

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P1532/2020  
P1954/2020  
PERMIT APPLICATION NO. 530/2019/02P

### CATCHWORDS

Sections 80 and 82, *Planning and Environment Act 1987*; Rural Conservation Zone; restaurant in conjunction with agriculture; utilisation of existing buildings; effect on conservation values; amenity; tourism.

<b>APPLICANTS P1532/2020</b>	Helen Stray, Dave and Helen Buttner & Others.
<b>RESPONDENT P1532/2020</b>	Dimitrios Missailidis
<b>APPLICANT P1954/2020</b>	Dimitrios Missailidis
<b>RESPONDENTS P1954/2020</b>	Helen Stray, Dave and Helen Buttner & Others.
<b>RESPONSIBLE AUTHORITY</b>	Nillumbik Shire Council
<b>SUBJECT LAND</b>	103 Bannons Lane, YARRAMBAT VIC. 3091
<b>HEARING TYPE</b>	Hearing (online)
<b>DATE OF HEARING</b>	23, 24 & 25 June 2021
<b>DATE OF ORDER</b>	28 March 2022
<b>CITATION</b>	Stray v Nillumbik SC [2022] VCAT 346

### ORDER

- 1 In accordance with Section 82(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, application numbers P1532/2020 and P1954/2020 are separate proceedings but heard and determined together.
- 2 Pursuant to Section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following persons are joined as parties to the proceeding in P1954/2020:

Helen Stray, Dave Buttner, Helen Buttner, Carolyn Dyer, Michael Dyer, Greg Tieman, Carolyn Tieman, Peter Wearne, Cathy Wearne, Lydia Tartaglia, Joe Tartaglia, Judy Rodsted-Wood, Bruce Birthisel, Jane Edwards, Ross Steel, Lorraine Steel, Donna Hope, John Hope, George Barratt, Gwendelene Barratt, Michael Lennox, Fiona Lennox, Jenny Bryson, Chris Bryson, Mike Bailey, Martina Bailey, Bill



Fleming, Malcolm McDowell, Janet Buzza, Jenny Gregory, Dennis brown Glenda Waldie, Murray Waldie, Judy Heseltine and Norm Heseltine.

- 3 In applications P1532/2020 and P1954/2020, the decision of the Responsible Authority in Notice of Decision to Grant a Planning Permit number 530/2019/02P is set aside. No permit is granted.

**Frank Dawson**  
**Member**

### APPEARANCES

For applicants in P1532/2020	Mr Peter Newman, town planner of PLN Planning. He called expert evidence from Mr Ray Phillips, agribusiness consultant of Phillips Agribusiness. Ms Helen Stray in person.
For applicant in P1954/2020	Mr Matthew Buckmaster, town planner of Buckmaster Town Planning Pty Ltd He called expert evidence from: Mr Richard Francis, environmental consultant of Abzeco Pty Ltd Mr Lucas Brooker, <sup>1</sup> acoustic consultant of Acoustic Dynamics. Mr Dimitrios Missailidis (observing) Mr Matt Dillon (observing).
For responsible authority	Mr Barnaby McIlrath, solicitor of P E Law. Mr Tyson McArdie, town planner (observing).
For respondent in P1532/2020	Mr Matthew Buckmaster.
For respondents in P1954/2020	Mr Peter Newman.

---

<sup>1</sup> Mr Brooker's evidence is co-authored with Mr Richard Haydon, also of Acoustic Dynamics. Acoustic evidence was given at the hearing by Mr Brooker.



## INFORMATION

Description of proposal	<p>The use and development of the land for agriculture (olive grove and lemon orchard), a restaurant, the sale and consumption of liquor (on premises liquor licence), associated buildings and works and the display of business identification signs. The proposed restaurant is in an existing shed on the property that is to be renovated internally for restaurant purposes with the addition of an entrance and outdoor dining area.</p> <p>The agricultural activity (olives and lemons) is to be developed with the restaurant to establish an association with Greek cuisine.</p>
Nature of proceeding	<p>Application under section 80 of the <i>Planning and Environment Act 1987</i> – to review the conditions contained in the permit.</p> <p>Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.</p>
Planning scheme	Nillumbik Shire Council
Zone and overlays	<p>Rural Conservation Zone – Schedule 3 (RCZ3). Environmental Significance Overlay – Schedule 1 (ESO1). Bushfire Management Overlay (BMO). The BMO applies to part of the land that includes a section of the proposed restaurant car parking area.</p>



## Permit requirements

Clause 35.06-1 - Section 2 in the Table of Uses (a permit is required to use the land for agriculture and a restaurant in the RCZ3).

