

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION**

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. 1550/2013
PERMIT APPLICATION NO. 678/200/A

CATCHWORDS

Section 77 of the Planning & Environment Act 1987; Port Phillip Planning Scheme; Commercial 1 Zone; Heritage Overlay; Design and Development Overlay; Existing Major Promotion Sign; Change to Electronic Sign.

APPLICANT	APN Outdoor Pty Ltd
RESPONSIBLE AUTHORITY	Port Phillip City Council
REFERRAL AUTHORITY	Vic Roads
SUBJECT LAND	1 Fitzroy Street, St Kilda
WHERE HELD	Melbourne
BEFORE	Megan Carew
HEARING TYPE	Major Case List Hearing
DATE OF HEARING	10 and 11 October 2013
DATE OF ORDER	1 November 2013
CITATION	APN Outdoor Pty Ltd v Port Phillip CC [2013] VCAT 1853

ORDER

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act* 1998, the permit application is amended by substituting for the application plans, plans prepared by Dennis Bunt Revision D dated 31 May 2013.
- 2 The decision of the responsible authority in relation to Permit Application No. 678/2000/A is set aside.
- 3 Planning Permit No. 678/2000 is amended and an amended permit is directed to be issued for the land at 1 Fitzroy Street, St Kilda. The permit is amended as follows:
 - What the permit allows is amended to read as follows:

To develop the land for the purpose of replacement/ reconstruction of an electronic major promotion sign in accordance with the endorsed plans.

- Conditions in the permit are amended to be those as set out in the Appendix to this order.
- Plans endorsed under the permit are amended and the responsible authority is directed to endorse amended plans prepared by Dennis Bunt Revision D dated 31 May 2013.

Megan Carew
Member

APPEARANCES

For Applicant

Ms. Susan Brennan of Counsel instructed by Allens Solicitors

She called the following witnesses:

Mr. Stuart McGurn, Town Planner

Mr. Gordon Watson, Lighting Engineer

For Responsible Authority

Ms. Tania Cincotta, Solicitor, Best Hooper

She called Mr. John Glossop, Town Planner to give evidence.

INFORMATION

Description of Proposal

To Amend existing Planning Permit 678/2000 to provide for replacement of existing internally illuminated major promotional sign with an electronic major promotional sign.

The existing sign is located on the roof of the building. The approved sign is 17m wide by 4 m high and about 800 deep (68m²). The advertisement panels on the sign are a vinyl wrap, which encloses the neon lighting that internally illuminates this sign. The signs are replaced on a monthly basis.

It is proposed to replace the sign display with an electronic sign. This technology involves the use of LED to create a digital message picture that can change. It is proposed that the display on the sign will change every 30 seconds.

The proposal maintains the current size of the advertising display area exactly and the existing support structure is retained. There are two key changes:

Increase in the extent of cladding of the support structure to meet the bottom of the site.

Change in display format from an internally illuminated sign to an electronic sign.

Nature of Proceeding

Application under Section 77 of the *Planning and Environment Act* 1987.

Zone and Overlays

Commercial 1 Zone

Design and Development Overlay Schedule 6

Heritage Overlay Schedule 5

Abuts Road Zone 1

Relevant Scheme policies and provisions.

Clauses 11, 15, 18, 21, 22.04, 22.08, 52.05 and 65.

Land Description

The appeal site is located on the corner of Fitzroy Street and the Esplanade (a combined frontage of 23.89 metres) and an area of 350m². A two-storey building used as a restaurant and bar exists on the land.

There is an existing major promotion sign erected on a structure above the roof of the building.

Tribunal Inspection

The Tribunal undertook an inspection on 11 October 2013 accompanied by the parties' representatives.

The Tribunal undertook further unaccompanied inspection in the evening of the subject site and of other existing electronic signs.

Cases Referred To

2001/3115 *Buckle Outdoor Advertising v Port Phillip CC* (26 April 2001)

Octopus Media Pty Ltd v Bayside CC [2004] VCAT 2304

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 In 2000, the Port Phillip City Council granted a planning permit for the reconstruction of a major promotion sign on the subject land. The sign was to replace a previously existing sign which I understand existed for over 20 years prior to the Council's decision. The existing major promotional sign is internally illuminated.
- 2 It is proposed to amend the existing planning permit to replace the existing major promotion sign with a new electronic sign with additional cladding on the support structure. The electronic sign would be of the same dimensions as the existing sign. The proposal involves changing the advertising panels of an existing sign to an electronic display, not the display of a new sign.
- 3 Council refused the application on the grounds that the new type of sign would not be consistent with the local policy and character objectives for the area.
- 4 I note that Vic Roads as the relevant referral authority did not raise any concerns regarding traffic safety subject to certain conditions.
- 5 Submissions, plans, photos, evidence statements and other documents submitted at the hearing have been retained on Tribunal files. The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Port Phillip Planning Scheme, I have decided to set aside the decision of the responsible authority and grant a permit. My reasons follow.

