

PLANNING COMMITTEE

28 MARCH 2018



6.4 **15-35 THISTLETHWAITE STREET, SOUTH MELBOURNE**

LOCATION/ADDRESS: **15-35 THISTLETHWAITE STREET, SOUTH MELBOURNE**

EXECUTIVE MEMBER: **CLAIRE FERRES MILES, GENERAL MANAGER, PLACE STRATEGY AND DEVELOPMENT**

PREPARED BY: **SIMON GUTTERIDGE, PRINCIPAL PLANNER FBURA**

WARD: **Gateway**

TRIGGER FOR DETERMINATION BY COMMITTEE: **Residential use in the Fishermans Bend Urban Renewal Area**

APPLICATION NO: **P0277/2015**

APPLICANT: **Australia Ruiyi Wisdom Dwelling Pty Ltd C/- Urbis P/L**

EXISTING USE: **Single storey commercial/warehouse building**

ABUTTING USES: **One, two and three storey commercial and industrial buildings**

ZONING: **Capital City Zone (CCZ1)**

OVERLAYS: **Design and Development Overlay (DDO30)
Development Contributions Plan Overlay (DCPO2)
Parking Overlay (P)1**

STATUTORY TIME REMAINING FOR DECISION AS AT DAY OF COUNCIL **Expired**

1. PURPOSE

- 1.1 To consider and determine a request to extend the time to start the development by two years.

2. EXECUTIVE SUMMARY

- 2.1 Planning Permit P0277/2015 was issued by Council on 14 December 2015 in accordance with a VCAT consent order.
- 2.2 Condition 43 of the permit allowed two years to start the development (ie to 14 December 2017) and two years from the date of commencement to complete the development.
- 2.3 The development was not started within the two-year window; the owner has requested an extension of a further two years to start the development.
- 2.4 There have been several changes to the planning scheme and associated strategy since the permit was issued, and further changes are currently under consideration.
- 2.5 The approved development would be generally consistent with the existing and proposed planning strategy and planning scheme controls.



- 2.6 It is considered on balance, an extension of time would be satisfactory and would not prejudice the strategic vision for the Fishermans Bend Urban Renewal Area.

3. RECOMMENDATION

- 3.1 That the Responsible Authority, having not caused the application to be advertised approve the request to extend the time to start the development by two years.
- 3.2 That the request be approved under Section 69(2) of the *Planning and Environment Act 1987* and the applicant be granted an extension of time of two years to start the development; ie the expiry date of the permit be extended from 14 December 2017 to 14 December 2019 to start the development.

4. RELEVANT BACKGROUND

Lodgement and Council Decision

- 4.1 Planning application P0277/2015 was lodged with Council on 07 April 2015 proposing demolition of the existing buildings and the construction of an eight-storey building including a five-storey podium and a basement car park, including ground level retail and dwelling entry, and a waiver of the requirement for a loading bay.
- 4.2 At the time the application was lodged, the land was:
 - Zoned CCZ1 and was included in DCPO2 and PO1.
 - In the Montague Precinct of the Fishermans Bend Urban Renewal Area (FBURA).
 - In a discretionary 8-storey (27m) preferred height area in the Fishermans Bend Strategic Framework Plan (FBSFP) (July 2014).A Planning Permit was required to demolish a building, construct a building and construct and carry out works, use the land for dwellings, and waive the requirement for a loading bay.
- 4.3 The application was exempt from notice requirements and was not advertised and no objections were received.
- 4.4 On 17 April 2015, **Amendment GC29** changed the CCZ1 and updated the FBSFP to April 2015 version to replace the discretionary preferred height with interim mandatory eight storey height limits. Pursuant to transition provisions in the amendment, the application could be determined under the earlier discretionary height provisions.
- 4.5 In September 2015, amended plans were lodged in response to Council concerns.

Application for Review and Amended Plans

- 4.6 On 30 September 2015, the applicants lodged an application for review with the Tribunal against Council's failure to determine the application within 60 statutory days.
- 4.7 The Tribunal listed the matter for a practice day hearing on 06 November 2015, a compulsory conference on 25 November 2015 and a hearing commencing 11 January 2016 for three days.



