

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

PLANNING AND ENVIRONMENT LIST	No. P424/2003 Permit Application No. 1448/2002
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CATCHWORDS

Application under Section 77 of the Planning and Environment Act 1987 for review of a decision to refuse to grant a permit; Port Phillip Planning Scheme; Residential 1 Zone; Design and Development Overlay – Schedule 12; Heritage Overlays 5 and 117; Clause 22.04 – local policy for demolition of significant buildings; Whether proposal produces acceptable outcomes in terms of the decision guidelines; Baymor Court flats; Design excellence; Respecting an urban design contribution; Not unreasonably compromising the cultural significance of the Esplanade Hotel.

APPLICANT:	Becton Corporation Ltd
RESPONDENTS:	Port Phillip City Council, Esplanade Alliance Inc. Ronald Friedman, National Trust of Victoria (Vic.), Vic. Music Inc. and others
SUBJECT LAND:	11-12 The Esplanade and 6 Victoria Street, St Kilda
WHERE HELD:	Melbourne.
BEFORE:	Jane Monk, Senior Member and Jeanette Rickards, Member
DATES OF HEARING:	Monday 11 to Thursday 14 August 2003
DATE OF ORDER:	22 August 2003
MEDIUM NEUTRAL CITATION:	[2003] VCAT 1066

ORDER

The decision of the Responsible Authority in relation to Planning Permit Application No. 1448/2003 is set aside.

A permit is granted and the Responsible Authority is directed to issue a permit for the land at 11-12 The Esplanade and 6 Victoria Street, St Kilda. The permit will allow:

Demolition of buildings, construction of a building of up to 10 storeys plus basements to contain 97 dwellings and associated parking, a food and drink premises, a convenience shop and services area for the Esplanade Hotel, use of part of the building for a food and drink premises and a convenience shop, the

provision and sale of liquor for consumption on and off the premises in the convenience shop and food and drink premises, the construction of minor buildings and works exceeding the Planning Scheme's setback requirements and a reduction of the Planning Scheme's parking requirements.

It is directed that the permit contain the following conditions:

1. Before the development and use starts, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed as evidence of their approval. The plans must be generally in accordance with the plans attached to the Notice of Application to Amend Plans dated 24 June 2003 but modified to show:
 - (a) The area to be made available to the hotel extended at ground floor to accommodate the car parking area shown at ground level accessed off Pollington Street (being the space defined in drawings in plan and section dated 23/07/03 Job 20117 by Fender Katsalidis (the loading area) to enable the continuation of the culturally significant live music venue at the hotel, particularly loading and unloading of live music equipment.
 - (b) The upper eave projection on the south-east elevation having a less solid appearance.
 - (c) Further design development of the entry to the convenience shop/café at the junction with the retained portion of the hotel.
 - (d) Environmentally Sustainable Design features to the satisfaction of the Responsible Authority, including but not limited to achieving an average of four and a half stars energy rating for each apartment.
 - (e) Full details of external colours, materials, textures and finishes to the satisfaction of Council's Manager, Urban Design and Architecture.
 - (f) Any consequential changes to the plans required to achieve compliance with the noise attenuation works required by Condition 3 and connections into the hotel

as a consequence of Condition 1(a).

- (g) Modification to the northern and southern corners of the building and screening methods, if required, to reduce any unreasonable new wind effects as recommended by a suitably qualified wind engineer following a wind tunnel test.
2. The development must be completed in accordance with the endorsed plans or any amendment to these plans approved by the Responsible Authority under Section 62(3) of the Planning and Environment Act 1987, including changes to the amendments required by the Tribunal under Conditions 1(b) and (c).
3. Prior to the use of the residential apartments, noise attenuation works to the external façade of the building designed to achieve a maximum noise level of NR 25 in bedrooms or such higher level which will avoid sleep disturbance to the satisfaction of the Responsible Authority and the NR in bedrooms plus 5 in living areas within the apartments must be completed to the satisfaction of the Responsible Authority, assuming the following external noise levels ($L_{\text{Oct}10}$) emanating from the Esplanade Hotel (operating as a culturally significant live music venue):

Frequency	Music noise at external facade
63Hz	75db
125Hz	70db
250Hz	64db
500Hz	60db

4. The existing buildings and perimeter walls must not be demolished unless, and until, a building permit for the replacement building and contracts to construct the replacement building have been entered into to the satisfaction of the Responsible Authority.

