

ALLOCATED OFFICER	Mich Watt
DATE RECEIVED	07 August 2017
PROPERTY NUMBER	90410
PROPERTY ADDRESS	48 The Esplanade, Torquay
APPLICANT	JDOT Pty Ltd
OWNER	Department of Environment, Land, Water and Planning
PROPOSAL	Use and Development of the land for a Tavern with On Premises Licence and Waive the Car Parking Requirements of Clause 52.06 and Waive the Loading Bay Requirements of Clause 52.07
ZONE	Public Park and Recreation
OVERLAY/S	N/A

PROPOSAL

The application seeks approval for the use and development of the land for a tavern; use of the land for the sale and consumption of liquor under an on-premises licence and a waiver of the standard car parking requirements of Clause 52.06.

The key details of the proposed use are:

Operating hours

- From the start of September school holidays to Easter Monday – 7 days, 12pm to 10pm;
- The day following Easter Monday to the start of September school holidays – Thursday to Sunday, 12pm to 10pm; and
- Public holidays and school holidays 12pm to 10pm.

Patron numbers

- A maximum of 150 patrons

Licence

- Supply of liquor for consumption on the premises under an on-premises licence

Music

- Pre-recorded and live music at background levels during opening hours

Car parking

- No on site car parking provided for the use

Buildings and works

The proposed development includes:

- Installation of a converted shipping container bar
- Installation of a portable disabled toilet
- Construction of barrier to enclose the tavern area.

Other than where inconsistent with the above description the proposal seeks approval in accordance with Planning Permit 15/0408. This permit was issued 28 July 2016 in accordance with an order of the Victorian Civil and Administrative Tribunal (VCAT) (*Teasdale v Surf Coast SC* [2016] VCAT 1224) for the temporary use and development of the land for a tavern (pop-up bar) and a waiver of the standard car parking requirements of Clause 52.06. This permit was acted on over the allowed period from Spring 2016 to Autumn 2017.

Previous Permit

Conditional requirements of PP15/0408 which this application adopts include:

- Drinks must not be served in glass containers
- Food and drinks must not leave the premises
- An acoustic report to be endorsed under the permit
- Downstairs toilets to be available for patron use
- Surveillance system

- Waste collection area to be provided
- Operator to collect litter from the surrounding area daily
- Patron management plan to be endorsed under the permit

Beyond this application seeking permanent use compared to temporary use for one season, this application can be differentiated from PP15/0408 by the following:

Element	PP15/0408	Application 17/0258
Opening hours	1pm to 9:30pm	12pm to 10pm
Trading days	26 Dec to 26 Jan – 7 days 31 Oct to 16 Apr (excluding above)– Thurs to Sun No trade outside above	Sept Hols to Easter Mon – 7 days Easter Mon to Sept Hols – Thurs – Sun Plus Public Hols and School Hols
Patron numbers	96	150
Musical entertainment	Pre-recorded background Up to two acoustic musicians at background level No live music after 8pm No more than 3 hours live music per day	Pre-recorded and live music at background levels

SITE AND SURROUNDING AREA

The subject site is part of the Torquay foreshore at Fisherman’s Beach on the eastern side of The Esplanade between Beach Road and Zeally Bay Road opposite Taylor Park and within proximity to the Torquay Bowls Club within Taylor Park.

The site is currently development by a single storey building occupied by the Torquay Angling Club and a kiosk (operating as Bomboras) selling food and drink predominantly for take-away consumption but with a few outdoor tables and chairs. This building also contains public toilets. The roof of the building is trafficable, level with The Esplanade, providing a public viewing deck. As noted above this viewing deck area was used temporarily over part of 2016-17 for a pop-up bar.

A two storey building is developed adjacent which is a facility for Torquay Marine Rescue. Around the two buildings is an area of car parking, including for oversized vehicles to accommodate cars with boat trailers. This area is slightly above beach level and a storey below the level of The Esplanade.

Approximately 100m north of the site is the nearest residential land which extends west around Taylor Park and north along The Esplanade. The Torquay Bowling Club building is approximately 140m southwest of the site and Torquay Town Centre is about 340m southwest.

The site can be seen in the image below.



Figure 1 – Aerial Image. Source: Council’s Mapping System

Relevant History and Background

Past permits:

App No.	Proposal	Decision	Date
07/0576	Development of a Boat Ramp	Approved	21/11/2007
07/0736	Development of Buildings & works; Use of land for a Restaurant; and Waiver of Standard Car Parking Requirement	Approved	08/09/2008
15/0408	Temporary use and development of the land for a tavern (pop-up bar) and a waiver of the standard car parking requirements of Clause 52.06	Approved	28 July 2016

Enforcement:

One written complaint was received during the operation of the pop-up bar about noise being experienced on the beach. From the investigation it appeared that the use was operating in accordance with the conditions of the permit and no further action was taken.

Registered Restrictions

Under Section 61(4) of the *Planning & Environment Act 1987* the Responsible Authority must not issue a planning permit that would result in a breach of a registered restriction. The subject land **is not** affected by registered restrictions.

CULTURAL HERITAGE MANAGEMENT PLAN (CHMP)

The Aboriginal Heritage Regulations 2007 specify the circumstances in which a Cultural Heritage Management Plan is required for an activity or class of activity. Part 2 - Division 2 of the Aboriginal Heritage Regulations 2007 specifies exempt activities which do not require a Cultural Heritage Management Plan.

