# RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as ‘Red Dot Decisions’. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P1629/2008 |

|  |  |
| --- | --- |
| in the matter of | Minawood Pty Ltd v Bayside City Council |
| BEFORE | Helen Gibson, Deputy President Mary-Anne Taranto, Member  |

|  |  |
| --- | --- |
| **Nature of case** | Refusal to amend permit under section 87A *Planning and Environment Act* 1987 to allow demolition of a building (Khyat’s Hotel in Brighton) having neighbourhood character and cultural identity but not covered by a Heritage Overlay. |
| **Potential guideline decision** | Yes  |
| **REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE**  |
| **Law – issue of interpretation or application**  | Weight to be given to volume of objections – whether community opposition constitutes a significant social effect under the *Planning and Environment Act* 1987 – consideration of *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2009] VSCA 45 |
| **Policy – interpretation or application of policy** | Consideration of cultural significance and cultural identity – when buildings which contribute to neighbourhood character should be protected even though not covered by a Heritage Overlay  |

## Summary

This was an application under section 87A *Planning and Environment Act* 1987 to amend an existing permit issued by the Tribunal. The site is occupied by Khyat’s Hotel, an iconic local landmark and ‘watering hole’ in Brighton. The permit allows 21 dwellings in a three-storey development whilst retaining the front portion of the existing hotel. The amendment to the permit proposed to demolish the remaining portion of the hotel and replace it with a further 5 dwellings. Over 4,300 objections were lodged with VCAT as a result of a well-organised campaign against the proposal.

The Tribunal agreed with the council that the application should be refused because the proposed amendment to the permit did not respect the cultural, social and historic associations and significance of the site. It failed to accord with the objectives of the Neighbourhood Character Policy and other objectives relating to cultural identity within the planning scheme.

The Tribunal considered the weight to be given to the volume of objections. It held that planning decisions about permits are administrative decisions that should not be based on popularity. The findings of the Court of Appeal in *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2009] VSCA 45 regarding the subjective perceptions of community members about their community are not relevant in the different legislative framework of the *Planning and Environment Act* 1987. The nature of ‘significant social effects’ within the meaning of section 60(1A)(a) of the Act is considered. Whilst the number of objections alone does not create a significant social effect, nevertheless they are evidence of the social and cultural significance of Khyat’s Hotel within the community.

Issues relating to historical significance, cultural significance, cultural identity, social value and neighbourhood character are considered.

The Tribunal also considers when it may be appropriate to retain important features contributing to the neighbourhood character, heritage and cultural identity of an area and incorporate them into a new development, even though they may not be formally protected from demolition under the planning scheme by a Heritage Overlay.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P1629/2008 |
| catchwordsSection 87A *Planning and Environment Act* 1987 – social effects – strength of community opposition - historical significance – social value – neighbourhood character – cultural identity – consideration of *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2009] VSCA 45 |

|  |  |
| --- | --- |
| APPLICANT | Minawood Pty Ltd |
| responsible authority | Bayside City Council |
| RESPONDENTs | Kayes Property Investments Pty Ltd & Others |
| SUBJECT LAND | 25 Wilson StreetBRIGHTON VIC 3186 |
| WHERE HELD | 55 King Street, Melbourne |
| BEFORE | Helen Gibson, Deputy President Mary-Anne Taranto, Member |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 27 & 28 November 2008 |
| DATE OF ORDER | 25 March 2009 |
| citation | Minawood Pty Ltd v Bayside CC (includes Summary) (Red Dot) [2009] VCAT 440 |

# Order

1. The application pursuant to section 87A of the *Planning and Environment Act* 1987 to amend Permit No 2000/6179 is refused.

|  |  |  |
| --- | --- | --- |
| **Helen Gibson** **Deputy President**  |  | **Mary-Anne Taranto****Member** |

# APPEARANCES

|  |  |
| --- | --- |
| For Minawood Pty Ltd | Mr P Bisset, solicitor, of Minter EllisonHe called the following witness:* Stuart McGurn, town planner, Fulcrum Town Planners Pty Ltd
 |
| For Bayside City Council | Mr Egils Stokans, solicitor, of Russell KennedyHe called the following witnesses:* Craig Czarny, urban planner and landscape architect, Hansen Partnership Pty Ltd
* Robyn Riddett, architectural historian, interior designer and heritage consultant, Anthemion Consultancies
 |
| For Mr Lynton Daehli | Mr L Daehli, in person |
| For Brighton Historical Society Inc | Ms Di Reidie |
| For Daryl Reilly & Others | Mr Jason Kane of counsel, by direct briefHe called as a witness:* Daryl Edward Jones Reilly
 |
| For Russ Jewell | Mr R Jewell, in person |
| For Andrew Stuart-Menteth | Mr A Stuart-Menteth, in person |
| For Gillian and Victor Lelah | Ms G Lelah, in person |
| For Paul Haworth | Mr P Haworth, in person |

# INFORMATION

|  |  |
| --- | --- |
| Description of Proposal | Amend Planning Permit 2000/6179 to enable the remaining portion of the Khyat’s Hotel building along Wilson Street to be removed and replaced with five residential apartments and associated basement parking. The amendments to the permit include:* Changes to plans.
* Amend what the permit allows so that it refers to the construction of 26 (rather than 21) dwellings.
* Delete conditions 1(g) and 1(i) as they are no longer relevant (given the removal of the hotel use).
* Update condition 1(k) to refer to Res Code rather than the Good Design Guide.
* Update condition 10 so that it applies (prior to the commencement of the use).
* Delete condition 14 as it is no longer relevant (given the removal of the hotel use).
 |
| Nature of Application | Section 87A *Planning and Environment Act* 1987  |
| Zone and Overlays | Residential 1 ZoneDesign and Development Overlay – Schedule 2 (building height control – inland areas) |
| Permit triggers | Clause 32.01-4 (construct two or more dwellings on a lot)Clause 43.02-2 (construct a building that is taller than 2 storeys in height) |
| Land Description | The land is on the northern side of Wilson Street approximately 20 metres west of its intersection with Carpenter Street. The land is 2,377 square metres in overall area and generally rectangular in shape. The site is currently occupied by Khyat’s Hotel and a patron/staff car park. The hotel is a two storey masonry building with a pitched roof that is being constructed along part of the front property boundary.  |
|  | To the immediate east of the subject site is the Brighton Police Station, which is located on the corner of Wilson and Carpenter Streets. Opposite on the south side of Wilson Street is the Brighton Town Hall, municipal offices, library and a public car park. Other surrounding uses to the west and north are residential. |
| Inspections  | The Tribunal inspected the subject site and the surrounding area. |

