VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1129/2019  Permit Application no. TPA/49621 |
| CATCHWORDS | |
| Section 77 *Planning and Environment Act 1987,* Residential Growth Zone, RGZ3, Neighbourhood Character, visual bulk, clause 22.01, access from rear lane, car stackers, landscape space, Amendment C125 Part 2. | |

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| APPLICANT | Papermite Pty Ltd |
| responsible authority | Monash City Council |
| respondents | Prudential Wealth Management Pty Ltd & MKS Asset Management Pty Ltd |
| SUBJECT LAND | 25 Thomas Street CLAYTON VIC 3168 |
| WHERE HELD | Melbourne |
| BEFORE | Alison Glynn, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 4 December 2019 |
| DATE OF ORDER | 11 December 2019 |
| CITATION | Papermite Pty Ltd v Monash CC [2019] VCAT 1954 |

# Order

### Amend permit application

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: | R Architecture |
| * Drawing numbers: | TP03 – TP05, all Revision C; TP06 Revision D; TP07 Revision C; TP08 – TP10 all Revision A. |
| * Dated: | 21 October 2019 |

### Permit granted

1. In application P1129/2019 the decision of the responsible authority is set aside.
2. In planning permit application TPA/49621 a permit is granted and directed to be issued for the land at 25 Thomas Street, Clayton in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:

* Construction of five dwellings on a lot in a three storey building.

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| **Alison Glynn**  **Member** |  |  |

# Appearances

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| For Papermite Pty Ltd | Mr Andrew Clarke, town planner of Clarke Planning Pty Ltd. He called the following witness:   * Mr Evan Boloutis, traffic engineer. |
| For Monash City Council | Mr James Turner, town planner. |
| For Prudential Wealth Management Pty Ltd and MKS Asset Management Pty Ltd | Mr How Ng, town planner of Melbourne Planning Pty Ltd. |



# Information

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| Description of proposal | Construction of five, three storey dwellings with a communal car stacker garage. |
| 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 | Residential Growth Zone – Schedule 3 (RGZ3)  No overlays |
| Permit requirements | Construction of two or more dwellings on a lot in RGZ3 |
| Relevant scheme policies and provisions | Clauses 11, 15.01, 16, 18, 21.04, 21.06, 21.08, 22.01, 32.07, 52.06, 55 and 65. |
| Land description | The site has a 15.24 metre frontage to the west side of Thomas Street with its rear boundary abutting a lane that services shops forming part of the Clayton Activity Centre. To the north and south are single storey dwellings. Further north are two sets of double storey, multi dwelling developments. |
| Tribunal inspection | I inspected the site before the hearing on 3 December 2019. This included a view from the rear lane and Thomas Street. |

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

## what is this proceeding about?

1. In May 2019, Monash City Council decided to refuse to grant a planning permit for five, three storey dwellings with rear car parking, in a stacker that accesses a rear lane at 25 Thomas Street, Clayton. The council did so on grounds that:
   * + - 1. The proposal was inconsistent with residential development policy at clauses 21.04 and 22.01 of the Monash Planning Scheme, as it existed at that time, as it failed to achieve architectural and urban design outcomes that positively contribute to the neighbourhood character having regard to the desired future character of the area.
         2. The proposal does not adequately satisfy the objectives and design standards of clause 55 of the Monash Planning Scheme with regard to neighbourhood character, site layout and building massing, vehicle access, and parking location, integration with the street, setbacks, landscaping, amenity impacts, private open space provision, sense of address and design detail.
         3. The proposed development is inconsistent with the design objectives of the Residential Growth Zone Schedule 3 (RGZ3).
         4. The vehicle access from the rear laneway is not supported.
         5. The proposal is an inconsistent design response for the site.
2. Papermite Pty Ltd (the applicant) has asked the tribunal to review this decision. In doing so it circulated amended plans dated 21 October, 2019 that sought to address the council conerns. These were substituted at the commencement of the hearing and form the proposal that is the basis of my consideration of the proposal.
3. On 14 November 2019, Amendment C125, Part 2 to the Monash Planning Scheme was gazetted. This amendment substantially redrafted clauses 21.04 and 22.01. I must assess the proposal against these redrafted provisions. This includes the new preferred neighbouhood character statement for the area of the site as set out in clause 22.01. The council submits that the plans continue to fail the preferred neighbourhood character statement, and both clauses of the planning scheme.
4. MKS Asset Management Pty Ltd owns 23 Thomas Street to the north of the review site and Prudential Wealth Management Pty Ltd owns 27 Thomas Street, to the south of the review site. These property owners, both represented by Mr Ng, oppose the development because they too consider the proposal is inconsistent with neighbourhood character and provides inadaquate access. They also submit that the proposal has a number of matters of design detail that they say fail clause 55 requirements and therefore is an overdevelopment.
5. This proceeding is therefore to consider if the proposal, as set out in the October plans is acceptable when tested against the current provisions of the Monash Planning Scheme, including the current provisions of clauses 21.04 and 22.01.

