18 Flawed DA Assessment and Enforcement cases - City of Yarra (as of April 2004)

NB: These files were referred to the 2004 Yarra Council Planning Audit; only 5 were considered and the process issues they raised were ignored

27 Lyndhurst St Richmond (*planning & enforcement*)
89 Kent St Richmond (*planning & enforcement*)
70 Wellington St Richmond (*planning*)
2 Hollick St Richmond (*planning*)
London Tavern (cnr Richmond Terrace & Lennox St) (*planning*)
47 Stanley St Richmond (front half of dual-occupancy) **(***planning & enforcement)*
4 Dando St Richmond (*enforcement; retrospective application refused*)
121 Kent St Richmond (*planning & enforcement*)
189 Coppin St Richmond (*failure to check permit conditions on endorsed plans*)
105 & 107 Somerset St Richmond (*planning & enforcement)*
8 Parker St Richmond *(failure to notify)*
104 Somerset St Richmond & subdivision file (*planning}*
69 Somerset St Richmond (*planning)*
4 Cole St Richmond (*planning)*
1B Aitken St Clifton Hill (*planning*)
57 Spensley St Clifton Hill (*planning & enforcement*)
812 & 814 Lygon St N. Carlton (*planning & enforcement*)
66 Wilson St N. Carlton (*planning & enforcement)*

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27 Lyndhurst St Richmond (*planning & enforcement*): 99 0466; VCAT P 2000/103405

A new boundary wall built across the title boundary and against habitable room windows was not detected by Council due to failure to carry out a site inspection during the original application process. The affected neighbour (a 75 yr old immigrant widow) tried twice over several months to explain her situation to planning counter staff but her English was bad and she was just told that a permit had been issued and she could do nothing about it. Instead, an interpreter should have been offered immediately, she should have been informed of her options, and the site (only a few 100m from the town hall!) should have been inspected immediately. Fortuitously, I was at the counter at the time and followed up the matter myself.

Yarra subsequently initiated enforcement proceedings but withdrew their stop work order request in Jan. 01 after Member Davis refused to hear it because Yarra's lawyer failed to serve the affidavit on the parties in time, prior to the hearing – instead it was presented at the hearing itself. Consequently, $1500 costs were awarded against Yarra. However, council enforcement officers later dishonestly stated in their report to Council that the application "failed", implying that the case was heard but failed on merit (Council Minutes Dec. 01, Item 2.10, appendix 2):

> *" • Endorsed plans do not show windows in question on site analysis plans (erroneous),* ***no adequate site inspection has occurred by planner****.*

• *Community Amenity instructs solicitors to instigate interim enforcement order application to stop work even though the development was complete. (Council relied on Solicitors advice, the fact that the development does not comply therefore cannot be complete).* ***Application failed*** *and costs were awarded against Council*."

The order did not "fail" - it was never heard, so the costs related purely to "preparation to defend" and were awarded on the spot (VCAT order, 11.1.01).

This failure to stop the development initiated a series of VCAT hearings over the next 11 months, finally ending in a negotiated settlement. Meanwhile, the objector, who had suffered considerable stress due to the case, died late that year of a heart attack.

Several appeals were then just left outstanding for nearly 2 years until VCAT dismissed them or allowed them to be withdrawn in October 2003 [VCAT P2000/103384; P2000/103405; P051542/2001 - Yarra City Council v Pollock [2003] VCAT 1529 (23 October 2003)].

This case is a classic example of the huge waste of time and resources that can ensue just from the failure to carry out a thorough site inspection during the initial assessment process.

89 Kent St Richmond dual occupancy (*planning & enforcement*): 991048; VCAT P1742/2002; PL02/0680; VCAT P954/2003 (s82) & P1119/2003 (s77)

The carport layout and design was changed after the permit was granted so the proposal was no longer compliant with the Good Design Guide (forerunner of Rescode) or with Austroads standards for accommodating 3 vehicles (entry width and turning circles). The "dog-leg" boundary amendment that Council allowed to subdivision permit 000987 facilitated changes to the carport layout that prevented the development from providing adequate access according to AustRoads standards for 3 vehicles as specified in the original planning permit.

