



**MORNINGTON
PENINSULA**
Shire

ATTACHMENTS

COUNCIL MEETING

TUESDAY, 24 JANUARY 2023

10.30AM

ONLINE ZOOM MEETING

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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P409/2022
PERMIT APPLICATION NO.P21/1949

CATCHWORDS

Section 79 of the *Planning and Environment Act 1987*; Mornington Peninsula Planning Scheme; Special Use Zone; Heritage Overlay; Retirement village, Residential aged care facility & Place of worship; Repeat appeal; Amendment C270; Green Wedge; Interurban break; Built form; Traffic and parking; Landscape; Ecological impacts

APPLICANT	Ryman Healthcare (Australia) Pty Ltd
RESPONSIBLE AUTHORITY	Mornington Peninsula Shire Council
RESPONDENTS	David Anthony Quinn David Grace David Morris Elizabeth Sheffield Frank Mangan Genevieve Adams Harry Wilson Leigh Eustace Paul Williams Green Wedges Guardians Alliance Inc Save Sir Regs Wedge Inc Tia Lange Gaffney
REFERRAL AUTHORITY	Head, Transport for Victoria
SUBJECT LAND	60-70 Kunyung Road MOUNT ELIZA Victoria 3930
HEARING TYPE	Hearing
DATE OF HEARING	3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 25, 26 & 27 October 2022
DATE OF ORDER	28 December 2022
CITATION	Ryman Healthcare (Australia) Pty Ltd v Mornington Peninsula SC [2022] VCAT 1495



ORDER

Amend permit application

1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans:

(a) The following architectural plans prepared by SJB Architecture Pty Ltd and filed with the Tribunal:

- Drawing numbers: DA01 Rev A, DA02 Rev A, DA03 Rev A, DA04 Rev A, DA05 Rev B, DA05A Rev A, DA06 Rev C, DA06A Rev A (corrected) (two sheets), DA07 Rev B, DA07A Rev C, DA08 Rev C, DA08A Rev A, DA09 Rev C, DA10 Rev C, DA10A Rev A, DA10B Rev A, DA11 Rev B, DA11A Rev A, DA12 Rev A, DA13 Rev A, DA14 Rev C, DA14A Rev A, DA14B Rev A, DA14C Rev A, DA14D Rev C, DA14E Rev C, DA15 Rev A, DA16 Rev C, DA16A Rev A, DA17 Rev C, DA17A Rev A, DA17B Rev A, DA18 Rev B, DA18A Rev A, DA18B Rev A, DA19 Rev C, DA20 Rev C, DA21 Rev C, DA22 Rev C, DA23 Rev C, DA24 Rev C, DA25 Rev C, DA25A Rev B, DA25B Rev B, DA25C Rev A, DA25D Rev A, DA25E Rev A, DA26 Rev C, DA26A Rev A, DA26B Rev A, DA26C Rev A, DA26D Rev C, DA26E Rev A, DA26F Rev A, DA27 Rev C, DA27A Rev A, DA28 Rev C, DA28A Rev A, DA28B Rev A, DA28C Rev C, DA28D Rev A, DA29 Rev C, DA29AA Rev A, DA30 Rev C, DA30A Rev A, DA30B Rev A, DA31 Rev B, DA31A Rev A, DA32 Rev C, DA32A Rev A, DA32B Rev A, DA32C Rev A, DA32D Rev A, DA32E Rev A, DA32F Rev A, DA32G Rev A, DA33 Rev B, DA34 Rev B, DA35 Rev B, DA36 Rev B, DA37 Rev C, DA38 Rev B, DA39 Rev C, DA39A Rev B, DA39B Rev B, DA40 Rev B, DA41 Rev B, DA42 Rev B, DA43 Rev B, DA44 Rev B, DA45 Rev B & DA46 Rev B
- Dated: 12 August 2022



- (b) The following landscape concept plan filed prepared by Urbis Pty Ltd and filed with the Tribunal:
- Drawing numbers: LCP-01 Rev B
 - Dated: 12 August 2022

Amend name of respondent

- 2 Pursuant to section 127 *Victorian Civil and Administrative Tribunal Act 1998*, the statement of grounds filed by ‘Rosemary West OAM coordinator (on behalf) of the Green Wedges Coalition (incorporated as Green Wedges Guardians Alliance Inc. Vic Reg No. A0046546X)’ is amended by changing the name of the respondent to:

Green Wedges Guardians Alliance Inc

Decision set aside

- 3 In application P409/2022 the decision of the responsible authority is set aside.

Permit granted

- 4 In permit application P21/1949 a permit is granted and directed to be issued for the land at 60-70 Kunyung Road, Mount Eliza in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
- Use for a residential aged care facility
 - Use for a retirement village
 - Demolition of buildings
 - Construction of buildings and construction and carrying out of works
 - Display of illuminated business identification signs
 - Removal of native vegetation

Geoffrey Code
Senior Member

Jane Tait
Member



APPEARANCES

By videoconference

For Ryman Healthcare
(Australia) Pty Ltd

Emily Porter SC and Jane Sharp of Counsel,
instructed by Stephanie Mann, lawyer,
Planning & Property Partners Pty Ltd

They called the following witnesses:

- Simon Howe, arborist, Tree Department Pty Ltd
- Jim Gard'ner, heritage architect, GJM Heritage
- Colleen Peterson, town planner, Ratio Consultants Pty Ltd
- Leanne Hodyl, urban designer, Hodyl & Co Pty Ltd
- Darren Atkinson, landscape architect, Urbis Pty Ltd
- Catherine Wells, retirement and aged care consultant, O'Hara Wells Pty Ltd
- Brett Young, traffic engineer, Ratio Consultants Pty Ltd
- Aaron Organ, ecologist, Ecology & Heritage Partners Pty Ltd
- Eileen KIELTY, regional operations manager, Ryman Healthcare (Australia) Pty Ltd
- Daniel Flood, photomontage developer, Flood Slicer Pty Ltd

Michael Bialek & Beau Fulwood, architects,
SJB Architecture, made an oral presentation
describing the amended plans in the permit
application



For Mornington Peninsula Shire Council	Peter O'Farrell and Carly Robertson of Counsel, instructed by Simone Jackson, lawyer, Jackson Lane Legal They called the following witnesses: <ul style="list-style-type: none">• Sally Jeavons, recreation planner, @leisure Planners Pty Ltd• John Briggs, architect & conservation consultant• Rob Milner, town planner, Milner Planning Advisory Pty Ltd
For Head, Transport for Victoria	No appearance
For David Quinn	In person
For David Grace	In person
For Elizabeth Sheffield	In person
For Frank Mangan	In person
For Genevieve Adams	In person
For Harry Wilson	In person
For Leigh Eustace	In person
For Paul Williams	No appearance
For Green Wedges Guardians Alliance Inc	Rosemary West
For Save Sir Regs Wedge Inc	Daan Spijer, lawyer He called the following witness: <ul style="list-style-type: none">• Jeff Yugovic, ecologist, Jeff Yugovic Consulting
For Tia Lange Gaffney	In person



INFORMATION

Brief description of proposal	<p>Retirement village & residential aged care facility both in association with a place of worship</p> <p>Some of the key features include:</p> <ul style="list-style-type: none">• Construction of buildings A, B, C, D, E & F ranging in height between one and four storeys• Provision of 60 residential aged care rooms (comprising 20 low care rooms, 20 high care rooms and 20 dementia rooms), 27 assisted living suites, and 104 independent living units• Part demolition of the Moondah mansion and construction of extensions as part of Building C• A centrally located place of worship• Communal facilities including a bowling green, swimming pool, gym, café, lounge, cinema room, hair & beauty room, craft room, residents' workshop, library, games room• A total of 229 car parking spaces, in a combination of basement and at grade bays
Nature of proceeding	<p>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.¹</p>
Planning scheme	<p>Mornington Peninsula Planning Scheme</p>
Zone and overlays	<p>Special Use Zone (Schedule 2) Heritage Overlay (Schedules 110 & 111)</p>

¹ 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.



Permit requirements	<p>Use for a residential aged care facility and a retirement village (clause 37.01-1)</p> <p>Construction of a building or construction or carrying out works (clause 37.01-4)</p> <p>Demolition and alteration of heritage buildings, construction of buildings and works, display of signage and tree removal (clause 43.01-1)</p> <p>Removal, destruction or lopping native vegetation (clause 52.17-1)</p> <p>Construction and display of signage (clause 52.05-13)</p>
Land description	<p>The land contains a former grand bayside mansion estate of about 8.9 hectares.</p> <p>It is located on the west side of Kunyung Road in a mid-block location, generally opposite the intersection with Kanya Road. It is irregular in shape. It has a frontage of about 204 metres and a depth of about 515 metres. The western boundary of the land is the Moondah Beach foreshore on Port Phillip Bay. The land falls about 20 metres from Kunyung Road to the edge of the escarpment above the beach.</p> <p>The Moondah mansion and some of its outbuildings have local heritage value. The estate's gatehouse, off Kunyung Road, is of State heritage significance.</p> <p>The land was originally established as a holiday resort, was later used as a hotel, and most recently used for the Melbourne Business School.</p> <p>The land contains many mature trees, mainly located in the eastern part of the land off Kunyung Road. It has two vehicle access points to Kunyung Road.</p>
Tribunal inspection	<p>We inspected the land and the neighbourhood accompanied by the parties during the hearing on 4 October 2022. We again inspected the land as well as the neighbourhood and other more distant locations (including Mornington North and the Mornington Pier) unaccompanied by the parties on 2 November 2022.</p>



REASONS²

BACKGROUND

- 1 In *Ryman Healthcare (Australia) Pty Ltd v Mornington Peninsula SC*,³ the Tribunal affirmed the decision by Mornington Peninsula Shire Council (the **Council**) to refuse to grant a permit under the Mornington Peninsula Planning Scheme (the **planning scheme**) to use and develop the subject land for a residential aged care facility and retirement village in association with a place of worship.
- 2 We will be referring to this decision in these reasons as the **previous decision** and the proposal in that decision as the **previous scheme**.
- 3 Ryman Healthcare (Australia) Pty Ltd (**Ryman**) subsequently applied to the Council again for permission under the planning scheme to use and develop the subject land for the same purposes.
- 4 In this proceeding, we are determining Ryman's application to review the Council's deemed refusal to grant that permission.
- 5 At the start of the hearing, we granted Ryman leave to substitute the architectural and landscaping plans in the permit application. We will refer to the use and development in those plans as the **proposal**. The Council and respondents remain opposed to the proposal on various grounds to which we will refer throughout these reasons.
- 6 Our ultimate finding is that the proposal, with some modifications and subject to permit conditions, is an acceptable planning outcome having regard to the provisions of the planning scheme. We will grant a permit. Our reasons follow.

PROPOSAL

- 7 Ryman's proposal is a development of a significant scale. Ryman submitted many technical reports to the Council describing and assessing the proposal. We have highlighted a few of its features in the Information section of these reasons.
- 8 Ryman's 'building storey plan' gives a helpful overview of the location of the six buildings A to E, the Moondah mansion (the **mansion**)⁴ that forms part of Building C, the place of worship, the bowling green and the foreshore escarpment. The buildings are colour-coded on this plan as to number of storeys. This plan is at figure 1, below.

² We have considered the filed submissions and filed evidence of the parties, documents tendered at the hearing and the filed statements of grounds in determining the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

³ (Corrected) [2021] VCAT 711 (Cook M & Cameron M, 1 July 2021).

⁴ The parties sometimes also referred to the mansion as the 'Moondah Manor' and it is described in this way in the Council's draft permit conditions. While we consistently refer to it as the 'mansion' in these reasons, we have retained the alternative description in the conditions as proposed by the Council and to which Ryman did not oppose.





Figure 1 Building storey plan
Source: Permit application drawing DA07 rev B

- 9 Buildings A, B & F are closest to Kuyung Road and on that part of the land with the most slope. It will be observed that the western part of those buildings (and Building E) is one storey higher than the eastern part of those buildings, and this is achieved by the slope. However, each building has a consistent overall height.
- 10 Further summarised details about location, storeys and use of each of the six buildings is provided by the table in figure 2, below.

Building number	Location	Storeys	Use
A	Easternmost building, towards the Kunyung Road frontage	2 storey to the east 3 storey to the west	14 x ILU
B	Central within the eastern half of the site, towards the southern boundary	3 storey to the north-east 3 storey to the south-east 4 storey to the north-west 3 storey to the south-west	18 x ILU
C (existing Moondah Mansion and extensions)	Three wing extensions off the existing Moondah Mansion	4 storey at the northern wing 3 storey down to 1 storey at the north-eastern wing 4 storey down to 1 storey at the south-eastern wing	60 x RACF 27 x ALS 19 x ILU Communal amenities
D	Westernmost building, towards the foreshore	2 storey to the east 3 storey to the west	6 x ILU
E	Central within the eastern half of the site, towards the northern boundary	3 storey to the east 4 storey to the west	20 x ILU
F	Towards the north-eastern corner	3 storey to the east 4 storey to the west	27 x ILU
POW	Central within the eastern half of the site	1 storey	510 square metre POW, accommodating a maximum of 120 persons ¹²

Figure 2 Building details. (Note “RACF” is residential aged care facility, “ILU” is independent living unit, “ALS” is assisted living suite, “POW” is place of worship)

Source: The Council’s written submissions, p 12-13



REPEAT APPEAL

- 11 Given the previous decision, this proceeding is a ‘repeat appeal’. The principles relating to repeat appeals are well established.⁵ We do not repeat them here. The starting point is that we must consider the proposal afresh and on its merits, and give significant weight to the previous decision.
- 12 The two most relevant repeat appeal principles in this proceeding are whether the proposal includes material changes from the proposal determined in the previous decision and whether those changes respond to the concerns identified in the previous decision.
- 13 Those two principles are the most relevant because there are no material changes in the circumstances of the subject land and its surrounds. As well, there are no substantial changes in planning policy, although we will refer later in these reasons to some apparent changes in coastal policies and heritage policies. We will also refer later in these reasons to relevant approved and proposed amendments to the planning scheme since the previous decision. Furthermore, there are no material changes in the interpretation of the facts or law relevant to our consideration.
- 14 Ryman submits the proposal responds to these two principles and the proceeding should be characterised as a ‘correcting’ repeat appeal because it ‘seeks to build on the aspects of the proposal that were supported [in the previous decision] and to respond positively to the concerns raised by the Tribunal regarding building layout and scale’.⁶
- 15 Although the proposal is similar in an overall sense to the previous scheme, we are satisfied it incorporates material changes. The main changes may be summarised as:
 - (a) Deletion of Building 3, located to the south of the mansion, allowing greater appreciation of the mansion on the approach along the estate’s driveway from the gatehouse.
 - (b) Relocation of the bowling green to the south of the place of worship.
 - (c) Reduction in the footprint and scale of Building 5 (being Building D in the current proposal) to the north-west of the mansion.
 - (d) Reduction in the height, scale and intensity and an increase in some setbacks from Kunyung Road and from the foreshore escarpment and most side boundaries.
 - (e) A different architectural form and materiality of all buildings.
- 16 Ms Peterson included a helpful plan in her written evidence that compared the building layout in the previous scheme to the building layout in the proposal. This plan is included at figure 3, below.

⁵ See eg *Zumpano v Banyule CC* [2016] VSC 420; *Zinc Melbourne Pty Ltd v Banyule CC* [2013] VCAT 2111, *Sprut Pty Ltd v Stonnington CC* [2012] VCAT 1675.

⁶ Opening written submissions on behalf of Ryman [8].





Figure 3 Comparison between building layout in previous scheme (orange shading) and building layout in the proposal (grey shading)

Source: Colleen Peterson, statement of evidence, Appendix A

- 17 The respondents disputed that the main changes in the proposal were a satisfactory response to the shortcomings of the previous scheme as expressed in the previous decision. In effect, they contended the proposal was not a correcting repeat appeal and should be rejected as a classic repeat appeal.
- 18 The respondents relied on the Tribunal’s findings in various paragraphs of the reasons for the previous decision, including paragraphs 16, 18, 20, 21, 22 & 464. To give a snapshot of those paragraphs, we include the following:
- 16 However, we consider that the siting and scale of two proposed buildings [*Buildings 3 & 5*] would unreasonably detract from heritage values of the site and from the open landscape setting that reinforces the mansion as a key local landmark.
 - 18 There are opportunities for this site to be developed for the proposed uses in a more intensive format than existing. However, we are not persuaded that the configuration and consistent 3-4 storey scale of buildings proposed is suitably site responsive, especially on parts of the land with a currently open character.
 - 21 We find that the particular configuration and siting of the proposed campus of buildings across the site would not suitably

achieve central policy directions for the land, which include the protection of the inter-urban break between Mount Eliza and Mornington and sensitive interface conditions to the Green Wedge Zone.

- 19 The previous decision included long and carefully expressed reasons. It needs to be considered in its totality and undue prominence to individual paragraphs should not be given. That approach risks ‘missing the wood for the trees’. It suffices to state we find Ryman has responded to the concerns to an extent that means the proposal should not be rejected as a classic repeat appeal.

PHYSICAL CONTEXT

- 20 It is unnecessary to set out our findings on the physical context of the subject land and its surrounds. That context has not materially changed since the past decision. We adopt the findings about physical context as set out in various paragraphs in the reasons for the past decision.

POLICY CONTEXT

- 21 In this section of our reasons, we set out our findings on how the proposal responds to the policy framework (including the municipal planning strategy) and what we will refer to as the ‘operative’ or ‘control’ provisions of the planning scheme. The main such provision is the relevant zone for the subject land.

Lawfulness of the proposal

- 22 The starting point is that the proposal must not be unlawful. If it were unlawful in the sense of being a prohibited use or development, no permit could be granted, and it would be unnecessary to assess its response to the policy context.⁷
- 23 The issue of lawfulness was considered at length in the previous decision.⁸ The Tribunal found the use was not unlawful and was permissible. As we are considering the proposal afresh, we must also be satisfied that this is the case.
- 24 The Council accepts the reasoning in the previous decision and that the proposal is permissible. The respondents made muted submissions that did not so much as dispute the reasoning but claimed the proposal was sufficiently different as to have the result that the reasoning did not apply.
- 25 It suffices to state we support the reasoning in the previous decision and that it equally applies to the proposal.

⁷ With the possible exception that conditions might be able to be included requiring modifications to make it lawful.

⁸ Previous decision [23]-[70].

- 26 We repeat the finding in the previous decision that the Core Planning Provisions (the **CPPs**) do not apply to the subject land and therefore do not operate to prohibit the proposal.⁹ This finding is not contested in this proceeding. We are satisfied the proposal is not unlawful because:
- (f) The 104 independent living units (**ILUs**) should be characterised as a separate use for a retirement village.
 - (g) The 60 residential aged care rooms and the 27 assisted living suites (**ALSs**) should be characterised together as a separate use for a residential aged care facility.
 - (h) The place of worship should be characterised as a separate use, even though (as in the previous scheme) other activities of a non-religious nature may be conducted there from time to time.
 - (i) The retirement village and the residential aged care facility will be used in association with the place of worship, particularly as the place of worship is proposed to be completed in the first stage of developing the proposal.

Green wedge land

- 27 The Tribunal in the previous decision correctly identified that the subject land is ‘green wedge land’¹⁰ and is outside the Urban Growth Boundary (**UGB**).
- 28 The previous decision carefully analysed relevant policy relating to green wedge land, the UGB, the interurban break between Mount Eliza and Mornington (the **IUB**), settlement, the Mornington Peninsula Localised Planning Statement, and the Green Wedge Management Plan.¹¹ We do not identify or repeat all these policies.
- 29 Shortly after the previous decision, a number of these policies were reorganised into the Municipal Planning Statement and Planning Policy Framework.¹² There have been some changes in text, but nothing that represents any fundamental change. We have carefully considered policies as currently included in or referred to in the planning scheme.
- 30 The land is at the edge of the UGB. The land to the north (the primary school and residential development to the west of the school) is inside but at the boundary of the UGB. Land to the south in the green wedge is in a Green Wedge Zone (**GWZ**), unlike the Special Use Zone Schedule 2 (**SUZ2**) that applies to the subject land. To the extent aspects of relevant policies apply only to land in a GWZ, those policies do not apply to the subject land.

⁹ The CPPs are at cl 51.02 of the planning scheme.

¹⁰ For the purposes of Part 3AA of the *Planning and Environment Act 1987*.

¹¹ Previous decision [71]-[108].

¹² Planning scheme, Amendment C279morn, in force 22 July 2021.

- 31 We will shortly express our findings on balancing competing policies applying to the subject land as green wedge land and SUZ land. Before we come to that, we identify what is relevant under the SUZ.

Special Use Zone

- 32 The subject land is wholly located in a site-specific Special Use Zone Schedule 2 (SUZ2).
- 33 A retirement village and a residential aged care facility use may both be permitted in SUZ2 if they are used in association with a place of worship. As we have stated above, the proposal complies with that requirement.
- 34 The purpose of SUZ2 is ‘to recognise strategic sites that contain recreational, religious, health or educational facilities that performs [*sic*] a significant community function’. The planning scheme therefore identifies the subject land as a ‘strategic site’.
- 35 We agree with the Tribunal’s observation in the previous decision that the SUZ2 does not prevent ‘new’ facilities.¹³ The proposal contains religious and health facilities. SUZ2 does not define a ‘community function’ but to the extent that the proposal meets a community ‘need’ (to which we will shortly refer in more detail), we are satisfied the proposal performs a community function. We are also satisfied that it is ‘significant’ in scale and scope. In that sense, we agree with the Tribunal’s findings in the previous decision on this point.¹⁴
- 36 The effect of the land’s designation in SUZ2 as a ‘strategic site’ is unclear under the planning scheme. No strategic sites are identified on the planning scheme’s Strategic Framework Plan.¹⁵ Nonetheless, as a strategic site, we would give weight to consistency with the SUZ purpose in any application to use or develop the subject land.
- 37 In deciding a permit application relating to ‘use’ (in this case, for a retirement village and a residential aged care facility), SUZ2 requires consideration ‘as appropriate’ of the matters in clause 65, the municipal planning strategy and the planning policy framework, and five specified matters including those relating to services and traffic.¹⁶
- 38 In deciding a permit application relating to ‘buildings and works’ (in this case, for all buildings and works in the proposal other than exempt buildings and works), SUZ2 also requires consideration ‘as appropriate’ of the matters in clause 65, the municipal planning strategy and the planning policy framework. It also requires consideration of eight other matters including those relating to landscaping, car parking, interfaces and streetscape.

¹³ Previous decision [55].

¹⁴ Previous decision [105]-[108].

¹⁵ Planning scheme cl 02.04.

¹⁶ Planning scheme cl 37.01 sch 2 cl 2.0.

- 39 We put emphasis on ‘as appropriate’ in both circumstances for reasons we will refer to when expressing our findings on balancing competing policies.
- 40 Mr Milner expressed the opinion that, having regard to the history of the planning scheme, the proposal was not ‘intended’ by the SUZ2. Several respondents supported this opinion. As set out in the previous decision, we agree that applying the provisions of the SUZ2 as they stand, including its purpose, must be given more weight than any claim as to intention of the SUZ2 as might be discerned by persons involved in the preparation or approval of SUZ2 or by documents prepared after the commencement of SUZ2.

Balancing conflicting policies

- 41 In the previous decision, the Tribunal identified potential tension or conflict between green wedge related policies and the SUZ2 and carefully considered how to resolve them in the circumstances of that decision.¹⁷ That tension or conflict remains in this proceeding.
- 42 The Tribunal resolved the tension or conflict by emphasising the role of the subject land as being located outside the UGB and at the start of the IUB. It said the previous scheme would ‘introduce substantial built form’ into the IUB in a form ‘contributing to linear development between townships’, would ‘detract from the scenic values of the green wedge’ by adding ‘sizeable buildings in parts of the site that retain a strong landscape and scenic character’.¹⁸
- 43 The previous decision records that the Tribunal did not accept expert opinion that the subject land was part of the ‘settled urban area’ or submissions that the subject land was in an ‘urban zone’ and the UGB was of no significance given the CPPs do not apply.¹⁹ We record that Ryman did not rely on this opinion or these submissions in this proceeding.
- 44 We give significant weight to the findings in the previous decision, as is necessary in a repeat appeal. Nonetheless, in considering the proposal afresh, we would give a different emphasis to the following matters referred to in the previous decision.

Inappropriate development

- 45 The first matter on which we would give a different emphasis concerns ‘inappropriate development’. It is metropolitan green wedge policy to ‘protect the green wedges of Metropolitan Melbourne from inappropriate development’.²⁰ It is also part of the municipal planning strategy that ‘the

¹⁷ Previous decision [119]-[134].

¹⁸ Previous decision [132].

¹⁹ Previous decision [121]-[122].

²⁰ Planning scheme cl 11.01-1R; previous decision [74].

green wedge planning provisions implement a ‘green break’ to protect the Peninsula from inappropriate metropolitan development’.²¹

- 46 In this proceeding, the Council and most of the respondents characterised the proposal as essentially urban in nature and contrary to IUB or green break or green wedge policy and ‘inappropriate’ for that reason.
- 47 These submissions fail to appreciate that ‘inappropriate’ must be understood in proper context. The previous decision did not refer in any detail to the parameters of what is ‘inappropriate’.
- 48 The main contexts for ‘inappropriate’ must be SUZ2 and the physical context, to which we now turn.

Special Use Zone Schedule 2

- 49 SUZ2 does not assist with giving shape to what is inappropriate. In a circular way, the relevant decision guidelines refer back to the policy framework. SUZ2 does not include any built form guidelines. There are no built form provisions in a Design & Development Overlay.
- 50 We disagree with Mr Milner’s opinion that all policy in the planning scheme must apply with equal force when determining an application for development under SUZ2 and determining whether the development is inappropriate.
- 51 Mr Milner’s opinion fails to consider that ‘the requirement for a permit does not open up the broad range of policy considerations or other matters that are not directed to the purpose for which the discretion is being exercised’.²² It also fails to consider that ‘in exercising discretion, the decision maker must only take into account relevant considerations [and the] ascertainment of what is relevant is primarily deduced from the words of the control itself as it is the starting point to identification of the purpose for which the exercise of discretion is to be undertaken’.²³
- 52 The error in Mr Milner’s approach is illustrated by his consideration of irrelevant policy for non-residential development outside the UGB when its provisions do not apply to the development in the proposal,²⁴ and irrelevant policy for green wedge land in a Green Wedge Zone or a Farming Zone.²⁵
- 53 We also disagree with Mr Milner’s opinion that a retirement village and a residential aged care facility necessarily have an urban setting, style and built form and are contrary to policy relating to green wedges and, in particular, this green wedge land. That opinion does not take proper account of SUZ2.

²¹ Planning scheme cl 02.01.

²² *Brunswick Investment Project Pty Ltd v Moreland CC* [2021] VCAT 1191 [69].

²³ *Ibid.*

²⁴ Planning scheme cl 11.01-1L-02.

²⁵ Planning scheme cls 14.01-1L, 14.01-2L, 15.01-6L & 18.02-4L.

- 54 Mr Milner's approach, in our view, results in less weight than should be given to settlement policy that supports health, wellbeing, safety and diversity of choice and sustainable development by taking advantage of settlement patterns and existing infrastructure and services.²⁶

Physical context

- 55 We agree with the Tribunal's findings in the previous decision about the constraints of the physical context.
- 56 In short, the Tribunal found a campus style development was an acceptable form provided (in general terms) the intensity of the built form in the previous scheme was moderated and the subject land was well landscaped especially on its east, south and west interfaces.
- 57 As well, it found the constraints of the relevant interfaces to the primary school and residential development to the west of the school and to Kuning Road were acceptable with some modifications.
- 58 In other words, the physical context does not lend support for a finding that the proposal is 'inappropriate development'.

Professor McGauran's 'green line diagram'

- 59 The second matter on which we would give a different emphasis is the diagram tendered in the previous proceeding by Professor McGauran, an architect and urban designer witness called by the Council. The parties referred to this as the 'green line diagram'.
- 60 In this proceeding, the Council tendered the diagram and heavily relied on it. We include the diagram in figure 4, below.

²⁶ Planning scheme cl 11.

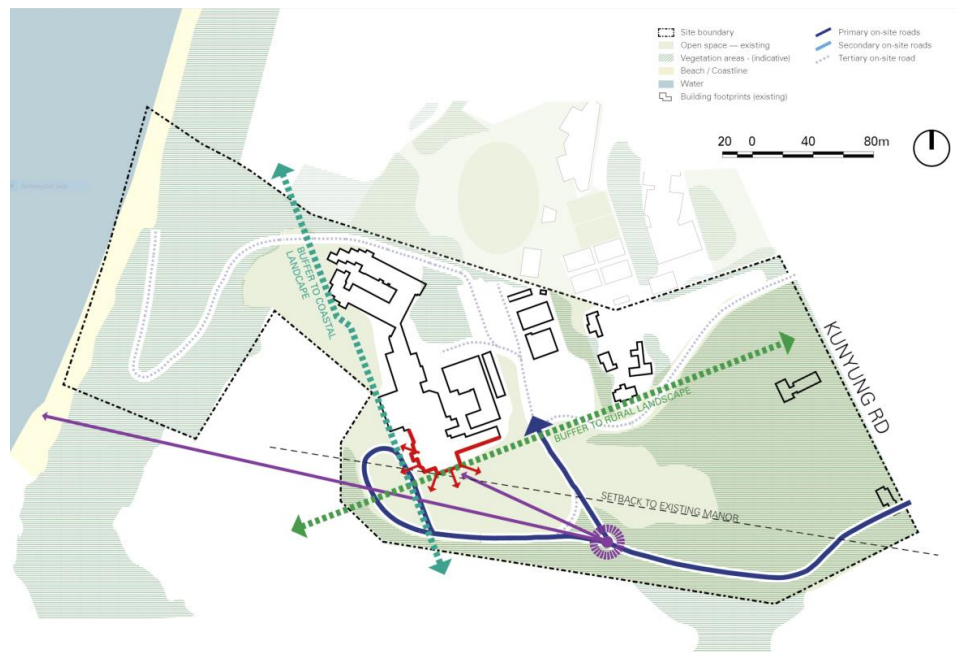


Figure 4 Professor McGauran's 'green line diagram', showing outline of existing buildings and green lines as edges to landscape buffers

Source: Previous decision [130]

- 61 The Tribunal said the diagram was helpful because it identified 'the concentration of outbuildings associated with the mansion adjacent to the UGB boundary, at the point of transition, with a notable absence of buildings on the eastern and southern parts of the land'.²⁷ The Tribunal said that it reinforced 'the open and landscaped character of the south western part of the land, consistent with the notions of the inter-urban break'.²⁸
- 62 The Council and most respondents relied on the diagram in support of submissions that development outside the green lines would be inappropriate and a poor response to green wedge and coast policies.
- 63 We do not give the diagram the weight the Council submits it should be given because:
- (a) It is not recognised in any way under the SUZ or any other part of the planning scheme.
 - (b) While it correctly identifies the location of most buildings adjoining the UGB, the 'buffer to rural landscape' line is arbitrary in the sense it omits the Principal's residence and the Gatehouse.
 - (c) Although identified as 'helpful' in the previous decision, the Tribunal did not rigidly adopt the diagram. The only building south of the

²⁷ Previous decision [129].

²⁸ Previous decision [130].



‘buffer to rural landscape’ line the Tribunal expressly preferred to remove was Building 3.²⁹

- (d) Reviewing Professor McGauran’s opinions, we do not discern an opinion that no buildings or works should be located outside either of the green lines. As well, the Council did not call Professor McGauran in this proceeding, so we are left with doubt as to whether he would support the same diagram in relation to the proposal.

Linear development between townships

- 64 The third matter on which we would give a different emphasis is whether the proposal contributes to linear development between Mount Eliza and Mornington.
- 65 The Tribunal found the previous scheme introduced ‘substantial built form into the inter-urban break in a form contributing to linear development between townships, which is expressly discouraged’ by policy.³⁰
- 66 ‘Linear development’ is not defined in the planning scheme and it is unclear why the previous scheme met with that description. We would not characterise the proposal as contributing to linear development having regard to the two main vantage points from the coast and Kunyung Road.
- 67 This is because built form in the proposal does not extend south beyond existing built form on the subject land. In other words, built form does not extend beyond the mansion, viewed from the coast, or beyond the gatehouse, viewed from Kunyung Road.

Resolution of inconsistency

- 68 If there is an inconsistency between SUZ2 and green wedge policies, the planning scheme ‘must, as far as practicable, be read so as to resolve the inconsistency’ and, subject to this principle, a specific control over land (such as SUZ2) ‘prevails’ over any policy in the planning scheme.³¹
- 69 Ultimately in this proceeding, we can resolve any inconsistency by giving weight to relevant policy. However, to the extent we are not able, SUZ2 must prevail. In the previous decision, the Tribunal resolved the inconsistency by giving significant weight to green wedge policies.

Campus of buildings

- 70 Mr Milner was critical that the ‘apartment style building typology and campus character of the proposed site layout has no obvious parallel within the green wedge, and with a few rare exceptions across the Peninsula’.³² Mr Milner also drew our attention to what he thought were concerns

²⁹ The Tribunal also sought to remove and relocate the bowling green to a location in the general vicinity of Building 3.

³⁰ Previous decision [132].

³¹ *Planning and Environment Act 1987* s 7(4).

³² Rob Milner, statement of evidence [106].



expressed by the Tribunal in the previous decision about the ‘campus of buildings’ format in the previous scheme.³³

- 71 We do not share Mr Milner’s concern. The absence of parallels is not fatal. The Tribunal in the previous decision had concerns with the ‘particular configuration and siting’ of the buildings. The proposal has similarities with the previous scheme but important differences. A campus of buildings is not an unacceptable format. The planning scheme does not discourage that format. A campus style creates opportunities for landscaped spaces between buildings.

Environmental, vegetation removal and landscape policies

- 72 In the previous decision, the Tribunal referred to various environmental and landscape policies. We do not repeat them here. Many have been reorganised in the planning scheme since the previous decision. We will shortly refer separately to coastal policies.
- 73 The planning scheme does not attribute the subject land with particular environmental or landscape values because the subject land is not affected by either an Environmental Significance Overlay or a Significant Landscape Overlay.
- 74 The Tribunal referred to the Mornington Peninsula Green Wedge Management Plan (April 2019) and its vision.³⁴ The Council and the respondents relied on it again in this proceeding. It does not have the weight of an ‘incorporated document’ in the planning scheme. Nonetheless, we agree the subject land enjoys pleasant views of Port Phillip Bay (the **bay**) from much of the subject land and, to this extent, has landscape values. The Management Plan has not been incorporated into the planning scheme.
- 75 The Tribunal considered biodiversity policy and impact of the previous scheme on biodiversity values.³⁵ It found the previous scheme responded satisfactorily.

Coastal policies

- 76 There are a range of policies relating to coastal areas. It is unnecessary to refer to all of them. We make brief reference to the following policies.
- 77 First, there is policy for the ‘protection of the marine and coastal environment’.³⁶ This applies throughout Victoria. We will not set out here details of that policy. Under this policy, there are ‘policy documents’ that we must consider, if relevant to do so, and they include the Marine and

³³ Rob Milner, statement of evidence [126].

³⁴ Previous decision [85].

³⁵ Previous decision [314]-[340].

³⁶ Planning scheme cl 12.02-1S.

Coastal Policy for Victoria (the **coastal policy**) and the Siting and Design Guidelines for Structures on the Victorian Coast (the **siting guidelines**).

- 78 Second, there is policy for ‘coastal settlement’.³⁷ We will also not set out here details of that policy. One of the ‘strategies’ in that policy that was emphasised by the respondents is to ‘minimise linear urban sprawl along the coastal edge and ribbon development in rural landscapes’.³⁸
- 79 Third, a number of policies in the ‘municipal planning strategy’ add to the above policies.³⁹
- 80 Mr Grace was prominent in contending the proposal was inconsistent with these policies. He said the proposal was contrary to policy seeking to reinforce settlement boundaries and non-urban breaks between settlements.⁴⁰
- 81 We do not find there is conflict with coastal policies mainly because:
- (a) For the reasons we have already expressed, we do not characterise the proposal as ‘linear development’ between townships.
 - (b) We do not characterise the subject land as being in a ‘rural’ landscape having regard to the existing development and to the SUZ. The proposal is not ‘ribbon’ development, in the same way it is not characterised as ‘linear’ development.
 - (c) We do not characterise the proposal as linear urban sprawl along the coastal edge for the same reasons. As well, we characterise only Building D as being located on the ‘coastal edge’ and due to its location between the mansion and the residential area within the UGB, we do not characterise it as ‘urban sprawl’.
- 82 Although the Shire’s ‘foreshores and coastal areas policy’ expressly discouraged linear development of coastal land,⁴¹ this policy applied at the time of the previous decision but has since been repealed. There is now no specific coastal policy but there are some references to coastal protection in ‘environmental and landscape values’ policy.⁴²
- 83 Mr Grace also contended the proposal was a poor response to the siting guidelines’ objectives to ‘minimise intrusions into public views of the natural environment’, to ‘locate structures so that they are visually unobtrusive from public areas of beach, foreshore and the water’, and to ‘avoid visual prominence in highly visible locations’.
- 84 The Council also submitted, based on lengthy cross examination of Mr Flood in which he accepted errors or inaccuracies in the presentation of, or

³⁷ Planning scheme cl 11.03-4S.

³⁸ Planning scheme cl 11.03-4S.

³⁹ See eg planning scheme cl 02.03-2.

⁴⁰ Coastal policy, ch 8.

⁴¹ Planning scheme cl 21.08 (now repealed).

⁴² Planning scheme cl 02.03-2.



facts underlying his photomontages showing Building B from further locations in the bay, that Building B was visually prominent in a highly visible location.

- 85 It must be observed that the coastal policy and the siting guidelines are neither incorporated documents nor background documents under the planning scheme. They are ‘policy documents’ referred to in the ‘protection of the marine and coastal environment’ policy.⁴³
- 86 We would not refuse permission solely on the proposal’s response to the coastal policy and the siting guidelines. In relation to specific contentions relating to visual impact, we make the following observations.
- 87 First, the proposal limits views from public places near the coast into the ‘natural environment’. While the subject land is well vegetated in its eastern portion near Kunyung Road, we do not consider this a ‘natural’ environment. The escarpment area near the foreshore is better characterised as ‘natural’ and the proposal has no impact on views of this area. In any event, ‘internal’ views from Kunyung Road may have a marginal impact on water views but these are not views of the ‘coast’ to which the policy is directed.
- 88 Second, the buildings in the proposal are visually unobtrusive from close vantage points on the beach and water because the buildings are screened by the escarpment.
- 89 Third, Building D and parts of the northern extension to the mansion may be visible from further locations hundreds of metres away in the water to the north-west but this impact is muted by distance, by those buildings not protruding above the tree line further from the beach, and the extent of additional visibility in excess of the existing northerly Jubilee Wing to the mansion is insignificant.
- 90 Fourth, Building B and parts of the eastern extension to the mansion may be visible from further locations in the water to the west and south and from the Mornington Pier. However, the impact is muted for the same reasons we refer to, above, in relation to Building D.
- 91 In conclusion, the proposal’s response to coastal policies does not warrant refusal of permission.

Aged care and accommodation policies

- 92 The planning scheme includes policy for residential aged care facilities.⁴⁴ We agree with the observations in the previous decision that these policies do not identify the locational attributes of the subject land as preferred for such facilities. Nonetheless, the proposal responds to settlement policy that

⁴³ Planning scheme cl 12.02-1S.

⁴⁴ Planning scheme cl 16.01-5S.



planning should contribute towards ‘health, wellbeing and safety [and] diversity of choice’ of the community.⁴⁵

- 93 Mr Eustace submitted that the planning scheme included aged care and accommodation policies for the Mornington Peninsula Shire and the proposal conflicted with or responded poorly to those policies. The Council supported this submission, but with little force. We do not accept the submission.
- 94 Mr Eustace drew our attention to policy for Mornington North.⁴⁶ It supports retirement villages and health facilities for elderly residents in a number of precincts identified in the Mornington North Outline Development Plan 2013. The policy is supported by Design & Development Overlay Schedule 22.
- 95 We accept that the proposal provides for a retirement village and a residential aged care facility that is not located at Mornington North. However, we do not construe the policy as one in which requires or encourages all proposed retirement villages or residential aged care facilities in either the Shire, Mornington or Mount Eliza to be located at Mornington North. Accordingly, the proposal is not in conflict with the policy.

Activity centre policies

- 96 The respondents pressed that the subject land is not suited for the proposal and does not respond to activity centre policies because it is not within 400 metres of the Mount Eliza activity centre or readily accessible by public transport and that there will therefore be heavy reliance on private transport.
- 97 We agree with the finding in the previous decision that the subject land is suitable for the uses in the previous scheme. We agree with Ryman’s submissions that a site of this size would be unlikely to be found within 400 metres of distance of any activity centre in the municipal district and that the facility will provide mini-bus transport for residents to locations such as the Mount Eliza activity centre.
- 98 We also agree with the observations of the Tribunal in recent decision concerning a proposed recent retirement village on land in Mount Eliza that a distance of more than 2 km from an activity centre did not ‘disqualify’ the use.⁴⁷

⁴⁵ Planning scheme cl 11.

⁴⁶ Planning scheme cl 11.03-6L.

