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Victorian Civil and Administrative Tribunal

Zagame Downtowner Pty Ltd v Melbourne CC [2015] VCAT 1952 (15 December 2015)

Last Updated: 23 December 2015

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P843/20
PERMIT APPLICATION NO. TP-2014-7

CATCHWORDS

Melbourne Planning Scheme; [Section 77](#) of the [Planning and Environment Act 1987](#); Mixed Use Zone; Heritage Overlay HO1; Design and Development Overlay DDO44; 13 storey building; Emerging character

APPLICANT	Zagame Downtowner Pty Ltd
RESPONSIBLE AUTHORITY	Melbourne City Council
RESPONDENT OBJECTORS	Ewan Ogilvy and others
SUBJECT LAND	66 Lygon Street, Carlton
WHERE HELD	Melbourne
BEFORE	Russell Byard, Senior Member Ann Keddie, Member
HEARING TYPE	Hearing
DATES OF HEARING	24, 25, 26, 27 and 28 August and 21 September 2015
DATE OF ORDER	15 December 2015
CITATION	Zagame Downtowner Pty Ltd v Melbourne CC [2015] VCAT 1952

ORDER

1. Pursuant to section 127 and clause 64 of Schedule 1 of the [Victorian Civil and Administrative Tribunal Act 1998](#), the application is amended by substituting the following plans for the application plans:

Prepared by:	Fendor Katsalidis Architects
Drawing numbers:	TP10, TP099 to TP108, TP200 to TP203, TP300 to TP302, TP400 to TP403, all Revision B, issued on 13/07/2015.

2. The decision of the responsible authority is affirmed.
3. In permit application TP-2014-735, no permit is granted.

Russell Byard	Ann Keddie
Senior Member	Member

APPEARANCES

For Zagame Downtowner Pty Ltd	Ms Susan Brennan SC, barrister with Jennifer Trehwella, barrister, instructed by Best Hoop solicitors. They presented written and oral submissions and called a number of expert witnesses who gave oral evidence adopting written reports circulated prior to the hearing namely: Christopher David Goss, architect; Bryce Raworth, heritage consultant; Craig Czarny, urban design consultant; Melissa Dunlop, landscape architect; Cainin McCabe, designer and analyst of environmentally sensitive design buildings; Charmaine Dunstan, traffic engineer; and David Charles Crowder, town planner. They also tendered written reports of Robert Galbraith, arborist, and Leah Reynolds, sustainability and waste management consultant, who were not called to give oral evidence as no other party wished to cross examine them.
For Melbourne City Council	Mr Andrew Clarke, town planner of Clarke Planning Pty Ltd. He presented written and oral submissions and called two expert witnesses who gave oral evidence adopting written reports circulated prior to the hearing namely: Nathan Alexander, urban designer; and Meredith Gould, heritage consultant.
For the respondent objectors	Ian Howie appeared in person and presented written and oral submissions. Lynette Cracknell appeared in person for herself and presented written and oral submissions.

in addition to presenting a written submission on behalf of Lester Levinson and Francois Levinson. Mr Levinson appeared in person on 21 September 2015.

Daniel Allan Peel appeared in person for herself and presented written and oral submissions. Floreana Coman presented written and oral submissions pursuant to leave given on behalf of herself and the Romanian Orthodox Church.

Barbara Pesel appeared on behalf of herself and Stuart Ayer. She presented written and oral submissions.

Ewan Ogilvy appeared in person and presented written and oral submissions.

John Weickhardt appeared in person and presented written and oral submissions.

Warren Green appeared in person and presented written and oral submissions on behalf of himself and the Carlton Residents Association.

Ian Bird appeared in person and presented written and oral submissions.

Colin Lovitt QC appeared in person and presented written and oral submissions.

Amy Tsang made oral submissions pursuant to leave given to her for that purpose.

Malcolm Foo appeared in person and presented written and oral submissions.

Shu-Haur Ou (appearing in the Tribunal records as Shu-Haur Ooi) presented oral submissions.

Subsequent to the hearing Planning Scheme Amendment C196 to the Melbourne Planning Scheme came into operation on 15 October 2015. In an interim order dated 12 November 2015 parties were given the opportunity to make written submissions in relation to that amendment, such submissions to be provided to other parties and filed by close of business on 26 November 2015. A further direction gave leave for any party wishing to make a written reply to any such submission could do so by close of business on 9 December 2015 with copies to be provided to other parties.

Several parties took advantage of that leave and submitted written submissions in relation to the planning scheme amendment. They are:

Ewan Ogilvy,

Ian Bird,

Warren Green (on the letterhead of The Carlton Residents Association Inc),

Lynette Cracknell,

Barbara Pesel and Stuart Ayer,

Dan Peel, and The applicant company.

Mr Ogilvy took advantage of the further leave and submitted a written reply.

Various plans, photographs and other documents were tendered in evidence. The evidence and submissions (including post-hearing submissions and reply in documentary form have been retained on the file of the Tribunal.

INFORMATION

Nature of Proceeding	Application under section 77 of the Planning and Environment Act 1987 for review of a decision of the responsible authority to refuse to grant a permit.
Proposal	Demolition of an existing four level motel building and its replacement with a 13 storey new building above 2 basements to contain retail premises, a place of assembly and residential apartments.
Permit requirements	Clause 32.04-2 use land for 'retail premises' in a Mixed Use Zone. Clause 32.04-6 construction of two or more dwellings on a lot in a Mixed Use Zone. Clause 32.04-8 works associated with a section 2 use in a Mixed Use Zone. Clause 43.01 demolition and construction of buildings and works on land subject to a Heritage Overlay. Clause 43.02 buildings and works under Schedule 44 of the Design and Development Overlay. Clause 52.06 waiver of car parking for retail premises.
Zone and Overlays	Mixed Use Zone. Heritage Overlay. Design and Development Overlay. Parking Overlay.
Title Particulars	Lots 1, 2 and 3 on Title Plan TP669507T being the land in Certificate of Title Volume 08943 Folio 804 and Lots 1 and 2 on Title Plan TP133854L being the land in Certificate of Title Volume 10178 Folio 255.
Land Description	Rectangle of land on the southeast corner of the intersection of Queensberry Street with Lygon Street, Carlton having a frontage of 50.86m to the east side of Lygon Street, 44.31m the south side of Queensberry Street and an area of 2241m ² .
Amendment	At the commencement of the hearing an application was made to amend the permit application giving rise to these proceedings by substituting a book of plans marked as exhil B1 for the original application plans. That amendment was granted by consent.
Tribunal inspection	On Friday 28 August 2015, in the course of the hearing, an accompanied inspection was made of the land and locality.

INTRODUCTION

1. This proceeding addresses a permit application for a 13 story mixed use building in South Carlton.
2. Having heard and considered submissions and evidence, and undertaken an accompanied inspection, we have reached the same decision. That is, the decision of the responsible authority is affirmed and no permit is granted.

3. We have articulated our reasons for reaching this decision differently. Consequently, two sets of reasons are published, one by each Member, explaining the physical and planning contexts that guide our decision and the reasons why the current proposal has not in our view achieved an acceptable outcome.
4. Subsequent to the hearing, Amendment C196 was gazetted on 15 October 2015. By order dated 12 November 2015 the presiding member invited a response by parties to the resultant changes to the planning scheme as they affected the subject site. The responses have been considered in our reasons.

REASONS

SENIOR MEMBER BYARD

What is this case about?

5. The ultimate question in this case is whether the proposed mixed use development is too tall.

What is proposed?