Also, two internal walls (No.89) were moved 700mm south and 700mm north respectively to increase the length of the study by 1.4m to normal room size. This modification was partly achieved during construction by a change to the façade, surreptitiously included as an unrequested part of a s73 amendment application (approved by Council without advertising) that purported to only involve minor changes to the front fence. The façade change was not mentioned in the amendment request but just quietly included in the revised plans.

The room enlargement and carport changes described above were done unilaterally by the developer despite Council & VCAT both stating at a prior VCAT hearing into the original permit conditions that this room should never be big enough to be able to be used as a bedroom.

During and after construction, Council repeatedly dismissed my complaints, claiming that the increased length of the study was well within "tolerable limits".

However, 15 months after my first complaint on 13.12.00 and after the development had been built, Yarra Building Services (not Planning or Enforcement/Community Amenity) contacted the private building surveyor corroborating my complaint, resulting in Council's head of Stat. Planning (then Peter Gaschk) personally signing an enforcement application for VCAT. This purported to respond to the discrepancies I had pointed out but only dealt with 6 other very minor changes which I had not even been aware of, which had no off-site impact and which would normally have been dealt with internally by Council as a s73 minor amendment (like the "fence amendment" above).

Thus it appears that the enforcement order was designed to force the applicant to lodge a retrospective permit application for general approval of the whole as-built dwelling, thus "regularising" the development without Council having to acknowledge or act on the serious deviations from the original planning permit which they had dismissed over the preceding 18 months.

The applicant did subsequently lodge a retrospective application (PL02/0680), which focussed on the same 6 innocuous discrepancies and was approved by Council. My objections about major internal changes in dimensions which created a third bedroom with extra parking implications were ignored by the delegate report, despite s60 P&E Act, and despite similar parking requirements being considered in the delegate report for the other unit (No.91 Kent St, a 3 bedroom dwelling).

The changes to the rear carports (actually built as open-fronted brick garages) were acknowledged in the assessment but instead of requiring compliance with the original permit, the retrospective decision suggested the "double" carport be re-designed into a single space with a storage area since it was no longer wide enough or long enough to accommodate 2 vehicles according to Austroads standards for car spaces, accessways and turning circles.

The subdivision changes which Council had previously incorrectly approved as being minor amendments with no implications (which legitimised the boundary variations which enabled changes to the carport layout so it no longer complied with the planning permit) were completely ignored.

VCAT Footnote: I challenged the Council's approval of the retrospective application at VCAT but although the substandard changes to the carports and the enlargement of the study were acknowledged to have been unilaterally carried out by the developer without authority, the Member approved the as-built development on its planning merits in October 2003.

This decision has several implications:

(1) a Tribunal can override a previous Tribunal by approving a different development from that originally permitted, effectively negating most of the original assessment process involving objectors. This lends great weight to the arguments of Save Our Suburbs, which believes that VCAT should ensure that a council has followed proper process in their original assessment, and that most standards should be mandatory or at least require specific factual justification if discretion is used to vary them

(2) a Tribunal can approve non-compliance with standards required by a State statutory body (AustRoads), standards which Councils are supposed to abide by. This undermines the ability of a Council to insist on appropriate standards for new developments.

70 Wellington St Richmond: 981434; VCAT 1999/55024 & 1999/78269

Two different versions of the Notice of Decision (NOD) were posted out - a *correct* one (grant of permit) to the applicant & an objector who had withdrawn her objection, and an *incorrect* one (refusal of permit) to the two remaining objectors.

Council appealed to VCAT itself immediately the "mistake" was detected by the objectors some months later, ostensibly to give the objectors their right to seek cancellation of the permit, according to the attachment to Council's application.

However, despite this wording of the lengthy attachment, the application for review form was filled in by Council's lawyers as merely a request for amendment, not to seek cancellation of the permit. This potentially denied the objectors the right to seek cancellation. A local planning barrister who had taken a brief look at Council's application for review to VCAT had also missed this key point in focussing on the wordy attachment.

The objectors only managed to remedy this at the last moment by filing their own application for cancellation once they realised what was actually intended - only a week before the hearing, Council had notified VCAT to change its request from one of "no order sought" to seeking an amendment, not cancellation (see argument over costs in Byard's VCAT decision). This would have denied the objectors natural justice. In the end, the application for a cancellation hearing was successful but the case itself was lost on the planning merits.

