

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P902/2022
PERMIT APPLICATION NO. TP/53309

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987* (Vic); Monash Planning Scheme; General Residential Zone (GRZ3); Vegetation Protection Overlay (VOP1), Multi-dwelling development; Neighbourhood character; Internal amenity, Amenity Impacts and Clause 55.

APPLICANT	Barry Morgan
RESPONSIBLE AUTHORITY	Monash City Council
RESPONDENTS	Ceinwen Scutter Marcello Rosa Virginia Rosa Cate Langley & Stephen Langley
SUBJECT LAND	55-57 Bruce Street MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	6 March 2023
DATE OF ORDER	7 July 2023
CITATION	Morgan v Monash CC [2023] VCAT 762

ORDER

No permit granted

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* the permit application is amended by changing the name of the permit applicant to:
 - Barry Morgan
- 2 In application P902/2022 the decision of the responsible authority is affirmed.
- 3 In planning permit application TP/53309 no permit is granted.

Shiran Wickramasinghe
Member



APPEARANCES

For Barry Morgan	R Hocking, town planner of City Shire Planning Pty Ltd
For Monash City Council	G Gale, town planner of Gareth Gale Town Planning and Advocacy
For Ceinwen Scutter	In person
For Marcello Rosa & Virginia Rosa	In person
For Cate Langley & Stephen Langley	C Langley



INFORMATION

Description of proposal	Construction of four dwellings
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 (Planning Scheme)
Zone and overlays	General Residential Zone, Schedule 3 (GRZ3) Vegetation Protection Overlay, Schedule 1 (VPO1)
Permit requirements	Clause 32.08-6 A permit is required for construction of two dwellings on a lot.
Key scheme policies and provisions	Clauses 11, 15, 16, 21.04, 22.01, 32.08, 42.02, 52.06, 55 and 65.



Land description

The site is located on the west side of Bruce Street, approximately 260 metres north of Waverley Road, Mount Waverley. It is an irregular shaped lot with a frontage of approximately 34.0 metres, maximum depth of 44.0 metres and site area of 1468 metres squared.

The site has a steep slope of 5.0 metres from the north-western corner (rear of the site) down to the front boundary adjacent to Bruce Street.

The site currently contains a split level rendered brick dwelling with a pitched roof and a driveway adjacent to the southern boundary. The rear garden includes a retaining wall that extends across the width of the site.

To the north at 53 Bruce Street is a double storey rendered brick dwelling with a pitched roof.

To the south at 59 Bruce Street is cream brick dwelling set on an angle to the adjacent side boundary with a single width garage that sits forward of the dwelling

To the west at 4 Nagara Court is a single storey dwelling with a part pitched and flat roof. The secluded private open space area of this property abuts the rear boundary of the subject site.

To the east on the opposite side of Bruce Street are single and double-storey dwellings. These properties sit lower in the streetscape due to the fall in topography.

Tribunal inspection

An unaccompanied site inspection was conducted.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 This is an application to the Tribunal for review of the Monash City Council's (**Council**) refusal to grant a planning permit for the construction of four two-storey dwellings.
- 2 Council refused the proposal on the following grounds:²
 1. The proposal is inconsistent with neighbourhood character objectives of the General Residential Zone Schedule 3.
 2. The proposal is inconsistent with Clause 22.01 (Residential Development and Character Policy) of the Monash Planning Scheme.
 3. The design and siting of the proposed development is not site responsive.
 4. The proposed development is out of character with the existing development in the area in particular with regard to mass, bulk and scale.
 5. The proposed development is not appropriate for the locality and will cause adverse impact on the streetscape and general neighbourhood character.
 6. The proposed development will have an adverse impact on the amenity of adjoining properties.
 7. The proposal does not adequately satisfy the objectives and design standards of Clause 55 with regard to Neighbourhood Character, Landscaping, Site Layout, Design Detail, and Private Open Space.
 8. The proposal will result in a poor level of internal amenity for future residents.
 9. The proposal does not allow for safe and efficient vehicle movement within the site.
 10. The proposal does not provide adequate pedestrian access.
- 3 The respondents support the Council's decision. They also submit the proposal will have unacceptable impacts with respect to overlooking, overshadowing, existing infrastructure, building height, site coverage and visual bulk.

¹ The submissions and evidence 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.

² Council submission pages 6, 7 and 8.

