Victorian Civil and Administrative Tribunal

Swanson v Melbourne CC [2011] VCAT 1595 (19 August 2011)

Last Updated: 29 August 2011

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P1053/2011
PERMIT APPLICATION NO. TP-2010-362

CATCHWORDS

Application under section 77 of the *Planning and Environment Act 1987* to review **a decision to refuse** a permit; Melbourne Planning Scheme; Development of a four storey building comprising eight dwellings; Residential 1 Zone; Heritage Overlay; Heritage significance; Parking and vehicle access.

APPLICANT	Andrew Swanson
RESPONSIBLE AUTHORITY	Melbourne City Council
RESPONDENT	East Melbourne Group & ors
SUBJECT LAND	18 Brahe Place, 6-8 Garden Avenue and 10-12 Garden Avenue, East Melbourne.
WHERE HELD	Melbourne
BEFORE	Anthony Liston, Senior Member Vicki Davies, Member
HEARING TYPE	Hearing
DATES OF HEARING	1, 2, 3 & 4 August 2011
DATE OF ORDER	19 August 2011
CITATION	Swanson v Melbourne CC [2011] VCAT 1595

ORDER

1. Wei Lu & Yun Hu, John Rogers and Belinda Gross are joined as parties pursuant to S.60(1) of the *Victorian Civil and Administrative Tribunal Act* 1998.

2. Leave is given to the Applicant to substitute for the permit application plans, the amended plans prepared by Mattingley Courtney Pty Ltd and identified as Drawings 1289-TP1 to 1289-TP6 (inclusive), all dated June 2011.
3. The decision of the Responsible Authority in relation to permit application TP-2010-362 is set aside.
4. A permit is granted and directed to be issued for the land at 18 Brahe Place, 6-8 Garden Avenue & 10-12 Garden Avenue, East Melbourne. The permit allows construction of a four storey building for eight dwellings and associated buildings and works at 18 Brahe Place and 6 to 12 Garden Avenue and a reduction in the standard car parking requirements in accordance with the endorsed plans.

5 The permit is subject to the conditions in Appendix A to these reasons.

A P Liston
Senior Member

Vicki Davies
Member

APPEARANCES:

For Applicant	Mr Gary Testro, Solicitor Witnesses: Mr John Glossop, Town Planner Ms Helen Lardner, Heritage Consultant Mr Graeme Butler, Heritage Consultant Mr Jim Higgs, Traffic Engineer Mr Mark Sheppard, Urban Design Consultant Mr Tim Marks, Acoustic Engineer
For Responsible Authority	Mr Simon Martyn, Town Planner of Fulcrum Urban Planning Witness: Mr John Briggs, Heritage Consultant
For Respondents East Melbourne Group and others:	Ms Emily Porter, Barrister by direct brief
Respondents appearing on own behalf	Mr John Lidgerwood Dr Maurice Rosenbaum Mr Lachlan Schonfelder Mr Paul David Ms Laurie David Mr Ian Mitchell

INFORMATION

Description of Proposal	The proposal is to construct eight apartment dwellings in a four level building. The proposed building is to be built to the rear of two existing interwar apartment buildings both of which fronts onto Garden Avenue and form part of the subject land. Pedestrian access to the apartments is to be from Garden Avenue Each of the proposed dwellings has two bedrooms. The ground level of the building is used for car parking. Eight car spaces are provided in four car stackers. Vehicular access to the land is obtained via Brahe Place, a narrow laneway off George Street.
Nature of Proceeding	Application under section 77 of the *Planning and Environment Act 1987* to review **a decision to refuse** a permit.
Zone and Overlays	Clause 32.01, Residential 1 Zone. Clause 43.01, Heritage Overlay (HO2). Clause 43.02, Design & Development Overlay (DDO21).
Permit Requirements	Clause 32.01-4, two or more dwellings. Clause 43.01-1, demolition, building & works. Clause 43.02-2, building & works.
Land Description	The subject land comprises three land parcels. 18 Brahe Place is a vacant site upon which the proposed building is to be erected. 6-8 and 10-12 Garden Avenue both contain interwar apartment buildings three storeys in height. Garden Avenue is very different to the balance of East Melbourne. The pattern of subdivision changed with the insertion of a railway cutting and lots were developed in the late interwar period with a group of interesting apartment buildings. Hoddle Street to the east of the land and George Street to the north display a more mixed character with both Victoria era buildings more characteristic of East Melbourne generally and interwar apartment buildings. See zoning and cadastral map below.
Tribunal Inspection	Ms Davies inspected the land prior to the hearing. Ms Davies and Mr Liston jointly inspected the land during the course of the hearing.

