

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1676/2022
PERMIT APPLICATION NO.TPA/53888

CATCHWORDS

Section 80 of the *Planning and Environment Act 1987*; Monash Planning Scheme; General Residential Zone 3; Construction of two dwellings on a lot; Clause 22.01 Residential development and character policy; First floor dwelling separation distance

APPLICANT	MI Design Group & Associates P/L
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	26 Jacqueline Road MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2023
DATE OF ORDER	20 March 2023
CITATION	MI Design Group & Associates P/L v Monash CC [2023] VCAT 294

ORDER

- 1 The decision of the responsible authority is varied.
- 2 The Tribunal directs that planning permit TPA/53888 must contain the conditions set out in planning permit Notice of Decision issued by the responsible authority on 7 December 2022 with the following modifications:
 - (a) Condition 1(a) is deleted.
 - (b) Conditions in the planning permit are renumbered accordingly.
- 3 The responsible authority is directed to issue a modified planning permit in accordance with this order.

Nick Wimbush
Member

APPEARANCES

For applicant	Mr Mark Waldon, Director, St-wise Pty Ltd
For responsible authority	Mr Calum Douglas, Senior Statutory Planner, Monash City Council



INFORMATION

Description of proposal	Construction of two (2) double-storey townhouses.
Nature of proceeding	Application under section 80 of the <i>Planning and Environment Act 1987</i> – to review the conditions contained in the permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	General Residential Zone (GRZ3) – Garden City Suburbs Vegetation Protection Overlay – VPO1
Permit requirements	Clause 32.08-6 Construction and extension of two or more dwellings on a lot, dwellings on common property and residential buildings.
Land description	The review site is a vacant rectangular residential allotment on the south side of Jacqueline Road 17.07 metres wide and 42.67 metres deep with an area of 728 square metres. A single storey dwelling (to the west) and a double storey dwelling (to the east) adjoin the site.



REASONS¹

BACKGROUND

- 1 The Notice of Decision (NOD) was issued by Monash City Council (council) on 7 December 2022 with a range of conditions related to amended plans, landscaping, tree protection, drainage, urban design and other matters.
- 2 Condition 1 in the NOD is a standard amended plans condition, which is not contested in substance, except for condition 1(a) which reads:

The removal of dwelling 1 first (sic) floor area containing bathroom, toilet and linen cupboard and relocate these rooms within remaining footprint of dwelling 1 first floor.
- 3 The area to be removed if the condition remains is shown in Figure 1 below, identified by a blue arrow inserted by the Tribunal. Dwelling 1 fronts Jacqueline Road and dwelling 2 is at the rear.



Figure 1 Extract from Application Plan TP05 (blue arrow added by Tribunal)

- 4 Figure 2, part of a mock-up prepared by council, shows the same elevation with the bathroom, toilet and linen cupboard removed.



Figure 2 Extract from Application Plan TP05: Council Mock-up Version

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 this material will be cited or referred to in these reasons.

- 5 Figure 3 shows the internal layout of dwelling 1, with the bathroom, toilet and linen cupboard to be removed under condition 1(a) to left of image.

