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Victorian Civil and Administrative Tribunal

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Colquhoun & Ors v Yarra CC [2010] VCAT 1710 (21 October 2010)

Victorian Civil and Administrative Tribunal

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Colquhoun & Ors v Yarra CC [2010] VCAT 1710 (21 October 2010)

Last Updated: 28 October 2010

DECISION SUMMARY

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS.
P1204/2010, P1340/2010, P1345/2010
PERMIT APPLICATION NOS.
PL09/0876, PL09/0877:

The Tribunal has reviewed two notices of decisions issued by the Yarra City Council to grant permits for the development of land on the north side of Victoria Street, Abbotsford.

The land is known as the ‘Honeywell site’ and is in the *Victoria Street Major Activity Centre* and the *Victoria Street East Precinct*, where more intensive development is encouraged and is occurring. It also adjoins and includes a sensitive interface with the Yarra River and riverside public land incorporating the Capital City Trail.

The development is significant and comprises 586 dwellings in a complex comprising three towers of eleven, nine and nine storeys. A four to five storey podium joins these towers. The three towers are each rectangular but are aligned so that their narrow sides face the Yarra River. A ground level pedestrian link divides the complex and provides public access between Victoria Street and the Yarra River. Along this link there is some commercial activity, including restaurants and cafes. The development includes a pontoon in the Yarra River with ramp and stair access to the link, across the Capital City Trail.

The Tribunal considered Applications by Boroondara City Council, the Yarra River Action Alliance Inc, the Protectors of Public Lands Victoria Inc and some Kew residents who all opposed various aspects of the development. All sought lower tower heights, but by varying amounts. Some also sought greater building setbacks from the Yarra River.

The Tribunal found that the three towers of eleven, nine and nine storeys, above a podium, and with a pedestrian link to the river is consistent with State and local policy and should be approved. The upper levels of the stage 1 tower facing Victoria Street must be recessed for streetscape reasons. Each of the towers is consistent with the planning scheme’s river corridor objectives and further recessing from the river is not required. The podium setback of around 10 m from the river corridor crest line is satisfactory provided the first 5 m is set aside for landscaping to enhance the river corridor.

A permit has been granted for development on the Honeywell site. The Tribunal supports, in principle, the proposed river pontoon and associated

riverside works, but cannot, in law, grant a permit for these works until a cultural heritage management plan is approved.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS.
P1204/2010, P1340/2010, P1345/2010
PERMIT APPLICATION NOS.
PL09/0876, PL09/0877

APPLICATION P1204/2010

APPLICANTS

Christiana Colquhoun; Boroondara City Council; Yarra River Action Alliance Inc; Protectors of Public Lands Victoria Inc

RESPONSIBLE AUTHORITY

Yarra City Council

REFERRAL AUTHORITY

Melbourne Water

RESPONDENT

Hamton JV (Abbotsford) Pty Ltd

OTHER PARTIES

Department of Sustainability and Environment; Parks Victoria

SUBJECT LAND

Crown land in and adjoining the Yarra River abutting the northern and eastern boundaries of 677-679 Victoria Street, Abbotsford.

PERSON INVITED TO MAKE SUBMISSIONS

Aboriginal Affairs Victoria

PERMIT APPLICATION

PL09/0876

APPLICATION P1340/2010

APPLICANTS

Christiana Colquhoun; Boroondara City Council; Yarra River Action Alliance Inc; Protectors of Public Lands Victoria Inc

RESPONSIBLE AUTHORITY

Yarra City Council

RESPONDENT

Hamton JV (Abbotsford) Pty Ltd

PERSON INVITED TO MAKE SUBMISSIONS

Aboriginal Affairs Victoria

SUBJECT LAND

677-679 Victoria Street, Abbotsford

PERMIT APPLICATION

PL09/0877

APPLICATION P1345/2010

APPLICANT	Hamton JV (Abbotsford) Pty Ltd
RESPONSIBLE AUTHORITY	Yarra City Council
RESPONDENTS	Christiana Colquhoun; Boroondara City Council; Yarra River Action Alliance Inc; Protectors of Public Lands Victoria Inc
SUBJECT LAND	677-679 Victoria Street, Abbotsford
PERMIT APPLICATION	PL09/0877
WHERE HELD	Melbourne
BEFORE	Geoffrey Code, Presiding Member Michael Read, Member
HEARING TYPE	Hearing
DATE OF HEARING	9, 10, 11, 12 & 13 August 2010; 20, 21, 22 and 23 September 2010
DATE OF ORDER	21 October 2010
CITATION	Colquhoun & Ors v Yarra CC [2010] VCAT 1710

ORDER

Applications P1204/2010 and P1340/2010 - Question of Law

1. The application by the Yarra River Action Alliance Inc and the Protectors of Public Lands Victoria Inc to adjourn the hearing of the question of law is refused.
2. A cultural heritage management plan under the [Aboriginal Heritage Act 2006](#) is not required to be prepared in respect of the activity in permit application PL09/0877.
3. A cultural heritage management plan under the [Aboriginal Heritage Act 2006](#) must be prepared in respect of the activity in permit application PL09/0876 and must, in accordance with [s 52](#) of that Act, be approved before the Tribunal may grant a permit in respect of that permit application.

Applications P1340/2010 and P1345/2010

1. The decision of the responsible authority is varied.
2. A permit is granted in relation to land at 677-679 Victoria Street, Abbotsford. The permit will allow:
 - Use and development of land for a mixed use development comprising dwellings, medical centre, convenience shop, offices, restricted recreation facility, licensed restaurants, licensed food and drinks premises (café), retail premises and place of assembly in a range of buildings, vegetation removal, additional landscaping and associated works, a reduction in the car parking and loading/unloading requirements and alterations to the Road Zone 1 (Victoria Street) crossover.
3. The permit is subject to the conditions contained in Appendix B to these reasons.

Application P1204/2010

1. The Respondent must file with the Tribunal and serve upon each party a notice within 21 days of the date of this order of its intention to either prepare or not prepare a cultural heritage management plan in respect of the activity in permit application PL09/0876.

Geoffrey Code

Michael Read

Presiding Member

Member

APPEARANCES

For Christiana
Colquhoun

Mr Jason Kane of counsel, direct brief (9 & 13 August 2010; 20 September 2010) and Mr Campbell Colquhoun (10, 11 and 12 August 2010; 21, 22 and 23 September 2010)). On 13 August 2010, Mr Kane called the following expert witnesses:

- Mr Stephen Schutt, landscape architect and urban designer, Hansen Partnership Pty Ltd
- Mr Damian Iles, town planner, Hansen Partnership Pty Ltd

For Boroondara City
Council

Ms Joanne Lardner of counsel, direct brief. She called the following expert witness:

- Mr Craig Czarny, urban designer, Hansen Partnership Pty Ltd

For Yarra River Action

Mr Tom Pikuser of counsel, direct brief. He called

Alliance Inc and
Protectors of Public
Lands Victoria Inc

the following expert witnesses:

- Ms Nicki Colls, environmental engineer,
Sustainable Built Environments Pty Ltd
- Mr Nigel Lewis, architect
- Mr Damian Iles, town planner, Hansen
Partnership Pty Ltd

For Yarra City Council

Ms Mimi Marcus, Maddocks Lawyers. She called
the following expert witnesses:

- Mr Rob McGauran, architect, McGauran Giannini
Soon Pty Ltd
- Mr Stuart McGurn, town planner, Fulcrum

For Hamton JV
(Abbotsford) Pty Ltd

Mr Ian Pitt SC and Ms Susan Brennan of counsel,
instructed by Best Hooper. They called the
following expert witnesses:

- Mr Alan Wyatt, landscape architect, ERM Pty Ltd
- Mr Mark Sheppard, urban designer, David Lock
Associates (Australia) Pty Ltd
- Mr Simon McPherson, urban designer, SJB Urban
Pty Ltd
- Mr Tim Biles, urban designer, Message
Consultants Australia Pty Ltd
- Mr Christopher Hayton, architect, Rothe Lowman
Architects
- Mr Tom Jordan, architect, Hayball Pty Ltd
- Ms Dimity Reed, architect
- Ms Liz Hui, acoustic engineer, Marshall Day
Acoustics
- Mr Andrew Long, archaeologist, Andrew Long &
Associates
- Mr Phillip Borelli, town planner, SJB Planning
Pty Ltd
- Mr Jan Talacko, environmental scientist, Ark
Resources Pty Ltd

Ms Samantha Slicer of Floodslicer Pty Ltd was also
called in relation to the verification statement for
the photomontages prepared by the company for the
land in the Applications.

For Aboriginal Affairs
Victoria
For Department of
Sustainability and
Environment, and Parks
Victoria
For Melbourne Water
INFORMATION

Mr Patrick Doyle, solicitor, Victorian Government
Solicitor's Office appeared on 20 September 2010
Ms Elana Radovic, Senior Statutory Planner,
Department of Sustainability and Environment

No appearance

Description of Proposal

*Application P1204/2010 and permit application
PL09/0876:*

Yarra River pontoon and associated works to the
river bank.

*Applications P1340/2010 and P1345/2010 and
permit application PL09/0877:*

Nature of Proceeding

Mixed use development, including 576 dwellings
Applications P1340/2010 and P1204/2010 are made
under [s 82](#) of the [Planning and Environment Act
1987](#). Application P1345/2010 is made under [s 80](#)
of the [Planning and Environment Act 1987](#).

Zone and Overlays

*Applications P1340/2010 and P1345/2010 and
permit application PL09/0877:*

Business 5 Zone (B5Z)

Design and Development Overlay Schedule 2
(DDO2)

Design and Development Overlay Schedule 4
(DDO4)

Environmental Significance Overlay Schedule 1
(ESO1)

Land subject to Inundation (LSIO)

The land abuts land in a Road Zone Category 1
(RDZ1) (Victoria Street)

*Application P1204/2010 and permit application
PL09/0876:*

Public Use Zone Schedule 1 (PUZ1)

Public Park and Recreation Zone (PPRZ)

Design and Development Overlay Schedule 4
(DDO4)

Permit Requirements	Environmental Significance Overlay Schedule 1 (ESO1)
	Land subject to Inundation (LSIO)
	<i>Application P1204/2010 and permit application PL09/0876:</i>
	Clause 36.01-2 (steps and paving works in PUZ)
	Clause 36.06-2 (constructing a pontoon, but not constructing pathways, trails, planting or landscaping, in PPRZ)
	Clause 42.01-2 (ESO1 - all proposed works)
	Clause 43.02-2 (DDO2 and DDO4 - all proposed works)
	Clause 44.04-1 (LSIO - all proposed works)
	<i>Applications P1340/2010 and P1345/2010 and permit application PL09/0877:</i>
	Clause 34.05-1 (B5Z - use for dwellings, office, medical centre (dentist), convenience shop, restricted recreation facility (yoga studio), place of assembly (artist's studio), tavern (wine bar), restaurant, café and retail premises (bike hire))
	Clause 34.05-4 (B5Z - all of the buildings and works)
	Clause 42.01-2 (ESO1 - all proposed buildings and works)
	Clause 43.02-2 (DDO2 and DDO4 –all proposed works)
	Clause 44.04-1 (all proposed works in LSIO that applies to small section of land in northeast corner)
	Clause 52.29 (alteration to the access to a road in RDZ1)
Relevant Scheme policies and provisions.	State policy - Clauses 10, 11, 12, 15, 16, 17, 18, 19.
	Local policy – Clause 21.02, 21.03, 21.04, 21.05, 21.06, 21.07, 21.08, 22.03, 22.05, 22.08, 22.09, 22.10, 22.11, 22.12, 52.06, 52.07, 52.17, 52.27, 52.29, 52.34, 52.35, 52.36, 65.
	Under local policy, the land is part of the <i>Victoria Street Major Activity Centre</i> (cl 21.03) and is a <i>Significant Redevelopment Site</i> (cl 21.03) and is in

Land Description

the *Victoria Street East Precinct* (cl 22.11). Under local policy, the *Victoria Street East Precinct, Richmond – Urban Design Framework* (2005) is a reference document (cl 22.11-4). *Applications P1340/2010 and P1345/2010 and permit application PL09/0877:*

The land is on the northern side of Victoria Street, Abbotsford, about 3.5 km from the Melbourne CBD. It is generally rectangular, with a frontage of about 156 m to Victoria Street, a west boundary depth of about 88 m, a northern boundary of about 120 m and an eastern boundary of about 110 m. It has an area of 1.422 ha. The northern and eastern boundaries abut public open space adjoining the Yarra River on which the Capital City Trail is located and which is the subject land in Application P1340/2010. Those northern and eastern boundaries broadly align with the crest in the land above the River. The land contains two two-storey office buildings surrounded by car parking. The bridge across the river between Victoria Street and Barkers Road abuts the south-eastern corner of the land. *Application P1204/2010 and permit application PL09/0876:*

The land is Crown land reserved for ‘conservation, recreation and tourism’. Parks Victoria is the land manager. The land steeply rises from the Yarra River. It is developed for the Capital City Trail, a major cycling and pedestrian path. It is well landscaped.

Tribunal Inspection

The land and its surrounds, including land to the north and east of the Yarra River and the Victoria Street bridge was inspected on 10 August 2010 (unaccompanied). The land at 50, 52 and 54 Young Street, Kew was inspected on 6 October 2010 (accompanied).

REASONS

Introduction

1. On 16 April 2010, the Yarra City Council (the **Council**) decided to issue two notices of decision to grant a permit in relation to two permit applications.
2. The first application (no PL09/0877) was to use and develop a major mixed use project, including 576 apartments, at 677-679 Victoria Street, Abbotsford (the **mixed use application**).
3. The second application (no PL09/0876) was to develop a pontoon in the Yarra River and associated river bank works, including upgrading the Capital City Trail (the **Trail**) (the **riverside application**).
4. The land subject of the riverside application abuts the land subject of the mixed use application.
5. The use and development in the two permit applications form an integrated proposal, which we refer to in these reasons as the **proposal**. We also refer to the land the subject of the mixed use application as the **Honeywell site**,[\[1\]](#) and to the land the subject of the riverside application as the **riverside area**. When referring to the combined area of the land in both permit applications, we simply refer to the **land**.
6. Ms Christiana Colquhoun (who occupies a dwelling in Young Street, Kew, across the Yarra River to the north of the Honeywell site), the Yarra River Action Alliance Inc and Protectors of Public Lands Victoria Inc (the **Groups**), and the Boroondara City Council (**Boroondara**) have applied to the Tribunal to review both of the notices of decision.

The proposal

1. The proposal is a large scale, mixed use, staged project. The proposal is primarily residential in nature (with 586 apartment style dwellings), but has commercial components and landscaping works on both the Honeywell site and the riverside area.
2. There are three main buildings, each a separate stage. Each is a relatively long building, with the narrower sides facing the Yarra River so that it has the effect of being like three splayed fingers stretching towards the river. Each sits above a 3 to 4 level podium.

The podium is setback about 10 m from the northern and eastern boundary, although private, ground level and sunken terraces intrude partly into the setback area.

3. Building 1 (Stage 1) is near the western boundary. It is hard edged to Victoria Street, has eleven storeys (around 38 m) and its height is at RL 51.6 m. It is setback from the northern boundary by between 5 m and 12 m (for the podium element, including terraces) and between 25 m and 38 m (for the tower element). It comprises 214 dwellings, 235 car spaces over five levels, and 1,404 sq m of commercial use, including a 115 seat licensed restaurant and a convenience shop at Victoria Street.
4. Building 2 (Stage 2) is oriented to the north-east from the centre of the land. It has 9 storeys (about 32 m) and its height is at RL 45.9 m. It is setback from the northeast boundary by between 2.3 m and 5 m (lower podium), between 11 m and 16 m (upper podium), and between 17 m and 42 m (main tower). It comprises 192 dwellings, 247 car spaces (over 4 levels) and 818 sq m of commercial space.
5. Building 3 (Stage 3) is on an east-west alignment, extending 70 m along Victoria Street. It has 9 storeys (about 32.5 m) and its height is at RL 43.7 m. It is setback from the eastern boundary by between 1.6 m and 13 m (lower podium), between 3.2 m and 10.2 m (upper podium), and between 10.3 m and 39 m (main tower). To Victoria Street, the building is setback between zero and 9.2 m. It comprises 180 dwellings and 187 car spaces.
6. The proposal provides two new pedestrian links to the Yarra River. The first and larger one is oriented north from the existing signalised entry off Victoria Street. It passes between Buildings 1 and 3 and then Buildings 1 and 2 before reaching the Trail. It starts at least 25 m wide and narrows to about 15 m wide before opening to 20 m where it joins the public land containing the Trail. It is to be publicly accessible. The second is oriented east-west and after passing between Buildings 2 and 3, there is a wider courtyard, that in turns leads to a 5 m opening between these two buildings to the Trail. Access is to be part public and part private.
7. The works in the riverside application comprise a floating pontoon in the River, stairs to and across the Capital City Trail between the pontoon access ramp and the link between Buildings 1 and 2, widening of the Capital City Trail, stairs between Building 3 and the

upper Trail, and removal and subsequent re-instatement of some vegetation.