Zoning & Cadastral Map[1]

REASONS

1. This is an application to review the decision of the responsible authority to refuse permission for a four storey building for 9 dwellings, at 18 Brahe Place, 6-8 Garden Avenue and 10-12 Garden Avenue, East Melbourne. The responsible authority issued a Notice of Refusal to Grant a Permit for the following reasons:
    1. The design of the proposed building, including its height, bulk, setbacks and appearance, would compromise the valued characteristics of the Garden Avenue heritage buildings and their setting, which is contrary to the objectives of the MSS, Clause 22.05, Clause 22.17 and the purpose and objectives of Clause 43.01.
    2. The design of the proposed development runs the risk of being confused with the original A graded heritage apartments, with reproduction of details and form, contrary to Clause 22.05 and Clause 43.01.
    3. The proposed development provides insufficient setbacks from its neighbouring residential properties, compromising neighbouring properties and compromising the development potential of adjoining properties.
2. At the commencement of the hearing Mr Testro applied to amend the permit application by the substitution of amending plans as foreshadowed by notice given in accordance with the Tribunal's practice requirements. The amendments include an increase in northern setbacks, another iteration of the architectural approach and a reduction in the number of dwellings to eight. No person opposed the amendment of the permit application in this way, and the Tribunal ordered the amendment of the permit application in accordance with Mr Testro’s request.
3. Mr Martyn advised the Tribunal that from council’s perspective, the plans did not entirely resolve its reservations, and continued to be of the opinion that:

The proposal's perceived scale and "sense of separation" from the existing heritage place (when viewed from Garden Avenue) remains a concern and a further reduction in building height is warranted.

The architectural expression and façade detailing fails to achieve an appropriate balance between its reference to, and differentiations from, the heritage place.

The proposal has necessitated the installation of opaque glazing within the eastern façade of 6-8 Garden Avenue (and a subsequent application to legalise the works) to avoid unreasonable overlooking from the proposed balconies of Apartments 3, 6 and 8.

Oral reasons given

4. The application for review was heard over three days at the beginning of August. After the Tribunal inspected the subject site and the surrounding area the hearing was reconvened and an oral decision was given to grant a permit. The reasons given for that decision follow.

Heritage

5. We agree with the general consensus of the heritage witnesses that the important heritage consideration is the potential for the proposed development to adversely affect the heritage significance of the two *A grade* buildings on the subject land and the heritage significance of the Garden Avenue streetscape generally.
6. Physical characteristics of the proposal relevant to this consideration are:
    - the subject land comprises three properties, 18 Brahe Place, 6-8 Garden Avenue and 10-12 Garden Avenue. The proposed new four storey building is to be built on 18 Brahe Place. There is an interwar apartment building on each of the Garden Avenue properties. These existing apartments are *A grade* buildings pursuant to the heritage provisions, as are other apartment buildings of the same period in Garden Avenue;
    - 18 Brahe Place is set behind the Garden Avenue properties. Consequentially, the proposed building is set back approximately 28 metres from Garden Avenue and there is to be a landscaped setback from the *A grade* buildings on the land varying between 4.7 and 9.3 metres;[2] and
    - the proposed building is approximately 1.7 metres higher than the *A grade* building at 10-12 Garden Avenue. As a consequence of perspective the proposed building has an apparent height similar to that of the *A grade* buildings in the foreground when viewed from the opposite curb in Garden Avenue.
7. The relevant heritage issue is whether or not the height and architecture of the proposed building is sufficiently respectful of the *A Grade* buildings and the heritage streetscape having particular regard to the provisions of clause 22.05 of the Planning Scheme.
8. In relation to the height of the proposed building:
    - Mr Briggs is of the opinion that an observer would understand that the proposed building is higher than the foreground buildings, because of our inherent ability to form a judgement as to height having regard to distance, and that as a result the new building would become a dominant and distracting element in the heritage streetscape;
    - Mr Butler is of the opinion that the perspective relationship between the proposed and existing buildings on the land, discussed above, produces an appropriately respectful outcome in this heritage context; and
    - Ms Lardner was of the opinion that the height of the proposed building was within the range of heights evident within the Garden Avenue precinct, and that this was an appropriate outcome, having regard to the location of the proposed building and its relationship to the

foreground buildings.

