

**1.3 36 SMYTH STREET, MOUNT WAVERLEY
EXTENSION OF TIME - DEVELOPMENT OF TWO DOUBLE STOREY DWELLINGS
TPA/44896**

EXECUTIVE SUMMARY:

An application has been received for an extension of time to Planning Permit TPA/44896 for the development of two double storey dwellings. The original permit was issued on 18 February 2016. The permit has been extended on three previous occasions, each extended for one year.

Construction of the development has not commenced.

The reason for presenting this report to Council is this is the fourth extension of time request sought for this permit.

The proposed extension of time is appropriate and it is recommended that a two (2) year extension to the permit is granted accordingly.

RESPONSIBLE DIRECTOR:	Peter Panagakos
RESPONSIBLE MANAGER:	Natasha Swan
RESPONSIBLE PLANNER:	Danielle Loh
WARD:	Mount Waverley
PROPERTY ADDRESS:	36 Smyth Street, Mount Waverley
ZONING:	General Residential Zone – Schedule 3
OVERLAY:	No Overlays
EXISTING LAND USE:	Single dwelling
RELEVANT LEGISLATION:	Section 69 of the Planning and Environment Act 1987

RECOMMENDATION:

That Council resolves to issue an **extension of time** to Planning Permit No. **TPA/44896** for development of two double storey dwellings at 36 Smyth Street, Mount Waverley pursuant to the provisions of Section 69(2) of the *Planning and Environment Act 1987*:

- That in accordance with Section 69(2) of the *Planning and Environment Act 1987*, the time for the completion of the development be extended for a further 12 months. Accordingly, the development must be commenced by 18 February 2022 and completed by 18 February 2024.
- That the applicant be advised it is unlikely a further extension of time will be granted given the time that has passed since the permit was granted and the non-compliance with Council Policy.

BACKGROUND:**History**

Planning permit TPA/44896 was issued on the 18 February 2016 for the development of two double storey dwellings.

The original application was decided under delegation and there was one objection to the proposal.

Council has extended the permit on three previous occasions. The current expiry date was 18 February 2021. The current extension of time request was made on 21 January 2021 which is within 6 months of the expiry date in accordance with the requirements of the *Planning and Environment Act 1987*.

Development plans were endorsed pursuant to the requirements of condition 1 of the permit on 22 June 2016.

The Site and Surrounds

The site is located on the east side of Smyth Street. The site has an area of 659 square metres and contains a single storey dwelling.

The surrounding land comprises the following:

- North: Single dwellings
- South: Single dwellings
- East: Single dwellings
- West: Single dwellings

The area can be characterised as attached and detached, brick veneer dwellings with pitched tiled roofs in a garden setting.

PROPOSAL:

The applicant has requested an extension of the permit's commencement date for two years to finalise the documents to proceed with the development to commence construction including obtaining finance and engagement of a builder.

DISCUSSION:

Pursuant to the provisions of Section 69(1) of the *Planning and Environment Act 1987*:

“Before the permit expires or within 6 months afterwards, the owner or the occupier of the land to which it applies may ask the responsible authority for an extension of time.”

The request was made on 21 January 2021 before the permit expiry date.

Accordingly, Council is able to consider a further extension to the commencement and completion date for the development under the *Planning and Environment Act 1987*.

Assessment

The Supreme Court decision *Kantor v Murrindindi Shire Council (1997)* established the following tests to determine if a permit should be extended. These tests must be considered on balance, meaning that an application does not necessarily need to meet all tests.

Whether there has been a change of planning policy.

Since the permit was issued there has been one significant state amendment affecting the land and two local amendments through Amendment C125.

Amendment VC110 (gazetted March 2017) introduced a mandatory garden area requirement and height requirement applicable to the zone. The proposal meets the mandatory height requirement of no more than 11 metres or 3 storeys as the proposal is limited to double storey and a maximum building height of 7.4 metres. In terms of the Garden Area, 36% garden area is provided which meets the requirement of 35%.

Amendment C125 Part 1 & 2 (gazetted April 2018 and November 2019) introduced new policies in Clause 21.04 Residential Development and Clause 22.01 Residential Development and Character Policy.

Under Clause 21.04, the land is now within a Category 8 – Garden City Suburbs residential area which identifies areas suitable for incremental change including multi-dwelling unit development within a garden setting.

Under Clause 22.01, the land is now within the Garden City Suburbs (Northern) character area. The preferred future character statement makes reference to the development of well-designed unit development which takes place within a pleasant leafy framework and architecture will be secondary in visual significance when viewed from the street. Furthermore the built form will be unified by well planted front gardens.

