

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P125/2023
PERMIT APPLICATION NO. 548/2022/P

CATCHWORDS

Section 79 of the *Planning and Environment Act 1987* (Vic); Frankston Planning Scheme; Commercial 1 Zone; Design and Development Overlay Schedule 14; mixed-use 14-storey building; Frankston Metropolitan Activity Centre; Frankston Metropolitan Activity Centre Structure Plan 2023; coastal and Kananook Creek setting; height and design response; street activation; visual bulk and mass; setbacks; amenity and parking

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| APPLICANT | Pace Development Group Pty Ltd |
| RESPONSIBLE AUTHORITY | Frankston City Council |
| RESPONDENTS | Ann Robb Hilary Bray Kananook Creek Association Inc. Long Island Residents Group Inc. Mornington Environment Association Inc Port Phillip Conservation Council Inc. |
| REFERRAL AUTHORITY | Department of Transport and Planning |
| OTHER | Melbourne Water Corporation |
| SUBJECT LAND | 438-444 Nepean Highway FRANKSTON Vic 3199 |
| HEARING TYPE | Hearing |
| DATES OF HEARING | 15, 16, 17, 18 and 19 April 2024 |
| DATES OF INTERIM ORDERS | 5 July 2023, 1 November 2023 and 23 April 2024 |
| DATE OF ORDER | 12 July 2024 |
| CITATION | Pace Development Group Pty Ltd v Frankston CC [2024] VCAT 645 |

ORDER

No permit granted

- 1 In application P125/2023 the decision of the responsible authority is affirmed.
- 2 In planning permit application 548/2022/P no permit is granted.

Christopher Harty
Presiding Member

Lorina Nervegna
Member



APPEARANCES

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| For Pace Development Group Pty Ltd | Mr Barnaby Chessell SC and Ms Jane Sharp of Counsel instructed by Minter Ellison Lawyers. They called the following witnesses: <ul style="list-style-type: none">• Mr Marco Negri, Town Planner from Contour Consultants Aust Pty Ltd• Mr Mark Sheppard, Urban Designer from Urbis Pty Ltd• Mr Russell Fairlie, Traffic Engineer from Ratio Consultants Pty Ltd• Mr Chris Goss, Visual Amenity Consultant from Orbit Solutions Pty Ltd¹ |
| For Frankston City Council | Mr Terry Montebello, Solicitor from Maddocks Lawyers. He called the witness: <ul style="list-style-type: none">• Mr Andrew Partos, Urban Designer from Hansen Partnership Pty Ltd |
| For Department of Transport and Planning | No appearance |
| For Melbourne Water Corporation | No appearance |
| For Hilary Bray | In person |
| For Ann Robb | In person |
| For Long Island Residents Group Inc. | Ms Jennifer Faulkner, Secretary |
| For Mornington Environment Association Inc. | Ms Margaret Howden, President |
| For Port Phillip Conservation Council Inc. | Ms Jennifer Ronda Warfe ² |
| For Kananook Creek Association Inc. | Mr Robert Thurley, Chairman ³ |

¹ Mr Goss was not called to give evidence and his evidence was tendered.

² Ms Warfe was not in attendance on days 4 and 5 of the hearing.

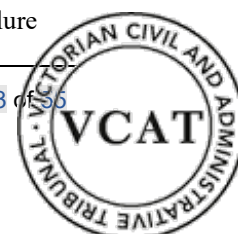
³ Mr Thurley was not in attendance on days 3, 4 and 5 of the hearing.



INFORMATION

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| Description of proposal | Construction of a mixed-use apartment building comprising 133 apartments over 14 storeys with ground level retail to both the Nepean Highway and Kananook Creek Boulevard in the Frankston Metropolitan Activity Centre. |
| Nature of proceeding | Application under section 79 of the <i>Planning and Environment Act 1987</i> (Vic) – to review the failure to grant a permit within the prescribed time. ⁴ |
| Planning scheme | Frankston Planning Scheme |
| Zone and overlays | Commercial 1 Zone ('C1Z'). Design and Development Overlay Schedule 14 – 'Kananook Creek Boulevard' ('DDO14'). Parking Overlay Schedule 1 – 'Frankston Metropolitan Activity Centre' ('PO1'). |
| Permit requirements | Clause 34.01-1 to use land for the purpose of a dwelling. Clause 34.01-4 to construct a building or construct or carry out works. Clause 43.02-2 to construct a building or construct or carry out works. Clause 52.06-3 to reduce car parking requirements (for the commercial component of the development). Clause 52.29-2 to create or alter access to a road in a Transport Zone 2 (Nepean Highway). |
| Relevant scheme policies and provisions | Clauses 02.03, 02.04, 11, 12, 13, 15, 16, 17, 18, 19, 34.01, 43.02, 52.06, 52.29, 58, 65, 71.02 and 74. |

⁴ Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) states a failure to make a decision is deemed to be a decision to refuse to make the decision.



Land description

The subject land is located on the west side of Nepean Highway and the east side of Kananook Creek Boulevard in the Frankston Metropolitan Activity Centre. It is rectangular in shape with an overall frontage of approximately 68.58 metres to Nepean Highway and a frontage of approximately 68.72 metres to Kananook Creek Boulevard, totalling an overall area of 3,285 square metres. The subject land is currently vacant and has a fall of approximately 3 metres generally from east to west.

To the east is the Nepean Highway, which is a 40 metres wide major arterial road with commercial development opposite. To the west is Kananook Creek Boulevard which is an 11.5 metres wide road reserve with one-way carriageway with the estuary of Kananook Creek and a mix of generally single storey and some double-storey residential dwellings beyond on the Long Island isthmus before the foreshore reserve of Port Phillip Bay. To the north is single-storey commercial development whilst to the south is a double-storey commercial development. This site has been recently granted a permit under the direction of the Tribunal for a 14-storey mixed-use development.

The surrounding area comprises a diverse building stock including a mix of commercial and residential development. The built form character of the area is beginning to change with mid-rise and taller built forms emerging.

Tribunal inspection

6 July 2023 unaccompanied and 23 April 2024 part accompanied and part unaccompanied.

REASONS⁵

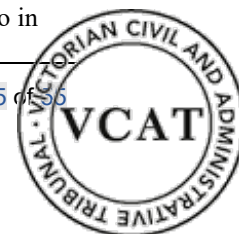
WHAT IS THIS PROCEEDING ABOUT?

- 1 This proceeding relates to one of several high-rise development proposals that together have become controversial in the Frankston community colloquially referred to as the ‘Great Wall of Frankston’. This reference has come about because of taller built form development proposals along a stretch of land sandwiched between the Nepean Highway to the east and Kananook Creek to the west on the western edge of the Frankston Metropolitan Activity Centre (‘FMAC’) and the perceived outcome of a line of tall built forms that will restrict views to Port Phillip Bay and be visually dominant from the foreshore.
- 2 It is an application for review by Pace Development Group Pty Ltd (‘applicant’) pursuant to section 79 of the *Planning and Environment Act 1987* (Vic) (‘P&E Act’) against Frankston City Council’s (‘Council’) failure to grant a permit within the prescribed time in respect of permit application 548/2022/P.

Background

- 3 The permit application sought permission to construct a 16-storey mixed-use building (comprising restaurants, café, take away food premises, shops, office, and dwellings), use of land for dwellings, creation/alteration of access to a road in a Transport Zone 2 and a reduction in the car parking requirements at 438-444 Nepean Highway, Frankston (‘site’).
- 4 On 3 April 2023, Council resolved that if it had been in a position to determine the permit application, it would have refused it on the basis of the inconsistent design response relating to height, setbacks, bulk, mass, scale and overshadowing impacts with what was sought under the *Frankston Metropolitan Activity Centre Structure Plan, 2015* (‘Structure Plan, 2015’) and *Draft Frankston Metropolitan Activity Centre Structure Plan, 2022* (‘Draft Structure Plan, 2022’). Council also had concerns regarding compliance with Clause 58 provisions relating to building setbacks, wind impacts and storage.
- 5 The proceeding was scheduled for hearing commencing 5 July 2023. Prior to this, the applicant circulated amended plans (‘first amended plans’) which, amongst other changes, partly reduced the height to range between 14 and 16 storeys and reduced the number of apartments from 188 to 148. The hearing was adjourned, and these amended plans were substituted by the Tribunal by order dated 5 July 2023.

⁵ The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



- 6 In response to the first amended plans, Council maintained its position of refusal of the proposed development on similar grounds.
- 7 Coinciding on 5 July 2023, Amendment C162fran was prepared and gazetted by the Minister for Planning which introduced into the Frankston Planning Scheme ('planning scheme') a Design and Development Overlay Schedule 14 – 'Kananook Creek Boulevard' ('DDO14') which covered the site for an interim period, and which expired on 27 October 2023. DDO14 included an interim mandatory height limit of 12 metres (3 storeys). This made the proposal prohibited and the proceeding was adjourned.
- 8 On 27 October 2023, Amendment C164fran to the planning scheme was prepared and gazetted by the Minister for Planning which amended DDO14. It remains over the site for an interim period to 24 April 2025, but changed DDO14 by replacing the mandatory height limit with a preferred height limit of 41 metres (12 storeys), preferred building setbacks, solar access requirements and pedestrian link requirements.
- 9 Presently, Council is progressing Amendment C160fran which has been publicly exhibited with submissions received and referred by Council to a Planning Panel for review in what we understand to be around July this year. Amendment C160fran seeks to implement the land use and development directions of the *Frankston Metropolitan Activity Centre Structure Plan, 2023* ('Structure Plan, 2023') which was adopted by Council on 14 June 2023.
- 10 Prior to the re-scheduled hearing date of 15 April 2024, further amended plans ('second amended plans') were circulated further reducing the height of the whole of the proposed development to 14 storeys and reducing the apartments to 133 with adjustments to setbacks to satisfy those discretionary requirements of the amended interim DDO14.
- 11 We have substituted these second amended plans by order dated 23 April 2024.
- 12 In response to the second amended plans, Council maintains its position of refusal of the proposed development with the following amended grounds:
 - The setbacks, bulk and mass of the proposed development to Kananook Creek Boulevard and the siting and design of the lower ground level to Kananook Creek and the public thoroughfare to the southern boundary are not consistent with the strategic objectives of the Frankston Metropolitan Activity Centre Structure Plan (2015), the Frankston Metropolitan Activity Centre Structure Plan (2023) and Design and Development Overlay, Schedule 14 (DDO14) in the Frankston Planning Scheme.
 - The proposed development to Kananook Creek Boulevard and the proposed siting and design of the lower ground level to Kananook Creek and the public thoroughfare to the southern



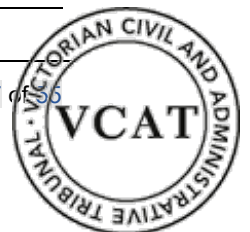
boundary does not represent a satisfactory urban design response consistent with the objectives of Clauses 11.03-1L-02, 12.03-1S, 15.01-1S, 15.01-2S and 15.01-5S of the Frankston Planning Scheme.

- The proposal has not demonstrated a sufficient level of compliance with Clause 58 of the Frankston Planning Scheme in respect to Clause 58.02-5 (Integration with the street objective), and Clause 58.04-4 (Wind Impacts).
- 13 In summary, Council considers that the current proposal does not present as an acceptable outcome.
- 14 In general support of Council’s views, objectors to the permit application (‘respondents’) have expressed their concerns to the proposal. They include the Mornington Environment Association Incorporated (‘MEA’), the Long Island Residents Group Incorporated (‘Long Island Residents Group’), the Kananook Creek Association Incorporated (‘Kananook Creek Association’), the Port Phillip Conservation Council Incorporated (‘PPCC’), and Hilary Bray and Ann Robb.⁶ In addition, the respondents have expressed more detailed concerns over a range of matters including traffic impacts, environmental impacts including acid sulfate soils, drainage, precedent, views from and to the coast and proximity to Kananook Creek.
- 15 In contrast, the applicant says the proposal provides an appropriate level of intensification of use and built form that is commensurate with the location of the site within the FMAC. The proposal makes a meaningful contribution to housing diversity with 133 apartments located close to shops, community facilities and public transport services. The proposal will also contribute to employment opportunities with retail and various food and drink premises. Areas facing the Kananook Creek Boulevard and Nepean Highway will have activated pedestrian frontages whilst a pedestrian link along the southern boundary will provide access between the Nepean Highway and Kananook Creek.
- 16 The applicant says the proposal represents an acceptable outcome to what the planning scheme currently seeks for the site and locality.

Additional information and evidence

- 17 In addition to amending the plans, our order dated 23 April 2024 also amended the description of the proposal to reflect the reduction in height to 12 storeys and included the additional permit requirement now triggered under the current interim DDO14 control.

⁶ They are collectively referred to as the ‘respondents’.