9. We agree that the view to the proposed building between the two *A grade* buildings on the subject land is an important view in this heritage context. Nevertheless, a 1.7 metre difference in height between buildings of this scale, would ordinarily be regarded as a very modest difference. Moreover, the fact that the proposed building is set back behind the *A grade* buildings and has a set back approximately 28 metres from Garden Avenue, is also an important consideration.
10. We agree with Ms Lardner's assessment. Garden Avenue is a robust and dynamic streetscape, and the proposed building, located as it is in relation to both the street and the *A Grade* buildings on the subject land, will have a respectful relationship with the street and the *A Grade* buildings, and will not detract from their heritage significance because of its height.
11. In relation to architecture, the heritage consultants agree that the proposed architecture represents a modern interpretation of the relevant historic buildings size, form, proportion, colours and materials. Mr Briggs remained concerned that:
    - the selected brick may be too similar to that of the *A grade* buildings on the subject land; and
    - the proportions of the windows in the west elevation reinforce a viewer's perception of the compressed floor to ceiling heights of the proposed building.
12. In relation to Mr Briggs' concerns:
    - we agree with Mr Butler and Ms Lardner that the selection of a modern wire cut brick will create a significant distinction between the proposed and existing buildings. It may be desirable to use a darker brick to produce a better outcome in terms of contrast; and
    - it is not unusual for modern buildings in heritage streetscapes to display a different floor to ceiling ratio to that of heritage buildings within the street, a difference usually managed by careful use of design detail. In this case the setback to the proposed building is such that any perceptions of difference resulting from this characteristic is diminished.
13. Other heritage related issues discussed at the hearing included the garden character of Garden Avenue, more particularly of 6-8 Garden Avenue and 10-12 Garden Avenue, and the risk that the proposed building will create the appearance of a quadrangle when no such outcome was intended in the design of the *A grade* buildings. We make the following observations:
    - the two *A grade* buildings on the subject land have been designed to share a garden space. This garden setting is not affected by the proposed development. Indeed, landscaping within this space has recently been upgraded and, as the trees within this garden mature, the visual prominence of the proposed building will be further diminished; and
    - the proposed building is set behind the existing *A grade* buildings on the subject land by a landscape space described earlier. This landscape setback will be readily perceived. In our view there is no risk that the proposed building will create a quadrangle effect detracting from the significance of these *A grade* buildings.

The inclusion of a rooftop deck will not exacerbate the perception of height, given its setback from the edges of the building and its separation from the Garden Avenue apartments.

Neighbour character and building bulk

14. The location of the proposed building and its relationship to surrounding buildings is such that the proposed building is not particularly sensitive from a neighbourhood character perspective. To the extent that the proposed building has a streetscape presence to Garden Avenue, it is our assessment that the building is appropriately respectful of this streetscape from a heritage perspective. This is equally true judged from a neighbourhood character perspective.
15. East Melbourne is a particularly urban environment. The overall height of the building is similar to

building heights already evident in the immediate environs of the land. The setback distances to buildings on adjoining sites, and to the existing buildings on the subject land, are such that the proposed building is not an unreasonably bulky building in this urban context.

Traffic

16. It is undoubtedly the case that vehicular access via Brahe Place is constrained. It is Mr Higgs' assessment that as a consequence of the fact that the land is already used for car parking, there is only a marginal increase in the number of vehicle movements in Brahe Place as a consequence of this development. We accept Mr Higgs' estimate and consequently it is unlikely that there will be any significant effect on traffic impacts.
17. Under cross-examination Mr Higgs accepted that a mirror system at the bend in Brahe Place would improve the safety and the function of this one lane, two-way road. We were also advised that Council's traffic engineer were not generally supportive of the installation of a mirror system, possibly as a consequence of maintenance considerations. This is ultimately a matter for the council. We will impose a condition which requires the applicant to install a safety mirror in the event that the council consents to the installation of such a mirror within a reasonable time frame.