## what are the key issues?

1. From the submissions and evidence provided, and my review of material relevant to the proceeding I find there are several key questions I need to determine:

* Is the proposed design an acceptable response to neighbourhood and housing policy affecting the site?
* Does the proposal result in unreasonable off-site amenity impacts?
* Does the proposal provide acceptable access and car parking?
* Is the internal amenity acceptable?

1. I address these below in context of the current provisions of the Monash Planning Scheme.

## proceedural issue

1. On 7 December 2019 Dr Chan sent an email to the tribunal stating she is a trustee and beneficiary of the two trusts that are the landowners of 23 and 27 Thomas Street. This additional correspondence, that was also sent to other parties, detailed additional submission in support of her position that a permit should not be granted. No leave was given for any party to make further submission after the hearing and as is the usual practice at the tribunal it would be procedurally unfair to other parties to accept such, unsolicited material. Accordingly I have had no regard to this additional material in making my findings as set out in reasons below.

## does the proposal adequately respond to neighbourhood and housing policy?

### What is proposed?

1. The proposal is to establish five dwellings on the site. Four are attached, three storey townhouses and the fifth, rear dwelling has a ground floor entry, but its habitable space sits above a proposed communal garage. This communal garage will accommodate 11 car parking spaces in a stacker arrangement to be accessed from the rear lane.
2. The front dwelling, facing Thomas Street has ground floor bedrooms and first floor living with a balcony to the street. It then has an additional bedroom at its top level. The building is set back four metres to the street with two window frames projecting into this setback.
3. Dwellings 2, 3 and 4 follow a consistent template of ground floor living, ground floor secluded open space to their north and three bedrooms above; two at first floor and one at the top level.
4. The rear dwelling is accessed at ground level, but has its living area with a north facing balcony and one bedroom at first floor, and a second bedroom at second floor. This dwelling is arguably an apartment not a townhouse, as it sits generally above part of other dwellings being the communal garage area.
5. Indicative images of the proposal are in figures 1 and 2 below.

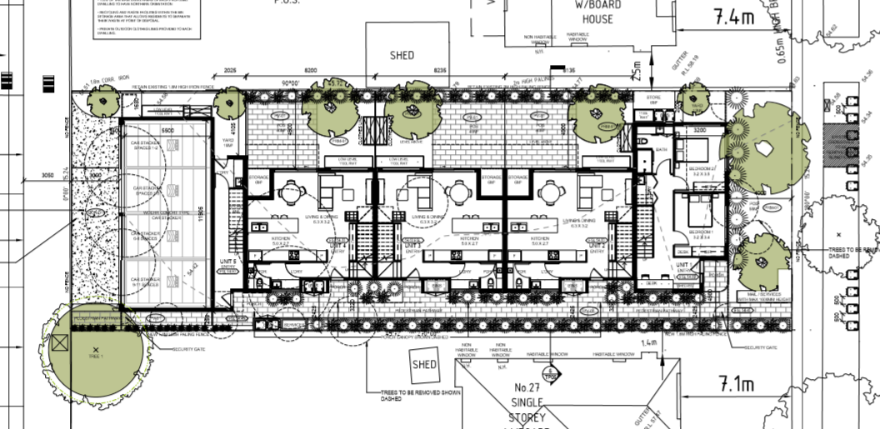


Figure 1 - Proposal: Ground floor layout



Figure 2 - Proposal: 3D sketch from south-east

### Is this an acceptable response to policy and provisions affecting the site?

1. All parties agreed there is strong policy support for increased housing density on this site due to its location in the Clayton Activity Centre. This includes State policy at clauses 11.03 and 16.01-1S that seek to direct increased housing density in well serviced locations, including activity centres. Clause 16.01-2R nominates that new housing to meet population growth in metropolitan Melbourne in a sustainable way is to be developed in areas designated as National Employment and Innovation Clusters (NEIC)s. The Clayton Activity Centre forms part of the Monash NEIC and is in easy walking distance to the core of the Clayton Activity Centre and Clayton Railway Station.
2. Local residential development strategy at clause 21.04 confirms this stating in its overview at clause 21.04-1:

Monash is committed to managing residential growth to ensure it is directed to neighbourhood and activity centres that are well serviced by public transport, retailing, community facilities and employment opportunities. A significant opportunity exists to increase residential densities around the Monash National Employment Cluster to provide housing close to jobs.

1. The residential development strategy goes on to direct higher scale development to activity centres, including the Monash NEIC and the Clayton Activity Centre, provided it also addresses neighbourhood character policy at clause 22.01.
2. Clause 22.01 directs that development should be consistent with a preferred future character statement as set out in the policy and addresses a number of general design directives that apply to all development across the municipality. The preferred neighbourhood character statement for the Clayton Activity Centre, in which the site sits, states:

The scale of new residential development will generally comprise larger footprint apartment development of a high-quality design and finish. Some infill town house and unit development will also occur. Where possible on larger sites, developments will be multi-level, and set in open gardens. Although setbacks from all boundaries will be less than is common in other parts of Monash, the developments will ensure the incorporation of well-maintained landscaping to address the garden city character, albeit in a more urban form.

1. A key question of debate in this proceeding is whether the proposal adequately responds to this preferred character statement. The council position, as presented at the hearing, is that ‘the critical issue for the council with this proposal is that the development of the land with only 5 dwellings is an underdevelopment of this site’. This is somewhat different to its assessment in May 2019 to the original proposal, that concluded ‘the scale of the development does not sit comfortably on this relatively small site and the proposed design fails to reflect the existing or preferred neighbourhood character of the area’ that was a different statement at that decision making time.
2. From what the council put to me at the hearing, I understand it would prefer an apartment building in this location, but also that for the site size (just less than 700sqm) the proposal is too visually bulky and lacks sufficient setbacks for the building proposed.
3. The objectors also contend that the building is too visually bulky and dominating to its existing neighbours, but that if a development is to occur, it should potentially consolidate with its neighbours. Having said this, Mr Ng submits that an apartment building is not possible given the council current requirements for secluded private open space on sites in this area. I acknowledge that the varied standard B28 set out in the RGZ3 schedule only provides for ground level private open space. I also agree that this requirement is contradictory to the proposition of an apartment building, but as a non-mandatory requirement I consider it can be addressed on a site by site basis, according to the provisions of clause 55.
4. The policy at clause 22.01 also encourages the consolidation of sites to achieve residential intensification where this is ‘specifically encouraged by the relevant zoning schedule’. This site is in RGZ3 where no such specific encouragement is specified.
5. RGZ3 has general purposes set out in its parent provision that include to provide housing at increased densities in buildings up to and including four storeys. As a development that is three storeys, the proposal is consistent with this purpose. It is also consistent with the reiterated direction to ‘encourage a diversity of housing types in locations offering good access to services and transport including activity centres and town centres’.
6. Specific design objectives of the RGZ3 schedule are:

* To facilitate housing growth in the form of apartment developments of a high quality design and finish.
* To ensure developments are constructed within an open garden setting through the retention and planting of vegetation, including canopy trees.
* To ensure that the height, scale and form of development respects any sensitive residential interfaces and minimises the appearance of visual bulk.

1. The proposal is not an apartment development as sought by one of the RGZ3 design objectives. Other divisions of the tribunal have already commented on this. In *HLP International Pty Ltd v Monash CC[[2]](#footnote-2)* the tribunal commented that:

[13] …based on the RGZ3 and the local planning policy framework in the planning scheme at present, a greater intensity of development is encouraged in this area including apartment buildings. However this encouragement does not extend to the point of excluding other types of medium density housing. Therefore, a three storey townhouse development is an acceptable form of development to propose in RGZ3.

