VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

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| planning and environment LIST | vcat reference No. P1601/2018Permit Application no. TPA/48679  |
| CATCHWORDS |
| Section 77 *Planning and Environment Act 198*7, Monash Planning Scheme; Neighbourhood Residential Zone Schedule 3; Neighbourhood character; Building Scale, Amenity Impacts, Two crossovers. |

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| APPLICANT | Denise Kotsikas  |
| responsible authority | Monash City Council  |
| Respondents | Richard and Nicole Predl  |
| SUBJECT LAND | 7 Tamar Grove, Oakleigh |
| WHERE HELD | Melbourne |
| BEFORE | Jane Tait, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 11 February 2019 |
| DATE OF ORDER | 7 March 2019 |
| date of correction | 15 March 2019 |
| CITATION | Kotsikas v Monash CC (Corrected) [2019] VCAT 307 |

# Order

1. In application P1601/2018 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/48679 no permit is granted.

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| **Jane Tait** **Member** |  |  |

# Appearances

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| For Denise Kotsikas | Mr Bruce Keen, town planner, Keen Planning |
| For Monash City Council | Mr David de Giovanni, town planner, David de Giovanni Town Planning |
| For Nicole and Richard Predl | In person |

# Information

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| Description of proposal | Two, two storey dwellings in a side-by-side layout. Both dwellings have ground floor living areas, kitchen, guest bedroom, bathroom, laundry and pantry. The first floor contains three bedrooms, sitting room, bathroom and en-suite.Each dwelling has a single garage with access from a separate crossover onto Tamar Grove.The dwellings are set back 7.6 metres from the frontage and have an overall height of 7.6 metres.  |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.  |
| Planning scheme | Monash Planning Scheme  |
| Zone and overlays | General Residential Zone Schedule 2 (GRZ2) |
| Permit requirements | Clause 32.08-6 – Construct two or more dwellings on a lot |
| Land description | The site is located on the west side of Tamar Grove, Oakleigh. It has a 15.24 metre frontage, depth of 40.14 metres and site area of 623 square metres. The land has a gentle fall of one metre from south-west to north-east across the site. There are no easements.There is a 3 metre wide disused laneway abutting the west boundary.The site is occupied by a single storey weatherboard dwelling with a fibro garage to the rear with access from a driveway along the north boundary.There is a two storey detached weatherboard dwelling to the south at 9 Tamar Grove and single storey detached weatherboard dwelling to the north at 11 Tamar Grove. |
| Tribunal inspection | An unaccompanied site inspection was conducted on 13 February and 28 February 2019 |

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

## What is this proceeding about?

1. This is an application for review of the refusal of the Monash City Council to grant a permit for the construction of two, two storey dwellings at 7 Tamar Grove, Oakleigh. Council has refused the application both on neighbourhood character grounds and inconsistency with the Residential Development Policies at Clause 21.04 and 22.01 of the Monash Planning Scheme. It also refused the application on the ground the proposal does not adequately satisfy the objectives of Clause 55 aimed at respecting neighbourhood character, residential policy, landscaping and access.
2. The applicant argues the development is a site responsive design that is consistent with the emerging character of the area.
3. The respondent owns a property to the south at 9 Tamar Grove. He argues the construction of two, two storey dwellings at a reduced frontage setback will be visually disruptive in the streetscape and for neighbouring properties. He also has concerns about the materials of the dwellings, two crossovers, loss of landscaping and amenity impacts on this dwelling.
4. A statement of grounds was also received from the owner/occupiers of the adjoining dwelling to the north at 11 Tamar Grove. These grounds raise the same issues canvassed by the respondent.

## What are the key issues?

1. Based on the submissions and site inspection, the key considerations in this proceeding are:
* Does the proposal respond positively to the policy expectations of the planning scheme?
* Will the development contribute to the preferred neighbourhood character?
* Will the development have unacceptable impacts on the amenity of adjoining properties?
1. Whilst the construction of two dwellings responds positively to policy directives for urban consolidation, I have decided that no permit should issue. I find the layout of the dwellings will not preserve and enhance the neighbourhood given the strong single crossover character evident in this street. I set out my findings on neighbourhood character further below.

