

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1758/2015
PERMIT APPLICATION NO. YR-2014/961

APPLICANT	Carringbush Pty Ltd
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
REFERRAL AUTHORITY	Country Fire Authority
SUBJECT LAND	361-365 Mount Dandenong Tourist Road, Sassafras
WHERE HELD	Melbourne
BEFORE	Frank Dawson, Member
HEARING TYPE	No Hearing
DATE OF ORIGINAL ORDER	13 May 2016
DATE OF CORRECTION ORDER	23 May 2016
CITATION	Carringbush Pty Ltd v Yarra Ranges SC (Amended) [2016] VCAT 772

CORRECTION ORDER

- 1 Pursuant to Section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, the Tribunal's Order in Application P1758/2015 dated 13 May 2016 is corrected as follows:
- 2 Condition 3 in Permit No. YR-2014/961 is deleted.
- 3 The permit conditions are renumbered to reflect the deletion of Condition 3 as set out in the Appendix to this Order.

Frank Dawson
Member

REASONS

- 1 By order dated 13 May 2016, the Tribunal ordered that permit YR-2014/961 be granted and directed to be issued for the land at 361-365 Mount Dandenong Tourist Road, Sassafras. The permit allows the construction of buildings and works for a food and drink premises ancillary to the existing plant nursery in the Green Wedge A Zone in accordance with the endorsed plans and the conditions contained in the Appendix to the Tribunal's Order.
- 2 The permit applicant has identified an error in the Order concerning the inclusion of Condition 3 from the draft permit conditions as follows:

The food and drink premises must only operate in conjunction with demonstration sessions associated with the plant nursery. Such demonstration sessions must be related to nursery operations and/or horticulture and/or gardening related matters. Such sessions may only operate a maximum of five times per week for a maximum of two hours per session.
- 3 As identified by the permit applicant, paragraphs 37 and 44 of my reasons explain my decision to change the permit conditions;

..to remove the nexus between operation of the food and drink premises and the demonstration sessions associated with the plant nursery.
- 4 Accordingly, the inclusion of Condition 3 is an error.
- 5 Section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the Tribunal may correct an order made by it if the order contains:
 - a a clerical mistake;
 - b an error arising from an accidental slip or omission;
 - c a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
 - d a defect of form.
- 6 I am satisfied that a mistake or error has occurred here, comprising an error arising from an accidental slip or omission, and find it appropriate to authorise a correction of the order.

Frank Dawson
Member

APPENDIX

PERMIT APPLICATION NO:	YR-2014/961
LAND:	361-365 Mount Dandenong Tourist Road, Sassafras
WHAT THE PERMIT ALLOWS:	The construction of buildings and works for a food and drink premises ancillary to the existing plant nursery in the Green Wedge A Zone in accordance with the endorsed plans.

CONDITIONS

- 7 Prior to the commencement of the use and/or development, including the removal of any trees or other vegetation, amended plans (2 copies) must be submitted to and approved by the Responsible Authority. When approved the plans will be endorsed and form part of the permit. The plans must be drawn to scale, with dimensions, and be generally in accordance with the plans submitted with the application or subsequent plans but modified to show:
- (a) Provision of appropriate screen landscaping along the north-western boundary where the carpark abuts the adjoining residential property.
 - (b) Provision of landscaping on either side of the car park entrance on Prince Street.
 - (c) The replacement of the existing fence along the north-western boundary with a new timber fence 2 metres high for the extent of the common boundary with 2 Prince Street.
 - (d) Define a maximum of 40 square metres for the indoor food and drink serving area and 36 square metres for the alfresco dining area.
 - (e) A notation indicating the proposed car parking area is to be formed and constructed with crushed rock or other suitable permeable surface.
 - (f) The provision of one (1) accessible car space to AS/NZS 2890.6:2009.
 - (g) All car parking bays re-numbered and dimensioned with dimensions of the car spaces and access driveway in accordance with Clause 52.06 of the planning scheme (as amended).

- (h) A notation indicating the existing crushed rock vehicle crossing in Prince Street is to be removed and replaced with a 6.0 metres wide sealed vehicle crossing.
 - (i) The end of the proposed access way provided with a 1.0 metre extension in accordance with AS/NZS 2890.1:2004.
 - (j) All existing easements labelled on relevant plans.
 - (k) Remove all reference to council upgrading the park.
 - (l) A 250m² wastewater envelope to be designated on the site plan in accordance with Condition 12.
- 8 The layout of the site and the size of any proposed buildings and works shown on the endorsed plans shall not be altered or modified without the written consent of the Responsible Authority.
- 9 The building must not be used in any way for the preparation and/or sale of food and drinks, except in accordance with the conditions listed within this permit.
- 10 Prior to the occupation of the permitted development the car parking spaces and vehicular access ways shown on the endorsed plan must be fully constructed, delineated and/or signed and drained incorporating Water Sensitive Urban Design elements to the satisfaction of the Responsible Authority.
- 11 Prior to the occupation of the permitted development the existing crushed rock vehicle crossing in Prince Street must be removed and replaced with a new nominal 6.0 metre trafficable width sealed vehicle crossing and all Council assets, including the nature-strip, reinstated to the satisfaction of the Responsible Authority.
- 12 Prior to the commencement of any works as required by this permit, a Drainage Strategy must be submitted to, and approved by, the Responsible Authority. The Drainage Strategy must show all drainage runoff being controlled and treated by Gross Pollutant Trap(s), and/or other Water Sensitive Urban Design elements.
- 13 Prior to the occupation of the permitted development the construction of all civil works within the site, including drainage/detention and internal/external signs must be fully completed and subsequently inspected and approved by a suitably experienced Civil Engineer or qualified person at the arrangement and expense of the owner/developer. This person must supply written certification that the works have been constructed in accordance with this permit and to relevant standards to the satisfaction of the Responsible Authority.
- 14 The loading and unloading of vehicles and the delivery and pick up of goods must be carried out at all times within the site boundaries.
- 15 All vehicles must enter and exit the site in a forward direction.

