VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P396/2021Permit Application no. TPA/52008 |
| CATCHWORDS |
| Application under section 77 of the *Planning and Environment Act 1987*. Monash Planning Scheme. General Residential Zone, Schedule 3. Vegetation Protection Overlay, Schedule 1. Two dwellings. Neighbourhood character. Amenity impacts. Covenant condition. |

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| **Applicant** | Ross Calvert-Jackson |

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| **Responsible Authority** | Monash City Council |
| **Respondents** | Monique Yevkine Heyn, Peter Karl Heyn, Doris Felstead, Peter Felstead  |

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| SUBJECT LAND | 73 Albert StreetMOUNT WAVERLEY VIC 3149 |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 14 October 2021 |
| Date of Interim Order | 4 November 2021 |
| DATE OF ORDER | 10 February 2022  |
| Citation  | Calvert-Jackson v Monash CC [2022] VCAT 120 |

# 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:

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| * Prepared by:
 | Design Edge Associates |
| * Drawing numbers:
 | TP2.0B, TP2.1B, TP2.3B, TP2.4A, TP3.0B, TP3.1B, TP3.2A, TP4.0B, TP4.1B, TP4.2B, TP4.3B, TP4.4B, TP4.5B, TP4.6B and LND.1B |
| * Dated:
 | 19 August 2021 |

1. In application P396/2021 the decision of the responsible authority is set aside.
2. In planning permit application TPA/52008, a permit is granted and directed to be issued for the land at 73 Albert Street, Mount Waverley in accordance with the conditions set out in Appendix A. The permit allows the construction of two dwellings in accordance with the endorsed plans.

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| Cindy Wilson **Member** |  |  |

# Appearances

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| For Ross Calvert-Jackson | Mr Peter Tesdorpf, town planner of Land Use Town Planning Service |
| For Monash City Council  | Mr Gerard Gilfedder, town planner of Currie & Brown  |
| For Monique Heyn and Peter Heyn | Ms Heyn and Mr Heyn  |
| For Doris Felstead and Peter Felstead | Ms Felstead and Mr Felstead  |

# Information

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| Description of proposal | Construction of two dwellings. |
| 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 | General Residential Zone, Schedule 3Vegetation Protection Overlay, Schedule 1  |
| Permit requirements | Clause 32.08-6 A permit is required for construction of two dwellings on a lot. |
| Land description | The review site is located on the north side of Albert Street, Mount Waverley, approximately 25 metres west of Bruce Street. The land is irregular in shape, has a frontage of 22.4 metres and an area of 731.7 square metres.  |
| Tribunal inspection  | I inspected the site and surrounds before and after the hearing. |

# Reasons[[1]](#footnote-2)

## What is this proceeding about?

1. Ross Calvert-Jackson (Applicant) seeks to construct two dwellings at 73 Albert Street, Mount Waverley. Monash City Council (Council) refused to grant a permit and the Applicant seeks a review of this decision.
2. Two neighbours (Respondents) support Council’s decision to refuse the application and are parties to the proceeding. Three statements of grounds opposing the grant of a permit have been lodged with the Tribunal.
3. The Applicant submits the proposal is an acceptable built form in the context of the mixed character of the surrounding residential area, especially the more modern dwellings. The Applicant says the proposal will respond appropriately to the streetscape and avoids unreasonable amenity impacts to adjoining properties.
4. Council says the proposal fails to respect the neighbourhood character of the area, provides insufficient opportunity for landscaping and will adversely impact the amenity of adjoining properties.
5. Respondents criticise multiple aspects of the proposal including minimal setbacks, inadequate landscaping, insufficient parking, adverse traffic impacts, design and building mass and detriment to neighbourhood character. They raise concerns about loss of amenity arising from overlooking, overshadowing, noise, location of air conditioners and visual bulk.
6. The Tribunal must decide if a permit should be granted and, if so, what conditions should apply. Having inspected the site and surrounds, had regard to the submissions, considered the policies and provisions of the Monash Planning Scheme (Planning Scheme), I have a decided a permit should be granted.
7. I have reached this decision based on my findings on the following key issues:
* Is the proposal respectful of neighbourhood character?
* Are there unreasonable amenity impacts arising from the proposal?
* Are there car parking or traffic reasons to reject the proposal?
1. A preliminary matter in relation to variation to a covenant that applies to the land was the subject of submissions after the hearing and this confined matter was referred to a legally qualified member of the Tribunal for determination. The findings of Member Whitney are in Appendix B to this decision. In summary, the ruling is that a permit condition can be imposed that requires the covenant to be varied and subject to this condition, there is no impediment in granting the permit on the basis of the covenant.
2. Before addressing the key issues, I describe the proposal and the site and surrounds.

## What is proposed?

1. Two attached dwellings are proposed.
2. Dwelling 1, on the west side of the site is two storey presenting to the street with a double garage, study and entry at ground level and bedroom at upper level. This dwelling extends into the site comprising four bedrooms, study and two living areas. A paved patio is provided at the rear of the dwelling together with secluded private open space.
3. Dwelling 2, on the east side of the site, comprises a basement level containing a double garage, home theatre, cellar and storage with a ramped accessway providing vehicle access. At ground level the dwelling presents with a lounge and entry facing the street with a lounge above at upper level. This dwelling contains 4 bedrooms and three living areas. A partially covered deck is proposed in the north east corner of the dwelling and secluded private open space is provided at the rear.



Figure 1: Ground floor plan. Source: TP2.0B Design Edge Associates



Figure 2: Upper level plan. Source: TP2.1B Design Edge Associates

1. Both dwellings present with a tiled pitched roof to the upper level with a flat roof to the lower level.



Figure 3 Street elevation. Source: South Elevation TP3.0B Design Edge Associates

## What is the physical context?

1. The review site is located on the north side of Albert Street, approximately 25 metres west of Bruce Street. The lot is irregular in shape with a frontage of 22.4 metres and a site area of approximately 731 square metres. The land slopes down from the west to the east with a fall of approximately 2 metres. A split level dwelling currently occupies the site.
2. The surrounding area is residential comprising both single dwellings and multi-unit development. To the immediate west is a contemporary two storey dwelling at 71 Albert Street with a double garage set back 1.2 metres from the common boundary.
3. To the east is a double storey dwelling at 75 Albert Street. It faces Bruce Street and presents with high side fencing to Albert Street.
4. To the north, the review site shares boundaries with part of the rear of 13 Nagara Court and part of the side of 67 Bruce Street. Both of these sites contain double storey dwellings.
5. On the southern side of Albert Street is a contemporary dwelling at 72 Albert Street and a recently completed dual occupancy at 74 Albert Street, on the southwest corner of Albert and Bruce Streets.



Figure 4: Aerial image. Source: Nearmap from Council submission

1. In the wider area there is a range of dwelling types and styles ranging from the 1950s, when the area was first developed, to contemporary development, including medium density dwellings. The topography is sloping and street alignments are curved. Dwellings are set back behind consistent front setbacks and there is a variety of garden settings, some open with limited planting and some well planted.

