

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P79/2023
PERMIT APPLICATION NO. MPS/2019/594

APPLICANT / RESPONSIBLE AUTHORITY	Merri-bek City Council
RESPONDENT	Bobsled Properties Pty Ltd
OTHER	Owners Corporation Plan No 1 706696X
SUBJECT LAND	1/294 Lygon Street BRUNSWICK EAST VIC 3057
HEARING TYPE	Practice day hearing
DATE OF HEARING	17 March 2023
DATE OF ORDER	21 March 2023

ORDER

Hearings

- 1 The details set out in the Tribunal's initiating order are **confirmed**.

The proceeding is listed for a compulsory conference and a hearing as detailed below.

The in-person compulsory conference and hearing will be at 55 King Street, Melbourne. Details will be published in the law list late on the afternoon of the day prior to the compulsory conference and hearing.

If there is any change to these details, the Tribunal will notify you.

Compulsory Conference:	
Date and time	24 July 2023 2.00 pm – 5.00 pm
Conduct	In person

Hearing:	
Date and time	10 & 11 October 2023 10.00 am – 4.30 pm
Conduct	In person

Applicant to give further notice

- 2 By **24 March 2023** the applicant must give the following documents to the owners and occupiers of the building located at 294 Lygon Street, Brunswick East Victoria 3057 as **affected persons**:

- a copy of the application and all attachments; and



- any other material given to the Tribunal; and
- a copy of the Tribunal's order dated 6 February 2023 along with a copy of this order; and
- a letter which must:
 - explain that an application for enforcement order has been lodged and the Tribunal requires the documents to be given to any person who may be affected by the alleged contravention or the making of an enforcement order,
 - explain that if the affected person wishes to be heard or to make a written submission in respect of the application for enforcement order, they must lodge a statement of grounds detailing their submission with the Tribunal by **12 April 2023** and that the Tribunal will consider the nature of their involvement in the proceedings at the practice day hearing; and
 - include the link to the online 'Statement of Grounds by an Affected Person – Enforcement' form on the Tribunal's website (<https://www.vcat.vic.gov.au/documents/forms/statement-grounds-affected-person-enforcement>); and
 - specify the dates and times of the compulsory conference and hearing contained in Order 1.

3 By **31 March 2023** the applicant must give to the Tribunal:

- a completed statement of service; and
- a list of names and addresses of all persons and authorities to whom the documents were given; and
- a sample of the letter sent with the documents.

If a statement of service is not given to the Tribunal by **31 March 2023**, this application may be struck out without further notice. No reminder will be sent.

What must an affected person do?

4 If you are an **affected person** and you want the Tribunal to consider your position on the application for enforcement order:

- you must complete a Statement of Grounds online at <https://www.vcat.vic.gov.au/documents/forms/statement-grounds-affected-person-enforcement> and give a copy to the applicant and the responsible authority by **12 April 2023**;
- if you also want to appear and present a submission at the hearing you must indicate this in your Statement of Grounds form and attend the next scheduled hearing so that the Tribunal can consider your role in the proceeding. (Note: you must also pay a fee. Information regarding fees is available at www.vcat.vic.gov.au/fees.)



Amended statements of grounds

- 5 By **24 March 2023** the Owners Corporation Plan No. 1 PS706696X must file with the Tribunal and serve on all other parties any statement of grounds that it is seeking to rely on in VCAT Application P79/2023, including whether it is seeking to be a party to this proceeding.
- 6 By **19 June 2023** the respondent must file with the Tribunal and serve on all other parties any amended statement of grounds that it is seeking to rely on in VCAT Application P79/2023.

Filing of expert evidence before Compulsory conference

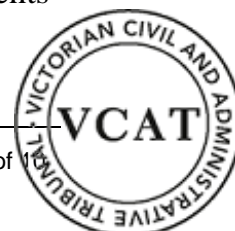
- 7 By **19 June 2023** the respondent must file with the Tribunal and serve on all other parties any expert evidence that it is seeking to rely on in VCAT Application P79/2023.
- 8 By **17 July 2023** the applicant must file with the Tribunal and serve on all other parties any expert evidence that it is seeking to rely on in VCAT Application P79/2023.

