

BUILDING APPEALS BOARD OF VICTORIA

Building Act 1993

BAB CASE NO. 451334

Appeal

CATCHWORDS

APPEAL – pursuant to s 142(1)(a) of the *Building Act* (the Act) between the owner of the building or land and the municipal building surveyor against a decision to serve a building notice on the owner – pursuant to s 142(1)(b) of the Act between the owner of the building or land and the municipal building surveyor against the failure within a reasonable time, or refusal to cancel a building notice on being requested to do so by the owner – pursuant to s 142(2)(a) of the Act between the owner of the building or land and the municipal building surveyor against the making of a building order under s 111 of the Act – pursuant to s 142(2)(c) of the Act between the owner of the building or land and the municipal building surveyor against the refusal to amend or cancel that order.

APPLICANT	Keymore Pty Ltd (ACN 100 280 224)
RESPONDENT	Andre Brewer (Municipal Building Surveyor)
RESPONSIBLE AUTHORITY	Cardinia Shire
SUBJECT LAND	4 Cotswold Crescent, Officer 3809
WHERE HELD	Melbourne (733 Bourke St)
BEFORE	Hannah Hodges (Chairperson) Geoff Woolcock, William Kong (Members)
HEARING TYPE	Oral Hearing and on the papers
DATE OF FINAL HEARING (ON THE PAPERS)	27 February 2020
DATE OF DETERMINATION AND ORDERS	9 June 2020
CITATION	Keymore Pty Ltd v Brewer [2020] VBAB 36

DETERMINATION AND ORDERS

Having considered all the submissions and information placed before it, the Building Appeals Board (**Board**) determines that:

1. The appeal made under s 142(1)(a) of the *Building Act 1993* (**the Act**) against the decision by the Respondent to serve on the Applicant the Building Notice dated 21 September 2018, is dismissed for want of jurisdiction.

2. Pursuant to s 149(1)(b) of the Act, the decision by the Respondent dated 28 November 2018, refusing to cancel the Building Notice dated 21 September 2018, is quashed.
3. Pursuant to s 149(2)(a) of the Act, the decision by the Respondent to make the Building Order dated 21 November 2018, is quashed.
4. The appeal made under s 142(2)(c) of the Act against the decision by the Respondent refusing to cancel the Building Order dated 21 November, is dismissed for want of jurisdiction.
5. Pursuant to s 149(4) of the Act, the Building Notice dated 21 September 2018, and served on the Applicant by the Respondent is cancelled.
6. Pursuant to s 149(4) of the Act, the Building Order dated 21 November 2018, and served on the Applicant by the Respondent is cancelled.
7. Pursuant to clause 16(3) of Schedule 3 to the Act, liberty is reserved to the parties to apply on the question of costs of and incidental to the proceeding under clause 16(2) of Schedule 3 to the Act, subject to such liberty being exercised within **14 days** of the date of this Determination.



Chairperson

Registrar

APPEARANCES

For the Applicant

Mr H Hassan, of counsel

For the Respondent

Mr D Silfo, solicitor

REASONS

BACKGROUND

1. Keymore Pty Ltd (ACN 100 280 224) (**Applicant**) is the Applicant in this matter and it is the registered proprietor of the land known as 4 Cotswold Crescent, Officer, Victoria (**Subject Land**).
2. The Applicant has associated entities, which own or develop different subdivisions adjacent to the subject land relevant to this appeal. The Board will refer to all these entities, including Keymore Pty Ltd, collectively, as the (**Development Group**).
3. The members of the Development Group are land holding entities, which purchase land and arrange the subdivision and development of the land for individual sale. The works completed by the Development Group include site works. The prepared lots are then sold to purchasers to engage their own builder for the construction of a residential dwelling.
4. On or about 13 September 2018, the Applicant delivered a temporary building office to the Subject Land by crane (**Building**). It was constructed in a factory and was a relocatable module.

Building Notice and Building Order

5. On 21 September 2018, the Municipal Building Surveyor for the Shire of Cardinia (**MBS**) issued a building notice in relation to the Building (**Building Notice**). The Building Notice stated that:
 - 3.1.1 Alleged illegal building work including the construction of a 'sales office and decking' has/have been carried out without a building permit required by Section 16 of the Act.
 - 3.1.1.3 building work is not exempt as provided for in 'Schedule 3' of the Building Regulations 2018 in that:
 - 3.1.1.3.1 Building Work (apart from that which is provided for in this notice is not evident on the land, and a 'Sales Office' is not considered a building for the purpose of 'construction purposes' or 'display purposes' (Item 6);
 - 3.1.1.3.2 a building permit was required, under s 16 of the Act, to construct the Building.
6. The Applicant and MBS engaged in discussions between 21 September 2018, and 21 November 2018, but the matter did not resolve.
7. On 21 November 2018, the MBS issued a building order against the Applicant (**Building Order**) in relation to the Building.
8. The Building Order included the following Orders:
 5. The Owner, is required to carry out the following building/protection work/other work required by the regulations in relation to the building /land within 30 days of a 'record of the sale of land' or 'display of land' not being in accordance with 'statutory declaration' prepared by 'Andrew Facey' and declared on the 13th Day of November 2018:

- 5.1 Prohibit entry to, or the use or occupation of the building by providing clear measures that restrict unauthorised entry (Authorised entry shall include practitioners engaged to cause compliance with the order);
- 5.2 Building Work in relation to the building to the satisfaction of the [MBS] and not limited to:
 - 5.2.1 Demolition of all decking and removal of debris from the land;
 - 5.2.2 Removal of the building (Sales Office) and associated structure from the land in accordance with a building permit (or further written direction from the [MBS]);
 - 5.2.3 Note: [Andrew Facey’s statutory] declaration provides confirmation that ‘the temporary display [unit] situated on the land ... will only be utilised for the purposes of sales and display of product with Plan of Subdivision PS814723U.’
- 6. The Owner, is required to carry out the following building/protection work/other work required by the regulations in relation to the building /land/place within 18 months of the date of service of this Building Order and before the completion of [May] 2020:

[6.1, 6.2, 6.2.1, 6.2.2 and 6.2.3 reflect the wording in 5.1, 5.2, 5.2.1, 5.2.2 and 5.2.3 above]’ (original emphasis)

Appeal

- 9. On 21 December 2018, the Applicant lodged an appeal with the Board. The nature of the appeal was unclear:
 - (a) in section 6A of the application, the Applicant indicated that it had identified the nature of the proceeding; the grounds for commencing the proceeding and the relief sought in an attachment to the application – however no such attachment was provided to the Board;
 - (b) section 6C of the application is meant to identify the section under appeal, but that section was not completed; and
 - (c) section 10 of the application relates to the appeal period – the Applicant inserted a ‘Y’, which indicated that the appeal related to a ‘building notice and/or building order’.
- 10. The Applicant’s *Statement of Contentions* dated 15 February 2019 (**Applicant’s Statement of Contentions**) noted that the appeal was:
 - (a) against the MBS’s decision to issue the Building Order;
 - (b) against the MBS’s refusal to cancel the Building Order; and
 - (c) to the extent required, against the MBS’s:
 - (i) decision to issue the Building Notice; and
 - (ii) refusal to cancel the Building Notice.

