VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference NO. P810/2020  Permit no. TPA/47037 |

|  |  |
| --- | --- |
| APPLICANT | Shayan Agdar Nejad |
| responsible authority | Monash City Council |
| SUBJECT LAND | 163 Wanda Street, Mulgrave |
| WHERE HELD | Melbourne |
| BEFORE | S. R. Cimino, Senior Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 27 August 2020 |
| DATE OF ORDER | 28 August 2020 |
| citation | Nejad v Monash CC [2020] VCAT 937 |

# Order

1. In relation to planning permit No. TPA/47037 issued on **21 May 2018,** pursuant to section 85(1)(f) of the *Planning and Environment Act 1987* the Tribunal directs that:
   1. the date by which the permitted development must be commenced is pursuant to Condition 15(a) of the Permit is extended to **27 August 2022**, and;
   2. the date by which the development must be completed pursuant to Condition 15(b) of the Permit is extended to **27 August 2024.**

|  |  |  |
| --- | --- | --- |
| **S. R. Cimino**  **Senior Member** |  |  |

# Appearances

|  |  |
| --- | --- |
| For Shayan Agdar Nejad | Ms Sophie Loddo, planning consultant of Acorn Planning. |
| For Monash City Council | Mr J. Turner, Principal Planner – Appeals Adviser. |

# Reasons

(given orally at the end of the hearing)

1. This matter involves an application under Section 81(1) of the *Planning and Environment Act 1987* seeking an extension of time to commence the development allowed under planning permit no. TPA/47037.
2. The permit relates to land known as 163 Wanda Street, Mulgrave and allows the construction of three double storey dwellings, a front fence exceeding 1.2 metres in height and alteration of access to a main road.
3. The permit was issued at the direction of the Tribunal on **21 May 2018** in proceeding no. P1819/2017. In its decision, the Tribunal comprising Member Wilson, set aside the Council’s decision to refuse the permit and directed the grant of the permit. Notably:
   1. Condition 1 on the permit required the submission of amended plans for endorsement before the development could commence; and
   2. Condition 15 states that the permit expires if the development is not started before two years from the date of issue and completed before 4 years from the date of issue. However, consistent with the requirements of section 69 of the *Planning and Environment Act 1987*, the condition also says that the responsible authority may extend the periods referred to in the condition if a request is made in writing before the permit expires or within 6 months of it expiring if the development has not started.
4. Plans were originally endorsed under the permit on **28 May 2018**, however later set with amendments and landscaping details were endorsed on **29 October 2018**.
5. The permit expired on **21 May 2020** as construction of the development has not commenced. However, on the **23 March 2020**, that is, before the permit expired, the current owner of the land, Mr Nejad, submitted a request to the Council to extend the life of the permit, i.e. the time for commencement and completion. On the **28 April 2020**, the Council refused the request on the following ground:

The application plans do not meet the requirements of the General Residential Zone – Schedule 3, in particular the requirement for a 5-metre rear setback to be provided at the site.

1. Mr Nejad subsequently lodged an application to review the Council’s decision.
2. The subject land is located on the north-west corner of Police Road and Wanda Street, Mulgrave. It is rectangular, save for a corner splay, and has a frontage of 14.59 metres to Wanda Street, a frontage of 45.66 metres to Police Road and a site area of 852 square metres. A dwelling occupies the land. Contextually it is located within an established residential area, although a dwelling converted to a medical centre exists immediately to the west.
3. The development allowed by the permit is for the construction of three double storey dwellings, one fronting Wanda Street, the other two onto Police Road. Notably, the endorsed plans show that Dwelling 3 fronting Police Road is setback 2.47 metres from the rear or west boundary.
4. The land is located within the General Residential Zone, with the provisions of Schedule 3 being applicable. Amongst other thing, the provisions of the schedule vary the requirements of a number of standards at clause 55 of the planning scheme, including Standard B17 which relates to side and rear setbacks. The varied standard says:

A new wall not or within 200mm of a rear boundary should be set back at least 5 metres.

Side setback requirements in accordance with Standards A10 and B17 continue to apply.

