

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1124/2019  
PERMIT APPLICATION NO. 5/2019/43/1

#### CATCHWORDS

Section 79 of the *Planning and Environment Act 1987*; Bayside Planning Scheme; Heritage Overlay HO773; Interim Heritage Control; Esme Johnston House; Demolition of Existing Building; Structural Condition of the Building; Significance of the Building; Neighbourhood Residential Zone NRZ3; Two Storey Side by Side Townhouses; Response to Neighbourhood Character Policy and Purpose of Clause 32.09; Precinct C1.

**APPLICANT** Frank Pothitos & Irene Strogylakis

**RESPONSIBLE AUTHORITY** Bayside City Council

**RESPONDENTS** Fiona Austin, Peter Shepard, Caroline Shepard

**SUBJECT LAND** 38 Grosvenor Street  
BRIGHTON VIC 3186

**WHERE HELD** Melbourne

**BEFORE** Margaret Baird, Senior Member

**DATES OF HEARING** 1, 2 and 3 June 2020

**DATE OF ORDER** 10 June 2020

**CITATION** Pothitos v Bayside CC [2020] VCAT 613

#### ORDER

##### **Application amended**

- 1 Pursuant to clause 64 of schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by:
  - Amending the permissions sought to include:
    - Clause 43.01-1 to demolish or remove a building, and to construct a building or construct or carry out works.
  - Substituting the following plans for the application plans:
    - Prepared by KG Architects.
    - Drawing Nos. 17020\_TP05 to 17020\_TP11 inclusive and 17020\_TP14 to 17020\_TP16 inclusive, all dated 14 October 2019.

##### **No permit granted**

- 2 In application P1124/2019, the decision of the responsible authority is affirmed.



3 In planning permit application 5/2019/43/1, no permit is granted.

**Margaret Baird**  
**Senior Member**

## **APPEARANCES**

For applicant	Mr B Chessell of counsel instructed by Rigby Cooke lawyers. He called expert evidence from the following persons: <ul style="list-style-type: none"><li>• Mr B Bendtsen, structural engineer.</li><li>• Mr B Lorich, building consultant.</li><li>• Mr T McBride-Burgess, town planner.</li></ul>
For responsible authority	Ms M Marcus, Marcus Lane Group. She called expert evidence from the following person: <ul style="list-style-type: none"><li>• Mr B Raworth, conservation consultant and architectural historian.</li></ul>
For respondents	Mrs F Austin in person. Mr P Shepard in person. Mrs C Shepard in person.



## INFORMATION

Description of proposal	Demolition of the existing building on the land and construction of two, double storey, attached dwellings.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. <sup>1</sup>
Planning scheme	Bayside Planning Scheme [ <b>scheme</b> ].
Zone and overlays	Neighbourhood Residential Zone [ <b>NRZ</b> ], schedule 3 [ <b>NRZ3</b> ]. Heritage Overlay [ <b>HO</b> ] schedule 773 [ <b>HO733</b> ]. Design and Development Overlay [ <b>DDO</b> ], schedule 3 [ <b>DDO3</b> ]. Development Contributions Plan Overlay, schedule 1.
Permit requirements <sup>2</sup>	Clause 32.09-6 to construct two or more dwellings on a lot. Clause 32.09-6 to construct a fence within 3 metres of the street associated with two or more dwellings, and to construct a front fence that exceeds the maximum specified in clause 55.06-2. Clause 43.01-1 to demolish or remove a building, and to construct a building or construct or carry out works.
Relevant scheme policies and provisions	Clauses 11, 15, 16, 21, 22.05, 22.06, 22.08, 32.09, 43.01, 45.06, 52.06, 53.18, 55, 65 and 71.
Land description	The subject land is on the south side of Grosvenor Street. It is toward the eastern end of Grosvenor Street, opposite part of the campus of Brighton Grammar. The land is approximately 1,010m <sup>2</sup> in area and contains a dwelling known as “Esme Johnston House”. It has a high steeply pitched roof with a Tutor Revival expression and large front garden.
Tribunal inspection	26 May 2020 (unaccompanied) as advised at the start of the hearing. I determined that a further site inspection was not required having regard to the extent and nature of photographic material presented through submissions and expert evidence.

<sup>1</sup> Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

<sup>2</sup> No permit is triggered under clause 43.02 and DDO3.



## **REASONS<sup>3</sup>**

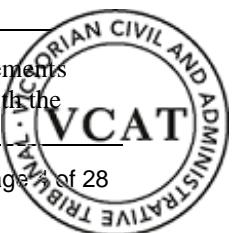
### **ABOUT THIS APPLICATION**

- 1 Mr Frank Pothitos & Ms Irene Strogylakis applied to the Council to develop the subject land with two dwellings. Following the Council's failure to grant a permit within the prescribed time, the permit applicant applied to the Tribunal seeking a permit.
- 2 In November 2019, Amendment C173 included the subject land in HO773, an interim control. At the start of the hearing, the applicant applied to amend the permit application to include the necessary permissions under clause 43.01. The amendment to the permit application was not opposed.

### **OVERVIEW OF PARTIES' POSITIONS**

- 3 The applicant relies on expert evidence in relation to planning and the building's structural condition in support of its application. Mr Chessell observes the recent introduction of HO773, long after the permit application for two dwellings was made to the Council. He submits the building on the subject land should be considered structurally unsound; it is a building that has reached the end of its useful life. Among his submissions are that while demolition would extinguish the heritage values of the place, this is acceptable given the extent of structural defects, and the nature, extent, cost and consequences of rectification works that would be required to address defects. In its written submission, the applicant contends that the heritage value of HO773 is not such that rectification of the nature and extent necessary is reasonable or fair. The replacement development will not sit within an identified heritage precinct nor affect the values of a wider heritage area. In the applicant's submission, the proposed development is an acceptable heritage outcome.
- 4 Further, the applicant submits that the proposed development is acceptable when assessed under clause 32.09 and clause 55, including with respect to the preferred character for this location. Minor changes recommended by its planning witness can be addressed by permit conditions.
- 5 The Council and respondents disagree. They submit the proposal fails to achieve an acceptable heritage outcome. Demolition of the building on the subject land would adversely affect the significance of the heritage place and is not adequately justified by the applicant. The Council and respondents submit the condition of the building is not unexpected given its age. The Council refers to disrepair and the building's condition as "*poor*" but it submits restoration and improvement can be achieved without unreasonable impact or cost. The Council relies on expert heritage evidence in support of its case. Respondents further contend the proposed dwellings lack design excellence and are disrespectful to the period building character of Grosvenor Street and Precinct C1.

