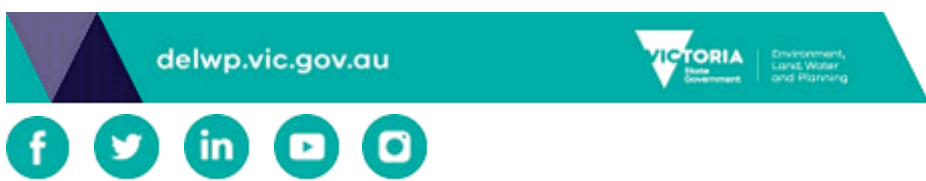


From: joseph.morrow@delwp.vic.gov.au
To: [Colin Charman](#)
Subject: Fw: Nitzal Investment Trust - requested VCAT case
Date: Tuesday, 25 September 2018 11:00:35 AM
Attachments: [ATT00007.png](#)
[ATT00009.png](#)
[ATT00010.png](#)
[ATT00011.png](#)
[ATT00012.png](#)
[ATT00013.png](#)
[P1238_2017_Baudoin v Melbourne CC \(PRM_280218\).docx](#)

Regards,

Joseph Morrow | Project Officer | Planning Panels Victoria
Planning | Department of Environment, Land, Water and Planning

Level 5, 1 Spring Street, Melbourne, Victoria 3000
T: 03 8392 5137 | E: joseph.morrow@delwp.vic.gov.au



----- Forwarded by Joseph Morrow/Person/VICGOV1 on 25/09/2018 10:56 AM -----

From: Liam Riordan <LRiordan@tract.net.au>
To: "Planning.Panels@delwp.vic.gov.au" <Planning.Panels@delwp.vic.gov.au>,
Cc: Maree Fewster <Maree.Fewster@melbourne.vic.gov.au>
Date: 13/08/2018 03:01 PM
Subject: Nitzal Investment Trust - requested VCAT case

To Planning Panels Victoria,

Please see the case referred to in submissions by myself today. This decision has been provided to the panel at the request of the members.

Regards,

Liam Riordan Senior Town Planner

Tract Consultants Pty Ltd | Town Planners | Urban Designers | Landscape Architects
4/65 Brougham Street Geelong | PO Box 1716, Geelong, Victoria, 3220
p. 03 5221 0105 d. 03 8420 0617
www.tract.com.au | www.tractmedia.com.au
Royal Adelaide Hospital - [2018 AILA SA Award – Civic Landscape](#)
Royal Adelaide Hospital - [2018 AILA SA Award – Urban Design](#)
Royal Adelaide Hospital - [2018 AILA SA Award – Cultural Heritage](#)
Bell Street Mall - [2018 AILA QLD Award – Community Contribution](#)
Bell Street Mall - [2018 AILA QLD Award – Research](#)
[Brisbane Airport Landscape Setting Strategy - 2018 AILA QLD Award – Landscape Planning](#)



Please consider the environment before printing this email. The information in this message and in any files included in this message may be confidential.
If you are not the intended recipient, please notify the sender immediately and delete or destroy all

copies of this message and any associated files.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1238/2017
PERMIT APPLICATION NO. TP-2016-624

CATCHWORDS

Melbourne Planning Scheme; Section 77 of the *Planning and Environment Act 1987*; proposed demolition of 'C' listed heritage dwelling and proposed replacement single dwelling; issues of the heritage merits of the proposal and the 'neighbourhood character' merits; proposal approved.

APPLICANT	Bernard Baudoin
RESPONSIBLE AUTHORITY	Melbourne City Council
SUBJECT LAND	341-353 Dryburgh Street NORTH MELBOURNE VIC 3051
WHERE HELD	Melbourne
BEFORE	Philip Martin, Member
HEARING TYPE	Hearing
DATE OF HEARINGS	13, 14 and 28 February 2018
DATE OF ORDER	23 March 2018
CITATION	Baudoin v Melbourne CC [2018] VCAT 448

ORDER

- 1 The decision of the Responsible Authority is set aside.
- 2 In planning permit application No. TP-2016-624, a permit is granted and directed to be issued for the land at 341-353 Drysdale Street, North Melbourne, generally in accordance with the endorsed plans and subject to the permit conditions set out in the Appendix to this decision. The permit allows:
 - The demolition of the existing dwelling and construction of a new dwelling.

Philip Martin
Member

APPEARANCES

For applicant

Mr Reto Hofmann of Planning and Property Partners Pty Ltd. He called the following expert evidence:

- Planning evidence from Mr Tim McBride-Burgess.
- Heritage evidence from Mr Bryce Raworth.
- Engineering evidence from Mr Russell Brown.
- Geotech evidence from Dr Chris Haberfield.
- Building evidence from Mr Bob Lorch.

For responsible authority

Mr Liam Riordan (planner) of Tract Consultants. He called expert heritage evidence from Ms Meredith Gould.