## Does the proposal respond positively to the policy expectations of the planning scheme?

### Zoning

1. The review site is located within a General Residential Zone 2 (GRZ2). This zone has purposes including:

To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.

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.[[2]](#footnote-2)

1. The GRZ2 contains three variations to Clause 55 including Standard B6 that specifies a frontage setback of 7.6 metres. Standard B28 varies the private open space requirements to consist of an area of 75 square metres, with one part of the private open space at the side or the rear of the dwelling with a minimum area of 35 square metres, a minimum width of 5 metres and convenient access from a living room and Standard B32 is varied to specify a maximum front fence height of 1.2 metres.
2. The development meets the requirements of the variations to Clause 55. It also satisfies Clause 32.08-4 as 38.4% of the site has been set aside as garden area.

### Planning Policy Framework

1. The Planning Policy Framework (PPF) at Clauses 11 and 16 promotes urban consolidation and encourages housing diversity in locations that are well serviced with public transport and community facilities.
2. Clause 15.01, Urban Design principles also places emphasis on new housing respecting the neighbourhood character.

### Local Planning Policy Framework

1. The Local Planning Policy Framework (LPPF) reiterates the PPF objectives relating to urban consolidation. Clause 21.03 has a vision for Monash that acknowledges the municipality must cater for changing household sizes and structure whilst also complementing and enhancing the Garden City Character. This is also identified in Clause 21.02-2 of the Monash Planning Scheme that states setbacks of buildings, mass and scale of building envelopes, quality of materials, location of car parking and canopy tree planting as important contributors to achieve the Garden City character.
2. Clause 21.04 identifies the review site is within Type A Character Area that is derived from the Pre-First World War and Inter-War development. Some of the contributory elements to this character include the grid subdivision pattern, well planted front gardens, consistent building setbacks, wide nature-strips, low fencing and high numbers of pre-second World War housing.
3. One of the objectives for housing at Clause 21.04-3 is to recognise the treed environment and enhance the Garden City Character of the municipality. The desired future character encourages built form to be unified by consistency in building setback. It recommends that new dwellings address the street and complement the scale and form of adjacent buildings. It also suggests low front fences to enable vegetation to be visible from the street, allow clear views of buildings and give the street an open and transparent quality.
4. The Residential Development and Housing Policy at Clause 22.01 implements the Municipal Strategic Statement and zone objectives and provides the policy basis for the neighbourhood character areas. It contains objectives to build on the contribution that landscaping makes to the Garden City Character and encourages design responses that contribute positively to the neighbourhood character. I will discuss how the development responds to these policy directions further below.

### Monash Housing Strategy

1. The Monash Housing Strategy (2014) is identified in Clause 21.01-2 which contains objectives, strategies and actions aimed at addressing issues faced in the municipality. In particular, issues relating to the need to protect the valued urban character and amenity of the area and to maintain and enhance the Garden City character.
2. This strategy identifies the review site falls within Category 8 – ‘Garden City Suburbs’ precinct. The objective for housing in this precinct is to preserve and enhance Monash’s Garden City Character.

### Amendment C125

1. Amendment C125 (Part 1) was gazetted on 19 May 2018. This amendment deletes Clauses 21.02 and 21.03 of the Municipal Strategic Statement (MSS) as the policies were consolidated into Clause 21.01. It also reiterated the existing policy directions and provided greater emphasis on the need to provide enough space for the planting of canopy trees.
2. Amendment C125 (Part 2) identifies the subject site and surrounding land is to be zoned GRZ3 or GRZ4. It also revises Clause 21.04 to include the Residential Development Framework Plan which shows the review site is within a ‘Garden Suburbs Area’. This part of the amendment is currently with the Minister for approval.
3. The proposed GRZ zone maintains a frontage setback requirement of 7.6 metres, site coverage of 50%, maximum front fence height of 1.2 metres, permeability of 30%, rear setback of 5 metres and requires a minimum of 35 square metres private open space to be clear of water tanks and outdoor storage sheds. It also includes building heights and the following neighbourhood character objectives:
* To ensure development is consistent with the desired future character statement for the area set out in Clause 22.01-4.
* To ensure that development enhances the existing garden city character.
* To ensure development has generous and consistent setbacks and respects the height, scale and massing of existing dwellings in the neighbourhood.
1. The development generally meets the above requirements of the schedule including the rear setback, site coverage, front fence and open space provision.
2. I will give the amendment some weight in my decision as it emphasises the importance of maintaining the garden character of the neighbourhood. The new zone also requires consideration of the preferred neighbourhood character statement and neighbourhood character objectives that are generally consistent with the existing character statement.