1. This position was endorsed by the tribunal in *Beattie v Monash CC[[3]](#footnote-3).* In both of these cases, Part 2 of Amendment C125 had not been approved and there was a greater disconnect between the neighbourhood character sought for areas applying RGZ3 and clause 22.01. With Part 2 of Amendment C125 now approved, the preferred character statement for the site of my review is now clear and consistent with the purposes of RGZ3. This preferred character statement acknowledges new development will ‘generally comprise larger footprint apartment buildings’ but also ‘some infill townhouse and unit development’. It is on ‘larger’ sites that multi-level buildings with open gardens are expected. Given there is no specific direction to consolidate sites in the schedule, providing a range of design options, including both townhouses and apartments, must be expected.
2. Reading the directions of RGZ3 together with the preferred character statement set out in clause 22.01 leads me to conclude that there is no express conflict with the proposal being generally a townhouse form, rather than apartments, or that because it is not an apartment building it is an underdevelopment of the site. For reasons I examine below I also consider that as a townhouse development it is not an overdevelopment.
3. The RGZ3 schedule sets out a number of varied requirements of clause 55 of which the proposal meets all, other than a rear setback that I address elsewhere in reasons below and the open space provision of dwellings 1 and 5. The schedule does not set a different height limit, so the discretionary four storey height limit of the parent provision applies. The RGZ3 schedule then sets out decision guidelines. In summary these direct that a proposal should:

* Include well located open space.
* Provide vegetation in the front setback.
* Provide for appropriate landscaping, including minimise the need to remove any significant trees and provide appropriate building setbacks for landscape space.
* Minimise hard paving throughout the site including limiting driveway lengths and widths, providing landscaping on both sides of driveways, and restricting the extent of paving within open space areas
* Minimise vehicle crossovers in number to prevent traffic disruption, and preserve nature strips and street trees.
* Include significant breaks and recesses in building massing and is designed to avoid large block like structures dominating the streetscape
* Use robust and low maintenance materials and finishes that complement the neighbourhood.

1. I address each of these decision guidelines below.

#### Does the proposal include well located open space?

1. The council is critical that dwellings 1 and 5 rely on balconies for open space, when the standard B28 of clause 55.04-4, varied by the RGZ3 schedule, directs private open space to be provided at ground level. I concur with comments of the tribunal in *Beattie* that ‘given that the RGZ3 specifically includes apartment development in its objectives I consider it must also be the case that private open space is anticipated to occur on levels other than ground’[[4]](#footnote-4). I agree, noting that the only purpose of the provision is to provide for the recreational needs of residents.
2. The proposed balconies are at least 10sqm. One is for a two bedroom dwelling and the other is for a three bedroom dwelling. The balcony to the three bedroom dwelling, dwelling 1, faces Thomas Street so has an open east and part northern aspect. The balcony to dwelling 5 is to its north and is partly screened but has an open aspect to its west and has a minimum setback of 4.5 metres to the centre of the rear laneway. It therefore would meet an overlooking test even if a development occurs on land to the west of the lane.
3. I am therefore satisfied that the balconies of dwellings 1 and 5 can meet the recreational needs of their future occupants, particularly in the site context.
4. Dwellings 2, 3 and 4 are provided with ground level secluded private open space. The council accepts these spaces meet the requirements of clause 55, but Mr Ng submits they are not the requisite 40sqm as they are partly overhung by first floor form that acts as a sun-shade to the north facing spaces. There is nothing in clause 55.05-4 that directs the space should not be overhung or shaded. Indeed, providing some weather protection to these spaces is good. There are some issues of landscaping to these spaces that I address further below but I find the location and size of the open space provided is good.

