

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1306/2023
APPLICATION NO. REF 7/2023/COMP

CATCHWORDS

Section 97P(1)(a) of the *Planning and Environment Act 1987* (Vic); review of refusal to issue a certificate of compliance under section 97N(1)(b) of the *Planning and Environment Act 1987* (Vic); rooming house; exemption in clause 52.23 'Rooming House' of the Frankston Planning Scheme; General Residential Zone of the Frankston Planning Scheme; self-contained apartment as defined in the *Residential Tenancies Act 1997* (Vic).

APPLICANT	The Casley Empire Pty Ltd
RESPONSIBLE AUTHORITY	Frankston City Council
SUBJECT LAND	17 David Street FRANKSTON VIC 3199
HEARING TYPE	Hearing
DATE OF HEARING	22 January 2024
DATE OF ORDER	21 February 2024
CITATION	The Casley Empire Pty Ltd v Frankston CC [2024] VCAT 151

ORDER

Certificate of compliance – not issued

- 1 The decision of the responsible authority is affirmed.
- 2 Pursuant to section 97P(1)(a) of the *Planning and Environment Act 1987* (Vic), I direct that a certificate of compliance must not be issued.

Susan Whitney
Member

APPEARANCES

For The Casley Empire Pty Ltd	Mr Richard Casley, sole director and secretary, of The Casley Empire Pty Ltd
For Frankston City Council	Ms Bronte Norris, town planner, of Frankston City Council

INFORMATION

Description of proposal	Application for a certificate of compliance stating that the use and development of the subject land for a rooming house does not require a planning permit.
Nature of proceeding	Application under section 97P of the <i>Planning and Environment Act 1987</i> (Vic) – to review the refusal of the responsible authority to issue a certificate of compliance.
Planning scheme	Frankston Planning Scheme.
Zone and overlays	General Residential Zone.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 The applicant, The Casley Empire Pty Ltd, applied to the Frankston City Council ('Council') for a certificate of compliance pursuant to section 97N(1)(b) of the *Planning and Environment Act 1987* (Vic) ('Act') stating that the proposed use and development of the land at 17 David Street, Frankston ('Land') would comply with the requirements of the Frankston Planning Scheme ('Scheme') as at the date of the certificate.
- 2 The applicant says that proposed use and development of the Land is for a rooming house, as defined in the Scheme.
- 3 The Land is in the General Residential Zone ('GRZ') of the Scheme.
- 4 The Land is shown in the following image taken from the Council's submission:²



Figure 1: Image captured via Near Maps and dated 3 September 2023.

- 5 Pursuant to section 97O(1)(b) of the Act, the Council refused to issue the certificate of compliance on the basis that:
... the whole of the use or development would require a permit or is prohibited under the planning scheme.³
- 6 The applicant seeks the Tribunal's review of the Council's refusal pursuant to section 97P(1)(a) of the Act.

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

² Frankston City Council VCAT Submission dated 22 January 2024, [11].

³ Letter from Bronte Norris of the Council to the applicant dated 14 September 2023.

- 7 The key issue for determination is whether what is proposed meets the requirements in the Scheme such that no planning permit is required for its use or development. This assessment involves consideration of:
- a. whether what is proposed is actually a ‘rooming house’ as defined in the Scheme; and
 - b. if it is a rooming house, whether the proposal meets the requirements of the use exemption and development exemption in clause 52.23 ‘Rooming House’ of the Scheme, such that no planning permit is required for use or development.
- 8 Before I discuss this issue, I address what is meant by a rooming house in the Scheme and provide details regarding the rooming house that is now proposed. In this respect, I also address how I have dealt with the plans that have been provided to the Tribunal that are different to what was before the Council for its consideration.
- 9 Having heard the submissions of the parties and having considered the materials provided and the provisions of the Scheme, I have determined that a certificate of compliance must not be issued. My reasons follow.

WHAT IS A ROOMING HOUSE ACCORDING TO THE SCHEME?

- 10 A rooming house is a form of share house that contains rooms for rent.

- 11 A ‘rooming house’ is defined in clause 73.03 of the Scheme as:

Land used for a rooming house as defined in the *Residential Tenancies Act 1997*.

- 12 The *Residential Tenancies Act 1997* (Vic) (‘RT Act’) defines a rooming house as:⁴

rooming house means a building, other than an SDA enrolled dwelling,⁵ in which there is one or more rooms available for occupancy on payment of rent—

- (a) in which the total number of people who may occupy those rooms is not less than 4; or
- (b) in respect of which a declaration under section 19(2) or (3) is in force.

- 13 The RT Act defines ‘room’ as follows:⁶

room means a room in a building, where the room is occupied or intended to be occupied for the purpose of a residence by a person having a right to occupy the room together with a right to use in common with others any facilities in the building but does not include a self-contained apartment.

⁴ Section 3(1) of the RTA.

⁵ ‘SDA enrolled dwelling’ is a term defined in section 3(1) of the RTA.

⁶ Section 3(1) of the RTA.

- 14 The RT Act defines a ‘self-contained apartment’ as follows:
- self-contained apartment*** means a portion of a building which forms a self-contained residence, including kitchen and bathroom and toilet facilities, under the exclusive possession of the occupier.
- 15 Amongst the purposes of the RT Act is to define the rights and duties of rooming house operators and residents of rooming houses. The *Residential Tenancies (Rooming House Standards) Regulations 2023* (‘RT Rooming Regulations’) also apply, imposing minimum standards for rooming houses commencing between 26 February 2024 and 25 February 2025.
- 16 In terms of the Scheme, a rooming house is included in the land use term ‘residential building’, along with the land use terms ‘community care accommodation’, ‘residential hotel’ and ‘rural worker accommodation’.
- 17 Clause 52.23 ‘Rooming House’ is a particular provision that is contained in clause 52 ‘Provisions that require, enable or exempt a permit’.
- 18 The purpose of clause 52.23 ‘Rooming House’ is to facilitate the establishment of domestic-scale rooming houses. The clause applies to use and development of land for a rooming house.
- 19 Clause 52.23 ‘Rooming House’ sets out when the use and development of a rooming house is exempt from the need to obtain a planning permit.
- 20 Importantly, clause 52.23 does not, of itself, contain a planning permit trigger.
- 21 Clause 52.23-2 ‘Use exemption’ sets out the circumstances in which the use of land for a rooming house does not require a planning permit. It states:
- Any requirement in the Activity Centre Zone, Capital City Zone, Commercial 1 Zone, General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone to obtain a permit to use land for a rooming house does not apply if all of the following requirements are met:
- Any condition opposite the use ‘rooming house’ in the table of uses in the zone or schedule to the zone is met.
 - The total floor area of all buildings on the land, measured from the outside of external walls or the centre of party walls, does not exceed 300 square metres, excluding outbuildings.
 - No more than 12 persons are accommodated.
 - No more than 9 bedrooms are provided.
- 22 Clause 52.23-3 ‘Buildings and works exemption’ sets out the circumstances in which the construction of a building or the construction or carrying out of works for a rooming house does not require a planning permit. It states:
- Any requirement in the General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone to obtain a permit to construct a building or construct

or carry out works for a rooming house does not apply if all of the following requirements are met:

- No more than 9 bedrooms are developed on the land.
- Bedrooms can only be accessed from within the building.
- The total floor area of all buildings on the land, measured from the outside of external walls or the centre of party walls, does not exceed 300 square metres, excluding outbuildings.
- If the development is in the General Residential Zone or Neighbourhood Residential Zone, a garden area is provided in accordance with the minimum garden area requirement specified in the zone.
- Shared entry facilities and common areas, including a kitchen and living area, are provided.

- 23 I observe that the use exemption applies to a broader range of zones than the development exemption.
- 24 In the present circumstances, the Land is in the GRZ of the Scheme, which is referenced within both the use and the development exemptions.
- 25 Clause 32.08-2 'Table of Uses' of the GRZ lists rooming house as a section 1 – Permit not required use subject to the following condition:
- Must meet the requirements of Clause 52.23-2.
- 26 As such, use of the Land for a rooming house is as of right if the proposed use meets the requirements of clause 52.23-2 of the Scheme. If the proposed use does not meet the requirements of clause 52.23-2 of the Scheme, the use will require a planning permit.
- 27 Unless specified for the particular use and development,⁷ the GRZ does not contain a permit trigger requiring planning permission for development of land for section 1 uses. Later in these reasons, I discuss the issue of whether a rooming house requires a permit for its development.

WHAT IS THE ROOMING HOUSE THAT IS PROPOSED ON THE LAND?

Explanation of the different plans

- 28 The design of the rooming house that was before the Council for consideration has evolved and plans have been lodged with the Tribunal that were not before the Council for its consideration.
- 29 The applicant lodged the following plans with the Council in order to obtain a certificate of compliance ('1st plans').

⁷ For example, development of a residential aged care facility requires a planning permit in clause 32.07-8 of the Scheme, notwithstanding use of land for that purpose is a section 1 use.



