

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P276/2022
PERMIT APPLICATION NO. TPA/52896

CATCHWORDS

Section 77 Planning and Environment Act 1987, Monash Planning Scheme, Neighbourhood Residential Zone – Schedule 4, two or three storey building, visual bulk, building height, neighbourhood character, active frontage.

APPLICANT	Julian Horan
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	43 Townsend Street GLEN WAVERLEY VIC 3150
HEARING TYPE	Hearing
DATE OF HEARING	28 October 2022
DATE OF ORDER	22 November 2022
CITATION	Horan v Monash CC [2022] VCAT 1319

ORDER

No permit granted

- 1 In application P276/2022 the decision of the responsible authority is affirmed.
- 2 In planning permit application TPA/52896 no permit is granted.

Alison Glynn
Member



APPEARANCES

For applicant	John Joyner, town planner of Melbourne Planning Outcomes
For Monash City Council	Gerard Gilfedder, town planner of Currie and Brown.

INFORMATION

Description of proposal	Construction of two, partly three storey dwellings in a side by side presentation. Each has a double garage to the street that abuts each side boundary.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	Neighbourhood Residential Zone – Schedule 4 (NRZ4). Vegetation Protection Overlay – Schedule 1 (VPO1).
Permit requirements	Construction of two or more dwellings on a lot in NRZ4.
Relevant scheme policies and provisions	Clauses 11.01, 15.01, 16.01, 21.01, 21.04, 22.01, 22.05, 32.09, 55 and 65.
Land description	The site has a 16.76 metre frontage to the north side of Townsend Road and a depth of 39.81 metres to create a 666square metre lot. The land slopes down to the rear of the site and contains a dwelling that contains two clearly habitable storeys. The sub-floor is accessible under a rear sunroom that has no level above.
Tribunal inspection	I understook an accompanied inspection of the dwelling, including the sub-floor area of the dwelling on 2 November 2022.



REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Julian Horan, (**the applicant**) is seeking a planning permit to construct two, three storey dwellings in a side by side format at 43 Townsend Road, Glen Waverley (**the review site**). Monash City Council (**the council**) has refused to grant a planning permit for the proposal. The applicant has asked the Tribunal to review this decision of the council.
- 2 The council refused to grant a planning permit on a number of grounds. In summary the council's grounds are that:
 - The proposal does not meet a mandatory building height control applying to the land,
 - The proposal is not respectful of the existing and preferred character of the area, and
 - The proposal fails a number of design requirements relating to visual bulk, overlooking, landscaping and parking design.
- 3 The applicant submits that the building meets the mandatory height requirement and also provides an acceptable response to the neighbourhood character and amenity requirements of the planning scheme.
- 4 From the submissions received and material provided, as well as having viewed the review site after the hearing I am unable to determine if the mandatory height requirement is met without parties providing further submission. However, I find that regardless of any such submission and ultimate finding, the proposal is unacceptable as a response to neighbourhood character. I therefore have determined to refuse the proposal and will not require parties to make further submission about whether the building height requirement is met in such circumstances. My reasons follow.

WHAT ARE THE KEY ISSUES?

- 5 From the submissions and material provided I find there are several questions to be determined in order to grant a planning permit for the proposal:
 - Does the proposal satisfy the mandatory height control of clause 32.09-10 of the Monash Planning Scheme (**the planning scheme**)?
 - Does the proposal provide an acceptable neighbourhood character outcome, particularly having regard to the schedule to NRZ4?
 - Are there any unreasonable off-site amenity outcomes from the proposal?

¹ The submissions of the parties, 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.



- Does the proposal provide acceptable parking design?

6 I address each of these questions below.

DOES THE PROPOSAL SATISFY THE MANDATORY BUILDING HEIGHT REQUIREMENT?

7 To address this question it is firstly necessary to set out what is proposed and the planning controls applying to the land. I then set out the submissions put to me and my observations about this issue.

What is proposed?

8 The proposal is to establish two, partly two storey and partly three storey dwellings. As set out in figure 1 below, this includes a part basement area that includes a utility room and an ‘unenclosed sub-floor’ as described in the plans. This ‘unenclosed sub-floor’ protrudes more than 1.2 metres above natural ground level and the submissions of the parties do not dispute the council position that the proposed dwellings contain three storeys. The schematic section in figure 1 also identifies (in what I have highlighted with a blue cloud) the ridgeline of the top level of the roof of the existing dwelling.

