

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
PLANNING LIST**

APPLICATION FOR REVIEW

NO: P424/2003

**No. 11 & (part of) No. 12 THE ESPLANADE
AND No. 8 VICTORIA STREET
ST. KILDA.**

APPELLANT/PERMIT APPLICANT BECTON CORPORATION LTD.

RESPONSIBLE AUTHORITY CITY OF PORT PHILLIP

RESPONDENT OBJECTOR ESPLANADE ALLIANCE Inc.

SUBMISSIONS ON BEHALF OF THE ESPLANADE ALLIANCE Inc

INTRODUCTION

1. This submission is made on behalf of the Esplanade Alliance Inc, which is an objector to the proposed development. The Esplanade Alliance Inc ("EA") is an incorporated association with a membership of approximately 200 and many associated supporters. This submission was contributed to by various members and supporters of EA and is presented on behalf of EA. Various authorised members will represent EA during the course of the hearing.
2. Three expert witnesses for EA have prepared statements, which have been circulated to the Tribunal and the parties. Those experts will appear and be made available for cross examination:
 - Norman Day Architect and Planner
 - Bruce Weibye Hotel Management
 - John Briggs Architect and Conservation Consultant
3. EA has filed grounds of objection. In this submission, the focus is threefold:

- (i) preservation of the full heritage value of the Esplanade Hotel as a significant heritage building and its significant cultural heritage use as a live music venue;
- (ii) provision of an effective process for design improvements;
- (iii) preservation of Baymor Court Apartments on Victoria Street.

BACKGROUND TO APPEAL

4. The City of Port Phillip ("COPP") considered the application for relevant permits for demolition and proposed development of the island site, described above. A Notice of refusal was both recommended and issued. A copy of the planning officer's detailed report to the Statutory Planning Committee meeting on 10 February 2003 is attached and marked A. The responsible authority followed the recommendation of the planning officer and the advice of other Council consultants and independent experts referred to in that report.
5. The permit applicant ("Becton") lodged an appeal to this Tribunal. Since that appeal was lodged, it is public knowledge that Becton and COPP have continued to discuss the matters that were in contention at the time of the refusal. Those matters include design issues, parking provision, provision of land for facilities to enable the continuing operation of the Esplanade Hotel as a viable hotel and music venue, demolition of various buildings, including Baymor Court apartments ("Baymor").

RESPONSIBLE AUTHORITY'S PROPOSED PERMIT CONDITIONS

6. Following the COPP Council meeting of 28 July 2003, a set of proposed permit conditions for submission to this Tribunal has been released as a public document. That document is attached and marked B. It is not known to EA whether that public document contains the conditions that will actually be proposed by COPP at this hearing. If there are other proposed conditions, EA has not been given notice of them.
7. It is public knowledge that COPP and Becton have entered into an agreement to facilitate the Tribunal granting a permit to Becton to proceed with demolition and development as proposed, subject to certain conditions. The terms of the agreement can also be inferred from the terms of COPP's proposed conditions for the grant of a permit:
 - Becton will be relieved of the requirement to provide visitor parking behind the town houses on site at ground level, so long as that ground area is allocated to car parking to enable the continuation of the culturally significant live music venue at the hotel, particularly loading and unloading of live music equipment: see conditions 1 (e) and 20.

- COPP will no longer oppose demolition of Baymor but seeks redesign of that part of the development to be on the site of Baymor (and on the other frontages): see conditions 1 (a), (b), and (c).
8. It appears that COPP has abandoned conservation of the heritage value of Baymor and parts of the hotel in exchange for the possibility of preserving the cultural heritage significance of the Esplanade Hotel as a live music venue. It is submitted that out of this political process, an uncertain and unacceptable planning outcome has emerged.

