provisions

Clauses 11.01-1R, 11.01-1S, 11.02-1S, 11.02-2S, 11.02-3S, 11.03-1S, 11.03-1R, 13.07-1S, 15.01-1S, 15.01-1R, 15.01-2S, 15.01-5S, 15.02-1S, 15.03-1S, 17.02-1S, 18.01-2S, 18.01-3S, 18.01-3R, 18.02-1S, 18.02-2S, 18.02-2R, 18.02-3S, 21.03, 21.04, 21.05, 21.06, 21.07, 21.08, 22.02, 22.05, 22.16, 22.17, 34.01, 43.01, 52.06, 65 and 71.02.

Land description

The subject land is located on the corner of Spensley Street and Berry Street, Clifton Hill, and is occupied by a three-storey hotel building known as the Royal Hotel. The building is constructed to all boundaries with the exception of a small vehicle entry located to the laneway to the south.

The subject land is rectangular in shape with its frontage to Spensley Street of 20.11 metres, a sideage to Berry Street of 36.58 metres and a total site area of 735 square metres.

Despite its history as a hotel, it is not currently used as such. It is understood that in recent times, it has been used a retail liquor store (bottle shop) at ground floor with the upper levels providing accommodation in a form similar to a 'rooming house'.

Tribunal inspection

An unaccompanied site inspection was undertaken during the hearing.

## REASONS<sup>2</sup>

### WHAT IS THIS PROCEEDING ABOUT?



Figure 1: Review site, Royal Hotel. Source Nearmap.

- 1 The Royal Hotel is a prominent heritage building located in a small neighbourhood activity centre at the intersection of Spensley Street and Berry Street in Clifton Hill.
- 2 Historically used as a hotel, that use ceased in 2017. Since that time, it has been occupied by a retail liquor store and distillery within part of the ground floor, with the upper levels used for accommodation in the form of boarding rooms.
- 3 In July 2019, an application was made to the Yarra City Council (**Council**) for a planning permit to undertake demolition and construct a five-storey development, plus basement, accommodating a wine bar and dwellings.
- 4 Notice of the planning application was given and 267 objections were received.
- 5 As the Council did not decide the application within the prescribed period, the applicant has made this application to the Tribunal for a review of the Council's failure to grant the permit within the prescribed time.
- 6 Subsequently, the Council considered a detailed report prepared by its planning officers which assessed the proposal against the relevant policies and provisions of the Planning Scheme. That report recommended the Council advise the Tribunal that, had it been in a position to determine the

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<sup>2</sup> The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

planning application, a Notice of Decision to Grant a Permit would issue, subject to conditions.

- 7 Contrary to this recommendation, the Council resolved to not support the proposal and advised the Tribunal and all parties that it would have refused a permit on a number of grounds which address heritage, character sustainability and amenity impacts.
- 8 Prior to the hearing, the applicant circulated amended proposal plans which, amongst other things, reduced the number of apartments from 18 to 14 and increased the building setback to the southern and western facades. These plans were substituted for the planning permit application plans at the hearing<sup>3</sup>.
- 9 The Council advised the Tribunal and parties that it remains opposed to the proposal on the following grounds, noting that it was no longer pursuing the ground of refusal relating to matters of sustainability as these matters could be addressed by planning permit conditions.
  - [1] The proposed extent of demolition is excessive, fails to retain elements that contribute to the importance of the heritage place and will negatively impact upon its heritage significance. This is contrary to clause 43.01 (Heritage Overlay) and the policies at clauses 15.03, 21.05, 21.09 and 22.02 of the Yarra Planning Scheme.
  - [2] The proposed development does not appropriately respond to the ‘Individual Significance’ of the building and fails to protect and enhance the heritage place. This is contrary to the clause 43.01 (Heritage Overlay) and the policies at clauses 15.03, 21.05 and 22.02 of the Yarra Planning Scheme.
  - [3] The building height and upper level setbacks result in an overbearing development and will be contrary to the built form character of the area.
  - [4] The proposed development would result in unreasonable visual bulk and overshadowing impacts, particularly to those at No. 33 Lilly Street and No. 31 Berry Street.
- 10 Respondents similarly oppose the grant of a permit, but raise additional concerns in respect of car parking and traffic considerations, the impact of the development of an existing solar energy facility, and noise from the use of the laneway and basement access, amongst others.
- 11 Based on the submissions, the key issues for determination in this proceeding may be expressed as follows:
  - Is the proposal an acceptable heritage outcome?

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<sup>3</sup> Tribunal Order dated 22 March 2022.



- Will the proposal have any unacceptable impacts on the amenity of adjoining properties?
- Will the occupants of the proposed dwellings be provided with an acceptable level of amenity?
- Is sufficient car parking provided and will there be any unacceptable traffic impacts?

12 Having considered the submissions and evidence, with regard to the relevant policies and provisions of the Planning Scheme, assisted by our inspection, we have determined to affirm the Council's decision. Our reasons follow.

### WHAT IS PROPOSED?

13 The proposed development may be described as follows:

- Demolition of the majority of the building with the exception of the eastern (Berry Street) and northern (Spensley Street) façades a small nib of the western wall and a section of the southern wall.
- Construction of a five-storey building with the addition of roof top plant screening.
- A wine bar, three home offices, a substation, entry lobby, store areas and bicycle storage (for 6 bicycles) at the ground floor level.
- A total of 14 dwellings on the upper levels, including a one-bedroom apartment; three, two-bedroom apartments with home office space; six, two-bedroom apartments; three, three-bedroom apartments; and one, four-bedroom apartment.
- The materials palette comprises a combination of concrete, recycled brick, render, aluminium battens and glass and the colour palette will comprise off-grey, charcoal and black.
- Access to the basement car park is to be from the laneway to the south. The basement provides parking for 24 car spaces (18 accommodated in car stackers) and 8 bicycle spaces.

### DETAILS OF THE PHYSICAL CONTEXT

14 We adopt the following description of the subject land's context from the Council's submission<sup>4</sup>:

12. To the immediate **north** of the Subject Land is Spensley Street which runs in an east to west direction. It connects the Spensley Street Neighbourhood Activity Centre with Clifton Hill Station to the west.

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<sup>4</sup> Council submission dated 7 March 2022.



13. On the northern side of Spensley Street is row of double storey Victorian era commercial buildings. There is at grade parking abutting those properties along Spensley Street. These buildings are used for a range of uses including medical clinic and dwellings. Further north there are single and double storey residential buildings fronting Berry Street and Grant Street. Residential development to the north is predominantly low rise.
14. To the immediate **south** of the Subject Land is a 3.7m wide laneway which separates the Subject Land from properties located in the Neighbourhood Residential Zone. On the southern side of the laneway is 31 Berry Street, a single storey Victorian era dwelling. Further south are single and double storey Victorian era dwellings fronting Berry Street. These dwellings are all located in the same Heritage Overlay as the Subject Land
15. To the immediate **east** of the Subject Land is Berry Street which runs in a north to south direction.
16. On the north eastern corner of Berry Street and Spensley Street opposite the Subject Land is a modified single storey Victorian era building occupied by a number of commercial tenancies including a fish and chip shop, pizza restaurant, hairdresser and a wine bar. The building is constructed to the front boundary with a large awning extending over the width of the footpath with business identification signage on the southern end of the awning with a decorative parapet above.
17. Further south is a single storey dwelling that marks the 'line' between the Commercial 1 Zone and the Neighbourhood Residential Zone. Residential dwellings to the south are a mixture of single and double storey.
18. To the immediate **west**, the Subject Land abuts land in the Neighbourhood Residential Zone. Fronting the rear lane is a single storey former industrial building that has been converted to dwellings ranging in height from one to four storeys.
19. To the southwest of the Subject Land is 33 Lilly Street which is a dwelling constructed to all site boundaries aside from a small light court to the northwest. The ground floor comprises a garage and entry fronting the laneway with a workshop and store located to the north. Bedroom windows on the first floor front the north western light court and laneway. There are habitable room windows to the north, south and west with private open space on a second floor terrace to the north of the Subject Land.
20. To the northwest of the Subject Land is a largely vacant lot<sup>5</sup> which contains the front façade that was retained under Planning Permit PLN18/0101 issued on 17 September 2018. This permit

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<sup>5</sup> This land is known as 33 Spensley Street, Clifton Hill (Tribunal's footnote).



permitted the part demolition and construction of a double storey dwelling plus a basement and roof terrace. The endorsed plans for this development show:

- 20.1 at first floor a car port and pedestrian entry accessed from Spensley Street. A living room, bathroom and bedroom will also be located at ground floor with the dwelling constructed to the full site boundaries.
- 20.2 the bedroom having access to daylight and ventilation with operable skylights to the south. The first floor will have an open plan kitchen/living/dining constructed to the eastern and western boundaries and partially setback from the north and south allowing for two terraces and operable windows/doors providing light and ventilation.
- 20.3 a rooftop terrace being located on the roof with 1.7m high privacy screening to the south, west and east.



Figure 2: Review site and surrounds. Source Nearmap.

## WHAT IS THE RELEVANT PLANNING CONTEXT?

### Zoning

15 The purpose of the CIZ is:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To create vibrant mixed use commercial centres for retail, office, business, entertainment and community uses.

To provide for residential uses at densities complementary to the role and scale of the commercial centre.

16 A series of decision guidelines is provided at clause 34.01-8. These must be considered, as appropriate and in addition to the decision guidelines at

clause 65 before deciding on an application. Relevant decision guidelines include:

- The Municipal Planning Strategy and the Planning Policy Framework.
- The interface with adjoining zones, especially the relationship with residential areas.
- The provision of car parking.
- The streetscape, including the conservation of buildings, the design of verandahs, access from the street front, protecting active frontages to pedestrian areas, the treatment of the fronts and backs of buildings and their appurtenances, illumination of buildings or their immediate spaces and the landscaping of land adjoining a road.
- The storage of rubbish and materials for recycling.
- Consideration of the overlooking and overshadowing as a result of building or works affecting adjoining land in a General Residential Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone.
- The impact of overshadowing on existing rooftop solar energy systems on dwellings on adjoining lots in a General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone.
- The design of buildings to provide for solar access.
- For an apartment development, the objectives, standards and decision guidelines of Clause 58.

## Heritage Overlay

17 The purpose of the Heritage Overlay is:

To implement the Municipal Planning Strategy<sup>6</sup> and the Planning Policy Framework.<sup>7</sup>

To conserve and enhance heritage places of natural or cultural significance.

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<sup>6</sup> The Planning Scheme does not currently include a Municipal Planning Strategy. Transitional provisions are detailed at clause 71.02-4. Pursuant to this clause, where a Municipal Strategic Statement is included at clause 21 of the Planning Scheme, the provisions of clauses 23.01, 23.02 and 23.03 apply. These provisions require responsible authorities (and, upon review, this Tribunal) to take the Municipal Strategic Statement into account before making decisions about planning applications.

<sup>7</sup> Pursuant to clause 23.01, clauses 21 and 22 of the Planning Scheme form part of the Planning Policy Framework. Where a provision of the Planning Scheme requires consideration of the Planning Policy Framework, that consideration must include clauses 21 and 22. A reference in the Planning Scheme, including any incorporated document, to the State Planning Policy Framework or the Local Planning Policy Framework is to be taken to be a reference to the Planning Policy Framework. Planning Policy Framework is to be taken to include the Local Planning Policy Framework.



To conserve and enhance those elements which contribute to the significance of heritage places.

To ensure that development does not adversely affect the significance of heritage places.

To conserve specified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.

18 The decision guidelines which must be considered as appropriate, in addition to the decision guidelines at clause 65 are detailed at clause 43.01-8. Relevantly, these include:

- The Municipal Planning Strategy and the Planning Policy Framework.
- The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable statement of significance (whether or not specified in the schedule to this overlay), heritage study and any applicable conservation policy.
- Any applicable heritage design guideline specified in the schedule to this overlay.
- Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
- Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

## Policy

19 Policy within the Planning Policy Framework (**PPF**) supports increased residential densities and more intensive development in and around activity centres to make greater and more efficient use of existing infrastructure and services, including public transport. Further policies support housing diversity and affordability. These policies, their objectives and related strategies are detailed at clauses 11.03 and 16.01, amongst others, and include:



To encourage the concentration of major retail, residential, commercial, administrative, entertainment and cultural developments into activity centres that are highly accessible to the community.<sup>8</sup>

Support the role and function of each centre in the context of its classification, the policies for housing intensification, and development of the public transport network.<sup>9</sup>

Encourage a diversity of housing types at higher densities in and around activity centres.<sup>10</sup>

To facilitate well-located, integrated and diverse housing that meets community needs.<sup>11</sup>

Increase the proportion of housing in designated locations in established urban areas (including under-utilised urban land) and reduce the share of new dwellings in greenfield, fringe and dispersed development areas.<sup>12</sup>

Encourage higher density housing development on sites that are well located in relation to jobs, services and public transport.<sup>13</sup>

Facilitate diverse housing that offers choice and meets changing household needs by widening housing diversity through a mix of housing types.<sup>14</sup>

Plan for growth areas to provide for a mix of housing types through a variety of lot sizes, including higher housing densities in and around activity centres.<sup>15</sup>

Manage the supply of new housing to meet population growth and create a sustainable city by developing housing and mixed use development opportunities in locations that are:

...

- Neighbourhood activity centres - especially those with good public transport connections.<sup>16</sup>

...