9 From the street, the front (south) entries are recessed in behind the garage door lines with upper level bedroom and walk-in-robe areas extending out over the garage facades.



Figure 1 - Elevations and cross section of proposed dwellings.



What are the relevant planning controls applying to building height for the proposal?

- 10 The site is located in NRZ4 that is directed by the provisions of clause 32.09 of the planning scheme. Clause 32.09 sets out general provisions for the Neighbourhood Residential Zone and includes purposes:
- To recognise areas of predominantly single and double storey residential development.
 - To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
- 11 Clause 32.09-10 sets out a ‘Maximum building height requirement for a dwelling or residential building’. The requirement states:
- A building must not be constructed for use as a dwelling or a residential building that:
- exceeds the maximum building height specified in a schedule to this zone; or
 - contains more than the maximum number of storeys specified in a schedule to this zone.
- If no maximum building height or maximum number of storeys is specified in a schedule to this zone:
- the building height must not exceed 9 metres; and
 - the building must contain no more than 2 storeys at any point.
- 12 The NRZ4 schedule does not specify any varied height requirement, so the second part of the requirement applies. That is, the building must not exceed 9 metres and the building must contain no more than two storeys at any point. The submission of the applicant does not dispute the council’s submission that the application is for a three storey building and that therefore this part of the requirement at clause 32.09-10 is not met.
- 13 The applicant relies on the remainder of clause 32.09-10 that goes on to state that:
- A building may exceed the applicable maximum building height or contain more than the applicable maximum number of storeys if:
- **It replaces an immediately pre-existing building and the new building does not exceed the building height or contain a greater number of storeys than the pre-existing building.**²
 - There are existing buildings on both abutting allotments that face the same street and the new building does not exceed the building height or contain a greater number of storeys than the lower of the existing buildings on the abutting allotments.

² My emphasis added.



- It is on a corner lot abutted by lots with existing buildings and the new building does not exceed the building height or contain a greater number of storeys than the lower of the existing buildings on the abutting allotments.
- It is constructed pursuant to a valid building permit that was in effect prior to the introduction of this provision.

14 The last two of the dot points do not apply as the site is not on a corner and is not the subject of a pre-existing building permit. There is also no dispute that the new building proposed will include more storeys than at least one of the existing buildings on abutting allotments that face the same street, with the existing dwelling to the east, at 45 Townsend Street being single storey at the front and no more than two storeys at the rear.

15 To exceed the applicable maximum building height, the proposed building therefore needs to meet the first dot point I have highlighted above. That is that the new building replaces an immediately pre-existing building and the new building does not exceed the building height or contain a greater number of storeys than the pre-existing building.

16 As referred to by the council, previous ruling of the Tribunal on a legal question of interpreting an almost identical³ exemption in clause 32.08-10 for the General Residential Zone, the Tribunal in *Burnley Maltings Pty Ltd v Yarra CC*⁴ (*Burnley*) found that the exemption should be read conjunctively, requiring the ‘or’ to mean both parts of the exemption need to be met. In particular I note paragraphs 688 and 710 of *Burnley* comments:

[688] Properly understood, the Extension Exemption should be read as conferring a benefit on the person relying on (not a negative as *Burnley* contends) by allowing an exceedance to the applicable maximum building height or contain more than the applicable maximum number of storeys if it *neither* exceeds the building height of the existing building *nor* contains a greater number of storeys than the existing building.

...

[710] So, in conclusion, the Exemptions should be interpreted to apply conjunctively such that both the height and number of storeys in the existing building must both be considered in relying on the respective Exemptions.

17 I have no reason to dispute the above comments and finding of *Burnley*. Nor did any party seek to dispute this interpretation of the provision as set out in the council’s submission.

18 This means that for the proposed three storey building to not be prohibited it must replace an immediately pre-existing building that is determined to

³ Save for the metrics used for the height and number of storeys that may be exceeded.

⁴ [2021] VCAT 337



be three storey and the new building must also not exceed the height of this pre-existing building.

How many storeys has the existing building?