The site is located within an area of Aboriginal cultural significance. The application is classified as a high impact activity. There has been significant ground disturbance on the land. In light of this, a CHMP is not required.

REFERRALS

The application was referred to the Victoria Police for comment. This is a non-statutory referral. The Police have advised that they have raised concerns about crowd control numbers through the liquor licence application. This can be dealt with through that process.

The application was referred to Council's Environmental Health Unit, with the following advice received:

The Environmental Health Unit has reviewed the application, acoustic report and premises history. The proposed amendments to the original permit have been reviewed with regards to potential health/amenity issues and comments are as below:

Condition 2 – the proposed operating hours are:

September School Holidays – Easter Monday : 12pm – 10pm, 7 days

Easter Monday – September School Holidays: Thursday – Sunday 12pm – 10pm

Public holidays and school holidays 12pm – 10pm

- This is an amendment from the original conditions which were - 1:00pm until 9:30pm from Thursday – Sunday, exception of Monday – Sunday between 26 Dec 2016 and 26 January 2017. The operating hours are proposed to increase to 12pm – 10pm daily.
- There have been numerous objections to this proposal from neighbouring residential properties. An increase in opening days and hours may impact on the residents living close to this premise.

Condition 3 – increasing patron numbers to 150

- This is an increase from 96 to 150 = 54 patrons.
- This will influence the noise produced from patron noise. The factors that influence patron noise include:
 - Number of patrons in the outdoor area
 - Voice levels of the patrons
 - Age and gender of the crowd
 - Acoustic characteristics of the venue
 - Whether or not alcohol is being consumed
- An acoustic report was completed by Darren Stephen Liu of Acoustic Control on the 04 May 2016 for JDOt Pty Ltd (applicant). The report was submitted to Council on the 01 Aug 2017 by the applicant along with the cover letter. I could not find any indication that this report had been submitted to council earlier than this date. I have reviewed the report and am satisfied with the methods used.
- The report equated the patron noise based on 96 patrons and determined that at the nearest house (north west of tavern) will be 46 dB(A)_{Leq}. Report states that this will be below ambient traffic noise and will not cause a loss of amenity.
- The patron noise should be reviewed due to the proposed changes to the amount of patrons and hours of operation changing. Additional information was provided to Environmental Health and the following comments were provided: I am satisfied with the report submitted by Darren Liu, Acoustic Control, and I am satisfied with the methodology used. The patron noise for 150 people is calculated to be 49 dB(A) L₉₀ (predicted level at the nearest house to the north west). This peak patron noise is expected to occur between the hours of 3pm and 7pm, where the background levels have been assessed at 50 dB(A) L₉₀ (assessed 26 October 2016). As the patron noise will be below background levels it should not have an amenity impact.

Condition 6 & 7 – to refer to background music as a number of musicians and the time the music played is not relevant if it is background in nature and meets SEPP N-2 requirements set out in attached acoustic report.

- Music from the premises will be required to comply with the State Environment Protection Policy (CONTROL OF MUSIC NOISE FROM PUBLIC PREMISES) No. N-2 (SEPP N-2). This document sets out the Government's objectives for controlling noise pollution from music produced at indoor and outdoor entertainment venues, and sets limits for music noise that must be met at the nearest residential properties. The goal is to protect residents from levels of noise that may affect the amenity of noise sensitive areas so that normal domestic and recreational activities are protected from music noise from indoor venues. These included activities such as talking, reading, watching television, listening to the radio and enjoyment of activities such as a backyard barbecue.
- Different noise limits are set for the day/evening and night periods because different beneficial uses are protected. A stricter limit is applied for the night period so sleep is not disturbed. During the day/evening period, noise limits are set so that activities such as talking, reading and watching television can occur without undue interference. Both noise limits are based on the level of music above the background noise (Background noise is measured in the absence of music from the venue). The more the level of

noise from music exceeds the background the more intrusive and annoying it become. For public premises operating more than 3 times per week, the applicable day/evening and night periods are set as follows:

Table 1

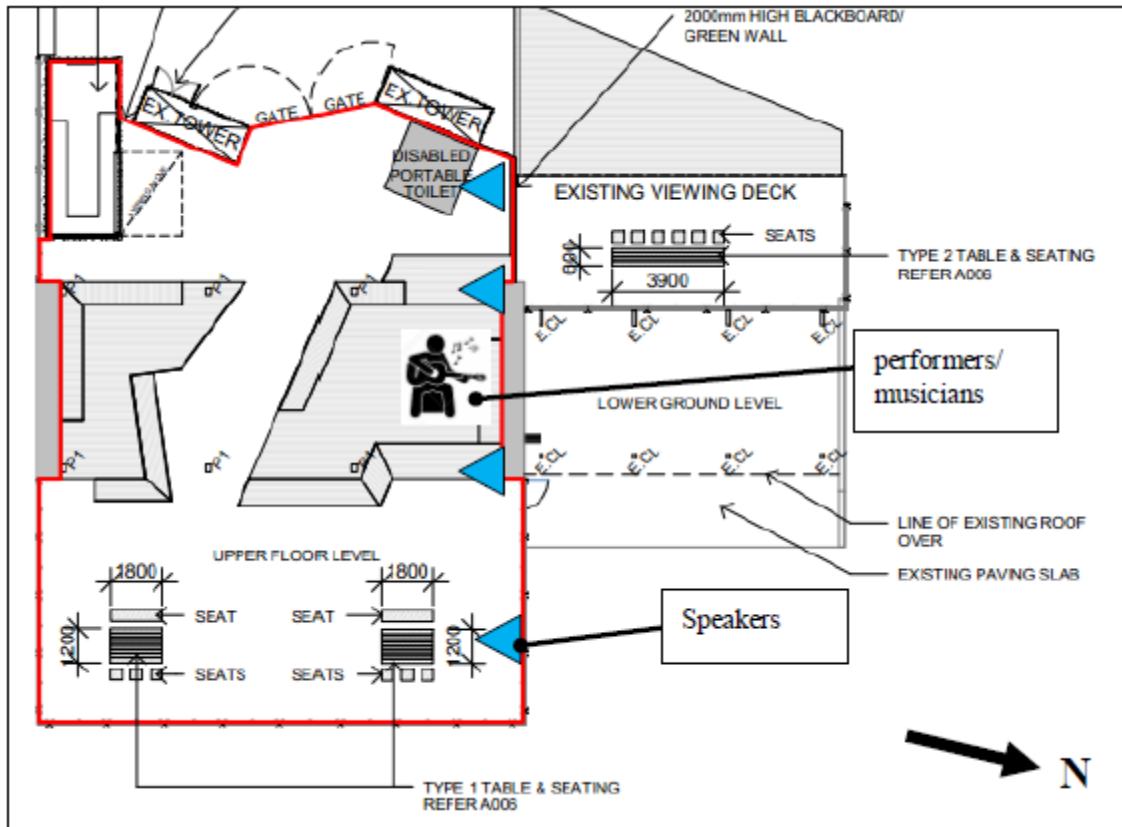
Day	Application time	
	Day/evening limit ¹ applies	Night limit ² applies
Monday-Thursday	9am – 10pm	10pm-9am (following morning)
Friday	9am – 10pm	10pm-10am (following morning)
Saturday	10am – 10pm	10pm-12 midday (following day)
Sunday	12pm – 9pm	9pm – 9am (following morning)

1. Day/evening limit = music noise (L_{Aeq}) must not exceed the background level (L_{A90}) by more than 5 dB.
2. Night limit = Music level (L_{oct10}) not to exceed the L_{oct90} background level by more than 8 dB in any octave band from 63Hz-4KHz.

- The following dot points are recommendations/observations from the acoustic report:
 - The current permit limits live music to 3 hours total in one day and no later than 8pm. This is not a requirement of the SEPP N-2. If the venue can comply with SEPP N-2 limits, it should not be necessary to impose a 3 hour time limit.
 - The acoustic report provided by the applicant has determined that the tavern will be within the SEPP N-2 permissible noise limits, if amplified music up to music style 1. This allows the use of background music and entertainment by performers (live music) using acoustic instruments (amplified or non-amplified). Loud 2-3 piece bands are not permitted.

Music style	Typical music level, L10 dB (63Hz-4KHz)	Description
1. Background music	85-90dB low frequencies 80-85 dB mid frequencies	Light amplified background music or entertainment by performers using acoustic instruments (amplified or non-amplified). Suitable for cafes, bars and lounges where conversation can take place easily.

- Speakers must be mounted on the north side of the venue, pointing away from the houses (southerly direction). No more than 4 speakers should be used. Subject to further background noise testing, the amplifier should be set up so that on maximum gain, the typical maximum sound pressure level does not exceed 85 dB(A) L_{10} when measured in the middle of the tavern space. Performers/musicians should set up on the north side of the premises and face in a southerly direction. The below figure from the acoustic report illustrates this.



- This premise will have to abide by the day/evening limit¹ for the majority of its operation, except for Sunday night 9pm – 10pm where the night limit² will apply.
- The nearest dwelling is 93m away, 71 The Esplanade Torquay. Dwellings are considered noise sensitive areas and can be detrimentally affected by noise and ongoing noise issues. Noise can be deemed a nuisance under the Public Health and Wellbeing Act 2008. Modern popular music is often loud. Consequently noise pollution can occur where residential properties are close to such venues. The proprietor must ensure noise emanating from the premises is managed appropriately and does not have a detrimental effect to neighbouring residents.
- A perceived issue with the premises is that it is being classified as an indoor venue, however structurally is more similar to an outdoor venue. When I reviewed the SEPP N-2, the venue would fall into an indoor venue category due to the nature of its operation. If the applicant complies with the recommendations in the acoustic report with regards to treating all types of music played as 'background music' then they will be able to comply with the SEPP N-2.
- The SEPP N-2 does not limit stipulate that live music be to a total of 3 hours total in one day and no later than 8pm. If the venue can comply with SEPP N-2 limits, it should not be necessary to impose a 3 hour time limit. It would be reasonable to have no live music later than 8pm.

