

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P17/2017
PERMIT APPLICATION NO. TP-2016-678

APPLICANT	350 William Street Owners Corporation No 1. PS 636376F
RESPONSIBLE AUTHORITY	Melbourne City Council
SUBJECT LAND	Art on the Park Apartments, 330-352 William Street MELBOURNE VIC 3000
WHERE HELD	Melbourne
BEFORE	Carol Daicic, Member
HEARING TYPE	Hearing
DATE OF HEARING	16 August 2017, 1 November 2018 (Practice Day Hearing) and 12 February 2018
DATE OF ORDER	5 March 2018
CITATION	350 William Street Owners Corporation No 1 PS 636376F v Melbourne CC [2018] VCAT 335

ORDER

No permit granted

- 1 In application P17/2017 the decision of the responsible authority is affirmed.
- 2 In planning permit application TP-2016-678 no permit is granted.

Carol Daicic
Member

APPEARANCES

For applicant	Ms Louise Hicks of Counsel by direct brief. She called evidence from Mr Andrea Pagliaro, town planner of Urbis ¹
For responsible authority	Mr Liam Riordan, town planner of Tract Consultants on 16 August 2017 Mr Matthew Townsend of Counsel on 1 November 2018 and 12 February 2018

¹ A witness statement prepared by Mr Pagliaro was filed and circulated prior to Day 1 of the hearing in accordance with VCAT Practice Note PNPE2. On 1 February 2018, leave was granted for the applicant to file an Addendum to this report date 13 November 2017 that was filed and circulated on 20 November 2017.

INFORMATION

Description of proposal	Installation of retractable canopy
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Melbourne Planning Scheme
Zone and overlays	Clause 37.04: Capital City Zone – Schedule 1 (Outside the Retail Core) (CCZ1) Clause 43.02: Design and Development Overlay – Schedule 4 (Weather protection – Capital City Zone) (DDO4) ² Clause 43.02: Design and Development Overlay – Schedule 10 (Built form controls) – (DD10) ³ Parking Overlay – Schedule 1 (PO1) – Capital City Zone – Outside the Retail Core ⁴
Permit requirements	Clause 37.07-04-4 and clause 3.0 of CCZ1 – Construct a building or construct or carry out works
Relevant scheme policies and provisions	Clauses 9, 10, 11, 15, 17, 21, 22, 37.04, 43.02, 45.09, 52.43 and 65

² Given this overlay relates to William Street, a planning permit is not required.

³ The requirements of DDO10 apply because the application was lodged on 17 August 2016 following the gazettal of Amendment C262 to the Melbourne Planning Scheme. However whilst DDO10 is a permit trigger, the built form requirements are not relevant to this application for a retractable canopy.

⁴ There is no planning permit requirement under the Parking Overlay as the proposal does not seek any car parking spaces.

Land description

The review site is developed with a building that has access from both William Street and Singers Lane. A basement tavern is located in the building and its primary access point is from Singers Lane. Singers Lane is primarily used for the purposes of back of house functions of the buildings which abut it and for loading and commercial purposes. It is approximately 6 metres wide bluestone laneway between La Trobe Street and Willis Street.

The review site is located within the Central Business District and within proximity to the Queen Victorian Market and a variety of other localised services and open space. Residential and commercial uses are close to the review site.

Tribunal inspection

A site inspection of the review site and surrounds was undertaken.

REASONS⁵

WHAT IS THIS PROCEEDING ABOUT?

- 1 The decision under review is Melbourne City Council's (**Council**) refusal dated 21 December 2016 of an application for the construction of a canopy above the entrance to the Bird's Basement Jazz Club (**Club**). The proposal seeks:

Proposed installation of retractable canopy on Singers Lane.
- 2 The Club is located at 11 Singers Lane at ground floor on the eastern side of the review site. Singers Lane is about 6.36 metres wide.
- 3 The proposed canopy is retractable and measures 5.5 metres x 17.2 metres, with a clearance height of 8.8 metres to the level of the laneway. It folds 900mm upwards to be flush against the building line when not in use.
- 4 When in an open position, the canopy covers approximately 86 per cent of the width of Singers Lane.
- 5 The first 4 metres of the canopy is to be constructed from steel and the remaining 1.5 metres of the awning is constructed from glass.
- 6 The Council refused the permit application on the following grounds:
 - a) The installation of the canopy does not address the responsibilities of the agent of change, being contrary to clause 52.43, Live Music and Entertainment Noise of the Melbourne Planning Scheme.
 - b) The canopy by virtue of its projection over Singers Lane and its excessive width and length would be contrary to clause 22.01, Urban Design within the Capital City Zone and clause 22.20, CBD Lanes of the Melbourne Planning Scheme.
- 7 The Applicant relies on the evidence of Mr Pagliaro and says:
 - a) On proper application of the "agent of change" principle, clause 52.43 does not apply to this application or ought to be given very little weight; and
 - b) There are no built form reasons why the application ought to be refused.
- 8 On the first day of the hearing, I heard submissions from the parties on the issues above. Further submissions were received before and at the subsequent hearing days about further information tendered by Council on 1 November 2017 dated 11 and 13 September 2017 confirming that Council's Internal Engineering Department objects to the projection because it breaches Council's 'Road Encroachment Operational

⁵ 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.

Guidelines'. It says the canopy extends into the Open Space Corridor of Singers Lane.

- 9 In response to this issue, the Applicant submits that the Road Encroachment Operational Guidelines should be afforded very little weight because they are not incorporated into the planning scheme.
- 10 The main focus of the subsequent hearings related to the lawfulness, validity and necessity about a proposed condition on any permit granted that required a section 173 agreement to be registered on title.
- 11 The Proposed Condition provides:
 - 4 Prior to the commencement of the development of the land, the owner of the land must enter into an agreement pursuant to Section 173 of the *Planning and Environment Act 1987* (**Section 173 Requirement**). The agreement must provide the following:
 - a) Liability (**Liability Requirement**) and maintenance (**Maintenance Requirement**) of those parts of the development projecting into airspace or sub-soil of land under the care and management of Council ('Projections').
 - b) A disclaimer of any right or intention to make or cause to be made at any time any claim or application relating to adverse possession of the land occupied by the Projections. (**Disclaimer Requirement**).
- 12 In this regard, the Applicant submits that it takes no issue with the content of the agreement but it does not wish those matters to be contained in the form of a section 173 agreement and registered on title. It says that the unanimous consent of the members of the owners' corporation could fail because there are over 400 members. This presents as a practical impediment such that it would impede the activation of the planning permit.
- 13 Council submits that the proposed condition 4 is lawful, valid and necessary and it is a matter for the Applicant to "pay the price" for its right to develop the land and there is separate legislation dealing with disputes and owners corporations. Accordingly, a section 173 agreement mechanism is appropriate.

BACKGROUND

- 14 The planning approval for the tavern use was granted by the Minister for Planning on 17 April 2013 in the form of an amendment (permit 2010003641B) to the existing permit for the multi-storey development on the site. The residential components of the approval were completed before the amendment to allow the tavern use.

WHAT ARE THE KEY ISSUES?

- 15 The key issues in this matter are:
- a) Is the built form of the canopy acceptable?
 - b) Does the proposal contravene clause 52.43, Live Music and Entertainment Noise of the Melbourne Planning Scheme?
 - c) Is proposed condition 4 lawful, valid and necessary?

IS THE BUILT FORM OF THE CANOPY ACCEPTABLE?

Hoddle Grid

- 16 The subject land is located within the Hoddle Grid.
- 17 Clause 21.04-1.1 (The original city centre – the Hoddle Grid), contains the following statement:
- Central City functions will be located in the Hoddle Grid. This area will be managed to facilitate continued growth where appropriate and limit change or the scale of development in identified locations to preserve valued characteristics. A strong emphasis will be placed on a quality public realm and good pedestrian amenity and connectivity.

[Tribunal emphasis]

- 18 In terms of the built environment, clause 21.12 includes the following relevant statements for the Hoddle Grid:
- Protect the regular grid layout, laneways, tree-lined boulevards and identified significant public open spaces.
 - Ensure development fronting streets creates a continuous building edge and integrated streetscape.

Urban design

- 19 Clause 22.01 (Urban Design within the Capital City Zone) recognises that ‘Melbourne’s buildings, streets, open spaces and landscape features combine to give the Central City its unique appearance and feeling.’ There is policy guidance relating to building design, public spaces and access and safety.
- 20 The policy has three sections relating to General Policy, Laneway design and Buildings and works adjoining lanes.
- 21 Clause 22.01 provides that canopies should not overhang lanes unless they:
- a) Follow a local pattern.
 - b) Contribute positively to the character and safety of public spaces.
 - c) Are discrete rather than prevailing elements of a building’s design.
 - d) Provide evidence of the building’s occupation.