- 30 The copy of the 1st plans provided to the Tribunal did not include any elevation drawings.
- 31 The proposal in the 1st plans includes the following:
 - a. Nine enclosed bedrooms, each with a separate ‘breakfast room’ and only one of which, being Bedroom 1, containing a bathroom;
 - b. One enclosed common kitchen room, which includes a toilet;
 - c. One enclosed common dining room, which includes a bathroom;
 - d. One enclosed common living room, which includes a bathroom;
 - e. One enclosed common laundry room; and
 - f. Five car parking spaces in the front setback.
- 32 The 1st plans indicate that the total floor area is 299.98m² and the total garden area is 45.45% (being 412.75m²).
- 33 It was the 1st plans that the Council considered and for which the Council refused to issue a certificate of compliance.
- 34 After commencing the proceeding with the 1st plans, the applicant then lodged another set of plans with the Tribunal when the applicant filed its submissions and evidence for the hearing on 24 December 2023 (‘2nd plans’).
- 35 In the submissions, the applicant stated that if the Tribunal accepts that the 2nd plans comply with clause 52.23-3 of the Scheme, then it wishes that those plans be adopted as the current plans to which a certificate of compliance can be issued.
- 36 The 2nd plans have the following floor layout:



- 37 As can be seen, the 2nd plans include:
- Nine enclosed bedrooms, each showing a 'breakfast room' within the bedroom and each containing a bathroom with a toilet, wash basin and shower;
 - One enclosed common kitchen room, which includes a toilet;
 - One enclosed common dining room, which includes a toilet;
 - One enclosed common living room, which includes a toilet; and
 - One enclosed common laundry room.

- 38 This plan was not lodged with the Council. The applicant provided the following explanation:⁸

Before submitting the application for a certificate of compliance and based on my experience with Council on my two earlier projects I was expecting that Council would continue to seek further information, details and clarification until we had mutually agreed on the design which receives the certificate of compliance. I am also aware that Council often refuse rooming house registration on their first inspection, if the built form differs to certificate of compliance plans. The 'Current Plans' labelled sheet CC6 have been prepared to detail facilities of the plan which deliver high amenity to the occupants. This plan would normally have been discussed with Council had they not been so quick to deem the initial plans non-compliant. Importantly, these plans deliver high amenity to the occupants whilst still meeting all the planning requirements of 52.23-3. These plans have the same 'open courtyard' style and the same 'bedroom access from within'. They also have an added benefit that there is simply no space to position the beds near the front of the rooms and this may give Council the reassurance that bedroom access will only ever be undoubtably "from within" (as it would then be under the roof and enclosed by walls from open air by being set in and away from the 'open courtyard').

- 39 On 17 January 2024, the applicant lodged a third set of plans with the Tribunal ('3rd plans').

- 40 In further submissions filed with the Tribunal, the applicant states:

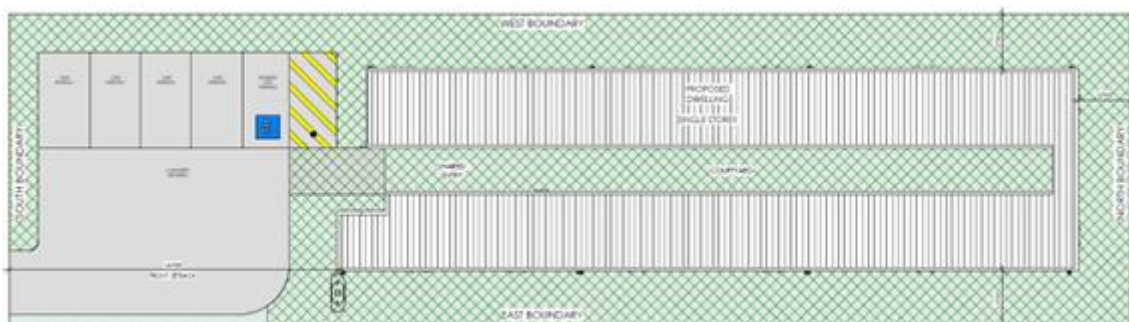
If the tribunal accepts that these plans (sheets cc 7, cc8 and cc9 dated 16/1/24) comply with 52.23-3 then I request that they be adopted as the current plans to which a certificate of compliance can be issued as these changes are minor and offer an improved amenity to the residents and do not appear to alter Council's argument. See page 1-3

- 41 The 3rd plans are as follows:

⁸ Applicant submission and evidence, 24 December 2023, 5.



AREAS		FLOOR AREA BREAKDOWN		LEGEND	
	AREA M ²		AREA M ²	DE	DUCTED EXHAUST FAN
TOTAL FLOOR AREA	299.97M ²		7.39M ²	EL	EXTERNAL BUNKER LIGHT WITH EXTERNAL MOTION SENSOR
			142.98M ²	SA	HARD WIRED SMOKE ALARM TO AS 3786 REQUIREMENTS
SITE AREA	906M ²		2.87M ²	DP	DOWNPIPE LOCATION
GARDEN AREA	45.57% - 412.83M ²		146.73M ²	REF	REFRIGERATOR
MAXIMUM 12 PERSONS ACCOMMODATED		TOTAL FLOOR AREA	299.97M ²	HW	HOTWATER SERVICE LOCATION
					CONCRETE THRESHOLD RAMP



- 42 As can be seen, the 3rd plans include the following:
- Nine enclosed bedrooms, each containing:
 - a 'breakfast room' with a different layout than in the 2nd plans, with a separately identified 'bedroom access location' corridor located between the breakfast room and the part of the bedroom that contains the double bed; and
 - a bathroom with a toilet, wash basin and shower;
 - One enclosed common kitchen room, which includes a bathroom with a toilet, wash basin and shower;

- c. One enclosed common dining room, which includes a bathroom with a toilet, wash basin and shower;
 - d. One enclosed common living room, which includes a bathroom with a toilet, wash basin and shower;
 - e. One enclosed common laundry room; and
 - f. Five car parking spaces in the front setback.
- 43 In the 3rd plans, the layout of the common kitchen room, common living room and common dining room appears the same as the layout of the bedrooms, as well as containing the same kitchen-type and bathroom-type fittings and appliances.

Tribunal receipt of 2nd plans and 3rd plans

- 44 The Council's pre-filed submissions had taken account of the 2nd plans that were filed with the Tribunal, notwithstanding that these were not the plans before the Council for assessment.
- 45 The Council identified that the 2nd plans have a different floor area (298.07m²) compared with the 1st plans (299.98m²) as well as all rooms in the 2nd plans containing a bathroom, along with an open plan kitchenette.
- 46 At the hearing, the Council objected to the Tribunal receiving the 3rd plans and the further submissions filed by the applicant on 17 January 2024 on the basis of procedural fairness, because no leave was sought by or given to the applicant to file further material and this material was filed in the week before the hearing.
- 47 In saying this, the Council submits that:
- a. the changes between the 2nd plans and the 3rd plans are relatively minor; and
 - b. the changes to the plans, in the Council's mind, clearly reinforce the Council's concerns with respect to the proposal, in that they clearly show that each bedroom could be used as a separate apartment area.
- 48 The Council did not submit that I could not accept the 3rd plans; it was a matter of procedural fairness that I should not accept the 3rd plans.
- 49 The applicant made verbal submissions suggesting that in his experience in another division of the Tribunal, the Tribunal was usually more lenient on consumers when it came to adherence to timeframes and procedural matters.
- 50 Having heard from the parties, I determined that I would accept the 3rd plans and further submissions for consideration in this proceeding. I did so mindful that the Council's submission was based on the 2nd plans, the Council submitted that the changes between the 2nd plans and the 3rd plans were relatively minor, and although filed late, there had still been some time available to the Council to consider the documents.

- 51 I then offered the Council some further time, if desired, to further review the material. I then stood the matter down for the period requested by the Council. I did not make orders to formally amend the application to include the 3rd plans. Later in these reasons, I further discuss this issue.
- 52 In accepting the 3rd plans for consideration by the Tribunal, I informed the applicant that in this division of the Tribunal, compliance with timeframes and procedural requirements is expected by all parties, including self-represented litigants. Further, given the applicant is a company that, according to its own submissions, has been operating 17 rooming houses as a commercial endeavour for some period of time, and Mr Casley is the sole director and secretary of that company, in any event more is expected of someone in the applicant's position than a 'lay' person who, for instance, is appearing at the Tribunal for the first time to object to the proposed development of neighbouring land.
- 53 During the hearing, the applicant made submissions and referred to some documents that were provided on the hearing day but had not been pre-filed with the Tribunal. In light of the content of those documents, I accepted receipt of that material but directed the applicant to provide these to the Tribunal and the Council in electronic form after the hearing concluded, which occurred.

DOES THE PROPOSED ROOMING HOUSE MEET THE REQUIREMENTS OF THE SCHEME SUCH THAT NO PLANNING PERMIT IS REQUIRED FOR ITS USE OR DEVELOPMENT?

Council's refusal to issue a certificate

- 54 The Council refused to issue a certificate of compliance in accordance with section 97N of the Act with respect to the 1st plans because it determined that the whole of the use or development would require a permit or is prohibited under the Scheme.⁹
- 55 The Council's delegate report provided the following reasons for refusal of the certificate of compliance with respect to the 1st plans:¹⁰

The plans submitted with the application show nine (9) enclosed bedrooms and an enclosed, dining, kitchen and living area. Bedroom 1 and the enclosed dining, kitchen and living area contain a bathroom in each room.