- 16 All sewage and sullage waste water from the proposed development must be discharged into a new EPA approved on-site wastewater treatment system which retains all wastes within the boundaries of the land and is located within any wastewater envelope indicated on the endorsed plan. Approval to install or alter an onsite wastewater treatment system must be obtained from the Yarra Ranges Council Health Department.
- 17 A 250m² wastewater envelope to be designated on the endorsed plan. Ensure all applicable setback distances are observed when sighting the field as described in EPA Publication 891.3 COP onsite Wastewater Management Table 5 (page 39).

CFA

18 Bushfire Management Plan

Before the development starts, a bushfire management plan must be submitted to and endorsed by the Responsible Authority. The plan must show the following bushfire mitigation measures, unless otherwise agreed in writing by the CFA and the Responsible Authority:

Defendable space

- (a) Show an area of defendable space to the property boundary where vegetation (and other flammable materials) will be modified and managed in accordance with the following requirements:
- Grass must be short cropped and maintained during the declared fire danger period.
 - All leaves and vegetation debris must be removed at regular intervals during the declared fire danger period.
 - In relation to any new plantings into the ground:
 - Plants greater than 10 centimetres in height must not be placed within 3m of a window or glass feature of the building.
 - Shrubs must not be located under the canopy of trees.
 - Individual and clumps of shrubs must not exceed 5 sq. metres in area and must be separated by at least 5 metres.
 - Trees must not overhang or touch any elements of the building.
 - The canopy of trees must be separated by at least 5 metres.
 - There must be a clearance of at least 2 metres between the lowest tree branches and ground level.

Construction standards

- (b) Nominate a minimum Bushfire Attack Level of BAL - 19 that the building will be designed and constructed.

Water supply

(c) Show 10,000 litres of effective water supply for firefighting purposes which meets the following requirements:

- Is stored in an above ground water tank constructed of concrete or metal.
- All fixed above-ground water pipes and fittings required for firefighting purposes must be made of corrosive resistant metal.

The water supply must also

- Incorporate a ball or gate valve (British Standard Pipe (BSP) 65mm) and coupling (64 mm CFA 3 thread per inch male fitting).
- The outlet/s of the water tank must be within 4m of the accessway and be unobstructed.
- Be readily identifiable from the building or appropriate identification signage to the satisfaction of CFA must be provided.
- Any pipework and fittings must be a minimum of 65 mm (excluding the CFA coupling).

Access

(d) Show the access for firefighting purposes which meets the following requirements:

- Curves must have a minimum inner radius of 10m.
- The average grade must be no more than 1 in 7 (14.4 per cent) (8.1 degrees) with a maximum of no more than 1 in 5 (20 per cent) (11.3 degrees) for no more than 50m.
- Have a minimum trafficable width of 3.5metres of all-weather construction.
- Be clear of encroachments for at least 0.5metre on each side and 4 metres above the accessway.
- Dips must have no more than a 1 in 8 (12.5 per cent) (7.1 degrees) entry and exit angle.

19 Bushfire Management Plan – Maintenance

The bushfire mitigation measures forming part of this permit or shown on the endorsed plans, including those related to construction standards, defendable space, water supply and access, must be maintained to the satisfaction of the responsible authority on a continuing basis.

20 This permit will expire if one of the following circumstances applies:

- (a) The development is not started within two years of the issued date of this permit.
- (b) The development is not completed within four years of the issued date of this permit.

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

--- End of Conditions ---

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1758/2015

APPLICANT Carringbush Pty Ltd
RESPONSIBLE AUTHORITY Yarra Ranges Shire Council
REFERRAL AUTHORITY Country Fire Authority
SUBJECT LAND 361-365 Mount Dandenong Tourist Road,
Sassafras
WHERE HELD Melbourne
BEFORE Frank Dawson, Member
HEARING TYPE No Hearing
DATE OF ORIGINAL ORDER 13 May 2016
DATE OF CORRECTION ORDER 16 May 2016
CITATION Carringbush Pty Ltd v Yarra Ranges Shire
Council (Amended) [2016] VCAT 772

CORRECTION ORDER

- 21 Pursuant to Section 119 of the *Victorian Civil and Administrative Tribunal Act* 1998, the Tribunal's Order in Application P1758/2015 dated 13 May 2016 is corrected as follows:
- 22 The name of the responsible authority in the preliminary information is corrected to read:
Yarra Ranges Shire Council
- 23 The citation is amended as follows:
Carringbush Pty Ltd v Yarra Ranges Shire Council [2016] VCAT 772



