

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P1625/2017  
PERMIT APPLICATION NO. PL16/026779

### CATCHWORDS

Section 79 of the *Planning & Environment Act 1987*; Manningham Planning Scheme; Rural Conservation Zone; Environmental Significance Overlay; Residential hotel; Vineyard; Orchard; Winery; Clauses 57 & 64.02; Whether Residential hotel a prohibited use; Policy; Built form; Amenity; Bushfire Risk; Access and parking

<b>APPLICANT</b>	Brumbys Road Investments Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Manningham City Council
<b>REFERRAL AUTHORITY</b>	Country Fire Authority
<b>RESPONDENTS</b>	Mark Watson, Lindi Wilson Hall, Noel Douglas Ogden & Elisabeth Ogden, Jason Brown, Robert William Wain, Katherine Wain, Victoria Wain, Renny Koerney-Brown, Warrandyte Community Association Inc, Marc Hofmann, Ken Seery, Fay Theodore, Jan Smids
<b>SUBJECT LAND</b>	46-52 Brumbys Road, Warrandyte South
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Geoffrey Code, Senior Member Joel Templar, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15, 16, 17, 18 & 19 January 2018
<b>DATE OF ORDER</b>	23 March 2018
<b>CITATION</b>	Brumbys Road Investments Pty Ltd v Manningham CC [2018] VCAT 449

### ORDER

#### Permit application amended

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

- Prepared by: Tract Consultants
- Drawing numbers and dates: DD-01 revision 4 dated 3 November 2017, DD-02 revision 4 dated 3 November 2017, DD-03 rev 4 dated 3 November 2017, DD-04 revision 2 dated 22 September 2017, DD-05 revision 3 dated 20 October 2017, DD-06 revision 2 dated 26 September 2017, DD-07 revision 1 dated 10 October 2017 & DD-09 revision 1 dated 23 November 2017

### **Decision affirmed**

- 2 The deemed decision of the responsible authority to refuse a permit is affirmed.

### **No permit granted**

- 3 In permit application no. PL16/026779 no permit is granted.

Geoffrey Code  
**Senior Member**

Joel Templar  
**Member**

### **APPEARANCES**

For Brumbys Road  
Investments Pty Ltd

Mr John Cicero, Best Hooper Lawyers

He called the following witnesses:

- Mr David Crowder, town planner, Ratio Consultants Pty Ltd
- Mr Stephen Hunt, traffic engineer, Ratio Consultants Pty Ltd
- Mr Darren Atkinson, landscape architect Urbis Valuations Pty Ltd
- Mr Darren Tardio, acoustic consultant, Octave Acoustics Pty Ltd
- Mr Richard Francis, environmental scientist, Abzeco Pty Ltd

For Manningham City Council	Mr Terry Montebello, Maddocks Lawyers
For Country Fire Authority	Mr Stephen Foster, Land Use Planning Program Leader, Country Fire Authority (15 January 2018)
For Mark Watson	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Lindi Wilson Hall	Mr Douglas Ogden (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Noel Douglas Ogden & Elisabeth Ogden	Mr Douglas Ogden (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Jason Brown	Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Robert William Wain	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Katherine Wain	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Victoria Wain	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Renny Koerney-Brown	Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Warrandyte Community Association Inc	Ms Valerie Polley (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Marc Hofmann	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Ken Seery	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)
For Fay Theodore	In person (15, 17 & 18 January 2018) & Mr Daniel Epstein of Counsel (16 & 19 January 2018)

For Jan Smids

Mr Daniel Epstein of Counsel (16 & 19  
January 2018)

## INFORMATION

Brief and informal description of proposal	Residential hotel, Vineyard, Orchard & Winery
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time <sup>1</sup>
Planning scheme	Manningham Planning Scheme
Zones and overlays	Rural Conservation Zone ( <b>RCZ</b> ) Schedule 3 ( <i>Conservation Values</i> ) Environmental Significance Overlay ( <b>ESO</b> ) Schedule 3 ( <i>Buffer conservation areas supporting sites of biological significance</i> ) Bushfire Management Overlay ( <b>BMO</b> )
Permit requirements	Clause 35.06-1 (use of land in RCZ for Agriculture, Winery & Residential hotel) Clause 35.06-5 (buildings and works for Agriculture, Winery & Residential hotel in RCZ) Clause 35.06-5 (earthworks that change the rate of flow or the discharge point of water across a property boundary in RCZ) Clause 35.06-5 (construction of a building in RCZ that is within 20 metres from a road, 5 metres from any other boundary, within 100 metres of a waterway, and within 100 metres of a dwelling not in the same ownership) Clause 42.01-2 (construction of buildings and works in ESO) Clause 42.01-2 (remove vegetation in ESO) Clause 44.06-1 (construction of buildings and works for accommodation in a BMO) Clause 52.06 (reduction in parking requirements for Residential hotel dining space and for Winery) <sup>2</sup> Clause 52.27 (to use land to sell or consume liquor)

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<sup>1</sup> Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

<sup>2</sup> The scheme also requires that consent (but not a permit) is also required for the provision of parking associated with uses not listed in Table 1.

Relevant scheme policies and provisions	Clauses 9, 10, 11, 12, 15, 16, 17, 18, 19, 21.07, 21.13, 22.02, 22.08, 22.09, 22.14, 35.06, 42.01, 44.06, 52.06, 52.17, 52.27, 52.34, 52.47, 57, 64.02 & 65
Land description	<p>The land is on the east side of Brumbys Road, northeast of its intersection with the Ringwood-Warrandyte Road. Brumbys Road is a no-through road with a length of about 650 metres and the land is located at the end of the road.</p> <p>The land is rectangular in shape with a frontage of about 79.5 metres, a depth of about 294 metres and an area of 2.35 ha. From a point at the centre of the frontage the land falls about 9 metres to a drainage line that crosses a central part of the land on a northwest-southwest alignment and then rises about 20 metres to the northeast corner of the land. The land is currently vacant but is developed with a brick dwelling and some outbuildings. There are scattered trees and regrowth <i>Yarra Burgan</i> east of the drainage line. A 9.5 metres wide easement burdens the drainage line.</p>
Tribunal inspection	<p>On 18 February 2018, the Tribunal conducted an unaccompanied inspection of the subject land, the <i>Olivigna</i> restaurant in Brumbys Road, the land occupied by the Wain family, Ms Koerner-Brown &amp; Mr Brown, Mr Hoffman and Mr Watson, and the surrounding area</p>

## REASONS<sup>3</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Brumbys Road Investments Pty Ltd (in these reasons, **BRI**) owns a 2.35 ha ‘rural living’ lot (in the sense the purpose of the existing use of the lot is dwelling) at the end of a cul de sac (Brumbys Road) in the Manningham ‘Green Wedge’ in Warrandyte South.
- 2 BRI wants to demolish the dwelling and construct a three-storey building containing a Residential hotel and a Winery.
- 3 The proposal may be described in brief as follows:
  - (a) The built form is two storeys from Brumbys Road and three storeys from the rear of the land based on the fall in land to the rear and proposed excavation.
  - (b) The building contains, mainly at the middle level and the upper level, a Residential hotel containing 49 rooms. It has an associated function room of about 375 square metres, divisible into two smaller rooms, plus an adjoining outdoor area of about 182 square metres, as well as a multi-purpose breakfast room of about 170 square metres.
  - (c) The building contains, at the lowest level, a Winery consisting of about 915 square metres. BRI proposes to manufacture in the Winery two particular varieties of wine known as Grappa and Acquavite. The Winery contains a cellar door and BRI says it has space for about 50 patrons who could also stay for associated refreshments in the breakfast room at the middle level of the building.
  - (d) A new vineyard and orchard on land to the rear of the building, principally to grow produce for use in the Winery and for use in hotel meals.
- 4 We will refer to further particulars of the proposal, as required, later in these reasons.
- 5 BRI applied to the Manningham City Council for a permit under the *Manningham Planning Scheme* (the **scheme**) to construct and establish the proposal. After BRI gave public notice of the application, a number of objections were received and, after consideration of those objections and a recommendation from its planners to refuse to grant a permit, the Council decided to refuse to grant a permit. In this proceeding, we are considering BRI’s application to review the Council’s decision.

