

Reference: TPA/51966

**ATTENTION:** The Hon. Richard Wynne MP  
Minister for Planning  
Department of Environment, Land, Water and Planning (**DELWP**)  
8 Nicholson Street  
East Melbourne 3002  
By email: richard.wynne@parliament.vic.gov.au; richard.wynne@minstaff.vic.gov.au

**AND TO:**

**Tina Ngu**  
Senior Ministerial Adviser  
By email: tina.ngu@minstaff.vic.gov.au

**Jane Homewood**  
Executive Director, DELWP  
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**Stuart Menzies**  
Director State Planning Services, DELWP  
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XX February 2022

Dear Minister

**URGENT Request for Amendment to the VPP**

Monash City Council (**Council**) writes in its capacity as responsible authority and planning authority for the Monash Planning Scheme (**Scheme**). Council seeks an urgent amendment to the Victoria Planning Provisions (**VPP**) to rectify an issue recently identified in the conduct of a VCAT hearing.

In particular, the residential suite of zones require an amendment to clarify that a permit is required to construct a dwelling on the same lot as an existing building used for the purpose of a rooming house or other form of residential building.

Council would be grateful if this matter were attended to urgently.

## Background

Council is currently involved in a current proceeding at VCAT which gives rise to this request. The background is as follows:

1. In September 2020, Council received a planning permit application seeking permission to construct a 3 bedroom double storey dwelling (**Proposal**) to the rear of an existing building
2. The existing building on the land is used for a rooming house and was constructed without a planning permit on the basis that it was exempt from such requirements by operation of clause 52.23 (Rooming house).
3. The land the subject of the application is zoned General Residential (Schedule 2) and is affected by Vegetation Protection Overlay (Schedule 1).
4. The permit applicant identified the permit trigger for the Proposal to be the first dot point of clause 32.08-6 which requires a permit to “construct a dwelling if there is at least one dwelling on the lot”. Council assessed the permit application on this basis.
5. Council refused the permit application based on planning grounds. The permit applicant applied to the Tribunal seeking review of Council’s refusal.
6. The matter was listed before the Tribunal in late October 2021. The Tribunal raised an issue at the hearing as to whether there was a permit trigger under the zone controls. Put simply, the issue identified by the Tribunal is that if the existing building on the land is not characterised as a “dwelling” or the proposal is not regarded as an extension to a residential building, no planning permit for either the use or the buildings and works associated with the new dwelling on the lot will be required.
7. In accordance with Tribunal order dated 17 January 2022 Council filed and served its submission on any implications relating to the permit trigger for the Proposal. A copy of those submissions is **attached** for your reference.
8. The permit applicant’s written submissions are scheduled to be filed and served by 7 February 2022. Council has requested that the matter be listed for a short hearing on this question before it is determined.

## Policy objectives

The purpose of clause 32.08 seeks to (amongst other things) implement the Municipal Planning Strategy and the Planning Policy Framework and to encourage development that respects the neighbourhood character of the area. The clause:

- includes permit requirements for the construction and extension of two or more dwellings on a lot, dwellings on common property and residential building;
- requires that such development must meet the requirements of clause 55, which are designed to 'achieve residential development that respects the existing neighbourhood character or which contributes to a preferred neighbourhood character' and 'to encourage residential development that provides reasonable standards of amenity for existing and new residents'.

Council considers that the purpose of clause 32.08 and clause 55 will not be promoted if the Tribunal holds that no permit is required under clause 32.08-6 to construct the proposed dwelling. This will create a loophole where land may be used and developed for the purpose of a rooming house first, followed by, then, a dwelling without a planning permit,<sup>1</sup> despite such built form having the same character and amenity impacts as a proposal for the construction of two dwellings.

This is significant for Council given the nature and size of allotments in its residential zones, the number of rooming houses or residential buildings in its municipality and given the presence of a number of higher education institutions in its municipality. Effectively, should this identified loophole not be rectified, this would facilitate a density of housing without consideration to an appropriate site response and clause 55 assessment. Council does not believe that this is the intent of the current provisions.

Furthermore, having regard to what has occurred on the site the subject of the VCAT proceeding, an implication of a VCAT decision that no permit trigger applies in this case would be to provide an opportunity for landowners to construct a rooming house on one part of an allotment, utilising the Scheme exemptions to do so without a planning permit and then, once constructed construct a single dwelling on the allotment with a planning permit not being required for that second structure. This would in effect create an opportunity for dual occupancies to be built in stealth.

## Proposed amendments

To close the potential loophole identified by the Tribunal and to achieve the objectives sought by clauses 32.08 and 55, Council proposes that the VPP ought to be amended to

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<sup>1</sup> Provided the requirements in clause 52.23 are met and the land is over 300sqm or 500sqm as may be specified in a schedule to the zone.

include an additional dot point in clause 32.08-6 (and equivalent provisions in the other residential zones) as marked up below:

**Construction and extension of two or more dwellings on a lot, dwellings on common property and residential buildings**

**Permit requirement**

A permit is required to:

- Construct a dwelling if there is at least one dwelling existing on the lot.
- Construct a dwelling or a residential building if there is at least one residential building existing on the lot.
- Construct two or more dwellings on a lot.
- Extend a dwelling if there are two or more dwellings on the lot.
- Construct or extend a dwelling if it is on common property.
- Construct or extend a residential building.