## Is the proposal respectful of neighbourhood character?

#### In summary, what are the submission of the parties?

1. Council says the proposal is inconsistent with the preferred character of the area for the following reasons:
* The two double storey dwellings, one with a basement, in French Provincial architecture is inconsistent with the streetscape and surrounding development and contrary to policy that discourages reproduction or mock-historic styles.
* There is little scope for the provision of trees to soften the areas between buildings or where there is a change in scale.
* The design provides inadequate recession, separation and articulation and will result in visual dominance to the streetscape and the neighbouring properties.
* There will be significant built form across the site which cannot be screened or softened given the topography of the site.
* The limited separation from side boundaries and extent of built form across the frontage and within the site means there is minimal landscaping to contribute to the garden city character and minimise visual bulk.
1. Concerns raised by Respondents and in statements of grounds[[2]](#footnote-3) include:
* The siting, architectural style, building mass and visual bulk are out of character with the area and the established buildings.
* The imitation French style results in an inappropriate and inconsistent style of building especially for the size of the lot.
* There is inadequate area provided for landscaping.
* Loss of large canopy trees results in reduced canopy and loss of bird habitat.
* Two crossings are contrary to policy which seeks to minimise driveways and basement car parking within street setback areas and will result in reduced nature strip and front garden.
1. The Applicant submits the proposal is acceptable in the mix of dwelling style and age in Albert Street and responds appropriately to the neighbourhood character through the following design features:
* The height is well under the maximum height permitted in the zone.
* Side setbacks are greater than required under clause 55 of the Planning Scheme and are significantly more than would apply for a single dwelling.
* The upper storeys are setback further than ground floors and the buildings are well articulated.
* The site coverage, permeability and garden area requirements are all met.
* Garage for dwelling 1 is recessed from the main façade and the sunken garage for dwelling 2 will together avoid garages dominating the streetscape.
* The side by side arrangement is appropriate to take advantage of the northern aspect, to respond to slope and provides space for well vegetated front and rear gardens with five canopy trees proposed.
* In terms of design detail, the street elevation presents with front setbacks consistent with nearby development, as well as having window proportions and roof form similar to modern houses nearby. Although there are some classical features such as horizontal banding and arched upper level windows, these are not excessive and could not fairly be described as mock period design.

#### What does the Planning Scheme say about neighbourhood character?

1. The review site is within the General Residential Zone, Schedule 3 (GRZ3). The purpose of the GRZ, in addition to implementing policy, encourages development that respects neighbourhood character and supports a diversity of housing types and housing growth.
2. Schedule 3 to the GRZ (GRZ3) relates to Garden City Suburbs and contains the following neighbourhood character objectives:

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.

1. GRZ3 varies clause 55 standards that relate to street setback, site overage, permeability, landscaping, side and rear setbacks, private open space and front fences. Decision guidelines in GRZ3 require consideration of whether the development provides an appropriate transition to built form on adjoining sites, the robustness of materials, the lot shape, vehicle crossovers, impact on nature strips and street trees and proposed planting.
2. In addition to seeking development that responds to context, policy seeks respect for existing neighbourhood character or for a preferred neighbourhood character.[[3]](#footnote-4) The local policy includes the site within an area suitable for incremental change[[4]](#footnote-5) and designates it as part of the “Garden City Suburbs Northern Areas” character type.
3. It is policy that the preferred future character statement for the area is considered in addition to whether the proposal will have an adverse impact on neighbourhood character. The preferred future character statement for Garden City Suburbs Northern Areas 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.

1. There are objectives[[5]](#footnote-6) that apply to all residential land. As relevant and in summary, they seek development that builds upon the contribution landscaping makes to the garden city character of Monash; achieves architectural and urban design outcomes that contribute positively to neighbourhood character; contributes to a variety of housing types; and achieves best practice environmental sustainability. There is a range of policy set out at clause 22.01-3 relating to general matters, built form and scale of development, vehicle crossings and landscaping.

#### Tribunal findings

1. My inspections of the area show a mix of development. There are original dwellings from the 1950s when the area was first developed, contemporary new dwellings that vary in design and examples of medium density development, including two recently constructed flat roofed dwellings diagonally opposite. Two storey development is common with the dwellings either side and behind the review site containing double storey detached dwellings. The sloping topography results in some development being prominent. The curved street alignment results in front setbacks that vary but front gardens are consistently generous. Established street trees and nature strips are evident and the undulating topography provides an attractive setting. Parties referred to a number of large and visually imposing dwellings in the wider setting. I viewed these in my inspections.
2. The Planning Scheme provides direction that development is to contribute to preferred neighbourhood character rather than existing character. This creates a planning context where although existing context is relevant, preference is to be given to achieving preferred character.
3. I find that subject to some changes, the development presents with a design that acceptably responds to the preferred character based on the following features.
4. To the street the proposal incorporates a front setback that achieves the minimum 7.6 metres specified in GRZ3 and is consistent with the front setbacks of nearby development. The upper level is recessed from the ground level in the street elevation and is setback to the street of between 8.5 and 9.9 metres. These varied setbacks to the street create an articulated streetscape elevation.
5. The upper levels are recessed from the ground level to side elevations as viewed from the street providing a setback of 2.9 metres to the west and 3.7 metres to the east. This limits the appearance of a ‘large block like structure’, an outcome sought to be avoided in policy and provides setbacks that are respectful of the sense of dwelling spacing evident in the character of the area.
6. The eastern side setback to the ground level of dwelling 2 creates a meaningful separation from the eastern boundary that limits the appearance of boundary to boundary construction. The setback allows for planting forward of the dwelling that will contribute to landscaping in the front setback.
7. The garage for dwelling 1 is located on the western boundary. I am not persuaded that this will appear as a foreign element in the neighbourhood where garages on or close to one side boundary is a common occurrence. Forward of the garage, adjacent to the western boundary, there is a garden bed, that while narrow, will allow for low level planting.
8. The garage for dwelling 1 is recessed from the façade of the dwelling and the basement garage provided for dwelling 2 avoids car accommodation appearing as a dominant element in the streetscape. This is an outcome sought in local policy and in the neighbourhood character objectives of GRZ3.
9. Although basement parking is not an element evident in the existing neighbourhood, it is anticipated in policy. Subject to an appropriate finish to the retaining walls either side of the driveway and additional landscaping on the eastern side of the site, I consider it will result in an acceptable presentation to the street. In making that finding, I have had regard to the presence of low retaining walls in front setbacks in the wider area.
10. The development is large but it presents with a massing and height that is not dissimilar to contemporary residential development nearby. I consider the design appropriately steps down the slope and achieves an acceptable transition in height across the sloping site and between the adjoining dwellings, a matter to be considered in the decision guidelines of GRZ3. This is demonstrated in Figure 5 below showing the proposal in context with existing adjoining development. A requirement to reduce the height of dwelling 2 by 400 mm to limit visual bulk to the east, a matter I address later in assessing amenity impacts, will increase the appearance of graduated height.