- 19 The council submits the existing building is only two storeys. It relies on existing plans and photos of the house that it says shows the dwelling having two internally accessible and habitable levels with the rear part of the dwelling being a sunroom over the sub-floor area.
- 20 The applicant submits that building plans supplied by the council show an existing building that can more than reasonably be interpreted as a three storey building. It submits that if these building plans were put before the council for approval today, the council would plainly state that a three storey building is being requested.
- 21 The building plans referred to are plans the Tribunal requested, and were provided by the council, prior to the hearing. A copy of the plans was also provided to the applicant at the same time. These plans include:
 - a. Original house plans⁵ that I would describe as showing a single level floorplate accessed via a front door with a concrete terrace rising up from three steps on the eastern side of the dwelling. At the rear of the house in these original dwelling plans is a sunroom with external concrete terrace to its west and 11 external steps leading down to the rear yard that sits at a lower level. No doors, internal or external, are shown into the area below the habitable room floorplate.
 - b. Upper level addition plans dated 2004.⁶ These show four bedrooms and two bathrooms to be established at an upper level, over the existing living area, but not over the sunroom at the rear. A balcony to one of the rear bedrooms extends out over the sunroom.
 - c. Addition of a double garage east of the front door dated 2006. These do not change the rear layout of the house.⁷
 - d. Overlaying of the exterior concrete terrace with a timber deck and then the extension of this outdoor deck with construction of a verandah above, west of the sunroom, in 2007. This retained, but made redundant the existing external stairs, that remain under the timber deck, and created a new set of external stairs that extend down from the deck to the rear yard, north of the sunroom.
- 22 None of the plans show an opening to an area under the sunroom that has been created. I do not know if creating such an opening would have

⁵ Plans are undated – Marked, ‘proposed brick veneer residence at Lot No. 50’ for Mr and Mrs Beggs with a marking ZA /218.

⁶ Job 2005/026 – Signature Designs

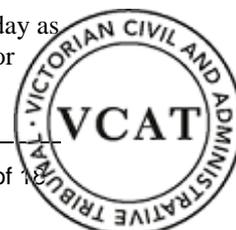
⁷ Job 2006/007 - Signature Designs.



required a building permit. I simply note it exists and that access is possible to the area under the sunroom, and this leads to access under the remainder of the house.

- 23 The council submits that the area below a rear deck and pergola ‘is an underfloor area with no direct access from the house’. The council acknowledges there is an access door adjacent to a bike shed under the deck, but this bike shed then only leads to what it says is ‘sub-floor, not a habitable storey’ that constitutes a third storey.
- 24 I undertook an accompanied inspection of the existing dwelling after the hearing at which I took some photos. Some of these photos, along with some photos provided by the council are set out in Appendix A⁸. The photos show that the area under what was the original outdoor concrete terrace, and now part of a larger deck with pergola, is used as a bike storage space and accessed via a wooden door from under the deck. This bike storage area has a concrete ceiling (I assume being the original concrete terrace) and a concrete floor. There is then an opening from this bike storage area into what was described by the council as the sub-floor area. On inspection there were some concrete pavers placed over earth in this sub-floor area, around timber footings of the sunroom and main living area that has natural ground level rising up to the south, toward the front of the site.
- 25 The sunroom is a habitable room that extends out from part of the dwelling that contains two storeys of habitable rooms, being the main living area and the bedrooms above. The question remains whether the sub-floor area constitutes a third storey where it sits under these two storeys.
- 26 A storey is defined in the planning scheme as:
- That part of a building between floor levels. If there is no floor above, it is the part between the floor level and ceiling. It may include an attic, basement, built over car parking area, and mezzanine.
- 27 A basement is separately defined as:
- A storey below ground level, or that projects no more than 1.2 metres above ground level.
- 28 The sub-floor area extends more than 1.2 metres above ground so is not a basement. In any event the key question is whether what is in the photos and described by both parties as the ‘sub-floor’ area constitutes a storey based on the above definition of a storey in the planning scheme.
- 29 From the material before me and my inspection I am not satisfied I have sufficient information to determine if the area, sitting under the two storey area above, constitutes a storey for the purposes of the definition in the planning scheme and therefore if the existing dwelling is two or three

⁸ At the hearing the applicant submitted it too had some photos that it had not provided on the day as they said they were difficult to interpret without context. While I stated it would be helpful for these to be provided to the Tribunal no further photos were provided by the applicant.



storeys. More detailed submission as to what may characterise or define a storey for this site, relative to the definition in the planning scheme, is required to determine this.