Conditions relating to Hotel parking and loading areas

9. It is appropriate for the responsible authority to seek and indeed it is required by its planning scheme to ensure the Developer makes provision for necessary land around the hotel for essential services for the hotel. The proposed conditions would achieve that planning objective. However, it is submitted that such provision need not and should not be at the expense of Baymor.
10. The current leasehold does not include the essential service areas for the Hotel. In the past, Becton has made the essential service areas available to the lessee under separate short-term agreements. Becton has retained control over the longer-term disposition of this part of the site.
11. EA understands Becton has given notice to the lessees effective from the 4th August 2003 to cease their short-term use of the area external to the hotel building and the grounds, not presently within their leasehold. No doubt the lessees would support the provision of further essential parking and loading space and other areas essential to their business, whether it be by agreement or ruling of this Tribunal.
12. **Mr Bruce Weibye**, former manager of the Esplanade Hotel for 10 years from 1988 to 1998, will give expert evidence. That evidence concerns the components of the Hotel business that have enabled its cultural significance and its cultural product made it a viable business. There is no doubt this hotel business requires the additional land referred to in COPP condition 1(e) to make it viable.
13. It is submitted that the provision of further land on the site, for uses that are ancillary and essential to the Hotel use, is not just a commercial matter between the current lessor and lessee. It is a planning matter inextricably linked with orderly planning to facilitate the current and proposed land uses.
14. It is also submitted that use of planning conditions to ensure the ongoing viability of the Hotel is supported by the "Esplanade Hotel Management Plan" prepared by Hansen Partnership for the operators of the Hotel. A copy of that Plan dated January 2003 is attached and marked C.

15. That Management Plan was prepared pursuant to particular provisions of the Port Phillip Planning Scheme ("the planning scheme") namely Clause 21.05-1 Residential Land Use under St Kilda Neighbourhood Strategies: COPP will "encourage the preparation of a management plan for the Esplanade Hotel that supports the on-going cultural significance of the Hotel" and the Management Plan states at page 2:

In considering an application for the redevelopment of the Esplanade Hotel site, the City of Port Phillip will have need to regard the ongoing access, operational and service requirements of the Hotel. This document identifies what those requirements are from the Hotel operator's perspective.

16. Further at page 3 the principle formulated to guide preparation of the management plan is stated as:

Redevelopment should not result in any activities associated with the hotel use that are presently accommodated on the site of the hotel, being accommodated on streets in the area.

17. The existing conditions and ongoing requirements for viable operations are then identified and provided for in the Plan. A summary and checklist are provided at pages 14-15 of the Plan to assist the assessment of any proposed redevelopment on the ongoing operation of the hotel as a place of cultural significance in St Kilda. The Tribunal is referred to the Plan.

18. It is submitted that Becton should be required to make proper planning provision in this development proposal for essential service areas to the Hotel to ensure its viability and its cultural heritage significance is preserved. Without those additional areas, the operation as a live music venue will be strangled.

19. The objective of the Design and Development Overlay (Schedule 12) ("DDO12") which is relevant in terms of use and cultural meaning requires Becton:

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.

20. The Heritage value of the Esplanade Hotel is in both the building and its cultural use as a live music venue. Both heritage attributes can and should be preserved. Becton's proposed development includes preservation of the main Hotel building. COPP's proposed conditions would address the issue of parking and loading areas to ensure the Esplanade Hotel can continue to operate as a live music venue. Those conditions are supported by EA.

Conditions relating to Sound Attenuation Measures

21. Of concern are potential land use conflicts between the Esplanade Hotel use and the new residential development, especially in relation to the proposed tower apartments.
22. As the development will bring new residential apartments closer to the existing music noise source from the Gershwin room and front bar entertainment areas, there is a danger that the Hotel (which the EA understands can comply with the SEPP N2 requirements) may have to require lower emitted music noise volumes if the proposed apartments are built without adequate noise attenuation measures.
23. If the redevelopment of the site resulted in a reduction of the currently permissible music noise limits so as to adversely affect the utility and viability of the hotel as a live music venue, then this would be an unacceptable outcome which is inconsistent with the policies and intent of the planning scheme, and with Becton's assurances in relation to the redevelopment site.
24. The EA understands that the Council's proposed condition 1(h) which effectively requires that the proposed apartments be constructed with sufficient noise attenuation measures to achieve "additional and effective protection for the amenity of future residents of the apartment and from music emanating from the Esplanade Hotel operating as a culturally significant live music venue" is the most satisfactory means within the existing noise regulatory scheme to ensure that subsequent residential development does not undermine an existing culturally significant live music venue.
25. Similar requirements are imposed on residential development under the Melbourne Planning Scheme (see e.g. Clause 22.08 and the schedule to the Capital City Zone) and is submitted to be an appropriate response to minimise land use conflicts between existing entertainment venues and new medium to high density residential development.