Figure 5: Streetscape elevation. Source: TP3.0B dated 10 August 2021 Design Edge Associates

1. In making my finding on height and built form, I have had regard to the changing character of the neighbourhood where there has been development of large and prominent single dwellings and the recent two dwellings approved by Council diagonally opposite the site at 74 Albert Street. This development presents with substantial two storey form to both Albert and Bruce Street and contributes to the context of the review site.
2. The layout aligns the development to correspond with the adjoining rear private open spaces of the properties to the west and the north and contributes to the ‘green corridor’ of open space created by backyards nearby, as sought in local policy. The provision of a minimum 5 metre setback achieves the varied rear setback sought in GRZ3 and is sufficient width to allow for the planting of screening trees.
3. Existing trees in the rear yard are to be removed, an outcome criticised for loss of habitat and canopy. Council advised none of the trees require a permit for removal under the Vegetation Protection Overlay that applies to the site. I have reviewed the arborist report that was submitted as part of the permit application and note that the trees are identified with low retention value for various reasons relating to health and structure. In view of this report and noting Council does not oppose removal of the trees, I consider the tree removal is acceptable.
4. Although I am not satisfied with the opportunity for landscaping in the front setback as shown on the plans, I consider with two alterations an appropriate response to the street can be achieved. The alterations required are:
* Removal of the paved pedestrian path to the front door of dwelling 1 and use of that area for additional landscaping in the front setback. The footpath to dwelling 2 is necessary given the ramped access to the garage will not allow pedestrian access to the front door via the driveway.
* The landscape plan shows the majority of the eastern setback as a pebbled pathway area with very little planting forward of the dwelling. The setback area varies in width but reaching 2.7 metres adjacent to the façade will allow for considerable planting that can contribute to the garden city character sought for the area.
1. I find the preferred neighbourhood character of the Garden City Suburbs (Northern) is somewhat contradictory in outcomes sought. On the one hand it anticipates that *buildings will be clearly visible through these low garden settings*… but also refers to the architecture being secondary in visual significance to the landscape and for new development to be screened from the street by well planted garden. I am satisfied subject to the changes referred to above, that landscaping forward of the dwelling can include canopy trees and shrubs that will achieve a well planted front garden that makes a positive contribution to the streetscape.
2. Two driveways are proposed. Despite the discouragement in policy for additional vehicle crossovers, I agree with Council that the 22.4 metre site width, the ability to allow for kerbside parking between the crossings and the absence of any impact on the existing street tree makes the arrangement acceptable.
3. The design detail is criticised for its mock-heritage design, an outcome discouraged in policy. Although there are elements in curved window tops, mouldings and horizontal lines that could be regarded as period elements, I do not find the overall presentation to the street as one that is mock-heritage. While opinions on building appearance differ, I find the proposal presents with a detail that is acceptable in a setting where there is significant mix of building styles.
4. Significant in my support for the proposal, is the compliance with the quantitative requirements of clause 55 of the Planning Scheme including standards varied under GRZ3. In particular:
* The front setback complies with the 7.6 metres set in GRZ3.
* The height is under the 11 metres permitted in the GRZ , noting that Schedule 3 does not vary height.
* The site cover does not exceed the 50% maximum specified in GRZ3.
* The permeability exceeds the 30% specified in GRZ3.
* There is opportunity to plant the number of canopy trees specified in GRZ3.
* The side and rear setbacks meet or exceed the standard, including the varied standard of 5 metres to the rear.
* The private open space exceeds the varied requirement in GRZ3.

## Are there unreasonable amenity impacts arising from the proposal?

1. Respondents raise concerns about overlooking, overshadowing, impacts to solar panels, loss of light, visual bulk, loss of aspect, noise, damage to side gate, asbestos removal and termites.
2. Council says the proposal will increase shadows to 71 and 75 Albert Street, although acknowledges the quantitative standard relating to shadow is met. In regard to overlooking, Council is satisfied that the appropriate screening is provided and that noise generated will be within what is expected for a residential development. Matters relating to the side gates, asbestos and termites are matters that Council says will be addressed through the Building Regulations.
3. Describing the interfaces first, I then address each amenity issue.
4. The property to the east, at 75 Albert Street, is at a lower level to the review site due to topography. The two storey house on that site faces Bruce Street. The layout provides secluded private open space along the western boundary and a number of habitable room windows facing west. A retaining wall with boundary fencing above defines the boundary. A larger area of secluded private open space is to the north west and includes a pool and a north facing ground level terrace.
5. The sloping topography means the property to the west, at 71 Albert Street, is at a higher level than the review site. The house on that land is two storey. A double garage extends to within 1.2 metres of the review site. Behind the garage there is secluded private open space that includes open area and a roofed alfresco area that includes glass skylights. The Respondents advise this is the main area of secluded private open space due to the design, accessibility to indoor areas and views to the east. The Respondents advise that the larger northern area of secluded private open space is less used due to limited privacy arising from overlooking from the property to the north. A number of habitable room windows at ground and upper floors face the review site.
6. To the north, the review site adjoins two properties. The rear boundary of 13 Nagara Court which contains a two storey dwelling with secluded private open space adjoining the boundary. To the north east, the review site shares a small part of the southern side boundary of 67 Bruce Street with secluded private open space adjoining the boundary.

#### Overlooking

1. Respondents to the east raised concerns about overlooking from the east facing kitchen window. There is reference to concern about inadequate detail on window openings and screening.
2. The east facing kitchen window of dwelling 2, although at ground level of the dwelling, is elevated such that it would allow views to the east above the boundary fence. A free standing privacy screen is shown adjacent to the boundary fence to address this issue. It is my view that a screen on the boundary would add to visual bulk and shadow to the east, where the existing retaining wall and boundary fence create a high boundary treatment. Instead, I consider an external louvred screen to the window should be provided with the louvres facing upward and fixed. In my view this will address privacy impacts and allow upward outlook from, and daylight to, the window, noting the kitchen also has aspect to the north. A similar louvred treatment to the east side of the alfresco area of dwelling 2 is appropriate rather than a solid screen. These modifications can be addressed by permit condition.
3. Upper level windows facing north are appropriately treated to limit views to the adjoining rear yards of the properties to the north.
4. I find the plans show adequate detail about privacy treatment to windows. Habitable room windows to be treated are marked with obscure glazing to 1.7 metres above finished floor levels on the elevations and there is a note on the plans that indicates film is not to be used for screening and the windows are to be fixed to 1.7 metres.

#### Overshadowing, solar panels and daylight

1. The objective[[6]](#footnote-7) relating to overshadowing of open space states:

To ensure buildings do not significantly overshadow existing secluded private open space.

1. The standard to achieve the objective is:

Where sunlight to the secluded private open space of an existing dwelling is reduced, at least 75 per cent, or 40 square metres with minimum dimension of 3 metres, whichever is the lesser area, of the secluded private open space should receive a minimum of five hours of sunlight between 9 am and 3 pm on 22 September.