The sending of incorrect NODs by Yarra Council was put down to "administrative error" but the process of producing, filing and dispatching these notices to the parties involved required that a series of half a dozen separate "errors" would have all had to occur for two different NODs to have been produced from two different computer templates and then dispatched.

Curiously, copies of the notices retained in the planning file and allegedly sent to all four parties showed that the correct (to grant) version had apparently been sent to everyone….

2 Hollick St Richmond:
PL 011476; VCAT P 1064/2002

A Council planner falsely stated at the VCAT hearing that Council's heritage officer had seen and approved the amended plans on which a NOD to grant was issued (see sequence of events in delegation report; also VCAT decision paras 40-42 inc).

The London Tavern (cnr Richmond Terrace & Lennox St):
PL 01/1434

This planning assessment by Council staff was deeply flawed - incorrect zone and site location description, failure to give notice ("*internal renovation only, so no off-site impact*") despite a significant 25% increase in floor space for patrons and consequent parking implications for the site & its residential neighbours.

By this stage the hotel renovations were nearly complete and neither Council nor the objectors were prepared to appeal to VCAT for cancellation or amendment of the permit because of the possibility of costs being awarded (especially against Council for granting a flawed permit allowing the development to proceed).

Finally, Yarra merely suggested that the applicant could apply retrospectively for a parking waiver, an admission that consideration was not given to this basic issue during assessment.

47 Stanley St (front half of dual-occupancy):
00 0090 *NB this file has apparently been lost!*

Complaints during 2001 & 2002 by local residents regarding non-compliant roof design, side & front wall heights, etc, were either ignored or incompetently investigated and whitewashed - eg, the planning officer's delegation report on the applicant's subsequent request for a s73 minor amendment to increase the front parapet wall height stated that there were no other changes, despite these prior objections. Apparently the planner either ignored residents' complaints or relied on the incorrect statements of the enforcement officer.

In fact, as detailed in the objections, the side walls were also higher and the roof was built as a higher single-hip design instead of a lower double hip.

All the permit breaches noted by me & the local residents were finally confirmed (see 2002 enforcement order application) but were not followed through as part of the eventual enforcement action at VCAT in October 2003 (regarding the rear half of this dual occupancy, 4 Dando St) only because they had relatively minor off-site detrimental impact compared to the rear dwelling.

4 Dando St Richmond (rear of dual-occupancy at 47 Stanley St):
00 0090 - VCAT P1174/2002 (enforcement);
PL02/0542 - retrospective application refused - VCAT P2421/2002

This case involved serious breaches of planning & building permits (also see building file) which were initially investigated by enforcement officers who claimed compliance and that no further action was warranted. The residents persevered with their objections and finally (after a retrospective permit application refused first by Council and then by VCAT), a scathing VCAT enforcement order (5.11.03, P1174/2002) 18 months later required major structural changes to bring the development into compliance with the original permit.

Note that one of the problems in bringing the enforcement action was the lack of key dimensions on the permit plans - despite specific written permit conditions, Council did not require these dimensions to be added on the plans to be endorsed. Council also failed to require one of the layout plans to be corrected - it had been drawn “accidentally” as a reversal or mirror image of the actual layout. It was hardly a coincidence that this reversed page of the plans dealt with the key non-compliant aspects of the construction.

The applicant, after pressure from neighbours, finally sought adverse possession of a sliver of land to the north of the block. To date, it appears that council has still not required the applicant to consolidate the two parcels of land as required under rating by-laws.

121 Kent St Richmond:
PL02/0661

The initial assessment failed to recognise that a demolition permit was required for this HO site, failed to apply the relevant criteria and thus failed to conclude that the condition of the building did not warrant demolition. This was only rectified after a local resident’s complaint.

Amended plans were then re-advertised showing retention of the first two rooms and demolition of the rest of the 100 year-old-plus dwelling, all confirmed by the endorsed plans

when the permit was issued. However, the entire house was subsequently demolished with the exception of the front wall/façade which was left propped up several hundred mm forward of its original position, to allow a new one to be built behind it.

