

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P45/2023  
PERMIT APPLICATION NO. TPA/54044

### CATCHWORDS

Monash Planning Scheme; alterations and additions to an existing heritage dwelling; front fence height to a heritage dwelling; amenity impacts and the Heritage Overlay.

|                              |                                       |
|------------------------------|---------------------------------------|
| <b>APPLICANT</b>             | Kellie Blacklock                      |
| <b>RESPONSIBLE AUTHORITY</b> | Monash City Council                   |
| <b>SUBJECT LAND</b>          | 11 Connell Road, Oakleigh             |
| <b>HEARING TYPE</b>          | Short Case Hearing                    |
| <b>DATE OF HEARING</b>       | 2 May 2023                            |
| <b>DATE OF ORDER</b>         | 18 May 2023                           |
| <b>CITATION</b>              | Blacklock v Monash CC [2023] VCAT 563 |

### ORDER

- 1 In application P45/2023 the decision of the responsible authority is varied.
- 2 The Tribunal directs that planning permit TPA/54044 must contain the conditions set out in planning permit TPA/54044 issued by the responsible authority on 19 December 2022 with the following modifications:
  - (a) Condition 1(b) is amended to read:

The new window on the south side of the dwelling east of the chimney to be deleted.
  - (b) Condition 1(c) is amended to read:

A maximum front fence height of 1.2 metres, with a sliding gate at the driveway entrance to be consistently shown on the site plan and elevations.
  - (c) Conditions 1(d) and (e) are deleted.
  - (d) 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.

**Michael Deidun**

**Member**



## APPEARANCES

|                           |  |
|---------------------------|--|
| For applicant             | Callum Bryant, Town Planner of Song Bowden Planning      |
| For responsible authority | Roseanna Oppedisano, Town Planner of Monash City Council |

## INFORMATION

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|---|--|
| Description of proposal                 | Part demolition and the construction of alterations and additions to a heritage dwelling   |
| 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                       | Neighbourhood Residential Zone 1<br>Heritage Overlay 92  |
| Permit requirements                     | Clause 43.01-1 to demolish a building, construct a building and construct or carry out works on land to which the Heritage Overlay applies   |
| Relevant scheme policies and provisions | Clauses 15, 21, 22.01, 22.07, 32.08, 43.01, 52.06, 54, 65 and 71.02.   |
| Land description                        | The land is a rectangular allotment with a frontage to Connell Road of 15.24 metres, a depth of 45.72 metres, and an overall area of 696 square metres. The land presently supports a single storey detached dwelling. |
| Tribunal inspection                     | The Tribunal inspected the site and surrounding area prior to the hearing, on 26 April 2023.   |



## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Kellie Blacklock (the ‘Applicant’) seeks to review conditions imposed on a planning permit by Monash City Council (the ‘Council’) that permits a development of land at 11 Connell Road, Oakleigh (the ‘review site’). The permit allows the part demolition of an existing dwelling, and the construction of alterations and additions to the dwelling. The Applicant seeks to review parts (b), (c), (d) and (e) of Condition 1 that requires the following changes to the plans prior to endorsement.

Before the development starts, plans drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans submitted with the application prepared by David Liddiard & Associates, *Revision B, dated June 2022*], but modified to show:

- a) ...
  - b) The new window on the south side of the dwelling east of the chimney changed from aluminium to a timber framed window in keeping with the heritage character of the building.
  - c) A maximum front fence height of 1.2 metres.
  - d) The garage on the northern side not to extend any further west than the east side of the centrally located habitable room window of the neighbouring dwelling (where the line of the 2.7 metre garage width notation is shown).
  - e) The concrete driveway/paved area reduced to a maximum 3 metres in width.
  - f) ...
- 2 The issues or questions for determination are whether each of the contested conditions are required in order to achieve an appropriate or reasonable planning outcome.
- 3 The Tribunal must decide which of the contested conditions should be applied to the permit. Having considered all submissions presented with regard to the applicable policies and provisions of the Monash Planning Scheme, I have decided to vary the Council’s decision, and direct the amendment or deletion of the contested conditions. My reasons follow.

