

DECISIONS UNDER THE HERITAGE OVERLAY

DEMOLITION, BUILDINGS AND WORKS

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FOREWORD

This report has been created by Kellehers Australia. It brings together our ongoing analysis of VCAT decision-making within the Heritage Overlay with particular focus on demolition, building and works.

It is designed to introduce individuals with limited experience to the area of planning law, and at the same time develop more complex themes.

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1.0 EXECUTIVE SUMMARY

Policy

There is a pattern when VCAT determines to grant a permit to read down local heritage policy. When refusing a permit it tends to adhere to local heritage policy. The application of local policy to permit decision making is itself a very complex area. The approach remains somewhat inconsistent. The conundrum for decision makers is the extent to which they should defer to policy in the exercise of discretion.

The issue is well expressed in The Final Report on New Format Planning Schemes:

“[U]nless policies are carefully monitored, they have the potential to undermine the intent of the planning reform program by becoming de facto zone controls. The emphasis will shift from what is permitted in the VPP zone to what is permitted under the Local Policy. They will be used as a prescriptive measure rather than as a means to establish a performance base. There will be the temptation to rely on local policies as proscribing the extent of discretion, in the interest of “certainty”, rather than always measuring a proposal against objectives. Alternatively, there will be the temptation to cast objectives themselves as prescriptions....

On the other hand, unless local policies are ascribed a legitimate role in guiding the exercise of discretion over use or development, there is little point in having them.”¹

Significance

A building’s contributory heritage significance must be considered under the Heritage Overlay. Buildings which contribute considerably to the heritage significance of the area have sometimes been preserved for their contributory heritage value alone. The threshold between degree of contributory significance and retention/development/demolition of the existing building, is unclear.

Studies

Reference documents, heritage studies and conservation policies play an important role in decision-making. However, due to the plethora of information available, decision makers should be wary of the importance they attach to those documents not incorporated into

¹Gibson, H. Panel Report, *Final Report New Format Planning Schemes*, Planning Panels Victoria, April 1999 at 10 and 11 <<http://www.doi.vic.gov.au>> (18 December 2002)

the relevant Planning Scheme.

Proposed Building

There is a close relationship between the proposed building, its bulk, form and appearance, local policy and the success/failure of permit applications. Rejections of applications on the grounds of bulk, form or appearance are less frequent than rejections on heritage significance grounds, but they are not uncommon. Proposals failing to 'fit in' with the heritage place are unlikely to succeed.

Heritage consideration of proposals in relation to adjacent buildings are even less influential than considerations relevant to the heritage place itself- other planning considerations obviously are crucial. The successful application will generally be of individual high quality design but will also endeavour to accommodate, work with and compliment the streetscape and neighbourhood amenity.

Demolition

There is a close link between the level of significance and the success of demolition applications. Demolition applications can succeed where a building has heritage significance. However, the likelihood of success is dramatically reduced with increased heritage significance. Consequently, factors that influence significance are extremely relevant to demolition applications. Local heritage policy concerning demolition is also be relevant. That said, VCAT always balances the loss of cultural heritage significance upon demolition against other favourable planning aspects of the proposal.

2.0 INTRODUCTION

Planning is not an exact science. It is underpinned by mechanisms designed to maximise flexibility. However too much flexibility can make decision-making appear arbitrary. There has been concern that the level of flexibility currently existing in Victoria's Planning system might outweigh a desirable degree of certainty.² With particular focus on the Heritage Overlay, this report is an overview of VCAT decision-making within the Decision Guidelines of the Heritage Overlay. As well as seeking to highlight trends, it points to areas of VCAT emphasis.

²Note 1 at 3

3.0 BACKGROUND

The Heritage Overlay

Standard Overlay requirements of Victorian Municipal Planning Schemes affect subdivisions, buildings and works. They operate in addition to the zone requirements and generally concern environmental, landscape, heritage, built form and land/site management issues.³ Heritage Overlays are found in the Planning Schemes for all of Victoria's 78 Councils.⁴

Victorian Civil and Administrative Appeals Tribunal (VCAT)

Local Government deals with about 45,000 planning permit applications each year.⁵ Objections are received in about 33 per cent of these applications.⁶ About 2,700 (or 6 %) of the applications made to Local Government go to VCAT on review.⁷ A number of these applications are affected by a Heritage Overlay. This year over 400 Heritage Overlay affected applications have been dealt with by VCAT.

³Victoria Planning Provisions under section "User Guide," Anstat 16 August 1999 at 2

⁴Towong is the only municipality with no sites individually listed as being of local significance

⁵Whitney, D. *Reference Group On Decision-making processes*, Report 1 - Using and Interpreting Local Policy, Sept 2002 at 10

⁶Note 5 at 10

⁷Note 5 at 11

3.1 DECISION GUIDELINES

When deciding permit applications within a Heritage Overlay, 11 Decision Guidelines apply. This report looks at the six Guidelines most relied upon by VCAT in reported and unreported decisions. The report looks broadly at the exercise of discretion regarding demolition, building and works.⁸

43.01-5 Decision guidelines

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable heritage study and any applicable conservation policy.
- 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.
- Whether the proposed subdivision or consolidation will adversely affect the significance of the heritage place.
- Whether the proposed subdivision or consolidation may result in development which will adversely affect the significance, character or appearance of the heritage place.
- Whether the proposed sign will adversely affect the significance, character or appearance of the heritage place.
- Whether the pruning, lopping or development will adversely affect the health, appearance or significance of the tree.