Subsequently, the development company was fined in the magistrates court (only because a building permit breach was involved) but a retrospective planning permit was obtained to legitimise the brand new dwelling (on alleged grounds of termite and rot damage to the original front part of the house).

189 Coppin St Richmond:
PL 01/0618

The council planner failed to check that the plans supplied for window screening met the relevant permit condition (compliance with GDG E7 T4) so that incorrect plans were consequently endorsed. This made enforcement technically impossible so after the neighbouring resident complained, the situation was re-assessed by a senior planner who found that the window screening "wasn't warranted", despite the fact that both the applicant and the planner who wrote the original delegation report had accepted the need for the screening right from the start and that this is what the permit condition specified.

105 & 107 Somerset St Richmond:
PL 03/0476

Good assessment - but no accurate site inspection was done (eg to check dimensions given in the plans, such as the width of the rear lane re turning circles, garage doors, etc), which would have picked up the discrepancies detected by the objector - eg the 4200-wide rear lane labelled as 4660. These errors noted in the objection were acted upon but had there been no such objection from someone experienced in planning issues, these discrepancies would never have been taken into account in the assessment. The lack of a comprehensive site inspection is still endemic at Yarra despite the obvious problems that can result if a thorough on-site inspection isn't done prior to assessment (as evidenced by some of these cases).

8 Parker St Richmond:
PL 001076 *(renovation)*

This case involved a series of errors and subsequent attempts at damage control on the part of Council planning staff:

(1) A s52 breach (requirement to give notice) - the two residents closest to the renovation and thus those potentially most affected were not notified of the development application, while three others in the same street were. This occurred despite council rate records having allegedly been used to identify the owners of all adjacent properties in order to notify owners by name. This resulted in denial of natural justice to the two neighbours not notified, who had no chance to object because they did not even know a permit had been applied for or granted until construction began (see legal advice in file). Interestingly, the first action of Council on hearing of the situation was to immediately refer the case to their insurance assessor, then their lawyer.

(2) Inaccuracies in site context diagrams were not detected at the time the permit was granted, and other un-requested and unauthorised changes included on amended plans were not detected at the time of endorsement. These changes were also not identified later by senior planning consultant Roz Hansen (hired by Council to "independently" assess the case as soon as Council realised they could have been guilty of breaching s52)

(4) Roz Hansen's assessment (10 Oct.01, part 4) did discuss rear open space but failed to address the two key issues of light intrusion & acoustic impact from the renovation itself due to height & proximity to the boundary, despite listing them as issues in her introduction.

(5) John Rantino's legal opinion (Maddocks, 9 Oct.01) re s52[1][d] was that the evidence suggested that originally the planner neglected to assess the impact of the development on the two properties not notified and thus that there could be a prima facie ground for permit cancellation or amendment. Hansen's only opinion on this issue was to suggest that Council "formulate and implement a policy on public notification of such applications to minimise this situation occurring again".

(6) Neither of these opinions remotely supported the statement by the then Head of Statutory Planning (Peter Gaschk - letter to me, 29 Oct.01) that Rantino and Hansen both "highlighted that Council satisfactorily carried out the notification requirements in accordance with s52...".

Council confirmed the permit breaches but continued to fail to issue a planning infringement notice and a fine to initiate genuine negotiations. Yarra's appeals officer stalled residents by claiming that the site owner was on the verge of negotiating with them, although the residents knew the owner had no intention of negotiating at all. Resident pressure finally caused an enforcement officer to issue a PIN requiring negotiations with neighbours as part of the remedial action (and as allowed for under s130 P&E Act) but his superior, the Community Amenity (enforcement) Team Leader, cancelled it the same day and re-issued a new PIN requiring only compliance with the planning scheme.

Unfortunately the residents were not litigious and had relied on assurances that Council was acting in their interests. Consequently, no appeal by residents to cancel or amend the permit had been lodged at VCAT by the time the timber-framed renovation was at lock-up stage. By that time, VCAT no longer had jurisdiction (s88, P&E Act), which in retrospect seemed to be the goal that the council was working towards. A challenge if made earlier (non-compliance with s52) would probably have been successful.