⁴⁷ *Hengyi (33 Jackson Road) JV Pty Ltd v Mornington Peninsula SC* [2022] VCAT 896 [51].



AMENDMENT C270MORN

99 In the previous section of these reasons, we have set out our findings on how the proposal responds to existing policies and existing provisions of the planning scheme.

Background

100 The Council has for some time been reviewing the provisions of the planning scheme as they relate to the subject land. In the previous decision, the Tribunal said that the Council had prepared Amendment C270morn (the **Amendment**).

101 The Amendment included a provision that the subject land be included in a Green Wedge Zone Schedule 3 and that the subject land's exemption from the CPPs be removed.

102 The effect of the Amendment, if approved, would be to prohibit the use of the subject land for a retirement village or a residential aged care facility.⁴⁸

103 The Tribunal said that the Council had requested the Minister for Planning to authorise the proposed amendment but that the Minister had deferred consideration of the request until after the Tribunal's determination on the previous scheme.⁴⁹

104 The Council told us that the Minister authorised preparation of the Amendment after the previous decision, that the Council received submissions (including from Ryman) and that a panel considered submissions in a hearing that concluded on 12 September 2022.

105 The Council publicly released the panel's report before the conclusion of the hearing and this allowed the parties to make submissions about the report. The panel recommended that the Council abandon the Amendment as it affects the subject land.

106 On 9 November 2022, the Council notified us and the other parties that the Council had rejected the panel's recommendation and that the Council had adopted the Amendment as it related to the subject land. Under existing case law, the Amendment is now a 'seriously entertained planning proposal'.

107 The Minister for Planning will now decide whether or not to approve the Amendment. As of the date of this order, the parties have not informed us of any decision by the Minister.

108 Although we must determine the proceeding in accordance with the law as at the date of our determination,⁵⁰ we must now have regard to the Amendment in determining the proceeding if we consider it appropriate to

⁴⁸ Previous decision [95].

⁴⁹ Previous decision [96].

⁵⁰ *Ungar v City of Malvern* [1979] VR 259.



do so.⁵¹ It is appropriate to do so because the Amendment does not have an indirect or marginal effect on the proposal. The Amendment directly affects the proposal because it specifically applies to the subject land and directly affects the uses for which permission is sought in the proposal.

- 109 In deciding what weight to give the Amendment, we must take a flexible approach.⁵² We are largely, but not entirely guided by the panel's report. Other relevant factors include what changes the Council made in adopting the Amendment and any report prepared for the Council's consideration when adopting the Amendment.

Panel report

- 110 The panel included a useful summary of the planning history of the subject land.⁵³
- 111 On one side of the ledger, we give the Amendment weight for two reasons. First, the grant of a permit would authorise a significant development. Second, the grant of a permit 'would impair the objectives' of the Amendment and 'not merely be inconsistent with the strict letter of the planning proposal'.⁵⁴
- 112 However, on the other side of the ledger, we give the Amendment less weight for two reasons.

Improbability

- 113 The first reason we give the Amendment less weight is improbability of approval.
- 114 The Tribunal in past cases has given less weight to a seriously entertained planning proposal if it does not represent 'sound planning' and is unlikely to be implemented. Less weight should be given to improbable and unreasonable proposals that are 'never likely to achieve acceptance and be approved as planning scheme amendments'.⁵⁵
- 115 Perusal of the panel's report shows that it rejected that part of the Amendment directly affecting the subject land in strong terms.
- 116 The panel said the Council relied on the opinion of its town planner witness, Mr Milner, and submitted the SUZ2 no longer appropriate for the subject land because it could facilitate de facto urbanisation contrary to green wedge policy. The panel put the Council's submission this way:

⁵¹ *Planning and Environment Act 1987* s 84B(2)(g).

⁵² *Whitehorse CC v Golden Ridge Investments Pty Ltd* [2005] VSCA 198 [62].

⁵³ Panel report, Amendment C270morn, Appendix C, pp 55-59.

⁵⁴ *Lyndale & Black Pty Ltd v Melbourne & Metropolitan Board of Works* (1983) 1 PABR 207, factors (d) & (e).

⁵⁵ *Abacus Fund Management Ltd v Bayside CC* [2006] VCAT 1716 [59].



Council submitted the SUZ2 was a “*legacy zone*” applied to facilitate a specific land use “*of the time*”. Council said the SUZ2 allows for use and development outside the UGB which could result in an intensity and/or form of development akin to “*defacto urbanisation*”. Council said this would not have been the intention of the zone when it was first introduced. Given the GWZ now exists, rezoning those parcels of land outside the UGB from SUZ2 to GWZ3 would better reflect their intended use, that they are outside the UGB, and are metropolitan green wedge land.⁵⁶

117 The panel did not support Mr Milner’s evidence. It said:

At the outset, the Panel disagrees with Mr Milner’s conclusion that the Amendment is strategically justified because it puts green wedge land in the appropriate rural zone. That is overly simplistic and does not give proper consideration to the planning history of sites and their physical context and condition. Non-rural zones are common through green wedge areas, including in the inter-urban break between Mornington and Mount Eliza. It would be illogical, for example, to apply a rural zone to land in the green wedge already subdivided and developed for low density residential purposes.⁵⁷

118 The panel found the purpose of the Amendment was ‘squarely founded on preventing the development of the [subject land] for a retirement and aged care facility’. It said the Amendment ‘appears rushed, bundled together with other parcels of land and described as a housekeeping amendment when the outcome will have profound future impacts on some land parcels’.⁵⁸

119 The panel was critical of the provisions proposed in the Amendment for the subject land. It said:

[The provisions] would confine future use and development of [the subject land] so significantly that it is unlikely a permit could be sought to even reuse existing buildings for a practical purpose in accordance with the zone. Council’s response to the Panel’s questions on this matter was highly unsatisfactory and demonstrated it had not properly considered the outcome of the Amendment.⁵⁹

120 The panel ultimately found that there was no strategic justification for the Amendment, that ‘it reflects unfair and bad policy making’, that it would ‘deliver a poor planning outcome and net community detriment’ and the existing provisions (including SUZ2) are ‘deliberate and adequate’.⁶⁰

⁵⁶ Panel report, Amendment C270morn, Executive summary, page 1.

⁵⁷ Ibid p 6.

⁵⁸ Ibid, Executive summary, page i.

⁵⁹ Ibid, page 17.

⁶⁰ Ibid, Executive summary, page 1, p 15 & p 17.



121 We accept that the Minister might ultimately agree with the Council and approve the Amendment as adopted. However, the clear findings and strong terms in which the Amendment is not supported lends weight to the probability that the Amendment would not be approved.

Transitional provisions and accrued rights

122 The second reason we give the Amendment less weight is technical in nature, relating to transitional provisions and accrued rights.

123 The Amendment does not include a transitional provision that would have the effect of requiring an application for permit lodged before approval of the Amendment to be determined in accordance with pre-Amendment provisions. The absence is consistent with an objective of prohibiting the proposal if a permit was not granted before the date the Amendment was approved.

124 Given the history of the Amendment, we consider it highly unlikely that the Amendment would be approved without a transitional provision.

125 However, even in the unlikely event that the Amendment were to be approved without a transitional provision, the Amendment would still not achieve its objective of effectively prohibiting the proposal. In adopting the Amendment, the Council must have understood that we may have decided to grant a permit in respect of the proposal before approval of the Amendment, if that were to be the Minister's decision.

126 If we were to grant a permit before approval of the Amendment as adopted, the permit would be an accrued right that would continue under the planning scheme after approval of the Amendment.⁶¹ The Council could have sought to prevent that outcome by including a provision that the intention of the Amendment was to remove all accrued rights.⁶² That would effectively cancel the permit and prevent the proposal, to the extent it had not been carried out to completion.

127 It is very rare that an amendment to a planning scheme includes a provision removing accrued rights. We have strong doubts a provision of that kind would be included in the Amendment if it were approved.

Conclusion

128 The Amendment is a seriously entertained planning proposal. We have had regard to it but have given it little weight in exercising our discretion as to whether or not to grant a permit.

⁶¹ *Interpretation of Legislation Act 1984 s 28(2)(e).*

⁶² *Ibid.*



NEED

- 129 The previous decision identified that one of the key policy themes discussed in submissions and evidence was the provision of housing and specialised facilities for the growing and ageing population. The Tribunal noted that clause 21.06 seeks to carefully manage demand for housing with other major planning objectives, including conservation and recreation.
- 130 The previous decision determined that whilst there will be increased need for aged care facilities throughout the Mornington Peninsula, it considered it did not have evidence of localised need that could not otherwise be fulfilled.⁶³ It concluded that the need for aged care in the relevant statistical district appeared to be low to moderate and Ryman had not demonstrated these needs (including the continuum of care) could not be met, if the application was refused.
- 131 The Tribunal accepted that whilst Ryman offered a high quality service to the aged, it did not place too much weight on the ‘alleged’ benefits given a planning permit runs with the land than to attach to a particular operator. It determined that as the site is not a preferred location for such use, claimed need did not outweigh the deficiencies in responding to policies outside the UGB and the IUB.
- 132 Ryman opened its case with submissions relating to the need for a continuum of care facilities for the ageing population. We have interpreted this to be a direct response to the findings in the previous decision. It relied on the evidence of Ms Wells who also presented evidence at the previous hearing. She expressed similar views and evidence that there is an existing and growing need for both aged care facilities and retirement village accommodation in the Mornington Peninsula and there will be an escalating crisis in coming years.
- 133 Ms Wells says that for the purpose of planning aged care, the Commonwealth Department of Health utilises an ‘aged care ratio’ to control the supply and distribution of Commonwealth funded aged care ‘bed licences’ to approved providers based on the number of persons over 70 years. She says this is a recognised formal benchmark that is a guide for the quantitative analysis of supply and demand. She noted that in response to the Royal Commission into Aged Care Quality and Safety, planning aged care ratio allocations are to be deregulated so that people can choose an aged care provider as part of their package of care that best serves their needs and preferences.
- 134 Ms Wells notes there is current undersupply of at least 249 aged care places and this is projected to increase to 1,803 places by 2032, and 2,093 places by 2036 on the Mornington Peninsula. She also says that if the proposed

⁶³ Previous decision [430].

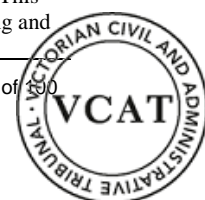


855 new aged care places were developed and operational by 2036, there will still be an undersupply of 1,238 places.

- 135 In terms of retirement village units, Ms Wells says that to maintain capacity by 2036, a further 1,498 units will need to be built. She says her investigations of other proposed facilities on the Mornington Peninsula indicates there are only 230 units to be developed in the future. She considers the shortfall will result in older persons having to relocate away from their area to access suitable support and accommodation.
- 136 Ryman also relies on the evidence of Ms Kielty who is the regional operations manager for Ryman. She outlined the range of services and facilities Ryman offers at their other facilities, which is based on a model of continuum of care for residents. This includes communal lounges, health amenities such a gym and pool, bowling green, well-being programs, gardening workshops, excursions, and volunteering programs. She says Ryman manages the transition between levels of care by providing services for residents in the retirement village units (the ILUs) and the ALSs when higher level of care is requested. She says this can often delay or prevent any need for transition to the aged care facility.
- 137 Ms Wells considers that whilst the aged care planning ratio is a useful guide in a quantitative sense, a qualitative analysis of supply and demand is necessary to assess the types of accommodation available. She says that need should respond to both changing and future community expectations for aged care and emphasised that a continuum of care in integrated facilities was important component of that need.
- 138 The respondents submit that Ryman has not produced convincing evidence that need exists. They say the proposal will provide no community benefit in Mount Eliza as there is an abundance of similar retirement villages and aged care accommodation nearby. Mr Eustace provided a comprehensive list of existing retirement villages and aged care facilities in Mount Eliza and Mornington North. He submits that the Council already has a local policy to address the housing needs of the ageing population by encouraging additional housing diversity that enables ageing in place in the area west of Racecourse Road.⁶⁴
- 139 The Council and respondents questioned Ms Wells on the catchments used in her analysis, which was partially based on data for the Southern Metro Region⁶⁵ and the Mornington Peninsula statistical area level 4 (SA4) that includes the Mornington Peninsula and Frankston area.

⁶⁴ Planning scheme cl 11.03-6L.

⁶⁵ Appendix 1 of Ms Wells evidence included a map of the Southern Metro Aged Care Planning Region, as defined by the Department of Health and Ageing, as referred to in her statement. This map showed the catchment extends east to Bunyip and Koo Wee Rup and north to Dandenong and Braeside.



- 140 The issues before us are:
- (a) Has there been a change in the level of demand for aged care accommodation and retirement villages since the previous decision?
 - (b) What are the relevant factors when assessing need?
 - (c) What catchment should be included/excluded in that assessment?
- 141 In the previous decision the Tribunal considered need in terms of the current and forecast capacity based on care places and number of units, primarily in Mount Eliza. The Tribunal concluded that whilst there will be increasing needs on the Mornington Peninsula, they did not have evidence that localised need could not be fulfilled.
- 142 We accept Ms Wells' views that assessment of need should include the catchment encompassing the whole of the Mornington Peninsula (SA4) and not just the discrete area of Mount Eliza that was tendered in evidence⁶⁶ in the previous hearing. We consider the proposal will attract residents from not only Mount Eliza but the whole of the Mornington Peninsula given the integrated continuum of care it is offering in a prime seaside location. We also consider demand may very well extend to the wider metropolitan area given the Mornington Peninsula has long been a destination for persons who seek a spend their retirement in a coastal location.
- 143 The findings the Royal Commission into Aged Care and Safety were handed down prior to the previous hearing. Therefore, similar submissions were presented regarding increased demand for a diversity of housing and support in a less institutionalised and flexible setting for future residents. However, we accept Ms Wells assessment this qualitative assessment of choice of residential aged care and retirement village accommodation should be acknowledged as a component of demand.
- 144 We are mindful the Tribunal, in the previous decision, said that 'need was a relevant consideration in circumstances where the use of land for a retirement village required planning permission under the zone controls' and will be a factor in the task of balancing competing policy objectives.⁶⁷
- 145 The Tribunal then referred to what was said about need in *Steller Lifestyle Pty Ltd v Mornington Peninsula SC*.⁶⁸ The Tribunal said that it was a case about 'aged care in the Mornington Peninsula' so had some relevance in the proceeding. In *Steller Lifestyle*, the Tribunal regarded the application as:
- ... properly characterised as falling within the 'middle ground' of cases identified by the Tribunal in *Tulcaney Pty Ltd v Knox CC* [2003] VCAT 1627 wherein 'need may not be a decisive factor in the case of an individual development application, but will be a factor which

⁶⁶ Catherine Wells, Statement of Evidence (February 2021) table on page 11.

⁶⁷ Previous decision [435].

⁶⁸ [2018] VCAT 55.



influences the balances to be struck between competing planning policy consideration' (sic).⁶⁹

146 We give weight to the continuum of care model in the proposal and accept that there is, and will continue to be, increased demand for a variety of range of housing options for the ageing population on the Mornington Peninsula. We consider this qualitative assessment should also be factored into assessment of future demand that needs to be considered when determining the weight given to the range of applicable policies in the planning scheme.

HERITAGE

147 In this section of the reasons, we consider submissions by the Council and the respondents that the proposal has an adverse impact on the significance of the heritage place. The heritage place in this proceeding is the area in Heritage Overlay Schedules 110 & 111, being the whole of the subject land.

Background

148 The description, history and heritage status of the mansion and the gatehouse, as well as the 1994 heritage citation, and the revised statement of heritage significance were all set out in the previous decision.⁷⁰ It is unnecessary to repeat those details here and we adopt them.

149 The previous decision also sets out the key provisions of the Heritage Overlay and heritage policy.⁷¹ Again, we do not repeat them here.

Findings in previous decision

150 The Tribunal's general findings in respect of the previous scheme included:

- (a) The reuse of the subject land was a 'significant positive element' and the restoration of the mansion would be a reinvigorated 'hub of the new facility'.⁷²
- (b) The scale and costs of the restoration works was unlikely to be carried out 'without a commensurately comprehensive proposal for the reuse of the [subject land] as a whole'.⁷³
- (c) 'Some flexibility' should be given to ensure buildings are 'fit for purpose' for the alternative use of the subject land.⁷⁴

151 We agree with those findings and adopt them in relation to the proposal.

⁶⁹ Previous decision [435].

⁷⁰ Previous decision [135]-[140].

⁷¹ In the previous decision, these were cl 43.01, cl 15.03 & cl 22.04. Since the previous decision cl 22.04 has been replaced by relevant parts of cl 02.03 by Amendment C279morn to the planning scheme (in operation 22 July 2021).

⁷² Previous decision [148], [459].

⁷³ Previous decision [154].

⁷⁴ Previous decision [155].



- 152 The Tribunal also supported some specific features of the previous scheme, such as:
- (a) The removal of the later and ‘unsympathetically sited and designed’ Jubilee Wing of the mansion.⁷⁵
 - (b) A new covered entry on the southern side of the mansion in the proposed extension replacing the mansion’s largely original Residential Wing.⁷⁶
 - (c) The restoration works (including the removal of the later addition of the mansion’s Copland Room) were ‘positive aspects’ and ‘would substantially restore the built form presentation of the mansion from the south west’.⁷⁷
 - (d) Removal of all later additions to the mansion (other than the Jubilee Wing) and all outbuildings, including the original but heavily modified ‘Coach House’.⁷⁸
 - (e) The removal of the Residential Wing as part of substantial additions to the mansion in Building 4.⁷⁹
 - (f) The Conservation Management Plan was a ‘rigorous starting point’ for enhancement of the heritage assets.⁸⁰
 - (g) The proposed loop road between the northern entrance (along a new alignment to the mansion), around the west side of the mansion and generally along the original alignment of the driveway from the southern entrance.⁸¹
- 153 These features are included in the proposal,⁸² and we also support the retention of these features.
- 154 The Tribunal did not support the following three main features of the previous scheme on heritage grounds.
- 155 First, the Tribunal did not support the four-storey Building 3 in the lawn area to the south-west of the mansion. This building was located about 60 metres from the nearest point of the retained mansion, but closer to the addition replacing the Residential Wing. It found Building 3 adversely affected the significance of the heritage place because it failed to retain view-lines to the mansion from the southern driveway approach.⁸³

⁷⁵ Previous decision [153], [220]-[221].

⁷⁶ Previous decision [156].

⁷⁷ Previous decision [150]-[152].

⁷⁸ In respect of the Coach House, see the previous decision [178]-[183].

⁷⁹ Previous decision [211]-[219].

⁸⁰ Previous decision [159], [199].

⁸¹ Previous scheme [192]-[193].

⁸² Including an updated Conservation Management Plan.

⁸³ Previous scheme [201]-[210].



- 156 Second, the Tribunal did not support the location of the proposed bowling green close to (about 20 metres from) the southern face of the retained part of the mansion.⁸⁴
- 157 Third, the Tribunal did not support the size and siting of Building 5 forward of the mansion because it had the ‘potential to diminish the landmark quality of the mansion when viewed from the water’ and, as we discern it, to also adversely affect the heritage significance of the place, especially the mansion.⁸⁵

Response in the proposal

- 158 The key changes in the proposal from a heritage perspective may be summarised as follows.
- 159 First, Building 3 has been removed and the bowling green relocated to the general location of Building 3.
- 160 Second, Building 5 has been replaced with Building D. This building has a smaller footprint, a lesser scale in its three-dimensional profile, a greater setback from the coast, and a greater setback from the mansion’s Bachelor’s Wing, being the nearest point of the retained part of the mansion.
- 161 Third, the additions to the mansion in Building 4 (now Building C) have a redesigned footprint around two rectilinear internal courtyards. Relevantly, the additions are further setback from the southern and western faces of the retained parts of the mansion. As well, the north-east addition, generally on the footprint of the removed Residential Wing, has a different materiality and façade design that aims to be more visually recessive than the previous scheme and more sympathetic to the colonnaded design of the mansion façade.

What is now in dispute?

- 162 In its written submissions, the Council maintains its concerns with the previous scheme that the campus of buildings in the proposal adversely affects the significance of the heritage place (ie the whole of the subject land) because they detract from its significance as a former ‘large seaside estate’. It also maintained concerns that there will be excessive demolition of original fabric.
- 163 While the Council said it ‘maintained’ these concerns, they were not made with great force at the hearing. The Council was sensible and realistic to do so having regard to the findings on these matters in the previous decisions to which we have referred.
- 164 The focus of the Council’s heritage concerns was Building D. It maintained that building continued to be inappropriately intrusive and dominant in the

⁸⁴ Previous decision [229]-[233].

⁸⁵ Previous decision [234]-[243].



heritage place and would detract from the significance of the retained parts of the mansion.

- 165 It is fair to say the heritage concerns were not the focus of the Council's ultimate and most forceful submissions. Accordingly, we will be succinct in explaining our findings.

Findings

- 166 The issues that were the focus at the hearing were excessive demolition, the scale of the mansion's additions, the impact of Building D, and the dining room pavilion adjoining the mansion's Bachelor's Wing.

Excessive demolition

- 167 Mr Briggs' opinion was that the proposal involved excessive demolition. Although not concerned with removal of unsympathetic additions like the Jubilee Wing and the removal of the Coach House, he was particularly critical of the demolition of the mansion's Residential Wing.
- 168 He said the Residential Wing was not an 'expendable' element and its significance had been underrated by the Tribunal in the previous decision. He said there was no support for removal of that largely original built fabric under heritage policy because Ryman had failed to show its demolition was necessary and that the benefits of demolition had not been explained.
- 169 We do not accept Mr Briggs' opinion that there is excessive demolition for several reasons. They include:
- (a) The Council and its heritage advisers did not oppose demolition of the Residential Wing.
 - (b) The extent of demolition does not reduce the mansion to a mere 'husk', to use Mr Briggs' description of demolition that would be excessive. The mansion retains a footprint of about 30 metres by 50 metres in an open setting on two sides.
 - (c) The Tribunal in the previous decision found the extent of demolition could be supported.
 - (d) As stated by the Tribunal in the previous decision, some flexibility' should be given to ensure buildings are 'fit for purpose' for the proposal and demolition of the Residential Wing fits into that category, partly because physical connection with a common ground floor is justified.
 - (e) Retention of the Residential Wing would require many external and internal changes (including to floor levels and fenestration and addition of a porte cochere) which would result in the loss of nearly all understanding as a secondary part of the building largely accommodating mansion staff.



- (f) Mr Briggs relied on what he said was an obligation upon Ryman to demonstrate the necessity of the partial demolition of the mansion. We do not discern such an obligation. To the extent that policy in clause 22.04 ‘discouraged’ partial demolition, that discouragement is not found in policy in the new clause 02.03. The obligation is not found elsewhere under the *Planning and Environment Act 1987* or the planning scheme.
- (g) Although the demolition removes original fabric, the relevant test under the planning scheme is not whether the demolition and additions enhance the original fabric but whether they enhance the existing fabric, being both original and later fabric and they are an acceptable outcome. As the Tribunal found in the previous decision, the restoration of the major part of the original mansion fabric is a significant enhancement.

170 We therefore find the extent of demolition, including of original fabric, is acceptable.

‘Sprawling’ additions and ‘cyborg’ body

- 171 Mr Briggs’ opinion is that the scale of the additions to Building C relative to the retained part of the mansion is excessive. He described the additions as ‘sprawling’ and a ‘hulking’ form behind the retained part of the mansion. He said the south elevation of Building C shows the additions have a length 3.5 times the length of the retained mansion and the retained part of the mansion will appear ‘grafted into the larger complex’, diminishing its heritage significance.⁸⁶
- 172 In colourful terms, he described Building C as a ‘cyborg’ which we took to mean a human head and a machine-like body. In other words, we discern he was saying the retained part of the mansion was a very small part of Building C. We find this description as emotive and unhelpful, having regard to the relevant provisions. Mr Briggs withdrew the comparison in oral evidence.
- 173 He said enhancement of the heritage place requires restoration of a ‘sense of the independent integrity of the former mansion’.⁸⁷ He would prefer the retained part of the mansion to be exposed without what he described as the ‘new encumbrance’.
- 174 One reason for his preference is a perceived loss of integrity of the mansion and the loss of appreciation of its rear more utilitarian or services-oriented elevation. He said just because that appreciation of that elevation has been blocked by later additions for many years does not justify blocking it again with new additions. However, the proposal does not affect the loss because the existing and later additions already obscure that elevation.

⁸⁶ John Briggs, statement of evidence [20].

⁸⁷ John Briggs, statement of evidence [21].



- 175 We agree with Mr Briggs that the south elevation of Building C is important is maintaining the appreciation of heritage fabric as one approaches that fabric from the sweeping southern driveway. The Tribunal in the previous decision found that appreciation important, as do we.
- 176 The relocated bowling green and the location of the place of worship means that the first view of the retained part of mansion is after one passes the bowling green and place of worship. At that point, only part of the additions in the southern elevation are apparent.
- 177 Figure 5, below, shows the additions are obscured from the southern driveway before the bowling green and place of worship.



Figure 5 Additions to the mansion, located to the right of retained part of mansion (on the left), are obscured by the place of worship (with brown roof) in centre. The bowling green is in the foreground of the place of worship. Retained vegetation is in foreground of the place of worship.

Source: Daniel Flood, statement of evidence, photomontage CE06 (no landscaping).

- 178 Figure 6, below, shows the additions have come into view from a point further west along the southern driveway.



Figure 6 View of part of the additions to the mansion, located to the right of retained part of mansion (on the left hand side of the image) and partly obscured by the place of worship (with brown roof, in centre of image). The bowling green is in the foreground behind retained vegetation.

Source: Daniel Flood, statement of evidence, photomontage CE06B (no landscaping).

179 However, beyond the viewing point in figure 6, the additional one-storey height of the additions over the mansion is an uncomfortable juxtaposition and detracts from the significance of the heritage place. It is uncomfortable despite the single storey connection between the retained part of the mansion and the additions. This juxtaposition is shown in figure 7, below.



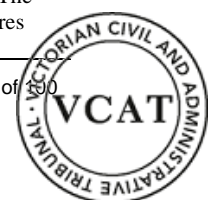
Figure 7 Additions to the mansion, located to the right of retained part of mansion (on the left).

Source: Daniel Flood, statement of evidence, photomontage CE07C (no landscaping).

180 A careful comparison of the previous scheme with the proposal shows the top (or fourth) storey of the additions is about 23 metres and 10 metres, respectively, set back from the single storey connection.⁸⁸ In other words, the top floor of the additions in the proposal is materially closer to the mansion than in the previous scheme.

181 We acknowledge the design and materiality of the additions is improved in the proposal. For example, it is slightly further setback from the line of the southern façade of the retained mansion, following removal of the Copland

⁸⁸ For completeness, it cannot be said the maximum height of the addition is materially lower. The maximum heights are comparable – about 59.9 metres AHD (previous scheme) and 59.3 metres AHD (proposal).



Room. Nevertheless, the proximity of the top storey to the mansion is unsatisfactory and will overwhelm the restored mansion when viewed from the south-east.

- 182 The problem can be remedied by a greater setback. By condition, we will require the setback to be increased by no less than 7.5 metres. An additional separation of this dimension will reduce the addition's visual dominance behind the mansion. It will also help maintain the visual primacy of the mansion when viewed from the southern driveway.

Building D

- 183 Mr Briggs did not support, in cross examination, the Council's concerns about the adverse impact of Building D on the 'host' building (ie the retained part of the mansion) and, by inference, the heritage place. This diminishes the weight to be given to the Council's concerns.
- 184 We agree with Mr Briggs that, even though the western edge of Building D sits forward of the western (or primary bay-facing) façade of the mansion, there is no unreasonable adverse heritage impact. This is supported by figure 8, below, showing Building D in the background of the mansion.



Figure 8 Building D viewed from the south, located beyond the mansion in the foreground.

Source: Daniel Flood, statement of evidence, photomontage CE08 (no landscaping).

- 185 The separation between Building D and the mansion is at least 80 metres. The bay-facing facades of Building D and the mansion are on a different alignment and this derogates from a perception of alignment. Building D has a lower scale than Building 4 in the previous scheme and has a comfortable relationship with the mansion.

The pavilion

- 186 The Bachelor's Wing is a two storey original northern extension to the mansion. The appreciation of this wing is obscured by the dining room in the Jubilee Wing, which prominently extends to a point about 12 metres forward of the western façade of the mansion.

- 187 From the north, Mr Flood’s image of the Jubilee Wing dining room appears below at figure 9, below. The dining room is in the centre of the image and almost totally obscures the western façade of the mansion.



Figure 9 Jubilee Wing dining room (existing view from the north, with mansion western façade behind and almost totally obscured).

Source: Daniel Flood, statement of evidence, photomontage CE10 (existing).

- 188 The proposal includes a lightweight single-storey glazed dining room, that is well set back from the existing dining room and behind the western façade of the mansion, thus offering some appreciation of the mansion. It is connected to the ground floor of the Bachelor’s Wing with a glazed roof and this accentuates appreciation of the entire west colonnaded façade of the Bachelor’s Wing from within the dining room. Mr Flood’s photomontage from the same point appears below in figure 10.



Figure 10 View of pavilion from same viewing point as figure 9. The western façade of the mansion (with porte cochere) is on the right of the image and the upper floor of the colonnaded Bachelor's Wing can be seen above and to the left of the pavilion.

Source: Daniel Flood, statement of evidence, photomontage CE10 (no landscaping).

- 189 Mr Briggs expressed concern about the pavilion and its impact on the heritage significance of the mansion, in particular the Bachelor's Wing. He would have preferred Ryman to have more carefully explored its possible removal. During the hearing, the Council supported these concerns, although not with any real force.
- 190 We would agree with Mr Briggs that an ideal outcome, from a heritage perspective, would be the deletion of the pavilion. This would present an unobscured view of the western façade of the Bachelor's Wing, consistent with the original design of the mansion.
- 191 However, the pavilion is an acceptable outcome in heritage terms. It is a significant improvement on the existing conditions of the Jubilee Wing, as is immediately apparent from figures 9 and 10. Mr Briggs agreed it was an improvement and described the design as 'elegant'. The Tribunal found the pavilion in the previous scheme an acceptable outcome. We also give weight to that finding.

Conclusion

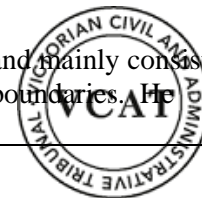
- 192 The proposal, subject to appropriate permit conditions, is a satisfactory response to the heritage provisions of the planning scheme.

BUILT FORM

- 193 A fundamental issue is whether this application has responded the built form concerns identified by the Tribunal in the previous decision. These relate to the massing and spread of the buildings across the subject land and how they respond to the IUB.
- 194 More specifically, the Tribunal found the location and scale of Buildings 1, 3 and 5 in the previous scheme would have unacceptable impacts on the IUB and streetscape. The Tribunal was also concerned about the impact on views of the mansion due to the design and siting of Buildings 3 and 5 and the bowling green, and the presentation of Building 6 to the primary school grounds.
- 195 The Tribunal found that whilst there was potential for buildings of increased scale that are not readily visible from public vantage points, the configuration of buildings and their effect on the layout and presentation of the entire site was a 'highly relevant consideration in this policy context that emphasises the concept of the inter-urban break.'⁸⁹
- 196 Whilst the Tribunal was supportive of greater intensification than the existing conditions, it said a consistent three to four storey scale of buildings in a 'campus-like' configuration magnifies its impact with the current open landscape character.
- 197 The Council submits the amended plans continue to demonstrate an inappropriate built form response to the subject land's context, interfaces, and the character of the surrounding area. It submits the built form typology, scale and height of buildings is an overdevelopment of the subject land which will detrimentally affect the coastal character and is an inappropriate interface with the east boundary. It says that neither zoning or planning policy anticipate or promote intensive development of the subject land but emphasises that development appropriately respond to the landscape and environmental qualities of the land that includes green wedge and coastal environment.
- 198 The Council relies on the evidence of Mr Milner who considers one of the lessons from the previous decision was consideration must be given to the open landscape character of the subject land. He considers the current proposal fails to grasp what a site responsive design and layout means if appropriate consideration is given to the 'inter-urban coastal/green wedge break outside the Urban Growth Boundary'.⁹⁰ He says the proposal seeks to rebuild on the site of the earlier inappropriately located development with more intensity and greater height.
- 199 Mr Milner says development within the green wedge land mainly consists of smaller and fewer buildings with larger setbacks to boundaries. He

⁸⁹ Previous decision [263].

⁹⁰ Previous decision [56].



considers a guiding principle and preferred outcome is protection of the IUB and that part of the subject land that contributes to the rural landscape character and sense of country estate. He says that any development of the predominately undeveloped landscape within the green wedge land should be unobtrusive and aligned with a ‘country setting’.

- 200 Mr Milner considers the development ‘unashamedly provides a relatively intensive residential development that does not contribute to the non-urban character of the green wedge’.⁹¹ He considers the apartment style typology and campus character of the site layout has no parallel in the green wedge land and across the Peninsula. He says the scale and intensity would be appropriate in a resort, or in an apartment form of development, close to an activity centre. He also considers the proposal lacks the subtlety and modesty of built form and intensity to be considered as a suitable response to policy.
- 201 The respondents support the Council’s submissions and submit the proposal is an overdevelopment of the subject land. They say the built form, scale is out of character for a site outside the UGB and the proposal fails to protect the open, natural landscape. They argue the building heights are excessive and apartment style development will not be subservient in the landscape. They consider the proposal is contrary to the planning scheme’s Design & Development Overlay Schedule 2 that restricts development in much of Mount Eliza to one and two storey buildings.
- 202 Ryman submits the proposal addresses the deficiencies of the previous scheme identified in the previous decision. It submits the proposal has sought to concentrate the more intense built form in the centre of the site surrounding the mansion, with lower scale buildings towards the edges. This includes substantial setbacks to green wedge land to the south, the coastal area to the west, and from Kunyung Road. It says landscaping plays an integral role in retaining the character of the subject land and responding to its strategic context.
- 203 Ryman relies on the evidence of Ms Peterson, Ms Hodyl and Mr Atkinson. They all consider the proposal adequately responds to the previous decision and the strategic policy context.
- 204 Ms Peterson says the proposal is a ‘substantive response’ to the previous decision due the deletion of a building and a reduction in size, height, and scale of several buildings. She also says there has been an overall reduction in the amount of accommodation. She considers the siting, height and scale of the proposed buildings and additions are responsive and will not unreasonably impact the IUB. She also considers the amended plans are an improvement to the previous scheme as the building site coverage has been reduced from 21% to 16%.

⁹¹ Previous decision [105].



- 205 Ms Hodyl also considers the design effectively responds to the existing character and ensures the IUB is maintained. She says the site configuration respects the existing character by maintaining the western coastal landscape, the southern green edge of vegetation, and stands of trees facing Kunyung Road. She says the buildings are located within the footprint of the existing buildings, within an area east of the mansion, and within the central part of the subject land. She considers the proposal respects the coastal context due to the retention of existing trees between the new eastern buildings and there are generous areas for landscaping due to the site coverage of 16%.
- 206 We have already made findings on Mr Milner's approach to green wedge policy and the SUZ2.⁹² We disagree with his approach that non-residential development outside the UGB should be subservient and recognise its 'country setting'. This approach fails to acknowledge that there is already a campus of buildings on the subject land.
- 207 We are satisfied the proposal responds to the built form concerns raised by the Tribunal in the previous decision. We find the layout of buildings, which increases perimeter setbacks and provides greater separation between the buildings, allows for the retention of existing trees and planting of new trees which will maintain an appropriate IUB. We also consider the siting of the new buildings will maintain views to the mansion.
- 208 The building typology (apartment style) and height were significant concerns raised by the Council and respondents. We find there is no necessity to restrict the development to two storeys to be consistent with the residential development within the UGB given the expansive size of the site. We are satisfied this proposal has responded to the slope of the land and the buildings are appropriately sited within the contours.
- 209 The Council and respondents expressed concerns about the extent of cut and fill required to accommodate the moderate slope and its annotations on the plans. We have carefully reviewed the plans and find adequate information is provided in the elevations and sections to assess the extent of earthworks required to accommodate each building. However, we will include a permit condition for a cut and fill plan to clearly annotate the proposed earthworks for the subject land.
- 210 We consider Mr Atkinson's concept plan demonstrates the landscape features (including retention of significant canopy trees) will remain prominent and the visual impact of new buildings will be softened by the landscaping to maintain the coastal setting. We will discuss the landscape concept plan further below in our findings.
- 211 We agree with Ms Hodyl that buildings, up to four storeys, can be accommodated on the subject land. We are satisfied the design has

⁹² See above, [50]-[54], [71].



'benched' buildings into the slope and broken up the built form of each building to diminish the impact of the taller forms. We note the four storey elements are generally located in the centre of the subject land where the existing buildings are located.

- 212 We acknowledge that buildings located in the eastern and southern periphery of the subject land will be more visible, but these are generally two and three storeys in height. We also find the redesign and reconfiguration of Building D responds to the Tribunal's specific concerns to ensure it is recessive component forward of the mansion and facing the bay.
- 213 We do, however, have concerns about building scale in two areas of the subject land. The first relates to Building A and its presentation in the Kunyung Road streetscape and the second relates to the scale of the addition to the rear of the mansion in Building C. We will address these issues in our findings below.

Kunyung Road streetscape presentation

- 214 The Tribunal had concerns that the previous scheme would result in far more built form facing Kunyung Road, at a far taller height. It stated:

268 While the existing bluestone Principal's residence is already a feature of the current streetscape, we distinguish the proposed design response which would provide a far more substantial face to the street at a far taller height and larger scale, including an approximate length of 67 metres. This is notwithstanding the fact this building will present as a 2-3 storey building given the difference in levels compared with the footpath and the fact individual units have been designed with articulated facades at all levels.

269 We support concerns expressed by Council that the scale of Building 01 in this streetscape would notably exceed buildings within the township and in the adjacent residential area. This is a concern for land outside the UGB in principle. Another equally relevant factor is policy which seeks to maintain the inter-urban break and the landscape presentation of the site.

- 215 The proposal has reduced the width and height of Building A and increased the setbacks to the frontage for Buildings A and F. The presentation of buildings in Kunyung Road is shown in figure 11, below.





Figure 11 Presentation of Building A (to the left) and Building F (to the right) in Kunyung Road from Kanya Street.

Source: Daniel Flood, statement of evidence, corrected photomontage CE02 (no landscaping).

- 216 The Council has concerns about the visual impacts of these buildings in the streetscape. The respondents argue that when viewed from the road, the multitude of large, high buildings and roofs will dominate view-lines and reduce the visual amenity and effect of the IUB.
- 217 Mr Milner agrees and says separate buildings will overlap, forming a large concentration of urban development in the underdeveloped part of the subject land. He considers the siting and scale of this element lacks subtlety and modesty of built form and intensity to respond to the policy settings. He acknowledges that whilst the buildings are cut into the subject land and set amongst retained and new landscaping, this will not mitigate their visual presence and unnecessarily impact on existing vegetation. He says the trees along the frontage present as clear trunks with canopy and screening set high above the sight line of pedestrians and passing motorists.
- 218 Ryman submits the difference in setbacks of Buildings A and F, the varying forms, and the location of accessways and vegetation will ensure they do not read as a continuous mass to Kunyung Road. Ms Hodyl considers the size and slope of the land will allow for a relatively limited presence of the new buildings along Kunyung Road. She says the buildings ensure the forms of the eastern side of Buildings A and F will present as diminutive two storey forms in the streetscape. She considers that retention of mature canopy trees along the frontage will provide a landscape screen to reduce the impact of new buildings from the public and private realm.
- 219 Ms Peterson agrees with Ms Hodyl but recommends additional planting be provided in the frontage to reinforce the IUB and further soften the built form.
- 220 In the previous decision, the Tribunal specifically excluded curtailment of views from the dwellings on the opposite side of Kunyung Road as a concern⁹³ and said the buildings were not required to be invisible from public vantage points. It also stated that a more respectful response to policy would preclude a sizeable building in this location running parallel to

⁹³ Previous decision [271].



Kunyang Road.⁹⁴ We therefore consider the main issue for us to determine is whether the presentation of buildings to Kunyang Road acceptably maintains the IUB and landscaping presentation of the subject land.

- 221 As part of our inspection, we walked along the west side of Kunyang Road and viewed the subject land from the viewpoints shown in figure 11. We acknowledge the slope to the west assists in reducing the visual impacts of building scale in Kunyang Road. However, we are concerned about the extent of built form visible across the site in the streetscape due to the length, setback and scale of Buildings A and F. Whilst we acknowledge the existing Sugar Gums in the frontage will provide some filtering of views of the buildings, we agree with the Council and respondents that the height and set back of Building A will still have an overbearing appearance in the streetscape, which is a stark contrast to the adjacent green wedge land to the south.
- 222 Ms Peterson also grappled with the design and siting of Building A. In oral evidence, she said that she considered supporting Building A only if it were set further back from Kunyang Road, to respond to the Tribunal's findings. However, she said she ultimately decided the proposed setback (ie between 39.1 metres and 49.3 metres) was acceptable as it allowed for the retention of a significant tree between Buildings A and B that is visible from the south across the green wedge land.
- 223 Her reasons for support of Building A at its current location is that the building has been reduced by one storey (ie lowering by four metres) and there is a clear step along the main front and rear facades. She says the overall building height of 6.6 metres in the eastern section, and 11.28 metres in the western section of the building, responds to the Tribunal findings to provide a low slung pavilion form at this location. She also considers the combination of the flat and skillion roofing and external finishes decreases its visibility in the streetscape.
- 224 Ms Peterson's comparison sections of Building 1 in the previous proposal and Building A are useful tools to understand our findings. We agree with Ms Peterson that the amendments to this building are a substantial improvement, as shown in figure 12, below:

⁹⁴ Previous decision [270].

