 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

 planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1864/2019Permit Application no. TPA/49734 |
| CATCHWORDS |
| Section 82 of the *Planning and Environment Act 1987*, correcting repeat appeal, whether garage wall on boundary is consistent with neighbourhood character  |

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| APPLICANTS | Arthur & Eva Skipitaris & Others |
| responsible authority | Monash City Council |
| RESPONDENT | Allan Armstrong & Associates |
| SUBJECT LAND | 47 Hilton Street, Mount Waverley |
| WHERE HELD | Melbourne |
| BEFORE | K Birtwistle, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 14 October 2020  |
| DATE OF ORDER | 2 November 2020 |
| CITATION | Skipitaris v Monash CC [2020] VCAT 1205 |

# Order

1. In application P1864/2019 the decision of the responsible authority is varied.
2. In planning permit application TPA/49734 a permit is granted and directed to be issued for the land at 47 Hilton Street, Mount Waverley in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
* Construction of two, two storey dwellings on a lot in the General Residential Zone – Schedule 3.

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| **K Birtwistle** **Member** |  |  |

# Appearances

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| For Arthur and Eva Skipitaris & Others  | Mr A Skipitaris |
| For Monash City Council  | Mr G Gilfedder, town planner of Currie & Brown |
| For Allan Armstrong & Associates  | Mr A Gray, town planner of GrayKinnane |

# Information

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| Description of proposal | Construction of two, two storey dwellings in a one behind the other format. The dwellings share a common accessway and crossover to Hilton Street located along the southern side boundary. Dwelling 1 is set back 7.6 metres from the street (excluding the porch). Dwelling 2 is located at the rear, and its garage wall is proposed to be built to the southern side boundary towards the rear of the lot. This is the only wall proposed on the boundary.  |
| Nature of proceeding | Application under section 82 of the *Planning and Environment Act 1987* – to review the decision to grant a permit. |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone – Schedule 3 (GRZ3)Vegetation Protection Overlay- Schedule 1 (VPO1) |
| Permit requirements | Clause 32.08-6 – Construction of two or more dwellings on a lot |
| Land description | The site is located on the west side of Hilton Street, north of Gordon Street, Mount Waverley. The site is rectangular in shape with a frontage of 18 metres, a depth of 42.2 metres and an overall site area of 759 sq.m. The site is generally flat, with a 1.8 metre wide easement across its rear western boundary.To the south, at No. 49 Hilton Street, is a large two storey contemporary dwelling with a triple garage adjoining the common boundary with the review site, and its secluded private open space (spos) to its rear.To the north, at No. 45 Hilton Street, is a single storey dwelling with its driveway located along the common boundary with the review site.To the rear, is a large contemporary two storey dwelling. |

# Reasons[[1]](#footnote-1)

## What is this proceeding about?

1. Allan Armstrong & Associates (the respondent) proposes to develop two, two storey dwellings at 47 Hilton Street, Mount Waverley. In August 2019, Monash City Council (the Council) determined to issue a Notice of Decision (NOD) to grant a planning permit for the proposed development, subject to a number of conditions (which are unopposed by the permit applicant). Arthur and Eva Skipitaris & Others (the applicants) were objectors to the original application and have requested the Tribunal to review Council’s decision.
2. Mr Skipitaris resides to the immediate south of the review site. The applicants say that the proposal is contrary to the neighbourhood character of the area as the development proposes the construction of a garage wall on the rear side property boundary. They say that this will also give rise to unreasonable amenity impacts.
3. The respondent (permit applicant) says the development satisfies the relevant Clause 55 standards and objectives relating to walls on boundaries, and that more broadly, the proposal responds to the existing and preferred neighbourhood character and will not give rise to any unreasonable amenity impacts.

## WHAT ARE THE KEY ISSUES?

1. Having considered all the submissions and evidence and inspected the subject land and its locality I must determine the following key issues in this matter:
* Is the proposal respectful of the neighbourhood character?
* Is the proposed garage on the boundary acceptable?
1. I must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions presented with regard to the applicable policies and provisions of the Monash Planning Scheme, I have decided to vary the decision of the responsible authority and direct that a permit be issued.
2. My reasons follow.