11. The Board accepts that the Applicant has appealed on the grounds set out in the *Applicant's Statement of Contentions*.

Appeal against the MBS's decision to serve the Building Notice

12. The appeal, under s 142(1)(a) of the Act, against the MBS's decision to serve the Building Notice on the Applicant is dismissed because:
 - (a) the appeal needed to be made within 30 days of the Building Notice being served on the Applicant;¹ and
 - (b) the appeal was made more than 30 days after the Building Notice was served on the Applicant.

Appeal against the MBS's refusal to cancel the Building Notice

13. The appeal documentation completed by the Applicant is capable of being read as both an appeal against the Building Notice and the Building Order. The Applicant's first *Statement of Contentions* addressed both the Building Notice and Building Order.
14. The Board was provided with emails between the parties throughout September, October and November 2018. The emails post-date the Building Notice in which the Applicant sets out its belief that the Building was exempt from the requirement of a building permit. Further it notes that other temporary display buildings in the area have not been required to obtain a building permit.
15. In relation to the appeal, under s 142(1)(b) of the Act, against the MBS's refusal to cancel the Building Notice, the MBS argued that 'there has been no request made to the MBS to cancel the Building Notice.'²
16. The MBS made this submission in a further *Statement of Contentions* dated 12 November 2019, prior to indicating that it considered this issue inconsequential. The Board understands the parties were seeking a decision on whether an exemption from permit requirements (**the exemption**) under Item 6 of Schedule 3 to the Regulations (**Item 6**) applied. Further, if the Board makes a finding that the exemption applies this will have implications for the Building Order and Building Notice. However, it is important for the Board to establish its actual jurisdiction for the purpose of making any orders in relation to the Building Notice and Building Order.
17. The evidence before the Board indicates the notice of the refusal to cancel the Building Notice was provided in the letter from the MBS dated 28 November 2018 (**the refusal letter**), which also enclosed the Building Order. This letter stated that:

A Building Notice dated Friday, 21 September 2018 was served on you and any representations made by you have been considered. I am of the opinion that insufficient cause has been shown by the owner of the land/ building to warrant closure of the Building Notice. Therefore, for the reasons set out in the Building Notice, I am issuing the attached Building Order.

18. The material provided to the MBS by the Applicant and Development Group after the Building Notice was issued sought to demonstrate the exemption to the

¹ the Regulations, r 271(1)(o).

² *Respondent's Statement of Contentions*, 1 March 2019, [3].

Building. If the building exemption applies, then the Building Notice could not be maintained. The purpose of providing the material appeared to be for the purpose of having the Building Notice cancelled and consequently the Board finds this material satisfies the requirement under s 142(1)(b) of the Act that the owner, being the Applicant, did make a request to cancel the Building Notice.

19. The Board further finds that the refusal letter contains a decision refusing to cancel the Building Notice.
20. Under r 271(1)(v) of the Building Regulations 2018 (**Regulations**) a decision or determination can be appealed within 30 days after the day notification is given of the decision. The Board finds that the Applicant filed an appeal with the Board within 30 days of being notified of the decision to refuse to cancel the Building Notice. It also filed contentions in support of the Building Notice's cancellation.
21. Given this, the Board considers that it has jurisdiction to make a determination in relation to the refusal to cancel the Building Notice. The Board further notes the determination of the appeal against the refusal to cancel the Building Notice would be on the same grounds as a determination against the making of the Building Order.

Appeal against the refusal of the MBS to cancel the Building Order

22. In relation to the appeal, under s 142(2)(c) of the Act, against the MBS's refusal to cancel the Building Order, the MBS argued that there has been no request made to the MBS to cancel the Building Order.³
23. However, the Board is of the view that the applicable requirement for the appeal right to be enlivened under s 142(2)(c) of the Act is the action by the MBS refusing to amend or cancel the Building Order within the period prescribed by the Regulations. With respect to this requirement, the Board finds that the Applicant has failed to provide evidence of the MBS refusing to amend or cancel the Building Order and the Board therefore determines that:
 - (a) the appeal under s 142(2)(c) of the Act must be dismissed for want of jurisdiction.

Appeal against the MBS's decision to make the Building Order

24. The appeal, under s 142(2)(a) of the Act, against the MBS making the Building Order was made within the prescribed appeal period and therefore the Board must determine.

KEY FINDINGS OF THE BOARD

25. The parties agreed that the Building was a 'building', for the purposes of the Act and the Regulations.
26. The main issue in dispute between the parties is whether the Building is exempt from permit requirements under Item 6.
27. For the reasons and findings outlined below, the Board finds that:
 - (a) the Building is exempt from permit requirements under Item 6;

³ Respondent's Statement of Contentions, 1 March 2019, [2].

- (b) the Applicant was not required to obtain a building permit to construct the Building; and therefore
- (c) the Building Order and the associated Building Notice ought to be cancelled.

RELEVANT LEGISLATION

28. Section 3(1) of the Act contains the following definitions:

building includes structure, temporary building, temporary structure and any part of a building or structure;

building regulations means regulations made under Part 2;

building work means work for or in connection with the construction, demolition or removal of a building;

construct, in relation to a building, includes—

- (a) build, re-build, erect or re-erect the building; and
- (b) repair the building; and
- (c) make alterations to the building; and
- (d) enlarge or extend the building; and
- (e) place or relocate the building on land;

temporary structure includes—

- (a) a booth, tent, marquee or other temporary enclosure, whether or not a part of the booth, tent, marquee or enclosure is permanent; or
- (b) a seating structure whether enclosed or not, including a mobile seating structure;

29. Section 16 of the Act contains offences relating to building work and the need to have, and comply with, a building permit:

- (1) A person must not carry out building work unless a building permit in relation to the work has been issued and is in force under this Act.

Penalty: ...

- (2) A person must not carry out building work unless the work is carried out in accordance with this Act, the building regulations and the building permit issued in relation to that work.

Penalty: ...

- (3) An owner of land must ensure in relation to building work carried out on that land that a building permit in relation to the work has been issued and is in force under this Act.

Penalty: ...

- (4) A building practitioner or an architect who is engaged to carry out building work must ensure that a building permit in relation to the work has been issued and is in force under this Act.

Penalty:

- (6) Subsections (1), (2), (3), (4) and (4A) do not apply if the building work is exempted by or under this Act or the regulations.

