

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P27/2012
PERMIT APPLICATION NO. PA1123425

CATCHWORDS

Section 77 of the *Planning & Environment Act 1987*; Hobsons Bay Planning Scheme; repeat appeal; guidance by the previous Tribunal decision; response to neighbourhood character; impact on significance of heritage place; modulation and articulation of built form; presentation of built form to public open space; traffic and car parking impacts.

APPLICANT	Raio
RESPONSIBLE AUTHORITY	Hobsons Bay City Council
RESPONDENTS	Melissa Goyak and others
SUBJECT LAND	6 Paine Street, Newport
WHERE HELD	Melbourne
BEFORE	Michael Deidun, Presiding Member Ann Keddie, Member
HEARING TYPE	Major Cases Hearing
DATE OF HEARING	10-13 September, 2012
DATE OF ORDER	5 October 2012
CITATION	

ORDER

- 1 Leave is granted to substitute the plans that are the subject of the Application for Review for the following:
 - Drawing Nos TP02 – TP05 inclusive and TP09 – TP11 inclusive all marked revision B and dated 4 June 2012;
 - Drawing Nos TP06 – TP08 and TP12 inclusive all dated 20 April 2012;
 - Ground and First floor landscape plans Ref LS4 and LS5 dated April 2012.
- 2 The decision of the Responsible Authority is affirmed. No permit is granted in permit application no. PA1123425.

Michael Deidun
Presiding Member

Ann Keddie
Member

APPEARANCES

For Applicant	Ian Pitt, SC, Lawyer from Best Hooper. Mr Pitt called expert evidence from Stuart McGurn (town planner) of ERM, Allan Wyatt (landscape architect) of ERM, Bruce Raworth (heritage consultant) of Bryce Raworth Pty Ltd, Charmaine Dunstan (traffic engineer) of Traffix Group, Mark Sheppard (urban designer) of David Lock and Associates, and Johnny Wilkinson (visualisation) of Scharp.
For Responsible Authority	Adeline Lane, Lawyer from Maddocks. Ms Lane called expert evidence from Andrew Hutson (architect) and Robyn Riddett (heritage consultant) of Anthemion Consultancies.
For Respondents	Melissa Gojak, Alison Terry, Darren Williams and Anthony Simmons all appeared in person.

INFORMATION

Description of Proposal	Construction of 42 dwellings in a three storey building and reduction of the standard car parking requirement.
Nature of Proceeding	Application under Section 77 of the <i>Planning and Environment Act 1987</i> .
Zone and Overlays	Residential 1 Zone Heritage Overlay No 27

Permit Requirements	<p>Clause 32.01-4 to construct more than one dwelling on a lot in the Residential 1 Zone</p> <p>Clause 43.01-1 to construct a building or to construct or carry out works on land within the Heritage Overlay</p> <p>Clause 52.06-3 to reduce the standard car parking requirement under the clause</p> <p>Clause 52.06-8 to vary the standard car parking design requirements set out under this clause</p>
Key Scheme policies and provisions	Clauses 10, 11, 15, 16, 21, 22.01, 22.10, 32.01, 43.01, 52.06, 55 and 65.
Land Description	<p>The subject land is a parcel of 3,254 square metres adjoining Armstrong Reserve and bounded by Paine Street (south), Crawford Street (east) and Latrobe Street (west).</p> <p>Surrounding land is entirely residential, with a variety of building ages and styles. The vast majority are detached, traditional cottage dwellings on quite small lots. Armstrong Reserve offers children's play equipment, sports courts and grassed/landscaped open space. The site is located some 700 metres from the Newport Activity Centre and train station.</p> <p>The subject land has the benefit of a planning permit allowing a 13 lot subdivision for traditional townhouses. This permit expires if the development is not completed by 22 April 2014.¹</p>
Tribunal Inspection	The Tribunal conducted an accompanied inspection of the review site and surrounding properties on 11 September 2012.
Cases Referred To	<i>Cahill v Hobsons Bay CC</i> (Correction) [2011] VCAT 589; <i>NJJKT Pty Ltd v Whitehorse CC</i> [2008] VCAT 1410; <i>Richmond Icon Pty Ltd v Yarra CC</i> [2011] VCAT 2175; <i>Jopsal Pty Ltd v Moonee Valley CC</i> [2010] VCAT 175; <i>2G Investment Group Pty Ltd v Yarra CC</i> [2009] VCAT 2182; <i>Taser Developments Pty Ltd v Boroondara CC & Ors</i> [2009] VCAT 1070.

¹ In part, this is the description of the land provided in the previous Tribunal decision of *Cahill v Hobsons Bay CC* (Correction) [2011] VCAT 589.

REASONS²

What is this proceeding about?