- 30 Putting this question to one side for now, I have also considered whether the existing building would meet the numerical mandatory height requirement, if it were deemed to be a three storey building.

If the existing building has three storeys, does its height meet the mandatory requirement of clause 32.09-10?

- 31 If the existing dwelling were determined to be a three storey building, then the new building must also not exceed the building height of the existing building. There is no dispute that the definition of building height, as set out in clause 73.01 is to be used in determining this matter. This states that building height means:

The vertical distance from natural ground level to the roof or parapet at any point.

- 32 The council tabled a copy of a survey plan it had requested as part of the application process showing the central ridge of the roof over the top floor of the existing building at a relative level of 122.00 metres. This sits mid-way over a contour line that crosses at the downslope end of the ridge at relative level of 113.20 metres. At the hearing the council agreed with the applicant that based on this information, the existing building, at its very highest point, is 8.80 metres in height. This reading of the survey plan by the council assumes that natural ground level directly under the ridgeline follows the contour line and that the ridgeline constitutes the point at which to measure the overall building height. No party contested these issues, and given I find the first limb of the exemption requires further information to be determined, I do not make detailed findings about any other possible reading of the planning scheme about determining the existing building height.
- 33 Based on the submissions of the parties on this issue, a new building, if replacing an existing three storey building, must not exceed a building height of 8.80 metres. The proposed three storey building has a maximum height of 8.984 metres, using the measure on the north elevation. Based on this reading of the building height by the parties, the proposed building would need to be reduced in height by at least 0.184 metres to make it no more than 8.80 metres. As was discussed at the hearing, this issue could have been resolved by a permit condition to reduce the height of the building to be no greater than the building height of the existing building.

Conclusion on building height

- 34 I make no determination on whether the existing building is two or three storeys for reasons set out above.
- 35 Below, I have examined if the proposed three storey building is acceptable based on its planning merits having regard to the character and amenity provisions of clauses 32.09 and 55, in context of relevant policy also applying to the site. My reasons about the merits of a three storey building are based on an 8.8 metre high building, having regard to the submissions of the council and the applicant about maximum building height.
- 36 From my review of the neighbourhood character issues alone I find the proposal unacceptable and determined to affirm the council decision to refuse to grant a planning permit. I have therefore not sought to require parties to incur additional cost and time in presenting further submission to determine if the existing building is two or three storeys.
- 37 If a new proposal is put forward it will need to firstly satisfy the responsible authority that the existing building is three storeys, not two storeys and that the proposed building does not exceed the existing building's height. In making these findings I note that no party sought to identify a specific question of law at the hearing, or prior to the hearing. Whether there is a question of law to be determined is a matter for the parties to consider if a new proposal is sought for this site.

DOES THE PROPOSAL PROVIDE AN ACCEPTABLE NEIGHBOURHOOD CHARACTER OUTCOME?

- 38 The applicant submits that the council's position that the proposal is not acceptable is because it is a side-by-side configuration. The applicant submits that the council has refused the development based on this premise, rather than accepting that the proposal is an appropriate response to the site context and character policy applying to the land.
- 39 More specifically the applicant submits that:
- A side-by-side development proposal is an acceptable design response to the site context.
 - The proposal is not overly dominating to the street as it is two storey as it faces the street and is comparable to other recent, large single dwelling constructions in the area.
 - The proposal is consistent with the NRZ4 purposes and objectives as it does not impede on views to the Dandenong Ranges, can incorporate tall canopy trees in the front setback and rear setbacks, and provides a consistent built form to the street.
 - To the street the proposal provides an open garden setback leading directly to a front door entry with additional windows at ground and



first floor. The applicant submits this is the same presentation as any other development of the site would produce.

Is any side-by-side development unacceptable?

- 40 The council submits that the side-by-side ‘and boundary to boundary’ layout proposed fails to integrate with the style and pattern of the surrounding area.
- 41 The applicant referred to other decisions of the Tribunal where side-by-side development has been accepted. Notably the applicant referred to a decision for a site in in Browning Drive, which is about 2 kilometres north of the review site, in the same character area. This is a decision⁹ determined by the same division of the Tribunal. The applicant, specifically referred me to paragraph 15 of the reasons to this decision that comments

[15] The development will present as a single, double storey mass to the centre of the property, with the upper level recessed both in the central section and in its side flanks. The presentation to the street will be different to that provided to its neighbours, but as part of the incremental evolution of the street, I do not see that a two storey form, in the centre of the site, is so starkly contrasting to the general range of dwellings in the street that the change is unreasonable.

