



Heritage Council Registrations and Reviews Committee

Spurling House

38 Black Street, Brighton (H0126)

Permit Review Hearing – 22, 23 & 24 October 2019

Members – Mr Patrick Doyle (Chair), Professor Stuart Macintyre and Mr Jeffrey Robinson

DETERMINATION OF THE HERITAGE COUNCIL

Affirm determination under review – After considering all submissions received in relation to the permit review, and after conducting a hearing pursuant to Section 108 of the *Heritage Act 2017*, the Heritage Council has determined, pursuant to Section 108(7)(a) of the *Heritage Act 2017*, to affirm the determination under review and refuse to issue Permit No. P30408 in respect of Spurling House, located at 38 Black Street, Brighton.

Heritage Council members – Committee majority determination

Stuart Macintyre

Jeffrey Robinson

Heritage Council member – Dissenting member judgement (Attachment 1)

Patrick Doyle

Decision Date – 20 December 2019

APPEARANCES/SUBMISSIONS

EXECUTIVE DIRECTOR, HERITAGE VICTORIA

Submissions were received from the Executive Director, Heritage Victoria ('the Executive Director'). The Executive Director was represented by Mr Paul Chiappi of counsel, who was instructed by Russell Kennedy Lawyers.

The Executive Director provided statements of expert evidence from the following persons, all of whom were called to give evidence and were made available for cross examination by other participants in the hearing:

Professor Alex Andrianopoulos, Professor of Genetics and Head of Fungal Genetics and Medical Mycology Group, University of Melbourne;

Ian Crew, Principal Consultant, Greencap Pty Ltd;

Dr Michael Taylor, Principal Consultant, Greencap Pty Ltd;

Andrew Smith, Consulting Rectification Engineer, Cracks in the Wall;

Terry Lancashire, Senior Structural and Civil Design Engineer, Maurice Farrugia and Associates (formerly of Macleod Consulting); and

Raymond Vassallo, General Manager, Amtec Disaster Recovery.

DR DAMIEN LOUIS

Submissions were received from Dr Damien Louis, the permit applicant and permit review requestor ('the Applicant'). The Applicant was represented by Mr Christopher Canavan QC and Ms Nicola Collingwood of counsel, who were instructed by Best Hooper Lawyers.

In relation to this proceeding, the Applicant provided statements of expert evidence from the following persons all of whom, with the exception of Mr Boak and Mr Glaister, were called to give evidence and were made available for cross examination by other participants in the hearing:

Mr Bryce Raworth, conservation consultant and architectural historian of Bryce Raworth Pty Ltd;

Mr Brian Murphy, managing director and occupational hygienist of EHS Assess;

Dr Barry Gilbert, Public Health Physician and Occupational Health Medicine Consultant, of Barry Gilbert Consulting;

Dr Cameron Jones, chief executive officer of Biological Health Services;

Dr Heike Neumeister-Kemp, senior mycologist and environmental consultant of Mycotec Pty Ltd;

Mr Brett Cole, managing director and chief occupational hygienist of Biosafety Pty Ltd;

Mr Owen Boak, restoration and remediation expert of Elements Vic Pty Ltd and Managing Director of Elements Specialty Cleaning and Restoration Group; and

Mr Rodney Glaister, director of Sub Zero Restoration, which specialises in, amongst other things, applied microbial remediation.

PROFESSOR DEIRDRE COLEMAN

A submission was received from Professor Coleman, who also appeared and made verbal submissions at the hearing.

BRIGHTON RESIDENTS FOR URBAN PROTECTION ('BRUP') REPRESENTED BY MS KRISTEN STEGLEY

Submissions were received from Ms Stegley for BRUP, who also appeared and made verbal submissions at the hearing.

BAYSIDE CITY COUNCIL (BAYSIDE)

Written submissions were also received from Mr Tom Vercoe of Bayside, who did not appear at the hearing.

INTRODUCTION

THIS PROCEEDING

01. This proceeding is a review of the Executive Director's determination to refuse to issue Permit No. P30408 pursuant to section 102(2) of the *Heritage Act 2017* ('the Act'), in respect of 38 Black Street, Brighton which is also known as Spurling House and is included in the Victorian Heritage Register ('the Register') and recorded there as H0126.

THE PLACE

02. Spurling House is a two-storey dwelling situated at 38 Black Street in Brighton, Victoria, constructed in 1889 and consisting at ground level of internal and external walls of double-bond brickwork, of timber stud framing on the first floor internal walls, of timber-framed gable ends and a roof clad in cedar shingles ('the Place').
03. The following is the Statement of Significance for the Place:

'What is significant?'

Spurling House, Brighton was built in 1889 for Phillis Spurling to a highly innovative design by Canadian-born, Sydney architect, John Horbury Hunt. It is the only known example of his work in Victoria. Originally known as Purno, Spurling House was built on a large block of land in the popular seaside village of Brighton, in close proximity to the Middle Brighton railway station which was constructed from 1882-87.

Hunt's design of the comparatively small Spurling House introduced the Shingle style to Melbourne. This Arts and Crafts-inspired North American domestic architectural style used organic materials in a way which heightened their natural qualities, eschewed any applied decoration, used contrasting vertical, horizontal and diagonal lines to achieve compositional balance, and grouped functional elements for aesthetic effect. At the height of the boom in Melbourne, when the majority of houses were designed in a highly decorative Italianate style, the surprising design of Spurling House was exceptional.

In his design of Spurling House, Hunt used simple, open planning and externally incorporated expanses of black stained shingles, bold timber bracketting and strongly modelled brick chimneys. The composition of the front facade is highly asymmetrical, with contrasting horizontal, vertical and diagonal lines providing balance. An off centre gable; a dominant plain brick chimney shaft which is offset from the gable apex; an offset recessed verandah and varying window opening sizes provide both contrast and balance to the composition. The stained shingles of the upper facade, corbelling of the chimneys and the projection of the upper floor beyond the lower floor add to the picturesque nature of the composition.

How is it significant?

Spurling House, Brighton is of architectural and historical significance to the State of Victoria.

Why is it significant?

Spurling House, Brighton is of architectural significance as the only known house designed by John Horbury Hunt in Victoria. It is one of twenty-two designed by this highly influential, Sydney-based architect.

Spurling House, Brighton is of architectural significance as the first, and one of the most innovative, domestic buildings constructed in the later nineteenth century in Victoria in the Shingle style. As the first of seven houses designed by Hunt in the North American Shingle style, it introduced this picturesque style to Victoria. At a time when the often heavily ornamented, rendered architecture of the domestic boom style was popular in Victoria, Spurling House was highly innovative and unique.

Spurling House, Brighton is of architectural significance as an influential design in the overall oeuvre of the Arts and Crafts style. Many concepts introduced at this house were integrated in the design of houses by architects from the 1890s and into the early twentieth century.

Spurling House, Brighton is of historical significance as a large house built in the popular bayside suburb of Brighton, at a time when the suburb was expanding, aided by the advent of the Sandringham rail line through the suburb from 1878.'

THE PERMIT APPLICATION

- 04.** On 7 February 2019, the Applicant applied to the Executive Director, pursuant to section 93 of the Act, for a permit to demolish the Place ('the proposed demolition').
- 05.** The Applicant submitted, in summary, that expert advice they had obtained had concluded that:
 - The Place presents as a serious health risk; and
 - no remediation effort can achieve both infection control and source removal other than by full demolition and disposal; and
 - the proposed demolition was the only method to make the site safe and remove the cross-contamination infection and allergen risks.
- 06.** The Applicant provided statements of evidence of experts in their respective fields which supported the Applicant's position and which the Applicant relied on in her permit application.

DETERMINATION OF THE EXECUTIVE DIRECTOR

- 07.** On 5 May 2019, the Executive Director refused to issue Permit Application No. P30408. The following reasons were provided by the Executive Director for the refusal:
 - *If the application were approved, it would result in the complete loss of all significant original built fabric and the cultural heritage significance of the place, contrary to the purposes of the Heritage Act 2017.*
 - *Only in exceptional circumstances would a permit be provided for the demolition of a state listed heritage place. The contamination issues have not been demonstrated to be unable to be reasonably and economically remediated, and I am not persuaded other exceptional circumstances apply.*

THE PERMIT REVIEW

- 08.** On 6 June 2019, the Applicant requested a review of the Executive Director's refusal to issue Permit Application P30408 and requested that a permit review hearing be conducted. Pursuant to section 108(4) of the Act, the Heritage Council must conduct a hearing in relation to the permit review if a hearing is requested by the Applicant.

- 09.** A Registrations and Reviews Committee of the Heritage Council ('the Committee') was duly constituted to consider and determine the matter and a permit review hearing was scheduled for two days on 12 and 13 August 2019.¹
- 010.** Following a request for adjournment made by the Executive Director and considered by the Committee, and following consultation by the Committee with other parties, the permit review hearing was adjourned and re-scheduled to be held over four days on 22, 23, 24 and 25 October 2019 ('the hearing').

PRELIMINARY AND PROCEDURAL MATTERS

FIRE, WATER AND OTHER DAMAGE TO THE PLACE

- 011.** The Place was damaged by a fire on 30 October 2015. On that date, immediately thereafter and subsequently, the Place experienced water ingress and further damage as a result of the fire and ash, firefighting efforts and exposure to the elements, as a result of which the interior of the Place has been and remains damaged and contaminated by fungi or mould.
- 012.** It is apparent that at some point between the October 2015 fire and October 2016 the Place's front support post, beam and some structural brickwork were damaged and removed from their original locations, which evidently has caused the front façade, part of the verandah, some of the timber roofing and other related structures to suffer extensive damage.
- 013.** The Place has been subject to some repair works, some efforts at rain proofing and other measures since the initial October 2015 fire and damage, including as a result of orders made by the Executive Director pursuant to the Act and its predecessor act. Some of the repair works were not timely enough in order to prevent further water damage at the Place and works have been inadequate in protecting the Place from water ingress. Neither tarpaulins placed over roof timbers nor a roof cover that was subsequently installed, without down-pipes, stopped water ingress. The Committee does not, however, propose to undertake an analysis of these works in respect of establishing degrees of causal link between the damage, inadequate repairs or protection and the current condition of the Place. The Committee's task is to consider the matters set out in section 101(2) of the Act in respect of the current condition of the extant Place.
- 014.** The Applicant received an insurance payment in April 2016 of \$1,528,000 in relation to the damage that had been sustained at the Place.

PREVIOUS PERMIT APPLICATION & PERMIT APPEAL AND HERITAGE COUNCIL DETERMINATION

- 015.** On 26 October 2016 the Applicant lodged an application (no. P25759) with the Executive Director requesting a permit for complete demolition of the Place, which was refused by the Executive Director on 3 February 2017.
- 016.** An appeal against this refusal and a request for a hearing was lodged by the Applicant on 2 March 2017, and following an adjournment the matter was ultimately heard by a

¹ The expression 'the Committee' is used throughout this decision of the majority of the Committee, for ease of expression and for convenience. The references to 'the Committee' do not, in every case, reflect the observations and conclusions of Mr Doyle, the dissenting member of the Committee. To the extent that the observations and conclusions of Mr Doyle differ from those of the majority, the substantive differences will be apparent in the dissenting judgement.