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<sup>3</sup> 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 BRI owns and operates a Restaurant on abutting land, also at the end of Brumbys Road, known as *Olivigna*. There is no formal connection between the proposal and *Olivigna* disclosed in the application or in the submissions or evidence. We have assessed the proposal as an independent land use proposal. This does not derogate from some possible relationships such as patrons of *Olivigna* choosing to stay at the hotel before or after attending *Olivigna* or choosing to taste or buy wine at the Winery before or after attending *Olivigna*. No party made submissions about how such possibilities might affect assessment of the proposal and we have given no weight to such possibilities in our assessment.
- 7 The key issues for determination are:
- (a) Is the Residential hotel a prohibited use?
  - (b) Is the design response acceptable?
  - (c) Will the proposal have any unacceptable environmental impacts?
  - (d) Does the proposal present an unacceptable risk in a BMO?
  - (e) Are the proposed traffic and parking impacts acceptable?
  - (f) Will the proposal create unacceptable noise impacts?
- 8 After considering the submissions and evidence and having inspected the land and surrounding land, we have decided the Council made the correct and preferable decision having regard to the provisions of the scheme. We will affirm the Council's decision. Our reasons follow.

### **IS THE RESIDENTIAL HOTEL A PROHIBITED USE?**

- 9 The Council and some of the respondents contend the Residential hotel is prohibited because it does not meet the requirements of clause 57 of the scheme. We do not agree with those contentions.
- 10 Clause 57 applies to *Metropolitan Green Wedge Land (MGWL)*. The land is MGWL because it is in a *Rural Conservation Zone (RCZ)* and is outside the *Urban Growth Boundary* identified in the scheme. Clause 57 provides that a Residential hotel is prohibited unless the following condition is met:
- Must be used in conjunction with Agriculture, ... or Winery;<sup>4</sup>
- 11 Accordingly, a permit could only be granted for the Residential hotel if we are satisfied it is or will be used in conjunction with either Agriculture or a Winery.
- 12 The scheme contains a provision regarding interpretation of provisions such as clause 57 that require a use to be in 'conjunction' with another use. Clause 64.02 of the scheme provides:

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<sup>4</sup> *Manningham Planning Scheme* cl 57.01-1. The clause includes a second condition that the number of bedrooms in the Residential hotel must not exceed 80. There is no dispute in relation to the second condition.



### **Land used in conjunction with another use**

If a provision of this scheme provides that a use of land must be used ‘in conjunction with’ another use of the land:

- there must be an essential association between the two uses; and
- the use must have a genuine, close and continuing functional relationship in its operation with the other use.

- 13 The Tribunal has previously characterised that the use that must be in conjunction with another use is the ‘secondary use’ and the other use is the ‘primary use’.<sup>5</sup> We adopt this helpful characterisation. Accordingly, the secondary use in this proceeding is the Residential hotel and the primary use is Agriculture or Winery or both of them.
- 14 The first thing we observe is that clause 57 does not expressly require Agriculture or Winery to be other uses of ‘the land’ ie the land (or part of it) in the permit application to be used for a Residential hotel. Having regard to the purpose and overall drafting of clause 57, we do not find the drafters intended a secondary use could be in conjunction with a primary use if the primary use existed on different land to that where the secondary use was located.

### **Is Agriculture or Winery a separate use?**

- 15 If the land use in the application is unable to be characterised as comprising a separate use of the land for either Agriculture or Winery, then plainly a Residential hotel is a prohibited use.
- 16 Clause 57 needs to be applied having regard to the case law about separate land uses. The case law emphasises that in characterising the proposed use of land it is necessary to disregard proposed activities, processes or transactions and to ascertain the purpose of the proposed use.<sup>6</sup> Accordingly, if Agriculture or Winery properly constitutes proposed activities, processes or transactions associated with the purpose of the use of the land for the Residential hotel, then Agriculture or Winery is not a separate use of the land.

### **Agriculture**

- 17 Agriculture is defined relevantly as ‘land used to ... propagate, cultivate or harvest plants, including ... fruit ...’.<sup>7</sup> Having regard to the application and the submissions and evidence, is there a separate purpose of the proposed land for Agriculture? We find there is not.
- 18 Part of the land is to be planted with fruit-producing vines and trees. The application drawings show an area of about 6,000 square metres planted with vines on either side of the central low point of the land and an area of

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<sup>5</sup> *Mornington Wine Company Pty Ltd v Mornington Peninsula SC* [2006] VCAT 2651 [32]; *Jinalec Park Pty Ltd v Mornington Peninsula SC* [2007] VCAT 1238 [32].

<sup>6</sup> *Cascone v Whittlesea CC* (1993) 80 LGERA 367, 381-2; (1993) 11 AATR 175, 189-90.

<sup>7</sup> *Manningham Planning Scheme* cl 74.

about 2,000 square metres planted with apple, pear and lemon trees at the rear elevated part of the land.

- 19 None of the witnesses were able to assist in how the vines and trees would be planted, maintained or harvested. There are no details about machinery and equipment, storage sheds, staffing and access across the site (including crossing the central drainage line) necessary to support the plantings. For example, the orchard layout was schematic in nature with no space between trees allowed for pedestrian or machinery access.
- 20 BRI responded to our concerns during the hearing with submissions about how many years after planting fruit could be expected to be harvested, anticipated harvest volumes and a revised landscape master plan with greater detail about planting area and planting layout, including spacing between trees.
- 21 The Residential hotel occupies higher ground near Brumbys Road. It occupies a prominent part of the frontage with car parking in relatively narrower spaces on the north and south sides of the building. Accordingly, a casual observer in Brumbys Road would not be aware of the vineyard and orchard. The plantings would, of course, be obvious to occupiers of lots to the northeast, east and southeast of the land. The land devoted to plantings is small, both in absolute terms and as a proportion of the land area. While these factors are not determinative in ascertaining the purpose of the use of the land, the proposed layout of building and works confirms for us that the vineyard and orchard is not for the purpose of Agriculture.
- 22 Many of the hotel rooms have an eastern outlook over the vineyard and orchard. The Winery has the same outlook. On the north side of the land, the vineyard gives way to a relatively broad area containing a landscaped path down the slope down to a generously-sized landscaped water feature to be established in the drainage line. The feature includes a garden pavilion. Between the orchard and the rear boundary (in an area identified as a buffer conservation area) is located another garden pavilion.
- 23 We find the vineyard and orchard is primarily a garden or landscaped setting for the Residential hotel. It might also be associated with fruit production for the Winery, and we will consider that shortly. In any event, the vineyard and orchard is small, unresolved in its details and it cannot be said that the land is to be used for the purpose of Agriculture.
- 24 As an aside to this issue, the Council submitted if Agriculture was a separate use of the land, a Residential hotel could not be used in association with Agriculture if the vineyard and orchard did not exist if and when a permit was granted for a Residential hotel or when the permit was acted upon. In particular, the Council submitted that if a permit was granted, it would take a number of years after the Residential hotel was constructed

and operating before the vineyard and orchard could produce any fruit and hence it submitted the uses could not be ‘in conjunction’.<sup>8</sup>

- 25 We do not agree with this submission. The definition of Agriculture makes it clear that it includes propagation and cultivation of plants. The definition does not require harvesting of the plants and does not confine the activity to the harvesting of the plants.

### Winery

- 26 It therefore follows that the Winery must be or will be a separate use of the land if the Residential hotel is not prohibited under clause 57. Is there or will there be a separate purpose of the use of the land for a Winery? We find there is or will be such a purpose.

- 27 Winery is defined as:

Land used to display, and sell by retail, vineyard products in association with the growing of grape vines and the manufacture of the vineyard products. It may include the preparation and sale of food and drink for consumption on the premises.<sup>9</sup>

- 28 The two key parts of the definition are that there must be sales of vineyard products ‘associated’ with grape vines and the manufacture must be of the vineyard products.