⁸It does not examine subdivision, signage, or infrastructure works, nor do we look at conditions imposed on permit approvals.

4.0 CASE ANALYSIS

4.1 Guideline 1

The State Planning Policy Framework and the Local Planning Policy Framework, including the MSS and local planning policies.

The Planning Policy Framework is comprised of State and Local policies. It is necessary to explain this in greater detail.

What is State Planning Policy?

State Planning Policy appears consistently at Cl 11 - 19 of each Planning Scheme. Cl 15.11 contains State Heritage Policy. Objectives of the policy are to assist in the conservation of places of natural, environmental, aesthetic, historic, cultural, scientific or social significance, as well as maintaining and enhancing Victoria's image and making a contribution to the economic and cultural growth of the State.

In *Port Phillip v A & M Reis*⁹ the Tribunal upheld Port Phillip City Council's decision to refuse a permit to demolish the existing house at the subject land and construct two new double-storey dwellings. The Tribunal provided commentary on the content of State policy:

"[The objectives of the State heritage policy are] based on the Burra Charter¹⁰ ...[I]t appears to me to have been drawn so as to extend beyond the "cultural significance" addressed in the Charter, to add both elements of natural and environmental significance which are caught neither by the "aesthetic" nor "scientific" aspects of cultural significance, and also an extra potential class of "other special value" which will cover matters not otherwise included, but which may also have an enduring value that should be conserved."¹¹

What is Local Planning Policy?

Local planning policy divides into the Municipal Strategic Statement (MSS) and various local planning policies.

⁹ [2001] VCAT 489 (31 March 2001)

¹⁰ "The Burra Charter provides guidance for the conservation and management of places of cultural significance (cultural heritage places), and is based on the knowledge and experience of Australia ICOMOS members." From the preamble to the Burra Charter <<http://www.icomos.org/australia/burra.html>> (12 December 2002)

¹¹ Note 9 at para 58

Municipal Strategic Statement (MSS)

Each Planning Scheme contains a unique MSS. The MSS is a strategic vision for the municipality.¹² In *Harding v Port Phillip City Council*,¹³ the Tribunal highlighted the following heritage related components of the Port Phillip MSS:

“Foster design processes which emphasize the value of Port Phillip’s Heritage Places and the elements which define local urban character.

Ensure that all significant Heritage Places receive adequate protection from demolition or unsympathetic alteration.

Restore and recycle heritage buildings and encourage new development which contributes positively to the heritage value and local urban character of the place and its natural systems.”¹⁴

Local Planning Policies (LPPs)

Different Municipalities have different LPPs, which may include local heritage policies. For example the Melbourne Planning Scheme contains two local heritage policies: “Heritage Places within the Capital City Zone”¹⁵ and “Heritage Places Outside the Capital City Zone.”¹⁶

*Centrum Architects Pty Ltd v Melbourne City Council*¹⁷ provides a good example of a decision heavily influenced by local policies, especially local heritage policy. *Centrum* was an appeal from Melbourne City Council’s decision refusing a permit to demolish part of the rear wing of an A grade Victorian terrace house and construct a new two storey addition. The Tribunal was influenced by the State and local heritage policies, as well as local demolition policies. The local demolition policy stated:

“Demolishing or removing original parts of buildings, as well as complete buildings will not normally be permitted in the case of ‘A’ and ‘B’, the front part of ‘C’ and many ‘D’ graded buildings. The front part of a building is generally considered to be the front two

¹²Note 5 at 10

¹³[2002] VCAT 416 (25 March 2002)

¹⁴Note 13 at para 6

¹⁵Melbourne Planning Scheme at 22.04

¹⁶Melbourne Planning Scheme at 22.05

¹⁷ [2001] VCAT 2050 (5 October 2001) reported : 9 VPR 260

rooms and deck.”¹⁸

In light of the clear application of that policy to the subject building, the Tribunal had little choice but to uphold the decision of the Responsible Authority and deny the permit.

Opposing positions comparing the role policy plays are *Icon v Port Phillip & Roberts*¹⁹ and *Williams S v Melbourne City Council*.²⁰

In *Icon*, the Tribunal gave great weight to the local heritage policy, upholding Port Phillip City Council’s decision to refuse a permit:

“[G]reater weight [should be] given to heritage policies in this application - given their less generic nature, the strength and frequency of the expression of the policies and objectives, and the explicit qualification of the urban consolidation policies to recognise areas of heritage value.”²¹

Williams read down the application of local heritage policy and ordered a demolition permit be issued:

“I do not consider this Tribunal to be inextricably bound by the Council policy... Policy must be taken as only one of several matters”²²

¹⁸cited in *Centrum* at para 17

¹⁹ [2000] VCAT 1351 (30 June 2000) at 73

²⁰ [2000] VCAT 1474 (31 July 2000)

²¹Note 19 at para 73

²²Note 20 at paras 56 and 60

Policy - Summary

What emerges therefore is a pattern of granting permits by reading down local heritage policy and denying permits by adhering to local heritage policy.

These examples provide insight into the layers of Victoria's Planning Policy framework. Policy is itself a very complex area, and receives considerable attention. However, the approach remains somewhat inconsistent. The conundrum for decision makers is the extent to which they should defer to policy in the exercise of discretion.