Frank Dawson
Member

REASONS

- 24 By order dated 13 May 2016, the Tribunal ordered that permit YR-2014/961 be granted and directed to be issued for the land at 361-365 Mount Dandenong Tourist Road, Sassafras. The permit allows the construction of buildings and works for a food and drink premises ancillary to the existing plant nursery in the Green Wedge A Zone in accordance with the endorsed plans and the conditions contained in the Appendix to the Tribunal's Order.
- 25 The Tribunal has identified an error in the Order concerning the correct placement of the name of the Responsible Authority (Yarra Ranges Shire Council) and the decision citation (*Carringbush Pty Ltd v Yarra Ranges Shire Council* [2016] VCAT 772).
- 26 Section 119 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that the Tribunal may correct an order made by it if the order contains:
- e a clerical mistake;
 - f an error arising from an accidental slip or omission;
 - g a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the order; or
 - h a defect of form.
- 27 I am satisfied that a mistake or error has occurred here, comprising an error arising from an accidental slip or omission, and find it appropriate to authorise a correction of the order.



Frank Dawson
Member

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CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*; Yarra Ranges Planning Scheme; Plant Nursery; Green Wedge A Zone; assessment of use ancillary to the primary use; Food and Drink Premises; car parking; tourist location; main road location.

APPLICANT	Carringbush Pty Ltd
RESPONSIBLE AUTHORITY	Mr Joel Templar
REFERRAL AUTHORITY	Country Fire Authority
SUBJECT LAND	361-365 Mount Dandenong Tourist Road, Sassafras
WHERE HELD	Melbourne
BEFORE	Frank Dawson, Member
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2016
DATE OF ORDER	13 May 2016
CITATION	Carringbush Pty Ltd v Templar [2016] VCAT 772

ORDER

- 28 The decision of the Responsible Authority is set aside.
- 29 In permit application YR-2014/961 a permit is granted and directed to be issued for the land at 361-365 Mount Dandenong Tourist Road, Sassafras in accordance with the endorsed plans and on the conditions set out in the Appendix to this order. The permit allows the construction of buildings and works for a food and drink premises ancillary to the existing plant nursery in the Green Wedge A Zone.



**Frank Dawson
Member**

APPEARANCES

For Applicant	Mr Simon Merrigan, surveyor and town planner of Millar Merrigan Pty Ltd. and Mr Jeff Barry, artist of Chojo Feature Trees.
For Responsible Authority	Mr Joel Templar, town planner of Perspective Planning Consultants.
For Referral Authority	Mr Stephen Foster, town planner.

INFORMATION

Description of Proposal This proceeding concerns a proposal to extend an existing use (Plant Nursery) to include food and beverage facilities and associated buildings and works at 361-365 Mount Dandenong Tourist Road in Sassafras. The existing plant nursery operates in conjunction with Chojo Feature Trees, which specialises in Bonsai plants and the accessories associated with Bonsai. The business includes a gallery display and Bonsai instruction.

Mr Merrigan explains the purpose of the application is to:

Expand the existing use as a Plant Nursery to include the provision of associated food and beverage facilities, to provide for the upgrading of existing buildings, to relocate the existing gravel car parking area, to build a new smaller building to provide for toilets and storage, and to upgrade existing boundary fencing.

The proposal includes a new on-site car parking area for 22 cars and an indoor food and drink premises of 40 square metres plus an outdoor alfresco area to operate in conjunction with the plant nursery at the same operating hours.

Nature of Proceeding Application under Section 77 of the *Planning and Environment Act* 1987 – to review the refusal to grant a permit.

Zone and Overlays

Green Wedge A Zone – Schedule 1 (GWAZ1).

Bushfire Management Overlay (WMO).

Design and Development Overlay – Schedule 14 (DDO14).

Significant Landscape Overlay – Schedule 9 (SLO9).

The land is partially within an Area of Aboriginal Cultural Heritage Sensitivity.

The land is adjacent to a Road Zone Category 1 (RDZ1).

Permit Requirements

Clause 35.05-4 (a permit is required for buildings and works associated with the existing plant nursery to accommodate the the use of a food and drink premises. A permit is also required for a building within 30 metres of a Road Zone Category 1 and a dwelling not in the same ownership).

Clause 42.03 (a permit is required for the construction of buildings and works in a Significant Landscape Overlay – Schedule 9 Main Ridge – Dandenong Ranges).

Clause 43.02 (a permit is required for buildings and works in a Design and Development Overlay – Schedule 14).

Clause 44.06 (a permit is required for buildings and works in a Bushfire Management Overlay).

Land Description

The subject land is on the north-western side of the the Mount Dandenong Tourist Road in the centre of Sassafras. The total area of the land is 2,270 m², is irregular in shape and consists of three adjoining titles (361-365 Mount Dandenong Tourist Road). The frontage to Mount Dandenong Tourist Road is 45.95 metres and the depth along Prince Street is 54.1 metres. A drainage and sewerage easement is located along the north-west boundary.

