

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2256/2019  
PERMIT APPLICATION NO. TP-2018-801

### CATCHWORDS

Section 79 *Planning and Environment Act 1987*, Melbourne Planning Scheme, Commercial 1 Zone, Design and Development Overlay – Schedule 20, Heritage Overlay – Schedule 2, building height, dominance of heritage place, impact on Fitzroy gardens, streetscape character, significant streetscape, demolition, overlooking, visual bulk and overshadowing.

### APPLICANT

Whitehaven Property Development Pty Ltd

### RESPONSIBLE AUTHORITY

Melbourne City Council

### RESPONDENTS

National Trust of Australia (Victoria), East Melbourne Group Inc., ACVP Residents Incorporated, East Melbourne Historical Society, C Mandrawa, M & R Fels, A D'Angelica, L Guthrie, V Hobson, A & A Donald, B Marsh, N Faulkner, R Bonnett, D Noel, I Stephen, S Koh, A Stevens, S & R Bower, H Guthrie, L Wilkie, M Sutton, J Barry, SRP Investment Trust, de Castella Australia Pty Ltd, S de Castella, A Fameli, A McGrath, R Thomson, C Calleja, J Winnett, E Douglas, Andec Collaborative Trust, Redfox Investment Trust, A Anderson, Commit Consultants Pty Ltd, Frisky Corp Pty Ltd, G Sussex, Altitude Ventures Pty Ltd, A Doty, P Clements, J Thick, M Davies, M Phillips, M Crawford, S Laurie, P Hargreaves, P, R & C Smallwood, C Morris, P Telfer, G New, A Faulkner, J Walker, J Beer, Coslyn Pty Ltd and S Knight

### SUBJECT LAND

204-208 Albert Street EAST  
MELBOURNE

### HEARING TYPE

Hearing

### DATE OF HEARING

17 to 21 and 24, 25 and 27 May 2021

### DATE OF ORDER

1 July 2021

### CITATION

Whitehaven Property Development Pty Ltd  
v Melbourne CC [2021] VCAT 690

## ORDER

### Amend permit application

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

- Development Plans prepared by: Jackson Clements Burrows Architects
- Drawing numbers: TP0-001: Revision 3; TP 0-000, TP0-002, TP0-003, TP0-201, TP0-202, TP0-203, TP1-101 to TP113 inclusive, TP2-101, TP2-102, TP2-103, TP3-101, TP3-102, TP3-103: all Revision 4; TP3-104, TP5-101 and TP9-101: all Revision 2.
- Dated: 23 March 2020
- Landscape plans and images prepared by: Nathan Burkett Landscape Architecture
- Drawing Nos. Pages 1 – 8.
- Dated: 23 March 2020

### No permit granted

- 2 In application P2256/2019 the decision of the responsible authority is affirmed.
- 3 In planning permit application no permit is granted.

Alison Glynn  
Member

Lorina Nervegna  
Member

## APPEARANCES

For Whitehaven Property  
Development Pty Ltd

Ms Susan Brennan, SC with Ms Emily Porter, barrister on instruction from Ms Holly McFall, town planner of SJB. They called the following witnesses:

- Ms Catherine Heggen, town planner.
- Mr Jason Walsh, traffic engineer.
- Mr Bryce Raworth, heritage consultant.
- Mr Ben Watson, photomontage expert.

For Melbourne City Council

Mr David Song, town planner. He called the following witnesses:

- Ms Meredith Gould, heritage consultant.
- Ms Julia Bell, urban designer.

For National Trust

Ms Felicity Watson.

For East Melbourne Group  
Incorporated

Mr Gregory Bisinella with Mr Rod Bower and Mr Peter Clements.

For Dr Christine Mandrawa

Ms Serena Armstrong barrister, and also in person on day 4 of the hearing.

For Albert Clarendon Victoria  
Powlett (ACVP) Residents  
Incorporated, M & R Fels, A  
D'Angelica, L Guthrie, A & A  
Donald, B Marsh, N Faulkner, R  
Bonnett, D Noel, I Stephen, S  
Koh, A Stevens, S & R Bower,  
H Guthrie, L Wilkie, M Sutton,  
J Barry, SRP Investment Trust,  
de Castella Australia Pty Ltd, S  
de Castella, A Fameli, A  
McGrath, C Calleja, J Winnett,  
E Douglas, Andec Collaborative  
Trust, Redfox Investment Trust,  
A Anderson, Commit  
Consultants Pty Ltd, Frisky  
Corp Pty Ltd, G Sussex,  
Altitude Ventures Pty Ltd, , P  
Clements, J Thick, M Davies, M  
Phillips, M Crawford, S Laurie,  
P Hargreaves, P, R & C  
Smallwood, C Morris, P Telfer,

Ms Serena Armstrong, barrister. She called the following witness:

- Ms Sandra Rigo, town planner.

A number of the resident objectors attended as observers throughout the course of the hearing.

G New, A Faulkner, J Walker, J Beer, and S Knight

For V Hobson

In person on Day 1

For R Thomson, A Doty and Coslyn Pty Ltd

No attendance

For East Melbourne Historical Society.

No appearance

## INFORMATION

Description of proposal

Part demolition of a heritage building and then construction of a nine storey addition to the rear of the retained heritage façade and front section of the building including side walls, roof and chimneys. The amended and extended building is to be used as an office. The proposal includes basement car parking, a ground floor café and staff amenities.

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

Melbourne Planning Scheme

Zone and overlays

Commercial 1 Zone (C1Z)

Heritage Overlay – Schedule 2 (HO2)

Design and Development Overlay – Schedule 20 (DDO20)

Permit requirements

Buildings and works in both C1Z and DDO20.

Buildings and works, including demolition in HO2.

Key relevant scheme policies and provisions

Clauses 11, 15.01, 15.03, 18, 21.04, 21.06, 21.16, 22.05, 22.17, 34.01, 43.01, 43.02, 65 and 71.02.

Land description

See paragraphs 30 to 33 of reasons.

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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.

## Tribunal inspection

We undertook an accompanied inspection of a number of dwellings around the site and then undertook an unaccompanied inspection of the public domain surrounding the site on 26 May 2021.



## REASONS<sup>2</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Whitehaven Property Development Pty Ltd (**the review applicant**) is seeking to renovate, alter and extend an existing heritage building to establish a nine to ten storey office building on land at 204-208 Albert Street, East Melbourne. Melbourne City Council (**the council**) opposes the development, saying it is too large, high and dominating for the heritage context and design provisions of the Melbourne Planning Scheme (**the planning scheme**) affecting the site. The council also opposes the development on the basis that it will adversely impact the general amenity of residents in adjacent buildings to both the east and west by way of visual bulk, overshadowing and overlooking
- 2 A number of residents, mostly represented by the Albert Clarendon Victoria Powlett Residents Incorporated group (**ACVP**) also oppose the proposal, as do the East Melbourne Group. At the hearing the East Melbourne Group deferred to the submissions and evidence provided by the ACVP. As set out in the ACVP submissions, they share the council concerns and are also concerned the development will result in unsafe access and has inadequate car parking arrangements. The National Trust also opposes the development both as an interested heritage body and as the adjoining landowner of Clarendon Terrace to the west of the site, at 212 Clarendon Street.
- 3 There is no dispute that as the site is in a Commercial 1 Zone (**C1Z**) the development of the land for an office is a suitable proposition and this use does not trigger the need for a planning permit. It is the form and scale of the building that is in dispute.
- 4 On the one hand, policy and provisions of the planning scheme direct that the site's inner city location and its CIZ designation mean development should be maximised. This is supported by general urban consolidation principles. The capacity of the site to forward urban consolidation principles, however, must also be tempered by the site's location both in Heritage Overlay – Schedule 2 (**HO2**) and Design and Development Overlay – Schedule 20 (**DDO20**), along with relevant planning policy applying to the site.
- 5 Assessing how to balance the competing needs for urban growth and consolidation, as supported by the CIZ, against the need to conserve heritage and character through the HO2 and DDO20 provisions requires consideration of these relevant provisions in context of the immediate surrounds.

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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.

- 6 From our review of the relevant provisions of the planning scheme, notably the need to balance the competing directions of the planning scheme for development of this site, we find the balance weighs heavily toward a more modest building for this site than the building that is the subject of this application. We find the combined heritage and design directions for this site require a significantly lower building that can better respect the heritage streetscape of Albert Street and its broader heritage and urban design context. We are also concerned that the proposal has not adequately addressed its amenity impacts on its neighbours. We therefore have determined to affirm the council's deemed refusal to grant a planning permit. No permit is granted.
- 7 Our reasons for this decision are set out below.

### **WHAT ARE THE KEY ISSUES?**

- 8 We identify a number of questions that we need to address in this proceeding.
  - Firstly, we need to determine if the extent of proposed demolition is acceptable.
  - Secondly, we need to determine whether the proposed building form provides an acceptable outcome to its planning scheme and physical context. Notably does the proposed building provide an acceptable response to the C1Z, HO2 and DDO20 provisions applying to the land having regard to its physical context?
- 9 Other relevant questions we examine are:
  - Does the proposal maintain reasonable amenity to the surrounding area including whether the proposal provides appropriate access and on-site car parking?
  - Does the proposal achieve net community benefit?

We address these issues below in context of the proposal sought.

### **WHAT IS PROPOSED?**

- 10 The proposal is firstly to demolish the rear of a building on a site of contributory significance in HO2. It then proposes to alter the existing building to the front of the site and construct a new, nine storey extension to the rear of the retained front section of the building, on a site listed as being in a significant streetscape. The proposal includes access to a new basement car park, via the lane to the east and north of the site.
- 11 The building includes a café and staff amenities at ground level and then office space to the rear. Due to a slope in the land, the ground level entry of the basement to the rear of the site sits 2.4 metres below the ground level entry of the building to Albert Street. In effect the building will appear as a 10 storey building at its rear. Overall, the building has a maximum height of 34.8 metres to the top of the building at its rear, northern interface, with

roof plant sitting above. Facing Albert Street the new building extension has a height of 33.4 metres to its roof level.

