



8.7	EXTENSION OF TIME - 161 BUCKHURST STREET, SOUTH MELBOURNE
LOCATION/ADDRESS:	161 BUCKHURST STREET, SOUTH MELBOURNE
RESPONSIBLE MANAGER:	GEORGE BORG, MANAGER CITY DEVELOPMENT
AUTHOR:	SIMON GUTTERIDGE, PRINCIPAL PLANNER FBURA
TRIM FILE NO.:	PI253/2011
ATTACHMENTS:	NIL
WARD:	Gateway
TRIGGER FOR DETERMINATION BY COUNCIL:	Use and/or development of land for Accommodation in the Fishermans Bend Urban Renewal Area
APPLICATION NO:	PI253/2011
APPLICANT:	Fatmms P/L C/- Jewel Partnership P/L
EXISTING USE:	Office
ABUTTING USES:	Offices, industry and warehouses
ZONING:	Capital City Zone (CCZ1)
OVERLAYS:	Design and Development Overlay (DDO30) Heritage Overlay (HO1) Development Contributions Plan Overlay (DCPO2) Parking Overlay (PO1)
STATUTORY TIME REMAINING FOR DECISION AS AT DAY OF COUNCIL	Expired
PROPOSAL:	Extend the time to commence and complete the development by two years.

I. EXECUTIVE SUMMARY

- 1.1 Council has received an application to extend (for two years), the time to start and complete an approval for a six storey mixed use (café, offices and dwellings) building.
- 1.2 The application was lodged in 2011 and originally proposed a four storey building.
- 1.3 Council argued the proposal would be an underdevelopment relative to planning guidelines at that time that recommended a five storey street wall and a maximum height of eight levels.
- 1.4 The application was amended to increase the height to six levels, and a permit was duly issued (by the Minister) in January 2014.
- 1.5 In March 2014, Responsible Authority status for the land and permit was transferred



from the Minister to Council.

- 1.6 The development has not started, but the applicant has taken material steps towards commencing the development including discharging a number of conditions, preparing a legal agreement (to discharge a condition), and entering into a contract for construction.
- 1.7 The Planning Scheme controls have changed since the permit was issued. The land is now in a mandatory four storey height limit area.
- 1.8 Victorian Civil and Administrative Tribunal (VCAT) case law has found that a permit granted prior to a change in planning policy or controls can be extended, provided it does not undermine local policy or cause material detriment.
- 1.9 It is considered the six-storey proposal would not be out of place in the context of existing nearby two, three and eight storey buildings and approvals for four, seven and thirty-storey buildings nearby.
- 1.10 It is further considered it would be procedurally unfair for Council to refuse an extension of time for the building on grounds it exceeded the current height controls, given Council encouraged the applicants to increase the height from four to six levels.

KEY ISSUES

1. Consistency with Fishermans Bend Strategic Framework Plan.
2. Changes to Planning Scheme controls.
3. Building height.
4. Amenity impacts.
5. Procedural fairness.

2. RELEVANT BACKGROUND

- 2.1 On 05 December 2011, planning permit application P1253/2011 was received by Council proposing demolition of the existing buildings and construction of **four-storey** offices.
Council officers raised a number of concerns and requested further information which was provided on 29 March 2012. Officers subsequently internally referred and gave notice of the application. No third party objections were received.
- 2.2 On 05 July 2012, Amendment C102 changed the Planning Scheme to include the land in the Capital City Zone and make the Minister for Planning the responsible authority for buildings of four storeys or more in height.
The application was transferred to the Minister care of the Department of Planning and Community Development (DPCD) (now Department of Environment, Land, Water and Planning / DELWP), who in turn informally forwarded it back to Council for comment.
- 2.3 On 17 September 2012, the application was considered under delegation, and it was resolved to advise the Minister Council did not support the proposal because of concerns:
 - The proposal would demolish a heritage graded former dwelling;
 - The four-storey building would be an underdevelopment in the context of the Capital City Zone;
 - The four-storey building would be an underdevelopment in the context of Council's



adopted Montague Precinct Structure Plan which recommended a street wall height of five levels and a maximum height of eight levels on the land; and

- The proposal would prejudice the comprehensive urban renewal of the Fishermans Bend Urban Renewal Area.