The land is generally flat and contains various small structures, including;

- a single storey central nursery sales building with a front verandah, set back approximately 19 metres from the frontage (total area approximately 180 m²), and
- a small galvanised shed with an adjacent covered area toward the rear of number 365.

A car parking area is located on the south-western side of the land, immediately adjacent to Prince Street. The car parking area appears to be part of the road, but is mostly within the subject land.

Surrounding development includes a single detached dwelling to the north-west (rear), numerous tourist oriented shops to the south-west (on the opposite side of Prince Street) and to the south-east (on the opposite side of the Mount Dandenong Tourist Road). To the north east is a local park, separating the subject land from a shops further along the main road.

The subject land is located within a commercial precinct directed to tourism.

Cases Referred To

Pacific Seven Pty Ltd v Knox CC [1993] 11 AATR 325.

Hoe v Manningham [2011] VSC 543.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

1 In July 2015, the Yarra Ranges Shire Council determined to refuse a planning permit application to “extend (the) existing use as Plant Nursery to include food and beverage facilities and associated buildings and works.” It is a decision the permit applicant requests the Tribunal to review. A submission is also made by the Country Fire Authority as a referral authority in relation to fire protection measures.

2 Council’s grounds for refusing the proposal are that:

1. The proposed food and drink premises is not considered to be an ancillary use associated with the nursery and is therefore contrary to the objectives of Clause 35.05 of the Yarra Ranges Planning Scheme. The use as a food and drink premises is prohibited in a Green Wedge A Zone.
2. The design and layout of the additions to the existing building and construction of the car park required in association with the proposed ancillary use of the food and drink premises is contrary to the objectives of Clause 21.04 of the Yarra Ranges Planning Scheme.

3 The applicant takes the contrary view, submitting that the proposed food and drink premises is ancillary to the plant nursery and is required in conjunction with the nursery activities. In his submission to the Tribunal, Mr Merrigan quotes correspondence to the Council of 19/1/2015 on behalf of the applicant, stating (in part);

.. it is submitted that the use of the premises for the sale of food and beverages will very much be ancillary in terms of scale. Most importantly, it is expected that provisions for the sale of food and beverages will significantly increase nursery sales by improving the overall experience of shoppers and by providing a point of difference from alternatives such as online shopping and big commercial retailers.

It is noted that the nature of the business is changing and the ongoing viability of the existing nursery is somewhat dependent on exploring novel ways to get people engaged with gardening and their nursery operation. The site is located within Sassafras Main Street and we adamantly believe that there is a genuine opportunity to enhance the viability of the existing enterprise through incorporating a minor ancillary component that will complement the existing nursery.

4 I consider the key questions to be determined in this matter are:

¹ I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I do not recite or refer to all of the contents of those documents in these reasons.

- Are the proposed buildings and works an acceptable change to the existing plant nursery in the GWAZ1, the SLO9, the DDO14 and the WMO?
 - Is the proposed food and drink premises ancillary to the existing plant nursery?
- 5 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions presented with regard to the applicable policies and provisions of the Yarra Ranges Planning Scheme, I have decided to set aside the Council decision and grant a permit. My reasons follow.

ARE THE PROPOSED BUILDINGS AND WORKS AN ACCEPTABLE CHANGE TO THE EXISTING PLANT NURSEY IN THE GWAZ1, THE SLO9, THE DDO14 AND THE WMO?²

Green Wedge A Zone – Schedule 1

- 6 The Sassafras township contains a number different land use zones distributed on either side of the Mount Dandenong Tourist Road, including the Commercial 1 Zone, the Mixed Use Zone and the Green Wedge A Zone, as well as various public use zones.
- 7 The GWAZ1 extends around the town, generally accommodating residential or rural living activities. The areas within the zone are quite fragmented, typically in the range of 1,000m² to 3,000m² and most lots are heavily vegetated.
- 8 Within the business area of the town, the GWAZ1 abuts the Mount Dandenong Tourist Road at two locations on either side of the main road, adjacent to the C1Z. The subject land is coincident with the extent of the GWAZ1 on the north-western side of the road, flanked on either side by the C1Z and a local park. All of the land opposite the subject land is in the C1Z.
- 9 The Green Wedge A Zone includes the purpose:
To recognise and protect the amenity of existing rural living areas.
- 10 This purpose distinguishes the zone from the broader Green Wedge Zone, in that while both zones have the purpose of providing for the use of land for agriculture and to ‘conserve and enhance’ environmental values, the GWAZ1 is predominately a rural living zone.
- 11 In this context, the reason for the inclusion of the subject land in this zone is not clear, particularly as the Council submission records the use of the land as a retail plant nursery since 1968. As a corollary to this, at the hearing Council was unable to provide a reason for the inclusion of the subject land

² Green Wedge A Zone, Significant Landscape Overlay – Schedule 9, Design and Development Overlay – Schedule 14, and the Wildfire Management Overlay.