5. Any crossovers made redundant as a result of the development are to be removed by the applicant and a kerb and channel reinstated to Council specifications. Any proposed cross-over is to be built to Council specification after a cross-over permit is issued by Standard Roads.
6. The use and development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
7. The number of seats associated with the food and drink premises shall not exceed 120 seats.
8. The food and drink premises hereby permitted shall operate only between the hours of 7 am and 1 am the following day.
9. The food and drink premises hereby permitted shall not cause nuisance or be detrimental to the amenity of the neighbourhood by emission of noise.
10. Without further consent of the Responsible Authority no form of public address system or sound amplification equipment shall be used in the food and drink premises so as to be unreasonably audible outside the premises.
11. The applicant/owner shall do the following things to the satisfaction of the Responsible Authority:
 - Pay the costs of all alterations/reinstatement of Council and public authority assets necessary and required by such authorities for development.
 - Obtain the prior written approval of the Council or other relevant Authority for such alterations/reinstatements.
 - Comply with conditions (if any) required by the Council or other relevant Authorities in respect of reinstatement.
12. Any plant and equipment proposed on the roof of the building must be acoustically baffled and screened in a manner to complement the appearance of the building to the satisfaction of the Responsible Authority.

13. Provision shall be made for the storage and disposal of garbage to the satisfaction of the Responsible Authority. All garbage storage areas must be screened from public view.
14. Prior to the occupation of the premises for the new use, areas set aside for parked vehicles, loading bays and access lanes as shown on the endorsed plans and approved engineering plans must be:
 - Constructed to the satisfaction of the Responsible Authority.
 - Properly formed to such levels that they may be used in accordance with the plans.
 - Surfaced with an all weather seal coat to the satisfaction of the Responsible Authority.
 - Drained and maintained to the satisfaction of the Responsible Authority.
 - Line marked to indicate each car space, loading bay and all access lanes in accordance with the endorsed plans to the satisfaction of the Responsible Authority.
15. Outdoor lighting must be designed, baffled and located to the satisfaction of the Responsible Authority to prevent any adverse effect on adjoining land.
16. No buildings or works shall be commenced until a landscape plan prepared by a suitably qualified and experienced person or firm has been submitted to and approved by the Responsible Authority. Landscaping in accordance with this approved plan shall be completed before the building is occupied and shall thereafter be maintained to the satisfaction of Council.
17. Prior to the commencement of development on the site, a plan detailing functional, contextually appropriate, integrated urban art to the value of 0.2% of the project cost within the development and its surrounds must be submitted to and approved by the Responsible Authority. The plan must show all proposed integrated urban art, including location and finishes. The art work must be provided to the satisfaction of the

Responsible Authority before any dwelling is occupied or such later time as approved by the Responsible Authority.

18. This permit relates only to the use and/or development of the land and does not comprise an approval for the erection of any advertising signs. The location and details of any advertising signs to be erected on the land shall be the subject of a separate application.
19. Prior to the demolition of the existing buildings the applicant shall engage a suitably qualified heritage architect or historian approved by the Responsible Authority to undertake full conservation analyses of the Baymor Court flats and all buildings to be demolished including the perimeter walls (to the Heritage Victoria [or National Trust] brief for Conservation Analyses) and a complete architectural record of the buildings, including full measured drawings [site/roof plan, floor plans, elevations and sections] at 1:100 scale and a photographic survey to Heritage Victoria standard requirements (for Council and State Library Archives) and shall provide for a commemorative plaque to be placed on the site all to the satisfaction of the Responsible Authority.
20. Prior to the commencement of the works hereby permitted, the applicant must prepare and submit to the Responsible Authority a construction management plan to the satisfaction of the Responsible Authority, the objective of which will be, but not limited to, the management of construction vehicles in surrounding streets and minimisation of disruption to adjacent streets and residents and the reasonable operation of the Esplanade Hotel, anticipated construction time limes and hours of demolition/construction.
21. The demolition hereby permitted shall not commence until the site of the hotel as defined in Registered Lease No. AB181945T together with the space required to be set aside pursuant to Condition 1(a) being the space defined in drawings in plan and elevation plan dated 23/07/03 Job 20117 by Fender Katsalidis (the loading area) has been delineated as a separate lot on a plan of subdivision capable of registration and, subject to an unconditional contract entered into for the sale of that lot to the lessees under the registered lease or to their transferees or assigns. For the purposes of this condition "*unconditional*" means not subject to a condition precedent, other than conditions relating to registration of the plan of subdivision; construction of buildings and works