As per standard practice, Council provided a set of without prejudice draft conditions for the Minister's consideration should he determine to approve the application.

- 2.4 The Minister did not make a decision on the application.
- 2.5 On 14 March 2013, an amended application for a **six level** mixed use development was lodged with the Department, and subsequently forwarded to Council for comment.
- 2.6 On 21 May 2013, Council's Statutory Planning Committee considered the amended application, and determined to advise the Minister for Planning:
 - The Council did not support the application because of concerns that it would demolish the heritage graded former dwelling on the land;
 - The design of the new building would be generally consistent with the Council's adopted Montague Precinct Structure Plan and the Fishermans Bend Urban Renewal Area;
 - In the event the Minister determines to grant a permit, that permit should include draft conditions proposed by Council.
- 2.7 On 28 January 2014, the Minister for Planning determined to grant a permit subject to conditions and issued a Notice of Decision to Grant a Permit (NOD) subject to conditions. Council did not object to the NOD.
- 2.8 On 17 March 2014 a permit was duly issued for a **six storey** building.
- 2.9 On 07 August 2014, Amendment GC7 changed the Planning Scheme, including to make Council the Responsible Authority for land generally along the edge of the FBURA, including the subject site.
- 2.10 On 17 April 2015, Amendment GC29 changed the Planning Scheme to introduce interim mandatory height controls, including a four-storey height limit on the subject site. On 14 November 2016, Amendment GC50 extended the interim controls to 31 March 2018.
- 2.11 The permit has not been previously extended.
- 2.12 If a permit is extended after it has expired, the extension applies from the date of expiry (so permit validity is continuous).

3. PROPOSAL

3.1 It is proposed to:

- Extend the time to start the development for two years, from 17 March 2017 to 17 March 2019.
- Extend the time to complete the development for two years from 17 March 2019 to 17 March 2021.

4. SUBJECT SITE AND SURROUNDS

- 4.1 The subject site is located on the south-east side of Buckhurst Street between Boundary Street and Montague Street, South Melbourne.



- 4.2 The land is developed with a single-storey double fronted Victorian period former dwelling, used as an office.
- 4.3 Surrounding land is developed for one, two and three-storey industrial and commercial buildings.

5. PLANNING CONTROLS

- 5.1 Section 69(1) of the Planning and Environment Act 1987 ('the Act') provides that *before a permit expires or within three months afterwards, the owner or the occupier of the land to which it applies may ask the responsible authority for an extension of time.*
- 5.2 Section 69(2) of the Act states that *the responsible authority may extend the time within which the use or development or any stage of it is to be started or the development or any stage of it is to be completed or within which a plan under the Subdivision Act 1988 is to be certified.*
- 5.3 In relation to requests for extensions of time, VCAT applies appropriate tests to assess whether or not an extension to the expiry date of a permit ought to be given. The criteria are:
- (a) Whether there has been a change of planning policy
 - (b) Whether the land owner is seeking to 'warehouse' the permit
 - (c) Any intervening circumstances that bear upon grant or refusal.
 - (d) Whether the time limit originally imposed was adequate.
 - (e) The economic burden imposed on the landowner by the permit.
 - (f) The probability of a permit issuing should a fresh application be made.

6. REFERRALS

- 6.1 The application was not required to be internally or externally referred.

7. OFFICER'S ASSESSMENT

- 7.1 Condition No. 30 of the permit sets out expiry times as follows:

Expiry of Permit

30. *In accordance with section 68 of the Planning and Environment Act 1987, this permit will expire if one of the following circumstances applies:*

- *The development is not started within three (3) years of the date of this permit.*
- *The development is not completed within five (5) years of the date of this permit.*
- *The use does not start within two years of completion of the development.*
- *The use is discontinued for a period of two years.*

In accordance with section 69 of the Planning and Environment Act 1987, the Responsible Authority may extend the permit if a request is made in writing before the permit expires, or within six months afterwards. The Responsible Authority may extend the time for completion of the development if a request is made in writing within 12 months after the permit expires and the development started lawfully before the permit expired.

