

SUBMISSION

VCAT Reference: P173/2021

Planning application No: PLN20/0509

Address: 88 Kerr Street, 71 – 75 Argyle Street and 380 Fitzroy Street, Fitzroy VIC 3065

BACKGROUND

On 23 July 2020 an application for a planning permit was lodged for the demolition of the existing buildings and construction of a mixed-use building, use of the land for two food and drinks premises (restaurants) and reduction of the car parking requirements at 88 Kerr Street, 71 – 75 Argyle Street and 380 Fitzroy Street, Fitzroy. The proposal is set out in plans prepared by Idle Architecture Studio dated 2020 (revisions A and B). In response to advertising of the proposal, 46 objections were lodged.

On 18 February 2021, Council was informed that the applicant had lodged a Section 79 'failure to determine within the prescribed time' appeal with the Victorian Civil and Administrative Tribunal (VCAT). The Fitzroy Residents Association (FRA) lodged a Statement of Grounds setting out reasons relating to height and massing, heritage and building performance why the proposal should not be approved.

Yarra City Council formed a position on the above application at its internal Development Assessment Panel (DAP) meeting on 27 April 2021, determining that had it been in a position to do so, it would have issued a Notice of Refusal to Grant Planning Permit PLN20/0509 subject to the following grounds:

1. The proposed height, setbacks, massing and design of the building will dominate the surrounding streetscapes and will not positively respond to the surrounding context.

2. The proposed height, massing and design of the building would unreasonably impact the heritage character of the area and the heritage significance of the South Fitzroy heritage precinct.
3. The proposal fails to respond to the off-site amenity of the surrounding properties and public realm, resulting in unreasonable visual bulk, noise, overlooking and overshadowing impacts.
4. The proposal would result in an unacceptable internal amenity outcome, contrary to clause 15.01-2 (Urban design principles), clause 21.05-2 (Urban design), clause 58 (Apartment Developments) and clause 53.06 (Live music and entertainment noise) of the Yarra Planning Scheme.
5. The proposal has not adequately dealt with wind matters with regard to on-site and offsite amenity.
6. The development fails to satisfy the requirements of clause 53.06 (Live music and entertainment noise) and has not adequately demonstrated the proposed sensitive residential uses are protected from live music and entertainment noise.

These six grounds closely reflect the issues identified by the FRA and many other objectors. The FRA therefore lodged a Statement of Grounds and applied to become a party to the proceedings. Since the Compulsory Conference held on 6 May 2021, a set of Amended Plans (rev C dated 11 June 2021) together with a Statement of Changes, a Clause 58 Assessment and updated Overlooking Diagrams have been circulated to all parties.

The FRA has assessed the amended plans and supporting materials and submitted a revised Statement of Grounds to VCAT, setting out the reasons why the proposal remains unacceptable.

The following submission sets out in detail the reasons why the Fitzroy Residents Association seeks to have a permit refused for application PLN20/0509

1 THE PROPOSAL IS A POOR RESPONSE TO THE SITE AND ITS CONTEXT IN A HERITAGE OVERLAY

The Site and its Context

The irregularly-shaped site is made up of land in four titles, including two sections of laneway, and has two distinct street frontages. All of the subject site is zoned Mixed Use, is included in HO334 South Fitzroy Heritage Precinct, and has an Environmental Audit Overlay. This section of West Fitzroy is separated only by a laneway from the row of commercial premises fronting Brunswick Street to the east, which comprises part of the Brunswick Street Major Activity Centre.

The land known as 88 Kerr Street has a frontage measuring 15.53m facing the 18m wide street and extending 37m south to the boundary of a modern residential development at 81-83 Argyle Street, which has a six-storey blank wall on the common boundary. The Fitzroy Street frontage measures 16.9m wide and is used as an open lot car park with some substantial vegetation on the eastern half. Part of the southern boundary abuts the six-storey high wall of a development under construction known as 71-75 Argyle Street.

