

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P6/2024
PERMIT APPLICATION NO. TPA54084

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987* (Vic); Monash Planning Scheme; General Residential Zone Schedule 3; Preferred future character; Garden City Suburbs (Northern Area); Policy support for townhouses; Acceptability of design response; Visual bulk and mass; Landscaping opportunities; Design approach; Impact on a street tree.

APPLICANT	Nguyen Hoan Ngo
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	70 Stephensons Road MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	12 April 2024
DATE OF ORDER	22 April 2024
CITATION	Ngo v Monash CC [2024] VCAT 349

ORDER

No permit granted

- 1 In application P6/2024, the decision of the responsible authority is affirmed.
- 2 In planning permit application TPA54084, no permit is granted.

Margaret Baird
Senior Member



APPEARANCES

For applicant	Russell Hocking, CityShire Planning Pty Ltd.
For responsible authority	Calum Douglas, Senior Statutory Planner.

INFORMATION

Description of proposal	Construction of two double storey dwellings and removal of an easement. Both dwellings would be accessed from Jacqueline Road. No front fencing is proposed.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> (Vic) – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme ('scheme').
Zone and overlays	General Residential Zone Schedule 3 – Garden City Suburbs ('GRZ3'). Vegetation Protection Overlay Schedule 1 – Tree Protection Area. Stephensons Road is in a Transport Zone ('TRZ2').
Permit requirements ¹	Clause 32.08 - to construct two or more dwellings on a lot.
Relevant scheme policies and provisions	Clauses 11.01, 15.01-2S, 15.01-5S, 16.01-1S, 21, 22.01, 22.04, 22.05, 32.08, 42.02, 52.02, 52.06, 55, 65 and 71.
Land description	The subject land is on the north-east corner of Stephensons Road and Jacqueline Road. It is 957.7m ² in area, with a 2.44 metre wide easement aligned with the eastern boundary. It is understood that the easement contains no services. The land has a fall of approximately 1.68 metres from the north-east to the south-west and contains a single storey dwelling. There are a number of trees and shrubs on the land. Two street trees are located in the nature strip on Jacqueline Road.
Tribunal inspection	Unaccompanied after the hearing.

¹ No planning permit is triggered in relation to vegetation removal. No access is proposed to the TRZ2.



REASONS²

INTRODUCTION

- 1 Nguyen Hoan Ngo ('applicant') applied to the Monash City Council ('Council') to construct two dwellings on the subject land.
- 2 The Council refused to grant a permit, leading the permit applicant to apply to the Tribunal for a review of that decision. The Council's grounds of refusal focus on the proposal's response to neighbourhood character, its lack of setbacks and articulation, its inadequate landscape outcome, and its impact on a street tree. An image of the proposed development is included in Figure 1.

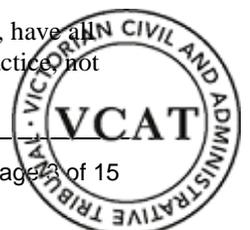


Figure 1 – Extract from Plan TP00.

- 3 The applicant challenges all of the Council's grounds for refusing a permit. It submits the proposed development will sit comfortably within its context and the evolving built form in Monash. The proposal responds to the urgent need for more housing. It is respectful, well-articulated, and well-designed, with the two dwellings sitting in a well-vegetated garden context featuring canopy trees. Among other submissions, the applicant emphasises the neighbourhood's diverse and eclectic character, the proposal's alignment with policy as it presents medium density units and townhouses, and compliance with clause 55.
- 4 I must decide whether the proposal will produce an acceptable outcome having regard to the relevant policies and provisions in the scheme. Clause 71.02-3 requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
- 5 I agree with the applicant that the Tribunal's task is to assess the permit application to decide whether the proposal represents an acceptable outcome, not find if there are alternative or better solutions, or ideal outcomes.³

² The submissions and evidence 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 Tribunal's practice, not all of this material will be cited or referred to in these reasons.

³ *Knox City Council v Tulcanly Pty Ltd* [2004] VSC 37.