Clause 35.06-5 (a permit is required to construct or carry out works for a building or works associated with use in Section 2 of Clause 35.06-1.

Clause 44.06 (a permit is required for a Restaurant in the BMO).

Clause 52.05-14 (a permit is required for a business identification sign with a total display area not exceeding 3 square metres).

Clause 52.27 (a planning permit is required for an on-premises liquor licence).

## Land description

The land is a rectangular site of 8 hectares located on the north-east corner of Bannons Lane and Edward Henty Avenue in Yarrambat. The land is undulating and generally cleared grazing land. There are established trees along the two road boundaries and around the dwelling and outbuildings. The north-east corner of the land contains a small dam.

The land contains a double storey dwelling, a second smaller house that is required to be made non-habitable and a 288 square metre shed. The dwelling and shed are positioned on the highest part of the land with extensive views to the north-east.

The 8 hectares size of the land is typical of the rural lots located north of Bannons Lane and east of Edward Henty Avenue. To the west, lots are generally between 2 and 4 hectares and used for rural living and hobby farm activities. To the south of Bannons Lane, the lot density increases, but the zone remains RCZ3. To the south-west, diagonally opposite the subject land, a Low Density Residential Zone commences containing a higher residential density.

The closest separation distance between the proposed restaurant building and a dwelling on adjoining land is approximately 197 metres to the north at 50 Edward Henty Avenue.



Tribunal inspection

The Tribunal inspected the subject land and the surrounding area.



## REASONS<sup>2</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Mr Dimitrios Missailidis, the permit applicant and owner of the subject land at 103 Bannons Lane in Yarrambat, wishes to convert an existing shed into a licenced restaurant. He also proposes to commence agriculture on approximately 4 hectares of the land by planting an olive grove and lemon trees. A herb garden is also proposed. The proposed restaurant is intended for a maximum of 150 patrons and includes car parking for 60 vehicles. The operating hours sought in the permit application are:
  - Wednesday to Saturday: 12 noon to 12.00 am.
  - Sunday: 8.00 am to 12.00 am.
  - Good Friday and ANZAC Day: 12 noon to 12.00 am.
- 2 In August 2020, Nillumbik Shire Council decided to issue a notice of decision to grant a planning permit (NOD) for the proposal. The NOD conditions require that the restaurant must not commence until the agricultural use is established in accordance with an approved farm management plan. The maximum number of permitted patrons is 150 and the hours of operation are:
  - Wednesday – Saturday: 12 noon to 10.00 pm.
  - Sunday: 8.00 am to 10.00 pm.
  - Good Friday and ANZAC Day: 12 noon to 10.00 pm.
- 3 In addition to the above operational parameters, the NOD conditions include detailed requirements for additional information. For example, a farm management plan, a land management plan, amended development plans, a landscape plan, a premises management plan, a waste management plan and a bushfire emergency plan.

### Restaurant proposal

- 4 The shed proposed to accommodate the restaurant is situated approximately 60 metres north of the existing dwelling on the subject land. The restaurant building has a north-south orientation with application plans showing the indoor and outdoor dining areas facing east, providing an elevated view towards Cottles Bridge and Arthurs Creek. The building will be supplemented by an entrance on the southern side and a pergola structure for outdoor dining along the eastern side. The pergola has a combination of open and closed roofed areas. The closed roof area is at the northern end of the pergola, with a fixed glass wall enclosing the northern section for

---

<sup>2</sup> The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



weather protection. The plans also show a kitchen, serving area and amenities all in the northern section of the building.

- 5 A gravelled car parking area for 60 vehicles is located on either side of the entrance driveway, south of the restaurant building. Entry from Edward Henty Avenue to the proposed restaurant is via an existing curved access driveway approximately 120 metres long, to be constructed to a width of 6 metres.
- 6 As described earlier, the restaurant is proposed to be open from Wednesday to Sunday, with Council's NOD conditions stipulating a 10.00 pm closing time.