# reasons

## What is this case about?

1. This is an application to amend an existing permit[[1]](#footnote-1). The subject site is occupied by Khyat’s Hotel, an iconic local landmark and ‘watering hole’. The permit allows 21 dwellings in a three storey development whilst retaining the front portion of the existing hotel. The amendment to the permit now proposes to demolish the remaining portion of the hotel and replace it with a further 5 dwellings.
2. The proposed demolition of Khyat’s Hotel has generated an enormous groundswell of public opposition. In excess of 4,300 statements of grounds have been received by the Tribunal vehemently opposing the loss of Khyat’s Hotel. There has been a small handful of submissions supporting the application.
3. Khyat’s Hotel has existed and traded continuously as a hotel since its construction in 1865. Its built form has altered considerably over time. It was extensively extended and remodelled during the 1950’s resulting (largely) in the present external appearance of the building. Despite its age and location within the Brighton Civil Precinct, the hotel is not included in a Heritage Overlay. It has been considered for inclusion on a number of occasions, but each time the council has resolved against its inclusion. Following this application to amend the permit, council requested the Minister for Planning to place an interim Heritage Overlay over the site. The Minister has refused this request[[2]](#footnote-2).
4. The council has resolved not to support the amendment on the following grounds:
* The proposed Amendment to the Permit does not respect the cultural, social and historic associations and significance of the site.
* The proposed Amendment to the Planning Permit does not accord with the objectives of Clause 22.07 – Neighbourhood Character Policy of the Bayside Planning Scheme.
* The proposed Amendment to the Permit will dominate and detract from the Neighbouring heritage buildings.
* The proposed Amendment to the Planning Permit does not comply with the front and side setback requirements of the Schedule to the Residential 1 Zone and the Bayside Planning Scheme.
1. We agree with the council that the application should be refused because the proposed amendment to the permit does not respect the cultural, social and historic associations and significance of the site. We also agree that it fails to accord with the objectives of the Neighbourhood Character Policy as well as other objectives relating to cultural identity within the Bayside Planning Scheme.

## What are the key issues?

1. The key town planning questions that were framed by Stuart McGurn, who gave evidence on behalf of the applicant, were characterised as follows:
* Is the proposal consistent with the statutory provisions and policy objectives of the Bayside Planning Scheme?
* Does the proposal respond appropriately to the opportunities and constraints presented by the site?
* Will the proposed dwellings provide a high standard of amenity for future occupants without a significant affect on the amenity of the surrounding area?
1. We agree that it is necessary to assess whether the proposal is consistent with the statutory and policy objectives of the planning scheme, although we take a less restricted view of what is relevant in this respect than Mr McGurn.
2. In terms of residential objectives, there is no question that the site is suited for residential development. However, we are not persuaded that the prospect of an additional 5 dwellings (on top of the 21 already approved) is, in itself, a strongly persuasive reason for approving this amendment. Simply because this area is identified as a residential opportunity area in the planning scheme is not enough, in our view, to justify the proposal. The existing permit achieves a substantial increase in residential density whilst maintaining the cultural identity of Khyat’s Hotel. So in terms of opportunities, the residential opportunity has already been achieved.
3. Vibrant and sustainable communities require a balance of facilities to serve the residential population. The development proposal that was approved in 2001 represented a balance between new residential development and retention of the existing hotel building and use. It drew very little public opposition (compared to the present proposal). Most of that was focused on issues such as car parking[[3]](#footnote-3), the design and height of the new building, and amenity impacts on adjoining properties. In 2006, the Tribunal again considered this proposal in the context of an application to extend the permit[[4]](#footnote-4). Notwithstanding some recent changes to the Bayside Planning Scheme[[5]](#footnote-5), Justice Morris found that the proposed development of the land with 21 apartments gave effect to council’s objectives for a residential opportunity area and that the changes which had occurred to the planning scheme and to planning policy since the permit was initially granted, did not militate against the extension of time to start the development.[[6]](#footnote-6)
4. We have no concerns that the proposed dwellings would not provide a high standard of amenity for future occupants. We find that they would not have a significant effect on the amenity of the surrounding area save for the change that would occur to the neighbourhood character. In our view, this is the critical issue.
5. Fundamentally, this case is about protection of neighbourhood character and heritage values. Khyat’s Hotel forms part of what is known as the Brighton civil precinct.[[7]](#footnote-7) The Brighton civil precinct consists of the Brighton Town Hall, Brighton Court House, Council Chambers, Library and formal gardens and St Cuthberts Church on the south side of Wilson Street, and the Brighton Police Station and Khyat’s Hotel opposite on the north side of Wilson Street.
6. Creating urban environments that have an easily recognisable sense of place and cultural identity is an important objective of the State Planning Policy Framework (SPPF) – see clause 12.05.
7. Within the Local Planning Policy Framework (LPPF), overarching goals of the Bayside Planning Scheme are:[[8]](#footnote-8)

To achieve quality design and continuously improve the image of land use and development in Bayside which:

* Contributes to a sense of place appropriate to Bayside’s character. …
* Respects valued elements of the arts, character and heritage. …
* Maintains, strengthens and enhances local character.
1. The planning scheme includes a Neighbourhood Character Policy at clause 22.07. It includes objectives:
* To ensure that development is responsive to the preferred future character of the area.
* To retain and enhance the identified elements that contribute to the character of the area.
1. Neighbourhood character is also referenced in the purpose of the Residential 1 Zone, which includes:

To encourage residential development that respects the neighbourhood character.