If existing sunlight to the secluded private open space of an existing dwelling is less than the requirements of this standard, the amount of sunlight should not be further reduced.

1. To the west, the shadow diagrams show additional shadow between 9 am and 11 am at the equinox. However, the extent of shadow cast is relatively confined and after 10 am is only marginally beyond the shadow cast by the boundary fence. The standard relating overshadowing of open space is met and I am satisfied the objective is achieved.
2. To the east, the shadows diagrams show the development will cast additional shadow beyond the boundary fence shadow after 2 pm. The additional shadow impacts a relatively confined area of secluded private open space on the western side of 75 Albert Street with the majority of the secluded private open space including most of the north facing terrace and pool unaffected. I find the objective and standard relating to shadows to private open space are met.
3. I acknowledge the development will cast shadows outside the assessed time of 9 am to 3 pm at the equinox including greater shadows in winter. The standard however requires assessment at the equinox between 9 am and 3 pm and the proposal meets the requirements of that standard.
4. There will be no shadows cast to the secluded private open spaces adjoining the site to the north.
5. Decision guidelines in the GRZ require consideration of the impact of overshadowing on existing solar energy systems on dwellings on adjoining lots in the GRZ. The energy efficiency objectives and standard at clause 55.03-5 require consideration of the impact on shadows to existing roof top solar energy systems. There are solar panels on the roof of the adjoining dwellings to the east and west.
6. To the west, on the roof of 71 Albert Street, there is two rows of solar panels and a single solar panel. I am satisfied that the setback of the development from the panels, the topography and the angled roof line of the 71 Albert Street will combine to ensure unacceptable impact of shadow on the solar panels is avoided.
7. To the east, on the roof of 75 Albert Street, there is a group of solar panels on the north side of the ridge. It is my assessment that the setback of the development combined with the height of the intervening roof ridge on 75 Albert Street will avoid unacceptable shadow impacts to the solar panels.
8. There are objectives and standards that relate to protecting solar access to north facing windows and ensuring daylight to existing windows.[[7]](#footnote-8) The setbacks of the proposal together with setbacks of windows on adjoining sites, ensure these objectives and standards are met.

#### Visual bulk and loss of aspect

1. Clearly the replacement of the existing dwelling with its relatively narrow side elevations with two dwellings extending deeper into the lot will change the outlook from adjoining properties and will impact on amenity. In examining the proposal carefully and assessing it against the relevant Planning Scheme provisions, I consider the impact will be acceptably limited having regard to the following matters and subject to some changes.
2. To the west the development presents with a garage on the boundary, ground level wall setback of 1.9 metres and upper level wall setback of 2.9 metres. At the rearm the upper element is setback from the western boundary 5.7 metres. At ground level the dwelling extends for 17.5 metres and the upper level for 16.6 metres. Maximum height to the roof ridge is 7.6 metres with wall height approximately 5.8 metres.
3. The 6.5 metre length of garage wall on the boundary is relatively confined in the context of a 33.9 metre side boundary. The garage largely aligns with the garage on 71 Albert Street, noting that garage is setback from the common boundary. The length and height of the boundary wall meet the relevant standard.[[8]](#footnote-9) Although concerns are raised about the lack of landscaping opportunity to the side boundary with the garage as proposed, I consider a relatively confined section of boundary construction is acceptable and observe it is not an uncommon element in the neighbourhood. Concern about damage to the side gate on 71 Albert Street through boundary construction is a matter addressed during the building permit process.
4. The western elevation of dwelling 1 is articulated though an upper level that is recessed from the ground level, the use of flat roof for the ground level and the inclusion of windows. Its length and placement on the site is similar to that of the dwelling on 71 Albert Street. This provides an alignment of rear private open spaces. The standard relating to side and rear setbacks is met, including the 5 metre rear setback required under the varied standards in GRZ3.
5. The Applicant offered to incorporate a recess to the upper level lounge to increase articulation and provide varied external materials and colours. It is my view that these changes would be a positive addition to the modulation of the western elevation and are matters that can be required by a permit condition.
6. The landscape plan shows very limited landscaping in the western setback of dwelling 1 with most of the setback area shown as a pebble path. In the setback provided, I consider a narrower path and a wider garden bed can be provided together with planting of tall slender trees capable, in time, of reaching a height that will provide softening of the built form when viewed from the west.
7. The loss of outlook over the existing rear yard of the review site is a relevant amenity consideration. However, in circumstances where there is no express protection of views in the Planning Scheme, where the relevant setback and building height setbacks are met and where the purpose of GRZ3 and policy seeks housing growth, loss of the outlook is not unreasonable.
8. To the east, dwelling 2 presents with a two and half storey wall. The ground level extending for 15.1 metres in length is setback from the angled eastern boundary between 2.1 and 2.7 metres with the basement level at similar setbacks. The upper level, extending for 15.4 metres, has varied setbacks between 3.4 and 4.1 metres with a recessed element at 5.3 metres. Maximum height to the roof ridge is 8.8 metres with wall height at 7.4 metres.
9. The Applicant offered to lower the height of dwelling 2 by 400 mm to address concerns about the visual bulk to the east, although submitted it is unnecessary. Acknowledging it will impact on the driveway gradient,[[9]](#footnote-10) it is my view that a reduced height is appropriate to reduce the impact of the elevated form as viewed from the lower secluded private open space to the east. Subject to this change, I am satisfied that with the setbacks proposed and the opportunity for landscaping, the proposal will avoid unreasonable visual bulk. The setbacks of the eastern elevation to the side boundary exceed the minimum required by clause 55.04-1 and meet the varied standard for rear setbacks. The upper level is recessed from the ground level and incorporates varied setbacks in a design that will avoid the appearance of an unarticulated elevation. The varied external finishes that will be required by permit condition will add to the interest in this elevation.
10. The side setback at ground and basement level is adequate to accommodate planting that will eventually allow for the softening of the built form. The landscape plan shows the eastern setback to dwelling 2 largely set aside as a pebbled path and will require amendment to incorporate planting to the side boundary.
11. To the rear, the two dwellings are setback a minimum of 5 metres. This setback meets the varied standard of GRZ3 and will provide adequate area for planting. The landscape plan shows three trees and 11 lilly pillys capable of reaching 4 metres in height in the rear setback, which will provide appropriate planting to contribute to the garden character. The confined extent of north elevation, the upper level recess to all elevations combined with the setback will avoid the appearance of visual bulk to the properties to the rear.
12. In making my finding about the acceptability of the elevations to the side and rear boundaries, I have had regard to the neighbourhood character in this area that includes prominent side elevations, often arising from the visibility afforded by sloping topography. This is a relevant consideration in the objective relating to side and rear setbacks.

#### Noise and other matters

1. I am not persuaded that the additional noise arising from occupants of two dwellings on the land replacing one dwelling will be significant. In any event noise associated with residential use of land in a residential zone is to be expected, noting no permit is required to use the land for residential purposes. A permit condition can require location of air conditioners as far as practicable from neighbouring bedroom windows or to be acoustically screened. There are regulations to deal with unreasonable noise in a residential setting.
2. I agree with Council that concerns raised about asbestos removal and termite protection are matters that will be addressed through the building permit process.