- 29 We find there will be ‘vineyard products’. BRI submits that it will produce Grappa,<sup>10</sup> Acquavite,<sup>11</sup> Pear brandy and Apple brandy. The first two products are based on grape products and are therefore vineyard products.<sup>12</sup> The two brandy products are produced by fermentation of pear and apple fruit. These are not products of a vineyard but of orchard fruit trees. It does not offend the definition if there is production of both vineyard and non-vineyard products, although we would expect the vineyard products to have to remain a significant proportion of total production.

- 30 We find there will be ‘sales’ of these vineyard products. There is a cellar door at the lower level, accessed from the car park on the north side of the hotel or through the hotel lobby and down one level. The cellar door has areas for sales and tastings that in Mr Crowder’s opinion could accommodate 50 patrons. BRI submits product would be available for sale from the ‘breakfast room’ in the hotel lobby.

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<sup>8</sup> BRI submitted that fruit would not be available for harvesting until three or four years after planting of the vines.

<sup>9</sup> *Manningham Planning Scheme* cl 74.

<sup>10</sup> BRI submitted details about Grappa. It suffices to state Grappa is made by distilling the skins, pulp, seeds, and stems (collectively known as the pomace) left over from winemaking after pressing the grapes. It is then aged in stainless steel tanks for three to six months before being chilled and filtered and bottled or it can be aged in barrels.

<sup>11</sup> BRI also submitted details about Acquavite. It suffices to state it is a refined spirit distilled from fermented grape juice. It also can be bottled after distillation or barrel-aged.

<sup>12</sup> BRI submits it has not yet determined the grape varieties to be planted in the vineyard but they will be chosen for the preferred grappa to be produced.

- 31 Next, we must be satisfied that there will be ‘manufacture of the vineyard products’. Grappa is manufactured from pomace, a by-product of grape pressing. Acquavite is manufactured from grape juice. Distillery equipment is shown on the plans in which the pomace and grape juice will be distilled. Distillation is a manufacturing process.
- 32 BRI did not confirm whether the pomace or grape juice will be produced in the Winery. For example, the plans do not show an area labelled for pressing for production of pomace or grape juice. In a small Winery it is an adopted practice that some or all of the grapes are processed off-site but matured and bottled at the Winery. We are content to characterise the Winery as a ‘small’ Winery. We will shortly refer to some production figures. The fact that some of the overall manufacturing process occurs at the Winery is sufficient to meet the requirements of the definition.<sup>13</sup>
- 33 We find that a question arises under the definition as to whether the sale and manufacture is confined to the vineyard products from the vineyard associated with the Winery. Neither BRI nor the Council submitted it was so confined. To deal with the question we need to return to the two arms of the definition.
- 34 First, the sales must be associated with vineyard products. This requires an association with vineyard products generally and is not expressly confined to vineyard products grown at the Winery. This is met with sales of Grappa and Acquavite. It could be met with sales of vineyard products produced off site from grapes grown off site.
- 35 Second, the manufacture must be of the vineyard products. A confining to products grown at the Winery does not accord with either the drafting or practice. If the drafters had intended such confining, they would have included the critical word ‘only’ so that manufacture of other products was excluded. Practice confirms the drafters’ intention. To manufacture a particular or new blend of grape product, different varieties of grapes are included from time to time in the production process. If a particular harvest fails or is reduced in volume or if the age of a vine is yet to reach anticipated maturity for fruit production, it is normal practice to import grapes grown elsewhere. We do not find that the drafters intended to exclude such exigencies or innovation.
- 36 So, the definition requires manufacture of vineyard product from the vineyard at the Winery. The Winery meets this requirement. The definition does not preclude manufacture also of product from grapes harvested from other vineyards. We accept there is an implication that a significant amount of the vineyard product from the vineyard at the Winery must be manufactured at the Winery. We consider it unlikely that manufacturing a miniscule amount of the vineyard product and selling the vast majority for manufacture elsewhere would satisfy the definition, but that does not require a finding in this proceeding.

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<sup>13</sup> *Mornington Wine Company Pty Ltd v Mornington Peninsula SC* [2006] VCAT 2651 [73].

- 37 The views we expressed about sales and manufacture of vineyard products is consistent with the observations of the Tribunal in *Mornington Wine Company*.<sup>14</sup>
- 38 The final part of the definition concerns preparation and sale of food and drink for consumption at the Winery. The definition clarifies that if this occurs at the Winery, the use may continue to be characterised as a Winery. There will be consumption in the forms of tasting at the cellar door. Food and other drinks, including wine, are expected to be available for cellar door patrons at lunch time and through the afternoon in the breakfast room off the hotel lobby. These activities comply with the optional consumption provision in the definition.
- 39 We therefore find that the Winery meets or can meet the requirements in the definition. But this does not make it a separate use of the land. We must be satisfied that the purpose of the use of land includes a Winery, as well as a Residential hotel. As we have stated, if we were to characterise the Winery as ‘activities, processes or transactions’ associated with the purpose of the use of the land for Residential hotel, there would not be a separate use for Winery.
- 40 This is a matter of fact and degree. We must therefore consider the application and the material in the proceeding.
- 41 We find the Winery could be characterised as a separate use having regard to the size, scale, layout, and vineyard product volume. The cellar door has a material size and scale in that, for example, 50 patrons can be accommodated. The distillation and other manufacturing equipment is also of a material size and scale. Although the cellar door is at the lower level to the rear, it is accessible either externally or internally to the hotel. For deliveries, there is a loading dock close to the Winery from the driveway on the south side of the hotel.
- 42 It is also relevant to consider the anticipated volume of fruit from the vines at the Winery and the anticipated volume and value of vineyard products. BRI submits that the vineyard area can reasonable expect to produce 10.7 tonnes of fruit based on Australian averages for white varietals, producing about 6,000 litres of grape juice for Acquavite and about 2,700 kg of pomace for Grappa. Based on consequential pure alcohol, distillation efficiency, and amount of water added, BRI submits it anticipates production of about 480 bottles (each 500 ml) of Grappa and about 3,700 bottles (each 500 ml) of Acquavite (combined total) per annum.<sup>15</sup>
- 43 The Council challenged, with some force, the assumptions behind these estimates but, even if the figures are optimistic and therefore unreliable to

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<sup>14</sup> *Mornington Wine Company Pty Ltd v Mornington Peninsula SC* [2006] VCAT 2651 [79].

<sup>15</sup> BRI also anticipates about 2,200 bottles (each 500 ml) of the two brandy products per year, but in accordance with the reasoning we have already referred to, these products are not relevant because they are not vineyard products.

some extent, we do not find the volumes are so insignificant as to derogate from a finding of a separate use.

- 44 In addition to the Winery being a separate use, it must meet what we summarise as the ‘essential association’ and ‘functional relationship’ requirements of clause 64.02. It is to these matters that we now turn.

### **Essential association?**

- 45 The first arm of clause 64.02 requires there to be an essential association between the primary and secondary uses. The Tribunal has held that the necessary association is not a literal one, but more a symbiotic one that requires a close and mutually benefitting association. The association may be broad in its nature and may be aesthetic, economic, practical, environmental or the like.<sup>16</sup>
- 46 We find there will be the necessary association for the following main reasons:
- (a) The secondary use (the Residential hotel) will benefit from the aesthetic setting provided by the vineyard component of the primary use (the Winery). As we have stated, many hotel room have a vineyard outlook. Hotel patrons will be able to access the vineyard and its associate paths and landscaped features.
  - (b) The primary use will benefit economically from the secondary use because it will bring patrons of the secondary use to the cellar door of the primary use and this will offset the significant investment required to establish the manufacturing plant including, in particular, the distillery.
  - (c) Both the primary and secondary uses will benefit from shared staff and management.
  - (d) The secondary use will bring environmental benefits to the primary use because it will help enable a high quality landscaped vineyard setting, generally in accordance with Mr Atkinson’s plans, to be created and maintained.
- 47 The Council submitted that the essential association is not met having regard to a reasonable expectation that the anticipated income and economic return from the secondary use will dwarf that from the primary use. We do not give weight to that submission because the concept of relative economic return is not recognised in clause 64.02 or the cases.
- 48 The Tribunal has also held that there should be a focus on acceptable outcomes based on the purposes of the relevant zone, including the policy framework, when considering whether there is an essential association. In this proceeding, the purpose of clause 57 is also relevant.