- 1 In April 2001 the Tribunal affirmed Hobsons Bay City Council's refusal to grant a permit for a development of the review site with 40 dwellings. The reasons for that decision are set out in *Cahill v Hobsons Bay CC* (Correction) [2011] VCAT 589.
- 2 In response to the *Cahill* decision the Applicant has modified the proposal. In September 2011 an amended development proposal was presented to Council, this time for 43 dwellings. Council determined to refuse the application on a variety of grounds, raising matters of compliance with policy, suitability of the urban design outcome, impact on the character of the surrounding neighbourhood and the relationship of the development with the surrounding heritage place.
- 3 The Applicant has again sought a review of Council's decision. Residents share Council's concerns, as well as raising issues in relation to car parking and traffic, and the surveillance of the adjacent public open space.
- 4 In a repeat appeal such as this the Tribunal must give significant weight to the previous decision. The key questions for our determination therefore are:
 - a. What did the previous Tribunal say?
 - b. What are the policy objectives for this area of Hobson's Bay?
 - c. Is the built form an appropriate response to heritage policy and HO27?
 - d. Is the built form an acceptable response to the neighbourhood character?
 - e. Does the proposal create any unreasonable off-site traffic or car parking impacts?
 - f. Does the proposal achieve appropriate levels of internal amenity?
- 5 Missing from that list is the topic of off-site amenity impacts. This is a site surrounded by roads and public open space and as a result there are no off-site amenity impacts from the development by way of overshadowing, overlooking or to daylight the daylight available to existing dwellings as set out in ResCode³. There is a potential impact caused by visual bulk, which we address as part of our neighbourhood character analysis.
- 6 The key planning issue in this case is the response to relevant State and local planning policies and the balance between those relating to urban

² We have considered all submissions presented by the parties although we do not recite all of the contents in these reasons.

³ As set out at Clause 55 of the Hobsons Bay Planning Scheme.

consolidation and those seeking an appropriate built form outcome in the strategic and physical context of the site.

- 7 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Hobsons Bay Planning Scheme, we have decided to affirm Council's decision.
- 8 It is the findings which we have made in relation to the proposal's design response to the character of the neighbourhood which have led us to affirm Council's decision to refuse the proposal. We have made findings on some other issues raised at the hearing in the hope that it will assist parties in any new planning application for the land. Our reasons follow.

What did the previous decision say?

- 9 Before considering the latest proposal for the review site we examine the previous Tribunal decision. Firstly, because it is a matter to which we should give significant weight. Secondly, because natural justice demands that we have good reasons if we are to depart from the findings and guidance given by a previous decision.
- 10 The previous Tribunal decision identifies a number of acceptable aspects in the previous development proposed for the site. In summary, these are:
 - a. A contemporary design response with building modules around the street edges (paragraph 21);
 - b. The provision of direct entries to the ground level apartments from the surrounding streets (21);
 - c. A carefully modelled series of three storey buildings (24), including a three storey presentation to Armstrong Reserve with numerous opportunities for outlook (25);
 - d. Front setbacks in the order of three metres, on the proviso that the overall building envelope is moderated (26);
 - e. The traffic and car parking impacts of the proposal were found to be appropriate (40-43); and,
 - f. By implication through a series of comments, it is also clear that the podium form central to the site was also an acceptable component of the proposal.
- 11 We draw from this that the Applicant should have a reasonable expectation that a three storey development is acceptable on the site, utilizing a perimeter based configuration. To this end, we consider that many of the submissions made on behalf of the group of local residents, which seek a less intense two storey form of development for the site, are contrary to the findings and guidance of the previous Tribunal decision.

- 12 The earlier proposal comprised a series of glazed, unashamedly contemporary three storey dwellings in a similar configuration to the current iteration. The Tribunal's concerns were, in summary:
- a. The juxtaposition of the proposal to the fundamental built form and siting characteristics of surrounding residential properties (paragraph 23);
 - b. The combination of the uniform three storey rectangular building forms, consistency in façade treatment and minimal front setbacks over reasonably long elevations, particularly to Armstrong Reserve and Crawford Street. (27);
 - c. Insufficient articulation and modulation in façade treatment (30);
 - d. The lack of reference to prevalent characteristics of the neighbourhood, including the width and scale of the properties opposite (28, 30);
 - e. The way in which the presentation of monumental stairways diminished the value of the breaks in building forms by not allowing the opportunity for through site views (36).

What are the policy objectives for this area of Hobsons Bay?

- 13 Council's submission is that the policy and statutory framework has not substantially altered since the previous Tribunal decision. State policy still identifies the site as a strategic redevelopment site⁴, one on which a significant development achieving urban consolidation should be achieved. We agree with the Applicant's submissions that policy creates an expectation that opportunities to intensively develop sites such as this should be grasped, and not reduced in yield unless there are sound reasons to do so.
- 14 However, the opportunity presented by this strategic redevelopment site is tempered by its context. It is not within or adjacent to an activity centre but rather within the residential hinterland. The residential hinterland is under a heritage overlay. The neighbourhood is characterised by low scale, predominantly single storey, cottages. This was recognized by the previous Tribunal.
- 15 State and local policy both seek development that respects and responds to neighbourhood character⁵. At local level, response to neighbourhood character is shaped by the Neighbourhood Character Policy.⁶ An objective of the policy is:

⁴ As defined at Clause 16.01-3 of the Hobsons Bay Planning Scheme.

