

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1532/2022
PERMIT APPLICATION NO.TPA/53003/A

APPLICANT	Pubudu Jayawardene
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	60 Portland Street MULGRAVE VIC 3170
HEARING TYPE	Hearing
DATE OF HEARING	11 May 2023
DATE OF ORDER	11 May 2023
DATE OF WRITTEN REASONS	28 June 2023
CITATION	Jayawardene v Monash CC [2023] VCAT 727

ORDER

No amendment of permit

- 1 In application P1532/2022 the decision of the responsible authority is affirmed.
- 2 Planning permit TPA/53003/A must not be amended.

Joel Templar
Member

APPEARANCES¹

For applicant	Mr Daniel De Fazio, town planner of Human Habitats.
For responsible authority	Ms Celia Davey, town planner of Monash City Council

¹ All appearances were via an online platform.



INFORMATION

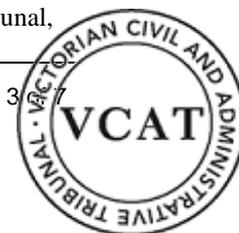
Description of proposal	Amendment of an existing permit to construct two dwellings on a lot.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	Neighbourhood Residential Zone Schedule 4 (NRZ4) Vegetation Protection Overlay Schedule 1 (VPO4)
Permit requirements	Clause 32.09-6 – to construct two or more dwellings on a lot.
Land description	The review site is located on the east side of Portland Street, between Fernbank Crescent and Alma Close in Mulgrave. It is generally rectangular in shape with a frontage width of 19.23 metres. The rear boundary is 14.98 metres wide with side boundaries of 38 metres (northern boundary), 40 metres (southern boundary) and an overall site area of 655 square metres. Topographically, the review site sits higher than street level with slope of 4.13 metres from the south-east corner at the rear to the north-west at the front.
Tribunal inspection	4 May 2023 (prior to the hearing).



REASONS²

- 1 These reasons were delivered *ex tempore*, or verbally, at the hearing.
- 2 On 26 May 2023, the council requested written reasons. The following are the reasons provided for the decision in this proceeding but have been modified to suit written, as opposed to verbal, reasons.
- 3 This is a decision in proceeding P1532/2022 between Pubudu Jayawardene and the Monash City Council for a development at 60 Portland Street, Mulgrave. It concerns an application brought by the permit applicant against the refusal of the council to grant an amended planning permit for the construction of two dwellings on a lot at 60 Portland Street, Mulgrave.
- 4 The key issue in this case relates to:
 - Whether the proposal is an acceptable neighbourhood character outcome with respect to the amendments sought, particularly the addition of a second crossover and driveway.
- 5 Detailed written submissions were received from the council and the permit applicant, setting out descriptions of the site, the proposal, neighbouring properties, and relevant planning scheme provisions and policies. Given the nature of this matter, it is not necessary for me to repeat all of those in detail. I also inspected the site and surrounding area prior to the hearing.
- 6 In summary, key points in this case are:
 - The applicant said that the amendment application was born through a necessity to achieve a minimum future subdivision area of 300 square metres. The originally assessed plans would not enable each of the dwellings to achieve this minimum lot size if subdivision of them onto individual lots. The council said this issue was identified to the applicant prior to the original permit being issued but that the applicant chose to pursue the permit application as it stood and did not choose to amend it at that time.
 - The amendment application subject of this appeal was lodged with the council shortly after the original permit was granted. The plans that accompanied the application also sought to incorporate a number of the requirements to amend the proposal contained in condition 1 of the permit. The applicant did not dispute this.
 - There was no dispute that the construction of 2 dwellings on the review site can be accommodated in principle.

² The submissions of the parties and any supporting exhibits given at the hearing 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.



- The review site is zoned NRZ4 which includes a number of variations to clause 55 standards. In this case, some of those varied standards are not met.
 - One of the key purposes of the NRZ in the head provision is:
 - To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
- 7 The NRZ4 schedule includes specific neighbourhood character objectives as follows:
- To ensure new development maintains the important view lines to the Dandenong Ranges, along the streets and between buildings.
 - To ensure development is defined by its spacious and generous garden settings, tall canopy trees and consistent built form and setbacks.
 - To encourage open gardens to the street, and the planting and retention of significant trees.
- 8 The NRZ4 also includes numerous specific decision guidelines. I will not recite all of these but in summary, they ask the decision maker to consider how the proposal responds to the preferred character, with particular focus on provision of open space and the ability to incorporate substantial landscaping and to minimise hard surfaces.
- 9 The NRZ4 also has a minimum subdivision lot size of 300 square metres.
- 10 Broadly, the planning scheme seeks to provide for diversity in housing types as well as facilitating development in appropriate locations.
- 11 Policy does not recognise the location of the review site as one where meeting higher level consolidation or diversity objectives is a priority.
- 12 Policy applicable to this proposal is weighted towards particular character outcomes. In this case, a clear preferred character is sought. This is centred around provision of open space, minimising hard paving and the provision of substantial vegetation, including canopy trees.
- 13 Clause 22.01, Residential Development Policy, identifies the site as being located within the Dandenong Valley Escarpment area, which runs generally in a north-south alignment adjacent to the broader Dandenong Creek environs. Without reciting the lengthy preferred character statement, in part, it seeks that vegetation be the dominant element in streetscapes
- 14 The council said that the provision of a second crossover, as well as the minimal landscaping strip along the southern boundary, did not meet the preferred character. It also said that varied standards B13 and B28 were not met. The applicant said that these standards either can be met, or that the



council was taking too narrow an interpretation of how the standards should be applied.