It is considered that the form, scale and intensity of the development continues to be broadly consistent with the policy objectives.

The zoning of the land has also changed from General Residential Zone – Schedule 2, to General Residential Zone 3, through the implementation of Amendment C125.

The General Residential Zone 3 introduced a number of changes to the schedule to the zone including front setback, site coverage, permeability, landscaping, side and rear setback, private open space and front fence height.

The proposal complies with all standards of the zone. An assessment of the proposal against the changes to the schedule is provided as follows:

Standard	Requirement	Provided	Assessment
Street setback	7.6 metres	7.8 metres	Complies
Site coverage	50%	41.49%	Complies
Permeability	30%	30.2%	Complies
Landscaping	Provision for 3 canopy trees	Provision for at least 3 canopy trees	Complies
Side and rear setbacks	5 metre rear setback	Dwelling 2 has a minimum rear setback of 3 metres.	Does not comply – see discussion below
Private open space	75 square metres, including 35 square metres SPOS with minimum width of 5 metres	At least 75 square metres, including 35 square metres SPOS with minimum width of 5 metres	Complies
Front fence	1.2 metre front fence	No fence	Complies

Side and rear setbacks

The schedule to the zone has the following objectives, relevant to the rear setback requirement:

- *To ensure new development transitions down in scale towards the creeks, respecting and reinforcing the natural topography.*

- *To ensure development is defined by its spacious and generous garden settings, tall canopy trees and consistent built form and setbacks.*

The current approval does not strictly comply with the desired 5m setback. This standard can be varied.

The context of the 'rear' can vary depending on the relationship of the adjoining properties which in turn affects the location of breaks and landscape character. The landscape open character is often created by traditional rear yards creating a landscaped open corridor however, for this site, this has been partially eroded by surrounding developments.

It is considered that any future application for development of the site would be required to provide a 5.0m rear setback consistent with current residential planning policy applicable to the area. With this in mind and given the length of time that has passed since the initial approval, it is considered appropriate to grant a 12 month extension to the permit and advise that further extension to the permit will not be supported.

Overall, building bulk and massing, landscaping opportunities, car parking, private open space and amenity impacts are considered appropriate and in keeping with the area and the objectives of the zone.

Whether the land owner is seeking to "warehouse" the permit.

Warehousing is the obtaining of permits with no intention of acting on them in the foreseeable future to obtain a windfall by selling the land. It would be difficult to show that the owner has no current intention of commencing the development. Nothing would currently suggest that the applicant is seeking to warehouse the approval.

The owner of the land has indicated that a builder for the project has been recently appointed and finance for the project is currently being sought. Whilst a considerable period of time has passed since the original approval, the current COVID-19 pandemic has caused delays in commencement of building projects and issues associated with financing projects.

Intervening circumstances bearing on the grant or refusal of the extension.

The applicant was unable to finalise the documents to proceed with the development to commence construction including obtaining finance and engagement of a builder. The applicant has indicated that delays in appointing a builder and obtaining finance have prevented the development commencing within the prescribed timeframe. The applicant submits that these issues have now been resolved and that the development should be able to commence upon extension of the permit.

The total elapse of time.

Five years have passed since the permit was issued, which is sufficient to have enabled completion of the development. This is not fatal to the application in isolation.

Although this report is coming to Council as a fourth extension, it is noted that previously one year extensions were given as Amendment C125 was being considered by the Minister casting some uncertainty of the approved controls.

Normally a 2 year extension of time would be supported where there is no proposed changes to planning policy, which would mean this is similar to a third request. Given the length of time that has now passed, changes to zoning provision applicable to the land and non-compliance with the rear setback requirement, it is considered appropriate to only issue a 12 month extension to the permit and advice that further extension is unlikely to be supported.

Whether the time limit originally imposed was adequate.

The time limit originally imposed was two years to commence and four years to complete, which is a standard condition of permit and considered adequate for a two dwelling development.

The economic burden imposed on the land owner by the permit.

Considering development has not commenced, the degree to which the owner is economically committed to the permit is limited.

It is not considered that any conditions of the permit would have placed additional economic burden on the applicant that could have affected the commencement of construction. The conditions are standard for this sort of development.

No submissions were lodged by the applicant to expand the economic considerations under this test.

The probability of a permit issuing should a fresh application be made.