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<sup>1</sup> 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.



## Monash Planning Scheme guidance

- 4 The review site is within a Heritage Overlay, with that Overlay being the only reason why a planning permit is required. The Heritage Overlay sets out the following decision guidelines that are relevant to this proceeding.

Before deciding on an application, in addition to the decision guidelines in Clause 65, the responsible authority must consider, as appropriate:

- The Municipal Planning Strategy and the Planning Policy Framework.
- The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable statement of significance (whether or not specified in the schedule to this overlay), heritage study and any applicable conservation policy.
- Any applicable heritage design guideline specified in the schedule to this overlay.
- Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
- Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

- 5 Relevant planning policy for heritage places are found at both Clause 21.12 and Clause 22.07 of the Monash Planning Scheme. Both parties referenced parts of these policies in their written and oral submissions. I will not quote from these policies at this part of my decision, but their content has informed my decision making and the reasons that follow.

- 6 Both the provisions of the Heritage Overlay and planning policy requires an understanding of the significance of a heritage place. The site falls within Schedule 92 to the Heritage Overlay, for which the following Statement of significance is provided.

The identified Residential Areas north of the Oakleigh railway station and the Station Street commercial centre are important for their capacity to demonstrate the stages in the evolution of Oakleigh which include the impact of the late Victorian Land Boom, the Post Federation recovery and the consolidation that took place during the Inter war period (Criterion A). The residential areas include a range of life styles and standards of accommodation throughout the settlement period, progressing from workers' cottages on the low lying land near



the railway and gasworks to middle class dwellings on the wider streets and higher ground north of Atherton Road (Criterion G). The survival of the courthouse and police station complex in Atkinson Street is important in that it recalls the existence of a precinct of public buildings there for many years, prior to the formation of the Atherton Road complex. The survival of a remnant of “Burlington Square” facing Burlington Street is of interest for its capacity to demonstrate the contemporary practice of providing residential squares along English lines in residential developments during the Land Boom period.

The Station Street commercial centre has aesthetic importance (Criterion E) on account of the space defined by the railway station and the Oakleigh junction hotel and shops at Portman Street and also for the Inter War buildings that establish the architectural character of Station Street. Finally, the termination of the vistas at both ends combines with the comparatively narrow width of Station Street to form a discrete precinct having an intimate quality that contrasts with Warrawee Park to the north and Portman Street to the south.

- 7 This framework provides a basis for the assessment of the four conditions that are under review.

**Condition 1(b)**

- 8 The applicant has suggested an alternative wording to this condition, as follows:

The new window on the south side of the dwelling east of the chimney to be deleted.

- 9 This alternative wording is not opposed by the Council. As the parties are in a consent position with regards to this part of the dispute, I will implement the agreed alternative wording to Condition 1(b).

**Condition 1(c)**

- 10 The Applicant submits that the proposed front fence height of 1.8 metres is appropriate for the following reasons:

- a. The statement of significance makes no reference to front fencing;
- b. The heritage policy at Clause 22.07 that seeks fences be no higher than 1.2 metres is too general, and does not take into account the changing character and context of heritage places throughout the municipality;
- c. The HO92 precinct comprises a range of fence heights; and,
- d. The broader character of land outside HO92 includes high front fences.

- 11 I am not persuaded by these submissions, and instead find that the condition is necessary to achieve an appropriate response to the heritage significance and context. I make this finding for the following reasons.



12 Firstly, policy is clear in its guidance for front fences, through the following at Clause 22.07-3 of the Monash Planning Scheme.

**Fences**

- Front fences characteristic of the contributory buildings in the streetscape be provided.
- In the inter-war areas, front fences and fences on the side boundaries between the front alignment and the facade line of the development not exceed 1 metre in height.
- In other areas, front fences not exceed 1.2 metres in height, excluding posts.
- Front fences be compatible with the Garden City Character of the area.
- Front gates and especially pedestrian or ‘garden’ gates be provided.