1. Throughout clause 55, there is constant reference to neighbourhood character and the need to ensure that the design respects the existing neighbourhood character or contributes to a preferred neighbourhood character.[[9]](#footnote-9)
2. The Tribunal which granted the permit clearly found that the design of the proposal would not create any unreasonable impacts on neighbourhood and streetscape character.[[10]](#footnote-10) This finding was made in the context of a proposal that retained the front portion of the hotel. The Tribunal acknowledged that the character of the immediate vicinity of the subject site had a different scale and context to the neighbourhood character of the domestic scale of surrounding residential areas. It was into this streetscape and built form context that the proposed apartment building had to fit. On this issue, the Tribunal was of the view that “design of the review proposal would make an appropriate transition between the large scale non-residential buildings, including the harder edged vertical facades of the hotel, and the residential dwellings in Wilson Street.”[[11]](#footnote-11)
3. We are now faced with a proposal to alter the streetscape and built form context that the previous Tribunal was concerned to ensure the development proposal would fit into. We are considering an amendment to a proposal that retained an important aspect of the existing streetscape and built form context in the shape of the hotel. Whilst we agree with Mr McGurn that the built form context now also comprises the 21 apartment development already approved under the permit, it still includes the existing hotel as an integral aspect of the built form context. We therefore consider it is most important to explore the effect that removal of the hotel will have on the existing built form context, which is what establishes the neighbourhood character of the area. It is also important to consider the effect of its removal on other values.
4. Thus, in response to the questions posed by Mr McGurn, we consider the existing proposal already responds adequately and appropriately to the opportunities and constraints of the site. Increasing the number of apartments will mean taking greater advantage of the site’s opportunities but at the expense of the ‘constraint’ that Khyat’s Hotel represents.
5. We consider that the issues surrounding the retention or otherwise of Khyat’s Hotel raise more complex issues of planning policy than identified by Mr McGurn. In deciding whether to amend the permit, we believe that the following key issues need to be addressed.
* Can the Tribunal refuse to allow demolition of the hotel in the absence of a Heritage Overlay?
* What weight should be given to the volume of objections?
* What social, heritage or neighbourhood character values does Khyat’s Hotel have?
* Would demolition of the hotel result in a loss of these values?
* What contribution does the replacement building make in urban design terms?
* Do the urban design values of the replacement building outweigh any loss of social, heritage or neighbourhood character values?
* Will retention of the hotel building safeguard the social significance of Khyat’s Hotel.

## can the Tribunal refuse to allow demolition of the hotel?

1. There is no Heritage Overlay applying to Khyat’s Hotel, therefore there is no direct control over demolition. Theoretically, the applicant could demolish the hotel at any time without a planning permit. However, the application currently being considered is an application to amend an existing permit. The development proposal, which is allowed by this permit, includes retention of the front portion of the hotel. Under the permit, the development cannot proceed without its retention. If the hotel building were demolished without amendment of the permit, it would mean a new permit for a new development scheme would need to be considered.
2. In our view, we are entitled to consider whether this element of the proposed scheme should be changed as part of our consideration of the application to amend the permit. Indeed, we cannot avoid considering whether the hotel should be demolished and replaced by a new building because this is the essence of the change sought.
3. We do not consider that we are bound to agree to the demolition simply because there is no demolition control under the planning scheme or that our task is simply confined to deciding whether the proposed new building is acceptable in urban design or neighbourhood character terms.
4. The Khyat’s Hotel site is a large site offering excellent opportunities to achieve increased residential densities in an area recognised within the planning scheme as a residential opportunity area[[12]](#footnote-12). When planning for the comprehensive redevelopment of such sites, good planning principles dictate that important features contributing to the neighbourhood character, heritage and cultural identity of an area are retained and incorporated into the new development design. Thus it is common for significant trees or buildings or other features of a site to be retained and for conditions in permits to protect them, even though they may have no formal planning protection.
5. The fact that a building could be demolished tomorrow may be relevant in some cases. However, the emphasis on the *protection* of neighbourhood character and cultural identity throughout the planning scheme means that in certain circumstances it is important to retain significant elements contributing to the character of a place, not just replicate or interpret a character through totally new development. Judgements will need to be made based on the facts of each case. In our view, Khyat’s Hotel has a particular significance, which makes it appropriate to consider whether the existing built form (or at least of the front portion) should be retained as part of the overall development scheme as a means of protecting neighbourhood character and cultural identity.
6. We consider that the approved design under the existing permit exhibits the good planning principles we have referred to above. The rear portion of Khyat’s Hotel will be demolished but the historic front section will be retained. A suitable balance has been struck between facilitating new residential development and retaining an important feature contributing to the existing sense of place and cultural identity of Bayside. As we shall discuss later, these are important objectives within the planning scheme. We must decide whether the balance in achieving the various planning objectives, which is represented by the existing permit, should be changed and whether the new scheme represents a better net community benefit.
7. For these reasons, we consider that we can, if appropriate, refuse to amend the permit, which requires the front portion of the hotel to be retained. This would effectively mean refusing to allow the hotel to be completely demolished, even though there is no demolition control in the form of a Heritage Overlay over the hotel.

## What weight should be given to the volume of objections?

### Decisions not based on popularity

1. Consideration of a planning application under the *Planning and Environment Act* 1987 should not be a political exercise or popularity contest. Making a decision about a planning application is an administrative power that must be exercised in accordance with the law. There is an overriding obligation to examine and weigh all the relevant considerations and to ignore irrelevant ones. It is improper and a legal error to have regard to an irrelevant consideration, just as it is to ignore a relevant one. In deciding what considerations are relevant, the decision maker (be it the responsible authority or the Tribunal) must be guided by the purpose of the planning control, decision guidelines set out in the planning scheme or Act and planning policy. In particular, a responsible authority must consider the matters set out in section 60 of the Act. The Tribunal must consider these matters and, in addition, those other matters set out in section 84B.
2. Clearly, public opinion cannot dictate a decision because popular views may be contrary to factors that the decision maker must properly consider. There may be room for popular opinion to influence the establishment or amendment of planning controls or policy, but numbers for or against a proposal are not relevant *per se* in administrative decision making. Rather, it is the substance or merits of the views expressed, viewed through the prism of planning relevance, that must guide the decision maker. Thus 100 objections based on an irrelevant consideration will not outweigh a single good objection based on a relevant consideration.

