

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1620/2022
PERMIT APPLICATION NO.TPA/53619

CATCHWORDS

Monash Planning Scheme; Application pursuant to Section 77 of the *Planning and Environment Act 1987* (Vic); Neighbourhood Residential Zone 2 (NRZ2); Vegetation Protection Overlay 1 (VPO1); Two double storey dwellings; Removal of tree within VPO1; Limited change area; Creek abutments character area; Clause 55; Design response; Built form; Building bulk; Articulation; Loss of one tree; Landscaping.

APPLICANTS	Igor Statkevitch & Skevoulla Statkevitch
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	19 Meadow Crescent MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	16 May 2023
DATE OF ORDER	13 June 2023
CITATION	Statkevitch v Monash CC [2023] VCAT 658

ORDER

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: ZAI (Pty) Ltd Building and Urban Design
 - Drawing numbers: TP-21038/100 to TP-21038/107 inclusive all Rev D
 - Dated: 17 March 2023
- 2 In application P1620/2022 the decision of the responsible authority is affirmed.
- 3 In planning permit application TPA/53619 no permit is granted.

J A Bennett
Senior Member



APPEARANCES

For Igor Statkevitch &
Skevoulla Statkevitch

Robbie McKenzie, Town Planner of Ratio
Consultants Pty Ltd. He called expert
evidence from the following witness:

- Mark Reynolds, Arborist of Arbor
Survey Pty Ltd.

For Monash City Council

Sally Moser, Principal Planner.

INFORMATION

Description of proposal

Construction of two double storey dwellings,
associated works and removal of one tree
within a Vegetation Protection Overlay.

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

Neighbourhood Residential Zone Schedule 2
(**NRZ2**).

Vegetation Protection Overlay Schedule 1
(**VPO1**).

Permit requirements

Clause 32.09-6 - to construct two or more
dwellings on a lot in NRZ2.

Clause 42.02-2 - to remove, destroy or lop any
vegetation specified in a schedule to VPO1.

Land description

The site is located on the western side of
Meadow Crescent, 120 metres north of
Waverley Road. The rear abuts public land
forming part of the Scotchmans Creek Trail and
water supply pipe track. The site is irregular in
shape, has a splayed frontage of 19.63 metres, a
rear boundary of 32.91 metres and a total area
of 1019 square metres. The site contains a
single storey timber clad dwelling and detached
garage. An existing crossover is located in the
north-east corner of the site. A 1.83 metre wide
easement extends along the rear boundary of
the site. The site contains 23 trees.

Tribunal inspection

An unaccompanied inspection of the locality
was undertaken on Tuesday 30 May 2023.



REASONS¹

WHAT IS AT STAKE HERE?

- 1 The application proposes to construct two expansive double storey, four and five bedroom² dwellings on this large lot of over 1000 square metres in area. The lot has a rear boundary which partially abuts the Scotchmans Creek reserve and the water supply pipe track reserve.
- 2 Monash City Council (**council**) has refused the application on seven grounds. Despite the preparation of amended, now substituted plans, council maintains its opposition to the proposal.
- 3 In summary its grounds are that the proposal:
 - Fails to achieve an architectural and urban design outcome that contributes positively to the desired future neighbourhood character.
 - Will result in a loss of amenity to adjoining properties by way of visual bulk and scale, and the upper levels will be viewed as bulky from adjoining public and private land.
 - Does not adequately satisfy the objectives and design standards in clause 55 for neighbourhood character, residential policy, landscaping, side and rear setbacks and design details.
 - Results in the loss of two canopy trees and adversely impacts nearby trees.
 - Provides inadequate room for landscaping including canopy trees.
- 4 The applicants (**applicant**) reject these criticisms. Instead, it is submitted that the proposed development is an appropriate response to neighbourhood character, the NRZ2, the designation within a Creek Abuttal area and the requirements of clause 55. The removal of Tree 9 and retention of Tree 8 provides a reasonable balance between conservation of existing trees and minimising impacts on trees within neighbouring properties. The proposal provides generous open space, spacious setbacks and significant opportunities for new canopy vegetation. Furthermore, the proposal accords with and in most respects mostly easily complies with the amenity tests in clause 55.
- 5 For the reasons which follow, I agree with council and will affirm the decision to refuse the application.