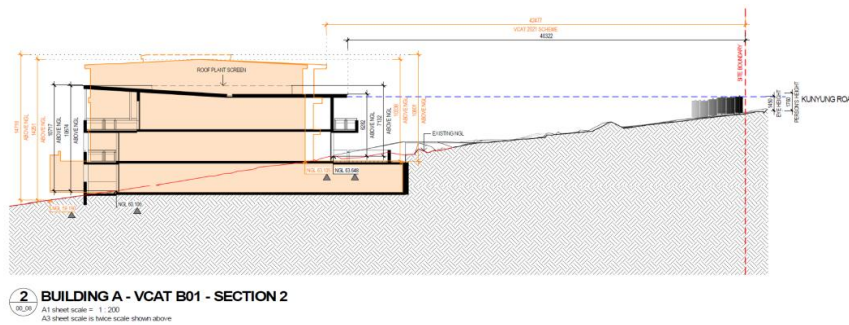


Figure 12 Diagram showing the change in building height and setbacks between the previous scheme (orange shading) and proposal (black outline). The viewline from a standing position on Kunyung Road to the roof of Building A in the proposal is shown in a dashed blue line.

Source: Colleen Peterson, statement of evidence, p 40.

- 225 However, this diagram shows that pedestrian and vehicles will still have views down over the two and three storey building and roof from various vantage points along the road at the setbacks proposed. We are concerned about the height, length, and expanse of roof of Building A that will be visible from Kunyung Road and find a reduction in building scale is warranted at this location to reduce its prominence in the streetscape and its interface to the green wedge land to the south.
- 226 We are not persuaded that additional planting in the frontage of the building shown on the landscape concept plan, in combination with the existing retained Sugar Gums, will address this concern. We find that removal of level 1 in Building A is required to reduce the overall building scale to minimise its impact in the streetscape. We consider this amendment will further open vistas to the south-west and reinforce the dominance of vegetation along the frontage in this section of the subject land. We acknowledge this level includes five retirement village units but there is potential to accommodate additional units at the lower ground level as the provision of car parking will be reduced for this building.
- 227 Our assessment of streetscape impacts includes the siting and design of Building F. We are satisfied the frontage setback of this building (ie between 74.3 metres and 81 metres) will mitigate the increased wall height and overall length of this building in comparison with the building proposed in the previous application. We also consider the retention of the stand of Sugar Gums and supplementary planting in the frontage will further filter views of this building in the streetscape.

Green Wedge Interface

- 228 The respondents submit that any development in the south-eastern section of the subject land will set a precedent for green wedge land and for linear development in the IUB.



229 The Council submits the proposal will impact views through the subject land to green wedge land to the south. It tendered a view-line diagram in support of its argument which, it says, shows there are extensive views to the south and south-west across the subject land. This is shown in figure 13, below.

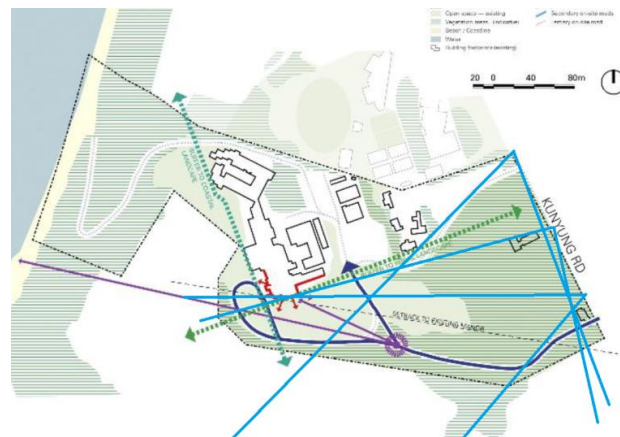


Figure 13 Diagram showing three view-lines (marked in blue) from Kunyung Road through the subject land to the south.

Source: The Council, document tendered during hearing.

- 230 Mr Milner agrees and says the subject land falls away steeply from Kunyung Road providing clear vantage points into, and across, the eastern half of the site. He considers any further development in the eastern half of the subject land should be subservient and complementary to the non-urban role and landscape.
- 231 Ryman is critical of this approach and says the diagram ignores the role of vegetation, slope of the land and expansive setbacks of the new buildings. It also says the Tribunal determined that buildings do not require to be invisible from public vantage points.⁹⁵
- 232 We agree with Ryman that the above factors should be considered when determining the impacts on views through the subject land to green wedge land to the south and south-west. Based on our site inspection we observed that vegetation along the frontage, and further within the site, restricts views over the adjoining green wedge land.
- 233 However, it is not only views from public vantage points that should be considered in the assessment of the proposal, but how the scale and intensity of the development responds to the existing open landscape character of the land within the IUB. This was a determining factor identified by the Tribunal in the previous decision.

⁹⁵ Previous decision [267].



- 234 The current plans show Building A and B set back 77.3 metres and 41.9 metres, respectively, from the south boundary. There is also a 44.82 metre separation between these buildings. We are satisfied these setbacks, assisted by the configuration of the south boundary, respond to the IUB and adjoining green wedge land. We find the setbacks will allow for the retention of existing vegetation along the southern accessway and the supplementary planting will filter views to and from the green wedge land.
- 235 Our findings to remove a level in Building A are also relevant to consideration of the interface with the green wedge land. The lowering of the overall height by one storey (ie approximately 3 metres) will also reduce its visual presence adjacent to open rural land to the south.
- 236 We also note Building B has a maximum overall height of 8.7 metres in the south elevation. The southern section of this building contains two and three storeys and is excavated into the site to reduce its prominence, as shown on figure 14, below. We find the stepping down of the built form of this building will also provide a suitable transition to the adjoining green wedge land.



Figure 14 South elevation Building B.

Source: Permit application, drawing DA18 Revision B.

- 237 In the previous decision, the Tribunal had concerns with the interface of Building D (formerly Building 5) and recommended increased setbacks to the green wedge land to the south. Our findings regarding Building D will be discussed further below.

Central grouping of buildings

- 238 In the previous decision, the Tribunal found it reasonable to provide 'higher levels of scrutiny of the appropriateness of development visible from the

public realm because of the sensitivities of this site'.⁹⁶ However, it acknowledged that many centralised parts of the site are not readily visible from the public realm and provide opportunities for buildings of increased scale.⁹⁷

- 239 Mr Milner agrees and says the central part of the subject land, that contains the Jubilee Wing and other outbuildings associated with the former business school, provide scope for extensive redevelopment without creating a significant new and incremental incursion.
- 240 The respondents disagree and consider the four-storey scale of Buildings B, C, E and F are excessive in size and height. They say there is no guidance in the planning scheme for use and development of this scale outside the UGB and the built form is contrary to the scale of all other development in Mount Eliza.
- 241 We concur with the findings in the previous decision and find the centralised parts of the subject land provide the opportunity for a more intense form of development, in the order of four storeys, provided the heritage and landscape values are respected. Buildings C, D and E are setback over 18 metres from the north boundary and are within the grounds and footprint of the existing buildings on the subject land. These buildings are also proposed to be benched into the slope and the screen landscaping along the north boundary and around the buildings will further mitigate the building scale.
- 242 We will address the design response for each building separately in our findings below.

Primary school interface

- 243 Some of the respondents are parents of the school. They presented similar submissions at the previous hearing including the incompatibility of an aged care facility adjacent to a primary school. We will address amenity impacts separately later in these reasons.
- 244 The respondents submit the four storey buildings will tower over the primary school buildings and grounds. They say this will adversely affect the amenity of the school.
- 245 Buildings C, D, E and F have an interface with the primary school and are setback between 18.1 metres and 28.3 metres from the north boundary. These buildings are three to four storeys, except for Building D that is two to three storeys.
- 246 We find these setbacks acceptable as they provide a transition between the school grounds and the subject land, which is outside the UGB. Our reasons are that there are existing buildings located near the common

⁹⁶ Previous decision [260].

⁹⁷ Previous decision [261].



boundary and the northern accessway acts as a buffer to the primary school. We are satisfied the landscaping, which includes screen vegetation and trees in the northern garden bed, will filter views to the north to the primary school.

- 247 The demolition of the Jubilee Wing will result in a reduction of built form facing the western section of the school grounds. The existing building is set back a minimum of 11.8 metres from the north boundary whereas Building D is set back approximately 18.7 metres. This building also has a more compact building footprint that is detached from north-west wing of Building C which will provide view-lines between buildings.
- 248 Our findings are consistent with the following findings in the previous decision:
- 279 At ground level, Buildings 04, 05 and 07 would be set back from the common boundary in the order of 16.9 to 25.8 metres, with increased setbacks to some upper levels. Excluding Building 06 at a reduced setback (discussed later), these setbacks would provide a reasonably substantial separation that would be supplemented by layered tree planting that would be expected to filter views further.
- 280 This is a measure that would appropriately exceed the separation that would be expected between buildings in different ownership within the township boundary, for example. Subject to the appropriate configuration of buildings, we consider these setbacks and interface treatment would assist in creating a meaningful transition into the UGB for this land, recognising it has already been developed for intensive institutional land use.

Individual buildings

- 249 The above findings address how the development responds to its main interfaces to the green wedge land, the primary school and Kunyung Road. Whilst we have made findings on the appropriateness of Building A in relation to the streetscape and green wedge land to the south, we will turn to the other buildings in terms of their response to the findings of the previous Tribunal decision and its immediate interfaces. We are assisted by Ms Peterson's comparative analysis in her evidence.

Building B (formerly Building 2)

- 250 Whilst this building has been reduced in length by 9.9 metres, the setback to the south boundary has been reduced by 3.6 metres. We are satisfied the reduction in height in the southern section of this building to part two and three storeys, and the break-up of the front and rear elevations, is an improvement that acknowledges the topography and its interface with the green wedge land.



- 254 Despite the Council's concerns, Mr Milner agreed the proposal is acceptable as there is a greater garden setback of the north-west wing to the south boundary. He considers re-exposure of the mansion will be a positive outcome in the coastal landscape and heritage terms.
- 255 Whilst the north-west wing has increased height, we find the design response acceptable for the following reasons:
- (a) The wing is generally located in the footprint and grounds of the Jubilee Wing, which is widely agreed as a highly inappropriate addition to the mansion.
 - (b) The upper level is recessed in from the lower levels which reduces the overall scale.
 - (c) The setback to the primary school has increased by 6.3 metres. The design has utilised the slope to accommodate the additional level without unduly increasing the overall height.
 - (d) The four-storey presentation of the west elevation is centrally located and has an outlook to the bay. There will be limited visibility of this wing from the public realm.
 - (e) The overall height and floor levels generally match those of the mansion.
 - (f) The contemporary design that includes flat roofing, verandas and muted materials will ensure the wing will not visually dominate the mansion. This will provide a clear distinction to the mansion which is shown in figure 16.
- 256 We agree with Ryman that any comparison to the primary school oval is of little assistance because the subject land is in a different zone and the use dictates a different built form response to its context.
- 257 The north-east addition to the mansion is set back 28 metres from the north boundary. This addition is setback 2.2 metres further from the primary school boundary. The proposal includes a three to four storey addition extending behind the mansion. Our findings, set out earlier in these reasons, address the scale and setbacks of this component of Building C.

Building D (formerly 5)

- 258 Building D has been reorientated to reduce its frontage to the west, it has a smaller footprint and increased setbacks to the north and south boundaries. One level has been removed and the height has been decreased to a part two and three storey building, as shown in figures 17 & 18, below.



mansion.⁹⁹ It said the building would impact the perception of spacing as it would be visible from oblique views from the bay to the north-west. It was also concerned about the visual impact of the building on the coastal values, including the commencement of the IUB.¹⁰⁰ It stated:

242 We recognise that parts of the Jubilee Wing are currently visible in this general location from some coastal vantage points. However, only its top architectural features are clearly visible beyond surrounding vegetation. It is notable that this existing structure is far lower and more substantially set back from the coastal bluff than the new building.

243 By comparison, the new building would be far more substantial in scale, sitting forward on the site and parts of the upper levels would be likely to project above the prevailing tree line when seen in distant views.

262 We find the amendments to the size, height and siting of Building D are significant and address the concerns expressed in the previous decision for the following reasons:

- (a) The reduction in building height by one level (ie 3.63 metres) and recessing of the upper level from the west elevation will reduce its prominence forward of the mansion, as shown in figure 18.
- (b) The building has a flat roof and is benched into the site and therefore uses the slope to reduce its overall scale.
- (c) The reduced building height will sit below the tree line viewed from the bay, as shown on Mr Flood's photomontage CE12. This addresses the Tribunal's concerns with the previous building where it stated that it was likely to project above the prevailing tree line when seen in distant views.¹⁰¹
- (d) The building setbacks have been increased by 10 metres to the south boundary. A setback of 28.9 metres will provide a sizeable break to the green wedge land and reinforce the IUB.
- (e) The building setbacks to the north boundary have increased by 3.3 metres. The combination of the reduced footprint and increased setbacks will improve the outlook and sense of openness for the adjoining school grounds and 16 Osprey Avenue.
- (f) The contemporary design, muted materials and finishes provide visual interest and articulation in all elevations.

Building E (formerly Building 6)

263 In the previous decision, the Tribunal had concerns about the design of Building 6 in relation to the primary school. It considered it was an

⁹⁹ Previous decision [237].

¹⁰⁰ Previous decision [240].

¹⁰¹ Previous decision [243].



insensitive design response that included a long façade parallel to the primary school that failed to follow the site contours. It considered a reduced footprint and narrower face to the school, that was orientated to the north-south with a four storey component, could be supported.¹⁰²

- 264 The proposal has reduced the size of the building by deleting the north-west section and increasing the set back to the primary school to a minimum of 17.54 metres, as shown in figure 19, below.



Figure 19 Site Plan comparison between Building 6 in previous scheme (on left) and Building E in the proposal (on right)

Source: Colleen Peterson, statement of evidence, p 51

- 265 This building generally faces the cluster of four portable classrooms that are near the common boundary. The presentation of this building to the north boundary is shown in figure 20, below.

¹⁰² Previous decision [286]-[288].



Figure 20 Building E, internal view looking east along the northern accessway. The primary school is to the left of the image behind the proposed fence.

Source: Daniel Flood, photomontage CE14 (no landscaping)

- 266 We acknowledge this building retains the part three and four storey built form facing the primary school and the amended plans have increased the overall height by approximately 1.15 metres. However, we are satisfied a building of this height and scale is acceptable as the expanse of north elevation wall facing the school grounds has been substantially reduced. This has occurred due to the re-orientation floor plate and reduction in floor area.
- 267 We note the setback to the north boundary has been increased by 4.3 metres which will provide greater opportunity for screen landscaping on either side of the northern accessway. This building is also located on the site of cluster of existing buildings (albeit single storey).
- 268 We consider the level of articulation of the building in all elevations, roof profile, range of materials and muted colours will also provide visual interest facing the school grounds.

Building F (formerly Building 7)

- 269 This building is primarily facing the side elevation of the main school building and shed. The orientation of the building has been altered to run parallel Kunyung Road and the setback to the north boundary has been increased by two metres to 18.9 metres.
- 270 In the previous decision the Tribunal did not have the same concerns about scale or proximity of this building. It said it was well set back into the site and responded to the slope.
- 271 We too find the siting and design of this building satisfactory. Whilst the building has increased in length by 14.4 metres and height by 860mm, it is set back a minimum of 57.9 metres from the frontage. This setback allows

for the retention of existing stands of Sugar Gums that will partially screen views of the structure. The additional setback to the primary school also provides opportunity for screen landscaping that is shown on the landscape concept plan.

Bowling Green

- 272 The Tribunal found the location of the bowling green in front of the mansion building problematic as it would detract from the setting of the mansion.¹⁰³
- 273 The removal of Building 3 and relocation of the bowling green further south-east of the mansion will assist in maintaining the primacy of mansion views when travelling along the southern accessway from the gatehouse towards the mansion, as we have set out in the heritage section of these reasons.
- 274 In its cross-examination of Mr Atkinson, the Council raised concerns about the elevated nature of the bowling green and the height of the western retaining wall. We accept Ryman's submissions that the fill batter is approximately 2.8 metres, as shown in figure 21, below. Mr Atkinson confirmed this batter can consist of rock to be used for seating and landscaping.

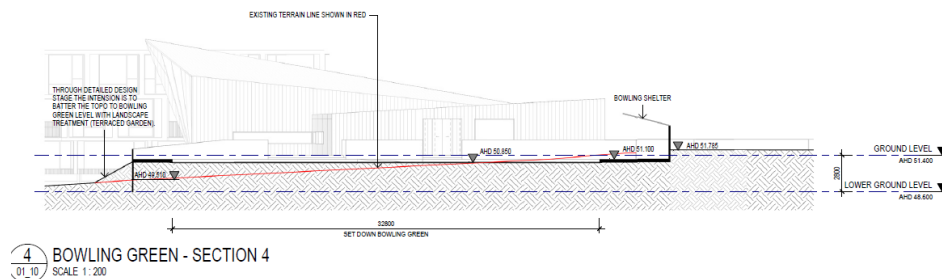


Figure 21 Bowling green, section 4, showing the existing ground level and extent of required excavation and fill. Outline of place of worship (located on north side of bowling green) is in the background.

Source: Drawing tendered by Ryman during the hearing

- 275 We consider the bowling green has responded adequately to the slope and it will not be obtrusive in the mansion grounds.

¹⁰³ Previous decision [233].

Place of Worship

- 276 The place of worship has been relocated closer to the mansion and is set back four metres from the addition to Building C.
- 277 We agree with Ms Peterson that the geometric design of this building and copper cladding provide a suitable contrast to the mansion and addition to Building C. The overall building height of 11.83 metres is low scale and will not impede of views of the mansion, as shown in figure 22, below.



Figure 22 Place of worship (central position in background of image, with brown roof, and behind bowling green, in foreground), view from southern driveway looking north

Source: Daniel Flood, statement of evidence, photomontage CE6B (no landscaping)

Beach access

- 278 As observed in the previous decision, the path from the top of the escarpment to the beach is in poor condition and the landing is inconvenient.¹⁰⁴
- 279 The proposal, like the previous scheme, does not propose any works to upgrade access to the Moonah Beach (the **beach**).
- 280 The Council and respondents submitted Ryman has not responded to the Tribunal's findings in the previous decision that beach access is a 'key site feature' and would be an 'important benefit' to residents of the facility. The Tribunal also said improved access should be considered in any new application, including the necessary 'integrated permissions'.¹⁰⁵ Other permissions would include those under the *Marine and Coastal Act 2018* and the *Aboriginal Heritage Act 2006 (AH Act)*.
- 281 Before the hearing in this proceeding, the Tribunal ruled that a cultural heritage management plan (**CHMP**) was not required under the AH Act for the activity in Ryman's permit application. We understand this was because no relevant use or development was proposed in the foreshore area

¹⁰⁴ Previous decision [410].

¹⁰⁵ Previous decision [411]-[413].

ie the part of the subject land on and generally below the escarpment.¹⁰⁶ If a CHMP was required, the grant of any permission for the proposal would be barred pending approval of a CHMP.

- 282 Ryman chose to frame and lodge the permit application so that this regulatory obstacle was ‘side stepped’. The question for us is whether the issue is so consequential that permission should be denied for failure to include beach access for facility residents.
- 283 We consider the issue is not fatal for two main reasons. First, although the proposal includes a barrier between the facility (near Building D) and the escarpment, the prospect of future access will be attractive to facility residents.¹⁰⁷ Ryman will therefore be motivated to provide future access. Second, Ryman proposes a permit condition that requires maintenance and/or minor works to the access path that enables improved and safer access by foot or scooter pending more substantial works following obtaining of necessary permissions. We will include such a condition.¹⁰⁸
- 284 Save Sir Regs Wedge (SSRW) submitted public access should be provided to the beach through the subject land. It sought permit conditions to that effect. We agree with the Tribunal in the previous decision that it would be unreasonable and unnecessary to require such public access.¹⁰⁹

LANDSCAPE AND ECOLOGICAL IMPACTS

- 285 Impacts on the landscape and environmental values of the subject land were raised by the respondents in the previous hearing and were reiterated in this proceeding. Concerns included the effect of tree removal on flora and fauna and drainage impacts on the beach.

Tree removal

- 286 The respondents submit there is excessive tree removal throughout the subject land which will impact existing flora and fauna which will negatively impact the landscape character of the area.
- 287 Ryman submits the proposal has sought to minimise tree removal and ensure built form will be presented in a generous landscape setting of existing and new trees that includes understorey planting, pathways, resting points, a central water course and buildings set into the slope.
- 288 Mr Howe is an arborist, horticulturist and landscape heritage consultant who also gave evidence on behalf of Ryman at the previous hearing. He

¹⁰⁶ *Aboriginal Heritage Regulations 2018* reg 31, 46 & 58.

¹⁰⁷ It will be especially attractive to those residents living in the independent living units who may be able to independently access the beach either by foot or by mobility scooter. However, it will also be attractive to those residents in the residential aged care facility rooms whose access could be assisted by facility staff.

¹⁰⁸ In deciding to include such a condition we have considered whether such works could be required by a permit condition before the preparation and approval of a CHMP under the AH Act. ‘Minor works’ are exempt from any requirement to prepare a CHMP before the grant of a permit.

¹⁰⁹ Previous decision [416].



assessed the trees within the subject land, near the north boundary and within the curtilage of the primary school. He says the current proposal retains one additional high value tree and five additional moderate value trees, compared to the previous scheme. However, he notes a moderately graded Monterey Cypress (Tree 1) at the end of the southern accessway has experienced storm damage and requires removal.

- 289 He notes the key decorative features, such as the Monterey Cypress driveway plantation and Norfolk Island Pine, can be retained and protected. He says the Sugar Gums in the frontage setback to be retained are low value specimens that are considered to be a weed species by the Department of Environment, Water, Land and Planning (**DEWLP**). Whilst these trees can be retained with the internal paths, he says they will require active management and risk assessment as they contain structural defects.
- 290 In the previous decision, the Tribunal accepted Ryman's approach to managing vegetation on the subject land because established trees within the frontage were to be protected during redevelopment. The Tribunal considered the established trees for removal were mainly decorative or commemorative trees and were not afforded any protection by clause 52.17 (Native Vegetation), a Vegetation Protection Overlay or a Significant Landscape Overlay.
- 291 The Tribunal also found there was substantial scope for replacing of semi-mature trees throughout the subject land, including opportunities for replanting along the common boundary with the primary school which will provide an appropriate visual buffer.
- 292 We also find the tree removal acceptable as the proposal retains more high and moderate graded trees than the previous proposal. We accept the evidence of Mr Howe that Ryman has carefully considered the tree removal, which includes retention of key heritage feature trees, such as the Monterey Cypress driveway plantation and Norfolk Island Pine.
- 293 We acknowledge the Sugar Gums in the frontage setback are of low arboricultural significance. However, we consider these trees should be retained as they maintain the landscape character in Kunyung Road and will filter views of Buildings A and F. We accept Mr Howe's evidence that the location of the internal pathway has been carefully considered to protect these trees.
- 294 The Council's draft permit conditions require active management of the trees to be retained throughout the subject land. We are also satisfied the landscape plan provides suitable replanting throughout the subject land, which will include indigenous trees. We will discuss this plan further in our findings later in these reasons.

Impacts on flora

- 295 Ryman submitted an updated biodiversity and ecology report with the application. This report was prepared by Mr Organ who also provided evidence at the previous hearing. He identified the subject land comprises predominately introduced and planted vegetation but there is contiguous area of native vegetation in the western section next to the foreshore. His assessment is that there are 27 indigenous species and 55 non-indigenous species on the subject land.¹¹⁰
- 296 Mr Organ identified the subject land contains three EVC's including Coastal Headland Scrub (EVC 161), Coastal Dune Grassland (EVC 879) and Grassy Woodland (EVC 175). He says there are two large patches of Coastal Heathland Scrub in the western coastal area (0.62 and 0.69 hectares), which also contained high weed coverage.
- 297 He says Grassy Woodland is in the eastern part of the subject land which comprises two small patches (0.023 and 0.033 hectares). He notes these patches are within the areas of maintained lawn and includes native grass which is greater than 25% cover.
- 298 Mr Organ determined the subject land fell within the intermediate assessment pathway¹¹¹ and prepared a Native Vegetation Removal (NRV) Report¹¹². The report indicates 0.023 hectares of native vegetation is to be removed in the eastern part of the subject land.
- 299 SSRW questions this assessment and relies on the evidence of Dr Yugovic, who also gave evidence about the impacts on the ecology at the previous hearing. He says the extent of Grassy Woodland is under-mapped as there are four patches which includes native lawn that are identified habitat zones. He says two areas should be larger and two additional areas should be included.¹¹³ He considers all four patches may be adversely affected by the proposal.
- 300 When questioned about the discrepancy, Mr Organ was not concerned about the difference in assessment as the areas Mr Yugovic included contains perennial grasses which are of poor quality.
- 301 We are not persuaded by Mr Yugovic's assessment of the biodiversity loss as his evidence failed to provide any photographs or methodology. In any event, even if we accepted his assessment, the proposal remains within the intermediate assessment pathway.
- 302 We accept the evidence of Mr Organ that the native vegetation to be removed is small and of low quality in terms of species diversity and there

¹¹⁰ This is consistent with the evidence submitted in the previous hearing – see previous decision [321].

¹¹¹ DELWP, *NVIM Tool* (2021).

¹¹² DELWP, *Guidelines for the removal, destruction or lopping of native vegetation* (2017).

¹¹³ Jeff Yugovic, statement of evidence, figure 1.



is an absence of mid-storey and tree canopy. We also accept that no significant flora will be impacted by the proposal.

- 303 The extent of native vegetation removal is reduced from the previous scheme when Mr Organ identified that 0.056 hectares were to be removed. Importantly, we are satisfied that Ryman has minimised the impacts on high quality patches of Coastal Dune Grassland and Coastal Headland Scrub in the western part of the subject land. We also acknowledge that Ryman agreed to undertake weed management of this area which will improve the quality of this indigenous vegetation. A Weed Management Plan will be included as a condition on the permit.
- 304 We find that offsets required under clause 52.17 for the proposed native vegetation removal can be met through DELWP's Native Vegetation Credit Register. This is included in the permit conditions. We are also mindful the landscape concept plan includes retention and replanting of native vegetation which will result in a net gain on the subject land. This includes the planting of semi-mature trees. Our findings are consistent with those in the previous decision.¹¹⁴

Impacts on fauna

- 305 The respondents are concerned about the impacts on local fauna and were critical that the proposal lacked species identification on the subject land. They say the existing trees currently provide shelter and habitat for a variety of birds, possums, koalas, and other wildlife. Ms Thomas is a wildlife carer and says the subject land is important koala habitat corridor. She is concerned about the excessive loss of habitat for the koalas because of this development.
- 306 Mr Organ did not provide a list of fauna on the subject land. However, he notes the Victorian Biodiversity Atlas (VBA) records 18 nationally significant and 34 State significant species within 10 kilometres of the subject land. He says that given the modified nature of the land, many of the significant species recorded are marine and freshwater species. He considers some birds may fly over the subject land when moving between other areas of habitat, but they are unlikely to reside within the subject land or rely on it as an important breeding or foraging habitat.
- 307 Mr Organ assessed the fauna habitat on the subject land and says the existing planted vegetation and lawn areas are likely to be used for foraging, roosting, and nesting habitat. He says there are no hollows in any of the planted trees. He considers the Coastal Headland Scrub in the western part of the subject land is likely to provide habitat for common fauna such as small bird, lizards, and skinks.

¹¹⁴ Previous decision [331]-[338].

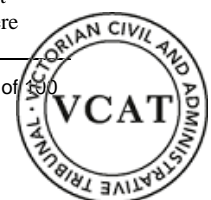


- 308 Mr Organ acknowledges that the subject land and surrounds may be occasionally used by koalas to move between higher quality sites¹¹⁵ where there is a higher rate of preferred eucalypt species. He considers that given the retention of a majority of the trees, particularly in the eastern part of the subject land adjacent to Kunyung Road, the ability for koalas to occasionally utilise the subject land to traverse to other habitats will not be impacted.
- 309 The Council does not object to the ecological and vegetation impacts of the proposal, but we have considered the submissions of the respondents. We find that a list of fauna species on the subject land is not required as we accept the evidence of Mr Organ that the native vegetation to be removed is small and low quality and provides limited habitat for significant fauna species.
- 310 We concur with the following findings in the previous decision:
- 336 It is clear that local residents highly value the opportunity to live amongst wildlife in this part of Mount Eliza. We appreciate it is important to preserve opportunities for a range of local fauna when considering the redevelopment of land.
- 337 At the same time, we consider these opportunities should generally be proportionate to the values and setting of the land. This land comprises a modified site, with existing institutional habitation and landscaped gardens. It is not specifically protected through an Environmental Significance Overlay, for example.
- 339 While some fauna species occupy the land from time to time or traverse through it, we are not persuaded that the site forms part of key habitat for any of these species or operates as part of a more established wildlife corridor. We are unable to accept evidence that the development of this site would further threaten species diversity or any species in particular in this region.
- 340 While the proposed development would significantly intensify the development and use of the land, there would still be some opportunities for fauna to occupy or inhabit the land, including by foraging, nesting or passing through. These opportunities have the potential to be enhanced or improved if a less intensive development outcome is sought in future, especially if widespread mid to understorey vegetation is established.

Impacts on drainage

- 311 The respondents are concerned there will be increased runoff into the existing stormwater drain that is located on the beach which will result in

¹¹⁵ Mr Organ identified Earmil Creek Bushland Reserve, Gunyong Creek Linear Reserve, Mount Eliza Regional Park and Frankston Nature Conservation Reserve. Some of these reserves were also identified by Ms Thomas.



increased erosion. Ms Adams is also concerned about the impacts on the geologically significant rocks and fossils on the beach.

- 312 Mr Eustace shares the respondents' concern and submits the existing drainage infrastructure in the western portion of the subject land needs repairs. He says Ryman tendered a detailed stormwater concept plan at the previous hearing and Ryman's storm water consultant agreed that works would be required due to the current state of the pipes and drains. He says that in a preliminary hearing in this proceeding, Ryman said that any stormwater devices will be moved outside the western portion of the subject land. He says the Storm Water Report (November 2021) that accompanied the current permit application does not reflect these changes.
- 313 DELWP is the manager of the Crown land associated with the beach. It did not object to the proposed use and development, subject to conditions. These include undertaking any remediation works of the soil or cliff erosion, slumping or scouring of Moondah Beach as a result of the development, to the satisfaction of DELWP. This condition and others relating to control of runoff during construction will address the concerns raised by respondents.
- 314 We will, however, require the recommendations in the Stormwater Management Report¹¹⁶ to be updated to reflect the undertaking Ryman made at the preliminary hearing to move any stormwater devices outside the western portion of the subject land, as a condition on the permit. Currently this report shows works in the western portion of the land.
- 315 We also consider the proposal is a water sensitive design. We have come to this conclusion as the landscape concept plan prepared by Mr Atkinson includes a dry creek be running through the centre of the subject land which will assist in improving water quality. We also note that this is recommendation in the Stormwater Management Report.

Impacts on bushfire risk

- 316 The entire site is within a Bushfire Prone Area. The planning scheme aims to assist efforts to mitigate risk to life, property and the environment from uncontrolled fire and ensure that land use and development includes adequate fire protection measures and does not increase the level of fire risk.¹¹⁷
- 317 The planning scheme also contains a strategy to direct population growth and development to low risk locations and ensuring the availability of, and safe access to, areas where human life can be better protected from the effects of bushfire.

¹¹⁶ Adams Consulting Engineers Pty Ltd, *Stormwater Management Report for Ryman Healthcare Australia Pty Ltd at 60-70 Kunyung Road, Mount Eliza* (17 November 2021).

¹¹⁷ Planning scheme cl 13.02-1S.



- 318 The application was accompanied by a Bushfire Attack Level (**BAL**) Assessment Report and Bushfire Management Report.¹¹⁸ The BAL report included a BAL site assessment map that identified all buildings are sufficiently set back from scrub and bushland to enable BAL-12 construction.
- 319 The Council referred the application to the Country Fire Authority (**CFA**) who had no objection subject to the inclusion of three conditions relating to the design of the accessways.
- 320 The Green Wedges Guardians Alliance (the **GWGA**) submits that given the subject land is in a Designated Bushfire Prone Area, compliance with the CFA standards for the clearance of trees and understorey vegetation within 30 metres of a building will exacerbate the loss of native vegetation. The GWGA says this is a good reason residential development should be prohibited in green wedge areas.
- 321 We are satisfied the proposal meets the objective and strategies of the planning scheme.¹¹⁹ Ryman has submitted a risk assessment that states the subject land is a relatively low bushfire risk landscape and Mr Atkinson's landscape concept plan takes into consideration these reports and the CFA regulations and requirements.
- 322 In the previous decision the Tribunal considered that a Bushfire Emergency Management Plan would be desirable as it has the potential to be effective for a confined site and where there is a centrally co-ordinated facility that has permanent staff.¹²⁰ The Tribunal said this plan would consider the vulnerabilities of aged care residents, if evacuation was required.
- 323 We consider a Bushfire Emergency Management Plan is not warranted given the siting of buildings and landscaping is based on a low risk bushfire assessment. This plan is best dealt with as part of the overall management of the facility, in accordance with relevant occupational health and safety regulations.

Impacts on landscaping

- 324 Ryman submits the landscape concept plan prepared by Mr Atkinson shows the retention of existing trees and new landscaping which will support the long-term aesthetic and landscape character of the subject land. Mr Atkinson says his design is heavily influenced by existing vegetation so that retirement village units and aged care facility windows will have green

¹¹⁸ Terramatrix, *Bushfire Attack Level (BAL) Assessment Report for the development of residential aged care facility and retirement village in association with a place of worship at 60-70 Kunyung Road, Mount Eliza* (August 2022) & Terramatrix, *Bushfire Management Report for the development of residential aged care facility and retirement village in association with a place of worship at 60-70 Kunyung Road, Mount Eliza* (August 2022).

¹¹⁹ Planning scheme cl 13.02-1S.

¹²⁰ Previous decision [346].



outlooks to new gardens and canopies of vegetation. He says views to the bay will be framed by existing and proposed planting.

- 325 We are satisfied Mr Atkinson's landscape plan adequately addresses the policy framework¹²¹ for the following reasons:
- (a) The plan shows the retention of 356 existing trees or groups of trees throughout the subject land.
 - (b) The plan includes the retention of the group of Sugar Gums in the frontage setback which will assist in filtering views of Buildings A and F in Kunyung Road.
 - (c) The plan includes the retention of exotic trees that have heritage significance for the mansion such as the Monterey Pines and Norfolk Island Pine. This is in accordance with the local policy to respect the values of the heritage place.
 - (d) The planting of a further 229 new native and exotic trees throughout the subject land will enhance the landscape character of the area.
 - (e) The screen trees along the north boundary will filter/screen views to and from the primary school.
 - (f) The plan includes gardens between buildings for use by residents which will also provide a garden outlook from within the buildings.
 - (g) The batters and retaining walls shown on the plan acknowledge the topography of the land
- 326 We are satisfied the landscaping will allow the proposal to sit comfortably with its broader landscape that includes the green wedge land, school, and residential area.
- 327 The Council raised concerns about the design of the batter adjacent to the bowling green that is currently shown as grass. Mr Atkinson agreed this could be improved by the inclusion of a rock retaining wall to create seating adjacent to the open grass area adjacent to the mansion. He also conceded that planting for the planter boxes had been excluded from his design.
- 328 The respondents were concerned the landscape plan contains too many exotic species which was raised as an issue by the Tribunal in the previous decision.¹²² Mr Atkinson agreed that more indigenous planting can be included but considered it was also important to include some exotic species that are familiar to the residents.
- 329 We find that further refinement of the landscape plan to include greater indigenous planting, planter box planting and planting adjacent to the bowling green can be dealt with by permit condition.

¹²¹ Planning scheme cls 11.01-1L-1 (Settlement), 11.03-5S (Distinctive areas and landscapes), 12.01-1L (Protection of coastal areas) & 15.03-1L-01 (Heritage conservation).

¹²² Previous decision [350].

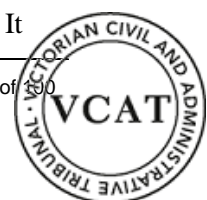


TRAFFIC AND PARKING

- 330 The respondents' expressed concern about the impact of the proposal on the local and broader traffic network in the previous decision.
- 331 This includes issues relating to the safety of students and pedestrians crossing the northern access point and southern gateway, particularly during peak pick-up and drop-off times of the primary school. Other issues also raised include impacts of additional traffic on Kunyung Road, local roads and the Nepean Highway intersection and the provision and allocation of resident and visitor car parking.
- 332 Our following findings refer to these issues and the findings made by the Tribunal in the previous decision.

Car parking demand

- 333 One of the grounds on which the Council refused to grant permission was the failure to provide the appropriate number of car parking spaces having regard to the demand expected to be generated in accordance with clause 52.06 of the planning scheme.
- 334 Ryman relies on the evidence of Mr Young who has calculated the parking requirement for the various uses on the subject land including the residential aged care facility, the ALUs, the retirement village (two and three bedroom ILUs) and the place of worship. He calculated there is a statutory requirement of 221 spaces using the parking rates listing in table A of clause 52.06. This figure assumes the ALUs fall within the definition of a 'residential aged care facility' that nominates a rate of 0.3 spaces per lodging room.
- 335 The proposal provides a total of 229 car spaces that includes 142 resident spaces, 2 DDA parking spaces and 55 visitor car spaces, which equates to a parking surplus of 6 spaces.
- 336 The Council submits the ALUs should be included within the retirement village use parking rate as it is reasonable to assume that most residents will own a car. The Council considers the case studies used as a comparison are not comparable to the Mornington Peninsula due a lack of proximity to shops, public transport, and other factors. It also submits that some buildings have minimal visitor car parking in close proximity and these spaces will be difficult to locate for visitors. It is concerned that the availability of these spaces will not be confirmed without entering each basement car park.
- 337 The respondents agree with the Council and raise concerns about potential overflow on-street parking, particularly during staff change-over times. They say this will exacerbate existing parking problems in the area.
- 338 Ryman submits the Council's ground of refusal is misconceived as the proposal exceeds the statutory requirement for parking in clause 52.06. It



says ALUs fall within the definition of a residential aged care facility as Ms Kielty has explained how residents receive daily care such as lunches, daily cleaning and 24 hour access to nursing staff. It submits this is consistent with the reasoning in other recent Tribunal decisions.¹²³

- 339 Ryman also relies on the evidence of Mr Young who considers the overall parking provision readily caters for the demands generated by the proposal. He considers that even if the retirement village rate was applied to the ALUs, empirical analysis of Australian Bureau of Statistics (ABS) statistics for car ownership in retirement villages indicates a rate of one vehicle per two bedroom unit and 1.1 vehicles per three bedroom unit. This would equate to a demand of 135 spaces, which is less than the 150 spaces provided on-site. He says this will still be a surplus of 15 resident spaces.
- 340 In the previous decision the Tribunal did not make findings on the adequacy of parking given its decision to refuse the previous scheme. We are not persuaded by the Council's arguments and are satisfied that the information provided by Ms Kielty indicates the ALUs fall within the definition of a residential aged care facility, being:

Land used to provide accommodation and personal or nursing care for the aged. It may include recreational, health or laundry facilities and services for residents of the facility.¹²⁴

- 341 We therefore find the proposal satisfies the statutory car parking requirements of the planning scheme and no reduction in car parking is required.

School interface

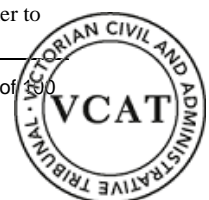
- 342 A central issue for the respondents is the safety of pedestrians from the adjoining primary school when traversing the two crossovers to the subject land during peak school hours.
- 343 Ms Gaffney says the introduction of road safety risks near the school is unacceptable and crashes at this location are predictable and foreseeable. She says Kunyung Road, outside the school, is not yet optimised given there is a single crossing guard for approximately 800 students and poor provision for the quantity of cars coming through Kunyung Road and surrounding streets in peak school times.
- 344 She submits this is contrary to the Council's Road Safety Strategy¹²⁵ that adopts Safe System principles that aim to reduce road trauma by transforming the road network.¹²⁶ She says the Council's strategy commits

¹²³ See eg *Japara Holdings Pty Ltd v Bayside CC* [2022] VCAT 390 and *Japara Holdings Pty Ltd v Mornington Peninsula SC* [2022] VCAT 1036.

¹²⁴ Planning scheme cl 73.03.

¹²⁵ Ms Gaffey, written submission, attachment B.

¹²⁶ Austroads Research Report AP-R509-16 *Safe System Assessment Framework* (February 2016) describes the Safe System approach involves different elements of the system working together to



to zero deaths by 2050 and aims to make all journeys to be safe and to feel safe for all road users, including cyclists and pedestrians.

