 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

 planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1342/2020Permit Application no. TPA/51243 |
| CATCHWORDS |
| Appeal against conditions requiring increased setbacks to rear and side boundaries, GRZ3 variations and neighbourhood character considerations  |

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| APPLICANTs | Jonathan and Daniela Kambouris |
| responsible authority | Monash City Council |
| SUBJECT LAND | 3 Peter Street, Oakleigh South |
| WHERE HELD | Melbourne |
| BEFORE | K Birtwistle, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 20 November 2020  |
| DATE OF ORDER | 24 November 2020 |
| CITATION | Kambouris v Monash CC [2020] VCAT 1321  |

# Order

1. The decision of the responsible authority is varied.
2. The Tribunal directs that planning permit TPA/51243 must contain the conditions set out in planning permit TPA/51243 issued by the responsible authority on 14 July 2020 with the following modifications:
	1. Conditions 1d) and 1f) are deleted.
	2. Condition 1b) is amended to read:

1b) Dwelling 2 – Kitchen setback a minimum of 5 metres from the western boundary with the laundry extended a commensurate 600mm on the eastern side of the dwelling.

* 1. Condition 1e) is amended to read:

1e) Dwelling 2 – Bed 2/WIR/Ensuite shifted 600mm east to provide a minimum setback of 5 metres from the western boundary*.*

* 1. Conditions in the planning permit are renumbered accordingly.
1. The responsible authority is directed to issue a modified planning permit in accordance with this order.

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| **K Birtwistle** **Member** |  |  |

# Appearances

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| For Jonathan and Daniela Kambouris | Craig Murphy, town planner of Braemar Urban |
| For Monash City Council | James Turner, town planner |

# Information

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| Description of proposal | Construction of a second dwelling to the rear of an existing dwelling. The dwelling is proposed to be two storeys with a two car garage. A new single carport is proposed to be constructed to the rear of the existing dwelling and both dwellings will share vehicular access via a crossover and driveway along the northern side boundary. |
| Nature of proceeding | Application under section 80 of the *Planning and Environment Act 1987* – to review the conditions contained in the permit. |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone – Schedule 3 (GRZ3) |
| Permit requirements | Clause 32.08-6 – Construction of two or more dwellings on a lot in the GRZ3 |
| Land description | The site is located on the west side of Peter Street, approximately 70 metres south of Valley Street, Oakleigh South. The site is rectangular in shape, with a frontage width of 16.3 metres, a depth of 42.2 metres and an overall site area of 690 sq.m.The site is currently developed with a single storey detached dwelling with garage to its rear. A single crossover provides access to the site along it northern side boundary. |

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

## What is this proceeding about?

1. Jonathan and Daniela Kambouris (the applicants) lodged a planning application with Monash City Council (the Council) to develop a second dwelling behind the existing dwelling at 3 Peter Street, Oakleigh South. On 14 July 2020, the Council issued a planning permit for the development subject to a number of conditions, which amongst others, requires amendments to the considered plans.
2. The disputed conditions (all contained under Condition 1) are:

1a) The Dwelling 2 garage west boundary setback increased to 4.2 metres by reducing the length of the garage and relocating the external storage.

1b) The Dwelling 2 ground floor kitchen west boundary setback increased to 5 metres.

1c) The Dwelling 2 ground floor family room west boundary setback increased to align with the 2/5 Peter Street wall on boundary. The family room may be extended into the south boundary courtyard.

1d) The Dwelling 2 ground floor siting room and Dwelling 1 carport south boundary setback increased to 1 metre and the external storage relocated.

1e) The Dwelling 2 first floor bedroom 2 ensuite and walk in robe west boundary setback increased to a minimum 5 metres.

1f) The Dwelling 2 first floor bedroom 4 west boundary setback increased to a minimum 5 metres.