Conditions relating to Design Improvements

26. EA concurs with COPP in its recommendations of proposed conditions that street frontages need redesign work and other aspects of urban design require improvement and elaboration.
27. **Professor Norman Day** will present expert evidence on various aspects of design and areas of recommended improvement.
28. In the event of a dispute concerning the proposed redesign conditions, particularly at 1(a) and (c), in which COPP recommends redesign of the rear elevation and of the frontage to the Esplanade, EA submits that either or both of two approaches be adopted by the Tribunal:
 - Impose conditions, including 1(a) and (c) as proposed [and 1(b) if relevant after the Tribunal considers Baymor - see para 30],

because detailed aspects of design, such as ground level interfaces, are matters capable of being resolved as part of a detailed design process following on from the granting of a permit: *MCC v Minister for Planning & 420 Spencer Street Developments Pty Ltd [2003] VCAT 905* (para 41);

- Unresolved and outstanding design issues be referred to mediation under the auspices of the Tribunal. It is submitted that such matters would be likely to be resolved once permits are issued following rulings by the Tribunal.
29. It is submitted it is not appropriate for the Tribunal to take on the role of "Judge of a design competition" or adjudicator of a design debate during the course of the hearing, particularly when the Tribunal, the objectors, the expert witnesses and possibly even the responsible authority have no notice of re-design suggestions that may be made by the Developer. The same applies to more detailed suggestions that may be made by the responsible authority during the hearing. These are matters requiring proper consideration.
30. Furthermore, the Victoria Street frontage redesign matters (condition 1b) cannot be determined until the Tribunal has made a ruling on the proposed demolition of Baymor.
31. The proposed conditions 1(a), (b) and (c) each relate to shortfalls in the proponents design response to various "design objectives" for the site which are specified in the COPP planning scheme.
32. It is contented, supported by Professor Day, that the architectural design of the proposal is inadequate in these particular areas of concern. Neither the EA, nor Professor Day, are proposing design solutions to these problems, only the mechanisms whereby they may be arrived at.

Conditions relating to Baymor Court Apartments

33. It is submitted the fate of Baymor ought not to be dealt with by way of COPP's proposed conditions, as those conditions pre-suppose demolition contrary to COPP's own decision and the controls of the Planning scheme.
34. It is submitted that the Tribunal should not accept demolition of Baymor as the result of this private negotiation, even if the responsible authority is prepared to do so. In abandoning its decision to refuse a permit to demolish Baymor, COPP is abandoning its responsibility to implement its own policies and the planning scheme, for which it is the responsible authority. COPP has given no explanation based on sound planning grounds for demolition and has not established that sound reasons exist to warrant such a "trade-off". Rather, its official refusal of demolition was based on sound planning grounds.

35. It is submitted that COPP's recommendation at condition 18 for a suitably qualified heritage architect or historian to undertake full conservation analyses of Baymor apartments, a complete architectural record and a photographic survey, to be followed up by a commemorative plaque after demolition, is nothing short of extraordinary. It is submitted that such analyses and surveys would lead COPP to ongoing support of conservation of this significant heritage building. This work would more usefully provide a testimony to preservation rather than a eulogy to destruction.

36. The EA objects to demolition of Baymor and seeks a determination of these matters by the Tribunal on the planning merits. The Tribunal has both the obligation and the opportunity to properly apply the planning policies and controls. It is submitted that proper application would result in preservation of both the cultural heritage significance of the Esplanade Hotel and the heritage significance of Baymor apartments. These are compatible, warranted and orderly planning outcomes. The proposed conditions, except for 1(b) would achieve those outcomes.

RETENTION OF BAYMOR COURT APARTMENTS

37. It is submitted that demolition of Baymor is not supported by the Planning Scheme. Furthermore the proposed development can proceed very much as proposed without the demolition of Baymor.

38. It is common ground that Baymor Court apartments are a significant heritage place protected by a Heritage Overlay ("HO5") in the Planning Scheme.

39. **Mr John Briggs**, Architect and Conservation Consultant, will present expert evidence on the heritage implications of the proposed residential development and demolition of heritage buildings. On the issue of demolition of Baymor, the Tribunal will hear evidence that Baymor can be feasibly reused and that the heritage significance of the building warrants its conservation and incorporation into the new development.

Planning Scheme controls

40. The protection afforded by the heritage overlay is supported by:

- the State Planning Policy Framework ("SPPF"),
- the Local Planning Policy Framework ("LPPF") with Municipal Strategic Statement and Local polices,
- the Port Phillip Heritage Review Version 2, 2000 Vol 1-6 with addendum, including Heritage Policy Maps and Statements of Significance for all heritage places.