Identify areas that offer opportunities for more medium and high density housing near employment and transport in Metropolitan Melbourne.<sup>17</sup>

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<sup>8</sup> Objective of clause 11.03-1S

<sup>9</sup> Strategy at clause 11.03-1S

<sup>10</sup> Strategy at clause 11.03-1S

<sup>11</sup> Objective of clause 16.01-1S

<sup>12</sup> Strategy at clause 16.01-1S

<sup>13</sup> Strategy at clause 16.01-1S

<sup>14</sup> Strategy at clause 16.01-1S

<sup>15</sup> Strategy at clause 16.01-1S

<sup>16</sup> Strategy at clause 16.01-1R

<sup>17</sup> Strategy at clause 16.01-1R



Facilitate increased housing in established areas to create a city of 20 minute neighbourhoods close to existing services, jobs and public transport.<sup>18</sup>

- 20 The applicant's submission emphasised the site's location in an activity centre and its proximity to a range of facilities and services. These include the Clifton Hill railway station some 150 metres to the west; the Queens Parade Neighbourhood Activity Centre approximately 450 metres to the west; and various recreation facilities and public open space areas within approximately 280 metres. These submissions were made in support of the site's suitability to accommodate a diversity of housing at increased densities.
- 21 The site's locational attributes were not disputed by the Council, its submission being:
83. In broad terms, the proposal is consistent with relevant State and local policy ambitions to increase development in and around activity centre locations and close to public transport and community infrastructure. The Subject Land's C1Z zoning is an invitation to take advantage of the C1Z's purposes.
84. But at the same time the C1Z has as its purpose of creating "vibrant mixed use commercial centres", it has its purpose of providing "for residential uses at densities complementary to the role and scale of the commercial centre". This co-joining of purposes is a strong and deliberate indicator that not all C1Z commercial centres are the same... They perform different roles. They are either expressly ear-marked to perform different roles or, by reason of physical and/or policy constraint, will continue to perform the role that they presently play. Residential uses are encouraged in the commercial centres but only to a density that complements the role and scale of the commercial centre.
- 22 The Council went on to submit that the site's development potential is 'substantially tempered' by its inclusion in a Heritage Overlay; the building's individually significant grading; and its location in a compact Neighbourhood Activity Centre surrounded by low-rise, fine grain residential properties in the Neighbourhood Residential Zone and with residential interfaces. Note was also made of the proposal to re-designate the activity centre to a Local Activity Centre,<sup>19</sup> which we refer to below.
- 23 Policy for building design, at clause 15.01-2S, has the objective of achieving building design and siting outcomes that contribute positively to the local context, enhance the public realm and support environmentally sustainable development. Related strategies refer to ensuring development responds and contributes to the strategic and cultural context of its location; minimising the detrimental impact of development on neighbouring

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<sup>18</sup> Strategy at clause 16.01-1R

<sup>19</sup> As part of proposed Amendment C269yara.



properties, the public realm and the natural environment; and achieving environmentally sustainable outcomes.

- 24 The objective of clause 15.01-5S, neighbourhood character, is to recognise, support and protect neighbourhood character, cultural identity and sense of place. The strategies include supporting development that respects the existing neighbourhood character; and ensuring development responds to its context and reinforces a sense of place and the valued features and characteristics of the local environment and place by respecting, amongst others, the neighbourhood character values and built form that reflect community identity.
- 25 Heritage conservation policy at clause 15.03-1S has the objective to ensure the conservation of places of heritage significance. Relevant strategies include:
- Provide for the conservation and enhancement of those places that are of aesthetic, archaeological, architectural, cultural, scientific or social significance.
  - Encourage appropriate development that respects places with identified heritage values.
  - Retain those elements that contribute to the importance of the heritage place.
  - Encourage the conservation and restoration of contributory elements of a heritage place.
  - Ensure an appropriate setting and context for heritage places is maintained or enhanced.
  - Support adaptive reuse of heritage buildings where their use has become redundant.
- 26 The policy guidelines are to consider as relevant:
- The findings and recommendations of the Victorian Heritage Council.
  - The Burra Charter: The Australian ICOMOS Charter for Places of Cultural Significance.

### **Municipal Strategic Statement**

- 27 Clause 21.05 of the Municipal Strategic Statement (**MSS**) details the objectives and strategies for built form. It states that heritage features underpin the municipality's valued character. It goes on to say that the cultural significance of heritage places must not be compromised by new development, and that in conserving areas of heritage significance there is also a need to provide for adaptive reuse and change of buildings.
- 28 Objective 14 is to protect and enhance Yarra's heritage places. Relevant strategies include:

Strategy 14.1 Conserve, protect and enhance identified sites and areas of heritage significance including pre-settlement ecological heritage.

Strategy 14.2 Support the restoration of heritage places.

Strategy 14.3 Protect the heritage skyline of heritage precincts.

Strategy 14.4 Protect the subdivision pattern within heritage places.

...

Strategy 14.6 Protect buildings, streetscapes and precincts of heritage significance from the visual intrusion of built form both within places and from adjoining areas.

...

Strategy 14.8 Apply the Development Guidelines for sites subject to a Heritage Overlay policy at clause 22.02.

- 29 Objectives and strategies for urban design are set out at clause 21.05-2. Objective 17 is to retain Yarra's identity as a low-rise urban form with pockets of higher development. Related strategy 17.2 reads:

Strategy 17.2 Development on strategic redevelopment sites or within activity centres should generally be no more than 5-6 storeys unless it can be demonstrated that the proposal can achieve specific benefits such as:

- Significant upper level setbacks
- Architectural design excellence
- Best practice environmental sustainability objectives in design and construction
- High quality restoration and adaptive re-use of heritage buildings
- Positive contribution to the enhancement of the public domain
- Provision of affordable housing.

- 30 Objective 20 is to ensure that new development contributes positively to Yarra's urban fabric. Strategy 20.1 is to ensure development is designed having particular regard to its urban context and specifically designed following a thorough analysis of the site, neighbouring properties and its environs.

- 31 Objective 21 is to enhance the built form character of Yarra's activity centres. The related strategies are:

Strategy 21.1 Require development within Yarra's activity centres to respect and not dominate existing built form.

Strategy 21.2 Require new development within an activity centre to consider the context of the whole centre recognising that activity centres may consist of sub-precincts, each of which may have a different land use and built form character.

Strategy 21.2 Support new development that contributes to the consolidation and viability of existing activity centres.

- 32 The locally specific implementation of the objectives and strategies of clauses 21.04 to 21.07 of the municipality's neighbourhoods is provided at clause 21.08. The Clifton Hill neighbourhood is addressed at clause 21.08-4, where it relevantly states:

The Spensely Street centre is a small convenience centre based around the intersection of Spensely and Berry streets. The centre has a village atmosphere and an attractive streetscape and landscaping. There is limited scope for more intense development of this centre.

### **Local policy**

#### Clause 22.02 - Development Guidelines for Sites Subject to the Heritage Overlay

- 33 This policy applies to all land within a Heritage Overlay and, according to the policy basis, provides for the protection and enhancement of the City's identified places of cultural and natural heritage significance. The objectives of the policy are:

To conserve Yarra's natural and cultural heritage.

To conserve the historic fabric and maintain the integrity of places of cultural heritage significance.

To retain significant view lines to, and vistas of, heritage places.

To preserve the scale and pattern of streetscapes in heritage places.

To encourage the preservation, maintenance, restoration and where appropriate, reconstruction of heritage places.

To ensure the adaptation of heritage places is consistent with the principles of good conservation practice.

To ensure that additions and new works to a heritage place respect the significance of the place.

To encourage the retention of 'individually significant' and 'contributory' heritage places.

To protect archaeological sites of cultural heritage significance.

- 34 Clause 22.02-2 provides the definitions of words used in the policy. Relevantly, these include:

Heritage place: anything subject to the Heritage Overlay and can include a site, area, land, landscape, tree, building or other work, or group of buildings of heritage significance, and may include components or spaces. When used in the context of a building graded individually significant, the heritage place is initially the individually significant building and then the broader heritage area. When used in the context of a contributory building, the heritage place is the broader heritage area.

35 Clause 22.03 explains the levels of significance as follows:

Every building of cultural significance has been assessed and graded according to its heritage contribution. The levels of significance used are:

- Individually significant: The place is a heritage place in its own right. Within a Heritage Overlay applying to an area each individually significant place is also Contributory.
- Contributory: The place is a contributory element within a larger heritage place. A contributory element could include a building, building groups and works, as well as building or landscape parts such as chimneys, verandahs, wall openings, rooflines and paving.
- Not contributory: The place is not individually significant and not contributory within the heritage place.

36 The policy addresses both demolition and new development on land within the Heritage Overlay.

37 Pursuant to clause 22.02-5.1, it is policy to generally discourage the demolition of part of an individually significant or contributory building or removal of contributory elements unless:

- That part of the heritage place has been changed beyond recognition of its original or subsequent contributory characters.
- ...
- For individually significant building or works, it can be demonstrated that the removal of the building or works does not negatively affect the significance of the place.

38 The relevant sections of the policy are reproduced and considered in later sections of these reasons. To avoid duplication, we will not set them out here.

39 The decision guidelines, which will be considered before deciding on an application are detailed at clause 22.02-7 and are as follows:

- Whether there should be an archival recording of the original building or fabric on the site.
- The heritage significance of the place or element as cited in the relevant Statement of Significance or Building Citation.

### Clause 22.05 - Interface Uses Policy

- 40 This policy applies to applications for use and development within, amongst others, Business Zones. An objective is to enable the development of new residential uses within and close to activity centres, near industrial areas and in mixed use areas while not impeding the growth and operation of these areas as service, economic and employment nodes.
- 41 It is policy that new residential use and development in or near commercial centres and activity centres and near industrial uses includes design features and measures to minimise the impact of the normal operation of business and industrial activities on the reasonable expectation of amenity within the dwellings.
- 42 The guidelines in this policy address matters of noise, fumes, air emissions, vibration, light spill, overlooking and visual bulk.

### 22.07 - Development Abutting Laneways

- 43 This policy applies to applications for development that is accessed from a laneway or has laneway abuttal. It addresses matters of traffic impact, vehicle access, pedestrian access, lighting, surveillance, built form scale, storage and emergency services access.
- 44 The objectives of the policy are:
- To provide an environment which has a feeling of safety for users of the laneway.
  - To ensure that development along a laneway acknowledges the unique character of the laneway.
  - To ensure that where development is accessed off a laneway, all services can be provided to the development.
  - To ensure that development along a laneway is provided with safe pedestrian and vehicular access.

### Clause 22.17 - Environmentally Sustainable Development

- 45 Pursuant to clause 22.17-2, the overarching objective of this policy is that development should achieve best practice in environmentally sustainable development from the design stage through to construction and operation. It sets out objectives, which should be satisfied where possible, in respect to energy performance, water resources, indoor environment quality, stormwater management, transport, waste management and urban ecology.
- 46 The decision guidelines, at clause 22.17-5, which will be considered as appropriate in determining an application are:
- The extent to which the development meets the objectives and requirements of this policy from the design stage through to construction and operation.



- Whether the proposed environmentally sustainable development performance standards are functional and effective to minimise environmental impact.
- Whether the proposed environmentally sustainable development initiatives are reasonable having regard to the type and scale of the development and any site constraints.
- Whether an appropriate assessment method has been used.
- Whether an ESD plan or framework has previously been approved by the responsible authority (whether under a planning control or otherwise).

### **Amendment C269yara**

47 Amendment C269yara (**Amendment**) proposes the replacement of the MSS and clause 21 and the local planning policies at clause 22 with a Municipal Planning Strategy and local policies in the PPF. The purpose of the Amendment is detailed in the Council’s submission:

65. The purposes of Amendment C269yara are two-fold in that it:
- 65.1 revises and updates local planning policies in the Scheme by implementing the findings of the Yarra Planning Scheme Review undertaken in 2014 and other key pieces of strategic work undertaken since that time; and
  - 65.2 facilitates the integration of Council’s local policy into the PPF as required by Amendment VC148 and the Victorian Government’s Smart Planning Program which seeks to simplify and modernise Victoria’s planning policy, and to make planning schemes more efficient, accessible and transparent.

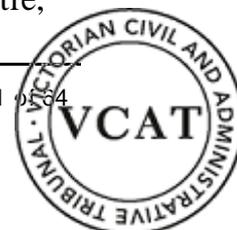
48 The Panel appointed to hear submissions to the Amendment published its report in January 2022.

49 The Amendment has been adopted by the Council and has been submitted to the Minister for Planning for approval. There is no dispute between the parties that the Amendment is a seriously entertained planning proposal to which we can have regard. We agree. Pursuant to section 60(1A)(h) before deciding on an application, the responsible authority (and, on review, the Tribunal) if the circumstances appear to require, may consider:

any amendment to the planning scheme which has been adopted by a planning authority but not, as at the date on which the application is considered, approved by the Minister or a planning authority

50 The Amendment was referred to in some detail, both in submissions and evidence.

51 Proposed clause 11.03-1L, Activity Centres, alters the designation of the Spensley Street Neighbourhood Activity Centre to a Local Activity Centre,



a lower order centre. Regarding this proposed designation, the Panel report states:

The activity centre hierarchy is based on a substantial volume of work completed by Council and is consistent with the State and metropolitan planning policy, including Plan Melbourne. The hierarchy is generally consistent with existing planning policy except for the introduction of a third tier of centres – the LACs. It is reasonable and appropriate to distinguish the very low order NACs in the existing Planning Scheme as LACs because, as demonstrated, these centres clearly serve a different role and function compared to the other NACs.

...

The Panel accepts it is appropriate to designate the Spensley Street and Berry/Ramsden Street activity centres as LACs. These centres are too small to exhibit the necessary range of services and facilities to be classified as NACs, however they are entirely in the Commercial 1 Zone and it is reasonable to designate them as activity centres to ensure appropriate policy can manage their growth within the local context.<sup>20</sup>

52 Proposed clause 15.01-2L as exhibited addressed ‘building heights’ in the following manner:

Ensure the height of new buildings respond to the height of adjoining development, unless indicated otherwise in the planning scheme.

Ensure that development reflects the predominant low-rise character of the area, except in the areas below:

- Activity centres (as shown on the Strategic Framework Plan in clause 02.04-1 and clause 11.03-1L).
- Employment areas (as defined in clause 02.01).
- Major regeneration areas (as shown on the Strategic Framework Plan in clause 02.04-1).
- Boulevards (as defined in clause 02.03).