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<sup>16</sup> *Jinalec Park Pty Ltd v Mornington Peninsula SC* [2007] VCAT 1238 [55]-[58].

- 49 The primary focus of the zone purposes, the overlay purposes and the local policy framework is protection and enhancement of the natural environment and its landscape and conservation values. Policy for the MGWL in clause 57 does not have a tourism focus unlike land in a *Green Wedge Zone*, such as parts of the Yarra Valley and Mornington Peninsula. On the other hand, State policy supports tourism development if there is ‘suitable’ transport and compatibility with surrounding ‘activities’. We will more carefully address transport in the merits assessment later in these reasons, as part of the overall assessment of acceptable outcomes. In relation to activities compatibility, the situation is mixed with relative compatibility with *Olivigna* and vineyards to the east and lesser compatibility with a wholesale plant nursery (hot houses) to the south, residential use to the east and further south, and equestrian activities to the north.
- 50 For the moment, while we acknowledge some doubts about acceptable outcomes based on the zone and policy framework, we do not find consideration of outcomes at this high level results in a clear failure of an essential association. We will consider outcomes in more detail in the merits assessment later in these reasons.
- 51 The cases also call for consideration of the relative scale of the secondary and primary uses and, in this proceeding, this is more relevant to the second arm of clause 64.02 relating to the functional relationship.
- 52 We therefore find there is an essential association between the primary and the secondary uses that meets the requirement in the first arm of clause 64.02.

### **Functional relationship?**

- 53 The second arm of clause 64.02 requires, in effect, that a secondary use (in this proceeding, the Residential hotel) must have a genuine, close and continuing functional relationship in its operation with the primary use (in this proceeding, the Winery).
- 54 The Tribunal has held that this, in essence, means that the primary use must be bona fide and not ‘mere window dressing’ to allow the secondary use.<sup>17</sup> The Tribunal has also held that the secondary use must not ‘overwhelm’ the primary use.<sup>18</sup> In this sense, the relative scale between the two uses to which we referred becomes a more relevant factor.
- 55 The Council opposes a finding of the necessary functional relationship because it submits the Agriculture activities (ie the vineyard and orchard) do not exist and would be dwarfed in scale by the Residential hotel. We have already addressed the ‘existing’ primary use issue. We agree that the Agricultural activities are so dwarfed and this was a factor in our finding that Agriculture is not a separate use of the land. However, in accordance

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<sup>17</sup> *Michael O’Sullivan & Associates Pty Ltd v Mornington Peninsula SC* [2007] VCAT 1937 [81].

<sup>18</sup> *Jinalec Park Pty Ltd v Mornington Peninsula SC* [2007] VCAT 1238 [65].

with that finding, the Residential hotel must have the necessary functional relationship with the Winery.

- 56 In our opinion, the Winery is bona fide, not window dressing to the Residential hotel and is not dwarfed by the Residential hotel. The other parties did not challenge BRI's contention that no other Winery in Victoria produces Grappa and Acquivate or that the installation and operation of the distillation equipment was a significant economic investment. The Winery occupies a not insignificant part of the building. It has both internal and external entrances. It has, in effect, its own parking area for patrons. It has a shared loading dock with the Residential hotel. The integration of the Winery into the building means there is better scope for ongoing staff and management sharing.
- 57 Nonetheless, we have some reservations about scale having regard to the size of the events and dining areas and the relatively bold presentation of the Residential hotel to Brumbys Road and the broader area. The presentation is not assisted by the landscape plans showing little visually filtering landscaping in the street setback or at the rear. We will address these reservations in the merits assessment later in these reasons.
- 58 While there was merit in the some of the criticism of production volumes, those volumes are (as we have found) not insignificant, particularly in view of the current high retail prices for these products from retail sources, details of which that BRI tendered.
- 59 If we had been minded to grant a permit, we would have been inclined to include a condition to tie the use for Residential hotel to the ongoing use for Winery including a continuing productive vineyard. A condition of this type was included in *Jinalec Park*.
- 60 We therefore find there is a genuine, close and continuing functional relationship between the primary and the secondary uses that meets the requirement in the second arm of clause 64.02.

#### **IS THE DESIGN RESPONSE ACCEPTABLE?**

- 61 The subject land is a 2.35 hectare parcel of land located at the end of a cul de sac. It currently supports a dwelling and outbuildings towards the Brumbys Road frontage, with the remainder of the land largely grassed pasture with some native vegetation, primarily Burgan. A waterway traverses the site centrally in generally a north-west to south-east direction and flowing in a northerly direction. A small dam is located along this waterway, towards the northern boundary.
- 62 Topographically, the land is reasonably flat at the Brumbys Road frontage and then falls away towards the east, at the centre of the land where the waterway traverses. The lowest part of the land is located approximately halfway along the northern boundary. On the eastern side of the waterway, the land rises up towards the eastern/rear boundary.



- 63 Brumbys Road is a narrow, sealed road with remnant vegetation along both sides, although not consistently. It winds its way up from the Ringwood-Warrandyte Road to the south.
- 64 The surrounding area is predominantly rural residential in nature. Native vegetation is also evident in the broader area and inconsistently spread with denser vegetation to the west and north and more sporadic distribution to the east and south. Topography is undulating providing expansive views from some vantage points.
- 65 Built form is recessive to the natural landscape, with few buildings evident on broader view. The dwelling on the land and *Olivigna* at the northern end of Brumbys Road are the more evident built forms, although the former is well screened by existing vegetation.
- 66 The Tandivale Equestrian Centre, which abuts the northern boundary of the land, is a large site, with an equestrian arena, oval-shaped training track, paddocks and farm buildings. This land has little vegetation.
- 67 The adjoining to the south at 38 Brumbys Road supports a dwelling which is elevated and located towards the central, southern boundary of that site. A number of hot houses and associated farm buildings are located in the front half of that land.
- 68 Land to the east is primarily large residential lots, with single-storey dwellings nestled amongst existing native vegetation which is more dense in this location, although less so than other parts of the wider area. A large vineyard also abuts a small portion of the eastern boundary of the land which appears to be associated with a larger agricultural operation located along Delaneys Road to the east.
- 69 BRI submits that the proposal has been sited on the flattest part of the land to minimise earthworks. Mr Crowder's opinion is that the proposal will not project above the canopy line of existing vegetation and will not 'break' a horizon line and its scale is of a domestic nature, between 8 and 10 metres in height. Mr Crowder's opinion is also that the visual impact of the proposal will not be unreasonable because:
- The subject land is at the end of a cul-de-sac.
  - The area already has a varied character which is not pristine and the introduction of the proposed building will not be foreign to the surrounding area.
  - The proposal is of high architectural quality.
  - The context, materials and restrained height will ensure it will not overwhelm the surrounding area and that it will only be visible from other properties which are in excess of 100 metres away.
  - The balance of the land will be planted with a mix of native and exotic species.