- 345 Ms Gaffney says there are various tools to evaluate current and proposed road safety risks including a Road Safety Audit¹²⁷, a Safe System Assessment,¹²⁸ an iRAP Road Safety (Star) rating¹²⁹ and a Star Rating for Schools.¹³⁰ She is critical of the evidence of Mr Young and says that evidence does not adequately appreciate the road safety risks introduced by the proposal or address how the risk will be mitigated as far as practicable. She says that a safety-based assessment, rather than a traffic-based assessment, is required as it focuses on how the development will improve, not hinder, road safety in the area.
- 346 She says Ryman should conduct a road safety impact assessment of the proposal using the various tools she has suggested. This could include traffic calming measures, further speed reductions, relocation/redesign of parking spaces and significant road upgrades. She says:
- Regardless of what is ultimately implemented, the applicant should be required to demonstrate an overall improvement in road safety and traffic flow at this location as a minimum requirement.¹³¹
- 347 Ryman disagrees with Ms Gaffney's contentions. It says that based on the evidence of Mr Young, a road safety audit is not required because he considers the access points to the subject land are safe and functional.
- 348 The Tribunal considered similar submissions relating to pedestrian safety at peak school times in the previous hearing. The Tribunal accepted that drivers associated with the facility will be licensed and will drive in accordance with the road rules, including giving pedestrians priority when exiting the subject land. The Tribunal also noted that peak vehicle movement times for the aged care facility are unlikely to coincide with school peak times and that pedestrian and vehicle traffic Kunyung Road (outside peak school times) is consistent with its collector road layout and designation.
- 349 The Tribunal did, however, consider that greater care needs to be taken driving in an area where an aged care facility adjoins a busy primary school. It noted:
- to its credit, the school already actively manages student pick up and drop off periods through the use of staff, parents and crossing supervisors in an effective way to ensure the safe movement of children along and across Kunyung Road, as well

help eliminate death and serious injury. It says this a shared responsibility, including road users and road managers each taking a role. It says a key objective for road managers is to ensure that when driver errors do occur, they do not result in high severity outcomes.

¹²⁷ Austroads, *Guide to Road Safety Part 6: Road Safety Audit* (2022).

¹²⁸ Austroads, *Safe System Assessment Framework*, Research Report AP-R509-16 (February 2016).

¹²⁹ International Road Assessment Programme (iRAP), *Star Ratings* (2018).

¹³⁰ International Road Assessment Programme (iRAP), *Star Ratings for Schools* (2017).

¹³¹ Ms Gaffney, opening written submission [15].



as the passage of vehicles in the vicinity of the school premises (including 'kiss and go' bays); and

- there are further opportunities for physical and management measures by the site operator to improve the safe operation of the access points, including signage reinforcing the need to give way to pedestrians as well as the offer by the applicant to provide traffic supervisors to guide traffic during school pick up and drop off periods. While we accept submissions that these measures would not be equivalent to statutory measures, we consider they would have been suitable as supplementary measures to provide a level of additional oversight.¹³²

- 350 We do not accept the respondents' submissions that there are unacceptable safety risks to the pedestrians associated with the primary school that warrant refusal of permission for the proposal for two main reasons.
- 351 First, the Council as the manager of Kunyung Road under the *Road Management Act 2004*, does not support those submissions.
- 352 Second, we must give weight to the independent expert evidence from Mr Young, whose opinions were tested in the hearing, over submissions made by Ms Gaffney, despite her road safety qualifications and experience.
- 353 We acknowledge that Ms Gaffney is urging us to adopt a holistic view of the road transport system and the interactions between people, vehicles, and the road environment (ie Safe System approach). This is different to Mr Young's approach that relies on assessment of intensity of traffic movements entering and exiting the subject land and sight lines available at the accessway entrances.
- 354 We have inspected the subject land and Kunyung Road on several occasions during the peak school morning drop-off and afternoon pick-up times. We observed there is high demand for on-street parking on both sides of Kunyung Road, extending well past the subject land, including south of the gatehouse. We also have an appreciation of the volume of pedestrians walking across both entrances. We observed that most of the children and parents failed to see, or acknowledge, they are traversing a crossover or see the yellow lines on the footpath.
- 355 We concur with the findings of the previous Tribunal that 'more could be done' to improve the safe operation of the access points. We therefore agree with Ms Gaffney that some form of road safety impact assessment is required to be conducted by Ryman which should also include recommendations to improve pedestrian safety at the accessways.
- 356 This can be achieved by inclusion of a condition on the permit. We do not wish to pre-empt recommendations but measures at the northern entrance to

¹³² Previous decision [364].

improve sight lines, to change footpath alignment and to change footpath surfaces could be considered.

Access to/from the Gatehouse

357 The southern access point to the subject land is through the State heritage-listed gatehouse. This will provide access to Buildings A and B, the place of worship and Building C.

358 The potential for vehicle conflict and safe access through the gatehouse entrance was the subject of submissions at the previous hearing. Ryman's expert traffic witness' opinion was that it could be managed by a 'stop-go' light system to give priority for vehicles and pedestrians. The Tribunal did not make findings on this matter but was not persuaded that this system would be suitable to regulate incoming traffic, particularly given the large numbers of pedestrians traversing the crossover entrance at peak school times.

359 Ryman relies on the evidence of Mr Young who considers there is no issue with the design of the accessway. He says the single-width, two-way access is acceptable as he predicts the gatehouse will carry a maximum of 15 vehicles per hour during the afternoon peak. He says that if clause 3.2.2 of AS/NZ 2890.1:2004 is used as a guide, 30 or more movements in peak hour (in and out combined) would usually require provision for two vehicles to pass on an accessway. Therefore, the accessway satisfies the capacity test under post-development conditions.

360 Mr Young says there are also passing opportunities either side of the gatehouse. He conducted a gatehouse conflict assessment of opposing cars seeking to use the gatehouse access at the same time at reduced speeds. He says there is a clear line of sight through the gatehouse to the frontage for vehicles exiting the subject land which allows the driver to view a vehicle approaching from the east or west. He also says vehicles entering the subject land from Kunyung Road will see for a length of some 55 metres into the subject land.

361 He devised a formula on the probability of cars meeting by equating the time taken for vehicles to transverse the one-way section of the accessway and the estimated traffic volumes.¹³³ He calculated that the estimated number of conflicts during the afternoon peak hour is 0.11, which was a very low frequency event. He concluded the arrangement is acceptable from a risk perspective.

362 Both the Council and the respondents questioned this analysis. Ms Gaffney submits that it is a crude analysis that does not consider vehicle-pedestrian conflicts even though it is largest area of road safety concern raised by the

¹³³ Brett Young, statement of evidence [198].



respondents. She says that whilst it is relevant to the overall picture of crash likelihood, it has no foundational basis on predicting crashes.

363 There are two issues relating to the gatehouse accessway. The first relates to the potential for conflict between vehicles when exiting and entering the subject land given the constraint of the one-way access at the gatehouse. The second, as with the northern accessway, is the safety of pedestrians traversing the crossover at peak school times. Our findings about the second issue are discussed above.

364 We accept the evidence of Mr Young that there are adequate sight lines for departing drivers to view vehicles approaching the subject land and similarly, there is adequate length for vehicles entering to view any departing vehicles. This was shown in his sight line diagrams.¹³⁴

365 However, we have reservations about the conflict assessment conducted by Mr Young. Whilst his findings are that the probability of two cars meeting is a low frequency event, we agree with Ms Gaffney this analysis does not paint the 'whole picture' as it does not assess vehicle-pedestrian conflicts. This is a further reason for including on the permit a condition for a road safety impact assessment.

Traffic impacts

366 The respondents are concerned there will be increased traffic and heavy vehicles on Kunyung Road given the subject land is not within easy walking distance of shops, public transport, and other facilities. They say the proposal will exacerbate existing traffic problems in the area, particularly during peak school times.

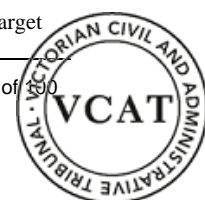
367 Ryman relies on the evidence of Mr Young who considers that the increased volumes of traffic created by the proposal will not adversely impact traffic flow along Kunyung Road or the Nepean Highway intersection.

368 Mr Young assessed surveys of traffic generated by similar retirement villages and aged care facilities and estimates the proposed development will generate 52 vehicles per hour in the morning peak, 64 vehicles per hour in the afternoon peak and a total of 568 vehicles per day. He has also assessed there will be an increase of 56 vehicles movements per day north of the site on Kunyung Road and 512 vehicle movements per day south of the site.¹³⁵ He says the increase in total volumes is within the environmental capacity of the street¹³⁶ He concludes that Kunyung Road will operate in a satisfactory manner post-development.

¹³⁴ Brett Young, statement of evidence, figures 9-4, 9-5 & 9-6.

¹³⁵ Brett Young, statement of evidence [203].

¹³⁶ Kunyung Road is classified as a Connector Road Level 2 in the planning scheme which has target volumes of between 3,000 and 7,000 vehicles per day.

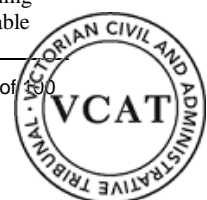


- 369 Mr Young also provided the predicted figures for the Nepean Highway intersection in a SIDRA¹³⁷ analysis of traffic volumes. He says these results show the intersection is currently operating under 'Fair' conditions during the morning peak hour and 'Good' conditions during the afternoon peak hour.
- 370 He says the queue lengths are anticipated to remain well within the existing right turn lane capacity. He predicts the delays to right turn vehicles will increase by 15 seconds in the morning peak hour and by 9 seconds in the afternoon peak hour. He concludes that the intersection will continue to operate within capacity, post development.
- 371 Our inspection of the subject land reveals the traffic movements along Kunyung Road, surrounding local streets and at the Nepean Highway intersection are relatively low, outside peak school times. We accept the findings of Mr Young that Kunyung Road operates within its environmental capacity for a Connector Road - Level 2. We did not receive any evidence from the respondents that challenged these findings.
- 372 The Council included draft permit conditions that require a Baseline Traffic Assessment that assesses the performance and operation of the site access and egress points onto Kunyung Road and the Nepean Highway/Kunyung Road intersection. Given we accept the evidence of Mr Young, which was not disputed by the respondents, we will not include these conditions in the permit.

Visitor car parking

- 373 The Council submits that insufficient information has been provided regarding the management of parking in the event the basement car park for the place of worship is at capacity. It is concerned there are no turning bays provided in the basement and drivers will not be able to exit in a forwards direction. It also submits that visitors to the retirement village will not know if spaces are available in the basement and it is uncertain on how they will access them.
- 374 Ryman relies on the evidence of Mr Young who says visitors seeking to park within the basement of the buildings will arrange for access with the resident they are visiting or with building management.
- 375 The main issue is whether the parking arrangements for visitors is functional. We note the proposal includes 20 spaces for visitors of the retirement village and 36 spaces for place of worship, which satisfies the statutory requirement of the planning scheme. We are satisfied that the Council's draft permit conditions, which requires a Place of Worship

¹³⁷ SIDRA is an analysis of time, queue length and average delay a vehicle experiences approaching Nepean Highway (east), Kunyung Road (north) and Nepean Highway (west), as shown on Table 9-5 of Mr Young's evidence.



Operational Management Plan, will provide the means to ensure patron and visitor car parking is managed within the subject land.

- 376 We accept the evidence of Mr Young that the layout of the basements in all buildings is in accordance with Design Standard 2 of clause 52.06-9 of the planning scheme, which includes turning bays. During questioning, Mr Young suggested that visitor car parking bays could be relocated to be proximate to the turning bays within the basement to further improve its functioning. Ryman has adopted this suggestion.

Construction management

- 377 The respondents have concerns about length and disruption to traffic along Kunyung Road by construction vehicles. A draft permit condition requires the submission of a Construction Traffic Management Plan which was recommended by Mr Young. He says this plan can include management of construction management activity during school pick-up and drop-off times.
- 378 We acknowledge that given the scale of the proposal, there will be a lengthy construction period. We are satisfied that inclusion of a condition for management of construction vehicle movements will minimise this impact for the school during peak periods.

INTERNAL AMENITY

- 379 In this section of the reasons, we consider submissions made about recreational opportunities for residents of the proposal.

Recreational opportunities within the subject land

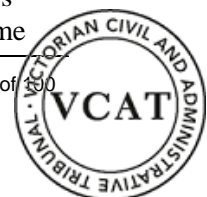
- 380 One of the grounds on which the Council refused permission was that the proposal fails to provide for the reasonable recreational needs of future occupants. It says as the subject land is relatively remote from local services and facilities, recreation opportunities for future residents must be carefully considered. It relies on the evidence of Ms Jeavons, who is a recreational planner. She says as this is a residential development, it will generate significant demand for community and recreation infrastructure.
- 381 She considers the subject land is inappropriate for the nature of the development due to its scale, density and topography which will constrain the provision of fit-for-purpose outdoor recreation facilities. Whilst she acknowledges the proposal includes a bowling green, several dementia gardens, a swimming pool/spa and gym, the plans do not show an area for social recreation for residents, families, and visitors to the retirement village.
- 382 Ms Jeavons says there is insufficient information about the adequacy of the open space and recreation facilities and whether they are suitable for intended residents and visitors, inclusive for people of all ages and abilities.



- 383 Ryman responds that Ms Jeavon's evidence lacks substance and is not adapted to the demographic of future residents. It submits the proposal will provide the opportunity for high quality accommodation for ageing people with extensive recreation facilities.
- 384 Ryman relies on the evidence of Ms Kielty who explained Ryman villages feature several resident amenities to support their lifestyles and provide social interaction with other residents and families. She says the significant size of the subject land provides many opportunities for residents to spend time for active and passive pursuits. This includes communal lounge and dining areas, exercise programs in the gym and use of the multi-purpose areas for dance classes, craft and other activities. The facility will also include outdoor activities such as lawn bowls, gardening and organise volunteering.
- 385 Ms Wells also considers the Ryman model of care will provide residents with contemporary accommodation that enables them to retain existing social, lifestyle and civic facilities.
- 386 We do not share the Council's and respondents' concerns about the adequacy of the recreation facilities offered on the subject land. We accept Ms Kielty's evidence that Ryman provides a suite of activities, which is devised in collaboration with the residents, and is enabled through the size of the resident community combined with the access to large scale and varied recreation, communal and well-being spaces on the subject land.
- 387 The proposal includes recreation facilities, such as the swimming pool, bowling green, gym, various walking paths and structured exercise programs that will accommodate residents' recreational needs within the subject land.
- 388 The landscape concept plan prepared by Mr Atkinson includes outdoor spaces between buildings that can be used as meeting places for residents and visitors. The plan also shows the provision of seating at the nodes of switchbacks in the internal pedestrian network which will provide opportunities for residents to use the paths.
- 389 We also acknowledge Ms Kielty's evidence that further consideration of the detailed design of the aged care accommodation and recreation facilities will be undertaken as part of the Commonwealth regulation and funding of a residential aged care facility.

Internal pedestrian network

- 390 The Council's submits that the proposal fails to provide for an adequate internal pedestrian network that enables efficient, convenient, and accessible movement. It submits the proposal fails the strategies of clause 15.01-2S of the planning scheme which is to ensure development provides safe access and egress for pedestrians, cyclists, and vehicles. It also says this is contrary to the objective of clause 18.02-1S of the planning scheme



which is to facilitate an efficient and safe walking network and increase the proportion of trips made by walking.

- 391 The Council relies on the evidence of Ms Jeavons who emphasised that paths within the site are critical to motivate residents to be outdoor, active, and social. She has reviewed the Accessibility Plan and notes there is no complete path provided for recreation uses within the subject land. She considers this is a priority as it is essential to encourage residents to do a minimum amount of activity. She says the plan needs further consideration as the accessible and non-accessible paths cross and this needs to be distinguishable for safety of people with low vision or cognitive function.
- 392 The respondents agree with the Council and contend the slope of the subject land is unsuitable for elderly residents. Mr Mangan submits that pedestrian access is exceedingly circuitous and increases the walking distance from outside the subject land, particularly for retirement village residents of Building D.
- 393 Mr Eustace referred a recent Tribunal decision that found a development for a retirement village in Mount Eliza had not adequately addressed the slope given there were multiple external stair lifts, paths with varying gradients and extensive retaining walls.¹³⁸ He says the subject land has greater slope and which will pose greater challenges to provide access throughout the site.
- 394 Ryman responds that this recent decision is not relevant as the slope of the subject land is less, it is not encumbered by a Design and Development Overlay that restricts building height, the proposal is not relying on mechanical lifts and excessive retaining walls, and the proposal includes a highly resolved pedestrian circulation network. It relies on the evidence of Mr Young who assessed the Accessibility Plan shown in figure 23, below.

¹³⁸ *Hengyi (33 Jacksons Road) JV v Mornington Peninsula SC* [2022] VCAT 896 [110]–[114].



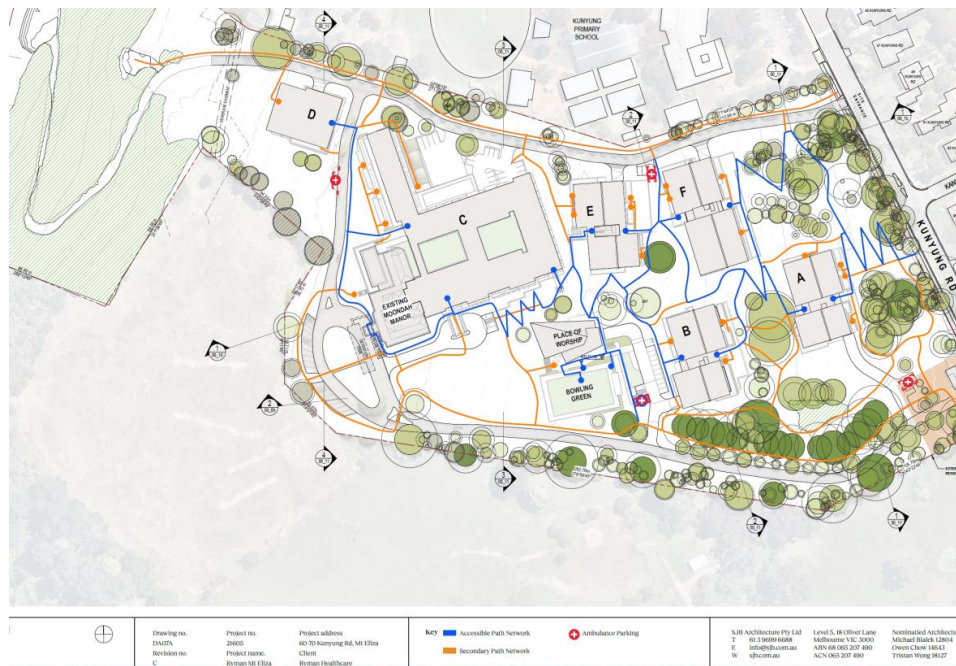


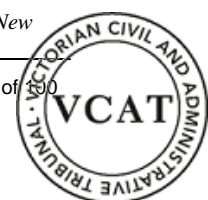
Figure 23 Accessibility Plan. Blue lines indicate the accessible path network connecting each building and orange lines show the secondary path network throughout the subject land.

Source: Permit application, drawing DA07A Rev C

395 Mr Young says this plan provides connections between all buildings and the Kunyang Road footpath, with minimal crossing locations over the internal vehicle accessways. He has reviewed the gradients of the pathway network and says they meet the relevant design standards for gradients, landings, and the provision of handrails.¹³⁹ Whilst he is satisfied that an accessible pathway network can be provided on the subject land, he recommended inclusion of a condition requiring detailed design to be in accordance with the standard.

396 Ms Hodyl also assessed the Accessibility Plan and says the proposal is acceptable as it creates multiple opportunities to move around the site through various landscape settings. She recommended, however, that access to Building C could be enhanced with a lift located at the south-east corner of the building. She considers this lift would be highly used by residents to the east as it provides direct access into the building and avoids use of the stairs and switchback ramps. She recommends that to improve external and internal access conditions in relation to the lift, expansion of the canopy at the entrance to the lift will increase the amount of weather protection for residents.

¹³⁹ AS 1428.1- 2009 *Design for access and mobility Part 1: General requirements for access – New Building Work.*



- 397 We acknowledge the subject land has a significant slope that must be factored into the overall design and layout, including the pedestrian path network. We do not see this as an insurmountable barrier for development of a retirement village and aged care facility as we accept the evidence of Mr Young and Ms Hodyl that the accessible paths can meet the relevant design standards.
- 398 We are satisfied the layout and design of the pedestrian network will provide access and connectivity to all residents, regardless of their abilities. The draft permit conditions require an Accessibility Report that includes a detailed design of all accessible pathways and associated fixtures (eg handrails and kerb ramps), in accordance with Mr Young's recommendation. We agree with Ms Hodyl that inclusion of additional weather protection for the lift in the south-east corner of Building C will enhance resident access to this building. This can be addressed by a permit condition.
- 399 We do not see there is a need for a circuit path within the proposal. Whilst the accessible paths include several switchbacks to accommodate the slope and retention of existing trees, they provide connections between buildings and the central facilities in Building C. The secondary path network generally mirrors the external vehicle accessways along the north and south boundaries which can be used to walk around the subject land. We accept the evidence of Ms Wells and Ms Kielty that a circuit path is not required for the residents of this type of accommodation.
- 400 We also note the landscape concept plan shows the provision of seating at the switchback nodes in the internal pedestrian network. We see this seating will further entice residents to use the internal paths for exercise and gathering spaces.

Pedestrian access outside the subject land

- 401 The respondents and the Council are concerned that paths in the surrounding streets are not acceptable for access to public transport and community and recreation facilities. They submit they will be difficult for future residents to walk, or exercise, given their condition and lack of connectivity. Ms Jeavons agrees and says the existing footpath along Kunyung Road is showing signs of wear and is already too narrow for the foot/cycle traffic it currently accommodates.
- 402 Ryman responds that these contentions should be given little weight given the existing residential area to the east and the existing valued character of Mount Eliza includes minimal footpaths. It says that many people of all ages and abilities currently walk around Mount Eliza on either the footpaths, roads, beach, or bush tracks. It says that lack of accessibility to



parks and facilities has already been identified by the Council as an issue that is sought be addressed through various strategies and plans.¹⁴⁰

- 403 We agree with Ryman that refusal of this application based on existing external accessibility conditions is unwarranted. We find that widening of the existing footpath in Kunyung Road unnecessary given we observed there is minimal use at times of the day other than school peak times. Any widening of this path will have visual impacts on the existing street trees and streetscape character, which is a valued feature of this neighbourhood.
- 404 We are also mindful that the Council already has implemented several initiatives to improve accessibility for elderly people throughout the municipality.

Accessibility and demand for external recreation facilities

- 405 The Council submits the subject land is relatively remote from local services and facilities. The respondents agree and say the subject land is remote from facilities in the Mount Eliza township and the nearest bus stop is 1.5 kilometres away.
- 406 Ryman responds that the proposal provides extensive facilities on the subject land that override any asserted locational disadvantages. Ms KIELTY advised Ryman will provide a village bus, eCabs and private transport to enable access to ongoing access to the community.
- 407 We consider residents of the subject land will be able to access existing community facilities and recreation facilities using their private vehicles, taxis, or village bus service. These locational attributes will be considered by future residents when choosing to reside at this location.

Beach access and internal amenity

- 408 The Council and respondents submit the proposal fails to provide convenient and safe foreshore access for residents due to the steepness of the escarpment. Mr Grace also says the internal amenity of some units are compromised as they do not have a bay outlook.
- 409 Ms KIELTY disagrees and says that resident access to the beach can be accommodated by staff, if required. She considers that views of the bay and the opportunity to take in the 'sea air' are also advantages of the subject land.
- 410 We have already commented on the lack of works in the proposal to upgrade access to the beach.¹⁴¹ We note Ms KIELTY acknowledges that location of the development adjacent to the beach will be valued by future residents. We agree this feature will enhance the internal amenity for

¹⁴⁰ Mornington Peninsula Shire Council, *Footpaths and pedestrian access strategy* (2019), *Keeping active, involved and informed directory*, *Peninsula Advisory Committee for Elders (PACE)*, *Disability Inclusion Plan 2018-2022* and *Accessible Recreation* (webpage).

¹⁴¹ See above [278]-[284].



residents who will be able to access the beach and view the sea from their units or suites. We see that further connectivity between the buildings and the western escarpment can be addressed after commencement of use and development in this application.

- 411 We also find that whilst some units and rooms do not directly face the bay, there are many viewing points from within the gardens, seating, and communal areas. We agree with Ms Kielty that this will enhance the amenity of the subject land for residents.

EXTERNAL AMENITY

- 412 In this section of the reasons we consider the submissions about the proposal's impact on the primary school, on noise impacts generally and on light spill.

Incompatibility of land uses

- 413 The respondents reiterated their concerns about the incompatibility of having a retirement village and a residential aged care facility adjacent to a primary school. These concerns do not rise close to the level at which they warrant refusal of permission for the proposal. It suffices to state that we concur with the findings in the previous decision.¹⁴²

Overlooking

- 414 The respondents raised concerns about the potential for overlooking from the retirement village units into the primary school grounds. Buildings C, D, E and F have an interface with the school. These buildings are set back over 18 metres from the common boundary, as shown on figure 24, below.

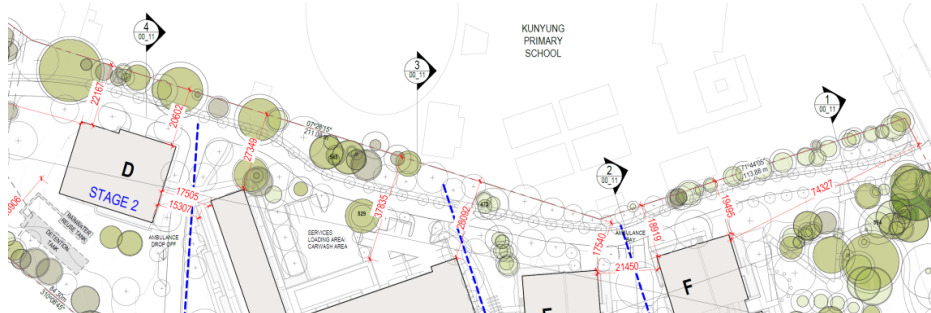


Figure 24 Setbacks of Buildings C, D, E & F from the north boundary with the primary school

Source: Permit application, drawing DA06 Rev C (excerpt)

- 415 We find these setbacks provide a reasonable level of separation to the school grounds which will also be occupied by screen landscaping that is shown on the landscape concept plan.

¹⁴² Previous decision [273]-[275].



- 416 Whilst there are some habitable room windows in the north elevation of these buildings, the primary outlook is towards the bay or Kunyung Road from most of the retirement village units. The existing cyclone fencing along the north boundary is also to be replaced with two metres high timber palings which will further reduce viewing between the properties.¹⁴³
- 417 We agree with the findings in the previous Tribunal decision that all views should not be prevented to the school as there will be benefits for both residents and providing passive surveillance of the school.¹⁴⁴

Noise

- 418 Ms Sheffield submits the proposal will cause ongoing noise pollution from the years of heavy construction work, the daily life of the retirement village and aged care facility, and vehicle movements throughout the day and night.
- 419 Ryman submitted an acoustic report with the application.¹⁴⁵ This report identified potential noise emissions from the subject land are likely to be from mechanical services equipment (including a generator), music noise from the place of worship and waste collection, compaction, and deliveries. The report included a Noise Management Plan that addresses how the development will ensure noise emanating from the land will not exceed the applicable Environment Protection Authority requirements, including deliveries and refuse collection during the night period.
- 420 The report states that given the moderate noise environment of Kunyung Road, no special external noise intrusion mitigation measures will be necessary. It says mechanical noise emissions from the site can achieve the regulatory noise limits with appropriate acoustic treatments. It states music noise from the place of worship can be controlled using appropriate building envelope construction or control of noise levels.
- 421 We acknowledge there will be noise emanating from the subject land during construction that includes heavy vehicles. This noise will have some impact on the operation of the primary school and the amenity of nearby residents. Refusal of the application on this ground is not warranted as it is a consequence of any development.
- 422 The Council's draft permit conditions include a Construction Management Plan and a Construction Traffic Management Plan which are designed to manage this stage, in conjunction with the Council.
- 423 The implementation of the Noise Management Plan, prepared for Ryman, as a condition on the permit, is an appropriate way of addressing any noise related issues due to the operation of the use.

¹⁴³ Permit application, drawing DA36.

¹⁴⁴ Previous decision [276] & [282].

¹⁴⁵ Marshall Day Acoustics, Report 20181313 (27 September 2021).



424 We also state that we concur with the findings on noise in the previous decision.¹⁴⁶

Light pollution

425 SSRW submits there should be no artificial lighting of the track in the western portion of the subject land because of the impact on the biodiversity of the foreshore bushland.

426 Ryman has submitted a Lighting Strategy Report¹⁴⁷ and Lighting Plan¹⁴⁸ for the subject land. The report recommends lighting solutions for the internal roadways, car park and internal paths. The Lighting Plan nominates the type of lighting (bollard and pole top) and the level of illumination for all the external car parks, accessways and pedestrian paths.

427 This plan does not show any lighting in the western portion of the subject land. We are satisfied the implementation of the recommendations of the Lighting Strategy Report, as conditions on the permit, will address any lighting issues.

ARE THERE ANY OTHER ISSUES?

428 The application includes the display of three backlit business identification signs on the front fence adjacent to the vehicle and pedestrian entrances in Kunyung Road, as shown on figure 25, below.

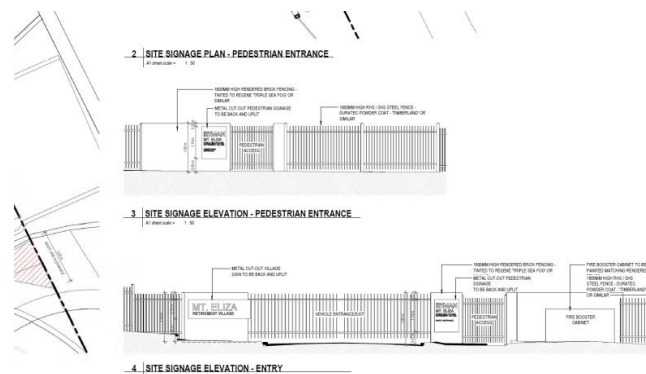


Figure 25 Signage plan

Source: Permit application, drawing DA35 Rev B

429 Whilst this component of the application was not contested by any party, we have reviewed the plans to assess the impact of the signs on the adjoining residential area to the east and green wedge land.

430 We find the backlighting of the signs on the 1.8 metres high fence will limit the level of illumination. These signs are suitably discrete and will not be

¹⁴⁶ Previous decision [385]-[386].

¹⁴⁷ Bestec, *Lighting Strategy Report* (5 August 2022).

¹⁴⁸ Bestec, Electrical Services – External Lighting, Drawing ESK-03, dated 4 October 2021.



distracting for vehicles and the residential properties opposite. The signs will also not be clearly visible from green wedge land to the south.

WHAT CONDITIONS ARE APPROPRIATE?

- 431 It will be no surprise that during a hearing of this length, various drafts of permit conditions were filed, adding to those originally filed by the Council. We provided opportunities for submissions on all draft conditions.
- 432 We will not add to the length of these reasons by including detailed findings about various proposed conditions. It suffices to state we have referred to various conditions throughout these reasons and we have carefully considered all parties' draft conditions. The conditions we consider appropriate are those set out in Appendix A.

NET COMMUNITY BENEFIT

- 433 The planning scheme contains a provision, headed 'integrated decision making', that a responsible authority should endeavour to integrate the relevant policies in a particular case and 'balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations'.¹⁴⁹
- 434 As is the case in many, if not most, planning proceedings, there are conflicting objectives in this proceeding. We have identified them throughout these reasons and we do not repeat them here.
- 435 The balancing task involves judgment and not a mathematical or 'tick a box' approach. In our judgment, the proposal has responded to the shortcomings of the previous scheme outlined by the Tribunal in the previous decision such that the scales have swung in favour of the proposal providing a net benefit to the community and for the benefit of future, particularly the elderly, generations.

CONCLUSION

- 436 For the above reasons, we will set aside the Council's deemed decision to refuse to grant a permit and we will grant a permit subject to conditions.

Geoffrey Code
Senior Member

Jane Tait
Member

¹⁴⁹ Planning scheme cl 71.02.



APPENDIX A

PERMIT APPLICATION NO	P21/1949
LAND	60-70 Konyung Road MOUNT ELIZA Victoria 3930

WHAT THE PERMIT ALLOWS

- Use for a residential aged care facility
- Use for a retirement village
- Demolition of buildings
- Construction of buildings and construction and carrying out of works
- Display of illuminated business identification signs
- Removal of native vegetation

CONDITIONS

Use of the land

- 1 The Residential Aged Care Facility and Retirement Village must be used in association with the Place of Worship.

Plans required

- 2 Before the use or development commences, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions. The plans must be generally in accordance with the amended plans specified in order 1(a) of the orders dated 28 December 2022 of the Victorian Civil and Administrative Tribunal in Proceeding P409/2022 but modified to show all of the following:
 - (a) Removal of Level 1 in Building A and consequential changes to the internal layout and external form of Building A, including a reduction in the number of car parking spaces in the basement, with all changes generally within the remaining three-dimensional footprint of Building A.
 - (b) Deletion of a minimum of 7.5 metres of the westernmost extension of Building C at Level 3 (at both the north and south facing accommodation) and corresponding eastwards relocation of the roof plant area and consequential changes to the internal layout of independent living units at this level.



- (c) An extended canopy structure in the south east corner of Building C as contemplated by Plan DA21 “C_Level 1 Floor Plan” prepared by SJB Architecture dated 28 September 2022.
- (d) Revision of the proposed layout and uses in the south east corner of Building C as contemplated by Plan DA20 “C_Ground Floor Plan” prepared by SJB Architecture dated 28 September 2022.
- (e) Consistency with the corrections and amendments shown on the plans prepared by SJB Architecture Pty Ltd drawings DA21 Rev C, DA39B Rev B & DA25 Rev D that were tendered during the hearing in proceeding P409/2022 before the Victorian Civil and Administrative Tribunal.
- (f) A heritage paint analysis, undertaken by a heritage conservation professional, to determine the original external finishes and colours of the masonry and joinery elements of the Moondah Manor.
- (g) Reinstatement of the original finishes and colours of the masonry and joinery elements of the Moondah Manor, or similar to the satisfaction of the Responsible Authority, in accordance with the heritage paint analysis.
- (h) The dining room addition to the west of the Bachelor’s Wing of the Moondah Manor to be a detailed in a manner that minimises the impact to extant heritage fabric during its installation or possible future removal.
- (i) A schedule of conservation works to Moondah Manor, including drawings and specifications.
- (j) The accessway to Building A must be increased in width and dimension to comply with clause 52.06 and AS2890.1:2004 – Off Street Car Parking.
- (k) All visitor car parking bays must be designed to clause 52.06 or AS 2890.1:2004 – Off Street Car Parking.
- (l) Vehicle swept path assessment to be conducted to show manoeuvrability to / from spaces accessed via the southern traffic aisle in Building C.
- (m) Dimensions of the traffic aisle and car parking spaces for the car park to Building D.
- (n) Dimensions of the traffic aisle and car parking spaces for the car park to Building E.
- (o) Vehicle swept path assessment to be conducted to show that a three point turn can be conducted within the access aisle to egress the basement in Building F. Dimensions of the traffic aisle and car parking spaces for the car park to Building F.

- (p) The deletion of vehicle kerb stops to car spaces in all locations where pedestrians may possibly walk through vacant car spaces.
- (q) Detailed design plans for the proposed crossovers, accessways, pedestrian network and car parking, to include, among other things:
 - i traffic control measures for the two-way access at the Moondah Gatehouse; subject to Heritage Victoria approval;
 - ii measures to ensure large vehicles only use the northern access point;
 - iii details of sight lines at the two access points and at internal intersection points between vehicle and pedestrian zones;
 - iv the width of accessways;
 - v the widths of pedestrian pathways and network;
 - vi gradients for the internal road network and basement ramps;
 - vii gradients for the internal pathways;
 - viii details of signage (including wayfinding signage);
 - ix details of line marking, access and ingress;
 - x details of lighting of the internal accessways and pathways;
 - xi details of traffic calming measures to ensure vehicles travel at appropriate speeds on the internal road network;
 - xii swept path diagrams where necessary (including for larger vehicles at the site ingress and egress);
 - xiii measures to prevent vehicles driving west of the basement entry to Building D; and
 - xiv details of measures to protect the port-cochere from passing traffic.
- (r) A car parking management plan to include, among other things:
 - i a full schedule of car parking spaces, with all car parking spaces to be allocated by use or, in the case of the independent living units, by individual unit, with all tandem spaces to be allocated to the same unit or to staff parking; and
 - ii details of the operation of the gates at the site access points.
- (s) Relocation of visitor car parking bays to be proximate to turning bays provided within basement car parks where practicable.
- (t) Any amendments necessary for consistency with the cut and fill plan approved under condition 5.

Approved development not altered

- 3 The use and development of the land, including the layout, the size and type of the development, the materials of construction and the staging of construction, on the endorsed plans must not be altered or modified without the prior written consent of the Responsible Authority.
- 4 All management plans endorsed under this permit must be implemented and complied with at all times to the satisfaction of the Responsible Authority, unless with the prior written consent of the Responsible Authority.

Cut and fill

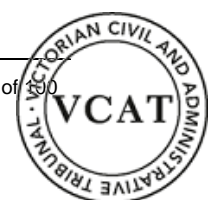
- 5 Before any earthworks start, a 'cut and fill' plan must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plan must show:
 - (a) Existing contours.
 - (b) Proposed contours with major contour intervals of 0.5 metres and minor contour intervals of 0.1 metres.
 - (c) Retaining walls and batters.

Heritage

- 6 Prior to their demolition, the Coach House and the Residential Wing of the Moondah Manor must be recorded photographically, both internally and externally to the satisfaction of the Responsible Authority. The recording must include archival quality photographic prints packaged with an associated site plan, description and history and high-resolution digital versions. The recording must be deposited with the Mornington Peninsula Library Service or other suitable repository to the satisfaction of the Responsible Authority.

Place of Worship

- 7 Unless with the prior written consent of the Responsible Authority, no more than 120 patrons may be accommodated within the Place of Worship at any one time.
- 8 Before commencement of the use of the place of worship, an updated Place of Worship Operational Management Plan must be prepared and submitted to the satisfaction of the Responsible Authority. The updated Place of Worship Operational Management Plan must be generally in accordance with the Place of Worship Operational Management Plan prepared by Ryman Healthcare (August 2022), but updated to include any amendments to the plans contemplated by Condition 2 of this permit.
- 9 The place of worship must be operated in accordance with the endorsed Place of Worship Operational Management Plan to the satisfaction of the Responsible Authority.

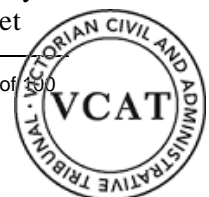


Screening

- 10 Prior to the occupation of each stage of the development hereby approved, all screening devices and fencing (internal and perimeter) as shown on the endorsed plans for that stage must be installed and maintained thereafter to the satisfaction of the Responsible Authority.

Native Vegetation

- 11 Before works start, a plan to the satisfaction of the responsible authority identifying all native vegetation to be retained and describing the measures to be used to protect the identified vegetation during construction, must be prepared and submitted to and approved by the responsible authority. When approved, the plan will be endorsed and will form part of this permit. All works constructed or carried out must be in accordance with the endorsed plan.
- 12 Within the area of native vegetation to be retained, the following is prohibited unless specifically provided for within the endorsed plans or reports required by this permit:
- (a) Any vehicle or pedestrian access, trenching or soil excavation, and
 - (b) Storage or dumping of any soils, materials, equipment, vehicles, machinery or waste products, and
 - (c) Entry or exit pits for underground services, and
 - (d) Any other actions or activities that may result in adverse impacts to retained native vegetation.
- 13 To offset the permitted clearing in accordance with Guidelines for the removal, destruction or lopping of native vegetation (DELWP 2017), the owner or permit holder must secure general offset of 0.006 general habitat units:
- (a) located within the Port Phillip and Westernport Catchment Management boundary or Mornington Peninsula municipal area
 - (b) with a minimum strategic biodiversity score of at least 0.472.
- 14 Before any native vegetation is removed, evidence that the required offset by this permit has been secured must be provided to the satisfaction of the responsible authority. This evidence must be one or both of the following:
- (a) an established first party offset site including a security agreement signed by both parties, and a management plan detailing the 10-year management actions and ongoing management of the site, and/or
 - (b) credit extract(s) allocated to the permit from the Native Vegetation Credit Register.
- 15 A copy of the offset evidence will be endorsed by the responsible authority and form part of this permit. Within 30 days of endorsement of the offset



evidence, a copy of the endorsed offset evidence must be provided to Planning Approvals at the Department of Environment, Land, Water and Planning Port Phillip regional office.