Compulsory conference

- 9 All parties must attend the compulsory conference either in person or by a representative who has permission to settle the proceeding on their behalf.
(Note: See more information in Appendix A of this order).
- 10 Any document to be relied on for the compulsory conference that is provided to the Tribunal must be clearly marked “**For Compulsory Conference**”.

Witness statements and submissions before hearing

- 11 No later than **20 business days** before the hearing, the applicant must provide the Tribunal and all parties with:
 - a list of all of the lay and expert witnesses that they intend to call or make available to give evidence at the hearing; and
 - a witness statement from each lay or expert witness that they intend to rely on at the hearing, not yet provided. All expert witness statements must be prepared in accordance with Practice Note – PNVCAT2 Expert Evidence.
- 12 No later than **15 business days** before the hearing, the respondent and any other party must provide the Tribunal and all parties with:
 - a list of all of the lay and expert witnesses that they intend to call or make available to give evidence at the hearing; and
 - a witness statement from each lay or expert witness that they intend to rely on at the hearing, not yet provided. All expert witness statements must be prepared in accordance with Practice Note – PNVCAT2 Expert Evidence.



- 13 No later than **10 business days** before the hearing, the applicant must provide an electronic copy of their submissions and associated material (such as supporting documentation and case law) to the Tribunal and all parties. The copy for the Tribunal must be sent to admin@vcat.vic.gov.au
- 14 No later than **5 business days** before the hearing, all other parties must provide an electronic copy of their submissions and associated material (such as supporting documentation and case law) to the Tribunal and all parties. The copy for the Tribunal must be sent to admin@vcat.vic.gov.au

Tribunal Book

- 15 No later than **5 business days** before the hearing, the applicant must provide an electronic copy of a Tribunal Book to the Tribunal and all parties. The copy for the Tribunal must be sent to admin@vcat.vic.gov.au
- Information on the content and format requirements of the Tribunal Book is available at www.vcat.vic.gov.au

Requests for procedural orders

- 16 Any request for procedural orders from the Tribunal must be made in writing and a copy must be given to all parties.

Hearing fees

- 17 If you are the applicant in this proceeding, you may be required to pay a daily hearing fee before the hearing commences. For more information, see the VCAT website www.vcat.vic.gov.au/fees

Susan Whitney
Member

APPEARANCES

For Merri-bek City Council	Mr Jacob Atkinson, solicitor, of Holding Redlich.
For Bobsled Properties Pty Ltd	Tom Pikusa of counsel, instructed by Mr James Douglas Kerr of Kerr & Kerr Partners
For Owners Corporation Plan No 1 706696X	Ms Pernille Cavanough



REMARKS

- 1 VCAT Application P79/2023 is an application for enforcement order brought by the Merri-bek City Council (**‘Council’**) against the Respondent, Bobsled Pty Ltd, the owner and occupier of 1/294 Lygon Street, Brunswick East (**‘Land’**).
- 2 The Respondent operates the ‘Piano Bar’ on the Land.
- 3 The Land is located in the Commercial 1 Zone (**‘C1Z’**) of the Merri-bek Planning Scheme (**‘Scheme’**) and is also subject to the Development Contributions Plan Overlay – Schedule 1, Design and Development Overlay – Schedule 19, Heritage Overlay 1 (as to part) and Parking Overlay – Schedule 1.
- 4 Use of the Land for a ‘bar’ as defined in clause 73.03 of the Scheme is an as-of-right use in the C1Z.
- 5 The Land is the ground floor of a multi-storey building that was constructed pursuant to planning permit MPS/2011/531, issued on 17 May 2012, that also allows use of the Land for dwellings. That permit allows:

Partial demolition of an existing building, the development of a multi-storey building (six storeys plus basement) for shop (apart from an adult sex bookshop) and dwellings, use of the land for the purposes of dwellings, the continued use of part of the land for the purpose of a hotel, waiver of loading bay requirements associated with the shop and reduction in car parking requirements for the dwellings and shop, in accordance with the endorsed plans
- 6 Above the Land are the residential apartments used for dwellings.
- 7 Planning permit MPS/2019/594 was issued on 16 June 2020 in respect of the Land (**‘Liquor Permit’**) and allows:

Use of the land for the sale and consumption of liquor in association with a bar., in accordance with the endorsed plans
- 8 The endorsed plans of the Liquor Permit show the layout of the Piano Bar and include the following plan:





- 9 The Council alleges that the Respondents have failed to comply with conditions 7 and 8 of the Liquor Permit. These conditions work in association with condition 6 of the Liquor Permit and all three conditions deal with acoustics. These conditions are as follows:

6. Prior to the commencement of the use, an Acoustic Report generally in accordance with the report advertised on the 03/03/202 (prepared by Marshall Day Acoustics) must be endorsed to form part of the permit and the venue must be soundproofed in accordance with the recommendations contained within the endorsed Acoustic Report. The Acoustic Report endorsed under this permit must be implemented and complied with at all times to the satisfaction of the Responsible Authority unless with the further written approval of the Responsible Authority.
7. Within 2 months of the commencement of the use, acoustic testing is to be carried out to ascertain whether the use complies with the maximum noise levels prescribed by SEPP N-2. The testing is to be carried out by an independent acoustician approved by the Responsible Authority. If the testing reveals that the use does not meet the specified maximum noise levels the buildings and works must be modified to make the use compliant with those levels. After any modifications have been made further acoustic testing must be carried out to ascertain whether the use complies with the prescribed noise levels. All acoustic testing is to be carried out during a busy period. The results of testing are to be provided to the Responsible Authority and made available to the public.

8. Noise levels associated with the use must at all times comply with the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2. Should the Responsible Authority deem it necessary, the owner and/or occupier of the land must submit an Acoustic Report to the satisfaction of the Responsible Authority to demonstrate compliance, or which outlines any measures considered necessary to achieve compliance. The recommendations of the Acoustic Report must be implemented to the satisfaction of the Responsible Authority. The endorsed plans must be amended to accord with the recommendations contained in the Acoustic Report to the satisfaction of the Responsible Authority.
- 10 SEPP N-2 has been superseded by EPA Publication 1826.4 ‘Noise Limit and Assessment Protocol for the Control of Noise from Commercial, Industrial and Trade Premises and Entertainment Venues’ (**‘Noise Protocol’**).
- 11 The Council has received complaints from residents of the apartment building regarding noise emanating from the Land. The residents complain about hearing the noise of piano playing and singing as well as the noise of people talking.
- 12 The Marshall Day Acoustics report referred to in condition 6 recommended works be undertaken to: the façade; the floor/ceiling above the Land; hydraulic pipes and slab penetration (where the report noted that the existing level 1 floor slab had several penetrations for pipework, which have not been acoustically sealed); and, reverberation control through absorptive acoustic finishes incorporated into the interior design.
- 13 An acoustic report prepared by Waveform Acoustics dated 17 February 2022 undertook acoustic testing in two apartments: 105 and 108. The noise levels exceeded the levels allowed by the Noise Protocol. Recommendations were made in that report including in relation to speakers, the installation of a noise limiter and that further testing be undertaken to determine sound paths ‘which appear to be in the wall systems’.
- 14 An acoustic report prepared by Waveform Acoustics dated 9 March 2022 undertook acoustic testing in three apartments, being 108, 306 and 104, during the evening period and the night period pursuant to the Noise Protocol. That report observed exceedances at apartments 306 and 108 during the night period. During the evening period compliance was achieved in apartment 306.
- 15 At that time additional works had been undertaken: speakers had been relocated; additional ceiling insulation had been placed inside ‘some of the accessible ceiling cavity’; and, staff had been supplied with and instructed in the use of a handheld Sound Level Meter. Further recommendations were made in this report as to how the Piano Bar could achieve compliance, these being changes to the foldback speakers utilised by the performers, and, the installation of a noise limiter.
- 16 According to the acoustic report by Acoustic Dynamics that was commissioned by the Council on 16 December 2022, acoustic testing