The Council's decision

1. The notices of decision propose permits be granted subject to various detailed amendments to the proposal.
2. The main amendments are to:
 - Increase the setbacks at the north-eastern river interface of Building 2 at levels 6 by 7.5 m, and at levels 7 and 8 by 4 m.
 - Increase the setbacks at southern (Victoria Street) interface of Building 1 at levels 9 and 10 by 9 to 13 m.
 - Delete the outdoor café from public land affected by the riverside application and modify the pontoon so that it projects less into the Yarra River and is smaller in overall dimensions.[\[2\]](#)
 - Reduce the impact of the level of the forecourt entry to reinforce the pedestrian and commuter features of the Victoria Street frontage.
 - Use less intrusive materials at level 9 of Building 2, such as printed glass or stainless steel mesh.
 - Use alternate materials to the Building 3 ground level, south-facing, car park enclosure wall.

The issues

1. The Honeywell site is in a Major Activity Centre (**MAC**), is a strategic redevelopment site (**SRS**) and is in an area undergoing rapid change with buildings of relatively significant height and mass. The parties, explicitly or implicitly, agreed that substantially higher density redevelopment of the Honeywell site is acceptable, having regard to the site being in a MAC and being a SRS and having regard to current policy.
2. The Honeywell site also abuts public land adjoining the environmentally-sensitive Yarra River on which is located the Trail.
3. These proceedings involve balancing policies between those relevant to a rapidly developing MAC and a relatively sensitive public open space interface.
4. The key issue is the height, scale and mass of the proposal, including its relationship to Victoria Street and the Yarra River corridor.
5. Each of the Applicants sought a moderation in the height, scale and

mass of the proposal, but there was not agreement among them about the extent of the moderation. The Applicants did all agree that it is acceptable that the proposal be visible from the River corridor and, in particular, from above the existing riparian tree canopy on either side of the river. Boroondara also agreed with the principle that quality architecture in a MAC should be seen and ‘celebrated’.

6. Other issues are architectural quality, visual amenity, environmentally sustainable design (**ESD**), amenity effects (including visual amenity and noise), Aboriginal cultural heritage, and the merits of the riverside works.
7. Traffic and car parking issues associated with the proposal are not in dispute.[\[3\]](#)

Policy context

1. A detailed web of policy applies or relates to the proposal. We do not propose to deal with it all in any detail.
2. State policy supports urban consolidation in accordance with *Melbourne 2030* and *Melbourne @ 5 Million*.
3. The land is in a MAC and is a SRS. The land is a significant opportunity to implement urban consolidation objectives.
4. A number of the parties made submissions about the effect of the new State Planning Policy Framework (**SPPF**) that commenced before the hearing but after the notices of decision. It is unnecessary for us to examine each new provision in detail because we are satisfied that, in the context of this case, the new SPPF largely has a neutral effect.
5. We do, however, record that a responsible authority must now explicitly take *Melbourne @ 5 Million* into account and this tends to move the balance in favour of achieving urban consolidation objectives. Otherwise, the policy continues that it is unnecessary to take neighbourhood character into account in a MAC. The need to take into account the effect of the former cl 19.03 provisions (in new cl 15.01-1) also continues.
6. Local policy supports significant development in the MAC and the *Victoria Street East Precinct*. Such development is occurring.
7. The thrust of these policies needs to be balanced by State and local policy requiring development to respect, relate to and improve the Yarra River environs.

8. Council adopted the *Victoria Street Structure Plan* in April 2010 (the **Structure Plan**).^[4] This is a Plan for the Victoria Street MAC and surrounding areas. The Honeywell site is in an area of substantial change in the Structure Plan. Improved connections to the Yarra River are proposed. Preferred ‘future buildings’ for the land are said to be medium height development of 3 to 6 storeys, but the Structure Plan notes that recent decisions by the Minister for Planning have ‘established the scale of redevelopment in the [Victoria Street North/Yarra River area, including the land]’. The Structure Plan is yet to be implemented by changes to the scheme.
9. In summary, the thrust of policy supports significant redevelopment of the Honeywell site, subject to appropriate treatment of the Yarra River interface. Recent approvals in the area (see Built Context, below) and the increased emphasis in State policy on accommodating a growing population in established areas, indicates to us that the preferences in the *Victoria Street East Precinct, Richmond – Urban Design Framework 2005* (the **UDF**) and Structure Plan for medium rise development not exceeding six storeys are now outdated. While we have considered all relevant policy in this case, we have give somewhat lesser weight to those policy preferences restricting development of the land.

Physical context

1. The Honeywell site and its surrounds has special physical characteristics, relating to its interface between the hard urban edge of Victoria Street and the softer, landscaped edge of the Yarra River.
2. The Honeywell site has a frontage of over 200 m to public land adjoining the river and the Trail.
3. The Honeywell site comprised lower riverside flats until the 1950s when the land was filled to a maximum depth of about 7 m. This created a flatter, more elevated surface for the Honeywell site.^[5] From the northern and eastern boundary of the Honeywell site, the land now falls steeply from the crest line to the River. Several metres below that crest line is the Trail. There is also an access path from Victoria Street to the Trail and this passes at a higher level across the eastern face of the site. The steep bank and its mature landscaping means that views of the Honeywell site, or of any buildings on it, from the Trail and the River are virtually impossible and the latter

would also be filtered through the vegetation.

4. The land on the eastern bank of the Yarra River (in the City of Boroondara) is a steep escarpment which rises to about RL 35 m. A number of dwellings are located on the top of the escarpment and overlook the land and beyond to Richmond and to the CBD skyline. There are a few dwellings below the escarpment further to the north, where it adjoins the flatter land near Hodgson Street.
5. The land on the northern bank of the Yarra River (also in the City of Boroondara) comprises river flats backed by rising land some distance from the river. Part of that land is subject to the LSIO and part of this riverside area has been acquired for public use.

Built context

1. The Honeywell site adjoins the well-landscaped recreation links provided by the Trail and the river. Beyond, to the north and east are residential areas in Kew.
2. To the west and south, hard-edged taller built form dominates. Buildings to the immediate west are 2 to 8 storeys and have a poor interface with the Trail. Some of the buildings to the west are in heritage areas. The *Skipping Girl* sign is located along Victoria Street about 225 m west of the land.
3. To the south is the Victoria Gardens complex. It contains a 7 storey (or 20 m to RL 35 m) office directly opposite the land. Further development of this complex is supported to a maximum of 40 m (to RL 55 m).[\[6\]](#)
4. The land forms part of the rapidly developing *Victoria Street East Precinct*. The Council outlined in detail at the hearing the nature and scale of new building recently completed, under construction or approved. A number of these buildings are approved in the *Victoria Street East Precinct* for heights exceeding the maximum height referred to in DDO4 of RL 41 m.[\[7\]](#)
5. The Minister for Planning has recently approved a number of developments nearby in that part of the MAC zoned *Priority Development* following advice from the Priority Development Panel between 2007 and 2009.

Design process

1. Mr Hayton, a Principal of Rothe Lowman Architects, was engaged

by the Respondent in late 2008 and he then assembled an extensive consultant design team, including Mr McPherson. Rothe Lowman had already prepared a preliminary concept plan which had been discussed with the Council. Mr McPherson stated that the team then ‘started again’ by preparing a schematic design and a detailed design before the permit applications, including the urban context report, were prepared. A large number of options were carefully considered.

2. We were informed that, as the work progressed, a greater emphasis was given to public realm outcomes including new public spaces and a significant pedestrian link from Victoria Street to the River.
3. The Council engaged Mr McGauran to assist it in discussions with the Respondent’s design team.
4. As the permit applications were being prepared, there were various presentations to the Council, a community information evening at the Council’s offices and use of a variety of techniques (including an animated computer model).
5. We were impressed with the depth and care and patience in the design process. The quality of the publicly available documentation was high, including various sectional studies that related the topography along the site frontage with the DDO4 preferred building envelope and the proposed building profile.

Effect of DDO4 Introduction

1. The parties disagreed about the effect of DDO4.
2. At the time of the hearings, the scheme provided that DDO4 would expire on 30 September 2010. Council informed us that it had sought an extension of time to the sunset date so that these proceedings could be resolved having regard to DDO4. The Minister ultimately extended the sunset date of DDO4.[\[8\]](#)
3. The Council nonetheless invited the Tribunal to evaluate the effectiveness of DDO4 to help the Council determine whether DDO4 should continue and, if so, in what form.
4. We conclude that the effect of DDO4 is clear but the intent and drafting of DDO4 warrants review.

Background

1. The background to DDO4 is the UDF. It commenced on 19 October 2006. [\[9\]](#) DDO4 includes the statement that it ‘implements’ the

findings of the UDF. DDO4 applies to part of the UDF area.

The DDO ‘parent’ provision

1. DDO4 needs to be interpreted in the context of the ‘parent’ DDO provision in cl 43.02 of the scheme. The purpose of the DDO includes identifying areas affected by ‘specific requirements’ relating to design and built form. The DDO also emphasises the ‘design objectives’ in a schedule and the need to consider those objectives in deciding permit applications in a DDO.
2. The DDO provides that ‘buildings and works must be constructed in accordance with any requirements in a schedule to this overlay. A schedule may include requirements relating to ... building setbacks ... building height ... plot ratio ... landscaping ... [or] any other requirements relating to the design or built form of new development’.[\[10\]](#) The DDO also makes it clear that ‘a permit may be granted to construct a building that is not in accordance with any requirement in a schedule ...’.[\[11\]](#)

DDO4 affects two separate areas

1. DDO4 addresses two different areas in the *Victoria Street East Precinct* – the ‘Yarra River corridor’ (the **river corridor**) and ‘commercial/industrial redevelopment areas’. This combination does not aid clarity.

The river corridor

1. The river corridor in DDO4 is not defined in words, but the diagram in the schedule states that the corridor consists of three separate sub-areas identified as YR6, YR7 and YR8. The subject land forms part of sub-area YR 7, which is an area along the river between Walmer Street and the Fenix building east of the Victoria Gardens complex. Hence, these proceedings only concern the river corridor provisions of DDO4.
2. The river corridor, for DDO4 purposes, does not include land, public or private, on the opposite side of the river in the City of Boroondara.[\[12\]](#) Each river corridor sub-area includes private and public land. Each includes a crest line. ‘Crest line’ is not defined but, in context, it refers to the top of the highest point of the river bank.

The river corridor objectives

1. The four river corridor objectives are: [\[13\]](#)
 - To relate the siting, scale, bulk and massing of new development to the distinctive landscape character and topography of this section of the Yarra River corridor.
 - To enhance and improve the natural landscape of the river corridor and provide publicly accessible riverside open space and an improved riverside pathway system.
 - To provide for long-range views of the River corridor paths and areas of public open space within the corridor and on the opposite bank, and protect views to significant landmarks from Victoria Street.
 - To minimise overshadowing of the river corridor and public spaces. [\[14\]](#)

What are the buildings and works ‘requirements’?

1. Clause 2.0 of DDO4 makes provision for buildings and works. The drafting of these provisions does not make them into ‘requirements’ as foreshadowed in cl 43.02-2. [\[15\]](#) A requirement is a provision of a mandatory character. Clause 2.0 is not of that character. Each of the four dot points in cl 2.0 provides that buildings ‘should’ adopt specified standards relating to height, setback and articulation.
2. Clause 2.0 has the character of discretionary or aspirational provisions. Clause 5.0 of DDO4 refers to them as ‘benchmarks’. Benchmark is not an ideal term because a benchmark may be mandatory or discretionary. Nonetheless, for convenience, we will refer to cl 2.0 of DDO4 in these reasons as ‘discretionary benchmarks’.
3. The Groups urged us find that ‘should’ is a prescriptive or mandatory word in context, having regard to the purpose of DDO4. We do not agree. In the context of the scheme as a whole, of cl 43.02, and of DDO4, ‘should’ has a non-prescriptive or non-mandatory meaning, consistent with the performance-based system in VPP schemes. The scheme, as a whole, employs ‘must’ for prescriptive or mandatory provisions and ‘should’ for non-prescriptive or discretionary provisions. [\[16\]](#)
4. DDO4 employs both ‘must’ and ‘should’. It employs ‘must’ in cl 5.0 where specified matters, as appropriate, are required to be considered in deciding an application. It employs ‘should’ in cl 2.0 and in

numerous places in that clause. Clause 2.0 contains a contrasting mandatory provision at the outset – it provides that a permit ‘is required’ to construct a specified fence.

5. We find, therefore, that the word ‘should’ in cl 2.0 of DDO4 is non-prescriptive and non-mandatory.
6. Because DDO4 contains no mandatory ‘requirements’ it is unnecessary for a permit to be granted under cl 43.02-2 that does not accord with the discretionary benchmarks in DDO cl 2.0. A permit is required only under cl 43.02-2 to construct a building or carry out works.
7. It is unnecessary to ascertain the intentions of the drafters of DDO4 because it is clear that cl 2.0 of DDO4 does not have a mandatory character. However, we note that our view accords with the view of the planning panels that considered Amendments C66 and C75 that the provisions should be flexibly and not rigidly applied and are a ‘starting point’ and a ‘guide’ to the preferred scale of development.

The two scenarios in clause 2.0

1. Turning to the discretionary benchmarks in cl 2.0, we find that their intent and drafting is unclear.[\[17\]](#)
2. Clause 2.0 provides two alternative scenarios for setbacks from the river crest line. It also provides a separate provision for preferred podium height to Victoria Street.
3. The first scenario in the first two dot points of cl 2.0 is a standard 10 m setback from the crest line where an 11 m maximum building height is preferred, with buildings rising 1 m for each 4 m from the setback line. This produces a three-dimensional building envelope with a height rising to the west and south of the crest line. This is an inflexible approach that fails to respond to a site’s particular characteristics.
4. The second scenario in the third dot point of cl 2.0 is what is expressed to be a ‘desirable’ 20 m setback from the crest line where the gradual stepping up in height under the first scenario may be exceeded subject to consideration of five specified factors. It is not clear to us why this discretionary benchmark begins at a 20 m setback. It logically means setbacks between 10 m and 20 m are subject to the first scenario.

Second scenario – first factor

1. The first of the five factors seeks ‘universal public access’, effectively public open space, for land in the 20 m setback in order to complement the river corridor.[\[18\]](#) It is unclear why this is not the aspiration under the first scenario. However, more fundamentally, the provision appears inflexible and unreasonable to us. In the context of this subject site and its steep crest, any public use of the setback area is unwarranted. The only reasonable planning purpose of such a setback appears to us, in the context of a site such as this, to act as a landscaped buffer to complement the landscaped public land along the river

Second scenario – second factor

1. The second of the five factors seeks to have a 35 m setback from the crest line for any parts of a building that exceed the height formula in the first scenario. It is not clear why 35 m was identified. Again, it does not respond to a particular site.

Second scenario – third factor

1. The third of the five factors seeks to specify a maximum building height of RL 41 m that should transition to a maximum of ‘approximately RL 29’ m at the river end of Victoria Street. It is also unclear why this is not the aspiration under the first scenario or, in any case, how it relates to the river-based objectives of DDO4.

Second scenario – fourth factor

1. The fourth of the five factors seeks to specify that ‘additional building volume’ above ‘the typical height/setback ratio’ (ie the formula in the first scenario) should not exceed the ‘usable building volume which could have been created within the setback area beyond the 10 metre absolute minimum’. This provision is also unclear to us for three reasons.
2. First, it is unclear if the ‘additional’ volume is gross or net volume.
3. Second, ‘usable building volume’ is not defined and creates uncertainty about whether the volume that ‘could have been created’ involves a straight application of the formula or some variation about what is the more likely volume having regard to a specified use and to the context of the particular land.