It is evident from the plans submitted that the enclosed dining, kitchen and living area can be utilised as bedrooms given the enclosed nature of the rooms. In Councils view these enclosed rooms have been labelled as dining, kitchen and living area to subvert the permit requirements. It is also evident that the 'breakfast rooms' noted on the plans can be utilised for kitchenettes and bathrooms. It is considered that there are therefore more than nine (9) bedrooms on the basis these rooms appear to be, or could easily be utilised as bedrooms.

⁹ Letter from Council to the applicant dated 14 September 2023.

¹⁰ Certificate of Compliance Delegate Report, 14 September 2023, 4.

It is further noted that Clause 52.23-3 stipulates '*Bedrooms can only be accessed from within the building*'. The proposed bedrooms are accessed from an open hallway and therefore access is not provided from within the buildings.

In relation to the floor area and garden area, an officer calculation of the plans indicates that the proposal meets the garden area requirement and that the total floor area does not exceed 300sqm. It is noted that if this area were roofed the floor area would exceed 300sqm.

Given that it is evident more than 9 bedrooms are proposed and the bedrooms cannot be accessed from within the building, a permit is required for use and development of the land for a rooming house.

- 56 In short, the Council's reasons were that there are more than nine bedrooms proposed and the bedrooms cannot be accessed from within the building.

Context of Tribunal's review

- 57 The applicant applied to the Council pursuant to section 97N(1)(b) of the Act for:

- (b) a certificate stating that a proposed use or development (or part of a use or development) of land would comply with the requirements of the planning scheme at the date of the certificate.

- 58 Pursuant to section 97O(5), the Council refused to issue a certificate because it determined that the whole of the use or development would require a permit or is prohibited under the Scheme:

- (5) The responsible authority must refuse to issue a certificate applied for under section 97N(1)(b) if the whole of the use or development would require a permit or is prohibited under the planning scheme.

- 59 Pursuant to section 97P(1)(a) of the Act, the applicant has sought review of the Council's decision, being the decision to refuse to issue a certificate of compliance with respect to the 1st plans.

- 60 Section 97P(1)(a) provides:

- (1) An applicant for a certificate may apply to the Tribunal for review of—
 - (a) a decision by the responsible authority to refuse to issue a certificate of compliance; or
 - (b) the failure of the responsible authority to issue the certificate within the prescribed time.

- 61 Pursuant to section 97P(2) of the Act, the Tribunal may either direct that a certificate must not be issued, or, direct the Council to issue a certificate.

- 62 The Council submits that I should affirm the decision under review, namely, the Council's refusal to issue a certificate of compliance for the proposed use and development.

- 63 Given the applicant now wishes to obtain a certificate of compliance with respect to the 3rd plans, in effect, the applicant seeks for the Tribunal to set aside the Council's refusal of the certificate of compliance with respect to the 1st plans and make another decision in substitution for it, namely the approval of the proposed use and development on the basis of the 3rd plans.
- 64 Unlike in the context of a planning permit application, I could not amend the application using the amendment power in clause 64 of Schedule 1 to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') because that power is not available in the context of this type of application.
- 65 I did not utilise the power to amend documents contained in section 127 of the VCAT Act because that would involve the amendment of the document that forms the basis of the proceeding, as opposed to the amendment of a document in a proceeding.
- 66 However, I allowed consideration of the 3rd plans because I formed the view that the 3rd plans are sufficiently similar to the 1st plans that were assessed by the Council that I can consider those plans in this proceeding, having regard to the power in section 51(2) of the VCAT Act to set aside the decision under review and make another decision in substitution for it.
- 67 In forming this view, I had regard to matters including the following with respect to the 1st plans and the 3rd plans:
- a. both show nine rooms marked as bedrooms along with a room marked as common living, a room marked as common dining, a room marked as common kitchen and a laundry;
 - b. both show the same configuration of those rooms in a u-shape with five car parking spaces in the front setback and access to all rooms via a hallway that is open to the sky and the street;
 - c. both show each bedroom being accessed via a room or area marked 'breakfast room'; and
 - d. both show each bedroom having access to open space to the 'rear' via a sliding door from the bedroom.
- 68 It was also the case that:
- a. the Council was content for the Tribunal to assess the 2nd plans;
 - b. the Council's submissions were that the changes between the 3rd plans and the 2nd plans are relatively minor; and
 - c. when asked, the Council did not submit that the Tribunal was not able to accept or to consider the 3rd plans.
- 69 As such, in the circumstances, I was satisfied that I could consider the 3rd plans and, if minded to on the merits, set aside the Council's refusal of the 1st plans and substitute for it an approval of the 3rd plans. That is, in terms of content, configuration and internal layout, the use and development

proposed in the 3rd plans is, in essence, a modified version of what was sought in the 1st plans.

- 70 I now turn to an assessment of the merits of the proposed use and development as shown in the 3rd plans.

Parties' submissions

- 71 Both parties pre-filed written submissions and material, only some of which I set out below.

Council

- 72 The Council remains of the view that the proposed use and development requires a planning permit and as such, a certificate of compliance should not be issued under the Act.
- 73 In terms of the operation of clause 52.23 of the Scheme, the Council submits that because a rooming house is a section 1 use, if the requirements of section 52.23-2 are met and the use is as-of-right, then the rooming house would not require a planning permit for its development because clause 32.08-9 only triggers a planning permit for buildings and works associated with a section 2 use.
- 74 The Council is of the view that the use requires a planning permit and then, accordingly, its development requires a planning permit.
- 75 At the hearing, the Council maintained its view that the proposal proposes more than nine bedrooms, because in light of the layout of the common living, common dining and common kitchen rooms, these are obviously additional bedrooms, irrespective of how they are labelled on the plans. The Council submits that this is even more evident on the 3rd plans on which the applicant now seeks to rely.
- 76 The Council also queried whether the bedrooms are actually separate self-contained apartments for the purposes of the definition in the RT Act.
- 77 The Council also maintained its view that the bedrooms cannot be accessed from within the building. This is because the proposed bedrooms are accessed from an open hallway that is not enclosed by external walls of the building, there being no wall or security door to enclose the hallway. The Council also observed that given the hallway is open to the sky, there is no protection from the elements.

Applicant

- 78 The applicant says that since 2007 he has been involved in the management of residents and the ownership of rooming houses in affordable accommodation provided in Frankston.
- 79 The applicant submits that the company's target market includes persons who are disabled, pensioners, the elderly and persons fleeing domestic abuse.

80 The applicant submits that:

This is an important case given the ever-worsening housing crisis and good designs which deliver high amenity should be supported now more than ever before.

81 The applicant provided plans of the layout of the existing building on the Land, which he says currently operates as a rooming house. In the existing layout there are six bedrooms (one accessed from outside), and a communal kitchen, laundry and bathroom. The building is accessed via a communal entry off a front porch.



82 The applicant refers to written correspondence from the Council stating that the existing building on the Land does not require a planning permit for its use as a rooming house.¹¹

83 The applicant contends that the proposed development provides superior amenity for prospective residents. The applicant submits:¹²

My experience in the industry over this time period has given me insight into what residents really want and therefore what built form would be most fit for the purpose of satisfying the residents. For the first time I am pleased to propose a built form for residents that have for years been asking for ‘my own place’.

84 The applicant submits that the proposed rooming house meets the requirements of clauses 52.23-2 and 52.23-3 of the Scheme and as such, no planning permit is required for its construction and operation. Accordingly, the applicant submits that the Tribunal should direct that a certificate of compliance be issued pursuant to section 97P(2)(b) of the Act.

85 The applicant contends that he requires a certificate of compliance for both the use and for the development of the Land for a rooming house. The applicant does not agree with the Council that if the use is as-of-right no permit would be required for development. Rather, the applicant submits that a permit is required for development unless the exemption applies.

86 The applicant previously obtained certificates of compliance from the Council for other rooming house developments at 74 Heatherhill Avenue and 8 Franklin Court, both also in Frankston. The applicant pointed to similarities between the present application and the layout of 74 Heatherhill Avenue and 8 Franklin Court.

87 The plans for 74 Heatherhill Avenue, Frankston that were provided to the Tribunal by the applicant are extracted below.



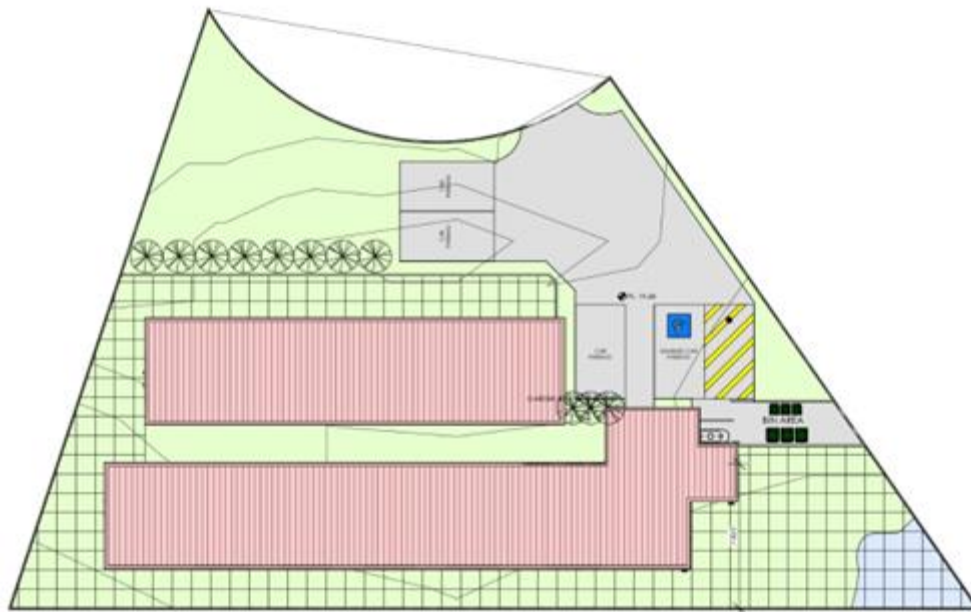
¹¹ Letter from the Council to the applicant dated 27 July 2023.