AGREED MATTERS

- 6 The parties agree that the subject land is within an area that is expected to contribute to a range of housing options and urban consolidation. The GRZ3 and State and local policy all support medium density development in this location. The land is designated for ‘incremental change’ by the scheme.⁴
- 7 The parties agree that:
- The development of two double storey dwellings on the land is acceptable, in principle, having regard to the land’s strategic and physical contexts.
 - Two storey townhouses are a typology expected here.
 - The application meets the mandatory requirements in clause 32.08.
 - Clause 55 standards and objectives are met, except for the disputed matters of neighbourhood character (Standard B1), street setback (Standard B6), landscaping (Standard B13) and side and rear setbacks (Standard B17).
 - On-site parking provision complies with clause 52.06.
- 8 The agreed matters are relevant and carry weight in my decision. This includes compliance with varied clause 55 standards. Such compliance is relevant to the proposal’s response to clause 32.08, GRZ3, preferred future character policy for the Garden City Suburbs – Northern Areas, and clause 55.02-1 (neighbourhood character).

KEY ISSUES

- 9 Arising from the grounds, the key issues for my determination are:
- Is the proposed development an acceptable neighbourhood character response having regard to the purpose of clause 32.08, the provisions of GRZ3, relevant provisions of clause 55, and applicable policy?
 - Are other clause 55 provisions met?
 - Would the proposal have an unacceptable impact on a street tree, and is this relevant to a decision in this proceeding?

NEIGHBOURHOOD CHARACTER RESPONSE

Scheme provisions and policy

- 10 The only permission triggered by this application is under clause 32.08. This is for the development of two or more dwellings on the lot.
- 11 The subject land is within the GRZ, Schedule 3, as shown in Figure 2 below. The same zone applies to properties to the north, south and east of the subject land. Properties on the west side of Stephenson’s Road are within a Neighbourhood Residential Zone, Schedule 3 ‘Creek Environs Area’ (‘NRZ3’). The Damper Creek open space corridor is evident in Figure 2.

⁴ Clause 21.04. This being one of the change categories in housing policy.





Figure 2 – Extract of zoning plan, with the subject land indicated. Source: Attachments to the applicant's submission.

12 A permit application under clause 32.08 for two dwellings must meet the requirements of clause 55. Clause 55 states (among others):

If a development meets standard B6, B7, B8, B17, B18, B19, B20, B21, B22, B27, B28, B30 or B32, it is deemed to meet the objective for that standard.

Where standard B6, B7, B8, B17, B18, B19, B20, B21, B22, B27, B28, B30 or B32 is met the decision guidelines for that standard do not apply to the application.

For all of the provisions of Clause 55 other than Clause 55.07 (Apartment developments):

- If a zone or a schedule to a zone specifies a requirement of a standard different from a requirement set out in this clause, the requirement in the zone or a schedule to the zone applies.

13 Neighbourhood character objectives in GRZ3 'Garden City Suburbs' are:

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.

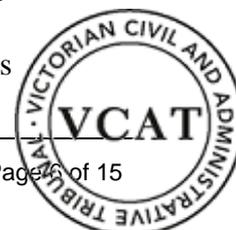
To support new development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form.

To support new development that locates garages and carports behind the front walls of buildings.

- 14 Varied clause 55 standards are B6 (street setback), B8 (site coverage), B9 (permeability and stormwater management), B13 (landscaping), B17 (side and rear setbacks), B28 (private open space) and B32 (front fences).
- 15 In addition to decision guidelines in clause 32.08 are the decision guidelines in GRZ3:
- 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.
- 16 Policy directions are contained in clauses 15, 21.04 and 21.06 which I do not recite. Among them are the following strategies in clause 21.04-3:
- Ensure that development enhances the garden city and landscaped streetscape character of the neighbourhood, responds to the features of the site and surrounding area and promotes good streetscape design.
 - Ensure that new residential development enhances the character of the neighbourhood, having regard to the preferred future character statements contained within Clause 22.01.
- 17 Clause 22.01 contains local character policies, preferred future character statements, and decision guidelines, that I have considered. The policy in clause 22.01-3 addresses a wide range of matters including street setback, landscaping, side and rear setbacks, vehicle crossings, and built form and scale.
- 18 The subject land is in the Garden City Suburbs – Northern Areas under clause 22.01-4. The preferred future character is:

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 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.

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.

19 Decision guidelines in clause 22.01-5 include the following:

It is policy that before deciding on an application, the responsible authority will consider, as appropriate:

- The applicable preferred future character statement.
- Whether the development will have an adverse impact on neighbourhood character.

20 While not given emphasis in parties' submissions, clause 22.05 (Tree Conservation) applies to all land.

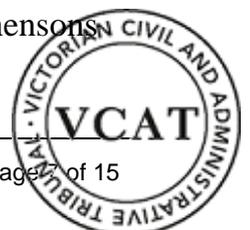
Physical context

21 The subject land is a sizeable corner lot on a main road. Contextually, there is a presence of multi-unit development in the immediate environs of the subject land. This includes older-style single storey units to the north as well as three double storey townhouses on the south-west corner of Stephenson's Road and Monomeith Crescent. There is an evident representation of the traditional single storey dwelling stock as well as two storey detached and units forms.