INFORMATION

Description of proposal	The demolition of the existing dwelling and construction of a new dwelling.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Melbourne Planning Scheme
Zone and overlays	General Residential Zone Schedule 2 Heritage Overlay HO3 Design and Development Overlay Schedule 66
Permit requirements	Clause 32.08-5: to construct a dwelling on a lot less than 300 sqm Clause 43.01: permission is required for demolition and for the construction of a building and the construction and carrying out of works on land affected by the HO3
Relevant scheme policies and provisions	Clauses 9, 10, 11, 15, 16, 17, 18, 21.06, 21.07, 21.16, 22.05, 22.17, 22.19, 22.23, 32.08, 43.01, 54 and 65

Land description

The subject land is a triangle-shaped site on the north side of the intersection of Shiel Street (which continues in a roughly north-westerly direction) and Dryburgh Street which extends to the north. The review site's size is 260 sqm. There is a drainage easement running alongside the north-west boundary of the subject land, but where the relevant authorities have confirmed that no actual assets exist in this easement.

The residential area further to the north-west and north is more fine-grain and is subject to a Heritage Overlay, albeit with some variation to the housing and with a very large Catholic church building. The land to the east, south-east and south features older multi-storey public housing or housing. The land to the south-west is zoned Mixed Use Zone (MUZ) and already features a panel beater's workshop plus some relatively tall and visually prominent buildings. The balance of this MUZ land further to the south-west is vacant. There are bus and tram services close by and some neighbourhood shops. The Errol Street shop and café strip is a little closer back towards the city.

Tribunal inspection

After the hearing, the Tribunal inspected the inside and outside of the subject dwelling and property. At this time I also walked around the local area, and had the chance to do another walk around a bit later.

REASONS¹

What does this application involve?

Introduction

- 1 The review site is within a really interesting area with a variety of built form extending in the various directions from the intersection which the review site lies next to – see the summary of the location further above. The subject land is zoned General Residential Zone Schedule 2 and also affected by a Heritage Overlay HO3 (North and West Melbourne Precinct).
- 2 Of most relevance for our purposes is that the areas to the north and north-west of the subject land (as well as the review site itself) is affected by the Heritage Overlay HO3 and features more fine-grain, mainly Victorian-era dwellings. Unusually, there is currently no Statement of Significance for HO3 in the Melbourne Planning Scheme (just individual building citations). With the HO3, there are no internal heritage controls.
- 3 The subject land lies in a transitional location, between the area of more fine-grain and mainly period built form to the north-west and north as described above vis-à-vis the more robust and visually prominent multi-storey built form to the east, south-east and and south. To the south-west of the subject land is a significant area of zoned Mixed Use Zone (MUZ). The closest areas of same already feature a panel beater's workshop that seems ripe for redevelopment and two taller apartment buildings. Where the rest of this MUZ land further away is still vacant, it seems reasonable to anticipate more intensive industrial/commercial or possibly apartment tower redevelopment of this balance land in the short to medium term.
- 4 The subject land itself features an inter-war, double-brick, single storey brick bungalow-style dwelling with a pitched roof. It has a 'C' grading, within a Level 2 streetscape, as per Council's Heritage Inventory system².
- 5 The main pedestrian entry door of the subject dwelling faces roughly south and there is a crossover and open concrete parking area for one vehicle at the northern end of the site. The subject lot is triangular in shape, with the subject dwelling located in the roughly central area of the lot, off-set from both adjacent street frontages. I agree with the applicant that it is likely this was done to maximise how big the building footprint could be. The more northern area of the subject land is currently the main secluded private open space.
- 6 It is common ground that:

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

² I refer here to the City of Melbourne Heritage Places Inventory June 2016.

- The external walls of the subject land feature a noticeable degree of cracking and that the cantilevering south-facing bow window has required a crude form of wooden support posts because it appears to be in danger of collapsing.
 - There is an area of ‘rising damp’ in some of the brickwork in the northern end of the house, near the bathroom.
 - The brick outbuildings are badly deteriorated and on safety grounds should be demolished.
- 7 In relation to the current owner of the subject land, I am told that he bought the subject land circa 2016, with the intention of renovating the existing dwelling for his family to live in. I am further told that after the applicant had lived in the subject dwelling for some months, the extent of the cracking/structural problems with the dwelling became more obvious. I understand that these problems in turn led to the applicant moving out of the dwelling, doing some cosmetic improvements to make the inside of the dwelling more liveable, then renting it out. The subject dwelling remains leased out.
- 8 The applicant then carried out various further investigations into the necessary repairs to the dwelling, to make it a long term, structurally sound dwelling for his family to use. After engaging suitably qualified consultants, the applicant has formed the view that it is not feasible to save the existing dwelling. Following this approach, the applicant has engaged an architect to prepare plans for a brick replacement contemporary dwelling and sought planning permission to replace the current inter-war house on the subject land with this intended contemporary dwelling.