- in the current zone. Based on my observation, the existing use is certainly uncharacteristic of the purpose of the zone.
- 12 I raise this point as I am unable to distinguish the subject land from other retail uses along the Mount Dandenong Tourist Road in Sassafras, other than to note the existing building is surrounded by an open area for plant propagation and display.
 - 13 The reality is that the GWAZ1 clearly places a restriction on the proposed use unless it can be established that a food and drink premises is ancillary to the existing plant nursery.
 - 14 A food and drink premises is included as a restaurant in the Table of uses at Clause 35.05-1 of the zone for the reason that the use 'Food and drink premises' is included under the uses 'Restaurant' and 'Retail premises' in the Land Use Terms at Clause 74 of the planning scheme.
 - 15 *Food and drinks premises* is defined in the planning scheme as:
 - Land used to prepare and sell food and drink for immediate consumption on, or off, the premises.
 - 16 Within the Table of uses in the GWAZ1, a restaurant requires a planning permit and is subject to the following conditions:
 - i. Must be used in conjunction with Agriculture, Natural systems, Outdoor recreation facility, Rural industry or Winery.
 - ii. The number of patrons present must not exceed the number specified in a schedule to the zone or 150 patrons, whichever is the lesser.
 - iii. If used in conjunction with Function centre, the total number of patrons present at any time must not exceed the number specified in a schedule to the zone or 150 patrons, whichever is the lesser.
 - iv. The lot on which the use is conducted must be at least the minimum subdivision area specified in a schedule to this zone. If no area is specified, the lot must be at least 8 hectares.
 - 17 If the proposed food and drink premises requires a planning permit as a use separate from the plant nursery, the conditions attached to the use of land for a restaurant clearly establish that the proposed food and drink premises is prohibited, as conditions (i) and (iv) above cannot be met:
 - Firstly, the proposed 'Food and drink premises' will not be used in conjunction with 'Agriculture', 'Natural systems', 'Outdoor recreation', 'Rural industry' or a 'Winery' as currently defined in the planning scheme.
 - Secondly, the area of the subject land is less than 8 hectares.
 - 18 The above provisions establish that the proposed food and drink premises cannot be considered in relation to Clause 64.02 of the planning scheme, which refers to "Land used in conjunction with another use".

- 19 Before turning to consideration of the proposed food and drink premises as an ancillary use to a plant nursery (in the context of Clause 64.01 - Land used for more than one use), it is necessary for me to briefly refer to the other permit 'triggers' that apply to the proposed use.

Significant Landscape Overlay – Schedule 9

- 20 A permit is required for buildings and works in the SLO9 if a permit is required under the applicable zone, which is the case in this proceeding.
- 21 The subject land is within a designated significant landscape, being the Main Ridge - Dandenong Ranges. The statement describing the landscape significance of this area includes the following comment in relation to the importance of tourism and appropriate commercial development:

The Dandenong Ranges are an important visual, environmental and recreational resource for not only the local community, but for Melbourne and the State in general. The area is a major focus for tourist activities and its appearance is important in defining the overall image of the Dandenong Ranges as an attractive visitor destination.

The protection of the diverse landscape elements of this area would be compromised by further intensification of residential development, the spread of commercial land uses outside established town centres and the development of inappropriate commercial development which does not reflect the established character of the townships.

- 22 The plant nursery on the subject land has been in the business area of Sassafras for more than 40 years and is an established part of the character of the town. The plans indicate the changes required to accommodate the proposed food and drink component of the premise is relatively modest, with the most prominent change being the new car parking area at the rear. In the context of the SLO9, I find the proposed development will not have a detrimental effect on the established character of the town.

Design and Development Overlay – Schedule 14

- 23 Schedule 14 to the DDO refers to the town centres of Kallista, Mount Dandenong, Olinda, Sassafras and Tecoma. With some specific exceptions, building and works on land within this overlay require a permit. Schedule 14 to the DDO, which includes the subject land, contains the following character statement:

The town centres in the Dandenong Ranges will continue to comprise informal collections of buildings, small in scale and somewhat irregularly spaced and aligned. They will retain their distinctive appearance as a cluster of buildings in a forest, rather than a 'wall to wall' urban environment. They will continue to sit comfortably in a landscape dominated by the tall trees, lush vegetation and hilly topography of their surrounds.

- 24 The existing plan nursery is in an open setting, with the central building surrounded by the outdoor plant display, which occupies the majority of the site. The form of the building and presentation to the main street will not change significantly if the proposed alterations and extension for the food and drink premises are implemented, as most of the change will occur within and behind the existing building. I consider the proposed development will retain the characteristic informality of the Sassafras business centre.

Wildfire Management Overlay

- 25 Council has assessed the proposal against the provisions of the BMO, which is required because the proposed development constitutes a retail premises. The application was also referred to the Country Fire Authority (CFA), who attended the hearing and made a submission to the Tribunal.

- 26 The vegetation impact assessment undertaken by the Council concludes:

The proposal is considered to satisfy the objectives and mandatory standards of the clause... In summary:

- In the context of the immediate grounds, level of risk is acceptable due to the modified fuel loads and managed gardens within the defendable space distances of the abutting residential and commercial properties.
- Defined defendable space requirements of 53 metres can be practically implemented for the site and abutting managed properties in accordance with the recommendations of the CFA.
- Static water supply and access to the water supply meet the requirements of the CFA. Access meets the requirements of the CFA.