### Policy Findings

1. Council argues the review site is located in an area where the primary focus is on neighbourhood character outcomes, over promoting more intensive outcomes. It says that unlike other parts of the municipality where there is greater policy emphasis for change, this area seeks to preserve and enhance the current character. It submits the site is part of the residential hinterland context that must form the basis of assessment of neighbourhood character.
2. I am satisfied the site is suitable for the development of two dwellings given its proximity to public transport and activity centres. I must have regard to all relevant policies that include those that encourage urban consolidation whilst also respecting the preferred neighbourhood character.
3. I find the side-by-side development does not adequately respond to the policy expectations and physical context of this neighbourhood that is characterised by a strong single vehicle crossover character. The layout that includes two crossovers and driveways, is contrary to the desired outcomes in the preferred neighbourhood character that seeks to ‘preserve and enhance’ this area. My reasons follow.

## Will the development contribute to the preferred neighbourhood character?

1. The plans indicate Dwelling 1 will utilise the existing (widened) crossover and a second crossover is to be constructed for Dwelling 2 that abuts the south boundary. This requires removal of 3 metres of the naturestrip and construction of a double crossover with 9 Tamar Grove.

### Are two crossovers acceptable in this neighbourhood?

1. The policy at Clause 22.01-3 provides clear direction about vehicle crossings, location of garages, carport and car spaces. It states:
* The Garden City Character of residential areas be retained by discouraging car parking and accessways that have a significant impact on or cause fragmentation of the streetscape.
* The number of vehicle crossings be minimised to maintain existing kerb side parking and green spaces in both front setback areas and in naturestrips.
* Hardening of the streetscape through the provision of additional crossovers is discouraged.
* Landscaping in the front setback areas of properties is to be maintained by minimising the number of crossovers provided on larger multi unit sites and placing vehicle parking to the rear on sites accommodating small to medium multi developments.
* Garages, carports and associated visitor spaces be designed so that they do not dominate or visually disrupt the streetscape.[[3]](#footnote-3)
1. The desired future character of the Residential Character Type A also notes:

The soft quality of the street that is derived from the wide nature strips will be maintained by ensuring that there is only one crossover per lot frontage.[[4]](#footnote-4)

1. This policy discourages additional vehicle crossings due to their impact on landscaping in frontage setbacks and nature-strips.

### What do the parties say?

1. The applicant argues the two crossovers will not unreasonably detract from the soft quality of this area as the new crossover will form a larger (double) crossover with 9 Tamar Grove. This crossover is separated from the existing crossover by an 8.7 metre wide section of nature-strip.
2. The applicant submits there are many other double crossovers in the street including at 10 and 12 Tamar Grove, 21 and 23 Tamar Grove, 27 and 29 Tamar Grove and 38 and 40 Tamar Grove. He also identified there were examples of two crossovers per lot at 33 and 43 Tamar Grove.
3. The applicant also notes there is sufficient space at the kerbside to park a vehicle and the proposal meets the requirements of Clause 55.03-9 (Standard B14 – Access). He submitted other Tribunal decisions that supported a site layout with two crossovers. These decisions discussed the context of the neighbourhood and suitability of the duplex layout.[[5]](#footnote-5)
4. Council argues this street has a strong single vehicle crossover character as all 45 properties feature a single crossover. This includes multi-dwelling developments at 3, 20 and 35 Tamar Grove. It says this is no coincidence as it is a result of the consistent application of policy over the years.
5. Council submits that the two crossovers will fragment the narrow and uninterrupted nature-strip and reduce landscaping potential in the frontage which is contrary to the Garden City policies in the scheme.
6. The respondent agrees with Council’s arguments and notes the loss of landscaping and greenery in the frontage will degrade the garden character of the neighbourhood. He is also concerned about the loss of a large canopy tree growing in the frontage near the south boundary and the loss of an on-street car space. He says this will increase parking pressure in the street that already has parking restrictions.

