

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2036/2018  
PERMIT APPLICATION NO. TPA/49073

### CATCHWORDS

Section 82 of the *Planning & Environment Act 1987*, alterations and extensions to an existing dwelling, front fence height.

<b>APPLICANT</b>	Guy & Alice Kumashev
<b>RESPONSIBLE AUTHORITY</b>	Monash City Council
<b>RESPONDENT</b>	Adam & Priscilla Gall
<b>SUBJECT LAND</b>	10 Farm Road, Oakleigh South
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	K Birtwistle, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	6 February 2019
<b>DATE OF ORDER</b>	15 February 2019
<b>CITATION</b>	Kumashev v Monash CC [2019] VCAT 208

### ORDER

- 1 In application P2036/2018 the decision of the responsible authority is varied.
- 2 In planning permit application TPA/49073 a permit is granted and directed to be issued for the land at 10 Farm Road, Oakleigh South in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
  - Alterations and additions to an existing dwelling on a lot less than 500 sq.m. and construction of a front fence greater than 1.2 metres in height within 3 metres of a street.

**K Birtwistle**  
**Member**



## APPEARANCES

For Guy & Alice Kumashev	Ms A Kumashev
For Monash City Council	Ms Sally Moser, town planner of Moser Planning
For Adam & Priscilla Gall	Mr A Gall



## INFORMATION

Description of proposal	Alterations and additions to an existing single storey dwelling, including the construction of a new fence greater than 1.2 metres in height within 3 metres of the street.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	General Residential Zone – Schedule 2 (GRZ2)
Permit requirements	Clause 32.08-5 - Alterations and additions to a dwelling on a lot less than 500 sq.m. and construction of a front fence greater than 1.2 metres in height within 3 metres of a street.
Land description	<p>The review site is located on the eastern side of Farm Street, south of the intersection of Murumba Drive, Oakleigh South. The site contains a weatherboard dwelling setback approximately 9 metres from the frontage. The dwelling appears to be an original post-war construction and a more recent dwelling has been constructed in what would originally have been its rear yard. A common accessway is provided along the northern property boundary. The secluded private open space of the dwelling is located at the rear. There are a number of structures in the rear yard of the review site and across what appears to be the common property accessway shared by the two dwellings.</p> <p>An existing picket fence across the site frontage is proposed to be removed as part of the application.</p>
Tribunal inspection	Unaccompanied subsequent to the hearing



## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

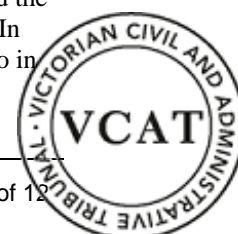
- 1 Adam & Priscilla Gall (the permit applicants) proposes to undertake alterations and additions to their existing dwelling at No. 10 Farm Road, Oakleigh South. The application includes the construction of a two car carport at the rear of the dwelling, which will necessitate the relocation of the secluded private open space to the front of the dwelling and the fencing of this space to provide privacy from the street.
- 2 Following advertising of the application by Council, one objection was lodged by the Kumashev's who reside at No.10A Farm Road, which is the dwelling located at the rear of the review site. In September 2018, Monash City Council determined to issue a Notice of Decision to Grant a Planning Permit (NOD) for the proposed development. Guy & Alice Kumashev (the applicants) have requested the Tribunal to review Council's decision.
- 3 The applicant asserts that the proposed high front and side fences are inappropriate in the streetscape and will compromise pedestrian and vehicular safety and be contrary to the neighbourhood character. They generally take no issue with the other elements of the alterations to the dwelling itself.
- 4 The permit applicant says the extensions to the dwelling are necessary to accommodate a growing family, and that there are other examples of high front fencing within the immediate streetscape. They do not oppose the conditions provided on the NOD which require the fencing to be setback further from the street and common accessway and say that these amendments will provide for safe vehicular access into and out of the site.