- 12 The building includes a series of colonnaded forms. Levels one to four sit generally behind the rear of the retained heritage form. Sitting above this lower, plinth section is a box like form, shifted west of the lower section and cantilevered 1.14 metres forward, south, over the rear section of the retained heritage roof. The upper five levels are therefore set back 9.1 metres from the retained building façade and 13.1 metres from the Albert Street site frontage. Both the project architect, Mr Jackson, and the planning evidence of Ms Heggen is that the building has been designed 'in the round' forming a three dimensional 'lantern' like form given it will be exposed from all directions.

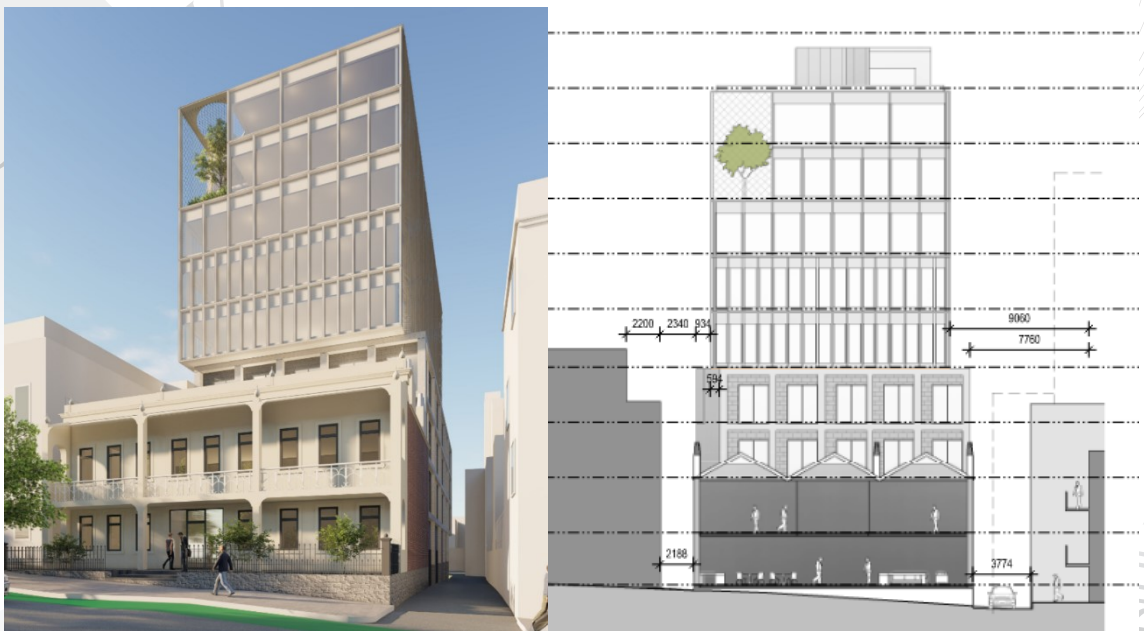


Figure 1 – An architectural render of the proposed building and a cross section through the front section of retained building, both extracted from the amended VCAT plans.

- 13 The lower two levels generally sit to the east and west side boundaries<sup>3</sup>. Levels 3 and 4 are then set in approximately two metres on the western side, where it sits close to 214 Albert Street. Levels 5 – 9 are then set in approximately 1.1 metres from the western side boundary and 1.5 metres from the eastern side boundary. The building sits flush to the northern, rear boundary for all levels.
- 14 A permit is required to construct the buildings and works in C1Z, DDO20 and HO2. Demolition of parts of the building triggers a permit in HO2. The proposal also relies on car parking below the standard rate directed by clause 52.06 and therefore a planning permit is required to reduce the car parking requirements.

<sup>3</sup> They are partly recessed approximately 0.4 – 0.5 metres, with columns at the boundary edge.



## WHAT IS THE DECISION MAKING CONTEXT?

### Statutory and strategic context

- 15 The site sits in what was variously described as a complex or varied statutory planning environment. The site is firstly in a C1Z but at the edge of General Residential Zone – Schedule 1 (**GRZ1**) to the site's east. Land further east of the GRZ1 area is a section of land in a Mixed Use Zone (**MUZ**) (**the Tribeca site**). South of Albert Street is the Epworth / Freemason's hospital in a Public Use Zone – Schedule 3 (**PUZ3**). Albert Street, while a major local road, is not in a Road Zone Category 1, like Victoria Parade to the north. The site's Commercial 1 zoning has several purposes. Relevantly these include:
- 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.

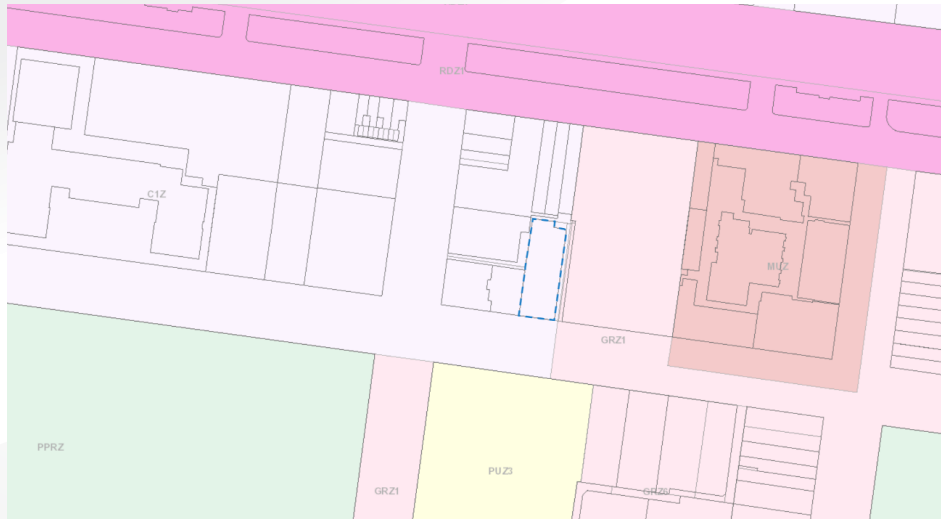


Figure 2 - Zone map of site and surrounds - From VicPlan

- 16 The site, along with land to its north forms part of HO2 which applies as a precinct heritage overlay over much of East Melbourne and Jolimont. Land to the direct east is in a separate heritage overlay, HO187 forming part of the Victorian Heritage Register (**VHR**) listed former Victoria Brewery site. To the direct west is HO132 which is also on the VHR. The VHR listed site includes both Valetta House at the corner of Clarendon Street and a rear modern building, known as 214 Albert Street. This modern four storey building sits directly west of the review site.
- 17 North of Valetta House is Clarendon Terrace in HO133 at 212 Clarendon Street. This is a VHR site, owed by the National Trust. West of Clarendon Street is then HO134, another VHR site with the Freemason's Hospital to the south in HO886, also a VHR listed site. The Fitzroy Gardens to the south-west of Clarendon and Albert Streets has its own HO883 listing and

is also on the VHR. Figure 2 below illustrates the different heritage overlay listings.

18 Of particular relevance to the proposal before us is that the heritage overlay has purposes:

- 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 does not adversely affect the significance of heritage places.



Figure 3 - Heritage Overlays affecting the area - From VicPlan

19 The land is also in DDO20. This overlay affects land along both the north side of Albert Street and the south side of Victoria Parade. DDO20 has several sub-precincts with the site, and land west of it, in DDO20- 43. Land to the direct north is in DDO20-11 and land in the Tribeca development, further east is in DDO20-45. Land south of Albert Street is in a different overlay.

20 DDO20 has four objectives:

- To minimise the visual impact of buildings on the Fitzroy Gardens and to preserve the amenity of the gardens.
- To ensure that the enjoyment of the Fitzroy Gardens is not excessively diminished by overshadowing from any new building or works.
- To ensure that any new development or redevelopment is compatible with the existing scale and character of adjoining buildings and the area.
- To protect and enhance the appearance of Victoria Parade as a major boulevard.

21 These objectives sit within the broader DDO, clause 43.02 provisions that direct a planning permit is required for buildings and works in the area.



Figure 4 - Design and Development Overlays (DDOs) affecting the area

- 22 DDO20 has requirements to be met set out in a table that lists the different sub-areas of DDO20 with different 'maximum building height', 'building setback' and 'outcomes' columns. The requirements state that an application to exceed the maximum height or to vary the building setback must be accompanied by a site analysis and urban context report documenting how the development will achieve the design objectives and outcomes of the schedule. The table to DDO20 has different height requirements and outcomes for the different sub-precincts in DDO20 being areas 11, 38, 43 and 45. In area 43, in which the site sits, there is a maximum building height defined as follows:

No buildings may be constructed that protrude above a plane inclined at an angle of 22 degrees from a point that is:

On the southern alignment of Albert Street.

At a permanent footpath level, or if there is no footpath, at natural surface level.

Directly opposite the centre of the site frontage.

- 23 The requirements also direct an eight metre building setback to Albert Street (excluding enclosed verandahs). The 'outcome' listed against the building height and setback requirements is that new buildings or works do not impact upon the visual attractiveness of Fitzroy Gardens or create additional overshadowing on the gardens between 11.00 am and 2.00 pm on 22 March and 22 September.
- 24 Land directly north of the review site is in area 11 where there is a maximum building height of 9 metres with an 'outcome' that 'the predominantly 2-3 storey scale and built form character of the area is maintained'.
- 25 The maximum building height in area 30, west of area 11 is 30 metres with an outcome that 'new buildings that edge Victoria Parade boulevard entry to the CBD have a consistent scale'. Area 45, forming the 'Tribeca' part of



the former Victoria Brewery site has a building height defined by a separate incorporated document.

