

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P913/2020
PERMIT APPLICATION NO. WH/2019/127

APPLICANT	Rose Burwood Pty Ltd
RESPONSIBLE AUTHORITY	Whitehorse City Council
REFERRAL AUTHORITIES	The Head, Department of Transport Melbourne Water
RESPONDENTS	Yvonne and John Maher, Remedios Teoh, Thut Young, M Toh & S Loo, N Loveless, R Asbiridonne, W Tanuwijaya, J Brooks
SUBJECT LAND	419-423 Burwood Highway VERMONT VIC 3133
HEARING TYPE	On the papers
DATE OF ORDER	13 July 2021
CITATION	<i>Rose Burwood Pty Ltd v Whitehorse CC</i> [2021] VCAT 755

DETERMINATION OF A QUESTION OF LAW

The proposed development of the review site, which generally comprises a building constructed externally of concrete panels covered by brick inlay (as depicted on plans prepared by R Architecture marked as TP01 to TP09, TP11.1 to TP11.4, TP12.1 to TP12.5, TP13.0, TP13.1, TP13.3, TP14, TP15.0, TP15.1 and dated 15 February 2021 (except that plan TP12.3 is undated)) will not result in a breach of one or more of the covenants that are registered to the three titles that comprise the review site (being Lots 15, 16 & 17 on PS79838).

Jeanette G Rickards
Senior Member

OPINION ON QUESTION OF LAW

NOMINATION OF MEMBER

- 1 Jeanette G Rickards, Senior Member is nominated pursuant to Clause 66(1)(b) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, as the member who is a legal practitioner to provide an opinion on a question of law arising in the proceeding.

QUESTION OF LAW

- 2 The question of law to be decided is:

Would the proposed development of the review site, which generally comprises a building constructed externally of concrete panels covered by brick inlay (as depicted on plans prepared by R Architecture marked as TP01 to TP09, TP11.1 to TP11.4, TP12.1 to TP12.5, TP13.0, TP13.1, TP13.3, TP14, TP15.0, TP15.1 and dated 15 February 2021 (except that plan TP12.3 is undated) result in a breach of one or more the covenants that are registered to the three titles that comprise the review site (being Lots 15, 16 & 17 on PS79838)?

REASONS

- 1 The Subject Land consists of three lots, being lots 15, 16 and 17 on LP 79838. Each of the lots are burdened by a registered restrictive covenant contained in the instrument of transfers G986232 registered on 1 March 1978 (lot 15), E087020 registered on 30 June 1971 (lot 16) and D940311 registered on 20 December 1971 (lot 17), respectively.

- 2 The covenants are each drafted in slightly different terms:

The Lot 15 covenant relevantly states:

... that the said FRANCESCO PANUCCIO and ANNETTE PANUCCIO shall not erect a dwelling or dwellings on the said land or any part of it unless the exterior walls of such dwelling or dwellings on the said land or any part of it (except for usual outbuildings) are substantially of brick or brick veneer.

The Lot 16 covenant relevantly states:

... that the said Sebastian Tine and Katherine Tine shall not erect a dwelling or dwellings on the said land or any part of it unless the exterior walls of such dwelling or dwellings (except for usual outbuildings) are substantially of brick or brick veneer.

The Lot 17 covenant relevantly states:

... that the said Anne Peterson shall not erect a dwelling or dwellings on the said land or any part of it unless the walls of such dwelling or dwellings are substantially of brick or brick veneer except for outbuildings. [Tribunal underlining]

3 Each of the covenants prevents the erection of a dwelling or dwellings on the subject land unless the walls of such dwelling or dwellings are substantially of brick or brick veneer. Two of the covenants refer to exterior walls and the third refers to walls, which in my view would refer to external walls.

4 The Council submits the grant of a permit would result in a breach of the covenants.¹ In its assessment the Council stated:

It is acknowledged that the lower floors contain high levels of brick construction, while the roofing is not visible to the public realm. However, the external wall comprising the articulated elements in the lower floors, and the 2 most upper floor levels, are not materials of brick. These elements are also highly prominent in both adjoining streetscapes. Together, these elements make up a strong portion of the building's appearance to the public realm of both Dalroy Crescent and Burwood Highway. It is therefore considered that the building is not substantially of brick or brick veneer in this instance, and will form as a refusal ground.

5 Amended plans incorporate brick inlay at upper levels. The amended plans show three types of face brickwork inlay to be provided externally on the building. They are described as being brown, grey/tan and white. The materials and finishes schedule on the plans show a photographic description of each of the proposed face brickwork inlays. The plans also show that in two sections at the frontages the ground, first and second floors panelised cement sheet cladding is proposed to be used.

6 The applicant provided a description of the proposed brick inlay tiles²:

It involves placing thin brick, porcelain or stone tiles into precast concrete panels, to create the look and feel of a traditional brick facade or wall with all the efficiencies and benefits of precast concrete.

InBrick is an inlay brick system that embeds genuine clay brick tiles into precast concrete panels, providing the look and feel of brick, with its durable aesthetic, to precast concrete panels.

7 The Council has stated:

- a) the relevant caselaw does not support the interpretation that a restrictive covenant related to a brick veneer building may properly include a brick inlay building, with reliance primarily placed upon *Beman Pty Ltd v Boroondara CC* [2013] VCAT 1249 (Beman); and
- b) 'brick inlay' does not accord with the Macquarie Dictionary definition of 'brick veneer' which refers to a timber framework.

8 Both the Council and the applicant agree the walls will not be of brick. The applicant submits brick inlay is a form of brick veneer and is a commonly used contemporary construction method in Victoria.