### **Agriculture proposal**

- 7 The agriculture component of the application is the planting of an olive grove (nominated as 63 trees) and lemon trees. The plan prepared by Abzeco and included in Mr Francis' evidence shows the olive grove within the eastern half of the site, with stage 1 nominated on the slope below the restaurant building and stage 2 extending further south towards Bannons Lane. For the olive grove, I estimate Stage 1 will occupy 1.5 hectares and a similar area for Stage 2. A small lemon orchard is proposed on the sloping bank below the proposed restaurant.
- 8 Conservation areas for existing native vegetation are in three locations totalling approximately 0.6 hectare, with new planting areas for native vegetation proposed along the northern and eastern boundaries of the land. The remainder of the land (excluding the area containing the dwelling and existing shed) is for livestock grazing (approximately 2.8 hectares).
- 9 During my inspection I observed approximately 100 olive trees in large pots. I assume these are the trees intended for the olive grove.

### **Review grounds**

- 10 In application P1532/2020 the applicants for review object to the proposal and submit that a restaurant of the size proposed is not appropriate for the local rural environment.
- 11 At the hearing Mr Newman presented submissions on behalf of the applicants for review, citing four reasons why the application should be refused. I summarise Mr Newman's reasons below:
  - i The proposal is inappropriate having regard to the Green Wedge policy directives (State and Local) and the decision guidelines under the RCZ and ESO1.
  - ii The proposed restaurant fails to satisfy the requirement that it must be "in conjunction with" the proposed agricultural use.
  - iii The application lacks the information required to make an informed decision, as evidenced by the extensive list of information Council is requiring by way of permit conditions.



- iv The proposal will have a significant impact on the amenity enjoyed by surrounding residents.
- 12 The Council submits the proposal is acceptable in the context of the RCZ3 and considers the proposal meets the requirement at Clause 51.02-2 that a restaurant located within Green Wedge land must be used in conjunction with agriculture, with a limit of no more than 150 patrons. Council also takes into consideration that the proposed restaurant will occupy an existing building and the agricultural use avoids native vegetation removal.
- 13 Council also considers the detail of implementing the restaurant and agriculture components of the proposal can be satisfactorily addressed through permit conditions, including a Section 173 Agreement. Finally, Council submits the reduction in operating hours required by the permit conditions will contribute to an acceptable amenity outcome for surrounding residents.
- 14 In supporting the Council's position for approval, the permit applicant (as respondent) maintains the proposed agricultural use will have a direct association with the proposed restaurant and the operating hours as proposed in the permit application are appropriate.
- 15 In application P1954/2020, the permit applicant contests many of the permit conditions in the NOD, specifically;
- Conditions 1(a), 1(b), 1(g), 1(i), 1(j), 1(k), 3, 5, 6, 15, 17, 22, 23, 24, 27, 28, 29, 30, 36, 37, 38, 40, 41 and 45.

Broadly, the issues in contention are:

- Conditions requiring amendments to various management plans that the permit applicant considers will be addressed in the endorsement process.
- Unclear conditions (for example, demonstrating on the plan how the original dwelling on the subject land will be converted to an uninhabitable building).
- Timing or interpretation issues. For example, lack of clarity concerning the point at which the implementation of the agricultural use warrants commencement of the restaurant.
- Operational provisions that are not considered to permit conditions (e.g. closure on a declared code red fire danger rating).
- An unnecessary requirement for a Section 173 Agreement in accordance with the *Planning and Environment Act 1987* on the basis of duplication of permit conditions and relevance beyond the use fulfillment.
- The need for a Bushfire Management Plan given there is no CFA condition requirement.
- Unreasonable reduction in operating hours.





- Repetition of condition requirements relating to noise and waste treatment and contention that the restriction on live music is not necessary due the requirement to meet EPA noise standards.
- 16 Council accepts some changes to the conditions to improve clarity of meaning and to avoid repetition. Essentially, however, Council maintains its position in the NOD, relying on conditions for the submission of the extensive list of management documents and design plans mentioned earlier.

### **WHAT ARE THE KEY ISSUES?**

- 17 I consider the key issues in this proceeding centre on determination of whether the proposed agricultural use of the land meets the requirement at Clause 51.02-2 that a restaurant:

Must be used in conjunction with Agriculture, Natural systems, Outdoor recreation facility, Rural industry or Winery.

And whether the operation of the proposed restaurant will cause unacceptable detriment to the amenity of surrounding residents.

- 18 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Nillumbik Planning Scheme, I have decided to set aside the Council decision and refuse the grant of a permit. My reasons follow.