### What are my findings?

1. The aerial photographs and site inspection reveals this street contains a strong single vehicle crossover character. This includes multi-dwelling developments in the street at 3, 20 and 35 Tamar Grove that have one crossover serving both dwellings. There is also a newer multi-dwelling development at 133 Atherton Road containing eight dwellings that utilise one double crossover onto Tamar Grove.
2. The 3.5 metre wide nature-strips generally contain mature canopy trees that are approximately 6 metres high. The uniformity of the streetscape is reinforced by the grid layout and regular spacing of crossovers along its length.
3. Dwellings are set back generally 9 metres from the frontage and have a driveway running along one side boundary. Garaging and car parking is usually located to the side or rear. Front gardens are visible due to the low front fencing and they contain smaller exotic trees and shrubs that provide visibility of the dwellings in the streetscape.
4. I find the side-by-side layout that requires the construction of an additional crossover on this lot will have a detrimental impact on the existing and preferred neighbourhood character for the following reasons:
* The site has a width of 15.54 metres and this limits the area in the frontage for landscaping. The plans show the frontage contains two driveways, two porches and two compact front gardens that have an area of 33.5 square metres and 24 square metres. This is inconsistent with the open and more spacious frontages of existing dwellings in the street.
* The naturestrip will have a length of approximately 8.8 metres due to the removal of 3 metres of grass for the crossover. This naturestrip will be shorter than a majority of others in the street and will result in fragmentation of the streetscape.
* The creation of a double crossover will increase the amount of hard paving in the street.
1. The applicant says there is adequate room for landscaping in the frontage of both dwellings. He argues the space for landscaping is large enough to accommodate the planting of three canopy trees which is shown on the landscape plan.
2. I acknowledge the landscape plan indicates the planting of three canopy trees in the frontage. However, I have concerns about the increase in hard paving and loss of sense of openness in the frontage given the site has a width of 15.54 metres.
3. I also observed many examples of double/joined crossovers in this street. However, these crossovers provide access to single dwellings that have the benefit of the full width of the frontage for landscaping. The anomalies cited by the applicant are to a single dwelling at 33 Tamar Grove and two attached dwellings at 45 and 45 Tamar Grove. All these properties are wider than the subject site and have greater area for landscaping in the frontage.
4. I also acknowledge there are examples of developments with more than one crossover in the wider area, including to side-by-side multi dwelling developments. However, Tamar Grove is unique as it contains properties, including multi-dwelling developments that have only one crossover and driveway. Clause 22.01 explicitly seeks to maintain this feature as part of the designed future character of the Residential Character Type A area.
5. Both parties tabled Tribunal decisions in support of more than one vehicle crossing and decisions that oppose such a layout. I have reviewed these decisions and have come to the conclusion that each site must be examined in its individual merits in relation to its physical and policy context. I note that some lots are wider and some streets were already fragmented by commercial development and other multi-dwelling development with similar layouts.
6. The applicant argues the side-by-side layout allows the walls to be set back from the side boundaries which adds to the sense of space around the development. He notes these setbacks meet the requirements of Clause 55.04-1 (Standard B17 – Side and Rear Setbacks).
7. Council argues the site is relatively unconstrained as it has features such as the east/west aspect, absence of overlays and easements and is rectangular in shape. It says it is therefore suitable for a linear layout and:

If the policy outcomes relating to character can be met whilst still providing two dwellings, then they should be.

