VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2154/2015
PERMIT APPLICATION NO. MPS/2015/5

CATCHWORDS

Section 80 of the Planning and Environment Act 1987; Moreland Planning Scheme, permit already issued for unit building but subject to permit conditions which (amongst other things) require the top levels to be stepped-in; conditions appeal; by the time of the Tribunal hearing only two conditions still in dispute relating to this 'stepping-in' requirement; appeal refused.

APPLICANT	Ridolfi Architecture
RESPONSIBLE AUTHORITY	Moreland City Council
SUBJECT LAND	234 Lygon Street, BRUNSWICK EAST
WHERE HELD	Melbourne
BEFORE	Philip Martin, Member
HEARING TYPE	Hearing
DATE OF HEARING	17 May 2016
DATE OF ORDER	10 June 2016
CITATION	Ridolfi Architecture v Moreland CC [2016] VCAT 846

ORDER

1 The decision of the Responsible Authority is affirmed.

2 In the situation where all the Application for Review of the other previously contentious permit conditions was withdrawn by the time of the Tribunal hearing, the application to delete planning permit conditions numbers 1(j) and 1(k) is refused.

Philip Martin
Member

APPEARANCES

For Applicant	Mr James Livingston (Consultant Planner)
For Responsible Authority	Ms Irene Plakidis (Consultant Planner)

INFORMATION

Nature of Proceeding	Application under Section 80 of the *Planning and Environment Act* 1987 – request to amend one or more planning permit conditions.
Zone and Overlays	Development Contribution Plan Overlay Parking Overlay Schedule 1
Relevant Scheme, policies and provisions	Clauses 9, 11, 15, 16, 17, 18, 21.01, 21.02, 21.03, 21.04, 22.01, 22.03, 22.07, 22.08.
Land Description	The subject land is a commercial site located on the eastern side of Lygon Street, with an area of 307m^2. The site is rectangular in shape, is relatively flat and backs on to a rear laneway. On the far side of the rear laneway are a row of residential properties. This section of Lygon Street is fairly hard edge and commercial in character, albeit with an emerging flavour of redevelopment.
Tribunal Inspection	The Tribunal inspected the site and local area after the hearing.

REASONS[1]

WHAT DOES THIS APPLICATION INVOLVE?

1 Council has already granted the planning permit No. MPS/2015/5 dated 14 September 2015, which provides for the following redevelopment of the subject land at 234 Lygon Street in Brunswick East:

> *"The use and development of a five storey building containing a shop and dwellings, a reduction in the car park requirement and a waiver of the loading and unloading of vehicles requirement, in accordance with the endorsed plans."*

2 This approved permit included 32 permit conditions. A handful of these conditions have been appealed to the Tribunal by the owner/permit holder.

3 However, there were ongoing discussions between the owner and Council about these contentious conditions, in the lead up to the scheduled Tribunal hearing on 17 May 2016. The upshot was that by the time of this hearing before me, the parties had agreed that the only two conditions still in dispute are conditions 1(j) and 1(k), which read as follows:

> "*1(j) A minimum setback of 3 metres from the front (west) property boundary at the third and fourth levels. The balcony on the third level may encroach into this setback, but not the roof over the balcony.*
>
> *1(k) A minimum setback of 3 metres from the rear (east) property boundary at the third and fourth levels. The balcony on the third level may encroach into this setback, but not the roof over the balcony.*"

4 The hearing then proceeded on the basis that Mr Livingston for the Applicant and Ms Plakidis for Council both made written presentations to me about this confined issue of whether or not these two permit conditions should remain as-is, be deleted or potentially remain in some amended form.

5 Soon after the hearing, I drove to the subject land and inspected it and the surrounding area. This included doing a pedestrian lap around the block of buildings, which includes the subject land, utilising the rear laneway. I also took note of the general character of this section of Lygon Street. In relation to the abutting land to the north, whilst a permit has been granted for its more intensive redevelopment, it was undisputed that this permit expires in about five months and that there is real doubt whether this permit will in practice be acted upon.

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[1] I/We have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I/We do not recite or refer to all of the contents of those documents in these reasons.

6 For the reasons set out below, my overall finding has been that I am unconvinced that the two contentious conditions should be deleted. Hence, this application for review is refused.

CONTEXT AND MAIN SUBMISSIONS OF EACH PARTY

7 By way of context, the subject land forms part of a fairly hard-edge commercial section of Lygon Street. To say that this section of Lygon Street is "eclectic" would be an understatement. The majority of buildings present as run down and relatively low-rise built form with an intriguing range of uses including a martial arts supplier and the intriguingly named "AZI Australian Zipper Industries Pty Ltd".

8 On the other hand, I also acknowledge the beginning of a trend towards contemporary infill buildings. In particular, I refer to the six storey apartment building, which has been completed fairly recently and sits roughly 100 metres or so farther south and on the same side of Lygon Street. On the opposite side of Lygon Street from this fairly new six storey building is a circa 1990s five storey apartment building, which presents in a fairly lacklustre way to the street and includes a roof-top architectural feature that has an unflattering resemblance to the top of the famous Atomic Bomb Dome in Hiroshima Peace Memorial Park.