WHAT NEEDS TO BE DECIDED?

- 6 This site has had a long history of use as a major promotion sign and this was confirmed in the grant of a permit for the form of the currently constructed major promotion sign. In addition, the Tribunal granted a permit in 2001 to enlarge the existing sign (although this permit has not been acted upon and has now lapsed)².
- 7 The planning scheme defines an electronic sign as:
A sign that can be updated electronically. It includes screens broadcasting still or moving images.
- 8 The need for a permit arises under the provisions of Clause 52.05. Under the planning scheme, the land and neighbouring properties in Fitzroy Street are located within the Commercial 1 zone. The advertising controls in

¹ I have considered all submissions presented by the parties although I do not recite all of the contents in these reasons.

² 2001/3115 *Buckle Outdoor Advertising v Port Phillip CC* (26 April 2001)

Category 1 at Clause 52.05 Under the category one provisions, an electronic major promotion sign would fall within Section 2 of the table. A permit is required for such a sign under the provisions of the Zone.

- 9 The provisions of Clause 52.05-5 of the Planning Scheme allow for the continued display of signs erected before the approval date. A permit is required to renew or replace a sign that would result in a different type of sign. The permit applicant did not rely on these provisions as the application is for an amendment to an existing permit.
- 10 The site is also affected by a Design and Development Overlay. The overlay does not include any provisions in respect to signs.
- 11 The Heritage Overlay Schedule 5 also applies. Under Clause 43.01-1, a permit is required to undertake buildings and works including to *construct or display a sign*. The applicant submitted that no permit was required under the Heritage Overlay as a sign was already constructed and displayed. However, I consider that new changes are proposed to the cladding, which would require approval under the overlay.
- 12 This is an application to amend an existing planning permit. Consideration of such an application does not however require an assessment of the appropriateness of the original sign or of the sign as a whole. An application to amend a permit does not create an opportunity to contest the permit in its entirety³. Rather, the question is whether it is appropriate to amend the existing planning approval to provide for an electronic sign. Matters such as whether the sign is in scale with the built form of the locality are not before me other than to the extent of change to the cladding of the support structure. Likewise questions of visual clutter are limited to the proposed changing electronic screen rather than to sign size or position (these matters are addressed by the current approved sign).
- 13 The key issues in this application are whether the amendment
 - Is consistent with Planning Policy;
 - Will result in light or glare which will affect the amenity of the area;
 - Will have a unacceptable impact on the amenity of the area;
 - Will detract from the heritage significance of the St Kilda Hill area or neighbouring Catani Gardens;
 - Will impact on the amenity of neighbouring residential properties;
 - Addresses traffic safety considerations.

It is to these matters I now turn.

³ See *Gelperowicz et ors vs Glen Eira CC & Anor [2013] VCAT 1139*

WHAT ARE MY FINDINGS?

Is the proposal consistent with Planning Policy?

- 14 State planning policy recognises that major promotional signs are a legitimate land use and they are explicitly provided for within the planning scheme. Electronic signs are also provided for, a relatively new addition to the planning scheme outdoor advertising terms.
- 15 Local Planning Policy at Clause 22.08 makes it is clear that in heritage areas major promotion signs, above veranda signs, illuminated and animated signs are actively discouraged. Rather signs are to be “simple contemporary and modest”. In Fitzroy Street, signs “should add to the precinct’s character and atmosphere”. Under this policy, major promotion signs visible from the foreshore are also actively discouraged. The policy when read as a whole clearly discourages significant signage in this area.
- 16 However, in this case, the major promotion sign exists. It is the electronic nature of the sign that is relevant. Clause 22.08-7 requires the consideration of the impact on new technologies on the amenity, form and character of the area. It is otherwise silent on the question of electronic signs.
- 17 I find that the local policy does not directly discourage the use of new technologies, but rather requires consideration of the amenity, form and character of the area. I consider these matters below.