- 16 If the offset includes a first party offset(s), the owner or permit holder must provide an annual offset site report to the responsible authority by the anniversary date of the execution of the offset security agreement, for a period of 10 consecutive years. After the tenth year, the owner must provide a report at the reasonable request of a statutory authority.
- 17 Within 6 months of the conclusion of the permitted clearing of native vegetation under this permit, the offset requirements must be reconciled with the written agreement of the responsible authority and the Department of Environment, Land, Water and Planning.
- 18 Any clearing or construction activity associated with the works must be carried out in accordance with the with EPA Publication No. 275 Construction Techniques for Sediment Pollution Control (May 1991).
- 19 The construction site must be managed in accordance with EPA Publication No. 981 Reducing Stormwater Pollution from Construction Sites (May 2005).
- 20 Construction equipment, building materials, refuse and site run-off associated with construction activities must be contained and controlled and not permitted to impact on the beach or enter Port Phillip Bay.
- 21 If soil or cliff erosion, slumping or scouring of Moondah Beach occurs as a result of the development, remediation works must be carried out and completed to the satisfaction of DELWP.
- 22 On the adjacent Crown land foreshore, there must be no:
 - (a) storage of materials (including temporary stack sites) or spoil;
 - (b) truck turning areas;
 - (c) new entry points;
 - (d) parking of vehicles;
 - (e) vegetation removal; or
 - (f) buildings and works.

Vegetation removal

- 23 The extent of clearing of vegetation as shown on the endorsed plans must not be altered or modified without the prior written consent of the Responsible Authority.
- 24 All disturbed surfaces on the land must be revegetated and stabilised to the satisfaction of the Responsible Authority.



Landscaping

- 25 Before the commencement of development, a revised landscape plan must be prepared to the satisfaction of the Responsible Authority. The revised landscape plan must be generally in accordance with the Landscape Plan prepared by Urbis (August 2022), but amended to include the following:
- (a) Any amendments required as a result of changes contemplated in Condition 2 of this permit.
 - (b) A greater provision of shrubs within the zone five metres from the frontage immediately adjacent to Kunyung Road, to assist in filtering views towards the development.
 - (c) Landscaping within the pedestrian sightline triangle of the southern Gatehouse access point to be maintained at a maximum height of 900mm.
 - (d) A greater provision of local indigenous species.
 - (e) Details of the planter boxes within the buildings including the proposed species at the time of planting.
 - (f) Detailed plans of the bowling green.
- 26 Prior to the occupation of each stage of the development (or other time agreed to in writing by the Responsible Authority) the landscaping works shown on the endorsed plans must be carried out for that stage and completed to the satisfaction of the Responsible Authority.
- 27 The landscaping referred to in the previous condition must be maintained to the satisfaction of the Responsible Authority, including that any dead, diseased or damaged plants are to be replaced as soon as practicable.

Weeds

- 28 Before the commencement of development or a later date agreed in writing by the Responsible Authority, a Weed Management Plan for the Coastal Headland Scrub escarpment located in the west section of the site must be prepared to the satisfaction of the Responsible Authority. The Weed Management Plan must include:
- (a) Identification and assessment of the extent of high threat weeds in the study area;
 - (b) Proposed management actions and targets;
 - (c) A 10 year implementation and monitoring timetable; and
 - (d) Reporting and certification template.

The approved Weed Management Plan must be implemented and complied with to the satisfaction of the Responsible Authority.



Tree protection

- 29 Before the commencement of development, an Arboricultural Report which includes an Arboricultural Impact Assessment and a Tree Protection Plan (drawing, specification and certification procedure) for all trees on the subject site or adjoining land whose Tree Protection Zones (TPZ) fall within the proposed development footprint (including any associated buildings, works, fencing or services provision) must be prepared to the satisfaction of the Responsible Authority. The Arboricultural Report must:
- (a) be prepared by a Level V (AQF) Arborist in accordance with Australian Standard AS 4970-2009 Protection of trees on development sites;
 - (b) demonstrate how retained trees will be protected during all stages of development;
 - (c) provide recommendations, detailing the general and specific tree protection measures which must be implemented to ensure retained trees remain viable; and
 - (d) contain a 'certification' procedure and schedule.
- 30 The Tree Protection Zones (TPZ), Recommendations and Tree Protection Measures required by the approved Tree Protection Plan must be implemented, complied with and certified to the satisfaction of the Responsible Authority. Prior to the occupation of each stage of the development a final certified copy of the Tree Protection Plan demonstrating that compliance with the plan has been implemented and achieved, must be submitted to the Mornington Peninsula Shire Planning Department to the satisfaction of the Responsible Authority.
- 31 The owner and occupier of the site must ensure that, prior to the commencement of buildings and works, all contractors and tradespersons operating on the site are advised of the status of trees to be retained and are advised of any obligations in relation to the protection of those trees.
- 32 No trenching or soil excavation is to occur within the Tree Protection Zones of retained trees unless shown on the endorsed plans without the prior written consent of the Responsible Authority. No vehicular or pedestrian access, storage or dumping of tools, equipment or waste is to occur within the Tree Protection Zone during construction.

Waste

- 33 Before the commencement of development, an updated Waste Management Plan for the site must be prepared by a suitably qualified consultant and must be submitted to and approved to the satisfaction of Responsible Authority. The waste management plan must apply to all development and ongoing uses on the site. The waste management plan must detail the following:



- (a) The Owner arranging for private collection of waste, recyclables and green waste bins from within the property including:
 - i The proposed collection route through the development.
 - ii Location of bin storage areas.
 - iii Location of bin collection areas.
 - iv Swept paths and turning movements of vehicle to be used for the collection of bins from the designated bin collection areas.
 - v Collective service arrangements including the frequency and times of collection.
 - vi Names of contractors able to provide the required service.
 - vii Parking spaces being clear of the truck swept path
- 34 The collection and management of all waste on the site must be undertaken in accordance with the endorsed Waste Management Plan.

Development Engineering

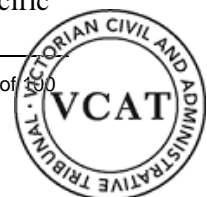
- 35 After the endorsement of Condition 2 plans and before any works associated with the development start, a signed and completed 'Checklist for Development Engineering Plan Approval' along with engineering plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. The plans must be drawn to scale with dimensions and must be emailed to the Responsible Authority in pdf format.

The plans must show:

- (a) All areas of the development being drained by means of an underground drainage system to retain a post-development 10% Annual Exceedance Probability storm event for the critical storm duration. Discharge from the site must be limited to an equivalent pre-development flow based on a 0.5 Exceedances per Year storm event for the critical storm duration and be connected to the existing outlet to Moondah Beach.
- (b) All surface areas of private open spaces being drained by a minimum 150mm diameter drainage pipe connected to the storm water system.
- (c) Floor levels of proposed dwellings and buildings based on flood mapping.
- (d) A drainage system on the site being designed to ensure storm water runoff exiting the site meets the current best practice performance objectives for stormwater quality, as contained in the Urban Stormwater Best Practice Environmental Management Guidelines (Victorian Stormwater Committee, 1999).



- (e) A drainage surcharge route within the development to avoid inundation of any dwellings.
 - (f) Details, including levels of all driveways, parking areas, lighting, footpaths and links within the site and at the intersections with Kunyung Road.
 - (g) Reinforced concrete vehicular crossings to Council standards, with any redundant crossing or vehicle laybacks being removed and replaced with kerb and channel, including reinstatement of the nature strip fronting the site.
 - (h) Sight distances for vehicles and pedestrians not being unduly restricted at the exits from site by fencing or landscaping works.
 - (i) Footpath links from the aged care facility to the proposed footpath network for the retirement village to facilitate access by staff, visitors and patients (in wheelchairs or mobility scooters).
 - (j) Cut and fill with depths to natural surface including any retaining walls, generally in accordance with the cut and fill plan approved under condition 5.
 - (k) Tree Protection Zones (TPZs) impacted by the works, or as shown on any other development plans and documents.
 - (l) Drainage works designed to avoid TPZs where possible.
 - (m) Proposed methodologies for complying with AS4970-2009 (Protection of trees on development sites) for any works that are required within TPZs.
- 36 Before the approval of engineering plans, drainage computations and documentation are required for:
- (a) The proposed drainage system.
 - (b) The consideration of any drainage catchment external to the development that may drain to the proposed drainage system.
 - (c) A MUSIC Report
- 37 Prior to the commencement of any works, a project-specific major staged Construction Management Plan (CMP) including construction sequencing must be submitted to and endorsed by the Responsible Authority. This CMP is to be based on the standard Major CMP template found on the Mornington Peninsula Shire's website. Staging must include all major elements of construction. When approved, the CMP will be endorsed and form part of the Planning Permit. The endorsed CMP must be implemented to the satisfaction of the Responsible Authority prior to and during the works.
- 38 Prior to the commencement of works for this development a project specific Construction Traffic Management Plan (CTMP) must be submitted to



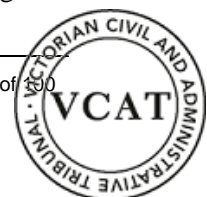
Council for approval. The CTMP must then be implemented to the satisfaction of the Responsible Authority prior to and during construction of the development.

Stormwater Management

- 39 Before the commencement of development, a Stormwater Management Report and Plan must be prepared to the satisfaction of the Responsible Authority. The Stormwater Management Report must show no works within the western portion of the site (as defined in condition 64) which require a planning permit.
- 40 Before the initial occupation of the development drainage works associated with that stage of the development must be constructed in accordance with approved engineering plans, and to the satisfaction of the Responsible Authority.
- 41 The owner must operate and maintain the drainage works including the on-site storm water detention and treatment system at their cost and must allow the system to be inspected by an authorised officer of the Responsible Authority from time to time. The owner must not modify the on-site storm water detention and treatment system without prior written approval from the Responsible Authority.
- 42 Before the initial occupation of any stage of the development, vehicle crossings and areas set aside for the parking of vehicles, access lanes and driveways as shown on the endorsed plans must be constructed in accordance with approved construction plans, surfaced with reinforced concrete or asphalt and drained to the satisfaction of the Responsible Authority.
- 43 Prior to the commencement of any works within Kunyung Road, the owner must lodge a bond to the value of \$50,000 with the Mornington Peninsula Shire to ensure Council has the ability to rectify any damages to Mornington Peninsula Shire Council assets caused by the development and to ensure works to be taken over for care and maintenance by Council are to Council's standards and specifications. On completion of all works within Kunyung Road to Council's satisfaction, completion of a 12 months defects liability period and rectification of any defects, the bond will be returned to the owner.

Car parking, access and transport

- 44 Car spaces, access lanes and driveways must be kept available for these purposes at all times.
- 45 Before the use starts in a stage, all car parking spaces in the stage must be line-marked and clearly signed to indicate if they are resident (and which residential aged care facility room or retirement village unit each parking



space is allocated to), visitor, accessible, staff or emergency vehicle parking.

- 46 The occupier and/or the owner must provide at least one adequately sized 'village bus' which must provide regular shuttle bus services for the residents to the nearby activity centres in Mount Eliza, Mornington and Frankston to the satisfaction of the Responsible Authority.
- 47 The occupier and/or the owner must ensure that deliveries and waste-collection are managed to ensure that they do not occur during peak school drop off (AM) and pick up (PM) times.

Environmentally Sensitive Design

- 48 Before the commencement of development, an updated ESD Report must be prepared to the satisfaction of the Responsible Authority. The updated ESD Report must be generally in accordance with the ESD Report prepared by LID Consulting (August 2022), with amendments to reflect any updates required as a result of changes to plans contemplated by Condition 2 of this permit.
- 49 All works must be undertaken in accordance with the endorsed ESD Report to the satisfaction of the Responsible Authority, and the approved uses and building must operate in accordance with this Plan, to the satisfaction of the Responsible Authority. No alterations to the ESD Report may occur without the written consent of the Responsible Authority.

Amenity

- 50 The occupier and/or the owner must not cause or permit unreasonable detriment to the amenity of the area to arise out of or in connection with the use of the premises.
- 51 Air-conditioning, external fans or other like plant equipment as shown on the endorsed plans must be installed, screened, baffled and maintained to prevent loss of amenity to the area by its appearance, noise emission or otherwise to the satisfaction of the Responsible Authority.
- 52 Before the commencement of development, an updated Acoustic Report must be prepared to the satisfaction of the Responsible Authority. The updated Acoustic Report must be generally in accordance with the Acoustic Report prepared by Marshall Day Acoustics (August 2022), with amendments to reflect any updates required as a result of changes to plans contemplated by Condition 2 of this permit.
- 53 Noise mitigation works must be carried out and must follow the recommendations outlined in the endorsed acoustic report to the satisfaction of the Responsible Authority.
- 54 Before the commencement of development, an updated Lighting Strategy Report must be prepared to the satisfaction of the Responsible Authority.



The updated Lighting Strategy Report must be generally in accordance with the Lighting Strategy Report prepared by Bestec (August 2022), with amendments to reflect any updates required as a result of changes to plans contemplated by Condition 2 of this permit.

- 55 The occupier and /or that owner must implement the lighting strategy in accordance with the endorsed lighting strategy report and plan to the satisfaction of the Responsible Authority.
- 56 The amenity of the area must not be detrimentally affected by the use or development, through the:
- (a) Transport of materials, goods or commodities to and from the land.
 - (b) Appearance of any buildings, works or materials.
 - (c) Emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil.

Environmental Health

- 57 All sewage and sullage must be discharged to the reticulated sewerage system to the satisfaction of the Responsible Authority
- 58 Prior to the occupation of the development, the owner or occupier of the land must enter into a Commercial Trade Waste Agreement with South East Water. Any trade waste infrastructure on the land must be located to the satisfaction of the Responsible Authority.

Accessways – fire protection

- 59 Accessways must be constructed to a standard so that they are accessible in all weather conditions and capable of accommodating a vehicle of 15 tonnes for the trafficable accessway width.
- 60 The average grade must be no more than 1 in 7 (14.4%) (8.1 degrees) with a maximum of no more than 1 in 5 (20%) (11.3 degrees) for no more than 50 meters. Dips must have no more than a 1 in 8 (12%) (7.1 degree) entry and exit angle.
- 61 Curves in an accessway must have a minimum radius of 10 metres.
- 62 Each accessway must provide a minimum trafficable width of 3.5 metres, be clear of encroachments 4 metres vertically and have no obstructions within 0.5 metres either side of the formed width of the road, to the satisfaction of the Responsible Authority.

Bushfire Management

- 63 Construction of buildings must be to a minimum Bushfire Attack Level (BAL) of BAL 12.5 in accordance with the relevant sections of AS3959-2009.



Western portion of the site

64 In this condition, ‘western portion of the site’ means that part of the land to the west of the proposed fence shown in a yellow dashed line on the landscape concept plan prepared by Urbis Pty Ltd dated August 2022 identified in order 1(a) of the orders dated 28 December 2022 of the Victorian Civil and Administrative Tribunal in Proceeding P409/2022.

No buildings and works must occur within the western portion of the site, unless those buildings and works do not require, or have otherwise been authorised by, a planning permit.

Before stage 1 is occupied, maintenance and repairs to the accessway to the Moonah Beach in the western portion of the site must be completed to the satisfaction of the Responsible Authority.

Accessibility Report

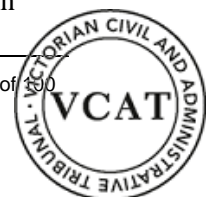
65 Prior to the endorsement of plans, an accessibility report must be prepared by a suitably qualified person and accredited access consultant and provide recommendations on access and mobility issues to the satisfaction of the responsible authority. Amongst other things, the accessibility report must provide for the following:

- (a) Confirm all buildings assist disability access to the building entry, lifts and common areas.
- (b) Detailed design of all accessible pathways and associated fixtures (e.g handrails and TGSIs and Kerb ramps) must be in accordance with the Australian Standards and suitable for use by people with limited mobility, including people using manual wheelchairs and mobility devices, as well as mobility scooters.
- (c) Accessible parking.

When submitted and approved to the satisfaction of the Responsible Authority the Accessibility Report and associated annotated plans will be endorsed and form part of this permit.

The recommendations of the plan for each stage of the development must be implemented to the satisfaction of the Responsible Authority prior to the occupation of that stage of the development. No alterations to the Accessibility Report may occur within the prior written consent of the Responsible Authority.

66 Prior to the issue of a Certificate of Occupancy for a stage of the development, a report from the author of the Accessibility Report, approved pursuant to this permit, or similarly qualified person or company, must be submitted to the Responsible Authority. The report must be to the satisfaction of the Responsible Authority and must confirm that all measures specified in the Accessibility Report have been implemented in accordance with the approved report.



Road safety audit

- 67 Before any one of the uses starts, a Road Safety Audit must be submitted to and approved by the Responsible Authority and any recommendations of the Road Safety Audit must be implemented to the satisfaction of the Responsible Authority.

Signage

- 68 All signs must be designed to a professional standard, constructed and maintained in good condition to the satisfaction of the Responsible Authority.

Completion

- 69 Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

Expiry

- 70 This permit will expire if one of the following applies:
- (a) The development is not commenced within 3 years of the date of this permit.
 - (b) The development is not completed within 8 years of the date of this permit.
 - (c) Each of the uses is not commenced within 2.5 years after the completion of the development.
 - (d) One of the uses is discontinued for a period of two years.

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

– End of conditions –



VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**PLANNING AND ENVIRONMENT LIST**VCAT REFERENCE NO. P1362/2020
PERMIT APPLICATION NO. P19/2453**CATCHWORDS**

Special Use Zone – Land outside Urban Growth Boundary – Proposed aged care and retirement facility – “In association with” Place of worship – Heritage mansion and grounds – Built form – Impacts on local and broader traffic network – Interface with Kunyung Primary School – Ecological and landscape values

APPLICANT	Ryman Healthcare (Australia) Pty Ltd
RESPONSIBLE AUTHORITY	Mornington Peninsula Shire Council
REFERRAL AUTHORITIES	Department of Environment, Land, Water and Planning
RESPONDENTS	National Trust of Australia (Victoria), David Anthony Quinn, Genevieve Adams, Elizabeth Sheffield & Others, Ian David Morrison & Others, Leanne Ennis, Frank Mangan, Klaus C Albert, Save Sir Reg's Wedge Inc, Daan Spijjer, Sally Trewenack, Leigh Eustace, David Morris MP, South Eastern Centre for Sustainability Inc, Rosemary West OAM, Green Wedges Guardians Alliance Inc (Green Wedges Coalition)
SUBJECT LAND	60-70 Kunyung Road MOUNT ELIZA VIC 3930
HEARING TYPE	Hearing
DATES OF HEARING	15, 16, 17, 18, 19, 30 and 31 March, 1, 6-9 April and 3, 4 and 6 May 2021
DATE OF ORDER	1 July 2021
CITATION	Ryman Healthcare (Australia) Pty Ltd v Mornington Peninsula SC (corrected) [2021] VCAT 711



ORDER

Substitution of amended plans

- 1 Pursuant to 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:

Drawing numbers (incl. revisions and dates):

- DA00-DA70, VCAT Issue, (Rev. A) January 2021

Determination of proceeding

- 2 In Application P1362/2020 the decision of the responsible authority is affirmed.
- 3 In permit application No. P19/2453 no permit is granted.

Dalia Cook
Presiding Member

Rebecca Cameron
Member



APPEARANCES

For applicant

Mr Christopher Townshend QC with Ms Jane Sharp of Counsel instructed by Minter Ellison Solicitors. They called expert evidence from:

- Ms Amanda Ring, Town Planner, SJB Planning
- Mr Chris White, Engineer, Adams Consulting
- Ms Catherine Wells, Retirement and Aged Care Consultant, O'Hara Wells Pty Ltd
- Mr Jim Gard'nr, Architect and Heritage Consultant, gjm heritage
- Mr Bernard McNamara, Town Planner, bmda Development Advisory
- Mr Aaron Organ, Ecologist, Ecology and Heritage Partners
- Mr Simon Howe, Arborist and Landscape Heritage Consultant, Tree Department Pty Ltd
- Mr Darren Atkinson, Landscape Architect, Urbis
- Mr Stephen Hunt, Traffic Engineer, Ratio Consultants
- Mr Daniel Flood, Photomontage Developer, Flood Slicer
- Mr Mark Sheppard, Urban Designer, Kinetica



For responsible authority	<p>Mr Barnaby Chessell of Counsel instructed by Marcus Lane Group. He called expert evidence from:</p> <ul style="list-style-type: none">• Mr Robert McGauran, Architect and Urban Designer, MGS• Ms Natica Schmeder, Architectural Historian and Buildings Conservator, Landmark Heritage Pty Ltd• Dr Christina Dyson, Landscape Heritage Specialist, Context• Mr John-Paul Maina, Traffic Engineer, Impact
For Department of Environment, Land, Water and Planning	No appearance
For respondents	<p>Mr Daniel Epstein of Counsel with Mr Daan Spijjer, Solicitor for Save Sir Reg's Wedge Inc. They called Dr Jeff Yugovic, Ecologist, Jeff Yugovic Consulting, to give expert evidence.</p> <p>Mr David Quinn, Ms Genevieve Adams, Ms Pamela King, Ms Elizabeth Sheffield, Mr John Karakitsos, Mr Greg Hooper, Ms Leanne Ennis, Mr Frank Mangan, Mr Klaus Albert, Mr Leigh Eustace, Ms Judy Walsh, Mr David Morris MP and Ms Rosemary West made submissions to the Tribunal while numerous other objectors observed the hearing.</p>



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INFORMATION

Description of proposal	<p>Residential aged care facility and retirement village in association with a place of worship</p> <p>The application proposes to restore core parts of the Moondah Mansion and to extend it for adaptive reuse.</p> <p>A total of seven buildings are proposed, including 82 residential aged care rooms, 48 assisted living suites and 181 independent living units.</p> <p>A stand alone single storey place of worship would be developed in a central location.</p> <p>Communal facilities would include a bowling green, swimming pool, activities area, beauty salon, café and lounge.</p> <p>A total of 357 car parking spaces would be distributed across the land in a combination of basement and at grade bays.</p>
Nature of proceeding	<p>Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.</p>
Planning scheme	<p>Mornington Peninsula Planning Scheme</p>
Zone and overlays	<p>Special Use Zone (Schedule 2)</p> <p>Heritage Overlay (Schedule 110 and Schedule 111 over part)</p>



Permit requirements	<p>Use of the land for a Residential Aged Care Facility and Retirement Village - Clause 37.01-1</p> <p>Construction of a building or construction or carrying out works – Clause 37.01-4</p> <p>Demolition and alteration of heritage buildings, construction of buildings and works, display of signage and tree removal - Clause 43.01-1</p> <p>Reduction in car parking spaces (for Place of Worship) – Clause 52.06-3</p> <p>Removal, destruction or lopping native vegetation – Clause 52.17-1</p> <p>Construction and display of signage - Clause 52.05-13.</p>
Key scheme policies and provisions	<p>Clauses 11, 12, 13, 15, 16, 17, 18, 19, 21 (Municipal Strategic Statement), 22.04 (Heritage Places and Abutting Land), 22.05 (Aboriginal Cultural Heritage), 22.10 (Advertising Signs), 22.11 (Mornington Peninsula Fire Protection) and Clause 65.</p>
Land description	<p>The land is the site of a former grand bayside mansion estate of approximately 8.9 hectares. The Moondah mansion and some of its outbuildings have local heritage value, with the state significant Moondah gatehouse at the entry to the property.</p> <p>The land contains a large number of established trees and other vegetation, including open lawns. It also hosts significant native vegetation in the mostly undeveloped portion of the site which slopes steeply towards Moondah beach. Title to the land extends to part of the foreshore, with stormwater draining from the property to a concrete outlet on the beach.</p>



Tribunal inspection

The Tribunal conducted an accompanied inspection of the subject land and an unaccompanied inspection of external areas of Kunyung Primary School on the second day of the hearing. In addition, it conducted an unaccompanied inspection of the subject land and its broader setting, including residential properties and vantage points nominated by parties as well as the local road network between the latter parts of the hearing.



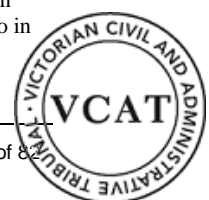
REASONS¹

INTRODUCTION:

- 1 Moondah Estate is a large and gracious seaside mansion property overlooking Moondah Beach. It was developed as a holiday home and later used for a residential hotel, then adapted and extended for the Mount Eliza Business School. It is currently vacant.
- 2 More recently, the land was purchased by Ryman Healthcare (Australia) Pty Ltd (Ryman), an experienced aged care provider with New Zealand origins. Ryman proposes to redevelop the land including restoration of part of the Moondah mansion for use as a residential aged care facility and retirement village in association with a place of worship.
- 3 Important aspects of the land's context is its location immediately outside the Urban Growth Boundary (UGB) with Green Wedge land to one side, as well as its adjacency to the Kunyung Primary School within a broader bayside residential setting.
- 4 These unique characteristics contributed to strong opposition by a number of local residents to the character, scale and intensity of the proposal.
- 5 Mornington Peninsula Shire Council (Council) determined to refuse to grant a permit for reasons including, in summary:
 - lack of compliance with planning policy since the proposed design, scale and vegetation loss is inconsistent with the context of the site, its interfaces and surrounding character;
 - the proposal would detrimentally affect coastal character and the visual and scenic qualities of the coastline;
 - there would be an unacceptable loss of habitat;
 - the proposal would adversely affect the significance of the heritage place;
 - the proposed pedestrian network is inadequate and on site car parking has not been suitably addressed. The proposed uses also may also necessitate mitigating works to the surrounding road network; and
 - the proposal would result in significant social effects².
- 6 Ryman sought review of this decision. It emphasised the Special Use zoning of the land, the lack of overlay controls (other than heritage) and the site specific exemption from the core Green Wedge planning provisions of the Mornington Peninsula Planning Scheme (planning scheme).

¹ The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

² By reference to section 60(f) of the *Planning and Environment Act 1987*.



- 7 Ryman sought to demonstrate the amended proposal represented a suitable response to planning policy and the land's context since it would respect landscape and coastal character, would not create unreasonable visual impacts (from public vantage points in particular) and would significantly enhance the heritage values of the Moondah mansion as part of its adaptive reuse.

Key considerations

- 8 It is clear that this land provides a spectacular setting for a future use, particularly for aged care. The suite of uses proposed have the capacity to generate significant community benefit from this strategic site.
- 9 The restoration and adaptive reuse of the Moondah mansion is highly desirable as part of any future redevelopment.
- 10 However, the suitability of the development also needs to be carefully considered in light of the notable open and vegetated qualities of this land, particularly in light of its strategic designation in the planning scheme. This raises complex considerations for our determination, reflected in divergent expert evidence and submissions.
- 11 Central issues include:
- Can planning permission be granted for the proposed uses?
 - Is the proposed use and development consistent with key policy directions?
 - Does the proposal respond appropriately to the heritage values of the site?
 - Has built form been appropriately configured and designed to respond to site features including its interfaces?
 - Does the proposal respect the landscape and ecological values of the site?
 - Could infrastructure including parking and traffic impacts be managed suitably?
 - How should net community benefit be evaluated in this case?
- 12 Ultimately, we are called upon to balance competing policy objectives in the planning scheme to achieve net community benefit and sustainable development.³

Summary of conclusions

- 13 We conclude that the proposed uses are lawful. On the basis of the application material and evidence, we find that the use of the land for both the residential aged care facility and retirement village would be in

³ Clause 71.02-3.



association with the proposed place of worship, meeting the requirements of Schedule 2 to the Special Use Zone (SUZ2).

- 14 Likewise, notwithstanding the location of the land outside the UGB, we conclude there is scope for the specific non-urban uses proposed for this land by virtue of the Special Use Zone controls and corresponding exemption from the core Green Wedge planning provisions. The land also has an important history of institutional use which is supported by the current planning controls.
- 15 The proposal would positively facilitate the reuse of a heritage property, with consequential improvements to the condition of key heritage fabric. On balance, we consider the applicant has provided suitable justification for the demolition of some primary and contributory heritage fabric. We would also support a number of new additions as suitably respectful of the key heritage values of the site, including the addition of new wings to the mansion building.
- 16 However, we consider that the siting and scale of two proposed buildings would unreasonably detract from heritage values of the site and from the open landscape setting that reinforces the mansion as a key local landmark.
- 17 Although the uses would have the potential to result in community benefit, we consider that priority needs to be given to these site specific policy directions over more general policy directions such as those favouring increased provision of housing and health facilities including aged care services. This is especially the case where the land is not in a preferred location for such services.
- 18 There are opportunities for this site to be developed for the proposed uses in a more intensive format than existing. However, we are not persuaded that the configuration and consistent 3-4 storey scale of buildings proposed is suitably site responsive, especially on parts of the land with a currently open character.
- 19 We also consider Ryman has downplayed the impacts of the effects on this bayside estate in its entirety by seeking to place much higher emphasis on parts of the development visible from the public realm.
- 20 Overall, we find that the application has given disproportionate reliance to the zone controls without sufficient recognition and respect for the location of the land outside the UGB and outside a designated township. Although the exemption from the core Green Wedge provisions facilitates a broader range of institutional uses on this site, there is a need for sensitive site layout and building design to achieve other key policies for this land.
- 21 We find that the particular configuration and siting of the proposed campus of buildings across the site would not suitably achieve central policy directions for the land, which include the protection of the inter-urban break between Mount Eliza and Mornington and sensitive interface conditions to the Green Wedge Zone.



- 22 An integrated approach to redesign would need to be taken to site configuration together with building scale or design in light of policy objectives to achieve an acceptable outcome for this land.

LAWFULNESS OF THE PROPOSED USE⁴

Is the proposed use of the land permissible under the zone controls?

- 23 Phrasing the question of law positively, the question is whether the uses of land proposed in the amended application namely, a residential aged care facility and retirement village, are permissible under applicable planning controls.⁵
- 24 The answer depends on whether the conditions in the relevant table of uses in the zone controls would be met. It also involves a question of mixed fact as to whether the proposal, properly characterised, includes a place of worship.
- 25 The subject land is included in the SUZ2 which is expressed to apply to Private Sportsgrounds, Religious, Health and Educational Establishments.⁶ The purpose of the schedule is to “recognise strategic sites that contain recreational, religious, health or educational facilities that performs (sic) a significant community function”.
- 26 Much was said by parties about the history of this zoning, but we do not find any aspect determinative since we are obliged to apply the planning scheme provisions as we find them at the date of our decision. Put simply, it appears that at least one of these facilities existed on each SUZ2 parcel of land at the time the new format planning scheme was introduced, and it was considered no other zone would provide a suitable fit. The subject land hosted an educational facility at that point in time.
- 27 Residential aged care is defined in Clause 74 of the planning scheme as:
- Land used to provide accommodation and personal or nursing care for the aged. It may include recreational, health or laundry facilities and services for residents of the facility.

It is clear to us that the aged care facility proposed in this application would meet this definition, noting also that it proposes a wide range of recreational and health services for residents.

- 28 Retirement village is defined as:

⁴ The parties identified a question of law in the lead up to the hearing. The Tribunal made directions at the conclusion of a compulsory conference for written submissions to be circulated on this question. Leave was granted by the Tribunal for confined additional submissions and evidence to be led on this issue at the hearing.

⁵ Member Cook has determined this question of law as a legal practitioner.

⁶ This zoning was applied in 1999.



Land used to provide permanent accommodation for retired people or the aged and may include communal recreational or medical facilities for residents of the village.

Given the integrated nature of the uses and facilities proposed, substantial communal recreational and medical (health) facilities would be provided for residents with a broad range of levels of care.

- 29 The table of uses at Clause 1.0 provides that the following are section 2 (permit required) uses:

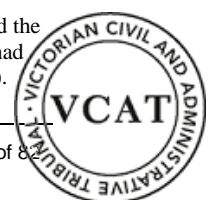
Residential aged care facility	Must be used in association with an Education centre, Minor sports and recreation facility or Place of worship.
Residential building	Must be used in association with an Education centre, Minor sports and recreation facility or Place of worship.
Retirement village	Must be used in association with a Place of worship.

- 30 Therefore, a permit may be granted for a residential aged care facility provided that the condition is met; requiring it to be “used in association with an Education centre, Minor sports and recreation facility or Place of worship”. A more confined condition applies to the use of land for a retirement village, which must be used “in association with a Place of worship”.⁷
- 31 The term “in association with” is not defined in the planning scheme. This permit application relies on demonstrating an association with the use of land for a proposed place of worship, which is intended to operate from a dedicated new building.

Party positions

- 32 The applicant submitted that the requirements within the table of uses would be met and could further be secured through a condition of a permit, if granted.
- 33 Mr Townshend QC and Ms Sharp submitted for Ryman that “the term *in association with* does not require one or other use to be a dominant or ancillary use; rather, an association is required between the two”. They further submitted that even if one use is dominant, this does not disqualify a relationship of association between the two uses.
- 34 Applying the ordinary meaning of the term “in association with”, they considered that the residential aged care facility and retirement village must be “joined, combined or connected with the Place of worship”.

⁷ This wording is the outcome of Amendment C254 approved in October 2019 which reinstated the use of Residential aged care facility as a section 2, permit required use (noting that such use had inadvertently become prohibited after earlier changes to the ‘nesting’ provisions of the VPPs).



- 35 Ryman suggested this connection would arise on account of these uses being part of the same permit application for a singular site by the same applicant and manager. It also emphasised their functional and practical connection since the place of worship would serve the community of the residential aged care facility and retirement village (in addition to being open to the general public by invitation).
- 36 Ryman’s experts also confirmed that the place of worship had been shifted to a central location in the amended plans and would now be physically well integrated with key parts of the facility, including the reception and communal facilities.
- 37 Council generally accepted that the amended proposal would meet the requirement for both uses to be “in association with a Place of worship”. Notwithstanding, it suggested that the primacy of the aged care/retirement uses on the land should inform an assessment of appropriate scale and intensity of redevelopment in the exercise of the Tribunal’s discretion to grant a permit.
- 38 Since the place of worship was designed principally to service residents of the proposed uses (as opposed to members of the general public) and to provide pastoral care, Council suggested it should be characterised as ancillary to those two uses. It considered that the nature and extent of the association would depend on its operation in practice, and suggested Ryman should demonstrate the place of worship was “more than a device to legitimise what would otherwise be a prohibited planning proposal”.
- 39 Ryman distinguished cases referenced by Council⁸ on the basis that they concerned the term “in conjunction with”, being a defined provision with different terminology. I accept this analysis.
- 40 By contrast, a number of objectors submitted that the uses of the land proposed would not meet the mandatory condition in the zone controls and would be prohibited as a result. They expressed concern that the proposal was using a “loophole” to establish an aged care facility as the primary use of the land. Mr Spijer and Mr Mangan outlined objectors’ key points on the question of law that:
- the primary use of the land must be as a place of worship to meet the implied requirement of the condition – i.e. the use of the land for a residential aged care facility and retirement village must be in association with the place of worship, rather than the other way around;
 - the proposed use of the land as a place of worship would be minor and insufficient;

⁸ Such as *Jinalec v Mornington Peninsula Shire Council* [2007] VCAT 1238.



- alternatively, if the place of worship would be an ancillary use to the proposed uses, it must already exist on the land (for reasons including the wording of the purpose to the zone schedule);
 - the proposed use of the building identified cannot properly be characterised as a place of worship as this term is defined in the planning scheme; and
 - the proposed use would not be consistent with the purpose of the schedule to the zone since the use of the land for a place of worship would not “perform a significant community function” i.e. to the wider community.
- 41 We distinguish the decisions referred to by Mr Spijer in submissions for a number of reasons. For the most part, in these examples, this term was imposed in permit conditions by the responsible authority or the Tribunal rather than stemming from a planning scheme requirement as it does in this case. We are also not persuaded that it was integral to the Tribunal’s reasoning in those cases that for a use to be “in association with” another use, it necessarily had to be ancillary.
- 42 Ryman disputed the objectors’ interpretation of the requirement. It also submitted that the proposed use of the land for a place of worship, residential aged care facility and retirement village would “sit comfortably” within the purpose of the schedule to the zone.

Tribunal findings

- 43 It is critical that the term “in association with” is not defined in the planning scheme. Therefore, it must be given its ordinary meaning in line with accepted principles of statutory interpretation.⁹
- 44 This must be distinguished from the term “in conjunction with” – a term used in the Green Wedge Zone for example and which is the subject of a specific provision (below) requiring a sufficiency of connection, being the subject of extensive case law.

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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.

- 45 The Macquarie Dictionary online provides a relevant meaning for the term “association” as “connection or combination”. The Oxford dictionary online includes a relevant meaning as “the action of conjoining or uniting one person or thing with another”.

⁹ For example, *Australian Education Union v Dept of Education and Children’s Services* [2012] HCA 3;(2012) 285 ALR 27; *SGRC Pty Ltd v Melbourne CC & Ors* [2014] VSC238; *Hartel & Ors v Macedon Ranges SC & Ors* [2014] VSC 215.



- 46 It is also highly relevant that an integrated facility is proposed encompassing all uses. Considering the application material as a whole, I find there would be multiple types of association between the use of the land for a place of worship and the proposed uses of residential aged care and retirement village. Key associations would include:
- the principal function of the place of worship would be to serve the religious needs of residents of the facility and their guests;
 - operational relationships would be created between the place of worship and the aged care uses, including pastoral and spiritual care; and
 - there would be a clear physical integration between the uses, with the place of worship uniquely designed and centrally located on the site proximate to key communal facilities.
- 47 As a matter of timing, the staging plan demonstrates that the place of worship would be constructed early in the development of the facility as a whole.
- 48 Although some objectors doubted the genuineness of the proposal or whether a place of worship would have been provided in the redevelopment scheme absent a planning scheme requirement, I note that it is not uncommon for this particular operator to facilitate such use as part of its aged care facilities in both Australia and New Zealand.
- 49 The planning scheme as drafted requires the uses of land to be “in association with” a place of worship. It would not be appropriate for the Tribunal to read in a requirement for minimum sufficiency of this association, especially where it is not a defined term. One exception may be if the association is illusory (and therefore not validly established), which I do not find is the case here.
- 50 I would not put it so high as to suggest the place of worship will be the primary use of the land, but I find this is not required to meet the condition for permitted uses. I contrast this with conditions in other zone controls that require one use to be ancillary to the other or in conjunction with another.
- 51 In practise, given the scale and nature of modern aged care and retirement facilities, it would be unusual to contemplate a situation where a place of worship could readily be characterised as the dominant use of land, especially where a private operator is involved (as distinct from a religious or governmental organisation which may have a different imprimatur). This is consistent with the provisions of planning schemes focusing on the conduct of uses irrespective of the nature of the operator and the reference in this zone schedule to “private” establishments.
- 52 It is also relevant to consider the purpose of the schedule in evaluating whether there will be an association between the proposed uses. I am satisfied there is a clear capacity for religious, recreational and health



facilities to be established on this strategic site through the combination of uses proposed (including the place of worship) that would provide a significant community function.

- 53 There was debate at the hearing as to whether the facilities performing a significant community function needed to already exist on the land (as submitted by the objectors) or whether new facilities could be contemplated.
- 54 I am unable to accept the objectors' submission that a place of worship must already exist on the land for the other uses to be permissible, or that this is a necessary implication from the drafting of the purpose to the zone schedule.
- 55 While I accept that the purpose of the SUZ2 was principally crafted to reflect existing uses on these sites, it is inherent in the operation of the controls in the schedule that new facilities *can* be contemplated for approval on this land. This proposal falls into such a category – while originally recognised for the former educational facility on the land, its future use for a significant community function cannot realistically be frozen in time to only that category of use. This is borne out by the objectives of planning in Victoria to provide for the fair, orderly, economic and sustainable use and development of land, to secure a pleasant, efficient and safe living and recreational environment as well as to balance the present and future interests of all Victorians.¹⁰
- 56 For completeness, I note submissions by some objectors that they were informed there was a restrictive covenant applying to the land that would constrain its use to education, religion, religious-based aged care or primary production. However, parties were unable to provide evidence of such a restrictive covenant either historically or currently attaching to the title. On this basis, I am unable to place any weight on expectations that may have arisen upon the sale of this land to its current owner.

Does the application include a place of worship?

- 57 Place of worship is defined in Clause 74 of the planning scheme as:

Land used for religious activities, such as a church, chapel, mosque, synagogue, and temple.

This land use is included in the land use category Place of assembly.

- 58 Objectors submitted that the proposed use of the building identified as the place of worship would not meet this planning scheme definition. At best, they suggested it would meet the definition of a place of assembly (providing cultural activities, entertainment and meetings) but would fall short of having a real and substantial purpose as a place of worship.

¹⁰ Per section 4 of the *Planning and Environment Act 1987*.



- 59 For example, Mr Mangan referred to the terminology used in the application material and submitted that “the proposed facility does not, in my submission, present as a church building, is not operated by a church organisation, is unlikely to have regular services comparable with those mentioned above and is not accessible to the public”. In his view:

The applicant cannot give any reasonable assurance that the building will be primarily used for religious activities. In fact, no assurance can be given for such activity at all. Once the development is built it will be the residents of the village who will vote with their feet and determine together with management the actual use of the building...

It is in fact not a church but a facility that is ancillary to the retirement village, where the retirement village community can undertake communal activities that may well, and rightly so include religious activities, but are also likely to include social meetings, celebrations, cultural and recreational activities and the like... The facility is in this respect no different from the bowling green provided for the village residents.