9 To summarise the position of the parties in brief terms, Mr Livingston urged me to find that this is such a commercial/hard-edged area that the proposed new building can sit comfortably in this context, without the extra stepping in at the upper level being required by the contentious permit conditions. He relied on the fact that, just farther to the south, the new six storey apartment building has only the two top levels stepped in at the front and rear. He also referred to the circa 1990s building opposite, which rises straight up with its five stories of height.

10 By contrast, Ms Plakidis highlighted that the immediate area around the review site is still relatively low-rise, such that the stepping in of the upper levels of the new building required by conditions 1(j) and 1(k) is entirely reasonable and appropriate. She urged the Tribunal to find that, without this extra stepping out of the upper levels, the new building would be excessively dominant and monolithic in this neighbourhood setting.

11 In addition she relied on the fact that there are residential properties with relatively open back yards on the opposite side of the right of way at the rear of the subject land.

12 There was also some discussion of the Bruswick Structure Plan, which was prepared by Council originally in 2010 and then updated in June 2012. It is undisputed that in its original form, this Structure Plan in fact anticipated four storey street walls along this section of Lygon Street. On the other hand, it is also clear that the June 2012 Addendum to the Structure Plan created a varied position, whereby the preferred street wall is the "*Type 3: 3*

storey street wall/3-5m min setback". In this regard, Ms Plakidis argued that the two disputed permit conditions are consistent with this preferred street wall height. However, Mr Livingston (perhaps drawing a long bow) still sought to bolster his case through the fact that the original 2010 version of the Structure Plan did anticipate a 4 storey street wall in this location.

13 Finally, there was some discussion of the proposed Schedule 19 to the Design and Development Overlay ('DDO'), which Council has approved but which has not yet been incorporated into the planning scheme. This Schedule 19 would deal with the "*Brunswick Activity Centre – Lygon Street local area*". Without needing to get into the relevant detail, suffice to say that the provisions of Schedule 19 dealing with "*Setbacks to residential land*" impose quite rigorous requirements in terms of the preferred substantial rear setback, which would be required for new buildings either backing straight on to residential property, or where (as here) there is a right of way in between. The situation is more straightforward in relation to the preferred front setback, where again a three level street wall is expected, with an additional fourth and fifth level anticipated but stepped-in to a greater extent. In the situation where the relevant Planning Panel did not support having any mandatory controls at all, Schedule 19 as put forward for ministerial approval makes the proposed front height/stepping-in treatment mandatory but allows for the treatment of the rear of the building to be ultimately discretionary.

14 Ms Plakidis urged the Tribunal to find that this proposed new Schedule 19 control, whilst not yet implemented, reinforces the broad sweep of Council's position that it is very reasonable and appropriate that the two contentious conditions be retained. This was disputed by Mr Livingston.

FINDINGS OF THE TRIBUNAL

15 Turning to the Tribunal's findings, I am unconvinced that the two contentious permit conditions should be removed, relying on the following key reasons.

16 First, I agree with Ms Plakidis that both the existing Brunswick Structure Plan June 2012 and the draft Schedule 19 to the DDO in totality provide significant planning policy support for the stepping in of the front and rear levels of the new building required by the two contentious planning permit conditions. I see no real weight can be given to the fact that the early 2010 version of the Structure Plan took a different position – the reality is that it is appropriate for the Tribunal to work with the most recent version of that document.

17 The other important factor with my discretion has been the physical nature of the local area. This is where my site visit has been quite valuable. In particular, my site visit confirmed that, notwithstanding some other large buildings a little farther to the south, the reality is that the existing built

form in this particular section of Lygon Street is still relatively low-key, albeit ripe for redevelopment. Where most immediately nearby buildings are typically one or two stories high, I accept that this reinforces the need for a more cautious approach to the treatment of the upper levels of this new five storey building.

18 In terms of whether or not the upper level of the new building needs to be stepped in at the rear, my site inspection confirmed that the residential properties on the far side of the right of way have quite open backyards. In this more sensitive situation, I am satisfied that it is a suitably respectful and appropriate response that the upper levels of the new building be stepped in at the rear, so as to make them more recessive when viewed from the rear of the neighbouring properties to the east.

19 Where there was discussion of the new six storey apartment building about 100 metres or so farther south on the same side of Lygon Street, I see the following factor as being an important consideration. On the one hand, I acknowledge that this new building features a four storey wall at its front and rear boundaries, with only the fifth and sixth levels completely stepped in. On the other hand, I consider it important that this building to the south has what the following positive design feature – most of its external terrace areas are open at the ends. This is in contrast to the situation with this new building where the terraces are enclosed at the sides for every level apart from the top level. This more heavy-handed treatment of the terrace areas with the new building here undermines the ability of the Applicant to seek to gain any "traction" from the design of this new six storey apartment building about 100 metres to the south.

20 I see the circa 1990s five storey apartment building on the opposite side of Lygon Street as offering little assistance to the Applicant, for the following reasons. First, it needs to be said that the design of this five storey building appears to be about 20 years old, when very different design considerations applied. Secondly, there is the alleviating factor with this five storey building that its front façade is quite broken up in its detailing and modulation in such a way as to make it more visually recessive – I do not see the new building as offering this type of visual relief with its front treatment.

CONCLUSION

21 For the reasons explained above, my finding is that the two disputed permit conditions shall remain unchanged.

Philip Martin
Member