demonstrated that music noise from the Piano Bar exceeded the Noise Protocol in apartment 108 during the evening and night periods and in apartment 306 during the night period.

17 According to this acoustic report:

34. The transmission path for the music noise intrusion could be localised to the southern wall/floor junction of both apartments (as shown in **Figure 3.2** and **Figure 3.3**). No music noise could be identified as being transmitted via the facade windows.

Figure 3.2 Level 1 Floor Plan & Music Noise Transmission Path in Apartment 108

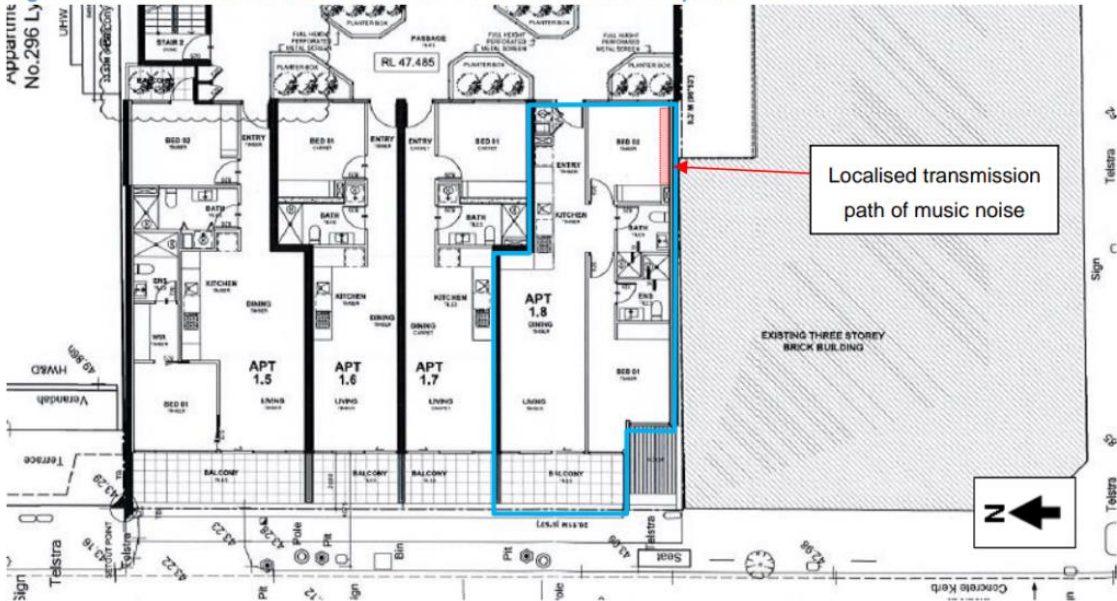
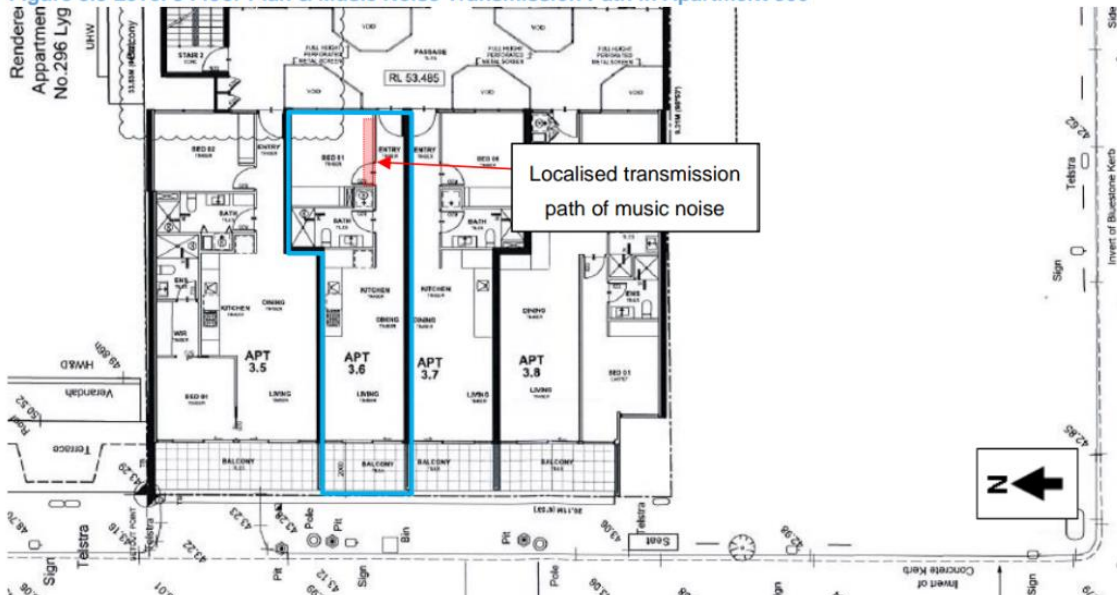