¹ Section 61(4) of the *Planning and Environment Act 1987*

² Robertson Façade Systems

- 9 The applicant refers to definitions in the Shorter Oxford English Dictionary:
- brick:** Clay kneaded, moulded, and baked or sundried, used as a building material.
 - veneer:** Apply or bond (thin layers of wood or other veneer) to a surface. Face with veneer; apply veneer to (a surface, furniture etc.)
Disguise (an unpleasant quality or character) with an outwardly attractive or commendable appearance.
- 10 The Council refers to the definition of ‘brick veneer’ in the Macquarie Dictionary:
- a building whose external walls each consist of a timber framework faced with a single skin of bricks, the brickwork being non-structural.
- 11 The Council submits ‘brick veneer’ should be read as one term whereas the applicant has referred to the definition of brick and veneer separately.
- 12 Two decisions of the Supreme Court were referred to. In *Jacobs v Grieg*³ (*Jacobs*), Scholl J held that the covenant requiring ‘any such building not to be constructed of any material other than brick or stone’ did not allow the construction to be of brick veneer. In *Clare & Ors v Bedelis*⁴ (*Bedelis*) the Court was required to consider whether the brick veneer walls (which were described as ‘outer walls are rendered brick veneer over a timber frame’) were of ‘brick’ within the meaning of that covenant. Derham AJ stated a ‘brick veneer wall was a wall of ‘brick’ for the purpose of that covenant.
- 13 The Council submits the walls of the proposed building do not meet the definition of ‘brick veneer’ as the proposed brick inlay tiles will be placed over an inner wall of concrete, not timber as indicated within the Macquarie dictionary definition. The Council also referred to the Tribunal decision of *Beman Pty Ltd v Boroondara CC*⁵ submitting the interpretation that a brick veneer building may properly include a brick inlay building is not supported.
- 14 In *Beman* the applicant submitted ‘the building proposed to be built on the subject land is to be constructed of solid brick, but some parts of the building are to be externally clad with zinc and aluminium cladding, as well as render and metal screens are to be used on the balconies.’ Referring to the decision in *Jacobs* the Tribunal concluded ‘the metal screens on the balconies are no different to architectural or decorative features and provided the underlying building is constructed in solid brick decorative features such as zinc or aluminium cladding, render or paint and metal screens are merely, as stated by Scholl J, ‘decorative additions such as are frequently superimposed on the main vertical structure’’. I do not find this decision of great assistance in respect of the issues raised in this matter.
- 15 Brick veneer is a method of construction where a property of either a wooden or steel frame is concealed with a single layer of bricks as the

³ [1956] VicLawRp 92

⁴ [2016] VSC 381

⁵ [2013] VCAT 1249

exterior layer. ... This means that rather than the brick holding up the property, the property is holding up the brick.

- 16 Brick veneer gives the appearance of a solid brick structure; however, it does not provide structural support. Therefore, the construction technique used for a brick veneer dwelling is different from that of a solid brick dwelling.
- 17 As stated in *Bedelis* ‘the meaning of walls of brick or stone is a question of fact turning on the ordinary meaning of the words in the context of the instrument and the circumstances permitted to be taken into account and nothing in the ordinary dictionary meaning indicates that walls constructed out of bricks on the outer layer with timber and plaster board on the inner layers, does not satisfy the description.’
- 18 Although the Council referred to the reference in *Jacobs* to the inner framework of timber and to the width of the brick to be used this is specific to the *Jacobs* case and cannot necessarily be applied in other cases.
- 19 As stated in *Bedelis* ‘the covenant must be construed having regard to the purpose or object of the restriction.’ In this case two of the covenants refer to external walls and whilst the third refers to walls it can be taken to mean external walls. The purpose therefore of the covenants is to require that the external walls of a building constructed on the subject land must be either constructed substantially of brick or brick veneer. As both parties agree the proposed exterior wall construction is not solid brick it must therefore fall under what is understood as brick veneer.
- 20 As stated in *Bedelis*:

Given that the purpose of the restriction is to require the external appearance to be of brick or stone and to avoid low quality construction materials, there is no reason why walls of brick veneer do not meet the purposes. There was no complaint that the brick is rendered.
- 21 A covenant must be read as it would be understood by an ordinary person, accustomed to the ordinary meaning. Brick veneer is a common building technique defined in the Macquarie dictionary and whilst the ordinary person may not view the difference of an external brick wall as constructed of all brick or brick veneer it is what is perceived as the external fabric of the walls.
- 22 In this case the applicant is intending to put a brick inlay tile over the inner skin of the building. The applicant submits the brick inlay tiles will have an external appearance of brick, consistent with the appearance of a brick veneer wall. To the ordinary person this will appear as an external brick wall. There is no requirement as to the specification of the brick merely that a layer of brick is required.
- 23 Whilst the definition in the Macquarie dictionary indicates bricks being placed over a timber frame. Given changes to building techniques the use of

concrete and steel frames make no difference to what is placed on the outer skin other than it must resemble brick or brick veneer. As indicated in *Bedelis* it is possible to satisfy the purpose of a covenant in different ways as building materials change over time. I note that in *Bedelis* whilst the walls were constructed of brick veneer a render was placed over the walls so for all intent the walls were not able to be viewed as brick.

- 24 The wording of the covenant states the dwelling or dwellings to be constructed on the subject land must be substantially of brick or brick veneer. I find that the use of the face brickwork inlays on the external parts of the building to be the same as brick veneer. They will give the appearance of brick and sit upon an internal structure but do not form part of the structure of the building. Although anyone viewing the walls will not be able to distinguish this feature. There are sections of the external walls that will not be covered in the brick inlay tiles however the plans indicate that the external walls will be substantially brick veneer in the form of brick inlay tiles. The requirements of the covenants are therefore satisfied.
- 25 The grant of a permit will not authorise anything that would result in a breach of any one of the covenants.

Jeanette G Rickards
Senior Member