Permits Committee of the Heritage Council, pursuant to the *Heritage Act 1995*, on 3 July 2017.

- 017.** After considering all submissions received in relation to the permit appeal and after conducting a hearing the Heritage Council determined on 21 August 2017, pursuant to Section 76(4)(b) of the *Heritage Act 1995*, to confirm the decision of the Executive Director and refused to issue a permit for the demolition of the Place.

REASONS FOR 2017 HERITAGE COUNCIL DETERMINATION

- 018.** The Heritage Council's reasons for refusing to issue a permit for the demolition of the Place in 2017 were that it was not satisfied the permit should be issued because, in summary:
- from a structural perspective, a large proportion of the existing structure could be retained, or dismantled and reused in reconstruction; and
 - the evidence presented by the Appellant had not established whether and to what extent mould had penetrated the brickwork and other building materials; and
 - if penetration of brickwork and other materials with mould had occurred, it would not be unreasonable to establish whether any reasonable methods exist to remediate the mould and establish how those methods would materially affect the cultural heritage significance of the Place.

DE NOVO PERMIT REVIEW AND DETERMINATION

- 019.** The Committee's task is to conduct a de novo merits hearing, consider all evidence given and submissions made, and to make a determination, pursuant to section 108(8) of the Act, of the Executive Director's 5 May 2019 refusal to issue a permit for the demolition of the Place. The Committee must consider the matters set out in section 101(2) of the Act. The Committee is not bound by the previous hearing, submissions, evidence or the 21 August 2017 determination of the Heritage Council.

SITE INSPECTION

- 020.** On 21 October 2019, the Committee conducted a site inspection of the Place. Access to the Place was facilitated by the Applicant, as requested by the Committee, and was led by EnviroProtect Pty. Ltd. (the Heritage Council's Occupational Health and Safety Contractor in respect of access to the Place). The Committee was accompanied by the Heritage Council Hearings Manager. No submissions were sought or received at the time of the site inspection.

PLANNING SCHEME CONSIDERATIONS

- 021.** Some submissions and evidence referred to planning scheme considerations that may relate to the Place. The Committee has not found it necessary to refer to local planning considerations in making its determination and considers that it can make its decision independently of the local planning considerations relating to the Place. The Committee notes that the material it has considered in making its determination relates only to the permit review.

APPLICATION THAT A MEMBER WITHDRAW FROM THE PROCEEDING

- 022.** During the second day of the hearing and prior to the beginning of his verbal submissions, Mr Canavan made an application on behalf of the Applicant that it would be appropriate that Mr Robinson withdraw from the proceeding. Mr Canavan stated this should occur because Mr Robinson had sat on the permit appeal committee that determined the 2017 permit appeal and because:

- *'He cannot bring an open mind to these proceedings. Mr Robinson questioned every one of the witnesses [called by Mr Chiappi on behalf of the Executive Director] yesterday but each question was designed to improve the case of the [Executive] Director. We discussed it last night and decided to wait until Dr Jones' evidence, but then I copped a thirty-second death stare from Mr Robinson and decided the application should be made now.'*

023. After inviting submissions from others and adjourning, the Committee declined Mr Canavan's application. This decision was made on the basis that both the Chair, Mr Doyle, and the Committee were satisfied that Mr Robinson brought an open mind to the proceeding, and was capable of determining it fairly.

APPLICATION THAT NEW MATERIAL BE ACCEPTED

024. During the second day of the hearing and prior to the beginning of her verbal submissions, Professor Coleman made an application to table and have circulated a new written submission. After inviting submissions from others, the Committee ruled that the written submission would not be accepted or considered because it would not be procedurally fair, noting the requirement for all parties that written material be made available to others well in advance of the hearing.

LEAVE GRANTED TO MAKE FURTHER EVIDENCE AND SUBMISSIONS IN REPLY

025. At the conclusion of the third day of the hearing, the Committee granted a week's leave to the Executive Director for the preparation of further material in response to new issues raised during the examination of the Applicant's witnesses by counsel for the Applicant. The Committee also granted a week's leave to the Applicant to provide a response to that further material provided by the Executive Director, once received. The further information was received and considered by the Committee.

SUMMARY OF SUBMISSIONS

- 026.** The submissions of the Executive Director, relying on expert evidence, generally contended that the Committee should affirm the decision of the Executive Director, because on the evidence it is possible to return the mould/fungal ecology to a normal level and make the place habitable, because the Applicant has not demonstrated that remediation of the Place was not a reasonable proposition and that, since the proposed demolition would result in the total and complete loss of cultural heritage significance, demolition should be a last resort in the context of the purposes of the Act.
- 027.** The submissions of Professor Coleman, Ms Stegley and Bayside broadly agree with each other and with the submissions of the Executive Director in concluding that a permit for demolition should be refused.
- 028.** The submissions of the Applicant, relying on expert evidence, generally contended that the Place has been so thoroughly contaminated by hazardous mould, that the remediation of the Place and its return to a habitable state is not a reasonable proposition, that the only reasonable course to remediate the mould contamination and make the Place safe and habitable is the complete demolition of the Place, and that in any case the Place's cultural heritage significance has been lost due to the damage suffered to it.

CONFLICTS OF INTEREST

029. At the hearing, the Chair noted he had invited Committee members to make declarations, written or otherwise, in relation to any matters that may potentially give rise to an actual or apprehended conflict of interest. The Committee members were satisfied that there were no relevant conflicts of interests and made no such declarations.

030. A week after the hearing Mr Doyle circulated a declaration to the parties that, subsequent to the close of the hearing, he had received a request from Department of Environment, Land, Water and Planning (DELWP), which includes the office of Heritage Victoria, that Mr Doyle be engaged as a part-time secondee lawyer within DELWP for a duration of five weeks. Mr Doyle outlined some details of the nature of the proposed secondment, and gave certain relevant undertakings for the purpose of avoiding an apprehension of bias or conflict of interests. All parties were invited to comment on Mr Doyle's declaration and none objected to Mr Doyle continuing on the Committee.

SUMMARY OF ISSUES

031. The following sections are not intended to be a complete or comprehensive record of submissions that were made to, or evidence that was heard by the Committee. It is a summary of what the Committee considers to be the key submissions, evidence and issues followed by a discussion and the conclusions reached by the Committee.

032. The key issues for this review were identified as:

- The cultural heritage significance of the Place.
- The extent to which the proposed demolition of the Place would affect its cultural heritage significance.
- The extent to which the permit application, if refused, would affect the reasonable and economic use of the Place.

033. The Committee notes that there is substantial overlap in submissions, evidence and arguments as they relate to the above three key issues. While the Committee has endeavored to confine its discussion within appropriate sections of this determination, the document in part will reflect the overlapping nature of the issues and considerations.

CULTURAL HERITAGE SIGNIFICANCE OF THE PLACE

034. Preparatory to considering the extent to which the proposed works would affect the cultural heritage significance of the Place, a consideration of the basis and nature of the cultural heritage significance of the extant Place is appropriate.

Statement of Significance

035. Places in the Register typically have a Statement of Cultural Heritage Significance ('Statement of Significance').

036. The Statement of Significance for the Place is reproduced in paragraph 03 of this Determination.

Submissions and evidence

037. The Executive Director referred to the Statement of Significance in describing the significance of the Place and submitted that the consequences of complete demolition outweighed the effects of remediation and repair on the significance of the Place. The Executive Director submitted that the primary cultural heritage significance of the Place relates to its exterior architectural expression. The Executive Director, relying principally on the evidence of experts he engaged, submitted that the Place is structurally sound, can be restored without complete demolition and that the current contamination by mould does not irretrievably compromise the cultural heritage significance of the Place.

- 038.** Mr Lancashire gave evidence in relation to the structural soundness of the Place itself. When questioned by the Committee as to the long-term structural stability of the Place, given the extent of current damage, Mr Lancashire stated that the structure of the ground floor walls provide most of the structural stability for the Place, and, given the containment of the fire event to the upper storeys of the Place and also the English bond construction of the walls, the Place is still in robust condition and would require significant force to demolish today.
- 039.** Dr Coleman, Ms Stegley and Bayside each agreed substantially with the position taken by the Executive Director.
- 040.** The Applicant submitted that most of the cultural heritage significance of the Place has been ‘irreplaceably lost’ and that whether by a permitted demolition or by the refusal to issue a demolition permit the loss of the Place is unavoidable. It was submitted that should a permit be refused, an attempt to reconstruct the Place would result in a ‘facsimile of dubious heritage value, in all likelihood made entirely of replica materials’.
- 041.** Mr Raworth’s evidence was that ‘the original appearance, character, integrity and significance’ of the Place have already been ‘eroded to a substantial degree’ as a result of the fire, water damage and mould contamination, and his evidence was that its cultural heritage values cannot practically be recovered. Mr Raworth’s evidence as to the cultural heritage significance of the Place or the prospective significance of a reconstruction of the Place was given on the basis of briefings to him that, in relation to mould contamination, no remediation efforts other than complete dismantling or demolition would be effective. Mr Raworth’s evidence in that context was that cases of full reconstruction of similar buildings are rare, that there are few such cases in Victoria and that reconstruction of partially damaged buildings is more common. Mr Raworth considered that, in the case of complete demolition, archival documentation and interpretation would be a valid response.

Discussion

- 042.** The Committee recognises that, although it is arguable that Statements of Significance do not carry statutory weight, they have played a fundamental role in conservation management practice for some time and provide a key resource for understanding the significance of places and assisting with the management, protection and conservation of places. The Committee therefore considers that the Statement of Significance for the Place can assist in its task under section 101(2)(a) of the Act.
- 043.** It is clear that the Place has been substantially damaged by fire, soot, water and mould, which has contaminated the building, and that the building is not currently habitable. However, the extant built fabric (including the timber shingles and double brick walls) continues to retain and contribute to the cultural heritage significance of the Place from an architectural perspective. In the Committee’s view, the structure, form and floorplan of the Place continue to be able to be appreciated and understood to a large degree as identified in the Statement of Significance. The Committee finds also that the registered historical significance of the Place, including the association with John Horbury Hunt, has been retained despite the damage that has occurred to the Place.
- 044.** The Committee finds the evidence of Mr Lancashire as to the structural soundness of the Place to be persuasive and notes that limited evidence of substance was led by the Applicant as to the structural soundness and intactness of the Place. The Committee considers that, on the basis of its view that the State-level significance of the Place largely rests in its overall form and principally in its external fabric, as represented by the brickwork, timber shingles and other exterior building fabric, that the cultural heritage significance of the Place is intact and appreciable to a large degree as set out in the Statement of Significance.