30. Section 21 of the Act relates to occupancy permits, and provides:

An occupancy permit is required in respect of all building work except—

- (a) building work which the relevant building surveyor considers to be minor; or
- (b) building work which the relevant building surveyor considers does not compromise the suitability of the building for occupation; or
- (c) prescribed building work.

31. Regulation 23 of the Regulations relates to building permits and provides:

A building permit is not required under the Act for the buildings and building work specified in column 2 of the Table in Schedule 3.

32. Regulation 185 of the Regulations relates to occupancy permits and provides:

185 Exemptions from occupancy permit

- (1) For the purposes of section 21(2)(c) of the Act, an occupancy permit is not required—
 - (b) in respect of building work specified in column 2 of the Table in Schedule 3.
- (2) A building specified in column 2 of the Table in Schedule 3 is exempted from the requirement for an occupancy permit in relation to building work carried out on that building.

33. Regulation 279 of the Regulations provides:

A building or building work specified in column 2 of the Table in Schedule 3 is exempt from the regulations specified in column 3 of that Table corresponding to that building or building work.

34. Item 6 provides:

Column 1 Item	Column 2 Description of building or building work exempted from building permit and occupancy permit	Column 3 Building regulations that building or building work exempted from
6	A building used only temporarily for the duration of building work for— <ul style="list-style-type: none">(a) construction purposes; or(b) display purposes.	All Parts

35. The combined effect of rr 23, 185 and 279 and Item 6 is that:

- (a) a building permit is not required ‘for or in connection with the construction, demolition or removal of’ a building that is specified in Item 6 (**Exempt Building**);
- (b) an occupancy permit is not required ‘for or in connection with the construction, demolition or removal of’ an Exempt Building; and

- (c) an Exempt Building is exempt from all building regulations (i.e. regulations made under Part 2 of the Act),⁴ including:
 - (i) volumes one and two of the Building Code of Australia (**BCA**), including its requirements regarding structure, fire resistance, access and egress, service and equipment, health and amenity and energy and efficiency;⁵
 - (ii) regulations regarding the construction, use, maintenance, demolition, removal of buildings and the safety of buildings;
 - (iii) regulations made under s 15B of the Act:
 - A. regarding keeping exits accessible and free from obstruction; and
 - B. requiring, testing or maintaining safety and emergency services, installations or equipment; and
 - (iv) regulations made under Schedule 1 to the Act regarding the design and siting of buildings.⁶

36. These exemptions, particularly the exemption from the building regulations, are broad, and the interpretation of Item 6 needs to be considered having regard to the nature of this exemption.

THE SUBMISSIONS OF THE PARTIES

Applicant's Submissions

37. The Applicant has provided the following submissions and information regarding the Building and the associated works:
- (a) on or about 13 September 2018, the Building was delivered to the Subject Land by crane;
 - (b) the Applicant is utilising the Building temporarily, namely for the duration of building work;
 - (c) the building work comprises the following:
 - (i) the current construction of the retaining walls on subdivided lots, which are particularly intensive for the lots contained in the plan of subdivision;
 - (ii) the current and future construction of residential dwellings on lots which have already been purchased;
 - (iii) the future construction of residential dwellings on lots which have not been purchased yet, but will be commenced prior to the removal of the display building;

⁴ Section 3 of the Act defines 'building regulations' to mean 'regulations made under Part 2 [of the Act]'. This definition applies to the Regulations: s 23 of the *Interpretation of Legislation Act 1984*.

⁵ The incorporation of the BCA is pursuant to s 9 of the Act and regulation 10 of the Regulations.

⁶ Although Item 6 does not exempt an Exempt Building from planning laws.

- (d) the display building is being used solely for display purposes, namely the display of land for sale within the estate where building works have occurred or will occur; and
 - (e) the display building is open to the public during normal business hours. The public can view displays containing information on the estates.
38. The Applicant's submissions regarding the interpretation of the Act and the Regulations is as follows:
- (a) the ordinary and grammatical meaning should be given to the text, having regard to the context;
 - (b) section 35 of the *Interpretation of Legislation Act 1984 (ILA)* requires the reader to seek to identify the purpose of the relevant provisions in context and prefer the interpretation which best achieves this purpose;
 - (c) statutory construction must construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute; and
 - (d) a construction that would result in an inconvenient, improbable or irrational consequence should be avoided.
39. The Applicant submitted that the Act does not require a building permit to be obtained for all structures. The Applicant relied on *Chen v Kevin McNamara & Son Pty Ltd* [2012] VSCA 63, which found that a large engineered structure did not require a building permit because it was unclassifiable. The Applicant says that the Board should not assume that a structure requires a permit, simply due to its size or use.
40. The Applicant further queried if Parliament did not intend a building of this sort to fit the exemption, then what buildings did Parliament intend to exempt.
41. In relation to the specific wording of Item 6, the Applicant noted the following:
- (a) a building is defined in section 3 of the Act as both a structure and a temporary building;
 - (b) the Building will be used only temporarily, being for the duration of building work. The Applicant notes this should mean the building is used on a temporary basis, because its sole use is to display the building work in order to sell the subdivided land;
 - (c) the word temporary is not defined in the Act, however the ordinary and natural meaning is 'lasting for only a limited period of time; not permanent'. The display building has no use after the building work is complete and the final lot from the plans of subdivision referred to is sold. Once the building is complete and the final lot is sold the display suite will be relocated; and
 - (d) the Building will be used for display purposes – the Building is used to display the land for sale within the estate where domestic building work has or will occur.
42. The Applicant argued that the Development Group is conducting building works, which includes preparatory works, to the subdivisions of land. Building

works can be episodic and done in phases. The temporal gaps between phases does not constitute a cessation of works.

43. The Applicant submits that the Building Order has no legal basis to require the building work to be visible from or related directly to the building location. Parliament placed no such restrictions or conditions on the exemption. Further, the Applicant submits that, where the building work is across multiple sites, a builder should be permitted to have a display building on one site for all of the building sites. The logical consequence of the MBS's decision would be to require a display on each piece of land. There is a clear nexus between the Building and the construction. The works started on a parent title and then subdivided.
44. The Building has been inspected and the MBS has not suggested the Building is structurally unsound or a risk to public safety.
45. The Building is used for the dominant purpose of displaying land for sale. The sales reports show some smaller number of sales occur in this office, but this is an ancillary purpose and not its dominant purpose. Most sales occur at the corporate office or at prospective purchaser's homes. Accordingly, the Building does not supply retail goods or services, but rather displays the land available for sale. Further, the fact that the Building is staffed for 40 hours per week does not suggest or determine permanency of the Building. The level of activity is commensurate with the display purpose.
46. There is no dispute on the word temporary. The word temporary must be applied in the context of permanent buildings and the final phase of building will require the removal of the office.
47. The Applicant submits that the Board should quash the relevant decisions by the MBS.