Figure 3.3 Level 3 Floor Plan & Music Noise Transmission Path in Apartment 306



35. My site inspection did not involve an inspection of the Piano Bar, nor the construction separating the venue from the apartments above. Hence, I could not fully investigate potential transmission paths and I cannot conclusively define how the music noise is being transmitted into the apartments.

36. Analysis of the logger audio indicates that noise from patrons singing and cheering is a contributor to the non-compliance. As such, it is likely that the installation and calibration of a music noise limiter (which can control amplified music and vocals only) would provide limited benefit, i.e. a music noise limiter will not reduce the level of noise emitted by patrons whilst singing.
- 18 The Respondent contends that although it has undertaken works, the acoustic issue present is due to transmission of noise from the Piano Bar to the residential apartments via unlagged pipes located on common property.
- 19 To this end, the Respondent has lodged proceedings in the Owners Corporation List of the Tribunal against the Owners Corporation 1 PS706696X ('OC') seeking reimbursement of the money it has spent on rectification works and for the OC to urgently attend to the lagging of pipes (proceeding OC122/2023).
- 20 In VCAT Application P79/2023 the Council is seeking orders that, among other things:
3. Within 21 days of the date of this order, the Respondent must reduce the noise levels associated with the use to a level below the maximum noise level set by SEPP N-2. Noise levels must thereafter remain below the maximum noise level set by SEPP N-2.
 4. Within 60 days of the date of this order, the Respondent must provide the Responsible Authority with an acoustic report which demonstrates, to the Responsible Authority's satisfaction, that the above order has been complied with.
- 21 I am informed that the OC has commenced proceedings in the Owners Corporation List against the Respondent that among other things seek a declaration that the 'licence' is void (proceeding OC192/2023).¹
- 22 The Respondent seeks to join the OC as a respondent to VCAT Application P79/2023. The Respondent contends that the noise issue has arisen due to the common services within the common property areas not having been acoustically lagged or treated. The Respondent contends that the person responsible for the alleged breach of the Liquor Permit is the OC.
- 23 The Respondent seeks for all three proceedings to be heard and determined together, given they arise out of the same facts and circumstances, notwithstanding that they are in different jurisdictions and seek different remedies. The Council is aware of OC122/2023 but is not a party to either of the proceedings in the Owners Corporation List.
- 24 A representative of the OC attended this practice day hearing but did not have formal instructions at that time. The representative indicated that the OC wants the noise to stop, it is just a matter of how this can be achieved.
- 25 At this stage, the Tribunal has not received any material from the OC. I consider that the OC should be given the opportunity to lodge a statement of grounds to explain its position and how it wishes to be involved in VCAT Application P79/2023, if at all. To this end, at this stage, I am