6. The review site in this case is 66-68 Lygon Street, Carlton. It is located in the southern part of Carlton on the south eastern corner of the intersection of Lygon Street with Queensberry Street. It has a frontage of 50.86m to the east side of Lygon Street and 44.13m to the south side of Queensberry Street with an area of 2241m².
7. Until several decades ago it was the site of a Methodist church, originally of the Primitive Methodist group, dating back into the 19th century. However, a redevelopment in the second half of the 20th century saw the construction of a four storey hotel motel known as The Downtowner. That building exists on the site today. It is a somewhat unprepossessing structure that makes little contribution, positive or negative; to the site, the context and the relevant streetscapes.
8. The proposal is to demolish the existing building and to construct a new one of 13 storeys over two basements that would contain car parking and storage. The ground floor would be occupied by several retail premises with the upper floors devoted to residential apartments. There would be 156 dwellings of which 86 would have one bedroom and 70 would have two bedrooms.
9. The mode of building would be to have a podium at the street alignments of both Lygon Street and Queensberry Street. However, these podiums would be substantial in height and would, in fact, vary in height. This variation would not be due to topography although the site does fall from east to west down Queensberry Street and from north to south down Lygon Street. On the Lygon Street frontage the podium would be four residential floors above the ground floor with a height in the order of 18m on the downhill side and varying from four to six residential levels on the Queensberry Street frontage with the six levels above ground level on the eastern side where the height above ground on that uphill side would be in the order of 23m.
10. A central tower of 13 storeys and with a height in the order of 42m would be set back bay 7m from the podium street walls.
11. A good deal of attention has been paid to articulating the building in terms of shapes, materials and colours. The proposal is not criticised from the point of view of those aspects of its architecture. On the right site, and in the right setting, it could well be judged meritorious from an architectural point of view. The concern here is about its size, and the particular aspect of its size of most concern is its height. In that respect I refer to the overall height of the building whilst nevertheless noting that the height of the podium exceeds that of neighbouring buildings in the immediate locality.

Context

12. This site is set in an area of south Carlton that is a highly valued, and rightly valued, urban locality.
13. I have mentioned a fall across the site from east to west. That is part of a general fall from Nicholson Street in the east (bordering the Carlton Gardens and the World Heritage Area of the Exhibition Buildings) over Drummond Street and Lygon Street, and then continuing downhill to the west as far as Elizabeth Street.
14. Queensberry Street marks the approximate southern end of the Lygon Street shopping area (and, indeed, café/restaurant area) which is one of the best known and most popular shopping, entertainment and eating areas in the metropolis of Melbourne. Although that retailing and entertainment area is relatively flat, the land falls more markedly to the south as Lygon Street passes Queensberry Street, reaches Victoria Street and turns into Russell Street.
15. There are no buildings of anything like the height proposed for this one in the immediate vicinity and the introduction of one such building, like the one now proposed, would transform the ambiance and appearance of the whole immediate locality. It would be considerably out of scale, in terms of height, and would dominate the two to three storey height of surrounding buildings and the streetscapes in which they are set. This dominance, and this detraction from the rest of the surrounds, would be serious enough in any event, but it becomes more so when the characteristics of this lower scale environment, and the buildings that give it its character, are taken into consideration.
16. Carlton is one of the innermost, and one of the earliest, suburbs of Melbourne. A good deal of the existing development in this locality dates back to the early 20th century and the second half of the 19th century. It is fortunate that so much of this built heritage has been preserved and is now protected by heritage controls in the planning laws and other legislation. If the one time Primitive Methodist church (or chapel) had survived it is hardly likely that this present site could be now be contemplated for redevelopment. Much of what surrounded that lost building for the previous century and more has survived.
17. I will refer to Design and Development Overlays (DDOs) later. For the present I am merely describing the area. In doing so I will make some reference to Heritage Overlays (HOs) and to the Carlton and North Carlton and Princess Hill Conservation Study 1985 which is a reference document in the planning scheme. The site is surrounded with significant, indeed highly significant, heritage buildings and streetscapes. These buildings and streetscapes are graded in the Conservation Study.
18. Opposite the site, on the north eastern corner of the intersection, and stretching north up Lygon Street, there is the two and three storey Victorian^[1] Lygon Buildings. It has an obviously justified A grade in the study and its own individual Heritage Overlay under the planning scheme^[2]. The whole area, except for the RMIT University site on the western side of Lygon Street below Queensberry Street, is subject to an extensive Heritage Overlay (HO1) in which there are numerous individual heritage overlays like that applying to the Lygon Buildings. The review site itself is within that extensive HO1 Heritage Overlay area.
19. Another A graded building with its individual overlay^[3] is the Romanian Orthodox church (previously Catholic Orthodox church) which dates back to 1867. This bluestone church with its clergy accommodation occupies the adjoining site on the eastern side of the review site. Its height is equivalent to three storeys. Beside it, along the southern side of Queensberry Street to its intersection with Drummond Street, and facing Drummond Street, is a substantial Victorian terrace townhouse. It is part of the streetscape, not only in Queensberry Street, but up and down Drummond Street on each of its side to the north and south of Queensberry Street. Those reaches of Drummond Street feature further Victorian terrace townhouses of varying size and style and which include a number of A graded structures and some further individual heritage overlay areas. Drummond Street in this area is intact and would generally be regarded as having very high heritage conservation value.
20. On the southern side of the review site, fronting the east side of Lygon Street, there is a reasonably recessed modern office building but adjoining it to the south there is another A graded church building, originally a Church of Christ and still used for religious purposes. Adjoining its southern side boundary, and continuing on down to Victoria Street, is the Trades Hall. It is an A graded building in the study and enjoys its own heritage overlay identification^[4]. Its importance, including its heritage importance, is obvious at a glance. It is a large building in layout and presents a significant façade to Lygon and Victoria

Streets but does not exceed what might be described as two Victorian storeys.^[5]

21. Extensive heritage overlays extend north of Queensberry Street and east of Lygon Street and thus occupy all corners of the intersection except for the south western RMIT one.

22. I will not go further into details of other individual heritage areas or other heritage gradings under the study but it also recognises significant heritage streetscapes. A level 1 streetscape occupies the frontage of the Lygon Buildings to the east side of Lygon Street and its side abutment to the north side of Queensberry Street extending. The streetscape grading applies along the north side of Queensberry Street to Drummond Street and beyond. Similar level 1 streetscapes are recognised on each side of Drummond Street north of Queensberry Street and running south from that thoroughfare. On the south side of Queensberry Street, in front of the Romanian church and running from the review site to Drummond Street, there is a further level 1 streetscape. The frontages of the review site to both streets are a level 2 streetscapes and that classification extends down the east side of Lygon Street to Victoria Street. It is an area of level 1 heritage streetscapes with a minority of level 2 streetscapes and an exception in relation to the RMIT.

23. These are also important thoroughfares and frequented places that are to be seen and appreciated by people who frequent them for residential, business, recreational and transit purposes. It matters what happens here.

24. As previously mentioned, it is an area of predominantly two and three storey scale. The Lygon Buildings and the Trades Hall are both large, extensive buildings with long frontages to Lygon Street and lesser but still significant secondary frontages to Queensberry Street and Victoria Street respectively. All that is true, but they are still within the dominant two to three level scale.

25. The existing Downtowner is of four 'modern' levels and the modern RMIT building is of red brick and rises intermittently to five 'modern' levels.