¹² Applicant submission and evidence, 24 December 2023, 1.



- 88 The plans for 8 Franklin Court, Frankston that were provided to the Tribunal by the applicant are extracted below.





LEGEND	AREA	PERCENTAGE
TOTAL SITE	950 M ²	
CONCRETE DRIVEWAY AND PAVING	178.71 M ²	18.81%
ROOFED AREA	309.53M ²	32.58%
PRIVATE OPEN SPACE	258.83 M ²	27.24%
TOTAL GARDEN AREA	475.17M ²	50.01%



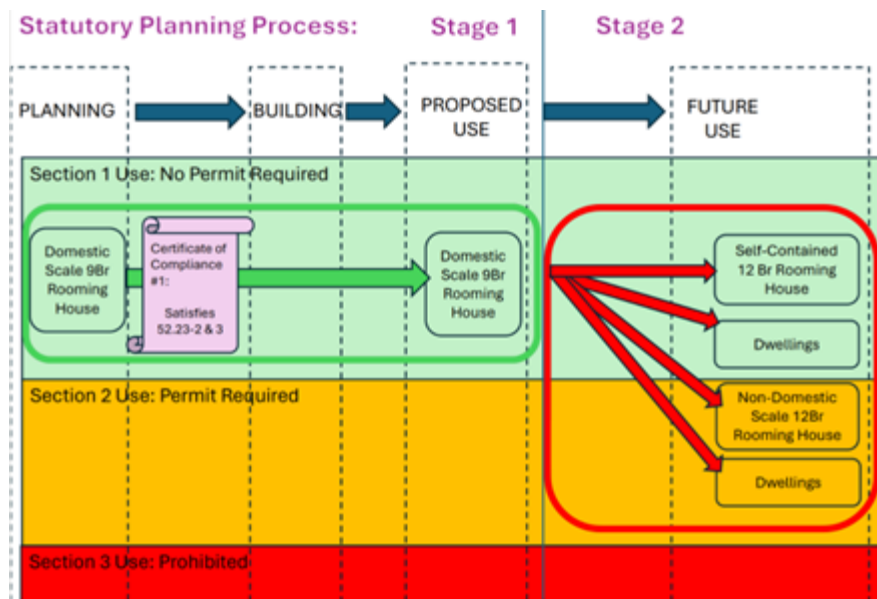
89 With respect to the present application before the Tribunal, the applicant contends that the plans show nine bedrooms along with some common rooms, and this is what must be assessed for a certificate of compliance.

90 In terms of the layout of the bedrooms and the common rooms and the potential future use of the Land, the applicant submits as follows:

Discussion on the layout strategy.

Please note that room similarity is a strategically important consideration of this design, which lends well to a future option of creating 12 self-contained rooms. I.e a self-imposed design constraint was that the layout must be able to be easily converted to a self-contained style by ensuring no building works would be required and that required services are already installed to their potential future locations. This then means that a superior use could be achieved under a future planning permit that enables the existing common rooms to instead be used as bedrooms. This change would maximise the amenity for the occupants by ensuring that all 12 residents are afforded 'their own place'. Plans of this nature would not receive the benefit of the permit exemption and could only be assessed under a planning permit application and as such are beyond the scope of this matter. Any consideration of self-containment can be addressed as part of a future planning application.

- 91 As to the applicant's future intentions, referenced above, the applicant also submitted the following diagram to explain these intentions to the Tribunal.



- 92 The applicant provided the following further information regarding these intentions:

If the decision of the responsible Authority was affirmed then there would be no benefit to future occupants, considerable cost to the owner and this hearing would not result in an improved outcome.

If the decision of the responsible authority was set aside and a certificate issued then there would be significant benefits to all parties, particularly the future occupants.

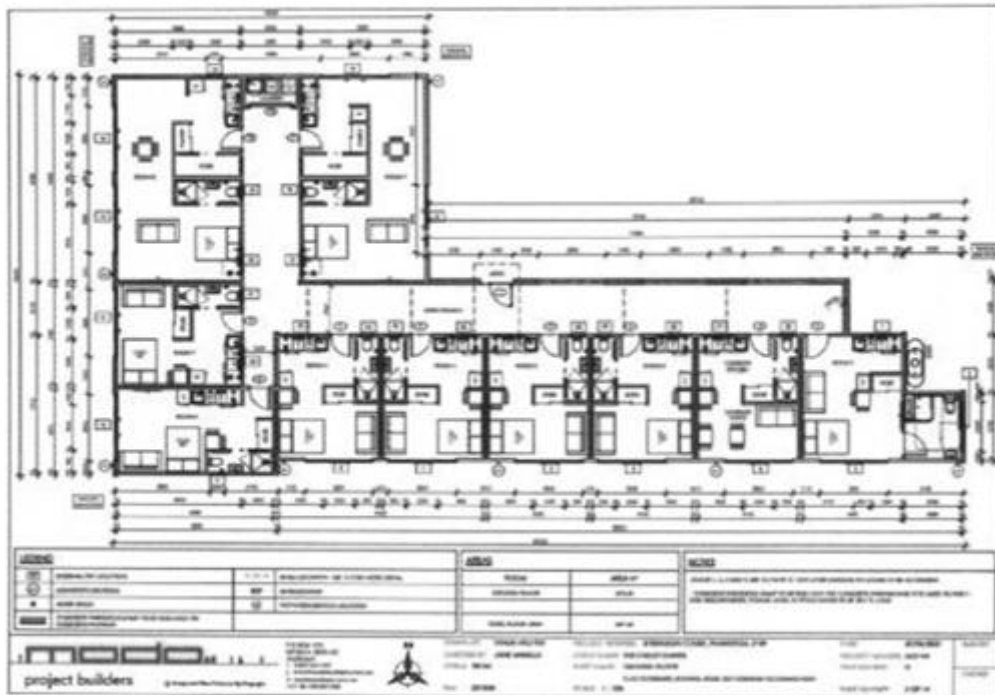
Also note dwellings (other than bed and breakfast) are a section 1 use ie no permit required under 32.08-2 (see p 33)

This may indicate that after Development is completed that 12 occupants of the planning exempt rooming house can then use the rooms as sole occupancy units without requiring further development or triggering any planning controls or the requirement for a permit. Naturally the occupants of the rooming house would be even happier if there was nothing to share at some future stage.

This then indicates that the smoothest path forward to achieve the best possible outcome for future occupants is to start by setting aside the decision of the responsible authority based on the plans which show all the required features of dwellings, despite that the initial use must be "Rooming House"

- 93 With respect to the rooming house at 8 Franklin Court, the applicant obtained legal advice about the bedrooms gaining access from ‘within the building’. That advice was relied on by the applicant in this hearing.
- 94 The applicant also provided a copy of the legal advice given to the Council by its solicitors with respect to 8 Franklin Court. I observe that the Council’s legal advice extracted part of the plans for 8 Franklin Court that were before the solicitors for consideration. I reproduce this plan below,¹³ noting that this layout differs from the plans for 8 Franklin Court that were provided to the Tribunal.

Sheet no. 5 of the plans shows the open hallway:



- 95 The applicant also relies on various cases, some of which were decided in relation to a previous version of the Scheme that was prior to the introduction of the current term ‘rooming house’ and the current form of clause 52.23; those cases are of less assistance given the subsequent changes to the Scheme.
- 96 The applicant submits that the proposal is not providing ‘dwellings’ as defined in the Scheme, nor is it providing ‘self-contained apartments’ as defined in the RT Act. The applicant reasons:¹⁴

¹³ Letter from Marcus Lane Group to Frankston City Council dated 9 July 2021, [5].

¹⁴ Applicant submission and evidence, 24 December 2023, 4.

As possession is defined as a current state of control, and occupant is defined as a person who resides or is present at a given time, and since there is a requirement for exclusive possession by an occupier for a portion of a building to be defined as a “self-contained apartment” then any portion of a building (despite that it may contain kitchen, bathroom and toilet facilities) will undoubtedly fail the definition of self-contained apartment and can not be excluded from the room count. This means that whilst the proposal at 17 David Street is not yet constructed, it has no self-contained apartments.

In contrast to the above, the RTA definition of “room” is met, based purely on intention. This then means that a building with 9 or even 12 rooms available for occupancy on payment of rent, that has a capacity of at least 4 will by the RTA definition be considered a “Rooming House”, and it will meet this definition as the total number of people who may occupy the rooms is 12. Even if the building had exactly 1 person residing in each of the 9 bedrooms, the building as a whole will still meet the rooming house definition if the residents are not granted exclusive possession of the rooms and the total number of people who may occupy those rooms is not less than 4.

