VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P889/2019Permit Application no. TPA/49001 |
| CATCHWORDS |
| Section 77 of the *Planning and Environment Act 1987*; subdivision; neighbourhood character; Garden City character; lot design. |

|  |  |
| --- | --- |
| APPLICANT | Andrew Bernard Bevan |
| responsible authority | Monash City Council |
| SUBJECT LAND | 168 Hansworth StreetMULGRAVE VIC 3170 |
| WHERE HELD | Melbourne |
| BEFORE | Susan Whitney, Member |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 2 October 2019 |
| DATE OF ORDER | 18 October 2019 |
| CITATION | Bevan v Monash CC [2019] VCAT 1637 |

# Order

### No permit granted

1. In application P889/2019 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/49001 no permit is granted.

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

# Appearances

|  |  |
| --- | --- |
| For applicant | Mr Stephen O’Brien, Town Planner, of Universal Planning. |
| For responsible authority | Mr James Turner, Town Planner, of Monash City Council. |

# Information

|  |  |
| --- | --- |
| Description of proposal | Two lot subdivision resulting in two lots being in a side-by-side arrangement. |
| 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 2 |
| Permit requirements | Clause 32.08-3 – subdivide land. |
| Land description | The subject land is located on the southern side of Hansworth Street and is the last lot at the eastern end of this street.The lot contains a double storey detached dwelling of brick and weatherboard construction that is set back from the street by approximately 11 metres. There is an existing crossover on the north western boundary.The subject land is burdened by restrictive covenant E546179 that requires construction of exterior dwelling walls to be of brick or brick veneer. |

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

## What is this proceeding about?

1. The Applicant, Andrew Bernard Bevan, seeks the Tribunal’s review of the decision of the Monash City Council to refuse the proposed subdivision of the subject land into two lots in a side-by-side arrangement.
2. The subject land is irregularly shaped, measuring 13.85 metres on its frontage to Hansworth Street, 38.38 metres on its western boundary, 41.44 metres on its eastern boundary and 27.43 metres on its southern boundary. It has a site area of 756.1m2.
3. As a consequence of the proposed subdivision, the following lots would be created:
	1. Lot 1, with a frontage of 6.93 metres, a rear width of 10.09 metres and an area of 362.9m2, with a proposed building envelope of 185.6m2; and
	2. Lot 2, with a frontage of 6.92 metres, a rear width of 17.34 metres and an area of 393.2m2, with a proposed building envelope of 186.7m2.
4. The Council refused the proposed subdivision on the grounds that it was not consistent with the Garden City character of the municipality, would not allow for future development that was consistent with the neighbourhood character of the area and did not adequately satisfy clause 56, in particular in relation to neighbourhood character, solar orientation of lots and lot access.
5. The key issues that I need to address in determining this application are:
	1. Does the proposal appropriately respond to neighbourhood character?
	2. Is the proposed lot design acceptable?
6. Having regard to the submissions of the parties and the policies and provisions of the Monash Planning Scheme, I have determined to affirm the decision of the Council with the result that no permit will issue. My reasons follow.

## does the proposal appropriately respond to neighbourhood character?

1. The subject land is located in the General Residential Zone – Schedule 2, the purposes of which include the encouragement of development that respects the neighbourhood character of the area and of a diversity of housing types and housing growth, particularly in locations offering good access to services and transport.
2. Schedule 2 applies to Monash Residential Areas and requires a planning permit for the construction of a dwelling on a lot of less than 500m2, as well as varying the requirements of ResCode in relation to minimum street setback (under both Standard A3 and Standard B6) and private open space (in relation to Standard B28 only).
3. The Council placed no reliance upon Amendment C125 (Part 2). This was in light of the Council’s current position that ‘Accessible Areas’ (which includes the subject land) should be excluded from the proposed rezoning to General Residential Zone – Schedule 3 and instead should remain in their current zoning, pending further strategic work and separate planning scheme amendments.
4. The decision guidelines of the GRZ2 require consideration of the pattern of subdivision and its effect on the spacing of buildings, along with the objectives and standards of clause 56 that relate to a two lot subdivision. These include, at clause 56.03-5, the objective:

To design subdivisions that respond to neighbourhood character.

1. In order to meet the associated Standard C6, a subdivision should:

Respect the existing neighbourhood character or achieve a preferred neighbourhood character consistent with any relevant neighbourhood character objective, policy or statement set out in this scheme.

Respond to and integrate with the surrounding urban environment.

Protect significant vegetation and site features.