Nevertheless, although an exception, it is not seriously out of scale as its presentation is discontinuous and is located on the downhill of Lygon Street so that its height is less intrusive.

26. There are some taller buildings that can be seen from within the immediate environment of the review site and its streetscapes but they are further removed so as not to over dominate this immediate locality. The Panorama Building of 14 storeys on the south west corner of Queensberry Street and Rathdowne Street and The Eminence and The Cloud (17 storey) downhill in Queensberry Street are prominent in long range vistas along Queensberry Street from the west but do not impinge more locally in anything like the way the proposed building would do. There is nothing like another 13 storey structure in the immediate locality and having the dominating impact that this one would have. There is not anything on the scale of 8 levels much less 13 or 17. The significance of 8 levels relates to applicable Design and Development Overlay controls that I will refer to whilst 17 levels represents the current proposal in its original form. The alteration achieved by the removal of four levels is marginal, but not material, in the circumstances.

Grounds of refusal by the responsible authority

27. The responsible authority was, and is, firmly of the view that this proposal should be refused. Its original decision to refuse was in relation to the 17 floor proposal but, in substance, is maintained in relation to the 13 floor development now sought.

28. The original grounds of refusal are as follows:

1. The proposed development will have a dominating impact on the existing and preferred low-scale built form character of South Carlton, contrary to Clauses 43.02 and 22.17 of the Melbourne planning scheme.
2. The proposed scale, design and prominence of the tower on Queensberry Street fails to respect the significant heritage buildings on opposite and adjoining properties, and the Level 1 streetscapes along Lygon and Drummond Streets, contrary to Clauses 43.01 and 22.05 of the Melbourne planning scheme.
3. The proposed height fails to maintain the contrast between Carlton South and Hoddle Grid, contrary to Clauses 43.02 and 22.17 of the Melbourne planning scheme.
4. The layout of the proposed buildings compromises the internal amenity of many dwellings, contrary to Clause 22.17 of the Melbourne planning scheme, and the Design Guidelines for High Density Residential Development (DSC 2004).
5. The proposed development fails to demonstrate sufficient potential to achieve a 5-star Green Star rating, contrary to Clause 22.19 of the Melbourne planning scheme.
6. The extent of shadow affecting nearby residential properties in Drummond Street is unreasonable in the context of an overdevelopment of the site.
7. The proposed Place of Assembly, which includes a broad range of uses other than gymnasium (restricted recreation facility) may have a detrimental impact on the amenity of the area.
8. The proposed crossover will have a detrimental impact on an existing street tree, necessitating its removal.

29. At the beginning of its submissions the responsible authority summarised and refined its grounds by saying:

These essentially related to urban design and heritage matters, considered in situ with the policy context, internal amenity, ESD matters, overshadowing, land use impact on a street tree.^[6]

30. It went on to say that the council no longer pursues grounds 6, 7 or 8 and that it recognises that ground 5 could be resolved by a permit condition. It also recognised that the 'ESD' matter could be resolved. Accordingly the essential issues, from the point of view of the responsible authority are encapsulated in its following paragraphs:

1.4 The more discrete question of internal amenity aside, this essentially leaves urban design and heritage issues associated with the built form as the primary issue in dispute. A high level of understanding of the rather complex planning policy context is required in order to pass judgement on these matters.

1.5 The primary submission of Council is that the building height is problematic for a range of urban design and heritage reasons.^[7] This is very prominent site^[8] with highly exposed direct and oblique view lines, and is likely to remain as such into the future. The extra height will stand out in an incongruous manner to this setting and contrary to what is desired by policy and to the detriment of the heritage streetscapes it will need to nestle into.

31. During the hearing the representative of the responsible authority further refined and simplified the main issue, putting it in terms of the height of the proposal.

32. In short the responsible authority maintains the first three of its grounds of refusal set out in paragraph 28 above. I agree and I consider that those first three grounds of refusal are sustained.

33. The objectors generally support the responsible authority in its concerns about the proposal, its size and height, and its impact on its immediate locality, its streetscapes and particularly in view of heritage values and, in some cases, reference to Design and Development Overlay considerations. Some objectors raised other matters, not all of which were relevant or important. Nevertheless, I agree with the responsible authority, and the objectors, that the essential issue in this case relates to the size, and in particular the height, of the proposed building having regard to its context.

Is this proposal too tall?

34. The ultimate issue becomes a simple one of whether the proposal is too tall. I agree with the responsible authority, and with the objectors, that it is. I have concluded that the proposal can, and should be refused on that basis and that this would be so, having regard to the context, without further consideration of Heritage and Design and Development Overlay matters. However, both those aspects are important and each affirms and reaffirms my original firm decision that the proposal must be rejected.

35. The responsible authority referred to the planning policy context and the planning scheme provisions as being complex. That is not so much so in relation to the provisions relating directly to the site itself, but we were referred to heritage, overlay and context considerations nearby the site and also in relation to another precinct based on Elizabeth Street involving an area between the existing Hoddle Grid^[9] and the University of Melbourne. The campus of that university has outgrown its original boundaries of Grattan Street, Swanston Street, College Crescent and Royal Parade. University premises now surround University Square and the new Law School fronts the southern side of Pelham Street, well south of Grattan Street. This 'City North Precinct' is distinct and remote from the Carlton South locality we are concerned with in this case. There is an historical planning scheme link between the two but the character, role and future of City North is quite different.

36. The expression 'City North Precinct' springs from Amendment C196 to the Melbourne Planning Scheme. At the time of the hearing the status of that document was that of a proposed planning scheme amendment and a seriously entertained planning proposal. It had gone through its various stages and was then currently with the Minister for Planning. Since the hearing, on 15 October 2015, that planning scheme amendment has been gazetted and become part of the Planning Scheme. I will discuss the effect of this amendment further at a later point. I am here referring to some policy considerations and the then proposed amendment was cited to us at the hearing in that context. It was then relevant to notice the distinction that then existed between the City North Precinct and the Carlton South locality. This is and was a difference in geography and character notwithstanding the historic link between them.

37. The eastern boundary of the City North Precinct in the then proposed amendment, and the now gazetted amendment, came no closer to the Carlton South locality we are concerned with than Swanston Street. That leaves a distinct gap between the two.

38. The effect of the now enacted Amendment C196 is to create the City North Precinct as an extension to, and part of the City Zone based on the Hoddle grid to the south and to detach it from Carlton South.

39. The amendment as proposed, and as gazetted, contemplates no similar future for the Carlton South area.

40. Part of the complexity referred to by the responsible authority relates to the previous planning scheme link between the two precincts which I will discuss further when dealing with Design and Development Overlays. However the essential issue in this case is simple and can really be determined without reference to those complexities. The proposal is too tall. It is too tall in its context and by considerable degree. The effect of the relevant planning scheme provisions, when their complexities are understood and taken into consideration, in my opinion re-endorse and affirm that conclusion.

41. This dominant structure would be detrimental to the immediate context generally, and in relation to its heritage buildings, streetscapes and values as viewed from within that immediate context, as well as in terms of intermediate range views of the area including the streetscapes of Lygon, Queensberry and Drummond Streets. In relation to Drummond Street I note it as unfortunate that the proposal would tower over the roofline of the heritage buildings in the level 1 streetscape along the western side of Drummond Street when looking north. That would be intrusive, and but one of a number of examples of heritage buildings and streetscapes being diminished, indeed significantly diminished, by this proposal.