- 7.2 The Victorian Supreme Court decision of *Kantor & Ors Vs Murrindindi Shire Council & Mitrevski [1997] VSC167* established the principles that are generally considered the 'test' in relation to determining whether or not a request for extension of time should be granted. The principles are widely summarised as follows:



- Whether there has been a change of planning policy.
- Whether the land owner is seeking to 'warehouse' the permit
- Any intervening circumstances that bear upon grant or refusal of the extension request.
- The lapse of time between the permit and the request.
- Whether the time limit originally imposed was adequate.
- The economic burden imposed on the landowner by the permit.
- The probability of a permit issuing should a fresh application be made.

7.3 The Tribunal has also found that the following additional principles are also relevant:

- There must be good reasons as to why an extension should be granted;
- The Kantor tests are not mandatory nor exhaustive - there may be other relevant considerations including natural justice and equity;
- The fact that an approved development is now prohibited does not mandate a decision to refuse - it is something that would usually be expected to be one factor weighing against an extension of time;
- Each case must be determined on its own facts and circumstances.

7.4 An assessment of the application against the Kantor principles is as follows:

7.4.1 Whether there has been a change of planning policy?

On 17 March 2014 when the Minister approved the application, the planning controls applicable to the site were the Capital City Zone (CCZI), the Heritage Overlay (HO1), the Development Contributions Overlay (DCPO2), and the Parking Overlay (PO1).

There were no formal binding height controls or height guidance in place at that time, although the Montague Structure Plan (adopted by Council on 11 September 2012) recommended a preferred street wall of 19m (five storeys) and a maximum height of 29m (eight storeys), and the September 2013 FBURA Draft Vision proposed a 4 storey height limit on the subject site.

On 07 August 2014, Amendment GC7 changed the Planning Scheme including adding the *Fishermans Bend Strategic Framework Plan (FBSFP) July 2014* as an incorporated document. The FBSFP set out discretionary preferred heights, and included the subject site in a 4 storey discretionary (15m) area. The Amendment also changed the responsible authority for the site and surrounds from the Minister back to Council.

On 17 April 2015, Amendment GC29 changed the CCZI and the FBSFP to replace the discretionary preferred heights with interim mandatory height limits for two years. The amendment imposed a mandatory 4-storey height limit on the subject site.

On 14 November 2016, Amendment GC50 changed the Planning Scheme to move the interim height controls from the CCZI to a new Design and Development Overlay (DDO30) and introduce new maximum street wall and tower heights, mandatory street and boundary setbacks above podium level and tower separation distances, and new local policy encouraging affordable housing



across the FBURA and increased commercial floor area along certain streets.

It needs to be noted that the planning controls for the FBURA are currently being reviewed by the Fishermans Bend Taskforce and DELWP. Whilst the outcome of that review has not yet been made public, one possible outcome might be that current mandatory height controls are changed back to discretionary, or a mix of discretionary and mandatory height controls.

7.4.2 Whether the land owner is seeking to 'warehouse' the permit?

There is no evidence to suggest the land owner is seeking to 'warehouse' the permit. The permit has not previously been extended, and the applicant has initiated multiple matters to commence the proposal including:

- Engaging consultants to undertake soil testing of the land;
- Preparing and submitting plans and reports to satisfy conditions of the planning permit;
- Preparing and signing a S173 Agreement to satisfy Condition 6 of the planning permit;
- Entering into a contract with a builder for the development.

7.4.3 Any intervening circumstances that bear upon grant or refusal.

7.4.3-1 The amendment of the Planning Scheme on 17 April 2015 to change the height controls for the land from preferred four storey to mandatory four storey needs to be considered in determining whether to grant or refuse the extension of time.