¹ I have not been provided with any documents relating to OC192/2023.



viewing the OC as a potential ‘affected person’, as set out in the *Planning and Environment Act 1987* (‘Act’).

- 26 I am also requiring the Council to give notice of VCAT Application P79/2023 to the residents in the building, given they are also potential ‘affected persons’, as set out in the Act.
- 27 Upon the receipt of responses from potentially affected persons, I will further consider how to proceed.
- 28 Accordingly, at this stage I am not determining the questions of whether to join the OC as a party to the proceeding, or, whether VCAT Application P79/2023 should be heard and determined at the same time as the Owners Corporation List matters. I observe, however, with respect to the latter that: it appears the Owners Corporation List matters will be listed some time after the scheduled listing of VCAT Application P79/2023; there might not be the availability in the Owners Corporation List for a member to hear those proceedings at the time scheduled for VCAT Application P79/2023; and, a decision in VCAT Application P79/2023 (if it remains listed separately) might assist in the determination of the proceedings in the Owners Corporation List. I also observe that the Council is not a party to the Owners Corporation List proceedings.

Susan Whitney
Member

HELP AND SUPPORT

Information for all parties is available at the Tribunal’s website
www.vcat.vic.gov.au

For information about what happens after you make your application, visit
www.vcat.vic.gov.au/afterapplyplanning

For information about responding to an application visit
www.vcat.vic.gov.au/respondplanning

If you are not able to access the website, contact the Tribunal on 1300 01 8228 Monday to Friday 9.00am to 4.30pm to request a paper copy.

To find out about the Tribunal’s support services such as interpreters, disability support and security, visit www.vcat.vic.gov.au/support



APPENDIX A

COMPULSORY CONFERENCE INFORMATION SHEET

What is a compulsory conference?

A compulsory conference is a private meeting between the parties to the proceeding.

With the assistance of a Tribunal member the parties can explore options to reach an agreement on all or some of the matters in dispute. The parties should come with an open mind and flexibility in considering options that could resolve the case.

Unless all parties agree, evidence of anything said or done in the course of a compulsory conference (including any document provided to the Tribunal for the purpose of the compulsory conference) is not admissible in any hearing before the Tribunal in the proceeding.

More information about compulsory conferences is available on the Tribunal's website at www.vcat.vic.gov.au and in **VCAT Practice Note PNVCAT4 – Alternative Dispute Resolution (ADR)**.

Requirement to attend compulsory conference

If you are a party, you **must** attend the compulsory conference in person or by a representative who has written permission to settle the proceeding on your behalf. If you do not attend, the matter may be resolved in your absence and you may be struck out as a party. If all the parties present at the compulsory conference agree, the Tribunal may make a final order or make other orders that may affect you in an adverse way.

The Tribunal may make any of the following orders under the *Victorian Civil and Administrative Tribunal Act 1998*:

- If you are the applicant, your application may be dismissed or struck out.
- If you are not the applicant, you may be struck out as a party. This means that you can take no further part in the proceeding, including the hearing.
- The matter may also be settled, approving the proposal with or without changes.
- You may be ordered to pay the costs of the other parties in certain circumstances.

Who may attend a compulsory conference?

Only parties to the proceeding may attend a compulsory conference.