CBD Lanes

- 22 Relevantly, clause 22.20 (CBD Lanes) identifies Singers Lane as a Class 3 Lane and provides:
- Class 3 lanes show signs of two or less of the four core value characteristics. Many of these lanes may benefit from upgrading and enhancement to realise their full potential with regard to pedestrian amenity and urban design. These lanes generally provide vehicular access to the rear of buildings for loading and service requirements or access to car parking areas.
- 23 The core value characteristics are identified as contributing to the success of the lane as a pedestrian environment are:
- a) Connectivity: The provision of a physical connection through a city block.
 - b) Active frontages: Building frontages that provide for visual and physical interaction between the public space of the lane and the ground floors of the buildings.
 - c) Elevation articulation: The architectural character of the buildings adjoining the lane and the degree to which this provides aesthetic and spatial interest to the public realm.
 - d) Views: Views from the lane's public realm towards a connecting lane, street or landmark.
- 24 The policy generally discourages buildings and works extending over lanes.

Road Encroachment Guidelines

- 25 The Road Encroachment Guidelines are guidelines which apply to the whole of the Municipality in regard to structures or parts of buildings that project or encroach into the road space.⁶ However, it is not a document that is incorporated into the Melbourne Planning Scheme but it is referred to other overlay controls which do not apply to the review site.
- 26 According to the Road Encroachment Guidelines, planning applications for projections or encroachments are considered against the policies and controls of the Melbourne Planning Scheme and according to clause 6.2 of the guidelines, the Management Principles set out in Clauses 7 (Public Interest Criteria), 8 (Management Principles) and 9 (Approval of projections or encroachments).
- 27 An extract of the Clause 7 Public interest criteria set out in the Road Encroachment Guidelines is contained in the Appendix to these reasons.
- 28 Figure 2 from the Road Encroachment Guidelines (refer below) provides that the maximum allowable width of a projection is 10 per cent of the laneway width which in this case, stands at 636mm.

⁶ Clause 3 Scope, Road Encroachment Guidelines.

