

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P763/2017
PERMIT APPLICATION NO. 615/2016

CATCHWORDS

Section 82 of the *Planning and Environment Act 1987*; Port Phillip Planning Scheme; Commercial 1 Zone; noise attenuation; building height; building setback; overshadowing; amenity.

APPLICANT	Owners Corporation 633620N & Others
RESPONSIBLE AUTHORITY	Port Phillip City Council
RESPONDENT	Morris Family Foundation Pty Ltd
SUBJECT LAND	85 Dundas Place, Albert Park
WHERE HELD	Melbourne
BEFORE	Frank Dawson, Member
HEARING TYPE	Hearing
DATE OF HEARING	11 October 2017
DATE OF ORDER	5 January 2018
CITATION	Owners Corporation 633620N v Port Phillip CC [2018] VCAT 28

ORDER

- 1 In application P763/2017 the decision of the responsible authority is varied.
- 2 In planning permit application 615/2016 a permit is granted and directed to be issued for the land at 85 Dundas Place, Albert Park in accordance with the endorsed plans and the conditions set out in Appendix A.
- 3 The permit allows the partial demolition of the building and construction of ground, first and second floor alterations and additions to the existing building, including a three storey rear addition, a three storey lift shaft, an additional floor at roof level and a waiver of the car parking requirements.



Frank Dawson
Member

APPEARANCES

For applicants	Mr Anthony Boothroyd, Mr Bryan Benjamin, Ms Esther Benjamin, all in person.
For responsible authority	Mr Richard Little, town planner.
For respondent	Mr Dominic Scally, solicitor of Best Hooper Lawyers. He called evidence from Mr Dan Bowden, town planner of Song Bowden Planning.

INFORMATION

Description of proposal	<p>The proposal in this proceeding is for a major renovation of the Albert Park Hotel at 85 Dundas Place, Albert Park. The proposed works include:</p> <ul style="list-style-type: none">• Construction of ground, first and second floor alterations and additions to the existing building.• A three storey rear addition.• A three storey lift shaft.• An additional floor at roof level. <p>The proposal includes a waiver of the car parking requirements.</p>
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Port Phillip Planning Scheme
Zone and overlays	Commercial 1 Zone (C1Z), Heritage Overlay Schedule HO443 (HO443).
Permit requirements	Clause 34.01-4 (a permit is required to construct a building or construct or carry out works). Clause 43.01-1 (a permit is required to demolish or remove a building or to construct a building or construct or carry out works).

Land description

I find it convenient to reproduce a description of the land and surrounding development from Mr Bowden's evidence, which accords with my on-site observations.

The subject site is located on the south-west corner of Dundas Place and Montague Street, Albert Park. To the rear of the site is Dundas Lane.

The site has a frontage to Dundas Place of 17.5 metres and a sideage to Montague Street of 53.04 metres with an overall site area of 572m².

The site contains a three storey hotel building constructed to the site boundaries, except for the slight recess at the northern corner. The hotel was originally built in the 1880s and significantly altered in the 1930's. Most of the current building dates from the 1930's.

To the west of the site is No. 87 Dundas Place which is a four storey mixed use building with a commercial use at the ground floor and apartments on the upper floors. The apartments have terraces facing the front of the site.

To the east of the site is the Albert Park Library.

To the immediate north of the site is Dundas Street reserve and beyond are commercial buildings located on the other side of Dundas Place.

To the south of the site is Dundas Lane and No. 336 Montague Street which is a single storey weatherboard Victorian cottage. Further to the south are a mixture of Victorian cottages and terraced properties.