Condition 8 – the existing acoustic report be applicable for condition 8

- It is recommended that a compliance report be completed by a qualified acoustic consultant demonstrating compliance with SEPP N-2. A noise reduction test between the venue and nearest residences with amplified speakers should form part of the report. The report should detail background noise measurements, permissible noise limits, and maximum noise levels permitted in the tavern area. The patron noise should be reviewed due to the proposed changes to the amount of patrons and hours of operation changing.
- This will ensure that the premise is compliant with SEPP N-2 limits at the nearest residences.

Condition 27 – be removed as the venue will be a permanent fixture

- No EH comment

The complaint files have been reviewed and there have been no complaints lodged (during the trial period) with

council in regards to this premises. However, the lack of complaints does not mean that there is not a potential for unreasonable amenity impacts experienced by residents caused by noise in this area.

The premises are encouraged to develop a noise management plan and complaints procedure to effectively manage any complaints that may arise.

Recommendations

- Compliance with the Environmental Protection Act 1970 State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2
- A compliance report is completed by a qualified acoustic consultant demonstrating compliance with SEPP N-2. A noise reduction test between the venue and nearest residences with amplified speakers should form part of the report. The report should detail background noise measurements, permissible noise limits, and maximum noise levels permitted in the tavern area. In addition the patron noise should be reviewed due to the proposed permit condition amendments (amount of patrons increasing and hours of operation changing). This will ensure that the premise is compliant with SEPP N-2 limits at the nearest residences.
- The premise is to develop an effective noise management plan and complaints procedure to effectively manage any complaints that may arise.
- Outdoor areas where smoking by patrons is intended must comply with the Tobacco Act 1987.

COASTAL MANAGEMENT ACT CONSENT

Coastal Management Act Consent has been issued by the Department of Environment, Land, Water and Planning (DELWP). The consent was issued on 7 September 2016 and includes a number of conditions.

The consent expires on 25 December 2021.

Officer comment

The application seeks approval for the ongoing use of the land as a Tavern. However, the application has agreed to a Planning Permit which would have a limited life and would reflect the Coastal Management Act Consent approval. Council cannot issue a Planning Permit which is not consistent with the Consent.

PUBLIC NOTICE

Public notification of the application was required, as it was considered that the application may result in material detriment. Public notification included two signs on site, a notice in the newspaper and notices to nearby property owners and occupiers.

As a result of public notification procedures, a total of 16 submissions were lodged with Council. Two of the submissions are in support of the application, with one of these submissions being a petition which included approximately 1,300 signatures.

AMENDMENT TO APPLICATION PRIOR TO AFTER NOTICE

Initially the application sought approval for a function centre. This element of the proposal has been removed and is not being pursued.

OBJECTIONS

The concerns of objectors are summarised below:

- The tavern will impact on the enjoyment of the public viewing platform
- The facility is inappropriate to be used as a tavern due to inadequate parking and toilet facilities. The toilets provided do not appear to meet the requirements of the Building Code of Australia.
- The venue cannot sustain an increase in patron numbers to 150 patrons.
- To allow a waiving of car parking means that parking areas available for the users of the Fisherman's Beach Precinct will be overtaken by those visiting the tavern
- A function centre is inappropriate
- Businesses should not be allowed to derive a profit from using a public asset.
- Illegal car parking will be encouraged if car parking is waived

- A decision on this application should be delayed by six weeks while objectors undertake additional community consultation.
- There should have been a tender process to allow a business to operate from the public land
- The lighting is intrusive and detracts from the peaceful landscape. Lighting should be shrouded to reduce its visual impact
- Noise is intrusive and impossible to escape, including from nearby residential properties and the beach.
- The noise from bass is particularly intrusive.
- As more patrons are proposed, the noise assessment should be upgraded.
- The increased hours of operation will increase amenity impacts.
- The VCAT decision was for a temporary permit and should not be relied upon or be persuasive in the consideration of a new and different application
- The VCAT determination did not decide the critical question as to whether the use is consistent with the recommendations under the Crown Land Reservation Act 1970. Council lacks the power to grant a permit for an inconsistent use.
- The development is detrimental to the visual amenity of the area
- Consumption of alcohol in a public place is prohibited and is contrary to Council's local law
- Has the ability for the building to support the additional loads from the buildings and people been checked?
- Noise should comply with the SEPP N-2 requirements for music noise from indoor venues.
- A noise limiter should be installed.

PLANNING SCHEME PROVISIONS

Zone Requirements

The review site is zoned Public Park and Recreation (PPRZ) under the provisions of the Surf Coast Planning Scheme. The land is not affected by any overlays.

Pursuant to Clause 36.02-1, Retail premises¹ is a Section 1 use subject to the condition that it:

Must be either of the following:

A use conducted by or on behalf of a public land manager² or Parks Victoria under the relevant provisions of the Local Government Act 1989, the Reference Areas Act 1978, the National Parks Act 1975, the Fisheries Act 1995, the Wildlife Act 1975, the Forest Act 1958, the Water Industry Act 1994, the Water Act 1989, the Marine Act 1988, the Port of Melbourne Authority Act 1958, or the Crown Land (Reserves) Act 1978.

A use specified in an Incorporated Plan in a schedule to this zone³.

Section 2 lists Retail premises – if the Section 1 condition is not met. In Section 2 the use is subject to the condition:

Must be associated with the public land use.