- 27 Mr Foster's submission on behalf of the CFA contains draft conditions the CFA submits are required for inclusion with the permit should the Tribunal decide to grant a permit. At the hearing, Mr Foster suggested some practical changes to these conditions to reflect the actual circumstances of the subject site. I accept these changes, which are included in the permit conditions.

- 28 Accordingly, in the context of the WMO and subject to the CFA permit conditions, I find the proposed development provides an acceptable bushfire management response.

IS THE PROPOSED FOOD AND DRINK PREMISES ANCILLARY TO THE EXISTING PLANT NURSERY?

- 29 Consideration of an ancillary use is enabled at Clause 64.01 of the planning scheme, which states:

If land is used for more than one use and one is not ancillary to the other, each use must comply with this scheme.

- 30 Case history in relation to what constitutes an ancillary use is extensive, but I consider it important in the first instance to understand the meaning of the word ‘ancillary’. For an explanation in planning terms, I cite the decision of *Hoe v Manningham* [2011] VSC 543; VPR 75 at [16] as follows:

The ordinary meaning of ‘ancillary’ is accessory or auxiliary. A use may be ancillary to another if it is a necessary adjunct to another use, or if it is subsidiary to that other use.

- 31 In the context of the terms ‘adjunct’ or ‘subsidiary’, I also find it relevant to recognise that functional relationships between uses can change or evolve over time. This characteristic is discussed in the often quoted case of *Pacific Seven Pty Ltd v Knox CC* [1993] 11 AATR 325. In that decision, the Tribunal explored the relationship between ancillary and primary uses as follows:

It has always been recognised that land may be used for more than one use. Land can also be used for more than one activity. However, not all activities constitute separate uses in their own right. Sometimes activities will be ancillary or incidental to the primary use of the property, in which case they will not constitute a separate use but are considered to be part and parcel of the primary use. Whilst these are commonly termed “ancillary uses,” the word “use” in this context is a misnomer. They are really activities which are an ancillary part of the primary use.

- 32 The *Pacific Seven* decision also identifies two types of ancillary use:

The first is where the ancillary activity is quite different to the activities constituting the primary use of the property, but are a necessary adjunct to the primary use. A common example given is the sixth floor of Myers in Melbourne which was devoted to office, yet the offices are ancillary to the primary use of the premises of a shop. In such cases there must exist a close association between the principal and ancillary uses. Thus, so long as the office of a business or industry deals with the administration of that business or industry, then it will not be classified as a separate office use but as part of the use constituted by the business or industry. But if other administrative work entirely unrelated to the business or industry in question is carried out, then that aspect of the office activity would cease to be ancillary to the primary use and would become a separate use in its own right which would need to comply with the planning scheme.

The second type of ancillary use are those types of activities which grow out of or develop from the primary use and are intended to enhance it. The most common example in recent years has been the sale of convenience goods by petrol stations.

- 33 I find the above discussion on ‘ancillary use’ is instructive in relation to the matter in this proceeding. The above decision in 1993 refers to the sale of convenience goods from ‘petrol stations’ with the purpose of enhancing the

primary use. Petrol stations are now service stations and have evolved to include what often amounts to a small supermarket.

- 34 I consider the plant nursery industry is another example of a retail activity that has changed over time by 'growing out of' its traditional function. For example, I observed a number of retail plant nurseries in the Dandenong Ranges area (some of which are in the Green Wedge Zone) that have a cafe or a restaurant as part of the visitor experience. There are many similar examples on the Mornington Peninsula and in the Macedon Ranges area. The plant nursery experience is now commonly enhanced by the ability to purchase food and drink on the premises; part of a competitive environment that has expanded into tourism.
- 35 The proposal in this proceeding is to expand the existing plant display area to incorporate provision for the sale of food and drink and to undertake associated improvements such as toilets, a kitchen area and car parking.
- 36 In his submission, Mr Merrigan contends that the proposed extension is not intended to usurp the plant nursery, but operate as an adjunct to the existing business. To illustrate this point, Mr Merrigan describes the proposal as follows:
- Sales of food and drink would only occur whilst the nursery was open (10 am to 6 pm, 7 days per week).
 - The building containing the food and drink element is setback substantially from the two street frontages (about 21 metres to the east and 16 metres to the south) and the setback areas contain an array of plants on display.
 - The building is designed to present to Mount Dandenong Tourist Road with an entry through a dedicated display area which fronts the street, the food and drink area will not be readily visible from the street.
 - The area to be utilised for food and drink preparation and consumption while seated (40 m² or 25% of the building area) is a very small scale and would not be a sufficient size to be a stand-alone business.
 - The entire area outside of the centrally located building (176 m²), the bonsai room (42 m²), storage and propagation areas (218 m²), and the car park (547 m²), is dedicated to the display and sale of plants and garden equipment, this equates to 1,805 m².
- 37 The applicant also emphasises the educational role of the associated business, which teaches the art of Bonsai. The intention is to run education and practice sessions in conjunction with the serving of food and drink. While I accept this will improve the experience for people wishing to learn about Bonsai, given the broader attraction of the plant nursery, I do not find it necessary or practical to require the operation of the food and drink component to be tied to the bonsai education activity. The proposed food and drink serving area is modest and, like many other similar businesses, is

intended as an adjunct to the experience of visiting the nursery. In this regard, I find the sale of food and drink, as proposed, will be subservient to the plant nursery.