Figure 2. Building Projections into the Road Reserve

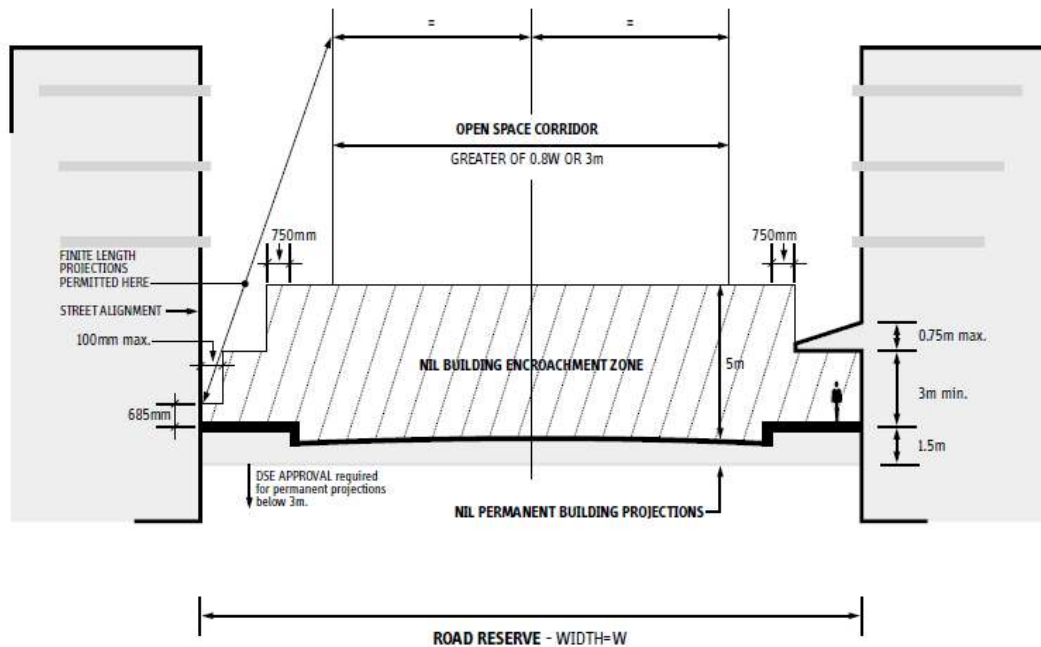


Figure: Extract from Road Encroachment Guidelines

- 29 In addition to the decision guidelines under clause 65, clause 37.04-1 (Capital City Zone – Schedule 1 (Outside the Retail Core)) provides that the responsible authority must consider certain matters in addition to State and local policy including (to paraphrase):
- a) The comments and requirements of relevant authorities.
 - b) The size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the land, adjoining land and adjoining development.
 - c) The movement of pedestrians and cyclists, and vehicles providing for supplies, waste removal, emergency services and public transport.
 - d) Loading of vehicles.
 - e) The existing and future use and amenity of the land and the locality.
 - f) The location, area, dimension and suitability of use of land proposed for public use.

- g) The responsibility for the maintenance of buildings, landscaping and paved areas.
 - h) The impact on the amenity of any existing dwellings on adjacent sites.
- 30 Whether the development would compromise the function, form and capacity of public spaces and public infrastructure.

What do the parties say?

- 31 The Council submits that the proposed canopy does not meet the requirements of local policies in the planning scheme and should be refused. It relies on advice from its Urban Strategy Branch of 26 September 2016 that:
- a) There are limited canopies or architectural projections into the 6 metre wide public realm and the presence of such an element within this compressed environment would be uncharacteristic.
 - b) The openness of the laneway environment is a key attribute of its reading as a legitimate public space (as distinct from an Arcade).
 - c) Where public realm projections are observed in surrounding streets, these are kept well back from the kerb, in the form of weather projection canopies, Juliette balconies, mouldings and cornices. Opportunities for projections in a laneway environment is to be distinguished from other higher order streets.
 - d) The proposed canopy with a 5.5 metre x 17.2 metre proportion has an excessive breadth and length that would compromise the legibility of the lane as a public space.
 - e) The canopy projection does not comply with the provisions of Clause 22.01 Urban Design the Capital City Zone, or Council's Road Encroachment Guidelines.
 - f) It is concerns about the potential cumulative impact of such a foreign intervention within a laneway environment, which would erode its quality in terms of access to natural light, in an already compressive environment.
- 32 Council also relies on the information from its Engineering Department dated 13 September 2017 and that the proposed canopy at 5500mm extends well beyond the Open Space Corridor that must be protected under the Road Encroachment Guidelines, which permits a maximum allowable width of projection of 10 per cent of the laneway width (i.e. 636mm).
- 33 The applicant relies on the analysis of Mr Pagliaro who concludes that the canopy is consistent with the planning scheme and is appropriate for its site and context. It says that the proposal appropriately addresses the State policy and local policy that places great weight on the retention of and investment in tourism and music venues in the CBD whilst addressing local

policy as it relates to retaining the valued character of the CBD laneways and ensuring their ongoing trafficability. Further, it addresses aspiration to lift class 3 lane ways towards the class 1 and class 2 laneways.

- 34 Mr Pagliaro gave evidence that he considers the more relevant consideration is clause 22.01 and clause 22.20 of the Melbourne Planning Scheme as these provisions contemplate encroachments and provide planning considerations. In summary, Mr Pagliaro considers the proposed canopy is consistent with the relevant planning provisions of the Melbourne Planning Scheme and is appropriate for the site and its context.
- 35 In relation to clause 22.01, Mr Pagliaro's evidence is that the canopy is appropriate because it:
- a) will not adversely affect the functions of Singers Lane given its tall height clearance above the road when opened;
 - b) displays sensitive design through use of partly transparent materials and will blend in with the building particularly when closed;
 - c) will cause no loss of sunlight to Singers Lane as it will be closed throughout the day;
 - d) provides a safety element to patrons accessing the venue; and
 - e) provides evidence of the building's occupation.
- 36 In relation to clause 22.20, Mr Pagliaro's evidence is that the canopy is appropriate because:
- a) it will enhance climatic conditions and amenity of Singers Lane by providing a safe pedestrian environment and shelter;
 - b) it will assist in elevating the laneway Class by further encouraging activity between the subject site and the public realm;
 - c) it encourages the tenancy to further promote its activities along Singers Lane and enjoyment of the lane; and
 - d) it will not adversely impact on the essential service and vehicle access functions of Singers Lane.
- 37 Notwithstanding this, Mr Pagliaro considers that the application satisfies the performance measures contained within the Road Encroachment Guidelines because:
- a) No significant views are obstructed in any manner.
 - b) The projection will assist from a public safety / amenity perspective for users of the tavern.
 - c) The canopy will not cause excessive shadow given it is proposed to be open during night time hours only.⁷

⁷ Mr Pagliaro would support a condition on permit restricting the hours it can be used.