The conundrum is arguably inherent in an activity that calls for the exercise of discretion within certain parameters. The issue is well expressed in *The Final Report on New Format Planning Schemes*:

“[U]nless policies are carefully monitored, they have the potential to undermine the intent of the planning reform program by becoming de facto zone controls. The emphasis will shift from what is permitted in the VPP zone to what is permitted under the Local Policy. They will be used as a prescriptive measure rather than as a means to establish a performance base. There will be the temptation to rely on local policies as proscribing the extent of discretion, in the interest of “certainty”, rather than always measuring a proposal against objectives. Alternatively, there will be the temptation to cast objectives themselves as prescriptions....

On the other hand, unless local policies are ascribed a legitimate role in guiding the exercise of discretion over use or development, there is little point in having them.”²³

²³Note 1 at 10 and 11

4.2 Guideline 2

The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.

This Guideline is the first of a number that refer to ‘significance.’ Heritage significance is sometimes quantified in the Council Policy with a grading. In *Warraglen Developments PL v Boroondara City Council*²⁴ the Camberwell Conservation Study grading system was explained. This explanation provides a typical template for the grading structure:

*A= State importance; B= Regional importance; C= Local importance;
D= Representative streetscape or contributory.*²⁵

Table 1: Significance gradings

Whilst there are no formal criteria for the Tribunal to apply in assessing the significance of a heritage place, the Heritage Council criteria for assessing State significance are helpful to separate the factors in determinations of significance:

- *Its importance in the course, or pattern, of Victoria’s cultural history*
- *Its possession of uncommon, rare or endangered aspects of Victorian cultural history*
- *Its potential to yield information that will contribute to an understanding of Victoria’s cultural history*
- *Its importance in demonstrating the principal characteristics of a class of Victoria’s cultural places*
- *Its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group*
- *Its importance in demonstrating a high degree of creative or technical achievement at a particular period*
- *Its strong or special associations with a particular community or cultural group for social, cultural or spiritual reasons*
- *Its special association with the life or works of a person or group of persons, of importance in Victoria’s cultural history.*²⁶

Table 2: Heritage Council Assessment Criteria

The purposes of the Heritage Overlay apply to *heritage places*.²⁷ Importantly this means that

²⁴[2000] VCAT 1914 reported : 6 VPR 148

²⁵Note 24 at para 7

²⁶“Criteria for assessment of cultural heritage significance,” Heritage Victoria

²⁷All Planning Schemes: Clause 43.01

the Overlay controls apply equally to those places located within an area control and those places subject to an individual overlay.

Assessing significance- the Schedule

*Harding*²⁸ concerned a place that was individually listed place in the Schedule to the Overlay and identified in the Heritage study as a “significant heritage place.” Council argued VCAT must find the building significant. Otherwise it was said VCAT would displace the study, which was incorporated into the Planning Scheme and this would be a de facto Planning Scheme amendment.

VCAT rejected this argument as “tantamount to saying...[it]... has no discretion.”²⁹ Such an argument would provide a greater level of protection than that enjoyed by buildings contained on the Victorian Heritage Register.³⁰

The fact that there are varying degrees of heritage significance is a proposition that is beyond doubt. “Significance” is not “black and white” - if it were then the decisions guidelines would simply not make sense.³¹ Heritage practice, decided cases and common sense confirm this. In *Harding*, VCAT took the view that the provisions of the Planning Scheme made it impossible to determine that the building had no significance. That said, both Council and VCAT must “establish just how significant that building is in heritage terms. It may well be that it has a very high level of significance, a high level of significance, a moderate level of significance or a low or very low level of significance.”³²

*Librey Pty Ltd v Melbourne City Council*³³ found that it is only an inference that buildings listed in the schedule have heritage significance. In refusing the application the Tribunal enunciated the role of the schedule:

“It would appear that the only reason a heritage place is listed in the schedule is

²⁸Note 13

²⁹Note 13 at para 22

³⁰s 73 of the *Heritage Act* clearly contemplates the grant of a demolition permit

³¹*Harding v Port Phillip City Council*- Applicants submission at para 24

³²Note 13 at para 26

³³[2001] VCAT 1833 (4 September 2001) reported : 8 VPR 247

because one or other of the specific matters referred to under the headings in the schedule apply to the particular listed Heritage place. Therefore in the example of the “Carlton Precinct” it would appear that the only reason it is in the schedule is that a permit is required to externally paint the building as under clause 43.01-1 a permit is required to “externally paint a building if the schedule to this overlay identifies the heritage place as one where external paint controls apply and it is so identified in the schedule.” As the subject property is not listed in the schedule none of the specific matters referred to in the schedule apply to this property.”³⁴

Significance requires identification of the degree to which the existing building possesses cultural heritage significance and balancing that degree of significance against the planning benefits of development.

Elements relevant to assessing significance go well beyond the “drive by windscreen survey” assessment utilized as the foundation of many local heritage studies. The assessment of significance reflects upon the extent to which the building’s associations render it a physical document of the historical or architectural cultural heritage.

In *Harding* important factual errors were found in the Council’s Heritage Study and Statement of Significance. VCAT adopted argument that the cultural heritage significance of a place is a question of fact informed by the building’s history, the historical associations of famous people with the building (if any), the building’s integrity and the opinion of qualified persons as to its cultural heritage significance.³⁵ VCAT is clearly prepared to go beyond poorly researched guesswork in a heritage study.