Will the proposal result in Light Spill or Glare?

- 18 The current sign is internally illuminated. In addition there appears to be external lighting to the cladding shown on the current endorsed plans and conditions on external lighting included in the permit itself. The plans before me remove reference to any external lighting elements.
- 19 The permit applicant submitted that the new lighting format could be managed so that the light emitted was restricted to the levels emitted from the existing internal illumination and that because the LEDs had a smaller degree of spill area would in fact improve the evening effect of the sign. The permit applicant submitted that the permit could be amended to include conditions restricting light spill and glare.
- 20 The evidence of Mr. Watson was that it would be possible to limit the levels of emission of light from the sign at night. He recommended that the level be no more than what is emitted from the existing sign at night. During the day, the technology provides for a level of lighting consistent with the ambient light. He also submitted that the level of light spread will be less than existing due to the orientation of the LEDs.
- 21 The written evidence of Mr. Watson did not include a measurement of the current luminance of the sign nor did Mr. Watson inspect the site before commencing his evidence. However, during the hearing, Mr. Watson

undertook both a site inspection and a measurement. While this is not an approach supported by this Tribunal, Council raised no objection to this additional material at the hearing. I found this additional material informative.

- 22 The evidence of Mr Watson was that the luminance of the sign as displayed at the date of the hearing) was 75cd/m² at a distance of 90m at ground level directly in front of the sign. This sign depicted a white Ipod on a black background. It was the evidence of Mr. Watson that the dark background of this particular advertisement would result in a lower measure of luminance than a sign with for example an all white background. He opined that a completely white sign would result in the highest levels of recorded luminance and that this would be in the order of 100cd/m².
- 23 If permit conditions restrict the extent of light emitted from the sign to current levels, I cannot find that the change in display format would result in any increased loss of amenity to the surrounding area or nearby residents from the level of luminance. Ms Brennan submitted detailed draft permit conditions to this effect that I have adopted in the conditions applied.

Will the proposed changing display impact on the visual amenity of the area?

- 24 Mr. Glossop opined that this sign is highly visible in the surrounding area. It can be viewed from the beach itself, the foreshore and the Catani Gardens as well as to the north and east. Mr. Glossop opined that the change in the lighting format would result in a brighter display of improved clarity and result in a more “eye catching” sign. The new lighting would operate all day rather than just in the evenings. The changing of the message would also draw attention to the sign and it was Mr. Glossop’s opinion that this more “eye catching” format would result in an unacceptable visual amenity impact on the surrounding area.
- 25 Mr McGurn agreed that the sign is highly visible from the surrounding area, but differed in his opinion as to the extent of impact caused by the change in the format of the sign to an electronic format.
- 26 Having inspected similar electronic signs at Melbourne Airport, St Kilda Junction, Kew Junction and on the Age Building in the CBD, I agree that electronic signs have a level of clarity greater than the traditional panel sign on the subject site, in both the day and evening periods. In addition, I consider that the activity of the sign in terms of its changing message also increases the level of attention one pays to the sign.
- 27 In respect to the clarity of the sign, I do not consider that just because the sign is clearer that it follows that the sign has a poorer amenity impact over a traditional panel sign. This change in format of the sign was a key consideration in the decision of the Tribunal in *Octopus Media Pty Ltd v Bayside CC* [2004] VCAT 2304 where the sign proposed incorporated

modern technology which the member considered “visually far preferable to the large panel signs of the past”. I agree.