As directed by Clause 31.02 if a condition opposite the use in Section 2 is not met the use is prohibited.

The use is not proposed to be conducted by or on behalf of the public land manager and therefore is Section 2 if the condition against the use is met. This condition is met (as discussed in further detail later in the report) and therefore a permit may be granted.

Under Clause 36.02-2 a planning permit is required to construct a building or construct or carry out works. A permit is therefore required to construct temporary buildings including bar servery in a converted shipping container, portable disabled access toilet and clear blinds. A number of exemptions are available under this clause, but it is considered that these do not apply to the proposed buildings.

¹ Pursuant to Clauses 74 and 75 Tavern is included in Food and drink premises which is included in Retail premises.

² Clause 72 defines Public land manager as "The Minister, government department, public authority or municipal council having responsibility for the care or management of public land. In relation to Crown land reserved under an Act and managed or controlled by a committee of management, other than Parks Victoria or a municipal council, it means the Minister administering that Act and does not include the committee of management."

³ The schedule to the zone does not include an incorporated plan.

Pursuant to Clause 36.02-3 an application for a permit by a person other than the public land manager must be accompanied by the written consent of the public land manager. The application was accompanied by the written consent of the Department of Environment, Land, Water and Planning⁴. The application has also been supported by the Great Ocean Road Coastal Committee (GORCC).

Particular Provisions

Clause 52.05 – Advertising signs

The application does not include the display of advertising signs but it is pertinent to note that land in PPRZ is Category 4 for the purposes of Clause 52.05. Under Category 4 a planning permit is required for a Business identification sign and the total advertisement area to each premises must not exceed 3 square metres.

Clause 52.06 – Car parking

Clause 52.06-2 provides that before a new use commences the parking required under Clause 52.06-5 must be provided on the land or a permit granted to reduce the requirement (including to zero).

Tavern has a parking requirement of 0.4 spaces per patron permitted, therefore with a proposed maximum of 150 patrons, 60 on site car parking spaces are required. No new parking is proposed to be provided on the site; therefore a permit is required under Clause 52.06-3 to waive this requirement.

Clause 52.07 – Loading and unloading of vehicles

This clause specifies requirements for loading bays for buildings and works associated with, amongst other things, the sale of goods. A permit may be granted to reduce or waive the requirements.

Clause 52.27 – Licenced premises

This clause provides that a permit is required to use land to sell or consume liquor. An application has been made for an on premises licence which allows the sale of liquor for consumption on the licensed premises. This is an appropriate licence for a tavern.

Clause 52.34 – Bicycle facilities

Bicycle parking requirements are specified by Clause 52.34, though a requirement is not stipulated for a *tavern*. For *retail premises* that aren't separately listed the requirement is 1 employee space to each 300m² of leasable floor area and 1 visitor space to each 500m². At about 350m² of leasable floor area proposed to be occupied by the Tavern, 1 employee bicycle parking space should be provided.

The application does not identify that bicycle parking will be provided but it may be possible to achieve. An employee space must be in either a bicycle locker or lockable compound. A permit may be granted to vary the requirements of the clause.

Clause 52.43 – Live Music and Entertainment Noise

The provisions of this clause apply to an application to use land for a live music entertainment venue. The key requirement of the clause is that:

“A live music entertainment venue must be designed, constructed and managed to minimise noise emissions from the premises and provide acoustic attenuation measures that would protect a noise sensitive residential use within 50 metres of the venue.”

The nearest residential premises is 100m from the site double the threshold of 50m, therefore the requirement is satisfied by default. It should be noted that this does not obviate the need for the use to comply with the requirements of State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2); nor the requirement for Council to consider the amenity impact on the surrounding area of noise (music, patron and mechanical) arising from the proposed use.

State Planning Policy Framework

The following clauses of the SPPF are relevant to the current application and have been considered:

⁴ On behalf of the Minister for Environment, Climate Change and Water

10 – Operation of the State Planning Policy Framework

10.04- Integrated decision making

11 – Settlement

11.07-1– Regional planning

11.07-2– Peri-urban areas

11.09-4– Environmental assets

11.09-6 – Sustainable communities

11.09-7– A diversified economy

12 – Environmental and landscape values

12.02 – Coastal areas

12.04 – Significant environments and landscapes

13 – Environmental risks

13.04-1 – Noise abatement

15 – Built Environment and Heritage

15.01-1 – Urban design

15.01-2– Urban design principles

17 – Economic development

17.01-1 – Business

17.03-1 – Facilitating tourism

Local Planning Policy Framework

Clause 21.03 – Environmental Management

This clause identifies a range of key issues and influences and relevant to this application is that of “*Social and recreational use of the coast threatening the inherent values of the coastal and marine environment.*” An objective of the Clause is “*To protect and enhance the Shire’s diverse natural resources in an ecologically sustainable manner for present and future generations.*”

Applicable strategies to achieve this objective include:

- *Ensure that development on and near the coast is compatible with and enhance the environmental values, visual character and amenity of the coastal environment.*
- *Support a limited range of sustainable and socially equitable, coastal dependent recreational and tourism activities that complement and promote the coast’s natural and cultural values.*

Clause 21.04 – Tourism

The objective of this clause is “*To enhance and expand the tourism industry, whilst protecting the environmental, landscape and cultural values of the Shire and the lifestyle of its residents.*”