The site is located in an area undergoing rapid transition from generally 1-2 storey dwellings dating from the Victorian era and nineteenth century buildings most recently used as warehouses and offices, to town-house and apartment style dwellings up to a maximum seven storeys in height. As these developments are in the Mixed Use zone, many have commercial uses at ground floor level. The site borders the Brunswick Street Major Activity Centre, which is recognised as a core area for the location of licensed premises and late-night entertainment venues in the Yarra Planning Scheme. Notably, two historic buildings, now known as The Evelyn Hotel at 351 Brunswick Street and The Fitz Café and Rooftop at 347-349 Brunswick Street, offer outdoor drinking areas within 20 metres of the Kerr Street frontage to the site.

The Proposal

The proposal requires the complete demolition of all buildings and structures and removal of existing vegetation from the site. None of the structures has any heritage value and therefore the main issue with clearing the site, to allow for three levels of parking and services across the full extent, is the removal of two trees that have been assessed as having arboricultural significance.

In essence, the proposal as advertised sought to infill this site with a seven-storey building extending to all boundaries, with minimal setbacks from the streets that it addresses. Light courts and setbacks were provided only where necessary to achieve, outdoor space, outlook and daylight for the dwellings proposed. It was designed with little regard for the occupiers of adjoining land, for the heritage and streetscape values of the area or for Council's strategic objectives for this part of the Fitzroy West Precinct.

The amended proposal now before VCAT has been modified to include increased setbacks from the southern boundary and a significant reduction in height across a 9 metre wide section at the centre of the site. The proposal remains, however, an overdevelopment of the site, which will be out of scale with the group of historic terrace houses at 76 to 84 Kerr Street that are included in the South Fitzroy Heritage Precinct (HO334) as 'contributory', and with the generally two-storey, historic scale of the section of the Brunswick Street Major Activity Centre Street immediately to the east.

Relevant Planning Scheme Provisions

In considering the heritage impacts of the proposed development, the most relevant aspects of the Yarra Planning Scheme are provided at Clause 15 (Built Environment and Heritage), Clause 21.05 (*Built Form*) and Clause 22.02 (*Development Guidelines for Sites subject to the Heritage Overlay*). Clause 43 (*Heritage Overlay*) is also relevant because the site is included in HO334 South Fitzroy Precinct.

Clause 15.03-1 includes strategies to encourage appropriate development that respects places with identified heritage values, creates a worthy legacy for future generations, and ensures an appropriate setting and context for heritage places is maintained and enhanced.

Clause 22.02-4 outlines the following objectives that are specifically relevant to the proposal:

- To conserve the historic fabric and maintain the integrity of places of cultural heritage significance.
- To retain significant views lines to, and vistas of, heritage places.
- To ensure that new additions and new works to a heritage place respect the significance of the place

With respect to new development, Clause 22.02 seeks to encourage the design of new development to:

- respect the pattern, rhythm, orientation to the street, spatial characteristics, fenestration, roof form, materials and heritage character of the surrounding streetscape;
- be articulated and massed to correspond with the prevailing building form of the heritage place or contributory elements to the heritage place;
- be distinguishable from the original historic fabric;
- not obscure views of principle facades

Clause 43.01 includes the purpose:

- to ensure that development does not adversely affect the significance of heritage places.

There are two current amendments to the Yarra Planning Scheme, which have relevance to the assessment of this proposal and the Tribunal is expected to hear evidence as to how much weight they should be given.

Yarra Planning Scheme Amendment C269 – Rewrite of Local Policies proposes to introduce new and revised local planning policies into the Yarra Planning Scheme.

In response to the 424 submissions received, Yarra City Council is expected to meet on 3 August 2021 to request the Minister for Planning to appoint an independent Planning Panel to consider all submissions referred in relation to Amendment C269 in accordance with Section 23 of the Planning and Environment Act 1987. The Panel is scheduled to commence hearings in October 2021. This major review of local policies is therefore a seriously entertained planning scheme amendment, which should be given due consideration in determining this application.