- 18 We also note that in addition to the amended plans that were circulated in February 2024 by the applicant, the following reports were also circulated in support of the proposal:
- Acoustic Assessment Report, Vipac Engineers and Scientists Limited, 14 February 2024.
 - Clause 58 Assessment.
 - Green Travel Plan, Sustainable Development Consultants, February 2024.
 - Landscape Plans, prepared by Acre, dated 15 February 2024.
 - Reflectivity and Glare Assessment, SLR Consulting Australia Pty Ltd, 13 February 2024.
 - Sustainability Management Plan, Sustainable Development Consultants, February 2024.
 - Transport Impact Assessment Report, Ratio Consultants Pty Ltd, 14 February 2024.
 - Waste Management Plan, Sustainability Development Consultants, February 2024.
 - Wind Tunnel Test and Report, Vipac Engineers and Scientists Ltd, 15 February 2024.
- 19 We note Council relies on the urban design evidence of Mr Partos while the applicant relies on the town planning evidence of Mr Negri, the urban design evidence of Mr Sheppard and the traffic evidence of Mr Fairlie.⁷ We have had regard to this evidence as well the submissions from Mr Montebello for Council, Mr Chessell and Ms Sharp for the applicant and the submissions from respondents including Mr Thurley, Ms Warfe, Ms Bray, Ms Faulkner, Ms Howden, and Ms Robb.
- 20 We also note that alongside the circulation of the expert evidence, the applicant also circulated the following additional reports:
- Pedestrian Level Winds – Wind Tunnel Testing Report, Vipac Engineers and Scientists Ltd, 27 March 2024.
 - Soil Site Assessment for Coastal Acid Sulphate Soil, Diomides & Associates Pty Ltd, 1 March 2024.
- 21 During the hearing further information was provided by the applicant including amended plans showing the removal of wind screening and an alternative street activation layout along the Kananook Creek Boulevard frontage.
- 22 We have taken all the above material into account in our deliberations.

⁷ In addition to tabled evidence from Mr Goss with photomontages of the proposal.



What is now proposed?

- 23 The proposal as shown in the second amended plans is for a 14-storey mixed-use development, use of the land for dwellings, alteration of access to a road within a Transport Zone 2 and a reduction in car parking requirements (refer to Figures 1, 2 and 3).



Figure 1: Architectural render view looking west from Nepean Highway. Source: Plus Architecture.



Figure 2: Architectural render view looking south-east from Kananook Creek. Source: Plus Architecture.



Figure 3: Architectural render view looking north-east from Kananook Creek. Source: Plus Architecture.

- 24 The proposal now includes 133 apartments comprising:
- 17 x one-bedroom apartments;
 - 85 x two-bedroom apartments;
 - 29 x three-bedroom apartments; and
 - 2 x four-bedroom apartments.
- 25 The proposal is for a 14-storey building over two levels of basement, comprising dwellings, shops, restaurants, food and drink premises, offices and amenities. It will have a maximum variable building height of approximately 47.9 metres to the western, Kananook Creek Boulevard interface and 44.5 metres to the eastern, Nepean Highway interface. This is due to the slope of the site from east (south-east corner) to west (north-west corner) of approximately 4 metres.
- 26 The building design includes a traditional podium and tower form with varied setbacks at the ground floor to Nepean Highway and at the lower ground floor to Kananook Creek Boulevard.
- 27 It has an overall width of the tower of 54.4 metres and a publicly accessible pedestrian link is provided along the southern boundary of the site.
- 28 The proposed development will be contemporary in architectural style featuring a range of materials and finishes consisting of concrete, glass, and

metal. Communal space is provided at level 1, level 11 and at roof level, which includes an outdoor area, dining space and wellness room.

- 29 Access to the proposed development is gained to the lower ground level on Kananook Creek Boulevard, with Nepean Highway providing access to basement levels 1 and 2. Car parking is proposed to be provided across two basement levels and one lower ground level with a total of 204 car parking spaces provided. This results in a shortfall of 19 spaces. It is also proposed to provide 178 bicycle spaces which is in excess of what is required under the planning scheme.

What is the physical context?

- 30 The site is a large vacant parcel of land positioned between Nepean Highway to the east and Kananook Creek Boulevard to the west (refer to Figure 4).

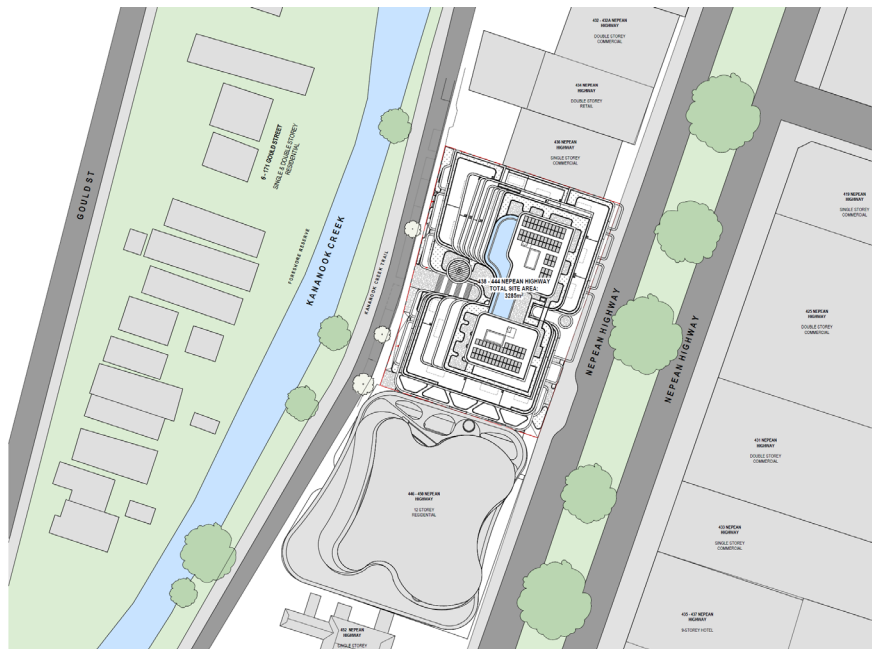


Figure 4: Plan showing the juxtaposition of the development footprint of the proposal with Kananook Creek, residential properties in Gould Street and the Harbour development to the south. Source: Plus Architecture.

- 31 It has an overall area of 3,285 square metres. The site is generally mid-block, south of Beach Street and north of Wells Street. The boundary to Kananook Creek Boulevard has a slightly angled alignment as it follows Kananook Creek.
- 32 The site has a fall from east to west with a low point in the central north of its frontage to Kananook Creek Boulevard. The permit application was notified to Melbourne Water, who, although are not a referral authority, advised that the frontage of the site is subject to storm-tide flooding from Port Phillip Bay and that the 1% Annual Exceedance Probability ('AEP') applicable flood level is 1.7 metres to the Australian Height Datum

(‘AHD’). Melbourne Water advise that this is anticipated to rise to 2.4 metres to AHD in 2100 as a result of the influence of projected climate change.

- 33 We note that Melbourne Water do not object to the grant of a permit subject to conditions which include raising the floor levels by 600mm above the predicted 2100 flood level requiring floor levels to be 3 metres AHD.
- 34 The site is located at the western edge of the FMAC and is within approximately 500 metres west of the Frankston Railway Station. The FMAC includes a wide range of uses such as office, commercial and residential. The FMAC presently displays a mixed built form, ranging from single-storey buildings to multi-storey developments.
- 35 To the immediate west of the site is Kananook Creek Boulevard, which is a one-way street operating in a north to south direction with access via Beach Street. It comprises a road reserve, footpath, and on-street parking on the eastern side only. The western side of Kananook Creek Boulevard includes a wider pedestrian path and grassed reserve, which slopes steeply down to the Kananook Creek. In this location (and further to the south) the banks of Kananook Creek are lined with constructed edges with more riparian vegetated edges found further upstream to the north.
- 36 On the western side of Kananook Creek is an established residential area within a General Residential Zone - Schedule 1 – ‘General Residential Areas’ (‘GRZ1’). Kananook Creek runs parallel with the foreshore of Port Phillip Bay creating a natural division between the core commercial centre of the FMAC and the long strip of land known as Long Island. Long Island is generally occupied by one and two-storey dwellings. The area is affected by the Design and Development Overlay Schedule 6 – ‘Frankston-Seaford Coastal Strip’ (‘DDO6’), which includes a mandatory building height limit of 9 metres. Dwellings in the Long Island residential area generally front Gould Street with private open space fronting Kananook Creek where many have constructed small jetties or landings. Those on the western side of Gould Street front directly onto the beach foreshore, with most having informal access directly to the beach.
- 37 Land to the south at 446-450 Nepean Highway is currently occupied by double-storey commercial buildings. This site has been granted a permit at the direction of the Tribunal in *Long Island Residents Group Inc. & Frankston Beach Association Inc. v Frankston CC* [2024] VCAT 359 (‘*Long Island Residents*’) for the construction of a 14-storey mixed-use building with a ground level café, basement car parking and 94 apartments. It is referred to as the ‘Harbour development’.
- 38 Land further to the south is 452 Nepean Highway which has been developed with a single-storey building that is occupied by a fast-food outlet and at grade car park. Further south is Wells Street, which is a local



road and a key pedestrian link to the foreshore. This street provides access to a foreshore car park and reserve and connects to Gould Street.

- 39 On the south side of Wells Street is the four to five-storey commercial building at 454-472 Nepean Highway (with a height of approximately 20 metres) and an eight-storey building at 101 Wells Street that is occupied by South-East Water Corporation with a frontage to Kananook Creek. This building has a maximum height of 36.5 metres.
- 40 Land to the north of the site includes a row of single and double-storey commercial buildings. The land further north at 424-426 Nepean Highway has an existing permit (492/2017/P) that allows the use of and development of an 11-storey mixed-use development, including retail, dwellings and serviced apartments. The approved development has a maximum height of 33.6 metres. This permit will expire if construction is not commenced by 18 September 2023 and not completed by 18 September 2025. There is a current amendment application that seeks to increase the maximum building height to 13 storeys (48.5 metres as presented to the west interface inclusive of rooftop services or 47.1 metres excluding the rooftop services).
- 41 Further north there are residential areas and the Kananook Creek takes on a more natural appearance.
- 42 To the immediate east of the site is Nepean Highway, which is approximately 50 metres wide. This section of Nepean Highway accommodates three traffic lanes in each direction, separated by a vegetated central median. Kerbside parking is available on each side of Nepean Highway, typically subject to short-term restrictions during weekday business hours.
- 43 Land on the eastern side of Nepean Highway is commercial in nature. It is characterised by a mix of built form, including a retail liquor outlet at 425-427 Nepean Highway, a row of single and two-storey commercial buildings at 431 and 433 Nepean Highway, and an 11-storey Quest Apartment building at 435-437 Nepean Highway. The Quest Apartment building was approved under planning permit 323/2008/P (issued on 26 March 2009). It has a two-storey podium and a maximum height of 46.4 metres.

What is the strategic and policy context?

- 44 The site is within a Commercial 1 Zone ('C1Z') that has purposes including creating vibrant mixed-use commercial centres for retail, office, business, entertainment, and community uses and providing for residential uses at densities complementary to the role and scale of the commercial centre.
- 45 The site is subject to Parking Overlay - Schedule 1 – 'Frankston Metropolitan Activity Centre' ('PO1'). This overlay sets the parking rates applicable of uses in Clause 52.06-5 – 'Car Parking'. The provision of car parking in the basement areas require a reduction in the car parking requirements.

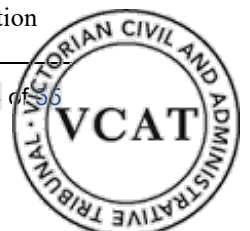


- 46 The application is subject to a suite of State and local policies that encourage intensification, housing diversification and design excellence in and around activity centres and strengthen Melbourne's competitiveness for employment and investment.
- 47 As previously noted, the site is in the FMAC which has been considered an important activity centre for many decades. It was first identified in Melbourne 2030⁸ as a Principal Activity Centre and more recently, it is one of the nine Metropolitan Activity Centres within Plan Melbourne 2017-2050 ('Plan Melbourne').⁹
- 48 Clause 02.03-1 – 'Settlement' in the Municipal Planning Strategy ('MPS') describes the strategic directions for the FMAC:
- The Frankston Metropolitan Activity Centre (MAC) is one of nine Metropolitan Activity Centres for the metropolitan area of Melbourne. It provides a key transport hub and attracts large scale developments, including those of a commercial, residential, health, entertainment and sporting nature that serve a wide catchment. In addition, residential development in and around the centre is increasing.
- 49 The strategic direction of the FMAC is based on a series of structure plans that have been adopted by Council over time. The first was the Tafe to Bay Structure Plan which was adopted by Council in 2005¹⁰, then followed and replaced by the Structure Plan, 2015 that is listed as a policy document in Clause 11.03-1L-02 – 'Frankston Metropolitan Activity Centre'.
- 50 In response to the release of Plan Melbourne in 2017, the Draft Structure Plan, 2022 was prepared that reviewed and updated the Structure Plan, 2015. Following community consultation, this structure plan was further revised to form the Structure Plan, 2023 which was adopted by Council in June 2023.
- 51 The Structure Plan, 2023 identifies the site as being within Precinct 4 – 'Promenade'. This area is envisaged to accommodate a thriving hospitality and entertainment precinct focused on Kananook Creek and Nepean Highway. Ground level uses will include hospitality, entertainment, and retail, with residential, office, accommodation, and other uses on upper levels.
- 52 The Structure Plan, 2023 includes objectives relating to matters such as:
- Encouraging economic investment in the FMAC.
 - Strengthening the FMAC as a regional employment hub.

⁸ Melbourne 2030: Planning and Sustainable Growth (October 2002).

⁹ Plan Melbourne 2017-2050: Metropolitan Planning Strategy, 2017 and Plan Melbourne 2017-2050: Addendum 2019, 2019 which are both policy documents under Clause 11.01-1S – 'Settlement'.

¹⁰ This structure plan was heavily referenced in the submission by the Kananook Creek Association as the version most supported by the local community for future change in the area.