⁵ At a state level that is clear from the policy references at Clauses 15.01-1, 15.01-2, 15.01-5, 16.01-4, and the purpose of the Residential 1 Zone, "To encourage residential development that respects the neighbourhood character."

⁶ Clause 22.10

To ensure that the development responds to the preferred neighbourhood character of the precinct in which it is located

- 16 The review site falls within Precinct 8, which contains the following statement of preferred neighbourhood character:

The low scale nature of the precinct and the garden settings of the dwellings should be retained and strengthened.

- 17 However, on this strategic redevelopment site, we find that respect for the preferred neighbourhood character does not necessarily have to reflect every aspect of the form of development seen in individual allotments. This too was clearly recognised in the previous Tribunal decision. As a result, we would anticipate a built form which is larger in scale than the surrounding housing stock, but one in which cues from the surrounding neighbourhood are clearly evident.

- 18 We also consider that such an approach is consistent with the Design Responses sought in this character area⁷, which include the following:

New development, including additions to existing buildings, should be distinguishable from original dwelling stock through the use of innovative and contemporary design.

- 19 Ms Lane informed us that Amendment C63 to the Hobsons Bay Planning Scheme proposes to introduce a revised Municipal Strategic Statement (MSS). The Amendment is currently before the Minister for Planning for final approval and gazettal. It is therefore a seriously entertained planning proposal, something to which we should give some weight.

- 20 Ms Lane submitted that the Amendment is policy neutral. Rather than diverging from the policy intent expressed in the current MSS, it seeks to express that intent in a different way. Such Amendments are not uncommon in the Victorian planning system. Amongst other things, the proposed MSS⁸ seeks to:

Protect the quality and character of existing suburbs from pressure associated with urban consolidation.

Protect places and precincts of local heritage significance from inappropriate development.

- 21 At the same time it expresses a vision of a City that:

Allows for increased housing growth and provides for diverse housing needs in a way that complements the valued urban village characteristics of its neighbourhoods;

Encourages built form that achieves harmony between the old and new fabric;

Encourages sustainable design and design excellence.

⁷ Clause 22.10-3.

⁸ Clauses 21.02-3, 21.02-4

22 Other objectives seek to:

Ensure new development responds appropriately to the character in which it is located

Ensure that new development respects and enhances the preferred neighbourhood character of the existing residential areas of Hobsons Bay

23 The policy tensions between the protection of urban character on the one hand and supporting housing growth on the other is a re-expression of that tension found both in State policy and the current MSS.

24 These policy tensions are common in planning disputes, and were explored in the decision of *NJJJKT Pty Ltd*⁹ where the Tribunal discussed the need to balance neighbourhood character considerations with those strategies in relation to urban consolidation, diversity and affordability, rather than giving undue weight to one or the other.

25 In relation to the review site, we agree that the level of respect or responsiveness that a proposal for the site should show to neighbourhood character should not be over emphasised at the expense of consolidation policies. Indeed the previous Tribunal has already determined that a development of far more intense scale and differing built form is acceptable.

26 It should also be noted that we are not seeking an outcome that is ideal in all respects. As the Tribunal observed in *Richmond Icon*¹⁰

Clause 65 requires us to consider whether the proposal will achieve acceptable outcomes. Clause 10.04 of the planning scheme contains the oft-quoted direction to responsible authorities and, upon review, the tribunal to balance competing and conflicting policies to achieve the most appropriate outcome for the community. We acknowledge ‘the community’ is a broad term and, as is the case here, a proposal may have some impacts upon parts of a community and it may also have benefits for a broader community.

The Supreme Court has recently considered the meaning of “acceptable outcomes” within the terms of clause 65 in *Rozen v Macedon Ranges SC*¹¹. After referring to the provisions of what is now clause 10.04 and clause 65, Osborn J said:

[174] In *Knox City Council v Tulcany Pty Ltd*, I observed:

The planning scheme does not require an ideal outcome as a prerequisite to a permit. If it did, very few, if any, permits for development would ever be granted and there would be difficult differences of opinion as to whether the outcomes were in fact ideal. The Tribunal is entitled to grant a permit where it is satisfied that the permit will result in a reasonably

⁹ *NJJJKT Pty Ltd v Whitehorse CC* [2008] VCAT 1410 t paragraphs 10-14 inclusive

¹⁰ *Richmond Icon Pty Ltd v Yarra CC* [2011] VCAT 2175: paragraphs 15-18 inclusive.

¹¹ [2010] VSC 583

acceptable outcome having regard to the matters relevant to its decision under the planning controls¹².

[175] For these reasons I accept the appellants' submission that the test which the Planning Scheme requires to be applied is one of acceptable and not ideal outcomes.

[176] The question in the present case is whether the Tribunal's reasons read in context demonstrate that it has failed to apply the correct test. The underlying task of the Tribunal is after all to reach the 'correct or preferable' decision on the material before it¹³.

[177] In this sense the preferable outcome is not to be equated with the 'ideal' outcome.