Clause 21.08 – Torquay-Jan Juc Strategy

A number of key issues and influences which are relevant to the application are identified by this clause, including:

- *The need to promote visitor activities along key boulevards (Bell Street and The Esplanade) but in condensed locations to ensure the visitor experience is engaging and continuous and can be experienced on foot.*
- *The continued growth of Torquay as a tourist/holiday destination, but also as a weekend and night-time shopping and entertainment attraction for the new Armstrong Creek population.*
- *Busy roads such as the Surf Coast Highway and The Esplanade creating barriers to local access, including access to the beach.*
- *Strengthen the role of the Surfing and tourist activity precincts at Surf City, Bell Street and The Esplanade.*
- *To increase the provision and quality of all forms of open space to meet the broad range of needs of the Torquay-Jan Juc community, and to site new open space to ensure its accessibility to all members of the community.*

A pertinent objective arising from these influences is *“To grow a vibrant and sustainable local tourism industry while marrying with the Torquay-Jan Juc lifestyle and promoting/showcasing the community’s values.”*

Relevant Incorporated, Reference Documents and Guidelines

The following must be considered:

- *The Victorian Coastal Strategy* (Victorian Coastal Council, 2014);
- *Siting and Design Guidelines for Structures on the Victorian Coast* (May 1998)
- *The Great Ocean Road Landscape Assessment Study* (Department of Sustainability and Environment, 2004);
- *The Great Ocean Road Region – A Land Use and Transport Strategy* (Department of Sustainability and Environment, 2004);
- *The Coastal Spaces Landscape Assessment Study* (Department of Sustainability and Environment, 2006);
- *The Great Ocean Road Coastal Committee Coastal Management Plan 2013* (Great Ocean Road Coastal Committee, 2013) as a management plan approved under the *Coastal Management Act 1995*;
- The purpose for which land is reserved under the *Crown Land (Reserves) Act 1978*.

Relevant Planning Scheme Amendments and/or Strategies

There are no amendments relevant to this application.

OFFICER DIRECT OR INDIRECT INTEREST

No Council officers have any direct or indirect interest in the matter to which this report relates, in accordance with Section 80 (C) of the Local Government Act.

DISCUSSION OF KEY ISSUES

Use of the Land as a Tavern

The applicant has applied for a permit to allow the use of a tavern from the land. Tavern is described within the planning scheme as follows:

Land used to sell liquor for consumption on the premises. It may include accommodation, food for consumption on the premises, entertainment, dancing, amusement machines, and gambling.

Whilst the use may include other activities such as accommodation and gambling it does not mean that these activities form part of the application or would be approved by virtue of the permit to allow a tavern.

In order to be able to use the land as a tavern (under *retail premises*) it is required to be associated with the public land use, failure to meet this requirement results in the use being prohibited. In considering the original permit application 07/0736 for a restaurant, Council obtained legal advice on the matter of a use being “associated with the public land use” with that advice commenting:

“The key issue, in our view, would be to demonstrate a genuine and substantial link between the use of the foreshore and use of the restaurant. Public access and operating hours correlating with the use of the foreshore would be expected.”

“Showing an intended operation with clear links to the public land use of the foreshore may be sufficient to demonstrate the required “association with the public land use”.

It is considered that factors in favour of the use being associated with the public land use are:

- The recommendation restricts the use of the tavern to during hours when beach use could be expected;
- The premises is to be designed to orientate primarily towards the beach and ocean;
- Users of the beach and foreshore will be the primary customers.

It is further supportive that the Great Ocean Road Coastal Committee as coastal land manager are managing the licence for the use and the Department of Environment, Land, Water and Planning (DELWP) have provided consent under the *Coastal Management Act 1995*.

Section 61(3) of the *Planning and Environment Act 1987* provides that:

“The responsible authority–

(a) *must not decide to grant a permit to use or develop coastal Crown land within the meaning of the **Coastal Management Act 1995** unless the Minister administering that Act has consented under that Act to the use and development;*"

As that consent has been granted Council may decide to grant a permit.

Hours of Operation

The application seeks approval to operate:

- September School Holidays until Easter Monday – 7 days – 12pm until 10pm;
- Easter Monday until September School Holidays – Thursday to Sunday – 12pm until 10pm;
- Public Holidays and School Holidays – 12pm until 10pm.

The hours of operation proposed are far more extensive than those previously approved.

The recommended permit conditions reduce the hours as follows:

- 1 October until 1 April – 7 days – 12pm until 9:30pm;
- 2 April until 30 September – Thursday to Sunday– 12 pm until 6pm.

It is considered the hours of operation should align with the hours in which the beach can be reasonably enjoyed, given the zoning of the land and need to have a functional relationship with the beach. This is reflected in the zoning table of the Public Park and Recreation Zone which requires as a condition that a retail premises 'must be associated with the public land use.' In supporting the application for the pop-up bar VCAT held that the application met the test of being 'associated with the public land use' because:

- *The purposes of the PPRZ overtly anticipate commercial uses such as this;*
- *In both its physical set up and the main patrons it would be seeking to attract, the facility would be oriented to the beach and beach-goers;*
- *Subject to liquor licensing requirements, the facility would be open to all of the public;*
- *The time of year and time of day that the facility would operate is consistent with the main pattern for when beach goers typically visit the beach most;*
- *Whilst located somewhat back from the beach, it would be easy for beach-goers to walk from the sand up to the facility.*

Given the above principles, it is not considered appropriate to support the hours which have been sought. It is considered that the hours of operation must align with the hours in which the beach would be typically used and these hours would vary due to daylight savings. As such, the permit conditions within the recommendation support hours which reflect daylight savings timing.