As previously discussed, it is considered that any future planning permit application would be encouraged to provide a 5.0m rear setback consistent with current policy requirements. The existing design would need to be substantially modified to provide this given the extent of ground and first floor encroachment. Whilst the development potential of the land for two dwellings is not disputed or inappropriate, a future design response would need to better respond to policy aspirations which seek a 5.0m rear setback to achieve increased landscaping outcomes and a greater sense of openness within rear yard interfaces. Given the above factors, the current approved development would be unlikely to be supported today and the permit should only be extended for a further 12 months.

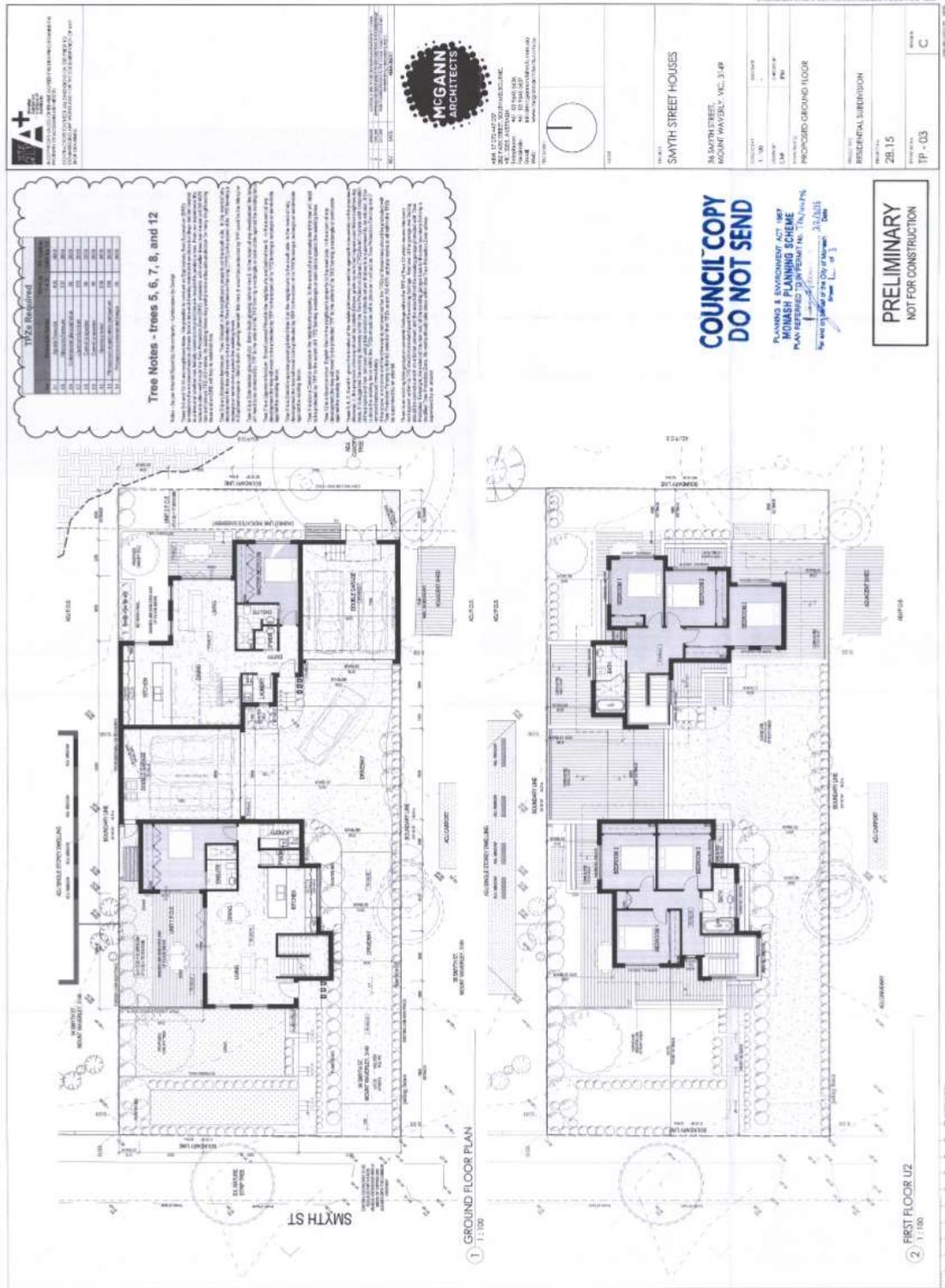
CONCLUSION:

It is considered appropriate to grant a further extension of time to the permit.