- 38 In relation to car parking, the Council submission points out that:
- Plant nursery is not a listed use in Table 1 to Clause 52.06. Therefore, the provision of parking must be to the satisfaction of the responsible authority.
- 39 In this case, the Council has assessed the 22 car spaces proposed on-site to be satisfactory ‘in the event that the restaurant use is determined to be ancillary.’
- 40 The subject land has the advantage on being on a corner location, with access to the site from Prince Street. Visitors currently use the car parking area adjacent to Prince Street, which avoids vehicular access for the main road. The proposed new car park retains the access from Prince Street, but brings the parking area into a currently unused area at the rear of the property, adjacent to the rear boundary.
- 41 The dwelling on the property to the north-west of the proposed car parking area is separated by a distance of approximately 8 metres, which accommodates a driveway leading to the rear garage. The fence on the common boundary is in poor condition, but supports screen planting. I consider it appropriate that the screen planting be improved or replaced, as is stipulated in Council’s draft conditions, and that a new timber fence be constructed on the boundary to a height of 2 metres, co-incident with the common boundary with 2 Prince Street. This requirement is included in the permit conditions.
- 42 Taking into consideration the existing activities associated with the existing plant nursery, the size and location of the business and the specifications for the proposed extension and car parking area, I find the proposed food and drink premises is an acceptable ancillary component of the existing plant nursery.

WHAT CONDITIONS ARE APPROPRIATE?

- 43 In deciding the conditions to be included on the permit the Tribunal has had regard to the draft conditions provided to the Tribunal by the responsible authority and the submissions of the parties in addition to the matters which arise from these reasons.
- 44 In accordance with my reasons, I have made changes to the ‘without prejudice’ draft conditions provided by the Council to remove the nexus between operation of the food and drink premises and the demonstration sessions associated with the plant nursery. These may well still occur, however, I find it both impractical and unnecessary for the hours of operation of the food and drink premises to be aligned with the demonstration activities. In reaching this conclusion, I take into

consideration the function of the Sassafras business area as a popular visitor destination. I find the hours for the food and drink premises and those of the existing the plant nursery should be aligned, that is; 10 am to 6 pm, seven days per week.

- 45 Council's draft conditions include a requirement to seal the car parking area. I agree with the permit applicant that this is not necessary, as a suitably constructed permeable surface is more in character with the site and surrounding area. I agree, however, that the vehicle crossing from Prince Street should be constructed and sealed in accordance with Council's suggested condition.
- 46 I have amended and renumbered the draft permit conditions to reflect the above changes and the changes arising from my reasons.

CONCLUSION

- 47 For the reasons explained above, the decision of the Responsible Authority is set aside. A permit is issued subject to conditions.



Frank Dawson
Member

Permit Notes

Although my order does not include the 'Notes' suggested by the Council, such advisory information may be included in the permit that the Council is directed to issue.

APPENDIX

PERMIT APPLICATION NO:	YR-2014/961
LAND:	361-365 Mount Dandenong Tourist Road, Sassafras
WHAT THE PERMIT ALLOWS:	
<p>The construction of buildings and works for a food and drink premises ancillary to the existing plant nursery in the Green Wedge A Zone in accordance with the endorsed plans.</p>	

CONDITIONS

- 1 Prior to the commencement of the use and/or development, including the removal of any trees or other vegetation, amended plans (2 copies) must be submitted to and approved by the Responsible Authority. When approved the plans will be endorsed and form part of the permit. The plans must be drawn to scale, with dimensions, and be generally in accordance with the plans submitted with the application or subsequent plans but modified to show:
 - (a) Provision of appropriate screen landscaping along the north-western boundary where the carpark abuts the adjoining residential property.
 - (b) Provision of landscaping on either side of the car park entrance on Prince Street.
 - (c) The replacement of the existing fence along the north-western boundary with a new timber fence 2 metres high for the extent of the common boundary with 2 Prince Street.
 - (d) Define a maximum of 40 square metres for the indoor food and drink serving area and 36 square metres for the alfresco dining area.
 - (e) A notation indicating the proposed car parking area is to be formed and constructed with crushed rock or other suitable permeable surface.
 - (f) The provision of one (1) accessible car space to AS/NZS 2890.6:2009.
 - (g) All car parking bays re-numbered and dimensioned with dimensions of the car spaces and access driveway in accordance with Clause 52.06 of the planning scheme (as amended).
 - (h) A notation indicating the existing crushed rock vehicle crossing in Prince Street is to be removed and replaced with a 6.0 metres wide sealed vehicle crossing.