Although the plans show facilities akin to dwellings these facilities are also requirements of the Residential Tenancies (Rooming House Standards) Regulations 2023 (see p 29-32)

- 97 The applicant then refers to various provisions of the RT Rooming Regulations that set standards for rooming houses. This includes that kitchen or food preparation areas and dining facilities can either be provided in a resident’s room or in a common area.¹⁵ As such, according to the applicant, the ‘dwelling’ features that are present in each bedroom are envisaged by the RT Rooming Regulations as being able to be provided in a resident’s room.
- 98 Similarly, the applicant also points to ‘dwelling’ features being required by the building legislation to obtain the required building permit, and, under the *Public Health and Wellbeing Act 2008* (Vic) and associated *Public Health and Wellbeing (Prescribed Accommodation) Regulations 2020* (Vic) in terms of toilet and bathing facilities to be provided in prescribed accommodation, which includes rooming houses.¹⁶
- 99 The applicant submits that each bedroom is accessed from within the building because:
- a. the bedrooms are accessed from the open air courtyard and the legal advice provided for 8 Franklin Court was that this was still access from within the building;
 - b. in any event, each bedroom area is accessed from the breakfast room associated with each bedroom area, hence:
...the ‘bedroom access location’ can be considered to be completely within the building and under the roofline as it is not located in the “open courtyard”;¹⁷

¹⁵ Refer Appendix A of this decision for an extract of the relevant provisions.

¹⁶ *Public Health and Wellbeing (Prescribed Accommodation) Regulations 2020* (Vic). Regulations 6 and 20.

¹⁷ Applicant submission and evidence, 24 December 2023, 3.

- c. in any event, the front boundary fence is included within the meaning of ‘building’ in the Act, so could form part of the building for the purposes of this requirement.

100 The applicant contends that a certificate should be issued with respect to both the proposed use and the proposed development.

Tribunal's findings

Overview of issues

- 101 The applicant seeks a certificate of compliance stating that the proposed use and development of the Land as shown in the 3rd plans complies with the Scheme; that is, the proposed use and development does not require planning permission.
- 102 In order to be satisfied that such a certificate of compliance ought be issued, I need to be satisfied that:
- a. The proposed use is for the purposes of a rooming house;
 - b. The proposed use does not require a planning permit; and
 - c. The proposed development does not require a planning permit.
- 103 The first issue requires consideration of what is meant by a rooming house.
- 104 The second issue assumes that what is proposed is a rooming house and considers whether the use meets the terms of the exemption in clause 52.23-2 of the Scheme.
- 105 The third issue assumes that what is proposed is a rooming house and considers whether the development meets the terms of the exemption in clause 52.23-3 of the Scheme.

Is this a ‘rooming house’?

- 106 The definition of ‘rooming house’ in clause 73.03 of the Scheme is extracted earlier in this decision.
- 107 To be a ‘rooming house’ for the purposes of clause 73.03 of the Scheme, the land use must meet the definition of the term ‘rooming house’ contained in the RT Act because this is what is referred to in the Scheme definition.
- 108 The RT Act definition of ‘rooming house’ refers to there being one or more rooms available for occupancy on payment of rent.
- 109 The relevant definitions in the RT Act, including what is meant by ‘room’ are extracted earlier in this decision.
- 110 As defined in the RT Act, a ‘room’ means:
- a. a room in a building;
 - b. where the room is occupied or intended to be occupied for the purpose of a residence by a person having a right to occupy the room together

with a right to use in common with others any facilities in the building; but

c. does not include a self-contained apartment.

111 The proposed development contains nine bedrooms.

112 The bedrooms are intended to be occupied for the purpose of a residence by a person having a right to occupy the bedroom.

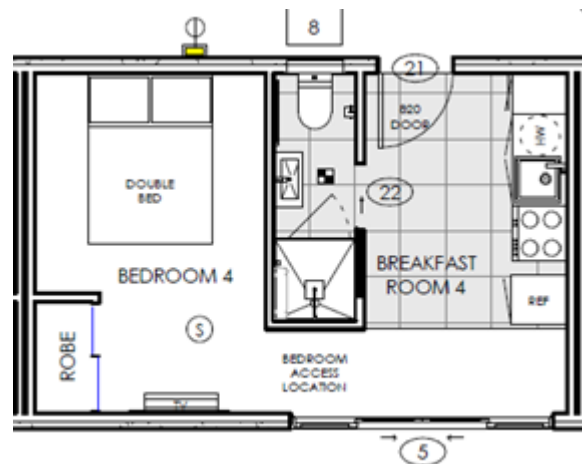
113 A person who occupies a bedroom will also have a right to use in common with other residents of the Land the common kitchen, common living room, common dining room and common laundry i.e. any facilities in the building.

114 However, given a 'room' does not include a self-contained apartment, the question is whether the bedrooms are self-contained apartments as defined in the RT Act. If so, the bedrooms are not 'rooms' for the purposes of the definition of 'rooming house'.

115 'Self-contained apartment' is defined in the RT Act as follows:

self-contained apartment means a portion of a building which forms a self-contained residence, including kitchen and bathroom and toilet facilities, under the exclusive possession of the occupier.

116 The following image is an extract of the 3rd plans, showing the facilities and layout of one of the bedrooms. Each bedroom has the equivalent facilities and layout.



117 This bedroom, Bedroom 4, contains:

- a. a 'breakfast room' that comprises elements commonly found in a kitchen including a cook top, sink and refrigerator;
- b. bathroom and toilet facilities; and
- c. a place to sleep and store possessions.

118 This bedroom is a portion of the larger building to be constructed on the Land.

- 119 This bedroom will be under the exclusive possession of the occupier of that bedroom, in that the person/s who occupies the bedroom will be able to exclude any other persons from being in that bedroom. Further, I note that the RT Rooming Regulations require that a resident's bedroom door in a rooming house be fitted with a locking device that is operated by a key from the outside,¹⁸ providing a physical means by which exclusive possession can be maintained.
- 120 I acknowledge that the RT Rooming Regulations allow for kitchen and food preparation facilities to be provided in a resident's room as an alternative to these being provided in a common area.
- 121 As such, I accept that kitchen or food preparation facilities could be provided in a resident's room and the land use might still be that of a rooming house. This is notwithstanding that the definition of self-contained apartment in the RT Act envisages that this would contain kitchen facilities.
- 122 I also acknowledge that the RT Rooming Regulations include a standard for dining facilities, where chairs equal to the maximum number of residents that can be accommodated in a resident's room and dining table/s are to be provided in each resident's room or in a common area.
- 123 I acknowledge that the bedrooms are not shown to include a dining table or chairs. Potentially these could be put in each room by a resident if there is sufficient space.
- 124 Given the definition of self-contained apartment in the RT Act does not refer to dining facilities, unlike kitchen and bathroom and toilet facilities that are specified, it is not clear that the absence of dining facilities in the bedroom would mean that the bedroom would not be a 'self-contained apartment' for the purposes of the RT Act.
- 125 The standards for toilet and bathroom facilities in the RT Rooming Regulations¹⁹ do not envisage the provision of individual toilet and bathroom facilities in the same way as the RT Rooming Regulations do for kitchen and food preparation facilities. Rather, the relevant standards address the internal locking of the door to a shared toilet or bathroom facility and the efficiency rating for any shower heads installed.
- 126 The RT Rooming Regulations do not state that a resident's room in a rooming house cannot be provided with what is, in effect, a private ensuite to the bedroom.
- 127 The definition of self-contained apartment in the RT Act envisages that a self-contained apartment would contain bathroom and toilet facilities.

¹⁸ RT Rooming Regulations, Regulation 7.

¹⁹ RT Rooming Regulations, Regulation 11.

- 128 So in light of the above, when is a bedroom in a rooming house no longer a ‘room’ and instead, is a self-contained apartment for the purposes of the RT Act?
- 129 If a bedroom contains kitchen and food preparation facilities, and/or dining facilities in accordance with the RT Rooming Regulations, this will not convert the room into a self-contained apartment because there are no bathroom and toilet facilities in the bedroom.
- 130 Similarly, if a bedroom contains bathroom and toilet facilities this will not convert the room into a self-contained apartment because there are no kitchen and food preparation facilities in the bedroom.
- 131 However, if a bedroom contains kitchen and food preparation facilities and bathroom and toilet facilities and, it ‘forms a self-contained residence’, then it will no longer be a room in a rooming house for the purposes of the RT Act but will instead be a self-contained apartment.
- 132 Given the nine bedrooms shown in the 3rd plans contain space for sleeping and kitchen and bathroom and toilet facilities, I find that each bedroom forms a self-contained residence, in that it contains the physical elements required for a person to reside in the bedroom, without needing to go elsewhere.
- 133 As such, I find that each of the nine bedrooms in the proposed development is actually a self-contained apartment pursuant to the RT Act. On this basis, each of the nine bedrooms is not a ‘room’ for the purposes of the definition of ‘rooming house’.
- 134 I accept that there may be a spectrum of what is included in self-contained apartments and that some self-contained apartments may be more rudimentary than others. However, that does not mean that any given room, however basic, is not actually a self-contained apartment for the purposes of the RT Act if it meets the elements of the definition.
- 135 I also observe that the context and layout of a development might play a part in whether any given room is viewed as a self-contained apartment.
- 136 In this particular proposal, I observe that the layout of the proposed development results in the residents of each bedroom being able to access their bedroom effectively directly from the car park and the street, given there is no front door to the courtyard. Gaining external access to the bedroom in this way aligns with each bedroom actually being a self-contained apartment. In addition, the development provides external access to the rear of each bedroom to what will be, according to the applicant, an area of open space available to each bedroom and fenced off from each other bedroom. This also aligns with each bedroom actually being a self-contained apartment.
- 137 The applicant’s submission that the bedrooms cannot be under the exclusive possession of an occupier because they are not yet constructed or occupied misses the point. I do not accept the temporal limitation that the applicant

places on the meaning of exclusive possession; although the building is not yet constructed, if what is to be constructed contains the physical elements of a self-contained apartment, as defined, and is intended to be exclusively possessed by the occupier of the bedroom, then it will be a self-contained apartment.