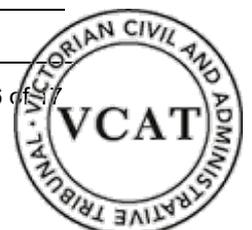


- 4 The applicant submits:
- The site is comprised of a double width residential lot of 1468 metres squared and the proposed development has a site coverage of 41 per cent, a permeable area totalling 42 per cent and garden area of 43.4 per cent.
 - The proposal complies with the design requirements of clause 55 including those parts of clause 55 that are varied through the Schedule to the Zone.
 - The proposal respects the neighbourhood character in a streetscape and a “backyard scape” sense. It sits in a streetscape on the west side of Bruce Street where there are a diverse and eclectic range of single dwellings and multi-dwelling developments including the recently approved development at 69 Bruce Street.
- 5 A number of Tribunal decisions were referred to by the parties in support of their positions. I have taken them into account.

WHAT IS THE RELEVANT PLANNING CONTEXT?

- 6 The site is zoned GRZ3, the relevant purposes of which are:³
- To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - 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.
- 7 Relevant decision guidelines at clause 32.08-13 include:
- Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:
- General
- The Municipal Planning Strategy and the Planning Policy Framework.
 - The purpose of this zone.
 - The objectives set out in the schedule to this zone.
 - Any other decision guidelines specified in a schedule to this zone.
 - The impact of overshadowing on existing rooftop solar energy systems on dwellings on adjoining lots in a General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone.

³ Clause 32.08.



Dwellings and residential buildings

- For the construction and extension of two or more dwellings on a lot, dwellings on common property and residential buildings, the objectives, standards and decision guidelines of Clause 55.
- 8 Clause 32.08-4 specifies a minimum garden area of 35% applies to the proposal and clause 32.08-10 specifies a maximum building height of 11 metres and three-storeys.
- 9 Clause 1.0 to schedule 3 to clause 32.08 provides the following Neighbourhood character objectives.
- 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.
- 10 At clause 4.0 to schedule 3 to clause 32.08, there are a number of varied clause 55 standards:
- a. Minimum street setback: Standard B6, walls of buildings should be set back at least 7.6 metres from the front street. Side street setbacks in accordance with standards A3 and B6 continue to apply.
 - b. Site coverage: Standard B8, 50% maximum site coverage (compared to the 60% maximum default provision at clause 55.03-3).
 - c. Permeability: Standard B9, 30% minimum (compared to the 20% minimum default provision at clause 55.03-4).
 - d. Landscaping: Standard B13, new development should provide or retain:
 - At least one canopy tree, plus at least one canopy tree per 5 metres of site width;
 - A mixture of vegetation including indigenous species;
 - Vegetation in the front, side and rear setbacks; and
 - Vegetation on both sides of accessways.



A canopy tree should reach a mature height at least equal to the maximum building height of the new development.

- e. Side and rear setbacks: Standard B17, a new building not on or within 200 millimetres of a rear boundary should be set back at least 5 metres. Side setback requirements in accordance with standards A10 and B17 continue to apply.
- f. Private open space: Standard B28, a dwelling or residential building should have private open space consisting of:
 - An area of 75 square metres, with one part of the private open space to consist of secluded private open space at the side or the rear of the dwelling or residential building with a minimum area of 35 square metres, a minimum dimension of 5 metres and convenient access from a living room; or
 - A balcony or roof-top area of 10 square metres with a minimum width of 2 metres and convenient access from a living room.
- g. Front fence height: Standard B32, A front fence within 3 metres of a street should not exceed 1.2 metres in height.

11 Clause 7.0 to schedule 3 to clause 32.08, provides the following additional relevant decision guidelines to those specified in clause 32.08:

- 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.

12 Pursuant to Clause 42.02 a planning permit is required to remove or destroy any vegetation that:

- Has a trunk circumference greater than 500mm (160mm diameter) at 1200mm above ground level, and
- Is higher than 10 metres.

13 There are no trees that are proposed to be removed that require a permit to enable their removal.



- 14 The Residential development framework map at clause 21.04-1, shows the site to be located in the ‘Category 8 – Garden City Suburbs’. The Category 8 – Garden City Suburbs areas are identified as areas suitable for ‘incremental change’.⁴
- 15 At Clause 22.01-4, Preferred future character statements, the Residential character types map shows the site to be in the Garden City Suburbs Northern character area. The preferred future character statement for the Garden City Suburbs Northern area is as follows:

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.

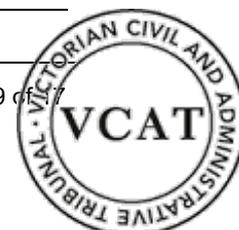
Architecture, including new buildings and extensions, will usually be secondary in visual significance to the landscape of the area when viewed from the street. New development will be screened from the street and neighbouring properties by well planted gardens that will ensure the soft leafy nature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

⁴ Clause 21.04-1, Residential development framework.