- 60 The amended application proposes a contemporary building with a flexible layout to be used as a place of worship for multi-faith use. The draft Place of Worship Operational Management Plan provides that it would have a maximum capacity of 120 people, be open each day between 9am and 5pm for residents and visitors. Access to the general public would be at management’s discretion.¹¹ It has been designed in a way that could facilitate its use for conventional services, religious study or related activities as well as use for special events such as weddings, funerals, baptisms and the like.
- 61 The draft Operational Management Plan includes the following description of the proposed use (noting that the use of the land for a place of worship is as-of-right in the SUZ2):

The Village includes a formal building which is flexible enough to meet multi faith needs but also adaptable where possible to meet the needs for specific religious services. Incoming residents will be consulted as to their needs and the Village will work to achieve outcomes that suit residents on an occasional or more regular basis depending on demand and availability of religious leaders. Consultation will also occur directly with religious organisations to provide services within the Village including virtual attendances where appropriate...

Weekly services will be conducted by various religious organisations and will be organised for residents by village staff. Capacity, room configuration and service type will be coordinated based on worship and resident requirements. A minimum of two (2) services including a Sunday service and a mid-week service, and one(1) study group will be conducted each week. Additional services will be organised based

¹¹ Included in Appendix B to the updated expert traffic report.



on demand. Village residents may also organise services and study groups with their select denomination as well as individual blessings. Residents may also use the PoW for individual or group prayers sessions. All denominations will be welcomed within the PoW for all services and, over time it is anticipated that the PoW will accommodate a range of religious denominations accordingly to community demand.

62 Ryman submitted that the real and substantial purpose of the building would be for use for religious activities and would therefore meet the characterisation of a place of worship as evidenced by:

- Its siting, design and layout;
- Its dedicated purpose to be used for religious activities for members of varying faiths;
- The design, externally and internally, for community and congregational gatherings;
- The architectural plans show that it will be identifiable, externally and internally, as a place of worship;
- The management proposal and pertinent operational conditions;
- The separate cost dedicated to the place of worship building is substantial (at an estimated cost of \$2,500,000);
- Whether or not the place of worship is confined to residents of the residential aged care facility and the retirement village or the broader community does not change its proper categorisation; and
- The categorisation of the use focuses on the use, and the activities constituting the use, and not on the occupiers or licencees (sic) and therefore the identity of the users or the religion they practice does not define whether the land is, in fact, a place of worship.

63 On the whole, I find this element of the application demonstrates a sufficient intention for the real and substantial use of the proposed building to operate as a proposed place of worship, centering around religious activities.

64 It is premature to expect all operational details for this place of worship to be pre-determined. Some flexibility is appropriate to cater for the ongoing religious needs and preferences of the residential community to be established on the land.

65 Likewise, there is no requirement that the place of worship be open to all members of the general public under the provisions of the planning scheme. The fact it is principally intended to serve the extensive community that would reside within the facility and their guests is sufficient.



- 66 The parameters for the use of this building could be secured through a permit condition for an Operational Management Plan as an ongoing requirement, even potentially to require a record of usage to be kept to confirm its primary use for religious purposes. Notwithstanding the fact the place of worship is itself an as-of-right (no permit required) use, I consider there may a sufficient nexus in this application to justify such a condition being applied.
- 67 Similarly, the applicant proposes a condition requiring the use of the land to be in association with the place of worship. This is essentially confirmation of the schedule requirement in the permit itself.
- 68 Some objectors considered that the use of the building for a place of worship would preclude its use for activities such as choir practice or Probus, Rotary and Lions Club meetings or similar (as suggested by Ryman).
- 69 I appreciate objectors' concerns there is potential for the building to be used for other purposes, not just religious purposes. In reality, it is not uncommon for places of worship to be used for functions and activities for the community they serve, such as a bridge club, performances or talks. So long as their real and substantial purpose remains the use of the land for religious activities, other ancillary uses will be permissible.
- 70 For the reasons above, I find that the grant of a permit for both the use of the land for residential aged care and a retirement village would be lawful in association with the proposed place of worship.

RESPONSE TO PLANNING POLICY AND CONTROLS

What are key policy aspirations of relevance?

- 71 We turn now to policies relevant to the exercise of the Tribunal's discretion as to whether the proposal is acceptable and warrants a planning permit in the context of its physical setting.
- 72 The parties took very different approaches to answering this question. Both Council and the applicant submitted that the other had misconstrued the provisions of the planning scheme in its application to this land. The objectors' position was substantially aligned with Council.

Policies outlined in the State Planning Policy Framework (SPPF) and Local Planning Policy Framework (LPPF)

- 73 Council and many objectors emphasised the significance of the land being outside the UGB and the Mt Eliza township. They pointed out that irrespective of its Special Use zoning, the land has the status of 'green wedge land' for the purpose of Part 3AA of the *Planning and Environment Act 1987* and its designation outside the UGB could only be varied by Parliament.



- 74 In our view, settlement policies in Clause 11 of the planning scheme are particularly pertinent to this land. A key strategy in Clause 11.01-1S is “to maintain a permanent urban growth boundary around Melbourne to create a more consolidated, sustainable city and protect the values of non-urban land”. Clause 11.01-1R seeks to “protect green wedge land from inappropriate development”.
- 75 Other key policy themes relating to this application as summarised in submissions and evidence for the parties relate to:
- a desire to protect and enhance environmental values including coastal landscapes (including in Clause 21.08). One strategy to protect and enhance natural ecosystems and landscapes is to contain development in coastal locations to existing settlements, specifically avoiding further linear development along the coast;
 - a strong emphasis on preserving neighbourhood character, noting that the municipality forms part of a distinctive area of state significance as recognised in Clause 11.05-2;
 - the need to protect, maintain and reasonably adapt heritage assets;
 - providing housing and specialised facilities for a growing and ageing population; and
 - addressing infrastructure demands of new development in a sustainable way.
- 76 The Municipal Strategic Statement addresses settlement planning at a more fine grain level. From our perspective, a central policy issue is the critical role to be played by inter-urban breaks between townships.
- 77 A central consideration in our decision making is the observation in Clause 21.02 that “[the] settlement pattern and the relationship between the townships, the coast and the rural landscape contribute to the Peninsula’s distinctive “sense of place”. We consider this statement also summarises what is most distinctive and valued about this particular estate in its physical context.
- 78 Clause 21.04 provides a Strategic Framework Plan for the municipality and identifies major strategic directions which include reinforcing the hierarchy of towns and villages and defining township growth boundaries as a means of focusing future development in the major towns. It also seeks to recognise and protect strategic landscape areas between and around townships, due to their strong influence on the Peninsula’s sense of place.
- 79 Clause 21.06 seeks to carefully manage demand for housing, to be integrated with the achievement of other major planning objectives including conservation and recreation. It identifies that:
- It is necessary to distribute future population growth in support of major township development, rather than allowing ad hoc expansion or dispersed population growth throughout the Peninsula’s rural area.



This requires clear definition of growth areas and township boundaries, including the “green break” between the Peninsula and metropolitan Melbourne.

- 80 A relevant objective is to establish an integrated land use pattern recognising the regional role and character of the Peninsula and to ensure urban development does not prejudice environmental, recreational or agricultural values. Pertinent strategies in Clause 21.06 include:
- Define clear and stable township boundaries which:
 - Maintain a clear separation or “green break” between metropolitan Melbourne and the Peninsula.
 - Reinforce the clear separation between Mt Eliza and Mornington.
 - Recognise the character and ‘sense of place’ of individual towns, including the relationship between towns, coastal areas and the rural hinterland.
 - Avoid the extension of urban development into areas of high agricultural and landscape value.
 - Protect areas of conservation, environmental and recreational value.
 - Recognise the constraints on development in areas that...may be subject to environmental threats (such as flooding or bush fire risk). [Tribunal emphasis].
 - Maintain the existing transition area of lower density residential development in Mt Eliza and the inter-urban break with Mornington, having regard to its particular environmental, landscape, township character and heritage values.

Other key policies

- 81 Policy 2.1.1, Outcome 4 and Direction 4.5 of Plan Melbourne 2017-2050 emphasise the need to strengthen protection and management of green wedge land as well as protecting valued attributes of distinctive areas and landscapes.
- 82 In addition, the *Marine and Coastal Policy, March 2020*¹² relevantly seeks to:
- manage coastal cultural heritage sites and encourage their adaptive reuse in a way that “maintains their values and character and enhances their contribution to community activities, coastal tourism and sense of place”;
 - maintain non-urban breaks between coastal settlements to preserve the character of the coastline and coastal settlements. A key policy seeks

¹² A policy pursuant to the *Marine and Coastal Act 2018* and identified for consideration under various state planning policies in the planning scheme.



to “avoid linear urban sprawl along the coast and within rural landscapes”; and

- encourage excellence in the siting and design of buildings in the coastal environment that is “sympathetic to the landscape context and minimises impacts on the environment”.

83 More detailed design guidelines are provided in the *Siting and design guidelines for structures on the Victorian Coast, May 2020*. One element calls for consideration of the distinctive environmental, social and cultural features that contribute to the sense of place.

84 Council referenced the *Mornington Peninsula Localised Planning Statement, Victorian Government, 2014*.¹³ This is one of the most detailed policy documents for the achievement of state and local policies relating to strategic planning, especially for land outside the UGB. Relevant strategies include:

Protecting coastal areas for their special recreational, community and conservation values.

The Mornington Peninsula will not accommodate major population growth and the existing Urban Growth Boundary and Green Wedge rural area will be maintained.

Urban development, including residential and low density residential development in whatever form, will be limited to areas within the Urban Growth Boundary...

The character and functions of the towns and villages will be protected and there will be no linear development between towns along the coast or expansion into the areas between townships.

Development within each settlement will only be of a scale and character appropriate to the role, function and location of that settlement...

Use and development, which by its intensity or form would result in defacto urbanisation of the rural or coastal landscape, including large scale caravan park or mobile home based developments, will not be permitted

85 This is supplemented by the *Mornington Peninsula Green Wedge Management Plan, April 2019*¹⁴, whose vision includes:

A place that retains a rural character, defined by agriculture and natural systems land uses, heritage places, attractive vistas, unobtrusive buildings and a low population settled in relatively few buildings that is:

- At its strongest in key locations including: significant landscapes, land with coastal frontage, land adjoining urban growth boundaries and separations between closely located townships...

¹³ Listed as a policy guideline in Clause 11.05-2.

¹⁴ An adopted document which applies to all land outside the UGB.



- 86 Mr Chessell submitted on behalf of Council that the proposal was an overdevelopment of the land since:

The proposal would do nothing to “reinforce” this character [sought for land outside the UGB]. Instead, given its scale and intensity, it would substantially erode the contribution that the site makes to the inter-urban break between the townships, and runs directly counter to the land’s designation as forming part of the break and part of the green wedge. In particular, the Council notes that the proposal is of an inherently urban (and residential) character, and that it will introduce buildings of a massive scale onto the site, including onto those parts of the site that are presently vacant and open.

- 87 Some objectors regarded the proposal as tantamount to a multi unit residential development. Ms Walsh submitted that the SUZ2 was never intended and should not be used to override the fundamental principle that residential and other urban development should not be permitted in green wedges.
- 88 Ms West referenced Professor Michael Buxton’s views on two fundamental criteria used to assess the success of protective ‘green belts’ – the extent to which they retain the primacy of non-urban uses and their ability to maintain a strict demarcation from metropolitan or township areas.¹⁵ The Green Wedges Coalition was concerned that the proposal would breach these two “fundamental principles” and would thereby compromise the integrity of the planning scheme and this green wedge.
- 89 Mr Morris MP similarly expressed the view that “it cannot be credibly argued that this is not a significant expansion of the urban area of Mount Eliza, outside the UGB, and contrary to state and local policy”.
- 90 By contrast, Ryman sought to give primacy to the provisions of the Special Use Zone in connection with the exemption from Clause 51.02 – Metropolitan Green Wedge: Core Planning Provisions.¹⁶ In essence, those provisions establish purposes for land outside the UGB in nominated zones and provide a bespoke (restricted) table of uses as well as limitations on subdivision.
- 91 Ryman therefore focused on the proposal’s response to policies seeking to:
- protect heritage assets (including encouraging adaptive reuse of heritage places);
 - preserve landscape and scenic character;
 - maintain coastal values and ecological processes; and
 - provide a respectful presentation to the streetscape and limit unreasonable impacts on adjacent land.

¹⁵ She quoted his expert evidence to Planning Panels Victoria in Amendment C273 to the Casey Planning Scheme.

¹⁶ The exemption arises from inclusion of the land in the schedule to Clause 51.01.



- 92 Mr McNamara in giving evidence for Ryman considered that the site's location outside the UGB should not be regarded as significant for a number of reasons. These include the fact the land benefits from provisions of the SUZ2, other applicable planning controls already call for a sensitive built form outcome and the uses will still need to ensure rural activities are not compromised. He also pointed out that the land benefits from single ownership and management and has a longstanding history of urban use as part of the suburb of Mt Eliza and is part of an existing settlement area. In his view, it was relevant that the proposal is "not seeking to use rural land for an urban purpose".
- 93 In summary, Mr McNamara identified the following factors leading to his support for the proposal in policy terms – the site's specific character, its history of commercial and institutional use, benefits from the restoration of heritage buildings, proposed redevelopment layout and scale including degree of separation from interfaces, extent of landscaping and presentation to the streetscape and the provision of more diverse housing options and services to the community.
- 94 Ms Ring considered similar factors and also emphasised that there would be no unreasonable impacts on amenity, that vegetation removal was suitably confined and that coastal and landscape character would be preserved.

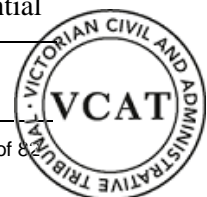
Amendment C270

- 95 We are conscious that Council has applied for Ministerial authorisation for Amendment C270 which seeks to rezone a number of parcels outside the UGB, including the subject land to Green Wedge Zone (Schedule 3). Concurrently, it seeks to remove the current exemption from the core Green Wedge provisions in Clause 51.02.
- 96 We were advised that the Minister for Planning has deferred consideration of the request for authorisation of that Amendment until after our determination of this proceeding.
- 97 We are obliged to evaluate this planning proposal under existing planning scheme provisions. We also refrain from making comment about the veracity of the proposed Amendment, noting it is not yet 'seriously entertained' as this term is understood under relevant legislation.¹⁷

What weight should be given to the zone provisions and the exemption from the Core Green Wedge provisions?

- 98 The zone controls applying to the land in its broader setting are indicated in the map below. It can be seen that the land is within a limited number of Special Use Zones and that it is to the south and east of an established General Residential area. Adjacent land to its south is included in the Green Wedge Zone which is also subject to the Environmental Significance Overlay (Schedule 1). There are also instances of Low Density Residential

¹⁷ As this term is understood in the *Planning and Environment Act 1987*.



Zoning further south subject to the Design and Development Overlay (Schedule 6).



Land use provisions

- 99 In our opinion, the central significance of the zone provisions and the exemption from Clause 51.02 is that the use of land for residential aged care and retirement village is permissible (subject to conditions). This can be contrasted directly with land use constraints on other land outside the UGB including the Green Wedge Zone, where such land uses would be prohibited (within the land use category Accommodation).
- 100 We accept that the site enjoys a full exemption from Clause 51.02. It is clear that the approach taken by the schedule in Clause 51.01 is to refer to the land, rather than current or former land use. In our view, the land is readily identified in this schedule.
- 101 When considered closely, we find that these core provisions and their associated purposes substantially address land use and subdivision. In this way, the land use provisions are effectively replaced for this land by the SUZ2 provisions.¹⁸
- 102 A notable aspect of the provisions of the Special Use Zone, as pointed out by Mr Townshend on behalf of Ryman, is that the schedule purpose as reflected in the table of uses would prevent the use of the land reverting to a single dwelling. Instead, it contemplates mainly institutional land uses including education, recreation and health facilities, with a focus on those

¹⁸ There is no proposal before us for subdivision.



performing a community function. This is consistent with the identification of the land as a strategic site in the purpose to the schedule.

- 103 As mentioned, some objectors took an ‘absolute’ position and considered that the land should be regarded as Green Wedge land and it would therefore be inappropriate to approve any form of use other than a rural one.
- 104 With respect, we regard this approach as too simplistic and not supported by the applicable planning controls for this land which are bespoke.
- 105 Instead, we support the use of the land for residential aged care and a retirement village as consistent with both the schedule to the zone and having regard to the long term historic use of the land for both residential and institutional use.
- 106 To the extent that some objectors regarded this proposal as a form of multi unit housing, we see clear distinctions between this proposal and more conventional accommodation. First, by law, there will be a minimum age for residents, with the entire facility catering for those in their advanced years. Second, given the integrated nature of the facility there will a significant focus on the provision of health, nursing and personal services to all residents, not only those in the aged care facility or high care rooms. Third, the facility will offer opportunities to age in place with well-developed communal and recreational facilities to encourage wellbeing, an active lifestyle and social connections. Fourth, the facility will provide a place of worship. Fifth, it will be run by consolidated management.
- 107 To the extent we support institutional use of the land in the form of an integrated aged care facility, we also accept the evidence of Ms Ring about its potential intensity, that:

Having regard to the possibility that they can be established at the site, neither of the uses requiring a permit can reasonably be expected to be boutique propositions as they rely on larger (rather than smaller) populations to sustain the diversity of accommodation and lifestyle offered, which includes a range of community facilities and health and other services.

- 108 This is especially the case where the purpose of the schedule is for the land to perform a “significant community function”. We consider the proposal has the potential to deliver this outcome.

Directions for built form

- 109 In order to achieve other equally important policy objectives, we consider that the buildings that house these uses must also be appropriately sited and scaled to maintain the natural, open and scenic qualities of this land which are integral to its strategic role.
- 110 We note that Clause 53.17 relating to residential aged care facilities does not apply to proposed buildings and works in the Special Use Zone but it



nonetheless makes a relevant observation that such facilities may involve a different scale and built form to the surrounding neighbourhood.

- 111 However, we are unable to find any direction in the zone controls as to what scale or configuration of institutional building forms would be acceptable for this site. In fact, the zone is silent in respect of buildings and works controls and there is no applicable Environmental Significance Overlay or Design and Development Overlay providing guidance (as it does for other land within this inter-urban break).
- 112 While the absence of these overlays is broadly relevant, in our view it does not create a vacuum for this land given specific policy directions.
- 113 Professor McGauran explained in evidence for Council:
- It does not follow in my view from the site's SUZ designation that this should make the site a candidate for scale of building footprints and heights that are incongruous inside the urban growth boundary let alone in a location specifically outside the UGB...
- 114 On this point, Council submitted that:
- It is also clear, in the Council's submission, that the purposes of the zone do not promote intensive urban development outcomes on this site (or on any site that is subject to the SUZ2). Indeed, in land use terms, it is apparent that none of the categories of facilities specified in the purposes would constitute intensive urban development outcomes comprising accommodation.¹⁹
- 115 The core planning provisions are also silent as to preferred or acceptable built form. Therefore, it is not a sufficient answer in all respects to say that the core Green Wedge provisions are 'switched off' for this land and therefore the status of the land being outside the UGB is of no real consequence to this proposal, as suggested by Ryman in response to questions by the Tribunal.
- 116 Although the zone contemplates institutional uses, these can take varying forms, scales and levels of intensity. We find that relevant policy provisions and the site context are key to evaluating the acceptability of the resultant development. Fundamentally, we accept that the location of this land outside the UGB informs an acceptable scale and intensity of urban design and built form.
- 117 Another important consideration informing the appropriateness of site layout and building form is the existing open landscaped character of the estate, hosting the mansion building as a coastal landmark.
- 118 Therefore, while the site has a strategic role to achieve the purpose of the SUZ2, we consider this must be delivered in a way that also satisfies its higher level strategic role of being outside the UGB. We find this is where the proposal overextends itself.

¹⁹ Council's closing submissions para 27.



How should tensions between competing planning policies be resolved when assessing this proposal?

- 119 The starting point is Clause 71.02-3 of the planning scheme which provides that planning policies should be applied in an integrated way and competing objectives should be balanced in favour of net community benefit and sustainable development.
- 120 We consider that planning policy at state and local level provides very clear guidance in respect of settlement planning, with an emphasis on the need to maintain defined township boundaries and to maintain the character of green wedge land outside these boundaries. In particular, we note the guidance in Clause 21.04 that “achieving balance does not mean trying to accommodate all land uses in all locations; it means making the most of each area’s particular strengths and respecting limits.
- 121 Some expert witnesses regarded the land as part of the township of Mt Eliza (or were equivocal about its status in this regard). For example, Mr McNamara regarded the site as part of the “settled urban area” since he considered the site had for many years in physical and land use terms formed part of the Mt Eliza “suburban area”. He considered the proposal would not endanger the ‘green break’ between the metropolitan area and the Peninsula.
- 122 Likewise, in closing submissions, Mr Townshend referred to the SUZ2 as contemplating small ‘u’ urban outcomes; being an “undeniably urban zone” since it did not prefer agricultural land use or similar. He submitted the UGB was of no significance to this proposal because the land was “exempted from the statutory implications of being outside the UGB”. Therefore, he urged the Tribunal to focus on whether the proposal was appropriate at the ‘edge’ of the UGB.
- 123 We regard this suite of submissions and evidence as misguided. On our interpretation of the relevant planning policies and provisions including the Strategic Framework Plan at Clause 21.04, the land is outside the urban area and defined township area as depicted in the map below.²⁰

²⁰ From page 2 of the Mornington Peninsula Localised Planning Statement.





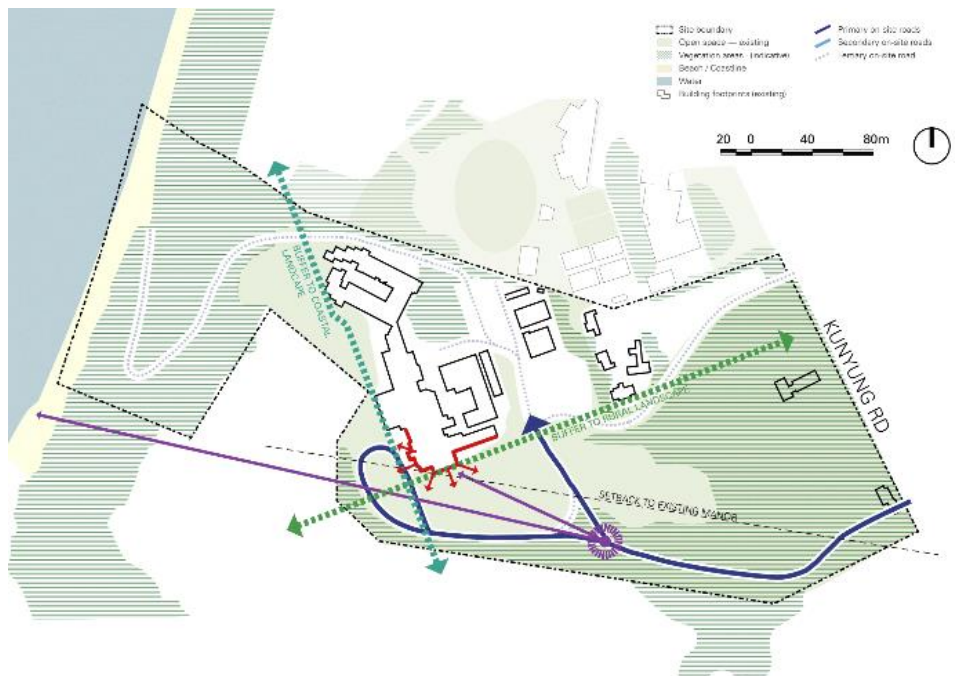
- 124 The location of the land outside the defined township boundary is also highly consistent with its location outside the UGB. These factors are critical to the acceptability of the built form response, including site planning and the overall scale of development.
- 125 To this extent, we consider Ryman and its experts have posed the wrong question - “with the site being outside of the UGB, the policy issue for integrated planning asks whether the re-use of the site would enhance the character and role of the settlement area” (Tribunal emphasis).²¹
- 126 Given the site’s values and location outside an existing settlement and in the UGB, we consider that too much emphasis was given by Ryman and its experts to policies encouraging the efficient use of urban land or encouraging consolidation of existing settlements on the Mornington Peninsula.
- 127 Instead, we accept submissions from Council and objectors that the land presently serves an important role in establishing the commencement of both the inter-urban break between Mt Eliza and Mornington, and in marking the commencement of the UGB. The two are aligned.
- 128 Key elements of the existing site layout and development are directly aligned with policy. There are numerous characteristics of the site that present as part of the inter-urban break, even though its current

²¹ From Mr McNamara’s expert report, page 26.



development has some peri urban characteristics. These are explored further below but include generally low scale development with limited visibility from public vantage points. The heritage mansion is the paramount building on the site.

- 129 One important element of the current site presentation as identified by Professor McGauran in expert evidence for Council is the concentration of outbuildings associated with the mansion adjacent to the UGB boundary, at the point of transition, with a notable absence of buildings on the eastern and southern parts of the land.
- 130 In our view, this reinforces the open and landscaped character of the south western part of the land, consistent with notions of the inter-urban break. This was helpfully illustrated by the figure below²²:



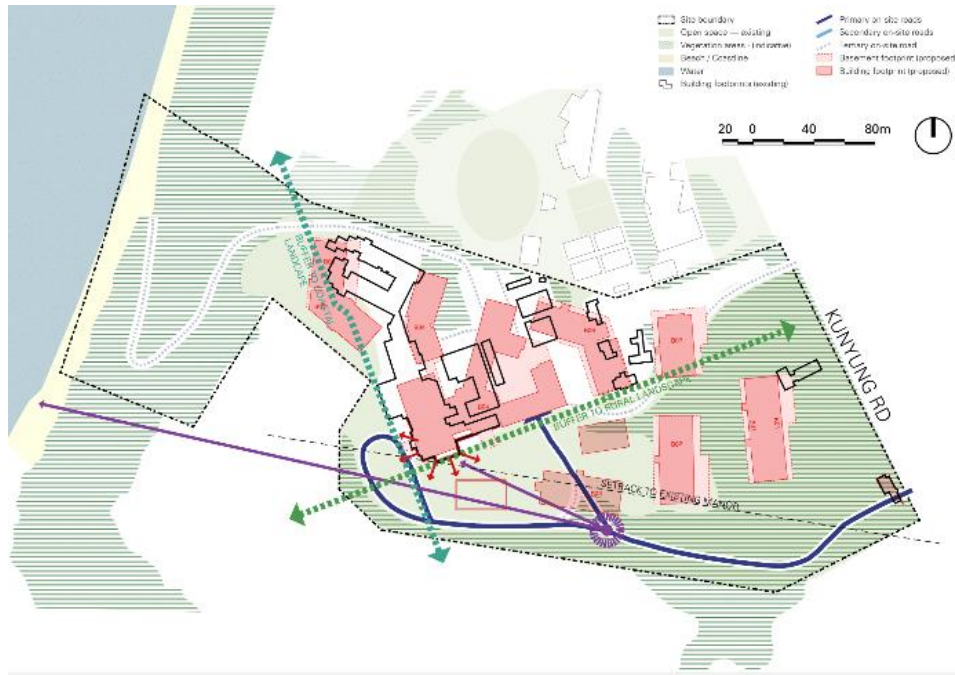
- 131 We have already identified there is scope for a change of use and more intensive built form on this land to achieve policy objectives relating to health and housing, even though this is not a preferred location for such uses.
- 132 However, in its proposed form, we find that the development would be inconsistent with other more site specific policy directions since it would introduce substantial built form into the inter-urban break in a form contributing to linear development between townships, which is expressly discouraged. It would also detract from the scenic values of the green

²² From Professor McGauran’s Powerpoint presentation at the hearing, Document J2.



wedge to the extent it would add a series of new, sizeable buildings in parts of the site that retain a strong landscape and scenic character.

- 133 This is evidenced by the proposed building and site layout compared with the existing site layout²³:



- 134 To the extent that competing policy objectives seek to retain and enhance heritage and landscape values, we find that the development needs to be tempered further to achieve an acceptable outcome. In essence, this will require a revised approach to the siting and design of buildings, most likely with a diminished site capacity. In other instances, the question of building scale may need to be revisited to achieve acceptable outcomes.

HERITAGE CONSIDERATIONS

Background

- 135 The subject land comprising the Moondah mansion, its outbuildings and grounds is included in Schedule 110 to the Heritage Overlay. The historic gatehouse to Kunyung Road is separately recognised on the Victorian Heritage Register for its architectural and historic significance²⁴ and is included in Schedule 111 of the Heritage Overlay.

- 136 Moondah was constructed in 1889-90 and is an Italianate Renaissance Revival mansion. The Gatehouse is of Gothic Revival style, constructed in 1902.

²³ As above

²⁴ VHR H1894. Works to this place would be subject to a separate statutory approval.



137 The starting point for our assessment of the acceptability of the proposal in terms of its heritage response are the objectives and decision guidelines within the Heritage Overlay, together with policies in the planning scheme. Other important documents informing our assessment include the statements of significance for the heritage place and documents prepared by experts on behalf of the applicant, including a Conservation Management Plan and Heritage Impact Statement.²⁵

138 The current heritage citation for the Moondah estate derives from the Shire of Mornington Heritage Study by Graeme Butler & Associates in 1994. It provides:

Moondah gatehouse and mansion ... are two buildings important in the townscape and history of the area, are representative of the large seaside mansion estates built in this area and are significant architecturally. The gatehouse is a rare and late example of the Picturesque Gothic Revival style and particularly of a picturesque folly. The location of the gate in the building is most uncommon. The typical boom style mansion is important for its porte-cochere and angled façade.

139 A revised Statement of Significance for the property was prepared as part of the more comprehensive heritage investigation undertaken on behalf of the applicant. All parties agreed that while this does not have statutory weight, it is detailed and highly relevant, following best practice heritage principles.²⁶ It provides:

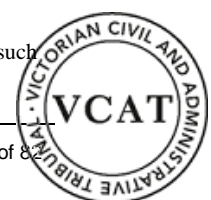
What is significant?

James Grice bought 251 acres of land adjacent to his father's estate Manyung in Mount Eliza in 1887. The Grices were a wealthy and prominent business family, due to the success of the firm Grice, Sumner & Co. The Mornington Peninsula was a popular destination for wealthy Victorians to construct residences as a retreat from the city, and James' father Richard had built the Picturesque Gothic and Tudor Revival mansion at Manyung (now Norman Lodge) nearby in the early 1860s. The mansion Moondah was constructed in 1889-90, and the family increasingly made the property their full-time residence.

The mansion, Moondah was designed by notable architect William Salway. It is a rendered two-storey mansion in the Italianate style with a porte cochere and key elevations expressed as arcades. It is of note for its immense scale and role as a landmark on Port Phillip Bay. A gatehouse in a picturesque medieval style was constructed at the entrance to the Moondah Estate in 1902. An original coach house survives on site but has been altered to the extent that its original role

²⁵ Moondah Estate Conservation Management Plan, Lovell Chen, March 2020 and Heritage Impact Statement, Lovell Chen, November 2019.

²⁶ This was contrasted with other draft statements of significance for other potential heritage properties which had not been progressed through planning scheme amendments or the like, such as for bayside mansions in the Mornington Peninsula.



is no longer legible. The form of the original driveway from the gatehouse to the mansion survives although an associated avenue of trees was replaced in the mid-twentieth century.

The Grices vacated the site in 1947 when it was purchased and altered internally and externally for use as a hotel. It operated as the Hotel Manyung until 1957 when the Australian Administrative Staff College (later Mount Eliza Business School) purchased the site making further alterations and extensive additions. A sprawling educational complex known as the Jubilee Wing was constructed to the north of the mansion in 1983. The original coach house was adapted as the Association Wing in 1984.

How is it significant?

The Moondah Estate is of historic and aesthetic (architectural) significance at a local level.

Why is it significant?

The Moondah Estate is of historical significance for its association with James Grice and the notable Grice family... Collectively, these residences and others in the locale form an important architectural ensemble which is of historical significance for its capacity to demonstrate the taste for grand residences on large estates among the wealthy in the second half of the nineteenth century. While the coach house has been altered to the extent that its original form, use and appearance are no longer legible, it is the last surviving outbuilding from the Grice family's occupancy and retains some modest historical significance.

The Moondah Estate is historically significant for its association with upper class life on the peninsula... The mansion, Moondah is of some aesthetic (architectural) significance for its immense scale and role as a landmark on Port Phillip Bay. While not a key element in Salway's oeuvre it is of some significance for its association with Salway and its role within his catalogue.

- 140 The updated statement of significance identifies historical (A), representative (D), aesthetic (E) and associative heritage significance (H), referable to established criterion used in *Planning Practice Note 1: Applying the Heritage Overlay*.

Outline of party positions

- 141 Although Council and its expert witnesses generally supported the adaptive reuse of the mansion and associated restoration works, it considered the redevelopment would have a major negative impact on the heritage significance of the Moondah estate overall. Council was concerned with both the extent of proposed demolition of original fabric and considered that "dominant, unsympathetic" forms would be introduced in close juxtaposition to key heritage fabric.



- 142 Ms Walsh on behalf of the National Trust expressed similar concerns. She emphasised by reference to the Burra Charter that the cultural heritage significance of the place was not limited to its buildings, but included its relationship with the landscape setting and the community. The National Trust considered the redevelopment would negatively impact these features.
- 143 Ryman submitted the suite of works proposed would lead to an improved or at least, acceptable, heritage outcome overall. More specifically, it considered that any loss of heritage fabric would be offset by enhancements that would create a 'net positive'; being a valid response to policy.
- 144 Submissions and evidence for Ryman emphasised that elements proposed for demolition would not unacceptably diminish the heritage values of the property. They considered that new additions had been suitably designed and sited to be recessive or sympathetic to the heritage significance of the place as a landmark bayside mansion estate.

Adaptive reuse and restoration

- 145 The Moondah estate is a significant landholding comprised of the main mansion building with extension wings, various outbuildings and grounds. It has been vacant since the conclusion of operations of the Mount Eliza Business School and its buildings (including the mansion) are need of considerable repair, restoration and maintenance.
- 146 A key purpose of the Heritage Overlay is to conserve and enhance places of cultural significance. Policy at Clause 22.04-3 includes to:
- Support the conservation of heritage places...
 - Encourage the removal of non-significant alterations or additions, particularly where this would assist in revealing the significance of the place.
 - Support the restoration or reconstruction of fabric of heritage significance where opportunities arise.
- 147 In our opinion, a key way to achieve this on the subject land is to provide for the adaptive reuse of primary heritage buildings and to facilitate new built form that is suitably respectful of the heritage values of the site. These are important components of policy in Clause 15.03-1S and the decision guidelines at Clause 22.04-4 relating to whether the proposed buildings and works would assist in the conservation of a heritage place by:
- Supporting the continued original use of a building by enabling it to be upgraded to meet present day requirements and standards; or,
 - Allowing an alternative use when the original use is no longer viable....
- 148 We accept the evidence and submissions for Ryman that the reuse of this property for a proposed aged care facility and retirement village is a significant positive element of the proposal. More specifically, it would



reinvigorate the Moondah mansion as the hub of the new facility in a way that would meet contemporary needs for accommodation, care and recreation.

- 149 The current condition of mansion viewed from the south west is shown in the figure below.²⁷



- 150 A further key positive aspect of the proposal is the extensive works proposed to restore and repair key heritage fabric. For example, the more recent structure enclosing the southern verandah of the Moondah Mansion (Copland room) would be removed to reveal the original arcaded façade.
- 151 The detailing above the mansion parapet and comparable external finishes would also be reinstated. The photomontages reveal this would reinvigorate its currently tired external presentation, although we do not assume that the exterior will be bright white as depicted in the application plans given the need to respect historic finishes.²⁸
- 152 In combination, these works would substantially restore the built form presentation of the mansion from the south west.
- 153 Another notable element of the works would include the removal of the unsympathetically sited and designed Jubilee Wing from the north west corner of the mansion adjacent to the Bachelors Wing.
- 154 From experience, we accept that these restoration works are of a scale and associated cost that are unlikely to be undertaken without a commensurately comprehensive proposal for the reuse of the land as a whole.

²⁷ Sourced from Figure 29, Conservation Management Plan.

²⁸ This would need to be determined through a heritage paint analysis in situ under supervision of a heritage conservation professional.

- 155 We also consider that some flexibility should be afforded in the redevelopment proposal to ensure buildings are fit for purpose to facilitate the alternative use of the land. For example, the grand driveway entrance to the mansion and porte cochere will be restored, but in a functional and more contemporary layout and design than the historic driveway entrance. We regard this as entirely acceptable.
- 156 For this reason, we also support the proposal to create an additional main driveway entrance to a new covered entry on the southern side of the mansion generally in the location of the historic Residential Wing, notwithstanding the site cut that would be required.
- 157 Likewise, in our opinion, there is scope for suitably designed new openings or altered fenestration to the historic fabric of the mansion without generating unreasonable impacts on key elements of architectural or historic significance. For this reason, we do not share Ms Schmeder's in principle concerns in evidence for Council about the proposed alterations to the southern side of the mansion.
- 158 However, we acknowledge these and other modernisation works would need to be managed carefully so as not to negatively impact the presentation or function of the heritage place.
- 159 In this regard, we consider that the Conservation Management Plan prepared for the applicant is a rigorous starting point. It identifies sound principles for the management and enhancement of this heritage estate. It also provides clear guidance for works to restore and modify these heritage assets. It is therefore capable of guiding suitable outcomes through conditions of a planning permit requiring its implementation.

Acceptability of demolition works

- 160 A number of structures and other outbuildings are proposed to be demolished to facilitate the redevelopment and proposed new use of the subject land. Council and some objectors opposed the demolition of structures considered more central to the values of the heritage place, but not others which were heavily modified or less integral to its heritage significance.²⁹
- 161 A relevant purpose of the Heritage Overlay is to ensure development does not adversely affect the significance of heritage places. Corresponding decision guidelines include whether demolition, removal, external alteration or proposed works will adversely affect such significance.
- 162 Partial demolition is addressed in policy in Clause 22.04-3 which seeks to:
- Discourage partial demolition of a heritage place unless it can be demonstrated that one of the following apply:
 - It will not adversely affect the significance of the place.

²⁹ Including the bluestone Principal's residence towards the property frontage.



- It will assist in the long-term conservation of the place.
- It will support the viability of the existing use or will facilitate a new use that is compatible with the ongoing conservation of the place.
- It will remove non-contributory elements such as alterations or additions.

163 This policy is important to inform the exercise of discretion for buildings and works under the Heritage Overlay but cannot be elevated to a mandatory requirement, having regard to the role of policies (as opposed to controls) in the planning scheme.

164 We turn to key aspects of demolition in dispute in this proceeding.

Residential Wing

165 The application proposes the demolition of the original (eastern) Residential Wing to the Moondah mansion and its replacement with a new building wing in a similar location. Existing conditions are shown in the figure below.³⁰



166 Mr Gard'nr confirmed that the Residential Wing (minus a small extension at its easternmost end) was constructed at the same time as the mansion and designed by the same architect. This was affirmed in the Conservation Management Plan. Mr Chessell and Ms Schemeder pointed out that the majority of the external fabric of the Residential Wing was identified of primary heritage significance in that document.³¹

167 On this basis, Council strongly opposed demolition of this part of the building, being largely original heritage fabric which Ms Schmeder regarded as significant. She considered the demolition of this wing would decrease one's understanding of the original form and function of the

³⁰ Figure 30, Conservation Management Plan.

³¹ Excluding the extension in approximately 2000.



mansion. Similarly, Dr Dyson gave evidence that the Residential Wing (which was occupied by staff or servants) is important to the understanding of how the historic mansion functioned as a wealthy holiday estate.

- 168 Council further submitted that the replacement building was of a siting, scale and design that would overwhelm the heritage mansion. Ms Schmeder explained that the demolition would result in a ‘visually truncated’ south elevation and would facilitate the juxtaposition of an unsympathetic addition (the glazed ‘link’ structure) against the core of the mansion.
- 169 We accept that, as a starting point, heritage policy does not support the demolition of original heritage fabric, especially where it contributes to the significance of the place. However, there are a number of reasons why we consider the demolition of the Residential Wing could be regarded as acceptable in the context of a proposal that provides for adaptive reuse on the proviso that new buildings are suitably respectful of heritage values.
- 170 The statements of significance for this heritage place confirm its historical and architectural significance, as well as representativeness and associative significance in more recent assessment.
- 171 From an architectural perspective, it is clear that the design language and detailing of the Residential Wing are deliberately far more modest and restrained than the highly detailed, ornate main mansion building.
- 172 From a historic perspective, we accept that the Residential Wing housed service accommodation for the estate. However, we regard this function as clearly secondary to the primary heritage significance of the place as a seaside holiday estate for the wealthy. While it may assist in telling a more complete story, we are of the view that its primary historic significance could still readily be understood in the absence of this supporting structure.
- 173 We are also not persuaded that the representativeness of the property or its association with the Grice family and the architect, Salway, would be diminished by the demolition of this part of the mansion building.
- 174 Further, in a practical sense, we accept that there is a need to permit demolition and new built form to the extent necessary to facilitate the adaptive reuse of the mansion building overall. The Residential Wing is in a critical part of the site to provide all-mobility access for an aged care and retirement facility. This is necessary to enable the regular use of the mansion building as a hub for key activities as proposed.
- 175 In our opinion, is not realistic to expect that facilities required for the central management of a contemporary aged care facility could be provided in this location if the Residential Wing was retained. In our opinion, the difference in floor levels (compared with the remainder of the mansion) and the narrow, regular openings in this building would likely preclude a realistic opportunity for adaptive reuse for this purpose.