Municipal Strategic Statement

42. The relevant Melbourne Municipal Strategic Statement appears in clause 21 of the planning scheme. I note in passing that this site is not within the various growth areas referred to in clause 21.04 of the planning scheme although it is intended that growth in such areas should maintain their existing characters as valued established areas.

43. Clause 21.06 says:

Melbourne's character is defined by its distinctive urban structure, historic street pattern, boulevards and parks, heritage precincts, and individually significant heritage buildings. Heritage buildings, precincts and streetscapes are a large part of Melbourne's attraction and the conservation of identified heritage places from the impact of development is crucial.

44. Strategy 1.2 seeks to ensure that a strong distinction is maintained between the built form scale of the Central City and that of development in surrounding areas. Strategy 4.3 reads:

In areas where the existing built form is to be retained, ensure development is designed to maintain the generally low scale and character of those areas.

45. This is low scale rather than small scale so that large buildings like the Trades Hall nevertheless comply with it. I would not regard the current 13 level proposal as low scale although that is the character of this immediate locality.

46. Clause 21.06-2 deals with heritage. It sets out objectives including the conservation and enhancement of places and precincts identified as of cultural heritage significance. Strategy 1.3 looks to maintain the visual prominence of heritage buildings and landmarks. The current proposal detracts from that approach. Strategy 1.7 seeks protection of the scale and visual prominence of important heritage buildings and 1.6 says:

Within heritage precincts and from adjoining areas protect buildings, streetscapes and precincts of cultural heritage significance from visual intrusion of new built form.

47. Clause 21.06-3 on page 5 of 17 of the Municipal Strategic Statement refers to Carlton. It states:

Carlton is a dynamic and diverse local area. It accommodates a range of uses including housing, retailing, entertainment, leisure and cultural activities. Lygon/Elgin Street is an important local shopping centre that also has a regional tourist role based on the popularity of its restaurants. Tourism functions, needs of local residents and retailing needs of the Commercial Zone in Lygon and Elgin Streets needs to be balanced.

Carlton provides a range of housing needs including a significant amount of public housing and student accommodation.

...

The scale and form of development in Carlton is determined by reference to the cultural heritage significance and preferred built form character of the locality in which the development is established.

Local policy

48. The local policy provisions are found in clause 22 of the planning scheme. Clause 22.05 deals with heritage places outside the Capital City Zone. Its policy

basis includes:

The Municipal Strategic Statement identifies that Melbourne has a high-quality, rich and diverse urban environment. Heritage is an extremely significant component of Melbourne's attractiveness, its character and its distinction, and therefore its appeal as a place to live, work and visit. This policy is the mechanism to conserve and enhance places and areas of architectural, social or historic significance and Aboriginal archaeological sites and to encourage development which is in harmony with the existing character and appearance of designated heritage places and areas.

49. Its objectives include:

. To ensure that new development, and the construction or external alteration of buildings, make a positive contribution to the built form and amenity of the area and are respectful to the architectural, social or historic character and appearance of the streetscape and the area.

50. Further on the clause deals with designing new buildings. Higher rear parts of new buildings should be concealed in level 1 streetscapes and partly concealed in level 2 and 3 streetscapes^[10]. Façade, height and position should not dominate an adjoining outstanding building in any streetscape, or any adjoining contributory building in a level 1 or level 2 streetscape. Generally, this means that the building should neither exceed in height, nor be positioned forward of, the specified adjoining building.

51. As to building height:

The height of a building should respect the character and scale of adjoining buildings and the streetscape. New buildings or additions within residential areas consisting of predominantly single and two-storey terrace houses should be respectful and interpretive.^[11]

52. The site is in a Mixed Use Zone which is a variety of residential zone. This site does not actually adjoin predominantly single and two storey terrace houses but that is a fair description of the heritage residential developments in Drummond Street which should be respected.

53. The responsible authority, in its first four grounds of refusal, which are the ones really in point in this case, refers several times to clause 22.17. That concerns local policy in relation to urban design outside the Capital City Zone. Its policy basis includes:

It is important that valued aspects of the City's character are not lost through redevelopment. Where the built form character of an area is established and valued, new development must respect this character and add to the overall quality of the urban environment.

54. The objectives include:

To ensure that the height of buildings relates to the prevailing pattern of height and scale of existing development in the surrounding area.^[12]

55. In my view that objective would be defeated by this proposal.

Design and Development Overlay

56. The Design and Development Overlay provisions are found in clause 43.02 of the planning scheme. The relevant purposes includes:

To identify areas which are affected by specific requirements relating to the design and built form of new development.

57. The overlay provisions require planning permission for the construction of buildings. Clause 43.02-5 contains decision guidelines relevant to a consideration of whether such permission should be granted. Those guidelines include:

. The design objectives of the relevant schedule to this overlay.

...

Whether the bulk, location and appearance of any proposed buildings and works will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area.

Whether the design, form, layout, proportion and scale of any proposed buildings and works is compatible with the period, style, form, proportion and scale of any identified heritage places surrounding the site.

Schedule 44 to the Design and Development Overlay

Schedule 44 at the time of the hearing (that is, prior to the operation of Amendment C196)

58. A part of the complications referred to by the Responsible Authority was the situation in relation to Schedule 44 of the Design and Development Overlay as it stood at the time of the hearing, that is, prior to the operation of Amendment C196 to the Melbourne Planning Scheme on 15 October 2015.

59. The pre-amendment Schedule 44 purported to link the South Carlton area that includes the present review site with what is now clearly identified as the City North Precinct. This link existed because Schedule 44 applied, prior to the amendment, to both of these areas. Indeed it was headed 'ELIZABETH STREET & SOUTH CARLTON'

60. Originally these two areas were dealt with separately but at some stage, and for some reason that is no longer apparent, they were placed together under the same Schedule 44. That link is not easy to understand because the character and needs of the two areas differ considerably.

61. Indeed the pre-amendment Schedule 44 concentrated all but exclusively on the needs and circumstances of what has become the City North Precinct based on Elizabeth Street, and not upon those of South Carlton. Every specific reference in the pre-amendment Schedule 44 focussed upon the Elizabeth Street, or City North Precinct.

62. The design objectives in clause 2 of the schedule were instructive. I will quote from them as follows and, where I think it appropriate, comment in square brackets:

To encourage development that promotes Elizabeth Street as a major boulevard entrance to the central city fronted by buildings of a consistent scale.

[This focus is on Elizabeth Street and really has nothing to do with South Carlton. If it did, this proposal would be of a scale, in terms of height, that would be totally inconsistent with its surrounds.]

To encourage a consistent higher form of development in this area.

['This area', in this context is singular and has to refer to the Elizabeth Street area mentioned immediately above. Any consistent form in South Carlton would be lower rather than higher].

To maintain a contrast in building heights between this precinct and the CBD.

[Again 'precinct' is singular and again I take it to refer to Elizabeth Street.]

To acknowledge the transitional nature of the area and the opportunity for the development of a new built form character.

[Again this must mean Elizabeth Street as circumstances in Carlton South are not conducive to a new built form character and Elizabeth Street is more appropriate for such a transition which is not available if the character of the vicinity of the review site is to be retained.]

To acknowledge of the Haymarket Roundabout with dominant landmark buildings surrounding.

[The Haymarket Roundabout is in the Elizabeth Street precinct.]

To encourage development opportunities for growth in education, research and development sectors.

[This objective is not particular and, although it may relate more to Elizabeth Street, it does not really relate to built form].