### **PLANNING POLICY CONSIDERATIONS**

- 19 The planning policy framework provides a state-wide policy framework that contains strategies that are particular to Nillumbik. My observations in relation to the use of the land for a restaurant and agriculture based on the information provided in submissions and the evidence called by the parties are set out below.

#### **Biodiversity (Clause 12.01)**

- 20 The proposed olive grove and lemon orchard will utilise a proportion of the land currently given to pasture. The location of these trees will fill the land in front of the restaurant dining area as a foreground to wide views of the valley, rising to distant views of the Kinglake National Park.
- 21 The plan contained in Mr Francis' evidence shows all of the existing native vegetation on the land is retained, supplemented by 'conservation zones' of perimeter planting of native trees along the northern and eastern boundaries. There is no information in the permit applicant's submission describing the purpose of the proposed conservation zone, the native species proposed, or any implementation and on-going management plan.



### **Bushfire (Clause 13.02)**

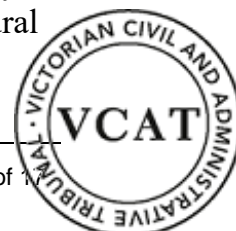
- 22 The BMO covers the southern and eastern part of the subject land, extending into the proposed car parking area, but not the proposed restaurant itself. Council requires the preparation of a bushfire emergency plan (BEP) as a condition (the condition also erroneously makes reference to a bushfire management plan (BMP)). The requirements in the BEP condition concern emergency matters such as evacuation triggers, transport arrangements and a location for shelter-in-place.
- 23 Closure of the restaurant on any day with a declared fire danger rating of Code Red is also included as a condition of the NOD.
- 24 There is little information in the submissions concerning mitigation of bushfire risk, however, if I had decided to grant a permit, I consider Council's condition for the preparation of a BEP is appropriate for the size and patron capacity of the proposed restaurant.

### **Noise (Clause 13.05)**

- 25 The strategy for noise abatement is intended to:
- Ensure that development is not prejudiced and community amenity and human health is not adversely impacted by noise emissions, using a range of building design, urban design and land use separation techniques as appropriate to the land use functions and character of the area.
- 26 The acoustic assessment evidence given by Mr Brooker is discussed later in my reasons. Mr Brooker models the noise levels likely to be received at sensitive receivers (in this case, adjoining dwellings). Council's permit conditions include a requirement for an 'as constructed' noise assessment prior to the commencement of the restaurant to demonstrate compliance with the EPA policy *Control of Noise from Commerce Industry and Trade – No. N-1*.

### **Agriculture (Clause 14.01)**

- 27 The protection of productive farmland is the objective of the planning policy for agriculture. A strategy to achieve this is the compatibility between a proposed use and the existing use of the surrounding land. The capability of the land to support productive agriculture is also a consideration.
- 28 I discuss the available detail of the proposed agricultural use and the capability of the subject land to support agriculture later in my reasons. In a strategic sense, the land use surrounding the subject land is mixed, despite being in the RCZ, except for the LDRZ located directly south-west of the subject site. North of Bannons Lane, there is a distinct gradation into larger lots, generally similar to the 8 hectare size of the subject land. During my inspection, I observed that many of these lots, while characterised as 'rural lifestyle', are actively used for agriculture. Most are grazing properties,



although some lots retain a significant proportion of native vegetation. Irrigated agriculture is not apparent, however, I noted some horticulture on smaller lots to the west of Edward Henty Avenue.

- 29 An olive grove established on currently cleared land, as proposed by the permit applicant, is not in my assessment an incompatible agricultural use in this area. This issue, presently unknown, is whether the land can support this form of agriculture on a sustainable basis.

### **Tourism (Clause 17.04-1L)**

- 30 In rural areas, tourism in Nillumbik is encouraged in green wedge areas on sites that can demonstrate minimal impact on the environment. Tourism development is encouraged in rural areas where:
- There is direct access from a major road.
  - It is compatible with the environmental and landscape values of the site and surrounding area.
  - Access is not reliant on local roads not suited to the traffic proposed to be generated by a use.
- 31 The above strategic guidelines are considered later in my reasons, taking into consideration submissions from the parties, the Traffic Engineering Assessment prepared for the permit applicant by the Traffix Group and where relevant, Council's proposed conditions.