- 42 The approval at Browning Drive was for side-by-side development, and on my inspection I visited the site to see the built form outcome. While it is a side-by-side development, its facts and circumstances are relevant to its own site. Notably its physical form affirms comments made in the following paragraph 16 of the Browning Drive decision that:

[16] The design of the façade that is forward of the proposed garage and car port elements ensures that the garages are recessive as sought by the character policy and NRZ4 design guidelines. Hence, while there are two driveways, the use of only one garage and a carport further recesses these elements of the development from the main building façade.

- 43 This is quite different to the presentation of the proposed development before me for the current review site. I do not see that the Browning Drive decision stands for a proposition that any side-by-side development is acceptable. Nor do I find that the proposal now before me is specifically unacceptable because it presents as a side-by-side development. It is the specific design response to its site context that needs to be addressed.

Is the proposed design response too dominating for its street context?

- 44 One of the decision guidelines in the NRZ4 schedule is to consider if a proposal incorporates a landscape theme that contributes to the ‘Dandenong Creek Escarpment’ character area in which the site sits. Specifically the

⁹ *Nhan v Monash CC* [208] VCAT 1523



schedule seeks to address landscape through a number of considerations. One of these is whether the proposal ‘includes the potential to break up the appearance of building mass through the provision of space for trees and vegetation between dwellings on the same site.

- 45 The council maintains that the proposal lacks room to plant tall canopy trees in the front setback and the secluded private open space areas and does not provide an appropriate built form response to the street. The council submits that the lack of separation between the two dwellings provides insufficient space for trees and vegetation to break up the appearance of the building mass.
- 46 As set out in figure 2 below, the proposal includes a side-by-side building format with a double garage to each dwelling, extending to each side boundary and a recessed front entry to each dwelling. Above each dwelling is a bedroom and walk in robe that cantilevers slightly over the garage alignment.

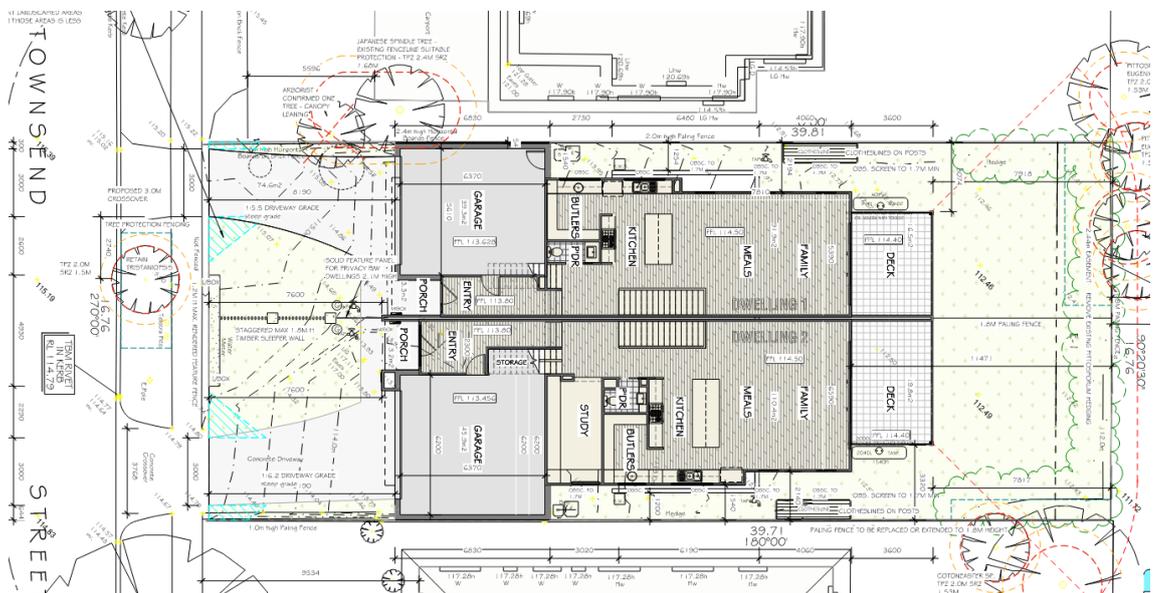


Figure 2 -Extract of 'Ground floor Design Response Plan'