#### Is the proposed front setback acceptable?

1. The proposal includes a landscaped, four metre deep front setback. Mr Ng notes that two small projecting window frame elements of the front façade are above 3.6 metres in height so do not meet the varied requirement of the RGZ3 schedule for front setbacks which is 4.0 metres. While these elements do not meet technical compliance with the standard, I am satisfied the façade and front setback setting is acceptable against the provisions of Clause 55.03, the RGZ3 schedule guidelines and the preferred character sought for reasons I set out below.
2. The setback is consistent with the preferred character statement to provide for apartment or townhouse form. Either would see a single building mass to the street with a landscaped front setting and a general setback of four metres. Even if the building were a more traditional apartment form it is likely to have small projecting balcony elements. The window frames assist in breaking up the mass and add visual interest as sought by other elements of the RGZ3 schedule. I also note the council made no comment or opposition to these projections.
3. The building will be significantly different to its immediate neighbours but this is a location where significant change is expected and encouraged. As a question of preferred character, having a three storey street wall that is modulated and articulated in nuanced manner as proposed, I find is acceptable.
4. There is generous room in the front setback for landscaping. This is primarily because the proposal relies on use of the rear lane for car access. This ‘frees up’ the front yard to provide a garden setting as is sought by the relevant local policy.
5. My only concern with the front setback is that the location of the bin storage for dwelling 1 is located to the north of its dwelling in a somewhat isolated and inconvenient location. As I commented at the hearing, when such services are not easy to access there is a natural desire to not use the designated storage location. In this case I am concerned that this is likely to lead to bins being left in the front yard. I consider a more acceptable outcome is for the bins for dwelling 1 to be located either in a nook created where the current study is proposed, or in the proposed side setback, similar to either dwellings 2, 3 and 4 or dwelling 5. This is a small issue of design detail that I am satisfied can be addressed as a permit condition.

#### Is the space for, and provision of, landscaping acceptable?

1. The proposal does not rely on any loss of significant trees. There is very little vegetation currently on the site, other than for two shrubs near the rear boundary. These will be replaced with new vegetation proposed in the landscape concept plan updated with the amended plans. This plan identifies that there is room in the secluded open space areas, along the south side boundary and in the front setback for improved landscaping, consistent with the garden city character concepts set out in the planning scheme. I say this, however, also in context that this is a distinctly urban location where more intensive urban form is sought. In this context, I am satisfied the setbacks provide sufficient room for meaningful landscape as demonstrated in the landscape concept plan.
2. The minimal rear landscape is to accommodate the car stacker and rear access. The immediate land to the rear boundary is the service lane and then the rear of commercial properties. This is not a typical suburban context where a landscaped rear interface would be preferred. I am therefore not concerned that in this context the rear setback has limited landscaping.
3. What the rear interface achieves is limiting the extent of hard paving, normally associated with a driveway or basement entry from the residential street, where the design direction is to emphasise landscaping over hard paving. I therefore consider the design approach of the rear access is a positive attribute of the proposal.
4. I am concerned that the secluded private open space areas of dwellings 2, 3 and 4 have an unnecessarily large area of impervious hard paving and I agree with Mr Ng that the placement of the canopy trees next to clothes lines needs review. I anticipate it is the clothes lines that may need to be moved, not the proposed trees. This again is a matter of design detail that can be resolved in the provision of plans and landscape plan for endorsement.
5. I will direct that the landscape plan be reviewed to consider alternatives to the extent of hard paving proposed in the yards of dwellings 2, 3 and 4 given the directions of the RGZ3 schedule and broader policies of the planning scheme for use of permeable surfaces where possible. I accept that in these yards, grass may not be a practical option, but other options can also be explored rather than hard, impervious paving.

#### Does the proposal minimise vehicle crossovers?

1. I have already commented above that the proposed use of the rear lane minimises vehicle crossovers to Thomas Street. I consider this is a positive attribute in addressing the on-street parking retention in Thomas Street and landscape objectives of the planning scheme.

#### Is the building massing acceptable?

1. The council and objectors are critical that the building, for its lot size, is too large. The council comments that the scale and elongated building form along with the visual presentation impacts on the adjoining residential properties. It says there is a lack of space for landscape planting.
2. The building includes side setbacks of 2.5 – 3 metres to the south side and more on parts of the north side to accommodate landscaping and tree planting, as well as most of the front setback dedicated to landscaping to soften the form.
3. The objectors are critical of the use of façade detailing to create visual articulation when much of the lower two levels are at the same plane. The design includes modulation and mix of materials and shadow lines to create visual interest as well as maintaining side and front setbacks to accommodate meaningful landscape.
4. As a three storey building, that is sitting in an area expected to have building up to and including four storeys, I am satisfied the proposed mass is a reasonable outcome. The impact on the existing single dwellings on either side will be a significant change, but this is an area where change is expected, and indeed the counter submission put to me by the council was that the proposal was an underdevelopment.
5. As an assessment against the character policy at clause 22.01 and the decision guidelines of the RGZ3 I am satisfied the building includes significant breaks and recesses in its massing. The use of modulation in form and materials is designed to avoid large block like structure. I am satisfied that the mass will not dominate the street, particularly as more change occurs, as directed by the zone and policy provisions for the area.
6. The rear setback meets the relevant rear setback at ground level. The top level encroaches into the RGZ3 varied five metre setback requirement as it is only set back 3.5 metres from the rear boundary. This upper level is small and interfaces to a rear lane. It is not a sensitive interface that I find requires a greater setback. I also acknowledge Mr Clarke’s comment that the balcony and setback of this rear dwelling maintain at least a 4.5 metre separation to the centre of the rear of the lane. If a future development occurs on the commercial side of the laneway, an equitable development setback has been established.
7. I consider the general use of car parking to the rear of the site a good design response to the site context. It reduces crossovers and driveways to the front of the site as I have already discussed and creates a visual and acoustic barrier from the main residential components of the development, to the service environs of the lane.

