VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P636/2020  Permit Application no. TPA/47781 |
| CATCHWORDS | |
| Monash Planning Scheme; s81(1); two dwellings; change in policy, Zone Schedule and clause 55 standards; *Kantor* tests satisfied. | |

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| APPLICANT | Minh Dang |
| responsible authority | Monash City Council |
| SUBJECT LAND | 2 The Boulevard, Glen Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Michael Nelthorpe, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 2 November 2020 |
| DATE OF ORDER | 6 November 2020 |
| CITATION | Dang v Monash CC [2020] VCAT 1236 |

# Order

1. The decision of the responsible authority is set aside.
2. Pursuant to section 85(1)(f) of the *Planning and Environment Act 1987*, I direct that:

* The time within which the development described in Permit No TPA/47781 is to be started is extended to 20 December 2021;
* The time within which the development described in Permit No TPA/47781 is to be completed extended to 20 December 2023.

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| Michael Nelthorpe |  |  |
| **Member** |  |  |

# Appearances

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| For applicant | Mr Peter Connell, town planner of AnC Planning Consultants |
| For responsible authority | Mr James Turner, Principal Planner – Appeals Advisor |

# Information

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| Description of proposal | To extend the life of a permit for two dwellings. |
| Nature of proceeding | Application under section 81(1) 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 3 |
| Permit requirements | Clause 32.08-6: to construct two or more dwellings on a lot. |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 21.04, 22.01, 32.08, 52.06, 55, 65 & 71.02. |
| Land description | This rectangular site is located on the south-east corner of The Boulevard and Walter Street, Glen Waverley. It has a 15.46 metre frontage, a 30.56 metre depth and an area of 777 square metres. The land falls approximately 1.2 metres to its eastern boundary. A single-storey dwelling occupies the site. |

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

## What is this proceeding about?

1. On 20 December 2017, Monash City Council (‘the council’) issued a permit for the construction of two dwellings at 2 The Boulevard, Glen Waverley. Condition 16 of the permit states:

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 has not started before two (2) years from the date of issue;

b) The development is not completed before four (4) years from the date of issue.

In accordance with section 68 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.

1. On 13 December 2019, the applicant lodged a request to extend the commencement time of the permit by two years. On 5 February 2020, the council determined to refuse to extend the commencement time due to changes in planning policy and changes in the Schedule to the General Residential Zone that applies to the land.
2. The applicant seeks a review of that decision.
3. After hearing submissions from the applicant and the council, I set aside the council’s decision and directed that the time to commence the permitted development be extended to 20 December 2021 and the time to complete the permitted development extended to 20 December 2023. I gave my reasons orally at the time. The applicant requested written reasons. These are provided below.

## reasons

1. The relevant *Kantor* tests in this review are:
   * + - 1. the changes to planning policy, the Zone Schedule and the applicable standards of clause 55 of the Planning Scheme; and
         2. the likelihood of a new permit being granted for the permitted development.
2. I find it is likely that a new permit would be granted for the permitted development, despite it failing to provide the five-metre rear setback nominated in the varied side and rear setback standard in Schedule 3 to the General Residential Zone.
3. I make this finding because I am satisfied that the permitted development achieves the neighbourhood character objectives of the Schedule despite the varied rear setback not being achieved.
4. The first of these objectives encourages new development to contribute to the preferred garden city character though well landscaped and spacious gardens that include canopy trees. Dwelling 1 has over 150 square metres of front garden and a secluded courtyard of over 50 square metres, while Dwelling 2 has a secluded courtyard of 115 square metres. I am satisfied that these open space areas are large enough to provide the spacious gardens and canopy trees sought by this objective.
5. The second objective seeks to minimise hard paving throughout the site by limiting the length and width of accessways and limiting paving within open space areas. The permitted development has limited paving within the open space areas.
6. The third objective supports 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. Dwelling 1 of the permitted development has a generous front setback, the two dwellings have a two-metre break between them and Dwelling 2 has a southern side with a minimum width of two metres. The upper floors of both dwellings are well recessed from their ground floor footprints. I find that these aspects of the built form achieve the neighbourhood character objective.
7. The fourth objective supports new development that locates garages and carports behind the front wall of buildings. The permitted development meets this objective.
8. I am not persuaded by the council’s argument that a green corridor would be achieved by providing a five-metre setback at the site’s rear boundary. The site is one of only four lots facing The Boulevard between Walter Street and The Ridge and a two-dwelling development occupies the site on the corner of The Boulevard and The Ridge. Consequently, any ‘green corridor’ would be very short and would end abruptly at its eastern end.
9. Apart from this, lots to the south of those facing The Boulevard face either Walter Street or The Ridge and have dwellings with shallow side setbacks adjacent to the rear boundaries of the lots facing The Boulevard. As such, they make an insubstantial contribution to the green corridor sought by the council.
10. On a separate matter, I am not persuaded that a five-metre setback on the south side of a two-storey dwelling strikes an appropriate balance between the competing objectives of neighbourhood character policy, amenity for future residents of the dwelling and efficient use of the site. Much of this setback is unlikely to meet the solar access objectives of Standard B29 of the Planning Scheme and it is inefficient to create such a large ‘side’ setback along the southern side of Dwelling 2.
11. This raises a challenge of interpretation of the varied ‘rear’ setback standard of Schedule 3 on corner lots. I accept the council’s submission that the ‘rear’ setback is based on the lot’s existing conditions yet consider it is equally valid to say that the ‘rear’ setback is what is behind proposed Dwelling 2, i.e. to the east of this dwelling rather than to the south. I note that clause 55 does not assist in resolving this challenge as it refers to ‘side and rear setbacks’ without distinguishing them. It is only when one of these two setbacks is varied by a Schedule that this challenge occurs.
12. I distinguish the decision in *Clause 1 Planning v Whittlesea CC*.[[2]](#footnote-2) In that case, the Planning Scheme had changed from having no statement of preferred neighbourhood character to having a statement that set architectural and landscaping outcomes. Accordingly, the test changed from respecting neighbourhood character to positively contributing to a preferred character. The Tribunal found that the proposal’s mass and appearance did not make this positive contribution.
13. This differs from what is before me where the change in the Planning Scheme is from one version of the preferred Garden City character to another.
14. In conclusion, policy and varied standards of clause 55 are discretionary and are to be applied in the context of the site and its surrounds. They are not rules that must be met in order to achieve the Planning Scheme’s objectives.

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| Michael Nelthorpe |  |  |
| **Member** |  |  |

1. The submissions of the parties and any supporting exhibits 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. [2020] VCAT 1082 [↑](#footnote-ref-2)