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- 4.8 On 06 November 2015 at the Practice Day hearing, the applicant advised they were preparing amended plans and requested adjournment of the hearing days. The request was granted and the matter relisted for a compulsory conference on 14 December 2015 and a hearing commencing 07 March 2016 for two days.

Council Decision

- 4.9 On 27 November 2015, amended plans were submitted to address Council's concerns.
- 4.10 On 09 December 2015, Council's Statutory Planning Committee considered the matter and determined to advise the Tribunal and the applicant that had the application been determined within the statutory time frame, the Council would have determined to approve the application subject to conditions, including conditions for further changes to the design.

VCAT Proceeding

- 4.11 On 14 December 2015, a compulsory conference was held at the Tribunal. The parties reached agreement regarding conditions and a consent order was signed, and the Tribunal issued an order that a permit be granted and the hearing listed for March 2017 be vacated.

Grant of Permit

- 4.12 A permit was duly issued on 14 December 2015.
- 4.13 Condition No 43 of the permit allowed two years to start the development (ie to 14 December 2017), two years from the date of commencement to complete the development, and two years from the date of completion to commence the use as follows:

43. Time for starting and completion

This permit will expire if any of the following circumstances applies:

- (a) *The development is not started within two (2) years of the date of this permit;*
- (b) *The development is not completed within two (2) years of the date of commencement of works;*
- (c) *The use is not commenced within two (2) years of the completion of the development.*

The Responsible Authority may extend the periods referred to if a request is made in writing:

- (a) *Before or within 6 months after the permit expiry date, where the use of development allowed by the permit has not yet started; and*
- (b) *With 12 months after the permit expiry date, where the development allowed by the permit has lawfully started before the permit expires.*

Application to Discharge Conditions

- 4.14 On 25 January 2017 plan and elevation drawings and a Sustainability Management Plan and a Daylight Modelling Report were submitted to satisfy Conditions 1, 2, 4, 12, 28, 29, 30, 37 and 38 of the permit.
- 4.15 On 03 March 2017, Officers advised the applicants the plans etc. did not satisfy the permit conditions and could not be endorsed. The applicant advised they would review Council's concerns and respond.

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- 4.16 During May and June 2017, the applicant made inquiries about possible amendments to the plans to provide two car spaces for the three bedroom dwellings. Officers did not support the proposed amendments.
- 4.17 In August 2017, the applicant prepared and submitted amended plans for discussion, proposing to reduce the number of dwellings (by changing 1BR and 2BR dwellings to 3BR dwellings).
- 4.18 On 01 and 05 December 2017, revised plans and supporting documents were submitted to discharge conditions.

Expiry of Permit

- 4.19 The development has not started. Accordingly, the permit expired on 14 December 2017.
- 4.20 Pursuant to S69(3) of the *Planning and Environment Act*, 1987, if a permit is extended after it has lapsed, the extension operates from the day the permit expired.

5. PROPOSAL

- 5.1 On 30 October 2017, Council received a request from Urbis Consultants to extend the time to start the development for two years (ie from 14 December 2017 to 14 December 2019).
- 5.2 The submission on behalf of the applicant states:

'Based on the permit history, change of landownership and project team, changes to the Planning Scheme following Amendments GC50, VC134 and VC136, and ongoing endorsement work and design development, the applicant is seeking an extension of two (2) years to the start date for the development of Planning Permit 277/2015 to 14 December 2019.'

The submission included a timeline of key dates as follows:

Key Dates	Description
14 Dec 2015	Permit issued.
June 2016	Previous owner sells land, change of land ownership process begins.
Sept 2016	Settlement of the purchase reached, new owner is Australia Ruiyi Wisdom Dwelling Pty Ltd.
24 Jan 2017	Architectural plans prepared for endorsement and incorporating minor changes submitted to the City of Port Phillip for approval.
3 Mar 2017	Plans were not endorsed due to unsatisfactory response to certain conditions and nature of minor changes to the plans introduced further matters. Council issue a Request for Further Information (RFI), particularly involving the daylight modelling results, which were identified as a serious concern by Council, along with more details of the Sustainable Management Plan (SMP) and clarification of the altered parking configuration.
June 2017	Change to the project team, First Urban replaced PDS as project managers to coordinate plans to meet permit conditions, improve daylight response and better align development with changed market conditions.