- 28 Matters of illumination are addressed above. I have found that the extent of illumination can be restricted to the levels currently emitted by the existing sign. The fact that it will be lit in the daylight period will make it more visible than at present in certain light conditions, but I do not consider that this in itself will result in a sign that is unacceptable when viewed from the surrounding area. The more significant issue is the changing message or activity of the sign.
- 29 When travelling south on Beaconsfield Pde, the sign is clearly visible set against the backdrop of the apartments behind. When travelling in the northbound lanes there would be very limited vantage points of the proposed sign due to the direction it faces. The sign is clearly visible from the north side of the tram stop. I consider that the electronic nature of the sign will sit comfortably in the context of the site located on the edge of the Fitzroy Street Major Activity Centre to the north and east. This is a retail/commercial area with a wide range of advertising. There are some other small sky signs located towards the northern end of this strip centre as well as a range of business signs. The changing nature of the sign will not add significantly to any visual clutter (as accepted by both planning witnesses). The sign sits on a contemporary building and in my view will not detract from the character or atmosphere of Fitzroy Street. Indeed if one is waiting at the tram stop, the activity of the sign could in fact add to the amenity of the area.
- 30 I can see no impact because of the electronic display to the residential neighbours to the south. The sign is orientated away from these residences. There are also residential properties some distance away to the north (in Beaconsfield Parade) which would have some views to the sign from their frontages, but any visual impact resulting from the changes is in my view successfully mitigated by distance.
- 31 Council’s main concern was the impact of the change on the St Kilda Foreshore and Catani Gardens. The sign is clearly visible from the foreshore directly opposite the site and from the southern section of the Catani Gardens (south of the rotunda). The more distance obtained from the site, the more views are intermittent and obscured by structures and vegetation.
- 32 While the sign is clearly viewable from the foreshore and garden areas, I do not consider that this will significantly affect the enjoyment of these spaces because the sign is viewed in its context as part of the urban backdrop and the activity of the abutting roads and major activity centre. I agree with the opinion of Mr. McGurn that those parts of the gardens from which the sign is most visible are those parts have a more urban context than areas further away from the site.

- 33 Overall I am satisfied that the amendment will not result in a significant change in impact on the visual amenity of the area.

Is the increase in the extent of cladding of the support structure to meet the bottom of the sign appropriate?

- 34 The proposal includes an increase in the black cladding to the support structure below the sign to meet the underside of the sign. The purpose of this change as put by the applicant was to respond to concerns raised by original objectors regarding existing light spill below the sign. Council supported this change.
- 35 It was the evidence of Mr. Watson that the LED lighting format now proposed was far more directional than traditional neon lighting and light spill would be unlikely below or over the sign as a result.
- 36 While it may not be necessary for management of light spill, the additional cladding will further hide the supporting structure of the sign. I consider that the removal of the gap will improve the overall presentation of the sign and I can see no visual amenity impacts resulting from the increase in height of the cladding. I also note that the endorsed plans in the current permit currently appear to show no gap between the cladding and the advertising face and in fact, the current “gap” was not contemplated in the original approval of the sign.

Heritage Considerations

- 37 Council’s Heritage and Urban Design Advisor expressed concerns that conversion to an electronic sign would increase the visual impact that the existing sign has in its heritage context, being the wider St Kilda Hill area identified in Heritage Overlay Schedule 5.
- 38 Council has previously approved size and scale of the sign. The change to an electronic sign may result in a sign that is more modern and clear, but this in itself does not make it unacceptable. The light levels will be restricted to the level of the existing sign. The fact that the image changes every 30 seconds, I consider will have minimal additional impact on the significance of the heritage place that applies to the active commercial area of Fitzroy Street.
- 39 Council submitted that the proposal could affect the heritage significance of Catani Gardens. The gardens are of heritage significance⁴ but are not included within the Heritage Overlay that applies to the subject land. The policy at 22.04 requires consideration of:

In the case of new development, how the proposal will complement existing heritage characteristics and be respectful of and respond to

⁴ Heritage Overlay 348 and Victorian Heritage Database H1805.

the prevailing scale, form, siting and setbacks of existing significant or contributory heritage places in the vicinity.

- 40 For the reasons set out above in respect to visual amenity, I consider that the proposal will not significantly affect the heritage significance of the gardens, as it will be viewed in the context of the urban backdrop to the gardens.

Amenity Considerations

- 41 Amenity considerations have been addressed in respect to lighting and visual impact as set out above. I did consider whether the changing light levels in the evening may result in disturbance through “flicker” to the residents in the nearby apartments. It was the evidence of Mr. Watson that the message changes would be instantaneous and that while light levels would change over the course of the night, the 30-second interval was sufficient to reduce the effect of “flicker” in the peripheral area surrounding the sign. In this respect, I consider it important that this sign not be animated. Subject to the inclusion of this condition, I am satisfied that the changing messages will not have a detrimental impact on the neighbouring properties from changes in lighting.
- 42 At the hearing, I raised the matter of the finish of the rear of the sign. I was advised that the existing mismatched cladding would remain. I note that the existing permit and endorsed plans do not provide a rear elevation. Apart from the fact that the rear of the sign is visible to immediate neighbours, it is also highly visible from the surrounding area. I consider that the rear of the sign should be finished and present a well-maintained appearance to the satisfaction of the responsible authority.