104 Somerset St Richmond: 99/1043; & subdivision file 97/014

This case involved the apparent failure of staff to check for the existence of any prior subdivision during the assessment of the planning permit. Subsequently at VCAT, council's lawyer Adeline Lane (from Maddocks) revealed that a subdivision permit did exist, so the development didn't have to provide on-site parking for the existing dwelling, thus negating one of Council's two main grounds for refusal.

This vital fact was not disclosed to Council planners or to the objectors at any stage before the VCAT hearing, despite the fact that on request, the applicant (at the time Council's own senior statutory planning officer!) had supplied Council with further particulars of the property on 26.8. 99. He did not mention the permit but instead fraudulently provided an out-dated copy of an earlier 1996 survey showing a single block.

The subdivision application was received by Council on 7.1.97 without any prior planning permit being applied for or granted for the two proposed lots. Despite this, the subdivision permit was granted on 12.2.97 (in just 5 weeks!) and renewed each year.

The subdivision file contains no document with the applicant's name and signature as owner of the property, not even the application itself which was signed on 23.12.96 by his wife in her maiden name, despite a title search showing joint ownership by the applicant and his wife (under her married name) since 21.12.94

Council's subdivision officer at the time continued to accept without question annual unsigned requests for extensions of the permit purporting to be from a local surveyor, not on letterhead but as hand-typed notes headed "C/- 104 Somerset St.". The subdivision permit was simply being warehoused (against Council policy) until the applicant was ready to use it.

None of this was (apparently) revealed to the officer considering the application. This is presumably why Council employed a lawyer to conduct such an apparently straight-forward dual occupancy VCAT case which would normally have been handled by a delegated officer.

69 Somerset St Richmond:
PL 01/0052; PL 01/1491

While the first application was assessed against the Good Design Guide, correctly found to be non-compliant and refused, the same planner failed to adhere to the new Rescode standards & objectives with the second application, which contained most of the same breaches as the first. Some of the key parts of my objection were never addressed, despite several follow-up letters to Council, including the following Rescode non-compliance:

A9: as a new, 3-bedroom development with rear vehicle access, this required 2 on-site car spaces - only one was provided. In this area, street parking was at capacity.
A10: side walls not on boundaries should be set back 1650, not 1000
A11: East boundary walls should be only 16,800mm long, not 23,200 (ie, 6.4m too long!)
A12: 2-storey fully-screened glazed building spine (not transparent so equivalent to normal wall) should be set back half its height from the windows of the east neighbour - ie, 2850mm, not 1840
A14: sunlight will only reach 75% or more of the POS of 71 Somerset St (abutting to the east) from just before 10am till just after 12noon (nearly 3hrs less than the 5-hr standard)
A18: S boundary of POS should be 7.04m south of studio but is only 5.5m - ie, 1540mm too short (the applicant met this requirement later during settlement negotiations at VCAT)

Also, the 24.75m2 POS barely met the minimum A17 standard (25m2), compromising energy efficiency (A7) - the studio would stop direct sunlight penetrating the rear living area of the main dwelling for several months in mid-winter when passive heating is required.

Under the Act, Council must consider each objection. So many standards breached indicated clearly that this proposal was an over-development. Most of the breaches above were significantly worse than the standards. Rescode specifies that all the objectives of Clause 54 must be met and most of the standards, but no alternative approach was demonstrated to meet all the relevant objectives. Despite this, Council granted an NOD.

I emailed then Planning Manager Peter Gaschk on 27.3.02 (the eve of Council's decision on this case) to stress that the development did not meet Rescode standards and that because all councillors at the recent election stood on a platform of improvement to statutory planning

at Yarra, more rigorous compliance was expected. He immediately forwarded my email to the applicant, who responded with an intimidatory email threatening demolition of my client's house (which would have been non-compliant under modern planning regulations) and seeking costs because of my attempt to exert undue political influence!!

4 Cole St Richmond:
PL02/0008

An example of flawed assessment process (especially on heritage) and failing to correctly notify objectors of amended plans, etc, even when their objections to Council contained their correct address. In this case, the owner of 8 Cole St resided in Barkers Rd Hawthorn but appeared on the planners list with the Cole St address, while the consultation meeting attendance sheet showed his Barkers Rd address.