53 In respect of the built form within activity centres, the Panel agreed with the Council that:

...there will be some locations within MACs and NACs which will retain a low-rise built form but other parts of MACs and NACs will support mid-rise forms. This is in accordance with good site responsive built form controls. The term ‘mid-rise’ may include a range of heights appropriate to the physical and strategic context of the location.<sup>21</sup>

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<sup>20</sup> Yarra Planning Scheme Amendment C269yara Rewrite of local policies Panel Report, 4 January 2022, at Pages 3020 and 3021 of Tribunal Book 1

<sup>21</sup> At page 1434 of Tribunal Book 1



54 The Panel recommended that proposed clause 15.01-2L be amended to:

Ensure that development reflects the predominant low-rise character of the area, except in the areas below where building heights should respond to the physical and strategic context of the site:

Activity centres (as shown on the Strategic Framework Plan in clause 02.04 and clause 11.03-1L).

- Employment areas (as defined in clause 02.01).
- Major regeneration areas (as shown on the Strategic Framework Plan in clause 02.04).
- Boulevards (as defined in clause 02.03).<sup>22</sup>

55 In adopting the Amendment, the Council did not accept the Panel's recommended wording. The adopted form of proposed clause 15.01-2L reads:

Ensure that development reflects the predominant low-rise character of the area, except in the areas below:

- Major and neighbourhood activity centres (as shown on the Strategic Framework Plan in clause 02.04 and clause 11.03-1L).
- Employment areas (as defined in clause 02.01).
- Major regeneration areas (as shown on the Strategic Framework Plan in clause 02.04-1)
- Boulevards (as defined in clause 02.03),

where building heights should be in accordance with any building height requirements set out in the relevant zone or overlay (including Design and Development Overlays), or, where there are no building height requirements specified, having regard to the physical and strategic context of the site.<sup>23</sup>

56 Proposed clause 15.03-1L details the policy for heritage, which is to apply to all land within a Heritage Overlay. The objectives include:

To conserve and enhance Yarra's natural and cultural heritage.

To preserve the scale and pattern of streetscapes in heritage places.

To ensure the adaptation of heritage places is consistent with the principles of good conservation practices.

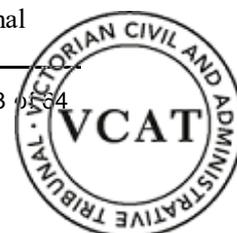
57 Proposed related strategies include:

Retain, conserve and enhance individually significant and contributory buildings as identified in the incorporated document in schedule to clause 72.04 'City of Yarra Database of Heritage Significant Areas.'

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<sup>22</sup> As detailed in the Council's Further Submission dated 12 August 2022, at page 352 of Tribunal Book 2

<sup>23</sup> As detailed in the Council's Further Submission dated 12 August 2022, at page 352 of Tribunal Book 2



Promote development that is high quality and respectful in its design response by:

- Maintaining the heritage character of the existing building or streetscape.
- Respecting the scale and massing of the existing heritage building or streetscape.
- Retaining the pattern and grain of streetscapes in heritage places.
- Not visually dominating the existing heritage building or streetscape.
- Not detracting from or competing with the significant elements of the existing heritage building or streetscape.
- Maintaining the prominence of significant and contributory elements of the heritage place.
- Respecting the following elements of the heritage place:
  - Pattern, proportion and spacing of elements on an elevation.
  - Orientation to the street.
  - Setbacks.
  - Street wall.
  - Relationship between solid and void.
  - Roof form.
  - Chimneys.
  - Verandahs and canopies.
  - Materials.
- Being visually recessive against the heritage fabric through:
  - Siting.
  - Mass.
  - Scale.
  - Materials.
  - Architectural detailing.
  - Texture, colours and finishes

Protecting and conserving the view of heritage places from the public realm (except from laneways, unless fabric visible from laneways is identified as being significant in the Statement of Significance for the place).

Maintain views to the front of an individually significant or contributory building or views to a secondary façade where the building has two street frontages by not:



- Building over the front of it.
- Extending into the air space above the front of it.
- Obscuring views of its principal façade/s.

Set back additions:

- To avoid facadism, where only the visible façade is retained and the remaining fabric is demolished.
- To maintain the visibility of the three-dimensional form and depth of a building.

Retain or reinstate historic street and laneway fabric and infrastructure, including bluestone.

In circumstances where primary pedestrian access is provided from a laneway, allow for any reinstatement of the laneway fabric to provide universal access.

### **Demolition**

Prioritise the conservation and adaptive reuse of a heritage place over demolition.

Avoid the demolition of individually significant or contributory buildings unless all of the following can be demonstrated:

- The building is structurally unsound rather than just in poor condition.
- Alternative stabilisation works have been investigated and are not feasible.
- The replacement building and/or works is appropriate for the heritage context.

Avoid the demolition of any part of an individually significant or contributory building unless all of the following can be demonstrated:

- The demolition will not adversely affect the significance of the heritage place.
- The partial demolition will contribute to the long-term conservation of the heritage place.
- The fabric does not contribute to the significance of the place or the area of demolition is not visible from:
  - The street frontage (other than a laneway), unless:
    - The principal façade addresses the laneway; or
    - The fabric visible from the laneway is identified in the Statement of Significance.
  - A park or public open space immediately adjoining the site.
- The removal of part of the building allows its three-dimensional form to be retained and does not result in the retention of only



the visible façade of the building and demolishing the remainder.

- The replacement building is a high quality design.

Encourage all applications for demolition to be accompanied by an application for new development.

Avoid the demolition of an individually significant or contributory building unless new evidence has become available to demonstrate that the building is not of heritage significance and does not contribute to the significance of a heritage place.

### **Commercial and industrial heritage places**

Articulate new façades by incorporating simple architectural detailing that does not compete with the more elaborate detailing of adjoining individually significant or contributory building.

Retain the visual prominence of both façades of buildings on corner sites (not including laneways).

Avoid the following in the facades of individually significant and contributory buildings:

- New openings.
- Enlarging existing openings.
- New floor plates, walls, columns or structural supports cutting through openings.
- Highly reflective glazing in historic openings (not including solar panels).
- Large expanses of glazing with a horizontal emphasis, except for ground floor shop fronts.
- Unarticulated curtain glazing.
- Balconies in historic openings.

### **Commercial heritage places**

Encourage all buildings and works to respect and respond to the existing proportions, patterning and massing of nineteenth and early twentieth century facades and streetscapes.

Maintain the prominence of the street wall through appropriate upper level setbacks.

...

### **Restoration and reconstruction**

Retain the significance of the heritage place and the original fabric through:

- Restoration (returning a place to a known earlier state by removing accretions or by reassembling existing elements without the introduction of new material).



- Adaptive re-use.
- Reconstruction, where evidence exists (returning a place to a known earlier state, including the introduction of new material).

Support the reconstruction of a building or works that previously existed in a heritage place if:

- The reconstruction will support the significance of the heritage place.
- Evidence exists to support the accuracy of the reconstruction.

58 Proposed clause 16.01-2L sets out policy for the location of residential development. It has the objective to direct the majority of new housing development within a major or neighbourhood activity centre or major regeneration area as shown on the Strategic Framework Plan at proposed clause 02.04.

59 The Strategic Housing Framework Plan for Fitzroy North and Clifton Hill shows the review site and surrounding neighbourhood as being within a ‘minimal change area’.

60 A further objective is to maintain the character and scale of established residential areas that have limited potential for housing growth. Related strategies include:

Provide for minimal change in minimal change areas by encouraging development:

- Of one or two dwellings on typically small individual lots.
- That respects the prevailing type, scale and character of development in the street.

Provide for incremental change in incremental change areas by encouraging development:

- Of single or town house type dwellings on individual lots or smaller scale apartment development.
- That respects the fine-grain subdivision pattern, neighbourhood or streetscape character and identified heritage significance.

Limit housing growth in minimal change areas and incremental change areas outside activity centres.

Support mixed use development in incremental change areas within activity centres to maintain the role and function of the centres as locations for economic activity.

## **CLAUSE 22.02 – DEVELOPMENT GUIDELINES FOR SITES SUBJECT TO THE HERITAGE OVERLAY**

61 Interpretation of clause 22.02 – *Development Guidelines for Sites subject to the Heritage Overlay* was the subject of extensive oral submissions by the parties at the hearing. Of particular focus was –



- clause 22.02-3 – *Levels of Significance* and its application to clause 22.02-5.1 – *Demolition*; and
- clause 22.02-5.7 – *New Development, Alterations or Additions*.

**Clause 22.02-3 – Levels of Significance and its application to clause 22.02-5.1 – Demolition**

62 The text of clause 22.02-3 is as follows –

**Levels of Significance**

Every building of cultural significance has been assessed and graded according to its heritage contribution. The levels of significance used are:

- Individually significant: The place is a heritage place in its own right. Within a Heritage Overlay applying to a whole area each individually significant place is Contributory.
- Contributory: The place is a contributory element within a larger heritage place. A contributory element could include a building, building groups and works, as well as building or landscape parts such as chimneys, verandahs, wall openings, rooflines and paving.
- Not contributory: The place is not individually significant and not contributory within the heritage place.

The level of significance of every building is identified in the incorporated document, *City of Yarra Review of Heritage Overlay Areas 2007 Appendix 8* (as updated from time to time). Details of methodology used to determine levels of significance can be found in *City of Yarra Review of Heritage Overlay Areas 2007 (Graeme Butler and Associates)*, *City of Yarra Heritage Gaps Review Two 2013*, *City of Yarra Heritage (sic) Gaps Study July, 2014 – Smith Street South (Anthemion)*, *Heritage Gap Study: Review of Central Richmond, Stage 2 Final Report, November 2014* and *Heritage Gap Study: Review of Johnston Street East, March 2016*.

63 On the facts, the part of clause 22.02-5.1 that is relevant is that part that deals with the removal of part of a heritage place or contributory elements. It is extracted below.

Encourage the removal of inappropriate alterations, additions and works that detract from the cultural significance of the place.

Generally discourage the demolition of part of an individually significant or contributory building or removal of contributory elements unless:

- That part of the heritage place has been changed beyond recognition or its original or subsequent contributory character(s).
- For a contributory building:



- that part is not visible from the street frontage (other than a laneway), abutting a park or public open space, and the main building form including the roof form is maintained; or
  - the removal of the part would not adversely affect the contribution of the building to the heritage place.
- For individually significant building or works, it can be demonstrated that the removal of part of the building or works does not negatively affect the significance of the place.
- 64 Both sub-clauses extracted above form part of clause 22.02 – *Development Guidelines for Sites Subject to the Heritage Overlay*. These guidelines apply to all land within a Heritage Overlay.
- 65 Sub-clause 22.02-2 contains definitions of words used in clause 22.02.
- 66 Of relevance to the interpretation of clause 22.02-3 and clause 22.02-5.1 is the following definition –
- Heritage place: anything subject to the Heritage Overlay and can include a site, area, land, landscape, tree, building or other work, or group of buildings of heritage significance, and may include components or spaces. When used in the context of a building graded as individually significant, the heritage place is initially the individually significant building and then the broader heritage area. When used in the context of a contributory building, the heritage place is the broader heritage area.
- 67 Clause 22.02-3 has the effect that an individually significant heritage place is also a contributory element to a broader heritage place; this is the effect of the designation of an individually significant heritage place as ‘Contributory’. An individually significant building does not, as a result of designation as a contributory element under clause 22.02-3, become a ‘contributory building’ for the purposes of clause 22.02-5.1.
- 68 On the facts of this matter then, the relevant parts of clause 22.02-5.1 that apply to the proposed demolition of part of the Royal Hotel are the parts underlined below.

Encourage the removal of inappropriate alterations, additions and works that detract from the cultural significance of the place.

Generally discourage the demolition of part of an individually significant or contributory building or removal of contributory elements unless:

- That part of the heritage place has been changed beyond recognition or its original or subsequent contributory character(s).
- For a contributory building:



- that part is not visible from the street frontage (other than a laneway), abutting a park or public open space, and the main building form including the roof form is maintained; or
- the removal of the part would not adversely affect the contribution of the building to the heritage place.
- For individually significant building or works, it can be demonstrated that the removal of part of the building or works does not negatively affect the significance of the place.

**Clause 22.02-5.7 – New Development, Alterations or Additions.**

69 There is no dispute between the parties that clause 22.02-5.7 is relevant to the assessment of the permit application. There is a dispute, however, whether –

- the Royal Hotel is a ‘residential heritage place’ or an ‘industrial, commercial and retail heritage place’ for the purposes of clause 22.02-5.7.2;
- on the facts, there is any conflict or inconsistency between the application of the general requirements in clause 22.02-5.7.1 and the specific requirements in clause 22.02-5.7.2.

Is the Royal Hotel a ‘residential heritage place’ or an ‘industrial, commercial and retail heritage place’?

70 For completeness, the relevant part(s) of clause 22.02-5.7.1 – *General* are set out below.

Encourage the design of new development and alterations and additions to a heritage place or a contributory element to a heritage place to:

- Respect the pattern, rhythm, orientation to the street, spatial characteristics, fenestration, roof form, materials and heritage character of the surrounding historic streetscape.
- Be articulated and massed to correspond with the prevailing building form of the heritage place or contributory elements to the heritage place.
- Be visually recessive and not dominate the heritage place.
- Be distinguishable from the original historic fabric.
- Not remove, cover, damage or change original historic fabric.
- Not obscure views of principle facades. [sic]
- Consider the architectural integrity and context of the heritage place or contributory element.

....