63. There were no equivalent objectives that specifically related to South Carlton.

64. Clause 2 of the pre-amendment Schedule 44 dealt with buildings and works. Building height was the only thing it referred to. It commenced by saying:

An application must be accompanied by a site analysis and urban context report which demonstrates how the proposed building or works achieve each of the Design Objectives and Built Form Outcomes in this schedule, and any local planning requirement.

65. The Built Form Outcomes were set out in nine paragraphs in the third column of the table to Schedule 44. Every one of them, except one, specifically referred to a feature or features in the City North/Elizabeth Street Precinct. There were references to Elizabeth Street, Haymarket Roundabout, Queen Victoria Market, University and Lincoln Squares with multiple references to some of them. None of the specific references relate to anything in South Carlton. The only general expression refers to a new character reflecting institutional, commercial and residential demand. Equivalent specific references relating to South Carlton were lacking.

66. I have mentioned these matters in relation to the pre-amendment Clause 44 because they demonstrate the main purpose of the schedule as it then stood and they provide background to the circumstances as they have changed by the introduction of Amendment C196. They are of assistance in understanding the new situation.

Amendment C196

67. Amendment C196 has reformed the situation by removing the link where the old Schedule 44 applied to both City North based on Elizabeth Street and the South Carlton area we are concerned with. It has done this by creating a new and separate schedule that applies separately to the City North Precinct and which contain numerous specific provisions relating to that area which never had apparent relevance to the South Carlton area we are concerned with.

68. Schedule 44 now refers only to 'South Carlton' and no longer to Elizabeth Street or its precinct. The new Schedule 44 no longer contains the numerous specific references applicable to the Elizabeth Street area in its clauses and in the table to the schedule. However, these amendments appear to be in the form of deletions rather than a re-writing of the schedule. There has not been a revision of the old provisions left from before the amendment to ensure relevance to the Carlton South situation. The applicant company is correct in observing, in its post-hearing submission, that Amendment C196 presented the planning authority with an opportunity to, not only delete irrelevant references to the Elizabeth Street City North Precinct, but also to revise the remaining provisions applicable to Carlton South. It may (or may not) have had the transition situation in mind. By not otherwise revising the DDO 44 provisions in relation to South Carlton, it has enabled this case to be determined on the provisions as they stood, so far as South Carlton is concerned, at the time of the application and the hearing. That is just and appropriate. The planning authority may (or may not) reconsider or revise those provisions. In the meantime the 8 storey limit, which is argued by some to be more suitable to the Elizabeth Street situation, has not been revised.

69. The design objectives in Clause 1 read

. To maintain the contrast in building heights between this precinct and the CBD.

. To acknowledge the transitional nature of the area and the opportunity for the development of a new built form character.

. To encourage development opportunities for growth in the education, research and development sectors.

70. The existing contrast in building heights between this precinct and the CBD, and need to maintain them, remain obvious enough. The transitional nature of the area compared with the CBD to the south and Carlton to the north remains. Having regard to the nature of the area including heritage considerations and Design and Development Overlay matters the opportunity for a new built form character remains quite limited, compared with when this objective also applied to the City North.

71. Clause 44 remains applicable to buildings and works as is demonstrated by Clause 2 thereof and the permit application requirement referred to in paragraph 64 above, and which remains in the schedule.

72. Clause 2 also contains the following:

Buildings or works should not exceed the Maximum Building Height specified in the table to this schedule.

An application to exceed the Maximum Building Height must demonstrate how the development will continue to achieve the Design Objectives and Built Form Outcomes of this schedule and any local planning policy requirements.

73. These two sentences are not happily worded in that the first appears to impose a mandatory Maximum Building Height as specified in the table whereas the second contemplates it being exceeded in certain limited circumstances.

74. Be that as it may, the table to Schedule 44 is now a very simple affair. It applies to South Carlton. It provides a Maximum Building Height of 8 storeys and it refers to a single Built Form Outcome that reads:

The creation of a new character reflecting institutional, commercial or residential demand.

75. The framework of Clause 44 remains but with the Elizabeth Street references removed. Some of its terms reflect the past when it was a more complicated document containing more objectives and multiple built form outcomes dealing with what is now the City North Precinct.

76. However, as it stands it is clear that the reference to '8 storeys' is a maximum subject to it being exceeded in specified circumstances. It is by no means the minimum starting point beyond which an applicant can expect to achieve extra storeys. Eight storeys is not an absolute legal bar but to exceed it there must be a demonstrated achievement of the objectives and Built Form Outcomes. The provision in relation to 8 storeys is the same as applied when Schedule 44 included the City North Precinct. Permission to exceed it might have been more readily be obtained in relation to that area although there is no legal prohibition under the new Clause 44 in South Carlton.

77. I should not be taken as indicating that I consider even eight storeys would necessarily be appropriate for this site. I am not in a position to make a

judgement upon proposals that have yet to be designed, and I make no prejudgement on a theoretical proposal that could conceivably rise to that height. I agree with the submission that a clear and persuasive case needs to be made for exceeding 8 m on this site, and that no such case has been made out. Furthermore, I am not satisfied that it has been demonstrated that this development would achieve the Design Objectives, Built Form Outcomes or local policy requirements, but rather the contrary.

78. In my view the proposal would be contrary to the Design and Development Overlay provisions, including the relevant schedule.

79. Without going through all the details, I note that the schedules relating to nearby overlay areas around this site point to buildings of low scale, so far as height is concerned, and that higher or medium range levels were contemplated in the top of Elizabeth Street area.

Podium

80. The urban design consultant called on behalf of the permit applicant made great play of the proposed use of the podium mode of building design. It is often enough a useful and successful compromise arrangement whereby a consistent lower wall height at street level is maintained whilst a higher rise or tower is setback from the streets. It is not a universal, nor is it a complete solution to every question or problem of scale that can arise in terms of building height. In this case the proposed podium height rises to levels above street wall heights in the vicinity and is at least suspect, from that point of view. Even so, as I have said, it is not the universal solution to everything. I do not consider that it solves or sufficiently ameliorates the problems that I have referred to above which amount to my reasons for concluding that this proposal must be refused.

Incidental matters

81. I have dealt with the principal issue in this case and given my reasons why I propose to refuse to grant a permit. I have not dealt with every matter mentioned or debated over the six days of the hearing, although none of the matters I have passed over would persuade me to the contrary of the conclusion that I have reached.

82. One of the grounds relied upon refers to internal amenity of the proposed dwellings. The proposal contains many single bedroom dwellings which employ the so called 'saddle back' or 'saddle bag'[13] arrangement whereby an inner bedroom avoids the need for borrowed light through an outer living/dining/kitchen with windows or balcony to the outer world by having an internal light alley admitting light along a passage beside the living room area from the outer wall of the building to an internal bedroom.

83. Having regard to my conclusion on the main issue, I do not propose to deal with such questions of internal amenity.

84. Although mention is made of shadowing residential properties in Drummond Street I am not necessarily persuaded that this would be a problem.

MEMBER KEDDIE

What is this case about?[14]

85. This is a case about context. The permit application is for a 13 storey mixed use building on a prominent corner in South Carlton. The question is whether the proposal on the land is appropriate in its strategic and physical context.

86. Melbourne City Council determined to refuse a permit for the proposal. It submits that the building is too high for a range of urban design and heritage reasons. Its case is supported by expert evidence.

87. A number of resident objectors support Council's decision to refuse the permit, for a variety of reasons.

88. Conversely, the Applicant relies on a number of expert witnesses in support of its case that the proposal's design response is appropriate in the context of the site.