- 045.** The Committee notes there are very divergent opinions on the feasibility of remediating the mould contamination of the Place. A more detailed discussion of the mould contamination and remediation evidence and issues will follow. The Committee notes, however, that the building appears to be structurally sound and records that the Committee has evidence before it arguing the Place can be returned to a habitable condition. On balance the Committee cannot presume that all or most of the Place's State-level significance has been lost.
- 046.** The Committee agrees with the Executive Director that the primary cultural heritage significance of the Place relates to its exterior architectural expression and considers that, despite the very clear mould contamination and current health risk presented by the interior of the Place, the cultural heritage significance of the Place is still intact and able to be understood and appreciated largely as per the Statement of Significance. That the Place is damaged or hazardous does not render it in the Committee's eyes a place devoid of cultural heritage significance.
- 047.** The Committee has not considered in detail the scenario in which the Place would be reconstructed in situ of substantially new materials. In the absence of detailed plans, the Committee would be hesitant to make a finding on the hypothetical cultural heritage significance of a hypothetical new structure or facsimile of the Place.
- 048.** On balance, the Committee finds there is evidence before it that the structure is sound and that, on the face of it, the damage to the Place could potentially be remediated, and does not agree with the Applicant's submissions that the cultural heritage significance of the Place has at this time been irretrievably lost.

THE EXTENT TO WHICH THE APPLICATION, IF APPROVED, WOULD AFFECT THE CULTURAL HERITAGE SIGNIFICANCE OF THE PLACE

- 049.** This section sets out the Committee's considerations under s.101(2)(a) of the Act.
- 050.** The Executive Director's first ground of refusal was that the proposed demolition, if approved, would result in the complete loss of all original built fabric and the cultural heritage significance of the Place, contrary to the purposes of the Act.
- 051.** The submissions of Bayside, Professor Coleman and Ms Stegley generally agreed with the decision and reasoning of the Executive Director.
- 052.** The Applicant's request for a review contended that the State-level significance of the Place is contingent on the method of remediation of the health hazards caused by mould contamination and that there is no evidence that the building can be remediated.

Submissions and evidence

- 053.** The Executive Director submitted, relying on the evidence of experts he engaged, that even if the mould is found to have contaminated the brickwork and within intact bricks, the Place can be reasonably and economically remediated and that because of the State-level significance of the Place, remediation is both an appropriate and wholly achievable course of action. The Executive Director submitted that there is substantial doubt as to the correctness of Dr Jones' opinions on the extent of the mould contamination within the bricks and submitted that, in any case, the relevant standards, the ANSI/IICRC S500 Standard for Professional Water Damage Restoration ('the S500') and the ANSI/IICRC S520 Standard for Professional Mould Remediation ('the S520') don't prescribe measures for the remediation of mould in bricks. Mr Chiappi put it that the inference should be that mould does not contaminate intact bricks and, in the Executive Director's view, there is no persuasive evidence as to the contamination by mould of the bricks. The Executive Director submitted that the tests should be set to one side because the experts he engaged provided evidence that there is nothing to support the notion of mould contaminating bricks, which are used because of their

impermeability. The Executive Director submitted the Committee should prefer the evidence of Dr Taylor that bricks contain no food for mould growth, and that if mould is present it would not be the species of mould that grow roots.

- 054.** Mr Lancashire's evidence as to structural integrity was that the structure of the ground floor walls provide most of the structural stability for the Place and that the Place is still in robust condition such that it would require significant force to demolish today.
- 055.** Professor Andrianopoulos' evidence was that fungal contamination is likely to have caused some damage to the Place, particularly to organic materials such as wood and plaster, but he acknowledged that he was not in a position to comment on how much structural damage has been caused by fungal decomposition and whether this has affected the structural integrity of the Place. Professor Andrianopoulos' evidence was that brick, mortar and other non-organic materials are unlikely to have been substantially affected by mould, given the species identified at the Place and also the alkaline nature of such materials, which is inhibitory to the growth of most fungal species. Professor Andrianopoulos gave evidence as to testing he conducted, which showed little to no fungal contamination that could be definitively confirmed on the inside of 4 bricks (those having previously been tested by Jones) that he tested and he expressed doubt about Dr Jones' findings. In reviewing the expert evidence relied on by the Applicant, Professor Andrianopoulos concluded that no compelling scientific evidence was provided to support the assessment that either current mould contamination or damage to the Place could not be remediated and there was no scientific basis for the presumption that the only course of action available to the Applicant is the complete demolition of the Place. During cross-examination, Dr Andrianopoulos said that it was possible that bricks in the Place did contain fungi, but he judged this to be extremely unlikely, and accepted that he was not a building remediation expert.
- 056.** Dr Taylor's evidence was that obvious fungal growth has occurred within most organic materials observed at the Place, causing structural damage to these materials. Dr Taylor also identified significant damage to the mortar of exposed wall surfaces; however, he stated that it is highly unlikely that significant damage has occurred to the structural walls of the Place as a result of biological causes. When cross-examined as to the presence of mould within the bricks, as identified in Dr Jones' 2018 report, Dr Taylor stated that, in his opinion, bricks do not provide a suitable environment for fungal colonisation. Dr Taylor's evidence was that bricks were the most studied building material of their type and that a literature review demonstrated there was no record of fungi colonising the interior of bricks themselves. Dr Taylor's evidence was that, as far as he was aware, there is scientific consensus that mould growth does not occur within intact bricks. Dr Taylor was asked about the literature review, which did not record an instance of fungi colonisation within bricks. Dr Taylor was unable to say whether or not any of those studies involved breaking intact bricks in two, as in Dr Jones' method, in order to test for the presence of fungi within them.
- 057.** Dr Taylor reviewed Dr Jones' 2018 method for testing for fungal growth within bricks taken from the Place and stated that insufficient steps had been undertaken to control for cross-contamination. It was the opinion of Dr Taylor that the likelihood of cross-contamination was very high in the circumstances of Dr Jones' sampling. Dr Taylor's opinion as to Dr Jones' method appeared to be based on the presumption the bricks were broken apart inside bags. Dr Taylor's evidence was that it is unlikely that any significant mould growth had occurred within otherwise intact bricks, and that any growth would not be significant. Dr Taylor concluded his evidence by saying that, in any case, that there is no scientifically sound basis to suggest, from a mould remediation perspective, that the place cannot be remediated. He stated that successful remediation of the Place can be achieved by way of the scope of works developed in conjunction with Mr Crew of Greencap, that such an approach would

result in a very low likelihood of subsequent human exposure to hazardous contamination, and that remediation would ensure the health of future residents of the Place.

- 058.** Mr Crew provided a written report in conjunction with Dr Taylor and gave verbal evidence at the hearing in relation to whether mould within the the Place can be successfully remediated. It was the opinion of Mr Crew that, following a detailed mould remediation process, the Place could be successfully remediated. Mr Crew proposed a 10-stage remediation process including upgrading the weather tightness of the building, debris and hazardous material removal, containment and high-efficiency particulate air ('HEPA') filtration, extensive mould remediation works, drying and heat treatment works, and reinstatement works. Mr Crew detailed that heat treatments and encapsulation would require materials to be heated to a minimum of 50 degrees celsius for a minimum of 16 hours and that, if sterilisation cannot be achieved through heat methods, a suitable fungicide should be injected into predesignated bore hole locations. All stages of the mould remediation process proposed by Mr Crew would require detailed assessment, evaluation and verification, to determine what structural materials can and cannot be remediated and ensure that the Place was returned to a normal standard of ecology.
- 059.** When questioned as to the use of heat treatment and subsequent encapsulation as a suitable method of mould remediation, Mr Crew stated that the use of fungicides should only be used if all other methods of sterilisation were unsuccessful and agreed that the use of the Place as a private residence should be taken into consideration when developing a method for the remediation of the Place. Mr Crew concluded that he was confident that the Place could be successfully remediated from a mould remediation perspective, so that it would no longer pose a risk to human health.
- 060.** Mr Vassallo's evidence was that mould and fungus has caused damage to the Place in the form of surface contamination, aerosolised contamination and severe dry rot. Mr Vassallo concurred with the evidence provided by Greencap, that no surface samples taken from within the Place indicated normal fungal ecology, with samples indicating both condition 2 (settled spore or fungal fragments) and condition 3 (actual growth) contamination as per the S520. In cross-examination, Mr Vassallo stated that he had conducted his assessment on the assumption that there was no mould within intact bricks. He also stated that he has no experience of injecting fungicide in bricks.
- 061.** Mr Smith gave evidence in relation to the estimated cost of remediating the Place to a habitable state and provided scopes of works for remediation of the Place, both as if works had occurred immediately following the fire event of 30 October 2015 and also for works to the Place in its current condition. Mr Smith's evidence was that the extant Place can readily be brought to a habitable condition.
- 062.** The Applicant, relying on the evidence of experts she had engaged, submitted that the bricks and mortar of the Place are infected with mould and cannot be remediated in situ, and that the cultural heritage significance of the Place has already been lost as a result, meaning that the effect of complete demolition on its significance would be negligible. The Applicant submitted that a permit refusal would result in the loss of the Place's cultural heritage significance because it would entail the reconstruction of a 'facsimile of dubious heritage value, in all likelihood made entirely of replica materials'. The Applicant argued, therefore, that the issue of a permit would not substantially affect the cultural heritage significance of the Place.
- 063.** Mr Raworth's evidence-in-chief was prepared on the basis of briefings to him that the experts retained by the Applicant had concluded only total demolition and reconstruction could remediate the damage and contamination at the Place. In those circumstances Mr Raworth's evidence was that the integrity of the Place would inevitably be greatly diminished and reconstruction would result in a substantially new

building or facsimile of the Place. Mr Raworth had also provided written evidence as to the method used for the brick removal and testing conducted by Dr Jones. Dr Jones also gave evidence in relation to some questions that had arisen during the course of the hearing about the method used.