Tribunal inspection

The Tribunal inspected the subject land and the adjoining premises at Apartment 3.01, 87-89 Dundas Place, Albert Park on the 17 October 2017.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 In March 2017, the Port Phillip City Council issued a notice of decision to grant a permit for renovations and additions to the Albert Park Hotel at 85 Dundas Place in Albert Park. The planning permit allows the partial demolition of the building and construction of ground, first and second floor alterations and additions to the existing building, including a three storey rear addition, a three storey lift shaft, an additional floor at roof level and a waiver of the car parking requirements.
- 2 The Owners Corporation (No. 633620N) for 87-89 Dundas Place and the residents of Apartment 3.01 at 87-89 Dundas Place (Mr Bryan Benjamin and Ms Esther Benjamin) request the Tribunal to review the Council decision. 87-89 Dundas Place is a mixed use three storey building immediately to the west of the subject site.
- 3 I note the proposed design has been through a number of revisions prior to the time of the Council decision. For clarity, the plans under consideration in this proceeding are as follows:
 - Plans prepared by Six Degrees Architects. Pty Ltd.
 - Project 16006
 - Drawing numbers TP10, TP11 & TP12, all dated 08/09/2017.
 - Drawing numbers TP13, TP14 & TP15, all dated 15/09/2017.
- 4 At the hearing, the parties confirmed that as a result of the Tribunal's compulsory conference process, conducted on 11 September 2017, the parties agree that the matters brought to the hearing in this proceeding are as follows:
 - i. Owners Corporation 633620N withdraws from this proceeding subject to the inclusion of the acoustic conditions recommended by Marshall Day Acoustics (MDA) in their review of the plans for the proposed development (Rp 001 2106295), dated 18 August 2017. The purpose of the proposed acoustic conditions is to ensure compliance with the State Environment Protection Authority Policies SEPP N-1 (*Control of noise from commerce, industry and trade premises*) and SEPP N-2 (*Control of music noise from public premises*).

Both the Council and the permit applicant, as parties to this proceeding, concur with the inclusion of the MDA recommendations in the planning permit conditions.

¹ 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.

ii. The grounds for review lodged by Mr Bryan Benjamin and Ms Esther Benjamin are now confined to grounds 5 and 6, viz:

5. The responsible authority failed to establish that the upper western wall shown on the plans immediately opposite the balcony of Apt 3.01 was a necessary part of the development. As the wall will impinge upon morning daylight for Apt 3.01 and other north facing apartments and will impose itself over the balcony, we request that the wall be redesigned to our satisfaction to permit light and remove its overbearing character.
6. The responsible authority failed to establish whether the new western staircase will result in a new wall immediately abutting and imposing itself over our balcony edge must be in that location and we request that it be moved approximately one metre south so as not to protrude north of the building line of Apt 3.01.

5 The permit applicant and the Council refute the above grounds, submitting that despite being in a commercial environment, the upper western wall and the stairwell meet the residential design guidelines at Clause 55 of the planning scheme for daylight to existing windows (Standard B19, the setback from a side boundary (Standard B17) and sunlight to a secluded private open space (Standard B21).

6 I have reviewed the matter of the concurrence of the parties concerning the recommended MDA acoustic conditions. The recommended conditions include the preparation of a noise report concerning the installation and operational management of a noise limiter designed to ensure compliance with State Environment Protection Policy No. N-2 (*Control of music noise from public premises*). I find the proposed conditions are appropriate and accordingly, I have added the recommendations to the permit conditions.

7 Pursuant to Section 82 of the *Planning and Environment Act 1987*, I now confine my consideration of this proposal to the matters raised in the remaining 'live' grounds for review - grounds 5 and 6 listed earlier.

8 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Port Phillip Planning Scheme, I have decided to vary the Council decision and grant a permit. My reasons follow.

HEIGHT AND LOCATION OF THE WESTERN WALL

9 In relation to the proposed western wall of the third floor board room, the key issues for the residents at Apartment 3.01 at 87-89 Dundas Place are the height of the wall (causing a reduction in morning sunlight) and the proximity of the wall to the boundary (visual impact).