89. We must decide whether to grant a permit. Clause 10.04 of the Melbourne Planning Scheme states that responsible authorities (and the Tribunal on review) should endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.

90. There is no disagreement that this is a large and very well located site, ripe for development. However, the current proposal has not, in my view, successfully responded to the opportunity presented. In its balancing of the opportunities presented by the site's inner city location (and encouraged by the DDO44) with the constraints of that imposed by that very location in terms of heritage and urban design, the application falls short of achieving an acceptable outcome.

What is proposed?

91. The review site is 66-68 Lygon Street, Carlton, on the south-eastern corner of the intersection of Queensberry and Lygon Streets. It has an area of 2241m² with a frontage to the east side of Lygon Street of 50.86m and to the south side of Queensberry Street of 44.13m.

92. The proposal is to demolish the existing four storey motel building known as 'The Downtowner' and to construct a new one of 13 storeys over two basements containing car parking and storage. The ground floor is to house several retail premises with the upper floors devoted to apartments comprising 86 one bedroom and 70 two bedroom dwellings.

93. The development utilises a podium along the street alignments of Lygon and Queensberry Streets, varying in height between 18 and 23m. Along Lygon Street the podium has four residential storeys above ground level and on the Queensberry Street frontage it varies between four and six storeys. Above the podium at the fifth and seventh level the tower element is setback 7m from both frontages rising to around 42m above the street level (not including the plant enclosure).

94. The building is strongly articulated in terms of its massing and use of materials and colour. The 'tower' element is clearly distinguishable from the podium. However, it is not the quality of the design that is the key issue in this case. Rather, it is whether it is an appropriate response to the policies and specific planning provisions for the area.

95. Is the proposal an acceptable 'fit' in its physical and strategic context? I have concluded that it is not.

What is the context of the site?

The physical context

96. South Carlton is a highly valued urban area. The Municipal Strategic Statement at clause 21.06-3 describes Carlton:

Carlton is a dynamic and diverse local area. It accommodates a range of uses including housing, retailing, entertainment, leisure and cultural activities. Lygon/Elgin Street is an important local shopping centre that also has a regional tourist role based on the popularity of its restaurants. Tourism functions, needs of local residents and retailing needs of the Commercial Zone in Lygon and Elgin Streets needs to be balanced.

Carlton provides a range of housing needs including a significant amount of public housing and student accommodation.

...

The scale and form of development in Carlton is determined by reference to the cultural heritage significance and preferred built form character of the locality in which the development is established.

97. Interfaces with the site are as follows:

- . To the north across Queensberry Street are the Victorian era Lygon Buildings, where a three storey corner element faces both Lygon and Queensberry Street. Two more modern developments of similar height sit between this building and Drummond Street.
- . To the east is the Romanian Orthodox Church, with a ridge height reaching approximately three storeys. Immediately adjacent to the site is a garden area, with other church buildings well set back to the rear of the site. Next to the church on the east is the rear of a large two storey terrace which faces Drummond Street.
- . To the south is a 3m wide right of way shared with a four storey office building. Further south is the former Church of Christ and the imposing Trades Hall building which marks the corner with Victoria Street.
- . To the west across Lygon Street is an RMIT precinct, comprising a cluster of monumental red brick buildings of varying heights. Directly opposite the site is one of five storeys.

98. Expert evidence drew attention to the 13m width of both Lygon and Queensberry Streets and the location of the site close to the highest point in Queensberry Street which is just west of Drummond Street. Queensberry Street falls gently to Cardigan Street (around 2m across the review site), then more steeply to the valley of Elizabeth Street some 800m to the west. This gives buildings on the subject site some prominence. Lygon Street rises more gently to the north from Victoria Parade.

99. All parties identified higher built form in the general locality particularly the 14 storey 'Panorama' building at the corner of Queensberry and Rathdowne Streets and the recent approvals of 139 to 155 Queensberry Street (15 storeys), 81 Cardigan Street (nine storeys) and 17 and 10 storey buildings on the corners of Swanston and Queensberry Streets. High rise development in the Victoria Parade/Russell Street/La Trobe Street triangle to the south and the tall buildings clustered around University Square were also highlighted.

The strategic context

100. In summary, the subject land is in a Mixed Use Zone within DDO44 and HO1 (a precinct wide Heritage Overlay covering much of Carlton east of Cardigan Street).

Urban design DDO44 Elizabeth Street and South Carlton

101. DDO44, before planning scheme amendment C196, had the following design objectives:

- . To encourage development which promotes Elizabeth Street as a major boulevard entrance to the central city fronted by buildings of a consistent scale.
- . To encourage a consistent higher form of development in this area.
- . To maintain a contrast in building heights between this precinct and the CBD.
- . To acknowledge the transitional nature of the area and the opportunity for the development of a new built form character.
- . To acknowledge the importance of the Haymarket Roundabout with dominant landmark buildings surrounding.
- . To encourage development opportunities for growth in the education, research and development sectors.

I note that whereas a number of these objectives specifically relate to Elizabeth Street there are no equivalent objectives for South Carlton.

102. A discretionary height limit of 8 storeys applies in DDO44. An application to exceed the Maximum Building Height must demonstrate how the development will continue to achieve the Design Objectives and Built Form Outcomes of this schedule and any local planning policy requirements. The built form outcomes included in DDO44 prior to amendment C196 relating to maximum building height include:

- . Higher new development that reinforces Elizabeth Street as a major civic space and boulevard entrance to the CBD.
- . Development that reflects the importance of the Haymarket Roundabout as an entry point and visual terminus through consistent built form.
- . Development which respects the proximity to the Queen Victoria Market as a pedestrian focus and heritage place.
- . A visual contrast in height between development in Elizabeth Street and the CBD.
- . An attractive and active pedestrian environment along Elizabeth Street.
- . The creation of a new character reflecting institutional, commercial and residential demand.

Again, the majority of these apply specifically to Elizabeth Street.

103. The decision guidelines in Clause 43.02 are relevant to my assessment in addition to the purpose of the DDO. I have considered the provisions relevant to the matters before us. Notable are the following:

- . The design objectives of the relevant schedule to this overlay.
- . The provisions of any relevant policies and urban design guidelines.
- . Whether the bulk, location and appearance of any proposed buildings and works will be in keeping with the character and appearance of adjacent buildings, the streetscape or the area.
- . Whether the design, form, layout, proportion and scale of any proposed buildings and works is compatible with the period, style, form, proportion, and scale of any identified heritage places surrounding the site.

104. Clause 22.17 sets out the urban design policy for land outside the Capital City Zone and Docklands. It includes objectives and policies that we have considered, among them:

- . To ensure that the scale, siting, massing and bulk of development complements the scale, siting, massing and bulk of adjoining and nearby built form.
- . To ensure that the height of buildings relates to the prevailing patterns of height and scale of existing development in the surrounding area.
- . To ensure that buildings on prominent sites are designed to achieve a high standard of design which reflects the importance of their location and extent of their visibility.

105. The policy states that where a desire for built form change has been identified, the scale should still relate to development in the surrounding area, and complement that of adjoining and nearby built form. New development should not overwhelm the scale and character of existing built form.

106. In this case, the low scale heritage buildings in the immediate vicinity of the site strongly contrast with newer development further away. This is a significant factor in my consideration as it is clear that the wider physical context of this site includes much higher built form.

107. Amendment C196 is the implementation of the City North Structure Plan. It rezones that land from MUZ to Capital City Zone – Schedule 5, City North (CCZ5) and, for that area replaces DDO44 with DDO61.