<sup>3</sup> The submissions and evidence of the parties, supporting exhibits given at the hearing, and statements of grounds filed have all been considered in the determination of the proceeding. Consistent with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



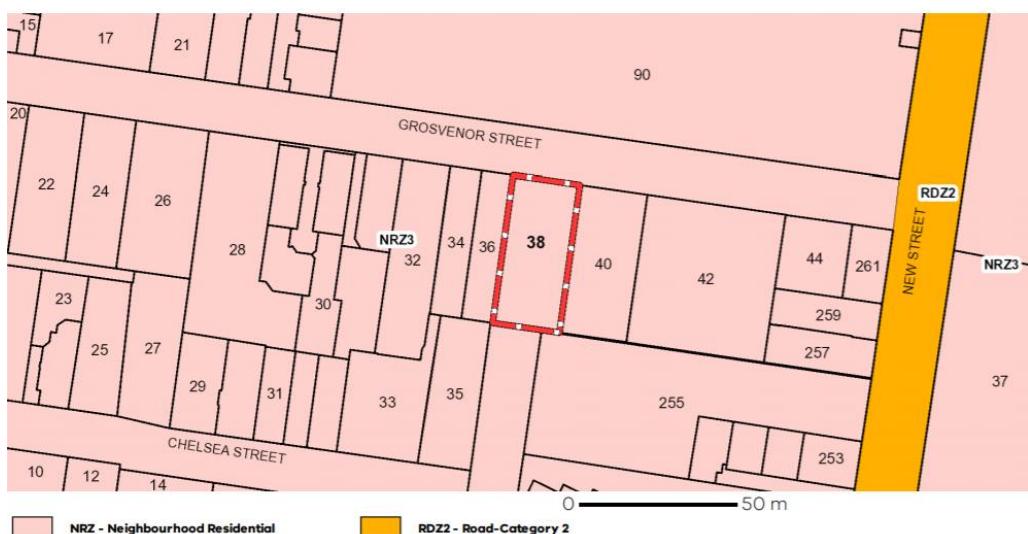
## KEY ISSUES

- 6 Having regard to the relevant matters under the scheme, and submissions before me, the central issue in this proceeding is whether demolition of the building on the subject land is acceptable. I must also assess whether the proposed development, comprising two dwellings and associated works, represents an acceptable response particularly to the relevant heritage provisions and neighbourhood character including with respect to the preferred character.

## PERMIT TRIGGERS

### Neighbourhood Residential Zone

- 7 As shown below,<sup>4</sup> the subject land is in NRZ3.



### Heritage Overlay

- 8 The subject land is in the individual HO773, shown below.<sup>5</sup> It is not part of a heritage precinct in the scheme.



<sup>4</sup> Extract from the planning property report.

<sup>5</sup> Ibid.

## **Summary of permissions required**

- 9 A planning permit is required:
- To construct two or more dwellings on a lot under clause 32.09-6.
  - Under clause 32.09-6, to construct a fence within 3 metres of the street associated with two or more dwellings and to construct a front fence that exceeds the maximum specified in clause 55.06-6.
  - To demolish or remove a building, and to construct a building or construct or carry out works under clause 43.01-1.

## **Decision-making framework**

- 10 The purpose and decision guidelines of clause 32.09, NRZ3 and clause 43.01 must be considered, as relevant. The decision guidelines in clause 65 must be considered. In addition to applicable State policy,<sup>6</sup> and the Municipal Strategic Statement,<sup>7</sup> relevant local policies include clauses 22.05 and 22.06. Other policies and assessment tools are also relevant including *Plan Melbourne 2017-2050* and the *BURRA Charter*.
- 11 I must decide whether to grant the permit applied for and, if so, what conditions should apply. Will the permit application produce an acceptable outcome having regard to the relevant policies and provisions in the scheme? Clause 71.02-3 requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.

## **HERITAGE COUNCIL CONSIDERATION**

- 12 The Heritage Council has considered two nominations for Esme Johnston House to be included on the Victorian Heritage Register. This process commenced in May 2019 and concluded when, on 14 May 2020, the Heritage Council determined that Esme Johnston House is not of State-level cultural heritage significance and would not be included on the Register.<sup>8</sup>

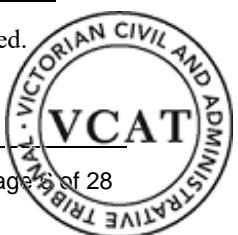
## **PLANNING SCHEME AMENDMENTS AND HERITAGE STUDIES & ASSESSMENTS**

- 13 The parties refer to previous heritage studies and proposed scheme amendments as part of their submissions. They include proposed Amendments C37 and C38 that were the subject of a report by an independent Panel in 2004. Multiple heritage studies have also been cited. Among them are several that are policy reference documents to clause 22.05-6 such as the 1986 *City of Brighton Urban Character and Conservation Study* [1986 Study], the 1999 *City of Bayside Heritage Review* (that form the basis of the 2004 amendments) [1999 Study] and the 2008 *City of Bayside Inter-war and Post-war Heritage Study* [2008 Study].

<sup>6</sup> The ‘Information’ section lists policies and provisions in the scheme that I have fully considered.

<sup>7</sup> Notable are clauses 21.02, 21.03 and 21.06 (including heritage policy at 21.06-5).

<sup>8</sup> I have been provided with a number of documents associated with this process, including the Executive Director’s assessment, and the decision dated 14 May 2020.



- 14 Amendment C173bays introduced HO773 in November 2019. The interim HO applying to the subject land expires in October 2020. A heritage assessment by Mr D Helms, dated October 2019, provided the basis of the Council's request to the Minister for Planning for the interim control.
- 15 A mapping error was corrected by a later Amendment on 6 March 2020.
- 16 Proposed Amendment C174bays seeks to introduce permanent heritage controls over No. 38 Grosvenor Street. It was exhibited and then re-exhibited in 2019-2020. Submissions are scheduled to be considered by an independent Panel at a hearing in July 2020.<sup>9</sup>

## **OTHER TRIBUNAL DECISIONS**

- 17 The Council and applicant refer to multiple Tribunal decisions in support of their positions as to how my consideration in this proceeding should be approached and the way in which, for example, phrases such as “structurally unsound”, may be considered.<sup>10</sup>
- 18 I have considered the decisions and understand how they have sought to be relied upon by the parties. However, it is important to understand the contexts within which the decisions themselves have been made. Further, of the cases referred to:
  - Only the decision in *Jansen*<sup>11</sup> relates to the Bayside Planning Scheme.
  - Policies in each scheme are not the same. For example, policy with respect to the demolition of buildings in the Port Phillip Planning Scheme cited in the decisions is not the same as currently found in the Bayside Planning Scheme.<sup>12</sup>
  - Many of the decisions were made more than 10-15 years ago and this may be relevant to an assessment and the weighting of relevant considerations based on the provisions and policies within the applicable scheme at the time of the decision.
  - There are many other variables. Among them are:
    - The building’s contribution to a heritage precinct and/or its location within an individual HO.

<sup>9</sup> Mr Chessell invited me to determine this application prior to the Panel hearing. I have determined this matter carefully and expeditiously mindful of the evident desire by parties for certainty about the outcome of this permit application.

<sup>10</sup> Such as *Harding v Port Phillip CC* [2002] VCAT 316, *Belvurn Partners and Associates Pty Ltd v Melbourne CC* [2005] VCAT 406, *The University of Melbourne v Minister for Planning* [2011] VCAT 469, *Con Tsourounakis Town Planning Services v Hepburn SC* [2008] VCAT 2554, *Catalano Family Pty Ltd v Port Phillip CC* [2003] VCAT 1739, *Jansen v Bayside CC* [2010] VCAT 492, *Kondos v Darebin CC and Ors* [2003] VCAT 645, *The Roman Catholic Trusts Corporation for the Diocese of Melbourne v Yarra CC* [2012] VCAT 1379, *Zanacorp Builders Pty Ltd v Port Phillip CC* [2001] VCAT 2107.

<sup>11</sup> *Jansen v Bayside CC* [2010] VCAT 492.