4. Third, it is unclear how the transition in height along Victoria Street is to be addressed in calculating the volume.
5. Mr Hayton's evidence was that, for the first scenario, the DDO4 envelope (ie with a 10 m setback) authorised a gross volume of some 203,000 cubic metres and that the proposed building (including those parts above and below this envelope) were about 136,000 cubic metres.
6. The Groups' architect estimated this volume and considered further variables, such as stepped versus sloping profiles, in the ratio. He calculated the gross envelope volume at up to 226,000 cubic metres (depending on particular assumptions) and the proposal's volume at 206,000 cubic metres.
7. Given the lack of clarity about this factor, the calculations by the parties were of little assistance to us. The calculations have little relevance when the proposal has carved out large areas of building volume for open areas, including the main pedestrian link. We regret to conclude that what might have seemed to the drafters of DDO4 to be a good idea in principle is meaningless in its detailed application.

Second scenario – fifth factor

1. The fifth of the five factors is (unlike the first four) a non-numeric discretionary benchmark and introduces subjective factors. It relevantly states that the building's design should demonstrate 'superior architectural quality', 'principles of environmentally sustainable design' and 'reasonable protection of nearby sites' re-development potential'.
2. We have some difficulty with this factor. In effect, greater setback can be traded off for greater height, provided subjective factors are demonstrated. How those subjective factors are to be evaluated is unclear. Expert peer review is perhaps the only way.
3. More fundamentally, we are concerned that there appears to be no nexus between the subjective factors, the extra height that can be gained if they are satisfied, and the objectives of DDO4. In other words, it is contemplated that a building of higher architectural quality (however measured) but potentially poorer relationship to the river environs could be supported in preference to a building of poorer architectural quality but superior relationship to the river environs. We feel that this issue has not been thought through to its

logical conclusion.

Do the five factors apply to the first scenario?

1. The drafting of cl 2.0 does not expressly provide any factors that should apply if the height formula is not complied with under if the first scenario (ie a minimum setback of 10 m is provided). This is the scenario, in general terms, in these proceedings. We can see no valid planning reason why cl 2.0 ought not provide factors in this circumstance.
2. Clause 5.0 of DDO4 anticipates this circumstance. It requires the Council (and this Tribunal, on review) to consider three specified factors. The first includes specified sub-factors if a building ‘exceeds the height benchmarks’ in DDO4. We conclude that the proposal before us does exceed those discretionary benchmarks and brings those factors into consideration. We have considered those matters in this case.

Victoria Street podium height

1. After the first and second scenarios in the first three dot points of DDO4, there is another discretionary benchmark concerning podium building height to Victoria Street. It provides that the height should not exceed RL 26 m. The fourth dot point of cl 2.0 provides that upper levels (presumably above the podium) should be setback and articulated and should ensure specified amenity impacts are minimised and views to landmarks such as the *Skipping Girl* sign are protected.
2. This provision can be faulted for being largely unrelated to the DDO4 objectives. Upper level impacts on ‘riverside open spaces’ is within the objectives but others (such as overshadowing of adjoining dwellings) are not.

Application of UDF in interpreting DDO4

1. Boroondara urged us to interpret DDO4 having regard to the ‘guidance’ on building height in the UDF. We do not accept that approach. We will not discern the legal effect of a provision of a scheme having regard to an earlier strategic document that was one of a number of matters that may have influenced the Council in its drafting of DDO4 and that is now no more than a reference document under cl 6.0 of DDO4. We do, of course, consider the

‘aspirations’ of the UDF, as cl 5.0 of DDO4 requires us to do.

Conclusion

1. The meaning of cl 2.0 of DDO4 is clear. It does not specify requirements or benchmarks of a mandatory character. It specifies discretionary benchmarks that, subject to the grant of a permit, may be varied, having regard primarily to the river-corridor objectives in DDO4.
2. In the end, cl 2.0 of DDO4 is not much more than a preference that:
 - buildings should not exceed RL 41 m in height,
 - there should be a transition in height along Victoria Street from Walmer Street to a maximum of RL 29 m at the Yarra River,
 - the setback from the crest line should be at least 10 m with a maximum building height at this setback of 11 m above the natural ground surface, and
 - the built form should moderate as it falls away from the Victoria Street frontage to the River.
3. The intent and drafting of cl 2.0 of DDO4 is unclear and warrants reconsideration.

Height scale and mass

1. The Applicants submitted that the proposal did not strike an appropriate balance between increasing development in a MAC and on a SRS, on the one hand, and protecting the natural features of the river corridor, on the other. More specifically, they argued that the proposal failed to meet the ‘requirements’ (or, as we have found, the discretionary benchmarks) of cl 2.0 of DDO4 and thereby the objectives of DDO4 and, consequently, it would not improve or enhance the existing public open space.
2. The Applicants sought increased building setbacks from the northern and eastern boundaries of the Honeywell site and various reductions in building height. Ultimately, the Groups, Boroondara and Ms Colquhoun did not have a common position on a preferred building height.
3. We have concluded that the proposal meets the relevant objectives of the scheme, particularly those in DDO4, and that there is no justification in reducing building height or increasing its northern and eastern boundary setbacks. We do conclude, however, that the

three upper levels of Building 1 should be set further back from Victoria Street, as proposed by Mr McGauran.

4. The height, scale and mass of the proposal is important on two of its interfaces – the Victoria Street frontage and the Yarra River. We deal with these in turn.

Height, scale and mass - Victoria Street

1. The Groups and Boroondara submitted that the proposal would be excessively high and bulky in views along Victoria Street, of not complying with the prescriptive requirements of the UDF and the Structure Plan.
2. We have concluded that, in the context of the emerging built form along Victoria Street, as is now being established by other development approvals and with regard to the principles in the UDF and the Structure Plan, the proposal's interface with Victoria Street is acceptable.
3. The relationship between this development and the Victoria Street streetscape is set out in DDO2 (which applies along the Victoria Street frontage of the *Victoria Street East Precinct* as well as to other arterial roads), and DDO4 (which applies to the whole of the *Victoria Street East Precinct*).
4. DDO2 is a generic overlay that has been applied to land fronting a large number of arterial roads in the City. It contains a set of very generalised objectives which do not reflect the fact the *Victoria Street East Precinct* is one designated for major change. DDO4, as we have discussed already, sets objectives and discretionary benchmarks for building height and setback. The focus on height and setback benchmarks is at the river interface. The preferred maximum building height along Victoria Street is RL 41 m and includes a requirement for a height-transition along Victoria Street to the River at RL 29 and a maximum podium height along Victoria Street of RL 26 m.
5. Mr Czarny faulted the Victoria Street interface because, he submitted, it failed to comply with DDO4, in particular the lack of a podium, excessive height and presentation of 'long uniform elevation to the south east of the site'. He concluded that the proposal would appear as an undifferentiated mass in views from the east, notwithstanding the separation of the tower structures in Stages 2 and

- 3.
6. Ms Lardner, in her submissions and cross-examination of various witnesses, sought to emphasise the undesirable dominance of the proposal, particularly Stages 1 and 2, when viewed from the bridge. She proposed that the south-western end of Stage 2 should be shortened to allow a gap to be seen between Stages 1 and 2 when viewed from the bridge.
7. She also sought to establish that the proposal exceeded the preferred building heights in the UDF and the Structure Plan.
8. The proposal, in relation to its presentation to Victoria Street, exceeds the discretionary benchmarks in DDO4, even taking into account the drafting deficiencies of DDO4, which we have already discussed. The maximum height exceeds RL 41 m - the Stage 1 tower has a maximum height of RL 51.65 m, Stage 2 of RL 45.90 m and Stage 3 of RL 43.70 m, with the most prominent eastern podium, towards the river, being at RL 26 m.
9. Do these heights satisfy the objectives of DDO2 and DDO4? The DDO4 objectives relate to the river interface. The only objective that relates, in part, to the Victoria Street frontage is the objective that seeks to protect views to significant landmarks from Victoria Street. Clause 5.0 of DDO4 requires consideration of a number of river interface matters plus the Victoria Street's southern footpath, landmark view protection and the UDF aspirations.
10. In contrast, DDO2, which relates specifically to Victoria Street, contains only the most general and vague of objectives and these do not readily relate to a locality expected to undergo substantial change. These objectives are, for example, largely directed to such matters as protection of 'existing streetscapes and places of cultural heritage significance', reinforcing 'the pattern of development and the character of the street', achieving high quality architecture, maintaining or creating a high level of amenity for adjoining dwellings and so on, and improving community safety and limiting visual clutter. The most general, but perhaps most useful nevertheless, is the first objective '[t]o recognise the importance of main roads to the image of the City'.
11. The three decision guidelines are no more helpful, merely providing a checklist of matters that the responsible authority must consider, without any further guidance.[\[19\]](#)

12. Mr McGauran had proposed, and the Respondent had not opposed, that levels 8 to 10 of the Stage 1 building be set back a further 6 metres further from Victoria Street. Subject to this proviso, he concluded that the proposal would be responsive to the preferred future character of the street, as envisaged by existing approvals and planning controls. These include provision for a building on the south side of Victoria Street (in the Victoria Gardens complex) to a height of RL 55 m, the existing Fenix building to the east of this at RL 35 m and other approvals to the west of the land and on the northern side of Victoria Street.[\[20\]](#)
13. The proposal will provide a hard urban edge to Victoria Street, as already occurs elsewhere and as is supported by other policies and the UDF. We consider that the height of the three towers, subject to the upper-level setbacks proposed to the Stage 1 tower by Mr McGauran, are acceptable. The overall Victoria Street frontage is broken into two large and differentiated elements by the open-space link, the varying architectural treatments and the articulation created by the different orientation of the three towers themselves.
14. We accept that, in conjunction with the likelihood of a building opposite to a height of RL 55 m, the proposal will help frame a worthy gateway at the eastern end of Victoria Street and we accept the opinions of Mr Borelli and Mr Jordan that a large building is appropriate for this location on this road. With respect to Ms Lardner's submission about the overwhelming bulk of Stages 2 and 3, we conclude that the large space between them will clearly differentiate them into separate elements and the Stage 1 building to the rear of Stages 2 and 3 would largely nullify any the benefit of any gap between the latter two buildings.

Height, scale and mass - the river interface

1. As previously stated, the most relevant provisions of the scheme, in relation to the river interface, are DDO4, cl 21.05 (Built Form) and cl 22.11-3 (*Victoria Street East Precinct Policy: Yarra River and Open Spaces and Urban Design and Built Form*). The UDF (a reference document in DDO4) and the Structure Plan (adopted by Council in April 2010) are also relevant.
2. The Applicants submitted that the proposal's height and setbacks from the northern and eastern boundaries met neither the first

scenario (the 10 m setback) in cl 2.0 of DDO4 nor most of the factors for exceeding the second scenario (the 20 m setback).^[21] We have no difficulty in finding that the proposal does not meet the discretionary benchmarks in DDO4.

3. Each of the proposal's three towers has a height that is, to different degrees, in excess of that preferred by DDO4.^[22] DDO4 seeks to achieve a height along Victoria Street that progressively reduces from a high point to the west to a lower point near the bridge. The proposal's northern and eastern boundary setbacks, at 10 m, include excavated terraces/courtyards for the lower outward-facing layer of dwellings and the outer edge of these terraces have a minimum 5 m boundary setback. On the other hand, the wall heights at the minimum northern and eastern setbacks are to be substantially less than the preferred 11 m in DDO4.
4. However, the proposal's failure to meet the DDO4 discretionary benchmarks does not mean it therefore fails to meet DDO4's relevant objectives. The Respondent's witnesses' evidence was that the proposal does satisfy the objectives of DDO4 and the related intents of the UDF and the Structure Plan. We agree with Mr Pitt that the Applicants relied too much on testing the design against the discretionary benchmarks of cl 2.0 of DDO4 and did not apply any other test to ascertain compliance with DDO4's objectives.
5. Ultimately, while the benchmarks may be the preferred way of meeting the objectives, they are not the only way and a failure to meet the benchmarks does not justify a conclusion that the objectives are not met. In this respect, we gave greater weight to the evidence of Mr Sheppard and Mr McPherson who, more explicitly, evaluated the proposal against the objectives of DDO4.
6. Given that the appropriate test of the proposal's acceptability in relation to DDO4 becomes one of assessing it against the four relevant objectives, we have found it most useful to consider on the evidence and submissions relative to each of these, in turn.

The first DDO4 Objective: To relate the siting, scale, bulk and massing of new development to the distinctive landscape character and topography of this section of the Yarra River corridor.

1. In our opinion, the most important viewpoints from which to assess this objective are those from the Trail, which passes along the

riverbank by the land's northern and eastern aspects, and from the bridge. We have dealt elsewhere with the matter of views from private land situated across the river.

2. Mr Sheppard's evidence was that the proposed building envelope, with its 10 m wall setbacks and relatively low outer walls would satisfy this objective better than the discretionary benchmark with 11 m high walls with the same setback and a 1:4 upward envelope slope above that. We agree.
3. Mr Sheppard's conclusion drew on the architect's presentation of sight lines to the proposed building from the adjoining Trail. These demonstrated to our satisfaction that the visible components of a building that complied with the first scenario in cl 2.0 of DDO4 (ie an outer wall of 11 m maximum height at a 10 m setback) would be much more dominant to someone on the Trail than the nearer visible elements of this proposal. That is, this proposal would be visually less dominant than would a building that complied with the first scenario envelope in cl 2.0 of DDO4.
4. Though not a determinative issue, we note that the proposal would be less visible from the Trail than most other buildings adjoining the Trail to the west. We do not consider that DDO4 is seeking to conceal development on the land from the Trail.
5. With respect to the landscape character of the river corridor as it may be experienced from the Boroondara side of the river, we conclude that this aspect is also acceptable.
6. The landform across the river is widely varied. There is a steep escarpment to the east, around the river bend and along to Hodgson Street. West of Hodgson Street are river flats that are partly in public and partly in private ownership. Some of this land is in a Public Acquisition Overlay or an Urban Floodway Zone. The zoning and overlays of the *Boroondara Planning Scheme* indicate that, at some time in the future, all of the riverbank west of Hodgson Street will be public land. The areas of existing and future public open space across the river and west of Hodgson Street are about 100 m from the proposal's upper levels and provide direct or oblique views towards and past the land.
7. There is also an area of public land immediately north of Victoria Bridge east of the River, accessed by a narrow ROW from a nearby court. There is no indication that, either now or in the future, this

area would receive much public use and, in any case, views from this area are screened by mature trees.

8. We conclude that, apart from the matter of building height, the differences between the proposal and a building that complied with the envelope that met the discretionary benchmarks in the first scenario of DDO4 cl 2.0 would not be material. Either way they would both be large, relatively bulky buildings but with their higher sections set well back and, in the case of this proposal, the lower sections being more eroded than sought by the DDO4 envelope.
9. We accept Mr McGauran's opinion that, in views from the north, the proposal will form 'a legible albeit evident part of the emerging Victoria Gardens shopping centre and ... will integrate in a visually coherent form with (its) emergent scale ...'.
10. The north-eastern (outer) end of the Stage 2 building, as originally proposed, would have a vertical wall of three levels above a podium, with the levels above this wall then stepping back. Mr McGauran proposed, and the Respondent did not oppose, that certain upper levels of the Stage 2 tower be set further back from the river, in order to reduce their 'visual intrusion ... into the river view'.
11. This additional setback would be applied to levels 6, 7 and 8, with level 6 being the top level of the 'wall' component referred to above. Mr Jordan disagreed, concluding that these setbacks would 'confuse the clarity of the design concepts for each building'.
12. We agree with Mr Jordan. The increased setbacks of the nominated levels would increase the sense of erosion of the north-eastern end of Stage 2 by weakening the wall-effect of the original design. The removal of the area of building proposed by Mr McGauran would, in our view, make only a minor difference to the building's profile, and that would be for a high part of the profile and for only limited and more distant viewing points.
13. We agree with Mr Jordan than retention of the full sections of levels 6 to 8 would ensure an intended degree of consistency between the architectural concepts of all stages and would have no or minimal effect on observers' appreciation of the river corridor or any sense of the building's overall scale.
14. Mr Jordan also differed from Mr McGauran in respect to the treatment of the roof profile. Mr McGauran had proposed something more 'transparent and ephemeral', while Mr Jordan proposed that the

top of the building ‘adopts the treatment of the elevation of the typical floors unaltered ...’. We agree with Mr Jordan’s view on this matter, as this would maintain the original strength of the building’s capping.

15. We also questioned the parties about the possibility of later construction of transmission towers above the building’s parapet, devices that would seem to destroy any architectural roof scape that was being argued before us and had not been considered by the designers or expert reviewers. Mr Pitt proposed an appropriate permit condition requiring shrouding if and when such devices were proposed in the future.
16. We conclude that the original proposal meets this objective, including with the retention of the river-end sections of levels 6 to 8 of Stage 2. We also accept Mr Jordan’s opinion as to the appropriate treatment of the roof profile and add our own requirements for a permit condition that would require (with appropriate design forethought) for the concealment of any future transmission structures above the building.