### **RURAL CONSERVATION ZONE**

- 32 With reference to agriculture, the RCZ has the purpose:
- To provide for agricultural use consistent with the conservation of environmental and landscape values of the area.
- 33 More specifically, Schedule 3 to the zone has conservation values:
- To ensure land use changes do not have an adverse impact on the landscape or strategic environmental values of the land.
- 34 Considering the existing development of the subject land, the size of which accords with the required minimum lot size of 8 hectares, the proposed restaurant requires a small increase in the footprint of the existing shed and the construction of the car parking areas and associated access drive. Overall the physical changes are minor and are unlikely to have an adverse impact on the landscape, although the positive or negative effect of the conservation zone proposal on the strategic environmental values of the land are not clear.

### **Metropolitan Green Wedge**

- 35 Clause 52.02 contains core planning provisions for land in the Metropolitan Green Wedge. The overarching purpose is:



To protect metropolitan green wedge land from uses and development that would diminish its agricultural, environmental, cultural heritage, conservation, landscape natural resource or recreation values.

And

To protect productive agricultural land from incompatible uses and development.

36 The Green Wedge planning provisions also require that the use of land for a restaurant:

Must be used in conjunction with Agriculture, Natural systems, Outdoor recreation facility, Rural industry or Winery.

No more than 150 patrons may be present at any time. If used in conjunction with Function centre, the total number of patrons present at any time must not exceed 150.

37 The issue of what constitutes ‘in conjunction’ has been considered in numerous Tribunal decisions. The parties refer to a number of key Tribunal decisions and where relevant to the matter in this proceeding, I make the following comments.

38 The Macquarie Dictionary definition of ‘conjunction’ refers to the act of cojoining; combination and association – ‘a combination of events or circumstances’. I find it is relevant to note that the definition does not refer to interdependency, but to combination or association.

39 In *Jinalec Park PL v Mornington Peninsula SC* [2007] VCAT 1238, the Tribunal provides a comprehensive review of the application of the term ‘in conjunction’ in the context of various types of uses in Green Wedge land.

40 The interpretation of the word ‘conjunction’ as ‘association’ has often been applied in a broad sense to allow separate uses to be considered as operating ‘in conjunction’. In the case of agriculture for example, the scale or viability of an agricultural activity need not be a determining test of whether agriculture can be considered to operate in conjunction with another use. It has been sufficient that agriculture, for example, simply have a side by side association with another use.

41 Clause 64.02 (Land used in conjunction with another use) was introduced into the planning scheme to give some clarity to the term ‘in conjunction with’ in the context of the use of land.

42 Clause 64.02 states:

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.



43 To my observation, Clause 64.02 tightens the association required between uses to meet the ‘in conjunction’ test. To put this in context, I cite the following summation by Deputy President Gibson in the *Jinalec Park* decision cited above:

28 These cases illustrate the liberal interpretation of the term ‘in conjunction with’ prior to the introduction of clause 64.02. The Tribunal allowed uses subject to the condition on relatively small lots where the agricultural use was small scale or only proposed, and in circumstances where the use permitted was arguably of a much greater scale than the use it was required to be in conjunction with. In more than one instance, it was evident that the agricultural use was being provided simply as the “hook” on which to hang the other use. In other words, the agricultural use was not the dominating use of the land. The recreational, accommodation, restaurant or function centre use was the primary use and the agricultural use was of little more than incidental significance and scale (albeit of sufficient scale to constitute a use in its own right rather than simply being ancillary). I consider that these types of outcomes represent the “mischief” that Clause 64.02 was intended to overcome.

44 This is the nub of my concern with the matter under consideration in this proceeding. The association of olive and lemon production with Greek cuisine is clear and I can accept that this is an ‘essential association between the two uses’. In the context of agricultural production, however, I can understand there is scepticism that the olive grove and lemon orchard has no greater purpose than to give credence to what is simply a proposal for a large restaurant in a rural setting.

### **Farm management plan**

45 Looking at the extent of the proposed olive grove in the proposed land use plan included in the evidence of Mr Francis, I am comfortable that if implemented to the extent proposed, the olive grove will have a credible and dominant presence and a strong visual connection with patrons in the restaurant.