The recommended hours ensure that the main patrons the tavern would be seeking to attract would be those using the beach. It is not considered that longer hours of operation, which would extend into the hours of darkness, can be justified when there is a requirement within the zone that the use be associated with the public land use. It is important to note that if the use is not associated with the public land use, it becomes prohibited.

Live Music

The application also seeks approval for live music and pre-recorded background music in association with the use of the land for a tavern. Clause 52.43 of the Surf Coast Planning Scheme (Live Music and Entertainment Noise) contains the relevant provisions applying to venues providing for live music entertainment. As there is no sensitive residential use within 50m of the site, the requirements as specified under Clause 52.43.3 are considered to be met.

Whilst the requirement of Clause 52.43.3 is met, the use must still comply with the State Environmental Protection Policy (Control of music noise from public premises) No. N-2 (SEPP N-2).

Council's Environmental Health Unit have not raised any concerns about the changes to the way in which music would be provided on the site with the officer noting that the current restrictions on live music are not a requirement of SEPP N-2, and if SEPP N-2 can be met, it should not be necessary to restrict live music at the venue.

Considering the way the use will operate, it is considered that the application should meet the requirements of SEPP N-2 in relation to Indoor Venues, given the hours in which the use will operate and the extent of the use. This is reflected in permit conditions.

When considering the previous application, VCAT determined that a noise limiter was not appropriate due to the temporary and limited nature of the use. Given that approval is now sought for a longer period of use and for longer hours, a permit condition within the recommendation requires the installation of a noise limiter. The noise limiter would be set up to ensure compliance with noise limits set by a qualified acoustic engineer, using the SEPP N-2 criteria for Indoor Venues. The noise limiter is also required to control bass noise.

On Premises Liquor Licence

It is proposed to operate the tavern with an on premises licence. It is considered that the sale and consumption of liquor on the premises is appropriate for the following reasons:

- The limited evening and night time trading hours reduces the likelihood of excessive liquor consumption and resultant antisocial behaviour.
- A single constrained access point is to be provided to the licensed area making it relatively easy for staff to monitor and control patrons trying to leave the premises with liquor.
- The site is removed from other licensed premises, with the nearest being the Torquay Bowls Club within Taylor Park. As a result, there is not considered to be a cumulative impact associated with existing licensed premises.
- The Victoria Police have not objected to the application.
- Council is not aware of any inappropriate patron behaviour associated with the pop-up tavern which operated from the land.

Planning Policy

Planning policy includes some specific themes which are relevant to the consideration of this application, including:

- Environmental issues;
- Noise abatement;
- Tourism;
- Business and diversification of economy.

The VCAT decision for the pop-up bar recognises that tourism plays an important role in the economic and employment 'health' of Torquay. The location of the tavern was recognised as providing for visitor activities within a 'condensed location' which is consistent with the thrust of the Victorian Coastal Strategy supporting this type of outcome. The GORCC Coastal Management Plan nominates several activity nodes along this coastal location and Fisherman's Beach is nominated as an activity node. The GORCC Plan overtly identifies this Fisherman's Beach location as appropriate for commercial uses. As such, it is considered that the site selection is appropriate to support a use which can support local tourism and provide for entertainment opportunities for those using the beach. The Tribunal noted that *the deck area in question forms part of an already highly modified location, which is already strongly used by beach goers and where I accept that the impacts of the proposal can be dealt with in a sustainable manner.*

In relation to noise abatement, it has already been noted that sensitive residential uses are located some distance from the tavern. The Tribunal was satisfied that the intervening distances act as a reasonable buffer to the likely increased activity and noise. It is noted that the application now seeks approval for 150 patrons, where previously 96 patrons were allowed, and an assessment from an acoustic expert has concluded that:

The peak patron noise of 49dB(A) Leq is expected to occur in the afternoon hours between the hours of 3pm and 7pm, the amenity impact of the additional patrons will be minimal as any noise impacts from the patrons will be below the average background level during this period. Council's Environmental Health Unit have not raised any concerns about this.

Issues around music noise have been detailed earlier in the report and will not be repeated here.

Car Parking

VCAT supported the waiving of car parking associated with a tavern which had a maximum capacity of 96 patrons. The waiving of car parking was supported on the basis that:

- Many of the patrons of the tavern will also be visiting the beach;
- Many of the patrons will be 'locals' who may well walk or ride their bicycles to this beach;
- A shuttle bus services the site in busy summer months;
- There is sufficient local on street car parking to deal with any additional parking demand generated by the proposal;
- Building a bigger car parking area in this location is inconsistent with the temporary nature of the use and may well have an adverse impact on the landscape of this foreshore area;
- While there will be an overwhelming level of car parking in the peak holiday period (Christmas to New Year or January long weekend), this is not a valid reason to refuse the application. There will be peak parking demand with, or without, the proposal going ahead and many summer beach goers would regard it as 'going with the territory' that finding a car park near the beach in peak periods is a challenge.