- Providing a diversity of housing.
 - Providing high quality built form across the FMAC.
 - Strengthening visual and physical connections to the water.
 - Protecting streets and public places from wind and overshadowing impacts.
 - Ensuring built form contributes to active and people-focused streets and responding to sensitive interfaces and protecting the amenity of existing and future residents.
- 53 It contains preferred height and setback requirements for each precinct that has been translated into DDO14 that now forms part of the planning scheme.
- 54 Clause 1.0 of the DDO14 contains the following design objectives:
- To encourage high quality built form along Nepean Highway that is responsive to its role as a gateway to the Frankston MAC and maintain a pedestrian scale at street level with taller building elements set above and behind.
 - To ensure development respects sensitive amenity and environmental interfaces including residential interfaces, Kananook Creek and the Frankston Foreshore.
 - To maintain adequate sunlight access to the public realm and public open spaces at key times of the year.
 - To encourage built form that creates a high quality backdrop when viewed from the foreshore reserve and Kananook Creek.
 - To minimise the visual dominance of development when viewed from the foreshore reserve and Gould Street residences.
- 55 The overlay contains requirements for building height and street wall height, building setback and separation, tower elements, sustainable and adaptive design, solar access, pedestrian links, landscaping and open space, access, carparking, loading area and services. There are also a series of general design requirements and decision guidelines that should also be considered where relevant.
- 56 Council outlined the relevant objectives and strategies of the Planning Policy Framework ('PPF') at Clauses 11, 15, 16 and 18¹¹ that provide guidance about the type, location, and anticipated density of new housing in

¹¹ Clauses 11.01-1S – 'Settlement', 11.03-1R – 'Settlement – Metropolitan Melbourne', 11.03-1R – 'Activity Centres – Metropolitan Melbourne', 15.01-1S – 'Urban Design', 15.01-2S – 'Building Design' and 15.01-5S – 'Neighbourhood Character', 16.01-1S – 'Housing Supply', 16.01-1R – 'Housing Supply – Metropolitan Melbourne' and 16.01-2S – 'Housing Affordability', 18.01-1S – 'Land use and transport integration', 18.01-2S – 'Transport system', 18.01-3S – 'Sustainable personal transport', 18.02-1S – 'Walking', 18.02-2S – 'Cycling', 18.02-3S – 'Public Transport' and 18.02-3R – 'Principal Public Transport Network'.



the municipality. Policies in the MPS and PPF that are relevant to our consideration include:

- Clause 02.03-5 – ‘Building form and design’ which acknowledges the municipality is undergoing land use and density change such as large scale development in the FMAC. It says Council is seeking to facilitate development, that is sympathetic to neighbourhood character, environmental and heritage values;
- Clause 02.03-6 – ‘Housing’ which identifies the FMAC as a location for significantly higher density residential development;
- Clause 02.03-7 – ‘Economic development’ which seeks to encourage diversification of the employment base to encourage economic activity to employ residents;
- Clause 11.01-1L-02 – ‘Frankston Metropolitan Activity Centre’ which includes a strategy to enhance the image of the FMAC by building on its unique bayside location. Other strategies are to encourage high density housing and accommodation throughout the FMAC, particularly on vacant or under-utilised sites and buildings and to encourage the provision of focal points and pedestrian circulation through the FMAC; and
- Clause 16.01-1L – ‘Housing Supply’ which contains a strategy to encourage higher density in and around the FMAC.

57 Environmental policies that are relevant include:

- Clause 02.03-2 – ‘Environmental and landscape values’ which has an objective to manage the competing demands between environmental protection, landscape amenity and facilitating development;
- Clause 02.03-3 – ‘Environmental risks and amenity’ which states that careful planning is needed for all major developments proposed in coastal waters, along the foreshore, close to Kananook Creek in terrestrial and riparian ecosystems, and in low lying areas of the Frankston municipality including the Frankston MAC;
- Clause 12.02-1S – ‘Protection of the marine and coastal environment’ which contains strategies including to protect coastal and foreshore environments and improve public access and recreation facilities around Port Phillip Bay by focusing development in areas already developed or in areas that can tolerate more intensive use;
- Clause 13.01-1S – ‘Natural hazards and climate change’ which has an objective to minimise the impacts of natural hazards and adapt to the impacts of climate change through risk-based planning; and
- Clause 14.02-1S – ‘Catchment Planning and management’ which has an objective to assist the protection and restoration of catchments,



waterways, estuaries, bays, water bodies, groundwater, and the marine environment.

- 58 Other documents that are relevant and which we have considered include:
- Urban Design Guidelines for Victoria, 2017 ('Urban Design Guidelines') which are a policy document under Clause 15.01-1S – 'Urban design'; and
 - Kananook Creek Built Form Review, 2022 ('Built Form Review') which modelled and assessed various iterations of built form outcomes within the precinct.

Post-hearing submissions

- 59 Towards the end of the hearing, the decision of the Tribunal in *Long Island Residents* was handed down.
- 60 At the request of the applicant and Council and in consideration of the implications of that decision for our matter, we agreed to allow an opportunity for all parties to lodge written submissions post-hearing on any matters arising from *Long Island Residents* that may be relevant to our matter.¹²
- 61 Written submissions were received from all parties, and they have been taken into consideration by us where relevant.

WHAT ARE THE KEY ISSUES?

- 62 This proceeding raises issues regarding the future impacts of significant built form changes along part of the Frankston bayside area. There is strong community sentiment against the proposal for a 14-storey mixed-use building close to Kananook Creek that will clearly be visible from the bayside shoreline.
- 63 Despite this sentiment, the planning scheme identifies the site within, albeit on the periphery, of the FMAC. These areas are identified and promoted in the planning scheme for not only substantial change but significant intensified development.
- 64 However, there is tension between a substantial built form change and a sensitive location adjacent to the Kananook Creek and not far from Port Phillip Bay.
- 65 Having considered the submissions and the evidence, and having inspected the site and the surrounding area, we have concluded that the principal issues in this case can be categorised as follows:
- Is the proposal acceptable having regard to the site's physical and strategic contexts?

¹² By order dated 23 April 2024.

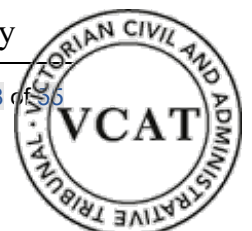


- Is the proposed built form an acceptable design response?
- Does the proposal provide an acceptable response to Clause 58?
- Are the proposed car parking and vehicle access arrangements acceptable?

- 66 We must decide whether the proposal will produce an acceptable outcome having regard to the relevant policies and provisions in the planning scheme. We note that many of the submissions from the respondents were critical of the structure and content of the planning controls with reference to the DDO14. However, it is important to distinguish that it is not our role to question what the planning scheme says, but rather to apply it in our decision making as we find it.
- 67 Net community benefit and sustainable development is central in reaching a conclusion. Clause 71.02-3 – ‘Integrated Decision Making’ of the planning scheme requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.
- 68 With this proposed development we must decide whether a permit should be granted and, if so, what conditions should be applied.
- 69 Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the planning scheme and assisted by our inspection, we find the proposal does not achieve an acceptable outcome.
- 70 The site is in a sensitive area at the periphery of the FMAC and although we accept that taller and more intensive development can occur in the area, what is proposed, in our view, is a built form that has significant visual bulk impacts on sensitive features including Kananook Creek and the dwellings and their areas of open space that back onto the Creek. We consider the proposal seeks too much in this regard. We also consider the proposal has unresolved design issues associated with effective and safe pedestrian activation along the site’s Kananook Creek Boulevard frontage and with the proposed pedestrian link along the southern boundary.
- 71 Although we have considered whether to grant a permit with conditions, we have formed the view that the design changes required are substantial, particularly in resolving tower design and street and pedestrian activation elements. We have determined to affirm the Council’s decision and that no permit be granted. Our reasons are set out below.

IS THE PROPOSAL ACCEPTABLE HAVING REGARD TO THE SITE’S PHYSICAL AND STRATEGIC CONTEXTS?

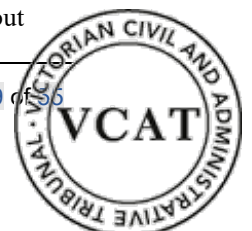
- 72 We note that there was general agreement between the Council, the applicant, and the evidence of Mr Negri that the proposal is supported by



strategic policy in the planning scheme that growth, including more intensified growth and higher built form, is encouraged in the FMAC.

- 73 Mr Negri says policy such as under Clause 02.03-5 identifies that larger scale development is occurring in the FMAC and that the policy promotes high quality urban design outcomes in both private and public realms. He says strategic directions in relation to housing under policy at Clause 02.03-6 notes the demand for a diversity of housing choices, including higher density housing. The policy promotes the FMAC as a location for significant higher density residential development.
- 74 Council says the site can and should accommodate a mixed-use development which includes a higher density residential component. This is primarily derived from its location in the FMAC as well as policy seeking to increase employment opportunities and high-density residential development on sites near and within Activity Centre locations such as this. The proposal derives support from the adopted Structure Plan, 2023 in this regard and Council's support for redevelopment is consistent with the Structure Plan, 2023.
- 75 Council says the proposal, sitting together with the Harbour development to the south, represents half of the land between Wells Street and Beach Street and will provide diversity of residential development in the FMAC. Council says its concerns with the proposal relate to design details but that the strategic support for taller built form including the proposed height and width of the building is evident subject to increased setbacks of the mid-tower levels from Kananook Creek Boulevard. In this regard, Council says the planning scheme also unambiguously calls for planning to contribute to a high standard of urban design, to promote urban design excellence which contributes positively to the local context and to respect and enhance sensitive landscape settings especially in activity centres.
- 76 Council referenced both the Structure Plan, 2015 and the Structure Plan, 2023 as setting the outcomes sought for the site.
- 77 We note the Structure Plan, 2015 is referenced in a strategy under Clause 11.03-1L-02 – 'Frankston Metropolitan Activity Centre' that seeks to encourage renewal and revitalisation of the FMAC by implementing the Structure Plan, 2015. It is also included as a policy document and is listed as a background document in the schedule to Clause 72.08.¹³ For the site the Structure Plan, 2015 includes aspirations for higher density residential development and a broadening of the diversity and range of housing within a revitalised public realm in the FMAC. In this location, the Structure Plan, 2015 promotes a tower above podium form composed of:

¹³ Background documents under the planning scheme do not form part of the planning scheme but they may assist in understanding the context within which a provision has been framed.



- A podium, with a preferred maximum building height of 12 metres, with no ground level setbacks to Kananook Creek Boulevard and Nepean Highway;
- Development above the podium setback 5 metres from the street frontage; and
- A preferred maximum building height of 32 metres.

- 78 We were advised by Council that the recommended provisions from the Structure Plan, 2015 were never implemented into the planning scheme. We also note that the schedule to Clause 74.02 – ‘Further strategic work’ refers to the Structure Plan, 2015 being reviewed, the outcome of which was the adopted Structure Plan, 2023.
- 79 Regarding the Structure Plan, 2023 we note that for the site, it identifies the following principles which Council says are the three primary considerations in this proceeding:
- Building design, height and bulk is sensitively integrated with the surrounds, including the natural landscape setting of the Kananook Creek corridor.
 - Views to and from public spaces and surrounding residential areas are maintained.
 - Development is in-keeping with or enhances the natural landscape character and appearance of the Kananook Creek environs.
- 80 The respondents say the proposed building height and scale will compromise the natural assets of Kananook Creek and the Port Phillip Bay foreshore that are considered the 'jewels in the crown' of Frankston.
- 81 The respondents were concerned with the contradiction in the planning scheme between the recognition of the sensitive coastal location of the site and the promotion of more intensive development. They say a proposal with such intensity as this is inconsistent with planning for a coastal and waterway location that may be at risk from the effects of climate change including coastal inundation.
- 82 They say the proposal is in a vulnerable location less than 200 metres from the shoreline of Port Phillip Bay and within 20 metres of Kananook Creek and is at risk from the effects of coastal climate change including sea level rise and coastal and estuary flooding.
- 83 The respondents drew our attention to comments made by Melbourne Water in its submission to Amendment C160fran in which it refers to a lack of direct consideration in the Structure Plan, 2023 to flood risks and that it is undertaking additional flood modelling work which the respondents say is due in 2025. The respondents have urged that development should wait until this flood modelling work is completed including the granting of any

approvals. The respondents say approving further developments in this area adjacent to Kananook Creek prior to the completion of Melbourne Water's revised flood mapping would contravene best practice and the precautionary principle.

- 84 The respondents also argue that taller buildings along the strip of land between Nepean Highway and Kananook Creek Boulevard from Wells Street to Beach Street is in the western periphery of the FMAC and risks separating the core of the FMAC from the outlook to Port Phillip Bay. They say the proposal will work against the objectives for this precinct within the FMAC and be detrimental to the natural assets of Kananook Creek and the foreshore environment of Port Phillip Bay.
- 85 They submit the proposal requires several variations to the requirements of the DDO14. They say the need and strategic justification for the variations is not evident and their acceptability is questioned given the highly sensitive interface with Kananook Creek, the intervening low rise residential properties on the other side of Kananook Creek and the foreshore area.
- 86 The respondents say the FMAC is the only Metropolitan Activity Centre that is located directly on Port Phillip Bay and that encouraging high rise development will impact on the low-rise built form character that predominates along the foreshore environs at this location and at Frankston more generally.
- 87 In addition, the respondents consider the proposal will detrimentally impact views of the coastal environment including from elevated lookouts such as Oliver's Hill.
- 88 Much of the respondent's submissions focussed on the nature and content of the controls arguing that they were not appropriate or acceptable because they would allow too large a development on the site that would, have unacceptable impacts on Kananook Creek, the residential area of Long Island and on the foreshore environment.
- 89 Some respondents favoured the Structure Plan, 2015 and others referred to the earlier Tafe to Bay Structure Plan, 2005. We note that just as the Structure Plan, 2015 replaced the 2005 version, so too has the Structure Plan, 2023 replaced the 2015 version as an adopted strategy by Council.
- 90 As we have indicated earlier, our role is not to question what the planning scheme says, but to apply it in assessing what is before us.