- 70 We agree with Mr Crowder that the RCZ has a different ‘slant’ than other areas of MGWL, with more of an environmental and landscape focus.
- 71 The RCZ broadly seeks to achieve outcomes which protect and enhance natural characteristics and resources, encourage development that is responsive to the natural environment, and the enhancement of the open rural landscape. The RCZ does not specifically have a tourism related purpose. We are aware that the *Green Wedge Zone* has purposes that refer to tourism opportunities.
- 72 Schedule 3 of the RCZ includes the following conservation values that are sought:
- The existing character, landscape quality, viewlines and other natural environmental characteristics of the area protected and enhanced in an equitable and sustainable manner.
  - Use and development designed and sited in recognition of the natural environment, landscape quality, energy efficiency, local amenity considerations and bushfire protection.
- 73 The Statement of environmental significance for the ESO3 sets out the following:
- Development should be located in those areas that are the least intact or devoid of vegetation to minimise detrimental impacts on identified environmental values. Built form is subordinate to the landscape and these areas need to be properly managed to ensure that the distinctive features are protected and enhanced.
- 74 Environmental objectives to be achieved under the ESO3, relevant to built form include:
- To encourage the location of development within those areas that are the most degraded and devoid of native vegetation.
  - To encourage development that is in keeping with the semi-rural character of the area and is sympathetic to the existing built form.
  - To ensure that development responds to the area’s environmental and landscape characteristics, including topography and waterways.
  - To minimise earthworks.
- 75 Local policy is consistent with these broad objectives and references the protection and enhancement of the natural environment.
- 76 We find that the proposed built form will be a large and imposing element in the surrounding landscape. Whilst there are a number of other buildings in the surrounding area that are prominently visible such as the *Olivigna* buildings and the hothouses associated with the use of the adjoining land to the south these should not be used as justification for further and greater built form. The environmental objectives to be achieved and the vision for this area with respect to built form outcomes is one which seeks to ensure development is subordinate or recessive to the natural environment.

- 77 The overall height of the building is not consistent with achieving this ‘subordinate’ objective. It will be a prominent and high built form element which protrudes into the landscape, rather than being designed to fit within it.
- 78 We do not accept Mr Crowder’s evidence with respect to the visibility of the building. In essence, his opinion is that the proposed building will not be visible from the public realm and will only be visible from distant private land. Whilst the visual impact to the public realm is one consideration, that is not the overall thrust of relevant planning considerations. The scheme insofar as it relates to the subject land and the surrounding area, supports development that is complementary to the surrounding environment, rather than that which is prominent within it.
- 79 The building will be a dominant built form feature, when viewed from both Brumbys Road and also from vantage points to the east. We find that the rear of the building is not site responsive, with double-storey form extending for a width of approximately 40 metres. The basement level and also the large extent of fill that is proposed adds to the dominance. Whilst the design detail of the rear elevation includes timber clad vertical steel columns which would be somewhat complementary to the natural landscape surrounds, the extent of built form, the sheer walls and lack of topographical response combine to produce a building that will sit prominently within the landscape, rather than subordinate to it. We find that this is not an acceptable response to the surrounding area and suite of applicable policy and relevant considerations.
- 80 Although the proposed building is relatively large, it has not been designed in a site responsive manner to respond to the constraints of the site and the site’s context.
- 81 When travelling along Brumbys Road, built form is not a dominant feature. Few buildings are prominent in the landscape and many are well set back from the Brumbys Road reserve, in some cases almost completely screened by trees and the landform.
- 82 The proposed building will be a large double-storey built form setback a minimum of 10 metres from the frontage at ground floor level, with 3.0 metre high feature stone walls within this setback. The first floor will be setback 13 metres. Bitumen car parks proposed on either side of the building will be located 24 and 11 metres from the frontage, with a large turning circle area in the north-western corner also. Side setbacks are a minimum of 10 metres to the north and about 18 metres to the south and include the accessways and parking spaces.
- 83 The scale, minimal setbacks (in the context of the area), extent of hard paving (including at the sides of the building) and minimal landscaping response in the front setback, does not respond to the land’s environmental setting or, more broadly, to the outcomes sought by the scheme.

- 84 The landscaping response to the front of the site includes exotic species which is not encouraged. The scheme prefers seeks a native and indigenous response. Whilst species choice and the proposed feature walls could be resolved with conditions, they would not go far enough to ameliorate the building's harsh presentation and redesign of the proposal is necessary to achieve an acceptable outcome.
- 85 To address our concerns, a complete redesign is necessary. The redesign cannot be addressed by conditions without significantly impacting the proposal. A smaller footprint, particularly at first floor level, reduced absolute height, increased setbacks, reduced earthworks and more site responsive landscaping is necessary to address our concerns.

### **WILL THE PROPOSAL HAVE ANY UNACCEPTABLE ENVIRONMENTAL IMPACTS?**

- 86 We agree with the Council's submissions that the three key environmental impacts are the impact to vegetation, the impact on existing waterway, and the impact on habitat corridor.
- 87 BRI submits that the vegetation to be removed is not of any significance. This vegetation consists primarily of Burgan, which is a shrub-like species and Mr Francis describes it as an understory species.
- 88 Before the commencement of Amendment VC138 to the scheme on 12 December 2017, the removal of Burgan was exempt from the need for a permit under the ESO3 and clause 52.17 of the scheme but now is.
- 89 Mr Francis' opinion is that Burgan should not be completely removed from the land but that in order for it to be an appropriate species, other vegetation of differing storeys was required so as to compete with it and provide an increase in biodiversity. He also stated that it is not typically a fodder plant for herbivorous or omnivorous animals.
- 90 Mr Francis' opinion is the land does not presently form a link or corridor for fauna. Nevertheless, he considers that the habitat corridor objectives sought under the ESO3 would be met with the 3.0 metre strip of landscaping along the southern boundary of the land providing a link between the biosites to the east and west.
- 91 The Council submits that the loss of native vegetation, impact of the development on wildlife corridors and the impact on the natural drainage line would be adverse if the proposal were granted approval.
- 92 We agree with Mr Francis that the loss of the Burgan from the review site is not significant. Without a storied selection of indigenous species, the Burgan proliferates and does not provide a greater biodiversity outcome.
- 93 We are not persuaded by the Council that the impacts to the waterway would be unacceptable, or that conditions could not achieve an acceptable outcome.

94 Areas affected by ESO3 are referred to as *Buffer Conservation* areas,<sup>19</sup> which support the *Core Conservation* areas identified as the ESO2.<sup>20</sup> ESO2 areas are immediately to the west and partially to the east of the subject land. The ESO2 Statement of environmental significance includes:

The sites covered by this schedule have been assessed as being the most intact and significant areas of indigenous vegetation, within Manningham. They are classified into 35 Sites of Biological Significance (Biosites) and are identified as being of national, state or regional biological significance according to the *Manningham City Council Sites of (Biological) Significance Review, 2004*. The Biosites support a diverse range of indigenous flora, fauna and ecological vegetation communities, many of which are rare or threatened.<sup>21</sup>

95 The ESO3 Statement of environmental significance includes:

... Buffer Conservation Areas whilst usually more modified from their presumed 'natural' condition than Core Conservation Areas, nevertheless have environmental values in their own right, as well as providing additional (usually adjacent) habitat that supports the ecological integrity and function of Core Conservation Areas. In Buffer Conservation Areas, indigenous vegetation provides the best habitat for indigenous flora and fauna, however large planted trees that are native to Australia also play a supporting role.<sup>22</sup>

96 The ESO3 also states that these areas are under threat, in part, due to 'fragmentation of bushland areas'.

97 One of the Environmental objectives to be achieved under the ESO3 is:

To protect and enhance habitat corridors and ecological stepping-stones.<sup>23</sup>