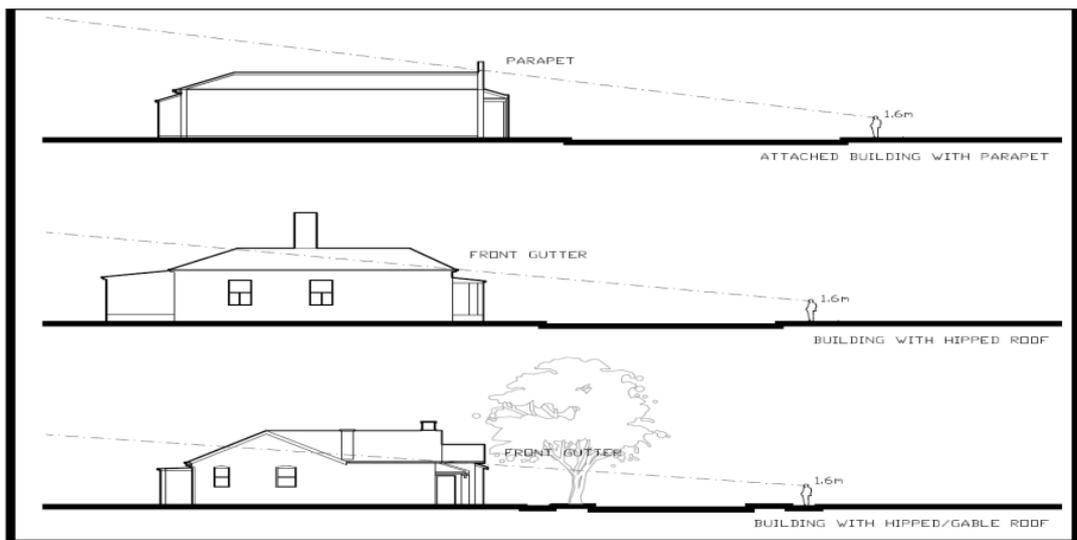


Minimise the visibility of new additions by:

- Locating ground level additions and any higher elements towards the rear of the site.
- Encouraging ground level additions to contributory buildings to be sited within the 'envelope' created by projected sightlines (see Figure 1).
- Encouraging upper level additions to heritage places to be sighted within the 'envelope' created by projected sight lines (for Contributory buildings referred to Figure 2 and for Individually significant buildings refer to Figure 3).
- Encouraging additions to individually significant places to, as far as possible, be concealed by existing heritage fabric when viewed from the front street and to read as secondary elements when viewed from any other adjoining street.

Discourage elements which distract from the heritage fabric or are not contemporary with the era of the building such as unroofed or open upper level decks or balconies, reflective glass, glass balustrades and pedestrian entrance canopies.

- 71 As the Royal Hotel is identified as an individually significant building, only Figure 3 set out in the general requirements is relevant on the facts. Figure 3 is extracted below.



**Figure 3** – appropriate areas for upper level additions to individually significant buildings are sited within the 'envelope' created by projecting a sight line from 1.6 metres above ground level (eye level of average adult person) from the footpath on the opposite side of the street through the top of the front parapet or the gutter line of the principal roof form.

Figure 3: Extract of clause 22.02-5.7.1.

- 72 The specific requirements of clause 22.02-5.7.2 are set out under the following general headings –

- Corner Sites and Sites with Dual Frontages

- Residential Upper Storey Additions
- Industrial, Commercial and Retail Heritage Place or Contributory Elements
- Carports, Car Spaces, Garages, and Outbuildings
- Front Fences and Gates
- Ancillaries and Services

73 For present purposes, the specific requirements for ‘Residential Upper Storey Additions’ and ‘Industrial, Commercial and Retail Heritage Place or Contributory Elements’ are relevant and set out below.

#### **Residential Upper Storey Additions**

Encourage new upper storey additions to residential heritage places or contributory elements to heritage places to:

- Preserve the existing roof line, chimney(s) and contributory architectural features that are essential components of the architectural character of the heritage place or contributory elements to the heritage place.
- Respect the scale and form of the heritage place or contributory elements in the heritage place by stepping down in height and setting back from the lower built form.

Sightlines should be provided to indicate the ‘envelope’ from the street of proposed upper storey additions (refer to the sightlines diagrams in 22.02-5.7.1).

#### **Industrial, Commercial and Retail Heritage Place or Contributory Elements**

Encourage new upper level additions and works to:

- Respect the scale and form of the existing heritage place or contributory elements to the heritage place by being set back from the lower built form elements. Each higher element should be set further back from the lower heritage built forms.
- Incorporate treatments with make them less apparent.

74 The loose drafting of these provisions has not assisted the Tribunal in determining whether the Royal Hotel is a ‘residential heritage place’ or a ‘commercial heritage place’.

75 The subheading ‘Residential Upper Storey Additions’ gives some expectation that the focus of the provision will be on the proposed use of any new additions, however the text under that subheading refers to “residential heritage places”. The text also refers to “*contributory elements to heritage places*” and in order for there to be any purpose distinguishing between residential heritage places and industrial, commercial or retail heritage places, the reference to “*contributory elements to heritage places*”



must necessarily be read as referring to contributory elements to *residential* heritage places.

- 76 Similarly, the inclusion of “*Contributory Elements*” in the subheading ‘Industrial, Commercial and Retail Heritage Place or Contributory Elements’ must be read as a reference to contributory elements of an industrial, commercial and retail heritage place to give purpose to the text below that subheading.
- 77 It is accepted that the Royal Hotel has throughout its life been used, in part, for residential purposes, however its architectural character within the Clifton Hill Eastern Precinct is of a non-residential commercial nature.
- 78 This conclusion is supported by the contents of the statement of significance for the Royal Hotel – <sup>24</sup>

Non -residential development is concentrated in two parts of the Precinct. The Spensley Street spine, leading east from the railway station, contains Centreway, a row of late Edwardian shops at the corner of Spensely and Berry Streets, and the Royal Hotel, a three storey rendered brick Italianate hotel with a rusticated ground floor, on the opposite corner. Collectively they help create something of a village atmosphere in the precinct. Also of note is an early shop on the corner of Abbot Grove and Fenwick Street. South of Roseneath Street, there are a number of notable Edwardian factory buildings, including the Australian Dye Cos. complex in Noone Street.

- 79 The statement of significance for the Clifton Hill Eastern Precinct also supports the conclusion that for heritage purposes, the Royal Hotel should be classified as a commercial heritage place rather than a residential heritage place – <sup>25</sup>

How is it significant?

HO316 Clifton Hill Eastern Heritage Overlay is **aesthetically and historically** significant to the City of Yarra (National Estate Register [NER] Criteria E1, A4)

Why is it significant?

The Clifton Hill Eastern Heritage Overlay Area is significant.

As a substantially intact and discrete precinct within the City of Yarra, surrounded by major transport routes and the Merri Creek, and containing a number of well preserved Victorian and Edwardian -era residential streetscapes;

For its distinctive village-like commercial centre, at the junction of Spensely Street and Berry Streets and near the railway station, with the Royal Hotel as an important focal point, being unusual among Melbourne’s Victorian and Edwardian-era suburbs because of its

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<sup>24</sup> Tribunal Book Vol. 1 at page 2946.

<sup>25</sup> Tribunal Book Vol. 1 at page 2938.



location central to the residential area rather than on its perimeter, as was typical in the 19th and 20th centuries along main thoroughfares.

Is there any conflict or inconsistency between the application of the general requirements in clause 22.02-5.7.1 and the specific requirements in clause 22.02-5.7.2?

- 80 We do not accept the applicant's submission that the specific requirements for industrial, commercial and retail heritage places are either in conflict with, or inconsistent with, any of the general requirements.
- 81 The specific requirements applying to industrial, commercial and retail heritage places encourage any new upper-level additions and works on such places to respect the scale and form of the existing heritage place by being set back from lower built form elements. We do not accept that the 'encouragement' policy advanced in respect to these heritage places is one that encourages new upper-level additions and works per se; the policy seeks to encourage a particular outcome where such additions and works are proposed. We see nothing in that outcome, that is, respect for the scale and form of the existing heritage place, to be in conflict, or inconsistent with, the general requirements set out in clause 22.02-5.7.1. To the contrary, we find that the outcome requiring respect for scale and form of an existing heritage place to be entirely consistent with the general requirements.

**IS THE PROPOSAL AN ACCEPTABLE HERITAGE OUTCOME?**

- 82 Whether the proposal represents an acceptable heritage outcome is a key issue in the assessment and determination of this application. This requires consideration of both the proposed demolition and the proposed new buildings and works. As part of the background to assist understanding of these considerations, we commence by providing the relevant statement of significance and citation in their entirety.
- 83 The statement of significance for HO316 is detailed in the *City of Yarra Review of Heritage Overlay Areas 2007 Updated March 2013* prepared by Graeme Butler and Associates. Under the heading 'How is it significant', it states:

The Clifton Hill Eastern Heritage Overlay Area is significant.

- As a substantially intact and discrete precinct within the City of Yarra, surrounded by major transport routes and the Merri Creek, and containing a number of well preserved Victorian and Edwardian-era residential streetscapes;
- For its distinctive village-like commercial centre, at the junction of Spensley and Berry Streets and near the railway station, with the Royal Hotel as an important focal point, being unusual among Melbourne's Victorian and Edwardian-era suburbs because of its location central to the residential area rather than



on its perimeter, as was typical in the 19<sup>th</sup> and early 20<sup>th</sup> centuries along main thoroughfares;

- For the distinctive but well planned layout of the area formed by the angled intersection of two planning grids, one based on the alignment of Heidelberg Road and the other based on that of Hoddle Street, producing fine streetscapes and vistas that are atypical to other contemporary suburbs. The relatively uniform planning of the streets and allotments relates well to the adjoining government surveyed North Fitzroy area and contrasts with the more haphazard private subdivisions in Collingwood and Richmond;
- For the contribution of the area's comprehensive network of rear laneways to expression of the main development era, with most retaining their original bluestone construction, original kerbs and channels;
- For individual pockets of distinctive development such as the fine group of timber bungalows in the Bungalow Court formed by Brockenshire Street, as well as other well preserved inter-war examples scattered through the area, and the small but distinguished group of interwar semi-detached villas in Grant Street;
- For the grouping of industrial buildings in the south part of the heritage overlay, with impressive Edwardian and Victorian-era brick factory buildings as significant markers of the precincts industrial past, including Schotts Emporium (the former Clifton Shoe Company) Hoddle Street which is an important landmark in the area. This collection of factory buildings reflects the significant industrial activity in the area, particularly the boot and shoe and clothing industries, from the turn of the last century;
- As, formerly, an important source of Melbourne's bluestone, with the early bluestone buildings in Ford Street and Clifton Avenue, the remaining quarry faces on the Merri Creek, and the adjoining Quarry Park owing their existence to the important Melbourne and Collingwood Council's quarries in the area; and
- For the special urban landscape character (particularly that of The Esplanade) enhanced by the large areas of adjoining creek-side parkland, many of which were developed on former quarry sites.

84 The *Collingwood Conservation Study Review, May 1995* prepared by Andrew C Ward and Associates provides the following description in the citation for the Royal Hotel:

A three-storeyed Italianate stuccoed hotel with rusticated lower section with round arched openings. The corner splay has a bayed configuration at the first and second floors which also has a recessed



round arched porch surmounted by a pediment with face and bearded face in entablature and tympanus respectively. Pilasters and Corinthian capitals at third floor and Ionic at the second floor levels, whilst the pediment treatment is repeated on the east elevation. A roof lantern is concealed from view.

85 The citation describes the building's significance as:

The "Royal" Hotel is a landmark building within the Clifton Hill Eastern Residential precinct and is representative of several richly decorated Italianate hotels in Collingwood and metropolitan Melbourne.

86 The *City of Yarra Database of Heritage Significant Areas April 2022*<sup>26</sup> identifies the significance of the Royal Hotel as 'Individually Significant' and describes this significance as:

Aesthetically, historically, scientifically, and/or socially significant at the Local level and contributory or complementary to the Heritage Overlay Areas.

## Demolition

87 The extent of demolition proposed is a key matter of contention between the parties. A brief description of the demolition was provided earlier in these reasons, but to enable a more detailed understanding of this element of the proposal, we adopt the following from Ms Brady's evidence:

- 40 Regarding the demolition, this will involve the substantial part of the building, including the roof and chimneys, but excluding the building facades to Spensley and Berry streets. At the south end of the east façade, the whole of the return wall will be demolished but 2.2m of the wall will be rebuilt/reinstated at ground and first floor levels; and at level 2, a longer section of the wall will be rebuilt (about 5m) including reinstating a window at this level. At the west end of the north façade, the existing return wall will be retained to 2.4m for the height of the façade. In addition, two chimneys on the east side of the roof will be reconstructed.
41. Works to the retained facades include the removal of all windows and the replacement of most, to match the form, materials and detailing of the original windows. Select windows in the upper two levels of the façade will not be replaced, where they are associated with proposed internal balconies. This occurs mainly on the east façade, with a concentration at the south end of the facade.
42. At ground floor level, façade works also include removal of existing doors and their replacement with glazed doors, in three of the existing door openings. Other works to the ground floor

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<sup>26</sup> An incorporated document to the Yarra Planning Scheme pursuant to the schedule to clause 72.04



façade include some demolition and/or modification of existing wall fabric and openings to reinstate or introduce original window forms and their associated detailing. These works will largely follow the arrangement of window openings as shown in the c.1889 architectural drawings ...