### Background

1. The site has been the subject of a previous Tribunal hearing in *Zelezny v Monash CC*[[2]](#footnote-2). The application before me is commonly known as a ‘repeat appeal’. The Tribunal and the courts have dealt with and established principles over a long period of time about how repeat appeals should be considered.
2. In *Sprut*[[3]](#footnote-3), Deputy President Dwyer stated the following:

“...the role of the Tribunal is to still consider the new application before it on its merits but, in doing so, to give great weight to the Tribunal’s decision on the earlier application having regard to the usual principles that have evolved for this purpose.”

1. The “usual principles” as referred to in *Sprut*, are drawn from *Reichert*[[4]](#footnote-4), which require consideration of this application before me having regard to whether there have been:
* significant changes in the application itself;
* changes in the circumstances of the land and its surrounds;
* changes in planning policy; and/or
* changes in the interpretation of the facts or law relevant to the Tribunal’s consideration.
1. Guided by these long established principles regarding repeat appeals, I must firstly identify what the previous Tribunal said about the proposal before it, and then assess what, if anything has changed. I must also determine if this review is a classic repeat appeal or a correcting repeat appeal, and finally determine the application *de novo*, on its merits guided by its response to the planning and built form contexts and whether the amenity it would provide to its neighbours and residents would be acceptable.
2. In general, I should give great weight to the findings and decision of the previous Tribunal, unless it can be demonstrated that the application, its built form context or the policy framework have changed.

### What did the previous Tribunal say?

1. In *Zelezny*[[5]](#footnote-5), the Tribunal provided a lengthy description of the site and its environs and the applicable planning framework. The development then proposed was in the form of an attached side-by-side development with two individual crossovers and driveways to each respective garage. A garage wall was proposed on the southern side boundary, with the upper storey of that dwelling recessed from this boundary at 2.443 metres.
2. The Tribunal found that:

Having regard to its dimensions, proportions and site area, the land can accommodate two dwellings and include a single vehicle crossover and driveway, as demonstrated by other developments in the neighbourhood, including within Hilton Street itself. An increased density can be achieved whilst complying with the policy. Having regard to policy, the characteristics of the site, and to the context, the provision of two crossovers is not justified.

1. On that basis, the Tribunal determined that no permit should issue. Relevantly for the matter now before me, the Tribunal then commented that:

The construction of the garage to the southern boundary will prevent planting in this location. The first floor level is set back a minimum of 2.443 metres from the boundary. The applicant offered to increase this setback by 1.0 metre to 3.443 metres to further recess it from the neighbouring yard. Given the relatively confined length of wall, the roof of the garage (which reduces the extent of visible wall) and the lightweight appearance, this additional setback would ensure that unacceptable visual bulk is not presented.

1. In summary, the previous Tribunal said that the key failing of that proposal was the proposed two crossovers and driveways. Further, it said that a garage wall on the rear southern side boundary, with an upper level setback of 3.443 metres would result in a development that did not present unacceptable visual bulk to its neighbours.

### Has anything changed since the previous review?

1. The permit applicant submits that this is a repeat appeal and therefore, the key issue is whether the design response, built form and amenity is appropriate to its context and has adequately responded to the issues identified by the Tribunal in the previous determination.
2. The Tribunal in its decision determined that the site could accommodate two dwellings with a single crossover. I agree. The site is well located with respect to access to services, is in an established and well serviced area of Monash, and is largely unaffected by significant constraints such as significant vegetation. It is of a size which is capable of supporting two dwellings while managing off and on site amenity implications.
3. The character concerns raised by the Tribunal previously related to the two proposed crossovers and driveways. The current proposal differs by proposing only one crossover and driveway and the dwellings in a one behind the other format. I find this proposal can aptly be described as a ‘correcting’ repeat appeal as the plans have been modified to address the identified issue.
4. While there have been changes to the planning scheme since the previous decision (for example, with the zoning now being GRZ3 where previously it was General Residential Zone– Schedule 2), these are not so significant insofar as this site and this proposal are concerned, in order to warrant a departure from the issues raised in the previous decision. Further, while local policy at 22.01 now differs (the site now being within the Garden City Suburbs Northern Area unlike in *Zelezny*, where the site was located within the Residential Character Type C area) the preferred character statement continues to support appropriate unit development subject to the usual design considerations as expressed in Clause 55.
5. Further, in terms of the above criteria, I note there has been no significant change in the surrounding land uses since the original application was considered by the Tribunal in 2017.
6. Having satisfied myself that this is a classic correcting appeal, I now consider the merits of this proposal, giving some weight to the previous Tribunal findings.