- 47 A key issue the council submits in opposing the design response is the boundary to boundary form of the ground level that comprises mostly of the garages with limited room for landscaping. The council is also critical of a solid screen fence to divide the two front garden areas of each dwelling.
- 48 The fence is potentially discordant, but it is a minor element that could be addressed by permit condition. What I find unacceptable in this street setting is the overall dominance of solid form to the street, which, at ground level, is dominated by garages. This is in context of the neighbourhood character policy at clause 22.01 of the planning scheme that directs garages to be incorporated into the dwelling design so as not to dominate the facade of the building. This is set out in the section specific to the Dandenong Creek Escarpment area in which the site sits.



- 49 The applicant submits that any two unit development either tandem or side-by-side, would have similar implications for landscaping in the frontage. I disagree. The double garages, extending across the majority of the boundary to boundary building, dominate the ground level form of the dwelling. Combined with the slope down from the front of the site, it also leaves the recessed front door entries quite isolated from the street, contrary to the safety objective and standard of clause 55.03-7 of the planning scheme.
- 50 As the applicant commented, there are many newer large dwellings in the area, often in a quite prominent double storey form. In every example put to me, however, the ground and upper levels have a least one break to a side boundary and include both ground and upper levels dominated by active frontage through use of windows and habitable space at both levels. The proposed design is dominated by garage at ground level and has a heaviness in form, created by the combination of the garages and their boundary to boundary format.
- 51 I find this response not consistent with the policy directions of the neighbourhood character policy at clause 22.01 that directs a need to provide side setbacks that maintain an open, spacious streetscape character and separation of dwellings. It also directs a need to design buildings to reflect the spacing and rhythm of existing streetscapes.
- 52 The dominance of the form across the site I find is emphasised by the relatively limited room for landscaping in the front setback, which will also need to be managed to accommodate planting within the the slope of the land. I am not satisfied that the proposal, as it presents to the street, provides a development that is defined by a spacious and generous garden setting, as directed by the neighbourhood character objectives of the NRZ4.
- 53 I find the presentation to the street unacceptable when tested against the NRZ4 neighbourhood character objectives and decision guidelines for these reasons.

ARE THERE ANY UNREASONABLE OFF-SITE AMENITY OUTCOMES FROM THE PROPOSAL?

- 54 In relation to clause 55 provisions the applicant submits:

This is a development that is fully compliant with every key aspect of Rescode, is well within the maximum height, and meets the required street frontage setback (7.86m) of Schedule 2 of the General Residential Zone. Building site coverage is 50.3%, more than favourable with the adjoining dual occupancies around this block. There is no overlooking to any adjoining habitable room window. Overlooking, overshadowing and visual bulk are well within Rescode standards (as acknowledged in the officer report).

- 55 This statement is not factually correct. Firstly there is what I assume is a typographical error as the site is not in a General Residential Zone, but in



the NRZ4. The applicant also acknowledged orally that some numerical standards of ResCode are not met. I agree that some of the numerical non-compliances are very small, such as being 50.3% when the standard is 50%. My reading of the officer report is that it does not acknowledge the amenity provisions are 'well within Rescode standards'. Rather the officer report, and the submissions of the council are that overlooking is an issue, but can be addressed by permit condition. It also sets out the visual bulk standard B17, as set out in clause 55.04-1 of the planning scheme is not met, and that the council considers the objective to this clause is not met.