necessary to create the allotment to be transferred or other conditions relating to the performance of obligations under that contract if sale.

22. Section 32 statements for the sale of any new dwelling within the development hereby approved shall include the following statement:

“The adjoining Esplanade Hotel’s activities and operations include musical entertainment. On occasions the residual noise emissions from the venue may be audible at your premises.”

23. This permit will expire if one of the following circumstances applies:

The development is not started within four years of the date of this permit.

The development is not completed and the use not started within two years of the date of commencement of works.

The Responsible Authority may extend the periods referred to if a request is made in writing before the permit expires or within three months afterwards.

Jane Monk Senior Member		Jeanette Rickards Member
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APPEARANCES:	
For Responsible Authority:-	Mr I. McP. Pitt SC, with Ms S. Brennan of Counsel, instructed by Best Hooper Lawyers.
For Other Parties:-	Mr A. Finanzio of Counsel, by direct brief, was given leave to make a submission on behalf of the lessees of the Esplanade Hotel.
For Other Respondent Parties:-	<p>The Esplanade Alliance was represented by Ms K. Shaw with Dr J. Spierings and Ms S. Pennievia.</p> <p>Mr Ronald Friedman appeared in person.</p> <p>Mr N. Tweedie, of Counsel appeared for Vic. Music, instructed by Mr J. Shaw of Middletons Lawyers.</p>
For Applicant for Review:-	Mr C. Canavan QC, with Mr C. Townshend of Counsel, instructed by Minter Ellison Lawyers.

REASONS

1. This was an application under Section 77 of the Planning and Environment Act 1987 (the Act) to review Port Phillip City Council's decision to refuse to grant a permit in Permit Application No. 1448/2002 for the land, comprising three titles, at 11-12 The Esplanade and 6 Victoria Street, St Kilda – being the land bounded by The Esplanade, Pollington Street and Victoria Street.
2. The land is zoned Residential 1 under the Port Phillip Planning Scheme and is also within:
 - Design and Development Overlay – Schedule 12 – Esplanade Hotel site;
 - Heritage Overlay No. 5 – St Kilda Hill, and;
 - Heritage Overlay No. 117 – The Esplanade Hotel.

The latter overlay covers only the northern part of the site covering the hotel buildings including its motor garage.

3. The proposed development requires permission under the following clauses of the Port Phillip Planning Scheme:
 - Under Clause 43.01-1, to demolish the rear kitchen wing and motor garage of the hotel and to demolish the Baymor Court flats.
 - Under Clauses 43.01, 32.01-4 and 32.01-6 to construct a new building of up to 10 storeys, plus basement, to comprise 97 dwellings and associated car parking (153 spaces), a food and drink premises, a convenience store, and a loading and services area for the hotel.
 - Under Clause 31.01-2 to use part of the building for a food and drink premises and convenience shop – these being Section 2 uses in the Table to the Residential 1 Zone.
 - Under Clause 52.27 for the provision and sale of liquor for consumption on and off the premises in a convenience shop and food and drink premises.