A person is a 'party' to the proceeding if the person:

- lodged an objection to the planning application
- has given a completed Statement of Grounds form to the Tribunal by the due date and paid the fee
- has indicated in their Statement of Grounds form that they intend to participate in the hearing

The following persons are NOT a party to a proceeding:

- a person who did not lodge an objection to the permit application
- a person who did not give their Statement of Grounds form by the due date and/or did not pay the fee
- a person who has indicated on their Statement of Grounds that they do not intend to participate in the hearing



If you are not a party to the proceeding but wish to be heard, you can attend at the start of the compulsory conference and ask the Tribunal to join you as a party to the proceeding. You will need to explain why you should be joined as a party to the proceeding. Other parties will also be given the opportunity to tell the Tribunal whether they agree or disagree about you being joined as a party. The Tribunal will then make a decision to join you as a party or not.

If you are not joined as party, you cannot take any further part in the compulsory conference and the Tribunal may make a final order or make other orders that may affect you in an adverse way.

A party who is struck out because they do not attend a compulsory conference cannot participate in any further compulsory conference or hearing.

What happens if agreement is reached at the compulsory conference?

If the parties present at a compulsory conference reach agreement, the Tribunal may make a final order to give effect to the agreement without a hearing being required. This can include allowing the proposal with or without changes.

What happens if agreement is not reached at the compulsory conference?

If parties present at the compulsory conference do not reach an agreement, a hearing date/s will be confirmed. An order will be issued by the Tribunal.

What happens if a partial agreement is reached at the compulsory conference?

If the parties reach agreement about some issues but not others, the hearing will proceed. If the parties present agree, the Tribunal may make an order that limits the issues to be considered at the hearing or specifies issues that will not be able to be considered. The Tribunal may also make further orders that restrict the ability of parties to raise any matters that were resolved at the compulsory conference.

What should you bring to the compulsory conference?

Parties should come to the compulsory conference with a summary of their issues and solutions. This could include possible changes that could be made to the proposal in order to address your concerns or the concerns of other parties. The attached 'Summary of Issues and Solutions for a Compulsory Conference' may be used. The applicant for the permit should bring an extra copy of any relevant plans including elevations.



**PLANNING AND ENVIRONMENT LIST
SUMMARY OF ISSUES AND SOLUTIONS FOR A COMPULSORY
CONFERENCE**

VCAT reference number	P79/2023
Responsible authority	
Your name	

It is suggested that each party identify key issues and potential solutions before the compulsory conference. This will help to clarify the key issues that the parties consider most important to them and possible solutions.

Most important issues in dispute from your perspective (including any legal matters) Use additional pages if required

What potential solutions would you consider? Use additional pages if required



PLANNING AND ENVIRONMENT LIST

STATEMENT OF SERVICE

To be completed by or for the Applicant

Subject Land	1/294 Lygon Street BRUNSWICK EAST VIC 3057	VCAT Ref: P79/2023
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I,(Print full name)
of(Print name of firm, if relevant)
.....(Print address)
.....

STATE to the Victorian Civil and Administrative Tribunal (VCAT) that:

- On (**date of service**) I served a copy of the application and all attachments and other material filed with the Tribunal and a copy of the initiating order on the responsible authority (where not the applicant).
- On (**date of service**) I served the following documents on each of the persons specified below by post*/by email*/in person*. (****delete whichever does not apply***)

Documents served:

- a cover letter;
- a copy of the application and all attachments and other material filed with the Tribunal;
- a copy of the VCAT initiating order;
- a blank statement of grounds form, cover letter and all other information required to be provided by VCAT’s initiating order.

Persons served: (tick as appropriate)

- ☐ respondents named in the application for enforcement order
- ☐ person who may be affected by the application named in the application

- I attach copies of the following documents.

Documents attached: (tick as appropriate)

- ☐ list of names and addresses of all persons or authorities served
- ☐ copy of sample cover letter sent with documents served

I understand that knowingly giving false or misleading information to VCAT may result in imprisonment or fine (section 136 of the *Victorian Civil and Administrative Tribunal Act1998*).

SignatureDate.....