- 56 The council maintains that both proposed dwellings encroach into the B17 standard envelope, as set out in clause 55.04-1 of the planning scheme. The council acknowledges the encroachment is minor but that due to the overall volume of building proposed, with what it says is extensive built form parallel to both boundaries, the dwellings will be visually dominant in the area.
- 57 If a three storey building could occur on this site, it would need to be slightly reduced to be no greater than the height of the existing building. This may lead to the B17 envelope being just met. A technical compliance could also be addressed by permit condition. The more considered question is whether such technical compliance would lead to a building volume that meets the objective to ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings.
- 58 While there are other large dwellings in the area it is not clear to me that it the street is characterised by buildings of the same overall scale and volume as proposed for this site. By example, the existing building to the direct west of the site is readable as three storeys, but the overall height and volume appears to be lower and more recessed than was in the proposal before me. The dwelling to the east is clearly lower and two storeys or less. The provisions of the NRZ4 are such that any redevelopment of these immediate neighbours will be limited to two storeys, or in the case of the three storey building to the west, a building height no greater than the existing building.
- 59 Development in the area is also directed by character policy at clause 22.01 that directs a need to:
- Respect the height, scale and massing of existing dwellings in the neighbourhood.
 - Ensure taller buildings incorporate sufficient articulation, including recessed upper levels, to respect the prevailing scale of the adjoining dwellings and the neighbourhood.
 - Ensure buildings respect the built form, rhythm and proportions of existing dwellings in the neighbourhood.



- 60 More broadly there are some other more prominent forms to the south of Townsend Street, but their prominence is partly derived by sitting on the higher slope of the street, where there is a more consistent pattern of prominence due to the slope of the land. On the north side of the street, other newer, large dwellings such as at 29 and 49 Townsend Street, are large in scale, but do not appear to be of the same scale proposed for the review site.
- 61 The building mass proposed for the review site needs to be contextual of the constraints of the surrounding lots in context of what the preferred future character may eventuate for these sites. In this NRZ4 context, the extent of volume close to the side setbacks is not what I find to be an acceptable response to the existing and preferred character of the area. If a new proposal is sought for this site it needs to better consider how the extent of volume to its side setbacks addresses the objectives of B17 in context of the preferred character of the area that is defined by the constraints of NRZ4 that apply to the area.
- 62 If a new proposal is sought for this proposal, overlooking to the rear also needs to be considered. I agree with comments of the council and the applicant that this issue could have been addressed through the provision of louvred screening that allows views out, but not down, so as to meet the overlooking provisions of clause 55.04-6 of the planning scheme.

DOES THE PROPOSAL PROVIDE ACCEPTABLE ON-SITE AMENITY, INCLUDING PARKING DESIGN?

- 63 The council submits that the gradient of the drive to the garages does not meet car parking design standards at clause 52.06-9 and therefore the proposal cannot provide access that is safe and efficient.
- 64 The applicant provided a sketch plan to show that the grades of the driveways can be adjusted to meet the design standards directed by clause 52.06-9. For dwelling 1 there is no change and for dwelling 2 there is a very minor change needed to meet the grade requirements.
- 65 This is a minor issue that could have been addressed by a permit condition.

CONCLUSION

- 66 For the reasons regarding the merits of the proposed building, without making finding about whether the building is prohibited, the decision of the responsible authority is affirmed for reasons set out above. No permit is granted.
- 67 If a new proposal is sought for this site then a determination about whether the existing dwelling is two or three storeys may need to be made, depending on the proposal sought.



Costs

- 68 During the hearing the applicant provided a supplementary submission to address the issue of whether the proposal is prohibited due to the height and number of storeys proposed. In doing so the applicant submitted that if it was determined that the proposal is prohibited it was incumbent on the council to have informed the applicant at the commencement of the permit application process in July 2021, rather than allowing the application to proceed. On this basis the applicant submits that if the Tribunal determines that the threshold test of building height and storeys is not met then the applicant requests that an application for costs be reserved under section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (**the VCAT Act**).
- 69 Given I have not made a finding about whether the threshold test is met, I do not need to make an order reserving costs, although I note that a party can always seek an application for costs if they see fit.
- 70 It is, however, worth noting that section 109 of the VCAT Act provides the Tribunal with the power to award costs having regard to:
- Whether a party has conducted a Tribunal proceeding in a way that unnecessarily disadvantaged another party to the proceeding through the party's conduct.
 - Whether a party to a proceeding has been responsible for prolonging a Tribunal proceeding.
 - The relative strengths of the claims made by each of the parties.
- 71 As an observation, I am not clear how these tests relate to the issue raised by the applicant.
- 72 I also note that the council refused the proposal, with the second ground of refusal stating:
- The proposed development fails to meet the mandatory height requirement of the Neighbourhood Residential Zone (Clause 32.09-10).
- 73 It was the applicant's choice to make an application to the Tribunal with its application stating that all eight grounds of the refusal cited in the council's refusal notice were contested.