41. The Tribunal is referred to these State and local policies and incorporated documents to appreciate the comprehensive policy framework which underpins and informs the planning scheme controls.

42. Such a reference may appear trite, but in this case, the proper regard for the role of policy and its application is a central issue. The approach taken by Becton's experts demonstrates a disregard for the significance of policy and the obligation to apply it.
43. This disregard is evident in the witness statement of Mr Peter Lovell dated July 2003 ("Lovell statement"). On pages 10-13, Mr Lovell makes reference to relevant extracts of policies and decision guidelines from the planning scheme. He then identifies by highlighting which decision guidelines he considers to be relevant (pg10). It is to be noted that he does not consider the following guidelines to be relevant:
- SPPF and LPPF, MSS and local planning policies
 - applicable heritage studies
 - affect of the proposed works on the significance, character and appearance of the heritage place
44. Mr Lovell goes on to extract and incorporate text from the heritage policies (pg 11-13). However, it must be noted that he is silent on the application of those extracted policies. Merely identifying policy does not relieve him of the requirement to apply policy.
45. Mr Lovell identifies the "key issues" (pg 13) which his report goes on to consider. Those "key issues" reflect the decision guidelines that Mr Lovell selectively extracted. In arriving at those particular "key issues", Mr Lovell has hurdled inconvenient policy to concentrate on the more subjective realm of "affect on significance of a heritage place".
46. It is not disputed that the decision guidelines selected by Mr Lovell are relevant. The issue is that the other decision guidelines, which he did not select, are also relevant.
47. For all of the eminence of Becton's experts and the weight of their opinions generally in support of demolition, it is submitted that their analysis is fundamentally flawed by a lack of application of all of the relevant policy considerations and decision guidelines to the question of demolition.
- Application of relevant Policies**
48. It is submitted that the Tribunal is required to take into account the MSS and local policies on heritage value in deciding whether Baymor should be demolished. Relevant policies are considered and applied below.
49. An identified municipal-wide issue (cl 21.03-1) is that demolition of heritage places to make way for new development adversely affects the significance of heritage buildings.
50. Port Phillip's vision for the municipality (cl 21.04-1) envisages:

- new development that complements the built environment in residential areas
- controls to ensure that all significant heritage places receive adequate protection from demolition
- restoration and recycling of heritage buildings
- new development which contributes positively to heritage value.

51. The objectives for residential land use (cl 21.05-1) require protection of important heritage and streetscape characteristics of established residential areas. Implementation of this objective includes using Heritage policy to manage new development (including alteration and demolition of all or part of a heritage place) in all areas covered by a Heritage Overlay.
52. The objectives for the foreshore (cl 21.05-2) include ensuring all development within the "viewshed" is designed to respect the established cultural, heritage ...values of the foreshore public realm.
53. The objectives for neighbourhood character (cl 21.05-3) include protecting distinctive and valued character including heritage places and streetscapes throughout Port Phillip.
54. The objectives for urban design (cl 21.05-4) include ensuring that new development minimises any detrimental impacts on neighbouring properties.
55. Heritage conservation (cl 21.05-5) involves recognition, protection, retention and celebration of heritage places. New development is required to be sympathetically integrated and to make a positive contribution to the heritage value of the area. The objectives for heritage conservation are specific and detailed. The strategies to achieve these objectives include:
- Encourage new development within a heritage overlay to respectfully and harmoniously integrate with the surrounding neighbour character
 - Encourage all heritage places in a heritage overlay to be restored, recycled and/or renovated in a sympathetic manner that will enhance the heritage value of the area
 - Encourage a conservative approach to urban consolidation in heritage overlay areas by supporting increased residential densities on sites where it can be achieved without adversely affecting the identified significance of a heritage overlay
 - These strategies are to be implemented by using heritage policy and applying overlays.
56. The residential neighbourhood character policy (cl 22.01) requires new development to respect and not detract from the scale, form and setbacks of nearby heritage places in the heritage overlay
57. The heritage policy (cl 22.04) applies to all land within a heritage overlay. This policy includes detailed definitions and objectives that enable both

conservation of heritage places and respectful new development. It specifically provides for the tests to be applied in deciding whether or not to permit demolition of a heritage building or place.