#### Are the materials and finishes acceptable?

1. The council is critical that the materials palette is ‘basic’ comprising brick, cement sheet cladding and pre-cast concrete. The design objectives of RGZ3 direct the use of robust and low maintenance materials and finishes that complement the neighbourhood. The area currently comprises dwellings that are brick and weatherboard. Using brick and fibre-cement that is finished in a way to appear as weatherboard strikes me as being a material palette that directly responds to the directions of the schedule. They are robust and low maintenance, while reflecting the character of the area.
2. This is also not a case where the materials are simply notated as a generalised term. A specific form of cladding and finish is proposed as set out in the legend of the plans. The applicant acknowledged that the amended plans had not included the materials sheet that was included in the original application plans that illustrated the intended finishes that are described in the legend of relevant elevation sheets. Mr Clarke volunteered that the original materials sheet should be added into the endorsed plans. I agree and will direct this by permit condition.

### Other issues

1. The council referred me to the Draft Clayton Activity Centre Precinct Plan – May 2019 as a document to have some regard to. This has been undergoing a community consultation phase and I was advised it will be put to a meeting of the council early in 2020 to adopt a final plan and I presume it may recommend a planning scheme amendment to implement its findings. This draft plan identifies the west side of Thomas Street, including the review site, as suitable for six storey mixed use development.
2. I find I can give little, if any weight to this draft plan given it is not yet an adopted policy of the council, let alone a seriously entertained planning scheme amendment. I do, however, note that:

* The provision of the proposed rear access does not conflict with the strategy. Comments in the draft strategy include that the site sits in an area that ‘has good access via a rear laneway’[[5]](#footnote-5). The strategy also includes comments that this area ‘supports adequate servicing of development via rear laneways’[[6]](#footnote-6).
* The subsequent design direction proposed in the draft strategy is for a rear setback of building of at least 2.5 metres to widen the rear laneway on both sides. The proposed rear setback is 3.0 metres.
* The proposed four metre front setback is consistent with the design directions of the strategy that also direct a four metre front setback to Thomas Street.
* The proposed three storey building is less than the preferred six storey sought in the draft strategy, but I must address the proposal in context of the existing scheme that has a purpose of up to four storeys and no specific direction to consolidate sites or provide for taller form. If the structure plan is adopted and changes are made to the planning scheme to create a different design regime, then the applicant may seek to revisit the proposal to establish a higher order development. Based on the tests of the current planning scheme, I find the proposal acceptable.

### Conclusion

1. In summary I am satisfied the proposal meets the relevant objectives and decision guidelines of RGZ3. In doing so it addresses the relevant requirements of clause 55 for site massing, street setback as well as side and rear setbacks.

## Does the proposal result in unreasonable off-site amenity impacts?

1. I have already addressed the issue of visual bulk as set out in my discussion of the general design above. The proposal meets relevant requirements of clause 55.04 and I am satisfied that in this area of significant change the change in visual form from the current traditional back yards of adjoining properties is acceptable.
2. The proposal also meets relevant tests for overlooking and overshadowing. The council is critical that too many windows require screening. No ground level windows require screening. Upper level windows of dwelling 1 face east to the street so they also do not need to be screened. The rear dwelling includes a terrace with a screen to its east and north, but is open to the west providing an outlook from first floor windows. It also has a first floor west facing window to the lane, adding passive surveillance to the lane.
3. The upper level windows of bedrooms to dwellings 2 – 5 are screened but given their height, relative to adjoining yards it is possible they could be modified to reduce screening and still meet the requirements of standard B22 of ResCode. Screening bedrooms windows at upper level is common in apartment buildings and townhouses in inner areas of activity centres. I am satisfied the use of screening in this proposal is not excessive.