1. Notably, the variation to Standard B17 was introduced into planning scheme through Amendment C125 part 2 which, amongst other things, included on land zoned General Residential Zone – Schedule 3 **[GRZ3]**.
2. The Council submits that the permit should not be extended given the change to the planning scheme. Council says that its neighbourhood character objectives support new development that contributes to the preferred garden city character through well landscaped and spacious gardens that include canopy trees and minimising hard paved surfaces.
3. The Council says that the **GRZ3** (Garden City southern suburbs) is different to other residential zones. While accepting that the housing mix in this type of area *‘will continue to evolve to meet the changing needs of the community’[[1]](#footnote-1)*, none the less the Council says that new development should complement the scale and siting of the original housing within the area and in so doing, will enhance the spacious, open landscape character of the area, allowing for the planting of tall canopy trees and maintenance of setbacks from the rear of the site. Specifically, the policy at clause 22.01-3 calls for the provision of rear setbacks that support a green corridor of open space created by backyards in the neighbourhood.
4. Further, the Council asserts that the Tribunal has recently upheld its decision to refuse a development proposal also comprising three double storey dwellings on the neighbouring property at 161 Wanda Street[[2]](#footnote-2). It seems the Council also refused that permit application on neighbourhood character grounds.
5. In support of the request, the applicant acknowledges the change to the planning scheme, but notes that the requirements of the varied standard are not mandatory and can be varied having regard to the specific merits of a proposal. In this case, the applicant notes that the land’s rear boundary is encumbered by an easement, and while part of the dwelling is within the 5 metre area, the backyard to Dwelling 3 has a depth of nearly 9 metres and, save for a driveway area, the balance of the front setback is also available for landscaping. Further the property immediately to the west is used for the purpose of a medical centre which includes extensive paved areas while there are numerous properties within the immediate area that have units or buildings associated with dwellings within 5 metres of their respective rear boundaries.
6. The decision to be made here is not whether the permit should have been issued, but rather, whether the life of a lawfully granted permit should be extended. The accepted principles for considering this type of application are set out in *Kantor v Murrindindi Shire Council[[3]](#footnote-3)*.
7. One of those principles is whether there has been a change in planning policy. I accept that the specific provisions of the applicable schedule have changed, but the land remains in the General Residential zone. Further, the merits of a proposal are not simply assessed against the zone provisions. Other relevant policies such as those supporting the consolidation of existing urban areas, provision of housing that adds to diversity and making more effective and efficient use of infrastructure and incremental change in this area continue to apply, just as they did when the permit was first issued.
8. Further, it is relevant that the approved proposal meets other varied standards in the **GRZ3**. Site coverage is 45 per cent whereas the standard in the schedule allows up to 50 per cent. Permeability is 33 per cent, whereas the schedule requires 30 per cent.
9. The notion of that local policy seeks to enhance the garden area of the municipality is not a new concept. It has been in place for many years now as evidenced in various decisions of this Tribunal.[[4]](#footnote-4) In deciding whether to grant a permit, the Tribunal would have taken this into account, as well as the adequacy of the landscaping response.
10. I agree with the applicant’s submission that the change to the setback standard, a standard that is in any event clearly not mandatory, does not represent such a significant change to planning policy that it warrants refusal of the request to extend the life of the permit.
11. In relation to other principles set out in *Kantor* I find that:

* The owner is not seeking to ‘warehouse’ the permit given that this is the first extension of time request;
* Restrictions that have been put in place during the current Covid -19 pandemic making it more difficult to commence and complete development projects within the same timeframes that apply when such restrictions do not apply;
* The permit is only two years old, and the current applicant completed purchase of the land in November 2019. The request to extend the life of the permit was made promptly, as was the lodging of this application. These are all signs that the applicant wishes to pursue the permission granted;
* The original time frame for the commencement and completion of development as set out in condition 15 is not unusual for a permit of this type, but neither is the granting of the first extension of time;
* I am far from persuaded that a permit would not be granted for the proposal. Although a 5-metre rear setback is not provided in totality, the requirement is in a standard that is not mandatory and the decision maker must in such circumstances turn its mind to whether or not it is reasonable to exercise discretion to allow a development is different to the standard. The standard cannot be treated as though it is mandatory. As noted earlier, part of the open space adjacent to the west/rear boundary is much greater than 5 metres. Importantly, it is located adjacent to the backyard of the adjoining residential property to the north. I agree that planning policy and current provisions of the scheme cannot be ignored, but neither can the need to consider whether a discretion provided by the scheme should be exercised.
* Further it is clear that a considerable amount of vegetation is proposed around dwelling 3 as shown on the endorsed landscape plan, including two trees in the front setback, a row of trees along the west boundary and a larger tree toward the northwest corner.

1. I also take issue with the Council’s submission that the Tribunal’s decision in *Thanh Vu Nguyen’s* case provides support for the Council’s position. In that case, it is clear on reading the Tribunal’s decision, that it did not have the benefit of fulsome submissions from the applicant who had quite inappropriately, sought to substitute plans at a very late stage and, further, did not wish to pursue the original proposal. The provides decision little, if any, assistance in this case.
2. Given the above, I will grant an extension of time of a further two years for the commencement and completion within four years which I consider appropriate given the current constraints on building and construction due to Covid-19.

|  |  |  |
| --- | --- | --- |
| **S. R. Cimino**  **Senior Member** |  |  |

1. See clause 22.01-4 under Garden City Suburbs (Southern) [↑](#footnote-ref-1)
2. Thanh Vu Nguyen v Monash CC [2020] VCAT [↑](#footnote-ref-2)
3. [1997] AATR 285 [↑](#footnote-ref-3)
4. See Cosentino v Monash CC and Ors [2004] VCAT 2062 at para. 49; Chai v Monash CC and Ors [2010] VCAT 913 at para. 32; Najjar v Monash CC [2015] VCAT 1709 at para.16 as examples [↑](#footnote-ref-4)