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.

- 16 Clause 22.01-3 includes Objectives, General policy as well as policy specific to Street setback, Site coverage and permeability, Landscaping, Side and rear setbacks, Walls on boundaries, Private open space, Fences, Vehicle crossings, Built form and scale of development, Car parking and Environment.
- 17 Relevant decision guidelines at clause 22.01-5 include
- The applicable preferred future character statement.
 - Whether the development will have an adverse impact on neighbourhood character.
 - Whether the development will have an adverse impact on the amenity of adjoining properties.
 - Whether the development will have an adverse impact on the environment.

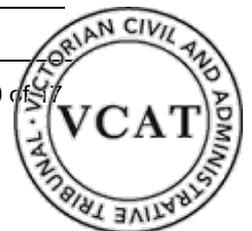
WHAT ARE THE KEY ISSUES?

- 18 Having regard to the submissions, the key issues for determination may be expressed as follows:
- Does the development acceptably respond to the preferred neighbourhood character ?
 - Does the development provide acceptable on-site amenity for future residents ?
 - Does the development create unacceptable off-site amenity impacts ?
- 19 Having considered the submissions, with regard to the relevant policies and provisions of the Planning Scheme, I have determined to affirm the Council's decision. My reasons follow.

DOES THE DEVELOPMENT ACCEPTABLY RESPOND TO THE NEIGHBOURHOOD CHARACTER?

- 20 The Council and respondents submit the proposal fails to accord with both the existing character of Bruce Street as well as the preferred character and is inconsistent with relevant purposes of the GRZ3, policy at clause 22.01 and the Garden City Suburbs (Northern) – Preferred Character Statement.⁵ More specifically Council submits:
- The proposed dwellings sit in a section of the street where the topography is pronounced. The slope of the land should provide an impetus to moderate and manage the scale of newer two storey forms.

⁵⁵ Council submission paragraph 45, pages 18 and 19.



- The proposed parapet of dwelling 1 is approximately 1.2 metres above the gutter line of no. 53 (RL 106.177 vs 105.00_i). This is despite being *downhill* from this adjacent property. In this regard, a transition in scale has not been achieved, which is one of the decision guidelines of the GRZ3
- The upper levels are not well-recessed from the ground floor. The upper levels sit on a similar alignment to the ground floor below. The ability to provide upper-level setbacks in such elevated positions is an option readily available, yet has not been satisfactorily deployed in this case.
- The extent of landscaping in the front setback is modest. The larger trees to be retained are located along the northern and western boundary (although many may be weed species) and do little in moderating views of the prominent development within the street.

21 The applicant in support of the proposal submitted:⁶

50. The proposal provides for a well articulated streetscape form – a development that will sit comfortably between large residential dwellings to the north and to the south and the “building mass and visual bulk” has been minimised noting the “generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form...”.
51. The streetscape essentially contains 2 detached, separated dwellings with a well articulated three-dimensional form and where the vehicle garaging has been incorporated into the overall aesthetic.

22 I am persuaded by the applicant with respect to the design’s response to the neighbourhood character. The site has a frontage width of approximately 34.0 metres and presents two double-storey dwellings to the street. The proposed design response is generally in-keeping with the character of existing development that includes single and multi-dwelling development that comprise robust architectural form. The two-storey modern built form will blend with the mix of existing robust architectural form of the older and more recently built dwellings that are proximate to the site as shown below:



⁶ Applicant’s submission, paragraphs 50 and 51, page 8.

Source: Applicant

59 Bruce St



53 Bruce St



51A Bruce St



61 Bruce St



Source: S Scutter submission – Photo set 1.

- 23 The siting of dwellings 1 and 4 with approximate setbacks of 8.72 metres and 8.5 metres respectively from the front boundary combined with the provision of one double garage facing the street is also generally consistent with the pattern and character of existing development. Further, the 34.0 metre wide frontage combined with the setback of the dwellings from the front boundary and two driveways provides sufficient opportunity for the establishment of landscaping that would make an acceptable contribution to the streetscape.
- 24 The proposal provides a separation in built form at first floor level as shown below. The first floor separation of 6.0 metres between dwellings 1 and 2 and 7.6 metres between dwellings 3 and 4 combined with the minimum 5.0 metre setback of these levels from the rear (west) boundary ensures the proposal acceptably responds to the pattern of built form in the area.



Source: Applicant

25 In this context I am persuaded the proposal is an acceptable response to the existing and preferred neighbourhood character.