Clause 11.03-1L (Activity Centres) of the revised local planning policies seeks to include the Fitzroy West Mixed Use precinct within the Brunswick Street, Fitzroy Major Activity Centre. The amendment also seeks to implement the adopted Yarra Housing Strategy 2018 through Clause 16.01-2L (*Location of Residential Development*).

The revised local planning policy seeks to identify areas for minimal, incremental, moderate and high change in respect of accommodating increased density of housing. The subject site and surrounding MUZ land are identified as 'incremental change areas,' where the following proposed strategy is relevant:

Support mixed use development in incremental change areas within activity centres to maintain the role and function of the centres as locations for economic activity.

On 30 March 2021, Council resolved to request the Minister for Planning to consider the approval of three further interim built form controls (Interim Design and Development Overlays 38, 39 and 40) as Stage 2 of the Fitzroy- Collingwood Interim Planning Scheme Provisions (Planning Scheme Amendment C288).

This second proposed planning scheme amendment is of relevance because it applies specifically to the subject site and is based on a Background Analysis Report by JGM Heritage and Hansen Partnership that provides a detailed analysis of existing conditions, including policy, physical attributes, and recent development trends. The subject site is proposed to be included in the draft Interim DDO 40 (Fitzroy West), which covers land subject to the Mixed Use Zone and Commercial 2 Zone between Nicholson Street in the west extending to the rear of lots fronting Brunswick Street to the east.

Refer to Attachment 1: Draft Interim DDO40.

Some relevant objectives of the proposed DDO40 include:

To ensure development responds to the heritage character and streetscape by supporting, relevantly, a mid-rise character (ranging from 3 to 8 storeys) in the mixed use precinct of Fitzroy West which ensures the varied but low heritage street wall remains the visually dominant element of the streetscape and upper level developments are recessive providing a clear visual distinction between lower street walls and upper level development.

To encourage development designs that promote pedestrian activity and passive surveillance, contributes to a high quality public realm, and avoid overshadowing of footpaths on opposite side of streets and public spaces.

To ensure that development provides for equitable development outcomes through building separation and a design response that considers the development opportunities of neighbouring properties.

To ensure development responds to sensitive interfaces by ensuring the overall scale and form of new development provides a suitable transition to low scale residential areas and protects these properties from an unreasonable loss of amenity through visual bulk, overlooking and overshadowing.

The draft interim DDO40 outlines discretionary height requirements that would apply to the subject site, with a preferred building height of 5 storeys attributed to the allotment facing Kerr Street with the balance of the site attributed with a preferred building height of 6 storeys.

The draft DDO40 specifies that a permit should only be granted to construct a building or carry out works which exceed the preferred building heights where each of the following requirements are met to the satisfaction of the responsible authority:

- *the minimum common boundary and building separation requirements in this schedule are exceeded by at least 1 metre for levels above the height;*
- *accessibility provision that achieves the standards in Clauses 55.07 and 58.05 (as relevant) for a minimum of 70% of dwellings;*
- *communal open space provision that exceeds the minimum standards in Clauses 55.07 and 58.03 by a minimum of 20%;*
- *secluded private open space provision that exceeds the minimum standards in Clauses 55.07 and 58.05 by a minimum of 20% for each dwelling;*
- *excellence for environmentally sustainable design measured as a minimum BESS project score of 70%; and*

- *no additional overshadowing to secluded private open space of residentially zoned properties outside of the schedule and/or opposite footpath, kerb outstands etc. beyond that which would be generated by a proposal that complies with the maximum building height.*

Assessment of the Design Response

Although now divided into two discrete modules above Level 3, comprising an L-shaped section facing Kerr Street and a separate section facing west to Fitzroy Street, the overall height of each section remains at seven storeys (24.2 metres excluding plant and 25.4 metres including plant).