22 There is a discernible landscape character to which the private and public realms both, but variously, contribute.

23 A driveway abuts much of the northern site boundary, associated with the adjacent two single storey dwellings. It has limited side planting.

24 A medical centre in a former dwelling is on the opposite corner of Stephenson's Road and Jacqueline Road, with strong landscaping to the public realm.



- 25 Two, double storey, detached dwellings are to the east of the subject land at Nos. 1 and 3 Jacqueline Road. Two storey houses are located on Stephenson's Road including opposite the site, and are further emerging in Jacqueline Road. The two storey dwellings, both as single dwellings and as units, have varied bulk and massing, roof forms, and degrees of articulation.
- 26 The character of the area is influenced by the landform, sloping generally toward the west/south-west, and street trees that contribute to the public realm. There is a range of architectural styles and dwelling presentations apparent within the environs of the subject land.
- 27 A campus of the Mt Waverley Secondary College is nearby to the south-west, as seen in Figure 3. An activity centre is around one kilometre away.

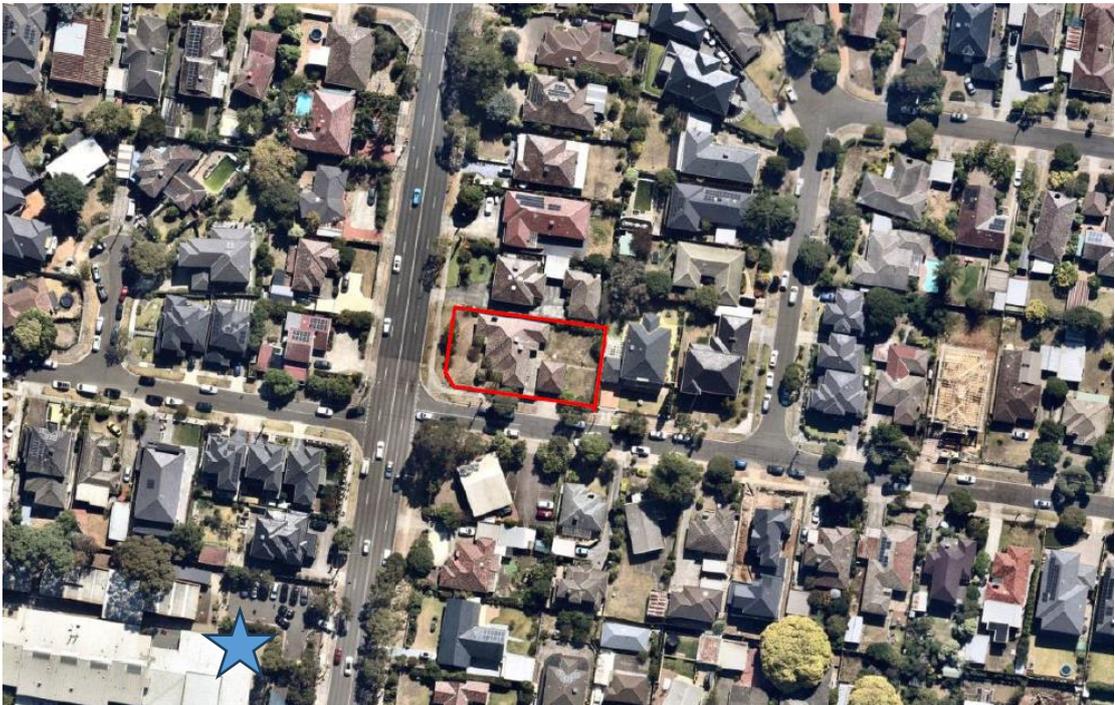


Figure 3 – Extract of aerial image. Source: Council submission. I have notionally marked the school campus.

Overview of parties' submissions

Applicant

- 28 The applicant refers to the site's main road location, and diverse and eclectic character. Reference is made to visible and substantial change evident in the area.
- 29 The applicant submits the character assessment needs to consider single dwelling development around the subject site as 'the basis for determining whether the proposal will respect the neighbourhood character'.⁵ It submits the Council has not properly assessed the existing neighbourhood character, it 'has all but ignored the immediate context of the subject site' and it has 'simply undertaken a 'desktop' analysis of character based on clauses in the scheme'

⁵ Paragraph 7 of the applicant's submission.