If an application was lodged for the land today, the maximum height that could be approved would be four storeys.

7.4.3-2 There are however a number of VCAT decisions that have found that a permit granted prior to a change in planning policy can be amended or extended.

In *AMV Homes Pty Ltd v Moreland City Council* [2015] VCAT 1699, the Tribunal found that, despite there being a significant change in planning policy, an extension should be granted. That case concerned an approval for five dwellings, and a subsequent change in the planning controls that limited the number of dwellings on the land to four. The Tribunal member found that an extension of time would not "lead to a poor planning outcome, undermine the directions of the local policy, nor create a situation of a development that is uncomfortably discordance with its surrounds". The Tribunal found that the context of the site surrounded by existing multi-unit developments and the acceptability of the design response when assessed against local character policy weighed in favour of granting an extension of the permit.

In *Hotel Windsor Holdings Pty Ltd v Minister for Planning* [2014] VCAT 993, the Tribunal found that in spite of a significant change in planning policy and controls which specifically targeted the site, it was appropriate to extend the permit.



In *155 Domain Road Pty Ltd v Melbourne CC* [2005] VCAT 637, the Tribunal found in relation to an application to amend a permit, that despite a change in planning controls that introduced a mandatory 12m (i.e. four-storey) height limit, a permit for a 19m (i.e. six-storey) building granted prior to the change could be amended noting “...the planning scheme as amended, does not prevent consent being given to change plans for a development, already approved under a permit, which exceeds 12 metres in height”.

7.4.3-3 It also needs to be acknowledged, that:

- The applicant originally proposed a four storey building on the land;
- Council objected to the four-storey proposal on the grounds it would be an underdevelopment of the site, including relative to Council’s adopted Montague Precinct Structure Plan;
- The application subsequently amended the application to increase the height of the building to six levels; and
- Council raised no objection to the height of the amended six-storey proposal.

7.4.3-4 Since the permit was granted, five permits have been lodged and determined for nearby properties as follows:

- **165-167 Gladstone Street, South Melbourne** (78.0m to the north-west): Construct an eight level mixed use development. Status: Under construction - almost completed.
- **179 Gladstone Street, South Melbourne** (96.0m to the north-west): Construct a seven level mixed use development. Status: Commenced (demolition), then stopped. May not proceed.
- **134-150 Buckhurst Street, South Melbourne** (70.0m to the north-east): Construct a 30 level mixed use development. Status: Permit granted 01 September 2014. Not started.
- **167 Buckhurst Street, South Melbourne** (adjacent site to the west): Construct an eight level mixed use development. Status: Refused 22 August 2016.
- **10-16 Boundary Street (Cnr. Thistlethwaite Street), South Melbourne:** (89.0m to the south-east): Construct 30 x four level townhouses. Status: Permit granted 18 October 2016. Not started.

It is considered that in the context of the nearby almost complete eight level building at 165-167 Gladstone Street and the other approvals, the development of a six level building on the subject site would, to quote the Tribunal in *AMV Homes*, not “lead to a poor planning outcome, undermine the directions of the local policy, nor create a situation of a development that is uncomfortably discordance with its surrounds”.

It is noted that the subject site is 40.0m from the Boundary Street interface of the Fishermans Bend Urban Renewal Area and the



residential and commercial precincts of Port Melbourne to the east, and thus would not prejudice the achievement of a four storey maximum building height transition at the perimeter of the FBURA.

7.4.4 The lapse of time between the permit and the request.

The application for an extension of time was submitted within time. As noted above, the applicant has initiated multiple matters to commence the proposal prior to the expiry of the commencement date

7.4.5 Whether the time limit originally imposed was adequate.

The original time frame of three years to commence and five years to complete the development is considered adequate given the proposed scale of the proposed works. Notwithstanding this,

- An applicant seeking an extension of time to commence and/or complete a development is not a particularly unusual circumstance, and
- The FBURA and permit condition requirements for the applicant to engage consultants to undertake soil testing of the land and obtain a Certificate or Statement of Environmental Audit to confirm the land is suitable for residential use imposed an additional cost and time imposition on the site, not commonly the case for most permit applications.