108. Before amendment C196, DDO44 applied to two separate areas. One flanked the Elizabeth Street spine, the other encompassed an area comprising Queensberry Street, the eastern boundaries of properties facing Swanston Street, Victoria Parade and the western boundaries of properties facing Lygon Street – although curiously includes the Romanian Orthodox Church land. After the gazettal of C196, only the latter area is subject to DDO44.

109. The subject site is almost at the north east corner of this remaining portion of the original DDO44. As previously noted, the discretionary height of DDO44 is eight storeys. To the north, DDO47 has a four storey height limit. To the east, beyond the Romanian Orthodox Church and south-east height limits of between 8m and 16m apply in various subsections of DDO6.

110. As noted above, almost all the original design objectives of clause 2 of the schedule refer to Elizabeth Street, either specifically or by implication. There were and are no specific references to South Carlton. Of the built form outcomes listed in the table to schedule 44, eight specifically refer to City North/Elizabeth Street precinct.

Heritage

111. The subject land is within HO1 heritage precinct which covers a wide area of South Carlton. The purpose and decision guidelines in Clause 43.01 are relevant to my assessment, with an aim to conserve and enhance heritage places of natural or cultural significance. I have considered them as relevant to the matters before the Tribunal. Notable are the following:

- . The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- . Any applicable statement of significance, heritage study and any applicable conservation policy.
- . Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
- . Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- . Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- . Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

112. The site is within two graded streetscapes. The south side of Queensberry Street is classified as a level 2^[15]. The level 2 streetscape runs along the front of the site. The northern side of Queensberry Street a level 1 streetscape^[16]. Lygon Street has a level 2 streetscape along the front of the site but no grading on the opposite western side.

113. In close proximity to the site are individual 'A' graded buildings^[17]. The Lygon Buildings to the north, the Romanian Orthodox Church to the east, the former Church of Christ one building removed to the south, and next to it the Trades Hall building.

114. Clause 22.05 sets out the local heritage policy for land outside the Capital City Zone and Docklands. It highlights the importance of heritage as a significant component of Melbourne's attractiveness, its character and distinction. It includes objectives and performance standards for assessing applications with respect to demolition and the design of new buildings.

115. These include, as relevant to this case, the objective that new developments make '*positive contribution to the built form and amenity of the area and are respectful of the architectural, social or historic character and appearance of the streetscapes and the area*'.

116. Objectives and performance standards for assessing applications with respect to the design of new buildings include^[18]:

Form

The external shape of a new building, and of an addition to an existing building, should be respectful in a Level 1 or 2 streetscape, or interpretive in a Level 3 streetscape.

...

Facade Height and Setback (New Buildings)

The facade height and position should not dominate an adjoining outstanding building in any streetscape, or an adjoining contributory building in a Level 1 or 2 streetscape. Generally, this means that the building should neither exceed in height, nor be positioned forward of, the specified adjoining building. Conversely, the height of the facade should not be significantly lower than typical heights in the streetscape. The facade should also not be set back significantly behind typical building lines in the streetscape.

...

Building Height

The height of a building should respect the character and scale of adjoining buildings and the streetscape.

117. "Respectful" and "interpretive" are defined in Clause 22.05:

Respectful and interpretive refer to design that honestly admits its modernity while relating to the historic or architecturally significant character of its context. 'Respectful' means a design approach in which historic building size, form, proportions, colours and materials are adopted, but modern interpretations are used instead of copies of historic detailing and decorative work. 'Interpretive' means a looser reference to historic size, form, proportions, colours, detailing and decoration, but still requires use of historic or closely equivalent.

Is the design response acceptable?

Is the impact on the heritage values of the area acceptable?

118. Parties did not dispute the major historic and architectural significance of Carlton South, nor that the south Drummond Street area is one of the most coherent areas of Victorian terrace housing in Melbourne. There was no dispute about the demolition of the existing motel building. The debate fairly centred on the acceptability of its replacement.

119. Ms Gould strongly disputes the description of the site as being within '*an area of transition*' considering the small amount of development that had occurred within the immediate vicinity of the subject site since the late 19th century. Her evidence is that any transition should be to the lower scale areas to the east, north and south of the site, rather than the higher development to the west or in the CBD. She says that the scale of the building proposed is incompatible with a heritage place. It would be highly intrusive when viewed from the level 1 streetscape of Drummond Street. Its prominence would diminish the significance of the three key heritage buildings in Lygon Street: the Lygon Buildings, the former Church of Christ and the Trades Hall building. It would overwhelm the Romanian Orthodox Church to the east.

120. Mr Raworth supports the proposal. His evidence is that the podium element ties the development into the low scale built form in Lygon Street and Queensberry Street. He considers that the tower, though clearly visible will 'read as a distinct and separate element that is not part of the streetscape character of Lygon Street and this part of Carlton more generally. It has due regard for the character and significance of HO1 and associated streetscapes.'

121. Whilst acknowledging that heritage policy 'does not countenance' the form of the development proposed, Mr Raworth pointed out that neither did it countenance the discretionary eight storey height limit encouraged by DDO44. He says that the 13 storey building strikes a balance between the built form in Lygon Street, through its use of a podium, and the larger built forms further to the south and west. Although not in the Heritage Overlay, he says that the emerging character of the wider area inevitably informs the context of the site. He points to the setback proposed from the Romanian Orthodox Church as one element responding to the requirements of the Heritage Overlay. Another is the rhythm expressed by the bays in the Lygon Street façade which references those of the nearby heritage buildings. He concludes that the proposal represents 'a considered attempt to find a balance between the heritage context and that encouraged by DDO44'.

122. The design of this proposal seeks to insert a tall building into a low scale neighbourhood with a highly valued heritage context. It articulates an unashamedly contemporary podium design, references the nearby Victorian shopfronts, and the height of the podium is not substantially higher than the heritage built form across the 30m wide Queensberry Street. The tower element seeks to distinguish itself by its setbacks and differing design. However, I find these design strategies are ultimately unsuccessful in integrating new with old, and respecting the adjacent and nearby outstanding heritage assets. I disagree with Mr Raworth that the proposal represents an acceptable balance between heritage and emerging built form – this is a site upon which its heritage location places considerable constraints. In particular, constraints on both height and site coverage. The proposal seeks far too much from the site. An example of this is the additional podium height proposed along Queensberry Street. It distracts from and counterbalances a very positive feature of the design, the setback from the garden area of the church.

123. Views of the site which the Tribunal observed on its inspection and the Applicant's montages (whatever their limitations) demonstrate that the development would be out of character and pay little respect to its singular heritage location. When viewed from Drummond Street, it is not the visibility of the building per se but rather its north-south extent, the assertive exterior design, and the impressive bulk of the building. The photomontage prepared from further north along Lygon Street, whilst clearly demonstrating its relation to the taller built form south of Victoria Parade, shows in addition the way in which the proposal diminishes the impact of the Lygon Buildings.

124. I find that the proposal as a whole does not integrate old and new in a manner which conserves, enhances and respects the 'A' graded buildings in close proximity to the site, nor does it display an acceptable relationship to the Level 1 and 2 streetscapes of the area. In particular I identify the height and disposition of the tower element and the height and site coverage of the podium, which I discuss further below.

Does the design achieve an acceptable outcome in terms of DDO44?