- 176 On balance, we agree that the proposed demolition of this structure can be justified and prefer the evidence of Mr Gard'nr on behalf of Ryman that:
- The Residential Wing demonstrates few of the architectural features or elements that characterise the primary form of the Renaissance Revival mansion;
 - to this extent, the Residential Wing is more of a secondary element, such that its demolition would have only a “modest detrimental impact” on the overall heritage significance of the place relative to the statements of significance which emphasise a large seaside mansion estate;
 - its removal would facilitate the ongoing use and conservation of the place by allowing its redevelopment for a residential aged care facility and retirement village; and
 - the suite of works proposed would result in a substantial overall improvement to the presentation of the principal façade of the mansion which is of prime significance.
- 177 We further agree there would be merit in a permit condition requiring the heritage values of this part of the building to be recorded (photographically) prior to demolition to help mitigate the loss of this nineteenth-century fabric in part.

Coach House

- 178 The Coach House is one of few remaining buildings dating from the original or early occupation of the site by the Grice family. Council submitted that the demolition of this structure would be inconsistent with policy and would detract from the heritage values of the site.
- 179 However, its expert Ms Schmeder considered that the demolition of the Coach House could be justified on the basis of its extensive alterations. Mr Gard'nr arrived at a comparable assessment, advising that it had lost most of its legibility as an original coach house, such that its demolition would have a negligible impact on identified heritage values of the estate.
- 180 Given its former function, we accept that this is one of a number of buildings that contribute to the understanding of the historical significance of the place.
- 181 Its adaptive reuse might be possible in an altered redevelopment scheme given its siting and flexible internal configuration. Retention would be preferable from our perspective but we are obliged to consider whether the suite of proposed works would result in an acceptable outcome.
- 182 We find that demolition of the Coach House could be justified based the extent of its alteration and consequent reduced legibility of original form, use and appearance as outlined in expert evidence.



183 Notably, given the Coach House is a contributory - not primary - element of significance, we also consider that the historic values of the land as a whole would not be unreasonably diminished if this structure was demolished.

Heritage landscape features

184 Dr Dyson gave expert evidence on behalf of Council about the key landscape features of the property she considered of heritage significance including:

- the generous landscape setting to the mansion;
- the landscape character of the grounds; and
- the prominence of the mansion in the landscape with aesthetic significance as a “bayside landmark”.

185 The schedule to the Heritage Overlay also includes tree controls for this land.

186 A positive element of the landscape response is the retention of the row of heritage cypress trees along the entrance drive (even though they are senescing). However, other plantings are more recent and we do not consider there is sufficient evidence justifying their retention on heritage grounds. We address their worthiness of retention when considering landscape and ecological values of the site.

187 We agree that an important part of the heritage significance of the place is the open landscaped coastal setting. This is reflected in the statements of significance recognising the land as a ‘country park’ style seaside estate for the wealthy in the 1880’s Boom period.

188 We have had regard to this characteristic when evaluating the appropriateness of new built form below.

189 Dr Dyson also emphasised the importance of early landscape features for the evidence they provide of its history and function as a large peninsula estate for the wealthy. These features include the carriageway alignment, landscape terrace or forecourt in front of the mansion, the southern lawn, subsidiary (northern) entrance drive, brick spoon drainage channel and identified trees.

190 Aside from the need to maintain the general alignment of the entry drive from the gatehouse to the porte cochere (referenced specifically in the statement of significance), we prefer submissions and evidence for Ryman on this issue.

191 We would not go so far as to prioritise any particular layout or features of the current landscape as notable or primary elements contributing to the heritage significance of the place having regard to each criterion for significance. We find that these features are not integral to the future presentation or operation of this land when redeveloped.



- 192 In addition, we are not persuaded by Professor McGauran’s evidence that continuing the driveway past the mansion to create a loop road is “major design flaw” that would diminish the relationship between the coast and the mansion.
- 193 We consider there is ample scope to reconfigure the layout of the northern driveway and to provide a continuing loop road past the mansion on the basis that it would be well separated and at grade such that it would not detract from the primacy of this structure as a landmark. If anything, it would have the potential to make the mansion building more readily visible in the round.
- 194 However, we make comment below that it is desirable to maintain the open presentation of the southern lawn in any redevelopment, with a need for sensitive design of any recreational structures.

Important vantage points and acceptability of new additions

- 195 Parties diverged in submissions about the acceptability of the proposed new buildings and works having regard to heritage values of the estate.
- 196 A core purpose of the Heritage Overlay and policy seeks to ensure that development does not adversely affect the significance, character or appearance of the heritage place. A key question relates to the implementation of the decision guideline in the overlay “whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place”.
- 197 Policy in Clause 22.04 provides that the significance of heritage places should be retained such as through:
- Creatively interpreting and respecting identified heritage values...
 - Being visually recessive and compatible in terms of scale, siting, design, form and materials with the historic character and significance of the heritage place, and
 - Responding positively to special features such as views, vistas, mature vegetation and landmarks.
- 198 When making this evaluation, it is important to bear in mind that the ‘heritage place’ is the entirety of the site – that is, the mansion, its outbuildings, grounds and associated works.
- 199 We support the recommendations of the Conservation Management Plan in identifying opportunities or parameters for new built form while respecting the significance of the heritage place, including³²:
- New built form should be designed and sited to minimise impacts on the key approaches to Mansion along Essington-Lewis Drive. New built form should not compete in terms of scale or character with the

³² At page 145.



design of Moondah and should be situated to avoid impacts on its key southern and western elevations.

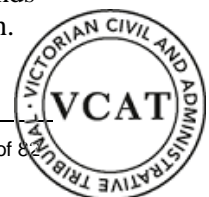
Where new buildings are required, these are most appropriately situated in the north-eastern sections of the site...Buildings in this area could be accessed by way of an alternative point of entry to the north of the existing gatehouse.

Some limited opportunities exist for new development in the vicinity of the existing tennis courts and vineyard although greater sensitivities exist in this section of the site than in areas to their north. New development in this area should be of a modest height and footprint adopting pavilion forms in a landscaped setting. New buildings in this area should not obscure or dominate Moondah.

- 200 Council in particular was critical that the redevelopment did not pay due deference to these directions.

Viewlines to the mansion

- 201 We find that the combination of siting and topography grounds the mansion in its setting and reinforces its primacy as a local landmark. Another important element is the choreographed entry sequence which includes openness of the grounds on the immediate approach.
- 202 We agree with Dr Dyson and Professor McGauaran that the curved entrance drive and 'reveal' of the mansion on the western approach towards the coast is a key element of the way the heritage buildings are configured and interact with site topography.
- 203 Council submitted that Building 03 was overscaled and inappropriately sited, with the consequence that it would directly and unreasonably impede important viewlines to the mansion on the approach from the state heritage listed gatehouse. We agree.
- 204 We consider that sympathetic redevelopment of this site requires the retention of open viewlines to the mansion, unobstructed by new built form on the immediate approach. We are concerned about the design and siting of Building 03 on this basis.
- 205 Had this been the only issue, there may have been potential to chamfer the building at its south western corner, for example, to facilitate the reveal of the corner of the mansion where the viewline opens out. At minimum, we would have wanted to facilitate the full reveal of the southern façade of the mansion building (excluding the Residential Wing) from the location generally depicted as the entrance to proposed Building 03.
- 206 However, a related concern is the effect of the viewing the mansion building in the backdrop of substantial new built form in the foreground (Building 03) in a part of the site with a deliberately open character. This is acknowledged in the Conservation Management Plan when it recommends that new buildings in this area should not obscure or dominate Moondah.



- 207 This is exacerbated by the 4 storey arrangement of this building in the location with the highest sensitivity. It is also reinforced by the 56 metre singular length of the building and its east-west orientation.
- 208 In theory, there may be potential for an alternative building in the general location of the proposed three storey element of Building 3 as a suitable heritage response. This would need to carefully adhere to the valid reference in the Conservation Management Plan to a building of modest height and footprint, adopting a pavilion form in a landscaped setting.
- 209 Beyond heritage considerations, there is also a need for caution if new built form was to be introduced in this location. The open garden aspect of this part of the property is a feature that we consider delivers on policies reinforcing this inter-urban break.
- 210 It also appears that a building in this location (especially a sizeable one) would complete the effect of a ‘campus of buildings’ across the site as a whole, which would represent a meaningful change to the open garden character achieved by current building siting.

New additions to and around the mansion

- 211 The southern elevation of the mansion is depicted in the application plan below³³:

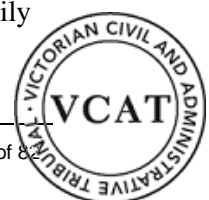


This depicts one wing of Building 04 as proposed.

- 212 Ms Schmeder’s evidence was that the mansion would no longer appear as the dominant element of the site given the cumulative effect of the demolition and construction works. Rather, it would be “perceived as the small centre point of the very large B04 building complex” and “this impact would be magnified by the construction of six more residential buildings around it of a similar height to and similar or longer length than the remnant mansion”.
- 213 By contrast, Mr Gard’nr considered the siting, form, scale and materiality of the proposed additions would provide a refined and recessive contemporary design that would maintain key heritage values of the place. In particular, he regarded the new addition to the north and east as suitably sited to ensure the mansion’s primary west and south elevations would retain their visual prominence and scale. In his opinion, taller built form would be suitably sited away from the mansion.

³³ Plan No. DA35.

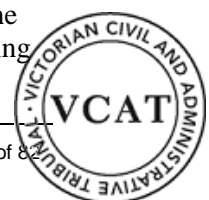
- 214 The starting point for our consideration are the statements of significance having regard to the character and siting of existing heritage buildings. In our opinion, the Conservation Management Plan fairly acknowledges that there is scope for new buildings in the north-eastern sections of the site while maintaining heritage values.
- 215 This is consistent with the layout of the current estate and the form of the mansion with its various wings. It is also facilitated by the sloping topography from north to south.
- 216 We agree that the north east sections of the site provide the greatest opportunity for new built form without detracting from key heritage values since:
- the ‘country park’ estate characteristics of a building set into an open garden are far less evident in that part of the site which already hosts a number of outbuildings and extensions in close proximity to the common boundary;
 - new built form would be embedded into the centre of the site, well away from public views, such as along Kunyung Road;
 - it would not impact materially on key viewlines or the primacy western façade of the mansion since it would not sit forward of the existing mansion building; and
 - the northern extension has been designed to sit below the decorative parapet of the mansion. Although it would partially obscure views of the mansion when viewed from the north, we do not regard this as a principal viewline of significance.
- 217 For reasons discussed below, providing additional built form towards the northern part of the site would also be consistent with the interface with the adjacent institutional school buildings within the UGB.
- 218 We therefore support the layout and siting of Building 04 even though it would result in a substantial extension to the mansion to the north and east. For the most part, we consider that it also has been sympathetically designed with a recessive presentation and materials palette and adopts building heights that would not visually overwhelm the historic mansion as the centrepiece. Its northern extension (Assisted Living Units) is also far more set back and confined in footprint compared with the existing Jubilee Wing which sits forward of the mansion currently.
- 219 While a substantial new structure is proposed in place of the Residential Wing, we consider that suitable design techniques have been employed to maintain the primacy of the heritage mansion. These include the simple glazed link between old and new fabric, the use of setbacks from the mansion’s arcaded façade and the stepping of height as one moves away from the core of the mansion. The two eras of construction will be readily



identifiable, with the ornate, projecting mansion sitting forward against the all-important coastal backdrop.

Jubilee Wing – demolition and replacement infill

- 220 The Jubilee Wing is a more recent, highly unsympathetic extension to the Mansion building that sits in front of the Bachelors Wing. It is proposed to be removed as part of the suite of works, with associated restoration to the northern façade of the Mansion and the western façade of the Bachelors Wing in particular.
- 221 This aspect of the demolition works was non-controversial and generally supported by the parties as a positive aspect of the proposal consistent with heritage policy.
- 222 However, the application proposes a new lounge structure infilling the ground level corner of the Mansion and Bachelors Wing. Mr Townshend emphasised that this facility would be ‘the heartbeat’ of the proposed facility, with close connections to the main administration within the mansion and a prized outlook to the coast.
- 223 Council submitted these works would obscure primary heritage fabric and would significantly reduce the benefits of demolishing the Jubilee Wing. Ms Schmeder was concerned that the Bachelors Wing would be largely obscured from views within the site. She considered the arcaded verandahs of both the mansion and Bachelors Wing should be unimpeded by new built form.
- 224 The applicant responded that the new structure would be a relatively lightweight design, with purpose-designed glazed roof elements around its perimeter to enable the arcaded facades to be appreciated within the new lounge space.
- 225 Mr Gardn’r fairly acknowledged in cross examination that avoiding a new structure in this location would be an improved heritage outcome but that it would remain acceptable. In particular, he accepted that some viewlines of the mansion would be interrupted but the works would be visually recessive. He further considered the presentation of the restored mansion would be enhanced by the demolition works when viewed from the north west, west and south west, maintaining the mansion’s role as a local landmark.
- 226 If ideal heritage outcomes were sought, we agree that it would be a lesser outcome to permit any new built form in the junction between these two important parts of the building. However, there are competing policies within the planning scheme, including within heritage policy itself, that seek to encourage suitable adaptive reuse. The question is whether the replacement works are acceptable in heritage terms.
- 227 There is scope for new built form adjacent to heritage fabric provided the location, bulk, form and appearance of the proposed building is in keeping

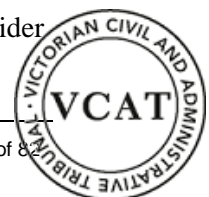


with the character and appearance of adjacent buildings and the heritage place overall (referencing the decision guidelines of the Heritage Overlay in Clause 43.01-8 and policy).

- 228 On balance, we consider there is justification in this instance for the new structure as proposed for reasons including:
- its design as a lightweight structure - being far more confined in height, footprint and of a vastly more recessive design than the structure it would replace;
 - the key opportunities it would provide for users to interact with and view these adjacent heritage facades on a day to day basis;
 - it is in a location that logically provides an opportunity to expand communal facilities that are central to the property's repurposing for an aged care and retirement facility;
 - there are still tangible heritage benefits in demolishing the Jubilee Wing. The photomontages prepared by the applicant confirm that from a number of vantage points on site and from the coast, there will be a greater reveal of the original fabric of both the mansion and the Bachelors Wing (especially the upper level) and the mansion will remain as a landmark building; and
 - in heritage and engineering terms, the structure could be designed as a 'reversible' addition which would not detrimentally affect extant heritage fabric. It would theoretically be capable of being removed in future if the use of the land were to change.

The Bowling green

- 229 The application proposes a communal bowling green in front of the mansion building with covered seating areas and balustrading or hedging. Council emphasised that given its levels and design, it would unacceptably obscure at least part of the lower level of the mansion when viewed from the south east.
- 230 The parties and witnesses addressed the design and impact of the bowling green on potential viewlines in detail at the hearing. This included relevant photomontages confirmed to be technically accurate by Mr Flood.
- 231 Towards the end of the hearing, Ryman offered an alternative concept design for the bowling green that would increase the cut downslope to reduce the extent of visual incursion on the mansion facade.
- 232 In heritage terms, we find strong parallels between the historic recreational use and presentation of the open lawns in front of the mansion its adaptive reuse as a bowling green.
- 233 However, we accept Council's concerns that the design as shown in the amended plans would detract from the setting of the mansion. We consider this could have been resolved through more careful attention to design



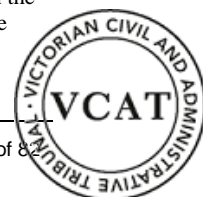
detail including levels and edge detailing. The objective would be to maintain generally unobscured views across the green to the lower level of the mansion building (excluding the Residential Wing).³⁴ The plans circulated by the applicant in closing submissions appear to be a step in the right direction.

Built form to Port Phillip Bay

- 234 Parties generally agreed that the new buildings would not be visible from Moondah Beach given the topography and extent of separation.
- 235 However, Council was concerned about Building 05, being a sizeable building that would sit forward of the mansion and would have the potential to diminish the landmark quality of the mansion when viewed from the water.
- 236 Ryman submitted that although Building 05 was sited forward of the mansion it would not be appreciated as being directly in front of it; such that the mansion would remain visually prominent.
- 237 We share Council's concerns from a heritage and policy perspective, particularly given the scale and height of the new building at 4 storeys with a width of some 45.6 metres parallel to the coast. We consider that an important aspect of the landmark quality of the mansion stems from it being the pre-eminent building viewed from the coast, reinforced by the openness of its landscape setting on either side.
- 238 Building 05 would clearly diminish this even though it would sit at a lower elevation given the slope of the land. Although there is sizeable spacing between the mansion building and Building 05, in oblique views from the bay to the north west, the perception of this spacing would be vastly reduced.³⁵
- 239 Beyond heritage considerations, the planning scheme acknowledges the sensitivity of these views. For example, a strategy in Clause 21.08 seeks to "ensure that new construction and development on the coast is designed on the basis of a site and landscape analysis, which takes account of the scenic and visual qualities of the foreshore and coastal areas".
- 240 A further objective seeks to achieve coordinated development, with a related strategy to:
- Limit the number of structures within foreshore areas to that necessary to meet demonstrated community needs. The preferred option is to investigate the re-use of existing buildings and the multi-use of buildings and structures and the upgrading of existing facilities in preference to a proliferation of separate buildings and structures.

³⁴ It appears that it would still be possible to provide access for people of limited mobility given the changes in grade between the proposed new driveway entry (beside the porte cochere) and the southern side of the bowling green.

³⁵ For example, as depicted in CE12 and CE13 of Mr Flood's evidence.



- 241 While Building 05 would have the capacity to provide future residents with spectacular views of the bay, we are concerned about the presentation of this building in terms of its effect on coastal values including the commencement of the inter-urban break in this location. Some experts for Ryman pointed to the fact that it would simply infill a part of the site between the northern boundary and existing built form (the mansion). However, we regard the current openness of this part of the site in its interface with the coast as a key characteristic of the inter-urban break, being an important feature that distinguishes this site from the more closely settled built form of the land further to the north, within the UGB.
- 242 We recognise that parts of the Jubilee Wing are currently visible in this general location from some coastal vantage points. However, only its top architectural features are clearly visible beyond surrounding vegetation. It is notable that this existing structure is far lower and more substantially set back from the coastal bluff than the new building.
- 243 By comparison, the new building would be far more substantial in scale, sitting forward on the site and parts of the upper levels would be likely to project above the prevailing tree line when seen in distant views.³⁶

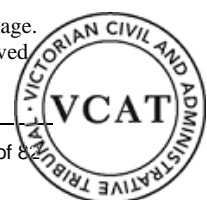
Aboriginal cultural heritage

- 244 The subject land is designated of cultural heritage sensitivity under the *Aboriginal Heritage Act 2006 and Aboriginal Heritage Regulations 2018*. High impact activities such as those proposed by the permit application³⁷ cannot be approved by planning permit unless there is an approved Cultural Heritage Management Plan (CHMP) for the relevant activity area.
- 245 This plan involves historic investigation (involving a desktop, standard and complex assessment) and site testing as well as recommendations for management of the site and any potential cultural heritage material. It did not find any evidence of Aboriginal cultural heritage in the activity area.
- 246 The National Trust of Australia (Vic.) was concerned that the CHMP may not cover all areas of the land in which works may be required, such as the native vegetation areas and access track adjacent to the coast.
- 247 We were provided with a copy of the approved CHMP for the subject land and were advised it would encompass all proposed activities constituting the permit application.³⁸ All works would need to be undertaken in line with applicable legislation and the comprehensive guidelines in the approved plan.

³⁶ This is borne out by the photomontages and to some extent from our inspection of the broader outlook from Mornington Pier, for example.

³⁷ Notably, works resulting in significant ground disturbance for the purpose of a retirement village.

³⁸ Plan No. 16147 prepared by Alpha Archaeology Pty Ltd dated 18 November 2019 and approved on



248 We confirm that the activity area in the CHMP is identified as the entire site (approximately 8.9 hectares) including the foreshore.³⁹ However, if the applicant proposes to extend the activity area or to alter the works comprising the approved activities, this would likely require a further approval process under the *Aboriginal Heritage Act 2006* as a precondition to such works being undertaken. This is a matter governed by separate legislation that is not under review in this proceeding.

APPROPRIATENESS OF NEW BUILT FORM

249 Council submitted that the scale, siting and design of new structures would fundamentally transform this seaside mansion estate into a more urbanised “campus of buildings”.

250 It submitted the proposal represented an overdevelopment of the site, notwithstanding its site coverage of approximately 21%. Its view was principally informed by:

- the location of the land outside the UGB and defined township boundaries;
- the nature of the coastal environs, including landscape and environmental qualities;
- the extent of incongruity with prevailing neighbourhood character; and
- the poor interaction with adjacent interfaces.

251 Mr Mangan explained that:

From an objector’s perspective...the highly visible and recognisable edge of the urban area in this location is, together with its landscape values and all-important view-lines to the bay, important for the character and sense of place of the residential neighbourhood adjoining the site to the north. The density and scale of the proposal would significantly detract from that.

We heard numerous submissions from other objectors on similar grounds.

252 Ms West of the Green Wedges Coalition submitted that it has been rare for residential development to be approved in green wedges throughout Victoria and that, in her experience, no proposal of comparable bulk, scale and height has been approved since relevant green wedge provisions were finalised as part of the Melbourne 2030.

253 Ryman further submitted that positive aspects of the development included substantial setbacks, use of topography to shield public views of buildings,

³⁹ This has been referred to as Lot 1 on TP813402. However, discussion at the hearing indicated that a second lot is proposed for development and is claimed to be within Ryman’s ownership. This issue would need to be resolved before any works could commence. The mapping in the CHMP indicates that almost all the activity area will be impacted except the far western section as described in Map 6.



relatively low scale buildings, extensive tree retention and replanting, maintaining landscape values and provision of a functional site layout.

- 254 Ms Ring gave evidence for Ryman that this was not a development proposal that would threaten or compromise policies protecting non-urban landscapes between Mount Eliza and Mornington. A prime reason was because of the site's longstanding history of institutional use and development and the fact it is not in the Green Wedge Zone per se. Ms Ring considered the land would continue to fulfil its function of an open setting with a view to the mansion after redevelopment.

What is the relevance of visibility from the public versus private realm?

- 255 Mr Townshend submitted for Ryman that it would be reasonable for the Tribunal to attribute greater weight to buildings and structures that would be visible from the public realm, with comparatively lesser weight to those that could only be viewed on the site itself.
- 256 This was aligned with a corresponding submission that neighbourhood character is principally understood in one's experience from the public realm, whereas impacts on the private realm are more suitably assessed as amenity impacts.
- 257 Ryman and its expert witnesses emphasised that the proposal would result in a limited perception of urban development from the public realm given the site's sloping topography and generous landscaped setbacks to most interfaces.
- 258 In fact, Mr Sheppard's evidence focused almost exclusively on the treatment of interfaces and the impact of the redevelopment on the public realm. In response to cross examination by parties and questions from the Tribunal, it became clear that he considered that one's experience of internal spaces to be created did not warrant significant scrutiny because they were regarded as 'private'.
- 259 Mr Chessell challenged this approach on behalf of Council, submitting that the planning scheme at Clause 15.01-1S for example does not distinguish between public and private views when requiring development to "respond to its context in terms of character, cultural identity, natural features and surrounding landscape". We agree. He asked rhetorically whether the impacts on a heritage property would be evaluated differently if that property was surrounded by high fencing and entirely obscured from public view.
- 260 We find it is reasonable in this case to provide higher levels of scrutiny of the appropriateness of development visible from the public realm because of the sensitivities of this site.
- 261 In our view, the fact that many (centralised) parts of the site are not readily visible from public vantage points provides an opportunity for buildings of



increased scale in these locations, provided that heritage and landscape values are respected.

262 Beyond this, we find the applicant's approach too superficial for this landholding. We reject the notion that the relevance of the internal site configuration and presentation of buildings is principally in terms of amenity for future residents. This site is not an isolated parcel of land and has a strategic role to play that calls for appropriate development of the site in its entirety.⁴⁰

263 In our opinion, the configuration of buildings and works and their effect on the layout and presentation of the entire site (whether directly visible by the public or not) is still a highly relevant consideration in this policy context which emphasises the concept of an inter-urban break.

Kunyang Road streetscape presentation

264 Mr Sheppard accepted that the view of the site from Kunyang Road is important in terms of neighbourhood character and also in contributing to the characteristics of the inter-urban break.

265 Notwithstanding, he considered Building 01 would present acceptably to the public realm in Kunyang Road for a number of reasons. These included its angled setback of between 40.4 metres from the site frontage and 63.3 metres to the southern property boundary, the building design including increased height where site levels fall away and the natural treed front setback that would be maintained and enhanced.

266 Mr Sheppard also considered that the planning scheme and the former use and development of the land contributed to expectations of different built form on this site compared with other land outside the UGB, where buildings could be prominent but not dominant from the public realm. He regarded the ESO as the policy that sought to most clearly implement the concept of an inter-urban break and confirmed that this did not apply to the subject land.

267 We recognise that the amended plans provide a more tempered built form to Kunyang Road, compared with the original application plans which provided more extensive built form closer to the site frontage. We also accept that sound planning principles do not generally require buildings to be invisible from public vantage points.

268 While the existing bluestone Principal's residence is already a feature of the current streetscape, we distinguish the proposed design response which would provide a far more substantial face to the street at a far taller height and larger scale, including an approximate length of 67 metres. This is

⁴⁰ The analysis undertaken by the applicant also neglects the opportunities for public and private views down the two wide accessways and from land opposite on Kunyang Road which would enable a more fulsome appreciation of the building layout. There are also qualities of the proposed occupation of this site that mean that it will be frequented by a large number of non-residents.



notwithstanding the fact this building will present as a 2-3 storey building given the difference in levels compared with the footpath⁴¹ and the fact individual units have been designed with articulated facades at all levels.

- 269 We support concerns expressed by Council that the scale of Building 01 in this streetscape would notably exceed buildings within the township and in the adjacent residential area. This is a concern for land outside the UGB in principle. Another equally relevant factor is policy which seeks to maintain the inter-urban break and the landscape presentation of the site.
- 270 We consider that a respectful response to this policy would preclude a sizeable building in this location running parallel to Kunyung Road. While there may be scope for a far more confined, low slung pavilion building form in this general location, we are unable to support Building 01 as designed.
- 271 For the record, we do not consider that the curtailment of bay views from this part of Kunyung Road, the adjacent side street (Kanya Road) or from private land opposite would justify the removal or redesign of this building. While these views may be valued by local residents, they are limited and somewhat fortuitous. In our opinion, they are not an integral part of the character of this site when viewed from public land, and should be distinguished from the far more significant, sweeping public views of the bay that can be obtained further north along Kunyung Road.
- 272 We take a different view of Building 02. While it is also proposed at 3-4 storeys, it is located far deeper into the site and consequently far more removed from public view. It also takes advantage of site topography as the land slopes towards the coast.

Interface considerations

Kunyung Primary School

- 273 Many local residents who are parents at the school made detailed submissions about the undesired effects of the proposed use and built form on the operation of the primary school. They submitted that particular sensitivities arose because of the use of adjacent classrooms, playgrounds and toilet blocks by younger students in particular. They were concerned about the capacity for aged care residents and visitors to observe these activities.
- 274 While we accept that these concerns are genuinely held and reasonably widespread among the objectors, we regard them as overstated given the nature of the two uses.
- 275 We are not persuaded that an aged care facility and primary school are in any way incompatible simply because both are regarded as sensitive land uses. The modern concept of seeking to facilitate ageing in place

⁴¹ Illustrated by sections on DA11.



acknowledges that aged care and retirement facilities are themselves community facilities. It is not uncommon to find them suitably co-located with institutional facilities (including educational facilities) or residential neighbourhoods for mutual benefit.

- 276 Likewise, we do not consider that the aged care facility needs to be designed to prevent all views to the school. A favourable consideration for this proposal is the siting and outlook of school buildings and key facilities such as the oval, which are principally internal to the school itself and to the coast, with the exception of one music/performance room towards the front of the site.
- 277 The school is on public land⁴² and is currently fenced with wire fencing that is visually permeable to the subject land. This appears to be a longstanding existing condition from when the site was operating as a business school.
- 278 The application proposes solid fencing along this boundary which would provide greater shielding of school activities from views along the northern driveway and pedestrian path and at ground level.
- 279 At ground level, Buildings 04, 05 and 07 would be set back from the common boundary in the order of 16.9 to 25.8 metres, with increased setbacks to some upper levels. Excluding Building 06 at a reduced setback (discussed later), these setbacks would provide a reasonably substantial separation that would be supplemented by layered tree planting that would be expected to filter views further.
- 280 This is a measure that would appropriately exceed the separation that would be expected between buildings in different ownership within the township boundary, for example. Subject to the appropriate configuration of buildings, we consider these setbacks and interface treatment would assist in creating a meaningful transition into the UGB for this land, recognising it has already been developed for intensive institutional land use.
- 281 There are also additional opportunities for the school to plant screening vegetation, especially in areas adjacent to the existing oval.
- 282 While balconies for the retirement village would not be screened, we consider there are benefits to both the residents of the new facility in terms of maintaining amenity and a broad outlook, as well as providing further passive surveillance of the school.
- 283 In terms of built form, we accept that the proposal would involve the replacement of scattered outbuildings with more intensive new development towards the common boundary.
- 284 In so far the Jubilee Wing is concerned, this already presents a bold and tall built form orientated toward the school. We consider this provides scope for replacement built form in this general location provided that appropriate setbacks and modulation are provided.

⁴² Within the Public Use Zone.



- 285 However, we accept submissions from Council, evidence from Professor McGauran and some objectors that Building 06 in particular has not been sensitively designed to meet site constraints and this strategic context. It provides a long (albeit partly cranked) façade parallel to the school at a height of 2-3 storeys. To this extent, it adopts a longitudinal orientation that does not follow site contours in the way that other buildings do, such as the northern element of Building 04.
- 286 Another significant consideration justifying a reduced footprint for Building 06 is that there is a need for careful building siting and design overall along this interface, recognising that it delineates the UGB. In our opinion, this would result in a more intensively developed interface than would reasonably be expected from land outside the UGB.
- 287 In these circumstances, we consider that generous spacing between buildings to allow views through and wide, landscaped circulation areas are crucial to an acceptable presentation of this land for urban development outside the UGB.
- 288 We consider that a building with a narrower face to the school, orientated more north-south could be supported in this location, generally adopting the location and scale of the 4 storey component of Building 06 to the south east. If this was undertaken, the proposed building including Building 07 and Building 02 would adopt a similar north-south orientation to school buildings, responding more suitably to site topography.
- 289 By contrast, we do not share concerns of objectors that Building 07 is problematic because of its scale or proximity to the school. It is well set into the site and responds to its slope and is in an area already occupied by a cluster of existing buildings. It would also adopt an angled setback with a minimum 16.9 metre setback from the common boundary and could be buffered by new landscaping. Notably, it would also present with a narrow building face to the school.

Green Wedge land

- 290 Council submitted that the southern return of Building 05 was an inadequate response to the values of adjacent farmland to the south, recognising that both properties are outside the UGB. In addition, it emphasised the natural landscape values of the adjacent site which are reinforced by its limited capacity for redevelopment given its location in the Green Wedge Zone.
- 291 Council was concerned that a building of 3-4 storeys constructed within 10 metres of the common boundary would not be consistent with expectations for this interface. We agree.
- 292 Much of the site is buffered from land to the south from established vegetation on the subject land. However, we consider that the direct relationship between this land and the open rural landscape to the south has not been sensitively responded to in the vicinity of Building 05.



- 293 We regard the scale and siting of the southern element of this building as particularly problematic since it would provide an abrupt and unsympathetic interface to land within the Green Wedge that is protected for its scenic values.
- 294 Also, a substantial building in this location would detract from the values of the inter-urban break when viewed from the coast. Expert witnesses such as Ms Ring and Mr Sheppard considered this was a reasonable location for a new building since it would constitute infill between the northern boundary and the existing mansion.
- 295 It was suggested by Ryman and its experts that a building in this location would simply extend the line of development along the coast which is already evident to the north. While this may be true, this other land is inside the UGB and potentially also within the defined Mount Eliza township boundary.
- 296 We are particularly cautious about such justification in circumstances where policy seeks to reinforce the qualities of the inter-urban break for this land, albeit recognising the existing landmark that is the Moondah mansion.

Osprey Ave

- 297 There are two freestanding dwellings adjacent to the subject land which we observed on our site inspections.
- 298 We accept the evidence of Mr Sheppard for Ryman that this interface has been appropriately managed by building setbacks, design and intervening vegetation. In addition, we consider that the primary outlook from these residential properties is to the coast, rather than towards the subject land.
- 299 We note that these properties would likely benefit from a more open outlook across the landscaped areas of the subject land if Building 05 was removed in line with our findings.

Residential properties opposite

- 300 We heard submissions from a number of residents who live on the opposite side of Kunyung road who objected to the proposal. They were concerned about the visual impact of the new buildings and the potential to generate increased noise, headlights and the like. We also inspected a number of these properties from inside.
- 301 These dwellings are substantially separated from proposed buildings on the subject land and are also notably more elevated given the increasing topography. They are also filtered by generous front gardens and landscaping on the subject land that will be retained and enhanced.
- 302 Their residential outlook to the west is expected to be well above the rooftops of the new buildings and, although some existing (generally confined) water views may be diminished, we find that there is no



reasonable expectation that these views of the bay will be maintained across all parts the site, being land in private ownership.⁴³

- 303 These are significant factors which lead to our conclusion that the proposed development (and more so if Building 01 was not approved) would not unreasonably affect the amenity of these properties.

Tribunal response to potential built form changes offered by Ryman during the hearing

- 304 In closing submissions Ryman offered a number of changes to proposed buildings and structures by way of permit condition as a response to party submissions, evidence and questions from the Tribunal.⁴⁴ These changes included:

- an increased setback of Building 05 to the boundary of the Green Wedge zoned land to a minimum of 16.8 metres (compared with a 10 metre minimum setback on the amended application plans)
- potentially removing half a floorplate from Building 05 to lower its profile;
- removing most of the east-west portion of Building 06 (extending somewhat into the three storey element of that building as shown in the amended plans); and
- lowering part of the bowling green by 1.4 metres with associated reconfiguration works.

- 305 We would generally support the changes proposed to Building 06 in line with our findings above, subject to confirming design and levels. We consider this would have the potential to result in an acceptable design response and presentation to the interface with the primary school.

- 306 Likewise, we consider the changes proposed to the bowling green would have the potential for acceptable outcomes subject to detailed design. The key objective would be to avoid intrusions into full height viewlines of the arcaded façade of the mansion from the entry drive.

- 307 However, given heritage, interface and UGB concerns, we remain unable to support:

- a substantial building in the location of Building 05 even if the setback to the Green Wedge zoned land was increased to a minimum 16.8 metres;
- Building 01 having regard to its siting and scale; and
- Building 03 as sited and designed, given its impacts on viewlines to Moondah mansion and its effect on the open landscape values of the site.

⁴³ No party identified any view sharing policies or provisions that would apply to these interfaces.

⁴⁴ Supplemented by concept plans at J57-J61 of the Tribunal Book.



- 308 We are conscious of Mr Townshend's observation that, in some ways, this proposal is in the nature of a master plan for the site. It follows that there may be some flexibility in the siting and design of certain buildings to achieve an acceptable outcome for the land as a whole.
- 309 In these circumstances and given the extensive public participation and hearing process to date, we considered whether it may be appropriate to issue an interim determination allowing for the circulation of amended plans to address our concerns.
- 310 However, we consider that the scope of these changes go well beyond what can reasonably be accomplished within the current permit application. Numerous buildings would need to be removed or redesigned and overall site planning and circulation would need to be reconsidered.
- 311 Also, while our reasoning has principally addressed individual buildings, when read cumulatively, we consider that this proposal for numerous sizeable new buildings across this site is too ambitious having regard to the policy and physical context.
- 312 This is particularly the case where most buildings adopt a similar typology, scale and design, creating an impression of a campus of like buildings. Its effect is also magnified when buildings are proposed in parts of the site with a currently open landscape character.
- 313 While we have identified scope for new buildings, especially with increased scale on central and northern portions of the site, greater restraint is required to preserve values of parts of the site that are currently free from buildings. A fresh permit application would need to consider and act on these more limited parameters to achieve sensitive redevelopment.

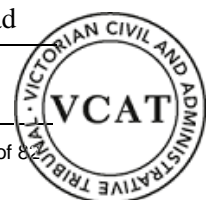
LANDSCAPE AND ECOLOGICAL IMPACTS

- 314 The land has impressive proportions with formal gardens including a wide variety of established trees and other vegetation. It also contains significant areas of native vegetation, particularly on the escarpment leading to the foreshore.
- 315 Numerous objectors were concerned about the impacts of the proposal on the environmental values of the site, especially the effect of tree removal and additional built form on wildlife and ecology.

Proposed tree removal

- 316 The applicant commissioned a number of arboricultural reports in support of the permit application and relied on the evidence of Mr Howe, an experienced arborist, horticulturist and landscape heritage consultant at the hearing.
- 317 If a permit was granted, Council had a preference for additional eucalyptus trees to be retained within the property frontage.⁴⁵ Mr Atkinson who had

⁴⁵ Tree Nos. 387, 393 and 394.



prepared a landscape concept plan confirmed this could be achieved with adjustments to the proposed path layout. Likewise, he explained how a group of native trees along the property frontage (Council land) could be protected if required by relocating a proposed entrance and path.⁴⁶

- 318 Some objectors opposed the extent of tree removal to facilitate the proposal, especially established native trees, which they considered would lead to a measurable loss in biodiversity and a diminution of landscape character.
- 319 Other objectors were particularly concerned about the removal of trees near the common boundary with the primary school, especially in light of what they regarded as a relatively narrow planting area proposed adjacent to this interface.
- 320 We accept that a sizeable number of trees are proposed for removal to facilitate the redevelopment.⁴⁷ Notwithstanding, had we supported the redevelopment scheme, we would have considered the applicant's approach to managing vegetation on site to be acceptable for reasons including:
- The two key areas of vegetation requiring protection for streetscape and environmental purposes are the treed area across the site frontage and the vegetated escarpment. The vegetated escarpment would not be negatively impacted and there is an opportunity for net gain through future management. For the most part, established trees (especially native trees) within the property frontage will be protected during the redevelopment. This would be supplemented by the addition of mid and understorey plantings (to be documented on a detailed landscape plan for Council approval).
 - While a number of established trees are proposed for removal, including trees of moderate retention value, they are for the most part decorative or commemorative trees planted in connection with the use of the land as a business school and are not generally visible external to the site. They are not native trees protected by Clause 52.17 of the planning scheme. Likewise, the land is not affected by a Vegetation Protection Overlay or Significant Landscape Overlay. No permission is required under relevant legislation such as the *Flora and Fauna Guarantee Act 1998*.
 - There is substantial scope for planting semi mature trees throughout the site as a whole, even once redeveloped. This was illustrated through a landscape concept plan but could be further enhanced.
 - While there would be some opportunities for planting additional trees along the common boundary with the school, we would have been in favour of increasing this planting area by potentially redesigning the pedestrian path or roadway to provide a wider area. Particular

⁴⁶ Tree Nos. 337 and 338

⁴⁷ Comprising a total of 2 high trees assessed of high worthiness to be removed, 43 of assessed of medium worthiness and 142 others.



attention would need to be given to this aspect of the landscape plan to provide an appropriate visual buffer to a new complex of buildings.

- In our opinion, had the siting of buildings was found to be acceptable, we would have generally supported the approach taken by the applicant's team in terms of giving priority to retaining specific trees while removing others. For example, we would have accepted the priority given to retaining the intact historic mature cypress hedge over Tree No. 127 (Lemon scented gum) if basement access was required for Building 01.
- Before plans were endorsed, there would be a further opportunity to minimise removal of established trees and maximise replacement planting as confirmed in evidence.

Potential impacts on native vegetation and fauna

321 The application was accompanied by assessments from ecologists on behalf of Ryman including Ecology and Heritage Partners which recorded 27 indigenous plant species.⁴⁸ It did not provide a list of fauna seen or recorded on the site but noted records of 15 nationally significant, 18 state significant and 12 regionally significant fauna species previously recorded within 10 kilometres of the study area.⁴⁹

322 Mr Organ expressed the view that:

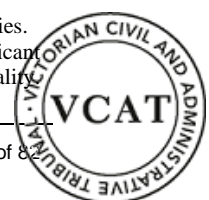
Based on the modified nature of the majority of the study area (the extensive lawns and ornamental planted gardens), other significant species are unlikely to occur, particularly in the parts of the study area lacking native vegetation. In particular, many of the significant species recorded within 10 kilometres of the study area are marine or freshwater species. Some birds may fly over the study area when moving between other areas of habitat but are unlikely to reside within the study area itself or rely on the study area as important breeding or foraging habitat.

323 In respect of the presence of koala, Mr Organ considered that this species may occasionally use the site and surrounds to move between more abundant food sources, there are only two trees on the land which are preferred by koala and insufficient to support a population of the species within the site. He considered that because most trees would be retained on the land, especially adjacent to Kunyung Road, "the ability of koala to occasionally utilise the site to traverse between higher habitats within the broader area will not be impacted by the proposal".