- 138 As such, each of the bedrooms is not a ‘room’ for the purposes of the ‘rooming house’ definition.
- 139 When the nine bedrooms are excluded from being ‘rooms’ in the building, this leaves the common kitchen room, the common dining room, the common living room and the common laundry.
- 140 A ‘rooming house’ is a building in which there is one or more rooms available for occupancy on payment of rent, in which the total number of people who may occupy those rooms is not less than four.²⁰
- 141 The common area rooms, such as the common dining room, are not rooms that are available for occupancy on payment of rent. This is because ‘occupancy’ means (among other things):²¹
- n.* 1. the fact or condition of being an occupant. 2. the act of taking possession. 3. actual possession²²
- and ‘occupant’ means:
- n.* 1. someone who occupies. 2. a tenant of a house, estate, office, etc.²³
- 142 In short, in the context of a rooming house a room is available for occupancy on payment of rent if a person can take possession of it and reside in it; the common rooms are not available for residency.
- 143 This being the case, the proposed development on the Land shown in the 3rd plans is not properly characterised as a ‘rooming house’ as defined in the Scheme.
- 144 Accordingly, I am not required to assess whether the use exemption or development exemption is available because this is not a rooming house.
- 145 However, in the event that I am wrong about the proposal not being properly characterised as a ‘rooming house’, I will now address the exemptions in clause 52.23-2 and 52.23-3 of the Scheme, below. The analysis that follows assumes that the proposal is properly characterised as a ‘rooming house’.

²⁰ Noting that the applicant is not claiming that a declaration under section 19(2) or (3) of the RT Act is in force, for the purposes of the second element of the definition of ‘rooming house’.

²¹ Noting that ‘occupancy’ is not defined in the RT Act so the ordinary meaning of the word is to be used.

²² Macquarie Dictionary, Macquarie Dictionary Publishers Pty Ltd, 6th edition.

²³ Ibid.

Is clause 52.23-2 met?

Overview

- 146 Pursuant to the GRZ, a 'rooming house' is a section 1 use provided the associated condition is met. That condition requires the use to meet the requirements of clause 52.23-2 of the Scheme.
- 147 Clause 52.23-2 of the Scheme specifies the circumstances in which use of land the GRZ for a rooming house will not require a planning permit.
- 148 All of the requirements listed in clause 52.23-2 must be met in order for the exemption to apply.

First requirement

- 149 The first requirement is that any condition pertaining to 'rooming house' in the table of uses is met.
- 150 Given the condition requires the use to meet the requirements of clause 52.23-2 of the Scheme, this is circular.
- 151 The following analysis of the requirements of clause 52.23-2 of the Scheme answers the question of whether the first requirement is met.

Second requirement

- 152 The second requirement is that:

The total floor area of all buildings on the land, measured from the outside of external walls or the centre of party walls, does not exceed 300 square metres, excluding outbuildings.

- 153 The proposed area plan of the 3rd plans state the total floor area is 299.97m², noting that the plans show this is measured to the outside of all external walls of the building. Given the layout of the building, I take the external walls of the building to be those that are to the 'rear' of each of the bedrooms and the common rooms, as well as those walls facing the 'courtyard'.
- 154 As measured, the total floor area is less than 300 m². On this basis, the second requirement is met by the 3rd plans.

Third requirement

- 155 The third requirement is that no more than 12 persons are accommodated. The applicant has expressed an intention that no more than 12 persons will be accommodated. Given there are nine bedrooms, this could be achieved with the layout of the proposed development.
- 156 The third requirement can be met by the 3rd plans.

Fourth requirement

- 157 The fourth requirement is that no more than nine bedrooms are provided. It is this requirement that the Council submits is not met in clause 52.23-2 of the Scheme.

- 158 The 3rd plans show that the proposal has nine bedrooms plus the common rooms.
- 159 The applicant has described its future intentions for the common rooms other than the laundry to be converted to additional bedrooms. However, for the purposes of the certificate of compliance now being sought, based on the layout as shown in the 3rd plans, the applicant contends that the proposed development contains no more than nine bedrooms.
- 160 I acknowledge that the internal layout and the facilities provided in the common kitchen room, common living room and common dining room are equivalent to each of the identified bedrooms. However, these rooms are not labelled as bedrooms; rather, they are labelled as being either a common kitchen room, a common living room or a common dining room.
- 161 Notwithstanding what may or may not occur in the future, I have to assess this certificate of compliance on the basis of what is shown in the plans before me and I must presume regularity and compliance with those plans.
- 162 On this basis, the fourth requirement is met by the 3rd plans because the 3rd plans show no more than nine bedrooms in the building.

Summary – is clause 52.23-2 met?

- 163 If the proposal was properly characterised as a rooming house, the use exemption contained in clause 52.23-2 of the Scheme would be met, with the outcome that no planning permit would be required for the Land to be used for a rooming house provided that this occurs in accordance with the 3rd plans.

Is clause 52.23-3 met?

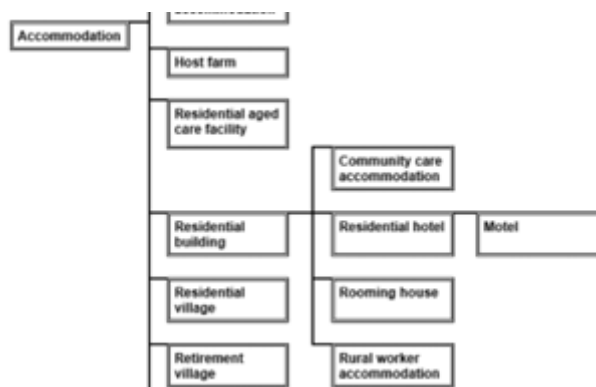
Overview

- 164 According to the Council, in the GRZ when a rooming house does not require a planning permit for use, no permit is required for development because there is no 'section 2 use'. This is based on clause 32.08-10 of the Scheme that provides that a permit is required to construct a building or construct or carry out works for a use in section 2 of clause 32.08-2. As such, the development exemption contained in clause 52.23-3 of the Scheme need not be relied upon.
- 165 The applicant maintains that it needs to obtain an exemption for development under clause 52.23-3 of the Scheme but does not identify why a planning permit would be required for development.
- 166 I find that a planning permit would be required for development of a rooming house on the Land, even where the use is as-of-right.
- 167 I say this because:
- a. notwithstanding the operation of clause 32.08-10 of the Scheme, there is a provision in the GRZ that specifies that a planning permit is

required for this particular type of development, this being clause 32.08-7 of the GRZ, which states that a planning permit is required for construction of a ‘residential building’; and

- b. the land use term ‘rooming house’ is nested within ‘residential building’ in the Accommodation group in clause 73.04-1 of the Scheme.

168 The Accommodation group in clause 73.04-1 is extracted below:



169 Accordingly, development of the proposed rooming house requires a planning permit pursuant to clause 32.08-7 of the Scheme, even if the use of Land for the proposed rooming house is as-of-right.

170 This being the case, development of the proposed rooming house could only occur *without* a planning permit if the development exemption contained in clause 52.23-3 of the Scheme is available.

171 Accordingly, I now consider the requirements of the development exemption contained in clause 52.23-3 of the Scheme.

172 All of the requirements listed in clause 52.23-2 must be met in order for the exemption to apply.

First requirement

173 The first requirement is that there are no more than nine bedrooms developed on the Land.

174 For the reasons set out in the preceding section, I find that there will be nine bedrooms in the proposed development on the basis that it is developed in accordance with the 3rd plans.

Second requirement

175 The second requirement is:

Bedrooms can only be accessed from within the building.