88 The following extracts from the plans show the nature and extent of the proposed demolition in red colouring and hatching:



Figure 4: Sheet No. TP03 – Demolition Plan



1 EXISTING NORTH ELEVATION  
1:100

Figure 5: Sheet TP13 – Existing North Elevation



Figure 6: Sheet TP13 – Existing East Elevation

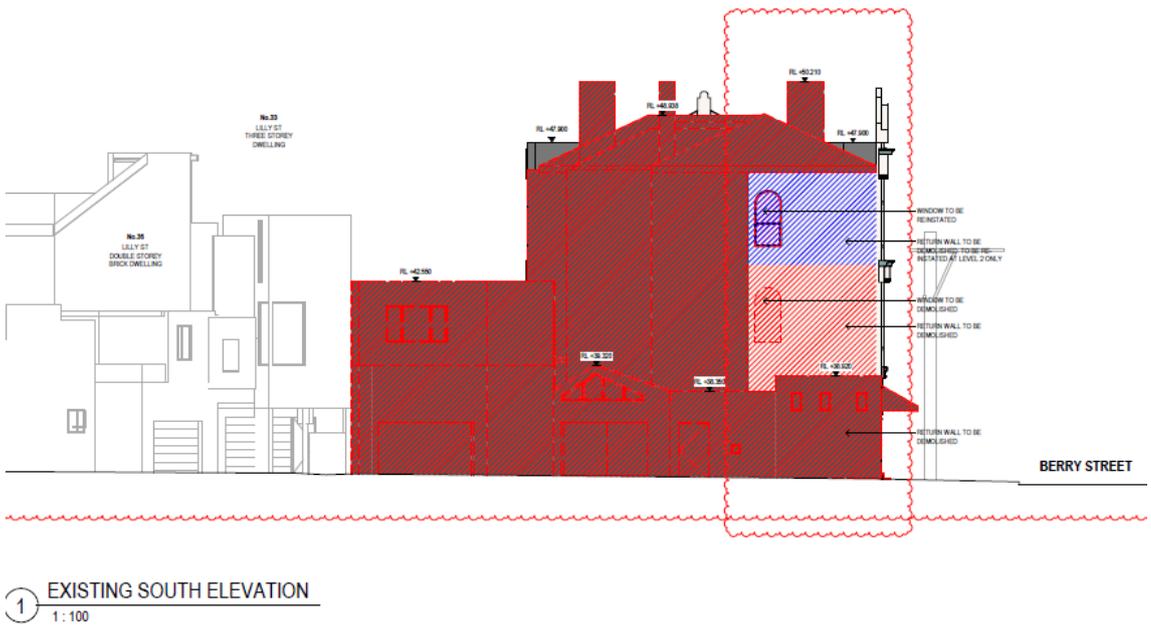
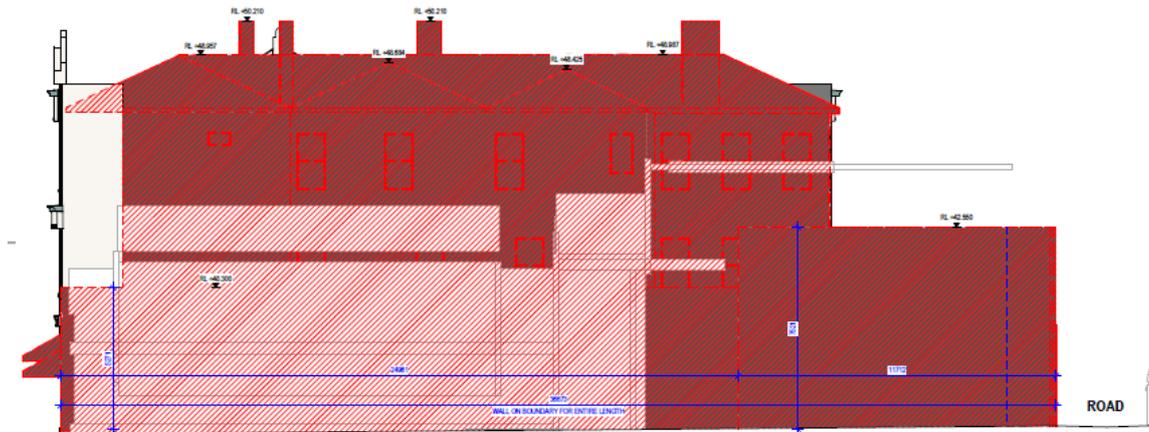


Figure 7: Sheet TP14 – Existing South Elevation



2 EXISTING WEST ELEVATION  
1:100

Figure 8: Sheet TP14 – Existing West Elevation

- 89 Ms Brady, Ms Riddett and the Council’s Heritage Adviser all consider the proposed demolition to be acceptable. This was also the opinion expressed in a Heritage Impact Assessment, prepared by Bryce Raworth Pty Ltd which accompanied the planning application. Mr Lewis does not consider the proposed demolition to be acceptable.
- 90 To enable an understanding of the various expert opinions in the proceeding, and of our assessment and conclusions which follow, we consider it useful to set out these opinions in some detail.

Robyn Riddett

- 91 In *Ashwick (Vic) 52 Pty Ltd v Yarra CC (Red Dot)* [2022] VCAT 296<sup>27</sup>, the Tribunal ruled that the expert evidence of Ms Riddett was admissible in this proceeding despite the challenge to her independence because of her previous involvement in *Clarke & Ors v Yarra CC* [2003] VCAT 176 and her failure to disclose that involvement in her statement of evidence in this proceeding. After hearing from Ms Riddett at the hearing, we accept that her failure to disclose her involvement in a previous proposal for the subject land on behalf of the then permit applicant was inadvertent. The weight to be given to her evidence is not affected by this omission but rather by consideration of the merits of the proposal within her area of expertise and the opinions expressed by her about those merits.
- 92 Ms Riddett’s opinion is that the proposed demolition is of fabric which makes minimal contribution to the heritage value of the building.
- 93 In her view, if the north end of the west elevation is retained as shown on the plans and that part of the south wall is taken down and rebuilt also as shown on the plans (with the rebuilding utilising salvaged bricks and is undertaken to the same dimensions and number of courses), the demolition

<sup>27</sup> See paragraph 110 of *Ashwick (Vic) 52 Pty Ltd v Yarra CC (Red Dot)* [2022] VCAT 296.



in respect of these elevations is acceptable. This is notwithstanding it will result in the loss of some original fabric. She described these walls as 'plain and featureless' and, in her view, the loss of this fabric is not such that it will negatively affect the significance of the building.

- 94 In respect of the roof, Ms Riddett's evidence is that it is 'minimally visible' from Berry Street and makes a minor contribution to this streetscape. In her opinion, when the removal of the roof is considered in the context of the overall demolition, it is acceptable and will not have an adverse impact on the heritage significance of the building. Ms Riddett supports the demolition and reconstruction of the two eastern chimneys provided they comprise salvaged bricks, are constructed using measured drawings and appear the same as they do now. She observed that the chimneys are proposed to be reconstructed "more or less in their current location", which she considers acceptable. In Ms Riddett's opinion, the northern chimney makes an important contribution to the Spensley Street streetscape and should also be reconstructed, noting that this will not be in the existing location and will require modification to apartments 301 and 401. In the absence of the chimneys, Ms Riddett considers that the proposal would give the impression of façadism.
- 95 The demolition of the lantern does not concern Ms Riddett as she does not consider it to be a major element in the visible 'roofscape'; it is not an unusual feature; it is fairly plain and utilitarian in appearance; is only partially visible in some views; and is of contributory rather than primary significance.
- 96 Ms Riddett did not raise any concerns regarding the proposed demolition/removal of the single-storey additions to the south and west elevations, the canopies, non-original illuminated signs, the shopfront to the bottle shop, a non-original window and blank masonry panel.
- 97 As a summary in respect of the demolition, Ms Riddett's evidence states:
85. With regard to the demolition, removal and external alterations on balance i.e. weighing up the limited visibility and contribution of the West elevation and a single roof face to the streetscape, the 3-dimensional legibility of the building, when considered in the whole context of the retention of 3 chimneys and rebuilding of part of the South elevation, the proposed demolition is acceptable and will not have an adverse effect on the heritage significance of the Individually significant building and will not adversely affect the significance of the heritage place i.e. the Clifton Hill East Precinct

Anita Brady

- 98 Ms Brady's evidence is that the demolition of the later additions to the south and west of the hotel building is acceptable and, while this may comprise some original fabric, it is largely modified. Her evidence



recognises that a substantial part of the building is to be removed and, while may be considered extensive, Ms Brady considers it is within a range which “is often seen as acceptable for heritage buildings”.

- 99 It is Ms Brady’s evidence that the removal of original fabric to construct an addition is relatively common, with the entire exterior not normally required to be retained. Reference was made to rear and side wall fabric in this respect, with the retention of part of the south and west walls assisting in maintaining evidence of the wall location and a “sense of the three-dimensional form of the building”. She observed that rear and side walls are often the walls demolished to make additions and that, overall, much of what is being demolished is not original.
- 100 In Ms Brady’s opinion, the loss of view of the rear (south) elevation from along Berry Street is balanced by the retention of the views and high visibility of the principal hotel elevations to the corner. Ms Brady placed some importance on the retention of “the original three storey Italianate façades to Spensley and Berry Streets, including the corner splay form and the valued elements and details of the ‘richly decorated’ hotel as described in the 1995 property citation”.
- 101 Addressing the proposed removal of the roof and chimneys, Ms Brady’s evidence is:
- the roof has generally limited visibility in proximity to the site and its loss in the immediate context will be limited in a visual sense
  - the lantern is not a large part of the roof and is in that part of the roof where one might place additions. It is original but its loss is acceptable
  - the roof is more visible in distant views to the south and east along Berry Street and Spensley Street respectively, but will be replaced in these views by visible new levels to the top of the building, which will change its appearance. The introduction of these levels is acceptable
  - the loss of the chimneys will be compensated by the reconstruction of two chimneys in the eastern setback of Level 3. The west chimney is not an important element in the views of the north and east elevations
  - the setbacks to the upper levels above the retained façades will assist in maintaining a sense of depth to the building, including a three-dimensional appearance even after the roof is removed
  - the extent of demolition is balanced in part by the proposed conservation works, including restoration/reconstruction works.

Nigel Lewis

- 102 The applicant challenged the independence of the expert evidence of Mr Lewis because of the content of certain emails between Mr Lewis and Mr



Ray Tonkin.<sup>28</sup> After considering the contents of these emails, we are satisfied that the emails do not establish that Mr Lewis (either in his written statement of evidence or in his oral evidence before the Tribunal ) did not express his independent expert opinion on the heritage considerations of the proposal.

103 Mr Lewis opposes the extent of demolition proposed. In his opinion, what he describes as an example of comprehensive façadism, does not represent good conservation practice. His evidence is that the building is of significance for “its entire external fabric, including the main street façades, roof forms, and side walls” and for “its landmark values and how it can be seen in a three-dimensional form from the surrounding area”.

104 The evidence is that the building is substantially intact and included the following description of the alterations that have occurred:

The main alteration has been the conversion of the northern parlour to create a wide opening for a bottle shop facing Berry Street. This appeared to involve the loss of two windows and two decorative panels. There are other changes where original openings have been altered or blocked up although retaining the original rendered facade detailing. A new window frame was built for the east facing arched window to the public bar, and framing to other ground floor windows has been altered. The residential entrance was relocated to Berry Street when the bar was extended to include the original dining room. New windows were inserted in the single storey bathroom and toilet wall. It is likely that the single storey Ladies Lounge was constructed at this time on the separate site at 35 Spensley Street, possibly incorporating the existing building shown on the MMBW plan. There are various projecting signs, typical of many hotels, but these have not impacted on the significant fabric.

105 The following extract from Mr Lewis’ evidence addresses the proposed demolition:

The extent of demolition of the Royal Hotel is entirely unacceptable. This proposal represents a token effort to retain the significant building fabric of the Royal Hotel, and will largely destroy its values as an individually significant landmark building when seen from within HO316. This example of such comprehensive facadism does not represent good conservation practice as sought in Clause 22.02-4 Objectives of the Yarra Planning Scheme ...

The building currently has a three dimensional form that rises above the surrounding highly valued one and two storey residential and commercial site context. This site context has elements dating from the late nineteenth century Land Boom era when the hotel was built, as well as later developments up to the Interwar period. The hotel is clearly visible from all directions. While the two principal Italianate facades provide major architectural interest, their appreciation

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<sup>28</sup> Exhibit A18.



depends on how they provide a counterpoint to the design, form and architectural qualities of the roofscape and the south and west side walls. The single storey toilets form part of the original street and lane elevations. Early toilets served by night soil collectors are considered to be significant fabric, even when located in obscure laneways.

The minimal 2 metres retention of the side walls will not provide much understanding of the building's landmark three storey volume. The extent of demolition will result in such an unacceptable loss of the building's architectural significance that its heritage values may need to be reassessed. The purpose of such comprehensive demolition of significant fabric will only allow the building facade to exist as a screen to partially conceal the new building.

- 106 Mr Lewis described the roof form as one of the most interesting aspects of the hotel, with a central roof lantern over the stairs and single and double chimneys. He referred to the lantern as a nicely designed roof element which, along with the chimneys, is an important part of the roof form.
- 107 Mr Lewis recommended that the entire original external fabric of the hotel building be retained, including the existing roof, roof lantern, chimneys and the toilets wing to the south. He also recommended retention of the south-facing wall and windows facing Berry Street, the original section of the single-storey wing facing Berry Street, and the west-facing wall adjoining Spensley Street at the second-storey level.

#### Tribunal consideration

- 108 The purpose of HO316 includes:

To conserve and enhance heritage places of natural or cultural significance.

To conserve and enhance those elements which contribute to the significance of heritage places.

To ensure that development<sup>29</sup> does not adversely affect the significance of heritage places.

- 109 A decision guideline at clause 43.01-8 is whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- 110 It is policy at clause 15.03-1S to ensure the conservation of places of heritage significance, with related strategies being:
- Encourage appropriate development that respects places with identified heritage values.
- Retain those elements that contribute to the importance of the heritage place.

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<sup>29</sup> The definition of the term 'development' in section 3 of the *Planning and Environment Act 1987* includes 'demolition'.



Encourage the conservation and restoration of contributory elements of a heritage place.

- 111 Local policy at clause 22.02 encourages the preservation, maintenance and restoration of heritage places; and the retention of individually significant heritage places. With respect to demolition, it is policy to generally discourage the demolition of part of an individually significant building or remove contributory elements unless:
- that part of the heritage place has been changed beyond recognition of its original or subsequent contributory character(s)
  - it can be demonstrated that that removal of part of the building or works does not negatively affect the significance of the heritage place.
- 112 We note that proposed clause 15.03-1L has a strategy of avoiding demolition of any part of an individually significant building unless a number of outcomes are demonstrated, as detailed in an earlier section of these reasons. Amongst these are:
- the demolition will not adversely affect the significance of the heritage place
  - the fabric does not contribute to the significance of the place or the area of demolition is not visible from the street frontage
  - the removal of part of the building allows its three-dimensional form to be retained and does not result in the retention of only the visible façade of the building and demolishing the remainder.
- 113 Having considered the submissions and evidence, and undertaken an inspection of the site and its context, we conclude that the proposed demolition is not consistent with existing policy (or the proposed policy) and will have an unacceptable impact on the significance of the heritage place.
- 114 The heritage significance of the Royal Hotel is beyond dispute. It is clearly recognised in the relevant statements of significance and by the designation of the building as ‘individually significant’ in the *City of Yarra Database of Heritage Significant Areas April 2022*. The building makes an important contribution to the heritage place. It is a ‘landmark’ building. This is by virtue not only of its evident heritage character and highly intact nature, but also its scale and prominence in the local context. It is a focal point of the surrounding heritage precinct, with a visibility that extends beyond its immediate environs.
- 115 We accept Mr Lewis’ evidence, and agree with the Council’s and respondents’ submissions, that the three-dimensional form of the building is an important element of its heritage character, given this extent of visibility. It is true that the ornate north and east elevations (including the corner splay) present the most apparent heritage detail and give emphasis to the

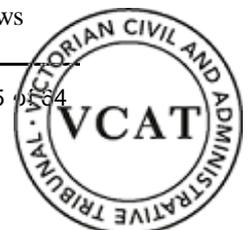


building's significance. We acknowledge the retention of these elevations, and the importance placed on the role this plays in achieving an acceptable outcome by the applicant, Ms Brady and Ms Riddett. However, this retention is not sufficient to ensure that the building's heritage character, individual significance and contribution to the significance of the heritage place are not adversely affected.