1. The Scheme emphasises what is termed the ‘Garden city character’ of the municipality, which consists of leafy, low-rise suburbs with well vegetated private gardens and wide streets with street trees.[[2]](#footnote-2) The Scheme states that this characteristic is a core value held by the community and the Council and is a significant and important consideration in all land use and development decisions in most residential areas.[[3]](#footnote-3)
2. The policy in clause 22.01-3 of the Scheme speaks to the treed character of areas being complemented and preserved, the Garden City and streetscape character of the neighbourhood being maintained and enhanced and minimising additional vehicle crossings and accessways that would otherwise harden the streetscape and remove these areas from green space.
3. The subject land is located in the Residential Character Type “E” of the Scheme, for which the current character statement is as follows:

This area is characterised by a variety of building types. Most are one and two storey 1970’s and 1980’s brick veneer single and double fronted villas. A range of brick colours are used but the palette is often consistent within neighbourhoods. The roofs are varied but in most areas have low pitched hip forms.

New buildings constructed post 1985 are often extremely large, up to 3 storeys high and eclectic in architectural style. Generally, the smaller buildings are on the lower slopes of the valley-side, the flatter land of the valley floor and plateau tops.

The interaction of the buildings with the topography creates a variety of levels in the steepest neighbourhoods and a need for retaining walls to the front of some properties.

Few properties have walls or fences. Some however have large prominent walls combined with metal railings.

Gardens are well planted and horticulturally diverse. Large stand-alone trees are common in front gardens, especially on the steeper slopes. Rockeries delineate the edges of some gardens.

This Character Type has a large proportion of open space and a close relationship to the semi-natural landscape of the Dandenong Creek valley.[[4]](#footnote-4)

1. The contributory elements identified for this Character Area are stated to be:

Sloping topography towards Dandenong Creek.

Curvilinear subdivision pattern.

Varied building style, scale and architectural quality.

Consistent building setback.

Well maintained, well-planted but open front gardens integrated with the street landscape.

Underground services in some neighbourhoods.

Concrete footpaths.

Nature strips 2-3 metres wide.

Insitu concrete kerb and channel.

Parking on the street and driveways.[[5]](#footnote-5)

1. The desired future character statement for this Character Area is:

The urban character of this area will evolve within a landscape that has a large number of native trees spread throughout both the public and private domain providing an overhead canopy visually unifying the diverse built-form of some neighbourhoods and providing a strong relationship with the semi-natural landscape of Dandenong Creek.

Dwellings will be designed to sympathetically integrate with any existing native trees and shrubs on, or adjacent to, the development site and relate in form and siting to the topography of the Character Type. Architecture of contemporary excellence that is energy efficient and sustainable will be encouraged. Building scale, height and bulk will be generally similar within neighbourhoods. Large scale contrasts between buildings will be discouraged except where existing trees and shrubs soften the junction between buildings or where there is a gradated change in scale.

Setbacks will be varied in many neighbourhoods but will be consistent within individual streets and will be sufficiently generous to enable the development of significant native tree canopy and vegetation. The main unifying element will be the canopy of native trees in both the public and private domain. Most gardens will be open to the street with no walls or fences, allowing the soft naturalistic qualities of most neighbourhoods to be retained. Large walls and fences will be discouraged except where they are already a visually dominant streetscape element.

The soft quality of the street that is derived in part from the nature strips will be maintained by ensuring that there is only one single crossover per lot frontage.

Planting will generally enable filtered views of the architecture and engender a sense of visual continuity with the street and adjacent properties.[[6]](#footnote-6)