Proposal for replacement dwelling and VCAT hearing

- 9 The proposed new dwelling would have a contemporary but fairly simple design. Its southern external wall would extend to the southern boundary, as would its western wall. The eastern external walls would be set back from the eastern boundary, albeit it is proposed that a balcony on the north-eastern upper level extends to the boundary or close to. The more northern section of the subject land would feature secluded private open space, an open car parking area and a bike shed. The two storey element of the dwelling would be more its middle and western area (closer to the two storey abutting terrace house to the west), whereas the new building would drop down to single storey as it gets closer to the eastern corner location.
- 10 The proposed new dwelling’s key material would be brick, but also featuring concrete, render, cladding and metal roofing. The ground floor would provide for the guest bedroom, open plan living/dining/kitchen area, laundry, office and outdoor deck. The first floor would feature a master bedroom with en suite, two other bedrooms, a rumpus room, bathroom and three balconies. One on-site car parking space would be provided, using the same crossover. There would be pedestrian access to both both Shiel

and Dryburgh Streets, but with the main entrance to the house being oriented to Dryburgh Street (to the east). I understand that the pedestrian entrance in the south-western corner of the new dwelling (off Shiel Street) would function as a separate access point for an intended home office. The maximum height of the new building would be 6.9 metres.

- 11 Council's heritage advisor does not support the proposal and Council has issued a Notice of Refusal to Grant a Permit. The applicant has sought the Tribunal's review of this decision.
- 12 The hearing of this matter came before me over 13 and 14 February 2018. The project architect Mr Brett Nixon of Nixon Tulloch Foley architects gave a factual explanation of the application plans early in the hearing. As we were part heard by the end of this process, a third full hearing day was held on 28 February 2018. Over the whole hearing, I received the submissions and expert evidence listed above. After the hearing, I did an inspection of the inside and outside of the subject dwelling and property. I also took the opportunity on two occasions to walk around the local area.

Outline of decision

- 13 The first part of my reasons below discusses what I consider to be the more straight forward aspects of the proposal, where it is clear to me that these aspects of the proposal are deserving of being granted a permit.
- 14 I then turn to the issue on which this proceeding has turned, being whether or not it would be an acceptable planning outcome for the existing dwelling to be demolished.
- 15 I have found this final critical issue quite challenging to deal with. However in the final result, I am satisfied that it would be acceptable and consistent with the objectives of the Heritage Overlay and relevant planning policies for the existing dwelling to be demolished, subject to conditions. This includes a permit condition making it a condition-precedent to the approved demolition that the applicant/permit holder provide Council with a bona fide, arms-length signed building contract for the construction (with any minor alterations) of the approved replacement dwelling.
- 16 My reasons follow.

More straightforward aspects of the proposal

- 17 I consider the following aspects of the proposal to be fairly straightforward and deserving of being granted a permit.
- 18 Relying on the town planning evidence of Mr McBride-Burgess, I find that the proposed new dwelling would be an acceptable 'neighbourhood character' outcome, be consistent with the purposes of the General Residential Zone Schedule 2 (GRZ2) and satisfies the Objectives of Clause 54.

- 19 If one takes as the context the existing built form in all four directions from the subject land, I accept that the existing neighbourhood character is of highly varied and very robust built form, including quite tall buildings to the south. I am also conscious that given its Mixed Use Zoning, it seems likely that the currently vacant land to the south-west will be developed more intensively.
- 20 Subject to my comments further below about the proposed boundary fencing, I share the view of Mr McBride-Burgess that the relatively simple design of the new dwelling, the intended predominant use of brick and its proposed two storey scale are all compatible with this existing varied and robust existing neighbourhood character. The intended maximum height of the new dwelling of 6.9 metres is quite measured. This height needs to be seen in the context of there being prominent double storey Victorian era terrace houses further west along Shiel Street.
- 21 The proposed two storey built form extending to the southern boundary is consistent with the run of double storey terrace housing extending further to the west up Shiel Street, which also sits fairly close to the street boundary. It is appropriate that the new building align itself with the abutting terrace house to the west – this is a more logical pattern than the current situation of the existing dwelling ‘squatting’ on the subject land in an awkward off-set manner.
- 22 I am satisfied that the new dwelling would offer a good level of internal amenity. It would have a favourable northern orientation for its inside living area and outside deck. The car parking situation is neutral, in that both the existing and the proposed dwelling would each feature an off-street car space. I am satisfied the new dwelling would cause no unreasonable external amenity impacts.
- 23 In most respects, I see the design of the intended new building as a positive heritage outcome. I am satisfied that the proposed new dwelling is consistent with the Purposes of the Heritage Overlay HO3 and with the relevant planning policies ‘*Designing new Buildings and Work or Additions to Existing Buildings*’ at Clause 22.05.
- 24 It is very appropriate that the new building’s key materials would be brick and timber and that it is a restrained contemporary design rather than a replica one. The scale of the new building is proportional to its heritage setting and it is ‘like-for-like’ in replacing one existing dwelling with one new dwelling. It is a good outcome that the new building would be oriented alongside the two storey period terrace house abutting to the north-west. My site inspection confirmed that there are other nearby relatively new infill two storey dwellings further north-west up Shiel Street that involve very contemporary designs³.