26 Clause 43.02 sets out decision guidelines to be considered in all design and development overlays, including DDO20. Relevantly these include:

- The Municipal Planning Strategy and the Planning Policy Framework.
- The design objectives of the relevant schedule to this overlay.
- The provisions of any relevant policies and urban design guidelines.
- Whether the bulk, location and appearance of any proposed buildings and works will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area.
- Whether the design, form, layout, proportion and scale of any proposed buildings and works is compatible with the period, style, form, proportion, and scale of any identified heritage places surrounding the site.
- Any other matters specified in a schedule to this overlay

27 The DDO20 has one specified decision guideline that reads:

In Area 43, before deciding on an application, the responsible authority must be satisfied that the building or works would not protrude above a plane elevated from the same point to the highest southern parapet of a building fronting Victoria Parade north of the site.

28 While 'the same point' is not defined, there is no dispute between parties that this is to be interpreted as the same point, as the point for measuring maximum building height, set out in the requirements table. It was also agreed that it would be impossible to achieve the criteria as the highest southern parapet to the north is the two storey Victorian terrace building facing Victoria Parade. Projecting a line from the southern point in Albert Street to this line would leave much of the review site in a single storey form. There is already two storey heritage form on the site.

29 South of Albert Street, along the east side of Clarendon Street, land is located in a Design and Development Overlay - Schedule 21 (**DDO21**). This includes land in the Freemasons/Epworth Hospital and land around it. DDO21 has different design objectives to DDO20, being:

- To enhance the importance of Wellington Parade as a key approach to central Melbourne through quality building design and street amenity;
- To minimise the visual impact and overshadowing effect of buildings on the Fitzroy Gardens and Yarra Park;
- To respect the scale and significance of heritage buildings on the site or on adjacent sites.



## Physical context

- 30 The physical surrounds of the site are also complex. The site itself has an 18 metre frontage to the north side of Albert Street, sitting approximately 40 metres east of Clarendon Street. It has a depth of just under 50 metres, creating a 918sqm site. To the front of the site is a building first constructed as a row of three, double storey row houses in 1859. In 1883 the building façade was remodelled with the inclusion of a double storey verandah and parapet detailing added, reminiscent of the era. In 1964 the building was again altered to convert the three dwellings into a single medical centre. At this time the 1883 verandah was removed and a new verandah, designed by Romberg and Boyd Architects, was put in place. Modern extensions to the rear of the building were also added in 1964. The site was then used as a medical centre until recently, but is now vacant.
- 31 To the direct west is a four storey modern apartment building that faces Albert Street but forms part of a VHR listed site at the corner of Clarendon Street, with a two storey heritage building at the corner. To the north of this, in the northern part of the site's western interface is Clarendon House, also listed on the VHR. Directly north of the review site are three Victorian terraces facing Victoria Parade that have contributory significance to the heritage of East Melbourne with a further two terraces at 376 and 378 Victoria Parade being of individual significance.<sup>4</sup>
- 32 East of the review site is an interconnected apartment complex referred to as the Victoria and Albert Town Residences (**VATR**). The VATR complex includes two three storey sections with a fourth level at street edge. One of these three storey sections directly interfaces the lane separating it from the review site. The complex also includes two, nine storey towers, one approximately 37 metres from the edge of the review site directly east, and another approximately 20 metres to the north-east (6.46 metres from its boundary to 386 Victoria Parade<sup>5</sup>). These are identifiable in the aerial image at figure 4<sup>6</sup>. Both of the towers are set back 7.5 metres from their respective street frontages behind effective five storey street walls<sup>7</sup>. The tower, directly east of the review site sits adjacent to a tall heritage building on the adjacent 'Tribeca' site to its east, and a further tall, modern tower east of this retained heritage tower that formed part of the Victoria Brewery.

<sup>4</sup> Some sites are identified as contributory or significant, as defined by policy at clause 22.05 of the planning scheme. Others retain an older classification of A, B, C or D. 376 and 378 Victoria Parade retain the A classification, defined in policy at clause 22.05 as sites of national or state importance. 380 – 386 Victoria Parade have the newer, contributory classification.

<sup>5</sup> As notated on development plans for VATR building provided by the ACVP group.

<sup>6</sup> The approximate measurements are taken from scaling Neamap. For the eastern tower this has also been verified by reviewing the development plans for VATR building provided by the ACVP group.

<sup>7</sup> Measurements taken from floorplans of VATR tabled as part of the hearing material.



Figure 5- Aerial image of the site (marked purple) and surrounds from Nearmap imagery

- 33 South of Albert Street is part of the Epworth / Freemasons Hospital complex, part of which is also listed on the VHR. This includes the predominantly four storey heritage building at the corner of Clarendon Street that has an extension to its east that becomes an effective five storey form directly south of the review site. East of this is a single storey modern extension. We were advised there is a current permit application to construct a tower on top of this modern extension with a proposed maximum 43 metres in height. This proposal is in an area where DDO21 has a maximum height requirement of 35 metres. To the west of Clarendon Street, south of Albert Street is the Fitzroy Gardens.
- 34 As is evident when reading the aerial photo in conjunction with the CIZ boundary and our site inspection, the CIZ has a range of building forms and uses within it. This ranges from the large Epworth/Freemasons' Hospital building on Victoria Parade and the Eastbourne residential complex to its south, to small, double storey offices, dwellings and medical suites in the immediate surrounds of Clarendon Street. The building form changes again, east and south of the review site where historic industrial and institutional buildings<sup>8</sup>, have larger sites and building footprints, as well as higher street walls than exist on the review site.

### IS THE PROPOSED DEMOLITION ACCEPTABLE?

- 35 Before turning to whether the proposed new development is acceptable we firstly need to be satisfied that the extent of proposed demolition is acceptable. The council is not opposed to the demolition although the expert evidence of Ms Gould on behalf of the council opposes the extent of demolition. The ACVP objector group support the position of Ms Gould

<sup>8</sup> being the former Brewery and the existing hospital.



about demolition. The National Trust does not specifically oppose the extent of proposed demolition.

- 36 Ms Gould's heritage evidence is that there is unnecessary demolition of elements that would change and diminish the significance of the review site. This includes removal of double hung windows to the Albert Street facade and roof parapets that divide the three original dwellings that form the building. Ms Gould is also opposed to the removal of some small sections of the north (rear) of the original building, as well as the 1964 verandah and elements of remnant forecourt bluestone and paving.
- 37 Mr Raworth clarified that the proposal is to fully retain the double-storey volume of the 'front parts' of the heritage building (to a depth of 10.355 metres from the front facade, and a greater depth from the front of the verandah wing walls). We understand this includes the original facade windows, although it is not specifically notated on the plans. We also understand that in retaining the roof, the exposed parapet elements will also be retained. The permit applicant also accepts a potential permit condition to clarify the elements of heritage facade to be retained.
- 38 We are not opposed to the removal of the north, rear facing elements of the original building as these are not seen from Albert Street. As a contributory building, policy at clause 22.05 directs that it is the front or principal part of the building that should be retained. We do not see that the rear elements, that are only visible from discrete parts of the rear lanes or from adjoining properties, are critical to the contribution the building makes to the heritage place. This is primarily because they are not seen from the main heritage streetscape of Albert Street or any other major thoroughfare that form the HO2 precinct. The rear elements are not specifically defined in the HO2 or the statement of significance as having particular significance that warrant their retention.
- 39 We are also not opposed to any removal of elements internal to the building. This includes a small, 0.2 metre, rise in the original ground floor level. This is because the planning scheme does not protect the internal elements of this building. We are also satisfied that while this may slightly alter the external forecourt area, it is associated with providing a lower level to the rear of the site with sufficient ceiling clearance and also introduces better universal access to the front door from Albert Street. Given the forecourt has already been altered at least twice in the life of the building we are satisfied this small further modernisation is acceptable.
- 40 There remains dispute between Ms Gould and Mr Raworth about whether the existing 1964 verandah should be retained or whether a new verandah reminiscent of either the 1883 verandah or another, interpretative verandah, should be constructed. In turn this raises a question of whether the demolition of the existing 1964 verandah results in a loss of significant heritage fabric.

- 41 The original 1859 building had no verandah. Mr Raworth's view is that the 1883 remodelling of the building is what is most evident in physical form and the era that conservation works should adopt as a starting point for restoration. He supports an interpretive approach as set out in the application plans. He also accepts that, with a photo found by his office that shows part of what would have been the 1883 verandah, a different design could be adopted, closer to the elements visible in the photo. His evidence remains that an interpretive version of verandah is better given the detail in the photo is still limited and the interpretive version is a lighter weight form than what appears in the photo of the 1883 verandah.
- 42 Ms Gould's view is the 1964 verandah has heritage significance as it was designed by Romberg and Boyd, noted architects of the era. Her view is that this current verandah enables a greater reading of the open façade that would have existed in 1859.
- 43 We generally accept Mr Raworth's view on the issue of the verandah. Although the building originally dates from 1859 we agree with Mr Raworth's comparison to hotels across inner Melbourne that may have originated from an earlier date, but are generally restored to a later date that is the generally accepted era of significance. In the case before us the parapet across the roof and use of a verandah since 1883 contextualise the site as part of the later 19<sup>th</sup> century significance of the HO2 area. While the 1964 verandah was designed by notable architects this more modern era is not what the HO2 significance defines as the era of dominant interest.
- 44 We also note the council officer report that assessed the original and amended plans before the Tribunal is not opposed to the verandah as proposed by the applicant. This is noting that the report was prepared prior to the photo in Mr Raworth's evidence being available.
- 45 Given our overall findings that the rear addition is not acceptable we do not need to make definitive findings on what a new or retained verandah should be. We record the discussion of the witnesses and our own comments above to assist in any future proposal for this site.
- 46 In summary, we do not oppose the extent of demolition proposed. It is the additions we do not support, as discussed below.