- 10 Mr Bowden's evidence indicates the external height of the boardroom wall is 3.17 metres. Scaling from the plans of the 15/9/17, the width of the western elevation is 3.6 metres. Over that distance, the wall is set back from the common boundary between 2.5 metres and 1.4 metres due to the angle of the boundary. The plans show the external finish of the wall to be timber cladding.
- 11 Opposite the board room wall is the north-facing external balcony for Apartment 3.01. Due to the height differential between Apartment 3.01 and the proposed addition level containing the hotel board room, the floor level of the balcony at Apartment 3.01 is shown on the plans to be approximately 1.59 metres lower than the floor level of the proposed board room.
- 12 Above the Apartment 3.01 balcony is a fixed eave of 1.4 metres, the outer part of which overlaps the board room wall opposite for approximately 700mm (the first 700mm being adjacent to a proposed stairwell wall). The top of the eave is approximately 1.8 metres below the maximum height of the board room wall, with a horizontal separation distance of approximately 2.5 metres.
- 13 Overall, the proposed additional storey is 1.2 metres higher than the existing pitched roof structure of the hotel.
- 14 As Mr Bowden points out in his evidence, the apartments at 87-89 Dundas Place are in the same Commercial 1 Zone as the subject site, therefore the decision guidelines for the zone do not give as much weight to overlooking and overshadowing compared to buildings or works affecting adjoining land in a residential zone. Nevertheless, I agree with Mr Bowden's view that the ResCode standards at Clause 55 of the planning scheme provide a helpful guide to the effect of the proposed board room on the amenity of the adjoining residence.
- 15 In this case, I accept Mr Bowden's evidence that in relation to the objective at Clause 55.04-1:

To ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings.

The accompanying Standard B17 is met.

- 16 Similarly, with respect to the objective at Clause 55.04-5:

To ensure buildings do not significantly overshadow existing secluded private open space.
- 17 I find the outcome from the application of the accompanying Standard B21 results in more than 30m² of the balcony private open space receiving 5 hours of sunlight at the equinox. In particular, I concur with Mr Bowden's opinion that:

Given the inner city context and location within an activity centre, some impact upon solar access is acceptable. Given the limited nature

and time at which the impact occurs I am comfortable that the additional overshadowing will not unreasonably impact on the amenity of the terrace.

- 18 Despite compliance with the technical application of ResCode, it is clear that the penetration of early morning light into the balcony area over the existing roofline of the hotel has particular amenity value for the residents. On review of the plans and from observation during my inspection, I find the loss of early morning light resulting from the height of the proposed board room wall can be ameliorated to a degree by raking back the roof line of the board room. I consider this can be done without compromising the function of the board room, as the plans show a bench installed along the western wall.
- 19 The external visibility of the change to the proposed additional storey is also minor, as the board room area is largely screened from the street due to the setback from the frontage and the intervening front parapet.
- 20 I have included an additional requirement in Condition 1 to give effect to the above change, which I consider can be achieved by sloping the ceiling of the board room back from the western wall commencing at a height of 2.1 metres (internal) above finished floor level at an angle of 35% from the horizontal.

NORTHERN SETBACK OF THE WESTERN STAIR WELL WALL

- 21 The proposed design includes a new stairwell built to the western title boundary and extending up to the third floor level. Immediately north of the stairwell is a small light court and rain garden of 8m².
- 22 The western boundary wall of the light well extends to a point 700mm north of the northern (front) wall of Apartment 3.01. The overlap extends half way between the front wall and the extent of the eave over the balcony.
- 23 Mr Benjamin submits there is no justification offered for the location of the stairwell and requests;
 - ... that it be moved approximately one metre south so as not to protrude north of the building line of Apt 3.01.
- 24 For the permit applicant, Mr Scally submits:
 - Respectfully, it is submitted there is no requirement for the applicant/respondent to satisfy the responsible authority that the new western staircase must be in the location proposed. The planning question requires consideration of whether its location is 'acceptable' on character and amenity grounds.
- 25 I accept Mr Scally's point in relation to justification of the proposed design; the issue is whether the proposal is acceptable on planning grounds. Given the predominately northern aspect of the balcony at Apt. 3.01, the 700mm 'encroachment' of the stairwell on the eastern side is in my assessment

minor and acceptable. I find there is no planning basis for relocating the proposed stairwell.