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 Dwelling 1 has five bedrooms. Dwelling 2 has four bedrooms and a study with a built-in wardrobe.



WHAT ARE THE METRICS OF THE DEVELOPMENT?

- 6 To summarise, the proposal achieves the following key features and responses to various standards and requirements:
- A minimum front setback of 7.6 metres increases to approximately 10 metres due to the curvature of Meadow Crescent. This against the varied NRZ2 standard B6 of 7.6 metres.
 - The maximum building height is two storeys and 9.09 metres against the mandatory standard B7 of two storeys and 10 metres on a sloping site.
 - Maximum site coverage of 35.9% against varied NRZ2 standard B8 of 40%.
 - Minimum permeable area of 49.8% against varied NRZ2 standard B9 of 40%.
 - Retention of Tree 8 which is a 17 metre high lemon scented gum plus the planting of four canopy trees that will reach a mature height of at least 10 metres. This against varied NRZ2 standard B13 requiring retention or provision of one canopy tree plus one canopy tree per 5 metres of site width with a minimum mature height equal to the height of the roof.
 - The two crossovers account for 30.5% of the frontage as against the 40% maximum in standard B14.
 - I do not specify the exact setbacks, but these are shown on the various elevations and demonstrate that the proposal achieves the varied NRZ2 side and rear setback B17 of side setbacks – 1 metre, plus 0.3 metres for every metre of height over 3.6 metres up to 6.9 metres, plus 1 metre for every metre of height over 6.9 metres
 - A minimum rear setback of 7 metres against the varied NRZ2 standard B17 of 7 metres. First floor has a setback of 7.75 metres.
 - Both dwellings are set off all boundaries and varied NRZ2 standard B18 does not apply.
 - Dwelling 1 has secluded open space of 41.66 square metres and approximately 150 square metres of private open space and dwelling 2 has 221 square metres of secluded open space and approximately 300 square metres of private open space. This against the varied NRZ2 standard B28 of a minimum 75 square metres of private open space with a minimum area of 35 square metres accessed from the living room.
 - No front fence against the varied NRZ2 standard B32 of 0.6 metres.

- The dwellings are separated from one another in the centre of the site by a minimum of 2.86 metres at ground level and 3.1 metres at first floor.
- Each dwelling is provided with a double car garage incorporating storage areas of a minimum 6 cubic metres.
- There are no unacceptable off-site amenity impacts assessed using the requirements in clause 55 such as daylight to existing windows (standard B19), north facing windows (standard B20), overshadowing to open space (standard B21), overlooking (standard B22) and noise impacts (standard B24).
- The garden area is 49.25% against the mandatory minimum requirement of 35% in clause 32.09-4.