³ I refer here to the infill properties at 36, 38 and 58/58B Shiel Street, which all also fall within the HO3.

- 25 I accept Mr Raworth's expert heritage evidence, where he supports the proposed building. Ms Gould who was called by Council as a heritage expert conceded that her concerns about the proposed new dwelling were fairly confined. That is, her concerns were limited to a handful of particular aspects of the design e.g. what she saw as the excessively high and dominant brick boundary fence (see my findings on this further below). Putting these handful of specific concerns aside, Ms Gould conceded that the new dwelling's design was generally commendable from a heritage perspective.
- 26 Subject to my own findings below about the upper north-east facing balcony, the southern façade and the fence issue, I agree with the following from Mr Raworth at his paragraph 10 fourth bullet point:
- It is proposed to construct a double storey townhouse on the subject site. The new building will be restrained in expression and materiality and contemporary in style. That said, it will respond to its heritage setting through a considered use of setbacks, compact scale and use of traditional materials including brick and timber. The scheme will interface with the adjacent sites to the north and west in an architecturally polite manner...
- 27 Where there was some criticism of the proposed southern elevation which sits on the southern boundary, with a proviso, I see this as reasonable in the situation where this elevation would be the equivalent of a side wall (because the new dwelling entrance will be oriented to the east). Walls-on-boundaries are a common feature both in this area and in heritage precincts generally (albeit they are nearly always side-walls). The proviso is that I support the suggested 'design tweaks' shown in the Revision G concept plans and photo montages tabled by the applicant on the final hearing day, with some final modifications (see Condition 1(a) in the Appendix to this decision).
- 28 It seems fair to say that it was a somewhat vexed and long-running issue as to how the external walls should appear. The original design involved the dwelling itself extending to the Shiel Street boundary with a mixture of brick and timber at two levels, then an extremely high brick fence 'wrapping around' the corner area, then a paling fence continuing further north up Dryburgh Street.
- 29 However from early in the hearing, the applicant via the evidence of Mr McBride-Burgess was suggesting an alternative brick fence over this final boundary area running north up Dryburgh Street. His thinking (which I agree with) is that having a paling fence over this boundary area is a rather drab and lacklustre treatment. His suggested alternative treatment involved a mix of black and red coloured bricks and a minor drop in height of the taller section of the proposed fence.
- 30 There was also debate whether the upper north-facing balcony should be set back further from the north-eastern boundary.

31 My own findings here are as follows:

- I share Council's view that the proposed very high brick fence (whilst well intended by Mr Nixon as a 'design feature') is an overly ambitious and heavy-handed design feature that would be visually dominant and jarring in the original form it was put forward. It is important to bear in mind that the main orientation of the new dwelling would be to Dryburgh Street. My site inspection confirmed the typical pattern with other nearby dwellings that they usually have a fairly low key front fencing treatment with their main pedestrian presentation to the street.
- Following this approach, my view is that the design response is wanting to 'have its cake and eat it too' in having a two storey dwelling façade right on the Shiel Street boundary, plus a high brick fence wrapping around the corner to Dryburgh Street. My finding is that whilst I am comfortable with the proposed more hard edge interface with Shiel Street⁴, the trade-off is that the design response needs to make a demonstrable effort to have a more low key and at least semi-transparent interface where the main entrance to the new dwelling would face Dryburgh Street. Accordingly, I endorse Council's proposed permit condition requiring the boundary fence to be no higher than two metres at any one point.
- I also consider that the brickwork for the Shiel and Dryburgh Street boundaries should have some minor variation but be kept relatively muted in its appearance⁵ (see Condition 1(a)), rather than what I see as a rather uncomfortable mix of red and dark bricks as was suggested in the course of the hearing.
- I agree with Council that the upper north-east facing balcony should be subject to a permit condition that it be set back from the nearest boundary at least one metre. I see this as respectful of the fairly open frontages of most nearby properties in Dryburgh Street.

Would it be an acceptable planning outcome to demolish the existing dwelling?

Preliminary points

32 Before considering the detail of this aspect of the proposal, I can deal with some preliminary points as follows.

33 As mentioned, currently there is no Statement of Significance (SOS) for this heritage precinct in the Melbourne Planning Scheme. However there was some debate as to whether or not the Tribunal should have regard to the

⁴ Noting that some extent of blank walls or almost blank walls to a boundary is a fairly common feature of built form in heritage areas (and there are examples of this in this precinct).