- 064.** Dr Jones gave evidence as to testing he conducted on bricks, mortar and wall void surfaces at the Place, including testing he conducted to determine if cells had colonised the inside of bricks. In relation to each location type (within bricks; void area; mortar joints), Dr Jones' evidence was that the species diversity included fungi, yeasts and bacteria and that known mycotoxin producers were present in each location type. Dr Jones gave evidence that there are 'extreme levels of mould growth across and into all porous and semi-porous wall elements' of the brick walls of the Place, and that this 'complete colonisation' presents a serious health risk. Dr Jones' evidence was that he could not see any way to remediate the Place due to the unacceptable levels of viable mould, yeasts and bacteria in each location type he tested, including on or within the bricks. Dr Jones' evidence was that demolition and disposal is the best method to contain the site and remove health risks.
- 065.** At the hearing, Dr Jones gave verbal evidence as to the method for testing surfaces within individual bricks that had been removed from the walls of the Place. Dr Jones' evidence was that he was outside the Place but on the property as each brick was extracted; the void area was then swabbed, the brick removed by Mr Anthony Gavan (for the Applicant), taken outside by him and cracked open with a hammer blow. Dr Jones' evidence was that where water has initially permeated through a brick, it will open up along that fault line and that the initial break was to see what was present within the brick at its weakest point and how microbes had been able to take advantage of the fault line. Dr Jones' verbal evidence was that, despite doubts expressed by other experts at this hearing, the probability of cross-contamination (by mortar, plaster, air etc.) affecting the inside of the brick is negligible and not supported.
- 066.** Dr Jones' evidence at the hearing corrected a misapprehension that had developed through various documents, that in his testing the individual bricks had been broken open while inside a bag. Dr Jones gave evidence that the contamination he found could not be explained by aerosol action as had been suggested, or by contamination from the outside surface of the brick or from other nearby surfaces.
- 067.** Dr Jones' evidence was that, in testing bricks, evidence of moisture and mould contamination was clearly visible within the wall void, on surface of bricks and in mortar, and that it was one of the clearest examples of in-wall mould infestation he had seen. Dr Jones gave evidence that he had no confidence in either encapsulation or heat treatment and that some of the contamination was by thermotolerant micro-organisms. In relation to encapsulation as a preventative method, Dr Jones gave evidence that many events could compromise the encapsulant and that many types of mould and fungal spores could remain viable for many years. Dr Jones' evidence was that he would always have concerns about encapsulants degrading and that there would remain many pathways for microbes to pass out of the bricks to the air, including rainwater on exterior surfaces. In verbal evidence, Dr Jones agreed his evidence-in-chief comprised no photographic evidence of mould growth within the brick.
- 068.** Dr Neumeister-Kemp's evidence was that it is not possible to remediate the Place (in situ) to the extent that any unacceptable health risk could be avoided and that she would propose removal and destruction of contaminated soft and porous materials and dismantling and treatment off site of contaminated semi-porous and solid materials such as bricks. Dr Neumeister-Kemp's evidence was that the food source for fungi within the brick is the brick itself. Dr Neumeister-Kemp gave evidence that encapsulation is not a feasible or safe means of remediation, and that it is only possible if the material is dry and completely free of viable microorganism. In verbal evidence, Dr Neumeister-Kemp's evidence was that there is no fungicide known to have a 100%

kill rate for fungi and she does not consider that method to be viable. Dr Neumeister-Kemp stated her only visit was in 2017 and that she has not carried out any tests at the Place either then or since.

- 069.** Mr Cole gave evidence that his testing of the Place showed it to be 'bio-hazardous with the presence of extensive microbial growth', and that this entailed potential exposure to spores and mycotoxins and the presence of faecal coliforms. Mr Cole's evidence was that, given the extensive microbial growth throughout the Place, the Place should be disinfected and demolished, as it is unlikely to be safe to either remediate the Place to pre-existing condition or rebuild it safely to allow for re-inhabitation. During cross-examination, Mr Cole accepted that it is not necessary to remove all mould in its entirety in order to provide a safe residence, rather that it is recommended, and agreed that he was not a remediator of mould-affected buildings and had not attempted to kill mould, or use heat or fungicide himself.
- 070.** Mr Murphy's evidence was that the Place remains water damaged with mould contaminating built fabric throughout the Place and presents many immediate occupational health and safety hazards under Victorian Occupational Health and Safety Regulations (2017) including: partial or full collapse; exposure to microbial contamination prior to and during any works; and future occupants' exposure to microbial contamination if the Place were not remediated adequately. Mr Murphy's opinion was that remediating the brickwork in situ is unlikely to succeed and that demolition of the brickwork is recommended. He expressed the view that the method of treatment proposed in Mr Vassallo's scheme of works was unlikely to succeed because it would not achieve the specified temperature. Under cross-examination he acknowledged he had no experience of conducting such treatment.
- 071.** Mr Boak was engaged by the Applicant to provide evidence relating to the potential remediation of the Place from a contamination perspective, and his evidence relied on reports completed by the other expert witnesses engaged by the Applicant. Mr Boak's evidence was that only a full dismantling and rebuilding of the Place was feasible, and that a 'great portion' of the built fabric would require reproduction in that case. Much of Mr Boak's evidence referred to relevant industry standards of care, the S500 and the S520. Mr Boak's evidence was that to return the Place to a normal fungal ecology, 'complete disassembly' of the Place would be required due to the contamination 'present within cavities in the brick'. Mr Boak's evidence was that the overall principle of the S520 is that the physical removal of the contaminant should be the primary means of remediation and that this would result in a loss of 'likely 50% or greater' of structural materials due to losses anticipated by the method. Mr Boak's evidence was that neither deodorisation nor encapsulation would be effective. Mr Boak did not appear at the hearing and was not cross-examined.
- 072.** Mr Glaister's evidence was that he did not believe there is a safe and reliable means of remediating the mould at the Place given the extent of mould contamination. Mr Glaister also gave his opinion that encapsulation 'would not provide an adequate guarantee' of containing the mould contamination within the Place and that he would strongly advise against encapsulation due to the risk of ongoing health hazard. Mr Glaister did not appear at the hearing and was not cross-examined.

Discussion

- 073.** The Applicant is seeking a permit for, according to her submissions and evidence, the total demolition of the Place, a permit which would result in the loss of the entirety of the cultural heritage significance of the Place. There is no greater extent to which the cultural heritage significance of the Place can be affected.
- 074.** The Committee has considered greatly contrasting evidence on the question of whether or not the mould can be treated to make the Place habitable. The Applicant's

expert evidence generally says it cannot, that there is mould contamination within the bricks and cavities, and that once activated, the sources will always remain and always present a health risk. The evidence and submissions of the Applicant are that the Place would need to be reconstructed, and that taking it down and reassembling it would result in loss of the Place's cultural heritage significance.

- 075.** The Executive Director argues that the extent of mould contamination within the bricks is exaggerated because of a faulty method of testing and that any mould contamination present is by no means ineradicable. The Executive Director also provided through expert evidence a costed program of works he says would remediate the Place and bring it to a habitable condition.
- 076.** Evidence provided to the Committee did not include any examples of the remediation (in situ or otherwise) of the mould contamination of a building, or comparable examples of actual mould contamination of a building. Nor was the Committee made aware of a single instance, in Melbourne or otherwise, in which mould contamination (in and of itself) has been the basis for, or has resulted in, the complete and total demolition of a place.
- 077.** The Committee has to weigh the evidence as to extent of mould contamination and its health consequences, and the evidence as to the likelihood that remediation works, such as those proposed in the witness statements by experts retained by the Executive Director, would provide sufficient protection. The Committee finds that the expert evidence relied upon by the Executive Director has cast sufficient doubt on the evidence the applicant relied upon. Specifically, the Committee was not persuaded by Dr Jones' evidence as to hazardous levels of mould contamination within intact bricks. The Committee is persuaded by the evidence of Professor Andrianopoulos and Dr Taylor that there is sufficient doubt about the method used by Dr Jones and that it is more likely that a negligible fungal load was present (and is present) within intact bricks at the Place.
- 078.** On the evidence, the Committee is not convinced that mould, if indeed it has contaminated the inside of individual intact bricks, would present a long-term health hazard to any occupants of the Place, if remediation works such as those suggest by experts retained by the Executive Director were undertaken.
- 079.** The Committee notes that it has generally placed more weight on the evidence of the experts who appeared at the hearing as compared with the evidence of Mr Boak and Mr Glaister, noting that neither gave evidence or were available to be cross examined at the hearing.
- 080.** The Committee finds that the proposed demolition would adversely affect the cultural heritage significance of the Place by permanently removing its cultural heritage significance, and that, on the balance of evidence, the Executive Director's submissions as to the ability of damage to be remediated should be preferred to the Applicant's submissions that all such cultural heritage significance is already lost at the Place. The Applicant's submission that the cultural heritage significance of the Place is already irretrievably lost is not sustained.

THE EXTENT TO WHICH THE PERMIT APPLICATION, IF REFUSED, WOULD AFFECT THE REASONABLE OR ECONOMIC USE OF THE PLACE

- 081.** Section 101(2)(b) of the Act states that in determining whether to approve an application for a permit, the Executive Director, and under review, the Heritage Council, must consider the extent to which the Permit Application, if refused, would affect the reasonable or economic use of the Place.

- 082.** In submissions to this hearing several issues were in dispute relating to reasonable and economic use of the Place, the future and long-term reasonable use of the Place and the extent to which refusal would affect such uses.
- 083.** A brief account of submissions made and evidence led that relate to the broad question of the extent to which a refusal would affect the reasonable or economic use of the Place is given below.

Submissions and evidence

- 084.** The Executive Director submitted that the use of the Place as a residence is a reasonable use and agreed with the Applicant that the Place is presently uninhabitable. The Executive Director relied on the evidence of experts he retained in submitting that demolition is not necessary to maintain or revive the reasonable use of the Place. The Executive Director relied on the evidence of Dr Taylor and Professor Andrianopoulos in particular in submitting that it is very unlikely that the inside of intact bricks is contaminated to any great extent by mould, and relied on the evidence of Mr Smith, Mr Lancashire and Mr Vassallo in submitting that the Place can be restored largely to its former condition.
- 085.** Dr Taylor undertook sampling of mould and fungi at the Place on 16 August 2019 and gave evidence that there is no scientifically sound basis to conclude that mould contamination at the Place could not be remediated. Dr Taylor undertook a review of reports and statements of expert evidence provided on behalf of the Applicant. It was the opinion of Dr Taylor that there were insufficient 'fungal growth indicators, airborne spores, airborne hyphal fragments' to satisfy him there would be ongoing health risks and that insufficient supporting scientific evidence had been provided to the Committee to conclude that the Place, if remediated correctly, would present a risk to human health. Dr Taylor's evidence was that he did not think it possible for mould to colonise the inside of intact bricks but that, if it has, no pathways would exist from inside the brick out to the air. Dr Taylor's evidence was that the complete removal of all mould is never achievable as spores may always be present in air and on surfaces, that the successful remediation of the Place can be achieved by way of a scope of works developed in conjunction with Mr Crew of Greencap and that such an approach would return the building to a normal mould ecology and ensure the health of future residents of the Place.
- 086.** It was the evidence of Mr Crew that, following a detailed mould-remediation process, the Place could be successfully remediated. Mr Crew proposed a 10-stage remediation process including upgrading the weather tightness of the building, debris and hazardous material removal, containment and high-efficiency particulate air ('HEPA') filtration, extensive mould remediation works, drying and heat treatment works, and reinstatement works. All stages of the mould remediation process proposed by Mr Crew would require detailed assessment, evaluation and verification to determine what structural materials can and cannot be remediated and ensure that the Place was returned to normal fungal ecology. Mr Crew stated that the use of fungicides should be used only if all other methods of sterilisation were unsuccessful and agreed that the use of the Place as a private residence should be taken into consideration when developing the method for the remediation of the Place. Mr Crew concluded that he was confident that the Place could be successfully remediated from a mould-remediation perspective, so that it no longer posed a risk to human health.
- 087.** Professor Andrianopoulos gave evidence that none of the fungi detected at the Place were primary pathogens that can infect and cause disease in healthy humans, while acknowledging that allergic and infectious disease could be caused in susceptible individuals. It was the opinion of Professor Andrianopoulos that the presence of the fungal species that were found at the Place is insufficient to draw solid conclusions

about biological hazards to humans, concluding that the Place, in its current state, may be hazardous to some individuals, but not to others.