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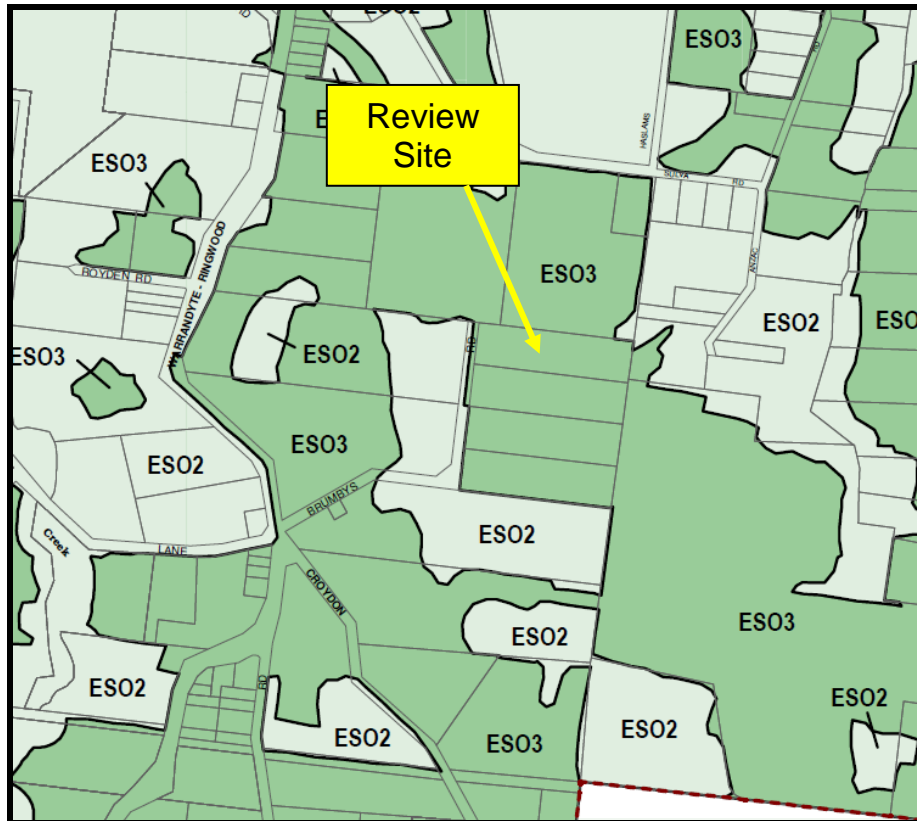
<sup>19</sup> More fully described as *Buffer conservation areas supporting sites of biological significance*.

<sup>20</sup> More fully described as *Sites of Biological Significance*.

<sup>21</sup> *Manningham Planning Scheme* cl 42.01 sch 2 cl 1.0.

<sup>22</sup> *Manningham Planning Scheme* cl 42.01 sch 3 cl 1.0.

<sup>23</sup> *Manningham Planning Scheme* cl 42.01 sch 3 cl 2.0.



- 98 It is not in dispute, and the tendered exhibits support the proposition, that kangaroos were present in the general area. We observed kangaroos during our inspection.
- 99 We do not agree with Mr Francis' opinion that the proposed 3.0 metre wide strip on land between the southern boundary and the car parking area is sufficient to achieve this objective.
- 100 The strip is the only area that could provide a habitat link, given the broad extent of development across the site. *Olivigna* presents as a more urban environment to the immediate north of the subject land. The width of the strip is inadequate and does not satisfactorily respond to both the ESO3 and ESO2 which seek to not only protect but also enhance with respect to habitat corridors.
- 101 Adding to this, the landscaping plan proposes screen planting along the full length of this 3.0 metre wide strip where it is adjacent to the car park. Whilst vegetation to provide such a link is obviously encouraged, we find that the purpose of this vegetation is for screening purposes and would provide little in the way of a habitat link. Whilst this concern could be addressed via conditions by requiring different vegetation, we find that it is demonstrative of the proposal's response to these habitat corridor objectives which is that it is more of an afterthought, rather than a primary issue that any proposal on this land must appropriately address.

## DOES THE PROPOSAL PRESENT AN UNACCEPTABLE RISK IN A BMO?

- 102 Some of the respondents raise bushfire issues and concerns relating to escape and egress in the event of a fire, both in terms of the nature of the development with probability that patrons of the hotel would not be familiar with the area and may also not have personal transport readily available in the event of a fire for escape purposes. Concerns were also raised that if an accident occurred or tree fell and blocked the road, it would prevent evacuation for occupants of the hotel as well as residents themselves. Ms Polley also submits that Warrandyte was one of 52 localities identified in the 2009 Royal Commission into the 'Black Saturday' bushfires as being a high risk location, although no information or material was tendered in support this submission.
- 103 The CFA attended part of the hearing and made submissions in support of its position to allow the proposal, subject to conditions.
- 104 The CFA submits that the subject land is best described as a Landscape Type Two landscape risk classification under the *Planning Permit Applications Bushfire Management Overlay* (September 2017) (**Technical Guide**), although it was not a completely neat fit. It also submits that the surrounding landscape is 'woodland', with well managed understorey and other areas that are devoid of trees and generally used for agriculture purposes.
- 105 It also submits that the surrounding area has been subject to bushfires in the past and that planned burns are undertaken to help manage bushfire risk. The CFA further submits that immediately adjoining land to the north and south has a lack of groundfuels which would diminish the risk of bushfire, as well as sufficient defendable space for the proposal. It classifies the landscape bushfire risk as 'moderate', although local conditions lower that risk.
- 106 The proposal includes providing defendable space of 21 metres, construction level to BAL-29, static water supply and a Bushfire Emergency Management Plan. The CFA supports a variation to the requirements of clause 52.47 (Planning for bushfire), which includes construction to a higher BAL level than would normally be required for such proposal, and lesser defendable space. This is due to the classification of this proposal being in similar category to aged care facilities and the like, where occupants are of assumed lesser capabilities in the event evacuation is required. The CFA is also satisfied with lower vegetation management requirements due to the relative certainty that nearby vegetation has a reasonable expectation of management in low-fuel load conditions.
- 107 Mr Francis' evidence is consistent with the position of the CFA, particularly with respect to the Landscape Risk categorisation and vegetation conditions on surrounding and nearby land. His evidence is also that in the event of a fire, the building construction of BAL-29 would be

suitable to ensure the safety of persons remaining inside that building in the event of a fire.

- 108 In cross examination, Mr Francis also stated that although the complete blocking of the road due to an accident or tree across the road is unlikely, the proposed construction level would be adequate to ensure the safety of occupants in the event they could not or did not want to leave the premises.
- 109 Clause 13.05 (Bushfire) of the scheme prioritises human life over all other policy considerations and directs development to low risk locations.
- 110 In determining the risk, the scheme provides guidance about how to determine the risk of a proposal in a particular location.
- 111 As the subject land is within the BMO, clause 52.47 of the scheme applies and the proposal is subject to clause 52.47-2 which refers to applications outside (broadly) residential zones and which are not for single dwellings.
- 112 An assessment of the risk to the proposal was undertaken during the application, despite the fact that the subject land was not affected by the BMO during the application process.<sup>24</sup> BRI produced a Bushfire Management Statement and Plan during the application process which sought to demonstrate compliance with the relevant provisions on an ‘assumed’ affected basis ie the BMS and BMP were produced on the basis that the land was included within the BMO and the relevant provisions of the scheme applied even though they technically did not at that time. The CFA assessed the proposal and was generally supportive of it from a bushfire risk perspective.
- 113 Whilst the CFA stated that the subject land fits within a Landscape Type Two landscape risk, it was described to us by Mr Foster as ‘not a perfect fit but the closest fit’. A reading of the Technical Guide could produce a different outcome. The following table sets out the differing descriptors between the two landscape types that could apply:

Landscape Type 2	Landscape Type 3
<ul style="list-style-type: none"> <li>• Bushfire can only approach from one aspect and ...</li> <li>• ... the site is located in a suburban, township or urban area managed in a minimum fuel condition.</li> </ul>	<ul style="list-style-type: none"> <li>• Bushfire can approach from more than one aspect.</li> <li>• The site is located in an area that is not managed in a minimum fuel condition.</li> </ul>
<ul style="list-style-type: none"> <li>• Access is readily available to a place that provides shelter from bushfire. This will often be the surrounding developed area.</li> </ul>	<ul style="list-style-type: none"> <li>• Access to an appropriate place that provides shelter from bushfire is not certain.</li> </ul>

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<sup>24</sup> The review site had the BMO introduced as part of Amendment GC13 to the Manningham Planning Scheme, which commenced on 3 October 2017.