Traffic Considerations

- 43 I note that Vic Roads has not objected to the proposal subject to the inclusion of conditions. One of these conditions was a 10 year expiry to which the permit applicant agreed. I note that the current permit does not contain a set expiry date.
- 44 In order to comply with conditions sought by Vic Roads in respect to traffic safety, the permit applicant accepted that the message on the sign would only change every 30 seconds.

Conclusion

- 45 It follows from the above reasons that it is my conclusion that the decision of the Responsible Authority should be set aside and an amended permit issued.

Megan Carew
Member

APPENDIX

PERMIT APPLICATION NO:	678/2000/A
LAND:	1 Fitzroy Street, St Kilda
WHAT THE PERMIT ALLOWS:	To develop the land for the purpose of a replacement/ reconstruction of an electronic major promotion sign in accordance with the endorsed plans

CONDITIONS

1. The development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
2. The permit shall not be construed as permitting any animation of the sign hereby permitted to the satisfaction of the Responsible Authority.
3. The location and details of the structure shown on the endorsed plan must not be altered without the written consent of the Responsible Authority.
4. Sign lighting must be designed, baffled and located to the satisfaction of the Responsible Authority to prevent any adverse effect on adjoining land.
5. Any electronic sign must incorporate:
 - a) Luminance sensors that measure ambient light at the sign and technology that enables the luminance of the sign to automatically adjust relative to the measured ambient light levels;
 - b) Technology that enables the luminance of the sign to be set to a maximum luminance level; and
 - c) A control system that will record no less frequently than every 5 minutes:
 - i. The sign's luminance (cd/m^2 or as a percentage of its maximum luminance); and
 - ii. The sign's luminance sensor reading of the ambient light.
6. Before the existing internally illuminated sign is decommissioned, an all-white vinyl billboard must be displayed and, with that billboard in place, an on-site measurement of the vertical illuminance (lux) of the internally illuminated sign must be taken and recorded by a qualified lighting consultant:

- i. at a distance of 90 metres standing directly in front of the sign (within Catani Gardens);
- ii. during night time hours while it is dark; and
- iii. while the sign is illuminated.

And, on the basis of that measurement the luminance (cd/m^2) at a distance of 90 metres directly in front of the internally illuminated sign must be calculated using the retina illuminance method and recorded by the qualified lighting consultant.

- 7 Once installed and commissioned, the electronic sign must be set to display an all-white screen and, while displaying that screen, set to operate so that during hours of darkness (that is after the sun has fully set and before the sun starts to rise) the sign's luminance levels 90 metres standing directly in front of the sign do not exceed the luminance 90 metres in front of the internally illuminated sign as recorded pursuant to condition 6.
- 8 Once installed and commission, the electronic sign must be set to operate so that at all times other than those referred to in condition 8 (that is, during daylight and twilight hours) the luminance of the sign will automatically adjust relative to the measured ambient light levels.
- 9 Records of the sign's luminance levels must be retained for a period of 6 months after the recordings were made.
- 10 The cladding on the sign's structure of the sign must extend vertically to ensure there is no gap between the cladding and the sign to prevent inadvertent light shining between the cladding and the sign.
- 11 No advertisement or image may be displayed for less than 30 seconds.
- 12 The transition from one advertisement to another must be instantaneous.
- 13 The rear of the sign should be finished/clad and present a well-maintained appearance to the satisfaction of the responsible authority.
- 14 In relation to the images displayed on the sign:
 - a. Sequences of images giving the illusion of continuous movement must not be displayed.
 - b. Images capable of being mistaken for traffic signals or traffic control devices because they, for example, contain red, amber or green circles, octagons, crosses or triangles must not be displayed.
 - c. Images or text capable of being mistaken as an instruction to a road user must not be displayed.
 - d. Flashing background, flashing text or flashing images must not be displayed.
- 15 The sign must not dazzle or distract road users due to its colouring.

- 16 The luminance of the advertising sign must be such that it does not give a veiling luminance to the driver, of greater than 0.25 cd/m^2 , throughout the driver's approach to the advertising sign.
- 17 In the event of an attack by a computer hacker or similar resulting in unauthorised display of visual images or any other display malfunction, the electronic sign is to shut down and cease any form of visual output until the malfunction is repaired.
- 18 The permit expires 10 years from the 1 November 2013, at which time the sign and all supporting structures must be removed and the site made good to the satisfaction of the Responsible Authority.

--- End of Conditions ---