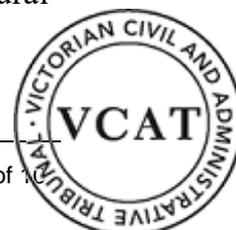
13 While policy cannot mandate an outcome, the clear policy guidance is a weighty consideration, unless other factors can weigh in favour of a different outcome.

14 Secondly, I am not persuaded by the Applicant’s submission that nearby land in HO92 has a range of fence heights. Instead, I agree with the Council’s submissions that of the eleven sites along Connell Road within HO92, the only one that has a high front fence is at the review site. While the Applicant also sought to rely on two properties that have a high front hedge or vegetation, these are not high fences, and present to the street in a different manner. I therefore find that there is an appropriate level of consistency in existing low front fence heights, that supports the application of policy.

15 Thirdly, I do not consider it relevant that three nearby properties outside of the Heritage Overlay also have high front fences. The decision guidelines of the Heritage Overlay concern themselves with the impact on the character and significance of the heritage place, and that does not include properties outside of the heritage place.

16 Fourthly, I do not regard the existing presence of a high front fence on the review site as a matter that assists the Applicant in this proceeding. If the existing front fence was demonstrated to have heritage significance, then that would be a different matter. However no such information was provided to the Tribunal.

17 Finally, I do not consider it relevant that fence heights are not stipulated in the Statement of significance for this heritage place. Indeed, that is not unusual for such a Statement of significance. However, fence heights are important for and relevant to the Statement of significance, as high front fences have the potential to obscure one’s ability to take in the architectural facets of contributory dwellings.



- 18 For these reasons I will retain Condition 1(c). I will however modify the condition to remove the current inconsistency where the site plan depicts a sliding gate, and the elevations depicts swing gates at the driveway entrance. Mr Bryant informs me that a sliding gate is proposed.

#### **Condition 1(d)**

- 19 This condition requires a reduction of the length of a proposed boundary wall for a garage, in order to achieve an improved amenity outcome for an adjoining resident. However, as a permit is only required under the Heritage Overlay, no Clause 54 assessment relating to off-site amenity impacts can be undertaken as part of a planning permit application.
- 20 The Council seeks to ‘get around’ this fact through the following submissions.

[36] The applicant has stated that the “condition relates to Rescode and not the heritage overlay”. The condition extends towards neighbourhood character in regard to the sensitivity of the Heritage Overlay, not Rescode as the application was assessed under the overlay.

[37] The Planning and Environment Act 1987 states in the grant of a permit that the Responsible Authority must consider amongst other matters:

- (e) any significant effects which the responsible authority considers the use or development may have on the environment . . .”

In this context it is the habitable environment of the abutting house to the north.

[38] Council acknowledges that Clause 54 does not apply to the dwelling as the lot is over 500 square metres however under the decision guidelines of Clause 65.01 (See Attachment 8) that specify that the responsible authority must consider the following:

- The orderly planning of the area.
- The effect on the environment, human health, and amenity of the area.

[39] As the proposed wall is to be constructed on the boundary at a height graduating from 3.21 metres to 3.7 metres with an approximate length of 12 metres (not dimensioned on plans) and it sits at the rear directly opposite two habitable room windows, the decision guidelines of orderly planning support consideration of human health and amenity. The existing carport length is half of what is sought by the applicant. If the condition is removed there will only be a gap of 950mm between the edge of the eaves on the neighbouring property and the 3.21-metre-high wall that is to be constructed, this will result in a considerable reduction in natural light to these habitable



rooms. Rather than remove the garage in its entirety Council included the condition to improve the amenity of the neighbouring resident and reflect the existing built form of likened heritage dwellings along Connell Road.