Tribunal's findings

- 91 We acknowledge the planning scheme requires consideration of climate change hazards such as storm surges and coastal inundation, floods, bushfires, and extreme temperatures. Clause 02.03-3 – 'Environmental risks and amenity' in relation to 'Climate change impacts' includes strategic

directions to apply the 'precautionary principle' in planning to avoid serious or irreversible climate change effects and states:

Careful planning is needed for all major developments proposed in coastal waters, along the foreshore, close to Kananook Creek in terrestrial and riparian ecosystems, and in low lying areas of the Frankston municipality including the Frankston MAC

- 92 We note that, despite the comments from Melbourne Water in relation to the strategic process associated with Amendment C160fran, we have their response to notification of the proposal that Melbourne Water do not object to the proposal subject to conditions. We note that in their response, Melbourne Water state:

Information available at Melbourne Water indicates that the applicable adjacent flood level (located within Kananook Creek Boulevard) is 1.7 metres to Australian Height Datum (AHD) based on a flood event which has a probability of 1% occurrence in any one year. The property is subject to storm-tide flooding from Port Phillip Bay. The 1% AEP applicable adjacent flood level is 1.7 metres to the Australian Height Datum (AHD). This is anticipated to rise to 2.4 metres to AHD in 2100.

- 93 We understand the site is not affected by any flood related overlay and that Melbourne Water were notified of the permit application. They are not a referral authority. Council tabled a plan which shows the extent of flood inundation associated with a 1% AEP event in 2100 to reach into the site by around 4.69 metres and affecting a slither of the site's frontage along Kananook Creek Boulevard.
- 94 We also understand, the applicant does not object to the conditions sought by Melbourne Water which includes a 600mm increase in the floor levels above the 2.4 metre AHD 1% AEP 2100 flood level.
- 95 We find that the combination of the response from Melbourne Water, the conditions it seeks which the applicant accepts, the lack of flood related overlays and the inclusion of much of the metrics and policy directions of the Structure Plan, 2023 into DDO14, provides support for the proposal in terms of the future risks posed to it from the effects of climate change including inundation. We note that in relation to the future effects of climate change, planning should not be based on a 'business as usual' approach. However, we accept the position of Melbourne Water with respect to future flood hazard and risk noting its response and that the proposal responds to what flood levels may be anticipated by 2100. We also accept that by intensifying housing in activity centres such as the FMAC, greater pressure on urban sprawl and its effects on the environment can be lessened.
- 96 In terms of the FMAC itself, we accept that it is true that it is the only Metropolitan Activity Centre around the edge of Port Phillip Bay. We note

that the FMAC is identified under the ‘Melbourne 2050 spatial framework in Clause 11.01-1R – ‘Settlement-Metropolitan Melbourne’ as a Metropolitan Activity Centre that has a direct engagement with Port Phillip Bay. This feature is also identified under Cause 11.03-1L-02 as a unique asset.

- 97 We also note that the size of the FMAC was reduced between the Structure Plan, 2015 and the Structure Plan, 2023, focusing the aspirations for growth of a more intensified and higher density form within a smaller, limited area. This, in our view, limits the extent of impact of higher built form to the small geographical area of the FMAC, without such development becoming more widespread around Port Phillip Bay. This in turn results in an outcome that better protects the low-scale built form character envisaged for and enjoyed around most of the Bay.
- 98 We note the Structure Plan, 2023 includes changes from the 2015 version and we note that much of what is included in the Structure Plan, 2023 has been introduced into the planning scheme under DDO14. This includes a preferred building height of 41 metres or 12 storeys with a street wall height of 12 metres or 3 storeys with setbacks.
- 99 We understand that these metrics have been determined through the Built Form Review which modelled and assessed various iterations of building heights to identify levels that would strike a balance between maximising development capacity, so that Frankston can fulfill its role as a Metropolitan Activity Centre, whilst ensuring that development does not visually overwhelm Kananook Creek and the foreshore environment, maintain adequate sunlight to Kananook Creek and key pedestrian footpath locations.
- 100 We note the DDO14 establishes the detailed policy and requirements for assessing the proposal. We also note the Structure Plan, 2023 has been adopted by Council and pursuant to section 60(1A)(g) of the P&E Act we may consider, if the circumstances appear to so require, any strategic plan adopted by Council. Given the provisions in DDO14 are predominantly derived from the Structure Plan, 2023, we do give it some weight in our deliberations. We provide our assessment of the detailed design aspects of the proposal later in our reasons.
- 101 Overall, we find that the site enjoys significant strategic support for redevelopment. It has physical features and characteristics that support a mixed-use development of a larger scale including:
- A large, vacant parcel of land within the FMAC.
 - Frontages to both the Nepean Highway and Kananook Creek Boulevard.

- A location in a part of a precinct where approvals are in place for taller buildings including up to 14 storeys in height with the Harbour development to the south.
- A location close to public transport, jobs, and services and close to natural environments such as Kananook Creek and the Port Phillip Bay foreshore.
- A location that does not directly abut residential areas. The site is separated by roads and Kananook Creek from the nearest residential areas.
- A location that is approximately 160 metres from the foreshore of Port Phillip Bay and is separated by a road, Kananook Creek, and dwellings in Gould Street.

102 These factors lead us to the conclusion the development is unlikely to have any significant impact on the coastal or marine environment other than what has been identified in the Structure Plan, 2023 and the DDO14.

103 The DDO14 has established both aspirational outcomes to be achieved through the design objectives supported by preferred design outcomes and general design requirements. We can only assume that where these preferred outcomes are identified under the DDO14, then their achievement will go a long way to satisfying the aspirational design objectives which can be assessed under the decision guidelines in Clause 6.0 of DDO14.

104 We find the proposal is strategically supported by policy and enjoys a physical setting acceptable for a proposal like what is proposed. What is of concern to Council and the respondents is the design approach of the proposal which we now consider.

IS THE PROPOSED BUILT FORM AN ACCEPTABLE DESIGN RESPONSE?

105 The acceptability of the built form design response has been met with varied opinion between Council and the respondents and that of the applicant.

106 Council has expressed concerns with how well the proposal has responded to the DDO14 requirements. Council has not expressed concern regarding building height. They have also stated no concerns with building width subject to the design requiring greater mid-tower setbacks from Kananook Creek Boulevard.

107 Council's strongest concerns have been in relation to the need for greater pedestrian activation along the Kananook Creek Boulevard frontage of the site and that the design response of the proposal is currently not acceptable given the changes in grade emanating from the requirements of Melbourne Water for raised floor levels in response to flood hazards.



- 108 Both Council and the applicant were at pains at the beginning of the hearing to downplay their arguments concerning the pedestrian link along the southern boundary of the site between the Nepean Highway and Kananook Creek Boulevard. Both Mr Montebello and Mr Chessell stated that their respective clients were close to agreeing on a conditional solution to how the design of the pedestrian link could be improved in an integrated manner with the Harbour development to the immediate south. To this extent, evidence from Mr Partos, Mr Negri and Mr Sheppard were limited regarding the pedestrian link.
- 109 The respondents are concerned the 14-storey development requires variations to several requirements in the DDO14. They say this fails to meet the design objectives and decision guidelines in the overlay. They argue the overall height is excessive, the setbacks are insufficient, and the architectural treatment contributes to the visual bulk, rather than mitigating it.
- 110 The applicant considers that the planning scheme provides built form guidance for the proposal. It says the DDO14 controls are discretionary and allows for flexibility in the design response of their proposal. The evidence of Mr Negri and Mr Sheppard is that the proposal responds appropriately to the DDO14, together with the scope of the Structure Plan, 2023. The applicant says the proposal represents an acceptable planning outcome having regard to the relevant policy and provisions in the planning scheme, including the DDO14.
- 111 We make the observation that the introduction of DDO14 into the planning scheme via Amendment C164fran whilst Amendment C160fran remains the subject of a Panel review process is unusual. We say unusual because the content of DDO14 includes objectives, built form controls and requirements which are generally consistent with those of Amendment C160fran and includes most of the key elements from the Structure Plan, 2023 which is the adopted strategic document that is the foundation for Amendment C160fran.
- 112 We note that in introducing DDO14 into the planning scheme, the Minister for Planning's reasons for doing so whilst Amendment C160fran and the Structure Plan, 2023 is subject to strategic review was to provide a level of control over developments, such as this proposal, such that:

Prompt approval of the amendment will allow an orderly planning process to proceed in relation to proposed Amendment C160fran, which proposes to apply permanent controls (including built form controls in this particular area) across the FMAC area. Approval of development that is inconsistent with proposed built form controls before this statutory process occurs would be highly likely to jeopardise the aims of proposed Amendment C160fran before it can be considered.



I consider that, without this amendment being exempted from the usual process, development may be permitted which is highly likely to compromise the orderly planning of this part of Frankston.

The prompt approval of interim built form controls is necessary to ensure that this part of Victoria is immediately protected from the risk of development that is likely to compromise the public realm, the future liveability, the built form character and orderly planning outcomes for the FMAC.

- 113 Having considered this context, we find the proposal extends beyond the preferred outcomes and requirements established under DDO14 in a location that we accept from the respondents' submissions as sensitive.
- 114 We note the design objectives of DDO14 include reference to pedestrian scale at street level with taller building elements set above and behind. The proposal includes a street wall podium with tower above, a more traditional design response unlike the curvilinear design approved in *Long Island Residents*. We consider that elements of the built form design in terms of building height, mid-tower setbacks and width of the tower that exceed the requirements of the DDO14 or Structure Plan, 2023 seek too much for a location where it is sought to minimise visual dominance when viewed from the Gould Street residences including those that back onto and front Kananook Creek.
- 115 In this regard, we consider:
- The building height should be reduced to meet the preferred height outlined under DDO14.
 - The mid-tower setback from Kananook Creek Boulevard should meet the requirement specified in the Structure Plan, 2023.
 - The tower form should be split and separated with a clear gap of at least 9 metres to allow for both a reduction in tower width and greater visual permeability for areas behind the site towards Port Phillip Bay.
 - The public realm activation to Kananook Creek Boulevard and Nepean Highway as currently proposed requires further work to balance conflicting design objectives, i.e. the flood level requirements and the activation of the west façade at ground/street level.
 - Public safety and crime prevention design should be at the forefront of design response with respect to the interface between the public and private realm.
 - The proposed pedestrian link should be integrated with the adjacent pedestrian link proposed to the south in the now approved Harbour development.

- 116 We have had the benefit of the Tribunal’s decision in *Long Island Residents* and have considered that decision and the submissions filed with the Tribunal in that respect.
- 117 We have structured our detailed responses in a format using the primary headings outlined in DDO14.
- 118 Our following findings examine how the development responds to the requirements of the DDO14, the design objectives, design requirements and decision guidelines.

Building height and street wall

What the DDO14 says

- 119 Clause 2.1 of the DDO14 recommends a preferred maximum height of 41 metres (12 storeys) above natural ground level and a preferred street wall height of 12 metres.

What the proposal seeks

- 120 The development proposes a podium and tower form with an overall height of 47.9 metres to the uppermost west elevation to Kananook Creek Boulevard and 44.5 metres to the uppermost east elevation to Nepean Highway.
- 121 The applicant and the evidence of Mr Negri and Mr Sheppard say the slope of the site provides for an averaging of building height that closely matches the preferred maximum height of DDO14. They say the overall proposed height exceeds the preferred maximum building height in DDO14 by 3.5 metres or one storey to Nepean Highway and 6.9 metres or two storeys to Kananook Creek Boulevard. The uppermost storey of the proposal comprises a recessed lift and stair access to the roof top communal terrace and pool, amenity spaces and a pool lounge.
- 122 The proposed street wall height is approximately 12 metres to Nepean Highway and Kananook Creek Boulevard.

What the parties say

- 123 We note that Council and the expert witnesses do not oppose the proposed tower height and street wall height. The applicant submits that the street wall height is in accordance with the requirements of DDO14 and that the overall building height is generally consistent with the DDO14.
- 124 Respondents, like the Kananook Creek Association, consider the proposal for a 14-storey building in a sensitive waterway environment to be in the wrong place and oppose it. They say the proposal is of a scale and bulk that overwhelms the natural aspect of the site’s location opposite Kananook Creek. Mr Thurley believes future development adjacent to Kananook Creek needs to be more respectful of the natural environment of the

waterway and that a proposal that allows the waterfront to be dominated by a wall of buildings is not considered a response inspired by nature.

- 125 The respondents say the proposal, together with other similar tall built form, creates a real risk of creating a barrier wall of high-rise buildings between the town centre and the Frankston coastline. The respondents say the proposal will add to the disconnect between the core area of the FMAC and the waterfront including Kananook Creek.
- 126 The Long Island Residents Group say the proposed height exceeds the preferred DDO14 height by a ‘very significant’ 19%. They say that this exceedance will not ‘minimise the visual dominance of development when viewed from the foreshore reserve and Gould Street residences’ as is called for in the design objectives of DDO14. They say that given the proximity to the Kananook Creek trail (10 metres) and the 21 private residences opposite in Gould Street, any exceedance of the preferred height is not supported.