## Are there car parking or traffic reasons to reject the proposal?

1. Concerns about traffic and car parking are raised by respondents and in statements of grounds. I address these as follows.
2. The proposal provides a double dwelling for each dwelling plus opportunity for tandem parking in the driveway. This provision exceeds the Planning Scheme requirement of two car spaces per dwelling with three of more bedrooms and is acceptable.
3. Exiting from driveways will require care given the rise in Albert Street to the west of the review site, but I am satisfied that sightlines are adequate to allow safe entry and exit from both proposed driveways. Permit conditions that require low level landscaping and low side fencing (where possible) adjacent to the footpath can be imposed to ensure ongoing maintenance of sight lines.
4. I am not persuaded that traffic generated by an additional dwelling will impose an unreasonable burden on Albert Street or the nearby road system.
5. In reaching my view about the acceptability of vehicle access arrangements and traffic impacts, I have had regard to the Council traffic engineer raising no objection to the proposal.

## Conditions

1. Draft permit conditions circulated by Council were discussed at the hearing. I have adopted those conditions subject to changes that implement my findings.

## Conclusion

1. For the reasons set out, I have decided that the decision of Council should be set aside and a permit issue.

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| **Cindy Wilson** **Member** |  |  |

# Appendix A – Permit Conditions

|  |  |
| --- | --- |
| Permit Application No: | TPA/52008  |
| Land: | 73 Albert Street, Mount Waverley VIC 3149 |

|  |
| --- |
| What the permit allows |
| Construction of two dwellings on a lot in accordance with the endorsed plans |

### Amended Plans

1. 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 TP2.0B, TP2.1B, TP2.3B, TP2.4A, TP3.0B, TP3.1B, TP3.2A and LND.1B prepared by Design Edge Associates dated 19/08/21 but modified to show:
2. The upper living area of dwelling 1 setback a minimum of 3.5 metres from the western boundary.
3. The overall height of dwelling 2 reduced by 400 mm.
4. An external screen of louvres attached to the east facing kitchen ‘splashback’ window and to the east side of the alfresco area of dwelling 2. The screens are to contain louvres that are fixed and facing upwards. Cross sectional diagrams to scale must be provided to show the height of the screens and the angle of louvres and how they will limit views to the adjoining property to the east.
5. Deletion of the freestanding privacy screen shown on the eastern boundary.
6. A schedule of external materials and colours to include variation in colour and texture to all elevations.
7. Provision of stone cladding or similar to the retaining walls either side of the driveway to dwelling 2.
8. The pedestrian footpath in front of dwelling 1 deleted and that area designated for landscaping.
9. The fencing in the front setback between dwellings 1 and 2 at a maximum height of 1.2 metres.
10. A clear notation that *‘No excavation is to occur within 4 metres of the base of the Council street tree (Melaleuca linariifolia) and any relocation of the stormwater outlet in the kerb to accommodate the new crossover, if within the setback zone, must not include trench preparation with any works (including pipe works in the zone) being undertaken by boring the width of the nature strip to a depth of at least 400mm. Photos of the preparation must be taken, be submitted to Council and be approved in writing prior to any works in this area taking place. Refer to Condition 5 of the permit’*.
11. Tree protection fencing in accordance with the AS4970-2009 for the Council street tree.
12. Gas/water meter locations in unobtrusive locations.
13. Air conditioners located as far as practicably from neighbouring habitable room windows or acoustically screened.
14. Letter boxes no greater than 900mm in height convenient to the dwellings incorporated into the fence.
15. The location and design of any proposed electricity supply meter boxes. The electricity supply meter boxes and any associated infrastructure must be located at a distance from the street which is at or behind the setback alignment of buildings on the site. Alternatively it must be setback a minimum of 3 metres from the front title boundary, be no greater than 1.4 metres in height and must be adjacent a side boundary fence where the most minimal level of visual impact arises.
16. Provision of a corner splay or area at least 50% clear of visual obstructions (or with a height of less than 1.2 metres), which may include adjacent landscaping areas with a height of less than 0.9 metres, extending at least 2.0 metres long x 2.5 metres deep (within the property) on both sides of the proposed vehicle crossing to provide a clear view of pedestrians on the footpath of the frontage road.
17. The recommendations of the project arborist required in Condition 6.
18. The landscape plan required in Condition 10.

### No Alterations

1. The development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.

### Common Boundary Fences

1. All common boundary fences are to be a minimum of 1.8 metres above the finished ground level to the satisfaction of the Responsible Authority. The fence heights must be measured above the highest point on the subject or adjoining site, within 3 metres of the fence line, except as required by condition 1o) of this permit.

### Tree Protection

1. The Council street tree must be protected by temporary rectangular wire fencing accordance with AS4970-2009 for a distance of at least 4 metres from the base of the tree.
2. No excavation is to occur within 4 metres of the base of the Council street tree (*Melaleuca linariifolia)* in the nature strip. If relocation of the stormwater outlet in the kerb is necessary to accommodate the new crossover, and the works are within the 4 metre setback zone, all works must be undertaken by boring the width of the crossover to a depth of at least 400mm. Before any works commence within the 4 metre zone, photos of the preparation must be taken and be provided to Council for approval. No works within the 4 metre zone are to commence until consent in writing is first obtained.
3. Prior to or at the same time as the endorsement of the plans referred to in Condition 1 of this permit, and before the commencement of any works (including demolition or levelling of the site), a report from a qualified arborist to the satisfaction of the responsible authority must be submitted to, be to the satisfaction of and be approved by the Responsible Authority under this permit. When the report is endorsed it will then form part of the permit. The report is to include the following:
	1. Set out recommendations and actions required to eliminate or minimise damage as a result of buildings and works (including any demolition, vegetation clearance, earthworks or works arising from the provision of underground services) to the health of trees on abutting land including the street tree (as impacted by the fence, footpaths and any other works occurring within the property), to the satisfaction of the Responsible Authority.
	2. The arboricultural report is to include a requirement for an initial investigation of the construction area within the site that is also the tree protection zone of the Council street tree, to be completed carefully utilising hydro works or careful excavation to expose any toots over 40mm. Any roots requiring cutting are to be attended to and finished by the project arborist.
4. Prior to occupation of the buildings, confirmation in writing by the project arborist confirming all of the recommended measures required in Condition 6 were undertaken in accordance with recommendations. Any non-compliance under this condition may require rectification works if necessary.
5. No building material, demolition material or earthworks shall be stored or stockpiled under the canopy line of any tree to be retained on or on adjoining sites during the construction period of the development hereby permitted.

### Contractors to be advised of trees to be retained

1. The owner and occupier of the site must ensure that, prior to the commencement of buildings and works, all contractors and tradespersons operating on the site are advised of the status of the trees in Conditions 4 - 9 and be advised of any obligations in relation to the protection of the trees.