58. The Heritage Overlay provisions (cl 43.01) require implementation of State and local planning policies to preserve and enhance heritage places and to ensure new development does not adversely affect the significance of a heritage place. Decision guidelines are specified and it is all of these matters that must guide the Tribunal.
59. It is clear from these extracts from the planning scheme that the responsible authority has gone to great lengths, with the support of the Port Phillip community and the State Government, to create planning controls that will preserve heritage places and enable new development which is respectful and compatible with heritage places.
60. There can be no doubt that the Planning scheme articulates clear policy on these matters and that such policy must guide decision-making. It is incumbent on the Tribunal to interpret and apply policy to preserve its integrity, give it operational effect and follow in the direction to which it points.
61. The planning controls, based on these policies, require new development to co-exist with heritage building and places. The controls do not permit new development that is at the expense of the heritage place. The question is not "when should new development be preferred to conserving heritage?" Nor is the question "how does the Tribunal strike a balance when there are competing and incompatible objectives between new and heritage?"
62. The objective of supporting new development, in a heritage overlay area, is not to be given priority over conserving relevant heritage buildings and places. The challenge and obligation in Port Phillip is to design a new development that is compatible with relevant heritage places, deals creatively with site constraints and responds to its environment.
63. It is submitted that in this case the objectives of development and conservation not only co-exist, but they are compatible. The development can proceed, with some relatively minor alterations, and Baymor can be retained.
64. The proposal meets its obligations to the extent that the main building of the Esplanade Hotel is to be preserved, and some development occurs behind it, in accordance with planning scheme controls. The proposal does not meet its obligations to the extent that demolition of the entirety Baymor Court is proposed.

Applying the demolition policy

65. The principle of conservation of heritage places is subject to the demolition policy (cl 22.04-4). It is submitted that the demolition policy does not support demolition of Baymor Court.
66. It is acknowledged that the Tribunal has the power to decide whether or not Baymor may be demolished. However, that power is not unfettered nor is there a "discretion" to apply some criteria for decision-making that is inconsistent with the controls in the planning scheme. The "discretion" to decide to demolish or not to demolish must be exercised in accordance with the planning scheme.
67. It is submitted that this argument is not tantamount to saying the Tribunal has no discretion or that the protection afforded may be higher than under the Heritage Act 1995. The argument is simply that only relevant considerations can be taken into account in the exercise of power and those considerations are the controls in the Port Phillip Planning Scheme.
68. Two arms of the demolition policy apply in this case and each will be applied to Baymor.

69. The **first arm of the demolition policy** is:

To allow demolition of a part of a heritage place if it will not affect the significance of the place and the proposed addition is sympathetic to the scale and form of the place.

Baymor Court falls within the definition of a "significant heritage place" (cl 22.04-2) being a building that is an individually important place of local heritage significance. It is proposed to demolish the whole of this particular heritage place.

That fact cannot be disguised by suggesting that Baymor is simply one part of a heritage place, namely St Kilda Hill (HO5) and that to demolish that part will not affect the significance of St Kilda Hill. That effort at disguise is made by each of Becton's experts on Heritage.

The recognition of the individual significance of this building is for the purpose of conserving its heritage value as a building, and not only as part of a heritage area.

Within HO5 there are many significant buildings protected by the overlay. Without the area overlay, each individually significant building would have an individual overlay, as is the case for many specific buildings outside overlay areas in the City of Port Phillip.

Becton's experts argue that demolition of Baymor is only a partial demolition within a wider heritage place without a particularly deleterious effect on the rest of the place. It is submitted this is a misreading of heritage protection controls in Port Phillip.

HO5 is both a precinct protection and protection for each component within the precinct. The importance of the significant buildings within the precinct is not just as a part of the precinct but the overlay serves to protect individual buildings in their own right and in accordance with their identified significance.

In this case, Baymor is identified as significant in its own right and as such, it makes a contribution to the precinct. It is not a proper analysis to say the precinct remains without that building and therefore its demolition does not matter. Baymor both contributes to St Kilda Hill and warrants protection in its own right. Demolition of Baymor is an unacceptable loss per se and St Kilda Hill will be poorer without it.

To accept the argument of the Developer's experts would have the effect of affording less protection to an individually significant building because it is in a precinct heritage overlay area. That cannot be the intention of the Heritage controls.

Therefore, that arm of the planning scheme does not support demolition because demolition of Baymor will obliterate the significance of that heritage place. One does not come to apply the second part of that arm, as the first is not satisfied.