125. The Applicant submits that the relevant design objectives of DDO44, supported by local policy for Carlton, seek to maintain a contrast in building heights with the CBD, to recognise the transitional nature of the area and the opportunity for a new built form character together with an encouragement of a consistent higher built form. It says that where this opportunity has been identified, the scale of development is encouraged to respond to the emerging built form^[19]. This is in contrast to areas seeking to maintain or reinforce a predominantly low rise character.

126. Council asserts that the particular circumstances of the site, relating to its built form character and heritage context, combine to make the proposal unacceptable. It does not accept that precedents nearer to Swanston Street, Elizabeth Street or on Rathdowne Street should influence the height acceptable on this site. Rather, it says that its location at the easternmost edge of DDO44 and the lower heights sought to the east and north should act as a constraint on the height proposed.

127. Relying on the evidence of Mr Czarny (urban design consultant) and Mr Crowder (town planner), Ms Brennan (for the applicant) submits that the podium height responds to the fall in the land across the site (around 2m from east to west), the scale of the other Queensberry Street buildings particularly the Romanian Orthodox church, the RMIT complex and the non-heritage buildings on the north side of Queensberry Street east of the Lygon Buildings. The proposed setback from the church presents an opportunity, she says, for greater height.

128. The Applicant argues that as the DDOs in Carlton were applied after the first heritage controls it was 'clearly contemplated that DDO44 and HO1 could and would work together in achieving higher built form of a new character that respected the heritage assets in the area'.^[20]

129. Ms Gould and Mr Alexander both agreed under cross examination that the height proposed for the podium of around 2.5 – 3m above that of the Lygon Buildings parapet height would be difficult to read given the width of Queensberry Street and the landscaping within it. This was despite their other concerns with the podium treatment and evidence that it was a discordant element.

130. The Applicant says that in relation to the podium height, DDO44 provides a discretionary height limit of 8 storeys and thus the podium height proposed complies with the scheme.

131. There appears to be a widely held idea that the 'envelope' generated by using the height nominated as discretionary in a DDO across a site is to create an 'as of right' building form across the entire site, and to provide a starting point for additional built form. In my opinion, the subject site is an example where, due to its location, this is clearly not the case. Support for the view that not every parcel of land within area 4.1 of DDO61 is appropriate for a building with a preferred height of 40 metres is provided by the design objective contained in DDO61 that seeks a mid-rise scale of 6-15 storeys.

132. In terms of overall height, the street wall of the existing motel building is more responsive and respectful of its neighbours than that proposed. It is, I find, the design proposition by which the higher portion of the podium is located on the more elevated area of the site, and would be read in the immediate context of the church that is curious. The Tribunal was told that it 'compensates' for the generous setback (around 14.5m) from the church garden.

133. I agree with the Applicant that there is nothing in the planning scheme requiring that built form on this site should not be visible. Many Tribunal decisions have affirmed that 'mere visibility' of a building is not a reason to reject it. Rather, in this proposal, it is the extent of visibility of particularly the tower form, not only from Drummond Street, but also from Lygon Street which contributes to its unacceptability.

134. Citing the 'Panorama' building as an example of a high building which has not undermined the 'feel' of Drummond Street (about which I remain unpersuaded), the Applicant says it is hard to see how this proposal would do so. As was acknowledged by all parties at the hearing, 'Panorama' is accurately described as an anomaly, built without the necessity for a planning permit.

135. There was considerable discussion at the hearing about the relevance of transition to the higher built form of the CBD. Many high buildings to the west of Lygon Street (some in DDO44, some not) were identified as demonstrating the acceptability of higher forms in this part of Carlton.

136. As noted by the Applicant in response to the Tribunal's order of 12 November 2015, Amendment C196 to the planning scheme retains the preferred height limit of 8 storeys in DDO44.

137. The design objectives now omit the two specifically relating to Elizabeth Street and the Haymarket Roundabout, but, as noted by Mr Ogilvy, the objective of encouraging a consistent higher form of development was also deleted. Mr Ogilvy says that this acknowledges that a 'consistent higher form' in an area of diverse and heritage character is not necessarily appropriate.

138. The nomination of a 'mid-rise scale' of 6-15 storeys in the City North Urban Renewal Area, which steps down to lower scale surrounding neighbourhoods, implies that a building as low as six storeys can effectively contract with the CBD. It supports the view that it could also do so in an area not earmarked for

renewal and constrained by heritage assets, such as the location of the subject site.

139. I am not persuaded that the proposed development achieves an acceptable urban design outcome. It is not an appropriate 'fit' in its strategic context. In closer views from Lygon, Queensberry Street or the Drummond Street public realm, I find that the building will be a discordant element.

Amenity impacts

140. Although Council no longer pursues overshadowing as an issue, objectors still do so. Shadow diagrams submitted by the Applicant demonstrate that the extent of overshadowing complies with the planning scheme. Shadow is cast on the western footpath of Lygon Street at 9am, but has gone by 10am. On the eastern footpath, that shadow remains largely as it is currently.

141. I accept the submissions of the residents of the west side of Drummond Street who are concerned about increased overshadowing of their rear yards by the proposed building. However, the shadow diagrams indicate that, although at 2pm there is additional shadow on the rear yard of 41 Drummond Street, it is not until after 3pm that more substantial overshadowing would occur.

142. Mr Peel raises concerns about overlooking, but I agree with the Applicant that, given the proposed setbacks, intervening built form and vegetation, in addition to any screening that may be required as a permit condition, opportunities for unreasonable overlooking would not occur.

143. One of Council's grounds of refusal related to the configuration of some of the proposed apartments. Modified drawings in relation to those affected were tabled at the hearing and found acceptable. I note that there are many 'saddlebag' arrangements, introduced to avoid the need for borrowed light. As a result, in some apartments where the provision of a long access 'light passage' was required, the living room width is constrained. However, having regard to our conclusions on the main issues in this case, I make no further comment.

144. In terms of other issues raised by Council and explored and largely resolved at the hearing, I also make no comment.

CONCLUSION

145. For the above reasons we have determined to affirm the decision of the responsible authority and to refuse to grant a permit.

Russell Byard

Ann Keddie

Senior Member

Member

[1] Victorian in terms of period.

[2] HO66.

[3] HO90.

[4] HO68.

[5] Victorian storeys are generally higher than is common in modern buildings.

[6] Paragraph 1.1 of the written submissions of the responsible authority.

[7] Sic, reasons.

[8] Sic, a very prominent site.

[9] The main central city between Spencer and Spring Streets and between Flinders and LaTrobe Streets.

[10] Page 3 of 6.

[11] Page 3 of 6.

[12] Page 1 of 5.

[13] No one seemed to know which is the direct or preferable expression.

[14] I have considered the submissions of all parties that appeared, all written and oral evidence, all exhibits tendered and all statements of grounds filed. I have also considered responses to the order of 12 November 2015. I do not recite or refer to all of the contents of this material in these reasons.

[15] Clause 22.05 defines level 2 streetscapes as significant either because they still retain the predominant character and scale of a similar period or style or because they contain individually significant buildings.

[16] Level 1 streetscapes contain a collection of buildings outstanding either because they are particularly well preserved group from a similar period or style or because they are highly significant buildings in their own right.

[17] 'A' graded buildings are of natural or state importance and are irreparable parts of Australia's built form heritage will be either or re-included on or recommended for the Victorian Heritage Register or the Register of the National Estate.

[18] We have not referred to 'concealment of Higher Rear Parts including Additions' because it is common ground that it is not reasonable to apply this policy in the context of this site.

[19] Clause 22.17.

[20] Applicant's submission p.18.