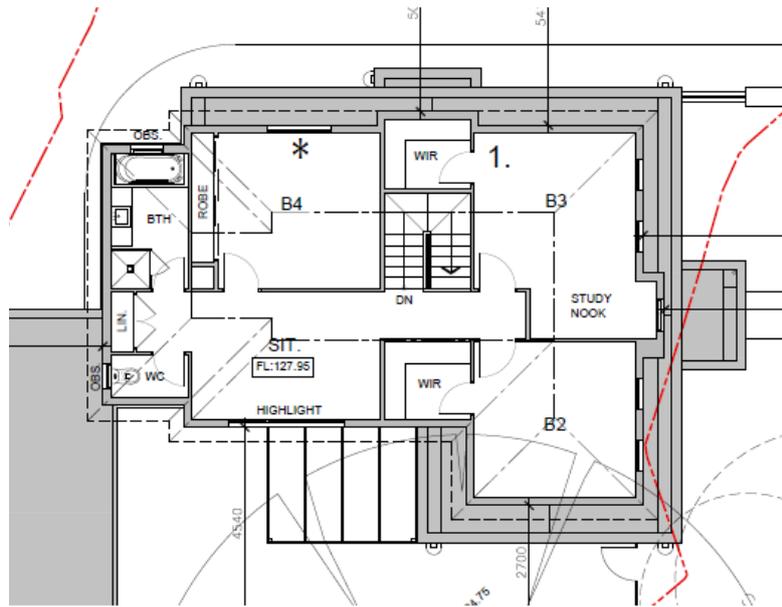


Figure 3 Extract from Application Plan TP04; First Floor Plan

- 6 The removal of the bathroom, toilet and linen cupboard would increase the separation distance between the first floors of dwellings 1 and 2 from 5.8 metres to approximately 7.7 metres.
- 7 An objection to the original application was received from the neighbours at 28 Jacqueline Road. MI Design Group & Associates Pty Ltd (the **applicant**) provided notice of the Tribunal hearing to the objectors but they did not seek to be a party to this hearing.

THE KEY ISSUE

- 8 The key issue is whether the increased separation distance between the dwelling first floors is needed to produce an acceptable planning outcome.

THE COUNCIL'S POSITION

- 9 Council drew my attention to clause 22.01 Residential development and character policy and specifically one of its objectives:

To encourage new development to achieve architectural and urban design outcomes that positively contribute to neighbourhood character having particular regard to the applicable preferred future character statement for the area.

- 10 It also highlighted policy statements in clause 22.01 including:
- Provide a separation between dwellings constructed on the same site to break up built form and support additional landscaping.
- 11 Council's view was that the setback of 5.8 metres between the first floors of dwellings 1 and 2 is inadequate, results in unreasonable visual amenity

impacts on neighbours and is inconsistent with the policy above and others in the clause.

- 12 The council outlined its views on the visual amenity impact on neighbouring properties from what it submitted is the ‘lack of a meaningful gap’. The visual amenity impacts to the east (number 28) were said to be to an outdoor area at the front of the site, from habitable room windows and from other outdoor areas. It submitted that while there are screening awnings (‘structures’) along part of the boundary to number 28, these are ‘temporary marquees’.
- 13 The visual amenity impacts to the west (number 24) were said to be to the outdoor areas including the covered patio at the rear of the dwelling by the first floors of the proposed dwellings.
- 14 In arguing for the increased separation, Council showed a number of other examples in the hearing of multi-unit dwellings in the vicinity with suggested generous upper-level separations.
- 15 Overall, Council submitted:

The combination of a lack of adequate modest break between the first floors of the dwellings exacerbated by the continuous ground floor resulting in a dominate (sic) first floor with a bulky interface with neighbouring properties.
- 16 The landscaping plan with the application includes a proposed canopy tree in the secluded private open space of dwelling 1, east of the bathroom, toilet and linen cupboard area in contention. Council submitted that without the removal of the first floor elements sought in condition 1(a), the proposed canopy tree cannot effectively screen the first floor of dwelling 1.

THE APPLICANT’S POSITION

- 17 The applicant submitted that the condition is not required to meet neighbourhood character objectives and will have adverse internal amenity consequences for residents of dwelling 1.
- 18 The character statements in clause 22.01-4 Preferred future character statements (Garden City Suburbs (Northern)) were outlined in the applicant’s submission, with the applicant concluding:

Essentially, the desired future character can be stated as (i) seeking significant landscaping around built form, (ii) built form that is compatible in scale, (iii) limited crossovers per frontage and (iv) an open edge to the street. In supporting the development Council obviously feels that the proposal is generally compatible with their policy position for the area.
- 19 The applicant highlighted the issues in the council officer report related to sheer walls, the outlook from neighbours, and to provide a bigger gap between dwellings.