The Tribunal’s findings

- 127 We are not persuaded that a height exceedance from that preferred in the DDO14 is justified in this location.
- 128 The design of the tower form (which also exceeds the design requirement for slender, narrower tower widths, as discussed below), in combination with the proposed height, will match the height of the now approved Harbour development to the south. In the *Long Island Residents* decision, the Tribunal found the proposed height acceptable for reasons including its immediate context and location within the FMAC, and importantly due to the undulating curvilinear design form of the whole built form.
- 129 In this case, and read as a whole, we find the design is a more traditional street wall podium and tower typology. We accept that the design of the tower seeks to differentiate between the northern and southern tower elements through a combination of a more tapered setback design for the northern tower from Kananook Creek Boulevard and provision of a 12-metre-wide central recess. However, the combination of height exceedance and the lack of a clear break, as apart from a recessed design, between the tower elements makes the overall appearance of the building bulky with a strong mass that is at odds with the general design requirements to minimise detrimental visual impacts to sensitive interfaces including Gould Street and enhancement of views from Kananook Creek and the foreshore reserve.
- 130 We have considered the decision guidelines concerning how the development is to respect the visual qualities of the foreshore and Kananook Creek and environs. The character of Kananook Creek and the trail is open and flanks the rear boundaries of residential properties. This is a sensitive outlook, and we find the proposal’s height, in conjunction with



other built form considerations, to be inappropriate and not what is anticipated in DDO14 or the Structure Plan, 2023.

- 131 By allowing further built form exceeding the preferred height north of the already approved Harbour development to the south, the opportunity for any transitioning (however marginal, in this case 2 storeys) to a residential zone is lost. This is an urban design principal embedded in policy and guidelines, such as the Urban Design Guidelines, Chapter 1 ‘Urban Structure’:

Objective 1.3.3, Ensure large development sites maintain the amenity of adjacent residential uses - Create a transition from large development sites to adjacent residential neighbourhoods using scale, built form and uses.

- 132 Here we have a large site capable of accommodating a scaling down or transition to its sensitive interface with the existing residential area. The Gould Street residences are acknowledged in Diagram 1 of the DDO14 (refer to Figure 5). We find that a strong adherence to the preferred heights of the DDO14 is warranted in this location and recommend that future design reflects this.
- 133 We also consider that a proposed height too closely replicating that of the Harbour development to the south, results in lack of variation inconsistent with the general design requirement for buildings to create an interesting and varied skyline. In our view, a lower height together with setbacks and breaks between and within built form would result in a better outcome.
- 134 The street wall heights proposed are uncontroversial and we these acceptable and in accordance with the DDO14 requirements.

Building setback and building separation

What the DDO14 says

- 135 From Table 2 of DDO14, the preferred minimum building setback is 3 metres to Kananook Creek Boulevard between Wells and Beach Streets. The site is in this location.
- 136 The site is identified under DDO14 within sub precinct A. The preferred upper-level setback for the site is 5 metres from a street wall where the street wall abuts a pedestrian link.
- 137 Elsewhere, the preferred upper-level setbacks are:
- Five metres from the street wall where it fronts Beach Street, Wells Street and Nepean Highway.
 - Development above 35 metres or 10 storeys should be set back so it has minimal visibility from the Gould Street properties opposite. The level of visibility should be measured 10 metres from the rear



boundaries of the Gould Street properties. This is shown in Diagram 1 of DDO14 (refer to Figure 5).

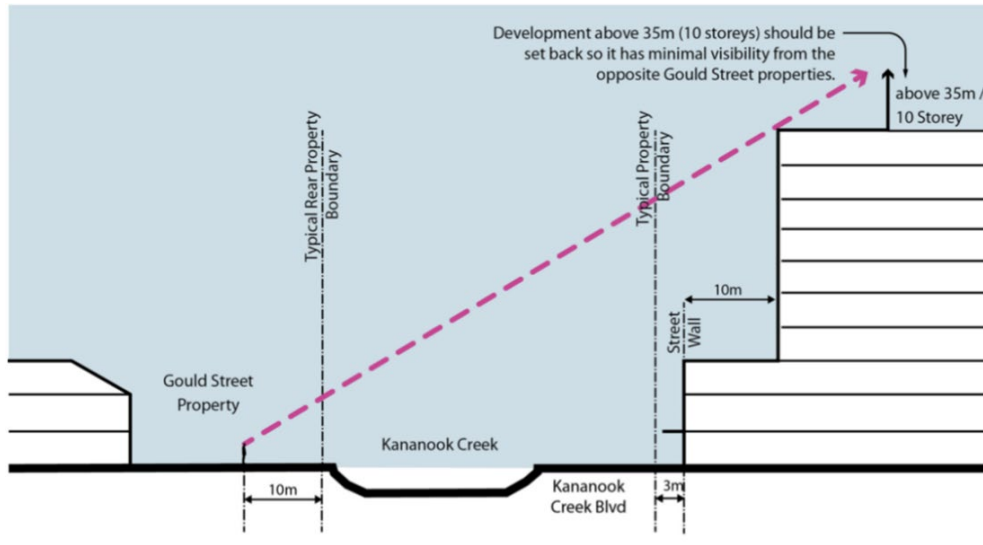


Figure 5: Diagram 1 from DDO14.¹⁴

138 Further setback requirements include:

Where development shares a common boundary with an adjoining site, provide side and rear setbacks above the street wall height in accordance with the requirements in Table 3.

Where sites are separated by a laneway, apply side and rear setbacks above the street wall height from the centre of the laneway.

The setbacks detailed in Table 3 also apply to development where there are multiple towers within the site and should be applied between tower elements as well as from side and rear boundaries.

Ensure that sufficient setbacks are provided as needed to allow for vehicle access, car parking and servicing.

139 Table 3 from DDO14 requires the following setbacks:

Table 3 - Side and rear setbacks above street wall height

| Building height | Preferred minimum side and rear setback above the street wall height |
|-------------------------|--|
| Up to 28.0m | 4.5m |
| Above 28.0m up to 42.0m | 6.0m |
| Above 42.0m | 10.0m |

¹⁴ Note the 3 metre setback from Kananook Creek Boulevard for developments shown diagrammatically is not shown in Table 2 for sub precinct A, but applies to all land, including the site. Also, note the inclusion of a 10 metre setback for mid-tower levels which is not included in the text of Table 2.

What the proposal seeks

- 140 The proposed building adopts a two-tower form connected by a central indented recess. We describe the connected tower forms as north and south towers. The north tower tapers in elevation/or vertically from the Kananook Creek Boulevard, while the south tower adopts a consistent vertical elevation. Both towers adopt a vertical elevation from the Nepean Highway elevation.

Nepean Highway elevation

- 141 At the Nepean Highway (east) elevation, the proposed minimum setbacks are as follows:

| | Proposed | DDO14 |
|--------------------|--------------|----------|
| Upper ground level | | |
| North tower | 2-2.5 metres | 3 metres |
| South tower | 4 metres | 5 metres |
| Levels 1-11 | 5-6 metres | 5 metres |
| Rooftop terrace | 5-6 metres | 5 metres |

Kananook Creek Boulevard elevation

- 142 At the Kananook Creek Boulevard (west) elevation, the proposed minimum setbacks and the DDO14 requirements are as follows:

| | Proposed | DDO14 |
|--------------------|------------------|-------------------------|
| North tower | | |
| Lower ground level | 3 metres minimum | 3 metres |
| Upper ground level | 3 metres | 3 metres |
| Level 1 | 3 metres | 3 metres |
| Level 2 | 3 metres | 13 metres ¹⁵ |
| Level 3 | 8 metres | 13 metres |
| Levels 4 to 6 | 8 metres | 13 metres |
| Level 7 | 10.7 metres | 13 metres |
| Level 8 | 12.2 metres | 13 metres |
| Level 9 | 13.7 metres | 13 metres |

¹⁵ Noting the reference to 13 metres for the north and south towers includes the setback of 3 metres from Kananook Creek Boulevard but also the additional 10 metres included in Diagram 1 and in the Structure Plan, 2023, but not referenced in Table 2 of DDO14.

| | Proposed | DDO14 |
|--------------------|------------------|--|
| Level 10 | 15.2 metres | Minimum visibility/over 35 metres height |
| Level 11 | 18.2 metres | Minimum visibility/over 35 metres height |
| Rooftop terrace | 14.25 metres | Minimum visibility/over 35 metres height |
| South tower | | |
| Lower ground level | 3 metres minimum | 3 metres |
| Upper ground level | 3 metres | 3 metres |
| Level 1 | 3 metres | 3 metres |
| Level 2 | 3 metres | 13 metres |
| Level 3 | 4 metres | 13 metres |
| Levels 4 to 9 | 8 metres | 13 metres |
| Level 10 | 8 metres | Minimum visibility/over 35 metres height |
| Level 11 | 11.2 metres | Minimum visibility/over 35 metres height |
| Rooftop terrace | 14.25 metres | Minimum visibility/over 35 metres height |

North boundary elevation

143 At the north elevation, the proposal provides:

- 4.67 metre setbacks up to level 8 (approximately 29.5 metres above natural ground level); and
- 6.17 metre setbacks from levels 9 to the rooftop terrace (approximately 44 metres above natural ground level).

South boundary/pedestrian link elevation

144 At the south elevation and pedestrian link location, the proposal is setback 6.5 to 6.85 metres from the south boundary at lower and upper ground

levels. Above, and cantilevered over, are levels 1-3, which are setback 4.5 metres. Levels 4 to the rooftop are set back 9.5 metres.

What the parties say

- 145 The setbacks to the north, south and Nepean Highway (east façade) are not in contest between Council and the applicant and are supported by the evidence of Messrs Negri, Sheppard and Partos. Although we do note that Mr Partos considered the street wall to the Nepean Highway did not require a setback and, without it, would better address the street.
- 146 Council opposes the proposed mid-tower setbacks to Kananook Creek Boulevard, saying that they are not consistent with DDO14 and the Structure Plan, 2023 and produce an unacceptable visual bulk and mass to Kananook Creek, the foreshore reserve and the rear yards of residential properties in Gould Street. They say that this interface/facade is the more sensitive of the elevations, as the Nepean Highway elevation fronts the centre of the FMAC and is in a more robust environment. In contrast, the Kananook Creek Boulevard interface abuts a sensitive environmental setting (the creek) and faces the rear of a number of established residential properties outside of the activity centre. The foreshore reserve is close by and is also considered a sensitive interface in the nearby environs that should be respected.
- 147 Council submits that extensive strategic work and community consultation over many years has led to the development of the adopted Structure Plan, 2023. The Structure Plan, 2023 builds upon work undertaken with the Built Form Review. This work included analyses of valued views and vistas in and around the adjoining neighbourhoods, Kananook Creek and the foreshore reserve. It comprises extensive scenario testing of heights and setbacks to arrive at recommendations that would ensure and encourage developments respect valued views and vistas and manage visual bulk and mass. Notwithstanding community feedback that built form controls be included as mandatory requirements, DDO14 has them as preferred or discretionary requirements.
- 148 With respect to mid-tower setbacks, we note there is a variation between Table 2 and Diagram 1 of DDO14 regarding preferred setback requirements from Kananook Creek Boulevard of 10 metres. Council says this is an oversight with the drafting of DDO14 whilst the applicant says it is not an applicable requirement.
- 149 Council says what is proposed for the Kananook Creek Boulevard elevation is inconsistent with the planning scheme and the strategic work. Mr Partos considers the ground level interface to the creek environs unresolved and further complicated by Melbourne Water flood level requirements. He says that the upper levels do not meet the setback requirements and are significantly less than what is required by DDO14. His evidence is that



there appears to have been no consideration given to the ‘guidelines’ of DDO14 in developing a built form response to Kananook Creek Boulevard.

- 150 The Long Island Residents Group say that the plans show development has a lower ground level setback of zero metres considering the incursion of stairs, planter boxes and wind protection screening. The plans show canopies encroaching into the minimum setback of 3 metres by extending to within approximately 1 metre of the Kananook Creek Boulevard boundary. Plans indicate the upper ground level setback of 3 metres is met.
- 151 The applicant submits that the proposed development is highly compliant with DDO14 to all boundaries. They say the Kananook Creek Boulevard elevation is acceptable, and in some areas the upper-level setbacks exceed the preferred metrics. Mr Negri says the setbacks are acceptable and that Melbourne Water requires a portion of the frontage to be provided with building floor levels of 3 metres AHD, which results in a level difference with the street of approximately 0.55 metres at the south-west corner and 1.4 metres at the north-west corner of the frontages of the site.

- 152 Mr Negri’s evidence is that:

In respect of the northern tower, the level difference is to be accommodated through a layered response to the Kananook Creek Boulevard frontage comprising:

- A retaining wall across the street frontage ranging from between approx. 900mm to 1200mm;
- Landscaping behind this retaining wall;
- An intermediate retaining wall (supporting outdoor dining areas) behind part of this landscaped area; and
- A glazed windscreen (1.8m in height) above the intermediate retaining wall forward of the outdoor seating area (no longer required)

- 153 Mr Negri says that the overall composition of the building assists in managing visual bulk from nearby rear yards of residential properties in Gould Street through the tapered built form of the northern tower.
- 154 Mr Sheppard’s evidence is that there is no setback requirement for the mid-tower levels above the Kananook Creek Boulevard (west) street wall until a height of 35 metres is reached. Mr Sheppard prepared a number of sightline diagrams to analyse the impact of the development from the Kananook Creek trail and says that the proposal will achieve the outcomes sought by DDO14.

The Tribunal’s findings

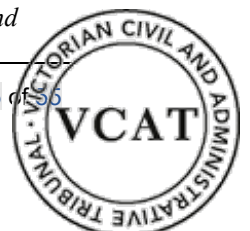
- 155 We agree with Council and the applicant that the north, south and east proposed setbacks are acceptable and consistent with DDO14. They respond to the robust character of the Nepean Highway and allow for



equitable development opportunities with upper-level setbacks to the north and south.