7.4.6 The economic burden imposed on the landowner by the permit.

It is considered that the applicant would suffer substantial economic burden if the planning permit was not to be extended.

As noted above, the permit applicant has initiated multiple matters to commence the proposal, and these costs, in addition to typical costs associated with purchasing or holding the site would likely be considerable.

7.4.7 The probability of a permit issuing should a fresh application be made.

If a fresh application for a six storey building was made, Council would need to either refuse the application or require the height be reduced to not more than four storeys.

If a fresh application for a four storey building was made, the most contentious issue to be resolved would likely be re-visiting the demolition of the significant graded heritage building on the land.

Council previously objected to the demolition of the building, but did not appeal the Minister's decision to grant a permit allowing its demolition.

Council Policy is to refuse to grant a permit for the demolition of a significant heritage graded building unless and only to the extent that:

- The building is structurally unsound;
- The replacement building and/or works displays design excellence which clearly and positively supports the ongoing heritage significance of the area.

The building is not structurally unsound, and the design of the replacement building responds to the FBURA Strategic Framework Plan and Design Guidance



over and above heritage considerations.

If Council was to refuse a fresh application on heritage grounds, the applicant could seek a review of that decision before the Tribunal. The Tribunal has previously (in 2001) considered a refusal to demolish a similar double fronted freestanding Victorian period dwelling at 173 Buckhurst Street (Cnr. Boundary Street), approximately 19.0m to the east and determined to allow the demolition and its replacement with a three storey commercial/office building.

Council contended that the front of the building should be retained and incorporated into any redevelopment of the land.

The Tribunal noted:

4. (The subject site and adjoining land to the east) is affected by a Heritage Overlay which extends in a minor way across Boundary Street to incorporate four buildings in Buckhurst Street, comprising a small two storey Victorian commercial building on the northern corner of the intersection, and three dwellings on the south eastern side of Buckhurst Street including the subject dwelling, although none of these dwellings are presently used for the purpose of a dwelling. Under this Heritage Overlay the subject dwelling is a significant building.

.....

6. The two significant issues to be resolved in this appeal are whether or not it is reasonable to demolish the existing building, given its heritage status, and if it is, whether or not the proposed building is an appropriate infill use and development of the land. The heritage issue is the issue which the Tribunal has had most difficulty resolving given the competing considerations which are relevant to this decision in this case. The demolition issue is a threshold issue and I will deal with that matter first.

.....

13. The relevant heritage place is the HO1 area, and therefore it is important to consider the significance of the subject building and its contribution to the heritage place, and the effect of its demolition on the significance of the heritage place. It was basically Mr Bicks opinion that the subject building is of modest heritage significance, but makes no significant contribution to the significance of the heritage place, because Boundary Street has the effect of disassociating the subject building from the broader heritage place.

14. Having inspected the site and walked around the locality, I am inclined to agree with Mr Bick's assessment that Boundary Street is a natural division between two areas of quite different character. With a single exception, from most vantage points the dwelling on the subject land makes little or no contribution to the character of the Heritage Overlay area generally. The single exception is that if one stands on the north western side of Bay Street, close to Boundary Street, then the subject site and the adjoining Victorian terrace can be read as a continuation of the residential development of the south eastern side of Bay Street, although not as a particularly important part of that streetscape character.

15. The existing Victorian cottage on the land, is of limited heritage significance, in isolation, its significance derives from its contribution to the overall significance of a heritage place. Clearly, if this dwelling was located in Bay Street, south west of Boundary Street, then it would be difficult to justify its demolition.



16. If one considers the subject building in the context of the development north east of Boundary Street, in particular the small number of buildings within the Heritage Overlay on the side of Boundary Street, again it is of limited significance. As previously indicated the character of this area is of mixed commercial industrial buildings interspersed with some pre first-world-war dwellings. The loss of this dwelling on this land would make little difference to the character, heritage or otherwise, of land to the north east of Boundary Street, including that small part of the land affected by the Heritage Overlay.