Council’s Heritage Study is not the last word on significance as the nature, thoroughness and extent of research associated with studies varies considerably. It is often not possible for Council to fully research the history and detail of every place prior to preparing a planning control. The limitations on the rigour of the initial assessment need to be

³⁴Note 45 at para 39

³⁵Note 30 at 18

acknowledged and a closer analysis undertaken when a permit application is being considered.

VCAT has rejected the view that, while a low level of significance may justify a place's inclusion within an Overlay, "a low level of significance is then sufficient justification to refuse a planning permit for demolition."³⁶

What is the significant place?

In *Harding*, Council argued that the only thing of significance on the identified land was the existing building and that demolition would entirely eliminate that significance. This argument tends to be particularly emphasised when the place is individually listed in the Schedule to the Overlay. Such an argument often justifies façade-ism or the retention of remnant elements of the original building.

However, were it to be that a demolition permit must be refused because the cultural heritage significance of the site would be lost upon demolition, the Heritage Overlay would amount to a prohibition upon demolition. The control clearly intends that demolition be discretionary.

Contributory and individual significance:

Significance can concern the significance of the place considered as individual significance or also its contributory significance to a wider area. It is important to understand the difference between these terms.

³⁶Note 13 at para 33

The Port Phillip Heritage Policy contains convenient explanations of key terms:

“Heritage place is a place that has identified heritage value and could include a site, area, building, group of buildings, structure, archaeological site, tree, garden, geological formation, fossil site, habitat or other place of natural or cultural significance and its associated land.

*Significant heritage places include buildings and surrounds that are **individually** important places of either State, regional or local heritage significance or are places that together within an identified area, are part of the significance of a Heritage Overlay...*

Contributory heritage places include buildings and surrounds that are representative of heritage places of local significance which contribute to the significance of the Heritage Overlay area. They may have been considerably altered but have the potential to be conserved...

Non-contributory properties are buildings that are neither significant nor contributory.”
[emphasis added]³⁷

Table 3: Key Terms - Port Phillip Heritage Policy

Significant/contributory theory:

There is a dichotomy between individual and contributory significance:

“The dichotomy between “significant” and “contributory” places is reflected in the local heritage policy. This follows a well-established basis of distinction in heritage controls that apply to areas rather than to individual buildings. The Overlay’s purpose distinguishes between the heritage place and those elements which contribute to the significance of the heritage place.”³⁸

This dichotomy is manifest when buildings themselves have low individual heritage significance, but contribute considerably to the heritage significance beyond. Generally, a building with only contributory significance will be considered less significant than a building with only individual significance. However, contributory significance alone has been taken to be enough to warrant preservation.³⁹ The issue is the extent to which local heritage policy should prevail over other policies, such as urban consolidation policies, when a building’s significance is only contributory.

³⁷Port Phillip Planning Scheme Cl 22.04-2

³⁸Note 9 at para 71

³⁹Note 9

In *Harding* the Tribunal found “*from our observations and on the basis of all the evidence provide... the building had little contextual relationship with either its neighbouring or other heritage buildings in the immediate locality.*”⁴⁰

In *Reis*⁴¹ the original building had relatively low individual heritage significance, but considerable contributory significance. However the Tribunal determined to uphold Port Phillip City Council’s decision not to issue a permit:

*“[E]ven if I were convinced that the building was merely contributory... I consider that the building and the context are such that its removal would weaken the values of the heritage place which are sought to be protected by the Heritage Overlay, which would be contrary to its purpose.”*⁴²

Reis and *Harding* can be contrasted with *First Katone Pty Ltd v Yarra City Council*,⁴³ *O’Connor & Houle v Port Phillip City Council*⁴⁴ and *P Jovic v Hobsons Bay City Council*.⁴⁵ In these cases permits to demolish were granted on the grounds that the buildings lacked individual significance, notwithstanding their contributory significance.

First Katone was a permit application to demolish the existing house erected in or around 1866 and construct a building comprising 6 attached houses. The dwelling had certain unusual features and a history of use for community purposes. The Tribunal took into account the findings of an independent Panel:

*“While the House of the Gentle Bunyip does not warrant protection, areas surrounding it should be protected. Consequently, the Council should have the opportunity to exercise control over the development of 94 Hodgkinson Street as a means of protecting the heritage value of the neighbourhood.”*⁴⁶

⁴⁰Note 13 at para 35

⁴¹Note 9

⁴²Note 9 at para 219

⁴³[2000] VCAT 1675 (31 August 2000) reported : 5 VPR 320

⁴⁴ [2000] VCAT 2386 (30 November 2000)

⁴⁵10 VPR 311

⁴⁶Note 43 at para 19

The question for the Tribunal was whether the building's contribution to the precinct was sufficient to warrant its retention and restoration.⁴⁷ It was held that while the dwelling itself was not a place "*integral to the cultural significance of the City of Yarra*,"⁴⁸ it remained an element of a culturally important precinct. However the nature of this contribution was such that it in itself did not warrant justification for retention. A permit to demolish and develop was granted.

O'Connor was an application to demolish the existing two bedroom dwelling and construct a modern three level dwelling. The application was initially refused by the Responsible Authority on the grounds that the demolition of the buildings "*would adversely affect the natural and cultural significance of the place*."⁴⁹ On review that decision was overturned. The Tribunal did not agree with Port Phillip City Council's original diagnosis of the building's contributory significance⁵⁰ and emphasised the building's lack of individual significance.