- 156 We are not persuaded that the Kananook Creek Boulevard elevation will provide an acceptable planning outcome and that the discretionary nature of the controls should be varied to the extent proposed. We acknowledge that the tapered façade of the north tower is designed to manage overshadowing to the creek trail and public realm, but the incursions into the preferred combined setbacks outlined in DDO14, the Structure Plan, 2023 and the Built Form Review by both towers, coupled with height exceedance, are significant and will result in an unacceptable visual bulk and mass viewed from the rear of the properties in Gould Street and the creek environs.
- 157 We have considered the decision guideline regarding the effect the development will have on the amenity of nearby properties and the public realm, particularly in regard to visual impacts, overlooking and overshadowing. While we do not consider overshadowing and overlooking to be an issue here, the visual impacts of the development as proposed are greater than envisioned in the DDO14 and the Structure Plan, 2023 through exceedances in preferred setbacks.
- 158 We consider that the DDO14, through extensive strategic work and built form testing, has balanced the management of growth in a major activity centre with a sensitive transitioning to the nearby residential properties and much-valued creek environment it fronts. We find that a future development proposal should more closely adhere to the built form controls on this site and ensure development potential is balanced against the aspirations of the DDO14, the Structure Plan, 2023 and the Built Form Review.
- 159 We find that the proposal does not acceptably mitigate off-site visual impacts to adjacent land including the public realm, public open space or adjacent residentially zoned properties.
- 160 We find the proposed design of the lower ground level interface to Kananook Creek Boulevard has not acceptably resolved the challenges of the Melbourne Water flood level requirement with providing suitably activated areas to this frontage. We understand the design challenges a future application will have in managing the level changes, the aspirations of the Structure Plan, 2023 and DDO14 while providing dignified access to persons with a disability, limited mobility and carers of young children in prams. However, as shown in the *Good Design Guidelines for Buildings in Flood Affected Areas*¹⁶ submitted by Council during the Hearing, these design challenges are faced in areas across Metropolitan Melbourne. There are many ways suitable design solutions can be arrived at, while satisfying street activation and widening, public realm benefits and producing high

¹⁶ *Good Design Guidelines for Buildings in Flood Affected Areas in Fishermans Bend, Arden and McCaulay*, Melbourne Water, City of Melbourne and City of Port Phillip (2021)



quality architecture and urban design. We find that the proposal does not contribute to or improves the pedestrian environment and other areas of the public realm.

- 161 We note the design requirement for the design to respond to topography so that the ground level of buildings meet the existing footpath levels to both frontages. The Nepean Highway frontage has acceptably dealt with the topography of the site, and this was not contested during the hearing.
- 162 The applicant, Mr Negri and Mr Sheppard say the restrictive conditions imposed by Melbourne Water result in a compromised design response to the street activation at the lower ground level interface of Kananook Creek Boulevard. To appropriately manage the flood hazards, the design response includes the raising of floor levels and some outdoor dining areas, with the provision of raised planter beds adjacent to footpath level.
- 163 Mr Partos describes the condition as raised activated edges set back from the boundary and raised by about 1 metre above the footpath level. As a consequence, what is required is a range of access stairs and external disabled lift platforms. He considers this is inconsistent with the vision of a widened footpath that can accommodate outdoor dining. In his evidence Mr Partos says:

While I consider that there may be some reasons for requiring a change of level, this should be minimised to the extent that enables a continuous path of travel to the front of the building, with universal accessibility (i.e. no stairs). This is consistent with the activation of the street edge. I note that the lower levels identified at the base of the stairs and at the car park ramp entrance suggest lower levels are achievable at this interface. I also note that the access stairs to Café 02 at the south west corner appear to compromise any opportunity for outdoor seating in this location.

- 164 We prefer the evidence of Mr Partos and find that the Kananook Creek Boulevard lower ground frontage does not provide an acceptable planning outcome and requires further resolution of the challenges faced with the Melbourne Water conditions and the integration of the requirements of DDO14.

Tower element

What the DDO14 says

- 165 Clause 2.3 requires the building to have a maximum tower width of 45 metres, with slender forms to reduce visual impact and allow for the sharing of views. All facades of the tower component are to be articulated. The general design requirements include the following:

Towers should be designed with slender forms, narrower than 45m width, that maximise spaces between built form elements and

minimise detrimental visual impacts to sensitive interfaces including of the foreshore reserve and Gould Street.

What the proposal seeks

166 The tower width proposed is 54 metres. The built form comprises two towers with a recessed central portion of dimensions varying at the east (Nepean Highway) and west (Kananook Creek Boulevard) elevations. At Nepean Highway, the proposed building comprises a south tower with a width of 22 metres and a north tower with a width of 29.4 metres with a 3-metre central recess. At Kananook Creek Boulevard, the south tower has a width of 20 metres and the north tower is 22.4 metres wide, with a central recess of 12 metres.

What the parties say

167 Mr Negri says the requirement is discretionary and that the ‘visual implication of the additional width, if regarded as one tower, is ameliorated through variation in massing and the provision of central recesses’. Mr Sheppard says the upper form of the proposed building has been designed to appear as two distinct forms and that while they are connected, they will ‘appear from most vantage points as separate, slender towers, reducing the visual bulk of the building’. He says that it is not a reasonable expectation that buildings opposite (across the Nepean Highway) should have a view of the bay. Mr Partos considers the inclusion of a recess to the street elevations with a maximum width exceedance of 9.4 metres a suitable response to articulating the façade and reducing the apparent massing.

168 The respondents disagree and say that the recess is not a visual break and is inconsistent with DDO14. They say that on oblique views, whether from the rear of Gould Street residences or along the Nepean Highway, the proposal will produce the effect of a wall of buildings, an outcome to be avoided clearly set out in the Structure Plan, 2023 and DDO14. They say that at 54 metres wide, the built form will create an unacceptable visual bulk and massing that will forever alter the visual landscape of the area and from the residential properties in the immediate environs. The Long Island Residents Group submit that the building will not allow for a reasonable sharing of views and will create a bulk and mass that will be detrimental when viewed from the foreshore reserve, Kananook Creek environs and the Frankston town centre.

The Tribunal's findings

169 Firstly, we accept the proposed design of the towers provides for articulation and materiality that seeks to respect the coastal setting of the site. This includes the tapered design of the north tower and the colours and materials proposed in construction.

- 170 However, we find that the building as proposed will create unacceptable visual bulk and that the recessed element, variable from 3 to 12 metres will not create a break in built form as required by DDO14. We consider the recess width on the Nepean Highway elevation inadequate, resulting in the appearance of a solid mass across what is a large site when viewed from the town centre. There will be no opportunity for even a marginal, or reasonable, sharing of views with the proposal and we are unconvinced that the recess is an acceptable response to what the DDO14 calls for.
- 171 Nor are we persuaded the wider recess on the Kananook Creek Boulevard elevation will provide a visual break when viewed from the foreshore reserve and Kanannok Creek environs. We note, that were a recess to be provided, when viewed obliquely, it would be difficult to appreciate whether it was occupied by a solid form or void. A continuity of built form is an unacceptable proposition, particularly as the building width proposed is about 20% greater than the preferred width of 45 metres.
- 172 We find that any future design needs to adhere more closely to the DD014 requirements for slender tower with a minimum 9 metre gap between, thus avoiding the necessity for screening of habitable windows between towers. In our view this would enable a scenario of a reasonable sharing of views and provide good amenity for future tower occupants.

Sustainable and adaptive design

What the DDO14 says

- 173 The relevant requirement is to design buildings to support a high level of internal amenity and adaptation over time, including through the provision of minimum floor to floor heights in accordance with the requirements in Table 4 of DDO14.
- 174 Table 4 sets out the following preferred minimum floor to floor heights:
- Preferred minimum floor to floor heights at ground level: 4m
 - Preferred minimum floor to floor heights above ground level to street wall height: 3.5m
 - Preferred maximum street wall height:
 - 3.5 for non-residential uses
 - 3.2m for residential uses

What the proposal seeks

- 175 In the proposal, at basements 1 and 2, 3-metre floor to floor heights are shown. The following floor to floor heights are proposed for all other levels:
- Lower ground level: 3.5 metres
 - Upper ground level: 4.0 metres

- Levels 1-11: 3.2 metres
- Rooftop terrace 4.5 metres

What the parties say

176 Council did not make a submission on the sustainable and adaptive design requirements. Mr Negri says that the proposal is consistent with DDO14, adding that:

The floor to floor heights for the residential levels in the podium (3.2m) are below that recommended in the table (3.5m). The minor difference is acceptable.

177 The respondents disagree, with the Long Island Residents Group submitting that the development only meets the floor to floor height requirements for 10 out of the 13 levels. They say this design requirement is important and has been overlooked by Council and the applicant.

The Tribunal's findings

178 At the Kananook Creek Boulevard elevation, the lower ground level (which is the ground level at this location) provides a 3.5 metre floor to floor height instead of 4 metres required by DDO14. Above this level (shown on the plans as the upper ground level), there is a 4 metre floor to floor height, with residential use, instead of 3.5 metres required by DDO14.

179 At the Nepean Highway elevation, the upper ground level floor to floor height is consistent with the 4.0 metre floor to floor height requirement, whilst levels 1 to 11 above have floor to floor heights of 3.2 metres.

180 At the uppermost rooftop terrace level, the floor to roof level is proposed at 4.5 metres.

181 We are not persuaded by the evidence of Mr Negri that the proposed floor to floor heights are acceptable to the lower ground, upper ground, and levels within the street wall. The requirement for adaptive reuse in lower levels or podiums is common in activity centre planning and is an accepted method to ensure amenity for commercial uses can be provided over the life of a building, even if residential uses are initially proposed.

182 Providing higher ceiling heights in podium levels allows for future conversion from a residential use to a commercial space where higher ceilings are required, and also allow for suitable commercial fit outs at the time of construction. The applicant has not provided a reason why these requirements have not been met and we find that what is proposed is unacceptable in a C1Z and major activity centre.

183 A future design should address these requirements, understanding that the slope of the site poses challenges in building layout and design. Nevertheless, we find the requirement is an important consideration and should be provided in the planning stages of a development proposal.



Solar access

What the DDO14 says

- 184 The applicable requirements are that new development should not overshadow:
- The eastern edge of Kananook Creek between 10.00am and 2.00pm on 22 June (winter solstice).
 - All of the Kananook Creek Trail between 10.00am and 2.00pm on 22 September (spring equinox)
 - Within 7.0 metres of the eastern property boundary of Nepean Highway between 10.00am and 2.00pm on 22 September (spring equinox)

What the proposal seeks

- 185 Shadow diagrams provided by the applicant show that the proposed building is generally compliant with the DDO14 requirement in terms of shadow impacts from 10.00am to the eastern edge of Kananook Creek at the winter solstice, and the Kananook Creek Trail at the spring equinox.

What the parties say

- 186 Council do not have any concerns with the shadow impacts of the development. Mr Negri says the development satisfies the solar access requirements of DDO14.
- 187 The respondents maintain that the shadow impacts will produce unacceptable conditions exacerbated by prevailing wind conditions and that the solar access requirements do not go far enough to protect the sensitive creek interface and environs.

The Tribunal's findings

- 188 We find the shadow impacts in the Kananook Creek environs (eastern edge and trail) have been largely mitigated by the development and that the minor incursions of shadows shown in the drawings on the creek trail are acceptable.
- 189 We also find the shadow impacts on the eastern footpath of Nepean Highway are acceptable and compliant with the requirements of Table 5 and Diagram 6 of DDO14.

Pedestrian link

What the DDO14 says

- 190 The DDO specifies that a pedestrian link is to be provided with a minimum width of 4.5 metres from the southern boundary. This link abuts a 4.5 metre link provided to the adjoining development to the south, with the

potential to create a 9 metre wide pedestrian accessway from Nepean Highway to Kananook Creek Boulevard.

- 191 We have also considered the design requirement for building entries to directly front the street, be clearly defined and legible from the public realm, be accessible, safe for all users and to avoid concealed spaces.

What the proposal seeks

- 192 The proposed building has been set back from the southern boundary by 6.85 metres at the upper ground level. From entering this setback via Nepean Highway, the site slopes down and leads to a widened area where the residential lobby is located in a recessed and further set back area. The pedestrian walkway terminates in a set of stairs leading to the western edge of the link, with a lift provided adjacent to the residential lobby. At the base of the stairs, the pedestrian link continues to the lower ground western edge of the development at Kananook Creek Boulevard and is shown on the drawings as a 3 metre wide laneway.
- 193 The length of the southern boundary shows a solid wall flanking the boundary and abutting the adjoining pedestrian link to the Harbour development. The link features several 1-metre high curved planter boxes and a series of large 1.8-metre high areas called up as ‘wind walls’ that are within the 6.85 metre setback. Sections show that this area has levels 1 and 2 cantilevered over the link and the building is set back from the south boundary by 4.5 metres. At the floor level of level 2, within this 4.5 metre setback, the pedestrian link is roofed with areas of clear glazing. That is, it is not open to the sky.

What the parties say

- 194 Council says that the future pedestrian link is a key consideration for the Tribunal and the proposal is an inappropriate design response. They say DDO14 and the Structure Plan, 2023 envision the integration of this pedestrian link with that on the adjoining Harbour development site, forming one unified 9-metre wide pedestrian laneway. While the requisite setback has been provided, as designed, this proposal results in two 4.5 metre wide pedestrian links, separated by a 1.8 metre high solid wall. Council says this is an incongruous design that would deliver a highly undesirable outcome.
- 195 Mr Partos says the pedestrian link should be designed in concert with the neighbouring site to present a single consolidated link, rather than two separate abutting links that have not had consideration of its neighbour. He says that while the setbacks are consistent with DDO14, the link as currently proposed along the southern boundary of the subject site an unacceptable response.