<sup>12</sup> For example, *Catalano Family Pty Ltd v Port Phillip CC* [2003] VCAT 1739, [39] – [55], which also refers to associated relevant policies in the Municipal Strategic Statement giving some guidance with respect to the weight to be given to urban consolidation objectives in heritage places.



- The identified level of significance of the building (for example, whether it is significant or contributory).
- The building's condition.
- The nature and extent of works including how these may impact on the integrity and intactness of the heritage place and the values for which the place is identified as having significance.
- Other factors that may have carried weight in a decision.

## **PERMISSIONS UNDER CLAUSE 43.01**

### **Scheme provisions and policies**

19 Demolition, buildings and works must be assessed under the provisions of clause 43.01.

20 The purpose of clause 43.01 includes:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

To conserve and enhance heritage places of natural or cultural significance.

To conserve and enhance those elements which contribute to the significance of heritage places.

To ensure that development does not adversely affect the significance of heritage places.

21 Decision guidelines in clause 43.01-8 include:

- The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable statement of significance (whether or not specified in the schedule to this overlay), heritage study and any applicable conservation policy.
- Any applicable heritage design guideline specified in the schedule to this overlay.
- Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
- Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

22 I recite the statement of significance referred to in submissions and evidence below.



- 23 There are no internal controls under clause 43.01 for HO773. External paint controls apply.
- 24 The key heritage policies are clauses 15.03, 21.06-5 and 22.05 of the scheme. I have considered these fully but do not recite them all. I note that the *Burra Charter* is a policy guideline in the scheme and is also cited (among other policy and reference documents) in clause 22.05. State and local policy are framed within the *Charter* and its principles.
- 25 Clause 22.05 (Heritage Policy) also includes:
- Clause 22.05-2 setting out objectives.
  - Clause 22.05-3 setting out policy, amongst other things, for matters to be taken into account when considering planning applications within the HO. These include taking into account the statement of significance when making decisions, and policies relating to demolition (22.05-3.2), front fences (22.05-3.8), car parking (22.05-3.9) and ancillary services (22.05-3.10).
  - Clause 22.05-5 defining various terms.
- 26 The demolition policy in clause 22.05-3.2 includes the following, as relevant to the circumstances of this permit application:

It is policy to:

Retain significant and contributory heritage buildings.

Discourage the demolition of significant and contributory heritage buildings unless it can be demonstrated that:

- the building is structurally unsound, and
- the original fabric of the building has deteriorated to such an extent that a substantial reconstruction would be required to make the building habitable, and
- the replacement building displays design excellence, and
- ....
- .....

- 27 Policy does not operate as a ‘rule’ or as a control does. It is not mandatory. The decision maker is required to exercise discretion. As clause 71.02-2 states:

A planning policy provides guidance for decision making and can help the community to understand how the responsible authority will consider a proposal. The consistent application of planning policy over time should achieve a desired outcome.

### **Significance of the heritage place**

- 28 HO713 previously applied to the subject land relating to a tree.
- 29 HO773 now applies to the subject land. The HO only applies to this site and as an interim control.

- 30 The subject land is not identified as part of a heritage precinct. Clause 22.05-5 defines a significant heritage building as a building that is identified as having heritage significance but is not located in a precinct. Consequently, submissions that the building is a gateway to nearby heritage precincts cannot carry weight.

### Statement of Significance

- 31 The citation prepared by Mr D Helms forms the basis of proposed Amendment C174bays. Mr Raworth states that he concurs with Mr Helm's statement.<sup>13</sup>
- 32 Mr Raworth considers that the building's architectural character and expression is the most obvious point of significance and the historical significance is a secondary matter. He states that "*the distinctive form and use of materiality contribute to the aesthetic qualities of the house (Criteria E)*". Mr Raworth's opinion continues that the:
- ...dwelling is a whimsical, idiosyncratic and 'vernacular' evocation of the Tudor, or Old English, revival architectures style, which was popular during the interwar period and is well represented in Bayside (ie is an important interwar style in Bayside) and also in Toorak in particular.
- 33 The statement of significance by Mr Helms is:

#### **What is Significant?**

The house at 38 Grosvenor Street, Brighton designed by Esme Johnston (who also acted as project manager for the works, procuring materials, engaging and supervising the various builders and tradesmen while undertaking some of the work herself) as her own residence and constructed in 1929 is significant. The house comprises a tall but otherwise simple, volume distinguished by its unusually steeply pitched roof creating tall pointed gables to either end and with two small dormer windows on each side. The external walls incorporate half-timbering on all four sides. The panels between are coarsely stuccoed with a trowelled pattern. Windows are typically timber-framed casements, with diamond-patterned leadlight to the lounge and dining room. The roof is clad in glazed modern roof tiles, which replaced the original timber shingles of the Johnston design. The chimney rises through all three levels and provides the focal point of the dwelling as viewed from the street. The front entry on the eastern side of the building adopts the form of a Tudor pointed arch.

Internally, the ground floor spaces are arranged around a large central stair hall. At ground floor level, much of the original detailing remains. Walls at ground floor level incorporate dark stained timber panelling to dado level and framing in the hall and stairs, and skirtings, window and door surrounds elsewhere and original wide floors. In the garden some early stone paving survives at the rear of the house. Non-original alterations and additions to the house, the

<sup>13</sup> He also acknowledges his role with respect to the forthcoming Panel hearing in relation to the Amendment on behalf of the Council.



outbuildings and the front fence do not contribute to the significance of the place.

### **How is it significant?**

The Esme Johnston House is of local historic and aesthetic significance to the City of Bayside.

### **Why is it significant?**

Historically, it is an example of a house designed by its owner as his or her own residence, which is a recurring theme in the City of Bayside, particularly from the early 1900s onwards. Typical of many of these houses the Esme Johnston House has an unusual and distinctive design, which in this case reflects her interest in (and love of) Old English architecture. In this house this is reflected in the use of authentic materials such as the half-timbering incorporated into the structure of the walls, the Tudor arch timber front door, internally by dark stained timber panelling to dado level and framing in the hall and stairs and the skirtings, window and door surrounds elsewhere and wide floorboards throughout, and in surviving landscape elements such as the stone paving. It demonstrates the emergence of women in the design and architecture fields prior to World War II. (Criterion A)

The Esme Johnston House has aesthetic significance as a house with distinctive form, materials and detailing inspired by the Tudor Revival style, which was popular during the interwar period. The authentic use of half-timbering with trowelled render to all the walls, and the very steeply pitched roof and prominent stepped chimney (which combine with the elevated siting to emphasise the building's height) contribute to the picturesque qualities of the house and make it a local landmark. (Criterion E)

- 34 The applicant did not present independent expert heritage evidence in this proceeding. It accepts that the building is subject to an interim HO. It submits that the forthcoming Panel hearing in relation to Amendment C174bays will be the opportunity for the significance of the building to be independently tested. Despite this, Mr Chessell made a number of comments over the course of the hearing about the prevalence of Inter-war and Tudor Revival dwellings in Bayside, the lack of identification of the existing building on the subject land as significant in earlier heritage studies and the fact that the Panel considering Amendments C37 and C38 recommended further work regarding the heritage significance of Inter-war properties but not specifically No. 38 Grosvenor Street.
- 35 Earlier heritage studies did not identify the building on the subject land as individually significant, for example:
  - The 1986 Study referred to it as contributory to the precinct values identified at that time.
  - The 1999 Study referred to it as contributory (Mr Raworth said that this was the only grading-type used).