6. OFFICER'S ASSESSMENT

6.1 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 if 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.

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

- The onus is on the applicant to justify the extension. The applicant must show good reasons why an extension should be granted;
- The considerations set out in Kantor tests are neither mandatory nor exhaustive. There may be other relevant considerations including natural justice and equity;
- The fact that the proposal authorised by the permit has been prohibited by a subsequent planning scheme amendment is a strong but not a determinative reason why an extension should not be allowed. It 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.

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

6.3.1 **Whether there has been a change of planning policy.**

6.3.1-1 Since 14 December 2015 when the permit was issued, there have been six changes to planning policy and/or the planning controls applicable to the FBURA and/or the subject site as follows:

1. **O3 October 2016:** State Government released the *Fishermans Bend Vision* (September 2016) setting out the ambitions for the FBURA overall and the five precincts for 2050.

2. **14 November 2016:** Amendment GC50 changed the Scheme to:

- Add a new Local Planning Policy, Clause 22.15 *Employment and Dwelling Diversity within the Fishermans Bend Urban Renewal Area* encouraging large developments to prepare a master plan, buildings of more than 12 storeys to include at least 30% 3BR dwellings, allocate at least 6% of dwellings as affordable housing, and provide non-residential uses, and increased commercial floor area along certain streets,



- Move the interim mandatory 4 and 8 storey height controls from the CCZ1 to a new Design and Development Overlay, Schedule DDO30, which also specified mandatory maximum street wall and tower heights, mandatory minimum tower street, side and rear boundary setbacks and tower separation distances. The overlay requirements apply to 31 March 2018.
 - Update the FBSFP to September 2016 version.
3. **22 November 2016:** **Amendment GC59** varied DDO30 to add exemption from notice and review.
4. **13 April 2017:** **Amendment VC136** introduced new Clause 58 Apartment Developments provisions for application to construct or extend an apartment development, or to construct or extend a dwelling in or forming part of an apartment development.
- Pursuant to the transitional provisions of the Capital City Zone, Clause 58 does not apply to this application because it was lodged on 07 April 2015, before the approval date of the amendment.
5. **29 August 2017:** **Amendment VC139** introduced the Urban Design Guidelines for Victoria (Department of Environment, Land, Water and Planning, 2017) as a reference document in Clauses 11 and 15 of the SPPF, and the Apartment Design Guidelines (Department of Environment, Land, Water and Planning, 2017) as a reference document in Clauses 11, 15 and 16 of the SPPF, (replacing the Guidelines for Higher Density Residential Development [DSE 2004], Activity Centre Design Guidelines [DSE 2005] and Safer Design Guidelines for Victoria [DSE 2005]).
6. **16 January 2017:** **Amendment VC142** introduced phase 1 of the State Government's smart planning reforms to:
- Remove redundant/excessive provisions / permit requirements for low impact matters;
 - Clarify unclear provisions and remove / relocate some administrative requirements to reduce planning scheme complexity;
 - Update planning provisions;
 - Revisions to use land use terms and removal of out-of-date references.
- In particular, relevant to the current application, the amendment deleted Clause 52.07 for the loading and unloading of vehicles and updated Clause 65 (decision guidelines) to ensure that loading and unloading facilities, amenity and traffic flow are considered. (ie no permit trigger but a planning consideration).
- 6.3.1-2 The changes to Planning Policy and the Planning Scheme are not retrospective and do not prohibit the currently approved mixed-use development of the land.
- 6.3.1-3 The ***Fishermans Bend Vision*** (September 2016)
- The Fishermans Bend Vision September 2016 (released 03 October 2016) sets out the State Governments ambitions for the whole of the



FBURA and the individual precincts. The vision for the Montague precinct including the subject site is:

- A diverse and well-connected mixed-use precinct celebrating its significant cultural and built heritage, and network of gritty streets and laneways, with:
 - A northern neighbourhood with a strong mixed-use focus including residential and offices, with building carefully designed to achieve human scale at street level;
 - A southern neighbourhood (including the subject site) with a range of building types, streets and lanes, shops, cafes and creative industries, including lower scale residential and commercial buildings along City Road and Boundary Street to integrate with neighbouring properties.
 - Light rail, bus, and bicycle links to the CBD and surrounding areas;
 - Proximity to the South Melbourne Market, the Yarra River, South Wharf, Lorimer and Sandridge precincts, and Albert Park parkland and sports fields;
 - Open space on Buckhurst Street and a community hub and school on Ferrars Street;

The existing permit is consistent with the above vision, and an extension of time of the permit would not prejudice the above vision.