- 114 The CFA describes the site as being in an area of ‘moderate bushfire risk’,<sup>25</sup> although states that the location of the land is ‘low risk’ due to the immediately surrounding area being largely cleared of vegetation.
- 115 The primacy of State policy in respect of this application prevails over other policy considerations. Having regard to this, we find that the reading of policy and guiding information with respect to bushfire assessment, must take the most conservative approach. We are not persuaded that this has occurred with this application.
- 116 In our opinion, if a site could fall into different categories with respect to landscape risk under the Technical Guide, then the more conservative of those should be used in any assessment. This is consistent with clause 13.05, where the protection of human life is prioritised and development is directed to low risk locations.
- 117 Although the immediately surrounding landscape might be in a somewhat fuel managed state, a bushfire event further afield has the potential to impact the site. This is consistent with the Technical Guide which requires the broader landscape risk to be categorised within 150 metres of the site and also Mr Francis’ evidence, which was that he assesses the broader risk out to 250 metres.
- 118 Given the CFA has described this site as being at moderate risk, this does not respond positively to the Strategies under clause 13.05. Assessment criteria under this clause includes:
- Not approving development where a landowner or proponent has not satisfactorily demonstrated that the relevant policies have been addressed, performance measures satisfied or bushfire protection measures can be adequately implemented (Tribunal emphasis).
- 119 The proposal is for a development to accommodate a use with patrons who may not be familiar with the land or the wider environs and the bushfire risk that the land is subject to. The proposal is primarily for a Residential hotel, where patrons are free to do as they please and are not under effective control of operators. We were not lead to any material that would suggest otherwise. This differs from other scenarios where masses of people might be under the effective control of a premises operator, such as a school, for example.
- 120 BRI also submits, in part through evidence, that patrons would expect to arrive by bus on occasions and so would not have immediate access to transport in the event of an emergency but would be highly mobile. Mr Francis’ opinion was that although this is the case, the construction level of the building would suffice as a place of refuge during a fire event.
- 121 We are not persuaded that the proposal has adequately addressed the State policy that applies to the land in respect of bushfire risk. We are not satisfied that the development proposed which will allow the use of the land

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<sup>25</sup> Paragraph 1.1, Page 1 of the CFA’s submission.

for this purpose, with such high numbers of patrons allowable, combined with the uncertainties that the use and transport options for patrons would raise, is acceptable in a moderate bushfire risk location.

- 122 The land could be categorised as a higher Landscape Type risk location than what the CFA has accepted. Even in the case where the CFA's submissions with respect to the 'single approach' fire scenario were accepted, this approach is from the west and would have the potential to impact upon the only route of egress from the site, which could potentially be cut off in a fire event. Given the nature of the proposed use, we find that this is an unacceptable outcome and we are not persuaded that the protection of human life has been prioritised in this instance.
- 123 Our findings in relation to bushfire risk are unnecessary to our ultimate finding that the proposal is not an acceptable planning outcome. They are also unnecessary because we have found the 3 metre wide strip along the southern boundary of the land fails to respond to the environmental objectives for the land. The proposed landscaping of the strip also fails to meet the defendable space requirements. If a fresh proposal is prepared and includes a biodiversity strip and permission is sought, the size, location and landscaping of the strip would require consideration in a fresh bushfire risk assessment.

## **ARE THE PROPOSED TRAFFIC AND PARKING IMPACTS ACCEPTABLE?**

### **Car parking provision**

- 124 Both the Council and the respondents raised concerns with the inability of Brumbys Road to cope with increased peak traffic flows under current circumstances, let alone if the proposal is approved, which would generate additional traffic movements. The Council also submits that in order to cope with the increased volume of traffic, widening of Brumbys Road would be necessary but that the Council would not do so given the amount of significant roadside vegetation that would be impacted.
- 125 The Respondents also state that any car parking reduction is inappropriate and that Brumbys Road is already impacted from significant overflow parking from *Olivigna* and that the proposal will only serve to exacerbate this, given it is seeking a reduction in the parking requirements.
- 126 BRI submits that it is inappropriate for the Tribunal to consider the capacity of Brumbys Road for peak times being one day per week and that if any overflow does occur, it would not be regular.
- 127 In relation to parking provision, the proposal includes a combination of uses. Some of which are listed in table 1 of clause 52.06 and some which are not.

- 128 Winery is the only use proposed that is specifically listed in table 1. Otherwise, Mr Hunt relies upon the Motel rate in assessing the Residential hotel component and the Place of Assembly rate for the Function/Events component. No rate is applied for the Agriculture use.
- 129 The Council did not dispute this method.
- 130 The allocation of proposed spaces includes no shortfall for the Residential hotel use, a 16-space shortfall for the Function/Events space and a 5-space shortfall for the Winery use.
- 131 On this basis, the proposal would have a total shortfall of 21 spaces.
- 132 Mr Hunt states that the shortfall in parking is acceptable, given the close relationship between all the uses on the land and the probability that there will be a significant sharing of car parking between them, thereby reducing the demand of each individual use.
- 133 Brumbys Road is a sealed road, with gravel edges, spoon drains and no curb and channel. Beyond this is grassed nature strip and vegetation. It takes the appearance of a ‘country laneway’. It is a no-through-road and has a wider court bowl at the end. It is approximately 650 metres in length with undulations and curves along its length. Mr Hunt describes the dimensions as being between 4.0 and 4.60 metres in width generally, with some sections widened to 5.50 metres. He also describes the condition of the gravel shoulders as being in poor to fair condition and this is consistent with what we saw during our inspection.
- 134 During our inspection, we also visited *Olivigna* at the northern end of Brumbys Road. We observed that the car parking areas at *Olivigna* were either full or close to full. We also noted that the cellar door was not operating and that the restaurant had additional capacity for patrons. Upon our departure of *Olivigna*, we observed that there were a number of vehicles parked along the Brumbys Road road reserve.
- 135 There is no formal car parking provided within the Brumbys Road road reserve. Photographs and video footage tendered during the hearing show significant numbers of vehicles parked along the road reserve at certain times. Most of this parking occurs along what we describe as the ‘nature strip’, adjacent to the road pavement.
- 136 During our inspection, we drove up and down Brumbys Road and came across a number of cars. Our experience was similar to that which was evident in some of the video footage tendered by Miss Wain, in that we had some difficulty passing other vehicles without some corrective manoeuvring, some of which involved moving off the road pavement.
- 137 Clause 52.06 includes the following decision guideline:
- The impact of fewer car parking spaces on local amenity, including pedestrian amenity and the amenity of nearby residential areas.

- 138 We are not persuaded that the provision of parking on site for the proposed use will be adequate and that any overflow parking would occur within the road reserve of Brumbys Road. Whilst there is a small number of residential properties in the area, there would be some impact to the amenity of these properties and also in a more general sense to the surrounding area.
- 139 We accept that there would be a level of sharing of car parking between the uses proposed and that this would reduce the demand. However, there is also little public transport in the area and almost exclusive reliance on private vehicles is necessary for people visiting the site. Whilst provision for buses has been made, for reasons we discuss below, we think that buses visiting the site would be problematic and in any case, they would be private chartered buses as there is no public bus route along Brumbys Road.
- 140 We acknowledge that such events may not be overly frequent or regular but the material tendered during the hearing and our experience during our inspection lead us to the conclusion that it is likely to happen from time-to-time, based on the existing circumstances of the surrounding area and that a shortfall of provision as part of this proposal has the potential to exacerbate this issue. We do not find that this would be an acceptable outcome.
- 141 Brumbys Road is not an urban or inner city street, with sealed areas for on-street parking, nor is it an area where one might expect to see such a large volume of cars parked along the roadway, irrespective of frequency. It is a narrow, rural style road, that has a minimal construction standard and several examples of remnant native trees spread along its length.
- 142 Greater on-site provision and/or a reduced intensity to ensure a greater proportion of on-site parking is provided, is necessary so as to eliminate any potential for the need for off-site parking.

### **Traffic impacts**

- 143 Mr Hunt states that the already widened sections of Brumbys Road allow for adequate passing for the total traffic volumes to be generated, including vehicles such as buses.
- 144 He also states that the configuration of the road is typical of many residential streets, where parking occurs on both sides and only allows for the passage of one vehicle at a time in either direction.
- 145 BRI relies on Mr Hunt's evidence in stating that the proposal will not create any unreasonable traffic impacts.
- 146 Our experience driving along Brumbys Road during our inspection was that it was difficult to pass another oncoming vehicle, without having to manoeuvre off the sealed pavement and/or without needing to reverse to a wider section. Whilst there are certainly sections of Brumbys Road that are wide enough to allow for passing of two cars, there are significant lengths that are not.