### Does community opposition constitute a social effect?

1. When faced with the 4,300 objections received to this application, we can say accurately that there is strong community opposition to the proposal to demolish Khyat’s Hotel.
2. The council submitted that under section 60(1A)(a) of the Act, if the circumstances appear to so require, we consider “any significant social … effects of the use or development for which the application is made”. It referred the Tribunal to the case of *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd[[13]](#footnote-13)* where the Court of Appeal considered the relevance of community opposition to the introduction of electronic gaming machines as evidenced by a community survey. The Court found[[14]](#footnote-14) that community opposition was a relevant consideration that the Tribunal was bound to take into account having regard to the statutory scheme under the *Gambling Regulation Act* 2003. Specifically, the power under the *Gambling Regulation Act* 2003 to approve premises suitable for gaming is exercisable only if the decision maker is satisfied that –

the net economic and social impact of approval will not be detrimental to the wellbeing of the community of the municipal district in which the premises are located.[[15]](#footnote-15)

1. For the purposes of the *Gambling Regulation Act* 2003, the Court said:

[43] … ‘Social impact’ means the impact on the society or community (or some part or parts of it) in which the gaming machines are proposed to be located. The ‘well-being’ of a community is a very broad concept. Dictionary definitions indicate that well-being is to be measured (at least) by the extent to which the community is healthy, happy, contented and/or prosperous.[[16]](#footnote-16)

[44] It follows, in our view, that if the approval of gaming at particular premises is likely to cause unhappiness or discontent in that community (or any part or parts of it), that consequence is a ‘social impact of approval’ which will be ‘detrimental to the well-being of the community’. It will be detrimental to well-being because it diminishes the citizens’ sense of happiness with, or contentment in, their community. Evidence tending to show a detriment of that kind as the likely or probable consequence of approval must, therefore, be taken into account by the decision-maker in determining whether the statutory ‘no net detriment’ test is satisfied. (The weight to be given to the evidence is, of course, a matter for the decision-maker, and will depend upon the nature, extent and cogency of the evidence.) It follows that the Commission was clearly correct when it said –

[In] considering the issue of net social and economic detriment the Commission must be influenced by its conclusion as to the effect which the granting of the application would have upon this community.

1. The Court also said:

[66] To sum up, the GR Act mandates consideration of the social impact of granting approval for gaming machines. By directing attention specifically to impacts which may be detrimental to community well-being, the Act makes squarely relevant the subjective perceptions of community members about their community, and their views about the likely effect of gaming machines on that community. While there is no place for the personal views of the decision-maker, the personal views of community members must be given their proper place in the evaluation.

1. In this passage, the Court clearly identifies that it is the provisions of the *Gaming Regulation Act* 2003 that make these subjective perceptions of community members about their community relevant. The *Planning and Environment Act* 1987 establishes a different framework and a different set of considerations. We are not persuaded that ‘social impact’ within the meaning of the *Gambling Regulation Act* 2003 and as interpreted by the Court of Appeal in the *Romsey Hotel* case is necessarily the same as ‘significant social effects’ within the meaning of the *Planning and Environment Act* 1987.
2. Whereas the *Gambling Regulation Act* 2003 is clearly concerned with the subjective perceptions of community members, matters which have been held to be relevant social effects under the *Planning and Environment Act* 1987 have tended to be more objective and evidenced in more tangible ways. For example, they include things like whether proposals –
* generate demand for increased community facilities and services;
* provide adequate facilities and services;
* meet needs for facilities and services already known to be deficient;
* improve or reduce accessibility to social and community facilities;
* provide greater or lesser choice in housing, shopping, recreational and leisure services;
* improve or reduce safety for people;
* meet the needs of targeted groups, such as aboriginal communities, youth, unemployed, aged, disabled etc.
1. The emphasis tends to be on ‘community’ rather than ‘individual’ social effects. There also needs to be a connection between the social effect and the use or development of the land: it is not about considering the likes or dislikes of people for the proposed use or development. Thus the Tribunal has not considered relevant objectors’ views about the religion, ethnicity or socio economic status of people who will use a particular development. It has repeatedly said that aversion to a proposal that is otherwise a lawful activity on moral grounds is not a relevant social effect.[[17]](#footnote-17)
2. The need for some objective link between a proposed use or development and an alleged social effect was discussed by the Tribunal in *Johnson v Greater Shepparton CC*[[18]](#footnote-18). This was a case involving an adult sex bookshop, which had generated considerable local opposition on the basis of its potential social and economic effects on the community. The Tribunal said:

[9] Although no burden or onus of proof in the curial sense exists in proceedings involving the exercise of the Tribunal’s review jurisdiction[[19]](#footnote-19), it is necessary for the Tribunal to be satisfied that a particular effect is sufficiently probable to be significant.[[20]](#footnote-20) Whether a particular effect is sufficiently probable will depend not just on the probability of the effect occurring, but also upon the consequences of the effect if it occurs and the utility of the use or development which gives rise to the effect. Further, any adverse effect must be weighed against any relevant positive effect. Hence a question we propose to answer in this case is whether we are satisfied that the proposed adult sex bookshop will cause net adverse social (or economic) effects on the community.