6.3.1-4 **Fishermans Bend Framework - Draft for Consultation (October 2017) / Amendment GC81**

On 21 October 2017, a draft revised Fishermans Bend Framework was released by the State Government for consultation.

On 31 October 2017, associated draft Planning Scheme Amendment GC81 setting out revised State and Local policy, zone, overlay and general provisions for Fishermans Bend was released for consultation.

The draft Framework Plan proposes (relative to the subject site and surrounds):

- No specific purpose for the subject site.
- Thistleton Street as a local street.
- Deletion of the mandatory eight storey height control facing Thistleton Street in lieu of a discretionary eight storey height control.
- The land in the Montague mixed use medium (non-core activity) precinct.
- Introduction of a Floor Area Ratio (FAR) control of 3.0:1 (**current application FAR = 7.80:1**).
- Introduction of a Floor Area Uplift (FAU) control requiring developments to provide affordable housing or community infrastructure or public open space (or a mix of these) in return for development exceeding the FAR (generally up to the preferred maximum height).



The Draft Planning Scheme provisions include:

- Municipal Strategic Statement (MSS) encouragement for:
 - Mixed use development with shops and businesses providing active street edges, fine grain built form and laneways and through block links for permeability and connectivity through street blocks, and retention of heritage buildings.
- Local Planning Policy Framework (LPPF) encouragement of a maximum dwelling density in the Montague non-core area of 198 dwellings/hectare (**current application [61 dwellings] = 510.88 dwellings/ha**).
- Encourage family friendly housing inc.
 - Mid-rise housing with access to POS;
 - Family friendly housing on lower levels with direct access to communal play areas;
 - Living room sizes exceed minimum requirements;
 - Access to outdoor communal green space on ground, podium, or roof top levels;
 - Children's communal active indoor play or recreation space as part of indoor communal spaces;
 - Sufficient storage areas with easy access to dwellings.
- Communal open spaces inc. community gardens, etc.
- Varying maximum street wall (podium) heights of four storeys/15.4m, six storeys/23m or eight storeys/30m for streets of up to 12, 22 or more than 22 metres width.
- Varying setbacks above the street for walls with or without habitable rooms.
- Controls to prevent overshadowing of existing and proposed open space;

The draft framework and planning scheme provisions have no force or effect at this time.

Submissions regarding the draft Framework and Planning Scheme provisions closed on 15 December 2017, after which they and the Framework will be reviewed by an independent Panel.

It is estimated the new framework and controls will not be resolved or implemented before circa mid-2018. It is likely the final version of the framework and controls will differ from the consultation draft.

6.3.1-5 The height and massing of the proposal would be consistent with the draft Planning Policy and Planning Controls, but the density would exceed the proposed controls.