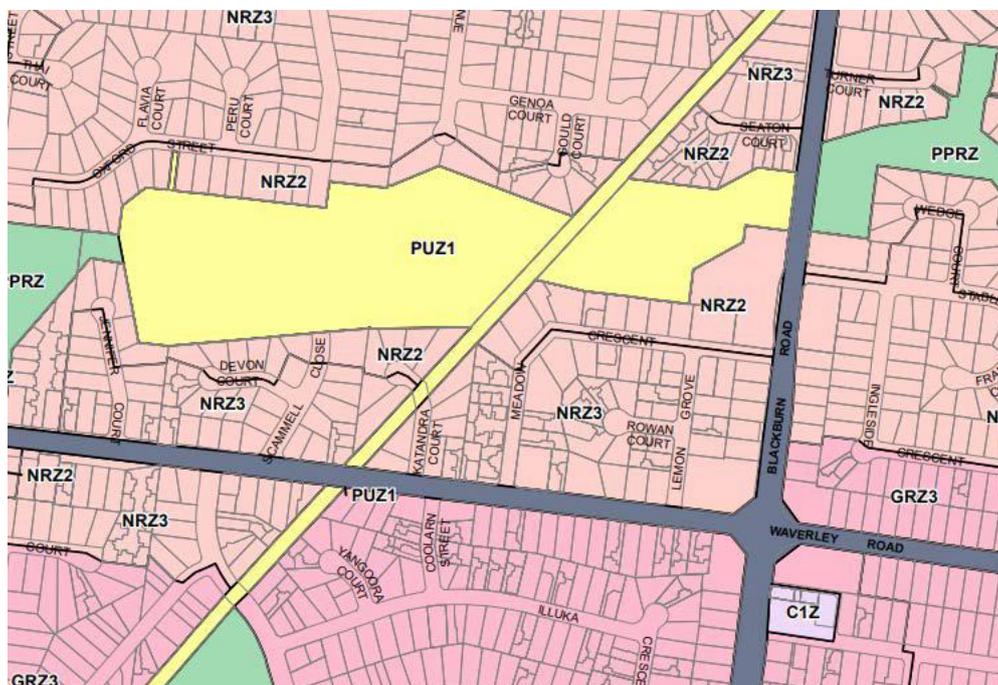
MY ASSESSMENT

Planning policy, the NRZ2 and neighbourhood character

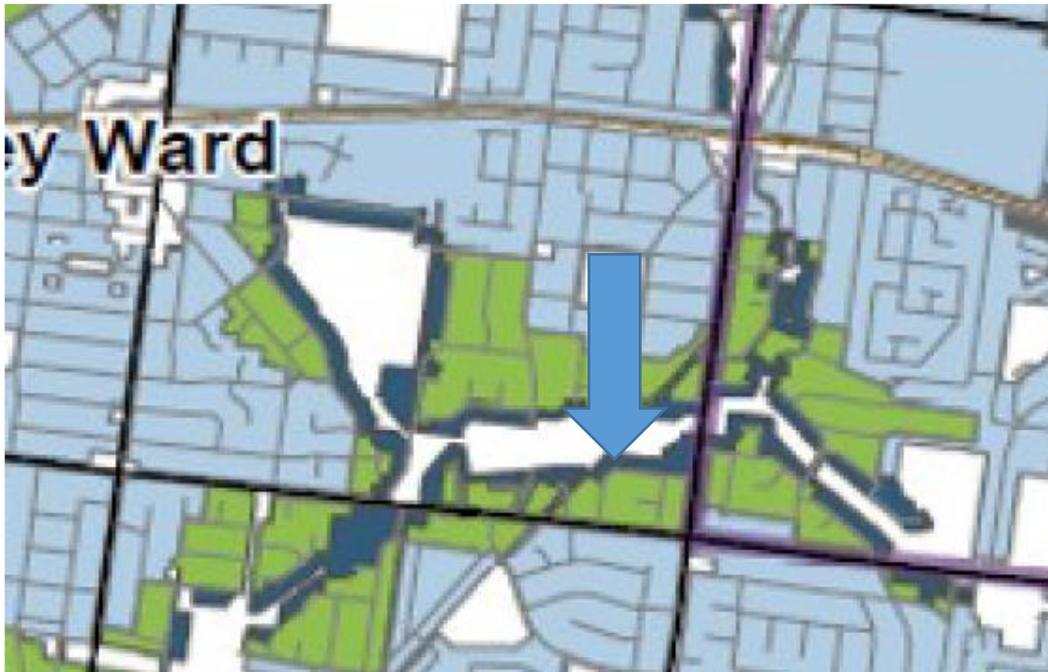
- 7 Given the metrics I have set out in the previous section, and the mostly easy exceedance of specified standards and requirements, it is reasonable to ask the question:
- What does it take for a development to gain support from the council?
- 8 Planning policy is unambiguous that there needs to be an intensification of housing development in our established suburbs to achieve the supply needed to meet the growing population. The population section in clause 21.01-1 tells us that Monash is expected to increase its population by over 26,000 in 2031.
- 9 Whilst the intention as set out in the Strategic Framework Plan in clause 21.01 is to focus that additional housing in and around activity centre, the Monash National Employment and Innovation Cluster and boulevards, it is not the case that areas outside those locations are excluded from new housing - whether it be new single replacement dwellings, dual occupancies or larger medium density developments.
- 10 However, policy is also clear about maintaining and enhancing the established garden city character and protecting treed environments by use of the Vegetation Protection Overlay. There is also an intention set out in clause 21.04-1 that residential growth will be further restricted in creek environs to ensure the garden city character is to be protected and enhanced.
- 11 The residential development framework (map 3 in clause 21.04-1) appears to identify the subject land as being in an area with limited development potential – Category 7 Creek Environs. I consider that the line markings between the different categories on Map 3 are somewhat imprecise and there appears to be some overlap between the Pinewood Accessible area and the Creek Environs along Meadow Crescent.