- 116 All but the street elevations and minor sections of the return walls to the south and west elevations will be removed as part of the proposal. This includes the roof, roof lantern and chimneys, and the greater part of the south and west walls of the building.
- 117 The removal of roof and lantern is supported by the Council's Heritage Adviser, Ms Riddett and Ms Brady primarily due to what they consider to be limited visibility from vantage points proximate to the building, and the fact that these elements would in any event be concealed by the proposed additions. While we agree that the roof and roof lantern have restricted visibility from locations immediately adjacent to the subject land due to the parapet/pediments, we do not accept that this is the case from locations along Berry Street and Spensley Street.
- 118 From these views toward the subject land, the roof form and roof lantern are clearly evident, given expression to the building's three-dimensional form and make an evident contribution to the building's heritage character.<sup>30</sup> They are original and intact elements, of form, composition and appearance which arguably make them integral to the building's heritage character.
- 119 Views of the roof and roof lantern are not incidental, transient or of minor importance. They are obtained from the neighbouring streetscapes and in locations that are not distant from the land. They are views readily obtainable from within this neighbourhood given the low-scale nature of the surrounding built form and the overall scale and height of the hotel building, which rises substantially above these.
- 120 We cannot accept the evidence that the roof form and roof lantern have limited visibility or make a minor contribution to the streetscapes. We find that any analysis which confines itself to the visibility of the roof form and roof lantern to the immediate surrounds to be flawed and fails to acknowledge the contribution these elements make to the heritage significance of the building and to the building's role within the heritage place. The complete removal of these elements represents an unacceptable loss of original fabric which makes an important contribution to the building's form and appearance. It will adversely affect the heritage significance of the building and the heritage place.

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<sup>30</sup> The roof form is evident in views from the south and west. The roof lantern is evident in views from the west.



- 121 The building has four chimneys. These are elements which are visible in the streetscape views and are original fabric which makes an evident contribution to the building's heritage character. Two of the chimneys are to be reconstructed within the eastern setback of Level 3, in the balcony/ deck area of Apartment 301. These will not be in the same location as the existing chimneys. The plans do not include the reconstruction of the remaining two chimneys.
- 122 Ms Riddett does not oppose the demolition and reconstruction of the two eastern chimneys, provided they are constructed from salvaged bricks and existing detailing is replicated. She does not object to the loss of the southern chimney on the basis that this is required to accommodate an apartment in this location, provided the remaining three chimneys are retained or rebuilt. In this respect, Ms Riddett does not support the loss of the western chimney, which she considers makes an important contribution to the Spensley Street streetscape. Her evidence is that this should be reconstructed in the western setback of Apartment 301, although the precise location and potential implications for the useability of these area were unclear. What is clear, however, is that the chimney would not be reconstructed in the same location.
- 123 Ms Brady did not raise any concerns regarding the chimney demolition and reconstruction. In her opinion, the loss of the chimneys will be, in part, compensated by the reconstruction of the two chimneys at Level 3 in the eastern setback area. She acknowledged that the demolition of original chimneys and their reconstruction in a different location is not common heritage practice, but is acceptable in the context of the overall design and restoration works.
- 124 Mr Lewis opposes the demolition of the chimneys. His evidence is that all four chimneys should be retained as original fabric and, together with the roof and roof lantern, are important elements of the building composition when seen in the wider context. He considers them to contribute to the building's 'landmark quality'.
- 125 We are not persuaded that the demolition and partial reconstruction of the chimneys is an acceptable response to heritage policy. The chimneys are original fabric, are variously apparent in views from all directions and are important (and prominent) elements in the building's composition and heritage character. Their loss would be to the detriment of the building's heritage significance. We are not persuaded that the reconstruction of chimneys in replica form and in a different location is an acceptable heritage response. It is misleading in terms of the understanding given of the building's original fabric, roof composition and heritage character. It is reflective of a 'mock' design, which is a practice discouraged in heritage areas, notwithstanding the intention to utilise salvaged materials and reproduction detailing. It does not constitute or represent preservation of the heritage place, which is an objective of heritage policy, nor is it



appropriate reconstruction given the chimneys are proposed to be constructed in different locations to where they currently exist. The outcome is not consistent with policy and is not acceptable.

- 126 The south wall is to be demolished and then partly reconstructed only at the top level, including reinstatement of an existing window. The west wall is to be demolished, with the exception of a return ‘nib’ which is minor in its extent.
- 127 The south and west elevations have a less adorned appearance than the street elevations. This is not unusual for a heritage building, where commonly the street elevations display a greater degree of decoration or embellishment than the more utilitarian elevations to the sides and rear. In this instance, again having regard to the height and scale of the building relative to its low-scale surroundings, both elevations have a greater degree of visibility than might otherwise be the case. Their unadorned appearance does not necessarily mean that there is no contribution made to the heritage significance of the building. These elevations have a role to play in the three-dimensional form and appearance of the building. They form part of its heritage character.
- 128 We agree with Mr Lewis that the appreciation of the two principal Italianate facades, at least in part, depends on how they provide a counterpoint to the design, form and architectural qualities of the roofscape and the south and west side walls. That said, we consider that there is scope to partially demolish (or partially conceal) the south and west elevation and still achieve an acceptable heritage outcome. The extent of demolition or concealment needs to be less than what is proposed here to retain sufficient understanding of the building’s three-storey volume, which is a contributor to its ‘landmark’ presence in the heritage precinct. The extent of demolition proposed, particularly of the western elevation is excessive and unacceptable.
- 129 The proposal includes the demolition of two single-storey wings of the building: one in Spensley Street, the other in Berry Street. The western wing, in Spensley Street, is non-original fabric and no concerns regarding its demolition have been raised by any of the heritage experts. It does not have any evident heritage character and we agree that its demolition will not have an unacceptable impact on the significance of the heritage place.
- 130 The south wing, presenting to Berry Street and the adjoining lane way, includes both original and non-original fabric. It comprises the original bathroom, attached to the main building, which was separated from a smaller freestanding structure to the south, on the laneway, that accommodated three toilets. The elevation to the laneway includes three original openings for night soil access which, according to Mr Lewis’ evidence, would have been bricked up when sewerage was connected in the



early 1900s. Later modifications, apparent at present, have created a combined built form which encompasses the bathrooms and toilets.

- 131 Ms Brady and Ms Riddett do not oppose the demolition of this structure, given the modifications which have been made. Ms Riddett describes it as non-significant heritage. While acknowledging that it includes some original Victorian fabric, Ms Brady refers to it as largely modified or comprising later elements added to the hotel over time.
- 132 Mr Lewis disagrees. His evidence is that the single-storey toilets form part of the original street and laneway elevations, and that early toilets served by night soil collectors are considered to be significant fabric, even when located in obscure laneways.
- 133 The combined bathroom/toilet wing has undergone significant modification and is not legible as original heritage fabric. The modifications are in the form of enclosure into one structure, where there were previously two (one connected to the main building, and the other a freestanding structure constructed to the laneway boundary), and changes to the visible elevations, including the sealing of the night soil hatches. The overall appearance is of a utilitarian, secondary wing with no apparent heritage character or contribution. We consider that its demolition would not result in an unacceptable heritage outcome.
- 134 Our conclusion is that the overall nature and extent of demolition is unacceptable and will have an adverse impact on the significance of the heritage place.
- 135 Respondents submitted that the existing building has social value or significance as a meeting place for the local community over the many decades that it operated as a hotel. They consider this a further reason why the proposed demolition should not be approved. We observe that there is no reference to any such social value or significance in the statement of significance for either the precinct or the hotel building itself. There is no evidence or any research material before us to demonstrate social value or significance and we make no finding in this respect.

### **Proposed buildings and works**

- 136 The proposed buildings and works comprise alterations to the retained heritage fabric, the construction of new additions (or wings) to the south and west, and the construction of a five-storey building behind the retained façades that will include two levels which protrude above the height of the façades. We consider each of these in turn.



Figure 9: TP15: Proposed Elevations.

### Alterations to the retained fabric

137 The following summary of the proposed works to the retained fabric is provided in Ms Brady's evidence:

41. Works to the retained facades include the removal of all windows and the replacement of most, to match the form, materials and detailing of the original windows. Select windows in the upper two levels of the façade will not be replaced, where they are associated with proposed internal balconies. This occurs mainly on the east façade, with a concentration at the south end of the facade.
42. At ground floor level, façade works also include removal of existing doors and their replacement with glazed doors, in three of the existing door openings. Other works to the ground floor façade include some demolition and/or modification of existing wall fabric and openings to reinstate or introduce original

window forms and their associated detailing. These works will largely follow the arrangement of window openings as shown in the c.1889 architectural drawings included in the Raworth HIS report, and as commented on above at paragraph 22, and below at paragraph 95 and following.

43. More generally, proposed conservation works will include repainting and repairs of external fabric.

- 138 Ms Riddett and Mr Lewis oppose the proposed removal of windows. Their evidence is that the windows should be retained and restored. In particular, they oppose the proposed removal of windows to provide openings to balconies that are to be constructed behind the retained building facades in order to provide an opening to these elements.
- 139 Ms Brady's evidence is that she has "come to accept" the intended removal of windows for the balconies given there is a limited number of openings proposed, and there is considerable restoration works proposed at the ground-floor level of the façade.
- 140 In response to the concerns expressed regarding the creation of voids where windows currently exist, the applicant provided further plans showing an alternative glazing system comprising folding panels. An image is provided in a later section of these reasons where we consider internal amenity. When closed, these are intended to give the appearance of a double-hung sash window, as exists at present. These can be opened through an upward folding mechanism to allow for ventilation to the balcony (and the habitable room windows beyond) as desired by occupants.
- 141 We consider that the intact and consistent nature of the fenestration to be an important element of the building's heritage character. It is an original element which should be retained and restored. The proposed window removal is not an acceptable heritage outcome. The creation of voids will detract from the appearance of the façades to the detriment of the building's heritage significance. It is not consistent with the objective of clause 22.02-4 to conserve historic fabric and maintain the integrity of places of cultural heritage significance.
- 142 Ms Riddett and Mr Lewis similarly oppose the proposed alterations to the first-floor loggia in the north wall, comprising the removal of the door and associated framing. There was also some uncertainty expressed regarding changes to the balustrade. Ms Brady does not oppose the modifications.
- 143 Again, the loggia is an original and, as we understand it, intact element of the building. It is clearly visible in the Spensley Street elevation and makes an evident contribution to the building's heritage character. Its alteration as proposed, including any changes to the balustrade, is not consistent with the objective of clause 22.02-4 mentioned above. It will have an adverse impact of the building's appearance and presentation.



144 We agree with Ms Riddett that the cellar door in the Berry Street elevation should be retained as it is an original element that makes a contribution to the building's heritage character as a Victorian hotel. We also agree that the proposed pedestrian entrance in the form of an aluminium framed tripartite door in this elevation is out of keeping with the nature of the façade and should have been designed to be more aesthetically in-keeping with the building's heritage architecture.

#### South and west wings

145 The proposed additions to the south and west of the retained fabric are acceptable to both Ms Riddett (with the exception of the metal mesh screens to the façades) and Ms Brady. Their evidence variously refers to the following as reasons why they consider these elements to be acceptable heritage outcomes:

- the design is a simple combination of rectangular, vertically-oriented windows and doors of varying heights which will be a 'neutral foil' to the more elaborate detailing and pattern of fenestration of the hotel
- the proposed setbacks allow parts of the retained west and south walls to be retained, and the height will be below that of the retained façade
- the siting and scale will allow the heritage façade to remain forward and prominent and the proposed building elements represent a deferential and sensitive response to the historic hotel
- the additions are respectful of their respective streetscapes; will not dominate the heritage place; will be distinguishable from the original fabric of the hotel; will not obscure views of the principal façades; and will have setbacks which defer to the historic hotel building and are acceptable in the context of adjoining development and this area of HO316.

146 As stated earlier, Mr Lewis opposes the demolition of the southern bathroom/toilet wing and his evidence is that this element should be retained. He opposes the proposed addition in this part of the site. While accepting the demolition of the non-contributory building to the west of the hotel, Mr Lewis does not consider the replacement to be acceptable. His evidence is that it should not exceed two storeys so as to not dominate its context. He holds the same opinion for any addition to the south of the retained building.

147 Policy<sup>31</sup> for new development, alterations and additions encourages designs to:

- respect the pattern, rhythm, orientation to the street, fenestration, roof form, materials and heritage character of the historic streetscape

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<sup>31</sup> Clause 22.02-5.7.1



- be articulated and massed to correspond with the prevailing building form or contributory elements
- be visually recessive and not dominate the heritage place
- be distinguishable from original historic fabric
- not remove, cover, damage or change original historic fabric
- not obscure views of principal façades
- consider the architectural integrity and context of the heritage place or contributory element.

148 Setbacks from the principal frontage, and façade heights, are encouraged to be similar to those of adjoining contributory buildings. For individually significant buildings, additions are encouraged to, as far as possible, be concealed by existing heritage fabric when viewed from the front street and to read as secondary elements when viewed from any other adjoining street. For corner sites and sites with dual frontages, it is policy to:

Encourage new building and additions on a site with frontages to two streets, being either a corner site or a site with dual street frontages, to respect the built form and character of the heritage place and adjoining or adjacent contributory elements to the heritage place.