- The Amendments C37 and C38 Panel in 2004 did not support the inclusion of the subject land in a heritage precinct having regard to the precinct's core values.
- 36 The parties variously referred to these studies. Among the submissions, reference was made to the emphasis in precinct statement/s of significance on, for example, the Victorian era.
- 37 The explanatory report for Amendment C174bays refers to previous studies and states in part:
- 38 Grosvenor Street, Brighton, has been identified as being of potential local historic and aesthetic significance to the City of Bayside in a heritage assessment prepared by David Helms Heritage Planning Pty Ltd. The amendment will apply the Heritage Overlay on an interim basis.
- The application of the Heritage Overlay will enable any proposed buildings and works to be assessed against the purpose and decision guidelines of the Heritage Overlay and the council's local heritage planning policy. Amendment C174bays proposes equivalent permanent controls and will provide public consultation on the proposed provisions.
- The interim control will expire on 30 October 2020.
- 38 The basis of the interim control is potential local historic and aesthetic significance identified in Mr Helm's assessment. Whether permanent heritage controls should be applied to the property is a matter for the planning authority and the subject of a forthcoming Panel hearing.
- 39 Evidence by Mr J Gard'ner to the Heritage Council is recorded in the Heritage Council's decision dated 14 May 2020 and is referred to by the applicant. This evidence was given in the context of an assessment as to whether the building should be included on the Victorian Heritage Register. The State-level criteria are not the same as those when considering the application of an HO.
- 40 I note that Mr Raworth expressed his disagreement with some matters set out in the Executive Director's report, particularly with respect to commentary about the Inter-war architectural style and period.
- 41 Mr Raworth also refers to the extent of brick Tudor Revival style dwellings in Bayside unlike the extant of building which has limited external brickwork, other than the chimney.
- 42 Respondents in this proceeding contend the subject building was excluded from the 2008 Study at Council's request when 70 places were identified for documentation. This is not, however, a submission that is verified and is not, in any event, a comment that carries weight in the context of the decision I must make in this case.



## **Findings with respect to the permit application for demolition**

### Extent of alterations and changes

43 Mr Raworth's evidence refers to non-original or modified building fabric which is based on evidence given on behalf of the land owners by Mr J Gard'ner to the Heritage Council hearing. Mr Raworth refers to Mr Gard'ner's summary of changes, below. Mr Raworth says these correspond with the matters he noted during his site inspection:<sup>14</sup>

- Reroofing of the original timber shingle roof cladding with clay plain tiles
- The addition of dome roof lights to the east and west slopes of the roof
- Application of a fiberglass mesh and bitumen coating to parts of the exterior of the house, particularly where there is evidence of weathering and timber decay
- Introduction of an additional window (in a style sympathetic to the house) to the east (sic, should be west) elevation to illuminate the main living room
- New windows, including an oriel bay window and door to the kitchen area on the east<sup>15</sup> elevation
- Addition of a window to the upper attic level on the south (rear) elevation
- Installation of window box air conditioning units
- Alterations to, and refitting of, the kitchen, laundry and bathroom
- Alterations to existing windows
- Removal of stair balustrade
- Installation of a bluestone hearth on the ground floor
- Alterations to the first floor layout
- Installation of an access stair to the second floor attic space and partial finishing of this space
- Erection of a carport attached to the east elevation of the house
- Erection of a double garage and garden shed.

44 Mr Raworth's evidence continues that:<sup>16</sup>

...it appears that the alterations to the first floor layout are relatively substantial, and include the introduction of non-original elements in terms of walls, doors, etc that have transformed the layout of this level. The changes undertaken within the rear portion of the attic are also substantial. While the ground floor retains some original elements and detailing, such as expressed timber beams to plaster ceilings and

<sup>14</sup> Mr Raworth's statement of evidence at paragraph 22.

<sup>15</sup> Mr Raworth states this should also refer to 'west'.

<sup>16</sup> Mr Raworth's statement of evidence at paragraph 23.



dark stained timber panelling to the dado level and framing in the hall and stairs, and skirtings, window and door surrounds elsewhere, the integrity of the interior to its 1930s character as a whole is not high.  
[Tribunal emphasis added]

- 45 Mr Lorich's evidence also includes a list of non-original items incorporated in the dwelling.<sup>17</sup> The matters identified with respect to the external fabric correlate with those set out above, such as with respect to the terracotta roof shingles, windows, carport and roof dormers. The evidence cites additional external elements such as the front fence and gates, driveway, retaining wall and rock work, external doors, some plumbing works and floor ventilation housings. Mr Lorich identifies various internal items, substantially overlapping with the list above. His oral evidence included that "*not a lot of the original structure remains*" other than the front door, chimney and floor.
- 46 Mrs Shepard also refers to some original garden fabric as remaining, more than the items cited in the statement of significance. She also refers to Ms Johnston's association with Edna Walling, elements of which are noted in the more detailed assessment by the Executive Director. The assessment states that Ms Johnston met Ms Walling after the house was designed, approved and constructed.<sup>18</sup>
- 47 Having regard to all of the material before me,<sup>19</sup> it is not contentious that the interior and exterior of the building have been altered. Modifications to the interior are not controlled under HO773. Most parties proceed on the external presentation and fabric as the relevant consideration in this case. Of the external fabric, roof tiling is the most significant matter notwithstanding the extent of fenestration that has been altered, repaired or otherwise modified (eg. windows).

#### Integrity and intactness

- 48 Having considered the extent of changes and alterations associated with the extant building, Mr Raworth describes the building as having "*substantial external integrity*" and a "*well executed example of the Old English mode with a good level of external integrity*". There is no contrary expert evidence about the integrity of the building in heritage terms.
- 49 Relying on Mr Raworth's evidence, the Council submits the dwelling's significance is not appreciably diminished by the changes made to the original heritage fabric. Ms Marcus submits that the biggest change is in the terracotta shingles (observing the roof originally comprised timber shingles). Based on Mr Raworth's evidence, she submits this change has a minor impact and one that has preserved the integrity of the building. Another change to the original heritage fabric to which Ms Marcus refers is the first floor window having been made larger (by a previous owner) with a consequential loss of the original window. The Council submits this

<sup>17</sup> Section 3.0 of Mr Lorich's statement of evidence at pages 2-3.

<sup>18</sup> Executive Director of Heritage Victoria, recommendation date 9 August 2019, page 12.

<sup>19</sup> Excluding some material that was withdrawn such as some photographs.

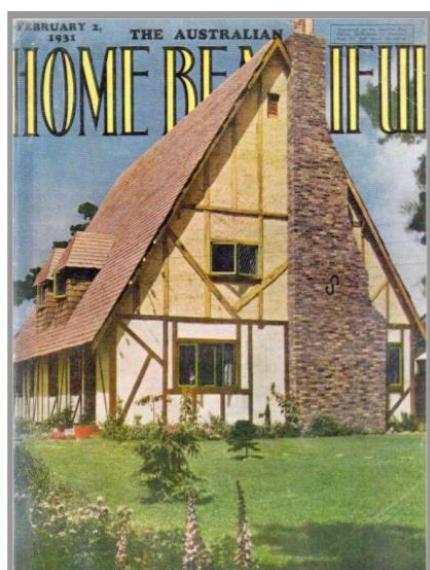


change is both a minor visual impact and a minor impact on the integrity. So too are the changes to the side elevation windows that are largely not evident from the street. Overall, the Council submits changes are not substantial and do not appreciably diminish the integrity of the place.