70. Reference is also made to HO117, being a specific overlay bringing internal controls to parts of the Esplanade Hotel, such as the Gershwin Room and grand staircase. The Esplanade Hotel (including its garages and kitchen wing) is subject to one overlay, which substitutes for, and takes over the functions of HO5, with no greater or lesser effect except for the addition of heritage protection to the Hotel's interiors. Becton's experts suggest that to demolish Baymor is only a partial demolition of the place protected by HO117 with no harmful effect on balance. However, HO117 does not relate to the whole of the development site taking in Baymor. It relates only to the Hotel buildings next door to Baymor.

71. This argument is faulty for similar reasons to those given above in relation to HO5. It is submitted that HO117 is for internal special purposes relating specifically to the Hotel and does not relate to Baymor. HO117 is therefore not in any way relevant to considering the effect of demolishing Baymor.

72. **The second arm of the demolition policy 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*

73. It appears to be common ground between the experts consulted by COPP, EA and Becton that Baymor is not in good condition but it is not structurally unsound. There is certainly no expert evidence that Baymor is structurally unsound. Professor Mackay's evidence ("MacKay report" dated July 2003 p 14 para 68) accords with that of Mr Briggs, in that the state of repair of Baymor would not justify demolition.

74. It is submitted that there is no basis for a finding that Baymor is structurally unsound on any definition. It is noted that definitions include:

- a meaning that goes beyond dictionary definitions to being likely to collapse in the foreseeable future (*J Harding v Port Phillip City Council & ors. 11 VPR 249 at 253-264*)
- where collapse is not imminent, it cannot be categorised as structurally unsound (*Ian Perkins & Assn v Port Phillip City Council P221/2002 unreported.*)

75. It is further submitted that it is open to the Tribunal to make a finding that Baymor is not structurally unsound.

76. On the matter of whether Baymor cannot feasibly be re-used, it is Mr Briggs evidence that it can feasibly be re-used. The Tribunal is urged to accept that evidence and find that Baymor can be re-used.

77. It is submitted that Becton's experts have not presented clear evidence to support a finding that Baymor cannot feasibly be reused.

78. Given that the proposed development has been designed on the assumption that Baymor is not there, a direction to reuse it will have cost and design implications, necessitating re-design and possibly additional cost. The Tribunal is asked to not reject reuse as an alternative on those bases, for several reasons:

- Whether or not the designs for the new development incorporated Baymor is a matter entirely in the Developer's hands.
- To design without Baymor creates a new and artificial benchmark against which to measure cost. It may well be cheaper to demolish Baymor than to work with it. However, this is not a greenfield site and there are basic planning principles which require site responsiveness and respect for heritage values.
- The heritage value and protection of Baymor (and the Esplanade Hotel) were well known to the Developer before the site was purchased. Review of the controls has not reduced or increased the pre-existing level of protection.
- There are no detailed costings of design with Baymor and design without Baymor to enable the Tribunal to take the cost aspect of 'feasibility' into account in an objective way.

- In the event the Developer produces costings at the hearing objection will be taken to the lack of opportunity to have those costs assessed independently.
 - In the event that general statements are made about having to redesign certain parts with consequential increased costs, the Tribunal is asked to find that general statements are not sufficient to determine that re-use is not feasible.
79. Retention of Baymor will not prevent the proposed development. Retention will require further design work, with perhaps some further cost in redesign and engineering works. These are normal and expected costs of a development of this magnitude and significance in a heritage precinct. They do not represent the kind of financial hardship that arises where retention would preclude development altogether.
80. It is to be noted that none of the array of Becton's experts has presented in their detailed statements any analysis of the feasibility of reusing all or part of Baymor. It is submitted that this omission is strategic and casts doubt on the independence and objectivity of those experts.
81. It is submitted that renovation, retention and re-use of Baymor cannot be ruled out in this case because no thorough assessment has been made of the feasibility of its re-use. It is submitted that the policy framework rules against demolition in the absence of a thorough investigation of the alternatives: *K.A. Reed [1998] VCAT 782*.
82. The Tribunal will hear evidence from Mr Briggs to support a finding that reuse of the building is both feasible and the preferable outcome to demolition.
83. It is submitted that one does not come to the second aspect of the second arm requiring an assessment of the replacement works because it has not been established that Baymor is structurally unsound or cannot feasibly be reused.
84. Nevertheless, Becton's experts consider that the replacement building on the Victoria and Pollington streets corner shows design excellence and makes a worthwhile contribution to the streetscape. It is submitted that the replacement building is not of excellent design and it does not make the kind of contribution the demolition policy demands.
85. The Tribunal will hear evidence from Professor Day and Mr Briggs on the inadequacy of the proposed building as a replacement for Baymor.
86. The responsible authority seeks further design work on the replacement for Baymor in its proposed condition 1(b). COPP seeks redesign to achieve a *coherent and picturesque streetscape, reflecting the existing contribution made to that part of the streetscape by the Baymor flats*.