Second DDO4 Objective: To enhance and improve the natural landscape of the river corridor and provide publicly accessible riverside open space and an improved riverside pathway system.

1. The proposal will substantially improve the public accessibility of the riverside open space and pathway system. The proposal includes the new pedestrian link between Victoria Street and the river, leading down to the proposed pontoon (the **link**). Additional landscaping will be provided along and behind the embankment.
2. Although DDO4 does not require an east-west pedestrian link between Victoria Street and the river, various policies and referral documents do refer to such a link:
 - The Structure Plan proposes, at page 15, to ‘develop more attractive links to the River from Victoria Street’ while the map on page 16 shows a number of possible links across or near this site, with a notation ‘investigate opportunities for green links to the river with new developments’.
 - The UDF, at page 5, shows a continuation of River Street (to the south of Victoria Gardens) across the site to the river as ‘a pedestrian priority boulevard’.

- The *Victoria Street East Precinct Policy*, at cl 22.11 of the scheme, includes the objective '[t]o create strong public links to the Yarra River and improve the accessibility and amenity of the River corridor as a significant public open space'. However, there is no specific policy that would implement this objective as a cross-site pedestrian link.
3. The Respondent's witnesses' opinion was that the link would be a valuable, publicly accessible and usable open space and should be considered a contribution to the accessible open space along the river corridor, as required by policy and referred to in DDO4 cl 1.0 and cl 2.0. Boroondara argued that the link is required by policy, should be provided anyway and should not be considered as a contribution to the open space sought by DDO4.
 4. It seems to us that the policy requirements for this link are relatively vague and inconclusive and there are many ways that it could be provided that would not contribute anything to public open space or its integration with the river corridor. One example that comes to our minds, where there is much clearer requirement for a pedestrian link (though none for public open space) is the east-west link that the *Stonnington Planning Scheme* requires to be provided through the Forest Hill Precinct in South Yarra.[\[23\]](#) Developers have now provided that part of this link between Yarra and Claremont Streets.
 5. On this basis, we accept that the link goes well beyond that that would satisfy the presently vague policy and would also provide a substantial benefit in terms of publicly accessible, attractive and usable open space that would effectively link on-site activities to the riverbank area.
 6. Other than for providing for additional landscaping, users will get little value by increasing the area of open space around the Honeywell site's river boundary, whether publicly accessible or otherwise and whether of 10 m or 20 m width, as is encouraged by DDO4. This is because the steep embankment between the crest line and the Trail would render ineffective any attempt to integrate these two areas and, in the absence of such integration, we do not see that such an upper level of accessible perimeter open space would be of any great public benefit.
 7. We therefore do not agree with the Groups that a rigid 20 m setback should be imposed and that all of that area must be publicly

accessible and no part used for private open space.

8. We conclude that this objective is met.

Third DDO4 Objective: To provide for long-range views of the River corridor paths and areas of public open space within the river corridor and on the opposite bank, and protect views of significant landmarks from Victoria Street.

1. This objective seeks to protect views from more distant points of the areas of public open space within the river corridor, and of areas of public open space in the City of Boroondara, as well as views of the *Skipping Girl* sign to the west.
2. There were no submissions suggesting that the proposed buildings close to Victoria Street would obstruct or fail to protect views of the *Skipping Girl* sign.
3. Boroondara argued that there would be an adverse visual impact of the proposal from the Barkers Road cutting (the **cutting**) and the Victoria Street Bridge (the **bridge**). Ms Lardner identified this as the most important issue affecting Boroondara, because this viewpoint 'would afford the greatest appreciation of the proposal from the public realm'. This concern is, in our view, unrelated to this third objective, for two reasons.
4. First, the concern is unrelated to 'long-range views of the River corridor paths'. These paths are largely out of view from the cutting and the bridge, particularly by vehicle occupants on Barkers Road and the bridge. Even if they were in view from certain points, the proposal does not disturb those views.
5. Second, the concern is unrelated to 'long-range views of areas of public open space within the corridor and on the opposite bank'. The proposal does not disturb the view of the riverside area public open space in the corridor from the cutting and the bridge, and does not disturb any views of public open space on the opposite bank. Those areas are largely not in view from the cutting and the bridge and, to the extent they might be, are not disturbed by the proposal.
6. We have already referred to Boroondara's submission that the south-west end of Building 2 be truncated to open a viewing gap between Buildings 2 and 3. Having regard to the location of Building 1 and the topography and other existing buildings to the west, we do not accept this change would create views of public open space in the

river corridor.

7. We find that the proposal would not interrupt or obscure any views of ‘the river corridor *paths and areas of public open space*’ (our emphasis), though this is not the point that we think the Applicants were advancing. Rather, the proposal will introduce a new, large building element adjoining, above and stepping away from those paths and spaces. The building’s height, whether as proposed or somewhat less, would not affect views of the paths and spaces and, in our opinion, an increase in the setback from 10 m to 20 m for the river boundary wall would have little or no effect in these views. The proposed 10 m setback will include a 5 m strip that is available for additional landscaping, so that in conjunction with additional landscaping to the adjoining embankment and public open space, the river corridor’s vegetation will be enhanced.
8. We conclude that this objective is met.

Fourth DDO4 Objective: To minimise overshadowing of the river corridor and public spaces

1. No shadow will be cast across the river to the north of the site and minimal shadow outside the site to the east until the equinox. Similarly, the proposal will cast no shade over the southern footpath of Victoria Street footpath until closer to the winter solstice.
2. We conclude that this objective is met.

Amenity

1. Ms Colquhoun and two of her neighbours reside about 130 m to the north of the land, across the river. They objected to the height of the proposal and submitted that it should be substantially reduced. They submitted that it unreasonably exceeds the discretionary benchmark maximum heights in DDO4 and it would be too intrusive in this sensitive setting.
2. They were also concerned about the loss of amenity from night-time illumination of premises within the proposal. They were also concerned about the potential for sleep disturbance from night-time use of outdoor activities associated with the roof-top bowling green and lower-level restaurants and the pontoon.
3. We have concluded elsewhere in these reasons that night-time noise from the proposal can be adequately managed and should not cause

nuisance. We have also concluded that the scale of the buildings is acceptable in terms of its impact on residents to the north.

4. Mr Kane submitted that the proposal's impact on neighbours to the north should be considered in terms of its affect on their amenity and its effect on the character of the area. The former related to potential noise from outdoor areas within the proposal, the latter to the visual intrusion of the building, particular those parts that exceeded the building envelope preferred by DDO4 and, more specifically, the upper sections of the towers of Stages 1 and 2.

Visual amenity/intrusions

1. Mr Schutt prepared photographic montages that sought to demonstrate the scale of both the DDO4 building envelope and the proposal, as viewed from three adjoining properties to the north of the site. We accept that the proposal's height substantially exceeds the first scenario building envelope in cl 2.0 of DDO4 and the greatest excesses are the tower blocks of Stages 1 and 2. Mr Kane submitted that the drivers for more intensive development should be tempered by policies that a design 'is appropriate to its location and sensitive in its impact on adjacent residential properties'.
2. However, we conclude that relevant policies do not provide this thrust. While there are general policies to this effect in the scheme at both State and local levels, these are quite generic. More specific, and therefore of greater relevance, is the lack of any reference to context or character in the strategies for a MAC as compared to a Neighbourhood Activity Centre.[\[24\]](#)
3. On one view, the envelope in the DDO4 first scenario provides the appropriate balance that Ms Colquhoun and her neighbours are seeking because it reflects both an intention to allow much greater densities of development on the land and to define an outer limit to the overall building scale. However, we do not consider that the envelope of DDO4 can be interpreted this way.
4. Rather, cl 2 of DDO4 allows an unspecified increase in building height trade-off for other design features. We can understand the attraction for planning authorities in offering a trade-off of more development in one form or another in return for some other public benefit. However, we find it difficult to see any nexus in this case between the extra building height in return for increased setbacks of

walls from the crest line - or at least, there is no obvious nexus insofar as this provision affects Ms Colquhoun and her neighbours.

5. In this case, DDO4 encourages an increased building setback of 20 m from the crest line and, in return, allows an unspecified increase in building height, with the higher buildings set 35 m from the crest line. If the design had followed this preference, Ms Colquhoun and her neighbours could well be faced with building towers of the same height as this proposal, set only slightly further away. The fact that the ground-level walls would be 20 m, rather than 10 m, from the crest line would be irrelevant to the intrusive effect of the towers.
6. While views may legitimately be considered to be a significant aspect of a dwelling's amenity, the protection of views should be supported by planning policy or controls if they are to be given considerable weight. The residential areas to the north are facing a MAC and it is inevitable that, given the size and nature of the Honeywell site, they will be facing a development of a large-scale typology. A reduction in height of any of the towers by up to three storeys will not alter the general nature of that typology. We have concluded that the proposal amounts to a change of view, not to a loss of visual amenity.
7. We also have taken into account the extent of the intervening distance (about 130 m) and that further development on the Victoria Gardens site to the south of the land, rising to a permitted RL 55 m, will also appear above the canopy.
8. Consequently, having regard to the fact that issues of neighbourhood character are explicitly excluded from the strategies for a MAC, and to the fact that DDO4 explicitly allows buildings to exceed its envelope on conditions that would not be discernible from across the river, we conclude there is no unreasonable loss of visual amenity.

Noise

1. The grounds relied on by Ms Colquhoun and her neighbours relate to unreasonable noise impacts, principally from the proposal's two restaurants (partly outdoor), one café, rooftop bowling green and adjoining wine bar, and pontoon.
2. The Honeywell site has few sensitive interfaces. Adjoining land to the west is commercial and is part of the MAC. The nearest existing sensitive uses are those of Ms Colquhoun and her neighbours, about

130 m away.

3. The only expert noise evidence was that of Ms Hui, called by the Respondent. The nearest sensitive noise receivers will be the dwellings within the proposal. As noise emissions from the proposal's commercial elements must comply with SEPP N-1 and SEPP N-2 in respect of dwellings within the proposal, those requirements for dwellings 130 m will also be met.
4. In our view, the notice of decision satisfactorily deals with control of unreasonable noise.
5. The notice of decision requires the preparation of an updated acoustic report before the works are completed, which is to demonstrate compliance with permit conditions and SEPP N-1. It also requires the removal of the roof top wine bar on Building 1. It also requires that no live music be played at the restaurants and there be no external speakers. It addresses patron noise from outdoor areas by requiring compliance with a Noise and Amenity Action Plan endorsed by the Council. It specifies maximum patrons numbers in the restaurants and the café and requires trading to cease at generally 1 am at weekends (for the restaurants) and 11 pm at other times.
6. There is no evidence to support the need to relocate the bowling green from the rooftop of Building 1 to Building 3. In the absence of a liquor licence, we do not anticipate that noise from the bowling green would be of any significance.
7. Ms Colquhoun seeks the restaurants and cafes to cease trading at 10 pm. In the absence of evidence, in the context of location in a MAC and having regard to the fact that dwellings in the proposal will be much closer to noise sources than Ms Colquhoun's dwelling, we are unable to agree with a condition to this effect.

Architectural quality

1. State policy seeks to achieve 'high quality urban design and architecture'.[\[25\]](#)
2. Local policy also provides that:
 - Higher built form in DDO4 should demonstrate 'superior architectural quality'.[\[26\]](#)
 - Higher built form on strategic redevelopment sites or within activity centres should achieve 'architectural design excellence'.[\[27\]](#)

- New development should make a positive contribution to streetscape through ‘high standards in architecture’.[\[28\]](#)
3. Ms Reed and Mr Jordon provided detailed analysis to explain why they considered the proposal to represent high quality architecture in both the sensitivity of its layout to the site and its context and its architectural massing and detailing and, in this context, supported its contribution to the Victoria Street streetscape. Ms Reed proposed further improvements to the detailing of some of the ground-floor, Victoria Street frontages.
 4. Mr Sheppard proposed additional windows to the east façade of the commercial space fronting Victoria Street.
 5. Mr Lewis relied on a document prepared in 2006 by the UK Commission for Architecture and the Built Environment (the **CABE**) entitled *CABE Design Review – How CABE evaluates quality in architecture and urban design*. Applying the *CABE Design Review* criteria, he considered the building to be of poor architectural quality in almost every respect. His analysis was based on testing whether the design met one of the criterion that could be used to justify heights in excess of the DDO4 guidelines.
 6. The approach of the *CABE Design Review*, in providing a number of criteria against which to assess a design, appears sensible. However, it does not in our view provide a useful basis for assessing the quality of a particular architectural design. Nonetheless, it may provide useful guidance for the design process or in comparing designs, as in an assessment of entries to a design competition. The *CABE Design Review* contains no design benchmarks against which a design’s outcomes can be objectively measured and most criteria are expressed in highly general terms. Mr Lewis’ assessment of the design against many of the criteria also appears to be unsubstantiated and more a matter of opinion.
 7. We have concluded that we should place greater weight on the opinions of Ms Reed and Mr Jordan.
 8. We find that the proposal represents a building of considerable architectural merit. We were impressed with the concept of three tower elements of rectangular form with narrow sides facing the river in a northerly, north-easterly and easterly orientation. This ‘three fingers’ concept creates a sense of openness and penetration to the river and a focus for pedestrian and vehicular entry to the urban edge

of the Victoria Street. It facilitates progressive eroding of the harder urban interface at Victoria Street towards the river. It also minimises less favourable southern orientation of dwellings and permits of a variety of architectural treatments and articulation.

9. The design also provides new public open space adjoining the river corridor and Trail and in the entry to the new major pedestrian link to Victoria Street. It also minimises space on the surface of the Honeywell site for vehicle access and car parking, and maximises pedestrian access. Finally, it also employs a variety of materials and finishes, including natural timbers and vegetation to green to selected facades.

Environmentally sustainable design

1. It is policy to encourage development to incorporate environmentally sustainable design (**ESD**) measures in a range of 'areas' such as passive solar design and water efficiency.[\[29\]](#)
2. The fifth factor in DDO4 for permitting proposed buildings in excess of the discretionary benchmark height/setback ratio in the first scenario in cl 2.0 is if the 'design demonstrates principles of [ESD]'.
3. Although we have concluded, separate to this criteria, that the design meets the objectives of DDO4, we have also concluded that the proposal does demonstrate a number of these ESD principles.
4. The proposal achieves a performance greater than that required by the Building Code of Australia (**BCA**). It therefore achieves a high level of thermal performance. It does not achieve 'world class' ESD principles, but that is not the standard encouraged by the scheme. The notice of decision incorporates a range of further measures, such as shading to western facades and rainwater connection to a number of toilets.
5. Ms Collis' evidence was that the rating tool that accords with best ESD practice is the Green Building Council of Australia Green Star Multi-Residential rating tool. In her opinion, the proposal could achieve between 24 and 42 points out of 100 points under that tool, which is insufficient for four-star Green Star certification or 'best practice'.
6. Mr Talacko re-evaluated the proposal's rating in light of changes to the Respondent's landscape plan prepared by Tract Consultants. The main change was the incorporation of rain gardens. This provides for

enhanced stormwater quality performance and rainwater harvesting. This change enables, in his opinion, the proposal to be capable of achieving a four-star Green Star rating.

7. On a more qualitative level, there is a high level of bicycle parking spaces, the ready availability of tram services, access to the Capital City Trail, a relatively low proportion of dwellings with a purely southern orientation, and various ESD-oriented changes required by the notice of decision.
8. We rely on the revised rating by Mr Talacko and the various qualitative features of the proposal and included in the notice of decision in order to find that the proposal demonstrates principles of ESD.

Aboriginal cultural heritage

1. The Groups submitted that a cultural heritage management plan (a **CHMP**) was required to be prepared under the [*Aboriginal Heritage Act 2006*](#) (the **AH Act**). They sought to amend their statements of grounds to require the preparation of a CHMP as a condition of any permit that the Tribunal may ultimately grant.
2. In its order dated 17 August 2010, the Tribunal refused to allow the Groups to amend their statement of grounds. However, the Tribunal identified a question of law concerning whether a CHMP was required to be prepared and approved under the AH Act before the Tribunal could grant either or both of the permits.
3. The question, and the opinion of the Presiding Member, are set out in Appendix A.