- 147 The dimensions of Brumbys Road might be typical of many residential streets, as described by Mr Hunt, however, this is not a typical residential street. It undulates and has blind curves which are not typical of many suburban residential streets, where sightlines generally provide greater visibility than what is the case along Brumbys Road.
- 148 In some situations, we find that traffic conflicts would occur that would not be acceptable. This includes the passing of two cars but more pertinently, when other vehicles come across a bus that BRI clearly contemplates would be a possible mode of transport for guests. A circumstance where a bus and other vehicle confront each other could be rather problematic and result in one of the vehicles having to reverse a significant distance along a narrow road or move almost completely off the sealed pavement, if that were possible. We find that this is not an acceptable outcome, acknowledging that this might be an infrequent event.

#### **WILL THE PROPOSAL CREATE UNACCEPTABLE AMENITY IMPACTS?**

- 149 The Council submits that the proposal will result in unreasonable amenity impacts including increased traffic, noise from the proposed new uses and vehicle noise, light spill and odours. Most of the respondents also hold similar concerns. The Council (in its submissions) was also critical of Mr Tardio's evidence which appeared not to address noise emissions when the function/events space had the doors open.
- 150 The evidence of Mr Tardio is that there are likely to be two possible sources of noise that might affect the amenity of the residents and surrounding area – patron noise and music noise.
- 151 Mr Tardio's noise modelling includes the windows and doors of the events/function space being open.
- 152 Mr Tardio describes the closest sensitive noise receptor as the dwelling at 38 Brumbys Road, which is located approximately 165 metres to the south-east. Mr Tardio's opinion is that audibility of noise produced from the site would be either inaudible or just audible from the dwelling on the adjoining site to the south (38 Brumbys Road) and also properties in Anzac Road to the east. Mr Tardio also states that if compliance with noise requirements at 38 Brumbys Road is achieved, then compliance at all other sensitive locations would also be achieved, given 38 Brumbys Road is the closest sensitive receptor.
- 153 Some of the dwellings further south along Brumbys Road and in Anzac Road are a considerable distance from the subject land and the location of the proposed building. We acknowledge that the proposal would allow patrons to walk to the full perimeter of the subject land and patrons doing so could create noise. However, considering the distances between the subject land and more sensitive spaces of nearby properties, we are satisfied that no unacceptable levels of patron noise will occur.

- 154 We find that the more likely impact of noise would be from music associated with events inside the function/events space and possible escape of such noise.
- 155 Mr Tardio's opinion is that the use could operate with what he describes as 'appreciable music levels' and still comply with SEPP N-2 (control of music noise from public premises), which is the relevant noise control.
- 156 He also states that as amplified noise can be controlled, a noise limiting system should be employed in order to do so and to ensure compliance is achieved. Such a system is calibrated and artificially controls noise levels to set levels, which can be set to ensure compliance with SEPP N-2. He states that persons are not able to tamper with the settings ordinarily and this prevents staff or other persons from manually increasing the volume.
- 157 We accept his evidence and find that had we directed the grant of a permit, we would have included a condition to require such a system be used for all amplified music, along with other appropriate conditions to ensure amenity from noise impacts were not unacceptable.

## **ARE THERE ANY OTHER ISSUES?**

### Are the proposed uses acceptable in-principle?

- 158 Some of the respondents took issue with the proposal and whether it was appropriate in a Green Wedge area. Many of the submissions on this point centre around the context of the subject land and made comparisons with what some of the respondents saw as the inappropriate scale of *Olivigna*. Submissions also went to the scale of the proposal, which we have discussed differing aspects of earlier in these reasons.
- 159 In this regard, we will address the Residential hotel and Winery aspects of the proposed uses. We find the agricultural activities (vineyard, fruit orchard and citrus grove) to be uncontroversial and appropriate on a largely cleared site in the RCZ.
- 160 The scheme includes policy that seeks to protect and enhance the attributes of the natural environment in locations such as this. It also includes policy that encourages tourism opportunities. It includes the following objectives:
- To encourage accommodation that enhances regional and local tourism without causing detriment to scenic, landscape and environmental resources.
  - To minimise any adverse impacts of tourism activities on local communities, surrounding land uses and natural resources.
  - To ensure tourism development does not impact on the amenity of the area.
  - To improve the quality, capacity and accessibility to key tourism assets.<sup>26</sup>

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<sup>26</sup> *Manningham Planning Scheme* cl 12.13-3.

- 161 The scheme does not include any *Green Wedge Zone* land (which actively encourages tourism uses) in its green wedge areas. The RCZ is the zone that has been applied to those areas.
- 162 We find that there is tension in the scheme between providing for tourism uses and protecting the Green Wedge areas. We characterise the proposal as a ‘tourism use’ for policy purposes. Where the scheme encourages tourism uses, there must be some acknowledgement that land in the RCZ might be expected to accommodate some of these types of uses. We find that having policy that actively seeks tourism opportunities, must be given some level of weight in determining whether the proposed use in principle, is an acceptable one. Tourism policy within the scheme does not distinguish between urban and rural areas, rather, takes a broad-brush approach.
- 163 What is proposed here are uses that we find are compatible with the zoning of the land and the relevant policy within the scheme. However, what we do find unacceptable, is the scale of the proposed uses and the reasons for this, we have set out earlier.

#### Extent of Liquor Licence

- 164 Ms Polley raised concerns with the vast majority of the land being proposed to have coverage of a liquor licence, particularly the eastern extent of the site and resultant amenity impacts from patrons creating noise if they were in this location.
- 165 Under cross-examination, Mr Tardio stated that he had not modelled noise from the garden pavilion, which is located towards the north-eastern corner of the land.
- 166 The closest dwelling to the eastern boundary of the land is approximately 100 metres away, with several others further than this. We find that these distances are adequate to ensure there would be no unacceptable noise impacts from patrons who are situated at the eastern fringes of the subject land. Noise from patrons may be audible from nearby dwellings. However, we find that such noise is unlikely to result in any unacceptable impacts due to the large distances between the subject land and the closest sensitive receptors, being dwellings.

#### Road widening and intersection works

- 167 Although not a party to the proceeding, VicRoads was provided with an opportunity during the application process to make comments on the proposal and in particular, its impact, if any, on the intersection of Brumbys Road and Warrandyte-Ringwood Road.
- 168 VicRoads made comments and requested that conditions be included on any permit, to upgrade the intersection of Brumbys Road and Warrandyte-Ringwood Road. These conditions primarily related to a left turning deceleration lane within Warrandyte-Ringwood Road (southbound).

- 169 It was Mr Hunt's opinion that that intersection requires these upgrades now under current conditions and that on that basis, the inclusion of conditions on any permit relating to the proposal was not warranted.
- 170 During our inspection, we drove along Warrandyte-Ringwood Road southbound towards Brumbys Road. Our experience was that although there is adequate signage to indicate Brumbys Road (and *Olivigna*), the driver experience is one of uncertainty. As one approaches Brumbys Road, there is a crest just before a bus stop turn-out area. The bus stop is immediately before Brumbys Road and Croydon Road, which is immediately after Brumbys Road does have a left-turn lane. These features provide a somewhat confusing experience for drivers. We find the bus stop could be easily mistaken for a left turn deceleration lane for Brumbys Road, and upon such a mistake, would then require a driver intending to enter Brumbys Road to re-enter the main road alignment to then make an immediate turn into Brumbys Road. The visibility of Brumbys Road is not immediately apparent upon cresting the rise in the road just to the north. The bus stop and left turn lane of Croydon Road are much more evident, which elevates the confusing experience presently experienced by motorists.
- 171 We accept Mr Hunt's opinion that the current situation with the intersection would require upgrade works now irrespective of the approval of this application or not. On this basis, had we directed the grant of a permit, we would not have included the conditions required by VicRoads.

## **CONCLUSION**

- 172 For the above reasons, we will affirm the Council's deemed decision to refuse to grant a permit. No permit will be granted.

Geoffrey Code  
**Senior Member**

Joel Templar  
**Member**