1. During my site inspection, and apparent from the material provided to me by the parties, I observed many of the contributory elements including the curvilinear subdivision pattern of the area, the varied building style, scale and architectural quality, a somewhat consistent front setback for dwellings and open front gardens, planted to varying degrees. I also observed the width of lots in Hansworth Street.
2. I agree with the Applicant’s observation that lot frontages are not of a consistent width in this section of Hansworth Street. In saying this, I observe that of the surrounding existing lots, the subject land is the narrowest at its frontage. The adjoining lot at 166 Hansworth Street has a frontage width of approximately 14 metres while the lot opposite (147 Hansworth Street) has a frontage width of approximately 34 metres. The lots further along, at 143 and 145 Hansworth Street have frontages of 19.812 metres, and 164 Hansworth Street has a frontage of 16.764 metres. Further along again, at 133 and 135 Hansworth Street, the frontages are 13.7186 metres. At 158 Hansworth Street the street frontage is 22.86 metres.
3. The resulting subdivisional lots would be noticeably narrower than lots in the immediate surrounds and further afield. They would also be markedly smaller, with the majority of existing lots ranging between 600 to 800 m2 in area.
4. The proposal also provides two single width (3 metre wide) crossovers to the street, resulting in a minimum of 43% of the frontage being given over to hard surfacing for crossovers and driveways.
5. Whilst the extent of canopy and other plantings in the front setbacks varies along Hansworth Street, what I consider to be relatively consistent is that there is a perception of space in the front setbacks – whether that space be lawn area or planted out. I do not regard the resulting front setback area to be sufficiently generous to enable the development of significant native tree canopy and vegetation.
6. This is notwithstanding the ‘indicative’ landscape plan that the Applicant handed up at the hearing. As I explained during the hearing, because that plan had not been circulated as an amended plan, nor was it put forward as expert evidence with its author available for cross-examination or questioning by the Tribunal, this detracts from the weight I am willing to give that plan. As I also explained during the hearing, I have some reservations about the capacity of the resulting garden areas to sustain the ‘indicative’ plantings, noting that the front setback area was suggested to be able to accommodate two large canopy trees (of 12 or more metres height at maturity), two small/medium canopy trees (of 12 metres or less) and one small tree (of less than 8 metres height at maturity).
7. Even if I was to accept that the front setback could accommodate those plantings, I remain unpersuaded that the lot layout, with its narrow frontages and two crossovers and driveways, will contribute to the soft quality of the street and the Garden City character, generally.
8. I acknowledge that a planning permit will be required for buildings and works, given the resultant lot sizes. However, in assessing this application I need to consider the possible future development of the subject land.[[7]](#footnote-7) Further, what is determined now in relation to the proposed subdivision will set the parameters for future development of the subject land and as such, I need to be satisfied that the lot layout and building envelope size and location will be acceptable in terms of neighbourhood character.
9. The proposed building envelopes are not central to the subdivision, instead pushing out to either side boundary and set back by one metre from the centre dividing line. For lot 1, this is a consistent one metre setback for the length of the building envelope. For lot 2, the irregularly shaped building envelope is one metre from the centre at its two closest points and otherwise angles away from the centre dividing line. The remaining area to the rear of the site that is not covered by the building envelope is occupied by the 2.44 metre wide easement that runs along the rear boundary.
10. Whilst acknowledging that side-by-side configuration is not common in this pocket of Mulgrave, the Applicant did refer me to one development quite some distance from the subject site – at 70 Hansworth Street – which is 18.24 metres wide and contains centrally located, attached built form. So that lot is wider to begin with and, through the central placement of built form, would present differently to the street than what would likely result from constructing within these proposed building envelopes.
11. The Applicant referred me to the large-scale development of the abutting land to the east that was approved by the Tribunal. Assuming it proceeds, that development will consist of two residential towers (including podium) of 9 and 10 stories in height and 30 two or three storey townhouses. Abutting the subject land will be the rear of four townhouses – two of two storey construction and two of three storey construction.
12. Significantly, in my view, in relation to neighbourhood character that development will only be able to be accessed from this section of Hansworth Street via a pedestrian path. This section of Hansworth Street will remain an effective dead-end road and vehicular access to the new development will be gained from the other section of Hansworth Street, on the other side of the large, presently vacant development site. This form of linkage, although useful for connection through the new estate to the land beyond, in my view will result in that development being read as a different estate with its own character, distinct from the existing development in Hansworth Street. Hence, even though that development proposes smaller lot sizes and narrower frontages than evident in the existing dwelling stock, that estate will be read separately and one would not expect a correlation between those lots and the lots in Hansworth Street. As a result, I think that the approved development is of less consequence than the existing lots in Hansworth Street when assessing the proposed subdivision.
13. In that case, the Tribunal observed that the neighbourhood character of the existing properties in Hansworth Street demonstrated considerable built form diversity and that the area is not one which is uniform or perhaps even consistent stylistically.[[8]](#footnote-8) These observations were made in the context of the Tribunal considering whether the development sought for that large parcel of land would be acceptable.
14. I accept the Tribunal’s observations in that case about the variation in built form and lack of consistent built form style in Hansworth Street. However, I do not consider that they assist the Applicant’s case or overcome the deficiencies with the proposed subdivision that I have identified: the narrow original frontage, the narrower resulting frontages, the lack of space for a genuine and meaningful contribution to be made to the Garden City character and the minimal space between the proposed building envelopes, leading to a perception that they are crowded onto the subject land.
15. Overall, I do not think that the 13.85 metre frontage is of sufficient width to accommodate two lots in a side‑by‑side arrangement, each with their own crossover and accessway, while still contributing to the achievement of preferred neighbourhood character. There simply will not be sufficient width and space in the front setback for the resultant lots to make an appropriate contribution. The resultant lots will be out of place in Hansworth Street and will appear jammed in at the end of the street.
16. Further, whilst I accept that the eventual built form might not occupy the entirety of the building envelopes, having regard to the narrow resulting lots and the minimal space between building envelopes, this will most likely result in a perception of built form squeezed onto the site. Having regard to the building envelope placement, it is likely that there will also be a wall along each of the outer common boundaries, potentially of some length. Again, having regard to the width of the resultant lots, even if the wall is brought off the boundary, any side setback will be unlikely to be of sufficient width to accommodate screen planting to soften the visual impact of built form in the building envelopes.
17. This is exacerbated by the minimal rear setback from the building envelope – 2.44 metres – which correlates with the drainage easement, limiting the extent of planting that can reasonably occur in this area. Even allowing for buildings to not occupy the entire length of the building envelopes, the rear yard of lot 1, in particular, likely will be of limited size. And this is in an area where the GRZ2 increases the ResCode private open space requirements (noting that only relates to multi-dwelling development – Standard B28), demonstrating an intention that the land in the GRZ2 be required to provide *more* than the standard amount of private open space.
18. Overall, I find that the proposed subdivision would be out of place in this neighbourhood context, creating lots that are markedly narrower than surrounding properties, with a high proportion of hard surfacing in the front setback and which will not be able to provide a landscape response that will adequately contribute to the Garden City character sought by the Scheme.