- Under Clause 52.06 to reduce the Scheme’s parking requirements and;
 - Under Schedule 12 of the Design and Development Overlay (DDO) for minor buildings and works and architectural features within the prescribed setbacks.
4. It would be fair to say that the permissions in relation to the last four dot points were not in dispute and we therefore see no reason to refer to them further.
 5. Mr Friedman did raise off-street parking as a concern but he provided no evidence to support his assertion that the provision to made for parking was inadequate. The other parties were content to rely on the evidence of Mr Grogan whose witness statement was circulated prior to the hearing. They did not seek to cross-examine him and his witness statement stands, we accept, as evidence of the adequacy of off-street parking.
 6. It can also be said that the evidence led by all parties, the Alliance included, was to the effect that the kitchen and motor garages of the hotel could be demolished and we accept this evidence.
 7. The Port Phillip Planning Scheme at Clause 65 sets out decision guidelines that must be considered, as appropriate, before deciding on an application for permit. It is against these decision guidelines that the permissions before us must be assessed. Clause 65 commences with the following relevant statement:

“Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.”
 8. So the principal question that this Tribunal must determine, on review and standing in the shoes of the Responsible Authority, is whether the proposal before us will produce acceptable outcomes in terms of the relevant decision guidelines.
 9. It was generally accepted that the decision guidelines most relevant to the proposal before us – and having regard to the issues in dispute – were:
 - The Local Planning Policy Framework and in particular the policy at Clause 22.04 in relation to the demolition of significant buildings,

- The purpose and decision guidelines of the Heritage Overlay at Clause 43 protecting Heritage Place No. 5 – St Kilda Hill, and
 - The design objectives of Schedule 12 of the DDO.
10. The State Planning Policy Framework, including introductory Clause 11 and the policies for settlement, housing, heritage and design and built form, were also referred to and relied upon.
11. The issues in this proceeding could be summarised as:
- The demolition of the Baymor Court flats,
 - The sufficiency of the provision for service, access, loading and unloading facilities for the hotel – so as not to “*compromise its cultural significance*”, and
 - The design excellence of the new building – including whether it has sufficient regard to the urban design contribution made by Baymor Court flats.
12. Also at issue, and this goes to the ultimate question to be decided, is whether on balance, the development represents an acceptable outcome in terms of the Scheme’s decision guidelines.

Baymor Court Flats

13. This building, which is within Heritage Overlay 5 – St Kilda Hill, is identified as a “*significant*” building in the Port Phillip Heritage Review 2000. The Statement of Significance reads:

“This building is of significance as a rare example of a flat block designed to define a street edge externally and a cortile internally, in the manner of Mediterranean vernacular village architecture. This design approach is extremely unusual in the Australian context, where the garden suburb approach of an object building set in landscaped ground is prevalent. The building strongly evokes European seaside villages in the adoption of this form, reinforced by its location on the rise on Victoria Street, framing the view to the sea and palm trees beyond. The Spanish Mission style of the building, with its pantile roof, its fine pigmented render applied in fan shapes imitating adobe plastering, and its cantilevered wrought iron balconies, reinforces this character. The internal courtyard, though in poor condition, is an important element in the conception of the building. The building is intact but in poor condition.”

14. Following negotiations between the hotel, Becton and the Council, the question of Baymor's removal became solely a concern for the Alliance – although we acknowledge the National Trust maintained its objection but chose not to appear or be represented at the hearing.

15.

The heritage evidence led by the Alliance was to the effect that the flats could be demolished save and except for their southern façade to Victoria Street, the eastern façade, part of the western façade and the extent of visible roof between.

16. The Alliance and their heritage witness, Mr Briggs, submitted that it would be contrary to the local policy at Clause 22.04 – in particular where it refers to the demolition of significant buildings – for Baymor Court to be demolished.
17. As it turned out this contention was not disagreed with by Becton or its Heritage witnesses, Mr Lovell and Professor MacKay.
18. It was Mr Lovell’s evidence that Baymor is appropriately identified in the Port Phillip Heritage Review as a locally significant building – although not nearly as significant as the Esplanade Hotel. The latter, when considered and rejected for registration by the Registration Committee of the Victorian Heritage Council, was referred to by the Committee as having significance at a regional level. In relation to Baymor, the Committee found that *“the Baymor Court flats contribute to the character and significance value within the urban conservation area”*. (St Kilda Hill)
19. The local policy in relation to the demolition of significant buildings is to:
 - Not support the demolition of a significant building unless and only to the extent that:
 - . The building is structurally unsound or cannot be feasibly reused.
 - . The replacement building and/or works displays design excellence which clearly and positively supports the ongoing heritage significance of the area.
20. It was not submitted by any of the parties that Baymor is structurally unsound. Poor condition yes – as noted in the Statement of Significance – but not, unsound.
21. Neither was it contended that the building is incapable of feasible re-use. Rather, most parties or their witnesses acknowledged that re-use was *“feasible”* depending on the amount of money one was willing or could afford to spend. As confirmation of this Mr

Briggs produced a photograph of “*The Mansion*” in Queens Road, which has had a complete basement level excavated beneath it.