- 088.** Mr Vassallo gave evidence that remediation of the Place is possible, on the basis that it is demonstrated that no mould exists within intact bricks of the Place and stated that a deviation from the S520 standard is appropriate in the circumstance. Mr Vassallo described a deviation from the S520 would be required to kill any potential contamination within the bricks prior to encapsulation. Mr Vassallo detailed that the surface of the bricks would need to be decontaminated as per the S520, but advised that there would be no practical way to remove contamination, if it existed, from within intact bricks. A sealant would be required to be placed over the heat-treated bricks to ensure encapsulation of any remaining fungal material within the bricks. Ultimately, Mr Vassallo concurred with the 10-stage remediation process proposed by Dr Taylor and Mr Crew of Greencap, estimating the total cost of mould remediation-works at approximately AUD\$256,559.47 inclusive of GST.
- 089.** Mr Smith gave evidence in relation to the estimated cost of remediating the Place to a habitable state and provided scopes of works for remediation of the Place immediately following the fire event of 30 October 2015 and in its current state. The scope of works included building rectification works and the mould-remediation works proposed by Amtec in their documents dated 23 September 2019. Mr Smith's total estimate of remediation works for the Place, in its current state, was AUD\$723,125 including GST. During cross-examination by Mr Canavan, Mr Smith's evidence was that while his estimates for remediation of the Place included mould remediation for the external surface of the walls, including the bricks and mortar, he had not provided costing for the remediation of the inside of intact bricks as he had relied on the evidence of Dr Taylor and Mr Crew that mould cannot be sustained within intact bricks.
- 090.** Mr Lancashire's evidence was that, despite the current condition of the Place, in his opinion the temporary propping and bracing currently in place has stabilised the Place to such an extent that rectification and repairs could be undertaken in a safe manner and are technically and practically feasible to undertake. It was also the opinion of Mr Lancashire that sufficient structural building fabric remains in good condition at the Place, and that there is no structural or building or occupational health and safety reasons to order demolition of the Place. Mr Lancashire advised that the Place could be repaired in a systematic manner and be successfully restored for human occupation. When questioned by the Committee as to the long-term structural stability of the Place given the extent of current damage, Mr Lancashire stated that the structure of the ground floor walls provide most of the structural stability for the Place, and that the Place is still in robust condition.
- 091.** The Applicant is seeking a permit for the total and complete demolition and removal of all built fabric which constitutes the Place. The Applicant's argument is that it would not be reasonable to refuse a permit for demolition as the evidence shows the Place is and will remain an uninhabitable health hazard. The Applicant submitted that a refusal to issue a permit would affect the reasonable use of the Place as a residence to a fundamental extent. The Applicant's submission is that the Place is a hazard to human health, will remain so and cannot be remediated, made safe or safely inhabited by humans as a residence. The Applicant submitted, relying on the consensus of qualified experts it retained, that the Place cannot be reasonably and economically remediated due to the high levels of contamination by mould of virtually all fabric at the Place.
- 092.** Dr Jones' evidence was that there was no way to remediate the Place due to the unacceptable levels of viable mould, yeasts and bacteria in each location type he tested, including within intact bricks, and that demolition and disposal is the only method to contain the site and remove all health risks.

- 093.** Mr Cole noted the presence of black mould and *Stachybotrys* to be of particular concern due to the serious health risks posed. In relation to future health hazards, Mr Cole's evidence was that the Place is so extensively contaminated that mould spores 'may remain dormant for months or even decades, then trigger germination and growth, when conditions become favourable', and that future microbial growth means remediation is not possible. Mr Cole gave verbal evidence that, eight months after Dr Jones' testing, his testing of a single brick that Dr Jones had stored in a bag showed relatively lower concentration of mould and different mould ecology than had Dr Jones' tests. Mr Cole's evidence was that encapsulation was not a solution and that it was physically impossible to sterilise the brickwork at 50 degrees celsius as proposed by the plan of remediation works recommended by Mr Crew, Dr Taylor and Mr Vassallo.
- 094.** Mr Murphy's evidence was that the Place remains water damaged with mould contaminating built fabric throughout the Place and presents many immediate occupational health and safety hazards under Victorian Occupational Health and Safety Regulations (2017) including: partial or full collapse; exposure to microbial contamination prior to and during any works; and, future occupants' exposure to microbial contamination if the Place were not remediated adequately. Mr Murphy's opinion was that remediating the brickwork in situ is unlikely to succeed and that demolition of the brickwork is recommended. In response to questions put to him by Ms Collingwood, Mr Murphy described Mr Vassallo's proposed heat treatment methodology as a deviation from the guideline and encapsulation as 'absolute nonsense'. Mr Murphy accepted that the S500 makes no reference to the treatment of mould within intact bricks but stated that, although he would not be comfortable with a deviation from the S500, if mould was to be treated within intact bricks some deviation may be required from the S500 because it calls for the application of 'common sense'. Mr Murphy's evidence was that the only cases of which he was aware where mould was within bricks were in relation to Dr Jones' report and one other building he had recently been involved with. Mr Murphy stated that he had no issue with the use of heat treatment proposed by Mr Vassallo, to dry a building, but that it would not be appropriate or feasible to heat the brickwork and cavity at the Place to 50 degrees celsius.
- 095.** Dr Gilbert was requested by the Applicant to review reports prepared by some of the experts retained by both the Executive Director and the Applicant, including those of Dr Jones, Dr Neumeister-Kemp and Professor Andrianopoulos. Dr Gilbert did not enter the Place or perform testing. Dr Gilbert's evidence in chief was that there is substantial doubt and poor evidence that remediation, detoxification of brickwork and alleviation of hazards to human health can be achieved without the demolition of the Place. In Dr Gilbert's evidence in chief he stated that there is strong evidence for the health risk to humans in relation to respiratory and possibly other diseases and that the Place would remain a risk to human health.
- 096.** During cross examination, Dr Gilbert conceded that, contrary to his evidence in chief, there was no causal link between the presence of *stachybotrys* (a genus of mould) and the infant deaths he had referred to. Following further questions from Mr Doyle, Dr Gilbert stated it was not his intention to mislead, apologised and retracted that evidence. Dr Gilbert also accepted during cross examination that whereas he had asserted that a European study he referenced demonstrated the continuation of respiratory disease in humans following mould remediation works, the same reference in fact contradicted Dr Gilbert's assertion and in fact demonstrated a positive correlation between the completed remediation works and human health outcomes (i.e. that remediation works had resulted in improved outcomes in that study). Dr Gilbert agreed that his evidence as to health risk largely related to the current condition of the Place rather than to a potentially remediated condition and also accepted that his asbestos remediation example was a study of an example of a botched effort at removal rather than being about asbestos remediation in general.

Discussion

- 097.** The Committee accepts that the use of the Place as a residence is a reasonable one and recognises that the Place is not currently able to be inhabited as a residence due to its condition, the mould contamination and associated health risks.
- 098.** The Committee notes the lack of informative or persuasive evidence as to the hazards to human health posed by current and potential future levels of mould contamination. While Professor Andrianopoulos, Dr Taylor, Dr Jones, Dr Neumeister-Kemp and others provided some evidence as to health effects, they are not public health professionals or medical doctors who specialise in diagnosis or treatment of mould-related conditions.
- 099.** The Committee notes the substantial disagreement among the parties to the hearing as to the extent of the health risk at the Place. The Committee finds that, in relation to the reasonable use of the Place as a residence, the evidence has not shown that the health dangers cannot be remediated. In the absence of such evidence, the Committee cannot justify a permit for demolition. In the absence of evidence demonstrating this conclusively, the Committee is of the view a permit for demolition cannot be issued. The evidence presented to the Committee did not establish the proposition that a degree of human health risk would definitely exist after a program of successful remediation. The Committee does not feel it necessary to be certain about the degree, percentage or likelihood of health risk, but is not persuaded in any case that an unreasonable health risk to a future occupant has been demonstrated.
- 0100.** Neither Dr Gilbert's evidence nor his approach to the development of his evidence was of assistance to the Committee. Dr Gilbert apologised for misleading statements he made in his evidence in chief. Elements of his evidence were also otherwise unhelpful to the Committee in understanding the health hazards posed by mould contamination. Few other witnesses were able to shed much light on the issue.
- 0101.** Dramatically different conclusions were given to the Committee on some of the issues before it, specifically the presence of mould within intact bricks, the behaviour of that mould and the ability to remediate mould contamination. The Committee was provided with starkly differing conclusions on these points and the only detailed evidence it heard as to a prospective program of remediation works came from experts retained by the Executive Director. The Committee prefers the evidence of Mr Crew, Dr Taylor, Mr Smith and Mr Vassallo in finding that the remediation of mould contamination at the Place is a reasonable course of action with a reasonable prospect of success.
- 0102.** The Committee agrees with the Executive Director's submission that the Applicant has not provided sufficient information to demonstrate the reasonableness and necessity of complete demolition of the Place in order to make reasonable use of the Place. The evidence of professionals retained as experts by the Executive Director, qualified to plan and cost remediation works for issues such as those at the Place, has persuaded the Committee that the repair and remediation of the Place for use as a residence is a reasonable proposition.
- 0103.** Preferring the evidence of the experts engaged by the Executive Director, including Professor Andrianopoulos, Dr Taylor, Mr Crew, Mr Smith and Mr Lancashire, the Committee finds that the Place can be returned to a normal fungal or mould ecology and a safe and habitable condition by way of a reasonably costed program of mould remediation and structural works. The Committee is persuaded by the evidence of Dr Taylor, Mr Crew, Mr Smith and Mr Lancashire in particular in determining that a permit to demolish the Place should be refused.
- 0104.** The Committee is of the view that the Register contemplates that private owners will reside in heritage places, and that they will be the custodians of properties of a variety of conditions or states of repair. The Committee notes that the Act does not contemplate that the State or some other authority would necessarily bear the cost of

remediation of a building in poor or very poor condition. The Committee is of the view that to reside in a registered place may, at different times, have some advantages and some disadvantages. The Committee does not ignore the burden that some places, including the Place, can at times cause private owners. Rather, the Committee points out that the Register is a register of places and objects of a State-level of cultural heritage significance, and different considerations apply to them and different controls and conditions apply to their owners and managers. In the present case the owner purchased the Place knowing it was on the Register and subject to its controls and conditions.

- 0105.** The Committee was not satisfied that refusal of a permit for demolition would affect the economic use of the Place. The Applicant did not provide evidence to establish that, after a successful program of remediation, the future use of the Place as a residence would not be economic, given both the significance of the Place and its use as a residence. The Committee notes, generally speaking, that the cost of remediation may exceed that of a new construction in that building footprint, and notes the potential for the overall cost of remediation in this case (including as a result of damage dating to October 2015) to exceed the Place's value. Those prospective overall costs to the Applicant, however, would not all necessarily flow from a refusal to allow demolition in this instance, and are not all necessarily relevant in the terms of section 101(2)(b). On balance, the Committee finds there is strong evidence to suggest that the Place, which is a residence, can be returned to habitable condition as a residence. The Committee is therefore not satisfied that the refusal to issue the permit would affect the future economic use of the Place as a residence.
- 0106.** The Committee finds that insufficient evidence was provided to satisfy it that the future and long-term reasonable or economic use of the Place for residential purposes would be affected, to an unreasonable extent, by a refusal to issue a permit for demolition.