#### **DOES THE PROPOSAL PROVIDE AN ACCEPTABLE OUTCOME TO ITS PLANNING SCHEME AND PHYSICAL CONTEXT?**

- 47 Any planning permit proposal must provide an acceptable outcome to relevant planning scheme provisions that trigger the planning permit, having regard to relevant planning scheme policy and its physical context.
- 48 In the proposal before us we need to determine if the proposed development of a nine storey office building on the review site provides an acceptable response to the site's C1Z location as well as its DDO20 and HO2 overlays applying to the land.



- 49 The proposal needs to be acceptable when tested against each of these relevant provisions separately and also as a whole, in context of policy of the planning scheme so as to form a net community benefit as set out in clause 71.02 of the planning scheme. Our assessment below therefore addresses the different numeric and performance based elements of the three permissions required in this case and how the proposal responds to each. Ultimately, we integrate this assessment to address the proposal as a whole, consistent with clause 71.02.

### What do the key numeric tests of the planning scheme direct for this land?

- 50 We have set out in broad terms the key objectives and provisions of the C1Z, DDO20 and HO2 provisions in paragraphs 15 to 29 above. The three provisions, particularly when read with relevant policy, have measurable tests to assess the building form.

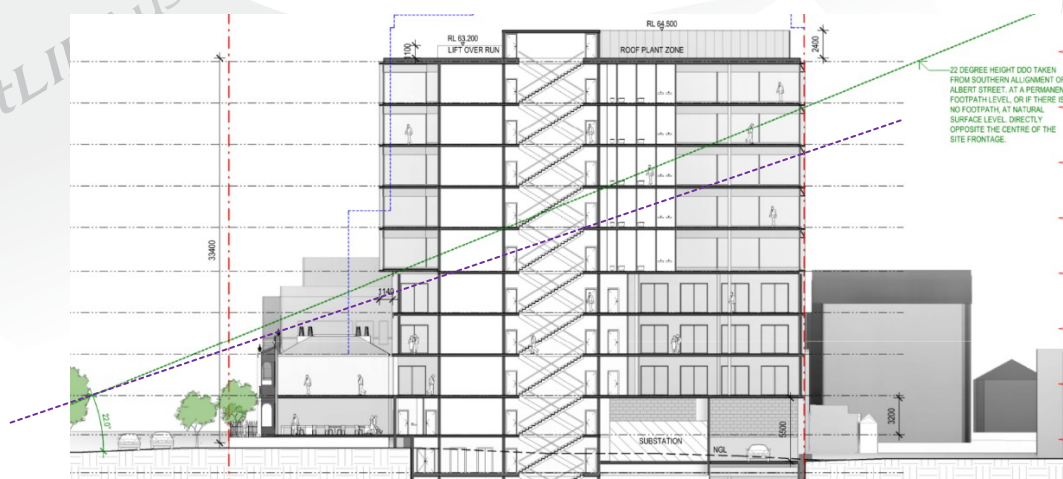


Figure 6 - North-south cross section of building - from TP 3-101 of amended application plans. The green line marks the 22 degree line. We have added a purple dashed line indicating a theoretical 'concealment' line. We also note the blue line depicts the volume of the original proposal. Red vertical lines are the property boundary.

- 51 Firstly, DDO20 requires buildings to be setback at a 22 degree line based from a point on the south side of Albert Street. The application plans usefully include a cross-section with this line marked in green, as we have included in figure 5 above. Parties agree this line is correctly depicted on this section and that the numeric requirement is not met. Submissions put to us relate to whether it is necessary or appropriate to meet the line, or if a different form is warranted given the site's physical and planning scheme setting.
- 52 As set out in paragraph 26 of our reasons above there is also a decision guideline in DDO20 that sets a numeric test that the responsible authority must be satisfied the building does not protrude above a plane that aligns with the highest parapet of a building fronting Victoria Parade, north of the site. Again, there is agreement between parties that this test is not met and that to meet it is impossible given the two storey heritage building on the site already intrudes into this line. This line is not marked in figure 5.

- 53 While impossible to meet, we still find it relevant to consider the impact of building that sits above the southern parapet line of a building to the north given the existence of the decision guideline. As commented by the National Trust, in relation to the need to give some weight to the 22 degree line, we find it consistent with findings of the Tribunal in *Hampton Beach Pty Ltd v Bayside CC*<sup>9</sup> that where a preferred maximum height is set it provides an important part of what might constitute a preferred outcome for an area given it exists in a DDO. To suggest otherwise would render the requirement and, in this case decision guideline, meaningless. Put another way, the decision guideline must mean something. In this instance we see that this 'something' must be derived from the design objectives set out in DDO20. The decision guidelines set out in clause 43.02 also direct us to consider the design objectives of DDO20.
- 54 It is also relevant to note that this same DDO20 regime (i.e. Area 43 with Area 11 directly north) extends from the review site at 204 Albert Street to 246 Albert Street. This is a section of Albert Street approximately 60 metres east and west of Clarendon Street. Beyond this to the west, a different height control exists along Victoria Parade (being in DDO20 area 30).
- 55 In concluding comments on the proposal's non-compliance with the DDO20 numeric provisions we reiterate the 2009 findings of the Tribunal<sup>10</sup> about this same overlay. This 2009 decision comments that:
- That said it was agreed on all hands, in the course of the hearing, that **these provisions are confusing and poorly drafted**. I agree that this is so. It would be a good thing from the point of view of the responsible authority, this applicant, other parties who may have to consider the provisions and the public generally (to say nothing of the Tribunal when called upon to adjudicate) if the provisions could be rewritten in clearer language. That would be more likely to give effect to the intended meaning of the provisions, and would let everyone know, with suitable clarity, where they stand.
- 56 Throughout our hearing, witnesses and advocates concurred that nothing has changed since 2009 to alter this confusion. There is, however, agreement between parties as to how they have applied the numeric tests and that not meeting them does not lead to automatic refusal of the proposal, only that it leads to consideration of the proposal on its merits having regard to the objectives of the overlay and the other relevant decision guidelines in clause 43.02 that establishes DDO20. We discuss the proposal in context of these below.
- 57 HO2 does not set any prescriptive test but clause 22.05 sets a heritage policy to assess proposals in heritage overlays. This policy sets a test that

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<sup>9</sup> (Corrected) [2017] VCAT 962.

<sup>10</sup> *Stokes v Melbourne CC* [2009] VCAT 364 – Paragraph 13. Our emphasis added.

Additions to a significant or contributory building are concealed in significant streetscapes. In other streetscapes, additions to significant buildings are concealed. For a second-storey addition to a single storey building, concealment is often achieved by setting back the addition at least 8 metres behind the front facade

- 58 The site is noted as 'contributory' in the inventory that is an incorporated document to the planning scheme with a 'significant streetscape' grading in this same document. To meet the test in the policy the proposed additions should be concealed. To meet the concealment test the building needs to sit roughly in line, or lower,<sup>11</sup> than a purple line we have marked in Figure 5. While the council and the National Trust contend that a lower proposed building form is needed, neither specifically submit that full concealment must be met. Their concerns are more general that a lower form that better meets the concealment test in context of the surrounding low rise heritage sites should be provided. The residents and ACVP maintain that concealment should be met.
- 59 There is also policy in clause 22.05 that additions to significant or contributory buildings:
- Do not build over or extend into the air space directly above the front or principal part of the significant or contributory building.
- 60 The building cantilevers slightly forward into the air space above the principal part of the contributory building for the top five levels, as is also evident in figure 5.

**Does the site context and the relevant planning scheme provisions support a response that does not meet the tests?**

- 61 The numeric tests set out above are simply that, tests. None are mandatory requirements of the planning scheme. Even if the tests were met we need to also be satisfied that the building meets the relevant objectives of the C1Z, DDO20 and HO2 provisions, along with relevant policy applying to these provisions to determine if the proposed form is acceptable. In this instance the numeric tests are not met, which emphasises a need for the building to demonstrate that it meets the objectives, regardless of the non-compliance with the numeric tests. We examine these matters below.

**Policy and provisions applicable to C1Z**

- 62 The proposal will assist in creating a mixed use commercial centre in accordance with the C1Z. The applicant put to us that providing office use at this location promotes local policy at clause 21.08 that seeks to support this site as part of one of six designated 'knowledge precincts' in the Melbourne City Council area where dense co-location of business, education, and medical and, research centres' are encouraged. The use of office at this site can assist in this goal, but we note the building has a total

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<sup>11</sup> We have taken a line to the top of the chimney pots, aligning with a figure produced by Ms Bell in the course of the hearing. A line to the parapet or roof line may be slightly different.



of 3,895sqm of proposed office floor area. In the scope of overall inner city, core office buildings this is quite small. Reducing it further, due to other constraints on the site, would only lead to a small lost potential of this particular knowledge precinct.

- 63 The lost potential is also in context policy at clauses 21.04 and 21.16.
- 64 Clause 21.04 sets out areas of urban renewal where targeted urban growth is sought as well as stable residential areas and areas of on-going or incremental growth. We agree with Ms Rigo and Ms Heggen's evidence that the site is not located in a stable residential area but in an on-going or incremental growth location. In such a location the policy framework directs 'growth will continue to be regulated under the current planning scheme controls'<sup>12</sup>. This is noting that this 'on-going or incremental growth location' is also different to other areas in the municipality that are designated for urban renewal where targeted urban growth is sought by clause 21.04.
- 65 Clause 21.16 provides local area policy for East Melbourne and Jolimont that supports 'the continued operation of existing businesses' in the area, not to specifically promote extensive growth. It also has policy that development in the commercial zone along Albert Street 'is consistent with the scale and character of the area'.
- 66 In summary, nothing in the State or local policy framework leads us to a view that the site is one where significant weight needs to be placed on office growth over other directives. Policy at clause 21.16 emphasises that development of the commercial area of Albert Street needs to be managed in a way that addresses the scale and character of the area. In this case, this is led by the built form requirements and objectives of both the DDO20 and HO2 provisions.