The riverside works

1. The opinion of the Presiding Member is that the Tribunal is unable to grant a permit for the riverside works, having regard to the effect of the AH Act. The Respondent must prepare a CHMP before a permit could be granted.
2. To assist the parties, the Tribunal heard argument on Application P1204/2010.
3. With the benefit of that argument, we are prepared to indicate that we are favourably disposed towards the grant of a permit in accordance with the notice of decision.
4. We cannot provide the parties with any more of an indication at this

stage. If a CHMP is prepared and approved, any permit we ultimately grant must be consistent with the approved CHMP.[\[30\]](#) We understand that the preparation and approval of a CHMP may take some time and, consequently, there is a possibility that legislation, including the scheme, may change before the date of our final orders.

5. In coming to our tentative views, it is relevant that Melbourne Water (the waterway and floodplain authority), Parks Victoria (the land manager) and Department of Sustainability and Environment support the grant of a permit for the riverside works, in accordance with the notice of decision.
6. The riverside area is Crown land reserved for ‘conservation, recreation and tourism’ in 2001. It is used for public open space.
7. The proposed works consist of a floating pontoon in the River, stairs to and across the Trail between the pontoon access ramp and the link between Buildings 1 and 2, widening of the Capital City Trail, stairs between Building 3 and the upper Trail, and removal and subsequent re-instatement of some vegetation.
8. The Groups submitted the stairs on the eastern side of the riverside area should only link to the upper Trail. We do not oppose this submission, and note that the riverside works and the notice of decision already incorporate this restriction.
9. The proposed works are consistent with broad objectives for improving the recreational and tourism potential of the Yarra River and with the purpose of the PPRZ. The modified pontoon, as proposed in the notice of decision, will have a reduced environment impact and is consistent with the purpose of the ESO.
10. The corridor will be enhanced by the Trail upgrades near the access points and by the proposed landscaping on the public land.
11. The dedication of the first 5 m inside the crest line to a landscaping strip available for public access will enable improved landscaping to strengthen existing landscaping below the crest line. As we state elsewhere in these reasons, we do not consider the 5 m as being needed or likely to be actually used to any significant extent for use by the public for open space. The main public use will continue to be the Trail.
12. In relation to the proposed pontoon, there are a number of private and public pontoons along the Yarra River. All improve accessibility

to the River consistent with policy. We do not oppose the authorities' requests that the pontoon be reduced in size and tucked in closer to the river bank to reduce its impact on the River.

13. The way forward is for the Respondent to consider and formally notify the Tribunal and parties whether or not it intends to prepare a CHMP.
14. If a CHMP is to be prepared, we then anticipate issuing further orders adjourning the Application to an administrative mention in about four months so the Tribunal is informed of the progress that is being made. If the CHMP is approved before the mention, we would expect the Respondent to file with the Tribunal a copy of the approved CHMP. Having regard to the size and scope of the approved CHMP we would then make further orders about service on the parties. The Tribunal may then invite the Respondent to inform the Tribunal whether the parties consent to orders affirming the Council's decision and granting a permit in the form of the notice of decision, or whether a further hearing (for example, on the effect of the approved CHMP) may be required.
15. If a CHMP is not intended to be prepared, the Tribunal would be likely to make final orders disposing of the Application on the grounds the Tribunal has no jurisdiction to grant a permit.

Application to review condition

1. In Application P1345/2010, the Respondent applied to review, in accordance with [s 80](#) of the *Planning and Environment Act 1987*, condition 89 in the notice of decision issued on 16 April 2010 in respect of permit application PL09/0877.
2. On 13 July 2010, after settlement at a mediation hearing, the Tribunal ordered by consent that if a permit was directed to be issued in respect of permit application PL09/0877, Application P1345/2010 was allowed and condition 89 would be amended as follows:

Prior to the commencement of any buildings and works, plans and relevant information must be submitted to Melbourne Water addressing Melbourne Water's conditions to the satisfaction of Melbourne Water.

1. We have made final orders consistent with the earlier order. Condition 89 in Appendix B to these reasons has been amended accordingly.

Submissions by non-parties Department of Planning and Community Development

1. The Department forwarded a written submission dated 3 August 2010 supporting the grant of a permit in respect of the mixed use application in accordance with the notice of decision.
2. The Tribunal did not request the submission. It was not a submission by the Minister for Planning in accordance with cl 57 of schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998*.
3. There was no appearance by an officer of the Department at the hearing.
4. Regrettably, the Department did not serve a copy of the submission on the parties. The Tribunal provided copies to the parties and all parties were given an opportunity to respond to the submissions during the hearing.
5. We have considered the submission.^[31] Its references to State and local policy relating to, and to recently approved developments in, the *Victoria Street East Precinct* were matters that the parties had already brought to our attention.
6. We emphasise that although we have considered the submission, we have come to an independent decision in these proceedings.

Wurundjeri Tribe

1. The Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc (the **Wurundjeri Tribe**) forwarded a written submission dated 6 August 2010 directly to the Tribunal. It pointed out that the Wurundjeri Tribe is a registered Aboriginal party (**RAP**) under the AH Act and has applied to be the RAP for the land.
2. The submission requests the Tribunal to consider the statement of evidence by Nigel Lewis concerning previous disturbance of the Honeywell site.
3. Regrettably, the Wurundjeri Tribe did not serve a copy of the submission on the parties. There was no appearance by a representative of the Wurundjeri Tribe in support of the submission. The Tribunal provided copies to the parties. There were no submissions by the parties on the submission.
4. This request in the submission is dealt with in the question of law set out in Appendix A to these reasons.

Conclusion

1. It follows, from the above reasons, that we conclude that—
 - The notice of decision relating to the Honeywell site should be varied and that a permit should be granted subject to modified conditions.
 - The Application concerning the riverside area cannot be resolved because a cultural heritage management plan must be prepared and approved before a permit could be granted.

Geoffrey Code
Presiding Member

Michael Read
Member

APPENDIX A QUESTION OF LAW

Background

1. The Applications concern two permit applications under the Yarra Planning Scheme (the **scheme**). Consequently, under the [Aboriginal Heritage Act 2006](#) (the **AH Act**) there are two activities and two activity areas.
2. The activity in both permit applications is a high impact activity.[\[32\]](#) Neither is an exempt activity.[\[33\]](#)
3. Permit application PL09/0877 is to use and develop a major mixed use development, including 576 apartments, at 677-679 Victoria Street, Abbotsford (the **mixed use application**). The activity area is the land parcel of 1.422 ha with that address.
4. Permit application PL09/0876 is to develop a pontoon in the Yarra River and associated river bank works, including upgrading the Capital City Trail (a major walking and cycle trail) (the **riverside application**). The land subject of this application adjoins the land subject of the mixed use application and is wholly Crown land. The activity area is those parts of the Crown land that are directly affected by the pontoon and associated works.
5. Unless the activity area for both permit applications has been subject to significant ground disturbance (**SGD**), the activity area for both permit applications is an area of cultural heritage sensitivity (**CHS**) because those areas are within 200 m of the Yarra River.[\[34\]](#)
6. Subject to the SGD issue, a cultural heritage management plan

(**CHMP**) is therefore required to be prepared and approved before the Tribunal could grant a permit.[\[35\]](#)

7. When the Yarra City Council (the **Council**) issued a notice of decision to grant a permit in respect of both permit applications on 16 April 2010 it was satisfied that a CHMP was not required.
8. The Yarra River Action Alliance Inc and Protectors of Public Lands Victoria Inc (the **Groups**) filed a statement of evidence dated 27 July 2010 prepared by Mr Nigel Lewis entitled *Assessment of Post European Ground Disturbance and Cultural Heritage Management Plan Implications* (the **Lewis statement**).
9. The Lewis statement primarily concerned the activity area relating to the mixed use application. It relevantly concluded—
 - (a) The western half of this activity area (west of the southern extension of the alignment of Hodgson Street, Kew) had been subject to SGD by industrial activities before the 1950s.
 - (b) In the 1950s, the then topsoil or surface rock layer of the ground (the **original surface layer**) of the eastern half of this activity area was levelled and filled in the mid 1950s to a maximum depth of about 7 m.
 - (c) The original surface layer had not been subject to SGD because it was only used as a market garden after European settlement.
 - (d) After the eastern half of this activity area was levelled and filled, industrial (liquefied gas works) use of this part of the activity area did not result in SGD of the original surface layer.
 - (e) The construction of the two existing buildings in the 1980s may have resulted in SGD to a small area of the original surface layer of the activity area (if deep piles were constructed), but almost all of those works did not result in SGD to the original surface layer.
 - (f) The construction of the buildings and works in this activity area will result in SGD to part of the original surface layer, primarily by excavation for the basements.

The Question

1. The Tribunal subsequently ruled that it needed to decide the following question of law—

Is a cultural heritage management plan required to be prepared and

approved under the [*Aboriginal Heritage Act 2006*](#) in respect of the activity identified in permit application PL09/0876 and PL09/0877 before the Tribunal may grant a permit in respect of either Application P1204/2010 or Application P1340/2010 or both of them?

1. This is a question of mixed law and fact.
2. The Tribunal ordered that the question of law be heard at the resumption of hearings on 20 September 2010.
3. At the request of Aboriginal Affairs Victoria (**AAV**), the Tribunal invited AAV to make submissions on the question of law.

Adjournment application

Background

1. At the hearing on 12 August 2010, Mr Lewis completed evidence on behalf of the Groups on a different issue in this proceeding. When it was clear that additional days were needed to complete the hearing and after considering the availability of advocates and witnesses, the Tribunal fixed the resumption of hearing for 20 September 2010 for a maximum of five further days and the hearing of the question of law on 20 September 2010. The Tribunal took into account that Mr Lewis stated he planned to be overseas in that period and would not be available to give evidence.

The hearing

1. At the start of the hearing on the question of law on 20 September 2010, Mr Pitt stated he would be calling Mr Long to give evidence. Mr Pikusa did not state whether or not he would be calling Mr Lewis to give evidence.
2. AAV then made submissions. Mr Long gave his evidence. The Respondent and the Council made submissions. There were no submissions on behalf of Ms Colquhoun or Boroondara City Council (**Boroondara**). At about 3.30 pm the Tribunal then invited the Groups to make their submissions. Mr Pikusa said he was not ready to proceed because Mr Lewis was not available to give evidence. Mr Lewis had not considered Mr Long's material because he was overseas. Mr Lewis was currently in Iran and difficult to contact, and that he was not expected back in Melbourne until mid to late November.

The Application

1. Mr Pikusa applied to adjourn the hearing on the question of law to a date not before late November and on a date that Mr Lewis could be available. He argued an adjournment was warranted and necessary because Mr Lewis' evidence was now in dispute.

Decision

1. The Tribunal refused the application to adjourn the hearing on the question of law. If Mr Lewis was unavailable and could not give evidence on the day fixed (20 September 2010) to hear the question of law, the Groups should have informed the Tribunal and parties before that hearing. The Groups did not apply to adjourn that hearing in accordance with the Tribunal's practice note. The Groups did not apply to adjourn that hearing at the start of the hearing on 20 September. The Groups should have done so.

Reasons

1. An adjournment of approximately two months to complete the hearing of the question of law would be unreasonable and cause unnecessary and unjustified delay to the resolution of the proceeding. The additional hearings days on 20 to 24 September 2010 (inclusive) had been fixed with the understanding by parties that they would be sufficient to complete the hearing.
2. The Tribunal is required to give a party a reasonable opportunity to call or give evidence.[\[36\]](#) The Tribunal gave the Groups an opportunity to call evidence on the question of law. The Groups had filed the Lewis statement before the commencement of the hearing on 9 August 2010 and the Tribunal had considered the statement in determining that there was a question of law to be determined. It was for the Groups to decide whether or not to call Mr Lewis on 20 September 2010 to give evidence. If he was not available on that day, it was for the Groups to organise another statement by a similarly qualified person. Another witness could have adopted Mr Lewis's statement.
3. In refusing the application for adjournment, the Tribunal emphasised that the Lewis statement would be taken into account by the Tribunal in deciding the question of law.

Significant ground disturbance

1. I adopt the observations of the Tribunal in *Mainstay Pty Ltd v Mornington Peninsula SC*[\[37\]](#) that (in summary)—
 - the significance of the ‘disturbance’ is drawn from the definition,
 - the ‘topsoil’ is simply the surface or upper part of the soil,
 - the disturbance to the topsoil could involve relatively limited interference, and
 - the disturbance must involve machinery and must be in the course of grading, excavating, digging, dredging or deep ripping (applying, for all but deep ripping, the general meanings of these terms).
2. The reference to ‘the topsoil or surface rock layer of the ground’ in the SGD definition does not expressly refer to a former topsoil or former surface rock layer. If that layer does, by inference, include those references, there could be uncertainty and additional cost in investigating the existence of a former topsoil or former surface rock layer. These are matters that might be relied upon in finding there is no reference to a former layer.
3. However, the preferred approach to statutory interpretation beings with context and purpose of the relevant provision. The context is the AH Act. Its purpose is ‘to provide for the protection of Aboriginal cultural heritage in Victoria’. One of the mechanisms in the AH Act to implement this purpose is a CHMP. If no part of an activity area is an area of CHS, no CHMP is required.
4. The [Aboriginal Heritage Regulations 2007](#) (the **AH Regulations**) confirm that past SGD can make an activity area that might otherwise be an area of CHS to not be an area of CHS. They also confirm that an activity that constitutes SGD can be a high impact activity.
5. The purpose of SGD under the AH Regulations is to help determine what activities are likely to damage Aboriginal cultural heritage, because of their potential to fundamentally alter the character of ‘the topsoil or surface rock layer of the ground’, and ought to be subject to a CHMP.
6. The topsoil or surface rock layer of the ground may be changed over time by natural or man made processes. Natural processes include land slippage, earthquake, water and wind erosion (including coastal recession) or volcanic activity. Man made activities include the matters referred to in the definition of SGD and other machine-based

activities or activities involving hand held tools.

7. I adopt the submissions of AAV that evidence of past Aboriginal occupation typically occurs within the topsoil or former topsoil surfaces sealed by more recent natural sediments and natural soil development. These natural processes do not lessen the significance of any evidence from a cultural heritage perspective. In contrast, the topsoil or surface rock layer created by man made activity is far less likely to yield evidence of cultural heritage.
8. One man made activity that may or may not involve machines is the filling of land. If fill is merely added to the existing topsoil or surface rock layer, then that disturbance is not SGD. This is clear from the exclusion of filling from the definition of SGD and is consistent the purpose of capturing activities that can fundamentally alter the character of the topsoil. Mere fill does not alter the topsoil in this way and any Aboriginal cultural heritage at or below the surface is unlikely to be damaged.
9. In *Finlay v Surf Coast SC*,[\[38\]](#) the Tribunal held that mere filling is not SGD. I agree with that conclusion.
10. If the ‘topsoil or surface rock layer’ did not include the ‘former topsoil or former surface rock layer’, merely placing a small amount of fill (whether or not by machinery) on the whole of an activity area could ensure that area was not an area of cultural heritage significance. Consequently, any high impact activity proposed for that activity area would not require a CHMP. This conduct could defeat the purposes of the AH Act.
11. I need to clarify my reference to former topsoil or former surface rock layer. It would not be consistent with the purpose of the AH Act if that layer was itself formed by mere fill or other man-made activities. The layer needs to be, as AAV submitted, a ‘naturally occurring surface level’, where that can be readily ascertained.[\[39\]](#)
12. Accordingly, and consistent with the purpose of the AH Act, it is my opinion that in the definition of SGD the ‘topsoil or surface rock layer’ includes the ‘former topsoil or former surface rock layer if that topsoil or surface rock layer is a naturally occurring surface level that is readily ascertainable’ and does not include the current topsoil or surface rock layer if established by the mere filling of the land.
13. My opinion is consistent with the requirement under the AH Act that a CHMP must include ‘[a] detailed description of the activity setting

out ... the likely impact of the activity on the surface of the land and buried former land surfaces’.[40] However, it has not been necessary to rely on this provision in forming my opinion.

The evidence

1. In addition to the Lewis statement, a statement of evidence by Mr Andrew Long, archaeologist, dated 3 September 2010 was filed on behalf of the Respondent on the question of law.

Riverside activity area

1. There was no evidence that the whole of the riverside activity area has been subject to SGD. In particular, there was no evidence that the works in the river bed (beneath the proposed pontoon) had been subject to SGD.
2. Accordingly, a CHMP must be prepared and approved before a permit could be granted in respect of the riverside application.