- 15 Furthermore, clause 22.01-4 seeks that second crossovers be discouraged to give favour to 'the soft quality of the street' being maintained.
- 16 The council was also concerned that the cumulative impact of the additional crossover and driveway area in the front setback, the topography that slopes up from the street and the double storey form of the proposal all result in a proposal that will see built form and hard surfaces dominate the streetscape where this is not the preferred character sought.
- 17 The applicant said that the proposal has reduced hard surfaces by some 50 square metres, even though site coverage has increased. It said that despite the increase in site coverage, it still complies with the varied standard of clause 55 which seeks a maximum of 50% - 43.6% is proposed and that permeability is increased to 45%.
- 18 The applicant also said that varied standard B13 can be met and it produced a landscape plan to demonstrate this, including the retention of one tree in the rear south east corner, as well as four canopy trees in the front setback, as well as one in each of the secluded private open space (SPOS) areas of each dwelling.
- 19 It was also submitted that the character of crossovers in the surrounding area is one per 10 to 12 metres of street length on average and that there are numerous examples of wide crossovers, extensive hard paving and in some cases, two crossovers per lot frontage.
- 20 Reference was made to two previous decisions of the Tribunal where two crossovers were permitted despite the policy at clause 22.01-4 applying in those cases as well.

Tribunal findings

- 21 The zoning and applicable policy in this case gives preference for a particular character outcome to be achieved. Housing diversity and consolidation objectives, in my view, take a backseat to achieving the preferred character outcome that is set out in policy.
- 22 The review site is not in a location that is identified for housing consolidation or diversity as a priority, with many such areas being designated elsewhere within the municipality.
- 23 Where there is policy preference and a preferred character for landscaping and open space to be the dominant feature, I find that the amendments proposed are inconsistent with what the planning scheme seeks to achieve on this site.
- 24 The addition of a second crossover and the associated driveway, and reduction in the landscaping possible along the southern boundary in my



view are clearly at odds with policy. Whilst there are some examples of second crossovers nearby, these are quite limited and some distance from the review site.

- 25 In relation to the submissions of the applicant regarding other properties that have wider crossovers and large areas of hard paving in the front setback, whilst these are undeniably in existence, I find that they too are at odds with the relevant policy in this case. Policy applicable in this instance, gives little, if any, reference to a new development having to respond to the existing character. Further, the submissions of the applicant in relation to the distance between crossovers on average, I find is not necessarily reflective of the character of the area. Whilst some crossovers are spaced at approximately 10 to 12 metres, there are many other examples where much greater distances of separation exist of between 30 and 40 metres and these examples are quite proximate to the review site.
- 26 Whilst the landscaping plan demonstrates the necessary canopy trees required under varied standard B13, I find that the development as a whole, when considering the scale and massing proposed in combination with the additional crossover and the dominance of the built form and hard surfaces as will be visible in the streetscape, will be a significant departure from what the preferred character seeks. Insofar as it is relevant, the proposal I find would also be an outlier in terms of how it fits with the existing character.
- 27 The other examples of decisions of the Tribunal that were cited by the applicant had their own set of circumstances, including their physical context and the fact that they were subject to different zone controls. What I must do, is apply the policy in an appropriate manner that takes into account the circumstances before me. I do not deny that this policy can and has been varied, but that a contextual approach must be taken.
- 28 The addition of a second crossover and associated driveway results in the reduction of landscaping within the frontage setback which is something I find is not an acceptable response to what the preferred character seeks. Although I acknowledge that some canopy trees can be planted within this front setback, the combination of the hard paving in the front setback, the resultant limited landscaping that can be planted, the reduction of the landscaping strip along the southern boundary and the double storey scale which sits in an elevated topographical position all combine to result in an outcome that is not one which I find the preferred character for this location is seeking.
- 29 The circumstances which this application was made where the applicant did not dispute that it was aware of the minimum subdivision requirement prior to the original permit being issued and proceeded in any event, should not be a reason why an amendment to the permit should be made. The minimum subdivision lot size has been designated in the NRZ for some



time. Whilst the refusal of this amendment application will obviously mean that the development as originally approved under the permit cannot be subdivided, that does not mean that some other alternative design cannot be explored and ultimately approved if it is deemed an acceptable outcome. To allow the amendment on that basis would effectively be the ‘tail wagging the dog’ and this is not an appropriate way in which to approach reaching an acceptable outcome.

- 30 On the basis of these findings, I will affirm the decision of the council and direct that no amended permit be granted.

Joel Templar
Member