## Is the proposal respectful of the neighbourhood character?

1. Mr Skipitaris says the proposal is inconsistent with the existing neighbourhood character as two dwellings are proposed, whereas most surrounding development is one dwelling on a lot. Further, he says where there are two dwellings on a lot these are generally single storey in nature, and that there are no two storey units built on rear side boundaries.
2. The purposes of the General Residential Zone include:

To encourage development that respects the neighbourhood character of the area.

To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.

1. Schedule 3 to the zone includes neighbourhood character objectives, makes some variations to Clause 55 Standards and provides additional decision guidelines.
2. The neighbourhood character objectives are:
* To support new development that contributes to the preferred garden city character through well landscaped and spacious gardens that include canopy trees.
* To promote the preferred garden city character by minimising hard paving throughout the site by limiting the length and width of accessways and limiting paving within open space areas.
* To support new development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form.
* To support new development that locates garages and carports behind the front walls of buildings.
1. To achieve these objectives, Schedule 3 varies a number of Clause 55 Standards including those relating to minimum street setbacks, site coverage, permeability, landscaping, side and rear setbacks, private open space and front fencing.
2. The additional decision guidelines are:
* Whether the development provides an appropriate transition to built form on adjoining sites.
* The robustness of proposed materials and finishes.
* The impact of the shape and dimensions of the lot on the ability of the development to meet any requirements of this schedule.
* The location and number of vehicle crossovers.
* The impact of the development on nature strips and street trees.
* The location, quantity and species of vegetation provided.
1. Mr Skipitaris relies on his understanding of what neighbourhood character is. *Planning Practice Note 43 Understanding Neighbourhood Character* describes neighbourhood character as:

Neighbourhood character is essentially the combination of the public and private realms. Every property, public place or piece of infrastructure makes a contribution, whether great or small. It is the cumulative impact of all these contributions that establishes neighbourhood character. The key to understanding character is being able to describe how the features of an area come together to give that area its own particular character. Breaking up character into discrete features and characteristics misses out on the relationships between these features and characteristics. Understanding how these relationships physically appear on the ground is usually the most important aspect in establishing the character of the area.

1. The Practice note says:

Respecting character does not mean preventing change. The neighbourhood character standard is not intended to result in the replication of existing building stock or stop change.

1. And further:

Respecting neighbourhood character does not mean limiting the scope of design interpretation and innovation, or mimicry or pattern book design. Instead, it means designing the development to respond to the features and characteristics identified in the neighbourhood.

1. The Practice Note makes it clear that “character” is derived from the quantum of features evident in particular neighbourhoods, not singular elements alone. And that “respecting” character does not mean replicating what is already evident.
2. Clause 22.01 is the City of Monash’s Residential Development and Character policy. It seeks to encourage new development to achieve architectural and urban design outcomes that positively contribute to neighbourhood character having particular regard to the applicable preferred future character statement for the area. The Preferred Character Statement for the Garden City Suburbs Northern area (in which the review site is located) states:

Although there will be changes to some of the houses within this area, including the development of well-designed and sensitive unit development and, on suitable sites, some apartment development, these will take place within a pleasant leafy framework of well-vegetated front and rear gardens and large canopy trees.