Re the heritage assessment for this case, the planner ignored the very visible proposed wall on the E side boundary, despite this not being a feature of the free-standing Californian bungalows in the area. The neighbour at 6 Cole St did not agree to this Eastern boundary wall, despite a note to the contrary on the heritage advisor's report, which appears to have been added to the report due to false information provided by the applicant that was not verified by the heritage officer or by staff.

The Rescode assessment was based on earlier plans and written before the heritage report was available. It states in a number of places that there is compliance with neighbourhood character objectives. However, the heritage report shows that the application neither responds to nor respects neighbourhood character - in particular, that the boundary wall is not in keeping with heritage guidelines and neighbourhood character and will detract from the original site layout. The failure to include this factor in the assessment made it difficult to argue this point at the subsequent VCAT hearing.

The heritage report also recommended a number of other changes aimed at reducing the overall visual bulk and building mass and preserving the streetscape character by making it compatible with the existing small bungalow. Council did not require the applicant to incorporate most of these recommendations, so the final amended plans revealed no significant change to the building envelope, including heights and setbacks.

The final plans still lacked key measurements for heights and lateral location & setback from the boundary of the roof hip (needed to properly assess shadow diagrams). Reference levels were provided for elevation diagrams but no finished ceiling levels, finished floor levels or natural ground levels were noted. Despite years of requests from community planning groups, Council still doesn't insist on these basic notations for application plans, compromising any later enforcement action as well as the accuracy of the subsequent building permit.

It was clear that there was support from staff for the application despite its ongoing flaws, despite assurances given by a senior planning officer at a meeting on 10.1.03 that the Council would not approve the proposal. It went to council's Internal Development Approvals Committee but was refused by councillors. The applicant appealed and won a permit with minor changes (but it was never acted on).

1B Aitken St Clifton Hill:
PL02/0319

This case started out as an application on 2.4.02 for a 4.2m high rear fence. Staff correctly told the applicant on 14.5.02 that the height couldn't exceed 2.6m. A week later (staff memo, 20.5.02), a gullible councillor and senior staff conducted a site visit and were persuaded by a hysterical applicant to "be more flexible".

As this colossal file testifies, this simple single mistake led to a farcical process that ran for nearly two years, wasting a huge amount of officers' time (and that of me and my client). The planners allowed themselves to be too easily influenced by the applicant who was extremely persistent in continually contacting officers using emotional tactics to influence their actions; and the planners were subsequently left trying to justify their flawed process.

The delegation report was factually incorrect in a number of instances and did not properly address most neighbour's objections as required under s60 P&E Act:

- Dwellings facing Dally St south of the site did not typically have "screens on the rear fence up to approximately 3m high". These fences are 2.4 to 2.65m high only because they abut a public lane rather than being between adjacent lots like the subject fence.
- Local houses were not built in the "late 1700's and early 1800's" and lot sizes do not range from 100 - 500 square metres. Lots in Brockenshire St are typically ~260 square metres, and somewhat less in Aitken St (~150 - 250).
- My original submission is missing from the file (but may have been subsequently put back - some documents are only temporarily "lost" or removed) so it cannot be ascertained whether all objections were considered as required [s60(1)(a)(i) P&E Act]. However, they clearly weren't - in particular the key point of the fence height and consequent breach of s62(4)P&E Act (see point 1 below)
- While the shadow diagrams provided by the applicant were corrected by the planner, those for 14 Brockenshire St were not (these understate the impact of a new extension there).

But the two key planning issues that were continually ignored were that:

(1) under s62(4) P& E Act, Council must not grant a permit which breaches the building act or regulations (which have siting requirements parallel to Rescode, including regulation of building heights and set-backs). A fence this high breaches the building regulations and this part of my written objection was never addressed as required under s60(1)(a)(i)

(2) Council's Rescode analysis failed to assess the fence against guidelines A10 & A11 because the planner erroneously assumed that since fence height was not defined in the Planning Scheme, Rescode A10 & A11 were not applicable.
In fact, clause 71 of the Planning Scheme states that a term used in the scheme has its ordinary meaning unless that term is defined in the scheme or in the P&E Act 1987 or the Interpretation of Legislation Act 1984, in which case the term has the meaning given in those Acts. In the P&E Act (s3(1)), fences are defined as buildings, so that A10 and A11 should have applied, which (as with the building regulations) would have limited the fence to around 2.6m, as originally advised. It was that simple.