⁵ A good example of a suitably darker (metal) upper level front façade but with a lighter ground level front façade using bricks is the nearby two storey dwelling at 24 Erskine St (works well).

proposed SOS for this North and West Melbourne Heritage Precinct which forms part of:

- the *Incorporated Document Heritage Precincts Statements of Significance 2017* prepared by Lovell Chen; which itself forms part of
- the proposed Amendment C258 to the Melbourne Planning Scheme.

34 I was told that Amendment C258 has been exhibited twice, but has not yet gone to a panel. Hence it is clear that it is not yet a ‘seriously entertained planning proposal’.

35 On balance, I am satisfied that it is reasonable and helpful for the Tribunal to give some weight to this aspect of Amendment C258. Hence I accept that it was appropriate for Mr Raworth to reference this aspect of Amendment C258 in his expert report. However I take the point of Council that what we are talking about here is all of the relevant Amendment C258 SOS provisions, not just some of them.

36 For the following reasons, it was common ground that the main focus of ‘what existing built form should be retained’ was the front two-rooms’ worth of depth of the existing dwelling:

- The ‘Demolition’ policy provisions at Clause 22.05 include the following text, with my highlighting – “*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 rooms in depth*”.
- Council confirmed that it does not object to all of the outbuildings being demolished, due to their very poor condition.

37 Hence this demolition debate (on which this proceeding has turned) has needed to focus on whether or not demolishing the front four rooms of the existing building would be an acceptable planning outcome.

Main findings

38 Within this more limited scope, I find that (despite some legitimate competing factors) it would be an acceptable heritage outcome to demolish the existing dwelling, relying on the following points.

39 Where the evidence of Mr Raworth on this issue conflicts with that of Ms Gould, I find the evidence of Mr Raworth more compelling.

40 It assists the applicant’s case on this issue that the Council Heritage Inventory grades the subject building as a ‘C’ building and hence the main focus is whether to require the preservation of the front four rooms.

41 It is a significant consideration that the subject land lies at the southern edge of the HO3 heritage precinct in question here, rather than at its core.

- 42 I also see it as a relevant consideration that the proposed Amendment C258 SOS for this Precinct places a very modest emphasis on inter-war buildings. Rather, as one would expect for a location this close to Melbourne CBD, I accept that the main style of architecture which this SOS highlights as being the valued style in this location (reflecting its main era of establishment) is Victorian-era dwellings.
- 43 This is physically reflected for example in the other period dwellings further along Shiel and Dryburgh Streets usually being other Victorian era cottages or townhouses.
- 44 In summary then, with or without reference to the Amendment C258 SOS for this precinct, the physical reality is that if one takes a walk around this heritage precinct, it is Victorian-era dwellings which stand out. Hence I accept that there is a lower level of heritage sensitivity where this is a very atypical inter-war dwelling, which was built at a considerably later period (and therefore 'out of step' with the main period of establishment of this area).
- 45 Whilst I expect that even an atypical heritage building can still have a high retention value if it a high-end period building which is A or B graded, this is a more challenging assessment issue when the subject building is pleasant but unremarkable (which I accept is the case here).
- 46 It assists the applicant's position on this 'demolition' issue that the subject land lies next to an intersection (at the end of a run of dwellings along Shiel and Dryburgh Streets), rather than being a mid-block site. Putting this another way, in mid-block locations there seems a more obvious risk of the removal of the older building creating a 'missing tooth' type of effect (which is not the situation here).
- 47 It is also a fair comment that the existing dwelling sits on its lot in a curiously off-set manner – it does not neatly align with the other closest dwellings on either Shiel or Dryburgh Streets.
- 48 With the benefit of having inspected both the inside and the outside of the subject dwelling, and having heard all of the expert evidence regarding the physical condition of the existing dwelling, I am satisfied that:
- the substantial age of the building, as an inter-war building;
 - the complication of this being a double-brick dwelling;
 - the more basic building standards at that time for a double brick dwelling, at least for this type of pleasant but unglamorous dwelling;
 - the convincing evidence from Mr Brown and Dr Haberfield that the subject dwelling sits on highly reactive clay soils that are very prone to expansion and contraction over time;
 - (based on the relevant expert evidence called by the applicant) the real possibility that the closest Plane trees on Shiel Street have somewhat

dried out the soil to the south of the subject dwelling, thereby exacerbating the above-mentioned process of the soil expanding and contracting⁶;

- the lack of proper maintenance of the subject dwelling (eg of the plumbing, guttering and downpipes) by previous owners; and
- the apparent lack of proper waterproofing of the bathroom (leading to 'rising damp')

have all contributed to what I accept is a major and very advanced extent of deterioration of the inherent physical condition/stability of the subject building. I also note that the more highly valued four rooms closest to the front facade are closer to (and more likely to be impacted by) the contentious nearby Plane trees.