## Does the proposal provide acceptable access and car parking?

1. The council’s grounds of refusal include that access from the rear laneway is not supported. The council’s written submission to the tribunal did not elaborate on this ground of refusal or make further submission. In response to my query at the hearing on this issue, the council simply commented that it continues to consider the access unacceptable.
2. The officer report that led to the refusal by the council in May 2019 states that there is a high number of businesses that use the laneway for both access, loading and unloading which means that it is not appropriate for residential vehicle access. The report says the residential use and functionality of stacker systems would cause regular delays for the commercial laneway users coupled with the trucks loading and unloading that would prevent access to dwellings.
3. While the council officer report suggests that the lane is for commercial use only, the title to the land clearly shows it has a ‘road’ abutting its rear boundary. Nothing was put to me that the property does not have legal access. The use of the lane also seems to be supported by more recent strategic work of the council in its Draft Clayton Structure Plan as I have discussed above.
4. The applicant relied on traffic evidence of Mr Boloutis who undertook a traffic survey of the lane between AM and PM peak hours to determine the extent of traffic and any impact this may have on the capacity for cars to enter and exit the site through use of a stacker. My observation of the lane at 8.30 in the morning concurred with Mr Boloutis’s survey and observations that at this time the lane is not particularly busy. If a through vehicle needed to wait then it could and should do so. Indeed when I was in the lane, there was one occasion where a car needed to pull over to allow a truck to pass. This is the nature of rear lanes.
5. Aerial photos of the area confirm that during business hours the rear of shops use the lane and many cars are parked casually in behind shops, but I have no statistical analysis to support a proposition that this makes the lane unsafe, or inconvenient to use for residential use.
6. Mr Boloutis’ evidence provided the only statistical analysis and impact of through traffic needing to wait while a car waits for the stacker to align and the car to then access the stacker. As Mr Boloutis commented, the key issue of potential disruption is from a car waiting to enter the stacker. This is more likely to occur in the evening, when cars are arriving home. He estimates that for the five dwellings, peak hour is likely to generate three vehicle movements. In the PM peak this is likely to result in two, incoming cars to the stacker. This may lead to two, 10, 70 or 100 second wait times, depending on the stacker shuffle arrangement at the time.
7. Importantly the proposal includes a three metre setback that allows turns into and out of the stacker in one movement. The setback could also allow a car to prop, side-on to the lane, if needed, to allow a through movement of another vehicle if it is waiting for the stacker. The turning car could then manoeuvre back to make the turn into the stacker once the other vehicle had passed. I also note that residential use may often be outside of core business hours.
8. The council and objectors are also concerned the stacker arrangement does not provide convenient parking for future residents as they will need to walk out into the lane to access the stacker. The lane is well patronised, not isolated, and includes a number of commercial properties to the west including rear, pedestrian access. There are also two public carparks east of the lane for customer parking. This means customers are often using the lane as a pedestrian access. This all leads me to a view that there is sufficient casual surveillance of the lane for residents to safely make the short, direct pedestrian route between the stacker and the secure side gate.
9. I am also satisfied that the stacker is sufficiently convenient to residents. The arrangement means residents need to walk some way along the proposed pedestrian side path close to the south side boundary to get to their car, but this is no different than if a resident had to walk down to, and through a basement. It provides secure parking in a location where the emphasis is on allowing, and encouraging, residents to use alternative modes to transport such the train and bus routes close by.
10. In summary, I am satisfied the stacker arrangement provides safe and convenient access for the development without unreasonably impacting on the effectiveness of the rear lane.
11. In making this finding I note that as part of providing expert evidence about the stacker the permit applicant also lodged with the tribunal, and circulated to parties, an acoustic report to examine any issues of locating dwelling 5 above the car stacker unit. This report was not contested by the council. As Mr Clarke noted, it is appropriate that this be endorsed and referenced in the planning permit to ensure endorsed plans address acoustic measures identified in the report to protect dwelling 5 from noise from the stacker. I have added this into permit conditions.