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To confirm, Council requests that this amendment be made to the equivalent provisions in all residential zones of the Scheme to rectify the identified loophole in all residential zones.

Council would appreciate **urgent** attention to this request.

Please do not hesitate to contact me if you have any questions.

Yours faithfully

CR STUART JAMES

Mayor



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### Email Letter

<b>From</b> Thy Nguyen	<b>Date</b> 27 January 2022	
<b>Direct</b> 03 9258 3503	<b>Email</b> thy.nguyen@maddocks.com.au	
<b>Partner</b> Maria Marshall		
<b>To</b> Registrar	<b>Organisation</b> Victorian Civil and Administrative Tribunal	<b>Email</b> admin@vcat.vic.gov.au admin@courts.vic.gov.au
<b>And To</b>  Sam Barbuscio c/- Jason Barnfather	  Squareback Pty Ltd	  jason@squareback.com.au

Our Ref MYM:TNGU:8819797

Dear Registrar

**1 / 36 Waverley Road, Chadstone**  
**VCAT Reference No. P467/2021**

We continue to act on behalf of Monash City Council (**Council**) in relation to the above and refer to the Tribunal order dated 17 January 2022 (**Order**).

In accordance with paragraph 1 of the Order, we attach, by way of filing and service, a written submission addressing any implications relating to the permit trigger with respect to the proposed development.

Given intricacies of issues raised by the Tribunal, Council seeks an opportunity to make oral submissions in relation to this matter and to that end, asks that the Tribunal list the matter for a further short hearing.

The Applicant's representative has been copied in this correspondence.

If you have any queries, please contact Thy Nguyen.

Yours faithfully

Maria Marshall  
Partner



7. After hearing the submissions from the Applicant and Council on 29 October 2021, the Tribunal raised the question as to whether a planning permit is required under clause 32.08-6.

### The planning controls

8. The Subject Land is zoned General Residential Zone – Schedule 2 and is affected by the Vegetation Protection Overlay – Schedule 1.

9. Clause 32.08-6 of the Scheme provides:

**Construction and extension of two or more dwellings on a lot, dwellings on common property and residential buildings**

**Permit requirement**

A permit is required to:

- Construct a dwelling if there is at least one dwelling existing on the lot.
- Construct two or more dwellings on a lot.
- Extend a dwelling if there are two or more dwellings on the lot.
- Construct or extend a dwelling if it is on common property.
- Construct or extend a residential building.

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A development must meet the requirements of Clause 55. This does not apply to a development of five or more storeys, excluding a basement.

..

10. The Subject Land currently accommodates an existing three-storey building which is used for the purpose of 'rooming house'. The existing building includes:

- 10.1 9 bedrooms (each with an ensuite);
- 10.2 an open plan living/dining/kitchen area on the ground floor;
- 10.3 a double garage with access from Murphy Street; and
- 10.4 a total floor area of 337.42sqm.

11. Pursuant to clause 73.03 (land use terms), 'rooming house' is defined as '*land used for a rooming house as defined in the Residential Tenancies Act 1997.*' It is included in 'residential building', which is defined as '*land used to accommodate persons, but does not include camping and caravan park, corrective institution, dependent person's unit, dwelling, group accommodation, host farm, residential village or retirement village.*' 'Residential building' is included in 'accommodation'.

12. 'Dwelling' is defined in clause 73.03 as follows:

A building used as a self-contained residence which must include:

- a) a kitchen sink;
- b) food preparation facilities;

- c) a bath or shower; and
- d) a toilet and wash basin.

It includes outbuildings and works normal to a dwelling.

13. 'Dwelling' is also nested under 'accommodation'.

**Permit trigger for the proposed dwelling**

*'Existing dwelling' argument – First dot point of clause 32.08-6*

14. Council submits that a planning permit is required under the 1<sup>st</sup> dot point of clause 32.08-6 to construct the proposed dwelling because there is an existing dwelling on the Subject Land.

15. The key question is whether the existing building which is used for the purpose of a "rooming house" is a dwelling for the purpose of this dot point.

16. In *Jinalec Park PL v Mornington Peninsula SC* [2007] VCAT 1238 (***Jinalec Park***), Deputy President Gibson commented:

101. The definition of dwelling in the planning scheme has two components – a use component and a facilities component. The use component requires that the building is used as a self-contained residence. Residence means a place where people live or reside either permanently or for a considerable period of time. The building must also include the facilities of a kitchen sink; food preparation facilities; a bath or shower; and a closet pan and wash basin.