- 12 However more importantly, Figure 12 in the residential development policy at clause 22.01 identifies the subject land as being in a Creek Abuttal Area and this was the designation referred to by Ms Moser and Mr McKenzie. The balance of the land bounded by Scotchmans Creek reserve, Blackburn Road and Waverley Road is in a Creek Environs Area.
- 13 The planning scheme is policy based. Zones, overlays and other requirements are designed to implement policies set out in the state, regional and local sections of the Planning Policy Framework (**PPF**) and in the Municipal Planning Strategy (**MPS**). The first purpose of zones and overlays requires implementation of policies in the PPF and MPS.
- 14 Clause 22.01-3 includes policy applying across Monash which are listed under the headings of general, 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. I do not repeat those here, but they were referred to by Ms Moser and Mr McKenzie and I have considered them in my assessment.
- 15 The following zoning extract shows that the area bounded by Scotchmans Creek reserve, Blackburn Road, Waverley Road and the pipe track reserve is in the NRZ2. As such the whole area is affected by the same neighbourhood character objectives and variations to the clause 55 requirements.



- 16 However, as can be seen on the following plan extracted from clause 22.01, policy geographically distinguishes between those parts of the area that lie between Meadow Crescent and the Scotchmans Creek reserve and those areas between Meadow Crescent and Blackburn/Waverley Roads. The position of the subject land is identified by the arrow.



- 17 I note that clause 22.01-4 does not include separate future character statements for each of the creek abuttal and creek environs areas. Instead, it includes a combined preferred future character for both areas as follows:

The neighbourhood character of this area will be defined by its spacious garden settings, tall canopy trees and consistent built form. New development will be designed to complement the established planting patterns and topography. There will be consistency in front setbacks and the maintenance of larger setbacks from the creek which will provide areas for planting and sustaining larger trees. Vegetation will dominate the streetscape and buildings will be recessive and normally hidden from view behind vegetation and tall trees. The larger rear setbacks will accommodate substantial vegetation, including large canopy trees. The landscape will be complemented by street trees and a lack of front fencing. Regular front setbacks and side setbacks from at least one side boundary will reinforce the consistent setback patterns along the street, allow views between buildings and provide space for landscaping.

New dwellings will complement the older 1950s and 1960s building styles through the use of simple details, low building scale and articulated facades. They will be well-designed, energy efficient and

adhere to sustainability principles. Long expanses of blank wall will be avoided, particularly when adjacent to public parks and open space areas. In this instance, the building should address the public area. Upper levels will be recessed and articulated to reduce visual dominance in the streetscape.

Design emphasis should be placed on promoting the preferred neighbourhood character by responding to the landscape setting.

This area will continue to provide lower scale residential development. Modest dwellings, with simple pitched rooflines and articulated facades, will continue to be the prevailing character.

New development will be well landscaped retaining the 'open landscape character' of the nearby creek environment and will taper down in scale closer to the creek. Development will visually connect to the creek environment through the use of colours and materials for buildings and fencing that blend with, rather than contrast with it.

Given the important recreational and ecological functions of the creek corridors, development on adjoining residential sites should seek to respect and enhance the existing character of these open spaces.

18 So instead of separate statements for each area, the policy includes what can be considered universal or general statements as well as those specifically relevant to sites closest to the creek reserve. In some cases, there is overlap but the universal statements include:

- Consistency in front setbacks which will provide areas for planting and sustaining larger trees.
- Vegetation will dominate the streetscape and buildings will be recessive and normally hidden from view behind vegetation and tall trees.
- The landscape will be complemented by street trees and a lack of front fencing. Regular front setbacks and side setbacks from at least one side boundary will reinforce the consistent setback patterns along the street, allow views between buildings and provide space for landscaping.
- New dwellings will complement the older 1950s and 1960s building styles through the use of simple details, low building scale and articulated facades.
- They will be well-designed, energy efficient and adhere to sustainability principles.
- Long expanses of blank wall will be avoided, particularly when adjacent to public parks and open space areas. In this instance, the building should address the public area.
- Upper levels will be recessed and articulated to reduce visual dominance in the streetscape.

- Design emphasis should be placed on promoting the preferred neighbourhood character by responding to the landscape setting.
- This area will continue to provide lower scale residential development. Modest dwellings, with simple pitched rooflines and articulated facades, will continue to be the prevailing character.