Mixed use activity area

1. The activity area is currently developed with two double-storey office buildings constructed in the 1980s. Around the offices, to the perimeter of the activity area, is associated works such as access ways and parking areas. The buildings and works extend to the perimeter, except for minor discrepancies.
2. As a matter of uncontested common knowledge, that part of this activity area, being an area west of a line extending south from Hodgson St, Kew (the **Hodgson Street line**) has been subject to SGD as a result of many years of industrial use and development.
3. I adopt the evidence of Mr Lewis and Mr Long that the balance of the activity area, being the land east of the Hodgson Street line (the **eastern area**) was subject to extensive filling up to 7 m deep in the 1950s.
4. I rely on the evidence of Mr Long in finding that the whole (for all practical purposes) of the topsoil of the eastern part in the 1980s was subject to SGD when the current buildings and works were constructed. However, having regard to my opinion about the meaning of ‘topsoil or surface rock layer’, this finding is inconclusive.
5. I rely on the uncontested evidence of Mr Lewis, based on the Respondent’s plans, that the activity, in particular the construction of

the basements, will project below the layer of fill in certain parts of the activity area. That fact is relevant because if the activity did not project below the fill there could be no disturbance of the former topsoil or former surface rock layer and the activity would not be a high impact activity.

6. I rely on Mr Lewis' evidence that immediately before the eastern area was filled it was used as a market garden, and that the market garden had existed since Europeans first settled this land. There was no dispute that while the land was used as a market garden it was not subject to SGD.[\[41\]](#)
7. The final, and determinative issue, is whether the former topsoil (i.e. the topsoil that existed when the land was filled) had been subject to SGD before it was filled. On this issue, the evidence of Mr Long and Mr Lewis diverged.
8. Mr Lewis relied on historical and comparative information, based on historical documents (including photography), to demonstrate that the former topsoil of the former market garden was not graded or excavated before it was filled.
9. Mr Long relied on the results of a geotechnical investigation of 677-679 Victoria Street in a report by Golder & Associates to the Respondent dated 24 July 2009.[\[42\]](#) The purposes of the investigation included:
 - To evaluate the subsurface conditions at the site relevant to the proposed development, including the presence and depth of fill materials, and the depth of groundwater, if encountered.
 - To provide recommendations for building footing design ...
 - To provide advice on the likely excavation characteristics of the materials to be encountered during basement and footing preparations.
10. The method of investigation was the drilling of nine boreholes, seven of which were located in a well distributed way across the eastern part of the activity area. The boreholes were drilled to between 9.6 m and 21.5 m below existing ground level. Core samples were removed for recording and assessment.
11. Mr Long's evidence was that soils commonly found in market gardens are loose homogenous sandy loams with high humic content to a thickness of 300 mm to 600 mm. If the former topsoil of the market garden had not been excavated, the borelog results would

show the existence of that material. In fact, the results were that in none of the relevant seven borelogs was topsoil found between the fill layer and the underlying layers of sand, clay and sedimentary rock.

12. Mr Long was also of the opinion that, based on the 1904 contours of the eastern area (from MMBW maps provided by Mr Lewis) and the borelog results, that the layer of fill was consistently located 1 to 2 m below those contours. He concluded that:

... a significant volume of sediment was removed from the surface of the subject land, prior to deposition of the fill. On the balance of evidence, we can only conclude that this volume of sediment was removed by mechanical means during the 1950s prior to the formation of the current ground surface, either for structural reasons and/or removal and sale of agricultural top soil ...

1. This conclusion is consistent with my own understanding and with the proposition put by the Respondent that it has been and is normal engineering practice to excavate or scrape away the topsoil before filling the land to remove a layer of future instability.
2. The authors of the Golder & Associates report were not called to give evidence and be examined. Nonetheless, I give more weight to the evidence of Mr Long than the evidence of Mr Lewis. I was not able to draw firm conclusions from the historical photographs provided by Mr Lewis about whether the topsoil was not subject to SGD before it was filled. I am satisfied that the geotechnical investigation was conducted and the results were analysed to professional standards. Mr Long's qualifications and experience as an archaeologist and experience in interpreting geotechnical investigations are more relevant than those of Mr Lewis.
3. I therefore find on the balance of probabilities that the topsoil of the eastern part was removed or excavated in the 1950s before the land was filled. I rely on the evidence by Mr Long and Mr McGauran that, having regard to a number of factors including the size of the affected area, that it was highly likely that the removal or excavation occurred by machinery. Accordingly, the eastern part (and consequently the whole of the mixed use activity area) was subject to SGD before it was filled.
4. It follows that I am satisfied that the Respondent has discharged its

obligation to prove that a CHMP is not required for the activity in respect of permit application PL09/0877 for the mixed use activity area.

Conclusion

1. In my opinion—
 - The whole of the riverside activity area has not been subject to SGD. In accordance with s 52 of the AH Act, a CHMP must be prepared and approved before a permit could be granted in respect of permit application PL09/0876.
 - The whole of the mixed use activity area has been subject to SGD. A CHMP is not required to be prepared before a permit could be granted in respect of permit application PL09/0877.

Geoffrey Code

Presiding Member

APPENDIX B

PERMIT APPLICATION NO:	PL09/0877
LAND:	677-679 Victoria Street, Abbotsford

CONDITIONS

1. Before the development starts, amended plans and documents 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 advertised plans but further modified to which show:

Building design

- (a) Stage 1, level 8 setback increased as generally depicted on SK10.17, drawing title level 8 – Revised Setbacks, dated 23 March 2010;
- (b) Stage 1, level 9 setback increased as generally depicted on SK10.18, drawing title level 9 – Revised Setbacks, dated 23 March 2010;

- (c) Stage 1, level 10 setback increased as generally depicted on SK10.19, drawing title level 10 – Revised Setbacks, dated 23 March 2010;
- (d) Stage 1, roof top bowling green and solar hot water panels reconfigured as a result of condition 1(c);
- (e) Stage 3, lobby and bicycle parking area reconfigured to include a café as generally depicted on SK10.10, drawing title Stage 3 Entrance, dated 23 March 2010;
- (f) Stage 1, eastern elevation of the convenience shop modified as generally depicted on SK10.11, drawing title Ground Floor South West Corner, dated 23 March 2010;
- (g) Stage 1, level 2, podium roof spaces improved to provide usable communal open space as generally depicted on sketch plan title, Garden to Stage 1 Level 2, dated 11 March 2010;
- (h) Stage 2, level 4, podium roof space improved to provide usable communal open space as generally depicted on sketch plan title, Roof Top to Stage 2 Level 4, dated 11 March 2010;
- (i) Stage 3, level 4, podium roof space improved to provide useable communal open space, generally as provided for podium roof spaces for Stages 1 and 2;
- (j) Stage 2, level 2 dwelling 2.01 reconfigured to ensure the bedroom has adequate access to daylight;
- (k) Stage 2, level 2 dwelling 2.07 reconfigured so the bedroom has direct access to daylight;
- (l) Stage 2, Level 2 dwelling 2.25 bedroom clarified as having direct access to daylight;
- (m) The requirements of Melbourne Water conditions 99(b), 99(c), 99(e), 99(f), 99(h), 100 and 101;
- (n) The requirements of DSE/Parks Victoria condition 107;
- (o) Clear glazing to the east facade of the proposed commercial space fronting Victoria Street in Stage 1 to improve its appearance and casual surveillance of the adjacent public realm;
- (p) The façade treatment of the uppermost storeys of the Stages 1, 2 and 3 buildings be the same as that of the typical floors below of the respective building;
- (q) All inboard bedrooms in the one-bedroom apartments provided with sliding doors facing the dwelling windows, in addition to sliding doors facing the dwelling corridor;
- (r) Design detail of the ground level of the south facing edges of Stage 1

Building 1 and Stage 2 Building 2.

Car and bicycle parking

- (s) General allocation of car parking spaces between uses, including access arrangements for permanent and visitor spaces ensuring visitor spaces are easily accessed, for each development stage;
 - (t) Tandem spaces allocated to like uses;
 - (u) Pedestrian walkways to lifts and storage facilities distinguished from vehicle access ways;
 - (v) Confirmation that all vehicle ramp grades and parking spaces (except for signed small bays) to comply with Australian Standard for Off-Street Parking (AS2890.1-2004) or to the satisfaction of the Responsible Authority;
 - (w) Control measures, which may include the provision of convex mirrors and stop lines at the “dead end” of all basement parking levels and at all intersections where aisle widths are less than 5.0 metres;
 - (x) Bollards provided at the stairwells and lifts to shield pedestrians from reversing cars.
 - (y) A minimum of 317 on site bicycle parking spaces (252 permanent spaces and 65 visitor spaces), including location and specification of bike parking;
 - (z) Details of general allocation and access arrangements to secured bicycle storage areas with all bicycle accessways throughout the site clearly designated, including bicycle paths on the entry/exit to Victoria Street and including a proportion of the Stage 1, Level 1 bicycle spaces relocated to the Stage 1 Ground level;
- ### Loading and Garbage collection

(aa) The garbage collection point via the main loading bay modified to confirm and ensure a 10.24 m long twin axle garbage vehicle can easily manoeuvre on-site, including adequate clearance from the parking entrance access for waste collection activities from the bin holding area and adequate clearance to car park entrance gate during truck reversing movements;

(aa) An updated “swept path diagram” to be submitted to confirm condition 1(z) can be achieved;

General

(bb) Deletion of all reference to the Stage 1, roof top wine bar from all plans and documents with the remaining space noted as being for resident/guest use only;

(cc) Internal corridor widths for all stages widened as generally depicted SK10.07, SK10.08 and SK10.09, drawing title Typical Corridors, dated 23 March 2010;

(dd) The specification and location of all proposed external plant and equipment (including roof top plant and equipment, car park ventilation and individual air conditioning and hot water units). All plant and equipment must be screened to prevent views from the river, street and habitable room windows of nearby dwellings;

(ee) An area set aside within the property boundaries for pits, meters and essential services;

(ff) Provision of a general staging plan that includes (but is not limited to) the order in which the development is to be staged, including excavation, construction, landscaping, car and bicycle parking provision;

(gg) Details and provision of an average of 4 cubic metres of storage for each dwelling;

(hh) Provision of a high quality lighting plan detailing lighting off all communal and publicly accessible spaces, ensuring lighting is baffled to minimise light spill into the Yarra River Corridor;

(ii) Provision of an internal signage plan detailing indicative signage to guide residents, visitors and the public to communal open spaces, commercial facilities, car parking areas, bicycle parking areas and the Capital City Trail with priority given to pedestrian and cyclist wayfinding;

(jj) An indicative internal, 1.7 metre high, solid screen, or suitable alternative mechanism to prevent interlooking between dwellings.

(kk) Screening of dwellings with terraces or habitable room windows separated by a distance of less than 9.0 metres, including detail of all screens proposed;

(ll) Indicative boundary fencing for lower ground and ground levels ensuring fencing is no higher than 1.5m (or higher for private terraces), simply designed and visually permeable;

(mm) The submission of a Noise and Amenity Action Plan (NAPP) in accordance with Clause 22.09-4.3 of the Yarra Planning Scheme for Restaurant 1 and 2 and the cafe;

(nn) The 30 remaining, upper terrace café seats allocated to Restaurant 1 and 2;

(oo) Licensed areas for Restaurant 1 and 2 and the café clearly outlined.

Environmentally Sustainable Design Principles

(pp) An indicative, internal elevation or cross section with sufficient detail showing habitable rooms where light is borrowed, incorporating adequately sized glazed sections to ensure maximum light penetration;

(qq) Indicative screening plans generally in accordance with SK10.03 and SK10.05, Shading Diagrams dated 23 March 2010, which show screening to provide protection from western, northern and north-western sunlight;

(rr) A clearly defined location on each floor for provision of recycling storage, with adequate signage;

(ss) Provision for a minimum of 60 residential dwellings having the ability to use recycled water for toilet flushing.

(tt) Details of all other environmentally sustainable design principles required by the ESD report referred to in condition 11.

Acoustic

(uu) all works recommended in the report of the professional acoustic engineer referred to in conditions 6 and 7.

Wind assessment

(vv) all works recommended in the wind assessment report referred to in

condition 10.

Building Materials

(ww) An updated schedule of all external materials and finishes (including materials samples, colours and coloured elevations/perspectives). The schedule must show the materials, colour, finish and application methods (where relevant) of all external walls, roof, fascias, window frames, glazing types, cladding, doors and fences and must confirm the following:

- (i) No bright, white colours are to be used for any parts for the building visible from the river interface;
- (ii) An alternate treatment to the Stage 3, ground level, south facing wall (car park enclosure) which may include an alternative cladding, colours, integrated art display, green wall or a combination of all;
- (iii) All roof top plant and equipment housing to be designed to ensure blank, concrete rendered walls are avoided and incorporating cladding, colours, textured concrete or green walls; and
- (iv) the requirements of DSE/Parks Vic condition 108.

Endorsed Plans

1. All development must accord with the endorsed plans. Any alterations must be approved in writing by the Responsible Authority.
2. Floor levels shown on the endorsed plan(s) must not be altered or modified without written consent of the Responsible Authority.
3. All new on boundary walls must be cleaned and finished to the satisfaction of the Responsible Authority.

Ongoing involvement of the architect

1. The owner of the land must retain Rothe Lowman Property Pty Ltd to complete the design and provide architectural oversight of the delivery of the detailed design as shown in the endorsed plans and endorsed schedule of materials and finishes during construction unless with the prior written approval of the Responsible Authority.

Acoustic Treatments

1. Before the plans are endorsed, an updated acoustic report to the satisfaction of the Responsible Authority must be submitted to and

approved by the Responsible Authority. The report must be prepared by a suitably qualified acoustic engineer to show how the requirements of State Environment Protection Policy N-1 and relevant Australian Standards will be met and must prescribe the form of acoustic treatment to:

- (a) protect dwelling occupants with a specific interface to commercial tenancies above, next to or below from associated commercial noise sources;
- (b) protect all dwelling occupants from external noise sources with specific regard to Victoria Street and off-site commercial areas;
- (c) the mechanical plant equipment and ventilation mechanisms installed or constructed as part of the development; and
- (d) the loading bays.

2. On the completion of the works referred to in condition 6 above and before the use commences, an updated acoustic report prepared by a suitably qualified acoustic consultant must be submitted to the satisfaction of the Responsible Authority demonstrating that the required level of noise attenuation has been achieved. The report must:

- (a) confirm the use complies with Condition 6 of the permit;
- (b) provide measurement data taken from inside the dwellings demonstrating compliance with State Environment Protection Policy N-1.

3. The acoustic report recommendations must be incorporated into the development and where they are recommendations of an ongoing nature, must be implemented to the satisfaction of the Responsible Authority.

Wind assessment

1. Before commencement of the development, a report to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. The report must be prepared by a suitably qualified person/firm and provide a wind assessment that assesses, but is not limited to, impacts on:

- (a) communal and public open space areas; and
- (b) tower level terraces, including roof terraces.

1. In the event the wind assessment required under condition 9 suggests measures are required to moderate wind impacts, those suggestions must be incorporated and thereafter maintained to the satisfaction of the Responsible Authority.

Environmentally Sustainable Design Principles

1. The recommendations of the Sustainability Statement (29 November 2009) prepared by Ark Resources and any updates must be implemented into the development with details submitted to the Responsible Authority demonstrating compliance with the Statement and any updates and in relation to the requirements in condition 1(pp) to 1(tt) (inclusive) within the period specified in writing by the Responsible Authority.

Green Travel Plan

1. Before the residential component of the use of the land commences, the Green Travel Plan prepared by Scape, must be amended to the satisfaction of the Responsible Authority to include, but not be limited to the following:
 - (a) confirmation and mechanism to ensure that household welcome packs including tram, train and bus timetables relevant to the local area will be provided to purchasers and/or occupiers upon occupation of an apartment that will also include:
 - (i) an on-site bicycle parking and facilities map; and
 - (ii) monitoring and review schedule.
 - (b) provide a designated ‘manager’ or ‘champion’ responsible for its coordination and implementation;
 - (c) once approved, be provided to all new residents of the development (and subsequent owners/tenants as properties change hands);
 - (d) include a regular review mechanism to review vehicle and bicycle parking/usage rates to either re-allocate the spaces if demand warrants so, or provide more spaces if the opportunity arises. This must include future Owners Corporation involvement and with findings submitted to the Responsible Authority; and
 - (e) the requirements of condition 90 (Department of Transport).

Car Share

1. Before the development starts the owner must enter into an agreement pursuant to [Section 173](#) of the [Planning and Environment Act 1987](#) with and to the satisfaction of the Responsible Authority. The agreement must be registered on the title to each lot. By the agreement, the owner must covenant with the Responsible Authority that provision will be made for at least 4 car share vehicles on-site (provision may be staged) by way of arrangement with a car share operator and/or the future Owners Corporation for a minimum period of 10 years. The agreement will reflect that any costs which may be associated with ensuring ongoing availability of at least 4 car share vehicles on site will be borne by the owner. All costs of preparation and registration of such agreement must be borne by the owner of the land, or the future Owners Corporation, including those incurred by the Responsible Authority.