### WHAT ARE THE KEY ISSUES?

- 5 Having considered all the submissions and evidence and inspected the subject land and its locality I must determine the following key issues in this matter:
  - Is the front fencing respectful of the neighbourhood character?
  - Will the proposed fencing cause unreasonable safety issues?
- 6 I must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions presented with regard to the applicable policies and provisions of the Monash Planning Scheme, and undertaken a site inspection, I have decided to affirm the decision of the responsible authority and direct that a permit issue.
- 7 My reasons follow.

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<sup>1</sup> The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.



## BACKGROUND

- 8 The site has an unusual context. It contains an original post-war weatherboard dwelling which currently has two bedrooms. A more recent small dwelling has been constructed in what would formerly have been the rear yard of the site. This is No.10A Farm Road, the dwelling owned by the Kumashev's.<sup>2</sup> The property was subsequently subdivided in 1995 with the review site and Kumashev property sharing a communal accessway located along the northern property boundary. There is no parking provided at the rear of the Gall dwelling as existing structures limit access from the common accessway.
- 9 Unlike more contemporary development, the common property accessway has not been constructed. There is an informal parking area located in the front setback of No.10 Farm Road which the Galls presently use to park their two cars. An electricity pole is located within the nature strip proximate to where the Galls park, which makes accessing the informal parking area quite challenging.
- 10 As was obvious during my site inspection, structures have been constructed in the rear yard of the review site that appear to extend over the common property accessway area. It was agreed by all parties that the site has a legacy of planning decisions that do not reflect contemporary thinking, and that there is potential to improve the current situation with respect to parking and the use of the common property.

### What is proposed?

- 11 The proposal seeks to:
- Construct a new double carport with roller door at the rear of the dwelling in the existing secluded private open space (spos) area, removing all existing structures in this area including structures on the common property.
  - Constructing a new 1.7 metre high front picket fence and 1.8 metre high side picket fence within the front setback, to facilitate the moving of the spos to within the front setback.
  - Construction of a new pedestrian pathway leading to the entry along the 1.8 metre high side picket fence.
  - Reconfiguration of the dwelling entry porch
  - Addition of a flat roofed third bedroom and ensuite at the rear of the dwelling

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<sup>2</sup> According to Council, this dwelling was constructed under the previous as-of-right provisions in the former Oakleigh Planning Scheme.



- Internal reconfiguration of the dwelling including the addition of screened windows, replacement of windows with doors and additional steps to the new spos.

## IS THE FRONT FENCING RESPECTFUL OF THE NEIGHBOURHOOD CHARACTER?

- 12 The applicant's principle focus was on the front fencing. They do not oppose the extension to the rear of the dwelling, (including the proposed carport) or the other works. They say that the neighbourhood character is derived from the lack of high front fencing with not many examples evident in the immediate street.
- 13 The Council assert that the fencing in the immediate area is varied, and that the amenity of the area is already affected by virtue of how the site has evolved. They say that the specific site conditions warrant approval of a higher form of front fencing, and that the conditions proposed on the NOD including greater setbacks and the submission of a landscape plan will result in an improvement to the neighbourhood character.
- 14 Neighbourhood character is a planning term that is highly subjective. The *Understanding Neighbourhood Character Practice Note 43* (Department of Environment, Land, Water and Planning 2018) says:

Neighbourhood character is essentially the combination of the public and private realms. Every property, public place or piece of infrastructure makes a contribution, whether great or small. It is the cumulative impact of all these contributions that establishes neighbourhood character.

The key to understanding character is being able to describe how the features of an area come together to give that area its own particular character. Breaking up character into discrete features and characteristics misses out on the relationships between these features and characteristics. Understanding how these relationships physically appear on the ground is usually the most important aspect in establishing the character of the area.

- 15 The Practice Note further states that:

Describing neighbourhood character requires a qualitative assessment and the exercise of judgement about which features and characteristics determine the neighbourhood character of an area.

Describing the character of an area will also depend on the extent of neighbourhood character analysis already undertaken by the relevant council and the particular characteristics of the neighbourhood in question.