There is no reason to depart from this clear and reoccurring policy direction in a streetscape that only has single crossovers/driveways, particularly when a development could be designed with a single vehicle crossover. [[6]](#footnote-6)

1. The importance of balancing many different policies and the policy statements is just one of many matters that needs to be considered. I agree with the findings in *Zelezny v Monash CC* [2017] VCAT 920 that states:

Departure from policies contained within the Planning Scheme without sufficient justification can incrementally erode the ability to achieve the expressed desired outcome. In the context of the policy at clause 22.01 and the character of the neighbourhood, I have not been persuaded that the provision of two crossovers and driveways is justified in this instance. Perpetuating what has occurred in the other two developments is contrary to the clearly expressed policy. Importantly, the Council has included the policy in the Planning Scheme. It is not within an extraneous document, which would, arguably, carry less weight. The implementation of policy is the first-stated purpose of the GRZ2. Policies contained within the Planning Scheme should be given meaningful expression.[[7]](#footnote-7)

1. Whilst a tandem development is not before me, I agree with Council that given its shape, topography, absence of easements, abuttal to a laneway and the location of buildings on adjoining properties, there is potential to accommodate two dwellings on this lot.
2. However, I must consider the application before me and balance the various policies in the scheme, including those relating to dwelling diversity and increased densities with those relating to neighbourhood character. I am not satisfied that departure from the clear policy expectations in Clause 22.01 is acceptable given the impacts on the strong single crossover character of this street. I find the development will not preserve and enhance the unique character of this street.

### Is the built form and detailing acceptable in this neighbourhood?

1. Council argues the large size of the first floor footprints, with no setback or intervening roof elements, will present as a sheer two storey wall in the streetscape. It submits this is a foreign element in this neighbourhood.
2. Council says the relevant policy directions in Clause 22.01 encourage the height and scale of existing dwellings to be respected and a high degree of articulation is to be exhibited.
3. This street contains a higher proportion of older brick and weatherboard Post-War and Inter-War detached houses with consistent front and side setbacks. There is also evidence of newer, two storey dwellings and infill detached houses in the street.
4. Whilst I acknowledge the size of the first floor is larger than both adjoining dwellings I find the scale is acceptable for the following reasons:
* The first floor north and south elevations are set back 2.45 metres to 3.05 metres from the side boundaries. These setbacks meet the requirements of Standard B17 and recess the upper level away from the adjoining properties.
* The dwellings include pitched tiled roofing with eaves at first floor level. This is consistent with existing dwellings in the street.
* The use of different coloured renders at ground and first floor level assist in breaking up the building mass.
* There are examples of larger dwellings with sheer walls in the street, including the dwelling at 10 Tamar Grove.
1. I agree with Council that the sheer wall of the master bedroom above the garage accentuates the dominance of the upper level in the streetscape. However, this is not a fundamental flaw of this proposal as the setback of the first floor could be increased to provide articulation in the façade.
2. The respondent is concerned about the use of render for the dwellings. He says this material is foreign in the street as the original houses are either brick or timber. I find the use of render is acceptable as the site is not within a Neighbourhood Character Overlay that requires materials to match original dwellings. I note there are some dwellings in the street that are rendered including the multi-dwelling development at 20 Tamar Grove.
3. Council is concerned about the two garages visible in the streetscape. It says they are a dominant element in the façade as they take up more of the frontage than the actual dwellings.
4. The respondent is also concerned about the construction of the garage on the south boundary. He says this siting is inconsistent with existing dwellings in the street that have garages located towards the rear of the site.
5. The garage for Dwelling 1 is proposed to be set back one metre from the north boundary and the garage for Dwelling 2 abuts the south boundary. I am not concerned about the setbacks and the extent of visibility of the garages as this street contains dwellings with double garages as part of the façade. This is evident at 2 and 10 Tamar Grove.

### Is the frontage setback acceptable?

1. The dwellings are proposed to be set back 7.6 metres from the frontage and the porches are setback 6 metres.
2. The respondent argues these setbacks are inconsistent with existing dwellings in the street that are generally set back 9.1 metres. He submits this will be visually disruptive to the character of the streetscape and neighbouring properties.
3. The dwellings will be located forward of both adjoining dwellings to the north and south as they are set back 9.1 metres from the frontage. However, the GRZ2 includes a variation to Clause 55.03-1 (Standard B6 - Street Setbacks) that allows a minimum frontage setback of 7.6 metres. Therefore a 7.6 metre setback is acceptable for new development as it is the recommended setback in the planning scheme.