1. In *Johnson*, the Tribunal also referred to the President’s remarks in *Tabcorp Holdings Pty Ltd v Moreland City Council[[21]](#footnote-21)* where he said, in the context of whether a condition prohibiting signage advertising a betting shop should be refused because of the adverse social effects of gaming:

[13] … When it comes to exercising powers pursuant to the *Planning and Environment Act* in relation to social effects, I do not believe that it is appropriate to simply apply philosophical or moral or religious values. Rather it is necessary to make such decisions on the basis of a true empirical understanding of the facts of the situation. No empirical information has been put before me in this case to support the notion that the proposed access arrangement or signage would have any significant adverse social effect.

1. In our view, the conclusion which can be drawn from the approach to considering significant social effects in the context of the *Planning and Environment Act* 1987, is that to be relevant, the proposed use or development must give rise to demonstrable social impacts on the community (as distinct from individuals) of an identifiable scale or extent. By contrast, in the context of the *Gambling Regulation Act* 2003, evidence about the subjective perceptions of community members about their community and their views about the likely effect of gaming machines on that community are sufficient to establish the likely social impacts of gaming machine approval on the wellbeing of the relevant community. This is a relevant consideration under the *Gambling Regulation Act* but not under the *Planning and Environment Act*.
2. We therefore return to the proposition put to us by the council that the sheer number of objections to the demolition of Khyat’s Hotel is evidence of a significant and detrimental social effect because it will cause unhappiness or discontent in the community.
3. For the reasons given, we do not agree with the proposition that the number of objections alone creates a significant social effect or that the number of objections alone should be given any weight. We do not consider that the findings of the Court of Appeal in the *Romsey Hotel* case are directly relevant in the different legislative framework of the *Planning and Environment Act* 1987[[22]](#footnote-22) or compel us to this conclusion.
4. Nevertheless, we consider that the number of objections and the consistency of their message about the significance of Khyat’s Hotel within the local community is evidence of the cultural significance of Khyat’s Hotel. Cultural significance and cultural heritage are both matters that the planning scheme specifically requires must be considered when making decisions about proposals, and we will now deal with this issue.

## What are the social, heritage or neighbourhood character values of Khyat’s Hotel?

1. We accept the evidence presented by individual objectors and documented in the numerous written statements of grounds that Khyat’s Hotel is very significant to the local community. We accept Mr Kane’s summary that Khyat’s Hotel is:
* a social hub of the Brighton Civil Precinct;
* a community building institution;
* a traditional element in the streetscape and the precinct;
* an important link to the past and the history/development of Brighton;
* valued by the local community;
* an iconic landmark in the neighbourhood and in Brighton;
* part of the social and cultural fabric of the local community;
* an important part of many peoples daily lives;
* the highly valued façade is entrenched in this historical setting; and
* it complements other historical buildings having a close relationship with the police station and Town Hall.
1. We acknowledge that the large number of objections was the result of an energetic and proficient campaign on the part of local residents. Even so, we are satisfied from the evidence given about the campaign that the objections received represent a genuine expression of community concern. In general terms, they focus on the loss of the hotel as a community hub; as a place for celebration, commiseration or just a quiet drink. The social significance of Khyat’s for the community is entwined with the building itself and its use.

### Heritage value

1. There is no Heritage Overlay over Khyat’s Hotel. However, we reject the suggestion by the applicant that we cannot consider its heritage or cultural value because there is no permit trigger available under the Heritage Overlay. We consider that issues of heritage, cultural identity and neighbourhood character are all relevant because of the general objectives about such matters found within the planning policy framework of the planning scheme and the directives in section 60(1) of the Act.
2. It is important to bear in mind that this is not an application for a new permit, but to amend an existing permit. As we have previously noted, the existing scheme under the permit proposed to retain the hotel as an integral aspect of the new use and development. It was a balanced outcome that the Tribunal found acceptable, and the community too. As we have also noted, we must decide whether a change to that balance is appropriate.
3. Heritage values are not created by the application of a Heritage Overlay. Rather, the overlay is a means of recognising and protecting pre-existent heritage values. Therefore, just because there is no Heritage Overlay over Khyat’s Hotel does not mean to say that it lacks any heritage value.
4. We accept the evidence of previous studies and decisions by council (and now the Minister) that Khyat’s Hotel lacks sufficient architectural significance or integrity to justify the application of a Heritage Overlay.
5. Nevertheless, we consider it is unfortunate that many heritage studies, which form the basis of decisions to apply the Heritage Overlay, focus so heavily on architectural significance, and less on historic and social significance.
6. The distinction between architectural and historical significance was explored by Professor Emeretus Graeme Davison’s *What Makes a Building Historic?*[[23]](#footnote-23):

When architects appraise a building, they implicitly adopt the standpoint of the connoisseur, grading buildings on a scale of relative excellence. When historians say a building is historically important they are not giving it a rank amidst a range of other possible candidates, but making a judgement of its significance in relation to their wider knowledge of social, political or intellectual history. The architects’ method of assessment is primarily intrinsic and comparative and derives from the specific aesthetic qualities of the building or structure itself; the historians’ is primarily contextual and relates to the society of which the building is a physical relic. When architects are asked to justify their judgement of architectural importance they will offer a descriptive analysis of the building; when historians are asked to say why they think a building is historically important they will usually tell a story about it, or place it in its social context. Often, of course, architectural and historical judgements will complement each other and historians and architects will be able to elucidate the way in which the structural form and style of the building reflects its historical role or purpose.

1. Robyn Riddett gave evidence about the heritage significance of Khyat’s Hotel on behalf of the council. In her opinion, the hotel has both historical and social heritage significance. She refers to the comment in Davison’s *What Makes a Building Historic?* that: “it is a principle of historical interpretation the building acquires significance only in relation to its context”. In her expert opinion, she said:

The context of Khyat’s Hotel is twofold, …namely, as an early hotel building in Brighton, albeit subsequently altered, and as a hotel having associations with the civic activities of the early municipality as demonstrated by its former name (Council Hotel) and its proximity to the Town Hall.