- (i) The end of the proposed access way provided with a 1.0 metre extension in accordance with AS/NZS 2890.1:2004.
 - (j) All existing easements labelled on relevant plans.
 - (k) Remove all reference to council upgrading the park.
 - (l) A 250m² wastewater envelope to be designated on the site plan in accordance with Condition 12.
- 2 The layout of the site and the size of any proposed buildings and works shown on the endorsed plans shall not be altered or modified without the written consent of the Responsible Authority.
 - 3 3. The food and drink premises must only operate in conjunction with demonstration sessions associated with the plant nursery. Such demonstration sessions must be related to nursery operations and/or horticulture and/or gardening related matters. Such sessions may only operate a maximum of five times per week for a maximum of two hours per session.
 - 4 4. The building must not be used in any way for the preparation and/or sale of food and drinks, except in accordance with the conditions listed within this permit.
 - 5 Prior to the occupation of the permitted development the car parking spaces and vehicular access ways shown on the endorsed plan must be fully constructed, delineated and/or signed and drained incorporating Water Sensitive Urban Design elements to the satisfaction of the Responsible Authority.
 - 6 Prior to the occupation of the permitted development the existing crushed rock vehicle crossing in Prince Street must be removed and replaced with a new nominal 6.0 metre trafficable width sealed vehicle crossing and all Council assets, including the nature-strip, reinstated to the satisfaction of the Responsible Authority.
 - 7 Prior to the commencement of any works as required by this permit, a Drainage Strategy must be submitted to, and approved by, the Responsible Authority. The Drainage Strategy must show all drainage runoff being controlled and treated by Gross Pollutant Trap(s), and/or other Water Sensitive Urban Design elements.
 - 8 Prior to the occupation of the permitted development the construction of all civil works within the site, including drainage/detention and internal/external signs must be fully completed and subsequently inspected and approved by a suitably experienced Civil Engineer or qualified person at the arrangement and expense of the owner/developer. This person must supply written certification that the works have been constructed in accordance with this permit and to relevant standards to the satisfaction of the Responsible Authority.

- 9 The loading and unloading of vehicles and the delivery and pick up of goods must be carried out at all times within the site boundaries.
- 10 All vehicles must enter and exit the site in a forward direction.
- 11 All sewage and sullage waste water from the proposed development must be discharged into a new EPA approved on-site wastewater treatment system which retains all wastes within the boundaries of the land and is located within any wastewater envelope indicated on the endorsed plan. Approval to install or alter an onsite wastewater treatment system must be obtained from the Yarra Ranges Council Health Department.
- 12 A 250m² wastewater envelope to be designated on the endorsed plan. Ensure all applicable setback distances are observed when sighting the field as described in EPA Publication 891.3 COP onsite Wastewater Management Table 5 (page 39).

CFA

13 Bushfire Management Plan

Before the development starts, a bushfire management plan must be submitted to and endorsed by the Responsible Authority. The plan must show the following bushfire mitigation measures, unless otherwise agreed in writing by the CFA and the Responsible Authority:

Defendable space

- (a) Show an area of defendable space to the property boundary where vegetation (and other flammable materials) will be modified and managed in accordance with the following requirements:
 - Grass must be short cropped and maintained during the declared fire danger period.
 - All leaves and vegetation debris must be removed at regular intervals during the declared fire danger period.
 - In relation to any new plantings into the ground:
 - Plants greater than 10 centimetres in height must not be placed within 3m of a window or glass feature of the building.
 - Shrubs must not be located under the canopy of trees.
 - Individual and clumps of shrubs must not exceed 5 sq. metres in area and must be separated by at least 5 metres.
 - Trees must not overhang or touch any elements of the building.
 - The canopy of trees must be separated by at least 5 metres.
 - There must be a clearance of at least 2 metres between the lowest tree branches and ground level.

Construction standards

- (b) Nominate a minimum Bushfire Attack Level of BAL - 19 that the building will be designed and constructed.

Water supply

- (c) Show 10,000 litres of effective water supply for firefighting purposes which meets the following requirements:
- Is stored in an above ground water tank constructed of concrete or metal.
 - All fixed above-ground water pipes and fittings required for firefighting purposes must be made of corrosive resistant metal.

The water supply must also

- Incorporate a ball or gate valve (British Standard Pipe (BSP) 65mm) and coupling (64 mm CFA 3 thread per inch male fitting).
- The outlet/s of the water tank must be within 4m of the accessway and be unobstructed.
- Be readily identifiable from the building or appropriate identification signage to the satisfaction of CFA must be provided.
- Any pipework and fittings must be a minimum of 65 mm (excluding the CFA coupling).

Access

- (d) Show the access for firefighting purposes which meets the following requirements:
- Curves must have a minimum inner radius of 10m.
 - The average grade must be no more than 1 in 7 (14.4 per cent) (8.1 degrees) with a maximum of no more than 1 in 5 (20 per cent) (11.3 degrees) for no more than 50m.
 - Have a minimum trafficable width of 3.5metres of all-weather construction.
 - Be clear of encroachments for at least 0.5metre on each side and 4metres above the accessway.
 - Dips must have no more than a 1 in 8 (12.5 per cent) (7.1 degrees) entry and exit angle.

14 Bushfire Management Plan – Maintenance

The bushfire mitigation measures forming part of this permit or shown on the endorsed plans, including those related to construction standards, defendable space, water supply and access, must be maintained to the satisfaction of the responsible authority on a continuing basis.

- 15 This permit will expire if one of the following circumstances applies:

- (a) The development is not started within two years of the issued date of this permit.
- (b) The development is not completed within four years of the issued date of this permit.

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

--- End of Conditions ---