In *Jovic* the applicant sought review of the conditions of a permit granted by Hobsons Bay City Council. The applicant had sought to demolish the existing D-graded building constructed circa 1920. The Tribunal granted the application, varying the Council's decision. It was held that the existing building did not have any individual significance. Its significance lay largely in its relationship and context with adjacent buildings. However that level of contributory significance was not enough to warrant its retention, notwithstanding the State and Local policy frameworks which sought to "*specifically encourage the conservation and enhancement of heritage places*."⁵¹

⁴⁷Note 43 at para 67

⁴⁸Note 43 at para 58

⁴⁹Note 44 at para 3

⁵⁰Note 44 at para 3

⁵¹Note 45 at para 38

Significance- Summary

It has therefore emerged that a building's contributory heritage significance must be considered under the Heritage Overlay. Buildings which contribute considerably to the heritage significance of the area have sometimes been preserved for their contributory heritage value alone. These cases show that the threshold between degree of contributory significance and retention/development/demolition of the existing building, is unclear.

4.3 *Guideline 3*

Any applicable heritage study and any applicable conservation policy.

It is useful to look at the VPP Practice Note - “*Writing a Local Planning Policy*” on the subject of reference documents:⁵²

“A reference document merely points the reader to background or supporting information that will assist in understanding the basis for the LPP. It has no statutory status and is not a substitute for appropriate policy content in the scheme itself. Specific planning requirements should be extracted from a reference document and included in the scheme in an appropriate way. A reference document should never be used to delegate discretion from the scheme.”

This Practice Note points to problems which can arise when reference documents are granted a level of status above that which they were intended. The following cases *SMA Projects v Port Phillip City Council*⁵³ and *Warraglen Developments PL v Boroondara City Council*⁵⁴ illustrate the problem, and provide some indication of the considerable scope the provision can grant to decision makers.

In *SMA* the Responsible Authority refused an application for demolition of the existing dwelling to enable construction of a three level building over a semi basement car park, on the grounds that it was contrary to local heritage policy. The issue before the Tribunal was the extent to which the local heritage policy should influence discretion. The local policy stated that:

“Any Significant Heritage Place identified in the Port Phillip Heritage Review (1998) and included in the Heritage Overlay (Clause 43.01) should be conserved.”⁵⁵

⁵²VPP Reference document, “Writing a Local Planning Policy,” December 1999

⁵³[1999] VCAT 1312 (31 July 1999) reported : 2 VPR 270

⁵⁴Note 24

⁵⁵Port Phillip Planning Scheme C1 22.04

The Tribunal explained the issue:

“For the purposes of this policy a significant heritage place includes not only those places identified in the Schedule to the Overlay, but also those places identified in the Port Phillip Heritage Review 1998. In this later document this site is one of more than 10,300 sites coloured red on the map associated with the Heritage Review and the Tribunal is advised that this denotes that it is a significant heritage place for the purposes of the policy....

In the new VPP based planning system decisions in the exercise of discretion should be heavily influenced by the strategic and planning policy framework set out in the planning scheme. What then is to be done in this case in the face of this quite clearly stated policy that any significant heritage place should be conserved....

In the new planning system planning decisions are meant to be heavily influenced by policy, and in particular the consistent application of policy can avoid the adverse effects of incremental change which can occur through an ad hoc site by site decision-making process. Nevertheless, policy must be applied in an intelligent and flexible way having regard to the entire strategic and policy framework affecting the future use of land while at the same time avoiding unfortunate outcomes in individual permit applications. I consider that it would be an unfortunate outcome in this application for review if the conservation of this dwelling on this land prevented its proper redevelopment”

Warraglen Developments also points to concern for ad hoc decision-making. In this case the subject building: a single storey, clinker brick, duplex constructed in 1934; was located within the residential precinct to the south of the Canterbury Station and Maling Road Shopping Centre.

It was proposed to construct two single-storey detached dwellings. The original building was within a Heritage Overlay, but had not been accorded significance in any previous heritage studies. In 1997 the Camberwell Conservation Study (1991) was revised. The end product was the “Maling Road & Environs, Canterbury Heritage Guidelines 2000.” This revised document did not form part of the Planning Scheme, but it contained a revised Statement of Significance:

“The ‘Maling Road Shopping Centre and Residential Environs’ is an area of State significance for the combination of the following factors: ...

The cultural contribution of well preserved examples from the 1920s-30s which reflects the premier status of Camberwell, within the State’s other urban growth

*areas, during that period...*⁵⁶

The Tribunal noted the effect of the changes to the Statement of Significance:

*“the building being initially ungraded, then being graded as a building of streetscape significance only, and finally now being graded as a building of heritage significance.”*⁵⁷

The applicants argued the amendments had been without due process. The Tribunal formed its own view that the building was in fact of low heritage significance and therefore the urban consolidation policies could override the heritage policies, granting the permit without directly dealing with the procedural fairness issues. However, in making the determination it made its concerns known:

⁵⁶Note 24 at para 9

⁵⁷Note 24 at para 11

“There have been decisions of the Tribunal which have criticised Responsible Authorities for amending Heritage Guidelines in relation to documents without due process. However, in this case the Responsible Authority in a sense avoids this criticism, because its Heritage Guidelines do not form part of the planning scheme itself... However, given the central role of a statement of significance in relation to a Heritage Overlay area, it seems to be a very unsatisfactory approach, to the implementation of the planning scheme itself, to have a key aspect of the control, the statement of significance, set out in what is such an informal and evidently variable document.”⁵⁸

To reintroduce a level of certainty the Tribunal recommended Boroondara City Council adopt a similar approach to Melbourne City Council, where the Statement of Significance is an incorporated document in their Planning Scheme.