Alison Glynn
Member



APPENDIX A – PHOTOGRAPHS OF THE EXISTING DWELLING



Figure 3 - Front of the existing dwelling (from the council submission).



Figure 4 - Rear of the existing dwelling, (from the council submission).



Figure 5 - Rear of the dwelling, (from the council officer report).

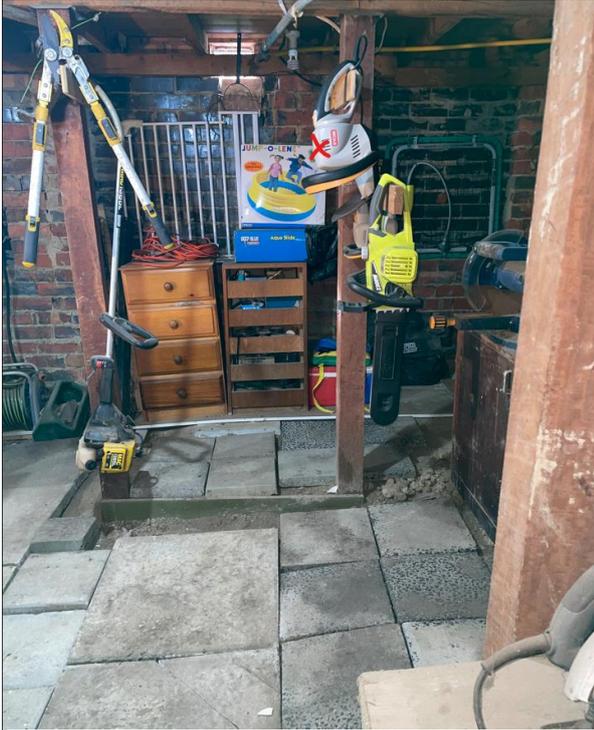


Figure 6 - View from west side of sub-floor facing east in front of the yellow handled spade in figure 8. Red cross marks the location of the equipment visible in figure 8. My reading of the site against plans is that the area to the right (south) of the pole with the garden equipment is under the main area of the house which is two storeys above this part of the sub-floor.

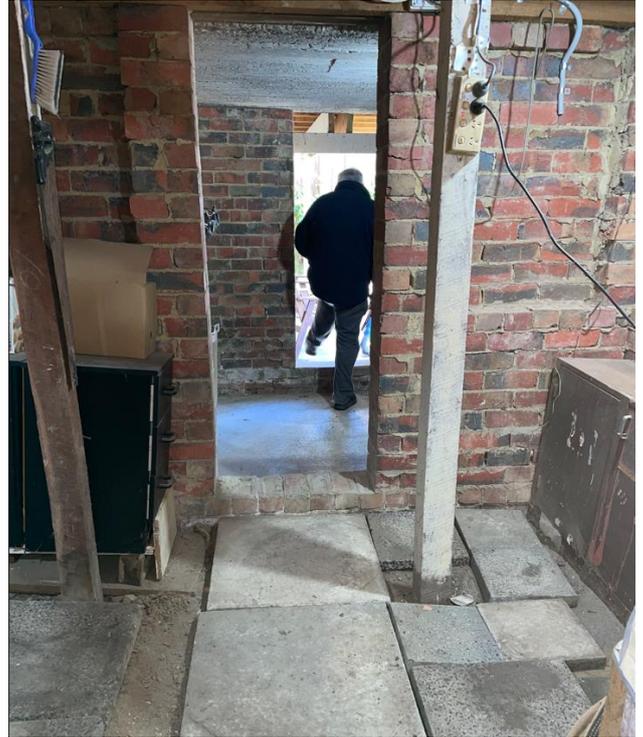


Figure 7 - View from east side of sub-floor (under the sunroom area) facing west, in alignment with opening to bike storage under solid part of porch structure. A deck area extends further east, as visible in photos of the rear of the house.



Figure 8 - View from east side of sub-floor facing west standing under the sunroom area. Red cross marks the garden equipment also marked with a cross in figure 6 and the red outline is a section of a lidded bucket visible in figure 9 that is under the area south of the sunroom.



Figure 9 - view west of sub-floor area at the brick wall corner that aligns with the sunroom corner. The red outline on the lidded bucket roughly aligns with the area visible in figure 8