### Landscaping

1. Concurrent with the endorsement of plans requested pursuant to Condition 1, a landscape plan in accordance with plan LND.1B dated 19 August 2021, modified to reflect any changes required by Condition 1 of this permit, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. The Landscape Plan must show:
	1. A survey and location of all existing trees, using botanical names to be retained and of those to be removed. The intended status of the trees shown on the landscape plan must be consistent with that depicted on the development layout plan.
	2. A planting schedule of all proposed trees, shrubs and ground cover, which will include the size of all plants (at planting and at maturity), pot / planting size, location, botanical names and quantities.
	3. Deletion of the pebble mulch path on the eastern side of dwelling 2 (except where providing access to the clothes line) and that area planted with species that will provide screening of the development when viewed from the east and include at least one canopy tree forward of dwelling 2 on the east side of the driveway.
	4. Reduction in the width of the pebble mulch pathway on the west side of dwelling 1 to a maximum of 1 metre and corresponding increase in planting area to be planted with narrow form evergreen screening trees capable of providing screening of the development when viewed from the west.
	5. Deletion of the pedestrian path in front of dwelling 1 and additional planting in that area and the front setback generally.
	6. Providing additional lower level shrubs in the front setback areas throughout and inside the southern boundary.
	7. Provision of drought tolerant creepers to all retaining walls.
	8. Location of any fencing internal to the site.
	9. Planting to soften the appearance of hard surface areas such as driveways and other paved areas.
	10. Location of canopy trees / significant plantings on adjoining properties within 3 metres of the site.
	11. The location of any retaining walls associated with the landscape treatment of the site.
	12. Details of all proposed surface finishes including pathways, accessways, patio or decked areas.
	13. The location of Tree Protection Zones and Tree Protection Fencing as outlined in Condition 1 and Conditions 4 to 8.
	14. An in-ground, automatic watering system linked to rainwater tanks on the land must be installed and maintained to the garden areas to the satisfaction of the Responsible Authority.
	15. The location of external lighting (if any).
	16. Planting required by any other condition of this permit.
	17. Landscaping and planting within all open areas of the site.

When approved the plan will be endorsed and will then form part of the permit.

### Landscaping Prior to Occupation

1. Before the occupation of the buildings allowed by this permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and then maintained to the satisfaction of the Responsible Authority.

### Drainage

1. Drainage of the site is to be to the satisfaction of the Responsible Authority.
2. All stormwater collected on the site from all hard surface areas must not be allowed to flow uncontrolled into adjoining properties or the road reserve.
3. The private on-site drainage system must prevent stormwater discharge from the/each driveway over the footpath and into the road reserve. The internal drainage system may include either:
	1. a trench grate (minimum internal width of 150 mm) located within the property boundary and not the back of footpath; and/or
	2. shaping the internal driveway so that stormwater is collected in grated pits within the property; and or
	3. another Council approved equivalent.
4. All stormwater collected on the site is to be detained on site to the predevelopment level of peak stormwater discharge. The design of any internal detention system is to be approved by Council’s Engineering Department prior to drainage works commencing and is to be to the satisfaction of the Responsible Authoirty.
5. The nominated point of stormwater connection for the site is to the south-east corner of the property where the entire site's stormwater must be collected and free drained via a pipe to the 150 mm Council drain in the naturestrip via a 900 mm x 600 mm junction pit to be constructed to Council standards. Note: If the point of connection cannot be located then notify Council's Engineering Department immediately.
6. Any internal drainage pipe found during construction from 71 Albert Street is to be reconnected to the satisfaction of Responsible Authority.

### Road Infrastructure

1. All new crossings must be a minimum of 3.0 metres in width.
2. The existing redundant crossing is to be removed and replaced with kerb and channel. The footpath and naturestrip are to be reinstated to the satisfaction of Council.
3. The Dwelling 1 crossing is within 1.50 metres of an adjoining crossing and shall be converted to a double crossing.
4. A corner splay or area at least 50% clear of visual obstructions (or with a height of less than 1.2 metres), which may include adjacent landscaping areas with a height of less than 0.9 metres, extending at least 2.0 metres long x 2.5 metres deep (within the property) both sides of each vehicle crossing to provide a clear view of pedestrians on the footpath of the frontage road.
5. The vehicle crossing is to align with the driveway.
6. The layout of the development shall follow the Design Standards for car parking set out in Clause 52.06-8 of the Monash Planning Scheme as detailed below:
	1. Driveway to be at least 3 metres wide.
	2. Driveway to provide at least 2.1m headroom beneath overhead obstructions.
	3. Ramp grades to be designed as follows:
	4. Maximum grade of 1 in 4.
	5. Provision of minimum 2.0 metre grade transitions between different section of ramp or floor for changes in grade in excess of 12.5% (summit grade change) or 15% (sag grade change).
7. Any works within the road reserve must ensure the footpath and naturestrip are to be reinstated to Council standards.
8. Engineering permits must be obtained for new or altered vehicle crossings and new connections to Council drains and these works are to be inspected by Council’s Engineering Department and be to Council’s approval.

### Completion of Buildings and Works

1. Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

### Permit Expiry

1. This permit will expire in accordance with section 68 of the Planning and Environment Act 1987, if one of the following circumstances applies:
* The development has not started before two (2) years from the date of issue.
* The development is not completed before four (4) years from the date of issue.

In accordance with section 69 of the Planning and Environment Act 1987, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within six months of the permit expiry date, where the development allowed by the permit has not yet started; or within 12 months of the permit expiry date, where the development has lawfully started before the permit expires.

**Covenant requirement**

1. This permit will not come into effect until such time as Registered Restrictive Covenant No. B375804 is varied in accordance with Planning Permit No. TPA/52053.

**- End of conditions -**

# Appendix B – opinion on question of law

## Nomination of member

1. Member Whitney has been nominated pursuant to clause 66(1)(b) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* as the member who is a legal practitioner to provide an opinion on a question of law arising in the proceeding.

## Question of law

1. The question of law to be decided is:

Whether the permit sought that incorporates a development with walls of other than brick or brick veneer can be granted when it would result in a breach of the registered restrictive covenant notwithstanding a planning permit has been granted for variation to the covenant?

1. My answer is:

A planning permit can be issued in this proceeding allowing the proposed development provided that such planning permit includes a condition that the permit is not to come into effect until such time as Registered Restrictive Covenant No. B375804 is varied in accordance with Planning Permit No. TPA/52053.

## Background

1. The Applicant, Ross Calvert-Jackson, seeks to construct two dwellings at 73 Albert Street, Mount Waverley (“**Land**”).
2. The Land is burdened by registered restrictive covenant B375804 (“**Restrictive Covenant**”) recorded on the title to the Land on 2 March 1962. The Restrictive Covenant provides that the owner of the Land:

…will not erect or cause to be erected on the said land any building or outbuilding having its walls of other than brick or brick veneer…

1. Planning Permit No. TPA/52053 was issued by the Monash City Council (“**Council**”) in respect of the Land on 24 December 2020 and allows:

variation of covenant / instrument B375804 to replace the following words 'that he will not erect or cause to be erected on the said land any building or outbuilding having its walls of other than brick or brick veneer' with 'that he will not erect or cause to be erected on the said land any dwelling having its ground floor walls of other than brick or brick veneer'.