46 My concern, however, is with practical application. I accept that Mr Phillips is an experienced agribusiness consultant. The evidence he places before the Tribunal is that success in establishing an olive grove on the subject land is problematic. In his summary of opinion, Mr Phillips makes the following assessment:

The natural feature characteristics of the district are suited to conservation management and low intensity grazing. Perennial orchard crops such as vineyards, fruit trees and olive growing are generally unsuited to the environment due to steep slopes, poor soils, lack of irrigation capability and little opportunity for scale of enterprise.

47 Later in his summary of opinion, Mr Phillips states:



A Farm Management Plan has been prepared which describes the agricultural activities complementary to the proposed restaurant being a herb garden, olive grove and lemon orchard. It is stated that the proposed agricultural business will be a productive and economically viable farming enterprise.

However, the farm plan fails to demonstrate that any of the enterprises meet the conditions of complementarity to the proposed restaurant. They lack sustainability of operation through low productivity levels and small enterprise scale. Under these conditions, the agricultural business fails to be a productive and economically viable farming unit.

48 Understandably, Mr Phillips' expertise is centred on providing professional advice directed toward agricultural viability. Taking into consideration the size of the land, in this case, viability is perhaps not the key objective. To my mind the acceptable outcome is a small scale olive grove producing olives on a sustainable basis. However, while viability is unlikely, I agree with Mr Phillips that the current Farm Management Plan fails to demonstrate that in terms of production, it is questionable that an olive grove can be sustained on this site.

49 In his assessment, Mr Phillips explains that:

The soils throughout the district are Silurian in origin, with a surface profile that comprises a light brown-grey silty clay loam, becoming bleached with depth and overlying a orange brown, mottled, medium textured clay subsoil. There is extensive amounts of gravel throughout the profile. Soils are in the pH range of 5.5 to 5.8, with nutrient deficiencies in nitrogen, phosphorous and marginal in potassium. They have good surface drainage due to contour, moderate to low profile permeability and are susceptible to gully and sheet erosion through the influences of soil characteristics, slope and weak surface vegetation.

50 On the subject of water availability, Mr Phillips notes:

Because of the small holding sizes (8ha) many are located on landforms that do not allow runoff collection through the absence of suitable dam sites and the lack of a sufficient catchment area. There is no irrigation capability from catchment supply. However, domestic and stock water is available through town water supply and roof runoff (tank collection). Although irrigation supply could be sourced from town water, its high cost renders it an uneconomic input, particularly for the type of crops being proposed.

51 While accepting Mr Phillips' evidence concerning the circumstances of the subject land, I take a different view and prefer to focus on the potential for a 'genuine, close and continuing functional relationship' between the proposed olive and lemon production and the restaurant, as required at Clause 64.02.

52 On the information before me, I cannot reach the conclusion that an acceptable association between agriculture and the restaurant is achieved,



however, if considered as a whole, a functional relationship may be achieved by considering the restaurant and Mediterranean fruit production together. By this I mean the attraction and credibility of the Mediterranean cuisine is reinforced by the obvious presence of the production of olives and lemons. On this basis, the cost of achieving fruit production may be justified as an input to the success of the restaurant. In my assessment, this would meet the ‘in conjunction’ test.

- 53 In my assessment, an element missing in the current application is a farm management plan that describes how the production of olives and lemons is to be achieved (as distinct from planned). Companion to this (and also missing) is a land management plan that describes how conservation values are to be maintained and improved.

## AMENITY

- 54 In addition to the consideration of the association between the proposed restaurant and agriculture, the effect of the operation of the proposed restaurant on the amenity of surrounding residents requires consideration. The key amenity concerns raised by the applicants for review are operating hours, noise and traffic.

### Operating hours

- 55 Council’s NOD requires the restaurant to close each operating day at 10.00pm. The permit applicant proposes to close at midnight and contests the Council’s requirement. Unfortunately, there is no discussion in the permit applicant’s submission concerning the merit of the proposed hours in relation to potential loss of amenity for surrounding residents.
- 56 Considering the rural location and the rural residential character of the area, particularly north of Bannons Lane, I agree with Council that if I was of a mind to grant a permit, a 10.00pm closing time is more respectful of the amenity of surrounding residents.