- 16 Clause 22.01 is Council's Residential Development and Character policy. The review site is located within Character Area C. A number of elements are identified that contribute to the current character. These include the undulating topography, the variety of architectural styles including two



storey houses, consistent building setbacks, and low fences, walls or open soft frontage.

- 17 The desired future character statement notes, amongst other matters, that front fences will be low. The applicants rely on this and say that both the existing and preferred character statement do not support high front fencing.
- 18 I undertook an inspection of the review site and the immediately surrounding streets. In walking these streets, I did not observe that fencing was a defining or overriding character element. In other words, while there were various types and styles of fencing evident (and in some cases none), the overwhelming impression of the neighbourhood's character was not derived from the front fencing. This is consistent with the Practice Note which identifies that breaking up character into discrete features and characteristics misses out on the relationships between these features and characteristics.
- 19 In my view, the character of the area is derived from the *combination* of generally consistent front setbacks, the spacing of dwellings off side boundaries, low or no front fencing and the pitched tiled roofs on generally single storey dwellings. I accept that while high front fencing is not common in the immediate locality, there are examples evident, including at Nos. 17 and 19 Farm Road.
- 20 The existing condition is a less than ideal situation. Informal carparking is located in front of the dwelling. It is unsealed and requires cars to partially drive over the naturestrip to access the space. It limits the area of the frontage dedicated to landscaping which impacts on the streetscape. The proposal seeks to relocate this carparking to the rear of the dwelling. In itself, this would be a "win" for neighbourhood character, however as a consequence of this relocation, the front setback will be required to be fenced to provide the secluded private open space for the dwelling.
- 21 I am persuaded by the particular circumstances of this matter that the fencing as proposed by the NOD conditions is acceptable. I say this for the following reasons:
  - The fencing is proposed to be in picket form so providing a degree of transparency from the street. Picket fencing is also complementary to the architecture of the dwelling.
  - It will have a maximum height of 1.7 metres across the frontage and along the common accessway.
  - It will be inset 1 metre from the street and the pedestrian pathway proposed from the street to the entry to the dwelling.
  - The setbacks will allow the planting of vegetation to enhance the garden city character of the area.





- The removal of the informal parking within the front setback will expand the opportunities to create additional planting in the private domain.
- The existing mature tree within the front setback will be retained and additional tree planting proposed to gradually create a tree canopy in the private domain.

## **WILL THE PROPOSED FENCING CAUSE UNREASONABLE SAFETY ISSUES?**

- 22 The applicants were concerned that the high fencing will result in safety issues. They say that a 1.7 metre high fence will make it difficult to achieve a clear sightline when they reverse down the common accessway. They say that this will result in risks to pedestrians using Farm Road, including school children.
- 23 Council's traffic engineers identified no safety concerns with the proposal. A condition on the NOD requires that a corner splay or an area at least 50% clear of visual obstruction (or with a height of less than 1.2 metres), extending at least 2 metres long and 2.5 metres deep be provided on both sides of the crossover to provide a clear view of pedestrians on the footpath. The condition also requires that the fence be inset 1 metre from the site frontage and 1 metre off the pedestrian path that will run alongside the common accessway.
- 24 On balance, I am satisfied that these setbacks and the conditions on the NOD will allow for appropriate sightlines to allow cars to safely exit the common accessway in a reverse motion. The condition requiring a corner splay at the site frontage is consistent with Clause 52.06-9 of the Planning Scheme<sup>3</sup>.
- 25 The relocation of carparking to the rear of the dwelling will reduce the number of cars reversing from the site. Turning circles demonstrate that cars will be able to undertake internal manoeuvring to then be able to exit the site in a forward motion. This will be an improvement on the current situation in which two cars parked in the front setback in a tandem arrangement back out of the site, partially over the naturestrip whilst seeking to avoid the large power pole proximate.

## **WHAT CONDITIONS ARE APPROPRIATE?**

- 26 Conditions were discussed at the hearing. The Council sought to make minor changes to the conditions to clarify their intent and delete repeated conditions. Any changes to the permit conditions contained in Appendix A of this order reflect those discussions plus further consideration by the Tribunal.