49 In making this judgement, I see less turning on the condition of the inside of the dwelling, since the internal plasterwork can if necessary be repaired and re-repaired. Rather, I see the key issue here as being the extent of the cracking of the building as visible from the outside walls. My site inspection was very helpful in allowing me to closely inspect these external walls.

50 With the benefit of this close inspection:

- I accept the combined evidence of Mr Brown, Mr Lorich and Dr Haberfield that there has been extensive and significant cracking of the external walls of the subject building.
- I also accept their combined evidence that very extensive, technically difficult and highly intrusive building works (e.g. putting in 'screw piles') would be necessary, to carry out sufficient structural repairs and deep soil bolstering to have any real confidence that the existing dwelling will over the longer term be made structurally stable (eg with flat floors and minimal future movement/shifting of the restored building over the longer term).

51 In referring to the prospect of 'highly intrusive works', my concern here is that I accept the expert evidence of Mr Brown and Dr Haberfield that it is probable that very deep underpinning of the existing dwelling to the underground basalt would be needed⁷, and that the machines to carry out the necessary drilling are very large and cannot fit through ordinary doors. Hence the likely scenario here would be that the use of these machines would require substantial areas of the wooden floors to be removed and some removal of internal walls to gain access to certain internal drilling points.

⁶ Noting that unlike the situation with the properties further west along Shiel Street, the subject land only had a root barrier installed to its south quite recently.

⁷ That is, very deep underpinning would be needed because to achieve real stability, the supports would need to go several metres down, to get to stable and reliable lower basalt rock, rather than the more unstable clay.

- 52 I am also conscious that the expert evidence of Messrs Lorich and Brown and Dr Haberfield as a whole indicates the following. The combined evidence was that even if these very extensive and intrusive stabilising works were carried out, given their inherently very technically challenging nature, there would still be at least a small risk that these works might fail and the existing building might remain unstable in the longer term.
- 53 I make this ‘small risk’ finding on the following basis. Dr Haberfield (who has a Doctorate and who I consider presented in a very knowledgeable and measured manner) took a more optimistic approach to the capacity to find a full engineering solution here. However it is appropriate that I also have some regard to the evidence of Mr Brown and Mr Lorich, who both expressed major reservations about the inherent feasibility of making the existing building properly structurally stabilised and bolstered over the longer term.
- 54 I note that at the hearing Council queried whether the written reports by any of Messrs Lorich and Brown or Dr Haberfield actually went so far as saying that the subject dwelling is ‘structurally unsound’. Whilst this is a relevant query to raise, it is appropriate for the Tribunal to take into account both the written and oral evidence of expert witnesses before it as a whole. Looking at this expert evidence in totality:
- whilst none of Messrs Brown and Lorich and Dr Haberfield are saying that the subject dwelling is currently uninhabitable or about to fall over;
 - I nevertheless accept that they have in totality provided credible expert evidence that very extensive, technically difficult and highly intrusive building works would be necessary to secure the long term stability of the subject dwelling, without any guarantee of success.
- 55 Relying on my various findings set out above, I have set out below the relevant Clause 22.05 provisions dealing with ‘Demolition’ and my comments on same:

Before deciding on an application for demolition of a graded building the responsible authority will consider as appropriate:

The degree of its significance.

Comment: I have explained above the reasons why in the particular facts and location here, I consider there to be a lower level of heritage ‘significance’ of the subject dwelling.

The character and appearance of the building or works and its contribution to the architectural, social or historic character and appearance of the streetscape and the area.

Comment: I consider the subject dwelling to be making a more limited contribution to the ‘architectural, social or historic character and appearance of the streetscape and area’ due to its ‘edge of precinct’ location, it being a bungalow not a Victorian era building and it

having a 'C' rather than an 'A' or 'B' grading. The appearance of the remnant heritage fabric here is also compromised by the substantial external wall cracking of the main building and the outbuildings being extremely run down.

Whether the demolition or removal of any part of the building contributes to the long-term conservation of the significant fabric of that building.

Comment: not applicable.

Whether the demolition or removal is justified for the development of land or the alteration of, or addition to, a building.

Comment: I consider this factor to be 'neutral' here.

- 56 These are the main points I rely upon in finding that the demolition of the existing building would be an acceptable planning outcome.
- 57 It is a fair point by Mr Hofmann that my findings above have some similarities with those of the Tribunal in the recent case of *Hadjitofi v Yarra CC* [2017] VCAT 1778. That case involved a circa 1860 bluestone cottage in Richmond which was proposed to be demolished, which Council opposed. In finding that such demolition was reasonable, Member Watson at [18] placed weight on expert evidence given about the “*high degree of technical difficulty*” to restore the front part of the dwelling to a “*habitable and structurally sound condition*”. However I acknowledge that Member Watson at [16] also refers to her finding that the cottage is “*uninhabitable and structurally unsound*”.