MBS's Submissions

48. The MBS noted that the inspection of the Subject Land revealed that:
 - (a) a movable building had been delivered to the Subject Land and placed on stumps;
 - (b) the Building included a modular building capable of being fitted out, including decking;
 - (c) the Building had been fixed to the ground with stumps/footings or the like;
 - (d) the Building was placed on the same land, which contained a similar building which had previously been used for land sales, but had since been converted into a café; and
 - (e) the MBS's records showed there had been no building permit issued or lodged with Council permitting the construction of the Building (including its decking) at the Subject Land.
49. The MBS argued that the Building Notice and Building Order were issued appropriately under the relevant legislation and regulations as:
 - (a) all building works require a permit unless an exemption applies;

- (b) the Building is more properly classified as a Class 6 building pursuant to the BCA, as it is a shop for the sale of goods by retail or the supply of services direct to the public. It is a market or sale room, showroom or service station. Class 6 buildings are not exempt under Item 6;
 - (c) the Applicant was required to obtain a building permit in order to place or relocate the Building onto the land, based on the definition of 'construct' contained in section 3 of the Act, which includes:
 - (a) build, re-build, erect or re-erect the building; and
 - (e) place or relocate the building on land;
 - (d) the placement of the Building at the Subject Land is for building work for, or in connection with, the construction of a building.
50. In response to the Applicant's submissions the MBS submitted:
- (a) the building work referred to by the Applicant is not visible from the Subject Land or relating to the Subject Land on which the Building is placed;
 - (b) the exemption provides for building work, being work relating to the Building, extending the boundaries of the exemption is not the intent of the exemption;
 - (c) the Building is labelled 'Land Sales & Information Centre' and the sales material suggests it is a sales suite. An ordinary customer would expect to be sold land. This role would resemble the function of a real estate agent or developer;
 - (d) the Applicant's contention of 'duration of building work' and the exemption cannot be extended to work that has or will be occurring, it is limited to actual work;
 - (e) the Building should not be considered to be a display of building work, as it simply shows the land for sale; and
 - (f) the case of *Chen v Kevin McNamara & Son Pty Ltd* [2012] VSCA 63 can be distinguished on the facts.
51. The MBS agreed that the issue in dispute is whether the Building is used only temporarily for the duration of building work for display purposes within the meaning of Item 6.
52. The MBS contended that:
- (a) there is no building work occurring at the Subject Land, where the Building is located;
 - (b) there must be a nexus between a building used only temporarily for the duration of building work for display purposes and the building work;
 - (c) in order for the exemption to apply, ordinarily, the building work would need to be occurring on the same land as the display building; and
 - (d) the act of having land for sale is not building work.
53. The MBS further contended that the building work, or matter relating to the building work displayed, must have a [Building] Act purpose, come within the scope of the Act and be related to building work already commenced.

54. The exemption cannot properly apply to the future building work and must apply to building work underway due to the word 'duration' in the exemption.
55. The term used temporarily cannot mean that people are in the Building all day working on a regular basis. It should mean occasional use and not open permanently.
56. Based on the wording of Item 6, the Building cannot have a dual purpose of display of different types of house options and a land sales office.
57. The MBS submitted that it could not be the intention of Item 6 to give an entity the right to deliver a building to an allotment for display of house options and land sales relating to other allotments within an undefined distance of the building works.
58. The MBS also submitted that the Board should have regard to section 4 of the Act, which includes the protection of the safety and health of people who use buildings as a place of public entertainment.
59. The MBS raised the issue of whether the footings had been assessed by an engineer. Further, the MBS noted that full certification of the Building had not been received (although the MBS but did not assert that the Building posed a danger).

REASONS AND FINDINGS OF THE BOARD

60. The Board finds that there is a genuine question of law raised as to the proper construction of whether the Building is exempt under Item 6. The Board would like to formally acknowledge and express its appreciation of the well-considered submissions from the legal representatives of the Applicant and MBS.
61. The Board confirms that during these proceedings it requested that additional material be filed by the parties pursuant to Directions and Orders dated 19 March 2019, 20 September 2019 and 4 October 2019 to enable it to determine the appeals before the Board. This additional material has been significant in allowing the Board to reach a conclusion in relation to the exemption. The Board accepts that the MBS was not availed of all the material presently before the Board at the time of making the Building Notice and Building Order.
62. Although the Applicant and MBS have researched the case law as it applies to Item 6, neither party identified any authority that considered the meaning of Item 6, or its corresponding predecessor provisions.⁷ The parties further provided submissions that the *Regulatory Impact Statements* were of minimal to no assistance in relation to the exemption the subject of these proceedings.
63. Given the absence of authorities, the Board will:
 - (a) outline the relevant principles of statutory interpretation;
 - (b) outline the history of Item 6, and the exemptions in Schedule 3 more generally;
 - (c) assess the context and the words used in Item 6; and

⁷ The wording of the exemption in Item 6 has been unchanged since the Building Regulations 1994: see paragraph (b) of Table 1.6 in regulation 1.6(1) of the Building Regulations 1994.

- (d) form a view regarding the meaning of Item 6.

Relevant Principles of Statutory Interpretation

64. In interpreting the Act and the Regulations, the Board has considered s 35 of the ILA, which provides:

Principles of and aids to interpretation

In the interpretation of a provision of an Act or subordinate instrument—

- (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and
- (b) consideration may be given to any matter or document that is relevant including but not limited to—
- (i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;
 - (ii) reports of proceedings in any House of the Parliament;
 - (iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and
 - (iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry, Formal Reviews or other similar bodies.
65. The following common law principles of statutory interpretation have also been considered by the Board:
- (a) a purposive approach must be adopted and that purpose must be determined in the light of the language of the relevant provision and the scope and object of the whole statute. (See *Tasker v Fullwood* [1978] 1 NSWLR 20, [24] approved by McHugh ACJ, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355);
- (b) the primary objective of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute: *Taylor v Public Service Board (NSW)* [1976] HCA 36; (1976) 137 CLR 208 at 213 per Barwick CJ;
- (c) the meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320 per Mason and Wilson JJ;
- (d) the process of construction must always begin by examining the context of the provision that is being construed: *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597;
- (e) it is best to give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions: *Australian*

Alliance Assurance Co Ltd v Attorney-General of Queensland [1916] St R Qd 135 at 161 per Cooper CJ;

- (f) a court construing a statutory provision must strive to give meaning to every word of the provision: *The Commonwealth v Baume* [1905] HCA 11; (1905) 2 CLR 405 at 414 per Griffith CJ;
- (g) statutory construction is a text-based activity. However, where the wording or structure of the statutory provisions is neither clear nor elegant, the duty of a court ... is to attempt to understand and explain the policy of the statute as it applies to the problem in hand. Doing so helps in the task of statutory interpretation. It is not impermissible. It is essential (see Kirby J at 74-75 in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59; and
- (h) this process of construction may sometimes require departure from the natural or ordinary meaning of a provision, if the alternative is absurdity or inconsistency with the purpose of the instrument: *ABC v Australasian Performing Right Association Ltd* [1973] HCA 36; (1973) 129 CLR 99, 109 (Gibbs J).