- 50 The building, seen from the street, is shown below.<sup>20</sup>



- 51 I accept the submissions and evidence for the Council with respect to the integrity of the exterior presentation of the building. The distinctive and identifiable architectural and aesthetic qualities are able to be appreciated and interpreted.
- 52 Unlike the situation in *Jansen*<sup>21</sup>, the expert heritage evidence is that the alterations have not resulted in the original character of the building being diminished.
- 53 Many parties refer to a February 1931 edition of “*Home Beautiful*”, the cover of which is shown below.<sup>22</sup>



<sup>20</sup> Mr Raworth's statement of evidence at page 7.

<sup>21</sup> *Jansen v Bayside CC* [2010] VCAT 492, [12].

<sup>22</sup> Ms Johnston worked for “*Home Beautiful*”. I understand that there is an associated feature story.

54 I note that the Executive Director's assessment states the image "*does not reflect the early presentation of the dwelling or the rustic intent of its designer and similarities in colour between the magazine cover and the building today should not be taken to reflect intactness*".<sup>23</sup> That has not been questioned in this proceeding. The parties have relied on the existing site conditions, as evident in the submissions and evidence presented at the hearing.

55 I note the Executive Director's comments with respect to integrity included:<sup>24</sup>

Notwithstanding the physical changes, the integrity of the place is high and the cultural heritage values of the place can be straightforwardly read in the extant fabric. The building continues to be used as a residential dwelling and this use is readily understood.

### Building condition and rectification/reconstruction works

#### Structurally unsound?

- 56 The applicant relies on the evidence of Mr Bendtsen<sup>25</sup> and Mr Lorich in support of the proposition that the dwelling should be considered structurally unsound having regard to the ordinary meaning of that term and the various approaches that have been adopted by the Tribunal in this respect over time.
- 57 The applicant's written submission sets out the following common elements which are said to emerge from Tribunal decisions acknowledged earlier at my paragraphs 17 and 18:
- First, the Tribunal's assessment should focus on the condition of the significant elements of the building's structure (such as a building's foundations, walls, floors and roof), as opposed to other cosmetic considerations;
  - Second, in order to be considered structurally unsound, the structural condition of the building must be materially compromised;
  - Third, the notion of being structurally unsound does not require that the building be in imminent risk of collapse or that it is not presently fit for occupation (though, clearly, either scenario would qualify), but should instead consider a longer timeframe (which in some cases was described at 10-15 years or possibly longer, and in others the 'medium term'); and
  - Fourth, the assessment should be undertaken having regard to the current structural condition of the building, and not on the basis of remediation works that may be undertaken in the future (although, as acknowledged

<sup>23</sup> Executive Director of Heritage Victoria, recommendation date 9 August 2019. The Executive Director also refers to the building condition as fair/good.

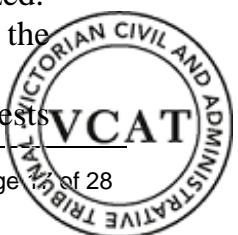
<sup>24</sup> Ibid, page 17.

<sup>25</sup> This includes an attachment by Dr C Haberfield providing a geotechnical assessment of the chimney.



below, this is a relevant factor in the context of whether it is reasonable for demolition to be permitted).

- 58 Mr Chessell submits the defects are not limited to an isolated component of the dwelling. They affect a number of elements of the building and are substantial in character and in consequence. In his submission, they are distinguished in this respect from defects of an insubstantial or cosmetic character. Mr Chessell submits that “*this is a building, to adopt the language of Mr Bendtsen, that has “reached the end of its useful life”.*”
- 59 Mr Bendtsen’s structural engineering evidence concludes that the structure has reached the “*end of life*”. At the hearing he explains that this means the work required to maintain the house and keep it stable are a significant cost and intervention. The phrase “*end of life*” assumes no intervention occurs. Mr Bendtsen has explained that this is different to the building being “*structurally unsound*” which would refer to structural inadequacy in the terms of the Building Code of Australia [BCA].
- 60 Mr Bendtsen’s opinion is that the chimney is the “*biggest concern*”. This is because of its rotation and lean. As he has only undertaken one inspection, and there has been no monitoring regime, Mr Bendtsen has been unable to comment on the rate and extent of the rotation. Mr Lorich said he noticed some minor cracking between his two site visits that indicated movement is occurring. This is not, however, quantified. Mr Lorich refers to elements of the building as dangerous. The chimney is described in this way; Mr Lorich says “*any movement is dangerous*”.
- 61 Mr Bendtsen states that it is possible to extend the life of the chimney with remedial works and repairs, but it is difficult to predict the extent of repair or how long the life of the structure could be extended. Mr Bendtsen states that monitoring over a short period of time, four to five years, is needed to determine the rate of increase. The chimney will need to be replaced and that will require external fabric to be removed.
- 62 Mr Bendtsen and Mr Lorich refer to cracking in the chimney bricks and the poor quality of the bricks. The half/diagonal timber frames evident in the building’s façades are not structural but some render damage could be expected with a programme of works.
- 63 Mr Lorich says the roof is a “*major problem*” although I have recorded Mr Bendtsen’s opinion that the outward lean and rotation of the chimney is the biggest concern requiring monitoring. Mr Bendtsen also identifies several concerns with the roof structure including the stability and condition of the timber members. The roof does not comply with modern codes and there are signs of damage due to the ingress of water. He says about one third of the roof structure was heavily modified in the 1970s where all the internal structural propping members were removed to make way for an open attic space. The rafters now span from the eaves to the ridge and are undersized. Mr Bendtsen indicates that there is a need to replace the roof tiles within the next couple of years and replace the roof cladding – effectively reconstructing it within the current frame. Given inter-linkages, he suggests



the chimney and roof works should be undertaken together although both Mr Bendtsen and Mr Lorich say it is possible for the works to proceed separately. Mr Lorich refers to the dangerous roof shingles that have fallen off and the deterioration of the second-hand bricks used in the chimney which are flaking and cracking. The roof shingles are affected by sea salt.

- 64 Mr Lorich's evidence is that the building does not comply with the BCA and is therefore unsafe. He identifies a range of non-compliant items with respect to building regulations including the staircase, steps and roofing.<sup>26</sup> These are among a range of defects requiring rectification,<sup>27</sup> some of which I have referred to above. The defects and works are scoped in Mr Lorich's evidence and summarised in the Council's submission as follows:<sup>28</sup>

Wood rot to 'many' of the perimeter timbers used in the walls.

Floor vents are not properly located to enable ventilation to the sub-floor space.

The concrete kitchen floor now partially blocking subfloor ventilation.

Dining room has evidence of termite attack.

Terra cotta roof shingles (observing they are not original) are failing and have delaminated.

Water leakage in the living room.

The brick chimney has an outward fall of 20mm over a 3cm length and cracking.

The ceiling internally over the fireplace has a small gap as the chimney and is slowing rotating outwards.

The ceiling has cracking evident due to the chimney movement.

In the roof space, none of the collar ties are bolted together to the rafters and wood rot and borer is evident in many of the underpurlin roof timbers.