#### Policy and provisions applicable to HO2 and DDO20

- 67 The council put to us that in considering the streetscape, HO2 and DDO20 should be considered together as they somewhat work in concert to address the scale of building as a question of addressing the heritage streetscape in which the site sits, as well as the DDO20 objectives. These include the DDO20 objectives to consider the impact on the Fitzroy Gardens, the appearance of Victoria Parade, along with ensuring that any new development or redevelopment is compatible with the existing scale and character of adjoining buildings and the area.
- 68 We agree that the clause 43.01 heritage objectives and DDO20 objectives are somewhat interlinked as both seek new development to be in scale or complement the existing character and setting of the area.
- 69 Examining the HO2 and DDO20 objectives together also requires us to consider relevant policy. In this instance this includes clauses 15.01 and

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<sup>12</sup> Clause 21.04-1.



15.03, along with clauses 22.05 and 22.17. Urban design policy at clause 22.17 reinforces the integration of design and heritage where it states that to consider if the scale of a building is acceptable 'an application will be assessed against the qualities of contextual response being scale, building grain, building location and alignment and heritage.'

- 70 The applicant put to us that the key issue in this case is the question of building height. We agree with this to the extent that parties are particularly critical of the proposed building height, but we consider it is also the overall form and mass of the building, at its proposed height, that needs to be addressed.
- 71 Ms Gould's heritage evidence on behalf of the council is that a much lower, and generally concealed form, should be provided. We have not refused the proposal simply because the extension is not concealed. This is because we agree with the evidence of Mr Raworth that there are other protrusions visible in the area and that the streetscape as a whole has some visible modern forms. These include the buildings to the immediate east and west, although in heritage overlays. These adjoining buildings are visible, but are of a scale commensurate with the identified places of significance. So, while we agree with Mr Raworth on this point, we find the extent of visibility is vastly out of scope of what the policy and provisions call for and the surrounding built form scale of the immediate area. This is because of the dominance of the proposed upper section that we find will draw the eye, rather than allowing the retained heritage form to dominate as part of the consistently lower heritage streetscape of this section of Albert Street.
- 72 Mr Jackson provided architectural evidence in support of the proposal. As the project architect we accept his evidence as explanatory, but not independent. His evidence, however, is useful in his explanation of the rationale behind the building. We understand from his evidence that his firm was engaged as part of a process by the permit applicant to review the concerns of the council and prepare a new design to be presented to the Tribunal. The proposal is one storey lower than the proposal put to the council.
- 73 Mr Jackson's evidence explains that his building design sought to avoid the tiered 'wedding cake' type profile that he described as a distinctly planning led outcome, in favour of a positive architectural outcome 'that is more robust and engaging' for the particular urban setting. His written evidence comments that:

...the existing built form character of East Melbourne as an important contextual driver of our response. East Melbourne's historical patterns of development has resulted in a suburb of predominant low scale residential dwellings, that is interspersed with pockets of taller built form of generally commercial or multi-residential development often located around the outer perimeter of the suburb and notably along Albert St, Clarendon St and Wellington Parade. These building are generally modernist in style and eschew overly setback or articulated

responses in favour of robust built forms of a medium scale. This understanding informed our built form response and challenges the prescribed 22-degree setback constraint of the DDO, designed to minimize overshadowing to the Fitzroy Gardens, which in our opinion seems somewhat misplaced for the block in which our site is located.

- 74 Reference examples for the architectural language included a number of taller buildings to the east of the gardens. However, these are all in DDO21 with different built form objectives. Despite questions put to Mr Jackson we were never able to confirm how the proposed building height was derived, other than general commentary that it is similar to buildings such as on the brewery site. It is not clear to us that it in any way was chosen as a height to respond to the DDO20 or HO2 provisions directly applying to the site.
- 75 Ms Bell's urban design evidence on behalf of the council included a rationale for a potential six storey building, based on her reading the DDO20 provision in conjunction with the physical attributes of the site and surrounds. She further qualified this based on a review of amenity considerations that we address elsewhere. The submission of the council is that Ms Bell's six storey envelope provides a good 'starting point'. The council submission is that this six storey height should be further tempered due to the low rise heritage buildings that surround the site and are unlikely to change in general height and form in the future. Ms Bell's evidence is that a six storey building could require further side setback to better address amenity issues. We address these separately, below in discussion of amenity impacts.
- 76 The applicant submits that reducing the building height to meet the DDO20 line will have no impact on the shadow or amenity of the Fitzroy Gardens and that to produce a staggered building line creates a poor 'wedding cake' type design outcome. The applicant, through evidence of Ms Heggen, relied, in part, on reference to a 1981 Panel report<sup>13</sup> that established the provisions that are now in DDO20. Ms Heggen's written evidence states that the Panel report 'makes clear that the purpose of what has now become the 22 degree profile was to allow further development along Victoria Parade in a manner that would not detract from the gardens. It is not a more general East Melbourne streetscape control or sightline test'.<sup>14</sup>
- 77 A number of extracts of the Panel report were provided to us. The Panel report states the proposed 1981 amendment had an 'aim at maintaining the quality of the boulevards, parks and historic precincts'<sup>15</sup> and that at the time 'there is an urgent need to designate Areas of Historic Significance'<sup>16</sup> in inner Melbourne. It also found that 'the existing 2 and 3 storey frontage to

<sup>13</sup> Panel Report on Amendment 151 to the Melbourne Metropolitan Planning Scheme - June 1981 (the Panel report).

<sup>14</sup> Ms Heggen's evidence at paragraph 2.3.11 – Page 8.

<sup>15</sup> Paragraph 3.13 of the Panel report.

<sup>16</sup> Paragraph 3.18 of the Panel report

Albert Street should be preserved where there is an intact historic townscape quality or adjoining listed historic buildings. Additional height within a sloping line from the Albert Street frontage could be permitted.<sup>17</sup>

- 78 The report, goes on to acknowledge that the amendment proposed a nine metre height limit along the south side of Victoria Parade, east of Clarendon Street, but that this 'should be extended west across Clarendon Street up to the vacant lot adjoining the terraces on the north west corner of Clarendon Street. This would ensure their retention and preserve the low rise character of this street.'<sup>18</sup>.
- 79 These statements suggest to us that the DDO20 provisions are not simply about protecting the Fitzroy Gardens. Regardless, clause 43.02 requires us to consider all of the objectives of DDO20. Ms Rigo, Ms Bell and Ms Heggen all concurred in their oral evidence that in assessing if the proposal meets DDO20, consideration needs to be given to all four of its objectives. Nothing in the Panel report leads us to a conclusion that we are to read DDO20 differently. Our reading of the Panel report extracts only reinforces the proposition of the council that the HO2 and DDO20 work together to address scale, relative to the heritage streetscapes to which they apply.
- 80 In addressing the DDO20 objectives we firstly agree that the proposed building will not overshadow the Fitzroy Gardens. While objectors and the council are concerned that the building will impact on the attractiveness of the gardens, as sought to be protected by the DDO20 objectives this is not a specific issue on which we refuse the permit application. Many buildings are visible from the gardens, some of which are taller. The permit applicant referred to a number of such buildings to the east of Clarendon Street, south of Albert Street. These address the question of scale to the gardens, but they are also in a different, DDO21, that has different design objectives. So, while the examples may demonstrate the gardens has interaction with taller forms, we do not see they provide a precedent for the building height in the proposal before us.
- 81 The third of the DDO20 objectives is to address scale and form. Ms Heggen's evidence is that the proposed building suitably addresses this objective as it will be read in association with other tall buildings. This includes the Tribeca building to the east and the nine storey towers in the VATR complex, along with taller form further west in Albert Street.
- 82 Ms Bell and Ms Heggen both drew upon diagrams showing relative building heights in Albert Street to support their views that the building either does or does not fit in the streetscape of the area. Ms Heggen takes the view that the proposal will simply be one more tall building in a street interspersed with taller buildings. These include the Eastbourne development at the former Dallas Brooks Hall site and a recently approved development at 364 – 370 Albert Street. Ms Bell takes the view that the

<sup>17</sup> Paragraph 5.44 of the Panel report.

<sup>18</sup> Paragraphs 5.49 and 5.51 of the Panel report.



proposal should be lower so as to graduate down from taller form to the site's east, to the lower heritage forms clustered around Clarendon Street. Both Ms Bell and Ms Heggen acknowledge the tall forms in the former Victoria Brewery site to the east. Ms Bell uses these as a marker by which some taller form behind the building on the review site could occur, graduating down from these markers. Ms Heggen sees them as part of a continuum of taller form along Albert Street.