In reference to the above, the Tribunal recently found¹⁴:

[78] As the Supreme Court observed, the test of acceptable outcomes is informed by the notions of net community benefit and sustainable development. An outcome may be acceptable despite some negative characteristics. ...

Hence, this proposal can be acceptable even if, in the eyes of some of the community, it has some negative characteristics or outcomes. A planning outcome that is 'Pareto optimal', i.e. a change that offers the greatest benefits for some individuals without making anyone else worse off than they were in the first instance, would be ideal. However, the complexities of cities are such that outcomes of this nature are rarely possible. Hence, the correct or preferable outcome should not be equated with an ideal outcome.

- 27 We therefore need to support an outcome that is appropriate or reasonable, even if some facets of the proposal have negative consequences, and overall the proposal is not ideal. It is our task, as decision makers in an expert Tribunal, to assess the evidence and submissions made to us and decide whether or not the current proposal achieves the required balance.
- 28 Finally, we note that Amendment C63 also seeks to identify strategic redevelopment areas within the municipality, and create policy expectations for those areas. This site is not one of them. However, we agree with the Applicant's submission that such policy does not reduce the importance of other strategic redevelopment sites in the municipality, such as the review site. That is clear in the objective which applies to the strategic redevelopment areas under Clause 21.03-2, which specifically identifies redundant industrial areas. It follows that the potential of strategic redevelopment sites in residential areas is not sought to be limited by this policy.

¹² (2004) 18 VPR 229, 234

¹³ [*Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, 433; *McDonald v Guardianship and Administration Board* [1993]] 1 VR 521, 528

¹⁴ *The University of Melbourne v Minister for Planning* (includes Summary) (Red Dot) [2011] VCAT 469

Is the built form an appropriate response to the heritage place?

- 29 The residents oppose the development on the grounds that the proposed scale and form of the development does not respect the heritage of the surrounding neighbourhood.
- 30 The Council relied upon the expert evidence of Ms Riddett. Her evidence was that due to the atypical site, a higher built form with perimeter blocks broken up as proposed is an acceptable response to the heritage values of the precinct.
- 31 Mr Raworth agrees with Ms Riddett that the surrounding streets are of mixed character and generally low heritage interest where they are opposite the site. His evidence is that the impact on the character and appearance of this small part of HO27 will not have an adverse impact on the overall significance of the precinct.
- 32 In relation to the previous proposal, the Tribunal found that it would not detract from the significance of the heritage precinct, nor from that of nearby contributory buildings, in the sense that it would interfere with the legibility of layering of history identified in the statement of significance. Further, it suggested that¹⁵;

To the extent that the common elements of housing are referred to in the heritage statement of significance, they are apt descriptors of the area under consideration. Ultimately, I regard these elements as far more significant in *character* terms than heritage, since they derive from the agglomeration of both heritage and non-heritage dwellings. This character is mostly comprised of a prevailing collection of modest single storey cottages.

In saying this, I regard the application of the Heritage Overlay to the entirety of the area around the development site as making it likely that built form change can be expected to be only incremental. In my opinion, the existence of the Overlay reinforces the stability of the existing built form of the immediate area, as does the current subdivision pattern of overwhelmingly compact lots in all adjoining local streets.

- 33 We agree with this observation. The citation for the Private Survey Heritage Precinct is noted as being aesthetically significant for the:
- ...groups of predominantly late nineteenth and early twentieth century houses that, although stylistically different, share common elements of scale siting, materials and roof forms, which create cohesive groups of distinctive character.¹⁶
- 34 We see no reason why, in principle, the 'layering of history' characterising HO 27 could not be enhanced by yet another 'stylistically different' group of dwellings.

¹⁵ At para 14-15

¹⁶ Hobsons Bay Heritage Study Amended 2012-Volume 3-Part 1 page 2/14

- 35 Both heritage experts emphasise the modest built form, mixed character and low heritage values of this part of HO27. We conclude that the relatively low level of significance attributed to this portion of the precinct based heritage overlay provides an opportunity for a contemporary design of some scale to be developed, without impacting on the significance of the heritage place as a whole. As put to us by Mr Pitt ‘this case is all about neighbourhood character and built form.’

Is the built form an acceptable response to the neighbourhood character?