17. It follows from the above conclusions that I am of the opinion that the subject building has modest heritage significance, it makes a very limited contribution to the significance of the heritage place, and as a consequence its demolition would have a limited effect on the significance of the heritage place.

.....

20. On balance it is my conclusion that it is reasonable to demolish the existing dwelling, provided that the infill building is of a reasonable standard. In reaching these conclusions I have had regard to:

- The significance of the subject building and its importance in the significance of the heritage place,
- The completing strategic and policy considerations arising from the Planning Scheme, and
- The issue of fairness, associated with the practical economic use of the land in the context of the preservation of the building.

This decision suggests a refusal based on heritage grounds may be difficult to sustain at the Tribunal.

It is noted that the subsequent development of 173 Buckhurst Street has diminished the heritage context of the subject site since the Tribunal made the above decision.

7.5 Assessment against the Tribunals additional principles is as follows:

7.5.1 There must be good reasons as to why an extension should be granted;

As per above assessment, it is considered the permit applicant has demonstrated a genuine intention to commence the development.

7.5.2 The Kantor tests are not mandatory nor exhaustive - there may be other relevant considerations including natural justice and equity;

It is considered it would be procedurally unfair for Council to refuse an extension of time for the building on grounds it exceeded the current height controls, given Council encouraged the applicants to increase the height from four to six levels.

7.5.3 The fact that an approved development is now prohibited does not mandate a decision to refuse - it is something that would usually be expected to be one factor weighing against an extension of time;

It is considered that on balance, extending the time of the permit would not result in material detriment to any person or materially prejudice the achievement of the planning objectives for the Fishermans Bend Urban Renewal Area.



7.5.4 Each case must be determined on its own facts and circumstances.

Refer above.

8. OFFICER DIRECT OR INDIRECT INTEREST

8.1 No officers involved in the preparation of this report have any direct or indirect interest in the matter.

9. OPTIONS

- 9.1 Approve as recommended.
- 9.2 Refuse - on key issues.

10. CONCLUSION

- 10.1 If a new application was submitted for the same development, Council would be bound to either refuse the application, or require the height of the building be reduced to a maximum of four storeys.
- 10.2 However, it is open to Council to approve or refuse extending the time to start and complete the current permit for a six storey building approved under now superseded discretionary planning controls.
- 10.3 Officer assessment of the request to extend the permit against the Kantor principles notes:
 - The planning controls for the FBURA have changed a number of times since the application was first lodged, and are currently under review and so are likely to change again, possibly during the first half of 2018;
 - The permit applicant has taken genuine steps to act on the permit prior to the expiry of the commencement date;
 - Council objected to the original four-storey proposal as being too low, and did not object to the height of the amended six storey proposal ultimately approved.
 - The proposed six-storey building if constructed, would not be incongruous in the proximity of a nearby eight-storey building and a number of approved but not yet constructed multi-storey buildings;
 - The applicant lodged the extension of time request before the expiry of the start date;
 - The original time frame allowed for the start and completion of the permit was reasonable relative to the scale of the development, although applicants seeking one extension of time is not unusual;
 - The applicant would be likely to suffer economic loss if the permit is not extended.
 - Refusal of a fresh application on heritage grounds may be difficult to sustain at the Tribunal.
- 10.4 It is considered on balance, it would be reasonable and appropriate to extend the time to commence and complete the development.



II. RECOMMENDATION - APPROVE

II.1 That the Council approve the request under Section 69(2) of the *Planning and Environment Act 1987* and:

- The time in which the development may start be extended by two years from three years to five years from the date of the permit (i.e. to 17 March 2019); and
- The time in which the development must be completed be extended by two years from five years to seven years from the date of the permit (i.e. to 17 March 2021).

REFERENCE ONLY - NOT TO BE REMOVED