## Is on site amenity acceptable?

1. I have already addressed many of the issues raised by the council and the objectors about internal amenity in reasons above. This includes the access to the stacker, bin storage and space for recreation.
2. During the hearing I questioned the location of the low level water tanks proposed to dwellings 2, 3 and 4 in front windows. This question was only because I am not familiar with tanks of this form, but accept that there may be tanks that can sit under a window height, if they are wide and long. Again this is a matter of design detail that can be addressed in the consideration of landscape and final development plans to be endorsed.

## Conclusion

1. This proposal provides for development consistent with the zone purposes and the policy set out at clauses 21.04 and 22.01 of the planning scheme. There are minor issues of design detail that need to be addressed through permit conditions, but I do not see this results in ‘design on the run’ or is an overdevelopment as suggested by Mr Ng. Nor do I find the proposal is an underdevelopment as submitted by the council. It is an appropriate response to the site’s context and site conditions.
2. For the reasons given above, the decision of the responsible authority is set aside. A permit is granted subject to conditions.

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| **Alison Glynn**  **Member** |  |  |

# Appendix A – Permit Conditions

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| --- | --- |
| Permit Application No: | TPA/49621 |
| Land: | 25 Thomas Street CLAYTON VIC 3168 |

|  |
| --- |
| What the permit allows |
| In accordance with the endorsed plans:   * Construction of five dwellings on a lot in a three storey building. |

## Conditions:

1. Before the development starts, a copy 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 application plans (TP03 – TP05, all Revision C; TP06 Revision D; TP07 Revision C; TP08 – TP10 all Revision A: prepared by R Architecture, dated 21 October 2019) but modified to show:
   1. Relocation of the rubbish bin storage to dwelling 1 to the south side of this dwelling, within the side setback of the building.
   2. A materials schedule consistent with sheet 03.3 Materials and Finishes Schedule forming part of urban context report prepared by R Architecture.
   3. Any noise mitigation measures that accord with the recommendations in the acoustic report prepared by Acoustic Control Pty Ltd, dated 18 November 2019.
   4. Details of proposed water tanks and their location relative to openable windows.
   5. Changes to paving to align with requirements of the landscape plan in condition 4.

### No Alteration or Changes

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.

### Landscaping

1. 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 be generally in accordance with the Zenith Concepts Landscape Design, dated November 2019 (Sheet 1 of 1 – revision B) but show the proposed landscape treatment of the site including:-
   1. the location of all existing trees and other vegetation to be retained on site
   2. provision of canopy trees with spreading crowns located throughout the site including the major open space areas of the development
   3. planting to soften the appearance of hard surface areas such as driveways and other paved areas
   4. 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
   5. the location and details of all fencing
   6. the extent of any cut, fill, embankments or retaining walls associated with the landscape treatment of the site
   7. details of all proposed hard surface materials including pathways, patio or decked areas. This should include increased permeable paving or soft landscaping in the secluded private open space areas of dwellings 2, 3 and 4.

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. 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.
2. 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.
3. 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. Further information regarding the design of the on-site detention system is provided in the notes section of this permit.
4. The nominated point of stormwater connection for the site is to the north-west corner of the property where the entire site's stormwater must be collected and free drained via a pipe to the Council pit in the laneway outside rear boundary to be constructed to Council Standards. If no pit exists, or the existing pit is either non-standard or in poor condition a new pit must be constructed to the Council standards.
5. Any works within the laneway must ensure the laneway be reinstated to Council standards.

### Vehicle Crossovers

1. 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.
2. Approval of each proposed crossing, and a permit for installation or modification of any vehicle crossing is required from Council’s Engineering Department.
3. Engineering permits must be obtained for new or altered vehicle crossings and new connections to Council pits and these works are to be inspected by Council's Engineering Department. A refundable security deposit of $1,500 is to be paid prior to the drainage works commencing.

### 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:
   1. The development has not started before two (2) years from the date of issue.
   2. The development is not completed before four (4) years from the date of issue.
2. 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 -**

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. [2018] VCAT 942 (19 June 2018) [↑](#footnote-ref-2)
3. [2019] VCAT 258 – specifically paragraph 40. [↑](#footnote-ref-3)
4. *Beattie* at paragraph 52 [↑](#footnote-ref-4)
5. Page 34 [↑](#footnote-ref-5)
6. Page 72 [↑](#footnote-ref-6)