22. We think it open however for us to accept the evidence of the architect, Mr Fender and of Mr Biasci the Town Planner called to give evidence on behalf of Becton, that re-use of this building – especially to the extent suggested by Mr Briggs – would compromise the internal planning of the proposed building and significantly diminish the amenity of occupants of the dwellings proposed for this southern side of the building’s podium level.
23. We would observe also that re-use of Baymor would isolate or divide the north-eastern and south-western portions of the proposed building and, as submitted by Mr Canavan, would require a major re-evaluation of the development’s entry point.
24. While not an impossible candidate for re-use, we consider the evidence of Mr Fender and Mr Biasci point to an impracticality of re-use and we could find nothing in the evidence of Mr Briggs to persuade us to a different view.
25. The further provision in the local policy for demolition of significant buildings – and seemingly to be applied only after being satisfied of structural unsoundness or no feasible re-use – is for the replacement building to display “*design excellence which clearly and positively supports the on-going heritage significance of the area*”.
26. We say “*seemingly*” to be applied once the other test have been proved, because we note some ambiguity as to whether this requirement is to be applied in addition to or as an alternative to the tests of unsoundness or no feasible re-use.
27. Unlike the subsequent policy provision in relation to demolition of contributory buildings, there is no use of the word “*and*” after the alternatives of unsoundness or no feasible re-use. However, as this was not debated to any degree in the course of the hearing – other than passing reference in the Tribunal’s cross-examination of Mr Lovell – we see no need to take it further. We accept that the word “*and*” between the two clauses is to be implied.
28. The issue of design excellence will be discussed later in our reasons. Suffice to say that because the permit applicant was unable to demonstrate either structural unsoundness or

no feasible re-use, we accept that it would be contrary to the local policy at Clause 22.04 to demolish Baymor Court. We will turn later to the question of whether this need be fatal to the application.

The Reasonable Access, Operational and Service Needs of the Hotel

29. A design objective to be met under Schedule 12 of the DDO is:

“To ensure that the reasonable access, operational and service needs of the Esplanade Hotel are appropriately addressed, such that the cultural significance of the hotel is not compromised.” (emphasis added)
30. Shortly before the hearing the permit applicant, the hotel and the Responsible Authority reached agreement in relation to a number of issues that had contributed to the Council’s original decision to refuse a permit.
31. Central to this was Becton’s agreement to make more substantial provision with the ground floor of the proposed building to better meet the hotel’s access and servicing needs and in particular the need for bands to unload and load their musical equipment.
32. In addition, the Council and hotel have agreed to enter into an agreement under Section 173 of the Act which will ensure that kitchen facilities will be provided within the hotel following Becton’s demolition of the current kitchen.
33. There is agreement also between Becton and the Council, that Becton will accept a condition requiring noise attenuation works designed to achieve a lower noise level within the development’s bedrooms and living rooms than would result if State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2) was met. We were advised that the hotel accepts its obligation to comply with SEPP N-2. However, this is not a “*no noise*” outcome for sensitive uses. By acoustically treating the proposed building a greater level of music noise protection will be achieved.
34. The Council, having been satisfied that the development would now not unreasonably compromise the cultural significance of the Esplanade Hotel, has determined to withdraw its opposition to the demolition of the Baymor Court flats.
35. At the hearing the Alliance called Mr Weibye – a former manager of the hotel for 10 years

– to give evidence in support of the Alliance’s contention that the cultural significance of the hotel may still be compromised, notwithstanding the increased provision for loading and the other agreements referred to above.

36.