 (“**Covenant Permit**”)

1. The Covenant Permit provides that before the plan of variation to the Restrictive Covenant can be certified, a plan in accordance with the *Subdivision Act 1988* must be submitted and approved by the Council.[[10]](#footnote-11)
2. The Covenant Permit provides that it will expire if the plan of variation is not certified within two years from the date of issue[[11]](#footnote-12) and is not registered within five years from the date of issue.
3. A preliminary matter in relation to the effect of the Restrictive Covenant was the subject of submissions after the hearing. I have considered the submissions received from the parties.
4. Included in the submissions received from the Applicant on 15 November 2021 was the following:

13. Further and in the alternative, if the Tribunal does not accept the above, there is an additional course of action which is available to the parties. The applicant has already taken steps to register the modification of the Covenant with Land Use Victoria. The process requires the preparation of a Text Only Plan of Restriction, which must then be certified by the Council pursuant to the *Subdivision Act 1988* before it is ultimately lodged with Land Use Victoria. That process could take anywhere from a few days to a few weeks.

14. The Tribunal could leave the matter open and list an administrative mention on, for instance, 24 December 2021, by which time the Applicant must advise the Tribunal if the Covenant has been varied in accordance with Permit No. TPA/52053 and if so, the Applicant must provide a copy of an updated register search statement which demonstrates that the Covenant has been varied. Upon receipt of such confirmation, the Tribunal could proceed to issue its decision in relation to the merits of the application in knowledge that the permit would not be in breach of s 61(4) of the Act.

(Tribunal emphasis)

1. In light of the Applicant’s submissions, the Applicant was invited to advise the Tribunal by 21 January 2022 if the Restrictive Covenant had been varied and to provide an updated register search statement in support of same.
2. On 21 January 2022 the Applicant informed the Tribunal that:

…a licensed surveyor has been engaged and they have prepared the *Text Only Plan of Restriction* ready for lodgement via the SPEAR system for certification by Council. After Council certification it will be lodged with Land Use Victoria and the amended title documents issued.

We cannot as yet confirm the date by which the amended title documents will be issued. We consider the best case timing will be approximately four weeks from today, however that will depend on Council and Land Use Victoria.

1. To the Tribunal’s knowledge, as at today’s date the plan of variation to the Restrictive Covenant has not been certified.
2. Accordingly, I have proceeded to determine the question of law.
3. The Applicant acknowledged that the proposed development would contravene the Restrictive Covenant as the upper level walls would not be constructed of brick or brick veneer.
4. The Applicant submitted that it was common ground between the parties that subject to the variation of the Restrictive Covenant pursuant to the Covenant Permit, the proposed development would not contravene the Restrictive Covenant.
5. Both the Applicant and the Council referred to section 62(1)(aa) of the *Planning and Environment Act 1987* (“**Act**”), which provides:

(1) In deciding to grant a permit, the responsible authority must -

…

(aa) if the grant of the permit would authorise anything which would result in a breach of a registered restrictive covenant, include a condition that the permit is not to come into effect until the covenant is removed or varied.

1. Both the Applicant and the Council submitted that a planning permit could be issued with a condition requiring the Restrictive Covenant to be modified in accordance with the Covenant Permit prior to the commencement of the development of the two dwellings.
2. The Applicant referred to *Costa v Glen Eira CC*[[12]](#footnote-13) while both the Applicant and the Council referred to *Design 2u for and on behalf of Y & P Harel Pty Ltd v Glen Eira SC* (“***Design 2u***”),[[13]](#footnote-14) the former a decision of Senior Member Byard and the latter a decision of Deputy President Gibson.
3. The third and fourth Respondents, Doris Felstead and Peter Felstead, submitted that section 62(1)(aa) of the Act should not be used as ‘a device’ to ‘circumscribe the clear words’ of section 61(4) of the Act, which states:

(4) If the grant of a permit would authorise anything which would result in a breach of a registered restrictive covenant, the responsible authority must refuse to grant the permit unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.

1. The Felsteads submitted that the Applicant had no other option but to take action under the *Property Law Act 1958* to remove the Restrictive Covenant.

## Opinion and reasons

1. Whilst section 61(4) of the Act contains a prohibition against the granting of a planning permit that breaches the terms of a registered restrictive covenant,[[14]](#footnote-15) section 61(4) contains an important exception to this prohibition. That exception is:

…unless a permit has been issued, or a decision made to grant a permit, to allow the removal or variation of the covenant.

1. The Covenant Permit was issued allowing the variation of the Restrictive Covenant. The Covenant Permit remains on foot (i.e. it has not expired). When the variation permitted by the Covenant Permit is made to the Restrictive Covenant, the proposed development will no longer be in breach of the Restrictive Covenant.
2. As per the timeline above, the variation to the Restrictive Covenant has not yet occurred.
3. However, section 62(1)(aa) of the Act operates in circumstances such as this to enable a planning permit to be issued provided that it contains a condition that the planning permit is not to come into effect until the Restrictive Covenant is, in this case, varied.
4. Importantly, sections 61(4) and 62(1)(aa) of the Act operate together. It is only where a permit to allow the removal or variation of the relevant restrictive covenant has been issued, or a decision has been made to grant such a permit, that the prohibition contained in section 61(4) will not prevent the issuing of, in this case, a development permit. And it is only in the situation where such a permit to allow the removal or variation of the covenant has been issued, or a decision made to grant such a permit, that the permit being applied for must contain a condition that the permit is not to come into effect until the covenant is removed or varied. If no permit had been issued to remove or vary the relevant restrictive covenant, or no decision made to grant such a permit, then the prohibition contained in section 61(4) of the Act would prevent the permit sought from being granted; section 62(1)(aa) of the Act does not enable one to avoid the prohibition contained in section 61(4) of the Act.
5. This was the conclusion of DP Gibson in *Design 2u* where it was stated:

5. I am not persuaded that a condition to the effect of [section 62(1)(aa)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/paea1987254/s62.html) can operate to overcome the prohibition in [section 61(4).](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/paea1987254/s61.html) I find that unless there is a prior or simultaneous grant of a permit or decision to grant a permit to allow the removal of variation of the covenant, a permit cannot be granted by either the responsible authority or the Tribunal if the grant of a permit would authorise anything which would result in a breach of the covenant.

1. DP Gibson went on to explain the way in which the sections worked together and the circumstances behind the legislative changes, as explained by the relevant second reading speech. Whilst a lengthy extract, I provide the following quote by way of explanation of this point, noting that *Design 2u* was decided some years ago and, to my knowledge, represents the approach of the Tribunal since its issue.