1. In our view, Khyat’s Hotel does have historical significance. It has existed and traded continuously on the same site as a hotel since its construction in 1865. There has been civic activity opposite the hotel since 1859[[24]](#footnote-24). The site next door has been used as a police station since the 1870’s. Whilst the Brighton civil precinct may not be recognised formally as an historic precinct in the Bayside Planning Scheme, the term aptly recognises and describes the cluster of civic buildings and public open space located in the vicinity of Wilson Street. Khyat’s Hotel has been part of the civil precinct since its inception. It has played an important social function as part of the precinct. Although its external appearance has altered over the years, it retains its essential outline and place within the streetscape, which marks its function as a hotel. It can still be interpreted as a typical 19th century suburban hotel.
2. Therefore, although Khyat’s Hotel may lack the formal protection of a Heritage Overlay, we consider that it still possesses heritage values, which under the planning scheme should be considered and protected.

### Social value

1. In addition to its historical significance, we consider that the hotel has social heritage significance also. Ms Riddett referred to the concept of social value as discussed by Chris Johnston in *What is Social Value?*[[25]](#footnote-25)

Social value is about elective attachment to places that embody meanings important to a community. These places are usually community owned or publicly accessible or in some other ways “appropriated” into people’s daily lives. Such meanings are in addition to other values, such as the evidence of valued aspects of history or beauty, and these meanings may not be obvious in the fabric of a place, and may not be apparent to the disinterested observer.

1. We consider that this description applies to Khyat’s Hotel and the value that it has for the local community. The hotel is publicly accessible and has been appropriated into people’s daily lives. For the reasons outlined by Mr Kane, it has maintained its original use and provided an ongoing service to the local community since the early days of Brighton’s settlement: it has not lost its identity: it continues to form part of the social and cultural fabric of Brighton.
2. The Burra Charter[[26]](#footnote-26) defines cultural significance to mean *aesthetic, historic, scientific or social value for past, present or future generations*. It is the overarching term that embraces the different aspects of heritage significance and social significance. The Burra Charter deals with the cultural significance of places that warrant conservation. They are the sort of places to which the heritage objectives found in Clause 15.11 of the SPPF apply and which may be protected by the Heritage Overlay.
3. In our view, there is a difference between the type of cultural significance that the Burra Charter deals with and the notion of cultural identity referred to in clause 12.05 of the State Planning Policy Framework, or the image and local character referred to in the LPPF. Although they are part of the same continuum, there is no hard and fast line between them. In fact, a growing awareness of what is important to a community and what has shaped its development, will often see the cultural identity of a place elevated over time to the status of cultural significance and accorded formal heritage protection.
4. Clause 12.05 of the SPPF is concerned about cultural identity and neighbourhood character. The objective is:

12.05-1 To create urban environments that are of better quality, safer and more functional, provide more open space and an easily recognisable sense of place and cultural identity.[[27]](#footnote-27)

1. Strategies for achieving this objective are set out in clause 12.05-2. They include:

**Cultural identity and neighbourhood character**

Recognise and protect cultural identity, neighbourhood character and sense of place by:

* Ensuring development responds and contributes to existing sense of place and cultural identity.
* Ensuring development recognises distinctive urban forms and layout and their relationship to landscape and vegetation.
* Ensuring development responds to its context and reinforces special characteristics of local environment and place by emphasising:
* The underlying natural landscape character.
* The heritage values and built form that reflect community identity.
* The values, needs and aspirations of the community.

**Heritage**

Protect heritage places and values by:

* Supporting the identification, conservation, protection and management of cultural heritage.
* Conserving places of Aboriginal and post contact cultural heritage significance.
* Encouraging appropriate development that respects established cultural heritage values.
* Supporting adaptive reuse of heritage buildings whose use has become redundant.
1. There are two sets of strategies included in clause 12.05-2: recognising and protecting cultural identity, neighbourhood character and sense of place; and protecting heritage places and values. We consider it is relevant that there is a distinction drawn between these concepts within clause 12.05-2. We regard the strategies relating to cultural identity and neighbourhood character as intended to apply to places that are not necessarily protected by the Heritage Overlay or have recognised heritage significance. It is a provision that recognises the difference between cultural identity and cultural significance.
2. We consider that the strategies set out in clause 12.05-2 about cultural identity and neighbourhood character are aimed at places like Khyat’s Hotel. They are places having social values and significance that make them part of the cultural identity of a community for reasons summarised by Mr Kane and set out earlier.
3. Whilst it may well be argued that Khyat’s Hotel does not have the type of cultural significance equating to heritage significance, which the Burra Charter refers to, we nevertheless consider that it has a cultural identity of importance to Bayside and that it is desirable to recognise and protect this cultural identity as directed by Clause 12.05-2.
4. In a similar vein, respecting valued elements of character and heritage are also goals within the LPPF of the planning scheme.[[28]](#footnote-28)

### Neighbourhood character value

1. Neighbourhood character is essentially the combination of the public and private realms and the way these come together to give an area its own particular character.
2. The scale of the buildings in the Brighton civil precinct, their disparate architectural forms, their strong street presence and clear non-residential function set them apart from the domestic scale of surrounding residential areas. Khyat’s Hotel holds its own in this context. Despite its alterations over the years, it maintains the form of a traditional 19th century hotel building and its public character.
3. We consider that the dominant presence of Khyat’s Hotel in this streetscape, adjacent to the police station and opposite the Town Hall, mark the intersection of Wilson and Carpenter Streets as a significant intersection. The neighbourhood character values of Khyat’s Hotel derive from its physical form, its absence of setback, the contribution it makes to this intersection, and its role in establishing the public or civil character of the broader Brighton civil precinct.
4. The Neighbourhood Character Policy in the Bayside Planning Scheme “builds on the objective of Clause 21.05-3 of the Bayside MSS by ensuring that development complements and respects the existing and desired future character of residential areas” [[29]](#footnote-29).
5. Khyat’s Hotel is included in Precinct B2 in the Bayside Neighbourhood Character Policy. This is a large residential area where the objective of the precinct is to “encourage the retention of dwellings that contribute to the valued character of the Precinct in the design of development proposals.”
6. However, is policy[[30]](#footnote-30) to take into account:
* The extent to which the characteristics of the built and natural environment in the immediate vicinity of the site may determine a preferred future character that is different from that applying to the remainder of the precinct in which the site is located.
* Whether the site is located within a residential opportunity area as shown on the Strategic Framework Plan of the Municipal Strategic Statement and the extent to which this may alter the relevance of the design responses to consideration of the proposal.
1. We consider that the preferred future character for Precinct B2 is more relevant to the predominant residential component of the precinct than to the Brighton civil precinct, even though it falls within Precinct B2. We consider the Brighton civil precinct has a quite different neighbourhood character to the rest of the residential component of the precinct. The neighbourhood character value of Khyat’s Hotel (or any replacement building) should not be judged by reference to the preferred future character for Precinct B2, but by reference to the character of the civil precinct itself and the fact that this site is within a residential opportunity area.
2. The council agreed with this approach.
3. Ultimately, any policy should be applied having regard to the objectives it seeks to achieve. In this case, we consider that the most relevant objective is to “retain and enhance the identified elements that contribute to the character of the area.”[[31]](#footnote-31) Khyat’s Hotel is such an element.