DOES THE DEVELOPMENT PROVIDE ACCEPTABLE ON-SITE AMENITY FOR FUTURE RESIDENTS?

26 Council is critical of the internal amenity that will be provided to future residents. They say:⁷

- Dwelling 4 is said to be significantly impacted with respect to internal amenity. The design response is submitted as being fatal to the proposal. Key concerns raised with respect to this dwelling include:
 - The location of the open plan living room and the proximity of its north facing windows to a retaining wall and driveway.
 - The location of walls proximate to the north and west boundary of the secluded private open space (SPOS) and impact of shadow.
- The limited width (2.6 metres) of the SPOS associated to dwelling 2 and the constraint created by the retaining wall.

⁷ Council submission, pages 21, 22 and 23.



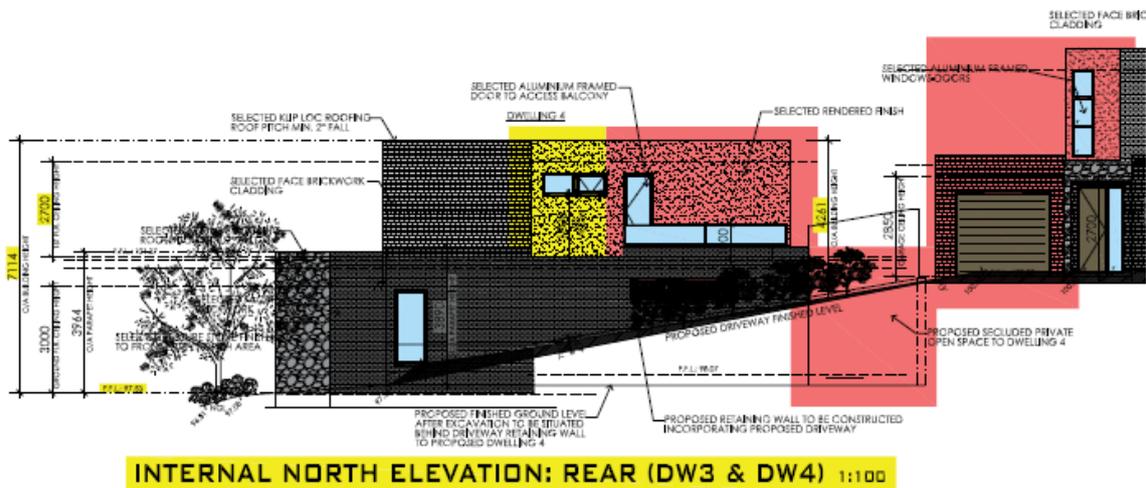
- The extent of shadow of the SPOS associated to dwelling 2 resulting from the first floor built form and limited solar access to living areas.
- The extent of shadow impact of the SPOS associated to dwelling 3.

27 The applicant submits:⁸

121. It is incorrect to suggest there will be “a poor level of internal amenity for future residents” when so much detail of each of the townhouses confirms the exact opposite.

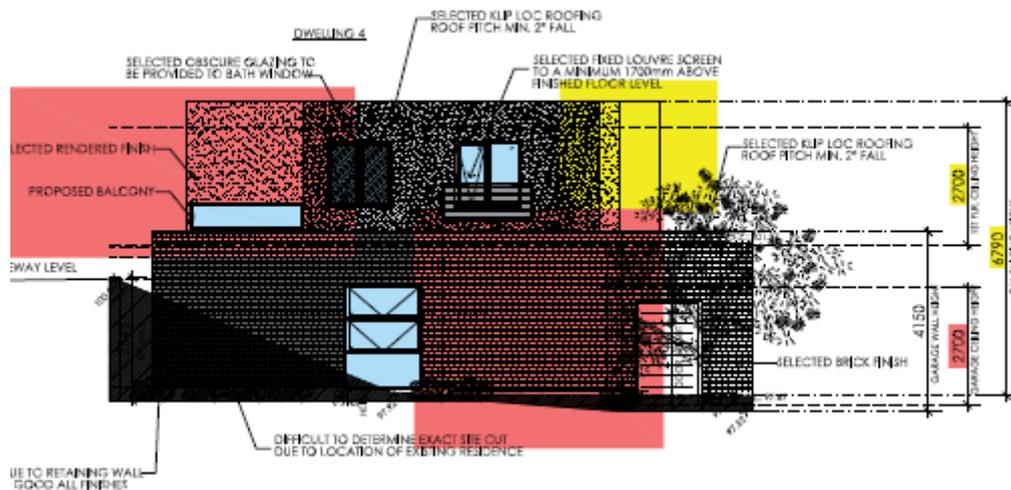
122. There are varied residential occupancies amongst the four townhouses and each have a different aspect and outlook, a different internal layout and indeed, to be fair, quite likely different levels of internal amenity depending on personal preferences of any one occupant it is unfair to say any of the dwellings have a “poor level of internal amenity”.