APPLICATION OF SECTION 102(2)(f)

Submissions and evidence

- 0107.** All parties made submissions on matters relating to the protection and conservation of the Place. The Executive Director considered the failure of the Applicant to maintain the Place to be a matter relating to its protection and conservation. In his refusal of the permit application and in submissions (also relying on the evidence of experts engaged), the Executive Director alleged neglect on the part of the Applicant in respect of certain responsibilities under the Act, arguing that the Applicant should not benefit from the purported inaction. In submissions, the Applicant denied any wrongdoing and rejected the Executive Director's submissions.

Discussion

- 0108.** The Committee does not propose to undertake a detailed examination of the issues that led to the current condition of the Place or of the conduct of the Applicant. It is clear to the Committee that more work could feasibly have been undertaken to protect and conserve the Place in the years since the fire, even if some of such works would have gone beyond what was strictly required by the Act. The Committee does not, however, consider the matters raised in respect of section 102(2)(f) to be relevant to its determination of this matter.

CONCLUSION

- 0109.** The Committee accepts that the Place is currently uninhabitable and finds that, in order for the Place to be occupied as a residence again, extensive and costly remediation works would have to be undertaken.

- 0110.** The Committee notes that the Executive Director and the Applicant disagree on many issues fundamental to the protection and conservation of the Place in its current condition. The Committee does not consider it possible to give the Applicant absolute certainty in relation to the possibility or probability of returning the Place to one of a normal mould ecology for a residence. That is not the Committee's role.
- 0111.** Once demolished, the cultural heritage significance of a place in the Register is ineradicably lost. The Committee considers it reasonable in the event of the damage or contamination of a registered place that, at the very least, serious investigations would begin in respect of a remedy.
- 0112.** The Committee disagrees with the submissions and the evidence of the Applicant that there is no possibility that the Place can be remediated. The Committee is instead convinced by the argument and evidence of the Executive Director that the suggested plan of staged remediation works, if undertaken, would result in the Place being remediated and returned to an inhabitable state. The course of action suggested by the Executive Director was costed and is feasible within the amount provided by the insurance payout. The Applicant provided no alternative costed proposal, merely submitting that the prospect of remediation was beyond reason.
- 0113.** The Committee recognises that it is beyond its power to direct the Applicant to undertake staged remediation works, but the Committee's view is that a course of action along the lines of that proposed and costed by experts retained by the Executive Director, should have already been undertaken, and should now begin to protect and conserve the Place. If, during the staged approach to that remediation work, it becomes clear that there is little chance of success in relation to remediating the damage and mould contamination at the Place, then it may clearly be reasonable for the Applicant to consider a different approach.
- 0114.** The Register is the highest level of recognition within the State of Victoria for places of cultural heritage significance. The key purpose of the Act, in terms of the establishment of the Register and the management of registered places, is the protection and conservation of the cultural heritage of the State. It is the Committee's view that to permit the complete and irretrievable demolition of a registered heritage place, and therefore the total and permanent loss of its cultural heritage significance to the State, should be a last resort, even in exceptional circumstances, including in cases where there has been clear damage, contamination and deterioration at a place.
- 0115.** It is clearly not the view of the Committee that no destruction or dismantling can occur at the Place, as the Committee agrees with the Executive Director that some destruction and dismantling would be required to remediate the Place to such a degree as to make it safe for habitation. However, the total and complete demolition of the Place is proposed and the irretrievable impact of this on the cultural heritage significance of the Place is not able to be supported, even having regard to the submissions and evidence relied on by the Applicant in relation to the considerations of section 101(2)(b).

DETERMINATION

- 0116.** After considering all written and verbal submissions and evidence received in relation to the permit review, and after conducting a hearing pursuant to section 108 of the *Heritage Act 2017*, the Heritage Council has determined, pursuant to section 108(7)(a), to affirm the determination under review and refuse to issue Permit No. P30408 in respect of the residence at 38 Black Street Brighton, also known as Spurling House.

ATTACHMENT 1

MINORITY JUDGEMENT – Mr Patrick Doyle

01. Unlike the Majority, I was persuaded that the appropriate course was to set aside the determination under review and to issue Permit No. P30408, thereby allowing the demolition of Spurling House, Brighton.
02. I would have issued the permit subject to the conditions put forward by the Executive Director (on a 'without prejudice' basis). Those conditions would have required an archival recording of the Place, and an application to remove the Place from the Register.
03. I have had the benefit of reading the decision of the majority of the Committee ('the Majority'). That decision sets out the relevant factual background to my satisfaction, as well as the preliminary and procedural matters. It is not necessary for me to repeat any of that material. I also share most of the Majority's observations in relation to the evidence. To the extent that my observations or findings differ from those of the Majority, this Minority Judgment seeks to make my own position clear.
04. At the heart of this case is the balance to be struck between section 101(2)(a) and (b). Sub-section (a) requires consideration of the extent to which the application, if approved, would affect the cultural heritage significance of the registered place. Sub-section (b) requires consideration of the extent to which the application, if refused, would affect the reasonable or economic use of the registered place.
05. The way that I seek to strike that balance is the fundamental difference between my analysis and the reasoning of the Majority. I was satisfied that the effect on the reasonable or economic use of the Place that would be occasioned by the refusal of the Application outweighed the effect on the cultural heritage significance of the Place occasioned by the grant of the permit. In other words, the refusal of the Application is a disproportionate price for the Applicant to pay, for the sake of the broader public interest in maintaining the heritage values of the Place.

ISSUES OF AGREEMENT AND ISSUES IN DISPUTE

06. As is often the case in a contested hearing, there was considerable focus on the issues in dispute.
07. However there are many significant issues which were either agreed as between the parties, or at least not the subject to substantial dispute. Those issues include:
 - That mould, in some form, is omnipresent in modern human environments, and cannot be eradicated or eliminated.
 - That mould contamination or infestation, beyond what may be regarded as 'normal mould ecology', poses a health risk to humans, including risks to the respiratory system, and that these risks are heightened in respect of children and immuno-compromised people.
 - That the building is significantly contaminated by mould, including extensive mould proliferation in cavities between and behind bricks, and including

within the mortar between the bricks, and also within bricks themselves (to a lesser extent).

- That the level of mould contamination currently evident at the Place is well beyond 'normal mould ecology', and would pose a health risk to humans inside the building who do not take precautionary steps such as protective clothing.
 - That any future beneficial use of the building, e.g. as a dwelling, would necessitate a remediation program undertaken by experts to resolve the mould contamination.
 - That any remediation program would involve the removal and replacement of most, if not all, internal plasterboard and much timberwork.
 - That the brick walls, of 'English bond' construction, are structurally sound.
 - That the heritage significance of the Place largely relates to the exterior of the building, including its appearance.
 - That the Place would be capable of retaining its heritage significance so long as the 'English bond' brick wall did not need to be demolished or dismantled.
 - That the heritage significance of the Place would be significantly eroded or lost if that brick wall was to be substantially demolished (as opposed to dismantled and reconstructed).
- 08.** For the purpose of determining this matter, it is very helpful that there is broad agreement, or at least lack of serious dispute, in respect of several relevant considerations in this case, particularly those listed above.
- 09.** This leaves the following broad areas which remained the subject of dispute as between the parties:
- How serious are the health risks associated with mould contamination?
 - To what extent is mould present inside the bricks?
 - Could the building interior be returned to a normal mould ecology, therefore safe for normal human use or habitation?
 - What processes or program of works would be required to return the interior of the building to a normal mould ecology?
 - What would be the associated cost?
- 010.** These broad areas of dispute include specialised or technical considerations. The Committee had the considerable advantage of extensive expert evidence called by both the Executive Director and the Applicant. However, in many instances the approach, analysis and conclusions of the respective expert witnesses was starkly different. This makes it difficult for the Committee to make conclusive determinations in respect of many of these issues.
- 011.** To illustrate this, I make an example of the evidence in relation to whether it is possible for mould to colonise the inside of bricks. The Applicant's witnesses are unequivocal that mould can and does infest the semi-porous interior of brickwork in the right environmental conditions (i.e. dampness). The Executive Director's witnesses are confident that mould does not subsist inside bricks – that the conditions inside bricks are inhospitable, even hostile, to mould growth. All witnesses expressing opinions on this question appeared to be highly qualified and experienced in the specialised field of mycology, yet their relevant expert opinions in relation to this important question were divergent.

- 012.** A related difficulty also arises, not just from the fact that the respective expert witnesses held widely disparate opinions, but also from my difficulty in understanding the basis for those divergent opinions. This is not intended as a criticism of the expert witnesses either collectively or individually. It is, however, a reflection of one of the unusual circumstances of this case.
- 013.** I again seek to illustrate this point by way of an example, this time in relation to the possibility of remediation of a building severely affected by mould. The Applicant's relevant witnesses deny that it is feasible to remediate the mould problem afflicting the building. They were not able to identify any example where this kind of remediation exercise had been attempted in comparable circumstances, with or without success, anywhere in the world. Nor were they able to identify any example where any building – anywhere in the world – was so badly affected by mould that it necessitated demolition. On the other hand, the Executive Director's witnesses are quite confident in their opinion that the mould problem can be adequately remediated, and they are also confident – albeit to a lesser degree – as to how it can be achieved. However, they are not aware of any similar mould remediation exercise having been undertaken in comparable circumstances – whether successfully or unsuccessfully – anywhere in the world. It is inevitable that other buildings throughout history have been infested by mould. Is this kind of remediation program uncommon because it is doomed to failure? Or, if mould infestation is not known to have necessitated the demolition of buildings, is this because it is relatively easily remediated?
- 014.** The Committee functions as an expert tribunal, and its constituent members are able to bring their own expertise and experience to questions such as these. However, from my perspective, the highly technical nature of some of the matters in dispute, as well as their apparent novelty, makes it difficult to make conclusive determinations in the absence of a clear basis for doing so.
- 015.** My inclination therefore is to attempt to determine this appeal firstly by reference to what seem to be the uncontested facts, and secondly by reference to the extent of uncertainty that applies to those other relevant matters. That is to say, I regard *the fact that there is uncertainty* in relation to some important questions to be a significant fact in itself. I am then inclined to resist seeking to determine the more difficult questions in dispute, except to the extent that I consider it necessary to do so, in order to responsibly determine the matter.