324 The application does not propose any works within the area of native vegetation on the escarpment. On this basis, Ryman's expert reports do not address potential impacts on this area.

⁴⁸ The relevant EVCs do not meet established criteria for national or state significant communities.

⁴⁹ Based on the Victorian Biodiversity Atlas (DELWP 2020), in addition to 28 nationally significant and two state significant species not previously recorded by with potential to occur in the locality.



- 325 However, during the hearing, it became apparent that there were ready opportunities that should be taken to improve the quality of this vegetation, especially through weed reduction and management required by permit condition. This would also directly facilitate improved erosion control.
- 326 We note the evidence of Mr Howe that there are a number of self-seeded trees within the predominantly native escarpment vegetation and that it may be desirable for these to be removed. This could be one potential component of such a plan if ecological values are to be prioritised. If the concern is to control their spread through self sowing, the proposed use would result in more active management of the overall landscape that could contain these effects.
- 327 Mr Organ gave evidence about the potential impacts of the proposal on what he identified as two remaining patches of native vegetation within the part of the site affected by the proposed development.⁵⁰ These patches are somewhat degraded but contain native grasses which have traditionally been mown and form part of the Grassy Woodland Ecological Vegetation Class (EVC 175).
- 328 The objector group Save Sir Reg's Wedge Inc called Dr Jeff Yugovic to give expert evidence about potential impacts on ecology. In summary, he considered:
- the areas of remnant native vegetation are more extensive than mapped by Mr Organ – the two areas identified should be larger and two additional areas should be identified,⁵¹
 - the site contains vegetation from a total of five EVCs (compared with three identified by Ecology and Heritage Partners) including Coastal Dune Scrub and Berm Grassy Shrubland;
 - the impacts of the proposal on fauna are likely to have been understated; and
 - Moondah Beach is an important natural and recreational asset which supports significant native vegetation and includes sites of geological and geomorphological significance. The ecological values of the foreshore should be enhanced, particularly through the removal of imported material on Moondah Beach.
- 329 Dr Yugovic and some objectors requested Ryman transfer its portion of the foreshore into public ownership (to vest in Council) to help compensate for biodiversity loss and to provide appropriate management. In our opinion, this request goes well beyond the scope of the current permit application or any reasonable expectations arising from zoning or land management practises.

⁵⁰ Estimated at 0.014 ha.

⁵¹ Per Figure 1 of Dr Yugovic's expert report.



- 330 In terms of remnant vegetation, the applicant provided a copy of a further Native Vegetation Removal Assessment from the Department of Environment, Land, Water and Planning (DELWP) for the larger area identified by Dr Yugovic.⁵² This remained within the intermediate assessment pathway under the *Guidelines for the removal, destruction or lopping of native vegetation, DELWP 2017* (Guidelines).
- 331 We have considered realistic opportunities to avoid or minimise impacts on this vegetation. We accept the evidence of Mr Organ that, in the current design, engineering requirements to create a realigned internal access road and footpath along the northern boundary would impact the northern patch. That size is small and of relatively low quality. Impacts on the southern patch have been minimised by the siting of buildings and configuration of the internal movement network.
- 332 Significantly, the application would avoid all impact on the high quality patches of native vegetation on the escarpment leading to the foreshore.
- 333 In its initial referral response (for the more confined area), DELWP advised that suitable offsets could be provided.
- 334 We accept that offset credits could be reasonably sourced for this vegetation in line with the Guidelines. In reality, we expect that while complete loss has been assumed, there is also potential for a proportion of this remnant vegetation to be retained and maintained on site within a managed landscape setting. This is made possible by avoiding building footprints within these patches.
- 335 Mr Karakitsos and the South Eastern Centre for Sustainability Inc considered the proposal would significantly reduce habitat and wildlife corridors for fauna. They were also critical of a lack of species identification on the site by way of survey, compared with more extensive investigation on the water reservoir property on the other side of Kunyung Road.⁵³
- 336 It is clear that local residents highly value the opportunity to live amongst wildlife in this part of Mount Eliza. We appreciate it is important to preserve opportunities for a range of local fauna when considering the redevelopment of land.
- 337 At the same time, we consider these opportunities should generally be proportionate to the values and setting of the land. This land comprises a modified site, with existing institutional habitation and landscaped gardens. It is not specifically protected through an Environmental Significance Overlay, for example.
- 338 We accept the evidence of Mr Organ that it is unlikely that significant flora species occur on the part of the land identified for development given its modified nature. Mr Organ was also of the view that the native vegetation

⁵² Included in J41 of the Tribunal Book, identifying 0.242 ha for removal.

⁵³ Included in the Public Use Zone.



proximate to the foreshore (mainly Coastal Headland Scrub) was unlikely to provide habitat for significant fauna species given high levels of weed infestation, erosion and general disturbance.

- 339 While some fauna species occupy the land from time to time or traverse through it, we are not persuaded that the site forms part of key habitat for any of these species or operates as part of a more established wildlife corridor. We are unable to accept evidence that the development of this site would further threaten species diversity or any species in particular in this region.
- 340 While the proposed development would significantly intensify the development and use of the land, there would still be some opportunities for fauna to occupy or inhabit the land, including by foraging, nesting or passing through. These opportunities have the potential to be enhanced or improved if a less intensive development outcome is sought in future, especially if widespread mid to understorey vegetation is established.

Bushfire management

- 341 The land is wholly within a Bushfire Prone Area but is not covered by a Bushfire Management Overlay. There are strong planning policies at state and local level including Clause 13.02 and 22.11 requiring the safe design and management of land having regard to bushfire risk, with the prioritisation of protecting human life.
- 342 The permit application was accompanied by a bushfire development report prepared by Terramatrix which explained:⁵⁴
- the site is adjacent to an established suburban area and is close to areas that would be rated Bushfire Attack Level (BAL) BAL-Low. This represents a relatively low bushfire risk landscape;
 - the majority of the land is managed as a low threat cultivated garden and parkland;
 - nevertheless, foreshore vegetation on the land and adjacent pasture constitute a bushfire hazard that need to be factored into the use and development; and
 - the use of the land for aged people should be taken into account given their potentially reduced ability to respond to bushfire threat.
- 343 The report recommended that all new buildings be constructed to BAL-12.5 standard and setback the minimum distance required from classified vegetation beyond the site boundary. In addition, Building 05 should be constructed to BAL-29 for most components (given the exposure to coastal scrub vegetation). During the hearing, Ryman's consultant re-confirmed

⁵⁴ Dated January 2021.



requirements for fencing between proposed Building 05 and the Green Wedge Zone land.⁵⁵

- 344 Terramatrix considered that a Bushfire Emergency Management Plan could be prepared if required by the Country Fire Authority (CFA).
- 345 The application was referred to the CFA. It did not object to the grant of a permit, subject to specific conditions such as restricting planting in certain areas, providing a vehicle turnaround area and restricting fire truck access to the northern entry.
- 346 We accept that with careful siting, building design and management, this site could suitably mitigate bushfire risk to an acceptable level. However, had we been inclined to approve the current proposal, we would have strongly supported the development of a Bushfire Emergency Management Plan. Such a plan has the potential to be effective for land with confined site and landscape bushfire risk and where there is a centrally coordinated facility including permanent staff. This would need to include specific measures to account for the vulnerabilities of future aged residents if evacuation was required.

Proposed landscaping

- 347 In light of our principal finding we do not make any conclusive comments about the adequacy of the proposed landscape concept. However, we make a number of observations for completeness.
- 348 A relevant heritage policy in Clause 22.04-3 seeks to “support landscaping that will enhance the historic cultural landscape character of a heritage place”. We recognise that the property hosts a mix of native and exotic trees and consider there is scope for this to continue in some form in deference to the values of the historic garden.
- 349 As mentioned, we consider that there is also scope for a well-designed bowling green in the vicinity of the Mansion, reminiscent of the historic recreational use of the Mansion open lawns.
- 350 Beyond this, we would have supported objectors’ preferences for a native (primarily indigenous) planting scheme where possible and respectful of the heritage setting, such as by replacing the proposed feature palms outside the Moondah mansion, the rows of capital pears along the northern accessway and the proposed exotic planting in the vicinity of the gatehouse entry.
- 351 This would provide a greater opportunity to enhance the ecological, coastal and landscape values of the site consistent with broader planning policies for the inter-urban break.

TRAFFIC AND PARKING

- 352 Many objectors were concerned about the impacts of the proposal on the local and broader traffic network, particularly:

⁵⁵ At J45 of the Tribunal Book.



- capacity for safe ingress and egress, especially given the likely older demographic of site residents and the land's adjacency to the Kunyung Primary School;
- impacts of additional traffic on Kunyung Road and other local roads;
- additional pressure on the intersection of Kunyung Road and Nepean Highway (considered to be already above capacity at times), especially in the absence of a commitment to specific mitigating measures as part of the proposal; and
- the allocation of resident and visitor parking, including claimed inadequate on site parking for all uses when operating at peak visitation (such as when events would be held at the place of worship).

353 Council and a number of other objectors also raised concerns about the layout, design and management of the proposed internal road and pathway network. A related issue was the proposed staging of development to provide ongoing access for people of limited mobility.

How should site access be managed?

354 Historically, the site used two access points - the southern access through the state heritage listed gatehouse, and a secondary northern access. Ryman proposes to reconstruct an extended version of the northern accessway to create a loop road with offshoots to various buildings.

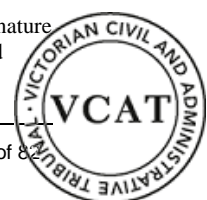
355 The gatehouse has fixed dimensions which both limit its use by oversized vehicles and constrain its capacity for two way vehicle movements depending on projected usage rates. We accept the evidence of Mr Maina who gave evidence for Council that this single width access point requires intervention to enable safe operation to service projected peak hour vehicle use.⁵⁶

356 Mr Hunt, Ryman's expert traffic witness, considered that access and egress through the gatehouse would be managed appropriately by a 'stop-go' light system combined with signage to give priority to incoming vehicles and pedestrians.

357 After further consideration, Mr Maina considered that a 'stop-go' light system in this particular setting would be potentially problematic, since it may create conflict by suggesting that incoming vehicles do not need to give way to pedestrians (particularly when faced with a green light).⁵⁷ Council therefore expressed a preference for the gatehouse to operate as a one-way only ingress point.

⁵⁶ Mr Maina's revised evidence was that the gate house access would attract 39 vehicle movements during peak hours, compared with the Australian Standard limit on 30 vehicles per peak hour for the use of a single width access accommodating two-way traffic.

⁵⁷ In a supplementary report tendered at the hearing after his oral evidence. Depending on the nature and location of signage and traffic controls, additional permissions may be needed under road management legislation and/or heritage controls.



- 358 While we do not need to decide on a preferred management approach given our principal findings, we make a number of observations. We are not persuaded that a ‘stop-go’ light system would be suitably safe to regulate incoming traffic, especially in this context where there are consistently large numbers of pedestrians traversing the driveway at school pick up and drop off periods (summarised below).
- 359 In these circumstances, we would have preferred to confine the use of the southern gateway to one way (incoming) vehicles. This direction would also have the advantage of maintaining the historic approach to the mansion which we have found is key to the site’s presentation.
- 360 We would have also been satisfied based on the further analysis undertaken by Mr Hunt that the northern access would have sufficient and safe capacity for all exiting vehicle movements, subject to appropriate design and management.
- 361 However, if a fresh permit application was made in line with our suggested approach to site planning, we anticipate it is likely to result in a reduction of units (with coincidental reduced vehicle movements) to the point that the southern accessway could be used for two way traffic in line with recommended standards without any specific interventions.

Could the interface with the school be managed acceptably?

- 362 This was a central concern for a large number of objectors who considered that it was fundamentally challenging, if not inappropriate, for an aged care facility traffic to directly interact with pedestrian and other movements associated with the adjacent primary school. Objectors sought to emphasise the incompatibility between potentially poor response times for elderly drivers and a lack of road safety awareness in younger pedestrians.
- 363 Local residents tendered a count of foot traffic during various school pick up and drop off periods undertaken by Ms Ennis. These counts indicated that there were just over 1,000 pedestrians traversing the site each day during both peak periods. This was consistent with our observations on our inspections.
- 364 Notwithstanding, we would have found that the interface with the school could have been managed acceptably in traffic and safety terms since, in summary:
- we accept the evidence of Mr Hunt that it is appropriate to assume that people associated with the facility who are driving are licensed and capable of driving in accordance with road rules;
 - road rules provide that pedestrians have priority over exiting vehicles when travelling along a pedestrian pathway;
 - while we consider that great care needs to be taken when driving in an environment where an aged care facility adjoins a busy primary



school, the two uses are not fundamentally incompatible in traffic terms;

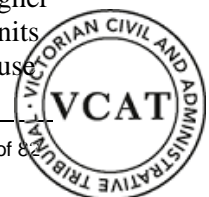
- acceptable sight lines could be provided for both accessways in line with Australian standards to provide clear visibility of passers-by. As indicated at the hearing, we would have given more careful consideration to reconfiguring or relocating services close to the property frontage to extend the length of direct sightlines towards the school;
- we accept evidence from Mr Hunt that peak vehicle movements associated with the aged care facility are unlikely to coincide with peak school times, with the former projected to occur in the late morning/midday period;
- with the exception of school pick up and drop off times - which are highly confined in duration and are predictable in timing (noting vastly higher pedestrian counts in the concentrated periods between 8.20am-9.00am and 3.15pm-3.40pm) - vehicle and pedestrian traffic in Kunyung Road would be consistent with its collector road layout and designation;
- to its credit, the school already actively manages student pick up and drop off periods through the use of staff, parents and crossing supervisors in an effective way to ensure the safe movement of children along and across Kunyung Road, as well as the passage of vehicles in the vicinity of the school premises (including 'kiss and go' bays); and
- there are further opportunities for physical and management measures by the site operator to improve the safe operation of the access points, including signage reinforcing the need to give way to pedestrians as well as the offer by the applicant to provide traffic supervisors to guide traffic during school pick up and drop off periods. While we accept submissions that these measures would not be equivalent to statutory measures, we consider they would have been suitable as supplementary measures to provide a level of additional oversight.

Would proposed parking arrangements be suitable?

365 A total of 347 car parking spaces are proposed on site for residents, staff and visitors. The majority of these are located in various basements under corresponding buildings. There are also 10 service and emergency vehicle spaces.

Resident parking demand

366 The application assumes comparable parking demand for the assisted living units and the residential aged care facility. Council considered that a higher proportion of parking spaces should be allocated to the assisted living units since they were not considered to form part of the residential aged care use.



of the land. It advocated for one car space per unit, rather than the 0.3 spaces per unit currently proposed.

- 367 Significantly though, Mr Maina considered the overall number of parking spaces to be provided on site would be adequate based on a car parking demand assessment. However, he recommended these spaces depicted in the application plans be reallocated to provide greater number of visitor parking spaces. Alternatively, he recommended the place of worship should be prevented from holding special events during weekdays.
- 368 We are not required to resolve this issue conclusively since the adequacy of parking would need to be revisited in any fresh proposal in any event. However, we are not necessarily persuaded by Council that the overall number of parking spaces offered to residents by category of occupancy is deficient in the current proposal.
- 369 In reality, there is a ready opportunity for parking spaces to be reallocated between various locations to cater for actual demand at any given time so long as the property is operated under consolidated management as proposed.

Visitor parking

- 370 Another issue was whether sufficient on site parking spaces would be provided to cater for parking associated with the place of worship when frequented for special events.⁵⁸ Residents were concerned about take up of on street parking spaces on Kunyung Road if this parking demand was not managed appropriately.
- 371 The application seeks a reduction of parking of 20 spaces for the use of the place of worship, compared with the rate in Clause 52.06 of the planning scheme.⁵⁹
- 372 Ryman proposes a Special Event Management Plan to cater for such times. A draft was included in Mr Hunt's evidence. Essentially, it proposes a system of parking marshals to direct traffic on days when special events are held at the place of worship, with capacity for parking along one side of the internal driveway.
- 373 We consider these issues could have been managed through suitable permit conditions generally as proposed by the permit applicant. In principle, we would support the reduction of parking proposed for the place of worship given its close integration with the facility and expected day to day use by residents and their visitors.
- 374 There is also capacity through active parking management as well as physical capacity for overflow short term parking on the internal road network within the site (as depicted in plan form) to provide suitable arrangements for special events. These arrangements could operate in

⁵⁸ Noting also that permission is sought for buildings and works for the Place of Worship.

⁵⁹ We note that this is the only shortfall compared with the planning scheme requirement.



conjunction with a management plan for the place of worship limiting overall patron numbers to 120 at any one time.

- 375 Although we consider it unlikely visitors would choose to park on Kunyung Road given the travel distance and topography, we accept it may be desirable to prevent special events being held in the place of worship during peak school times to avoid any potential overflow impacts on Kunyung Road.

Impacts on the local road network

- 376 Mr Hunt estimated that the development would generate two way volumes of 935 vehicles per day, with up to 146 vehicles per hour expected during the site peak (late morning/midday). Mr Maina derived generally similar upper end estimates for vehicles per day but up to 71 trips at commuter peak hours.
- 377 Approximately 88 and 64 vehicles per hour are estimated for AM and PM network peaks respectively. In broad terms, we accept Mr Hunt's use of pre-COVID survey data as a more indicative baseline to predict maximum traffic volumes in this road network compared with more recent data.
- 378 Kunyung Road is extremely busy at weekday school pick up and drop off times. This was clear from submissions, evidence and as confirmed by our inspection, with vehicles banked up a significant distance from the site with generally slow moving traffic (generally in the western carriageway on the side of the land).
- 379 At other times, however, we accept that Kunyung Road operates satisfactorily as a collector road (Level 2) - consistent with its network designation.⁶⁰
- 380 Mr Hunt prepared turning movement diagrams and estimates of vehicle movements at peak hour in each direction. We accept that the vast majority of traffic from the site will seek to travel in a southerly direction, towards Nepean Highway, Acheron Avenue (towards Mt Eliza) and Volitans Ave (comprising exit trips to Mornington).
- 381 Only a relatively small percentage (in the order of 10%) are expected to travel to local neighbourhoods to the north. We also do not consider there will be an unreasonable impact on the local road network from vehicles travelling to Mount Eliza Village given the numerous routes available.
- 382 Therefore, a far lower proportion of the overall site traffic will be expected to pass by the school directly, with a far higher percentage expected to travel in the opposite direction as the prevailing path of travel.
- 383 We are not persuaded by submissions by residents that Kunyung Road is either of a character or capacity that would fundamentally be compromised

⁶⁰ Noting this aligns with a target of 3,000-7,000 vehicles per day. Measured volumes were in the order of 3,350-4,200 vehicles per day, with the development expected to increase southbound traffic movements by approximately 850 vehicles per day.



by the additional vehicle movements likely to be generated by the proposed uses.

- 384 Some residents such as Mr Karakitsos and Ms Sheffield were concerned about the increased noise associated with additional vehicle movements.
- 385 While the proposal would result in notable traffic increases along Kunyung Road, we do not consider that additional passing traffic would equate to the type of noise disturbance that would unreasonably affect any residence, professional, service or other businesses operating from home in this immediate area. In any event, Kunyung Road is an identified collector road and the additional traffic that could be expected is within the engineering and environmental capacity of this roadway.
- 386 We are also conscious that some residents operate businesses from home. The principal activities of the proposed aged care and retirement facility are expected to be generally centralised on this site, such that they would not cause detriment to the amenity of the neighbourhood.

Impacts on the intersection with Nepean Highway

- 387 Kunyung Road is a road under Council's control and management, while Nepean Highway is a road under the control and management of the Department of Transport. Right turns are facilitated into Kunyung Road via a dedicated turn lane and only left turns out into Nepean Highway are permitted.
- 388 The application was referred to the Department of Transport which did not object to the grant of a permit.
- 389 One ground of Council's refusal related to the absence of mitigating works that may be required at this intersection. It initially suggested additional traffic lights may need to be installed. At the conclusion of the hearing, it proposed permit conditions on a without-prejudice basis requiring a Traffic Impact Assessment (TIA). These measures were sought before the commencement of the approved uses and would focus on:
- the performance and operation of the site access and egress points on Kunyung Road compared to baseline conditions;
 - the performance of the intersection of Kunyung Road and Nepean Highway, including at peak times as compared to baseline conditions; and
 - any recommendations for mitigation treatments or operational changes to the intersection of Kunyung Road and Nepean Highway that may reasonably arise as a consequence of the development.
- 390 The permit applicant did not investigate potential traffic impacts on the intersection between Kunyung Road and Nepean Highway as part of the permit application or in evidence to the Tribunal.



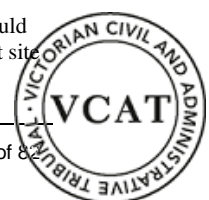
- 391 Mr Maina for Council analysed data on the existing operation of this intersection and found it was above acceptable operating conditions at certain times.⁶¹ He therefore recommended that the additional impact of vehicle movements associated with the facility should be investigated with recommendations for mitigating measures if required.
- 392 Mr Hunt agreed that this level of detailed investigation would be appropriate, although he was of the opinion that this should be undertaken after stage 3 of the development, to provide data pertaining to actual traffic from the facility using the road network.⁶² He also considered that mitigating measures were likely to be more operational rather than in the nature of improved or new road infrastructure, such as recalibrating the timing for traffic lights in the opposite direction to provide additional breaks for vehicles turning right.
- 393 We accept Council's position that it would be incumbent on the applicant to take responsibility to investigate and address the effects of vehicle movements from the proposed facility on this intersection. If the facility was to alter the status quo, it should take responsibility for proportional mitigating measures.
- 394 Had we approved the application, we would have supported the permit applicant's version of the condition including the timing of the investigation i.e. after part of the use was operational. The planning permit would continue to control the ongoing use of the land and the works would be proportionate to its impact, such that a condition of this nature would be enforceable.
- 395 Consistent with Mr Hunt's evidence, the traffic associated with the earlier stages would not of itself be expected to warrant additional mitigating works, but would provide useful data about practical operating conditions as an input to the TIA.
- 396 In addition, we accept the evidence of Mr Hunt and Mr Maina that there would be a range of potential mitigating measures available to restore this intersection to pre-development operating conditions if required. This would need to be explored with input from the Department of Transport.

Construction management

- 397 Objectors reiterated concerns throughout the hearing about the potentially long and disruptive effects of construction of the facility (if approved), particularly on school operations and residential amenity.
- 398 We recognise that development of this scale would be lengthy and would have the potential to be disruptive to local residents and the primary school. This is not a reason to refuse redevelopment if appropriate. Rather, it is a

⁶¹ Based on pre-COVID results in 2018.

⁶² This would result in occupation of 87 independent living units in buildings 2, 3 and 5 and would generate up to 300 vehicle movements per day, with up to 40 vehicle movements estimated at site peak.



matter that would require careful management to reduce construction impacts on the local community.

- 399 Ryman was prepared to accept a detailed condition of approval requiring a Construction Management Plan to be approved and implemented to Council's satisfaction. This could include management of suitable times for certain activities including access or egress to large construction vehicles, measures to manage emissions including noise, as well as a liaison officer for contact by residents and Council. This would be accompanied by a Construction Traffic Management Plan as proposed by Council.

FORESHORE ISSUES

Is the stormwater concept plan reasonable in principle?

- 400 A relevant strategy in Clause 21.08 seeks to "minimise the need for drainage outfalls to the coast and ensuring that the location and design of all structures minimises the impact on both physical and ecological processes and coastal amenity". It also seeks to ensure that preference is given to the re-use of existing structures "where feasible".
- 401 Some residents were very concerned that the proposal would increase stormwater discharge to Moondah Beach given the ongoing reliance on the existing outlet pipe and drainage system.
- 402 For example, Mr Eustace and Mr Albert identified that some existing drainage infrastructure assets (pits) were in disrepair and there were signs of coastal erosion within the area of native vegetation (observed on our accompanied inspection). Residents were concerned that additional runoff would cause scouring to Moondah Beach and would have the potential to reduce water quality if not managed scrupulously.
- 403 DELWP as the land manager of adjacent unreserved crown land did not object to the proposed use and development subject to conditions. These would include the containment of drainage runoff from the site onto coastal land to be controlled to pre-development levels to its satisfaction. It also required the drainage design to account for increased rainfall due to climate change.
- 404 In reality, the existing site (albeit with far lesser residential intensity than proposed) has historically discharged uncontrolled and untreated stormwater onto the foreshore and into the bay.
- 405 By comparison, the stormwater concept plan for the proposal would involve significant detention tanks including filtration and tertiary treatment systems, with careful attention to water flows across the site. This system would regulate water flows to ensure they did not exceed pre-development conditions and would need to comply with current regulations and best practice.
- 406 Having heard from Mr Chris White, Engineer, Adams Consulting, we are satisfied that the stormwater concept plan for this proposal would be



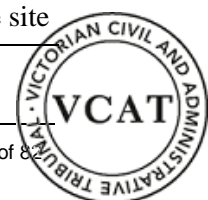
adequate to service the proposed use without unreasonable effects on the environment. This would of course be fully engineered as part of the future design work prior to construction to demonstrate its efficacy.

- 407 A further benefit expected from capturing stormwater ‘upstream’ is that it would reduce the risk of uncontrolled water flows and consequential erosion to the cliff face.
- 408 We would also have considered repairs to the existing infrastructure were warranted, especially damaged pit entrances, but otherwise accept the assessment by the applicant’s engineers that this infrastructure has been investigated and found to be of suitable capacity and fit for purpose.

Foreshore access and works

- 409 For the record, we note that earlier proposals for lighting along this track were withdrawn by Ryman in an attempt to minimise the effects of illumination on fauna, the beach and the night sky.
- 410 The application does not propose any works to upgrade access to Moondah Beach and we observed that the existing surfaced roadway from the top of the escarpment to the beach is in poor condition. Similarly, access from the ‘landing’ at the end of this roadway to the sand is variable to challenging at present, even for able-bodied people, given the condition of an unsecured sand deposit without any defined transition points.⁶³
- 411 While we accept separate permissions are likely to be required for this work given zoning and land management arrangements, we consider it was deficient for this application not to have addressed these issues at least in principle.
- 412 In our opinion, direct foreshore access is a key site feature and is an important benefit to future users. If the land is to be used and developed with an aged care and retirement facility, it would be remiss not to ensure there is convenient and safe foreshore access for at least a proportion of future residents.
- 413 In this regard, any future application should consider integrated permissions for such works.
- 414 We agree with Save Sir Wedge’s Reg and the evidence of Dr Yugovic that it is highly desirable that these works have regard to principles of ecologically sustainable development. In particular, they should involve ecological restoration to the foreshore - especially within the title boundary, since existing conditions are unsecured and sub-standard. Dr Yugovic fairly suggested these works should involve short term stabilisation and long term fulsome removal as part of a broader strategy of managed coastal retreat with sea level rise.
- 415 However, we do not accept proposed conditions sought by objectors (as their default position) that public access should be provided through the site

⁶³ The landing generally comprises artificial fill lined by imported boulders.



to the foreshore. While there may have been opportunities in the past from time to time, these were fortuitous.

- 416 It is not reasonable to require this operator to provide safe passage through the site to the foreshore for members of the public when considering its obligations as both an aged care provider and private land owner. This is especially the case when other suitable public access points for local residents and visitors to access Moondah Beach are provided locally.

EVALUATING NET COMMUNITY BENEFIT

Significant social effects

- 417 Another ground of Council's refusal was that the proposal would result in significant social effects pursuant to section 60(f) of the *Planning and Environment Act 1987*. It suggested that the number of objections (1068 with 33 letters of support) should be taken into account by the Tribunal on review.⁶⁴
- 418 Mr Chessell urged the Tribunal to consider the capacity for the proposal to generate adverse social effects as a consequence of "the impact of the project on the character and composition of the township of Mt Eliza, as well as on the recognised heritage values of the Moondah Estate".
- 419 Ryman submitted that the number of objections in this application was not enough to demonstrate a significant social effect and that both positive and adverse effects of the proposal must be considered.
- 420 All parties relied on the reasoning in *Rutherford & Ors v Hume CC*⁶⁵ and other seminal cases⁶⁶ where the Tribunal considered that such effects should be objectively ascertained; must be sufficiently probable to be significant; should have a causal connection to the proposed use or development; would generally involve effects on the community at large or an identifiable section of the community (rather than a small group of individuals); and should be based on a proper evidentiary basis or empirical analysis (such as a formal social impact or socio-economic assessment).
- 421 While a significant number of objections were submitted, we do not find that these necessarily equate with a significant social effect of the proposal. We accept that there is substantial local opposition to the aged care facility but consider that the principal adverse effects of the proposal would principally be experienced in built form and strategic planning terms, rather than as social effects per se. No objective evidence was presented by objectors to sustain this allegation beyond a general assumption.

⁶⁴ Pursuant to section 84(2)(jb) of that Act.

⁶⁵ (Red Dot) [2014] VCAT 786.

⁶⁶ Including references in the submissions for Save Sir Reg's Wedge at pages 40-42.



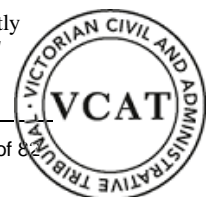
- 422 Even if a significant social effect is demonstrated, case law confirms it should still be balanced alongside all other relevant planning considerations.
- 423 The nature of this proposal is such that it stands to offer significant social benefits through the provision of integrated, modern aged care within this part of the Mornington Peninsula. This is a positive factor of the proposal being likely to deliver community benefit.

Evidence of need

- 424 Council explained that under planning scheme definitions, the independent living units forming part of the retirement village are to be regarded as a form of accommodation, rather than a health care (aged care facility).
- 425 Ryman strongly advocated for the fact that the facility as a whole should be regarded as a health facility and that it would deliver a substantial community benefit.
- 426 Parties did not dispute that Victoria is predicted to experience an increase in an ageing population and that there will be an increased need for services to all age cohorts.
- 427 Ryman relied on the evidence of Ms Wells, a retirement and aged care industry consultant. She identified that:
- *In the immediate Mount Eliza SA2, the benchmarks⁶⁷ indicate a current undersupply of 46 residential aged care places, and without further supply, this is projected to increase to an undersupply of 85 places by 2032. . . This would indicate the need to develop and open an average of 140 new places each year between 2021 and 2031 – that is the equivalent of opening 1.5 new sites each year;*
 - *There are 7 proposed new sites and 1 existing site holding 609 allocations [for residential aged care]. If all were developed [sic] by 2026, this would indicate the current undersupply of 195 places as at 2021 may change to an undersupply of 178 places within 5 years to 2026 or 903 places within 11 years to 2032;*
 - To maintain the current 6.3% capacity for the 65 plus population to access retirement dwellings would require development of around 486 new retirement dwellings in the 5 years to 2026 or 896 new dwellings in the 10 years to 2031. While 516 new dwellings are proposed across 6 retirement villages (including the subject land), this would fall short of current capacity. At this point in time only 168 dwellings are known to be proceeding.⁶⁸

⁶⁷ Referred to as Department of Health planning ratios of 125 aged care places per 1,000 people aged 70 and above, including targets of 80 residential care places and 45 home care packages.

⁶⁸ Noting that a 72 dwelling proposed retirement facility by Ryman at Mount Martha was recently refused by the Tribunal in *Ryman Healthcare (Australia) Pty Ltd v Mornington Peninsula SC* [2020] VCAT 1394.



- Average entry age to retirement facilities is 74-75 years of age with an average resident age of 81 years. Community, government and resident expectations have shifted to a modern, integrated retirement village. There are currently no villages in the Mornington Peninsula offering independent living, assisted living and residential aged care “on the one site as a fully integrated care continuum”.
 - Provision of aged care services through the Ryman model would provide for significant savings to all levels of government compared with other models of care.
- 428 In cross examination of Ms Wells, Council sought to emphasise that the potential shortfalls in the provision of aged care were principally in parts of the municipality more remote from Mt Eliza.
- 429 Residents also expressed the view that there was no certainty that local residents of Mt Eliza or the relevant catchment would be able to reside in either aspect of the facility, with access depending on pricing.
- 430 While there will be an increasing need for aged care facilities throughout the Mornington Peninsula, we are not persuaded that there is evidence of clear localised need that could not otherwise be fulfilled. We are also not satisfied through evidence in this proceeding of a minimum yield that would be required to make this facility viable.
- 431 It is therefore entirely conceivable that a viable facility could be provided within a more confined development footprint that would constitute sympathetic redevelopment of this distinctive site.
- 432 Ms Wells also outlined features of Ryman’s proposed operations that would provide a high standard of care to residents, referred to as “the Ryman Difference”. These include a guarantee given to future residents that they would have a seamless transition through the facility within their lifetime to cater for all levels of care, as well as a low capped deferred management fee and fixed weekly fee for life.
- 433 Mr Townshend submitted that Ryman’s model of care is highly consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety, generally seeking to provide improved quality of life and connection for older people, offer more choice as to how and when care and support is accessed and to deliver residential aged care in less institutional and more flexible environments.⁶⁹
- 434 While we accept that Ryman offers a high quality service to the aged, we refrain from placing too much weight on alleged benefits that may flow from the particular operations proposed, since the planning permit is proposed to run with the land rather than to attach to any particular operator.

⁶⁹ The Final Report Volume 1 was referred to in part during the hearing.



435 In *Steller Lifestyle Pty Ltd v Mornington Peninsula SC*⁷⁰ SM Bennett outlined planning issues relating to the provision of aged care in the Mornington Peninsula, with a particular focus on Westernport. He held that need was a relevant consideration in circumstances where the use of land for a retirement village required planning permission under the zone controls. However, the Tribunal regarded that application as:

...properly characterised as falling within the ‘middle ground’ of cases identified by the Tribunal in Tulcan Pty Ltd v Knox CC [2003] VCAT 1627 wherein ‘need may not be a decisive factor in the case of an individual development application, but will be a factor which influences the balances to be struck between competing planning policy consideration’ (sic).

436 SM Bennett therefore regarded an assessment of need as one matter to be balanced when evaluating matters under Clause 65 of the planning scheme. Ultimately, in *Steller Lifestyle* he gave greater weight to zone and policy expectations which did not support the proposed density of development on that land, notwithstanding evidence of need for more retirement village units.

437 We approach the issue of need in this case through a similar lens.

Balancing need with other policy considerations

438 Residents and Council did not take issue with the provision of aged care per se. Rather, they considered that any claimed need for such a facility of this intensity on the subject land would not outweigh other relevant considerations such as strategic policy considerations and the need to achieve appropriate built form outcomes. Mr Chessell submitted:

The Council, in making its decision in respect of the application, was cognisant of these clauses and that the provision of aged care facilities and retirement villages is important in servicing the needs of the community. That said, considerations of need in this case, do not outweigh the clear deficiencies of this proposal in heritage, strategic, or urban design terms.

It is important to stress, also, that nothing about the nature of the proposed use of the site justifies:

- a) a facility of the size or intensity proposed;
- b) the provision of a campus of buildings of 3-4 storeys in scale;
- c) the provision of buildings of up to 70 metres in length; or
- d) the degree of urban intensification and character change proposed.⁷¹

⁷⁰ [2018] VCAT 55.

⁷¹ Paras 48 and 49 of Council’s closing submissions.



- 439 Some objectors emphasised that the strategic policy framework identifies Mt Eliza as a ‘service town’, which is to be contained within its established boundaries and is not identified as a key focus for future population growth.
- 440 Other objectors considered that need should not override the impacts on vegetation, heritage, character and protection of the values of the green wedge.
- 441 We accept that the need for both aged care facilities and retirement villages will increase over time as the population ages, but consider the evidence falls short of demonstrating either a strong need or one which is particular to this locality.
- 442 Another important consideration is a spatial one. Mr Mangan submitted that even if there is a need for more accommodation for ageing people, it is to be satisfied on urban land, and not on this site outside the UGB.
- 443 The submission made by Mr Morris MP resonates with us, that:
- Many of the claimed benefits of this development, and the claimed consistency with the State Planning Policy Framework, relate to urban metropolitan Melbourne, and do not reflect the role of the Peninsula, as endorsed by the State government, as an area of special character and clearly distinct from, and complimentary to, metropolitan Melbourne.
- 444 We agree this is not a preferred location for aged care or a retirement village under policy although it may be an acceptable use of this land. To the extent that planning policy supports ‘ageing in place’, Clause 16.01-5S seeks to ensure residential aged care facilities are located in residential areas, activity centres and urban renewal precincts, close to services and public transport. While this site may be a suitable candidate from a ‘first principles’ assessment, it remains relatively remote from other local services and facilities and does not meet these criteria.
- 445 We conclude that the need for aged care in the relevant statistical area appears to be low to moderate and it has not been demonstrated these needs (or a continuum of care on an individual site) would not otherwise been met if this application was refused in its current form.
- 446 Also, the site is not a preferred location for such land use and any claimed need does not outweigh the deficiencies in responding to policies for land outside the UGB and the inter-urban break between Mt Eliza and Mornington.

CONCLUSION

- 447 We find that planning permission can be granted for the proposed uses. The application demonstrates that the proposed residential aged care facility and retirement village would operate “in association with” the proposed place of worship in a physical, functional and spiritual sense. The zone controls do not expressly or impliedly require the place of worship to be the



primary use of this land. In addition, there is scope for ancillary use of the place of worship building, so long as its real and substantial purpose remains for religious activities.

- 448 We reject submissions that the location of this land outside the UGB precludes any form of urban use, since the Special Use zoning of the land specifically provides opportunities for nominated institutional uses. This is confirmed by the site's full exemption from the core Green Wedge planning controls. Likewise, we are unable to accept submissions from some objectors that approving any form of residential aged care or retirement village on this land would be tantamount to rezoning. It is well within the scope of a valid planning permit application.
- 449 A key benefit of the proposal would be the adaptive reuse and restoration of the Moondah mansion. For the most part, we support the approach taken to maintaining and enhancing the historic values of the place, but retain concerns about the design and siting of Building 03 on the approach to the mansion and the resolution of design for the proposed bowling green and Building 05 forward of the mansion in bay views. Had these been the only outstanding issues, they could potentially have been addressed through redesign.
- 450 However, the more significant issue is whether the proposed layout and built form is acceptable in this relatively unique policy and physical context. This is where we find the application overextends itself.
- 451 The location of the land outside the UGB and outside the Mt Eliza township are highly relevant considerations for the use and development of this land. Key policies applying to this land focus on maintaining the inter-urban break between Mt Eliza and Mornington as well as the landscape, scenic and coastal features of the setting.
- 452 In our opinion, the existing site configuration and buildings respond well to these policies. There is scope for greater built form around the location of existing buildings and with the benefit of topographical screening in a way that would be consistent with these policies.
- 453 However, we are concerned about the proposal's introduction of extensive new built form at the Kunyung Road frontage (Building 01), notwithstanding its setback and intervening vegetation. This would represent an unwarranted intrusion into the inter-urban break that is also inconsistent with the character of this particular streetscape.
- 454 To a lesser extent, we make the same observations about the location and scale of Building 03 (regarding the inter-urban break), even though it would have reduced visibility from public vantage points due to siting and topography.
- 455 As mentioned, we are also concerned about introducing a substantial built form (Building 05) between the UGB and the Moondah mansion when



viewed from the coast. This building is also a poor response to the direct interface with Green Wedge land to its south.

- 456 The east-west form element of Building 06 would also present with excessive scale at the UGB adjacent to Kunyung Primary School that is not site responsive to existing contours. It would also limit spacing between buildings when viewed across the site from the north west to the south east, which is a definitive feature that aligns with landscape and scenic policy aspirations.
- 457 While Kunyung Primary School is an important existing land use with a strong community focus, we do not accept submissions that the proposed facility would be incompatible as a direct neighbour.
- 458 Kunyung Primary School generates high pedestrian traffic past the site. This requires particular care when making provision for access and egress for vehicles for the proposed aged care facility. However, we consider the school peaks occur at very confined and predictable times and access to and egress from the facility would be capable of safe management.
- 459 Overall, we find that increased projected traffic could be reasonably absorbed by the local and broader road network, subject to further investigation of whether mitigating measures would be required at the Nepean Highway intersection.
- 460 Much of the land is landscaped and highly modified and it has a history of institutional use. We are not persuaded that the proposal would result in unreasonable ecological impacts. While a substantial number of trees would be removed to facilitate the redevelopment, we consider this would also be acceptable subject to an appropriate landscape plan that would enhance existing values.
- 461 Another positive aspect of the proposal would be its integrated stormwater management system and enhancement of the vegetation on the coastal bluff down to the foreshore by way of permit conditions.
- 462 Beyond this, we strongly recommend that any future permit application consider ecologically sustainable works to facilitate safe foreshore access for future residents.
- 463 We accept that the proposal for a modern, integrated aged care and retirement facility would have the capacity to meet the future needs and expectations of an ageing population. That said, this is not a preferred location for aged care, neither is there strong evidence of unmet localised demand.



464 In these circumstances, when evaluating the proposal in light of net community benefit and sustainable development, we consider priority needs to be given to preserving what is unique about this site. This would require a more consolidated and considered building layout or scale to achieve important policies for land outside the UGB.

Dalia Cook
Presiding Member

Rebecca Cameron
Member