- 20 The applicant did not consider there are ‘sheer walls’ due to articulation of the dwellings from most elevations and the use of vertical articulation between brickwork on the ground floor and cladding on the first floor.
- 21 It acknowledged that it is the neighbours that might be impacted by the built form and appreciate a greater break between dwellings at the upper level; but submitted that on both sides the primary secluded private open space would be minimally impacted due to its location.
- 22 The applicant submitted that the 5.8 metre gap is ‘generous by any standard’ and there is nothing in the planning scheme that defines an acceptable gap dimension.
- 23 The internal amenity of dwelling 1 was discussed in the hearing. The applicant submitted it would be compromised by the need to relocate the bathroom, toilet and linen cupboard into the remaining first floor floorplate. The applicant submitted that the bedrooms, which are already not large could be compromised in area and other features such as the sitting room and walk in robes lost.
- 24 In conclusion the applicant contended that the condition appears to be the officer’s preference rather than being derived from policy.

THE TRIBUNAL’S VIEW

- 25 Firstly, I consider it important to acknowledge what is not in dispute. The council and applicant have reached agreement on almost all elements of the proposal leading to the NOD.
- 26 From my understanding of council’s perspective, a significant part of the case rests on the suggested visual bulk impacts on neighbouring properties of the first floor separation distance of 5.8 metres.
- 27 I note in passing that it has not been argued before me that the size of the gap has any significant bearing on other amenity impacts such as overshadowing or overlooking.
- 28 It is also clear to me that the size of the gap, whether 5.8 metres or 7.7 metres, will have minimal or no impact on the streetscape or broader neighbourhood character policy objectives given its limited visibility from the public domain.
- 29 As the neighbours were not parties to the hearing, I am reluctant to draw hard conclusions about the use of their properties and how they may be affected.
- 30 That being said, a suite of images and plans was provided in the hearing which allows me to draw some general conclusions.
- 31 On both neighbouring properties there appears to be significant secluded private open space at the rear which will not be affected by the size of the first floor gap.



- 32 Of the property to the west (number 24), I consider any impact of the gap size (whether 5.8 metres or 7.7 metres) is mitigated by:
- a the approximately 8 metre distance between the southwest corner of dwelling 1 and the edge of the covered patio;
 - b the limited field of view between the patio roof on number 24 and the proposed 1.95 metre timber paling fence; and
 - c the proposed canopy tree to be planted as part of the development on the western boundary.
- 33 The property to the east (number 28) has a two-storey articulated dwelling and significant planting (including canopy trees) between the dwelling and the western boundary with the subject site. As council submitted there are structures or awnings (temporary) along some of the boundary on number 28 that limit views to the subject site from ground level.
- 34 Views from upper levels on number 28 opposite the first floor gap it would appear are mitigated by existing canopy trees, albeit noting they appear to be deciduous.
- 35 The proposed canopy tree on the review site in the secluded private open space of dwelling 1 will, over time, further mitigate any impact on number 28.
- 36 The above discussion must be put in the context of the application for review. This is a review of the size of the gap between first floors of the proposed dwellings, not a review of the whole application which has already largely been settled.
- 37 It is the impact of increasing the first floor gap between dwellings 1 and 2 by 1.9 metres that is relevant.
- 38 It is difficult to see how this increase will make a material difference to the visual amenity impact on neighbouring properties. That visual amenity impact, whatever its magnitude, will come from the fact the property is being developed with two, two-storey dwellings, rather than the relatively small change at the margins being considered here.
- 39 In my view there is nothing before me that militates that the increased gap results in an acceptable planning outcome compared to the application plans. I accept the applicant's submission that there is no required minimum separation distance in the planning scheme.
- 40 The policy objective to 'Provide a separation between dwellings constructed on the same site to break up built form and support additional landscaping' is in my view met by both proposals, noting that landscaping is not contested.
- 41 I note the internal amenity arguments raised by the applicant. I accept that the increase in the separation proposed by council would create an inferior

internal amenity outcome, and this is a consideration in my overall decision and weighing up net community benefit.

- 42 Further, reviewing council's mock-up, and acknowledging it is just that, it also appears to me that the council preferred outcome results in a 'boxiness' in dwelling 1 that is less attractive than the articulation provided in the application.
- 43 Overall, in my view, the increased separation is not required to produce an acceptable planning outcome and condition 1(a) should be deleted.

CONCLUSION

- 44 For the reasons given above, the decision of the responsible authority is varied. A permit is granted subject to conditions

Nick Wimbush
Member