### Is there sufficient landscaping to enhance the garden character of this neighbourhood?

1. The respondent is concerned the development requires the removal of several mature canopy trees in the frontage setback and rear yard. He says local policies recommend that mature canopy trees need to be retained, where possible and these trees are clearly visible in the street.
2. The applicant argues the number of canopy trees to be planted will be greater than in the gardens of other dwellings in Tamar Grove, including properties adjoining and opposite the subject site. Whilst the loss of canopy tree in the frontage is unfortunate, there are no planning controls that require a planning permit for tree removal.

Will the development have unacceptable impacts on the amenity of adjoining properties?

### Walls on Boundaries

1. The respondent is concerned about the construction of the garage of Dwelling 2 on the south boundary. He says the 6.98 metre long and 3.2 metre high boundary wall will be visually disruptive in the streetscape. He also submits the garage will significantly overshadow the open space in the frontage.
2. I am not persuaded by these arguments and find the location of the garage on the south boundary will not result in unacceptable amenity impacts for the following reasons:
* The garage is abutting the driveway and is set back from the frontage to match the respondent’s dwelling. This wall will be facing the side elevation only.
* The wall height and length meet the requirements of Clause 55.04-2 (Standard B18 – Walls on Boundaries).
* Shadow diagrams for the 22 September (the Equinox) indicate that shadows fall over the driveway.
* Adequate daylight will enter the respondent’s bedroom window as the garage is set back 3.4 metres from the window. This meets the requirements of Clause 55.04-3 (Standard B19 – Daylight to Existing Windows).

### North Facing Windows and Daylighting

1. The respondent submits there will be loss of light into his north facing windows, door and garden. He also says the solar panels on his roof will be impacted.
2. The respondent’s dwelling is set back 3.4 metres from the north boundary and includes a bedroom and living room window in the north elevation.
3. Clause 55.04-4 (Standard B20 – North Facing Windows) is not applicable as the windows are not within 3 metres of the boundary. The diagrams for the 22 September (the Equinox) indicate shadows fall predominately over the adjoining driveway throughout the day.
4. The height and setback of the ground and first floor of Dwelling 2 meet the numerical requirements of Clause 55.04-3 (Standard B19 – Daylight to Existing Windows). This standard has an objective to allow adequate daylight into existing habitable rooms.
5. In agree with the respondent that in winter shadows will be longer. However I am satisfied the setback of the ground and first floor of Dwelling 2 will allow adequate solar access and daylight into the respondent’s north facing windows and front yard.
6. I also note the height and setback of the north elevation at ground and first floor of Dwelling 1 also meets the requirements of Standard B19. This will allow daylight adequate daylight access into the habitable room windows of the dwelling at 5 Tamar Grove.

## Other Matters

1. There are many features of this development that are satisfactory and meet the requirements of Clause 55. This includes screening of habitable room windows to prevent unreasonable overlooking of adjoining properties, internal access to daylight and the provision of 50 square metres of secluded open space in the rear yard of each dwelling. Car parking also meets the requirements of Clause 52.06.
2. The design of the dwellings is also satisfactory as they include pitched tiled roofing and setbacks from the side boundaries which is consistent with the range of dwelling styles found in this street.
3. However, in balancing the various matters that I must consider, I am not satisfied that the neighbourhood character impacts are acceptable in a street that contains primarily dwellings with a single crossover that is identified as a desired future character outcome in this area.

## Conclusion

1. For the reasons given above, the decision of the Responsible Authority is affirmed. No permit is granted.

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| **Jane Tait** **Member** |  |  |

1. The submissions and any supporting exhibits given at 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. Monash Planning Scheme [cl 32.08]. [↑](#footnote-ref-2)
3. Monash Planning Scheme [cl 22.01-3]. [↑](#footnote-ref-3)
4. Ibid [22.01-4]. [↑](#footnote-ref-4)
5. *Yap v Monash CC* [2015] VCAT 1956 and *Lateral Building Design v Monash CC* [2017] VCAT 166. [↑](#footnote-ref-5)
6. Council submission [para 92 and 93]. [↑](#footnote-ref-6)
7. *Zelezny v Monash CC* [para 12]. [↑](#footnote-ref-7)