66. In relation to s 35 of the ILA:

- (a) In *Gledhill v Scotia Property Maintenance Pty Ltd (Building and Property)* [2019] VCAT 422, the findings of the Court of Appeal in the case of *Brirek* were considered in relation to s 35 of the ILA. In doing so, it referred to the High Court's decision in *Catlow v Accident Compensation Commission*:⁸

This provision is extremely broad. Unlike s 15AB of the *Acts Interpretation Act 1901* (Cth), s 35 does not restrict the purposes for which it is permissible to consider the extrinsic materials referred to in that section. Whether or not extrinsic material is considered in interpreting a statutory provision, it is clear that the meaning attributed to the statute must be consistent with the statutory text. If the meaning which would otherwise be attributed to the statutory text is plain, extrinsic material cannot alter it. It is only when the meaning of the text is doubtful (to use a neutral term rather than those to be found in s 15AB(1) of the *Acts Interpretation Act*), that consideration of extrinsic material might be of assistance. It follows that it would be erroneous to look to the extrinsic material before exhausting the application of the ordinary rules of statutory construction. If, when that is done, the meaning of the statutory text is not doubtful, there is no occasion to look to the extrinsic material.

- (b) Section 35 of the ILA provides guidance as to which construction is to be preferred when choosing between two or more possible constructions. It can only have application where there are in fact two possible constructions available. If a provision has been written with such clarity that only one construction is appropriate, then that construction must be given effect and there is no scope for the

⁸ [1989] HCA 43; 167 CLR 543, [6] per Brennan and Gaudron JJ.

operation of s 35(a): *Church of Jesus Christ of Latter Day Saints v Yarra Ranges SC* [2002] VCAT 1047.

67. For reasons outlined in detail below, there is more than one possible construction of Item 6. Given this, the Board is required to apply the principles of statutory construction delineated under section 35(a) of the ILA.

The history of Item 6

68. Under s 7 of the *Subordinate Legislation Act 1994 (SLA)*, the responsible Minister must (subject to specified exceptions) ensure that a *Regulatory Impact Statement (RIS)* is prepared for a proposed regulation. A RIS must outline the object of the regulation, a cost benefit analysis of the regulation and other matters outlined in s 10 of the SLA.
69. Whilst a RIS is not covered by sub-paragraphs (i) to (iv) of s 35(b) of the ILA, a RIS is covered by the chapeau of s 35(b), because a RIS is a ‘relevant’ document. Accordingly, a RIS may be considered in order to determine the object of Item 6.
70. The exemption in Item 6 has been unchanged since the first regulations under the Act. For instance, exactly the same wording was used in Item 6 as was used in:
- (a) paragraph (b) of Table 1.6 in regulation 1.6(1) of the *Building Regulations 1994*; and
 - (b) item 6 of Schedule 8 to the *Building Regulations 2006 (2006 Regulations)*.
71. The RIS for the 2006 Regulations proposed a number of additional exemptions be included in Schedule 8 to those Regulations. Those additional exemptions were all justified on the basis of ‘reduction in compliance burden’.⁹
72. The RIS for the 2018 Regulations,¹⁰ was released in 2017 (**2017 RIS**) and proposed a number of additional exemptions in Schedule 3 to the 2018 Regulations. The 2017 RIS reflected that exemptions in the 2018 Regulations involve a balancing of competing considerations, having regard to:
- (a) the burden that would be alleviated if the Regulations provided for the relevant exemption; and
 - (b) the impact of providing for the exemption on the purposes underlying the regulatory regime, such as health and safety, amenity and siting considerations.
73. For instance, in relation to single sheds, the 2017 RIS posed the following questions:¹¹
- Should an exemption be introduced to allow the construction of a single Class 10a building (such as a shed) on vacant land, provided it does not exceed 10 m² in floor area?

⁹ Building Commission of Victoria, Regulatory Impact Statement - Building Regulations 2006 (January 2006), p.80 at www.betterregulation.vic.gov.au/Current-and-Past-RIS/2005-06.

¹⁰ Department of Environment, Land, Water and Planning, Regulatory Impact Statement, Building Regulations 2017, Overview (May 2017) www.betterregulation.vic.gov.au/Current-and-Past-RIS/2016-17.

¹¹ Department of Environment, Land, Water and Planning, Regulatory Impact Statement, Building Regulations 2017, Overview (May 2017), p 16 at www.betterregulation.vic.gov.au/Current-and-Past-RIS/2016-17.

Are there any other exceptions that should be specifically recognised that will not undermine the objectives of the siting and amenity provisions?

74. The 2017 RIS also reviewed certain exemptions for occupancy permits and posed the following questions:¹²

Occupancy permits for minor building work or building work that does not compromise the suitability of the building for occupation

Can you provide any specific examples where the costs of undertaking the permit process was more than the costs of building work? Were the risks associated with this building low?

What safety problems, if any, are posed by building work which is currently exempt from the permit process? What are these problems and when do they occur? Should such building work be required to have an occupancy permit? Why or why not?

Interpretation of Item 6

Purposes and Objects

75. Section 4 of the Act relates to the objectives of the Act and provides:

- (1) The objectives of this Act are—
 - (a) to protect the safety and health of people who use buildings and places of public entertainment;
 - (b) to enhance the amenity of buildings;
 - (e) to facilitate the cost effective construction and maintenance of buildings and plumbing systems;
 - (f) to facilitate the construction of environmentally and energy efficient buildings;
 - (g) to aid the achievement of an efficient and competitive building and plumbing industry.
- (2) It is the intention of Parliament that in the administration of this Act regard should be had to the objectives set out in subsection (1).

76. The objectives set out in regulation 1 of the Regulations do not provide assistance to the Board's interpretation of Item 6.

77. The exemption in Item 6, particularly the exemption from the building regulations, would:

- (a) appear to undermine the objectives in sections 4(1)(a), (b) and (f), because they exclude the requirements to comply with a broad range of safety, amenity and environmental and energy efficient standards; and
- (b) arguably support the objectives in sections 4(1)(e) and (g), because these buildings, are not subject to the expenses (and time) incurred by complying with relevant standards and obtaining building and occupancy permits – however, in order to adopt purposive approach it is necessary to assess why these buildings are exempt, when other buildings are not exempt.

¹² Department of Environment, Land, Water and Planning, Regulatory Impact Statement, Building Regulations 2017, Overview (May 2017), p18 at www.betterregulation.vic.gov.au/Current-and-Past-RIS/2016-17.