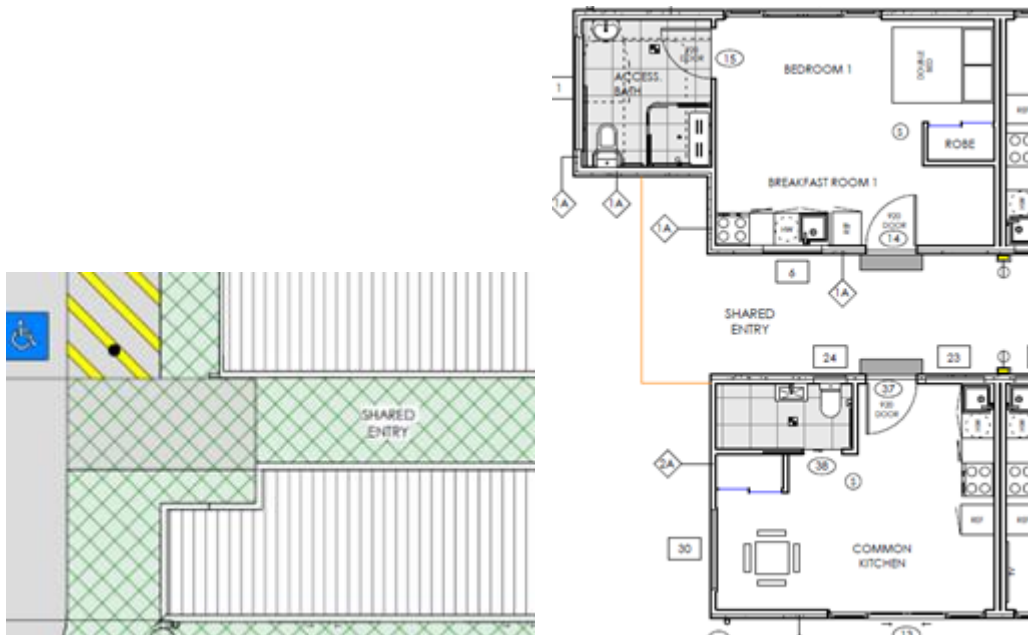
176 The Council asserts that this requirement is not met.

177 The applicant asserts that this requirement is met and relies on the certificates of compliance issued for 74 Heatherhill Avenue and 8 Franklin Court, which applicant claims to be similar developments as that proposed.

- 178 I observe a difference in the entry arrangements for the rooming houses at 74 Heatherhill Avenue and 8 Franklin Court compared with the Land.
- 179 For 74 Heatherhill Avenue, there is one common entrance door from the street, leading to the open-air central walkway that is then enclosed by a common laundry at the other end.
- 180 The applicant points to the legal advice provided with respect to 8 Franklin Court. The two pieces of legal advice provided to the Council and to the applicant discuss, predominantly, whether the bedrooms in that proposed development were ‘accessed from within the building’ for the purposes of clause 52.23-3 of the Scheme.
- 181 Obviously, the issue of a certificate of compliance for 8 Franklin Court is not before me in this proceeding. However, to the extent that the legal advice provided regarding that property deals with similar issues, I have found it to be broadly of assistance in my assessment of this matter.²⁴
- 182 In this respect, I refer to the layout of 8 Franklin Court that is extracted in the legal advice to the Council, noting that this differs from the plans for 8 Franklin Court that the applicant provided to the Tribunal in the present case. I observe that in the plan extracted in the legal advice to the Council, the courtyard is enclosed with external walls and a door shown in the external wall.
- 183 By contrast, the proposed rooming house on the Land does not appear to have any entrance door or enclosed entry area. Rather, there is an area marked ‘shared entry’ that leads to an area marked ‘courtyard’. The courtyard area is open to the street, in that there is no door or wall closing off the courtyard from the front setback and the car parking area.
- 184 Whether or not the bedrooms in the 3rd plans are ‘accessed from within the building’ as required by this clause depends on what is meant by ‘building’.
- 185 ‘Building’ is defined inclusively in the Act as follows:
- building*** includes—
- (a) a structure and part of a building or a structure; and
 - (b) fences, walls, out-buildings, service installations and other appurtenances of a building; and
 - (c) a boat or a pontoon which is permanently moored or fixed to land;
- 186 I agree with the legal advice with respect to 8 Franklin Court that where an area is enclosed by external walls of a building, the area inside those external walls is ‘within’ the building, whether or not that area is roofed.

²⁴ Although I note that I do not agree with all that is contained in the two advices provided.

- 187 Hence, I agree with the applicant that for a bedroom to be accessed from ‘within’ a building, the relevant part of the building does not need to be covered with a roof.
- 188 I acknowledge that it may be that when people think of a bedroom in a rooming house being accessed from within a building they envisage access from a hallway covered by a roof. This is perhaps because many rooming houses are converted dwelling houses, where this is the existing, conventional layout. However, different building designs feature, for instance, open-roofed courtyard gardens and open-roofed decking areas. These areas may be located within a building, in that they are surrounded by the external walls of the building; these areas are just design carve-outs from the roofed part of the building. As such, conceivably, a bedroom could be accessed from an unroofed courtyard area, provided that the unroofed courtyard area is ‘within’ the building, in that it is surrounded by the external walls of the building.
- 189 I observe that this interpretation is consistent with the legal advice given to the applicant and also to the Council with respect to 8 Franklin Court.
- 190 As such, I have proceeded on the basis that bedrooms in a rooming house that are accessed from an unroofed courtyard area can be ‘accessed from within the building’ *provided that* the unroofed courtyard area is, in fact, ‘within’ the building.
- 191 On the facts of the proposal before me, I find that the proposed design *does not* contain an unroofed courtyard that is ‘within’ the building. I say this because there is no external wall or front door entrance shown on the proposal plans to enclose the courtyard and result in it being ‘within’ the building.
- 192 Rather, what is shown is a shared entry with no external wall or door to close off the courtyard from the car park and the street beyond, as seen in the extracts from the 3rd plans, below.



- 193 This being the case, I find that the second requirement is not met, as on the facts of the proposal before me as shown in the 3rd plans (but also, it should be said, as shown in the 1st and 2nd plans), the bedrooms are not accessed from ‘within’ the building.
- 194 The applicant submits that given the definition of ‘building’ in the Act, the picket fence on the front boundary of the Land can form part of the ‘building’ for the purposes of the second requirement in clause 52.23-3 of the Scheme.
- 195 Whilst that would appear to be available on the meaning of the term ‘building’, this would produce a nonsensical outcome, where bedrooms could effectively be open to the street if a front boundary fence was present.
- 196 This might also have unexpected consequences for the other requirements in clause 52.23 of the Scheme. I say this because the terms used in clause 52.23 should be interpreted consistently to ensure harmony within the clause. Further, the requirements of 52.23-3 of the Scheme should be read in conjunction, as they are all required to be met and they work together to regulate when a development does not require planning permission.
- 197 To this end, the third requirement in clause 52.23-3 is that:
- The total floor area of all buildings on the land, measured from the outside of external walls or the centre of party walls, does not exceed 300 square metres, excluding outbuildings.
- 198 If the applicant’s submissions are correct, the fence and the front setback areas between the fence and the ‘main’ residential building would need to be taken into account in the area measured for the third requirement, which is also nonsensical.
- 199 Rather, when I read the second and third requirements together, I understand that clause 52.23-3 is seeking that:

- a. The 'main' residential building on the Land (that is, not including any outbuildings such as sheds or garages) must not exceed 300m² in area;
- b. The area measurement is to be taken from the outside of the external walls (or the centre of party walls, which is not relevant here) of the 'main' residential building on the Land; and
- c. The bedrooms in the rooming house must be accessed from within the 'main' residential building on the Land.

200 This approach then excludes the front boundary fence and front setback area from both the floor area calculation and from what is meant by accessing the bedrooms from within the building.

201 As to the applicant's submission that each bedroom is accessed from a breakfast room meaning that access is from 'within the building', I do not accept that this is the case. Whilst the layout of each bedroom contains areas marked, for instance, 'breakfast room 4', 'bedroom access location' and 'bedroom 4' (see extract of Bedroom 4 from 3rd plans, below), in reality these are all sections within the overall 'bedroom' that is provided to the occupant of the rooming house.



202 It is this overall bedroom that is referred to in the second requirement of clause 52.23-3. It is the overall bedroom that is to be accessed from within the building. The applicant's argument that the internal layout of the overall bedroom means that the bedroom section of the room is accessed from 'within the building' would appear to be a contrivance to meet this second requirement. In my view, the entire area behind the locked door to the courtyard is the 'bedroom' for the purposes of clause 52.23-3 of the Scheme.

203 To reiterate, with respect to the proposal before me, I find that the nine bedrooms are not accessed from within the building. This is because there is no 'front' to create an external wall to enclose the courtyard, so the courtyard is not 'within the building'. This creates the problem that the bedrooms are not accessed from 'within the building' but actually have an external access because the front of each bedroom is, in effect, an external wall.

204 As such, the second requirement is not met.

Third requirement

205 The third requirement in this clause is the same as the second requirement in clause 52.23-2 of the Scheme and addresses the area of the building. The third requirement is that:

The total floor area of all buildings on the land, measured from the outside of external walls or the centre of party walls, does not exceed 300 square metres, excluding outbuildings.

206 For the reasons set out with respect to the second requirement of clause 52.23-2 of the Scheme, I find that this requirement is met in the 3rd plans.

207 As an aside, as stated above, the individual requirements of clause 52.23-3 should work together and should be interpreted together and consistently. When this is done with respect to the second and third requirements, the result is that if a bedroom is accessed from ‘within the building’, the area ‘within the building’ that provides access to the bedroom should be included in the total floor area calculation in the third requirement.