As noted in the advice from Council's Heritage consultant, the existing six storey development at 81-85 Argyle Street is visible from the opposite footpath on the east side of Brunswick Street. In the absence of a proper sight-line analysis, it must be concluded that seven storeys will be visually intrusive.

Viewed from the intersection of Kerr Street and Brunswick Street, the prominence of the proposed development remains unacceptable, largely due to the 10.4m high podium, lack of setbacks above the podium and the selection of materials. The Tribunal now has the advantage of considering the photographic modelling undertaken by Pointilism and will hear heritage and urban design evidence for both Council and for the applicant, which makes differing suggestions as to how the appearance of the Kerr Street wing, in its entirety, needs further design resolution.

The proposed 10.4 metre high podium facing Kerr Street comprises the ground floor commercial space and two residential floors above, each with a 2.230m deep balcony extending to the frontage. At Level 3 the wall of the apartment is set back 7.230m behind a balcony that extends almost to the street edge. Above this, Levels 4 and 5 have balconies projecting into the setback.

To achieve a comfortable relationship with the two-storey structures to the east and west in Kerr Street, the street wall needs to be lowered to approximately 8 metres, and the levels above set back at least 6 metres with no intruding balconies or structures. Any built form above five storeys should be demonstrated to be setback sufficiently to be fully concealed when viewed from the north side of Kerr Street and from the east side of Brunswick Street.

In addition, there needs to be significant change to the architectural approach to reduce the prominence of the development, including simplification of materials and colours to achieve a more recessive appearance. As currently designed, with the retail frontage recessed 0.885m from the title boundary and brick columns supporting the balconies of the two floors

above built on the boundary, the podium appears to lean over the footpath when viewed from several angles.

It is the evidence of Mark Sheppard that extending the brick columns at Levels 1 and 2 in the street walls down to ground level will more clearly delineate the edge of the public realm, whereas in other evidence, and from viewing the photomontages, these stacks of bricks will emphasise the three level height and inappropriate materials of the podium.

The recommended two metre additional setbacks at Levels 4 and 5 (para 49 on page 16 of the heritage evidence of Bryce Raworth) has been presented in 'visualisations' but has not been made available as architectural drawings to show the impact on the balcony or room dimensions of Apartments 4.04 and 5.04.

Another change recommended by the applicant's urban design witness to reduce the visual impact of the upper levels is to make the front 5.3 metre section of the balcony on the east side of Apartment 4.04 a non-trafficable roof. Again, the internal consequences of such changes have not been fully analysed.

The building as it presents to Fitzroy Street has not been modified. A 3- storey street wall (11.39 metres) is proposed with setbacks commencing at Level 3 remaining at 2.230metres. The photomontage evidence by Pointilism does not include any modelling for Fitzroy Street.

The impact of the proposed seven storey development in Fitzroy Street can, however, easily be judged by looking at the nearly completed development at 71-75 Argyle Street, which has transformed this section of the historic street.

Refer to Attachment 2, 2a Figs 11 and 13, photographs in evidence from Bryce Raworth.

From a pedestrian perspective, such as the photographs in Figs 11 and 13, on pages 13 and 14 respectively, of the heritage evidence of Bryce Raworth, the new building completely dominates the streetscape and the podium appears to sit forward obscuring views to the retained heritage façade at the corner. By comparison, the proposal for the subject site is of comparable height but with lesser setbacks, and is therefore likely to appear overwhelming rather than respectful of the streetscape.

The narrower north-south historic streets in Fitzroy are particularly susceptible to shading from tall structures both early in the day and later in the afternoons, even at the Spring equinox. Although the updated shadow diagrams submitted with the amended plans appear to show some reduction in morning shadow, this change is in fact (as revealed in the supplementary delegate report), due to errors in the original diagrams.

An overall height reduction and additional upper level setbacks would reduce the shadow impacts at 10am. The design needs to be modelled to demonstrate that the wind conditions will meet standards for pedestrian comfort in Fitzroy Street. Architectural changes are also needed to provide a suitable response to the context of the western section of the subject site and avoid an adverse impact on the significance of the heritage precinct.