- d) The canopy will not adversely affect the service functions or safety of Singers Lane given its height above the road level when open (height clearance of 8.8 metres).
- e) The canopy will not create additional floor space.
- f) The materials are of a high quality to form part of the overall architectural design of the building.
- g) The projection is retractable and when in the closed position, will sit within the title boundary of the subject site.

38 Overall, Council relies on Mr Pagliaro's evidence that the proposed retractable canopy is appropriate for the subject site and its context because:⁸

- It will assist in elevating the status of Singers Lane and improving the connection between the public and private realm.
- The design of the canopy is of a high quality, proposing contemporary materials such as glazing and mesh screening found in new developments within the immediate area.
- The use of glazing will enable some light to filter through in the summer evenings.
- The canopy design has been successfully integrated into the design of the building. Further, in the close position it will sit flush with the building face within the subject site's title boundary.

Assessment

39 I find that the proposed canopy is not supported by local policy and I have placed significant weight on this finding in determining to refuse to grant the permit. My reasons follow.

40 First, the proposed canopy is not consistent with the requirements of Clause 22.01-6 which discourages overhang into a lane because it does not fall within the exceptions.

41 There is no local pattern of canopies in Singers Lane and it unlikely that other canopies will be established in the medium to longer term given that Singers Lane is primarily used for service functions.

42 I do not consider the proposed canopy is a discrete element. The dimensions are substantive and would be considered a prevailing element of the building design in that rear site context. Further, I do not consider the canopy provides evidence of the building's occupation because it is disproportionate to the relative discrete entrance point to the basement tavern. I am also not convinced that it contributes positively to the character of Singers Lane.

⁸ Expert Witness Statement prepared by Mr Pagliaro dated August 2017, at paragraph 57.

- 43 Whilst it is arguable that the canopy contributes positively to safety, its purpose is to protect the safety of patrons attending the tavern rather than the public at large. It is intended to be retracted when members of the public (other than patrons) use the laneway.
- 44 Secondly, clause 22.07 provides the following for ‘wind and weather protection’:
- The design, height, scale and detail of canopies, verandahs and awnings should be compatible to nearby buildings the streetscape and the precinct character.
- 45 Whilst I acknowledge that the canopy is to be retractable and therefore would not open at all times, I find that the canopy is simply too large for the scale of Singers Lane as it extends more than three quarters of its width when in use.
- 46 Thirdly, the application fails to meet the relevant policy of clause 22.20 which also discourages buildings and works extending over lanes. Despite the undertaking by the applicant that the canopy would only be used when the tavern is open, the proposed canopy would reduce the openness of Singers Lane when in use given the width of the canopy at approximately 5.5 metres and the width of the laneway at 6.36 metres which I consider is contrary to clause 22.20. The purpose of the canopy is not to increase pedestrian amenity, it is intended solely for the service of the tavern use and its patrons.
- 47 I am also concerned that the Council’s Urban Strategy Branch does not support the proposal on the basis that the canopy does not accord with the Road Encroachment Guidelines in meeting the requirements of Figure 2 and therefore the public interest criteria at clause 7.18.
- 48 Overall, I am persuaded by the referral comments of Council’s Urban Strategy Branch that due to the excessive dimensions of the proposed canopy relative to the narrow laneway and the subsequent negative impacts on the public realm, the application should not be supported.
- 49 I observe that it might be the case that a less dominant form of canopy might be acceptable in Singers Lane given the site context and that Council concedes the level of amenity of this lane is reasonably poor due to its loading and commercial function purposes. However, I do not consider that the proposed canopy in its current form is acceptable given the planning scheme requirements that I am required to take into account.

DOES THE PROPOSAL CONTRAVENE CLAUSE 52.43 (LIVE MUSIC AND ENTERTAINMENT NOISE) OF THE MELBOURNE PLANNING SCHEME?