Transport Management

1. Prior to the occupation of any part of the development, a car parking management plan prepared by an appropriately qualified traffic consultant must be submitted to and approved by the Responsible Authority. When approved, the car parking management plan will be endorsed and form part of this permit. The car parking management plan may be submitted in stages and must address, but is not necessarily limited to, all of the following:
 - (a) An internal signage plan distinguishing permanent parking areas from visitor parking areas, highlighting sub standard spaces are to be for smaller vehicles only, clearly marking all disabled spaces and height clearances;
 - (b) Mechanisms to ensure non-permanently allocated car parking spaces will only be available for visitors to the site;
 - (c) An internal signal system or alternative safety measure to assist with traffic management at the Level 1, Stage 1 car park entrance and at all “blind aisle” locations within the car parking areas;
 - (d) The number and location of the car parking spaces to each commercial tenancy and dwelling, with any tandem parking spaces applied to a single tenant or dwelling and the clear

identification of dwellings without any car parking;

(e) The number and location of car spaces for shared use, including time of shared use.

(f) The management of visitor car parking spaces and security arrangements for occupants of the development, including details on how the 'Security Line' to the Residential Parking area is to operate and how residential visitors are to access this area. Car park security arrangements must allow for the expansion of the car-share scheme.

(g) Details of way finding, cleaning, security of end of trip bicycle facilities.

(h) Policing arrangements and/or formal agreements;

(i) A schedule of all proposed signage including directional arrows and signage, informative signs indicating location of disabled bays, small parking bays, bicycle parking, exits, restrictions, pay parking system etc;

(j) Details regarding the management of loading and unloading of goods and materials for the commercial and residential uses; and

(k) An ultimate master management plan that includes a mechanism for future Owners Corporation involvement in reallocating surplus or underutilised vehicle or bicycle parking spaces.

2. The master management plan referred to in condition 14(k) must be submitted to the satisfaction of the Responsible Authority within twelve months of completion of the last stage of development.
3. Prior to commencement of the first stage of the development, the permit holder must make a one off, contribution of a maximum of \$20,000 to be used for Council's Strategic Transport Department's modelling assessment/study of local traffic conditions and potential traffic management improvements, to the satisfaction of the Responsible Authority.
4. The car parking management plan must be implemented to the satisfaction of the Responsible Authority. No alterations may be made without the prior written approval of the Responsible Authority.
5. Prior to the commencement of the development, the permit holder must pay a bank guarantee to the value of \$40,000 to the City of

Yarra for future public transport improvements to Victoria Street, Abbotsford. The bank guarantee may be drawn down by Council and used for proposed works by either Yarra Trams, Department of Transport or VicRoads to carry out public transport improvements along Victoria Street, Abbotsford. The bank guarantee will be returned to the permit holder if the transport improvement works are not commenced by the relevant authorities, prior to the occupation of the final stage of the development.

Water Sensitive Urban Design

1. Prior to the endorsement of the landscape plan required by condition 25, or as otherwise agreed in writing by the Responsible Authority, a water sensitive urban design strategy and plans prepared by a suitably qualified consultant must be submitted to the satisfaction of the Responsible Authority to detail how storm water is mitigated, stored, cleaned and used in the precinct and how the proposed initiatives will reduce run off from hard paved areas, prevent erosion and contribute to delivering the precinct-wide water sensitive urban design program to 'best practice standards'. The plan must include, but not be limited to the following:
 - (a) details of all water sensitive urban design elements including rainwater tanks, filtration systems, water retention;
 - (b) a specification of works to be undertaken prior to planting, including details of proposed watering requirements and opportunities for reuse of rainwater (irrigation system); and
 - (c) specifications of tanks, rain gardens and maintenance methods proposed for all landscaped areas including river environs, terrace areas, green walls and communal open spaces.

Drainage

1. Provision must be made for the drainage of the site including landscaped and pavement areas all to the satisfaction of the Responsible Authority.
2. The permit holder must apply for a Legal Point of Discharge under Regulation 610 – Stormwater Drainage of the [Building Regulations 2006](#) from Yarra Building Services Unit.
3. The drainage design for the entire site, along with hydraulic calculations, must be submitted to the Responsible Authority for

assessment and approval.

4. All piping and ducting, other than for drainage above the ground floor storey of the building must be concealed.
5. Any storm water drainage within the property must be provided and be connected to the nearest Council pit of adequate depth and capacity (legal point of discharge), to Council's satisfaction under [Section 200](#) of the [Local Government Act 1989](#) and Regulation 610.

Landscape Implementation and Maintenance

1. Prior to commencement of the first stage of development and with approval from Melbourne Water and DSE/Parks Victoria, an updated landscape plan, generally in accordance with the "Tract Masterplan" drawings, dated 5 November 2009 and the Tract "Landscaping Works Package – Permeable paving and Raingarden Mapping – STG1 drawing No 309053 L/D DD01 Rev 00" dated 30 August 2010, must be prepared and submitted to the satisfaction of the Responsible Authority. It must be prepared by a suitably qualified person/firm, drawn to scale, with three (3) copies provided. When approved, the landscape plan will be separately endorsed and will then form part of the permit. The plan must show:
 - (a) the location, quantity and maturity of all proposed plants with a full plant schedule of botanical names, common names, mature height & width, plant spacing's, pot sizes and quantities. Proposed planting should be drought tolerant, free from invasive weed species and predominantly consisting of locally indigenous plants.
 - (b) Extent of basement car park must be indicated on the landscape plans.
 - (c) Additional planting on podium on podium roof top spaces must be incorporated and installed in raised planter beds in heights suitable for the long term growth and establishment of the proposed species. Details of proposed raised planters including heights must be specified on the plans.
 - (d) Specific ongoing maintenance requirements of all green walls including installation requirements, watering requirements and suitability of species;
 - (e) All pedestrian zones should be DDA compliant. Proposed spot levels, top of wall heights and grades should be indicated

on landscape plans;

(f) Details of the proposed irrigation system ensuring wherever possible, water supply must be from rainwater tanks with water collected from roof runoff. Passive irrigation systems such as rain gardens and water sensitive urban design tree pits must also be included.

(g) Confirmation that runoff from the site will be filtered through a passive water sensitive urban design treatment system, in compliance with condition 19.

(h) Tree protection measures must be erected during construction to protect existing trees along the boundary.

(i) All landscaping works must comply with the Australian Standard for the 'Protection of Trees on Development Sites' (AS 4970-2009).

(j) The location of any permanent structures, furniture or other facilities;

(k) Streetscape design for Victoria Street. Any streetscape furniture installed should be consistent with Council's Design Guidelines for streetscapes.

(l) The public "piazza" to be designed to a public standard (hard wearing materials, has to adhere to Australian standards, DDA, security, etc)

(m) All public area footpaths, steps, ramps and crossings to comply with DDA – Tactile indicators, nosing's and handrails where necessary.

(n) Details of all external artwork, including type of art, location to be displayed, timing for incorporation and ongoing maintenance requirements, in accordance with the "Mars Artistic Vision" dated 23 November, 2009.

(o) All existing trees to be retained, protected from construction works in accordance with the advice of a suitably qualified person/firm;

(p) Ongoing maintenance requirements of all landscaping works;

(q) An indicative landscape staging plan outlining the intended stages of landscaping works and the timing and duration of each intended stage.

(r) Cross section details of the two new connections to the

Capital City Trail, ensuring level connection, where possible;
and

(s) Details of all upgrade works and landscaping proposed to be undertaken to the south (front) of the Stage 3 building, adjacent to Victoria Street with inclusion of communal furniture, high quality landscaping and water sensitive urban design features.

2. Unfettered public access must be maintained through the public “piazza” at all times and the Stage 2 and Stage 3, communal courtyard between the hours of 6:00am and 9:00pm daily, to the satisfaction of the Responsible Authority.
3. All landscaping must be paid for by the permit holder and then maintained thereafter, by the future Owners Corporation to the satisfaction of the Responsible Authority.
4. Before construction work commences, a landscaping bond or bank guarantee of no less than 5% of the total landscaping value must be paid to the responsible authority. This bond will be returned in full no later than 6 months after the satisfactory completion of these works and subject to an inspection by the Responsible Authority.
5. All vegetation marked as being retained, must be retained to the satisfaction of the Responsible Authority.
6. All landscaping works must be completed in accordance with the endorsed landscape staging plan, prior to occupation of the final stage of development and maintained thereafter to the satisfaction of the Responsible Authority.
7. Prior to the completion of the development, the permit holder must provide to the Responsible Authority, in writing, a letter from Melbourne Water, confirming that all works have been carried out and completed in a satisfactory manner.
8. Prior to the completion of the development, the permit holder must provide to the Responsible Authority, in writing, a letter from DSE/Parks Victoria, confirming that all works have been carried out and completed in a satisfactory manner.

Vehicle Crossings and Accessways

1. Any damaged road(s) and footpath(s) and other infrastructure adjacent to the development site as a result of the construction works must be reinstated to the satisfaction of the Responsible Authority.
2. Any portions of redundant vehicle crossing must be broken out and

removed and reinstated with kerbing and paving of the surrounding area. The cost of these works must be borne by the permit holder and be undertaken to the satisfaction of the Responsible Authority.

3. The proposed new vehicle crossings and internal roads are to be constructed in accordance with City of Yarra Standard Drawings and Specifications and VicRoads requirements, to the satisfaction of the Responsible Authority.
4. The management of the internal road within the development must remain in private ownership and not be vested in Council. The internal road is to be managed by the future Owners Corporation, to the satisfaction of the Responsible Authority.
5. The development's finished floor levels for pedestrian access and car parking areas must be such that pedestrian and vehicular access accords with Australian Standards.
6. Existing footpath, kerb and channel, and road pavement surface levels must not be altered unless with the approval of the Responsible Authority.
7. The permit holder must not commence any civil infrastructure works on any Public Highway without obtaining formal consent from the Responsible Highway Authority.
8. The permit holder must not commence any civil infrastructure works, repair works or upgrading works on Council land without obtaining formal consent from the Responsible Authority.

Road Infrastructure Works

1. Prior to the occupation of the development, all the footpaths and kerb and channel adjacent to the subject development must be reconstructed in accordance with the Responsible Authority's engineering standards and requirements and to the satisfaction of the Responsible Authority.

General Parking Areas

1. Unless with the prior written consent of the Responsible Authority, no fewer than 668 car parking spaces (including a minimum of 4 car share vehicles spaces) and 317 bicycle parking spaces must be provided on the land at all times, to the satisfaction of the Responsible Authority.
2. The area set aside for the parking of vehicles, together with the

associated access lanes as delineated on the endorsed plan must:

- (a) be designed, provided and completed to the satisfaction of the Responsible Authority prior to the commencement of the development hereby permitted;
- (b) thereafter be maintained to the satisfaction of the Responsible Authority;
- (c) be made available for such use at all times and not used for any other purpose;
- (d) be properly formed to such levels that it can be used in accordance with the endorsed plan; and
- (e) be drained and sealed with an all weather seal coat.

3. Bicycle access must at all times be clearly signed and marked, to the satisfaction of the Responsible Authority.
4. Prior to the occupation of any dwelling, car parking must be allocated in accordance with the transport management plan (condition 14).
5. The development must provide for a minimum of 2 showers and change rooms for use by all employees of the commercial components of the development, to the satisfaction of the Responsible Authority.

Loading Areas

1. All loading and unloading must be carried out within the confines of the land's boundaries.
2. The loading areas must be maintained in a clean and tidy manner at all times to the satisfaction of the Responsible Authority.
3. Loading movements are restricted to between the hours of 6am and 10pm, seven days a week, unless with the prior written consent of the Responsible Authority.

Lighting

1. The development must be provided with external lighting capable of illuminating access to each car parking space, motorcycle parking space, bicycle parking space, store, rubbish bin, recycling bin, pedestrian walkway, stairwell, lift, dwelling entrances, lobbies, communal areas and entry foyer. Lighting must be located, directed, shielded and of limited intensity so that no nuisance or loss of amenity is caused to any person within and beyond the site, or the

Yarra River Corridor, to the satisfaction of the Responsible Authority.

Restaurant/Café use

1. Unless with the prior written consent of the Responsible Authority, no more than 130 seats may be provided for Restaurant 1, to the satisfaction of the Responsible Authority.
2. Unless with the prior written consent of the Responsible Authority, no more than 125 seats may be provided for Restaurant 2, to the satisfaction of the Responsible Authority.
3. Unless with the prior written consent of the Responsible Authority, no more than 50 seats may be provided for the café in Stage 3, to the satisfaction of the Responsible Authority.
4. Unless with the prior written consent of the Responsible Authority, trading is restricted as follows:
 - (a) 7am to 11pm, Sunday - Thursday and 7am to 1am the following day, Friday and Saturday, for the restaurants; and
 - (b) 7am to 11pm, seven days a week for the café.
5. No live music is to be played on the premises at any time.
6. No music other than background music may be played on the premises at any time.
7. No external speakers are permitted be located outside of the premises at any time.
8. Bottles must not be emptied into garbage bins after 10:00pm on any night, or before 7:00am on any day unless the activity is inaudible from within any nearby residential premises.
9. The use must at all time comply with the requirements and undertakings outlined in the endorsed Noise and Amenity Action Plan (NAPP) to the satisfaction of the Responsible Authority.
10. Noise emanating from the restaurants must comply with the State Environment Protection Policy N-2, to the satisfaction of the Responsible Authority.
11. Within 6 months of the restaurant and café uses commencing, an acoustic report prepared by a suitably qualified acoustic expert must be submitted to and approved by the Responsible Authority. When approved the report will be endorsed and will then form part of the permit. The report must demonstrate the measures recommended in the endorsed Noise and Amenity Action Plan achieve compliance

with the relevant standards to the satisfaction of the Responsible Authority.

Medical Centre

1. Unless with the prior written consent of the Responsible Authority, trading is restricted to 7am to 10pm, Monday to Friday, and 7am to 6pm, Saturday and Sunday.

Convenience Shop

1. Unless with the prior written consent of the Responsible Authority, trading is restricted to 7am to 11pm, 7 days a week.

Place of Assembly (Artists studio)

1. Unless with the prior written consent of the Responsible Authority, the artist's studio may only be used between the hours of 7am and 10pm, 7 days a week.

Retail Premises (Bicycle shop)

1. Unless with the prior written consent of the Responsible Authority, trading is restricted to 7am to 8pm, Monday to Friday and 7am to 6pm, Saturday and Sunday.

Restricted Recreation Facility (Yoga studio)

1. Unless with the prior written consent of the Responsible Authority, no more than 30 people may be present in the studio at any time.
2. Unless with the prior written consent of the Responsible Authority, trading is restricted to 7am to 10pm, Monday to Friday and 7am to 6pm, Saturday and Sunday.

Noise

1. Noise emanating from the development, including plant and other equipment, must comply with the State Environment Protection Policy N-1 to the satisfaction of the Responsible Authority.

General amenity conditions

1. Alarms associated with the commercial premises must be directly connected to a security service and must not produce noise beyond the premises.
2. The amenity of the area, particularly the Yarra River Corridor, must

not be detrimentally affected by the use or development, through:

- (a) the transport of materials, goods or commodities to or from land;
- (b) the appearance of any buildings, works or materials;
- (c) the emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, or
- (d) the presence of vermin.

3. All buildings must be maintained in good order and appearance to the satisfaction of the Responsible Authority.

Waste Management

1. All waste from the commercial component of the development must be collected via a private collection service, to the satisfaction of the Responsible Authority.
2. Prior to the occupation of the dwellings the permit holder must submit a waste management plan in consultation with and to the approval of the Responsible Authority. The Waste Management Plan must include, but not be limited to the following:
 - (a) Weekly collection frequency (with not more than twice weekly if sufficiently justified);
 - (b) Waste weekly quantities in cubic metres of garbage and recycling that will be generated;
 - (c) Waste containers to accommodate the waste generated;
 - (d) Appropriately sized bin storage area;
 - (e) The actual collection process and procedures; and
 - (f) A mechanism to ensure future owners and occupiers of the development (residential and commercial) are made aware of all collection agreements.
3. Rubbish, including bottles and packaging material, must at all times be stored within the building and screened from external view and be managed in accordance with the Waste Management Plan prepared by Leigh Design, dated 23 November 2009. All waste collection and recycling collection to be undertaken between the hours specified in Council's Local Law No. 3.