Setbacks will be generous and consistent within individual streets. Building heights will vary between neighbourhoods. Neighbourhoods with diverse topography and a well-developed mature tree canopy will have a larger proportion of two storey buildings. In the lower, less wooded areas, buildings will be mainly low rise unless existing vegetation or a gradation in height softens the scale contrast between buildings. New development will complement the established buildings through consistent siting, articulated facades and use of materials. New development will consider energy efficiency and sustainability principles. Long expanses of blank wall will be avoided, particularly when adjacent to public parks, reserves and other open space areas, where the building should address the public area.

Architecture, including new buildings and extensions, will usually be secondary in visual significance to the landscape of the area when viewed from the street. New development will be screened from the street and neighbouring properties by well planted gardens that will ensure the soft leafy nature of the street is retained.

Gardens will consist of open lawns, planted with a mix of native and exotic vegetation and trees. Existing mature trees and shrubs will be retained and additional tree planting within streets and private gardens will add to the tree canopy of the area.

Buildings will be clearly visible through these low garden settings, and non-existent or transparent front fences. Additional vehicle crossovers will be discouraged.

The built-form will be visually unified by well-planted front gardens that contain large trees and shrubs and street tree planting. Trees within lots to be redeveloped will be retained wherever possible to maintain the established leafy character.

Landscape elements such as remnant indigenous vegetation and the large old coniferous wind-rows will be retained until trees are no longer healthy or safe.

1. Mr Skipitaris says the proposal is not consistent with the existing neighbourhood character as two dwellings are proposed on the land. Further he says that garages on side boundaries at the rear of properties is not consistent with the existing neighbourhood character.
2. State planning policies encourage urban consolidation in well serviced locations closer to the city, in the interests of minimising Melbourne’s on-going outward sprawl. This enables our community to get better value from its existing infrastructure and services. It is inevitable that achieving additional residential development will, to varying degrees, change the existing character of an area.
3. Although the applicant is concerned that the proposal is an overdevelopment, respecting character does not only mean allowing the same style or similar number of dwellings that already exists. If that were the case there would be no additional dwellings in established urban areas, despite the GRZ encouraging housing growth, and State and local policies encouraging infill development.
4. There is no provision in the planning scheme that can be regarded as a requirement or a policy direction that only detached dwellings on large lots, intended to accommodate a particular type of household, are acceptable in this neighbourhood. To the contrary, Council’s preferred character statement for the area supports the development of well-designed and sensitive unit developments.
5. I find that the existing character of the neighbourhood immediately surrounding the site is varied. While the majority of lots have single dwellings, they include a mixture of single and double storey dwellings with differing architecture, landscaping and setbacks. There are varying levels of on-site landscaping, and building materials are generally brick with tiled gabled rooflines. Many properties have built form on one side boundary in the form of garages or sheds. Aerial photographs show that built form extending deep into lots is characteristic of the area.
6. In this respect the following aspects of the proposal’s design reflect an acceptable response to the character of the area:
* At a two-storey height which is well below the maximum height permitted in the GRZ, the single storey transition in height from the predominant single storey scale of development in the neighbourhood, is not excessive. Two storey development is consistent with a typical suburban context and there are examples of two-storey development in the neighbourhood, including on Mr Skipitaris’ property.
* The dwellings are set back from the street frontage in accordance with standard B6 of Clause 55.
* Only one vehicle crossover is proposed.
* The front setback allows ample space to ensure meaningful landscaping can be provided.
* The upper level of each dwelling is recessed from the ground level below.
* The proposal seeks to use a mix of brick, render and tiled gabled roof form.
1. I am also satisfied that the proposal is consistent with the preferred neighbourhood character as expressed in Clause 22.01 as:
* There is upper level separation of more than 5 metres between both dwellings which breaks up the perception of built form from its neighbours.
* The development is setback off one side boundary, which is consistent with that evident on surrounding properties.
* The use of one crossover and driveway minimises hard paving and provides the opportunity for landscaping on both sides of the driveway.
* Dwelling 1 at the street frontage is provided with an articulated façade with varied setbacks and projecting porch.
* The proposed garages are setback behind the buildings.
* There is only one wall proposed on the boundary, which ensures landscaping space is more broadly provided around buildings.