## wILL DEMOLITION RESULT IN A LOSS OF THESE VALUES?

1. We consider that the response to this question is ‘yes’ – demolition of Khyat’s Hotel will result in a loss of its social significance, historical significance and neighbourhood character values. Part of the cultural identity and sense of place of Brighton would be lost by its demolition.

## what urban design contribution does the replacement building make?

1. Craig Czarny gave evidence on behalf of the council about urban design. He considered that the proposed permit amendment constitutes a substantial and unacceptable change to the approved scheme, resulting in an adverse neighbourhood character and urban design outcome. Under the existing permit, the proposed apartment building was subordinate to the traditional Khyat’s Hotel. Under the amending proposal, a replacement building on the hotel’s footprint would compromise the important relationship between traditional buildings within this key civil precinct and undermine the integrity and character of the Wilson Street streetscape.
2. If we leave aside the issue of demolition and consider the replacement building on its merits, we agree with Mr Czarny that the proposed design of the new building is too homogenous and that architecturally, there should be a point of departure for the hotel site. However, we disagree with him that any new building on the hotel site should have no front setback.
3. The front of the new building is set back from the street in a staggered arrangement, although the closest element next to the police station still sits slightly forward of it. There was considerable discussion at the hearing about what would be an appropriate setback for the new building.
4. It is common ground that the hotel building is not significant on aesthetic grounds. Rather, the hotel is significant in the hearts and minds of the community as a ‘place’ and for what it has provided in social terms for nearly 150 years inside its four walls – a meeting place and focus for community gatherings. The proposed siting of the replacement building on the front boundary, forward of the police station is, in Mr Czarny’s view, a means of replicating the familiar location of the hotel building as an external and tangible expression of its physical importance to the community.
5. But in many respects this misses the point about the hotel’s significance. To site the new building on the boundary would, in our view, only mock or insult the memory of the place and what has occurred inside its four walls over many years. The hotel’s significance cannot be evoked simply by siting the new building on the boundary. Symbolically, retention of the existing external fabric, even with a different use, is necessary in order to salvage something of the place’s significance and the memories it evokes.
6. In our view, it does not matter that the existing hotel is so prominent from many vantage points within the streetscape. Perhaps its prominent siting relative to the police station, obscuring it from the west, is analogous to its importance to the community – despite the greater aesthetic significance of this neighbouring building.
7. However, if the existing building is removed, we agree with Mr McGurn that the new building should be subservient to the police station, which is of recognized heritage significance and covered by a Heritage Overlay. There is clear policy support for this position. These policies are based primarily upon the visual and aesthetic significance of heritage places and the relationship of new buildings to them. It is appropriate that the new building is assessed against these policies by way of visual appraisal taking into account streetscape and neighbourhood character considerations, including the heritage elements of the precinct.
8. Mr McGurn proposed various setbacks and modifications, but even with them, we consider the built form response would not be acceptable. We consider that:
* The new building is too homogenous and linear in form when combined with the approved building. It is an uncharacteristic response taking into account the siting and proportions of other buildings in the area.
* The design detailing of the façade is poor and the form and massing is not characteristic of the other significant buildings in the immediate vicinith. The overall design accentuates the horizontal too much compared to the strongly vertical patterns found within the police station and Town Hall.
* The building seems to have been added as an afterthought to the original design concept rather than forming an integral part of it. The approved building around the hotel site and the small size of the lot are constraints to which this proposal has not adequately responded. We note that nearly 20% of the apartments are to be contained on a portion of the site that only comprises around 10% of the total site area.

## DO THE URBAN DESIGN VALUES OF THE REPLACEMENT BUILDING OUTWEIGH THE LOSS OF the HOTEL BUILDING?

1. The design of the new building replicates the design of the residential building under the existing permit. However, this design was predicated on retaining the front portion of the hotel building as the dominant streetscape element. It was a design that was intended to be a transition between “the large scale non-residential buildings, including the harder edged vertical facades of the hotel, and the residential dwellings in Wilson Street.”[[32]](#footnote-32)
2. Without the hotel, we consider that more is warranted for this site given the sensitivities of its location in heritage and streetscape terms. Ultimately, the construction of a new building and its use for five apartments will only benefit a select few. It will generate no new social significance in terms of what happens inside its four walls. Rather, any future significance will be limited to its own architectural merit.
3. Whilst competent enough, we do not consider that the architectural expression of the new building is of such a quality that it will, in the future, become a building that is highly valued by the community architecturally and considered worth fighting for. It fails to achieve the objectives identified in the MSS of quality design which “contributes to a sense of place appropriate to Bayside’s character”; “respects valued elements of …. character and heritage”; and “maintains, strengthens and enhances local character”.[[33]](#footnote-33)
4. In conclusion, we do not consider that the urban design values of the new building are so good that they will outweigh the loss of the hotel building in urban design terms, and its loss in cultural identity and neighbourhood character terms.