- 65 Mr Lorich's evidence contains a scope of works to "*make good the premises & compliant with BCA*"<sup>29</sup> and associated pricing calculations.<sup>30</sup> As he estimates more than 50% of the original volume of the building would be altered, the items and calculations include bringing the entire building into conformity.<sup>31</sup>

- 66 Neither Mr Bendtsen or Mr Lorich could access the sub-floor at the ground level but both observed damage they consider to be associated with termite activity and dry rot. For reasons they explained, this is the case even

<sup>26</sup> Section 4.0 of Mr Lorich's statement of evidence at pages 3-4.

<sup>27</sup> Section 5.0 of Mr Lorich's statement of evidence at pages 2-3.

<sup>28</sup> At page 15 of the Council's submission.

<sup>29</sup> Section 5.0 of Mr Lorich's statement of evidence at pages 2-3.

<sup>30</sup> Section 5.0 of Mr Lorich's statement of evidence at Attachment C.

<sup>31</sup> Based on regulation 233 of the Victoria Building Regulations 2018.



though concrete piers are described as being associated with the floor construction in the article cited by Mr and Mrs Shepard.<sup>32</sup>

- 67 Further, neither Mr Bendtsen or Mr Lorich could precisely estimate the longevity of the building if no intervention occurs. Mr Lorich states that the roof would not collapse today but in the next five years will be a problem if nothing is done. The structural engineering evidence concurs with the view that water is affecting the timber members. Mr Bendtsen states that there is a need to augment the roof structure with supporting members and new roof tiles. As indicated earlier, the structural engineering evidence is that the chimney is the biggest concern and that it needs to be monitored over four to five years to understand the rate and extent of change. Neither expert witness indicates rectification/repair/reconstruction works are not feasible and cannot be undertaken; the tools and skills are available. There are, also, ways to stabilise the chimney without replacement.
- 68 In response to my questions, Mr Bendtsen stated:
- the building is “*not unsafe*” and “*not unsound*” today;
  - the chimney is safe;
  - the building is “*stable and safe*” and “*people can live in it today*”.
- 69 Mr Raworth states that it is “*not readily apparent that the building is structurally unsound or beyond repair*”. He understands that the building is habitable and sound. His evidence was prepared prior to his opportunity to read the expert evidence of Mr Lorich and Mr Bendtsen who address the building’s structural condition. Mr Raworth indicates that he was not in a position to contest or challenge that evidence but also observes that the type of information in the evidence would usually be the subject of testing. Mr Raworth agrees that should the Tribunal accept the evidence then it “*opens the door*” to the consideration of policy in clause 22.05-3.2 regarding demolition; that is, “*there are serious issues for the building*”.
- 70 The applicant has tendered a letter by a former resident of the subject land who, in 2019, refers to the building reaching the end of its life. Mrs Shepard submits the same person had offered different opinions in 1999, based on a letter she recites in part. I note the views expressed but have not given the opinions in the letters weight. They are not able to be tested and are not based on any independent technical or professional advice or expertise.
- 71 Having considered all of the submissions and evidence, including opinions expressed by expert witnesses through robust cross-examination, I accept the Council’s submission that the building is not in danger of collapse in the foreseeable future. The rate and extent of chimney movement is not documented and the evidence of the structural engineer is the chimney is safe.

<sup>32</sup>

The same “*Home Beautiful*” article is referenced in the report of the Executive Director of Heritage Victoria, recommendation date 9 August 2019, at page 11.

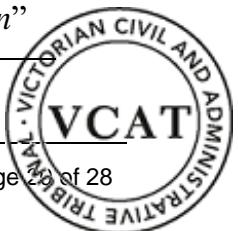


- 72 Access limitations are the consequence of controls that apply, so that the evidence is based on visual inspections at ground level for the exterior of the house and at ground, first floor and attic levels for the interior. With additional inspection and monitoring, the condition could be better, or worse, than set out in the material before me. Mr Bendtsen fairly states that much of the structure behind cladding, flooring and ceilings has not been able to be inspected. As Ms Marcus has indicated, there is no evidence of extreme dilapidation such as wide cracks and largely uneven floors.
- 73 Moreover, the expert evidence does not support the applicant's assertion the building is structurally unsound even taking into account that the engineer's meaning differs from the approach cited in several Tribunal decisions. I accept that there are structural deficiencies, parts of the building are dilapidated and aspects are in poor repair. However, the building is evidently habitable, and is occupied. Rot, insect attack and leaking roofs are common and although the roof issues and leaning and rotating chimney are more significant, on the evidence of the structural engineer, the building is stable and is habitable.
- 74 I am not persuaded to accept the applicant's submission that the condition of the building is such that it is fairly described as structurally unsound, notwithstanding there are some significant defects.

#### Rectification/reconstruction/restoration works

- 75 Mr Chessell submits that this is clearly a case in which the requisite works go far beyond what would be characterised as usual repair and maintenance. A very substantial intervention is required.
- 76 Works scoped and costed by Mr Lorich affect the interior of the building and external works (or works that would be visible externally). It is fair to say that the works are not a renovation (in the sense of renovating a kitchen and bathrooms) but it is also fair to say that they are to achieve a standard which, on Mr Lorich's evidence, is based on the building achieving compliance with the current BCA. This presumes that the majority of the building volume would be replaced and therefore the whole of the building would need to be brought into compliance with the BCA.<sup>33</sup> I have referred to these earlier.
- 77 The major items are reconstruction of the roof (close to \$160,000, one quarter of which is required for scaffold hire given the high and steep roof form), reconstruction of the chimney (\$22,850), replacement of external windows (\$29,920) and external timbers/walls (\$21,830). Mr Chessell submits that two thirds of the described items relate to the structure and external fabric. Other works are required as a direct result of the need to address the structural stability of the house.
- 78 In cross-examination by Mr Chessell, Mr Raworth refers to the rectification works to the roof and chimney as being "*fairly substantial reconstruction*"

<sup>33</sup> Regulation 233, Victoria Building Regulations 2018. The Regulation sets out where partial compliance may be allowed.

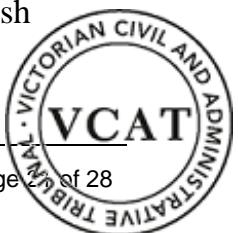


and “*quite a lot of works to the exterior*”. They are not minor works. Mr Raworth refers to the roof and chimney as the substantial reconstruction works. However, Mr Raworth also states that the works are not atypical for a 90 year old building of this scale in this location.

- 79 While there are multiple ways in which works could be carried out, as evident in some of the answers given in cross-examination of Mr Lorich and Mr Bentsen, the scope of works and associated pricing have not been challenged through any contrary evidence.
- 80 I note the high cost of the roof cladding is associated with tiles that are not original fabric. It is apparent that works to the roof would not alter its substantial presence as a steeply pitched form. The chimney could be rebuilt in all-new bricks or with some older second-hand or re-used bricks. Decorative timbers can be replaced and stucco patched.