## Is the proposed lot design acceptable?

1. The GRZ2 also requires consideration of other provisions in clause 56 of the Scheme. Of those, I hold concerns in relation to clause 56.04-2 and 56.04-3.
2. Clause 56.04-2 has as its objective:

To provide lots with areas and dimensions that enable the appropriate siting and construction of a dwelling, solar access, private open space, vehicle access and parking, water management, easements and the retention of significant vegetation and site features.

1. The resulting lots each contain a building envelope measuring at least 9 metres by 15 metres if a boundary wall is nominated as part of the building envelope. However, Standard C8 also provides that the building envelope must meet Standards A10 and A11, dealing with side and rear setbacks and walls on boundaries respectively, in relation to the adjoining lots not in this subdivision. This will impact upon the building that can occur within the building envelopes.
2. Standard C8 also provides that lot dimensions and building envelopes should protect solar access for future dwellings. This links to clause 56.04‑3, which has as its objective:

To provide good solar orientation of lots and solar access for future dwellings.

1. Given the orientation of the lots and their dimensions, I am not persuaded that resulting dwellings will be able to obtain good solar access. To the extent that a wall is built to the boundary of lot 1, this future dwelling may experience compromised solar access from the west due to the relative location of the existing dwelling constructed on 166 Hansworth Street. Any private open space provided to the rear of the lots will be south facing. Further, given the resultant lot and building envelope dimensions, if two storey dwellings are constructed, the overshadowing that will be created by each dwelling upon the other in this subdivision will impact upon the morning and afternoon solar access experienced by each dwelling.
2. Overall, I am not satisfied that the subdivision and building envelope layout will enable the appropriate siting and construction of future dwellings, solar access or provision of private open space, nor am I persuaded that future dwellings will have acceptable solar access.

## Conclusion

1. In a separate application (not before this Tribunal), the Applicant previously sought to construct three double storey dwellings on the subject land – two attached in the front and one behind. The Council refused that application on grounds including inconsistency with neighbourhood character and scale of development. The Applicant informed me at the hearing that the Council indicated at that time that a dual occupancy, one behind the other, would be a preferable layout. Indeed, the Council stated at this hearing that it was not against the subdivision or redevelopment of the subject land, per se.
2. Any subdivision or development proposal needs to be cognisant of the constraints and opportunities afforded by a parcel of land, along with the planning intentions for that parcel as expressed in the relevant planning scheme. A design should then be devised that is mindful of those matters.
3. For the reasons stated above, I am not satisfied that the proposed subdivision is an acceptable outcome in terms of neighbourhood character response or lot design and layout.
4. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

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

1. 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. [↑](#footnote-ref-1)
2. Clause 21.01-1 of the Scheme. [↑](#footnote-ref-2)
3. Clause 22.01-1 of the Scheme. [↑](#footnote-ref-3)
4. Clause 22.01-4 of the Scheme. [↑](#footnote-ref-4)
5. Ibid [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. Clause 65.02 of the Scheme. [↑](#footnote-ref-7)
8. *Pong Property Development Pty Ltd* v *Monash CC* [2017] VCAT 1360 at [61]. [↑](#footnote-ref-8)