19 Those outcomes that are directed to sites closest to the creek reserve include:

- The maintenance of larger setbacks from the creek which will provide areas for planting and sustaining larger trees.
- The larger rear setbacks will accommodate substantial vegetation, including large canopy trees.
- Long expanses of blank wall will be avoided, particularly when adjacent to public parks and open space areas. In this instance, the building should address the public area.
- New development will be well landscaped retaining the ‘open landscape character’ of the nearby creek environment and will taper down in scale closer to the creek.
- Development will visually connect to the creek environment through the use of colours and materials for buildings and fencing that blend with, rather than contrast with it.
- Given the important recreational and ecological functions of the creek corridors, development on adjoining residential sites should seek to respect and enhance the existing character of these open spaces.

20 These outcomes listed in paragraph 19 allow for a more qualitative or nuanced assessment of a proposal. Mr McKenzie submitted that the NRZ2 has sought to tighten the clause 55 provisions that apply in creek abuttal areas and that to the extent that they seek to regulate or give effect to the desired neighbourhood character outcomes sought for such creek abuttal areas, it is significant that the proposal is fully compliant with each of these quantitative requirements.³

21 I have already set out the metrics of the proposal and agree that the proposal complies with the varied quantitative standards in clause 55. However, I have also explained that the NRZ2 does not just apply to the creek abuttal areas, but also to the creek environs area. The different outcomes sought for the two areas needs to be discerned from the breakdown of the preferred future character statement I have set out in paragraphs 19 and 20.

22 These different outcomes will influence the design response and whether the two dwellings now proposed achieve the preferred future character for a site backing onto the creek corridor.

³ Paragraph 61 of Mr McKenzie’s written submission.



The design response and built form

- 23 Earlier I posed the question of what would it take for a development to gain support from the council. The metrics or quantitative figures I set out earlier in my reasons would suggest that the development should be acceptable.
- 24 However, it is often the case that quantitative standards such as those for minimum garden area, maximum site coverage and minimum permeability can be met by the ground floor footprint of a building and yet it can have upper levels that result in built form that is too dominant because of size or lack of articulation, and not responsive to the built form outcomes sought by policy.
- 25 Such is the case here, where I am not persuaded that the proposal has met the qualitative policies for these sensitive environmental and landscape environs.
- 26 Whilst two dwellings, and even relatively large dwellings could be accommodated on this site, these two dwellings are not lower scale with upper levels recessed and articulated to reduce visual dominance to the street. The upper level of the front dwelling has minimal setbacks from the ground floor. Except for the articulation created by the single storey garage on the north side there is minimal first floor setback on the south side adjoining the driveway to dwelling 2.
- 27 The garage for dwelling 1 is flush with the front wall and occupies approximately 40% of the front façade. As such, I consider that the garage and the absence of any meaningful articulation across the ground floor will result in the dwelling being highly visible and dominant in the streetscape. That dominance is exacerbated by the site being on the outside curve of Meadow Crescent.
- 28 Opportunities for landscaping to the sides of dwelling 1 are limited by the 1.2 metre setback to the north boundary and the 3 metre wide driveway to the south boundary. I acknowledge that retention of Tree 8 is a positive feature of the proposal as is the ability to plant larger canopy trees in the front setback. These trees will to some extent soften the built form of dwelling 1 and go some way to achieving the character outcome of providing areas for planting and sustaining larger trees. Aside from the larger trees, the landscape plan proposed lawns and low shrubs and groundcovers in garden beds. Whilst I would not expect buildings to be hidden from view behind vegetation and tall trees as suggested by the future character statement, a landscape plan incorporating more shrubs and mid-level vegetation would be more consistent with that intent.
- 29 At the rear, dwelling 2 has some vertical articulation given the upper level is set back up to 1.75 metres more than the ground floor from the rear boundary but I agree with council that when viewed from the reserve the ground floor presents as an unbroken mass for a length of 24.91 metres and

17.8 metres at the upper level. I consider it will be a visually dominant element when viewed from within the reserve, despite being some distance away from the main walking path and partly screened by intervening vegetation.