Submissions

- 36 Submissions from Council and residents led by Ms Gojak assert that the proposal is not an appropriate built form response to the character of the surrounding area.
- 37 In Council’s view, the setbacks at upper levels and breaks between buildings are inadequate and the rectilinear repetitive form, scale, and lack of clearly designated front doors all lead to an unacceptable outcome.
- 38 Mr Hutson’s evidence is that the proposal displays insufficient variety of form and that the series of repetitive elements presenting to the street interfaces is at odds with the complexity evident in nearby housing stock. The three storey terrace form, and in particular the height and width of the forms facing Paine Street, Crawford Street and the Armstrong Reserve do not relate to the scale of buildings found in the surrounding neighbourhood. He considers that the two end units facing the reserve should be reduced in height to better respond to the housing on the opposite sides of LaTrobe and Crawford Streets.
- 39 He says that the horizontal change in materials serves to emphasise, rather than reduce the continuous three storey form. The indentations articulating the projecting box elements along Paine Street fail to break down the continuity of form. He noted that the design does not reflect in any way the oblique street frontages which characterise Paine Street, and that the repetitive treatment made little effort to incorporate setbacks and formal variety to reduce the perception of visual bulk.
- 40 Mr Sheppard’s evidence is to the contrary. He says amendments to the application plans introducing greater front setbacks, upper level changes generally and increased setbacks to the dwellings facing the reserve have resulted in an acceptable urban design solution for the site. He considers that the additional modulation and building breaks have responded to the previous decision and are an appropriate response to the prevailing character.
- 41 Mr Sheppard defends the use of a common architectural language by what he described at the hearing as a need to be authentic to the fact that this is

one co-ordinated development, and that there will be a lack of architectural integrity if there is greater variation.

- 42 Mr McGurn agrees that the greater articulation and modified setbacks evident in the new design respond to the Tribunal's concerns. He says that the lowering of the podium by 800mm and setting back the stairways to it has eliminated their 'monumentality'.
- 43 The residents supported the Council's submissions that the proposal would have an adverse impact on the neighbourhood character and amenity of the precinct due to its height, mass, colour, bulk, roof form and detailed design. They submit that an analysis of the existing character of the surrounding area demonstrates that other, larger development sites in more advantageous locations, such as along main roads, have managed to achieve outcomes more responsive to the character of housing in Newport than this proposal for the review site.

Analysis

- 44 While we need to consider this application afresh, having regard to all of the relevant matters, the relevant case law directs us that we should not depart from the previous decision unless there has been a significant change in circumstances. In the decision of *Jopsal Pty Ltd v Moonee Valley CC* [2010] VCAT 175 the Tribunal stated:

There are numerous Tribunal cases dealing with repeat appeals including *Van De Velde v Wodonga CC* [2005] VCAT 1426 and *K & B Reichert v City of Banyule & Ors*, (1996/38819) where four factors were identified which might justify a departure from an earlier determination:

- significant changes in the application itself;
- changes in the circumstances of the land and its surrounds;
- changes in planning policy; and/or
- changes in the interpretation of the facts or law relevant to the Tribunal's consideration.

- 45 In this case, the change is in the application itself, to one that the Applicant submits has adequately responded to the previous Tribunal's criticisms. In the absence of any other change, and none were put to us by any of the parties¹⁷, we affirm the Tribunal's identification of design elements which might form the basis of a new design. We consider that a development of contemporary design adopting a largely three storey form built around the perimeter of the site is a legitimate starting point for development on this site.

¹⁷ We have considered Amendment C63 to the Hobsons Bay Planning Scheme, and while it was not put to us by any of the parties as being a material change in planning policy, we have also independently come to this view.

- 46 Whilst the residents have urged us to find that a more traditional built form of individual dwellings, more akin to the existing surrounding housing, should be pursued, as mentioned above we consider that approach is contrary to the findings of the previous Tribunal. The Applicant is entitled to use the findings of the previous Tribunal about an appropriate form of development for the review site as the basis of a new proposal. It is for this reason that we reject many of the submissions made on behalf of the resident objectors.
- 47 Our role is to assess whether the Applicant's team has devised a new design which successfully addresses the concerns of the previous Tribunal, having regard to the context of the site and the Hobsons Bay Planning Scheme.

Neighbourhood character

- 48 We first set out what we consider are the key characteristics of the surrounding neighbourhood. We have been assisted by Council's neighbourhood character policy.¹⁸ However, as the subject site is roughly in the centre of the large area covered by Precinct 8¹⁹, we have also given significant weight to our own observations of the more immediate neighbourhood as a result of our inspection.
- 49 We consider this neighbourhood to be characterised by the following:
- a. Modest built form, consistently at one and two storeys in height;
 - b. Materials consisting mostly of timber, usually painted weatherboards;
 - c. Spaces between buildings, albeit sometimes of narrow dimensions or the result of a combination of heights;
 - d. Consistent small front gardens with front doors clearly visible from the street;
 - e. Low front fences; and,
 - f. Pitched roofs.
- 50 Despite these consistent themes, the surrounding neighbourhood also contains some diversity in built form. For example, some streets contain a high number of period cottages, others contain small collections of newer two storey dwellings, and others, including those streets abutting the review site, a mix of low scale dwellings.
- 51 It is in its response to both the existing and preferred future character of the neighbourhood that this proposal fails to achieve an acceptable outcome. This failure may not be fatal to an application in every case, for example where a neighbourhood is one in which a far greater degree of change is sought. We draw the distinction here between a strategic redevelopment

¹⁸ Clause 22.10

¹⁹ Precinct 8 covers a wide area of Newport, from Ferguson Street in the south to just beyond North Road to the north, stretching between Melbourne Road and Douglas Parade.

site located in a neighbourhood that could be characterised as one where incremental change is expected and one, for example, in an area largely comprising redundant industrial land, or on the edge of an activity centre. However, this neighbourhood, modest and diverse as it may be, is one which is not only valued by both Council and residents, it is protected by a clear policy objective, which we have already identified, whereby:

The low scale nature of the precinct and the garden settings of the dwellings should be retained and strengthened.