6.3.2 Whether the land owner is seeking to 'warehouse' the permit



- 6.3.2-1 There is no evidence to suggest the land owner is seeking to 'warehouse' the permit. The permit has not previously been extended, and the current owner has initiated several matters to commence the proposal including:
- Preparing and submitting plans and reports to satisfy Council and Melbourne Water conditions of the planning permit;
- 6.3.2.2 It is considered the land owner is not seeking to 'warehouse' the permit.
- 6.3.3 **Any intervening circumstances that bear upon grant or refusal.**
- 6.3.3-1 The changes to the Planning Scheme since the permit was granted on 14 December 2015 do not prohibit the proposal.
- 6.3.3-2 The approved proposal is generally consistent with the Fishermans Bend Vision September 2016.
- 6.3.3-3 The approved proposal is not affected by the housing diversity / affordable housing provisions of Clause 22.15 and would be consistent with the height and setback provisions of the Design and Development Overlay introduced by Amendment GC50/GC59.
- 6.3.3-4 The application is not required to retrospectively comply with the apartment design provisions of Clause 58 because it was lodged before the introduction of these standards.
- 6.3.3-5 The approved proposal would be generally consistent with the Urban Design Guidelines for Victoria.
- 6.3.3-6 The approved proposal would not be materially affected by the planning scheme changes of Amendment VC142, and continues to provide a loading bay, despite this no longer being a mandatory requirement.
- 6.3.3-7 There are several VCAT decisions that have concluded that a permit granted prior to a change in planning policy can be amended or extended. The determining factors in these decisions relate to the context of the site, ie typology, size, height, densities of nearby developments and whether the design response is acceptable when assessed against local character.
- 6.3.4 **The total elapse of time between the permit issuing and the request.**
The application for an extension of time was submitted within time.
- 6.3.5 **Whether the time limit originally imposed was adequate.**
- 6.3.5-1 The original time frames of two years to commence the development and use, and two years from the date of commencement to complete the development are considered adequate given the scale of the proposed works.
- 6.3.5-2 Notwithstanding this:
- An applicant seeking an extension of time to commence and/or complete a development is not an unusual circumstance;



- The FBURA and permit condition requirements for the applicant to engage consultants to undertake soil testing and remediation (as necessary) 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; and
- The property was sold following the grant of the permit, with settlement in September 2016, leaving the new owner less than two years to start.

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

- 6.3.6-1 The applicant has incurred costs for purchase of the land, and plan preparation and consultant fees.
- 6.3.6-2 Satisfying permit conditions will incur further costs, particularly regarding contaminated land testing and remediation, plus construction costs.
- 6.3.6-3 Refusal of the extension of time would result in a loss to the applicant of all costs to date, plus likely additional costs from interest on any borrowings.

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

If a fresh application for a building of the same or similar proportions and height was made today, it would likely be supported as being consistent with the current planning scheme and strategic framework plan provisions, subject to detail assessment / possible revision of internal apartment designs to meet the April 2017 Clause 58 Apartment Design Standards.

6.4 Assessment against the Tribunals additional principles is as follows:

6.4.1 The onus is on the applicant to justify the extension. The applicant must show good reasons why an extension should be granted.

As per assessment above, it is considered that the change of ownership following the grant of the permit, and the steps taken to date to discharge the permit conditions, together with the proposal being generally consistent with the current and proposed future planning controls and strategic framework, justifies the grant of an extension of time.

6.4.2 The considerations set out in Kantor tests are neither mandatory nor exhaustive. There may be other relevant considerations including natural justice and equity;

As per assessment above, it is considered the change of ownership, and the new owner consequently having less than two years to start the development is a relevant consideration as to why the permit should be extended.

6.4.3 The fact that the proposal authorised by the permit has been prohibited by a subsequent planning scheme amendment is a strong but not a determinative reason why an extension should not be allowed. It 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;

The use and substantive proposal is not prohibited under either the current and draft planning scheme controls.



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

Refer to assessment above.

7. COVENANTS

7.1 There is no restrictive covenant on the titles for the subject site.

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 Approve with changed or additional conditions

9.3 Refuse - on key issues

10. CONCLUSION

10.1 If a new application was submitted for the same development, officers would be likely to support it, subject to detail assessment / possible revision of internal apartment designs to meet the April 2017 Clause 58 Apartment Design Standards.

10.2 Assessment of the request to extend the permit against the Kantor principles shows:

- The planning controls for the FBURA have changed several times since the application was first lodged, and are currently under review and so are likely to change again, likely during the second half of 2018;
- The permit applicant has taken steps to act on the permit prior to the expiry of the commencement date;
- The proposed eight-storey element of the building would be consistent with the current and proposed future planning framework and planning scheme controls for the site and surrounds.
- 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, however the new owner of the land has had less than two years to start.
- The applicant would be likely to suffer economic loss if the permit is not extended.

10.3 It is considered that on balance, it would be reasonable and appropriate to extend the time to start the development.

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ATTACHMENTS Nil