The Fitzroy Residents Association concedes that limited weight can be given to the quite prescriptive requirements of Interim DDO40, but nevertheless they provide a clear indication of what Yarra Council is trying to achieve in terms of the quality of architecture and standards for new housing.

The Interim DDO40 height and setbacks controls are based on the combined strategic analysis undertaken by experienced urban design and heritage consultants, which is exactly the type of site analysis required before a design response is prepared for a constrained site such as this.

In the absence of such thorough analysis, it is no coincidence, therefore, that the proposal is not a satisfactory site response when tested against the current policies and controls or the more refined interim design development overlay.

The proposal does not comply with Strategy 17.2 within clause 21.05, in that the development does not provide significant upper level setbacks, architectural design excellence, a positive contribution to the enhancement of the public realm nor affordable housing. These items are key indicators that the development is not an exemplary built form outcome that would warrant a height above 5-6 storeys.

From a heritage perspective, it is considered that the height, together with the architectural expression, will result in a building that will dominate both of the heritage streetscapes that the site addresses, and it will adversely affect the significance of the heritage precinct.

2 ADVERSE NEIGHBOURHOOD AMENITY IMPACTS

The amenity implications of the proposed development for the occupiers (or future occupiers, in the case of the nearly completed development at 71-75 Argyle Street) relate to:

- Visual Bulk
- Overlooking
- Overshadowing
- Wind
- Daylight access

From all south facing windows and private open spaces at 76 to 84 Kerr Street, the seven storey high buildings behind will severely reduce views to the sky, creating a feeling of enclosure, which will adversely impact on the amenity of these dwellings. While the break in the building at Level 4 provides visual relief and improved access for daylight and air-circulation, the overall height is excessive and the amenity of these dwellings will be impaired.

The increased setbacks from the southern boundary and increased sizes of the light courts adjoining the development at 71-75 Argyle Street have been driven by a desire to avoid undue impacts on the amenity of the nearly completed apartments to the south. These changes do little to reduce the scale of the proposal in its context and, rather worryingly, have not adequately resolved some internal amenity issues within the development, such as cross ventilation.

As noted in the Council's supplementary report, the overlooking diagrams circulated after the amended plans, which purport to show measures to prevent views downward to secluded open spaces of existing dwellings, do not conclusively show that privacy will not be compromised by overlooking from a number of windows and balconies. This is unacceptable. The sectional diagrams also emphasise the high numbers of new apartments that will overlook the existing dwellings.

The redesigned layouts of the apartments above podium level in the Kerr Street wing result in new concerns with overlooking from the west-facing window and balconies across the three metre wide ROW into the secluded private open space of No. 84 Kerr Street. This is confirmed utilising Section GG and reviewing potential sightlines from the edge of the balconies and habitable room windows, including the unscreened bedroom windows of Apartments 4.04 and 5.04.

An assumption has been made that the buildings to the east do not contain dwellings and therefore measures to avoid overlooking are not included.

It is not surprising therefore that a review by the applicant's town planning expert has identified a long list of plan amendments and additional measures required to remove opportunities for overlooking, including some internal views.

The desk top Wind Impact Assessment of the Revision A and B plans submitted by the applicant identified that the wind conditions in the existing private open spaces of Nos. 76, 78, 80, 82, and 84 Kerr Street would be expected to satisfy the standing criterion, with the following assessment provided:

The locations of these spaces are in the corner of the 'L' shaped proposed development and the wind flow would be expected to stagnate and swirl in this area due to the presence of the proposed development.

An updated assessment has not been provided for the Revision C plans.

Combined with the increased morning shadowing to the open spaces, particularly at 82 and 84 Kerr Street and the ground level courtyards and east facing balconies at 71-75 Argyle Street, such increases in wind speeds are yet another adverse impact on the occupiers of adjoining dwellings that is unacceptable.