30 The applicant states the proposal has a site coverage of 48%, permeability of 42% and a compliant garden area of 46%. The landscape plan shows the proposal is able to make a positive contribution to the landscape and garden character of the surrounding neighbourhood.

31 The applicant's submission sets out the permit application's response to the preferred future character statement as follows:⁶

This is a well designed multi dwelling development that respects the neighbourhood character & a well-vegetated garden context featuring canopy trees is proposed.

The street setbacks are consistent with other dwellings in this section of Mt Waverley noting the range of one & two storey dwelling development surrounding.

Two storey buildings are common in this neighbourhood & the proposed canopy tree planting adds to the mature tree canopy around the neighbourhood.

The proposed dwellings have well articulated facades and good use of materials and finishes. Energy efficiency and ESD principles are a feature of the proposal. There are no long expanses of blank wall.

The architecture sits comfortably in the proposed landscape and garden setting of the overall development of the subject site. Canopy trees and large shrubs filter views at a pedestrian scale.

The proposed front setbacks will feature open lawns with plentiful planting including a number of canopy trees.

The buildings will have a sense of address and are visible from Jacqueline Road which is appropriate.

The provision of two dwellings with two crossovers is an excellent outcome where many other properties have a "1 dwelling/1 driveway crossing" arrangement.

The Landscape Plan sitting with the Application will provide at least 9 new canopy trees and extensive landscaping of the subject site.

32 The applicant's submission states the 'Client Brief has remained clear and specific in terms of the provision of two dwellings of a certain style, design detail and design aesthetic'. It says care must be taken to not give undue weight to the subjective issues around the design aesthetic, design detail and the style proposed. An assessment of a medium density housing proposal in terms of the preferred future character statement 'must operate on the basis that the Statement is read in a positive and facilitative manner not literally and inflexibly with a search for words or lines that might justify a Refusal'.

33 Further in the applicant's submission:

any number of large double storey single dwellings of a similar style and design to this have been constructed within Mount Waverley –, probably in the hundreds, it would be appear to be a proposal which is consistent

⁶ Citing the responses only (not the statement which I have set out earlier in these reasons).



with community expectations for new residential development in this neighbourhood. [sic]

- 34 The applicant submits that there are more than adequate landscaping opportunities around the subject site noting the proposed site coverage and the more than adequate compliance with the garden area requirements. Standard B13 is met, as varied by GRZ3.
- 35 The applicant does not accept that there is a rear corridor of open space to which the proposal must respond for the purposes of assessing setbacks under B17 (as varied), nor that Standard B6 (as varied) is not met. However, it submits a minor change to the porch of Dwelling 2 can ensure Standard B6 is met. Alternatively, the variation is minor and the objective of clause 55.03-1 is met in any event.

Council

- 36 The Council submits the proposal presents with significant issues that directly impact on its ability to produce a response that is satisfactory in terms of the planning control framework and site context. The Council opposes the form, scale and design of the proposed development, the lack of setbacks and articulation, and the failure to provide satisfactory landscaping opportunity in accordance with the requirements of the scheme.
- 37 Related to these matters, which are based on the Council's assessment of the proposal's response to clause 55.02-1 and the preferred future character, the Council submits the proposal fails Standards B6, B13, B17 and B31 of clause 55. The Council submits the architectural elements and features are expressly discouraged by clause 22.01 and are inconsistent with the character of the area.
- 38 The Council submits the development's scale and mass results in a dominant built form. It presents with bulk, form and scale issues - expansive blank walls, box like design and inadequate recessing of the first floor through the development. It fails to meet the future character, and is inconsistent with the existing neighbourhood character. There should be some link in the design, bulk and form with the layout so as to assist to integrate the buildings into the existing neighbourhood – this is not achieved. The fenestration is part of the mock historical design and further exaggerates the sizes of the dwellings.

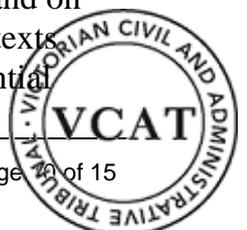
Findings

- 39 The permit application is assessed under the provisions of clause 32.08 and clause 55.02-1. The objectives of the latter are:

To ensure that the design respects the existing neighbourhood character or contributes to a preferred neighbourhood character.

To ensure that development responds to the features of the site and the surrounding area

- 40 GRZ3 and the applicable preferred future character statement apply to land on the east side of Stephenson's Road. Different physical and planning contexts apply on the west side of Stephenson's Road under the NRZ3 and residential character type (Creek Environs Area).