- 21 I am not persuaded by these submissions. The intent of the Monash Planning Scheme is clear, that certain applications are to be assessed against Clause 54 considerations, and others are not. It is not appropriate that general provisions, such as the purposes of a zone or Clause 65, be used to bring in Clause 54 considerations, where the planning scheme clearly does not intend them to apply.
- 22 The Council also submits that the proposed long garage boundary wall will be contrary to the character of this heritage precinct. They rely on policy at Clause 22.07-3 to support this position. I am not persuaded by this submission. The heritage character is in part informed by the Statement of significance, which comprises interwar and some earlier dwellings that present to the public realm. The condition as sought by Council would remove the rear component of the approved garage. Such a modification would have no impact on streetscape views of the review site or nearby properties, and would not alter the mix of interwar and more modern development visible in the streetscape. For these reasons I am not persuaded that the proposed length of the garage will have an impact on the character and significance of the heritage place, in the manner in which this is intended to be assessed under the decision guidelines of the Heritage Overlay.
- 23 Further, the Council submits that the proposed length of the garage is contrary to the following policy guidance at Clause 22.07-3 of the Monash Planning Scheme.

#### **Garages**

- Garages and garage doors not dominate the design of proposed buildings.
  - Single garages be set back a distance greater than 1 metre from the facade line of the building.
  - If double garages are unavoidable they must be visually recessive.
- 24 I am not persuaded by these submissions, for the following reasons:
- a. The condition sought will not alter the extent to which the proposed garage dominates the design of the existing dwelling, as it will not alter the streetscape appearance of the proposed development. From a heritage perspective, it is the streetscape or public appearance that is the key consideration.
  - b. The proposed garage is setback more than one metre behind the façade line of the dwelling, and the contested condition does not affect the setback.



- c. The proposal does not involve a double width garage, which I understand this policy to address.
- 25 Finally, the Council also relies on policy at Clause 22.01 Residential Development and Character Policy to argue that the proposed length of wall on boundary will be contrary to the preferred character of this neighbourhood. With respect, this is not a dispute where issues of neighbourhood character and preferred character are relevant, as no permit is required under the Neighbourhood Residential Zone. As such, general neighbourhood character policies, such as those found at Clause 22.01 of the Monash Planning Scheme, should not be used in the assessment of a planning permit application, where the only permit trigger is in the Heritage Overlay.
- 26 Rather it is the heritage character of the heritage place that is the relevant consideration. For the reasons set out above a reduction in the length of the garage is not required to achieve an appropriate response to the character of the heritage place.
- 27 For these reasons I will direct that Condition 1(d) be deleted from the permit.

**Condition 1(e)**

- 28 The Council submits that the proposed extent of paving within the front setback is contrary to the character of the heritage place, and the Garden City character that is sought to be achieved by the Monash Planning Scheme.
- 29 I am not persuaded by these submissions, for the following reasons. I do not regard the proposal to provide a widened driveway so another car can park within a part of the front setback, to affect the contribution of the existing dwelling on the review site to the heritage place, or more broadly the character and significance of this heritage place. The proposed paving will be at ground level and sited largely behind a fence and gate. It will not unreasonably impact the appearance of the heritage dwelling in the streetscape.
- 30 Further, the front gardens of existing dwellings is not a matter that is identified as contributing to the significance of the heritage place, in the relevant Statement of significance. Therefore, I am not persuaded by the Council's submissions that the proposed balance of hard paving and front garden area on the review site, could be said to result in an undesirable heritage outcome in this heritage place.
- 31 Finally, for the reasons set out above, broader neighbourhood character considerations, including the policies that support a Garden City character, are not relevant when the only permit requirement is found in the Heritage Overlay.



32 For these reasons, I cannot support Condition 1(e) as being a permit condition that is required to achieve an appropriate heritage outcome on the review site. This condition should be deleted.

**Conclusion**

33 For these reasons I will vary the Council's decision, and direct that the contested permit conditions either be deleted, or amended.

**Michael Deidun**

**Member**