The application should outline the existing wind conditions and ensure the development does not unreasonably impact the use of the adjacent open space areas. As identified previously, sitting criterion, not standing, is reasonable for open space areas. For a development of this scale, the proposed wind impacts are fundamental and should be the subject of wind tunnel testing before a permit is issued.

It is noted that daylight modelling for the Revision C plans has now been provided as part of the Environmentally Sustainable Design Outcomes evidence prepared by Ark Resources, and part 7 of the evidence addresses daylight impacts at 71-75 Argyle Street.

3 PUBLIC REALM IMPACTS

As discussed above, the same issues related to shadowing and wind speeds that will impact on the occupiers of adjoining land will adversely affect the public realm adjoining the site. No changes have been made to address the matters of morning shadows and increased wind speeds, which will result in uncomfortable conditions for pedestrians in Fitzroy Street, including occupiers of the building who must use this entrance. Wind tunnel modelling is required to determine whether it is a reduction in overall height, a lower podium height or increased upper level setbacks from Fitzroy Street are required to address these issues.

4 ABSENCE OF AFFORDABLE HOUSING

This is an ideal site for affordable housing, given its proximity to employment, services and transport. There is little diversity of housing offered in this proposal. The amended plans remove five of the more modest two-bedroom apartments and provide one additional three-bedroom apartment.

In the amended proposal, the number of car spaces remains at 47, including one each for the two commercial tenancies, which means the six two-bedroom apartments each have one space and the 23 three-bedroom apartments share 39 car spaces (1.7 spaces per apartment). There are no apartments without car spaces. The cost of excavating to three

levels and the operation of a car lift for access means that all of these apartments will be relatively expensive.

Clause 21.04-1 of the Municipal Strategic Statement includes the following relevant objective and strategies:

Objective: *To retain a diverse population and household structure.*

Strategies:

- *Support the provision of affordable housing for people of all abilities, particularly in larger residential developments and on Strategic Redevelopment Sites.*
- *Encourage residential development which allows people to age in their existing homes and communities by supporting a range of housing types.*

The Yarra Housing Strategy (YHS) was adopted by Council in September 2018 to guide and inform decisions on how residential land in the municipality will evolve and develop into the future. The subject site is located in an 'incremental change area' that is applied to mixed use and commercial areas that have heritage significance include cohesive and highly intact heritage streetscapes and buildings.

Incremental change areas are generally residential, mixed use or commercial areas that have the capacity to accommodate a more modest level of housing growth over time.

As discussed on page 4 above, Amendment C269 Rewrite of Local Policies has now advanced to the stage where the post- advertising adopted version is to be referred to an independent panel. Although the detailed strategies of proposed Clause 16.01-4L Housing Affordability do not strictly apply to a development of less than 50 dwellings, the following objective should be given considerable weight:

To facilitate the provision of affordable housing for key workers and social housing (public and affordable community housing), including new social housing and upgrades to existing social housing.

Town planning and urban design witnesses for the applicant argue that the strategic thrust of Plan Melbourne, State and Local planning policy to promote housing and employment in activity centres and sites such as 88 Kerr Street and 350 Fitzroy Street outweigh issues of context and heritage.

Capacity monitoring for Yarra by SGS Economics as part of expert evidence for Amendment C231 (Yarra Housing Strategy August 2019) found there is ample dwelling capacity in Yarra's activity centres. Based on planning controls proposed in current amendments there

is a total potential capacity of 32,730 dwellings across Yarra's activity centres. This far exceeds the predicted dwelling demand for 16,540 dwellings in all of Yarra to 2031.

Directions for guiding future residential growth in these areas have now been informed by the detailed heritage reviews and urban design analysis undertaken for each of Yarra's activity centres and the mixed use areas where increased residential densities are anticipated.