- 196 The respondents agree with Council and Mr Partos that the pedestrian link is inconsistent with the vision in the Structure Plan, 2023 and requirements in the DDO14.
- 197 Mr Negri says the 6.5 metre wide pedestrian link exceeds the preferred requirement of 4.5 metres. He says Council have prepared a concept plan showing how the pedestrian links on the site and the adjoining Harbour development could work, but that there appears to be no direct response from the neighbouring land (Harbour development). Overall, he says the pedestrian link is positive.
- 198 Mr Sheppard supports the pedestrian link design but recommends that the overhead structure or glazed canopy could be removed as it is no longer required for wind mitigation. He says the misalignment of levels is a result of an existing underground substation on the review site owned by United Energy and serving a broader area. It is unclear whether it can be moved or not and to what extent, therefore any changes to improve the alignment of the adjoining link would have to come from the Harbour development proposal. He recommends that subject to removing several visitor bike racks, the southern interface responds appropriately to DDO14.

The Tribunal's findings

- 199 We find that the proposed setback is in accordance with DDO14, however we have concerns regarding the configuration and layout of this pedestrian link.
- 200 The Built Form Review identifies the importance of such links in increasing visual and physical connections between the city centre and Kananook Creek. It states:
- The recommended width of 9.0m will require a 4.5m ground level setback from each property. The total width of the links at 9.0m is a similar width to Station Street Mall and Shannon Street Mall. This width provides opportunities for a range of uses to activate the link by providing outdoor dining and seating which will provide a comfortable space for pedestrians to move through the link.
- 201 Unfortunately, the link provided on the review site and the adjacent Harbour development do not, in the current designs, show an integrated solution or response to DDO14 and the Structure Plan, 2023. We find the provision of two independent 4.5 metre links separated by a solid wall to be an unacceptable design response.
- 202 We note Council and the applicant have advised that they are comfortable that the design of the pedestrian link can be addressed and managed as a secondary consent process via permit conditions. However, we are not satisfied this is an appropriate means of addressing design issues surrounding the proposed pedestrian link.

- 203 We recommend a future design team works closely with Council and the neighbouring developer to ensure a safe, pedestrian friendly 9-metre wide pedestrian link is delivered for the benefit of the wider community as well as residents, workers and patrons. This is an important feature in the Structure Plan, 2023 that is the result of work undertaken by Council and the community and should be more comprehensively addressed.
- 204 We find the design of the pedestrian link unresolved, and the landscaping treatments and wind walls do not engender a safe environment as they provide potential places of concealment. This is unacceptable and inconsistent with Crime Prevention Through Design principles ('CPTD') embedded in urban design policies, including the Urban Design Guidelines. We also have concerns with the location of the recessed residential lobby entrance and lift as being potentially unsafe after hours for residents and visitors as they are located in recessed building forms with poor visibility from the entrances to the pedestrian links.
- 205 The combination of design imperatives for the pedestrian link poses challenges and a sophisticated design solution is required. This has not been acceptably dealt with here. These challenges include:
- The significant fall in the land from Nepean Highway to Kananook Creek Boulevard
 - The existing substation and whether it can be relocated
 - Design for safe environments and crime prevention
 - Wind mitigation measures to ensure acceptable walking and sitting conditions for pedestrians and outdoor seating.
- 206 We accept that there are challenges in designing a suitable and safe pedestrian link with good amenity given the site constraints. However, many successful pedestrian links on challenging sites in activity centres across Melbourne have been delivered with similar requirements. A comprehensive design review of the link is required ensuring collaboration with Council and the adjoining developer to produce an outcome that will benefit future occupants, visitors and the wider community and that this work and concepts are established as part of any future proposal.

Street activation, access, car parking, loading area and services

What the DDO14 says

- 207 The DDO14 has a set of design requirements regarding the location and height of rooftop services and the way they are to be integrated into the overall design.
- 208 Basement car parking is encouraged, and where not possible, sleeved carparking arrangements should be provided in street wall levels with active uses.

- 209 Clause 2.7 of DDO14 includes that vehicle access to basement carparking should be from Beach Street and Wells Street rather than from Nepean Highway or Kananook Creek Boulevard where possible. Where vehicle access cannot be provided from laneways and secondary streets, access points should be minimised to reduce disruption to the footpaths and existing on-street car parking, and located to avoid street trees.
- 210 In terms of street activation, design requirements include activated spaces along Kananook Creek Boulevard and the creek and to discourage a lack of active frontages detrimental to pedestrian activity.

What the proposal seeks

- 211 The statutory car parking requirements under clauses 45.09 and 52.06 are discussed below and this section deals with the access, car parking, loading area and services requirements under DDO14. We also provide further consideration of what is sought for pedestrian activation along the Kananook Creek Boulevard.
- 212 The proposal seeks to provide double width carriageway access points to basements and lower ground carparking, at Nepean Highway and at Kananook Creek Boulevard respectively. The Nepean Highway carpark entrance is to service the residential component of the development in two basement levels with residential car spaces, EV charging stations, storage cages, bicycle store and infrastructure and ancillary service areas.
- 213 The Kananook Creek Boulevard carpark entrance leads to a lower ground level, subterranean and semi-sleeved car park, servicing the food and beverage tenancies, with some additional residential car parking, residential and commercial waste and collection areas, a loading bay and other infrastructure and ancillary services.
- 214 There is no physical connection between the basement carparks accessed from Nepean Highway and the lower ground level car park accessed from Kananook Creek Boulevard. That is, one cannot access the lower ground car park from the basement car parks and vice versa.

What the parties say

- 215 Council, the applicant and expert witnesses all say the car park access arrangements are acceptable given the site constraints and significant fall in the landform across the site. They also did not raise concerns regarding the roof top services arrangement, saying what is proposed is acceptable.
- 216 The respondents disagree and raise issues relating to the effect a double width accessway to the lower ground car park at Kananook Creek Boulevard would have on pedestrianisation of the street. They say this will cause significant conflicts between vehicle, bikes in what is intended to be a pedestrian friendly environment. No issues were raised by the Department

of Transport and Planning or parties regarding the location of the car park entrance at Nepean Highway.

- 217 In respect to services, Long Island Residents Group raised concerns regarding the proposed height of screens at the roof top, saying they exceed the DDO14 requirement by a significant amount. They say it is unclear whether the roof top services have been successfully screened from view and that the preferred maximum height outlined in DDO14 is exceeded, with both the upper floor levels including the rooftop services, lift overrun and amenities.

The Tribunal's findings

- 218 Our previous findings relating to building height informs our decision making with respect to the roof top services. We are unclear as to why the uppermost level should require a proposed floor to roof height of 4.5 metres, and whether this is needed to assist the screening of the roof top services. These ceiling heights are unwarranted in terms of amenity for the pool change rooms, lounge and the utility areas proposed, and should be reduced in a future design.
- 219 We find the vehicular access arrangements on the Kananook Creek Boulevard frontage problematic. The double width carriageway and the adjacent, similarly sized building entrance ramp, takes up roughly a quarter of the building frontage on Kananook Creek Boulevard and is generally centrally located on the property boundary fronting a relatively narrow and sensitive creek environment.
- 220 DDO14 and the Structure Plan, 2023 call for a pedestrian friendly environment. Unfortunately, the strategic work underpinning DDO14 and the Structure Plan, 2023 have proceeded without the knowledge of flood levels and Melbourne Water requirements.
- 221 The Melbourne Water flood level requirements mean that a simple widening of the footpath meshing into the property boundary of the site is not possible as is called for under the general design requirements. A creative approach to dealing with level changes will be required.
- 222 We understand the applicant has sought to address this level change requirement by providing high planter boxes at the property edge that also incorporate street benches and further stairs to reach the raised floor levels. However, we are not satisfied that what is proposed will lead to an acceptable pedestrian environment for the wider community who will have to live with the effects of a disjointed set of levels. These level changes impede the ability to create a sense of openness in and around what is a significant new built form.
- 223 When read as a whole, the DDO14 and the Structure Plan, 2023, reinforces and emphasises what elements contribute to achieving a successfully activated high density development on the edge of the activity centre. It



stresses that the community will benefit through the provision of widened ground level treatments that promote safe and pedestrian friendly environments and offer opportunities for outdoor dining. Unfortunately, what is proposed, in our view, will not deliver this for the FMAC and may instead create a sense of separation between the development and the community.

- 224 If we are to then prioritise the pedestrian environment along Kananook Creek Boulevard, the only possible alternative is to allow for all vehicle and bicycle access via the Nepean Highway access point. This may require significant redesigning of the basements and lower ground level car parking and services arrangements. We find this a preferred option that may lead to lower ground and basement levels that are integrated and not disconnected.

Landscaping and open space

What the DDO14 and Clause 58 Landscaping objectives say

- 225 The DDO14 sets out qualitative and quantitative requirements for landscape and open space treatments in terms of what is sought to contribute to the local character and sense of place, as well as metrics for extent of landscaping and where it is to be located. The DDO14 requirements are as follows:

Provide landscaping throughout sites particularly in ground floor setbacks to provide amenity and attractiveness and contribute to local character and sense of place.

Incorporate landscaping areas that comprise a minimum of 60 per cent of the total front setback area.

Maximise deep soil planting areas in front and rear setbacks to incorporate canopy trees.

Encourage the use of green roofs, walls and balconies to provide additional landscaping and soften the visual impact of buildings particularly in areas that where ground level landscaping would be difficult to accommodate.

Encourage planting themes that use a minimum of 40 per cent indigenous and 40 per cent native species to respect the coastal character of the local area.

Encourage the provision of communal garden spaces at podium and rooftop levels to create amenity for residents, workers and visitors.

- 226 The Landscaping objectives in Clause 58.03-5 are dealt with here for clarity and consistency with DDO14. The objectives are:

To provide landscaping that supports the existing or preferred urban context of the area and reduces the visual impact of buildings on the streetscape.

To preserve existing canopy cover and support the provision of new canopy cover.

To ensure landscaping is climate responsive, supports biodiversity, wellbeing and amenity and reduces urban heat.

227 Standard D10 under Clause 58.03-5 calls for a number of measures to be met and the following have been extracted for those that are relevant to the proposal:

Development should:

- Provide the canopy cover and deep soil areas specified in Table D2. ...
- Provide canopy cover through canopy trees that are:
 - Located in an area of deep soil specified in Table D3. Where deep soil cannot be provided trees should be provided in planters specified in Table D3.
 - Consistent with the canopy diameter and height at maturity specified in Table D4.
 - Located in communal outdoor open space or common areas or street frontages.
- Comprise smaller trees, shrubs and ground cover, including flowering native species.
- Include landscaping, such as climbing plants or smaller plants in planters, in the street frontage and in outdoor areas, including communal outdoor open space.
- Shade outdoor areas exposed to summer sun through landscaping or shade structures and use paving and surface materials that lower surface temperatures and reduce heat absorption.
- Be supported by irrigation systems which utilise alternative water sources such as rainwater, stormwater and recycled water.
- Protect any predominant landscape features of the area.
- Take into account the soil type and drainage patterns of the site.
- Provide a safe, attractive and functional environment for residents.
- Specify landscape themes, vegetation (location and species), irrigation systems, paving and lighting.

228 For sites greater than 2500 square metres, Table D2 specifies 350 square metres of canopy cover is to be provided plus 20% of site area above 2,500 square metres, with a deep soil zone comprising 15% of the site area. The soil requirements for trees are given in Table D3, which we do not replicate here.

What the proposal seeks

229 Mr Negri's evidence¹⁷ is that the proposal provides the following landscape response to Clause 58:

- Deep soil planting across the Kananook Creek Boulevard frontage accommodating various species including a tree (water gum) with a mature height of 8m and a spread of 4m.
- Deep soil planting and a planter box on either side of the pedestrian link accommodating coastal tree with a mature height of 6m and a spread of 4m.
- Deep soil planting along the Nepean Highway frontage accommodating trees (water gum) with a mature height of 8m and a spread of 4m.
- Planters at each level of the building; and
- Landscaping within planters at the roof terrace level.

What the parties say

230 We note the Council officer's assessment of the landscape plans identified some shortfalls and, as relevant, notes:

- It is proposed to remove one street tree for the driveway entrances on Nepean Highway. ...Banksia is to be retained.
- A canopy tree has been provided in the north-west corner.
- Planter box balcony planting should consider reducing the number of large shrubs and increasing the planting of grass/flax species which will be more sustainable.
- The European Olive (*Olea europae*) must be non-fruiting variety due to its potential weediness.
- Delete the Barberry Cotoneaster (*Cotoneaster dammeri*) as it has an unknown weediness risk to the foreshore area. May self-seed through bird distribution.
- The bike hoops in the walkway are a poor outcome. The hoops should be integrated into the landscaping.
- The maintenance plan provided is not sufficient. It should document the ongoing maintenance requirements and information (beyond the initial establishment period) and specific to this development for the Body corporate to engage a professional gardener experience in maintaining planter box/balcony planting areas.

231 Mr Negri states that the landscape concept plans show that the proposal will provide landscaped zones appropriate for the C1Z that advances the

¹⁷ Paragraph 304, Mr Negri's evidence.

objective of Clause 58.03-5. He says that the landscape concept plans respond well to DDO14.