The proposal on balance meets the majority of tests established in the Supreme Court decision *Kantor v Murrindindi Shire Council (1997)*, including and most importantly consistency with current planning policy objectives.

It is recommended the Council approve an extension of one year for the commencement and completion of the development. Considering the elapse time since the issue of the permit and the lack of compliance with Council policy in relation to the 5m rear setback, it is recommended that the applicant be advised it is unlikely a further extension of time will be granted.

ATTACHMENT 1

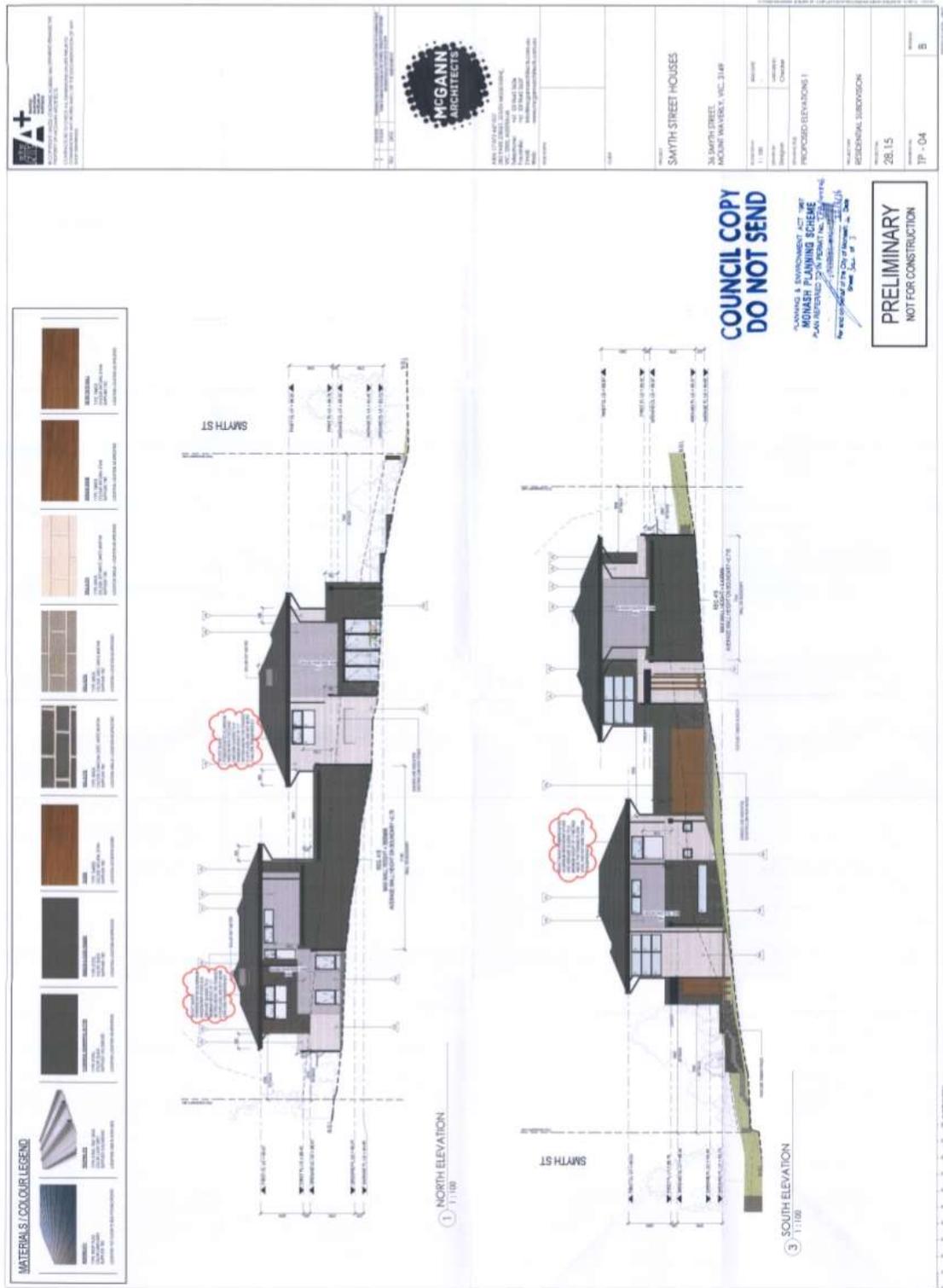


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ATTACHMENT 1 (Continued)



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