5 INTERNAL AMENITY AND ACCESSIBILITY STANDARDS

Lack of compliance with the standards of Clause 58 and concerns about the achievement of environmental sustainability standards were major reasons why the Fitzroy Residents Association and several individual members objected to this proposal. The Council assessment detailed both actual non-compliance issues and areas where there was insufficient information. The supplementary report highlights on-going shortfalls or areas where permit conditions would be needed to achieve full compliance. In particular, non-compliance with the following Clause 58 standards are indicators that the proposal will fail to offer a high level of internal amenity:

- D15 Internal views
- D16 Noise impacts
- D17 Accessibility objective
- D19 Private open space
- D24 Functional Layout Objective
- D25 Room depth
- D27 Natural ventilation

The proposal capitalizes on the adjoining easements on the Title, that allow for dual aspect apartments without setbacks along several boundaries. For these reasons it should achieve the highest sustainability standards for energy efficiency, daylight, natural ventilation and sunlight to habitable room windows and outdoor spaces.

The Environmentally Sustainable Design Outcomes evidence prepared by Ark Resources, applies the appropriate tools to allow a full assessment of the expected performance of the Revision C plans in terms of relevant State and local policies for environmentally sustainable design, energy efficiency and stormwater management.

The evidence makes several recommendations in terms of sustainable transport initiatives and renewable energy supply. This includes a significantly enlarged solar photovoltaic system from 10kW to 24.5Kw, noting this will utilise all the available roof space. The Tribunal will need to be mindful of these assessments when considering other expert recommendations, such as glazing systems to meet noise standards and glazing types recommended to improve energy efficiency. This type of cross-referencing of design changes should have been undertaken before the amended plans were circulated.

It is disappointing that only 41 percent of the apartments meet the accessibility standards when the minimum objective of Clause 58 is 50 percent. Moreover, a common feature of the draft interim DDOs in Amendment C288 is:

- *accessibility provision that achieves the standards in Clauses 55.07 and 58.05 (as relevant) for a minimum of 70% of dwellings;*

Open space sizes and dimensions remain a problem. While the overall size of some balconies and courtyards meets the Standard, the narrow, elongated shape reduces useability. For example, the apartment G02 has a courtyard width of only 2m, which is unacceptable for a three-bedroom apartment.

The minimum balcony size provisions have been created specifically to ensure larger dwellings are provided with larger spaces to ensure useability and functionality, yet in this proposal the majority of the private open spaces associated with the three- bedroom dwellings do not meet the standard or the objective of the Clause.

In addition, the application plans anticipated that wind conditions for many of the elevated private open spaces would only achieve the 'standing criteria' in terms of wind conditions for users. No information has been submitted with the amended proposal to show that anything has been done to address this issue.

In apartments where the use of private open space is subject to suitable weather conditions, it is even more important that internal spaces have generous dimensions and a functional layout. The Clause 58 assessment of the relevant standards shows that the proposal has been designed to achieve only minimum requirements.

In the advertised proposal, all bedrooms provided throughout the development complied. It is disappointing, therefore, that the amended plans show five apartments not fully compliant and two, in the assessment of Council, being unacceptable. A further three apartments have living room dimensions assessed as being too small.

Room depths are related to daylight penetration as well as functionality. Daylight modelling of the amended Revision C plans has been undertaken by Ark Resources, which addresses the lack of information identified in the Council assessments. This modelling reveals that in terms of performance, daylight will be adequate with the exceptions of five bedrooms of apartments 101, 102 (south facing), 106 and 206 which do not meet the best practice standard to exceed the daylight factor threshold over 37-76% of the floor area. All of these bedrooms rely on light courts adjoining the southern boundary. Importantly, these light courts have been increased in size as part of the revision.

In terms of natural ventilation, only 17 dwellings from 29 in the amended proposal comply. While this would be 58%, and therefore complying with the standard, it is not unreasonable to expect full compliance in a development which seeks to achieve additional yield from a site.

6 FAILURE TO CONSIDER NOISE IMPACTS

Clause 21.05 Interface Uses Policy is particularly relevant to this application because the site immediately adjoins a Major Activity Centre and the 'agent of change' principle applies. The onus is on the applicant to demonstrate that the development has been designed to minimise the impact of the normal operation of business and industrial activities on the reasonable expectation of amenity within the dwellings.