The planner said he was not going to buy into personal issues involved in this dispute, yet throughout the assessment he allowed himself to be driven by constant pressure from the applicant - witness the frequent email exchanges prior to mediation in mid-Oct 2002 and later exchanges between the applicant and other planning staff.

My clients (in Brockenshire St at the rear of the site) were also subjected to intimidating behaviour by the applicant and finally withdrew their VCAT action and sold up in mid-2003.

Successive amendments were subsequently proposed to the permit, Council opposed the changes, more staff became involved (including the Director City Development, Manager Planning Unit and even the Mayor) and the matter was finally heard at VCAT on 18.12.03 as a s149 and s87 appeal.

But the two fundamental issues above were never addressed at VCAT - it was not in either the applicant's nor the council's interests to reveal these flaws in the planning assessment. Consequently no arguments on these points were advanced and the Member simply upheld the s149 appeal and did not determine the planning merits of the case under s87.

Result: a very poor planning outcome (re inappropriate structure, poor planning process and disadvantaged and disillusioned residents), and a huge waste of council's resources over nearly two years - all over a rear fence, and an initial failure to stick to a simple guideline!

57 Spensley St Clifton Hill:
99 1480 & PL 01/0841

The initial permit for this development was poorly assessed - a rear garage that faced transversely across the narrow block was allowed for the applicant to garage 2 cars, despite an internal length less than 4.8m (6m being the normal requirement for an enclosed parking space). An external staircase was also allowed with a condition requiring screening, but the applicant ignored the permit and built an unscreened straight external stairway across the block in full view of neighbouring backyards and windows.

A full set of internal amenity facilities (WC, shower, cooking area, etc) was allowed to remain on the plans for the studio above the garage despite the written objections of the neighbours, so that once the structure received a permit it had an "as of right" use as a dwelling under the planning scheme, despite a Note on the permit stating that it must not be used as a dwelling. The senior planner involved was aware of this issue and either knew or should have known that the Note had no legal status and could not be enforced (as DOI and a letter from the former planning manager later confirmed).

Proper regard for the Clifton Hill heritage area would have respected the local sub-division pattern with rear lane access for vehicles, which in this case would have allowed space for only a single-car garage (but with adequate dimensions) and an internal staircase with no privacy concerns, plus retention of 2 on-street parking spaces on the east side of adjoining Abbott Grove, an area of high on-street parking demand.

The neighbours unfortunately did not challenge the original flawed permit but did complain when the unscreened staircase was built instead of the screened spiral one - council issued a PIN so the applicant sought a retrospective permit which the objectors challenged at VCAT.

Finally, in early 2003, after months of prevarication by the applicant and several VCAT mediation and directions hearings, a s173 agreement was reached to completely screen the stair as built (and to modify door and window grilles to meet heritage requirements).

Due to lawyers for both Council and the applicant failing to act with alacrity, it took from June 2003 until January 2004 to actually conclude the s137 agreement and a further 9 months until it was signed and lodged with the Titles Office - two and a half years after the retrospective permit was sought.

812 & 814 Lygon St N. Carlton
98/0354 (enforcement)

I complained in writing that there were no rear ground floor windows due to the rear open courtyards having been illegally constructed as covered enclosed garages. Yarra's enforcement officer subsequently photographed the rear of the dwellings and noted that there were rear windows and concluded that the development was compliant. His report however referred to the 1st floor windows, ignoring the lack of those on the ground floor. It would appear that either he was stupid or he calculated that I would probably not persevere if he didn't substantiate my complaint. The same enforcement officer was also involved in similar erroneous initial enforcement processes for 89 Kent St, 4 Dando St and 47 Stanley St.

A renewed complaint was then acted on by Yarra Building Services since the matter also involved a breach of the building permit. The case was heard at the Magistrates Court in mid-Feb.2004 where the permit applicants pleaded guilty.