Final comments on 'demolition' issues

- 58 Before closing, I also make the following points in passing.
- 59 I support the line of thinking that where any one longer term owner of a heritage listed building allows that building to run down in condition, it is inappropriate to let that owner effectively ‘benefit from their own neglect’ over that period. Hence I have always taken a very cautious approach to longer term owners of heritage buildings seeking to effectively get a ‘leg up’ with their ‘demolition’ case by highlighting the poor condition of the structure. However this is not a practical issue here, since the applicant has only owned the subject land for in the order of a year or two.
- 60 I am conscious that Council queried why the applicant was challenging the viability of saving the existing dwelling, when it is tenanted out currently. This is a fair query to raise – the fact that the subject property is being occupied at the time of the hearing (i.e. is habitable) does not make it any easier for the owner to argue that the existing dwelling is not worth retaining.
- 61 However in the particular circumstances here, whilst I acknowledge the subject dwelling is currently occupied by tenants and retains many of its original features, I see this as outweighed by the credible expert evidence of

Messrs Lorich and Brown and Dr Haberfield that the long term preservation and stabilisation of the building would involve highly extensive and intrusive engineering works and no guarantee of long term success. It may be that with an A or B graded building, the owner might have to just accept that with these higher graded buildings, these sorts of extensive works and inherent risks ‘go with the territory’ of choosing to own such a building. However I see this type of logic as harder to justify for C or D graded buildings.

- 62 Finally, there was some discussion at certain points of the hearing about the likely cost of the potential major engineering works to stabilise and bolster the existing dwelling, if it were to remain long term. Whilst it was a somewhat crude exercise, there was still some helpful discussion about the range of possible ‘stabilisation’ costs involved. Council⁸ for example saw these costs as more like around \$220,000, whereas the applicant’s position what that the likely figure was more like at least \$360,000 or a considerably higher figure well into the \$400,000s.
- 63 As discussed at the hearing, it is a vexed situation for the planning decision maker to assess how much (if any) weight to put on these type of personal concerns about the major heritage restoration costs to the owner. I say ‘vexed’ in that *SMA Projects Pty Ltd v City of Yarra (Red Dot)* [2013] VCAT 436 at [73-76] indicates that the Tribunal would usually ‘contemplate limited circumstances’ in which the financial feasibility of a project would be a factor in the Tribunal’s planning discretion. To my knowledge, the planning policy framework is silent regarding these type of ‘heritage restoration cost’ considerations.
- 64 If there is to be some regard of the potential costs in preserving the subject dwelling, it needs to be kept in mind that the range of costs mentioned above would merely relate to stabilising the building. The owner would still have to contend with the other usual costs of fully renovating an older building up to a modern and safe standard, plus associated landscaping and any new outbuildings.
- 65 My findings here are as follows. Where the issue of ‘the likely cost of the necessary preservation works’ is not mentioned as a policy consideration or as a decision criteria in the Heritage Overlay, I do not see it as a determinative consideration.
- 66 However in the situation where the objectives of the planning system include the notion of ‘fairness’⁹, it seems reasonable that the planning decision maker have some regard to any credible evidence that:
- the necessary engineering preservation works would be exceptionally expensive; and

⁸ Referring here in particular to the expert evidence of Ms Gould.

⁹ See Section 4(1)(a) of the *Planning and Environment Act 1987*.

- there is a real residual risk that these works might still fail over the longer term.

67 Whilst this might be less of a practical issue with a typically more valuable A or B graded building (see my comments about such buildings above), it may be more of a practical issue per se with C or D graded buildings which in many situations may have a lesser inherent value.

68 To summarise, the estimated cost of the necessary restoration works has not been a determinative factor in my decision to grant permission for the demolition of the existing dwelling. However in the particular circumstances here, it is a factor I have had some regard to.

Conclusion

69 For the reasons set out above, I have set aside Council's Notice of Refusal to Grant a Permit and directed that a permit issue, subject to the final version of the draft permit conditions. This final version includes what I consider to be some significant further improvements to the design of the new dwelling.

Philip Martin
Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO:	TP-2016-624
LAND:	341-353 Dryburgh Street NORTH MELBOURNE VIC 3051

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- The demolition of the existing dwelling and construction of a new dwelling.