Studies - Summary

What emerges is the importance of reference documents, heritage studies and conservation policies for use in decision-making. However, due to the plethora of information available, decision makers should be wary of the importance they attach to those documents not incorporated into the relevant Planning Scheme.

⁵⁸Note 24 at para 12

4.4 Guideline 4

Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.

This is the first of the Guidelines compelling the decision maker to consider the *proposed* building in terms of its bulk, form and appearance.

The following cases show how considerations of bulk, form and appearance influence the decision maker. This is especially the case when there is great disparity in terms of bulk, form and appearance between the proposed and existing buildings.

In *Tonkin Fiona v Ballarat City Council*⁵⁹ the Tribunal visited the Ballarat site and noted that the existing building was a virtual mirror of an adjoining dwelling. The Tribunal, focussing on the appearance of the proposed building, found the replacement mock Victorian would only serve to “confuse observers.”⁶⁰ It could not add to the significance of the heritage place, nor would it “complement the streetscape... [or] conserve and enhance those elements which contribute to the significance of heritage places”⁶¹ The permit was denied.

Another example is *Icon Developments Pty Ltd v I. Henderson and Others and the City of Port Phillip*.⁶² In this case it was determined that demolition of the existing dwelling was reasonable in the circumstances, but that the proposed development was too large and would unduly dominate its immediate neighbours. The Tribunal found the proposed three storey, nine dwelling building with basement car parking for 18 vehicles, over scaled. It was said that the building would overwhelm the dwelling to the south and would not sit easily within the streetscape. The permit was denied. The application was considered again, one year later in *Icon v Port Phillip & Roberts*.⁶³ The applicants had amended their proposal but it was again rejected, this time on the grounds that it was contrary to local heritage policy.

⁵⁹[2001] VCAT 2101 (24 October 2001) cited in *Icon v Port Phillip & Roberts*

⁶⁰Note 59 at para 32

⁶¹Note 59 at para 37

⁶²1999/04403 (unreported)

⁶³[2000] VCAT 1351 (30 June 2000)

In *Siles v Hobsons Bay City Council and Ors*⁶⁴ a Council decision to reject a proposal on the grounds that the building was too bulky, was overturned by the Tribunal forming a different opinion. The replacement building was considered in detail in terms of its compatibility with local policy, neighbourhood and streetscape character and heritage values.

The Tribunal formed the view that the proposed building would not detrimentally affect the historic character and appearance of the area. It was satisfied that the proposal would be in keeping with the character and appearance of adjacent buildings and the heritage place, as required under the Heritage Overlay and the MSS and concluded that the building would make a “*positive contribution to the area.*”⁶⁵ A permit was granted.

*Staged Developments Australia v Minister for Planning, Heritage Victoria and Or*⁶⁶ points out the close relationship between this Guideline and State and Local Policy. The colossal proposal to construct a 191.6 meter tower on the former Herald Weekly Times site, Flinders Street, Melbourne, would have been very unlikely to succeed under the Port Phillip Planning Scheme. However, urban consolidation policies under the Melbourne Planning Scheme led to in principle approval:

“We consider that the starting point is the consideration of the appropriateness of the proposed development concept from an urban design viewpoint. On this issue, we note that the policy for Design and Built Form at clause 19.03 of the SPPF is to achieve high quality urban design and architecture. The policy calls for “development that achieves architectural and urban design outcomes that contribute positively to local urban character and enhance the public realm while minimising detrimental impact on neighbouring properties...”

*After having reviewed the submissions and expert evidence, we consider it fair to say that, subject to some refinement in the detail of the development, the proposal is one which is acceptable from an urban design viewpoint.”*⁶⁷

⁶⁴[2000] VCAT 1144 (31 May 2000)

⁶⁵Note 64 at para 83

⁶⁶[2001] VCAT 1447 (29 June 2001)

⁶⁷Note 66 at paras 191 and 192

The point should be made that this proposal was not subject to the Heritage Overlay per se, because although the land was a place covered by the Heritage Overlay, CI 43.01-3 states that no permit is required to develop a heritage place which is included on the Victorian Heritage Register. The subject building, was included on the Victorian Heritage Register and therefore a permit was required not under the Heritage Overlay, but under the Heritage Act 1995.

Proposed Building - Summary

What emerges therefore is a close relationship between the proposed building, its bulk, form and appearance, local policy and the success/failure of permit applications. Rejections of applications on the grounds of bulk, form or appearance are less frequent than rejections on heritage significance grounds, but they are not uncommon. The decisions considered provide some insight into the Tribunal's approach to this Guideline. Proposals failing to 'fit in' with the heritage place are unlikely to succeed.

4.5 Guideline 5

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.

This Guideline is similar to the previous Guideline as it also relates to the *proposal*. The difference is that this Guideline relates more specifically to adjacent heritage buildings.

In *SMA*,⁶⁸ the existing house was considered inconsistent with the heritage place:

"[The current] house is in terms of its scale quite inconsistent with the existing and emerging character of Carlisle Street in [its] location, in particular it is inconsistent with the larger inter-war flat developments which are also of heritage significance."

The Tribunal determined that the development would be "an attractive addition to the character of the locality."