While we accept that the hotel will have to make changes to the manner in which it operates, we were not persuaded by Mr Weibye's evidence – prepared we note before he was made aware of the changed loading and other agreements – that as a result of this development the cultural significance of the hotel will be unreasonably compromised. Tellingly also, it was Mr Weibye's evidence that hoteliers are "*adaptable people*".

37. In reaching this conclusion we think we can give weight to the fact, as submitted by Mr Finanzio for the hotel, that the hotel accepts, following the above referred to arrangement, that its ability to operate as a live music venue is no longer compromised. The submission by Mr Tweedie on behalf of Vic Music, supports this conclusion also .

Design Excellence

38. Throughout the Port Phillip Planning Scheme, including in the Local Heritage Policy, the State Policy for Design and Built Form at Clause 19.03 and in Schedule 12 of the DDO, design excellence is referred to as a preferred outcome for any redevelopment proposal.
39. The Alliance called Professor Norman Day, a well respected architect, to give evidence in support of their contention that the development does not achieve design excellence – the implication being that as a result it can be no substitute for the loss of the Baymor Court flats and would fail to achieve the design objectives of the DDO.
40. The design objectives of the DDO, in addition to one relating to the urban design contribution of the Baymor flats which we refer to later, include:

To ensure that new development is highly articulated and modulated within the height and setback controls.

To ensure that scale and massing at street interfaces acknowledges and mediates the surrounding built form.

To ensure that new development will positively contribute to the diversity of the built form of the Esplanade.

To ensure that new development responds to (and does not dominate) other built form elements along the Esplanade.

41. The Responsible Authority did not go so far as to say that the development did not display design excellence. Rather it was Mr Pitts submission that in a number of discrete areas the detailed design of the building needed further development. The particular concerns of the Council were:
 - The south-east “tower” elevation, including a perceived heaviness of the cornice or double eave banding affect and the pattern of balcony detailing;
 - The front façade to The Esplanade and whether it should be made less contrastingly lightweight, against the more solid form of the hotel; and
 - The Victoria Street podium to replace Baymor flats. One of the design objectives of the DDO is “To ensure that any new development on the south-east corner of the site has regard to the urban design contribution made by Baymor flats building to the built form and streetscape of Victoria and Pollington Streets” (emphasis added). The Council submitted that the corner treatment at Pollington Street needed further strengthening and that the southern façade of the podium should come closer to Victoria Street, including at the upper podium level.
42. We were not persuaded by Professor Day’s evidence that this development fails to achieve design excellence. We agree with Mr Canavan that Professor Day’s, we think quite subjective, analysis failed to take sufficient account of the mandatory height and setback provisions that apply to this site.
43. We prefer the evidence of Mr Biasci who suggested that design excellence must include the ability to come up with a design that takes account of the statutory as well as contextual constraints of a site and achieve well designed accommodation.
44. The architectural firm selected to design this building is, we accept, a firm that is held in very high regard. The evidence of both Ms Von Hartell and Mr Olszewski was at one, namely that the design of this development has merit. Professor Day’s evidence was not that much different, except that in his opinion a better design could have been achieved by

this particular architectural firm. This may well be the case. What we have to decide however is whether in the circumstances – including the particular statutory context – the proposal before us exhibits design excellence. We accept that the weight of expert opinion in this case was to the effect that it does and we accept that evidence.

45. We then come to the design detail of certain elements. It was clear from the evidence of Ms Von Hartell and Mr Fender that a development of this nature and by this architectural firm will, as a matter of course, be subjected to further detailed design and development.
46. Mr Fender acknowledged that the concerns raised by the Council, particularly in relation to the top “*eave*” treatment had generated ideas for improvement that he was keen to pursue. However, except for a more transparent eave treatment and further development of the entry to the café/convenience shop – a suggestion by Ms Von Hartell - we find ourselves reluctant or unpersuaded of the need to suggest the specific design outcome to be pursued elsewhere. We have accepted that the building exhibits design excellence and that the various design objectives have been met to an acceptable degree. We agree with the Alliance that in this particular instance the Tribunal is not the most appropriate forum for settling design details.
47. We will include a condition enabling further design changes to be developed, provided they are to the satisfaction of the Responsible Authority. If a dispute arises then the matter can be referred to this Tribunal for resolution.
48. Our findings in relation to detailed design development extend also to the issue of the development’s response to the urban design contribution made by Baymor Court flats.
49. Having heard the evidence of Mr Fender, Ms Von Hartell and Mr Olszewski, we are entirely satisfied that the development has indeed “*had regard to*” the urban design contribution made by the flats to the built form and streetscape of Victoria and Pollington Streets.
50. Having regard to an urban design contribution is not, we accept, an invitation or obligation to copy the former form of the building – or indeed to retain a part or parts of the former building as suggested by Mr Briggs and Professor Day.