Encourage new buildings on corner sites to reflect the setbacks of buildings that occupy other corners of the intersection.

149 We have found the demolition of the bathroom/toilet wing acceptable from a heritage perspective given its significantly altered state. We agree with the evidence of Ms Riddett and Ms Brady that the proposed addition in this part of the site, with the exception of the top floor, achieves an acceptable heritage response. It has a contemporary architecture and overall appearance which distinguishes it from the retained heritage fabric, and its overall scale ensures it does not detract from hotel building. The proposed setback from Berry Street allows views of the hotel walls to be retained and is respectful of the front setbacks displayed by the heritage dwellings on lots to the south. The second-floor level has a setback from Berry Street greater than those at the ground-floor and first-floor levels to allow a view of the second-floor window and a larger section of the south wall. For reasons we set out below, we do not find the top floor acceptable. The remaining three-storey height can be accommodated as it is lower than the heritage fabric, and will allow this addition to have an appearance which is recessive in comparison to the hotel building.

150 The demolition of the non-contributory building to the west of the historic hotel is acceptable. The addition in this part of the site is proposed to be sited to the Spensley Street frontage at the ground-floor and first-floor levels. Given the siting of the converted former glove factory one property removed to the west, and the approval of a three-level dwelling on the



directly adjoining property which includes construction to the front boundary, this siting is acceptable. The second-floor level is to be set back 2.3 metres in part and allows views of the hotel building from the west.

- 151 Like the southern addition, this proposed building is at a lower height than the retained heritage fabric of the hotel. We find that this floor should have a greater setback from Spensley Street, in the order of 5.0 metres as is shown for the southern addition, to allow a larger section of the hotel's side wall to be visible from the west. This would allow a more meaningful appreciation of three-dimensional form than is proposed, which we consider to be inadequate. The contemporary architecture and overall appearance is appropriate for the reasons expressed above in relation to the southern addition. Again, for reasons we provide below, we do not find the third and fourth levels acceptable, both from a heritage perspective and having regard to the impacts on the adjoining residential land to the west. With respect to the latter, this may have implications for the form and extent of the second floor level.

#### Upper levels

- 152 Levels 3 and 4 (fourth and fifth storeys) are the most contentious elements of the proposed new built form. Ms Riddett considers that these levels would be acceptable subject to providing a greater setback from Berry Street and providing a raked profile to make them more recessive. This position differed from her written evidence, which was that a level should be deleted and a greater setback provided from the remaining level. This revised position was arrived at once her attention was drawn to the sightlines on the elevations, being those referred to in policy. Ms Riddett has no concerns regarding the silhouette of the chimneys and pediment against the backdrop of the contemporary elements, or with the proposed rooftop plant and equipment. She does, however, consider that the proposed planter around the edge of the third-floor level balcony/terrace may be unsightly if the vegetation is not maintained to height that ensures it is not visible above the parapet and pediments. Ms Riddett opposes the use of mesh material on the elevations of these levels and recommends that the window shrouds in the Berry Street elevation be deleted.
- 153 Council submitted that it did not agree with Ms Riddett's revised position.
- 154 Ms Brady considers that the landmark quality and dominance of the heritage building allows for some additional height, and that the proposed setbacks are consistent with what policy contemplates. In her opinion, the additional levels will not dominate the heritage building and will clearly be read as being set back from the facades, which will respect the built form and character of the hotel.
- 155 In respect of the strategy relating to the protection of heritage skylines, Ms Brady's evidence is that the skyline of the precinct is not one of a consistent



height or scale. As a consequence, she does not consider the additional levels to what is already a tall building in its context will have a negative impact on this characteristic. Further, her evidence is that the form, materials and expression of the new levels are acceptable, observing that the design has an understated expression and utilises details and materials which are not jarring or intrusive, or in competition with the heritage building.

- 156 Mr Lewis holds a different opinion. His evidence is that the building height and upper-level setbacks will result in a highly visible and intrusive development. He described that design as ‘boxy’ with a complexity of design and forms that is out of character with the host building with respect to fenestration, roof forms and materials. Mr Lewis considers that the upper levels are not visually recessive and will dominate the heritage place. Observing that parts of both the north and east elevations will intrude into the projected sightlines, his opinion that these incursions are not acceptable. In this view, the new building elements will become the focal point of the site.
- 157 Our finding is that proposed Levels 3 and 4 do not achieve an acceptable heritage outcome. They will dominate, and detract from, the heritage fabric and have an adverse impact on both this individually significant building and the surrounding heritage place in which, we consider, the hotel building plays an important role.
- 158 The elevations include the sightlines detailed at clause 22.02-5.7.1 which are shown to be taken from a 1.6 metre eye level on the opposite side of both Berry Street and Spensley Street through the top of the front parapet. The policy refers to these as ‘appropriate areas for upper-level additions to individually significant buildings’. The diagrams confirm that compliance is not achieved with this element of the policy. The incursion into the sightline is approximately 1.0 metre in Berry Street and 300mm in Spensley Street. Although it is true that compliance could be achieved with some modification, the acceptability of these parts of the building is not confined to this consideration. As demonstrated by the submissions and evidence, and confirmed by our inspection, the hotel building has a high level of visibility from several vantage points. Given their siting, extent, height and scale, this would also apply to the proposed third and fourth levels. The sightlines do not contemplate views of additions from locations other than directly opposite.
- 159 The upper levels will be apparent in views along both Spensley Street and Berry Street, on the oblique and also from varying locations, proximate to the site and further afield. We agree with Mr Lewis and with submissions from respondents and the Council, that these levels will have a dominant presence that will detract from the retained heritage fabric. This is compounded by the proposed demolition/removal of the roof form in its entirety. Given the somewhat unique context of the subject land at



intersection comprised of roads on both a perpendicular and angled alignment and a low-scale built form environs resulting in a prominence of the hotel building, the policy of minimising the visibility of new additions by siting them within the projected sightlines is not achieved to an acceptable degree. On an objective assessment, we are unable to conclude that the visibility of the additions has been minimised. The upper levels are not visually recessive but have a strong presence which, while distinguishable from original heritage fabric, will have a dominant appearance.

- 160 Heritage policy for corner sites and sites with dual frontages does not materially add to the above considerations as it refers to encouraging new buildings and additions to respect the built form and character of the heritage place and the adjoining or adjacent contributory elements to the heritage place. In the context of a substantial historic hotel building within a low-rise environment, it is difficult to see how the construction of upper levels of the height, form and siting proposed here can be said to comply with this policy. They will present as an aberrant form, which does not respect the character of the heritage place.
- 161 Where upper-level additions are proposed, policy encourages respect for the scale and form of the heritage place by being set back for lower built form elements, with each built form element set back further from the lower heritage elements. The proposal does not comply with this policy as the setback of Level 4 (fifth storey) from Berry Street in part matches that of Level 3 (fourth storey) directly below.
- 162 Our finding is that the proposed additions and the proposed alterations to retained original fabric are not acceptable and will adversely affect the significance of the heritage place.

#### **WILL THE PROPOSAL HAVE ANY UNACCEPTABLE IMPACTS ON THE AMENITY OF ADJOINING PROPERTIES?**

- 163 The expectations of persons who occupy properties in a residential zone at an interface or a boundary with a commercial zone should reasonably be tempered. We agree with Council that the reverse is also expected, that the development opportunities of commercially zoned land are also tempered. The Council and respondents raised amenity concerns including the impact of the development to adjoining properties having regard to matters of visual bulk, overlooking, overshadowing, noise and the effect on solar panels. We will address these issues below and turn firstly to the impacts on the residential properties to the west. The following extract of the plans showing the western elevation is included for reference.



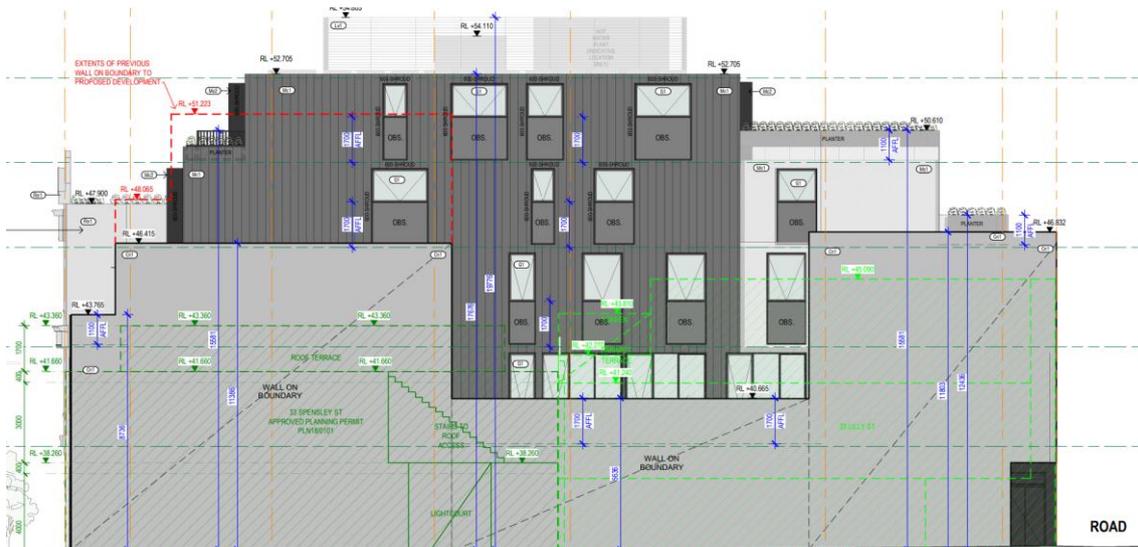


Figure 10: TP15 Proposed West Elevation.

### 33 Lilly Street

#### Solar panels

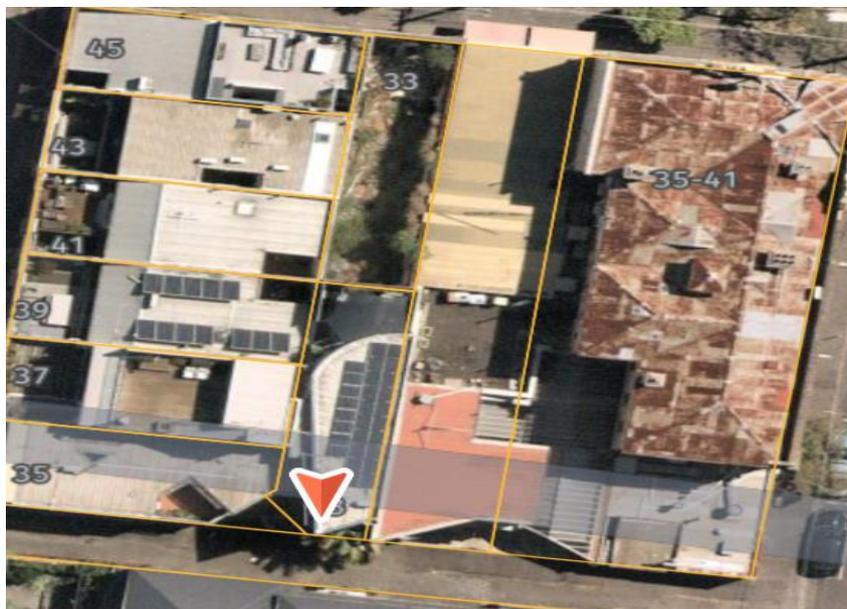


Figure 11 Solar panels on the roof of 33 and 39 Lilly Street, Clifton Hill.

164 Both No. 33 and No. 39 Lilly Street have rooftop solar energy panels.

165 Mr deWaard’s evidence addressed the proposal’s impact on these rooftop solar panels and includes the following conclusions:

- At No. 39 Lilly Street, the overall solar energy reduction would be, at worst, 8.25%.

- 166 At No. 33 Lilly Street, from 9.00am to 11.30am the performance of all of the 28 solar panels would be affected by shadowing, with the effect being a reduction of the system's daily yield by 35-40%.
- 167 Mr deWaard considered this impact to be acceptable on the basis that the panels were installed after the lodgement of the planning permit application for the proposal.
- 168 Mr Negri also considered the impact of overshadowing and observed that, based on aerial photographs, the rooftop solar panels were installed during March-April 2021, after the planning application was lodged. It was his evidence that whilst the impact of overshadowing on the existing rooftop solar energy panels is to be considered by others, the impact is acceptable given the guidance contained in the Planning Practice Note 88 'Planning for domestic rooftop solar energy systems'<sup>32</sup> (**PPN88**), that is the timing of installation and the location adjoining land in the C1Z. We do not consider that the consideration of timing is sufficient basis for us to conclude that the impact of the proposal on the neighbouring solar panels is acceptable.
- 169 Based on the submissions and the evidence, it is understood that the solar panels were installed on the roof of No. 33 Lily Street in February 2021. The planning application was lodged with the Council in July 2019 and notice of the application was given in May 2021. We were advised, and it was not disputed, that the owners of No. 33 Lilly Street were unaware of the lodgement of the planning application in June 2019 until the application was advertised.
- 170 Pursuant to clause 34.01-8 a relevant decision guideline is:
- The impact of overshadowing on existing rooftop solar energy systems on dwellings on adjoining lots in a General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone.
- 171 PPN88 is a practice note that provides guidance regarding planning applications for development that may overshadow an existing domestic rooftop solar energy system. Notably PPN88 states that:
- The solar energy system must exist at the date of the planning application being made on an adjoining lot'.
- 172 It goes on to state that the responsible authority must consider the extent to which the solar energy system is already overshadowed, whether it is appropriately located and the effect of overshadowing from the proposed development.
- 173 A number of relevant factors are then identified including the extent of existing overshadowing; whether the proposed development meets relevant standards under clauses 54 and 55; the type of rooftop solar energy system; whether the rooftop system takes into account the potential future

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<sup>32</sup> Department of Land, Environment, Water and Planning (2018)



development of adjoining lots; and the extent to which the system has been located to protect it from overshadowing.