CONDITIONS:

Further details

- 1 Prior to the commencement of the development (including any demolition, bulk excavation, construction or carrying out of works) on the land, two copies of plans, drawn to scale must be submitted to the Responsible Authority generally in accordance with the advertised plans, TP01-101 to TP0-102 (Rev. B) and TP0-013 to TP11-101 (all Rev. A) prepared by Nixon Tulloch Fortey, but amended to show:
 - (a) The boundary fencing, building facades facing Shiel and Dryburgh Streets and Shiel Street pedestrian entry area to be revised as shown in the Revision G concept plans tabled on the last hearing day of the VCAT P1238/2017 proceeding, but with the following additional modifications. The upper level balcony to the north of the ‘Rumpus room’ must be set back from the Dryburgh Street boundary by at least one metre. The highest point of the brick boundary fencing must be no higher than two metres above the adjacent footpath level, with the angle of the sloping areas of the fence adjusted accordingly. The upper southern façade facing Shiel Street shall include an upper window generally as shown in the Revision F concept plans. The brickwork on the Shiel and Dryburgh Street boundaries shall feature the following mix of bricks rather than any paling fencing – rather than being a mix of red and black bricks, such brickwork shall be a combination of darker middle and high level bricks and mortar but a lower level treatment which is a mixture of ‘darker bricks but a light-coloured mortar’, as generally shown on the relevant photomontage tabled on the final VCAT P1238/2017 hearing day. If this change is inconsistent with any existing ‘materials information’ on the architectural plans, such information must be updated accordingly.

- (b) Further 'cut-out' details of the nature and appearance of the wooden battens on the Shiel Street façade.
- (c) Confirmation of compliance with Clause 54.04-6 Standard A15 of the Melbourne Planning Scheme to be provided including an overlooking diagram demonstrating potential views into adjoining properties from the proposed first floor balcony and screening details.

The amended plans must be to the satisfaction of the Responsible Authority and when approved will be the endorsed plans of this permit.

- 2 The development as shown on the endorsed plans must not be altered or modified unless with the prior consent of the Responsible Authority.
- 3 Prior to the commencement of the development, a schedule and samples of all external materials, colours and finished including a colour rendered and notated on plans / elevations must be submitted to, and approved by the Responsible Authority.

Condition-precedent to demolition

- 4 Unless otherwise permitted in writing by the Responsible Authority, before the permit holder commences the demolition of the existing dwelling as authorised by this permit, the permit holder must provide to the Responsible Authority's satisfaction a bona fide, arms-length executed building contract for (other than minor alterations) the construction of the replacement dwelling approved by this permit.

Landscape as on endorsed plans

- 5 Landscape works as shown on the endorsed plans must be completed within six months from the completion of the development to the satisfaction of the Responsible Authority and subsequently maintained to the satisfaction of the Responsible Authority.

Building over easements

- 6 Prior to the commencement of the development (excluding demolition), the permit holder must either obtain the necessary permission(s) from the relevant parties/authorities to construct over the easement(s) and provide evidence of this to the Responsible Authority; or obtain planning permission to remove or vary the location of the easement(s).

Engineering

- 7 All projections over the street alignment must be drained to a legal point of discharge in accordance with plans and specifications first approved by the Responsible Authority – Engineering Services
- 8 Prior to the commencement of the development, a stormwater drainage system, incorporating integrated water management design principles, must be submitted to and approved by the Responsible Authority – Engineering Services. This system must be constructed prior to the occupation of the

development and provision made to connect this system to the City of Melbourne's underground stormwater drainage system.

- 9 Prior to the commencement of the use/occupation of the development, all necessary vehicle crossings must be constructed and all unnecessary vehicle crossings must be demolished and the footpath, kerb and channel reconstructed, in accordance with plans and specifications first approved by the Responsible Authority – Engineering Services.
- 10 The footpath(s) adjoining the site along Dryburgh Street and Shiel Street must be reconstructed together with associated works including the reconstruction or relocation of kerb and channel and/or services as necessary (i.e. any repairs necessary due to wear or damage caused by the approved construction works) at the cost of the developer, in accordance with plans and specifications first approved by the Responsible Authority – Engineering Services.
- 11 Existing street levels in Dryburgh Street and Shiel Street must not be altered for the purpose of constructing new vehicle crossings or pedestrian entrances without first obtaining approval from the Responsible Authority – Engineering Services
- 12 Existing street furniture must not be removed or relocated without first obtaining the written approval of the Responsible Authority – Engineering Services.
- 13 All pedestrian ramps must be designed and constructed in accordance with AS 1428:2009 Design for Access and Mobility and should be fitted with ground surface tactile indicators (TGSI's). Details of the TGSI's must be submitted to and approved by City of Melbourne – Engineering Services prior to their installation.

Timeframes

- 14 This permit will expire if one of the following circumstances applies:
 - (a) The development is not started within two years of the date of this permit.
 - (b) The development is not completed within four years of the date of this permit.

The Responsible Authority may extend the permit if a request is made in writing before the permit expires, or within six months afterwards. The Responsible Authority may extend the time for completion of the development if a request is made in writing within 12 months after the permit expires and the development started lawfully before the permit expired.

- End of conditions -