Car parking

18. Eight on-site car spaces are to be provided for residents. This is a satisfactory outcome, and provides sufficient car parking for future residents. It is true that car parking in stackers is less convenient than otherwise unconstrained car spaces, but they are not so inconvenient that they could be regarded as unusable.
19. No provision has been made for on-site visitor car parking. We accept there is a very high level of demand for on-street car parking in East Melbourne, and that there will be occasions on which visitors find it very difficult to find a closely located car space. However, the subject land is a very well located inner urban site that is very well served by public transport services. We do not think the failure to provide visitor car parking should be a basis for the refusal of the residential development in a location such as this.

Noise

20. Concern was expressed about the potential for noise impacts from the proposed development in respect of air conditioners, car stackers and the use of the roof top deck.
21. In relation to air conditioning and other plant, and the proposed car stackers, we accept Mr Mark's evidence, and do not believe that any unreasonable off site effects are likely.
22. In relation to the roof top deck, we note that it is reasonably well set back from nearby buildings. We believe it is an important aspect of the amenity of future residents of the subject building. We do not believe it is comparable to the roof top deck at the nearby Quest Apartments. The potential behaviours of people staying in short term accommodation for holidays or to attend a sporting event are different to those associated with long term residents.
23. We considered restrictive conditions such as a curfew, but could not arrive at a condition which is not overly complex, and which did not restrict conceivably reasonable uses of this space. Permanent shade structures and the like are not proposed, and would require separate permission.

Privacy

24. In general terms the design of the proposed building has addressed issues associated with the privacy of nearby sensitive open spaces and habitable room windows. There remains a privacy

issue between the proposed balconies in the south west corner of the proposed building, and east facing bedroom windows of bedrooms in the north east corner of 6-8 Garden Avenue.

25. The applicant has installed obscure glass in these windows, an outcome opposed by the council. On balance we think that the proposed apartments with the affected balconies have good outlook to the south, and therefore the better outcome would be privacy screening to the western edge of these balconies. On the other hand, we acknowledge that there is a north-facing window in these existing bedrooms which is not obscured, and that there is a debate to be had about the relative impact of privacy screening on the amenity of bedrooms, living rooms and balconies. If the disputed obscure glass is to remain, the balconies need not be screened.

Development Potential of abutting land

26. We note that the council did not pursue this ground of refusal at the hearing. We found the evidence of Mr Glossop and Mr Sheppard in relation to this issue persuasive.

Shared facilities

27. It is wholly appropriate for there to be shared bicycle and bin storage with the other existing apartment buildings on the subject site.

Permit Conditions

28. Our final order will address other matters raised with respect to conditions, including the need for a Landscape Plan, detailed requirements for a Construction Management Plan and various other 'drafting issues' highlighted by Mr Testro.
29. In particular we will ensure that the Construction Management Plan includes measures addressing the constraints imposed by access via Brahe Place.

A P Liston
Senior Member

Vicki Davies
Member

APPENDIX A – PERMIT CONDITIONS

Endorsed plans

1. Before the use and/or development start(s), 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 and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans substituted at the hearing of Application for Review P1053/2011 but modified to show:
    (a) The resolution of the inconsistency between Drawing Nos. 1289-TP2 and 1289-TP4;
    (b) The external materials, colours and finishes required by condition 7;
    (c) A notation that the western edge of balconies in the south west corner of the proposed building must be fitted with 1.7 metre privacy screens, similar to those used elsewhere in the

building must be fitted with 1.7 metre privacy screens, similar to those used elsewhere in the permitted development, in the event that east facing windows of bedrooms in the north east corner of 6-8 Garden Avenue are not lawfully glazed with obscure glass at the date on which application is made for a certificate of occupancy.

Layout Not Altered and Satisfactory Completion

2. The development as shown on the endorsed plans must not be altered or modified without the prior written consent of the Responsible Authority.
3. Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

Landscaping

4. Before the development starts, a landscape plan must be submitted to and approved by the Responsible Authority. When approved, the plan will be endorsed and will then form part of the permit. The plan must be drawn to scale with dimensions and three copies must be provided. The landscaping plan must be generally in accordance with the landscape plan prepared by Habitat, dated June 2011, but modified to show:
   (a) An in-ground irrigation system provided to all landscaped areas; and
   (b) The retention of Tree No 1, as indicated on the survey included in the Statement of Evidence of Mr Rob Galbraith in Victorian Civil and Administrative Tribunal Application P1053/2011; and
   (c) The use of the Hydrapave porous paving system, for the proposed access way.
5. Before the use/occupation of the development starts or by such later date as is approved by the responsible authority in writing, the landscaping works shown on the endorsed plans must be carried out and completed to the satisfaction of the Responsible Authority.
6. The landscaping shown on the endorsed plans must be maintained to the satisfaction of the responsible authority, in particular any dead, diseased or damaged plants are to be replaced.