- 50 Clause 52.43 (Live Music and Entertainment Noise) seeks to ensure appropriate protections are in place between sensitive and non-sensitive uses by prescribing specific noise attenuation measures. It provides the following purposes:

- To recognise that live music is an important part of the State's culture and economy.
- To protect live music entertainment venues from the encroachment of noise sensitive residential uses.
- To ensure that noise sensitive residential uses are satisfactorily protected from unreasonable levels of live music and entertainment noise.
- To ensure that the primary responsibility for noise attenuation rests with the agent of change.

51 Clause 52.43 (Live Music and Entertainment Noise) provides that:

An application to use land for, or to construct a building or construct or carry out works associated with a live music entertainment venue or a noise sensitive residential use that is within 50 metres of a live music entertainment venue.

52 Practice Note 81 (Live music and Entertainment Noise) provides further clarification on the application of this particular provision:

- In practical terms this means that if a new or an existing live music venue seeks to establish or expand, they will be responsible for attenuating any noise effects that are caused by that change on nearby residential properties.

53 In light of my findings above, it is not necessary for me to make any findings in relation to whether the proposal contravenes clause 52.43 of the planning scheme.

54 However, if it was necessary for me to consider the issue, I would have found that the proposal does not contravene clause 52.43. The proposal is for the construction of a canopy whereas clause 52.43 seeks to control the use of land involving live music. Based on the submissions, the issues which concern Council do not relate to the use of the venue for live music per se. Council's concern relate to amenity issues arising from patrons accessing and leaving the premises during live events.

WHAT CONDITIONS ARE APPROPRIATE?

55 In light of my finding that the design of the canopy is not acceptable and that the decision of the responsible authority should be affirmed, it is not necessary for me to make any findings in relation to issue of whether with without prejudice condition 4 is lawful, valid or necessary.

56 I would observe however, that I do not consider the Applicant's submissions regarding the practical impediments relating to obtaining the consent of the members of the owners corporation to enter into a section 173 agreement are relevant. If I was wrong in that regard, I would have afforded that fact very little weight. I say this because there are other avenues open to the Owner's Corporation under separate legislation to

address such issues in the event the consent of the members is not forthcoming.

CONCLUSION

57 For the reasons given above, the decision of the responsible authority is affirmed. No permit granted.

Carol Daicic
Member

APPENDIX

Extract Road Encroachment Guidelines

7. Public Interest Criteria

- 7.1. Is the projection or encroachment, such as a plaza or a setback at a public access level, balanced by additional public open space within the property?
- 7.2. Are any significant views from the road or adjoining buildings to parks, waterways or landmark buildings or structures obstructed in any manner?
- 7.3. Will the design provide a visual interest or create a landmark?
- 7.4. Does the projection or encroachment improve public amenity in the area by providing shelter from the elements by way of canopies, verandahs etc?
- 7.5. Will the projection or encroachment cause excessive shadows at street level or on adjoining buildings?
- 7.6. Will the projection or encroachment present a problem for safety and welfare of the public, such as exit doors swinging into the public right of way, or a structure obstructing views of traffic signals or likely to obstruct the safe movement of pedestrians or vehicles?
- 7.7. Will the erection or maintenance of the projection or encroachment require a road closure more than twice a year for more than 20% of the width of the road adjoining the projection or encroachment?
- 7.8. Is the projection or encroachment including any wall faces exceeding 3m high adequately drained to a legal point of discharge?
- 7.9. Does the projection or encroachment provide additional floor space?
- 7.10. Are materials and fabric durable and low maintenance?
- 7.11. Can the projection or encroachment be practically removed if required in the future?
- 7.12. Will the projection or encroachment affect the planting or growth of street trees?
- 7.13. Is the design of the projection or encroachment compatible with the design of the building and adjoining buildings?
- 7.14. Are there any sharp intrusive elements proposed into the streetscape?
- 7.15. Will the projection or encroachment affect street lighting
- 7.16. Will the projection or encroachment affect traffic signage or lines of sight to traffic control devices?
- 7.17. Will the projection collapse prematurely in the event of an earthquake or fire and in doing so impede access by emergency services or the safe egress of occupants?
- 7.18. Are clearances in Figures 1 and 2 complied with?
- 7.19. To what extent does the projection or encroachment affect the public and private rights on title or otherwise, of property owners and occupiers and the public?
- 7.20. Will the projection or encroachment adversely effect the operations of the emergency personnel?