- 83 Ms Bell's evidence suggests that a six storey building may provide a starting point for consideration, subject to consideration of amenity impacts. The permit applicant sought to contend that as Ms Bell in part used a visibility test to form this view, then taller form could exist behind it, raking up to possibly eight or nine storeys. We do not see this was the purpose of Ms Bell's suggested envelope. In any event, such a hypothetical envelope would produce a form that is different to the concept of the application plans. We understand Ms Bell's envelope was seeking to articulate what she could consider an acceptable building envelope for the site having regard to the site context and a desire to avoid a 'wedding cake' type envelope.
- 84 Ms Heggen's view drew upon a comparison both with the former brewery buildings and development along the full length of the A43 area of DDO20 area. This includes the western section where taller forms have existed for many years and they all sit south of Area 30 where taller form is expected and enables a sight line test from Victoria Parade to be met. We find these western examples are not comparative to the specific heritage setting in which our site is located and nor the DDO20 setting of having Area 11 to the direct north of our site, where only low form is anticipated to Victoria Parade.
- 85 Ms Heggen also acknowledged in response to questions that the taller forms at 300 Albert Street (Eastbourne), and 364-370 Albert Street sit behind taller forms in Victoria Parade. In any event, both are generally consistent with the 22 degree line (but not fully complying). They both step back their form to rake up to existing or permissible form in Area 30 of Victoria Parade. The proposal before us is a nine storey form with no such raking back and does not have a taller form to sit against to its rear.
- 86 Two other proposed new buildings in Albert Street were also referred to us. One is for the redevelopment of an existing tall building at 372 – 376 Albert Street, being the north-east corner of Landsdowne Street. While the existing building forms part of the existing character of the western end of Albert Street we do not see its redevelopment as a similarly tall building sets a precedent for the site of our review. The other site referred to us is at 254 – 260 Albert Street. This site now<sup>19</sup> has approval for a raked building sitting behind retained heritage buildings. This again is a sculpted form that

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<sup>19</sup> At the time of the hearing this proposal was the subject of a compulsory conference. A permit has since been granted after consent was reached between parties at the compulsory conference.



slopes back to align roughly with the Eastbourne building to its west and sits well back from Albert Street. It also abuts a site in Victoria Parade that forms part of precinct 30 of DDO20, that has a 30 metre building height requirement.

- 87 From our inspection we concur with the comments of Ms Bell that the taller forms in the former Victoria Brewery site are also different in context. The larger towers within the former Victoria Brewery site, east and north-east of the review site, are in a different planning regime and sit in much larger sites with different overall proportions and context. The towers within the former brewery sit behind 4 – 5 storey street walls and within overall large building footprints as part of large sites that historically had larger, more robust form.
- 88 Our inspection, and review of photographic material, also supports the comments of Ms Bell that while there is taller form expected behind the Epworth/Freemasons Hospital in DDO21 this is behind a 4 – 5 storey, large institutional footprint. It is quite different in context, and has different applicable design objectives (being in DDO21) to our review site.
- 89 Ms Rigo's planning evidence on behalf of the ACVP group is that from the north-east edge of the Fitzroy Gardens, looking across the Albert Street and Clarendon Street intersection and the 'block' within which the review site is sited, there appears a 'layering' of built form. This includes the lower 2-3 storey scale, former grand homes up to the taller built form towers within the VATR and taller towers within the former brewery precinct. Her view is that the review site falls within a 'transitional space between the two scales of built form'. This is somewhat consistent with Ms Bell's view that a lower, transitional height is required on the review site.
- 90 We concur with this position based on our view of the physical setting of the site. We also agree with Ms Rigo's evidence that the robust 'square' form and massing of the proposed development, together with its prevailing use of glass and angled metal screen elements of the upper 'visually' exposed storeys are at odds with the key attributes in the immediate lower area of the precinct, exacerbating its dominating visual presence in the area.<sup>20</sup> In a different setting, we find that what was described by Mr Jackson as a lantern type form, could form an attractive outcome. But the heritage and design provisions applying to this site do not call for such an exposed outcome. The review site is relatively small and narrow. The proposed exposed lantern create a strong and exposed vertical presence that is at odds with the surrounding small heritage sites to the north and west and existing lower rise buildings that have different proportions in the immediate surrounds.
- 91 DDO20 uses the 22 degree line as a requirement for building height but also has a decision guideline that a decision maker must be satisfied that the buildings are not higher than the rear of a building to the site's north.

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<sup>20</sup> Paragraph 83, last dot point – page 30.

Neither the requirement nor the decision guideline are met. Turning then to the objectives of DDO20 address building height we need to be satisfied the development is compatible with the scale of the surrounding area. While there is a nine storey building to the north-east, the proposed building has no immediate neighbour on which its height will transition or sit behind. Rather it will be an exposed form in a low rise area that exists around the Clarendon Street area of Albert Street and Victoria Parade.

- 92 All the design and planning witnesses commented that a wedding cake form for this site, while meeting the 22 degree line, is not what is needed for this site. We agree. This is primarily because the review site does not sit south of a taller form where such a design will read as part of an overall mass. Rather it would form an incongruous angled form in an otherwise low rise heritage area on relatively small sites and be highly exposed in this heritage setting. In the immediate context of the review site we find the DDO20 objective to ensure new development is compatible with the existing scale and character of adjoining buildings and the area requires a much lower, but not necessarily tiered building.
- 93 In context of the heritage considerations, Mr Raworth's heritage evidence is that the proposed additions will not overwhelm the existing heritage building on the site due to the use of modern form and its physical separation through use of the cantilever. His written evidence is also that the development could sit at an 'appropriate height with regard to the context of the surrounding streetscape and its future development'<sup>21</sup>. In response to questions in cross-examination he acknowledged that the building will be much higher than the surrounding form and that some people may find it dominating to the heritage setting. Mr Raworth, also accepted that his written statement was not based on a detailed review of DDO20 and was unaware, for example, that the land to the north of the review site has a nine metre height requirement in DDO20. He relies on the nine storey buildings within the VATR as reference points for higher form occurring in the immediate area.
- 94 From our inspection we concur with comments of the council and the objectors, that standing directly opposite the site in Albert Street the immediate context of this site is quite different to many other locations along Albert Street. While there is a nine storey building forming part of the VATR complex north-east of the review site it is generally not seen behind the existing buildings in Albert Street. There is currently an open sky view behind the retained heritage façade of the building on the review site. This is quite different to sites, such as around 364 – 370 Albert Street that sit with a backdrop of taller form behind in Victoria Parade.
- 95 Ms Gould's evidence is that the building will be visible and dominant, particularly having regard to the fact that the buildings west of the former brewery, including those to the north and west of the review site have had

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<sup>21</sup> Paragraph 52, page 26.

remarkably little change since their construction in the second half of the 19<sup>th</sup> century. Ms Gould also noted that the taller forms within the brewery site had some link to the taller heritage form in the centre of the brewery site.

- 96 Our views of the area concur that there is a distinct low rise heritage character to the area west of the brewery site, across Clarendon Street to the eastern edge of area 30 of DDO20. This approximate 60 metres either side of Clarendon Street has a low rise heritage form to both Albert Street and Victoria Parade.
- 97 The National Trust and objectors question if the building will also dominate the view of heritage buildings in Clarendon Street. It was agreed by witnesses that Clarendon Street is particularly well preserved and has a high level of heritage significance, including listed VHR buildings. This reinforces the low rise heritage character that sits either side of Clarendon Street, facing Albert Street and Victoria Parade.
- 98 We accept Mr Raworth's evidence that the test of visibility is to front setbacks not side setbacks and as such a visibility test to Clarendon Street does not apply. However, a lower form that is less visible, and therefore more compatible to the low rise nature of the immediate heritage surrounds of Albert Street we find is needed. This will have the consequential effect of diminishing any adverse impact on the broader heritage surrounds, including the significant streetscape of Clarendon Street.

#### Impact on the heritage building on the land

- 99 Our findings above relate to the classification of the building as one of contributory significance to the HO2 area. Ms Gould and the council also question if the building itself will lose its heritage significance as a contributory place due to the scale and design of the form proposed.
- 100 We reiterate that as the place is contributory to the streetscape it is its impact on this streetscape, which in turn the building forms part of, that we find fails this proposal. A tall rear form in a different streetscape setting may have been acceptable.
- 101 The council is particularly concerned that the proposed cantilever is contrary to recently introduced policy within clause 22.05 that directs building should not build over or extend into air space above a retained heritage building. Witnesses were directed to examples of significant cantilevers, that we understand were used by the council in presenting why the policy should be included in amendments to clause 22.05 through Amendment C258 to the Melbourne Planning Scheme. As Ms Gould commented in response to questions on this issue, the cantilever before us is considerably less pronounced than the examples in the pictures provided, but the context of the proposals shown were also quite different.
- 102 The cantilever included in the design is a useful device in distinguishing the retained heritage form to the upper five levels. However, our concern is



that the taller form is not fitting to its surrounds. A lower form would not need the cantilever. We also note there are many different ways that a modern extension to a heritage building can distinguish itself from the original form. A cantilever is not the only way for the additions to create visual separation or distinction between old and new.

### Conclusion

- 103 In conclusion of the design considerations of the Melbourne Planning Scheme that are directed by reading both DDO20 and HO2 with their relevant policy, we find that the proposal fails when tested against the objectives and decision guidelines of both DDO20 and HO2. This is principally because we find the proposed building additions are not a scale we find appropriate to the site's heritage and character setting, as directed by these two planning provisions.
- 104 We also find that simply meeting the numeric 22 degree line of DDO20 on this site is not the appropriate outcome. Such a form is not consistent with the decision objectives when read together. The heritage provisions also direct a need to consider the scale and context of the surrounding heritage area. An overall lower building that better responds to its adjoining scale and heritage streetscape is required. Such a building also needs to be a form that addresses any relevant amenity impacts, as we address below.

### **DOES THE PROPOSAL MAINTAIN REASONABLE AMENITY TO THE SURROUNDING AREA?**

- 105 The review site sits next to apartments both to its east and west, as well as to its north-west and north-east. To the direct east are a number of dwellings across a 3.8 metre wide lane within the VATR complex. While the dwellings to the east are in GRZ1, the zone boundary between the review site and this land is aligned to the centre of the lane. Parties did not dispute the legal position of the review applicant that as the zone boundary sits in the centre of the lane the review land does not 'adjoin' a residential zone.<sup>22</sup> As such the decision guideline in C1Z, at clause 34.01-8 of the planning scheme, to consider overlooking and overshadowing as a result of building or works in C1Z does not apply.
- 106 As non-legal members we do not refute this position but as we also noted at the hearing, the neighbours to the east remain parties in relation to the consideration of buildings and works in the C1Z due to the provisions of clause 34.01-7 and neighbours on all adjoining land have standing in the proceeding in relation to the DDO20 and HO2 provisions. Clause 65 also applies and it directs us to consider the effect on the amenity of the area before deciding on an application. Relevant policy including clauses 15.01-2S, 21.16 and 22.17 also direct that:

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<sup>22</sup> Relying on legal decisions of the Tribunal including *Wight v Yarra CC* [2019] VCAT 1291 at [38]-[40], *Prizac Investments Pty Ltd v Maribyrnong CC* [2009] VCAT 2616 at [29]-[30] and *Block & Ors v Indigo SC* [2002] VCAT 199 at [46]-[49].