87. It is clear from that proposed condition that the current design is not of the quality and standard required of a replacement building. It is premature to permit demolition of Baymor when the replacement building is not excellent and may never be.

88. It is further submitted that any replacement building is required to *clearly and positively support(s) the ongoing heritage significance of the area*. It is submitted that the proposed replacement, whatever the standard of design is assessed to be, does not support the ongoing heritage significance of the area. At best, it may be said that the modern building has echoes of the past, is of the same scale and does not damage the heritage significance. It is submitted that does not amount to "positive support of ongoing heritage significance". A plaque will not remedy that inadequacy!

89. The matter of the extent of "re-use" of Baymor will be considered below.

90. In summary, it is submitted that the planning policy framework recommends against the grant of a permit to demolish Baymor.

THE SIGNIFICANCE OF THE HERITAGE PLACE: BAYMOR COURT

91. It is submitted that the findings of the Port Phillip heritage and conservation studies suggest a refusal of a permit to demolish Baymor.

92. The Tribunal is referred to the expert statement of Mr Briggs ("Briggs report" at pp16-21) for a detailed description of Baymor and discussion of the conservation studies and history of the building. Mr Briggs considers (p16) that:

Unlike the vast majority of significant buildings that contribute collectively to the heritage fabric of Port Phillip, Baymor's individual citation and statement of significance indicate its unique individual significance as a heritage place in its own right.

93. The Becton experts assert that Baymor is isolated and contrasting with its immediate surrounds and therefore its loss will not diminish the heritage value of the wider overlay area. It is submitted this is a spurious conclusion. The Tribunal may find that the very characteristics which one expert dismisses as "isolated and contrasting", are lauded by another as "unique".

94. Mr Briggs goes on to compare the characteristics of Baymor with other comparative Spanish Mission buildings (pp21-21). He concludes that Baymor displays certain features that make it rare of its type, certainly making it significant within Port Phillip and arguably on a scale beyond local or regional.

95. Professor MacKay (p11 para51) concedes that the 1998 Allom Lovell Analysis of Significance of Baymor could have included more discussion on the wider context of the Spanish Mission style.

96. It is submitted that it is not open to the Tribunal to review the findings of the Port Phillip heritage studies with a review to disregarding them. Re-assessment of significance has been found by the Tribunal to be appropriate when Heritage studies are in need of review and there is new evidence of a substantial nature. At this stage in the evolution and development of the Port Phillip Planning Scheme, heritage studies and policy, it can not be said that the strategic or substantive bases of heritage policy and controls are out of date, unclear or in need of review. It is also submitted that there is no new evidence presented in this case concerning significance to warrant re-assessment.
97. The heritage and conservation studies make it clear that Baymor is of individual significance and is a significant contributor to the heritage precinct. It is submitted that the tribunal does not need to re-adjudicate that matter of significance.
98. Nevertheless, it is noted that the Developer invites the Tribunal to enter into that re-assessment and leads expert evidence to suggest that the heritage significance of Baymor is not such as to preclude demolition.
99. In the event the Tribunal accepts the invitation of the Developer to consider the level of heritage significance of Baymor as being different from that accorded it in the Port Phillip Heritage studies, the Tribunal is referred to the expert evidence of Mr Briggs. The Briggs report discusses Heritage assessment criteria (pp23-24) and the significance of Baymor. Mr Briggs concludes (p25):

Baymor Court's heritage significance is firmly established due to the rarity of its type at the local metropolitan level, its aesthetic appeal and its intactness and as an integral part of the set of key Spanish/Hollywood imagery that is emblematic of St Kilda in its golden age as a sea side resort, which is still the imagery of St Kilda's enduring character and appeal. From its imagery to its detail Baymor is quintessentially St Kilda.