*PCH Melbourne Pty Ltd v Melbourne City Council and Ors*⁶⁹ concerned an application to retain

⁶⁸Note 53

⁶⁹[2002] VCAT 301 (3 May 2002) reported : 11 VPR 165

the front two hipped roof sections of the MCG hotel and demolish the rest. A new, 13 level apartment building over 2-3 levels of basement parking, would be constructed to the rear and partly above the retained portions of the hotel. The Tribunal determined to uphold the City of Melbourne decision not to issue a permit. The form of the proposed building was too high and overwhelming relative to the retained portion of the MCG hotel given its height and the extent to which it cantilevered over the lower hipped roof section.⁷⁰ Nearby George Street 'A' grade buildings would also be diminished when viewed from the public realm and from within those sites.⁷¹

Harding also considered bulk, form and appearance. It was accepted that the proposed building: 10 levels containing 46 apartments and 95 car parking spaces at ground and basement levels in Queens Road, Melbourne; responded positively to its site context and did not attempt to maximise dwelling yield.⁷²

Proposed Building - Summary

Heritage consideration of proposals in relation to adjacent buildings are less influential than considerations relevant to the heritage place itself- other planning considerations obviously are crucial. However, on the whole these decisions show that proposals adversely affecting neighbouring properties may be struck down. The successful application will be of individual high quality design but will also endeavour to accommodate, work with and compliment the streetscape.

⁷⁰Note 69 at para 127

⁷¹Note 69 at para 84

⁷²Note 13 at para 44

4.6 Guideline 6

Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.

This Guideline is the only one specifically dealing with demolition. The vast majority of permit applications involve some element of demolition and therefore this Guideline is particularly important and highly influential in decision-making.

Siles vs Hobsons Bay City Council and Ors⁷³ discussed the required process:

“The first [step is to] consider... the issue of the significance of the existing building on the site. Having examined that matter, next the Tribunal then turns to the merits of the proposed replacement building. Having regard to the significance of the existing house and the form of the proposed replacement, the Tribunal considers whether demolition should be permitted and the proposed dwelling approved.”⁷⁴

Inherent in the demolition of a heritage significant property is the loss of significant heritage. Therefore the level of individual and/or contributory significance is a key consideration in demolition applications and the positive benefits to flow from demolition will vary from case to case. The following cases demonstrate this point.

Zanacorp Builders P L v Port Phillip City Council and Ors⁷⁵ was an application for review of Port Phillip City Council’s decision not to issue a permit to demolish an existing single dwelling and replace it with two 3 storey dwellings. The Tribunal’s exposition of its key considerations provides a useful template for demolition applications in general:

“The key issues can be broken down into three broad categories, namely;
whether the demolition of the existing building is warranted having regard to the significance of the heritage place or alternatively, because the structural integrity of the building is such that its re-use is not feasible;
whether the proposed replacement building is appropriate having regard to its impact on the significance of the heritage place, and

⁷³[2000] VCAT 1144 (31 May 2000) reported : 10 VPR 76

⁷⁴Note 73 at para 29

⁷⁵[2001] VCAT 2107 (17 October 2001)

*whether the new building is appropriate having regard to the provisions of the zoning of the land, the planning scheme's policies and the [Good Design Guide]."*⁷⁶

It was held that, whilst the condition of the building was very poor and costs associated with its renovation would be substantial and a decision to require the building to be reused would be unfair, a permit should not be granted because it could not be said the dwelling made no contribution to the heritage significance of the area.

*G Jenzen v Ballarat City Council & Anor*⁷⁷ was another demolition application. Here the Tribunal affirmed Ballarat City Council's decision to grant a permit to partially demolish a former hotel building included on the Victorian Heritage Register. The decision was heavily influenced by the fact that the streetscape had already been compromised by inappropriate development that tended to dominate the streetscape which the new proposal would partially redress:

*"[A] building of the scale, height and bulk of that proposed is capable of being accommodated within the wider heritage place and... will make a positive contribution... While the new building will be clearly visible above and behind the Hotel, this is not in my view inappropriate because it will... [be] respectful of... the architectural treatment, materials and the symmetry of the façade."*⁷⁸

In addition, the rear section of the building had been irreversibly compromised.⁷⁹ In terms of the relevant policy framework it was felt that the proposal would achieve an outcome consistent with the provisions of the LPPF.

In *Peter Sgourakis Architect v Port Phillip City Council*⁸⁰ the subject building was a late Victorian single storey cottage in very poor condition. Port Phillip City Council had rejected an application to demolish the building and construct a three level office building.

The principal demolition issue for the Tribunal was whether or not it was reasonable to demolish

⁷⁶Note 75 at 32

⁷⁷[2001] VCAT 1660 (6 August 2001) reported : 9 VPR 183

⁷⁸Note 77 at para 49

⁷⁹Note 77 at para 50

⁸⁰[2001] VCAT 2022 (1 November 2001) reported : 9 VPR 270

the existing building given its heritage status. The Tribunal was influenced by the condition of the existing building, described as “*poor and beyond redemption*” and “*probably not habitable*.”⁸¹ Coupled with the buildings relatively low significance and limited contribution to the significance of the heritage place,⁸² issues of fairness in imposing repair of the building,⁸³ and its location in an Industrial 3 Zone in which a dwelling is prohibited use;⁸⁴ the Tribunal set aside Port Phillip City Council’s decision and granted the permit sought.