- Building design should minimise the detrimental impact of development on neighbouring properties (clause 15.01-2S) with reference to the Urban Design Guidelines of Victoria – 2017.
- Within East Melbourne and Jolimont, ensure any redevelopment of the sites respects the scale of the surrounding residential area, heritage buildings and Fitzroy Gardens (clause 21.16-2).
- That the massing and design of large new buildings is discouraged from overwhelming the built scale of any important pattern and character of existing built form (clause 22.17).

107 We accept in general that there needs to be some difference in consideration in the amenity impacts to dwellings to the east that are in GRZ1 and more clearly identifiable as being in a stable residential policy setting (consistent with clause 21.04). Land to the west and north-west, while containing dwellings, is in C1Z where there are more limited rights or review and amenity expectations must be more tempered given these sites could also be converted to commercial purposes, and the land has different primary purposes, consistent with C1Z.

108 Given the different interfaces and the different controls we address the amenity impacts below based on the geographic position of properties.

#### **Amenity impacts to the east**

109 A number of owners and occupiers of the VATR complex to the east oppose the development and question the visual bulk, loss of sunlight, loss of daylight and overlooking that will occur to their properties and the communal open space area in the centre of their site.

110 Some of these dwellings, notably Nos. A15 and A16, at ground level and their corresponding dwellings at A19, A20, A23 and A24 above only have west orientation toward the review site, across the lane. These dwellings are all set back approximately 3.6 – 4 metres from their western side boundary, or 7.4 – 7.8 metres from the review site boundary.

111 We were provided with a copy of plans for the adjoining building that assisted all parties in reviewing this issue. We have extracted floor plans for dwellings A15 and A16, as well as A19 and A20 sitting above, in figure 6 below. Dwellings A23 and A24 are not shown but mirror these floorplans again. As is evident in the plans, there is also an air vent that extends up through all three levels on the western side boundary that sits north of the living area of dwellings A15, A19 and A23. The orientation of the dwellings means that they all have limited sunlight in the morning due to the VATR building itself. The air vent in the centre of the day further limits sun to dwellings south of the vent. The existing building on the review site already limits some direct sunlight in the afternoon.



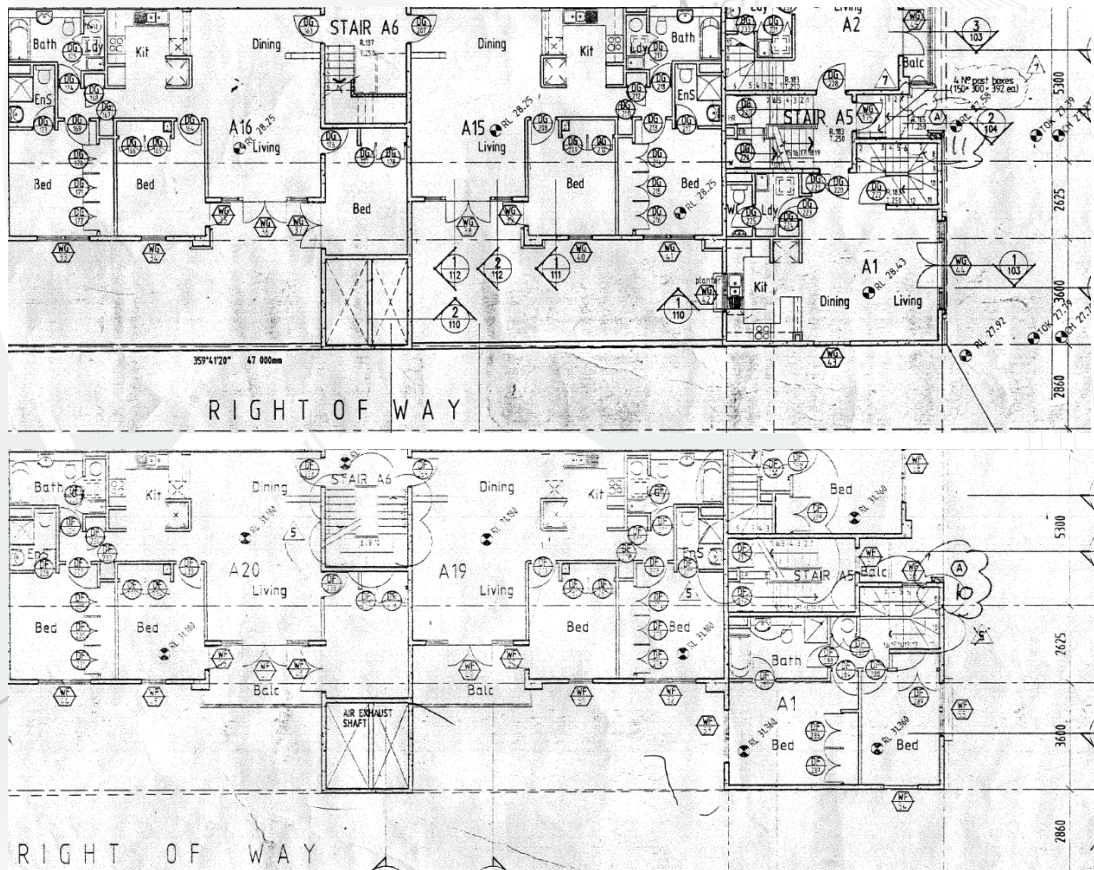


Figure 7 - layout of dwellings 15, 16, 19 and 20 of the VATR complex. Albert Street sits to the right of the images.

- 112 Ms Bell's evidence is that, to review amenity impacts, she started with the DDO20 22 degree line building envelope as a basis to assess what might form an acceptable test for visual bulk and outlook from these dwellings. We understand that this is not because the 22 degree line sets an amenity test, but because it is a building envelope that neighbours may have anticipated could occur on the review site given the requirements of DDO20. Her conclusion is that the nine storey building creates an unreasonable additional shadow and bulk to the adjoining western dwellings of the VATR. Her view is that her six storey envelope she derived as a potentially acceptable outcome from assessing the DDO20 provisions for streetscape design, needs to be further moderated to form a four storey base, with the two upper levels above, recessed in from the side boundary. She based this on her own invented test that it was reasonable to lose no more than half of the existing two hours of sun provided to the lowest level properties.
- 113 Shadow diagrams were provided by the review applicant showing the impact of the proposed nine storey building. These show the proposed nine storey building significantly shadows the western side of the VATR building by 1pm. The review applicant also provided shadow diagrams comparing this shadow to shadow cast from a 22 degree line envelope as well as a four and a six storey envelope. All of these modelled envelopes are of a volume extending to the eastern boundary of the review site.



- 114 Ms Heggen's evidence is that the additional overshadowing to western interface of the VATR from the proposed building is acceptable given the review site's C1Z location where planning policy supports higher density and scale development. In questioning how the design addressed amenity, Mr Jackson's evidence was that neighbours in the VATR should have been aware of the potential for a building of height on the review site when they decided to purchase a site next to a C1Z area.
- 115 We reiterate that while, in general, C1Z sites support higher density and scale, on this site there is also competing DDO20 and HO2 provisions that temper the design expectations on the review land. We accept Ms Bell's starting point of using the numerical 22 degree line set in DDO20 as a useful starting point as a crude numerical basis of what neighbours could reasonably have expected to occur when they moved into the VATR site. We reiterate this is a crude measure only and one that does not consider the broader design expectations that putting aside that the HO2 also needs to be considered.
- 116 In the context of what might form a reasonable expectation for amenity of dwellings to the east we note that a shadow cast from a 22 degree envelope, at the site boundary is significantly less than the nine storey building. It is notably different for dwellings A15 and A19 as they sit further south, in the lower end of the 22 degree line. We find it an unreasonable and unjustifiable outcome that as a result of the nine storey building dwelling A15 goes from currently receiving limited direct sunlight between 12pm and 2pm to retaining the same limited sunlight only between 12pm and 12.30 only, and then having all direct sunlight removed from its private open space from 12.45pm onward. By 1pm the nine storey building casts a shadow across the entire west façade of dwellings A15, A19 and A23 above, as well the facades of dwellings A16, A20 and A24.
- 117 This shadow highlights the impact of visual bulk and loss of outlook from these dwellings. This is particularly to the private open space areas of dwellings A15 and A16 at ground level. It is not simply that these dwellings' open space areas will be in shadow, or that a conventional clause 55 type test should apply. Our finding is broader, that the nine storey form proposed results in a large and rapid loss of sunlight to the entire west side of the VATR building when there is already limited outlook and sunlight available to these dwellings. This has impacts to both direct loss of sunlight but also the sense of visual bulk and enclosure to these spaces, particularly the lower level dwellings. The impact reduces to dwellings higher up the building, but again at nine storeys the change in shadow and outlook is significant.
- 118 We do not seek to determine what forms an acceptable envelope to address amenity or that using the 22 degree or other modelled envelopes creates an acceptable amenity envelope. We simply find that the impact of the nine storey proposal results in unreasonable and unjustifiable impacts to what might be reasonably expected. A lower form is needed to address amenity

issues to the east. The starting point to this should be a form consistent with our findings about the design of the building in the street as already set out.