100. It is to be noted that the responsible authority's independent heritage consultant, Mr Andrew Ward, also does not support demolition of Baymor (Attachment A).
101. It is submitted that it is open to the Tribunal to find that the heritage significance of Baymor is such that it ought not to be demolished.
102. Professor Mackay, supporting the opinion of Mr Lovell, both heritage experts engaged by Becton (p14 para 66) asserts that because Baymor does not have an individual heritage overlay, the appropriate benchmark for consideration of the "heritage effect" is on the wider overlay within which it is located.

103. The Tribunal is urged to reject this interpretation of heritage significance of an individually significant building that is within an area overlay. The Tribunal is referred to the reasoning in paragraph 69 above.

104. In any event, Professor MacKay and Mr Lovell both acknowledge that demolition of Baymor will diminish the stock of heritage buildings and would be an incremental loss to the area. Their subjective assessment is that such incremental loss can be accommodated. It is submitted that the Tribunal should find that such an incremental loss does matter and ought not to be accommodated. The evidence of Mr Briggs supports such a finding.

105. In terms of the significance of Baymor in the wider area, the Tribunal is referred to the evidence of Mr Briggs (p16). In the area overlay context, his view is that Baymor is protected to the extent of its appearance from the public domain. This appearance is to be found in the fabric visible from and to the public domain.

Partial demolition of Baymor Court Apartments

106. Mr Briggs goes on to discuss the fabric of Baymor in detail (p25). He supports his opinion that partial demolition of elements of Baymor may be justified when assessed against their contribution to the significance of the building and to the broader heritage place. Mr Briggs acknowledges that there may be grounds to allow partial demolition of Baymor (p38). EA accepts that evidence and seeks retention of that part of Baymor that conserves the building fabric visible from and to the public domain.

107. This way of conserving the heritage value of Baymor cannot be dismissed as mere "facadism". Mr Briggs' evidence (p25) is that external facades of Baymor Court and the roofs that are visible from the street as a part of those external facades should be protected and restored. He gives specific evidence as to the depth of the walls at both levels and on both street frontages to be retained. The Tribunal is referred to that evidence.

108. It is submitted that what is proposed by Mr Briggs does not amount to "facadism". There is a distinction to be made between real "facadism" and a proposal to retain sufficient of the original building to see its three dimensional form, or at least a significant portion of it so that the reality and impression of three dimensions is retained. That approach was adopted in the case of *Staged Developments Australia v Minister for Planning [2001] VCAT1447* (para 140).

109. In that case, it was also observed that such retention is a legitimate form of conservation in relation to buildings with heritage registration and without heritage registration (para 141).

110. It is submitted that the retention of Baymor described by Mr Briggs is a legitimate form of conservation and the appropriate form in this case.

111. It is submitted that if the Tribunal considers that the proposed residential tower does not dominate the Heritage building of the Esplanade Hotel, the Tribunal is also entitled to accept that the tower will not dominate the retained fabric of Baymor and vice versa.

112. Professor Day and Mr Briggs will give evidence concerning the general compatibility of the proposed development and retention of the recommended part of Baymor.

113. It is to be noted that the omission of evidence in the Developer's experts' witness statements concerning re-use of Baymor extends to an omission concerning retention of any part of Baymor.

CONCLUSION

114. It is submitted that the Tribunal's discretion in decision-making is reposed in the Tribunal to ensure that both the letter and the spirit of the relevant planning controls are enforced. The question for the Tribunal is "what decision will give effect to the objectives of the planning scheme?" The exercise of discretion must always be referable to and guided by the clear policy objectives and planning controls of the municipality, endorsed by the State.

115. In conclusion it is submitted that the Tribunal impose planning conditions on any permit:

- to ensure that Becton makes available the area around the Esplanade Hotel that is necessary to preserve the ongoing viability of its significant cultural heritage use.
- To require that the new apartments are sufficiently noise attenuated to ensure that the existing operations of the Esplanade Hotel as a culturally significant live music venue are not undermined by the proposed residential redevelopment.
- to provide for re-design of the frontages to The Esplanade, Victoria Street and Pollington Street to the satisfaction of the responsible authority.
- to provide for the conservation and re-use of Baymor Court Apartments to the extent recommended by Mr Briggs.
- to provide for those other matters identified by the responsible authority in their original proposed permit conditions.

The Esplanade Alliance
11th August 2003.