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<sup>3</sup> Although I note that Design Standard 1 of this Clause does not apply to an application to construct one dwelling on a lot





## **CONCLUSION**

27 For the reasons explained above, the decision of the responsible authority is varied. A permit is issued subject to conditions.

**K Birtwistle**  
**Member**



## APPENDIX A – PERMIT CONDITIONS

<b>PERMIT APPLICATION NO:</b>	TPA/49073
<b>LAND:</b>	10 Farm Road, Oakleigh South

### WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Alterations and additions to a dwelling on a lot less than 500 sq.m. and construction of a front fence greater than 1.2 metres in height within 3 metres of a street

### CONDITIONS:

- 1 Before the development starts, three copies of plans drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans submitted with the application Sheet 1, 2 and 3, NewScope Building Design, dated June 2018, but modified to show:
  - (a) The proposed 1.8 metre high timber picket fence along the pedestrian pathway to be reduced to a height of 1.7 metres and set back 1 metre from the pedestrian pathway.
  - (b) The proposed 1.7 metre high front fence to be set back a further 1 metre from the street frontage.
  - (c) The north-west corner of the front fence and the fence along the pedestrian pathway to be stepped in 3 metres east (from the front title boundary) and 3 metres south of the pedestrian pathway, to the satisfaction of the Responsible Authority.
  - (d) Elevations to show the stairs to the front entry porch aligning with the brick paving pedestrian pathway.
  - (e) The labelling of the property boundary dimensions and rear drainage and sewerage easement to be corrected to be consistent with the title plan of subdivision.
  - (f) 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 vehicle crossing to provide a clear view of pedestrians on the footpath of the frontage road.



- 2 The development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 3 Prior to the completion of the development approved by this permit, all internal fencing is to be relocated so it does not extend into common property.
- 4 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.
- 5 Before the commencement of buildings and works, a landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority prior to the commencement of any works. The plan must show the proposed landscape treatment of the site including:
  - (a) the location of all existing trees and other vegetation to be retained on site;
  - (b) provision of canopy trees with spreading crowns located throughout the site including the major open space areas of the development;
  - (c) planting to soften the appearance of the high fencing in the front setback;
  - (d) a schedule of all proposed trees, shrubs and ground cover, which will include the size of all plants (at planting and at maturity), their location, botanical names and the location of all areas to be covered by grass, lawn, mulch or other surface material;
  - (e) the location and details of all fencing;
  - (f) the extent of any cut, fill, embankments or retaining walls associated with the landscape treatment of the site;
  - (g) details of all proposed hard surface materials including pathways, patio or decked areas.

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

- 6 No building material, demolition material or earthworks shall be stored or stockpiled under the canopy line of any tree to be retained during the construction period of the development hereby permitted.
- 7 The 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.
- 8 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.



- 9 The private on-site drainage system must prevent stormwater discharge from the driveway over the footpath and into the road reserve. The internal drainage system may include either:
- (a) trench grates (150mm minimum width) located within the property; and/or
  - (b) shaping the driveway so that water is collected in a grated pit on the property; and/or
  - (c) another Council approved equivalent.
- 10 The nominated point of stormwater connection for the site is to the western corner of the property where the entire site's stormwater drainage must be collected and free drained via a pipe to Council pit in the rear easement of the property to Council standards.
- Note: If the point of connection cannot be located then notify Council's Engineering Department immediately.
- 11 Engineering permits must be obtained for drainage works are to be inspected by Council's Engineering Department. A refundable security deposit of \$1000 is to be paid prior to the drainage works commencing.
- 12 One copy of the plans for the drainage and civil works must be submitted to and approved by the Engineering Department prior to the commencement of works. The plans are to show sufficient information to determine that the drainage works will meet all drainage conditions of the permit.
- 13 Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.
- 14 This permit will expire in accordance with section 68 of the *Planning and Environment Act 1987*, if one of the following circumstances applies:
- (a) The development is not started before 2 years from the date of issue.
  - (b) The development is not completed before 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.

**- End of Conditions -**