28 I have been persuaded by Council and find the proposal does not provide acceptable internal amenity for future residents. The design response with respect to the ground level living/meals area and SPOS associated to dwelling 4 is unacceptable. The living area and SPOS associated to dwelling 4 is impacted by retaining walls and walls associated to the garage associated to dwelling 3 as shown below.



Source: Applicant

⁸ Applicant's submission, paragraphs 121 and 122, pages 19 and 20.



Internal west elevation dwelling 4. Source: Applicant

- 29 Having regard to the site level variation, the proposed SPOS associated to dwelling 4 will have a retaining wall with a height up to approximately 2.8 metres located along its north boundary. Further, a retaining wall (varying in height from approximately 1.6 metres to 2.5 metres) with an approximate 2.85 metre high garage wall above (in part) is to be located along its west boundary. The location of the retaining walls and associated built form results in a ‘sunken’ SPOS area that will create an unacceptable sense of enclosure. This design response will create a ‘tunnel’ like outcome due to its location between the west elevation of dwelling 4 and the retaining wall and east elevation of dwelling 3. This outcome combined with the shadow impacts resulting from the abutting built form will unacceptably diminish the amenity of this space and limits its ability to meet the reasonable recreation needs of residents.
- 30 The location of the proposed north facing living/meals area window associated to dwelling 4 and its proximity to the proposed retaining wall and driveway is a poor design response. This north facing window is set back approximately 1.0 metre from the retaining wall and driveway. The living/meals room has a lower floor level than the level of the central driveway that rises as it traverses toward the rear of the site. The location of the driveway will have an unacceptable amenity impact on the only north facing window associated to this ground level living area.
- 31 The poor design response is continued with respect to dwelling 2. This dwelling fails to include any north facing habitable room windows at ground and first floor level.
- 32 The proposal includes a site cut to the rear of dwelling 2 to create a level area of SPOS for this dwelling. The plan shows an approximate 21.0 metre long site cut and associated retaining wall of up to 0.6 metres in height as shown below.



Source: Applicant

- 33 Whilst the proposed SPOS layout associated to dwelling 2 meets the quantum required by the varied Standard B28 I find the split-level configuration and the inclusion of the retaining wall limits the usability of the open space.
- 34 Accordingly, I am not satisfied that the benefits of this proposal outweigh the poor amenity outcomes for future residents, in particular the residents of dwelling 4. Therefore, I find the proposal does not provide acceptable on-site amenity for future residents and a permit should not be granted.

DOES THE DEVELOPMENT CREATE UNACCEPTABLE OFF-SITE AMENITY IMPACTS?

- 35 The respondents raised concerns regarding unacceptable impacts with respect to overlooking, overshadowing, existing infrastructure, building height, site coverage and visual bulk. As I have determined that a permit should not issue on internal amenity grounds, I make brief findings on these matters.
- The site coverage is 41.2%. This is below the maximum 50% required by the varied standard in GRZ3.
 - The maximum height of the dwellings at 8.4 metres and two-storeys is below the maximum building height of 11.0 metres and three-storeys specified at 32.08-10.

- The plans show the provision of obscure glazing, windows with raised sill heights of 1.7 metres above floor level and screens to limit overlooking in accordance with Standard B22 of clause 55.04-6, Overlooking objective. Had there been any concerns with respect to overlooking these matters could have been dealt with by condition. Therefore, this matter has not been determinative to my decision.
- Concerns with respect to visual bulk were specifically raised by the respondents to the rear (west) of the subject site. I have not been persuaded that unacceptable building massing and visual bulk impact would occur. Having regard to the topography of the locality the proposed development will sit lower than the abutting sites to the west. This lower topography combined with the setbacks at first floor that varies from 5.0 metres to 7.4 metres from the west boundary and flat roof design will limit any unacceptable visual bulk. Accordingly this matter has not been determinative to decision.
- The shadow diagrams show there will be shadow cast from the proposed development onto the adjoining secluded private open space area associated to the dwellings located on adjoining land to the west and south. However, the extent of this shadow is within the parameters set out in Standard B21, Overshadowing open space objective of clause 55.04-5. Therefore, this matter has not been determinative to my decision.
- There was no evidence to substantiate the submission that the proposed development would have an unacceptable impact on existing infrastructure.

CONCLUSION

36 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Shiran Wickramasinghe
Member