## Is the proposed garage on the boundary acceptable?

1. Clause 55.04-2 (Standard B18) provides the amenity objectives relating to walls on boundaries. The objective comprises two parts; the first being to ensure that the location, length and height of a wall on a boundary respects the existing or preferred neighbourhood character and the second being to limit the impact on the amenity of existing dwellings.
2. I have previously found that garage walls on boundaries are a character element evident in the immediate neighbourhood. Mr Skipitaris’ own garage is built on the side boundary (albeit set further forward on his lot).
3. Further, I do not agree with Mr Skipitaris’ assertions that the garage wall on the boundary and the second storey form of Dwelling 2 will result in unreasonable impacts to his property. The impacts he asserts relate to the visibility of the proposed wall, garage roof and second storey of Dwelling 2 from his rear spos.
4. The garage wall satisfies Standard B18 by having a wall height of less than 3 metres. Its length (at 6 metres) is less than the Standard allows (being 10 metres plus 25% of the remaining length of the boundary of an adjoining lot).
5. While the garage wall will be on the boundary with Mr Skipitaris’ rear spos, and both it and the upper level of Dwelling 2 will be visible from this space, mere visibility alone is not a reason for a development to be refused. The upper level of Dwelling 2 will be set back 3.444 metres from the boundary with Mr Skipitaris’ property (in accordance with Condition 1a). This is consistent with the Tribunal’s findings in *Zelezny*.
6. This setback, and the pitched roof above the garage means the upper level wall of the dwelling will appear further recessed than if a flat roof with blank upper level wall was proposed. Important to note is that the proposed upper level set back of this dwelling also meets Standard B17 of Clause 55.04-11.
7. More broadly, I am otherwise satisfied that the visual bulk impacts of the proposal are acceptable because with the exception of the garage on the southern side boundary, there are no buildings on side boundaries.

## WHAT CONDITIONS ARE APPROPRIATE?

1. In accordance with Council’s request, I have modified Condition 1 of the NOD to refer to the correct version of plans that were considered by Council and have otherwise made no changes to the remaining conditions contained in Council’s NOD.

## conclusion

1. For the reasons explained above, the decision of the responsible authority is varied. A permit is issued subject to conditions.

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| **K Birtwistle** **Member** |  |  |

# Appendix A – Permit Conditions

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| Permit Application No: | TPA/49734 |
| Land: | 47 Hilton Street, Mount Waverley |

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| What the permit allows |
| In accordance with the endorsed plans:* Construction of two, two storey dwellings on a lot in the General Residential Zone – Schedule 3
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## Conditions:

1. Before the development starts, three copies of plans drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans submitted with the application: Pages 2-4 (Rev. C, 17/07/19), Pages 5-7 (Rev. B, 17/07/19), Page 8 (Feb 19), Pages 9-11 (Rev. B, 17/07/19) by Allan A. Armstrong Associates,but modified to show:
	1. Increased southern setback of first floor of Dwelling 2 to a minimum of 3.443m.
	2. Blade screening to be provided Dwelling 2 first floor bedroom 1 east facing two southernmost windows. Sectional diagrams are also to be provided to demonstrate compliance with ResCode overlooking Standard B22.
	3. Dwelling 1 ground floor south facing meals and kitchen windows and west facing meals window to be double glazed
	4. Dwelling 2 ground floor south facing and east facing meals windows to be double glazed
	5. A corner splay or area at least 50% clear of visual obstruction (or with a height of less than 1.2m) extending at least 2.0 metre long x 2.5 metres deep ( within the property) on both sides of each vehicle crossing to provide a clear view of pedestrian on the footpath of the frontage road.

**No Alteration or Changes**

1. The development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.

**Common Boundary Fences**

1. All common boundary fences are to be a minimum of 1.8 metres above the finished ground level to the satisfaction of the Responsible Authority. The fence heights must be measured above the highest point on the subject or adjoining site, within 3 metres of the fence line.