- 52 The previous Tribunal found the crisp glazed apartment blocks before it ‘overly foreign’. We find the current iteration equally so. We find that the way in which this series of new dwellings relates to, and is accommodated within, the surrounding streets is a key failing.
- 53 Residents highlighted the example provided by a nearby corner building as one which interrupted and, in their view, downgraded, the streetscape because of its built form. This is despite the fact that it would appear to comply with the scheme in terms of height and setback should a permit have been required. In other words, it is the design of the built form which has a negative impact on the two streets it faces. Its location on a corner increases its prominence. The review site is similarly exposed. This is both an opportunity and a constraint. There is the opportunity to build an integrated contemporary development which of itself has interest and reflects the current era. But conversely, if the built form is jarring or aggressive and presents too strong a contrast to the existing housing and as a result draws attention to itself at the expense of the valued buildings of former periods, then it is disruptive.
- 54 In a neighbourhood where policy identifies its defining characteristics as modest and low scale, it is not unreasonable to seek a development, even if it contains 40 units and rises to three storeys, that has a low key manifestation. We consider that in this location, residents have a legitimate expectation that not only the scale, but also the built form of new development will be a ‘well mannered’ addition to the neighbourhood.
- 55 The current proposal with its uniform architectural presentation to most elevations and decorative box framing elements along Paine Street, does not achieve this goal. We have considered the submissions made by the applicant about various aspects of the design. For example, the ease of designating the sliding living room doors as ‘front doors’, Mr Sheppard’s suggested changes to the upper balcony treatments to the central units which face the reserve, and the efficacy of the arrow shaped separations between the framing elements to Paine Street and other possible design changes.
- 56 We find, as did the previous Tribunal, that a perimeter layout is a sensible response to the neighbourhood, and accept that a lower podium will assist in providing more legible breaks. Dwellings built along street edges reflect the street pattern of the area. Whilst we accept that changes in materials

emphasises the lower two storeys rather than the topmost one, the proposal still presents as a monolithic block, particularly to Paine and Crawford Streets, despite these changes.

- 57 The neighbourhood character statement in the planning scheme notes that landscaping provides the opportunity to strengthen the garden settings which characterise the area.²⁰ We acknowledge the attractive landscaping proposed to the south west corner and we have no doubt that the interior spaces will be well landscaped. The example of planting along Paine Street shows open fencing and low hedging which reflects that of the neighbourhood. The proposed new street planting will considerably enhance a neglected part of the street.
- 58 The three metre setbacks along street frontages is consistent with many in the neighbourhood, but they are diminished in Paine Street by the projections of the floor above. This in itself is not necessarily problematic. It is the framing element, a device regularly seen in the more constrained areas of the inner suburbs, which is out of keeping with the neighbourhood. We do not find the device successful in breaking down the Paine Street block. Further, small variations in setbacks and height have been employed to break down the visual uniformity of the Crawford Street and Armstrong Reserve façades. However, we do not consider that the degree of the articulation and modulation sought by the previous Tribunal has been achieved.
- 59 We conclude that the built form requires ‘fracturing’ in order to better reflect that of the neighbourhood. This is not a matter of applied decoration or stylistic references, rather it is simply an echo of, or link to, the variety and broken forms evident in the majority of the existing housing, using a contemporary idiom.
- 60 In essence, our views align with those of Mr Hutson and as a result we accept his evidence in this matter, and prefer it over the evidence of Mr Sheppard and Mr McGurn. In particular we adopt Mr Hutson’s opinion where he states:
- Given the length of the street elevations and expanse of the subject site it should be reasonable to expect that the design proposal incorporate greater variety of form and scale and to respond effectively to the pattern and rhythm of the streetscapes. The current proposal also fails to adequately ameliorate the visual mass of the three storeys through sufficient set-backs and material variety.
- 61 In response to Mr Sheppard’s concerns regarding the impact of introducing greater variety in this built form, we are of the opinion that this can be done without having a negative impact on the architectural integrity of the site, and the reading of the proposal as a co-ordinated development.

²⁰ Clause 22.10

62 This is not the first time the Tribunal has refused an application because the design fails to achieve an acceptable standard. In *2G Investment Group v Yarra CC*²¹ the Tribunal said:

At the outset, we wish to acknowledge the effort of the argument put by Mr O'Farrell, and we agree with him that this site provides a significant opportunity for an increased density of housing. However, we disagree that this opportunity and the strategic imperative override the necessity to also achieve a good design outcome. We have refused this application because of the failure of this particular design to respond to its context and to provide a reasonable level of amenity to future occupants and adjoining properties.