In *Harding* the Port Phillip Heritage Policy rejected demolition unless the building was structurally unsound or could not be feasibly reused. The question was what constituted “structurally unsound.” It was agreed that “Structurally unsound” does not require a building to be at the point of collapse. It requires evidence at least of defect and damage to structural elements. The cost of repair works is important and goes to the feasible reuse of the building.

The Tribunal found that “structurally unsound” has an element of meaning beyond dictionary definitions and means that “*the building or significant structural parts of it, such as the foundations and/or walls and/or roof, are likely to collapse within the foreseeable future (say, within the next 10 years).*” On the basis of evidence that the building or significant parts of it had a less than 50% probability of collapse within the next 10 years, it rejected the argument that the building was “structurally unsound.”⁸⁵

⁸¹Note 80 at paras 8 and 9

⁸²Note 80 at para 17

⁸³Note 80 at para 18

⁸⁴Note 80 at para 18

⁸⁵Note 13 at 37

Demolition - Summary

What emerges therefore is the close link between the level of significance and the success of demolition applications. The cases show that demolition applications can succeed where a building has heritage significance. However, the likelihood of success is dramatically reduced with increased heritage significance. Consequently, factors that influence significance are extremely relevant to demolition applications. Local heritage policy concerning demolition is also be relevant. That said, VCAT always balances the loss of cultural heritage significance upon demolition against other favourable planning aspects of the proposal.

5.0 CONCLUSION

The analysis highlights some of the trends in decision making and exposes some of the underlying problems.

The Overlay guidelines broadly consist of four components: the State and Local Planning Policy Frameworks, heritage significance, the proposed building and demolition.

We have seen that depending upon the application, these components are weighted differently. Our findings in relation to each of the four components can be broadly summarised as follows:

Policy considerations are made in most decisions. In those applications where local policy is heavily relied upon it seems heritage places are more likely to be preserved.

The level heritage significance of the original building must be carefully researched. Individual and contributory significance are both relevant. Whilst individual significant buildings are more 'important' than contributory buildings, contributory significance alone can be enough to preclude development.

The bulk, form and appearance of the proposed building is more likely to be approved where the building is in keeping with the streetscape. The design which seeks to accommodate the particular attributes of the heritage area and make an overall 'positive contribution' to the heritage place, is more likely to succeed than a design which does not.

Demolition also ties in closely with level of significance. Building conditions and Local policies are also relevant. Many municipalities have local policy which specifically prohibit the demolition of buildings with high heritage significance gradings.

APPENDIX

6.1 CASES CONSIDERED

The following cases were considered in preparing this report.

<i>Name - reported</i>	<i>Citation</i>	<i>Member</i>
<i>Centrum Architects Pty Ltd v Melbourne City Council</i>	9 VPR 260	Monk
<i>First Katone Pty Ltd v Yarra City Council</i>	5 VPR 320	Monk
<i>P Jovic v Hobsons Bay City Council</i>	10 VPR 311	Cimino
<i>Librey Pty Ltd v Melbourne City Council</i>	8 VPR 247	Rickards
<i>SMA Projects v Port Phillip City Council</i>	2 VPR 270	Liston
<i>Warraglen Developments PL v Boroondara City Council</i>	6 VPR 148	Liston
<i>PCH Melbourne Pty Ltd v Melbourne City Council and Ors</i>	11 VPR 165	Monk
<i>Staged Developments Australia v Minister for Planning, Heritage Victoria and Or</i>	8 VPR 131	Senior Member Byard and Member Cimino
<i>Zanacorp Builders P L V Port Phillip City Council and Ors</i>	10 VPR 76	Cimino
<i>G Jenzen v Ballarat City Council & Anor</i>	9 VPR 183	Hewet
<i>Peter Sgourakis Architect v Port Phillip City Council</i>	9 VPR 270	Liston

<i>Title - unreported</i>	<i>Citation</i>	<i>Member (s)</i>
<i>Port Phillip v A & M Reis</i>	[2001] VCAT 489 (31 March 2001)	Senior Member Monk and Member Baird
<i>Harding v Port Phillip City Council</i>	[2002] VCAT 416 (25 March 2002)	Senior Member O’Leary and Member Eccles
<i>Icon v Port Phillip&Roberts</i>	[2000] VCAT 1351 (30 June 2000)	Moles
<i>Williams S v Melbourne City Council</i>	[2000] VCAT 1474 (31 July 2000)	Senior Member Gould and Member Gilfillan
<i>O’Connor & Houle v Port Phillip City Council</i>	[2000] VCAT 2386 (30 November 2000)	Liston
<i>Tonkin Fiona v Ballarat City Council</i>	[2001] VCAT 2101 (24 October 2001)	O’Leary
<i>Icon Developments Pty Ltd v I. Henderson and Others and the City of Port Phillip</i>	cited in Icon v Port Phillip&Roberts [2000] VCAT 1351 (30 June 2000)	
<i>Siles v Hobsons Bay City Council and Ors</i>	[2000] VCAT 1144 (31 May 2000)	Baird
<i>Australian Properties Pty Ltd v Port Phillip City Council</i>	[1999] VCAT 2078	His Honour Judge Wood
<i>K.A. Reed (Group) Pty Ltd v Port Phillip City Council</i>	[1998] VCAT 782 (15 January 1999)	Senior Member Ball and Member Monk
<i>Kaystead Pty Ltd v Port Phillip City Council</i>	[1999] VCAT 780 (30 April 1999)	Osborne