51. We think Mr Olszewski got it right when he said in his evidence that the proposed development respects Baymor’s contribution in that it:

- Captures the eye
- Frames the view to the sea and
- Makes the process of proceeding down the street attractive.

52. This is the urban design contribution that Baymor makes and we agree that the proposed development makes it too. The Pollington Street corner is also to include provision of urban art, something Fender Katsalidis are well known for and we are satisfied that the Council is the preferred agency to consider and decide upon this.

An Acceptable Outcome

53. The final issue then is whether this development represents an acceptable outcome in terms of the decision guidelines of the Scheme, notwithstanding the fact that the local policy for the demolition of significant buildings is not met in relation to Baymor Court flats.

54. A very relevant decision of the Tribunal in relation to this issue is that of *SMA Projects v Port Phillip City Council* 2 VPR, 270 and it was referred to by both Messrs Canavan and Pitt.

55. As in the subject case, the local policy in relation to demolition of a significant building was not met in *SMA* because the building was not structurally unsound or could not be feasibly re-used. The Tribunal concluded on balance, however, that:

“It would be an unfortunate outcome in this application for review if the conservation of this dwelling on this land prevented its proper redevelopment.” (emphasis added)

56. In coming to this view the Tribunal observed that while decision making under the Victoria Planning Provisions format planning schemes is to be “*heavily influenced*” by policy – and that the consistent application of policy over time can avoid the adverse effects of incremental change, through ad hoc decision making (a point noted at Clause 20 of the Planning Scheme) – policy must nevertheless be applied in an intelligent and

flexible way having regard to the entire strategic and policy framework affecting the future use of land, while at the same time avoiding unfortunate outcomes in individual cases.

57. It is our conclusion that it would be an “*unfortunate outcome*” in this case to prevent the grant of a permit for this development for the sole reason that Baymor Court or a part of it should be retained.
58. We believe that the weight of the evidence in this case goes to the fact that this development achieves so much in terms of the strategic direction and policy framework of the Scheme that the loss of Baymor can be justified.
59. The development:
 - Maintains and does not detract from the cultural significance of the Esplanade Hotel.
 - It respects the urban design contribution made by Baymor Court.
 - It positively responds in every other way to the very detailed design objective of the DDO, that have taken so many years to be formulated.
 - It results in a building that will inject design excellence into the otherwise unremarkable cluster of buildings crowning the foreshore views of St Kilda Hill.
 - It will provide well designed accommodation for a significant number of new households in a well serviced inner-city location close to the beach, shops and public transport.
60. And not only all of the above, it will bring closure to a long and drawn out planning process.
61. We are more than confident in finding that this proposal achieves an acceptable outcome in terms of the Scheme’s decision guidelines and that a permit should issue.
62. There is one final matter, namely the description of the land to which this permit should

apply. At the commencement of the hearing – and as foreshadowed in correspondence circulated prior to the hearing – Mr Canavan asked that the application for permit be amended by altering the description of the land to, in effect, exclude the remaining parts of the existing hotel covered by the lease agreement between it and Becton.

63. We have not been persuaded to make this change. While we do not believe that much turns on it, we consider that the lease description does not equate to a separate title description. We understand that it is intended to re-subdivide the land, to take into account the lease arrangement and with the proposed new loading facilities to be contained in a future title to the hotel. We think it appropriate for that to form the basis for separation of these two entities rather than this permit.

Jane Monk Senior Member Planning and Environment List		Jeanette Rickards Member Planning and Environment List
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