Soil conditions

1. Before the commencement of each stage of the development hereby

approved other than works for the purpose of obtaining a Certificate or Statement under Clause (a) or (b) of this condition respectively, either:

(a) Certificate of Environmental Audit indicating the land in that stage is suitable for residential use must be issued for the land in accordance with [Section 53Y](#) of the [Environment Protection Act 1970](#); or

(b) an environmental auditor appointed under the [Environment Protection Act 1970](#) must make a statement in accordance with Section 53ZS of the Act that the environmental conditions of the land in that stage are suitable for residential use.

2. A copy of the certificate of environmental audit and/or statement, and the complete audit report and audit area plan must be submitted to the Responsible Authority.
3. The use and/or development/buildings and works allowed by this permit must comply with the directions and conditions of any statement of environmental audit issued for the land.
4. Prior to the occupation of dwellings in a stage of the development a letter must be submitted to the Responsible Authority by an Environmental Auditor accredited with the EPA, to advise that all construction and remediation works necessary and required by an environmental audit or statement for that stage have been carried out.
5. Any handling and disposal of contaminated site soil must be in accordance with the requirements of any statement of environmental audit issued for the land, the requirements of the Environment Protection Authority and the [Environment Protection Act 1970](#).
6. The landowner and all its successors in title or transferees must, upon release for private sale of the parent lot or each of the lots, created by the subdivision, include in the vendor's statement pursuant to [section 32](#) of the [Sale of Land Act 1962](#) annexed to the contract of sale for the sale of the land, a copy of the endorsed development plans, planning permit and statement of environmental audit (together with any later issued certificate of environmental audit) for the land.

Construction

1. Before any stage of development commences, a Construction Management Plan to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority.

When approved, the plan will be endorsed as evidence of its approval. The plan must provide for or include the following:

- (a) a pre-conditions survey (dilapidation report) of the subject site and all adjacent Council roads frontages and nearby road infrastructure;
- (b) protection works necessary to road and other infrastructure (limited to an area reasonably proximate to the site);
- (c) remediation of any damage to road and other infrastructure (limited to an area reasonably proximate to the site)
- (d) containment of dust, dirt and mud within the site and method and frequency of clean up procedures in the event of build up of matter outside the site, particularly in relation to the interface with the Capital City Trail;
- (e) on site facilities for vehicle washing;
- (f) methods for management of noise and general nuisance;
- (g) site security;
- (h) waste and stormwater treatment;
- (i) construction program;
- (j) preferred arrangements for trucks delivering to the site;
- (k) parking facilities for construction workers;
- (l) delivery and unloading points and expected frequency;
- (m) an outline of requests to occupy public footpaths or roads, or anticipated disruptions to local services;
- (n) an emergency contact that is available for 24 hours per day for residents and the Responsible Authority in the event of relevant queries or problems experienced; and
- (o) traffic management measures to comply with provisions of AS 1742.3-2002 Manual of uniform traffic control devices - [Part 3](#): Traffic control devices for works on roads.

2. During construction, the following must occur:

- (a) any stormwater discharged into the stormwater drainage system to comply with EPA, Melbourne Water and DSE/Parks Vic guidelines;
- (b) stormwater drainage system protection measures must be installed as required to ensure that no solid waste, sediment, sand, soil, clay or stones from the premises enters the stormwater drainage system;
- (c) vehicle borne material must not accumulate on the roads

- abutting the site;
- (d) the cleaning of machinery and equipment must take place on site and not on adjacent footpaths or roads;
- (e) all litter (including items such as cement bags, food packaging and plastic strapping) must be disposed of responsibly;
- (f) all site operations must comply with the EPA Publication TG302/92;
- (g) at no time during the construction of any stage of the development is the Capital City Trail to be obstructed from public use; and
- (h) the permit holder must ensure that at all times, all construction workers and associated development staff are aware of conditions 79 and 80.

all to the satisfaction of the Responsible Authority.

1. The development, once commenced, must be completed to the satisfaction of the Responsible Authority.
2. Except with the written consent of the Responsible Authority, demolition or construction works must only be carried out between: 7.00 am – 6.00 pm, Monday-Friday (excluding public holidays) and 9.00 am – 3.00 pm, Saturday and public holidays. No work is to be carried out on Sundays, ANZAC Day, Christmas Day or Good Friday without a specific permit. All site operations must comply with the relevant Environmental Protection Authority's Guidelines on Construction and Demolition Noise.

Communications Infrastructure

1. If communications infrastructure is installed on the buildings, such infrastructure must be screened and thereafter maintained to the satisfaction of the Responsible Authority.

Wildlife Management Plan

1. Prior to works commencing, a wildlife management plan must be submitted to the satisfaction of the Responsible Authority. The plan must include, but not be limited to:
 - (a) identification of any sensitive wildlife on site-or in the buildings requiring relocation; and
 - (b) methods for relocation, based on advice of a suitably

qualified person/firm.

VicRoads (conditions 87-89)

1. A scaled (1:250 or larger) functional layout plan for proposed alterations to the Victoria Street/River Boulevard signalised intersection shall be submitted to VicRoads for review and approval.
2. A traffic management plan shall be submitted to VicRoads for consent at least 14 days prior to the commencement of any works on site.
3. Work site management practices must be in accordance with Australian Standard AS 1742.3-2009 “Manual of Uniform Traffic Control Devices – [Part 3](#): Traffic Control Devices for Works on Roads” and VicRoads’ “Worksite Traffic Management (Road works Signing) Code of Practice”.

Department of Transport (condition 90)

1. The permit holder must implement a Green Travel Plan generally implementing the recommendations set out in Section 4 of the “677-679 Victoria Street Travel Plan” report by Scape, dated November 2009, included in the application documents to the satisfaction of the Responsible Authority.

Melbourne Water (conditions 91 – 106)

1. The layout of the site and size, design and location of buildings and works as shown on the submitted plans must not be altered without the prior written consent from Melbourne Water.
2. Prior to the commencement of any buildings and works, plans and relevant information must be submitted to Melbourne Water addressing Melbourne Water’s conditions to the satisfaction of Melbourne Water.
3. Pollution and sediment laden runoff shall not be discharged directly or indirectly into Melbourne Water's drains or waterways.
4. The minimum lower ground floor levels for the proposed buildings must be constructed no lower than 11.4 metres to Australian Height Datum.
5. All entrances and exit points to the basement car park and sub floor areas, for pedestrians and vehicles, must be constructed with surface levels no lower than 11.4 metres to Australian Height Datum.
6. All ventilation points, including exhausts, must be constructed with

- openings no lower than 11.4 metres to Australian Height Datum.
7. All basement and sub floor areas must be protected by a bund or levee with a maximum surface height of 11.4 metres to Australian Height Datum.
 8. Any drainage system to the basement car park and sub floor areas must be designed such that floodwater and stormwater is unable to penetrate the basement.
 9. Prior to the commencement of any buildings and works, a comprehensive Landscape Plan for the subject site must be prepared by a qualified horticulturist/landscape architect and submitted to the satisfaction of Melbourne Water. The landscape plan for the site must indicate the extent to which the riparian fringe along the Yarra River corridor is proposed to be rehabilitated and managed as part of the development. The plans should indicate how vegetation continuity through the site's riparian fringe would contribute to improving habitat along the Lower Yarra River. The plan must also show:
 - (a) a survey (including botanical names) of all existing vegetation to be retained and/or removed;
 - (b) details of the trees on adjoining sites in close proximity to the site boundaries including incorporated tree protection measures;
 - (c) details of a landscape setback/buffer a minimum of 5 metres along the Yarra River frontage of the property;
 - (d) details of surface finishes of pathways and driveways;
 - (e) details of fencing along the Yarra River boundary;
 - (f) a planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, sizes at maturity, and quantities of each plant;
 - (g) details of all trees to be removed, including all weed species along the embankment; and
 - (h) the provision of canopy trees along the Yarra River boundary to assist in the integration of the development with the existing river corridor.
 10. The layout of the site must be designed to allow for a vegetated buffer/setback a minimum of 5 metres wide along the boundary of the property with the Yarra River corridor.
 11. Any new development must be designed to ensure that any walls and

fences are largely screened from the waterway by shrubs and ground covers and the skyline is largely formed by tree canopies.

12. Prior to the commencement of any buildings and works, a Site Environmental Management Plan (SEMP) must be submitted to Melbourne Water for approval. The SEMP must include a site map detailing the location and design of all measures including the following:
 - (a) Site controls to be installed during construction;
 - (b) Access tracks;
 - (c) Spoil stockpiling;
 - (d) Tree protection measures;
 - (e) Trenching locations; and
 - (f) Machinery/Plant locations.
13. Prior to the commencement of any buildings and works, engineering drawings must be submitted to Melbourne Water for approval, which detail the proposed treatment and works associated with the excavation of the crest and embankment of the Yarra River. The submitted information must include any proposed changes to bank profiles and how the works will be undertaken and managed in the future. The plans should indicate cross sections, proposed retaining wall treatment, fencing, rehabilitation and revegetation of the area disturb and how that will complement the landscape treatments beyond the bank.
14. Prior to the commencement of any buildings and works, a geo-tech report from a qualified and accredited supplier of such services is required to determine the soil conditions on the crest and bank of Yarra River and especially providing comments on the nature of material on the slopes of the bank. The report should also outline the suitability of the soils to support walls and structures.
15. Stormwater runoff from the subdivision must achieve State Environment Protection Policy (Waters of Victoria) objectives for environmental management of stormwater as set out in the CSIRO 'Urban Stormwater Best Practice Environmental Management Guidelines 1999'.
16. Prior to the commencement of works, a separate application direct to Melbourne Water must be made for any new or modified storm water connection to Melbourne Water's drains or watercourses.

DSE/Parks Vic (conditions 107-108)

Outdoor café seating

1. The entire café to be completely located within the freehold land at 677-679 Victoria Street, in particular, the proposed “Riverland Piazza” (see page 13 of the Landscape Design Report).

Colours, materials and finishes

1. The building facades facing the Yarra River do not incorporate bright, reflective materials.

Time limits

1. This permit will expire if the development is not commenced within four years from the date of this permit. All development must be completed within four years from the date of commencement. The Responsible Authority may approve extensions to these time limits if requests are made within three months of expiry.

--- End of Conditions ---

[1] This land is commonly referred to as ‘the Honeywell site’ after the company that occupies one of the existing buildings on the site.

[2] These changes are in accordance with the recommendations of Melbourne Water.

[3] By consent order of the Tribunal dated 13 July 2010, following a mediation hearing on 8 July 2010, the parties agreed that in Application P1204/2010 ‘traffic and parking are not issues to be raised at the forthcoming hearing’.

[4] We were informed that the Plan was adopted shortly before the date of the notice of decision.

[5] The Honeywell site now falls about 2 m from the southwest to the southeast corner, about 5 m from the southwest to the northwest corner, and about 2.5 m from the southwest to the northeast corner.

[6] The scheme cl 37.02 schd 1 cl 6.0 approved development plan.

[7] For example, in the Walmer Street to river section, the building approved at 647 Victoria Street has a maximum height of RL 45.25 m. Approved heights on sites nearby, on the west side of Walmer Street, include RL 49 m (Yarra Gardens East), RL 45 m (Yarra Gardens Central), and RL 44.55 m (609 Victoria Street).

[8] Am C132 to the scheme, in operation on 30 September 2010. The new date for the sunset of DDO4 is 30 September 2011.

[9] DDO4 was also amended on 19 October 2008 upon the approval of Amendment C75.

[10] The scheme cl 43.02-2.

[11] The scheme cl 43.02-2.

[12] See river corridor, third objective at cl 43.02 schd 4 cl 1.0.

[13] The scheme cl 43.02 schd 4 cl 1.0.

[14] 'Public spaces' (in the fourth objective) is not defined, but in context they must be in the river corridor. Hence, they include riverside public land. It does not include the Yarra River itself because it lies outside DDO4. It does include part of Victoria Street because part of Victoria Street is within DDO4. That part is not entirely clear because the diagram is not scaled. However, we find it includes most, but not all, of Victoria Street adjoining the land. It excludes part of the western frontage, being about 45 m abutting Building 1. It also excludes that part of Victoria Street where it crosses the Yarra River (ie that part of the Victoria Street bridge from the west bank of the River).

[15] With the exception, irrelevant for present purposes, that the introductory provision of cl 2.0 that a permit is required for a specified fence.

[16] In relation to the DDO, we observe that cl 2.0 of DDO1 and DDO3 consistently employ 'should'. However, cl 2.0 of DDO6 employs 'must' in relation to one provision and 'should' in relation to another provision. In the context of a DDO, 'must' is not mandatory unless the schedule

specifies that a permit may not be granted to vary the requirement in the DDO.

[17] As a particular matter of drafting, the first of the four river corridor discretionary benchmarks provides that ‘buildings should be setback no less than 10 metres from the crest line ...’. Council’s notice of decision provides for the podium to rise at around the 10 m setback mark.

Extending about 5 m into this setback area are one or two levels of private open space terraces for dwellings at the lower-ground and lower-ground 2 levels. Boroondara urged us to adopt the meaning of ‘building’ in cl 71 of the scheme (being the meaning in the [Planning and Environment Act 1987](#)) to demonstrate non-compliance with this discretionary benchmark. We do not accept this ‘black letter’ approach in the context of DDO4. In the context of the objectives of DDO4 we consider ‘buildings’ should be read to mean the above ground elements of buildings, otherwise all types of below-ground buildings and works would be non-compliant and this would produce a nonsensical result in conflict with the objectives.

[18] As a matter of drafting, the reference to river corridor in this provision appears to refer to public land adjoining the river and not the public and private land concept of river corridor in DDO4.

[19] They are ‘[t]he contribution of the proposal to the streetscape’, ‘[t]he design, height and visual bulk of the development in relation to surrounding land uses and developments’ and ‘[t]he design, height and form of the development in relation to the built form character of the street’.

[20] The *Going Going Green* site at of RL 44.85 m, RL 55 m for an approved building opposite the end of Leslie Street, RL 49 m for an approved building immediately west of Walmer Street and RL 45 m for a building to the east of Walmer Street.

[21] Even ignoring the fact that the factors are applicable only to buildings with boundary setbacks of more than 20 m.

[22] Stage 1 building is effectively to have a height of about RL50 m, Stage 2 building to be RL43 m and Stage 3 to be RL42 m and the podium effects that can be identified are found within the complex’s northern

aspect and fall between RLs of 20.0 and 27.3 m.

[23] The design objective of DDO8 of the *Stonnington Planning Scheme* is ‘[t]o create a mid-block east-west link and public space that provides a vibrant, attractive and safe pedestrian and cycle connection through the Forrest Hill Precinct.’ The DDO then specifies in some detail the spatial requirements for the link.

1. [24] Clause 11.04-2 of the scheme includes, for Neighbourhood Activity Centres, the strategy to ‘[e]ncourage higher density housing in and around Neighbourhood Activity Centres that is designed to fit the context and enhances the character of the area while providing a variety of housing options for different types of households.’ There is no equivalent strategy for Major or Principal Activity Centres.

[25] The scheme cl 15.

[26] The scheme cl 43.02 schd 4 cl 5.0.

[27] The scheme cl 21.05-2 Strategy 17.2.

[28] The scheme cl 22.10-2. [29] The scheme cl 21.07-1 Strategy 34.1, cl 22.10-3.5.

[30] AH Act s 52. [31] *Victorian Civil and Administrative Tribunal Act 1998 s 98(1)*.

[32] *Aboriginal Heritage Regulations 2007* rr 43, 45.

[33] *Aboriginal Heritage Regulations 2007*

[34] *Aboriginal Heritage Regulations 2007* r 23.

[35] *Aboriginal Heritage Regulations 2007* r 6.

[36] *Victorian Civil and Administrative Tribunal Act 1998 s 102*.

[37] [2009] VCAT 145 at [16].

[38] [\[2010\] VCAT 722](#) at [\[20\]](#).

[39] An example of this might be a topsoil layer on the bank of a waterway that has been realigned. The evidence of engineering drawings may readily discern that the current topsoil layer is fill and a former layer lies below the current layer that was the undisturbed bed of the waterway.

[40] AH Regulations r 64; schd 2 cl 6.

[41] It is reasonable to infer the market garden would have been ploughed for many years. Ploughing, other than deep ripping, is not SGD.

[42] The report refers to '675-679' Victoria Street but it is clear that it relates to 677-679 Victoria Street and the inclusion of 675 is a mistake.

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