WHAT CONDITIONS ARE APPROPRIATE?

- 26 In deciding the conditions to be included on the permit the Tribunal has had regard to the conditions contained in Council's Notice of Decision to Grant a Permit and the submissions and evidence of the parties in addition to the matters which arise from these reasons.

CONCLUSION

- 27 For the reasons given above, the decision of the responsible authority is varied. A permit is granted subject to conditions.

A handwritten signature in black ink that reads "Frank Dawson". The signature is written in a cursive, flowing style.

Frank Dawson
Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	615/2016
LAND	85 Dundas Place, Albert Park, Victoria 3206

WHAT THE PERMIT ALLOWS

Partial demolition of the building and construction of ground, first and second floor alterations and additions to the existing building, including a three storey rear addition, a three storey lift shaft, an additional floor at roof level and a waiver of the car parking requirements, generally in accordance with the endorsed plans.

CONDITIONS

Amended plans required

- 1 Before the development and/or use starts, amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans submitted with the application and as amended on drawings TP10 to TP12 on the 8/9/17 and drawings TP13 to TP15 on the 15/9/17, but modified to show:
 - a) A set of plans showing existing conditions.
 - b) A privacy screen with a minimum height above floor level of 1.7 metres installed along the western elevation of the third floor terrace, generally in accordance with the design shown on Drawing TP15 prepared by Six Degrees Architects and dated 15/9/2017.
 - c) The roof of the third floor board room angled back from the western wall in an easterly direction, based on a commencement height of 2.1 metres (internal) above finished floor level at an angle of 35% from the horizontal.
 - d) The first floor window on the western elevation to be fitted with obscure glass and fixed shut to a height of at least 1.7m above finished floor level.
 - e) A coloured schedule (2 copies) of the materials, colours and finishes to be used on the main external surfaces, including roofs, walls, windows, doors of the proposed additions.

- f) All plant, equipment and domestic services (including air conditioning, heating units, hotwater systems, etc.) which are to be located externally.
- g) Any changes to the detail of the building design arising from the Noise Levels Report required by Condition 16.

No alterations

- 2 The development and/or use as shown on the endorsed plans must not be altered without the written consent of the responsible authority.

Use of terrace

- 3 The terrace on the second floor level must:
 - a) Only be used in association with the office
 - b) Not be used after 10 pm Monday to Friday
 - c) Not be used on weekends and public holidays.

Green Travel Plan

- 4 Before the development starts (other than demolition or works to remediate contaminated land), a green travel plan to the satisfaction of the responsible authority, prepared by a suitably qualified professional, must be submitted to and approved by the responsible authority. The green travel plan must provide detailed advice regarding how traffic movements and staff parking will be managed and ensure an alternative, non-private vehicle transport modes will be encouraged. The plan should also identify specific opportunities for the provision of more sustainable transport options and encouragement of their use. The plan must include but not be limited to:
 - a) Tram, train and bus timetables be installed in prominent locations in lifts and public areas (on noticeboards).
 - b) Bicycle parking areas to be installed in well secured and prominent locations.
 - c) Install signs in prominent locations advising of the location of, bicycle parking facilities for staff and visitor, tram stops, taxi ranks, railway stations, bus stops and bicycle paths.
 - d) Ensure that access to the on-site parking is restricted and controlled.
 - e) Funding by the applicant of the purchase of a bicycle for staff.
 - f) Establishment of a car-pooling database for staff.
 - g) Specific targets to guide the plans ongoing implementation.
 - h) Identify persons responsible for the Implementation of actions.
 - i) Estimate timescales and costs for each action.
 - j) Include a plan for monitoring and review of the Travel Plan on an annual basis for at least three years.

Once approved this document must be complied with to the satisfaction of the responsible authority and must not be varied except with the written approval of the responsible authority.