208 In this respect, I make two observations.

209 First, the term ‘floor area’ is not defined in the Scheme or the Act and as such, the ordinary meaning of the term applies. Whilst ‘floor area’ is not a term that is defined in the Macquarie Dictionary, ‘floor’ is defined to mean (among other things):²⁵

n. 1. that part of a room or the like which forms its lower enclosing surface, and upon which one walks. 2. a storey of a building

210 If the open air courtyard *was* within the building, the open air courtyard could be said to form the lower enclosing surface of this floor of the building. Accordingly, I agree with the legal advice provided to the Council with respect to 8 Franklin Court that the open air courtyard should be included in calculating the total floor area of the building for the purposes of the second requirement.

211 Second, the terms ‘gross floor area’, ‘net floor area’ and ‘leasable floor area’ are defined terms in clause 73.01 of the Scheme, however, none of these terms are utilised in clause 52.23 of the Scheme. As such, one cannot use those terms in interpreting what is meant in clause 52.23 of the Scheme. Had it been the intention to use one of those terms in clause 52.23 of the Scheme, this could have been done.

212 In the case before me, as I have found that the bedrooms are not accessed from within the building because the courtyard is not ‘within the building’, the area of the courtyard need not be included in the total floor area of all buildings for the purposes of the second requirement.

213 I do not have before me any proposal or request to enclose the courtyard. However, even if the plans were modified to create a front so as to enclose

²⁵ Macquarie Dictionary, Macquarie Dictionary Publishers Pty Ltd, 6th edition.

the courtyard within external walls, this would result in the area of the courtyard needing to be included in the ‘total floor area of all buildings on the land’, which must not exceed 300m² to be exempt from the need to obtain a planning permit. Given the existing total floor area is measured at 299.97m², inclusion of the courtyard in the calculation would result in the total floor area exceeding 300m². As such, the result would still be that all of the requirements of clause 52.23-3 (and clause 52.23-2) of the Scheme would not be met.

- 214 In short, you cannot have it both ways: if the bedrooms are accessed from within the building, the area within the building that is used for access should be included, and not left out of, the total floor area calculation of the building.
- 215 However, based on the 3rd plans, for the reasons set out above, I find that the third requirement is met.

Fourth requirement

- 216 The fourth requirement is:

If the development is in the General Residential Zone or Neighbourhood Residential Zone, a garden area is provided in accordance with the minimum garden area requirement specified in the zone.

- 217 ‘Garden area’ is a defined term in clause 73.01 of the Scheme.
- 218 The 3rd plans show the minimum garden area requirement calculation as being 412.83m², which equates to 45.57% of the site area. This satisfies the minimum garden area requirement of 35%. Hence, the fourth requirement is met.
- 219 Again, I observe that the requirements of clause 52.23-3 of the Scheme should work together. As such, if changes were made to a design to meet other requirements in clause 52.23-3 of the Scheme, this might have down-stream consequences in terms of compliance with this fourth requirement.

Fifth requirement

- 220 The fifth requirement is:

Shared entry facilities and common areas, including a kitchen and living area, are provided.

- 221 The 3rd plans include common areas, including a common kitchen room and a common living area.
- 222 The 3rd plans also show a shared entry area, in that the opening to the courtyard is used by all residents to access their bedroom and the common rooms.
- 223 Whether the shared entry area in the 3rd plans is what is meant by ‘shared entry facilities’ for the purposes of the fifth requirement will not be

determinative of this proceeding because the proposal has failed to meet the second requirement and, as such, cannot obtain the exemption in clause 52.23-3 of the Scheme.

- 224 Notionally, ‘shared entry facilities’ is suggestive of physical elements such as a locked door and corridor. However, I observe that ‘facility’ is defined to include the following:

noun (plural facilities)

1. something that makes possible the easier performance of any action; advantage: *transport facilities; to afford someone every facility for doing something.*

...

8. a building or complex of buildings, designed for a specific purpose, as for the holding of sporting contests, launching of rockets, etc.

- 225 As can be seen, ‘facility’ can mean ‘something that makes possible the easier performance of any action’ as well as ‘a building or complex of buildings’.

- 226 I note that while the definition of ‘building’ in the Act is quite broad and includes things such as structure and fences,²⁶ the dictionary meaning of ‘building’, to which the above definition refers, is more confined:²⁷

noun 1. a substantial structure with a roof and walls, as a shed, house, department store, etc.

- 227 Accordingly, where the definition of ‘facility’ refers to a building it is referring to a ‘substantial structure with a roof and walls’.

- 228 However, the definition of the term also refers to ‘something that makes possible the easier performance of any action’. This might not need to comprise physical built form or physical elements.

- 229 In saying this though, given the requirements of clause 52.23-3 work together, and the second requirement is for bedrooms to be accessed from within the building, it may be in order for all requirements of clause 52.23-3 to be met, the ‘shared entry facilities’ need to comprise a physical door and built form entry way.

Summary – is clause 52.23-3 met?

- 230 Given that I have found that the nine bedrooms are not accessed from within the building, had I found that the proposal constituted a rooming house, I would have declined to issue a certificate of compliance with the Scheme for the proposed development contained in the 3rd plans as all of the requirements of clause 52.23-3 of the Scheme are not met.

²⁶ Section 3(1) of the Act.

²⁷ Macquarie Dictionary online, Macmillan Publishers Australia 2024.

CONCLUSION

231 In summary, I have found that:

- a. The proposed use and development as contained in the 3rd plans is not properly characterised as a 'rooming house' as defined in the Scheme and as such, the exemptions contained in clause 52.23 of the Scheme are not available;
- b. In the event that I am wrong about the characterisation of the proposed use and development as contained in the 3rd plans, then assuming that the proposal is for a rooming house:
 - i. The use of the Land for the rooming house shown in the 3rd plans does not require a planning permit as the requirements of clause 52.23-2 of the Scheme are met; but
 - ii. The development of the Land for the rooming house shown in the 3rd plans does require a planning permit as the requirements of clause 52.23-3 of the Scheme are not all met.

232 Accordingly, pursuant to section 97P(2) of the Act I direct that a certificate must not be issued because either:

- a. What is proposed is not properly characterised as a 'rooming house' as defined in the Scheme and as such, the exemptions contained in clause 52.23 of the Scheme are not available; or
- b. If the proposal is correctly characterised as a 'rooming house' as defined in the Scheme, the proposal shown in the 3rd plans requires a planning permit to construct a building or construct or carry out works for a rooming house and the exemption contained in clause 52.23-3 of the Scheme is not available because all of the requirements of that clause are not met.

233 As such, for the reasons given above, the decision of the responsible authority is affirmed. No certificate of compliance is to issue.

Susan Whitney
Member

APPENDIX A

Residential Tenancies (Rooming House Standards) Regulations 2023

12 Standards for kitchen or food preparation facilities

- (1) On and from 26 February 2023 until 25 February 2024, the standard for a kitchen or food preparation facility is the provision of the following—
 - (a) a food preparation area—
 - (i) in each resident's room; or
 - (ii) in a common area;
 - (b) a sink—
 - (i) in each resident's room; or
 - (ii) in a common area;
 - (c) an oven that is in good working order—
 - (i) in each resident's room; or
 - (ii) in a common area, for every 12 or fewer residents of the rooming house who do not have an oven in their room, based on the maximum number of residents that the rooming house can accommodate;
 - (d) a cook top that is in good working order—
 - (i) in each resident's room; or
 - (ii) with 4 burners, in a common area, for every 12 or fewer residents of the rooming house who do not have a cook top in their room, based on the maximum number of residents that the rooming house can accommodate;
 - (e) a refrigerator that is in good working order—
 - (i) with a minimum gross capacity of 80 litres, in each resident's room; or
 - (ii) with a minimum gross capacity of 400 litres, in a common area;
 - (f) not less than one cupboard for each resident, based on the maximum number of residents that the rooming house can accommodate—
 - (i) with a minimum storage space of 0·10 cubic metres; and

- (ii) that is lockable, if provided in a common area.
 - (2) On and from 26 February 2024, the standard for a kitchen or food preparation facility is the provision of the following—
 - (a) each of the facilities referred to in subregulation (1)(b), (c), (d) and (f);
 - (b) an area which is intended to be used solely for food preparation—
 - (i) in each resident's room; or
 - (ii) in a common area;
 - (c) one or more refrigerators in good working order—
 - (i) with a minimum gross capacity of 80 litres, in each resident's room; or
 - (ii) with a minimum gross capacity of—
 - (A) 400 litres for every 4 or fewer residents who are not provided a refrigerator in their room; and
 - (B) an additional 28·5 litre capacity for each additional resident who is not provided a refrigerator in their room—
- based on the maximum number of residents that the rooming house can accommodate, in a common area.

Example

If a rooming house has 7 residents and none of the residents are provided a refrigerator in their room, one or more refrigerators in good working order with a combined minimum gross capacity of 485·5 litres are to be provided in a common area.

13 Standard for dining facilities

- (1) The standard for dining facilities in a rooming house is the provision of the following—
 - (a) a number of chairs equal to the maximum number of residents that can be accommodated in a resident's room in the rooming house—
 - (i) in each resident's room; or
 - (ii) in a common area;
 - (b) one or more dining tables that can comfortably accommodate the number of chairs referred to in paragraph (a)—
 - (i) in each resident's room; or
 - (ii) in a common area.

- (2) For the purposes of subregulation (1)(b), a dining table—
- (a) includes a benchtop that is large enough to accommodate the number of chairs required under subregulation (1)(a); and
 - (b) does not include a benchtop that is wholly or partially in an area for food preparation referred to in regulation 12.