66 Wilson St N Carlton:
97/1487 – alterations & additions **00/0075 – paint exterior**
PL01/1068 – alterations & additions to façade

Summary
(NB: locals were aware the owner/applicant was a close friend of Yarra's Head of Planning)
- no enforcement action was taken by Council on breach of permit re façade
- failure of Council to reply promptly (or sometimes to reply at all) to the northern neighbour's letters and phone calls or to properly address or resolve their concerns over several years re an overlooking window in the central light-well that was not detected during the original assessment
- harassment of N neighbour by the applicant who complained about a trellis on the shared side fence, despite it being erected originally by mutual agreement. Council issued a PIN but later withdrew it once architectural drawings were supplied to Council by the neighbour
- planning staff misled councillors by supplying IDAC with a photo of the façade of no. 66 which had been rendered and painted, rather than the photo supplied by the same applicant with an earlier application (to paint the façade) which clearly showed the original façade brickwork. The issue at IDAC was whether illegally-applied render on the façade should be removed. The applicant had falsely implied that the render was already there when they bought the dwelling but this was concealed from the councillors. IDAC is Yarra's Internal Development Approvals Committee comprising 3 rotating councillors

From the files: The original permit 97/1487 included no mention of any alteration or treatment to the building façade. However, the applicant's architectural statement of 10.11.97 says the front façade was to be retained and restored where possible and that there would be no alteration to the Wilson St façade. The photo of this façade clearly shows the original brickwork, with no apparent major cracks as later claimed by the owner.

The 8-page report to IDAC for permit 01/1068 includes 2 attachments, neither referenced in the report. The second attachment includes a photo of the paint treatment of the site façade, presumably relating to permit 000075 but taken after the rendering was done. In contrast, the notated page and photo endorsed as part of permit 00/0075 clearly shows the brickwork of the façade before sandblasting and rendering was carried out. Together with resident complaints, this indicates that rendering was carried out around June 99, before permit application 000075 was lodged in Jan. 2000.

The original photos showing the brickwork indicate that the façade was in original condition (with some peeling paint) when the owner bought it, and that whenever the rendering was done, it was done without a permit.

Council failed to properly and in a timely way address this heritage breach of the Planning Scheme or the legitimate concerns of the north neighbour, again wasting huge amounts of time for staff and objectors in avoiding dealing effectively with the issues. It is reprehensible that neither photo of the original brick façade from file 97/1487 or 00/0075 were reproduced in the IDAC report for councillors to consider, given that the "prior existence" of the render was a key aspect of their deliberations, on which the subsequent VCAT case was based.

NB: Other later flawed cases will be the subject of further comment shortly

Common problems for most assessments in Yarra in the 2000s:

- few applications include a copy of the current title (a requirement under the Act)

- few proper onsite inspections so discrepancies on plans are often not detected.

- extra unrequested and unauthorised changes to amendment plans or to final plans submitted for endorsement as part of a planning permit are a frequent occurrence. Unless council staff check all the plans meticulously and not just the variations requested or required by permit conditions, the unauthorised changes get endorsed as well. That makes it almost impossible to effectively enforce these permits later to remove any such built changes, for which Council could be liable for costs.

- evidence from objectors of inaccuracies in applications is often not considered or addressed in delegation reports, contravening s60(1)(a)(i).

- no insistence on reference levels for ground, floor & wall heights on plans - ie, fully dimensioned and accurately-scaled plans

- planning officers often ignored the 1997 Urban Conservation Study in DA assessments despite the new Built Form Policy not being incorporated into the Planning Scheme until around 2005. The UCS was the only incorporated guide for urban design and residential development in non-heritage areas given there are no Neighbourhood Character Overlays

- written requests to developers for further information are often sent weeks or months late and sometimes informally, so that the 60-day assessment clock continues to run.

- inadequate advance notice is given to residents (and councillors?) for consultative & IDAC meetings - often only a few days for residents (IDAC is the Internal Development Approvals Committee at Yarra which comprises 3 councillors rotating at 3-monthly intervals. It decides on applications which staff have approved in principle but where there are more than 6 objectors)

- damage control over Council error is always at the expense of residents/objectors and seeks to minimise risk rather than rectify mistakes