- 119 Submissions on behalf of the VATR owners and occupiers were also that the building will add to shadow of a central communal open space area of the VATR complex. We are less concerned about this space given the additional shadow occurs generally after 3pm but we note that with the need to reduce the building form for other design and amenity reasons it will have the result of also reducing any shadow to this communal space.
- 120 Residents to the east are also concerned that the development will unreasonably overlook into their dwellings. The development includes screening over lower levels. While there was submission by residents that the upper levels should also be screened we do not see that these levels result in excessive overlooking. The levels are sufficiently away from immediate view and at such an angle that the views would be limited. It is the visual bulk created by these upper levels that we find unacceptable.

#### **Impacts on dwellings to the west and north-west**

- 121 To the west, while neighbours within 214 Albert Street are concerned about loss of outlook and increased shadow we are satisfied that the proximity of a building to these dwellings is acceptable. With a reduced height we find necessary for the heritage and DDO20 objectives the visual impact of a modified building close to these dwellings should also be more acceptable. We say this as:
  - a This adjoining building to the west is in a CIZ and therefore there must be some expectation that a commercial building could abut the boundary close to the review site. These adjoining dwellings have a number of opportunities for daylight and outlook. This includes living spaces that look south and east toward the gardens as well as toward and over the roof of the heritage building, retaining a view east and south-east. There will be some loss of daylight to the bedrooms on the eastern side of these dwellings but we find it should not be unreasonable, particularly with a lower form required for other reasons.
  - b Direct overlooking between the office building levels to these dwellings is provided for with the building including opaque glazing at levels directly adjacent to these apartments to the west.
- 122 The National Trust and owners of dwellings in 220 Clarendon Street also expressed concerns about overlooking and visual bulk from the development. Our findings about the impact on these dwellings correlates with our findings for 214 Albert Street. There must be an expectation of some change on the review site and this may compromise some of the amenity currently afforded. In general, we consider the issues of overlooking and overshadowing to these sites are acceptable. It is a

question of visual bulk and scale that we find unreasonable more as a question of character. A consequence of reducing the building height to address the HO2 and DDO20 objectives is that it should also reduce any visual bulk impacts to these nearby dwellings within the C1Z.

### **Conclusions about visual bulk, overlooking and overshadowing**

- 123 The applicant submits that there should be a tempering of amenity expectations for residents adjoining a commercial zone or within a commercial zone. We agree, but we also find there should be a tempering of development expectations in a commercial zone where there is also design controls such as the DDO20 and HO2. We find it reasonable that residents, particularly to the east, should have some general expectation that development on the review site would be less visually intrusive and have less impact on outlook and shadow to their residences than that proposed.
- 124 While there were various modelled outcomes of the impact of shadow to the adjoining properties it is not for us to redesign the building or determine what should be an acceptable building envelope. That itself will be a balancing exercise in a new proposal. We simply conclude that what is before us is not acceptable.

### **Traffic, parking and pedestrian use of the lane**

- 125 The ACVP group expresses concern that the proposal relies on the adjoining lane to the east and north for access to a basement car park that will accommodate 28 car parking spaces. This is an additional 17 car spaces from the 11 already on the site.
- 126 The objector group submit the additional traffic in the lane will create a safety issue both in the lane and at the access point to Albert Street. They also submit the scale of the proposed eastern wall to the lane is excessive and contrary to the design strategies of clause 21.06 that seek to protect and enhance the character and function of laneways.
- 127 The existing laneway has a clearly functional purpose that is primarily directed as car access to the rear of the review site and sites at 380 – 386 Victoria Parade, 220-222 Clarendon Street (that we understand also services 376 and 378 Victoria Parade). It is not a pedestrian thoroughfare between two streets but rather a service environment.
- 128 Firstly, we therefore are not concerned that the proposed wall to the boundary of the lane somehow diminishes the environment of the lane itself. As a site that is in C1Z it is common to have a wall on boundary to such an environment. Indeed, the existing heritage building on the site already has a wall that is over eight metres high and 12 metres long adjacent to the west side of the lane. The VATR complex also has sections of three storey wall to boundary. The proposed building to four storeys at the boundary is not an unreasonable expectation for the usability of the



laneway as a pedestrian space, particularly noting that it is not a major pedestrian route.

- 129 We are also satisfied that the additional car parking and traffic that would arise from the development can be accommodated by the lane and the broader road network. This is validated by the evidence statement of Mr Walsh and also the lack of opposition to the access from the council.
- 130 With this we note that there was an agreement between the applicant and the council to provide a 3 x 3 metre splay at the north-east corner of the site to remain open and transfer to the council to form part of the lane so as to enable flow of traffic around the corner of the lane at this point if a permit was granted.
- 131 We are aware that there may be times in using the lane that cars need to yield while there is oncoming traffic as there is no passing point in the lane. We also understand there already is some waste collection from the lane that may add to these times. This is part of the functioning of a small rear service lane. We do not see that adding up to 17 vehicles into this environment will create unreasonable amenity problems through unreasonable additional traffic conflicts.
- 132 We do not refuse the proposal because of any inadequacy of the proposal to address traffic and amenity of the lane. With this we note that the proposal also uses part of Menzies Lane to the west to provide separate bicycle access. We support this as a positive attribute to addressing this access in a way that provides safe and separate bicycle access from the vehicle access in the basement.
- 133 The objector parties also questioned if a carriageway easement across part of the rear of the review site needs to be retained as open laneway space for other general users of the lane. We understand from a review of title information provided by the permit applicant that this easement only benefits the land itself, not public or adjoining land owners of the lane.

## **OTHER ISSUES**

### **Equitable development**

- 134 The National Trust, as owner of the VHR listed Clarendon Terrace at 212 Clarendon Street, submits that it may seek to develop the rear of its building and this may be limited by the proposed development that abuts the review site's western boundary. At this point the review site is approximately 0.8 metres from the northern part of the National Trust site. The southern part of the rear boundary of the National Trust site sits approximately 5.5 metres from the review site with the north/south arm of Menzies Lane in between.
- 135 As a question of equitable development we are not concerned that the proposed office building will be close to the rear of the National Trust site. As a commercial form there is reasonable opportunity for the National Trust to develop its own land without needing to compromise such development

because of the proximity of the office building. Clarendon Terrace is currently a non-residential building. We see no need in the C1Z environment for the proposed office to screen windows in anticipation that Clarendon Terrace may be renovated and extended to include residential use in the future.

- 136 We also do not assume that a possible future residential development on the National Trust site can only orientate itself in a way that it would be excessively overlooked by the proposed office building. In saying this we note that the proposed office building on the review site cannot assume that development to its west will retain light and outlook from west facing windows that are on its west boundary. If the National Trust were to build to its rear boundary it would reduce light into the proposed windows that sit on the western boundary, but the office floor area would retain light from other locations north and further south-west.

### Wind

- 137 Objector parties represented by ACVP questioned if the proposal has adequately addressed potential wind impacts of the development. The applicant tabled a wind assessment, dated 14 May 2021, during the course of the hearing. This indicates that relevant tests of walking and standing around the site can be met. We do not refuse this proposal because of any unreasonable impact of wind.

### Social impact

- 138 The ACVP submits there is a lack of community support for the proposal with 110 objections received to the advertised plans and over 60 parties to the proceeding. It submits that given this, when considering any social impacts of the proposal, the Tribunal must have regard to the number of objectors to the proposal.
- 139 No submission put to us identified any particular social impact that may result from the proposal. The ACVP submission while noting the number of objections did not elaborate on what the social impact is to these objectors.
- 140 In response, the review applicant referred us to the Tribunal decision in *140 High Street Pty Ltd v Mansfield SC*<sup>23</sup> that in turn refers to *Rutherford & Ors v Hume CC*<sup>24</sup> on how social impact should be addressed. In particular we highlight the comments in *Rutherford*<sup>25</sup> that:
- from a town planning perspective, significant social and economic effects have traditionally been recognised as those that affect the community at large, or an identifiable section of the community, rather than affecting an individual or a small group of individuals.

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<sup>23</sup> [2021] VCAT 291.

<sup>24</sup> (Includes Summary)(Red Dot) [2014] VCAT 786.

<sup>25</sup> At paragraph 54.

- 141 We reiterate the comments in *140 High Street Pty Ltd* that while we recognise the extent of community opposition, and that this opposition is genuinely held, the relevant factors to identify social impact, as set out in *Rutherford* have not been demonstrated or achieved in the submissions put to us on this issue. We also reiterate that a 'specific social impact still needs to be demonstrated and the number of objections, of itself, does not achieve this.'<sup>26</sup>

## CONCLUSION

- 142 While we do not find there is any identifiable adverse social impact to the broader community, as we also set out in paragraph 62, we do not find there are any identifiable economic benefit to the broader community of any substance from the additional office floor area provided in the proposal. The increase in office floor area, while supporting broad C1Z purposes is not sufficient benefit to outweigh the character, heritage and amenity concerns we have with this proposal.
- 143 We also accept that the building design has been prepared by competent architects and has a good degree of sustainable design. We find the proposed nine storey building to 'challenge'<sup>27</sup> the DDO20 provisions is not supportable when tested against the overall provisions of the planning scheme.
- 144 As put by the National Trust, while some change has occurred in HO2 area, the Clarendon and Albert Street streetscapes, as they relate to the subject site, have a high level of integrity and demonstrate the State significant values identified in the precinct statement of significance and intended to be protected under both State and local planning policy. The proposed development is out of step with the existing scale and character of adjoining buildings and the area, which is a matter contrary to both the DDO20 and HO2 provisions applying to the land.
- 145 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Alison Glynn  
**Member**

Lorina Nervegna  
**Member**

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<sup>26</sup> Paragraph 196 of *140 High Street Pty Ltd v Mansfield SC*.  
<sup>27</sup> as put by Mr Jackson.