63 In case of the review site, the balance to be struck is that between consolidation and the design response in an area of clearly articulated character. In a decision concerning a proposal for a 'landmark' site in Kew²², the Tribunal observed:

The desire to achieve urban consolidation policies is at the forethought of this Tribunal. However, in this case, the desire to achieve urban consolidation cannot be achieved at the expense of poor design in a landmark location. It is for this reason that we find the building an inappropriate response to the constraints of the site, the design challenges of the site and fails to aspire to be a building of high quality architecture and urban design.

64 The requirement for well designed buildings is not restricted to landmark buildings. Nor should it be lessened because a development site is buried within a modest residential area. Rather, it is what constitutes good design in this context which is the issue. We consider that the planning scheme's requirement to achieve high standards in architecture and urban design²³ on this site requires a design solution that, without mimicking its neighbours, sits comfortably amongst them. It should make no excuse for being contemporary, but neither should it ignore the characteristics evident in its surroundings or seek undue prominence.

65 The mix of dwellings, under podium car parking, three storey buildings and flat roofs are not common in this neighbourhood, but we consider that incremental change is able to accommodate such changes in presentation – indeed these differences can enliven the neighbourhood. However, the design before has ignored other opportunities to incorporate recognizable references to the existing built fabric that would tie the new into the old. Examples include;

- a. The unbroken appearance of the terraced groups of units. The La Trobe Street elevation is the most successful of the four facades, possibly because its built form is the most diverse, whereas the

²¹ [2009] VCAT 182 para 9

²² *Taser Developments Pty Ltd v Boroondara CC & Ors* [2009] VCAT 1070

²³ Clause 15.01-2

indentations between the framing elements separating the terraces along Paine Street seem to link the units rather than separate them. The uniform height of the blocks does not reflect the variation in heights evident in the neighbourhood nor incorporate the degree of articulation sought by the previous Tribunal;

- b. The setback of the third level successfully increases the emphasis on the lower two levels, but it remains a dark element which links the terraces along the streets, emphasising the horizontality of the blocks, rather than breaking them down into smaller forms;
- c. At each end of the Armstrong Reserve row, the first floor projects out by a metre, with a 100mm setback to the uppermost floor. This overhang would appear to contribute to the dominance of these street walls which Ms Riddett found uncharacteristic of the heritage precinct.
- d. The setback of the upper level terraces of the Armstrong Reserve group of units is visually negated by the heavy timber pergolas over the balconies. The increased setback of the central units is reduced in impact because the upper level is encased in framing;
- e. The lack of definition of front entrances of the street level dwellings; and the lack of incorporation of entrances to the reserve from the ground level private open spaces;
- f. Dwellings accessed from the podium are cut off by the security fencing in a way that is foreign to this community.

66 Having regard to these criticisms, we consider that our findings reflect the concerns expressed by the previous Tribunal. That Tribunal noted the positive features of the proposal, and suggested changes that needed to be made. However, our role is not simply to check off each criticism or instruction made and consider how successfully this iteration of the design has responded to them. It is important that we are also satisfied that the overall outcome is reasonable and appropriate. Our ultimate finding is that the proposal presented at the hearing is not an appropriate 'fit' into this residential neighbourhood.

67 We note that after the previous Tribunal indicated changes which might benefit the design, it made the following comment²⁴:

Alternatively, another approach may be to vary building heights across the development to range between 2-3 storeys or to shift the upper level away from the street, although this would represent a more dramatic departure from the current design rationale.

68 While we recognise that this advice was provided in the alternative, given what has been put before us, we suggest that it is an alternative approach worth exploring. We consider that it is more likely to result in an

²⁴ *Cahill v Hobsons Bay CC (Correction)* [2011] VCAT 589 para 11.

appropriate built form outcome for a site within this neighbourhood. In response to the previous Tribunal's observations, the Applicant chose to apply a differing style to the original proposal, rather than investigating the 'more dramatic' Tribunal suggestion. Individual issues have been addressed, but the 'big picture', the response to the neighbourhood character, has not.

Does the proposal create any unreasonable off-site traffic or car parking impacts?

- 69 The resident objectors raised concerns in relation to the provision of on – site car parking, the suitability of resident car parking being provided by way of stackers, and the impact of the additional traffic on the surrounding road network. It is appropriate to deal with each of these matters in turn.

Visitor car parking

- 70 Ms Dunstan provided traffic and car parking evidence. The development requires planning permission as it has only five visitor car parking spaces on the site, as opposed to the statutory requirement of eight spaces. Ms Dunstan said that the street boundaries of the site could accommodate 26 cars post development, that at present these frontages experienced a very low level of parking and that thus a reduction of the standard requirement for the provision of visitor car parking should be approved.
- 71 Residents submitted that the width of the surrounding streets were such that when cars are parked on both sides of the road, it is difficult for through traffic. The narrowest of the adjacent roads is Paine Street, at 7.0 metres. Clause 56.06-8 of the Hobsons Bay Planning Scheme, (although not applicable to the present application), details road widths for the construction of new subdivisions. It states that a road width of 7.0 to 7.5 metres for an access street – level 2 is sufficient to accommodate car parking on both sides of the carriageway, and a single lane of through traffic. On this basis we do not accept the submissions of the residents.
- 72 The residents also queried the accuracy of Ms Dunstan's traffic surveys, asserting that the capacity to park vehicles in the surrounding streets is lower, and the extent of actual car parking is higher, than was detailed in her evidence. Even if we were to accept the residents' data, we still find that there will be more than sufficient capacity to cater for the three visitor car parking spaces that are needed off-site at peak times.
- 73 We therefore consider it appropriate to grant the requested reduction in the provision of visitor car parking on site.