232 In his assessment against Clause 58.03-5¹⁸, Mr Negri states that a variation is required to the standard. He says that:

- The proposal does not provide the canopy cover and deep soil areas as specified in Table D2.
- As illustrated in the Landscape Concept Plans prepared by Acre (dated February 15, 2024), the proposal will provide new landscaped zones at various levels of the development. Given the Commercial 1 Zone of the land, in my view, the proposed landscape concept is an appropriate response.

233 The respondents disagree saying that the proposed landscape plans provide insufficient landscaping to the lower and upper ground levels. They say the only landscaping provided is within planters and that the lack of in ground vegetation and canopy trees is a shortcoming of the proposal. They say that it is unknown whether the landscape areas provide a minimum of the 60% requirement of the total front setback and note a previous Council officer assessment stating that the 'proposed basement results in no opportunity for the planting of canopy trees'. A review by the Long Island Residents Group notes that it is 'unknown' whether any of the DDO14 metric requirements have been met as no detailed assessment has been undertaken by expert witnesses or a landscape specialist.

The Tribunal's findings

234 In an environmentally sensitive coastal setting such as this, we would have benefitted from a more comprehensive assessment than what was proffered by the applicant. We rely on the evidence of Mr Negri who assessed the proposal against DDO14 and Clause 58.03-5.

235 There are complexities with integrating the requirements of DDO14 and Clause 58.03-5. We are not persuaded that the evidence of Mr Negri has comprehensively assessed the landscape plans. Mr Negri notes that a variation is sought to Clause 58.03-5 but does not explain the extent or whether the variation sought is acceptable.

236 His evidence is that deep soil planting across the Kananook Creek Boulevard frontage shown on the landscape plans¹⁹ is limited to two narrow areas on the flood plain in front of the restaurant and Café 03. The deep soil planting along the Nepean Highway frontage²⁰ that Mr Negri states accommodates trees, is only one discrete, relatively small area shown in the south-east corner with two Water Gums (*Tristanopsis laurina* 'Luscious').

¹⁸ Appendix 3, Mr Negri's evidence

¹⁹ At drawing number 4_TP_04, Acre plans (Ref. Tribunal Book 1, pdf 211).

²⁰ At drawing number 4_TP_06, Acre plans (Ref. Tribunal Book 1, pdf 213).



Although we also note the provision of street tree planting using four Coastal Banksias (*Banksia integrifolia*).

- 237 We find that the landscape plans have been professionally and competently prepared and appear comprehensive and sound, however, it is difficult to determine the level of compliance with DDO14 and Clause 58.
- 238 A future design should at the outset take into consideration all the landscape requirements in the planning scheme and respond accordingly. While many requirements can be interpreted as non-mandatory, further information is needed as to why certain metrics cannot be met and where they have. We find the suite of plantings appropriate for the coastal setting but consider that additional deep soil canopy tree planting facing Kananook Creek would be an improved response.

DOES THE PROPOSAL PROVIDE AN ACCEPTABLE RESPONSE TO CLAUSE 58

- 239 The proposal is subject to the objectives and standards of Clause 58 – ‘Apartment developments’. Clause 58 deals with various elements including urban context, site layout, amenity impacts, on-site amenity and facilities, detailed design and internal apartment amenity.
- 240 Council says the proposal has not demonstrated a sufficient level of compliance with the following:
- Clause 58.02-5 – ‘Integration with the street objective’
 - Clause 58.04-4 – ‘Wind Impacts’
- 241 The applicant says the proposal is highly compliant with the objectives and standards under Clause 58 and Mr Negri says the development meets all objectives of Clause 58. Mr Negri provides an assessment against Clause 58 at Appendix 3 of his evidence surmises the only standard that requires a variation is Standard D10 under Clause 58.03-5 relating to landscaping which we considered earlier.

Clause 58.02-5 Integration with the street objective – Standard D5

- 242 We have discussed the issues relating to this matter in building setbacks and pedestrian link sections above and do not repeat them here.

Clause 58.04-4 Wind Impacts – Standard D17

- 243 Council says that in order to meet acceptable conditions with respect to wind impacts, the proposal relies on a series of undesirable pedestrian and urban design features recommended by the wind consultant Vipac. They say:

Wind tunnel testing has been submitted with the Applicant’s expert evidence. That testing was performed with the following design elements proposed in the built form:

- 1m high raised planters in the southern laneway;
- 1.8m high wall at the boundary of the proposed development and the development at 446-450 Nepean Highway;
- canopies along Kananook Creek Boulevard and Nepean Highway; and
- colonnades throughout site.

- 244 Council says the 1.8-metre-high solid wall on the south boundary is inconsistent with, and undesirable in, the pedestrian link. This feature limits the potential to integrate the southern link with the adjacent Harbour development into a shared 9-metre-wide laneway, a key feature of DDO14 and the Structure Plan, 2023. They are also critical of the high screens required at the upper and lower ground levels, saying that at 1.5 metres to 1.8 metres high they would prevent access to the landscape areas for maintenance. They also raise concerns about using walking criteria for wind testing of the private and communal terraces, saying a standing criterion would be more appropriate.
- 245 The applicant submits that the latest advice from Vipac²¹ is that the overall building height has been lowered since the initial testing, which is expected to be beneficial to overall wind conditions. They also note the inclusion of high screens and canopies since initial testing was conducted. They say the roof terrace wind conditions can be mitigated with high screens and a number of residential terraces have changed in location and size. They recommend retesting be carried out to quantify wind conditions and properly determine what wind mitigation measures are required.
- 246 We also note the design requirement in DDO14 requires that building design mitigate wind impacts to the public realm and building occupants. We find that the location and extent of wind mitigation strategies, including the 1.8-metre-high wind screen, at the lower and upper ground levels are inappropriate and conflict with the pedestrian link as forming part of a 9-metre thoroughfare with opportunities for outdoor dining. Any wind mitigation measure should not preclude the possibility of creating an integrated and cohesive pedestrian link in conjunction with the Harbour development. However, we are confident that a new design proposal could address these concerns and provide a suitable response for the development.
- 247 Future wind testing should address private and communal terraces as having at the minimum standing comfort criteria. A lower building will logically lead to better wind conditions as noted by Vipac.

²¹ At Tribunal Book 1, pdf 435.



ARE THE PROPOSED CAR PARKING AND VEHICLE ACCESS ARRANGEMENTS ACCEPTABLE?

- 248 The review site is affected by the PO1. The prescribed parking rates are contained within Table 1 of PO1, which we do not reproduce here. The applicant seeks to vary the parking requirements under Clause 52.06 which triggers a permit requirement.
- 249 Council says the permit application generates a statutory car parking requirement of 223 car parking spaces. The second amended plans include a total of 206 car parking spaces. Due to the proposed car parking allocation, a reduction in the car parking requirement is sought for the food and drink premises, office and shop uses. There is no shortfall associated with the residential use. The proposal therefore seeks a reduction in 19 car parking spaces. Council says they have no issue with this shortfall, and this is supported by the traffic evidence of Mr Fairlie.
- 250 Under Clause 52.29 – ‘Land adjacent to the principal road network’, a permit is required to create or alter access to a road in a Transport Zone 2 (‘TRZ2’). The permit application seeks to create or alter access to Nepean Highway, which is in a Transport Zone 2. The permit application was referred to the Department of Transport and Planning as a determining referral authority who did not object to the permit application subject to conditions.
- 251 The proposal generates a statutory bicycle parking requirement of 54 bicycle spaces under Clause 52.34 – ‘Bicycle facilities’. The proposal provides a total of 196 on-site bicycle parking spaces (156 spaces for residents, 30 spaces for visitors and 10 spaces for staff). The statutory requirement is therefore met under Clause 52.34-2.
- 252 We find the provision of car parking and bicycle spaces acceptable. Parking provision for residential use is in accordance with the requirements of Clause 52.06. The parking shortfall relates to the commercial activities which we consider is acceptable given the emphasis on promoting pedestrian activation and movement around and through the site.
- 253 Nepean Highway carries significant traffic flows with around 40,000 to 60,000 vehicles per day and Kananook Creek Boulevard accommodating around 1,000 vehicles per day.
- 254 Mr Fairlie’s evidence was that proposal is estimated to generate 75 peak hour vehicle movements with 23 occurring via Kananook Creek Boulevard and 52 movements on Nepean Highway. Access to the proposal will be left turn in and out movements from both streets which will assist in creating safe and efficient access. He also considered that the amount of traffic generated by the proposal can be accommodated by the road network assisted with the signalised intersections to the north and south of the site along Nepean Highway at Wells Street and Beach Street which will assist in breaking up traffic flows.

255 We accept Mr Fairlie's evidence with respect to parking and traffic safety and do not consider that the generation of additional traffic by the proposal will contribute to significant parking or traffic safety impacts.

ARE THERE ANY OTHER ISSUES?

256 Other issues raised by the respondents included the effect of the proposal on Kananook Creek and the potential risk from acid sulfate soils associated with excavation works on the site.

Kananook Creek estuary

257 Kananook Creek is a narrow waterway that flows just inland and parallel with the coast in a north-south direction extending from the Seaford Wetlands to Frankston.

258 The section of Kananook Creek opposite the site is part of the estuary component of the waterway which is a navigable stretch of waterway for 9 kilometres from the Mornington Freeway bridge to its mouth near Frankston Pier. The far upstream reaches of Kananook Creek flow out from the Seaford Wetlands which are recognised as a Ramsar Wetland. These wetlands and the upper reaches of Kananook Creek contain high quality riparian vegetation. However, the section of Kananook Creek at the location of the site is neither in the designated Ramsar Wetland area or in what could be described as a 'natural condition' given the reduced coverage of riparian and estuarine vegetation and its urbanised setting.

259 The section of Kananook Creek opposite the site and along the east bank in particular forms a concrete edge with a highly variable riparian zone, with scattered remnant Banksias and Swamp Scrub vegetation. However, despite its variable natural condition, this section of Kananook Creek does provide an important environmental and recreational corridor and an attractive waterway environment for pedestrians. This is clearly recognised under the planning scheme and in the DDO14.

260 Nevertheless, the respondents were concerned with the proximity of the proposal to Kananook Creek and the potential for impacts on the waterway from overshadowing and impacts on the proposal arising from the effects of climate change and flooding.

261 The effects from overshadowing have been considered earlier in our reasons, however, we note the Long Island Residents Association and the PPCC have expressed concern over the potential overshadowing of seagrass vegetation within Kananook Creek. We note that Clause 2.5 of DDO14 requires that the eastern edge of Kananook Creek and beyond is not overshadowed between 10.00am and 2.00pm on 22 June (winter solstice). We accept that the proposal achieves this requirement. Concerns around the effects on seagrasses present within Kananook Creek from overshadowing are not considered significant when considering that solar

access and access to daylight will remain accessible for the plants to maintain biological processes. In this regard, we find the impacts from overshadowing of Kananook Creek are acceptable.

- 262 The respondents were also concerned that the proposal fails to protect Kananook Creek from water quality impacts associated with its natural drainage function and stormwater management due to the proximity and size of the proposed development.
- 263 We see no issues with regards to the proposal's proximity to Kananook Creek with respect to physical impacts. Stormwater generated by the proposal will be managed and discharged in accordance with the requirements of Council. The proposal seeks to achieve appropriate sustainability aspirations including water sensitive design treatments to capture, store and re-use stormwater runoff from roof catchment areas with a minimum total effective storage capacity of 30,000 litres rainwater tanks. This water will be distributed for re-use in part for toilet flushing, in raingardens and for drip irrigation of landscaping. We consider the proposal is sufficiently responsive to the requirements of Clause 53.18 – 'Stormwater Management in Urban Development' and will assist in maintaining water quality in Kananook Creek and the locality.
- 264 We do not consider there to be any conflict from an environmental perspective between the proposal and Kananook Creek given the highly urban setting of this locality. With respect to Clause 12.02-1S – 'Protection of the marine and coastal environment', Clause 12.03-1S – 'River and riparian corridors, waterways, lakes, wetlands and billabongs' and Clause 14.02-1S – 'Catchment planning and management', we do not consider the proposal will have significant impacts on the maintenance of the environmental condition and drainage function of Kananook Creek, its stream habitat or on its banks in terms of erosion or from polluted runoff. The site is separated from Kananook Creek by Kananook Creek Boulevard and the existing trail. This provides a sufficient buffer that will avoid impacts from development associated with the proposal.
- 265 The proposal does not result in the loss of public land and will introduce public activation into this section of Kananook Creek which is currently dormant and unavailable on the western side of the waterway due to private residential land. We consider the proposal has the potential to rejuvenate the locality of this section of Kananook Creek as a pedestrian friendly environment where people are encouraged and will be able to sit, walk, and enjoy the waterway setting whether they are residents or visitors to the area.

Acid sulfate soil risk

- 266 Clause 12.02-1S and Clause 5.0 of DDO14 requires the avoidance of disturbing acid sulfate soils and managing any potential for acid sulfate soils.

- 267 The PPCC expressed concern about acid sulfate soils being generated from the excavation of soils on the site. They were concerned about the potential for exposure and what assessment and management should be provided to avoid the risks from generating acid sulfate soils and the hazards these types of acidic soils can have on the environment and on any buildings constructed on the site.
- 268 The applicant provided a soil assessment report prepared by Diomides & Associates Pty Ltd which investigated soils found on the site and concluded that acid sulfate soils are unlikely to pose an unacceptable risk and that the site is suitable for the proposed development. The investigation found that no further soil site assessment for coastal acid sulfate soils is necessary and no further management for coastal acid sulfate soils is required.
- 269 Given the findings of this report, we find that risks from acid sulfate soils on the site are low and acceptable.

CONCLUSION

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

Christopher Harty
Presiding Member

Lorina Nervegna
Member