Storage and disposal of garbage

- 5 Provision must be made for the storage and disposal of garbage to the satisfaction of the responsible authority. All garbage storage areas must be screened from public view.

Amenity

- 6 The amenity of the area must not be detrimentally affected by the development through the:
- a) Transport of materials, goods or commodities to or from the land.
 - b) Appearance of any building, works or materials.
 - c) Emissions of noise, artificial light, vibration, smell, fumes, smoke, steam, soot, ash, dust, waste water, waste products, grit or oil.
 - d) Presence of vermin.
 - e) Change to television and/or radio reception.

Air conditioning

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

Equipment and services

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

Sustainable design assessment

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

Incorporation of sustainable design initiatives

- 10 The project must incorporate the sustainable design initiatives listed in the endorsed Sustainable Design Assessment to the satisfaction of the responsible authority.

Implementation of sustainable design initiatives

- 11 Before the occupation of the development approved under this permit, a report from the author of the Sustainable Design Assessment (SDA) approved pursuant to this permit, or similarly qualified person or company, must be submitted to the satisfaction of the responsible authority. The report must confirm that all measures and recommendations specified in the SDA have been implemented and/or incorporated in accordance with the approved report to the satisfaction of the responsible authority.

Water sensitive urban design

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

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

Incorporation of water sensitive urban design initiatives

- 13 Before the occupation of the development approved under this permit, the project must incorporate the water sensitive urban design initiatives listed in the endorsed Water Sensitive Urban Design Report to the satisfaction of the responsible authority, and thereafter maintained to the satisfaction of the responsible authority.

Maintenance manual for water sensitive urban design initiatives

- 14 Before the development starts (other than demolition or works to remediate contaminated land) a Maintenance Manual for Water Sensitive Urban Design Initiatives must be submitted to and approved by the responsible authority.

The manual must set out future operational and maintenance arrangements for all VVSUD (stormwater management) measures. The program must include, but is not limited to:

- Inspection frequency.
- Cleanout procedures.
- As installed design details/diagrams including a sketch of how the system operates.

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

Site management water sensitive urban design

- 15 The developer must ensure that:

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

Acoustic design and management

Noise limiter

- a) Before the use commences, the permit operator must install and maintain a noise limiter ("the Device"), set at a level by a qualified acoustic engineer, to ensure the emission of amplified music does not exceed the requirements of SEPP N-2, to the satisfaction of the responsible authority.

Noise report

- b) Before the use commences, a report prepared by a suitably qualified acoustic consultant must be submitted to and approved by the responsible authority. The report must confirm that the noise limiter ("the Device") is calibrated and operating to the following specifications:
 - i) The Device limits internal noise levels so as to ensure compliance with the music noise limits according to State Environment Protection Policy (Control of Music Noise from Public Premises) Na N-2 (SEPP N-2).
 - ii) The Device is a limiter suitable for interfacing with a permanently installed sound system which will include any amplification equipment and loudspeakers.
 - iii) The Device is installed to control all amplification equipment and associated loudspeakers.
 - iv) Amplified music is not permitted to be played other than through the permanently installed sound system and when the Device is installed and operating to ensure compliance with State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2) to the satisfaction of the responsible authority.

- v) The Device controls are in a locked metal case that is not accessible by personnel other than a qualified acoustic engineer or technician nominated by the owner of the land and notified to the responsible authority.

Once submitted and approved the noise report will be endorsed to form part of the permit.

SEPP N1 and N2

- c) Noise levels must not exceed the permissible noise levels determined in accordance with the procedures laid down in State Environment Protection Policy No. N-1 (*Control of noise from commerce, industry and trade premises*) and State Environment Protection Policy No. N-2 (*Control of music noise from public premises*) to the satisfaction of the responsible authority.

Permit expiry

- 16 This permit as it relates to development (buildings and works) will expire if one of the following circumstances applies:
 - (a) The development is not started within two (2) years of the issue date of this permit.
 - (b) The development is not completed within two (2) years of the date of commencement of works.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

– End of conditions –