- 30 One of the neighbourhood character objectives in NRZ2 is that new development transitions down in scale towards the creek, particularly along the interfaces with the creek corridors. Vertically, dwelling 2 is approximately one metre lower than dwelling 1 at the front of the site and to that extent has responded to the approximate 3 metre slope of the land towards the creek reserve.
- 31 However, it is the combination of height, width, lack of articulation at both ground and first floor, and between floors, which creates built form that is not of a lower scale, modest with simple pitched roofs and tapering down towards the creek as required by future character policy. In its current form it is unacceptable.
- 32 But do not misconstrue me.
- 33 I am not suggesting that the rear dwelling should be single storey. Rather, the outcome sought for preferred future character suggests a much more articulated and less bulky built form at the rear of the site. I acknowledge the proposal achieves, although does not exceed, the varied 7 metre rear setback standard B17. Whilst the 7 metre boundary setback provides an opportunity to plant taller vegetation to help filter views of the built form, I note that at ground level a 2 metre wide terrace intrudes into that space for a length of 13.61 metres.
- 34 Council is opposed to any planting within the 1.83 metre wide easement along the rear boundary although in my experience planting of vegetation within easements seems to be tolerated. Even if planting is allowed adjacent the easement, I am not persuaded that the setback will accommodate substantial vegetation, including large canopy trees. The landscaping plan suggests the planting along the rear boundary of one Illawarra Flame Tree, five Ornamental birch trees and one Olive tree. These are said to have a mature height of between 6 and 12 metres. Except for the 6 metre high Olive tree, these trees will eventually exceed the height of the rear dwelling.
- 35 I do have reservations about the choice of species given the preferred future character refers to the important ecological functions of the creek corridors. It seems to me that indigenous or native species would be more appropriate from an ecological point of view. The chosen tree species would not be a reason to refuse the proposal if I was granting a permit, and different and more appropriate species could be required by permit condition.

Tree removal

- 36 I now discuss the retention and removal of Trees 8 and 9. Both trees are mature Lemon Scented Gums (*Corymbia citriodora*) and are the only trees requiring a permit for removal under VPO1.
- 37 Tree 8 has height of 17 metres, a spread of 11 metres and is noted as having minor deadwood and a driveway close to the tree. It has 33% encroachment into the Tree Protection Zone (TPZ) and has been assessed as having a high protection value.
- 38 Tree 9 has a height of 21 metres, a spread of 14 metres and is noted as having suppressed growth and over extended branches. It has 100% encroachment into the TPZ and has been assessed as having a moderate protection value.
- 39 I note that the encroachment percentages are based on the current plans and that a different layout would have different impacts.
- 40 Mr Reynolds attended the hearing to present his written and oral evidence and answer questions.
- 41 I do not repeat all his material which I found very helpful in deciding whether Trees 8 and 9 should be removed or retained. To summarise, I accept his evidence that Tree 8 can be viably retained, and that Tree 9 can be removed due primarily to the larger over extended branches and canopy bias to the northwest.

Other

- 42 I finally comment about the oral submission that the two dwellings are required for the personal use of the applicant's family. I cannot put any weight on that submission. Whilst I understand there maybe personal reasons for wanting two large dwellings offering similar facilities and amenities, circumstances change for often unforeseen reasons, and it may be that one or both of the dwellings are not retained by the applicant's family. My assessment must be on the planning merits of the proposal based on provisions in the planning scheme. To do otherwise would be an error.
- 43 One of council's grounds of refusal concerned loss of amenity to adjoining properties by way of visual bulk and scale. Aside from the built form shortcomings I have discussed earlier in my reasons, there are no additional off-site amenity impacts arising to adjoining properties. Any new design that increases articulation and reduces bulk and scale, will likely have flow on benefits for adjoining properties.

CONCLUSION

- 44 There is no question that this large site could accommodate two new dwellings. Council is not opposing two new dwellings. Rather it is concerned about the design response and the failure to respond to an acceptable degree to the outcomes sought in the NRZ2, VPO1 and preferred future character for this creek abuttals area.
- 45 I share those concerns. I do not find the current proposal results in a site responsive design or acceptable outcome. Despite the benefits in providing two new dwellings, or a net increase of one over what exists, I am not persuaded after balancing all the relevant factors, that it represents a net community benefit in the terms set out in clause 71.02-3.
- 46 For the reasons given, I will therefore affirm the decision of the responsible authority and direct that no permit is to be granted.

J A Bennett
Senior Member