78. The exemptions in Schedule 3 generally relate to buildings or building works that:
- (a) pose a minor risk, such as:
 - (i) the construction or demolition of Class 10 and Class 10b buildings/structures of limited size (Items 1, 2, 12, 13, 16);
 - (ii) minor repairs, maintenance, renewal or alterations of a building (Item 3, 4);
 - (iii) temporary structures (Item 5);
 - (iv) smaller or temporary swimming pools or spas (Items 7, 8); and
 - (v) certain fences (Items 10, 11) and small retaining walls (Item 15);
 - (b) certain buildings where there are other regulatory practices or oversight in place:
 - (i) a relocatable building that is a movable unit that is constructed for a community service and is to be used or intended to be used to provide temporary accommodation on a non-profit basis (Item 18); and
 - (ii) a relocatable building used as a school or TAFE institute (Item 19); or
 - (c) certain buildings are merely outside the regulatory framework (Item 5 – buildings that are not covered by Classes in specified clauses of the BCA).
79. In relation to Item 6:
- (a) this is not an exemption that can be explained by reduced risk:
 - (i) although the exemption is time limited (i.e. ‘for the duration of building work’), the exemption is applying in situations where (but for the building’s connection to building works) there would be no exemption; and
 - (ii) the fact that it is connected to building works does not, in itself, reduce the risk – in fact it could be argued that the connection to building work could increase the risk; and
 - (b) this is an exemption that arises in relation to an area which is not naturally outside the regulatory framework (i.e. building work).
80. The question therefore arises of:
- (a) why would there be an exemption granted in relation to a building that is connected to building works; and
 - (b) why is there an exemption for display purposes, but not for other purposes.
81. The Board considers that the exemption reflects the following considerations:
- (a) worksites are subject to the stringent requirements under the *Occupational Health and Safety Act 2004* (and associated legislation) and WorkSafe, which is a very effective regulator. The exemption is

relying on the effectiveness of that regime to ensure that the risks are adequately addressed; and

- (b) a building that displayed the proposed buildings/units would be expected to be built in a safe manner, as part of the effective promotion of the building/unit.

82. In interpreting Item 6, the Board should favour an interpretation where the exemption is consistent with the above considerations.

The words used in Item 6

Assessing the words holistically

83. Whilst it is important to assess each word that is used in Item 6, it is essential that there is a holistic analysis of Item 6, in order to ensure that the words are assessed within the context of the other words in Item 6 and the Act and Regulations, as a whole.

84. In particular, the Board considers that:

- (a) there needs to be a connection, or sufficient nexus, between the temporal limitation (i.e. 'for the duration of building work') and the display purposes. This means that the 'display purposes' need to directly relate to the building work that is being undertaken; and
- (b) the building work needs to be a discrete body of work (or overlapping work) and not separate intermittent building work.

85. In this case:

- (a) the Development Group is preparing the allotments for sale, by building roads, connecting utility infrastructure to the allotments and building retaining walls; and
- (b) the Development Group also constructed houses on some of the respective allotments.

86. Therefore, the Board considers that the purpose of the Building is:

- (a) to display land for sale. The land has roads and is connected to various utilities (e.g. gas, water, electricity and sewerage), and has retaining walls for some properties; and
- (b) to display buildings constructed by the Development Group on the subdivided allotments for sale.

87. The requirement that the building work needs to be a discrete body of work (or overlapping work) and not separate intermittent building work reflects the limitation that the Building can only be used for the duration of the building work.

88. This does not mean that there needs to be workers undertaking building work every moment that the display building is being used. For instance, there could be demolition of a building and the subsequent building of an apartment building and the building works could cease over the Christmas period or as a result of industrial action or planning appeals. In these types of cases, a building could, under Item 6, be used for display purposes, during the short periods when no worker is undertaking building work.

89. However, if the building work is separate, such as the development of separate parcels of land, then the periods when the work is not being undertaken would not be included.
90. The Board considers that it is helpful to breakdown the provision and assess each element in turn. This involves an assessment of the meaning of:
- (a) a ‘building’;
 - (b) ‘used only’:
 - (i) ‘temporarily’;
 - (ii) ‘for the duration of building work’; and
 - (iii) ‘for display purposes’.

A Building

91. The Board finds that the Building is a building for the purposes of the Act and the Regulations.

Only

92. The first issue is whether the word ‘only’:
- (a) only limits the word ‘temporarily’ (**‘narrow limitation’**); or
 - (b) limits the expressions ‘temporarily’, ‘for the duration of building work’, ‘for construction purposes’ and ‘for display purposes’ (**‘broad limitation’**).
93. If the word ‘only’ were only limiting the word ‘temporarily’, then it would be a redundant word, since a building cannot be used temporarily and non-temporarily. This is contrasted to the other expressions in Item 6, where the word ‘only’ would have an impact – for instance, a building can be used:
- (a) ‘for the duration of building work’ and also used for a different duration;
 - (b) ‘for construction purposes’ and for other purposes; and
 - (c) ‘for display purposes’ and for other purposes.
94. By comparison, item 9 of Schedule 3 does not use the word ‘only’ and refers to ‘A relocatable swimming pool or spa that is erected temporarily in an area enclosed by an approved barrier’.
95. The Board should refrain from interpreting the word ‘only’ in a manner that makes the word redundant and the Board therefore prefers the broad limitation that applies to ‘temporarily’, ‘for the duration of building work’, ‘for construction purposes’ and ‘for display purposes’. The Board also considers that the broad limitation is more consistent with the objects of the Act.
96. The online Macquarie Dictionary defines ‘only’ as:¹³

adverb **1.** without others or anything further; alone; solely: only she remained. ...

¹³ Accessed 6 July 2019.

3. singly; as the only one: the only begotten Son of God.

4. as recently as: he was here only a moment ago.

5. exclusively: I work here only.

–adjective 6. being the single one or the relatively few of the kind, or sole: an only son.

7. single in superiority or distinction.

97. The term ‘only’ imposes a high standard. It does not, for example, bear the same meaning as primarily, dominantly or principally.

Temporarily

98. The parties dispute the meaning of the word ‘temporarily’ in Item 6.

99. The Applicant submitted that:

- (a) temporarily means that building is not permanent; and
- (b) since the building will be removed when the building work is completed, the building will be used, at the site, temporarily.

100. The Applicant submitted that the online Macquarie Dictionary defines ‘temporary’ as:¹⁴

adjective 1. lasting, existing, serving, or effective for a time only; not permanent: a temporary need.

101. However, this meaning would make the word ‘temporarily’ redundant, because the provision already has this limitation that the use can only be for the duration of the building work.

102. In order for the word ‘temporarily’ to not be redundant, there needs to be an interpretation of ‘temporarily’ that, at least in some situations, imposes a temporal requirement, that is less than ‘the duration of the building works’.