Car stackers

- 74 The residents were opposed to the design of the stackers, which in their view are of inadequate dimension to accommodate a significant number of

vehicles types favoured in the neighbourhood. They were also concerned that the 100% reliance on stackers would mean that residents would be more likely to take advantage of the available and convenient on-street parking, to the detriment of the amenity of the local area.

- 75 Car stackers have been for some time an acceptable form of providing for long term parking within developments that appear before this Tribunal. Particularly for multi-level residential developments, stacker parking is becoming more and more common. There is nothing unusual or exceptional, therefore, in the proposed use of stackers to provide for the resident car parking in this development.
- 76 Ms Dunstan's evidence is that the arrangement of the stackers is appropriate, that they provide appropriate turning circles, and that as the stackers operate independently, each vehicle can be accessed at any time. We accept her evidence that the height clearance of the stackers, at 1800mm, complies with the requirements of Clause 52.06-8. It is thus acceptable.
- 77 We also accept the evidence of Ms Dunstan that for longer stays, including overnight, residents are likely to prefer the security and weather protection provided by the on-site parking, even if it is slightly less convenient to use the stackers. She acknowledges that residents may use the kerb-side parking for short stays, for example between trips, but says that this will not cause a traffic issue in the surrounding streets as there is significant availability on-street
- 78 If other medium density development occurs in this neighbourhood, we accept that on-street parking availability may become scarcer over time. In that event, it is likely that the convenience factor to residents of parking kerb side for a short stay will dissipate, resulting in more frequent use of the stackers.
- 79 We therefore find the proposed use and design of the stacker car parking arrangement as proposed acceptable.

Traffic impacts

- 80 Ms Dunstan's evidence is that the existing level of use of the surrounding road network is well below capacity, and that the expected traffic levels from this development will not markedly change that situation. Having considered the traffic levels provided in her evidence, and the likely increase of traffic from this proposal, as well as our own observations of traffic levels during our site inspection, we accept her evidence.
- 81 In relation to the collection of waste, we acknowledge that it will require a waste vehicle to prop in Paine Street for a short period of time while the rubbish and recycling bins are retrieved and emptied. We anticipate that the Waste Management Plan will ensure that this is done in a manner which causes the least amount of interruption to the other traffic movements.

- 82 The residents are also concerned about the possibility of headlights shining into the windows of no 7 Paine Street as cars exit the review site. We note that the access ramp to the review site is not located opposite 7 Paine Street, but rather the adjacent high fence to the side boundary of 33 Crawford Street. Headlights on high beam will flash across the windows of 7 Paine Street for vehicles turning right. However, we consider the number of vehicles making such movements to be low, and their impact or time in which the lights shine through the windows to be short, in the possibility of high beam low.
- 83 We reject the proposition put forward by the residents that, as a result of their analysis, headlights from 80 vehicles per evening would be affecting the windows of 7 Paine Street. Firstly, it being the evening period, the majority of these 80 traffic movements will entering the site rather than departing. Such vehicle movements into the site will not cause headlights to shine at the bedroom windows at 7 Paine Street. Secondly, we accept Mr Pitt's submissions that, due to the relatively gentle gradient of the ramp, only cars using their high beams will shine their lights up towards the bedroom windows. We cannot speculate how many vehicles will use their high beams, but it is likely to be a minority.
- 84 We therefore do not consider the small number of times this event might occur to be unreasonable in a suburban context such as this. We conclude that, based on the evidence, there are no reasons to refuse to amend the permit application.

Does the proposal achieve appropriate levels of internal amenity?

- 85 Council does not oppose the development on grounds relating to internal amenity. Residents, however, assert that the proposal is deficient in regard to internal views, daylight to new windows, provision of storage facilities, solar access to open space and the provision of secluded private open space.
- 86 As we have decided to uphold Council's decision and expect that a new design will have a different layout, we do not comment on these matters. Suffice to say that a preliminary review of the plans indicates that internal amenity would not have been a matter on which the proposal was refused and we are confident that any non compliances identified could be addressed by conditions.

Conclusion

- 87 The review site provides a good opportunity to introduce a more intense and diverse form of housing into the location. Given its attributes, the use of the land is appropriate. However, for the above reasons, we find that in this location, the design fails to respond acceptably to the built form of the heritage protected neighbourhood and we do not consider that the

amendments made to the previous proposal are an acceptable response to the previous Tribunal decision.

- 88 For these reasons, the decision of the Responsible Authority is affirmed. No permit is granted.

Michael Deidun
Presiding Member

Ann Keddie
Member