Reference was also made to a previous VCAT decision *St John Sutton v Surf Coast SC* [2008] VCAT 827 where the Tribunal found:

Providing additional car parking is a major problem for development in coastal settlements and is not unique to Lorne. In this case I agree with Council that there should be a complete waiver of the requirement for additional car parking resulting from an upgrading and expansion of additional facilities. There is no opportunity for additional on-site parking or loading facilities close to the development without utilising more of the foreshore reserve.

It is considered that the above assessment is relevant to the current application and the waiving of car parking associated with 150 patrons is supported.

Objections

The objections have been responded to as follows.

The tavern will impact on the enjoyment of the public viewing platform

The tavern will change the experience available from the public viewing platform. The use of the land and the buildings and works have been supported by the Public Land Manager and DELWP.

The facility is inappropriate to be used as a tavern due to inadequate parking and toilet facilities. The toilets provided do not appear to meet the requirements of the Building Code of Australia

The provision of toilet facilities will be assessed as part of the Building Permit process. This is not a relevant planning consideration.

The venue cannot sustain an increase in patron numbers to 150 patrons

The permit applicant has provided an assessment from a Building Surveyor that sets out that more than 150 patrons can be accommodated in the venue. Again, a Building Surveyor will need to consider this issue as part of the Building Permit phase.

Patron numbers are relevant to the planning assessment, particularly in relation to noise and car parking. This assessment is set out above.

To allow a waiving of car parking means that parking areas available for the users of the Fisherman's Beach Precinct will be overtaken by those visiting the tavern

This issue has been addressed earlier in the report. The waiving of car parking is supported.

A function centre is inappropriate

Initially the application sought approval for a function centre. This element of the proposal has been deleted.

Businesses should not be allowed to derive a profit from using a public asset

This seems to be a philosophical position. DELWP and GORCC have supported the application, noting that GORCC will need to issue a licence under Section 17B of the Crown Land (Reserves) Act 1987.

Illegal car parking will be encouraged if car parking is waived

Council's Local Laws can issue fines if there is illegal car parking.

There is no clear link between the use of the land as a tavern and a propensity for patrons to park illegally.

A decision on this application should be delayed by six weeks while objectors undertake additional community consultation

Council has statutory obligations under the Planning and Environment Act 1987. The notice periods which were undertaken align with the requirements of the Act.

If a decision is not made on the application within 60 statutory days, an avenue is available to the applicant to appeal to VCAT against Council's failure to determine the application.

There should have been a tender process to allow a business to operate from the public land
This is not a Council matter and the concern should be raised with the land manager.

The lighting is intrusive and detracts from the peaceful landscape. Lighting should be shrouded to reduce its visual impact
Permit conditions restrict the hours of operation of the use. Any lighting which is visible during these times, which generally align with daylight hours, is considered acceptable.

Noise is intrusive and impossible to escape, including from nearby residential properties and the beach.

The noise from bass is particularly intrusive

Permit conditions restrict the hours of operation.

Permit conditions address noise and require the use of a noise limiter, to ensure that noise limits as identified by an acoustic expert as being appropriate are not exceeded.

As more patrons are proposed, the noise assessment should be upgraded

The noise assessment has been upgraded to demonstrate that the noise associated with the increased number of patrons will not exceed background noise levels experienced at the nearby residential properties.

The increased hours of operation will increase amenity impacts

The increased hours of operation have not been supported.

The VCAT decision was for a temporary permit and should not be relied upon or be persuasive in the consideration of a new and different application

The assessment of the application is included earlier in the report.

The VCAT determination did not decide the critical question as to whether the use is consistent with the recommendations under the Crown Land Reservation Act 1970. Council lacks the power to grant a permit for an inconsistent use

It is considered that the use is consistent with the permanent reservation which applies to the land which is for "the protection of the coastline" because:

- The application has been supported by DELWP, representing the Crown;
- The application has been supported by GORCC, the Committee of Management under the Crown Land (Reserves) Act 1978;
- The application for a pop-up tavern was supported by VCAT legal member Philip Martin and this issue was considered at the hearing;
- Under Section 17B of the Crown Land (Reserves) Act 1978, where GORCC as the Committee of Management, will be required to issue a licence for the application for purposes which are consistent with the purpose of the Reserve;
- The use is considered to be 'not detrimental' to the purpose of the reservation.

The development is detrimental to the visual amenity of the area

The buildings and works associated with the application are considered appropriate in this commercial node location.

Consumption of alcohol in a public place is prohibited and is contrary to Council's local law

Approval is sought for a liquor licence to allow the sale and consumption of liquor on the premises. The licence does not allow for the sale of liquor for consumption off the premises.

Has the ability for the building to support the additional loads from the buildings and people been checked?

The applicant has advised that this issue has been considered. The relevant Building Surveyor will need to consider this issue in detail as part of the Building Permit process.

A noise limiter should be required

Permit conditions require the installation of a noise limiter.

Noise should comply with the SEPP N-2 requirements for music noise from indoor venues.

Permit conditions reflect this requirement.

CONCLUSION

It is recommended that a Notice of Decision be issued in support of the application.