103. The Applicant argued that the use of the word temporary and temporarily in the Act and Regulations provide an indication of the meaning of temporary in Item 6.

104. The Act has a definition of ‘temporary structure’, which includes marquees or seating structures. Such structures could last for decades, and it is therefore not surprising that the Act and Regulations envisage the possibility of such structures having multiple occupancy permits of 5 years’ duration (see s 57 of the Act and r 206 of the Regulations).

105. The Board concludes that the definition of ‘temporary structure’ does not provide significant assistance to the Board because the definition does not provide a period of time beyond which a ‘temporary structure’ is not permitted to remain a structure.

106. The word ‘temporarily’ and ‘temporary’ are used elsewhere in the Act and the Regulations, although the meaning of the expressions vary depending on the

¹⁴ Accessed 6 July 2019.

context. They do not have a uniform meaning and do not provide guidance for the use of the word ‘temporarily’ in Item 6.

107. The MBS submitted that the term ‘used only temporarily’ should be read so as to take into account the hours and staffing of the Building.
108. The Board finds there is nothing in the Act, Regulations or surrounding provisions which suggests the word temporarily should be read in this manner – except that the word temporary needs to have a meaning that is, on occasions, less than the duration of the building works.
109. The Board finds that the word ‘temporarily’ should be interpreted in the following manner:
 - (a) on occasions, a building will no longer be considered to have been used ‘temporarily’, at a stage when the building works have not ceased;
 - (b) it is not enough that there is an end date, based on the building works – the building needs to have been only used temporarily; and
 - (c) a building that is used for several years, and may be used for several more years, and is being used continuously during business hours is not being used temporarily.
110. The Building is a modular construction designed to be re-located as required. The Board accepts the evidence of the Applicant that the Building will no longer be used after the building work on the estate has been completed and all of the land has been sold.
111. The parties agree that this particular Building will be removed in 2020 after being delivered to the Subject Land in September 2018.
112. The emails between the parties during September, October and November 2018 discuss the building and whether its temporary in nature. The initial correspondence from the MBS considered the Item 6 and Item 7 exemptions. Further emails between the parties considered Item 6 more extensively. The emails discuss the building as being more temporary rather than permanent in nature. The emails discussed the timeframe in which the building would be removed and appear to have come to a general agreement about the building removal.
113. Based on the information provided to the Board, the Building is considered to meet the ‘temporarily’ requirement of the exemption.

For the Duration of Building Works

114. There is no definition for the term ‘duration’ provided for in the Act or the Regulations.
115. The MBS submitted that the plain English definition of ‘duration’ should be relied on. The online Macquarie Dictionary for duration which is:¹⁵

noun 1. continuance in time: *He began to impose suspensions, usually of short duration –Frank Hardy, 1950.

¹⁵ Accessed 6 July 2019.

2. the length of time anything continues: to impose restrictions for the duration of the games.

–phrase 3. for the duration,

a. for a long time; for as long as something takes: he realised she might be sick for a long time and that he would have to be there to help for the duration.

b. (with particular reference to World War II) as long as the war continues.

116. To give proper context to the term duration, it must relate to the continuance in time and the length of time that building works occurs.

117. The Board notes that a review of whether the exemption applies would ordinarily occur prior to erecting the Building. Accordingly, a consideration of ‘duration’ may not be definitive due to the usual allowances required during construction for delays caused by inclement weather or supply. However, reference can be made to time estimates for the building work and the intention to remove the building at the end of that construction period to determine ‘duration’.

118. The term ‘building works’ and ‘construct’ are defined under section 3 of the Act as:

building work means work for or in connection with the construction, demolition or removal of a building;’

‘**construct**, in relation to a building, includes—

- (a) build, re-build, erect or re-erect the building; and
- (b) repair the building; and
- (c) make alterations to the building; and
- (d) enlarge or extend the building; and
- (e) place or relocate the building on land;

119. The parties agreed that some works such as earthworks or retaining walls had been or were being placed onto the subdivided lots. The Board requested more information on this aspect. The additional information indicated that:

- (a) Plan of Subdivision 814723U was at stage 1 of the road and drainage plans. Photographs were provided to demonstrate ongoing works as of 27 March 2019;
- (b) Plan of Subdivision 818648K was at stage 12 of road and drainage construction plans. Photographs were provided of ongoing building works dated 27 March 2019;
- (c) Plan of Subdivision 810946U showed 8 townhouses completed in, or around, November 2018 with corresponding certificates of occupancy;
- (d) the remaining Lot TT within the Plan of Subdivision is currently vacant and the Applicant says it awaits a planning permit. Following the issuing of the planning permit, works will commence on roadworks, water, power, gas, sewerage and drainage and the construction of 4 dwellings; and

- (e) Lots 2401, 2402 and 2424 on plan of subdivision 801147D currently have no building work as they are titled and awaiting sale.
- 120. The Board finds that the construction of the townhouses would constitute building works under the Act.
- 121. The question, however, arises whether the following would, for the purposes of Item 6, be building works:
 - (a) clearing of the land, and the connection of water, power, gas, sewerage and drainage on the sites where the houses will be built (**Allotment Works**); and
 - (b) the works that occur off the individual lots, such as the clearing of land, construction of roads, and the laying of the power, gas, sewerage and drainage mains that connect the subdivided land to these utilities (**Off-Allotment Works**).
- 122. These reasons will refer to the Allotment Works and the Off-Allotment Works, collectively, as '**Preparatory Works**'.
- 123. A review of the construction of the town-houses will also be undertaken and these will be referred to as '**Construction Works**'

Preparatory Works

- 124. The Preparatory Works will, for the purposes of Item 6, be building works, if they are:
 - (a) either the construction of a building, or work 'in connection with the construction ... of a building'; and
 - (b) the building works are sufficiently connected to the display purposes.
- 125. The Board considers that pipes for storm water, sewerage, gas and electricity are not, in themselves, buildings for the purpose of the Act, and that roads are also not, for the purposes of the Act, buildings. Accordingly, the construction of these pipes and roads is not the 'construction of a building', they are civil works.
- 126. A retaining wall is a structure, which is a building for the purposes of the Act. The construction of a retaining wall is therefore, for the purposes of the Act, the construction of a building.
- 127. The issue therefore arises whether the Preparatory Works would be or work 'in connection with the construction ... of a building'.
- 128. In *McAskell v Timelink Pacific Pty Ltd* [2010] VSCA 79 (**McAskell**), the Court of Appeal unanimously found that site preparation works could fall within the definition of building works contained within the Act. The Court determined that definition of 'connected with' could extend to site preparation for building works. The Court upheld the trial judge's finding that it was artificial to distinguish site preparation works that was integral to the laying of the footings, from the construction of the footings.
- 129. The Court of Appeal in *McAskell* approvingly cited the following observation by the trial judge (Hansen J):¹⁶