45 I have assumed the landscape proposed in the landscape plan can be delivered (and accept that trees species can be changed as Mr Hocking states). While the front setback to Stephenson's Road has good opportunities for tree planting, Dwelling 2 is massed into rear of the site adjacent to secluded private open space (albeit the unit to the north has a confined rear setback too). The landscape plan, an extract of which is in Figure 5, demonstrates the limitations. The proposed gum trees would not (based on the plant schedule) reach a height to achieve the outcomes sought by policy and varied Standard B13. I do not consider the proposed landscaping to the north and east of the dwelling is appropriate given the proposed trees are cited as 3-6 metres in height whereas the development has walls that are 8 metres high and an overall height of just over 9 metres. I also find the objective of clause 55.03-8 is not met.

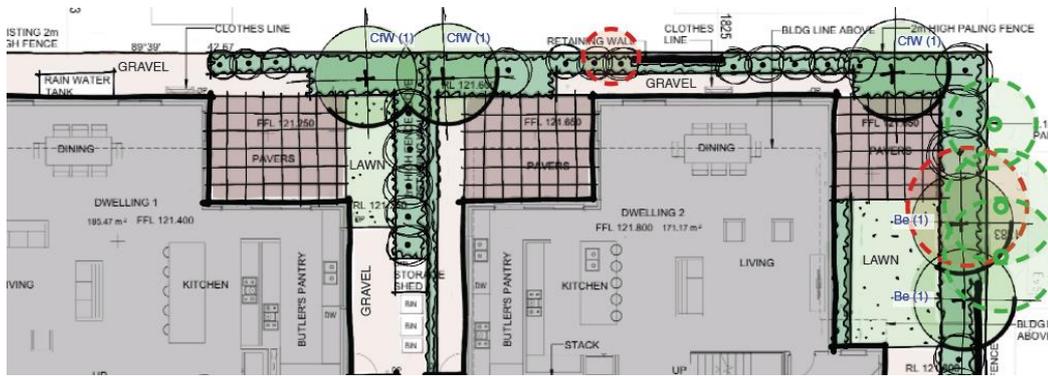


Figure 5 – Extract from landscape plan.

46 The preferred character refers to architecture, including new buildings, usually being secondary in visual significance to the landscape of the area when viewed from the street. The bulk of both dwellings will be readily apparent from Stephenson's Road to the north, seen over the adjacent driveway.

47 I find also the development will not be sufficiently screened from the street and neighbouring properties by well planted gardens to ensure the soft leafy nature of Jacqueline Road is retained. The plan extract in Figure 4 and the elevation in Figure 6, below, assist to show the massing and bulk. I have assumed, however, Standard B6 can be met by ensuring Dwelling 2's porch is less than 3.6 metres above ground level. This can be addressed through a permit condition.



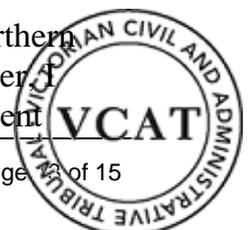
Figure 6 - Extract from Plan TP50 - Jacqueline Road elevation.



- 48 The scale and position of Dwelling 2 would, however, be a dominant and aberrant form in Jacqueline Road. The proposed species of crepe myrtle trees in the front setback would not achieve an outcome where the new building would be secondary in visual significance to the landscape of the area, as sought by policy.
- 49 I appreciate the proposal's extent of numerical compliance with clause 55 standards, such as B7, B8, B9 and B28. However, these standards do not address the entire building massing and envelope, nor other considerations such as design detail and the efficacy of the landscape response to the proposed built form. That is relevant to the point I have made, above, and the assessment under Standard B1 and clause 55.02-1. The proposal involves two sizeable dwellings whose bulk, massing and form would not respect the existing or the preferred future character of this area. Examples of two storey dwellings near to the subject land in GRZ3 include sheer walls but typically offer visual relief through single storey elements, such as garages.
- 50 Finally, I am unable to accept the design details achieve the objective of clause 55.06-1, which is to encourage design detail that respects the existing or preferred neighbourhood character. Standard B31 sets out elements in building design that should respect the existing or preferred neighbourhood character. These include facade articulation and detailing, window and door proportions, roof form, and verandahs, eaves and parapets. I am not persuaded to accept the applicant's submission that the architectural composition appropriately addresses the existing or preferred character. The deliberate design choice has not had sufficient regard to the preferred future character statement which seeks design that complements the established buildings through consistent siting, articulated facades and use of materials.
- 51 For the above reasons, I am not persuaded that the proposal is acceptable when assessed under the purpose and provisions of clause 32.08 and GRZ3, including clauses 55.02-1, 55.03-8 and 55.04-1.