### Noise

- 57 Mr Brooker appeared at the hearing to give acoustic evidence based on his *Operational Noise Emission Assessment* prepared for the permit applicant. Mr Brooker’s assessment uses a modelling technique to predict the likely noise levels at various sensitive receivers (surrounding dwellings). Eight sensitive receivers are identified, varying in distance from 195 metres to 400 metres distance from the proposed restaurant. Mr Brooker notes the hours of operation required in Council’s NOD, that no live music is permitted and that no external sound amplification or loud speakers are to be used unless with the prior written consent of the Responsible Authority. All of these conditions are contested by the permit applicant.
- 58 Mr Brooker’s modelling takes a conservative approach, assuming ‘maximum noise source levels and maximum capacity operations (i.e. worst

case scenario)' at the proposed restaurant, noting that this 'is unlikely to occur for the majority of the time.'

- 59 As a minimum operational noise strategy, Mr Brooker recommends a number of parameters for noise control that are based on a trading period that extends to midnight. From a modelling perspective, I consider the recommendations are reasonable. It is not necessary for me to reproduce them here, as I have decided to refuse the application on other grounds.
- 60 Generally, I support the Council's comprehensive conditions for noise management, particularly the requirement for post construction noise monitoring and response procedures.

### **Traffic and parking**

- 61 Access to the subject land is via sealed roads approximately 1,200 metres from Yan Yean Road, which is a major thoroughfare. The lowest order access road, Edward Henty Avenue, is a two way sealed rural road with a pavement width of 7 metres. The Traffix Group prepared a traffic assessment for the permit applicant, submitted with the application documents. The assessment notes:

The surveys also included recording vehicle speeds, which identified that this section of Edward Henty Avenue has an average speed of around 60 km/h and an 85th percentile speed of around 65 km/h.

- 62 In relation to traffic volumes, the Traffix assessment finds:

Whilst traffic volumes of a weekend at lunch and of an evening dinner period are expected to be higher, a total peak hour volume of not more than 60 vehicle movements is expected. This is equivalent to an average of less than one vehicle movement every minute generate to the network across the hour.

The majority of these movements will be arrivals turning into Edward Henty Avenue from Bannons Lane.

Based on our observations, and the surveyed traffic volumes, we are comfortable that the traffic generated by the proposal can be accommodated by the existing road network and will not have a significant impact on the operation of the nearby intersections.

- 63 The Traffix assessment accords with my observation of the road system giving access to the subject land. I agree with the Traffix Group view that;
- .. the level of traffic generated as a result of this proposal is acceptable and in the most part will occur outside of peak commuter periods.

### **CONCLUSION**

- 64 On the basis of the information before me, I cannot conclude that this proposal can be credibly realised in the context of being in conjunction with agriculture. I also have a concern that the range and detail of further information required by the proposed permit conditions affects almost every aspect of the proposed restaurant and agricultural use of the land. The





responses required by the conditions may serve to alleviate on one hand, or accentuate on the other the concerns of the objectors to this proposal, however, their input may be limited as the key requirements for further information are to the satisfaction of the Responsible Authority and presumably resolved under secondary consent. This is acceptable when the purpose of the conditions is to specify or confirm information already apparent in the permit application and any changes required are minor. In this case, however, the extent of information required by conditions assessed under Council consent effectively ‘sidelines’ input from residents who may be affected. This in my view is unreasonable.

- 65 The NOD conditions require detailed ‘baseline’ information regarding the management of the agricultural use, the land, the restaurant, waste management, bushfire emergency and landscaping. I find the detail of this application is deficient and the proposed conditions too open-ended for me to reach an informed view about an acceptable outcome in accordance with the planning scheme. In my assessment, the majority of the further information being sought by the Council through conditions should be included with the permit application, allowing informed input from all parties.
- 66 I find agreement with Mr Newman’s view that ‘the application lacks the information required to make an informed decision’. I am also in agreement with Mr Newman that the extent of information required in Council’s conditions is a measure of the deficiency of the permit application as currently presented.
- 67 I find a credible connection between the Mediterranean fruit production of olives and lemons and the serving of Greek cuisine in the restaurant, however, as indicated above, the credibility diminishes when the sparse detail concerning the implementation of the agricultural ‘in conjunction’ association is explored. A more considered application containing greater certainty about the establishment and sustainability of the proposed agricultural use would be helpful.
- 68 In terms of amenity, consideration of the operational scale of the proposed restaurant in the context of the rural residential character of the surrounding area may result in a more integrated association between the restaurant and the agricultural production of olives and lemons.
- 69 For the above reasons, I have decided to set aside the decision of the Responsible Authority. No permit is granted.

**Frank Dawson**  
**Member**