- 174 PPN88 does not form part of the Planning Scheme. It is not an incorporated document or a reference document. It is nonetheless used in assessing the impact of development on rooftop solar systems. Unlike PPN88, the decision guideline at clause 34.01-8 makes no reference to the existence of otherwise of a solar energy system at the time the planning application is made.
- 175 We consider that, given the significant elapse of time between the lodgement of the planning application and the giving of notice (approximately 22 months), the statement in PPN88 that ‘The solar energy system must exist at the date of the planning application being made on an adjoining lot’ cannot fairly be applied in this case. In any event, as stated, the decision guideline of clause 34.01-8 makes no reference to such a consideration.
- 176 Having said that, PPN88 requires the decision maker to consider whether the rooftop system takes into account the future potential of adjoining lots. This is a dwelling adjoining a commercial property which may be considered could have development potential. That is not an unreasonable proposition. The solar panels are located on a third level roof adjoining the review site.
- 177 There is to be a balancing of interests between properties. The only practical location for solar panels on 33 Lilly Street is the roof but it is also a reasonable expectation that the review site would be upgraded or redeveloped at some stage.
- 178 We consider the degree of loss to the solar panels to 33 Lilly Street of between 35-40% is unacceptable, but do not say that there should be no impact at all.

#### Visual bulk

- 179 Visual bulk is a planning term that is used to describe the impact that a building may have on its neighbours or surrounding environment by virtue of its scale, mass, volume and appearance. As discussed, the expectations of both sites should be tempered due to the interface between a residential and commercial zone.
- 180 No. 33 Lilly Street is a three-storey dwelling that shares its eastern boundary with the subject land. Adjoining this property it is proposed to construct:
- the basement;
  - at ground floor, the basement ramp and services;



- at Level 1, an apartment wall with balcony located on the boundary but the bedroom and bathroom walls set back 2.2 metres;
- at Level 2, an apartment wall in part located on the boundary with a setback of 2.2 metres to the bedroom and bathroom walls;
- at Level 3, an apartment that is set back 2.2 metres;
- at Level 4, an apartment that is set back 2.2 metres including part which is a balcony with a 1.1 metre high balustrade.

181 According to Mr Negri's evidence, the windows and terrace of No. 33 Lilly Street are orientated away from the review site and it will be possible to look over the terrace screen that is currently located on the boundary to view the upper levels of the building. However, he contended that as the primary outlook of this space is to the west, the amenity implications of viewing the upper-level elements of the proposed building from the terrace vantage point are acceptable.

182 We find that the western elevation will be visually imposing to the terrace of No. 33 Lilly Street.

183 We agree that the orientation of the windows and terrace of No. 33 Lilly Street is to the west, rather than having an outlook toward the review site. However, the terrace of this dwelling is unenclosed we consider that the proposed 2.2 metre setback will result in an unacceptable visual impact. With this siting, the building will be visually imposing to No. 33 Lilly Street and result in an unacceptable sense of enclosure to its terrace.

#### Overshadowing

184 The shadow diagrams show that the terrace of No. 33 Lilly Street is currently in shadow at 9.00am, at 10.00am and in part at 11.00am during the equinox. The proposed development extends the shadow to the whole of the terrace at 10.00am and in part at 11.00am. There is no shadow or increase in overshadowing from 12 midday onwards, due to the orientation of the site.

185 As we have discussed, there are different expectations where there is a zoning change. In this case, given the terrace will receive unencumbered solar access during the afternoon period, the extent of overshadowing as a consequence of the development is not a reason to refuse a permit.

#### Overlooking

186 All west-facing windows and balconies are screened to a height of 1.7 metres. Unacceptable overlooking will not occur.

## Noise

- 187 The concern regarding noise impacts was raised in respect of the location of the ramp adjoining the property at No. 33 Lilly Street and the location of balconies on the western boundary adjoining residential properties.
- 188 Clause 58.04-3 Noise impacts has the following objectives:
- To contain noise sources in developments that may affect existing dwellings.
  - To protect residents from external and internal noise sources.
- 189 Acoustic evidence was not called by any party, but an acoustic report prepared by Cogent Acoustics<sup>33</sup> formed part of the planning application material. This report largely addresses potential noise sources such as those arising from the proposed wine bar and patron noise, mechanical equipment and car stackers.
- 190 The report does not address the concern raised by No. 33 Lilly Street and in particular the noise associated with the access to the basement having regard to it siting adjacent to the dwelling and bedrooms.
- 191 Whilst it is acknowledged that basements located on boundaries are not uncommon, there is insufficient information is available to us to reach a conclusion on this issue. Accordingly, we make no finding, noting that we have determined to refuse a permit for other reasons.

## **33 Spensley Street**

- 192 This property is currently vacant but, as described earlier, has a permit for the development of the site for a two-storey dwelling with rooftop terrace. We have approached the assessment below based on the issued permit, noting that the permit may or may not be acted on and the dwelling built in the approved form.

## Visual bulk

- 193 No. 33 Spensley Street is also located to the west. The proposed building to No. 33 Lilly Street continues part on the shared boundary to Level 3 and is then set back 2.2 metres. Level 1 includes a small 4.0 square metre balcony located off a bedroom and part of the larger balcony associated with another apartment.
- 194 For similar reasons set out above in respect of the development's impact on No. 33 Lilly Street, we find that the proposed building would be visually imposing to this adjoining site if it was to be developed in accordance with the current permit.

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<sup>33</sup> Cogent Acoustics Rev 2, 09/03/2021.



### Overshadowing

195 The approved roof top terrace would be overshadowed at 9.00am until 12 midday at the equinox. The current site has some overshadowing from 9.00am to 3.00pm. As detailed above, we do not consider the shadow impact on this property to be a reason to refuse a permit.

### Overlooking

196 The west-facing balcony and windows where they are located adjacent to this property are screened to a height of 1.7 metres. Unacceptable overlooking would not occur.

## **31 Berry Street**

### Visual bulk

197 No. 31 Berry Street is a two-storey terrace dwelling located to the south of the subject land (on the opposite side of the laneway) that has its frontage to Berry Street and its rear boundary to Lilly Street. The impact of the proposed development differs for this property. The northern side elevation of the dwelling features a number of windows including a ground-floor window in the original part of the house as well as high-sill windows at ground-floor level. The first-floor windows facing north are screened with external louvres.

198 Whilst the occupants of No. 33 Lilly Street would be aware of the proposed development, its visual impact is acceptable given this dwelling orientates itself to east and west and has included high sills or screening measures to its north-facing windows.

### Overshadowing

199 The proposed development will increase overshadowing to the rear yard at 9.00am at the equinox. There will be no additional overshadowing of this secluded private open space area for the remainder of the day. The extent of overshadowing will not have an unacceptable impact on the amenity of this secluded private open space area.

### Overlooking

200 Mr Negri evidence is that there are a number of apartments either orientated to the south or have south-facing balconies or habitable rooms. His assessment is that, given the dwelling at No. 31 Berry Street has screened its north-facing windows, there is an opportunity to limit overlooking through measures such as 1.1 metre high or 1.3 metre high screens to balconies as opposed to a 1.7 metre high screen.

201 Had we determined to grant a permit, a condition requiring this modification could have been included.



**WILL THE OCCUPANTS OF THE PROPOSED DWELLINGS BE PROVIDED WITH AN ACCEPTABLE LEVEL OF AMENITY?**

- 202 The Council’s grounds do not address internal amenity, but this issue was raised by a number of respondents. This was particularly in respect of access to daylight and the internal amenity of apartments 102 and 202. Both are single-aspect apartments facing east.
- 203 A purpose of clause 58 is to encourage apartment development that provides a reasonable standard of amenity for existing and new residents. In respect of internal amenity, the provisions of clause 58.07 address matters of functional layout, room depth, windows, and natural ventilation.
- 204 The plans detail a depth of 2.103 metres and a length/width of approximately 5.0 metres for the balconies of apartments 102 and 202. The plans show the removal of existing windows where balconies are located beyond. Concerns regarding daylight and ventilation to the rooms which have their window openings to the balconies were raised. During the hearing the option of fitting the window openings with fold up’ windows was suggested by the applicant in response to heritage windows concerns related to the removal of windows from the retained façades.

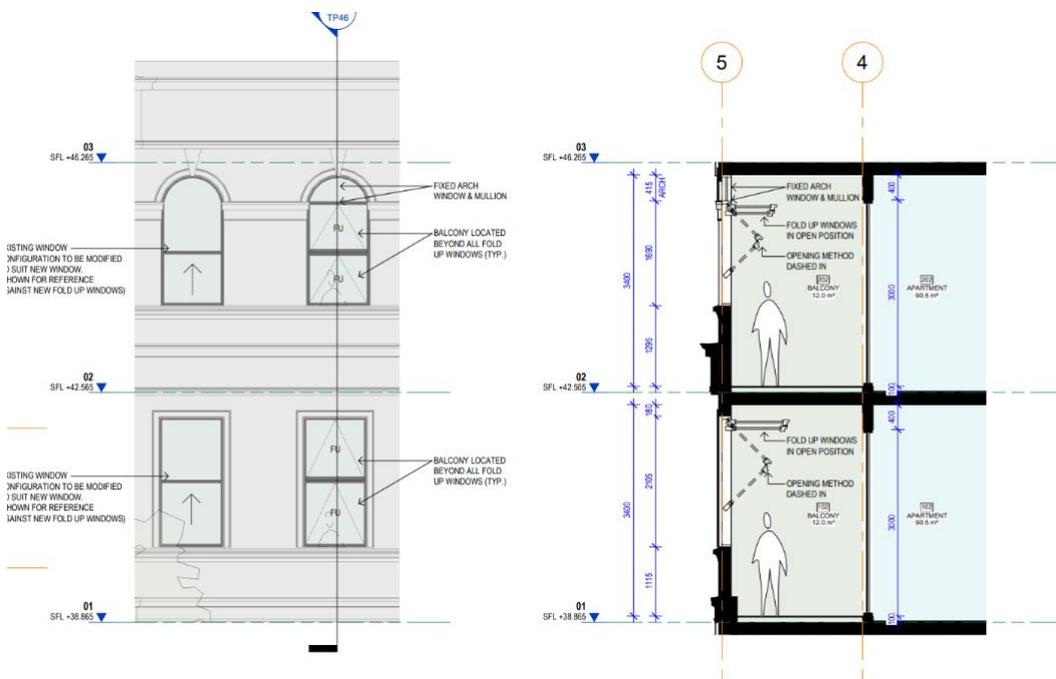


Figure 12 : Amended window openings with ‘fold up’ windows.

- 205 The applicant did not call evidence in respect of daylight access, but Mr deWaard addressed the issue of natural ventilation. His evidence is that the overall natural ventilation outcomes for the apartments is satisfactory subject to the project “clearly demonstrating the operability of windows, including insect screens, and catches to prevent internal doors along breeze paths from slamming shut”.

206 Clause 58.07-3, Windows, has the objective ‘To allow adequate daylight into new habitable room windows’. The related Standard D28 reads

Habitable rooms should have a window in an external wall of the building.

A window may provide daylight to a bedroom from a smaller secondary area within the bedroom where the window is clear to the sky.

207 The living rooms of apartments 102 and 202 do not have a habitable room window to an external wall of the building. These rooms have a sliding door and window to a balcony that, as it was proposed during the hearing, will have a ‘fold up’ window. We consider the concerns expressed regarding the daylight access to these rooms to be understandable and observe that we would have been assisted by daylight modelling. We make no finding in respect of this issue, noting that we have determined to refuse a permit for other reasons.

### **IS SUFFICIENT CAR PARKING PROVIDED AND WILL THERE BE ANY UNACCEPTABLE TRAFFIC IMPACTS?**

208 The Council and its traffic engineers do not oppose the proposal on car parking or traffic related grounds. However, these were raised in respondents’ submissions.

209 The proposal provides 24 car spaces including 18 spaces within stacker units and six at-grade spaces in the basement car park. One of the spaces is EV-charging capable. A total of 14 bicycle spaces are provided. Access to the basement is via the crossover to the adjoining laneway. Loading and waste collection are proposed to occur along the review site’s frontage.

210 Pursuant to clause 52.06, the development has a requirement for 21 car spaces including 18 for the residents and three for the hotel (wine bar). The proposal allocates the 24 basement car spaces to residents only leaving a shortfall of three spaces. A car parking reduction is required under clause 52.06-3.

211 Mr Furness’ evidence that the reduction could be granted because the site is well served by public transport, on-street spaces are available, the area of the wine bar is small and the demand generated by the former use as a hotel exceeds the current proposal.

212 Based on the information before us, we are persuaded by Council and the applicant that the provision of car parking spaces and access arrangements is acceptable, for the reasons detailed in the evidence.

213 The evidence is that the proposal will generate 50 vehicle movements per day, equating to five vehicle movements in the peak hour (or one every 12 minutes). Survey data contained in the evidence shows that, at present, the laneway has very low usage and carries a maximum of two vehicles per

hour in any one location. As a consequence of the proposal, the evidence is that this will increase to seven vehicles per hour. This can be accommodated without resulting in an unacceptable impact on the operation of the laneway or the local road network. Further, given the relatively short (40 metre length) of the laneway and its accessibility from both Berry Street and Lilly Street, in the event that there is a vehicle in the laneway, a vehicle exiting the basement car park can proceed in the other direction.

## **CONCLUSION**

- 214 Clause 71.02-3 addresses integrated decision making. It states that planning and responsible authorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.
- 215 We acknowledge that the proposal is consistent with the identified policies which seek to increase residential densities in well-served locations such as this for a range of reasons, including making more efficient use of existing infrastructure, services and facilities. The proposal would also provide some economic and employment benefits. These were raised in submissions and evidence, and we have considered these. On balance, however, we find that these benefits do not outweigh the detriment to the significance of the heritage place (and to this individually significant heritage building), that will be a consequence of the proposal. Our conclusion is that the proposal will not result in a net community benefit.
- 216 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Bill Sibonis  
**Senior Member**

S P Djohan  
**Acting Senior Member**

Tracey Bilston-McGillen  
**Member**