9. Section 62(1)(aa) is concerned with the practical implementation of section 61(4)(b) – i.e. the grant of a permit subject to conditions. A permit to allow the removal or variation of a covenant does not of itself remove or vary the covenant: it simply authorises this from a planning perspective. Once a permit is issued, steps must be taken to prepare the necessary paperwork and lodge a certified plan at the Office of Titles. Ultimately, the Register of Titles will be altered and the covenant on the title will be either removed or varied.

10. There is an old adage that “*there’s many a slip twixt the cup and the lip*”. Thus someone who obtains a permit to remove or vary a covenant may fail to follow through with the necessary paperwork and actually have the covenant removed from the title or varied. In my view, section 62(1)(aa) is intended to address that situation. Until the second step of actually removing or varying the covenant in the Register of Titles occurs, the permit will not come into effect. The permit holder will not be able to act on the permit until the covenant is removed or varied and the use or development authorised by the permit is no longer in breach of the covenant.

11. These two provisions are intended to work together. Section 62(1)(aa) supports the principle and operation of section 61(4). Both provisions were introduced into the [*Planning and Environment Act 1987*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/paea1987254/) at the same time by the *Planning and Environment (Restrictive Covenants) Act* 2000 as part of a comprehensive package.

…

15. Having regard to the context of the legislative package which introduced sections 61(4) and (2(1)(aa) into the Act, I find it is reasonable to conclude that the words of section 62(1)(aa) refer to removal or variation of the covenant as a result of the permit for such removal or variation referred to in section 61(4). It is not referring to removal or variation by some other means, such as a planning scheme amendment or Supreme Court application under [section 84](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/pla1958179/s84.html) of the [*Property Law Act 1958*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/pla1958179/).

16. The mischief that the legislative package represented by the *Planning and Environment (Restrictive Covenants) Act 2000* was intended to address was identified in the second reading speech in the following terms:

In 1988, the then Labor government introduced groundbreaking legislation to allow covenants to be removed or varied by planning processes. This introduced a simple alternative to complex Supreme Court proceedings.

In 1993, the Kennett government introduced amendments to the legislation that made it very difficult to remove or vary a covenant by grant of a planning permit. Most applicants then opted to apply for a permit to use or develop land, before subsequently acting to remove or vary the covenant.

This caused a variety of problems. Covenants beneficiaries had to participate in two applications to defend a covenant.

They also found that relying on the covenant in support of their objections was not a relevant planning consideration. Applicants lost the chance for simultaneous consideration of both development and covenant matters. Responsible authorities and the now Victorian Civil & Administrative Tribunal lost opportunities to act as a one-stop shop. At times, responsible authorities felt obliged to grant permits even though they supported the covenant.

This bill implements a simple principle to end these problems – that a permit to use or develop land must not be granted if the permit would result in the breach of a covenant. It may only be granted if authority to remove or vary the covenant is given either before or at the same time as the grant of the permit.

17. The second reading speech then goes on to outline the way in which the Bill implements this principle and the methods by which applicants may seek the necessary authority. There is some dispute between the parties about whether the Act faithfully implements the methods described. I do not need to enter this debate. In my view, the meaning of the provisions are plain when regard is had to the plain meaning of the words, the structure of the [*Planning and Environment Act 1987*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/paea1987254/) as a whole, and the mischief which the *Planning and Environment (Restrictive Covenants) Act 2000* was intended to address.

18. I agree with the views expressed by Deputy President Horsfall in *Cardamone v Darebin CC* that the bar in section 61(4) is a specific provision, which prohibits the grant of a permit in certain circumstances, whereas section 62(1)(aa) is a provision that only applies if a permit can be granted.

(footnotes omitted)

1. I agree with the reasoning of DP Gibson in *Design 2u* in terms of the meaning of the relevant provisions. I disagree with the submissions put by the Felsteads that section 62(1)(aa) of the Act is being relied on as a device to avoid the prohibition contained in section 61(4) of the Act. I say this because the sections work together, as explained above, and it is only where a permit has already been issued to vary or remove the relevant restrictive covenant (or a decision made to do so) that a permit can be issued. There is no circumventing involved when one has the permission contemplated in section 61(4) of the Act and seeks to rely on it when obtaining another planning permission. Section 62(1)(aa) of the Act then prevents the permit from coming into effect until the variation or removal (as the case may be) to the covenant occurs, thereby upholding the integrity of the intention of the prohibition in section 61(4) of the Act.
2. I also agree with the comments and reasoning in *Design 2u* that the words of section 62(1)(aa) of the Act are not referring to removal or variation by some other means, such as a planning scheme amendment or Supreme Court application under [section 84](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/pla1958179/s84.html) of the [*Property Law Act 1958*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/pla1958179/). As such, I disagree with the submissions put by the Felsteads that the Applicant has no other option but to proceed under the [*Property Law Act 1958*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/pla1958179/).
3. As such, in circumstances where:
	1. the Covenant Permit has been issued allowing variation of the Restrictive Covenant; and
	2. the permitted variation would result in the proposed development the subject of VCAT Application P396/2021 not being in breach of the Restrictive Covenant,

the Tribunal is able to issue a planning permit in this proceeding allowing the proposed development provided that such development permit includes a condition that the development permit is not to come into effect until the Restrictive Covenant is varied in accordance with the Covenant Permit.

1. Accordingly, if Member Wilson determines that the acceptable planning outcome is to grant a planning permit in this proceeding, planning permit TPA/52008 must contain the following condition:

This permit will not come into effect until such time as Registered Restrictive Covenant No. B375804 is varied in accordance with Planning Permit No. TPA/52053.

|  |  |  |
| --- | --- | --- |
| **Susan Whitney****Member** |  |  |

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 of this material will be cited or referred to in these reasons. [↑](#footnote-ref-2)
2. Three statements of grounds were lodged opposing the proposal from persons who are not parties to the proceeding but who wish their grounds to be considered. [↑](#footnote-ref-3)
3. At clause 15.01-5S. [↑](#footnote-ref-4)
4. At clause 21.04-1 shown on Map 3 Residential development framework map as part of Category 1 – Garden city suburbs. [↑](#footnote-ref-5)
5. At clause 22.01-2. [↑](#footnote-ref-6)
6. At clause 55.04-5. [↑](#footnote-ref-7)
7. At clauses 55.04-3 and 55.04-4. [↑](#footnote-ref-8)
8. B18 at clause 55.04-2. [↑](#footnote-ref-9)
9. Noting the Applicant advised at the hearing that appropriate gradients and height clearance could be met with the reduced height. [↑](#footnote-ref-10)
10. Covenant Permit, condition 1. [↑](#footnote-ref-11)
11. Note that condition 2 of the Covenant Permit contains a typographic error, stating “form” rather than “from”. [↑](#footnote-ref-12)
12. (Red Dot)[2005] VCAT 2719. [↑](#footnote-ref-13)
13. (Correction) [2010] VCAT 1865. [↑](#footnote-ref-14)
14. Noting that this is a defined term in section 3(1) of the Act and that the Restrictive Covenant is a registered restrictive covenant for the purposes of section 61(4) of the Act. [↑](#footnote-ref-15)