OTHER CLAUSE 55 MATTERS

- 52 In addition to the clause 55 issues raised by the Council's grounds, above, the Council submits the proposal fails to achieve energy efficiency outcomes cited in clause 55.03-5 and in the preferred future character statement.
- 53 The Council's grounds focus on the shallow setbacks from the northern site boundary, 2 metre high boundary fence and a section of cantilevering associated with Dwelling 2. The Council submits the design does not take full advantage of the north orientation. Cantilevering the first floor in Dwelling 2 further reduces the amount of northern light that will enter the ground floor kitchen, dining and living rooms.
- 54 The applicant disagrees. It submits the development complies with energy efficiency principles and are a feature of the proposal.
- 55 The subject land offers the opportunity for both dwellings to enjoy a northern aspect. I accept not all rooms must have a northern orientation. However, I appreciate the Council's concern, which I consider is related to insufficient



boundary setbacks that reduce northern light and solar access opportunities. Ultimately, this alone is not a reason why I have refused a permit.

STREET TREE

- 56 The Council expresses concern about the potential impact on a street tree by a new crossover servicing Dwelling 1. Arboricultural information provided by the applicant at the Council's direction shows the new access point is 1.63 metres from the base of the tree. The tree has a structural root zone of 2.7 metres. The outcome is a major encroachment into both the structural root zone (21.5%) and tree protection zone (12.5%) based on the Australian Standard. The Council says that it will not agree to the removal or demise of the large tree, which is said to have a useful life expectancy of 20+ years.
- 57 The applicant states this ground is not relevant to the determination of this proceeding. If a permit is granted, and an application is made for a new crossover, tree root investigations can be undertaken. Mr Hocking submits there is no evident sign of tree roots, and there are already the kerb and channel, the bitumen road carriageway, a footpath and the boundary fence on the subject land surrounding the tree.
- 58 The street tree in question is a large melaleuca, seen to the right in Figure 7.



Figure 7 – Extract from photograph 30 as part of the Council's submission.

- 59 I accept that:
- no planning permit is required to remove the street tree;
 - the tree is not on the subject land and that there is a separate approval process through the Council for a crossover; and
 - Standard B14 is met with respect to the proportion of the frontage occupied by crossovers.
- 60 Scheme policies reference the role of street trees in the garden city character. Clause 22.01 includes policies to 'Ensure street trees are retained and protected'

and to ‘Locate and minimise vehicle crossovers to prevent traffic disruption, and preserve nature strips and street trees’. This is an evident and common theme throughout the Monash Planning Scheme. Street tree planting is also cited in the preferred character statement, is part of policy in clause 22.05⁸, and is relevant in terms of the decision guidelines in GRZ3 as cited earlier.

- 61 I do not, therefore, consider potential impacts on the street tree are irrelevant. On the information provided, the crossover would be a major encroachment into the structural root zone and tree protection zone, based on the Australian Standard AS4970 – 2009 ‘Protection of Trees on Development Sites’. There has been no tree root investigation to date, nor other measures proposed (as had been recommended by the arborist) to protect the long term viability of the tree.
- 62 I find that there are valid questions about the potential impact of the proposed development on the street tree. The proposal does not sufficiently respond to the scheme’s provisions and policies in relation to this matter.

NET COMMUNITY BENEFIT

- 63 I find the extent of building mass throughout the site and some restricted areas for landscaping in this proposal fail to respond to the preferred neighbourhood character. The architectural approach adds to the unacceptable visual impact. The design does not achieve an acceptable outcome when assessed against the existing and preferred character including clause 22.01. I am not persuaded that the design response can be accepted when having regard to the nature of single dwelling development in the wider municipality, rather than the site’s specific context.
- 64 I have regard to all parts of the Planning Policy Framework in reaching my decision, as the applicant urged be done. I accept the permit application for two dwellings on the land can assist to advance housing objectives and supply as the applicant has emphasised. This, however, does not overcome or outweigh my findings that the design response is not acceptable when fully considering all relevant provisions and policies in the scheme.

CONCLUSION

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

Margaret Baird
Senior Member

⁸ A policy at clause 22.05-3 is ‘Existing street trees be retained and protected’.