The policy requires, amongst other things:

Permit applications for residential development to include details of proposed acoustic attenuation design features or measures, and other design features to mitigate the potential noise, fumes and air emissions, light spillage, waste management and other operational matters from the nearby business or industrial uses.

An Acoustic Assessment Report is to be provided in circumstances where the Council determines the potential for noise disturbance to residents is present. The report should demonstrate that the residents will enjoy a reasonable level of acoustic amenity within the dwellings.

The development also triggers the requirements of clause 53.06 Live Music and Entertainment Noise as the site is located within 50 metres of a live music entertainment venue (The Evelyn Hotel).

In addition, the site is separated only by the width of an ROW from No. 347 – 349 Brunswick Street, the 'The Fitz Café and Rooftop.' This establishment has a large first floor terrace located within the rear portion of the allotment, which is permitted (PL06/0503) to operate

between 9am and 12am, Sunday to Wednesday and 9am and 1am, Thursday to Saturday. The permit for use of the rooftop prohibits live music.

As an acoustic assessment was not provided, Council made a request under Section 54 of the Act for further information (RFI), but the applicant claimed that due to the fact that it was prepared during the COVID-19 Stage 4 shutdown in Melbourne, a number of the items raised in the RFI could not be fully addressed. These matters included music, patron and mechanical plant noise from existing commercial premises.

In the time since that this matter has been referred to the Tribunal, there have been several periods when venues have been operating at close to normal conditions and measurements of patron and music noise could have been undertaken but this information has only now been made available in the form of an expert witness statement received on 19 July 2021.

Given the proximity of these two licensed venues and the array of existing plant associated with an entire row of commercial premises immediately across the ROW to the east of the site, it is likely that the architects would need to employ a range of noise attenuation measures to address all of the impacts including kitchen exhausts, ventilation systems, music noise and patron noise over a 24-hour period. Such design changes could potentially affect the achievement of other apartment standards such as ventilation and energy efficiency. It is not appropriate, therefore to condition changes to meet State Environment Protection policies for noise, for example. A comprehensive architectural review based on actual noise measurements is required.

CONCLUSIONS

As site that currently comprises a vacant office building and a car park it offers a clear opportunity for a mixed-use development including affordable housing to take advantage of the locational attributes. The design as submitted does not adequately reflect the constraints of the site. Although improved by removal of built form at the centre, it still seeks to shoe horn an excessively tall and bulky building into the site, to the detriment of the occupiers of adjoining land and the important urban design and character context of Brunswick Street and Fitzroy West.

A feature of this application from the outset has been lack of information to allow a proper assessment. The applicant expedited the application to VCAT utilising Section 79 of the Act and has only now provided information such as noise readings in the form of witness statements, after Council was required to assess amended plans.

It is notable that almost all of the applicant's expert witnesses recommend further design changes and that these changes differ again from the recommendations of Council's

heritage and urban design witnesses. The Tribunal will be very mindful in adopting any such changes without proper modelling to ensure that unforeseen outcomes to other aspects of the proposal do not result.

Clause 21.05 (*Built Form-Urban Design*) of the current Yarra Municipal Strategic Statement includes Strategy 17.2 which remains pertinent for a proposal which continues to be significantly taller than the five-six storey guidance:

Development on strategic redevelopment sites or within activity centres should generally be no more than 5-6 storeys unless it can be demonstrated that the proposal can achieve specific benefits such as:

- *Significant upper level setbacks*
- *Architectural design excellence*
- *Best practice environmental sustainability objectives in design and construction*
- *High quality restoration and adaptive re-use of heritage buildings*
- *Positive contribution to the enhancement of the public domain*
- *Provision of affordable housing.*

Based on the evidence presented it is clear that the proposal fails to achieve many of these benefits and a permit should be refused.

Martin Brennan

Chair, Fitzroy Residents Association