#### Impacts of works on the building and heritage values of the place

- 81 The parties agree that the impact of works on the heritage fabric of the building must be taken into account in my decision.
- 82 The applicant states that on the evidence of Mr Lorich and Mr Bendtsen, substantial components of the heritage fabric would need to be removed and replaced in order to make the structural components of the building sound. These submissions relate to the roof and chimney in particular, with additional external items including windows.
- 83 Mr Chessell submits that the substantial and costly works will impact on the heritage value of the building. Emphasis is given to the extent to which external fabric would be required to be removed, replaced or reconstructed as a consequence of the degraded condition. He submits that the significant reconstruction will result in replication and diminishment of the building’s heritage values.
- 84 Mr Chessell submits that Mr Raworth’s evidence did not appreciate the extent of new material required to the façade, such as the need for new bricks. However, I note Mr Lorich’s evidence that even though a builder would probably not wish to re-use bricks, noting the second-hand bricks have cracking and flaking, some re-use may be possible. He also noted that second-hand bricks, externally sourced, could also be used.
- 85 The Council submits the combination of necessary repairs, restoration and reconstruction of the dwelling would not unreasonably erode the integrity and significance of the dwelling. This is particularly the case for the roof which has already been replaced with the terracotta shingles. It is also the case for the chimney subject to the chimney’s restoration and reconstruction managed by an appropriately qualified heritage expert.
- 86 Mr Raworth’s evidence is that the required works, whether reconstruction or restoration or repair, will not change the building’s integrity or diminish the overall heritage value of the heritage place.



- 87 I have considered the extent to which works are external and will be visible from the public realm compared with internal modifications. It is understood that any works programme would need to be approved and one might usually expect a heritage expert to be involved at a detailed level. While works are indicated to be required to external fabric, I accept Mr Raworth's evidence that the building's integrity and aesthetic value would remain.

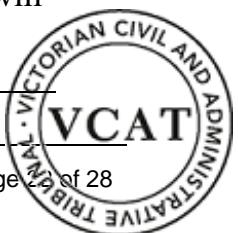
#### Reasonableness and costs

- 88 As already indicated, pricing calculations are set out in Mr Lorich's evidence. Mr Chessell submits that costs are not determinative but are a relevant consideration. He submits it is relevant that the cost of works would cause hardship to the owners of the land who purchased the property before a heritage control applied. He emphasises that the costs are not associated with a renovation of the property but to rectify the building to meet the relevant code.
- 89 The applicant submits that the dwelling demonstrates elements of the Tudor Revival style (and has been afforded interim heritage protection on this basis) but the building should not be taken to possess a special or elevated level of local heritage significance in this respect. He refers to the Executive Director's comments in the context of its report to the Heritage Council as follows:<sup>30</sup>

The house itself adopts an unusual Tudor revival style to an unorthodox form arising from a singular approach by an untrained designer. It is not one of a small number of buildings remaining that demonstrates the Tudor Revival Style nor is it an exceptional example of the mode. Tudor Revival buildings survive in large numbers throughout suburban Melbourne. Apart from its steeply pitched roof, its design features were typical rather than extraordinary. The unusual steeply-pitched, timber-shingled roof was not widely replicated.

- 90 Mr Chessell continues that this is:<sup>34</sup>
- not to suggest that the Tribunal should conduct its assessment on the basis that the building does not warrant heritage protection. It is to recognise, however, that the heritage value of the place is not such that rectification of the nature and extent necessary should be considered reasonable.
- 91 The Council submits that the costs are not prohibitive and are reasonable in the circumstances. It relies on Mr Raworth's evidence that, in his experience, the cost of works is not unusual for a building of this style and scale in Bayside. Mr Raworth's opinion includes that although more substantive costs relate to the roof, in his experience the overall costs are not extraordinary.
- 92 There is no evidence to enable a conclusion to be reached that hardship will result. If the scope of Mr Lorich's assessment is accepted, there is no

<sup>34</sup> Applicant's written submission at paragraphs 44 and 45.



evidence that the extent of costs is unreasonable or disproportionate to other factors or facts. The chimney, which Mr Lorich says is the greatest concern and more unusual than often seen, could be re-built at a cost of around \$22,850. Reconstruction of the roof is the largest cost, on the presumption of works set out by Mr Lorich. Those works include \$40,000 for scaffold and \$75,000 for slate. This is some 72% of the total re-roofing cost in the pricing schedule. The scope at section 7.0 on page 5 of the evidence cites other options such as slate-look and colourbond metal cladding but these do not appear in the pricing calculations.<sup>35</sup>

### Response to demolition policy

- 93 Decision guidelines in clause 43.01 include whether the demolition or removal will adversely affect the significance of the heritage place.
- 94 It is policy in clause 22.05-3.2 to retain significant and contributory heritage buildings.
- 95 It is also policy in clause 22.05-3.2 to discourage the demolition of significant and contributory heritage buildings unless specified circumstances can be demonstrated, as cited earlier. My conclusion with respect to the relevant matters are:

Part of Clause 22.05-3.2 policy (factors relevant in this case)	Tribunal conclusion
– the building is structurally unsound, and	<p>The expert evidence does not support a conclusion that the building is structurally unsound, even though there are identified defects.</p> <p>Having regard to the way in which some Tribunal decisions have addressed this matter, I find that the building is not structurally unsound for the purposes of this clause.</p>
– the original fabric of the building has deteriorated to such an extent that a substantial reconstruction would be required to make the building habitable, and	<p>Works associated with the roof and chimney, as well as some timbers, are the most substantial required based on current information.</p> <p>However, the expert evidence does not support a conclusion that the original fabric of the building has deteriorated to such an extent that a substantial reconstruction would be required to make the building habitable – existing defects do not prevent the building from being inhabited and it is currently inhabited.</p>
– the replacement building displays design excellence, and...	<p>Demolition extinguishes the values of the heritage place. The replacement does not form part of a heritage precinct so as to influence the heritage values of a broader area. The replacement building is acceptable.</p>

<sup>35</sup>

Mr Raworth did not comment on the various roofing treatments from a heritage perspective.

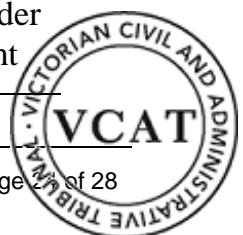


- 96 I find that the circumstances of this building do not accord with the policy criteria that seek to retain significant buildings and discourage the demolition of a significant building unless all of the above can be demonstrated.
- 97 But that does not automatically mean that the permit application is unacceptable just as meeting all of the criteria does not presume a permit must or should issue. My finding does, however, indicate that there is not policy support under clause 22.05-3.2 for demolition of the significant building.

Is demolition acceptable?