## safeguarding the social significance of khyat’s hotel

1. This case is not about protecting the use of Khyat’s as a hotel. The permit does not relate to use and, in any event, could not compel the continuation of the existing use. Whilst it was an issue of concern to the many objectors, it is not a matter we can deal with, except to make the following observations.
2. We recognise that even if the building form of Khyat’s Hotel is retained, this will not necessarily guarantee its continued use as a hotel. Nevertheless, if the built form is retained, there is a possibility that the use may continue and its social significance will be preserved. If the built form is retained and the use is changed, there will still be a vestige of the cultural identity of Khyat’s left. But if the hotel is demolished, then its cultural identity and the sense of place created by it will be gone forever.

## conclusion

1. For all these reasons, we conclude that the application to amend planning permit 2000/6179 should be refused.

|  |  |  |
| --- | --- | --- |
| **Helen Gibson** **Deputy President**  |  | **Mary-Anne Taranto****Member** |

1. Planning permit No 2000/6197 was issued on 30 October 2001 at the direction of the Tribunal in application P50095/2001 (*Resdale Pty Ltd v Bayside CC* [2001] VCAT 2141). The permit has been extended on 4 occasions. Currently, it will expire if not commenced by 25 September 2009 or if not completed by 25 September 2011. [↑](#footnote-ref-1)
2. By letter dated 29 December 2008 [↑](#footnote-ref-2)
3. The proposal will replace the existing car park and existing function rooms at the rear of Khyat’s Hotel. The Tribunal held that some additional car parking may well occur on the street and in the public car parking nearby, but there is an ample supply and the change in mix from large functions/dining/bar to one of a smaller meeting room and bar may result in a different role for the hotel: *Resdale Pty Ltd v Bayside CC* [2001] VCAT 2141 at [55]. The loss of the hotel/car park interface with existing residences was seen as a benefit. [↑](#footnote-ref-3)
4. *Minawood Pty Ltd v Bayside CC* [2006] VCAT 2097 [↑](#footnote-ref-4)
5. Amendment C2 in March 2004 introduced new requirements in the schedule to the Residential 1 Zone in relation to such things as minimum street setback, site coverage, side setbacks and front fence height. Amendment C48 in March 2006 introduced a new neighbourhood character local planning policy at clause 22.07. [↑](#footnote-ref-5)
6. [2006] VCAT 2097 at [25] – [26] [↑](#footnote-ref-6)
7. We regard the expression “Brighton civil precinct” to be a descriptive term rather than a formal name for the precinct which is used in the planning scheme or any heritage studies. [↑](#footnote-ref-7)
8. Clause 21.04-2 [↑](#footnote-ref-8)
9. For example, see clause 55.02-1 [↑](#footnote-ref-9)
10. [2006] VCAT 2097 at [30] [↑](#footnote-ref-10)
11. [2006] VCAT 2097 at [29] [↑](#footnote-ref-11)
12. Clause 21.05 Bayside Planning Scheme [↑](#footnote-ref-12)
13. [2008] VSCA 45 [↑](#footnote-ref-13)
14. At paragraph [40] [↑](#footnote-ref-14)
15. Section 3.3.7(i)(c) *Gambling Regulation Act* 2003 [↑](#footnote-ref-15)
16. *New Shorter Oxford English Dictionary* (3rd ed, 1993), 3654. [↑](#footnote-ref-16)
17. For example, see *Rowe v Wangaratta Rural CC* [2008] VCAT 1472 [↑](#footnote-ref-17)
18. [2005] VCAT 1432 at [8] – [18]. The Tribunal consisted of Justice Stuart Morris, President and Margaret Baird, Senior Member [↑](#footnote-ref-18)
19. *Golem v Transport Accident Commission (No 1)* (2002) 19 VAR 265. [↑](#footnote-ref-19)
20. *Australian Conservation Foundation v International Power Hazelwood* [2004] VCAT 2029 at [41]. For a discussion of the same principle in other contexts, see *X v Commonwealth* (1999) 200 CLR 177, 190-192, per McHugh J (negligence law) and *Hay v Dubbeld* [2005] VCAT 642, at [6] (anti-discrimination law). [↑](#footnote-ref-20)
21. [2004] VCAT 693 [↑](#footnote-ref-21)
22. The same view was expressed by the Tribunal in *Rowe v Wangaratta Rural CC* [2008] 1472 at [49]. In this case Member Komesaroff (presiding) and Member Bennett who were considering a permit application for an adult sex bookshop and who were presented with a petition of well over 100 signatures against the sex shop. [↑](#footnote-ref-22)
23. Graeme Davison. *What Makes a Building Historic?* Victoria Historic Buildings Council, 1991, page 4 [↑](#footnote-ref-23)
24. Premises on the south west corner of Wilson and Carpenter Streets were used as council municipal offices and court house from mid 1859. [Weston Bate. *A History of Brighton*, 1962, page 223 – 225]. The Town Hall was built on its current site in 1886. [↑](#footnote-ref-24)
25. Chris Johnson. *What is Social Value: A Discussion Paper.* Australian Government Publishing Service, 1994. Page 11. [↑](#footnote-ref-25)
26. The Australia Icomos (International Council on Monuments and Sites) Charter for the Conservation of Places of Cultural Significance (The Burra Charter). January 1987. [↑](#footnote-ref-26)
27. Clause 12.05-1 Bayside Planning Scheme [↑](#footnote-ref-27)
28. For example, see clause 21.04-1 (Vision) and clause 21.04-2 (Design and image; and Liveability) Bayside Planning Scheme [↑](#footnote-ref-28)
29. Clause 22.07-1 Bayside Planning Scheme [↑](#footnote-ref-29)
30. Clause 22.07-3 Bayside Planning Scheme [↑](#footnote-ref-30)
31. Clause 22.07-2 Bayside Planning Scheme [↑](#footnote-ref-31)
32. [2006] VCAT 2097 at [29] [↑](#footnote-ref-32)
33. Clause 21.04 Bayside Planning Scheme [↑](#footnote-ref-33)