MY FINDINGS IN RELATION TO THE EVIDENCE IN DISPUTE

- 016.** In terms of characterising the nature and extent of health risks associated with mould, the relevant expert evidence was divergent. On the one hand, Professor Andrianopoulos was notably sanguine, whereas other relevant witnesses, even some called by the Executive Director, were more cautious. On the face of it, given that he is a medical doctor, as well as a public health physician, the evidence of Dr Gilbert might be expected to have been of greater assistance than others. However, as revealed under cross-examination by Mr Chiappi, Dr Gilbert's evidence included a number of statements that can only be described as misleading. I do not know whether this was intentional, but in any case I am unable to place any reliance on Mr Gilbert's evidence to the extent that it differs from that of other witnesses with expertise in relation to human health and mould. I am ultimately unable to reach any determination beyond what was effectively common ground: that mould contamination beyond 'normal mould ecology', poses a real health risk to humans (not to all humans, but to many).
- 017.** Turning to the next main controversy, I have been persuaded that there is an unusually high incidence of mould inside many of the bricks of the building, including within fissures in bricks. The primary evidence in this regard is that of Dr Jones. The Executive Director, including through his witnesses, questioned the Dr Jones' method of testing, and therefore the validity of his results. However, noting Dr Jones'

qualifications and experience as a mycologist, I am not persuaded to doubt his results or conclusions. I note that one of the Executive Director's own witnesses, Professor Andrianopoulos, conducted his own testing and also confirmed the presence of mould inside freshly opened bricks, albeit at lower levels than those found by Dr Jones. I do not intend to canvass the various explanations for their different results. Dr Jones' evidence included photographs of mould in small cavities within the English bond brick wall. Those cavities had been effectively sealed within the wall until they were revealed by the removal of bricks for the purpose of testing. The presence of mould in those cavities was extensive and elaborate. From my non-expert perspective, those displays of mould within what had been relatively small internal wall cavities helps to satisfy me that mould has similarly found a way inside bricks, presumably via fissures or pores, via whatever avenues water has been able to enter those bricks. The Committee was also provided an academic paper attesting to the ability of mould to subsist inside bricks and mortar. I am persuaded that the mould presence within the walls – including within bricks, within mortar and within cavities – is extensive and unusual.

- 018.** The remaining controversies all relate to the possibility of remediation of the building, including whether it is possible, if so by what means, and at what cost. I remain uncertain in relation to many of these fundamental questions. The Executive Director relied on the evidence of Mr Crew and Mr Taylor, who together took responsibility for the Greencap 'Remedial Scope of Works'. Those experts accepted the need to undertake remediation in respect of any mould within bricks, and their primary recommendation was a method of heat treatment of the bricks *in situ*. In the event that heat treatment was found to be unsuccessful, they then recommended injecting fungicide into affected bricks. In the event that fungicide was found to be unsuccessful, they then recommended encapsulating the bricks by means of some kind of applied membrane, intended to prevent mould, surviving within the wall, from entering the human environment inside the building. The Applicant's relevant witnesses explained various reasons that gave them no confidence as to the efficacy of any of these cascading interventions. Ultimately I am left in considerable doubt as to whether any of the recommended means of remediation would or could work. I cannot definitively find that they will not work; however, nor am I persuaded that they will work. To my mind, the possibility of satisfactory remediation remains a topic of inherent uncertainty. Consequently, the cost associated with any such remediation measures remains unknown, along with the time and effort that might be required.

ANALYSIS AND REASONING

Effect of approval on the Cultural Heritage Significance of the Place

- 019.** Like the Majority, I do not agree with the Applicant that the cultural heritage significance of the Place is already irretrievably lost. As long as the external architectural expression of the Building remains discernible, its recognised State-level heritage values are likely to persist. Perhaps unlike the Majority, I consider that those values are currently diminished to a minor extent, as it is harder to appreciate the building in its current damaged and neglected state, although that diminution may be reversible.
- 020.** I also agree with the Majority that the approval of the Application would result in the loss of the entirety of the State-level cultural heritage significance of the Place.
- 021.** However section 101(2)(a) requires a further analytical step, in my opinion. I consider it necessary to have regard to the nature and extent of the persistent cultural heritage significance of the Place, in qualitative terms. It is only by understanding the quality and nature of the Place's cultural heritage significance that an informed judgement can be made as to nature and extent of the relevant heritage 'loss', for the purpose of that provision. The demolition of a registered building will usually result in the absolute loss

of its State-level heritage significance, yet the extent of that loss will vary from building to building, so a more sophisticated judgment will be required.

- 022.** Like the Majority, I find the Statement of Significance to be an informative explanation of the heritage values of the Place that were recognised at the time of that statement.
- 023.** Mr Raworth, on behalf of the Applicant, was the only witness with heritage expertise. Mr Raworth adopted the Statement of Significance and did not give evidence that departed from it, in terms of identifying the prevailing heritage values. I have no basis to reach any other conclusion in relation to the heritage values of the Place.
- 024.** Accepting that the Place, in its current state, meets the threshold of State-level recognition, that does not mean it has the same degree of heritage significance as every other place that is included in the Register. Of course the Register does not admit different gradations of heritage significance. However logic and experience both dictate that some places (and objects) on the Register will be more valuable than others, in heritage terms. The loss of a more valuable place represents a greater heritage impact than the loss of a less valuable place.
- 025.** The heritage significance of the building is not necessarily obvious. At its lowest, the building might be regarded as a mere curiosity, and one unlikely to capture the popular imagination. However its design is truly surprising, particularly once its early vintage is understood. Accepting that the Place meets the very high threshold for inclusion in the Register, I am also inclined to think that it may rise somewhat above that threshold, relative to other places on the Register, mainly by virtue of being remarkable for its time.
- 026.** I therefore find that the Application, if approved, would have a very high impact on the cultural heritage significance of the Place.

Effect of Refusal on the Reasonable or Economic Use of the Place

- 027.** Refusal, in the first instance and for an unknown period of time, will effectively maintain the status quo, in terms of the use of the Place. The Place cannot realistically be used for any beneficial purpose at present. The Applicant (who is also the owner of the Place) might not use the Place at all for a period of time, and the Applicant might conceivably have no real choice in that regard. Leaving valuable land unused should, in itself, be regarded as an economic cost.
- 028.** In order for the Place to be used in any beneficial way, the building would need to be either demolished or entirely renovated, including mould remediation. The refusal of the Application eliminates the possibility of demolition, leaving renovation (and remediation) as the necessary course for the Applicant to seek to establish a beneficial use (presumably as a dwelling). The cost associated with remediation would clearly be substantial (estimated by the Executive Director at over \$1.1 million). Further, for the reasons given above, the full cost of remediation cannot be known at this time. The scope of works, cost, and timing, may all continue to increase over time as the process is undertaken, particularly if the task proves to be more difficult than the Executive Director's relevant witnesses anticipate. No assurance can be given in terms of maximum cost, time or effort that may ultimately be required.
- 029.** In the best-case scenario, mould remediation of the building would be a complex and expensive project. Potential worst-case scenarios would be considerably worse. If remediation proves more difficult once the project is underway, the project would require more time and effort, and become even more expensive, without any assurance of eventual success.
- 030.** On the other hand, approval of the Application would have enabled the Applicant to embark upon the course of redeveloping the Place. The submission of Bayside City Council included reference to relevant provisions of the Bayside Planning Scheme. By

virtue of that Planning Scheme, as well as the size and locational attributes of the land, some form of redevelopment of the site seems feasible and attractive. It is arguable that s 101(2)(a) of the Act should encompass the opportunity cost equivalent to loss of profit associated with a hypothetical, but feasible, redevelopment of the Place, as a result of refusal. No submissions were made in relation to this kind of opportunity cost, and I do not make any findings in relation to that interpretation.

- 031.** Confining my consideration by excluding that kind of opportunity cost, I am persuaded that the refusal of the Application would in any event have a very high impact on the reasonable and economic use of the Place, either by necessitating an expensive and complex mould remediation program (as part of an overall renovation of the building), or by continuing to prevent any beneficial use of the Place at all. I am unable to quantify that impact either in financial or other terms, because I do not believe the total cost can yet be known with any confidence.
- 032.** Before leaving this topic, there is also a question in my mind as to whether the psychological cost of refusal should also be considered, as another kind of effect on the reasonable or economic use of the Place. Several acknowledged experts engaged by the Applicant, but all professing professional independence, have given evidence that the proposed mould remediation methods simply will not work. Is it reasonable that a person in the Applicant's position should be indirectly coerced to nonetheless undertake those very mould remediation methods? Further, even after the mould remediation and broader renovation is complete, is it reasonable for the Applicant, or any future occupant of the building, to live with an underlying doubt as to whether the remediation had truly been effective? Would it be reasonable for any occupant to live in hope that any unusual level of moisture in the building will not result in a sudden and potentially dangerous proliferation of mould within the domestic environment? These aspects of the Executive Director's position cause me concern, although I am content to exclude them from my assessment pursuant to s 101(2)(b) of the Act.

Balancing the competing considerations

- 033.** As indicated at the outset, the determination of this permit review depends on the balancing of section 101(2)(a) and (b). Having explained my relevant findings on the evidence, and having described both the heritage 'loss' occasioned by approval, and the effect on the reasonable or economic use of the Place occasioned by refusal, it is now necessary to strike that balance.
- 034.** The relevant officer's report to the Executive Director included the statement that approval:
- ...would not be countenanced for any [place] in the [Register] unless all other options had been explored to finality and found to be impossible to implement...*
- 035.** The second ground of refusal was in similar terms:
- Only in exceptional circumstances would a permit be provided for the demolition of a heritage building. Where demolition has been approved by HV in the past it has usually been due to irremediable structural or other issues. Such issues have not been demonstrated to be irremediable in the Application.*
- 036.** The Executive Director's hearing submission includes similar passages, directed against approval of demolition '*unless all other options have been explored to finality and found to be impossible to implement.*
- 037.** The Applicant's hearing submission included:

On no reasonable view does the Act require a permit applicant to embark on every imaginable, untested method, no matter how elaborate, expensive and ultimately fruitless...

- 038.** I also take issue with the Executive Director casting this question in such absolute terms. I accept that it is, and that it should be, unusual to approve the demolition of a building that is included on the Register. However such permission may be legitimately sought pursuant to the Act. When sought, any such application must be determined in accordance with the provisions of the Act. The Act does not mandate refusal in all cases other than 'exceptional circumstances', or 'irremediable damage'. Rather, the Act requires a balancing exercise as between the relevant considerations, typically including s 101(2)(a) and (b).
- 039.** The Act contemplates change to registered places, including demolition. The way that the statutory scheme manages that change includes via the grant of permits. The balancing exercise typically necessitated by a permit application has been thoroughly examined in decisions including *Staged Developments Australia Pty Ltd v Minister for Planning* [2001] VCAT 1447; and *Hotel Windsor P15781* [2010] VHerC114.
- 040.** In the circumstances of this case, I consider that the Executive Director has set the bar unreasonably high. I am satisfied that the difficulties associated with the retention and beneficial use of the building make this an exceptional case. The Applicant has provided compelling and extensive evidence of the nature and extent of the mould problem, and of the confounding difficulty in resolving it. To my mind, these circumstances justify the exercise of discretion to grant the permit sought. Like any statutory exercise of discretion, the decision-maker should be prepared to be influenced by the circumstances that arise in any given case, rather than slavishly applying blanket principles. The impact on heritage would be real, substantial and irreversible in this case, but such impacts must be understood as part of the system contemplated by the Act.
- 041.** If a place is added to the Register, the private owners of that land should not be compelled to leave no stone unturned for the sake of the public interest in favour of heritage protection, all at the expense of their own private interest.