**Landscaping**

1. Before the commencement of buildings and works, a landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority prior to the commencement of any works. The plan must show the proposed landscape treatment of the site including:-
	1. the location of all existing trees and other vegetation to be retained on site
	2. provision of at least 3 canopy trees with spreading crowns capable of reaching a mature height of 8m located throughout the site including the major open space areas of the development
	3. planting to soften the appearance of hard surface areas such as driveways and other paved areas
	4. a schedule of all proposed trees, shrubs and ground cover, which will include the size of all plants (at planting and at maturity), their location, botanical names and the location of all areas to be covered by grass, lawn, mulch or other surface material
	5. the location and details of all fencing
	6. the extent of any cut, fill, embankments or retaining walls associated with the landscape treatment of the site
	7. details of all proposed hard surface materials including pathways, patio or decked areas

When approved the plan will be endorsed and will then form part of the permit.

**Tree Protection**

1. Trees on the nature strip and adjoining properties must be protected in accordance with the recommendations contained in Sections 4.3, 4.4 and 5 of the report prepared by Adam Hamilton of Constructive Arboriculture dated February 2019.
2. No building material, demolition material or earthworks shall be stored or stockpiled under the canopy line of any tree to be retained during the construction period of the development hereby permitted

**Landscaping Prior to Occupation**

1. Before the occupation of the buildings allowed by this permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and then maintained to the satisfaction of the Responsible Authority.

**Stormwater**

1. All stormwater collected on the site from all hard surface areas must not be allowed to flow uncontrolled into adjoining properties or the road reserve.
2. The private on-site drainage system must prevent stormwater discharge from the/each driveway over the footpath and into the road reserve. The internal drainage system may include either:
	1. a trench grate (minimum internal width of 150 mm) located within the property boundary and not the back of footpath; and/or
	2. shaping the internal driveway so that stormwater is collected in grated pits within the property; and or
	3. another Council approved equivalent.
3. All stormwater collected on the site is to be detained on site to the predevelopment level of peak stormwater discharge. The design of any internal detention system is to be approved by Council’s Engineering Department prior to drainage works commencing.
4. The nominated point of stormwater connection for the site is to the east of the property where the entire site's stormwater must be collected and free drained via a pipe to the kerb and channel in the naturestrip via a Council approved kerb adaptor to be constructed to Council Standards. Note: If the point of connection cannot be located then notify Council's Engineering Department immediately.

**Road Infrastructure**

1. Any works within the road reserve must ensure the footpath and naturestrip are to be reinstated to Council standards.

**Permits**

1. Engineering permits must be obtained for new or altered vehicle crossings and new connections to Council pits and these works are to be inspected by Council’s Engineering Department. A refundable security deposit of $1,000 is to be paid prior to the drainage works commencing.

**Urban Design**

1. The walls on the boundary of adjoining properties shall be cleaned and finished in a manner to the satisfaction of the Responsible Authority.

**Completion of Buildings and Works**

1. Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

**Permit Expiry**

1. This permit will expire in accordance with section 68 of the *Planning and Environment Act 1987*, if one of the following circumstances applies:

(a) The development has not started before two (2) years from the date of issue.

(b) The development is not completed before four (4) years from the date of issue.

In accordance with section 69 of the *Planning and Environment Act 1987*, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within six months of the permit expiry date, where the development allowed by the permit has not yet started; or within 12 months of the permit expiry date, where the development has lawfully started before the permit expires.

**- End of conditions -**

1. The submissions of the parties, any supporting exhibits provided to the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. [↑](#footnote-ref-1)
2. [2017] VCAT 920 [↑](#footnote-ref-2)
3. *Sprut Pty Ltd v Stonnington CC* [2012] VCAT 1675 [↑](#footnote-ref-3)
4. *Reichert v Banyule CC* [1996] VCAT 44 [↑](#footnote-ref-4)
5. *Zelezny v Monash CC* [2017] VCAT 920 [↑](#footnote-ref-5)