¹⁶ [2010] VSCA 79, [12] per Harper JA, with Mandie JA and Emerton AJA agreeing.

the question whether ‘site preparation works’ require a building permit cannot be answered in the abstract, but rather requires an analysis of the nature of the particular works in question to determine whether or not they are ‘building work’

it is artificial to distinguish the ‘site preparation works’ from the construction of the footings themselves. First, the slab plan (the plan for the footings) states on its face the very requirements of site preparation which were not followed by the builders. Secondly, the building permit identifies the slab plan as one of the ‘approved documents’, and further states that the first mandatory notification stage is ‘prior to placing a footing’. **Thirdly, this is not a case where ‘site preparation works’ were done in the abstract, that is to say without any reference to any actual building which was to be constructed on the site, as might be the case where land is cleared for future building but at the time of clearing there are no actual plans to build. Nor is it a case where one party did site preparation works, and then a different party came in to construct the building on the prepared site.** Rather, according to counsel, the building contract not being in evidence, the builders were engaged under a single contract to perform both the site preparation works and the work of constructing the building. (emphasis added)

130. The Court of Appeal found that:¹⁷

The laying of the concrete slab was an essential part of the construction of the building. A building permit was required, and issued, for it. That permit mandated the protection of the footings (the slab) by the provision of at least 300 mm below its base and above the piles; and if that meant that the piles ‘need to be cut down under footings, [and] 300 [mm] compacted sand placed between them and the footings above’, then that is what had to be done. It was the failure to obey this directive, all of which related to the construction of the slab and was therefore a failure in ‘work for or in connection with the construction ... of a building’ that constituted the breach.

131. Accordingly, site preparation works may or may not be building work, depending on their connection with the construction of the building.

132. Clearly there is a connection between the Preparatory Works and the subsequent construction of a building. For instance, an occupancy permit may not be granted for a building without the connection of utilities. However, the Preparatory Works:

- (a) are clearly less connected to a building than the type of works that were considered in McAskell;
- (b) were ‘done in the abstract, that is to say without any reference to any actual building which was to be constructed on the site’ – the ‘land is cleared for future building [where] at the time of clearing there are no actual plans to build’; and
- (c) were undertaken ‘where one party did site preparation works, and then a different party came in to construct the building on the prepared site.

133. On balance, the Board finds that the Preparatory Works are not sufficiently connected to the construction of the subsequent buildings and that the

¹⁷ Ibid.

Preparatory Works is not, for the purposes of the Act, work ‘in connection with the construction ... of a building’.

134. Other than retaining walls, the Preparatory Works would not be building works for the purposes of Item 6. The retaining walls which did require building permits to construct would fall within the definition of building works under the Act.

Building Works

135. The evidence provided to the Board shows the following building works have been completed for:
- (a) retaining walls in Cotswald Crescent and Grace Street;
 - (b) retaining wall layout for Petworth Rise and Earnley Way; and
 - (c) construction of residential dwellings in Grace Street and Cotswold Crescent.
136. Based on the documentation provided, the Board notes the retaining walls run through and along some of the subdivided lots for Stage 1 (being Cotswald Crescent and Grace Street). The Stage 12 retaining walls both border and run through multiple lots.
137. The documentation further suggests a building permit for the construction of approximately 8 units with garages on Lot BB was granted to the Applicant. The occupancy permit was granted on 31 October 2018. Additional material suggests that there were lots in Grace Street which included a residential dwelling. Further plans were provided for the construction of residential dwellings in Cotswold Crescent.
138. The Board was provided with promotional brochures suggesting the residential dwellings were being promoted or displayed in the Building subject of this proceeding.
139. The Board finds that a number of these building works were taking place in close proximity to the display building. The display building is in the same or adjacent street as some of the building works for the residential dwelling construction. Further, in the Respondent’s email to the Applicant dated 30 October 2018, the Respondent seeks comments on a number of matters including the location of the display building being 170-400 metres from the subject building site. The evidence provided suggests the building works are not remote from the display building site advertising the properties for sale.

For Display Purposes

140. The parties have disputed whether the Building has been used for display or sales purposes. The term ‘display purposes’ does not have a definition in the Act or Regulations.
141. The online Macquarie Dictionary defines ‘display’ as:¹⁸

verb (t) 1. to show; exhibit; make visible: to display a flag. ...

¹⁸ Accessed 6 July 2019.

–noun 6. the act of displaying; exhibition; show: a display of goods; a display of skill; a display of friendship. ...

–phrase 11. on display, on show, as for an exhibition, etc.

142. The MBS however did submit that the Building is in fact a sales suite and referred to promotional brochures which stated ‘sales suite’. The evidence before the Board from both parties is that the building contains material such as promotional brochures which display the land and land and housing packages for sale.
143. As noted above, the Board concluded that there needs to be a connection, or sufficient nexus, between the temporal limitation (i.e. ‘for the duration of building work’) and the display purposes. This means that the ‘display purposes’ need to directly relate to the building work that is being undertaken.
144. For reasons noted above, the Board finds that the relevant building work includes the building of residential dwellings on the allotments and retaining walls.
145. The Board further finds that the Building has several display purposes including:
 - (a) displaying land for sale; and
 - (b) displaying land and home packages.
146. Accordingly, there is some nexus between the display of allotments for sale and the ongoing building works in these circumstances.
147. Further, although it is not necessary for the Building to be on the same allotment as where the building works were occurring, the Board finds that there needs to be a reasonable physical proximity or connection between the display building and the building works. In this case, the display building appears to be proximate to the building works which have been displayed and is sufficient to fall within the relevant exemption.
148. Neither party provided a full and complete chronology or sequencing of all building works that were relevant to the display building. For this reason, the Board sought additional information by way of directions and orders. The Board received and had the benefit of substantially more information than the MBS had available to him at the time of issuing the Building Notice and Building Order. This included plans, building permits and occupancy permits which allowed the Board to review the time frames within which completed work had been conducted and future works. This allowed the Board to fully consider whether the building met this part of the definition in Item 6.
149. The Board finds that at the relevant time of serving the Building Notice and making the Building Order, there is evidence that building works for residential dwellings were in the final stages of construction. The Board bases this conclusion on the building permit and occupancy permit documentation. Further, it appears that additional building works for residential dwellings were planned. As noted previously, there appears to be material for these residential dwellings which were being displayed at the Building. Accordingly, based on this evidence and the prior findings contained in this decision, the Board concludes the appeals against the refusal to cancel the Building Notice and the making of the Building Order should be upheld.

150. The Board finds that the Building does fall within the exemption provided by Item 6.
151. The Board therefore determines that the Building did not require a building permit. Accordingly, orders are made herein cancelling the Building Notice and Building Order.