102. When the definition of group accommodation refers to "dwellings used to accommodate persons away from their normal place of residence", it must be taken to be referring to dwellings in the sense of buildings that include the facilities specified in the definition of dwelling. The requirement that they are used to accommodate persons away from their normal place of residence is a direct antithesis of the use component of the definition of dwelling, which requires the building to be used as a self-contained residence. I would endorse what Senior Member Byard said in *Richardson v Bass Coast SC* [http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1238.html?context=1;query=%5b2007%5d%20VCAT%201238;mask\\_path=au/cases/vic/VCAT - fn42](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1238.html?context=1;query=%5b2007%5d%20VCAT%201238;mask_path=au/cases/vic/VCAT - fn42) regarding the definition of group accommodation:

[20] Really, the expression "Group accommodation" seems to be very badly drafted in that it employs the word "dwellings" to mean something that must be other than either the land use definition "Dwelling" or the ordinary meaning of dwelling because the reference to accommodation away from normal place of residence contradicts that normal English meaning. It therefore seems to mean something like a place with the facilities of a dwelling that would be able to be used as a dwelling but which is used for temporary accommodation. It is a pity that the definition should have been drafted in such unclear terms.

[emphasis added]

17. Similar to the reasoning in *Jinalec Park*, the reference to "dwelling" in the 1<sup>st</sup> dot point of clause 32.08-6 must be taken to be referring to dwelling in the sense of buildings that include the facilities specified in the definition of "dwelling" at clause 73.03. This is because:

17.1 clause 32.08-6 sets out permit requirement for development, not land use; and

17.2 the 1<sup>st</sup> dot point of clause 32.08-6 refers to "**one** dwelling", which cannot be interpreted as referring to the use component of dwelling.

18. Given the existing building includes the four facilities (i.e. a kitchen sink, food preparation facilities, a bath or shower, and a toilet and wash basin) which constitute a dwelling, the proposal therefore satisfies the facilities component of “dwelling” and can be considered as a dwelling for the purpose of the 1<sup>st</sup> dot point of clause 32.08-6. It follows a planning permit is required under clause 32.08-6 to construct the proposed dwelling.

*‘Extend a residential building’ argument – Last dot point of clause 32.08-6*

19. In the alternative, Council submits a planning permit is required under the last dot point of clause 32.08-6 to construct the proposed dwelling as it is an extension to the existing residential building.
20. Whilst there is no physical connection between the proposed dwelling and existing residential building, clause 32.08-6 does not place any parameter around the nature or extent of an “extension”. In other words, there is no limitation on the scope of “extension” in the Scheme nor any requirement that an extension is only defined by reference to a physical connection to a building.
21. The word “extend” is not defined in the Scheme or the *Planning and Environment Act 1987 (Act)*, therefore its ordinary meaning should be applied.
22. The Macquarie Dictionary (6<sup>th</sup> ed) defines “extend” as:
- a. to stretch out; draw out to full length.
  - b. To stretch, draw, or arrange in a given direction, or so as to reach a particularly point, as a cord, or a line of troops.
  - c. To stretch forth or hold out, as the arm of hand.
  - d. To place at full length, especially horizontally, as the body, limbs. Etc.
  - e. To increase the length or duration of lengthen; prolong.
  - f. To stretch out in various or all directions; expand; spread out in area.
23. Council submits the proposed dwelling constitutes an expansion to the existing building on the Subject Land because there is an expansion or “spreading out” in the overall building footprint.
24. In *R v Shire of Ferntree Gully; Ex Parte Hamley (Hamley)*, Herring CJ held that the expression “extension of any building” in s 197(5)(b) of the *Local Government Act 1928* included the building of additional or supplementary buildings which were detached from any existing building. His Honour remarked:

It is thus the "enlargement, rebuilding or extension" of a building or buildings, that is authorised and one moreover that may involve the use of adjoining land. The question is what is the meaning of the word 'extension' in this connection. That is not used in the sense of 'enlargement' is clear from the context, for if so read it would add nothing to the words that go before. "Enlargement" involves an increase in the size of an existing building, and no doubt when it involves an 'increase in the area covered by the building', there may be said to be an "extension" of it. But it would not cover the case where an additional wing or an annexe is added to an existing building. In such a case there is a spreading out or "extension" and it seems to me that the word "extension" in the proviso covers the building of additional or supplementary buildings. No doubt on many occasions such additions will be built on to an existing building, as a new wing may be built on to an existing factory. But it would, I think, be taking far too narrow a view to hold that such a wing would cease to be an "extension" of the factory just because it was detached. I think a new detached wing could just as properly be regarded as an extension of the factory, as one that was built on to it.





**CONCLUSION**

- 29. For the foregoing reasons, Council submits a planning permit is required under clause 32.08-6 to construct the proposed dwelling because there is an existing dwelling on the Subject Land, or alternatively as an extension to the existing residential building on the Subject Land.
- 30. Given intricacies of issues raised by the Tribunal, Council seeks an opportunity to make oral submissions in relation to this matter and to that end, asks that the Tribunal list the matter for a further short hearing.

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**Maddocks**  
**Maria Marshall**  
**Lawyers for the Responsible Authority**  
**27 January 2022**