Materials and Finishes

7. A schedule and samples of all external materials, colours and finishes must be submitted to the satisfaction of the Responsible Authority prior to the commencement of the development, excluding demolition. The schedule must show the materials, colours and finishes of all external walls, roof, fascias, window frames, glazing types, doors, balustrades, fences and paving, (including car park surfacing), outbuildings and structures. When approved, the schedule will be endorsed and will then form part of the permit. All finishes and surfaces of all external buildings and works, including materials and colours, must be in conformity with the approved schedule to the satisfaction of the Responsible Authority.

Staged Subdivision

8. Prior to the commencement of the development hereby approved, the land at 18 Brahe Place must be given an abuttal to Garden Avenue created by way of a staged subdivision including the land known as 6-8 and 10-12 Garden Avenue setting out common property for shared access, servicing and storage.

Construction Management Plan

9. Prior to the commencement of the development hereby approved, including site preparation works, a detailed Construction and Demolition Management Plan must be submitted to and be

works, a detailed Construction and Demolition Management Plan must be submitted to and be approved by the Responsible Authority. This construction management plan is to be prepared in accordance with the City of Melbourne - Construction Management Plan Guidelines and is to consider the following:

(a) public safety, amenity and site security;
(b) operating hours, noise and vibration controls;
(c) air and dust management;
(d) stormwater and sediment control;
(e) waste and materials reuse; and
(f) traffic management, including measures addressing the constraints imposed by access via Brahe Place.

Building appurtenances

10. All building plant and equipment on the roofs are to be concealed to the satisfaction of the Responsible Authority. The construction of any additional plant machinery equipment, including but not limited to air-conditioning equipment, ducts, flues, exhausts (including car parking) and communications equipment, shall be to the satisfaction of the Responsible Authority.
11. Any satellite dishes, antennae or similar structures associated with the development must be designed and located at a single point in the development to the satisfaction of the Responsible Authority, unless otherwise approved to the satisfaction of the Responsible Authority.
12. Mailboxes and newspaper receptacles must be provided prior to the occupation of the development, including an additional mailbox for the body corporate if and when the development is subdivided, to the satisfaction of the Responsible Authority.
13. All service pipes, apart from roof down pipes, must be concealed from the view of a person at ground level within common areas, public thoroughfares and adjoining properties.

Waste Management

14. Prior to the commencement of the development hereby approved, excluding demolition and bulk excavation, a Waste Management Plan (WMP) must be prepared and submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Waste Management Plan prepared by Land Use Town Planning Services and identified as Version 1, dated 3 September 2010 but revised to reflect the nature of the development hereby approved.
15. The waste storage and collection arrangements must be in accordance with the Waste Management Plan required by Condition 14. The waste storage and collection arrangements must not be altered or modified without the prior consent of the Responsible Authority.

Drainage

16. Prior to the start of the development hereby approved, a stormwater drainage system, incorporating water sensitive urban design, must be constructed for the development and provisions made to connect this system to Council's underground stormwater drainage system and, where necessary, upgrade the system to accept the discharge from the site in accordance with plans and specifications first approved by the Responsible Authority.
17. All projections over the street alignment should be drained to a legal point of discharge in accordance with the plans and specifications first approved by Responsible Authority.

Traffic safety

18. Prior to the completion of the permitted development the owner must, at the owner's expense,

install a traffic safety mirror at the bend in Brahe Place to the satisfaction of the Responsible Authority, provided that within six months of the commencement of development the Council of the City of Melbourne advises the owner in writing that it consents to the installation of such a traffic safety mirror.

Expiry of Permit

19. This permit will expire if one or more of the following circumstances apply:
    (a) The development is not started within two years of the date of this permit;
    (b) The development is not completed within four years of the date of this permit.

The Responsible Authority may extend the date upon which the permit expires. A request for an extension of time must be in writing and be received before the permit expires, or within three months afterwards.

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[1] The subject land is the 3 lots to the centre of the plan labelled 18, 10, 6 & 6.

[2] These are setbacks to proposed balconies. Wall setbacks are somewhat larger.

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