Relevance of the Applicant's Conduct

- 042.** Aside from the mandatory considerations that are the focus of this permit review, it is worth noting a separate undercurrent namely the relevance of the Applicant's own conduct. To what extent is it relevant to consider whether the Applicant failed to mitigate damage to the building after the fire and water ingress? To what extent is it relevant to consider whether the Applicant failed to prevent various other kinds of damage to the building over the subsequent period?
- 043.** The relevant officer's report to the Executive Director, recommending the refusal of the Application, quoted one of the grounds of refusal in respect of the previous application for demolition, which attributed the damaged state of the building '*in a significant degree to the owner's failure to implement measures that would have effectively mitigated the extent of such problems...*' The officer's report then proceeded to '*maintain this position*' in respect of the Application.
- 044.** Consistent with that approach, the Executive Director's hearing submission included the following passages:

In the context of what can best and most generously be described as the inaction of the Applicant consequent to the fire damage, the building is currently in poor condition...

The ED considered the failure of the owner to maintain the Place as a matter relating to the protection and conservation of the Place in his refusal of the permit application.

It is appropriate to have regard to neglect in assessing whether a permit allowing for demolition of the Place should be granted. Owners of State significant places should not be encouraged to ignore their responsibility under the Act to maintain buildings of heritage value...

It is an important matter of public policy to ensure that those who do not at least act reasonably to mitigate the impact of an event such as a fire, do not benefit from that inaction.

- 045.** This issue assumed a somewhat low profile in the course of the hearing itself, with neither main party choosing to dwell on the question of 'blame' for the current state of the building.
- 046.** When I raised the question with Mr Chiappi, he suggested that an applicant's responsibility for damage to a place falls within the scope of considerations pursuant to s 101(2), but that is in no way clear to me.
- 047.** I am not persuaded that any past acts or omissions of the Applicant should be relevant to the determination of the Application. On the understanding that the Executive Director alleges recklessness or worse on the part of the Applicant, in the context of a pattern of damage to the Place, then the Act may provide recourse. The usual avenues of recourse to (at least) consider might include repair orders (s 154), rectification orders (s 160), stop orders (s 165) and prosecutions (ss 87, 88, 89). If the rectification of the building can be secured by any of those mechanism, so be it, but if not, I doubt that it is appropriate to seek to indirectly compel those works via the refusal of permit applications. Such an approach could be perceived as using the permit process as an attempt to 'punish' an applicant, which is not consistent with the proper functioning of the Act.
- 048.** An application for a permit under the Act should be determined on the basis of the matters set out in s 101(2) of the Act. Although some of its sub-sections appear to be open-ended, I do not regard it as appropriate to give weight to suspicions or allegations or perhaps even proven facts in relation an applicant's conduct or omissions, in this context. The Executive Director, and the Heritage Council on review, should take the place or object as they find it, and determine any permit application by reference to its current state. If there is blame to be attributed there are other provisions of the Act which are more suited to that purpose.

2017 HERITAGE COUNCIL DETERMINATION

- 049.** Having set out the basis for the approach that I have taken to the determination of this review, I will conclude with some observations in relation to the 3 July 2017 determination of the relevantly constituted Heritage Council Permits Committee ("**the Previous Committee**"). I agree with the Majority's summation of the three central issues which resulted in the refusal of the permit application in that case.
- 050.** In relation to the first issue, namely structural considerations, the Previous Committee was satisfied that a large proportion of the existing structure could be retained, or dismantled and reused in reconstruction. Informed by the evidence presented, and putting aside the question of mould infestation, I have reached a similar conclusion in relation to the building in its current state today.
- 051.** In relation to the second issue, the Previous Committee placed significance on the lack of evidence in relation to whether or to what extent mould had penetrated the brickwork and other building materials. Informed by the evidence before the current Committee, I

am satisfied that mould has penetrated the brickwork and mortar, as well as cavities between bricks and mortar. The extent of that penetration is significant and unusual.

- 052.** In relation to the third issue, the Previous Committee considered it reasonable for the applicant to establish whether any reasonable methods were available to remediate the mould without materially affecting the cultural heritage significance of the Place. On the basis of the evidence presented, I am not persuaded that any reasonable methods are available to remediate the mould (short of dismantling and reconstruction). I cannot find that it would be impossible to achieve that result. Rather, I find that there is a high level of doubt as to whether that result can be achieved, and an even higher level of doubt as to the steps that would be required, the time that would be taken, and the costs that would be incurred, in embarking on that project.
- 053.** Although I was not a member of the Previous Committee, I am informed by that Committee's reasoning and conclusions. I do not consider the decision of the Previous Committee to be binding on the present Committee, in any sense. However, as a matter of comity, and also as a matter of fairness to the parties, I consider it preferable that a decision in relation to the current Application be informed by that previous decision, to the extent that it remains relevant.
- 054.** I am able to reconcile my own conclusion with the reasoning of the Previous Committee.
- 055.** I read the three issues emphasised by the Previous Committee firstly as grounds for refusal, but secondly as anticipating future attempts to seek permission for demolition of the building. Whether intentionally or not, the 2017 Determination encouraged the Applicant to conduct further investigations in relation to those three matters. Having commissioned those investigations, the Applicant found that the results effectively answered two of the three doubts of the Previous Committee. This obviously encouraged the Applicant to make a new application for the demolition of the building, seeking to overcome the Previous Committee's reasons for refusal.
- 056.** It is true that one of the issues raised by the Previous Committee has not been advanced in any way that assists the Applicant: the evidence indicates that the important structural components of the building, principally the brick walls, remain physically sound. However this is effectively outweighed, in my view, by the Applicant's combined answers to the other two issues: that mould has significantly penetrated the building materials, and that as a result remediation is not feasible. Regardless of the structural solidity of the building, it can hardly be reasonable to require it to remain as a curious 'ruin' in the contemporary urban landscape, unfit for human habitation or other beneficial use. No party advocated for such an outcome.
- 057.** The case presented on behalf of the Applicant has persuaded me that the main concerns expressed by the Previous Committee no longer provide a sound basis to refuse the Application. The mould has extensively penetrated the brickwork and other building materials. There are substantial difficulties, as well as substantial uncertainties, associated with remediating the mould. These circumstances strongly tip the balance in favour of the grant of the permit sought, notwithstanding the absolute and irreversible impact on the heritage significance of the Place that would result.

ATTACHMENT 2

List of documents tendered on behalf of the Executive Director:

1. Email from Best Hooper dated 21 October 2019, 11:17am
2. Email from Russell Kennedy Lawyers dated 21 October 2019, 12:29pm
3. Email from Russell Kennedy Lawyers dated 21 October 2019, 3:12pm
4. Email M. Taylor to Russell Kennedy Lawyers dated 4 September 2019, 12:48pm
5. *Building & Structural Forensic Report* by Andrew Smith for 'Cracks In The Wall' Consulting Rectification Engineers report dated 25 September 2019, with appendices

List of documents tendered on behalf of the Appellant:

1. 'Heavy rain, gales & storms' Bureau of Meteorology internet reports on Melbourne's weather on 9 May 2016
2. B. Cwalina '*Biodeterioration of concrete, brick and other mineral-based building materials*' in *Understanding Bioerosion* (2014)
3. Response to Document 10 (above) from M. Taylor 24 October 2019, 8:45am
4. R. Sauni et al. '*Remediating buildings damaged by dampness and mould for preventing or reducing respiratory tract symptoms, infections and asthma*' in *Evidence-Based Child Health*, Issue 9 (2011)

List of documents tendered by Professor Deirdre Coleman – (not accepted by the Committee or circulated):

1. Written submission of Professor Deirdre Coleman

List of documents tendered by Kristin Stegley on behalf of BRUP:

1. Written submission of Kristin Stegley on behalf of BRUP
2. Photographs accompanying written submission

List of documents tabled after the hearing:

1. Letter to the Heritage Council of Victoria from Russell Kennedy Lawyers as per leave granted
2. Response to letter to the Heritage Council of Victoria (above) from Best Hooper Lawyers
3. Letter to the Heritage Council in response to Best Hooper correspondence dated 12 November
4. Email in response to letter from Russell Kennedy Lawyers dated 18 November
5. Email in response to email from Best Hooper Lawyers dated 25 November

ATTACHMENT 3

HERITAGE ACT 2017 - SECT 101

Determination of permit applications

- 1) After considering an application the Executive Director may—
 - a) approve the application and—
 - i. issue the permit for the proposed works or activities; or
 - ii. issue the permit for some of the proposed works or activities specified in the application; or
 - b) refuse the application.
- 2) In determining whether to approve an application for a permit, the Executive Director must consider the following—
 - a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object;
 - b) the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;
 - c) any submissions made under section 95 or 100;
 - d) if the applicant is a public authority, the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the public authority to perform a statutory duty specified in the application;
 - e) if the application relates to a listed place or to a registered place or registered object in a World Heritage Environs Area, the extent to which the application, if approved, would affect—
 - i. the world heritage values of the listed place; or
 - ii. any relevant Approved World Heritage Strategy Plan;
 - f) any matters relating to the protection and conservation of the registered place or registered object that the Executive Director considers relevant.
- 3) In determining whether to approve an application for a permit, the Executive Director may consider—
 - a) the extent to which the application, if approved, would affect the cultural heritage significance of any adjacent or neighbouring property that is—

- i. included in the Heritage Register; or
 - ii. subject to a heritage requirement or control in the relevant planning scheme; or
- b) any other relevant matter.

HERITAGE ACT 2017 - SECTION 108

Determination of reviews by the Heritage Council

- 1) Subject to sections 107 and 109, the Heritage Council must determine a review within 60 days after the request is made.
- 2) The Heritage Council may ask the applicant for any additional information that the Heritage Council considers necessary to assist the determination of the review.
- 3) The time within which the Heritage Council must decide a review—
 - a) stops to run at the time when a request for the additional information is made; and
 - b) starts to run only when the information is provided to the Heritage Council.
- 4) The Heritage Council must conduct a hearing into a review—
 - a) if the hearing is requested by the applicant or the relevant responsible authority; or
 - b) in any other case, unless the applicant agrees to the determination of the review without a hearing.
- 5) The responsible authority for the area in which the registered place or registered object is situated and, if the responsible authority is not a municipal council, the relevant municipal council, may appear, be heard or be represented at any hearing into the review of an Executive Director's determination relating to a permit.
- 6) The National Trust may be a party to a hearing into the review of a determination in relation to a permit if the National Trust has previously lodged a written submission with the Executive Director in relation to the permit application.
- 7) The Heritage Council may make a determination on the review to—
 - a) affirm the determination under review; or
 - b) vary the determination under review; or
 - c) set aside the determination under review and make another determination in substitution for it.
- 8) In determining a review, the Heritage Council must consider the matters set out in section 101(2).

- 9) The Executive Director, within 7 days after a determination is made under subsection (7), must—
- a) if the Heritage Council has determined to approve the permit application, issue the permit to the applicant; and
 - b) give written notice of the determination to—
 - i. the applicant for the review and, if the applicant is not the owner or government asset manager, the owner or government asset manager of the place and object; and
 - ii. the responsible authority for the area in which the registered place or registered object is situated and, if the responsible authority is not a municipal council, the relevant municipal council; and
 - iii. any other person who was a party to any hearing.