- 98 The parties agree that demolition of the existing building will extinguish the significance of the place. The historical and aesthetic interest of the place will be entirely lost.
- 99 In the applicant's submission, the Tribunal should conclude it is reasonable to allow demolition given the building's poor condition even though that would extinguish the value of the heritage place.
- 100 I am not persuaded to agree. The only structural engineering evidence is that the building is stable, safe and habitable. I accept submissions for the Council, supported by respondents, that the condition of the building does not justify its demolition and that works required to address deterioration and structural defects can be undertaken in a manner that will not compromise the integrity and aesthetic values that have been identified to date.
- 101 There is no material before me to enable a conclusion to be reached that the building cannot be monitored, as recommended in evidence, and works undertaken as required to ensure the stability and integrity of the structure.
- 102 The costs are not small but some significant costs can be expected to sustain this building that is 90+ years in age with the unusual features it demonstrates. Notable are the very high, steep, roof and form and scale of the chimney.
- 103 Submissions about hardship have not been supported by any evidence, although I have considered the fact that HO773 has been applied only recently and there is no indication that the owners of the property have acted improperly. These matters are relevant to submissions about 'fairness' and 'reasonableness'.
- 104 With respect to the relevant permissions triggered under clause 43.01, I have considered whether these and any other factors and policy considerations should persuade me to find that the demolition is acceptable. The Court of Appeal in *1045 Burke Road Pty Ltd*<sup>36</sup> held that in deciding whether a permit should be granted to demolish or modify a building under the HO, considerations of a non-heritage nature can be taken into account

<sup>36</sup> *Boroondara CC v 1045 Burke Road Pty Ltd [2015] VSCA 27.*



provided that they are relevant matters under the provisions of the *Planning and Environment Act 1987* or the purposes, objectives or decision guidelines relating to, or incorporated into, the HO.<sup>37</sup>

- 105 In the current case, other than the provision of two dwellings on a lot in a well-serviced location, there are few counter-balancing factors. Mr Chessell's submission identifies the broader planning merits but, using his words, Mr Chessell "does not say that the modest community benefit of two units outweighs the loss of the building". Mr Chessell submits demolition is justified because of the building's structural condition and what is reasonable in this case. I have not been persuaded to accept these submissions.
- 106 In *Icon Co*,<sup>38</sup> the Tribunal said that there must be something about the circumstances of the site, the proposal or the strength of the broader policy framework that makes it relevant to give more weight to non-heritage objectives when exercising discretion under the HO. I have found that demolition of the existing building is not acceptable when assessed under the relevant provisions of clause 43.01, including having taken into account the building's structural condition and the nature and extent of works the applicant says are required. I am not persuaded that there are other related considerations, including those of a non-heritage nature, to reach the conclusion that demolition is acceptable.

### **Findings with respect to proposed development and works**

- 107 The Council does not identify specific issues with respect to the proposed replacement building/dwellings.
- 108 Mr Raworth states demolition of the existing house would effectively nullify any heritage considerations. He observes that the dwellings further west along Grosvenor Street are located within the Grosvenor Estate Precinct (HO656). Brighton Grammar School is opposite the subject land and has a campus-specific HO547. Buildings to the immediate east (No. 40 Grosvenor Street) and west (Nos. 36 and 34 Grosvenor) are, in Mr Raworth's opinion, of limited or no heritage interest and are not subject to a HO. In Mr Raworth's view, there are no heritage interfaces that would need to be addressed by development on the subject land.
- 109 Mr Raworth states if demolition were to be supported from a heritage perspective, future development on the site would essentially become an urban design and broader planning issue rather than a heritage issue. He states that the subject land is located toward the eastern end of Grosvenor Street, which has a more mixed character than the streetscape further west, which is part of a heritage precinct. A pair of contemporary townhouses in this location could be an acceptable outcome.

<sup>37</sup> Ibid, at [162].

<sup>38</sup> *Icon Co (Jessamine Avenue) Land Pty Ltd v Stonnington City Council (Red Dot)* [2018] VCAT 1134, [72].



110 Mr Raworth's evidence picks up concerns by respondents that the locality is predominantly period dwellings and the proposal is at odds with these important heritage precincts. However, I accept Mr Raworth's evidence analysis, based on the precinct boundaries and site-specific nature of HO773. The proposed buildings and works are acceptable pursuant to clause 43.01.

## PERMISSIONS UNDER CLAUSE 32.09

### Scheme provisions and policies

111 The proposed dwellings must be assessed under the provisions of clause 32.09. The purpose of clause 32.09 includes:

To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.

112 Decision guidelines in clause 32.09-13 require consideration of (amongst other things) the objectives, standards and decision guidelines in clause 55.

113 The mandatory requirements of clause 32.09 are met, such as with respect to building height and garden areas.

114 NRZ3 is entitled "*Minimal Residential Growth Area*". There are no specified objectives or decision guidelines in the schedule. Varied clause 55 standards in NRZ are B6, B8, B17 and B32.

115 Clause 22.06 sets out the neighbourhood character policy. It includes objectives (clause 22.06-2) and policies when exercising discretion (clause 22.06-3). The subject land is within Neighbourhood Character Precinct C1. The preferred character statement is:

The mix of dwelling styles, including a substantial presence of pre WW2 dwellings, sit within spacious gardens and do not dominate or overwhelm the streetscape. Garden plantings, and well-articulated façades and roof forms, assist in minimising the dominance of buildings from within the street space, as well as providing visual interest. Front setbacks allow planting of substantial trees and shrubs and side setbacks on both sides maintain a sense of spaciousness in the area. Trees are a mixture of exotic and natives, with an increasing frequency of traditional coastal and indigenous species, strengthening the visual connection of the area with the coast. Open style front fences retain an ability to view buildings from the street. Buildings fronting the foreshore reflect their setting and provide a visually attractive built form interface with the reserve.

116 Precinct guidelines contain objectives as well as design response and "*Avoid*" statements which I have fully considered. I do not recite these. They have been addressed in the planning evidence and in some submissions.



- 117 In addition to broad design and built form policies, neighbourhood character policies are included in clauses 15.01-5S and 21.06. I have considered these fully but do not recite them all.

### **Overview of submissions and evidence**

- 118 The Council has not opposed the permit application for reasons relating to neighbourhood character or failure to meet specific clause 55 standards or objectives.
- 119 Respondents have a different view, as alluded to above. They emphasise heritage buildings in the immediate and wider area. They consider the design response does not accord with the preferred character outcomes mindful that the character area is larger than the site's immediate setting. They also challenge the examples used as reference points for the design response.
- 120 The applicant relies on the evidence of Mr McBride-Burgess. His opinion is largely consistent with the Council officer's assessment which pre-dated the introduction of the interim HO and recommended a permit be granted. He recommends a number of changes to the development, that the applicant accepts and submits can be addressed by permit conditions.

### **Findings and conclusions**

- 121 I accept submissions that there are many period dwellings within the vicinity of the subject land and wider Precinct C1. However, I have not been persuaded that the proposed dwellings depart from or are inconsistent with the mixed character cited as the preferred character for Precinct C1.
- 122 The proposal has a high level of compliance with the numerical standards in clause 55 as they relate to neighbourhood character considerations. It does, however, vary from several standards including the front setback (Standard B6), side and rear setbacks (Standard B17) and the height of the front fence (Standard B32). The non-compliances are identified in the evidence of Mr McBride-Burgess. I accept his evidence that the relevant objectives are met (clauses 55.03-1, 55.04-1 and 55.06-2).
- 123 I accept the expert planning evidence, and Council officer's assessment, that the proposal would produce an acceptable outcome when assessed under the neighbourhood character provisions and policies, and other objectives of clause 55, in the scheme.
- 124 There are no submissions that the development would have unreasonable off-site amenity impacts, such as with respect to overshadowing and overlooking. The proposed development is also acceptable in relation to these matters based on compliance with relevant clause standards (such as B21 and B22).

### **CONCLUSION**

- 125 For the above reasons, the permit application for demolition of the building on the subject land assessed under clause 43.01 and applicable policies is



refused. Even though the proposed replacement development is acceptable subject to permit conditions, and two dwellings offer a minor benefit to urban consolidation, these conclusions do not override my finding that demolition is unacceptable. The permit application is refused for this reason.

**Margaret Baird**  
**Senior Member**