1. The applicants for review circulated further and better particulars on the 10 October 2020 which included the proposed rewording of Conditions 1b) and e). The Council has indicated that they support this proposed rewording.
2. The Council says the remaining conditions are necessary to ensure acceptable character and amenity outcomes and achieves the Council’s vision for the area that is contained within the GRZ3 and Clause 22.01. They say that each of the contested conditions are entirely reasonable, can be accommodated without compromising the design and are necessary to achieve a comfortable fit in this neighbourhood.
3. In contrast, the applicants submit that the design in its current form represents an acceptable outcome with respect to the siting of Dwelling 2. They say that the disputed conditions relate primarily to “backyard” character rather than the streetscape; that the properties to both the north and south have been developed for two dwellings in a tandem configuration in a similar manner to what is proposed, and are well insulated from any amenity impacts from the proposal; and that numerous developments in the area have been constructed on or very close to their side and rear boundaries
4. Oral reasons were given at the conclusion of the hearing. In summary, I have decided to both affirm, vary and delete conditions in dispute, the details of which are provided in the following reasons. The following written reasons confirm the content of the oral reasons given.

## Consideration

1. For the purpose of this decision, the conditions have been grouped together where they seek to achieve similar aims or are interrelated.

#### Conditions 1a) and 1c)

1. Conditions 1a) and 1c) relate to the rear lower level of Dwelling 2. They seek to:
* Increase the setback of the garage west boundary to 4.2 metres by reducing the length of the garage and relocating the external storage.
* Increase the setback of the ground floor family room west boundary to align with the 2/5 Peter Street wall on boundary. The family room may be extended into the south boundary courtyard.
1. The Council says these increased setbacks are necessary in order to achieve meaningful landscaping and private open space opportunities along with responding to the pattern of development to the north and south. They rely on Schedule 3 to the GRZ which varies Standard B17 and requires a new wall not on or within 200mm of a rear boundary to be set back at least 5 metres.
2. They say that while Condition 1a) will still allow the garage to encroach into this varied setback the inclusion of this setback represents a modest variation and consistency with the property to the north at 2/1 Peter Street.
3. Further, they say the inclusion of condition 1c) requiring consistent alignment with the property at 2/5 Peter Street will reflect the backyard character in the immediate vicinity along with preventing the presentation of flat ground floor wall to the west.
4. The policy basis for these conditions is to achieve the preferred character set out in the statement for the Garden City Suburbs Southern Area in which this site is located which, in part, reads:

This character area will be notable for its spacious garden settings, tall canopy trees, consistency in front setbacks and the maintenance of setbacks from at least one boundary and from the rear of the site

1. The Council submits that the family room is of a generous size with sufficient space to accommodate the required change.
2. The applicants say that the proposed setback of 3.5 metres is entirely appropriate in the context where neighbouring sites provide little or no rear setback.

#### Condition 1d)

1. Condition 1d) seeks to increase the setback of the ground floor siting room of Dwelling 2 and the carport to Dwelling 1 from the south side property boundary to one metre and to relocate the external storage.
2. The Council says this condition will firstly reduce the extent to which the proposed dwelling is built boundary to boundary to better reflect the prevailing detached character of the area, and secondly, to increase the opportunity for landscaping.
3. The Council submits that the inclusion of Condition 1d) is consistent with the Council’s Local Policy and given the overall footprint of the family room, sitting room and carport, the changes are able to be accommodated without compromising the overall layout of the dwelling.
4. The applicant says the on-boundary construction in this location has little if any impact on the detached character of the area, and that the setback sought will provide no landscaping benefit.

#### Conditions 1e) and 1f)

1. Conditions 1e) and 1f) relate to the rear upper level setback of Dwelling 2. They seek to:
* Increase the setback of the first floor bedroom 2 ensuite and walk in robe west boundary to a minimum 5 metres.
* Increase the setback of the first floor bedroom west boundary to a minimum 5 metres.
1. The Council says these conditions seek to reduce the bulk and mass of the first floor when viewed from adjoining properties to the west, north and south. They say that that the first floor presents as a sheer wall with little articulation and the increased setbacks in both bedrooms 2 and 4 would provide benefits when also viewed from the north and south.
2. The applicants says this is not a neighbourhood that exhibits a consistently open or pristine backyard character. Nor is it one that is devoid of double storey built form at the rear of properties. They say there are no amenity implications that arise from this elevation.

## What are my findings?

1. Taking a holistic view, the conditions in dispute all seek to achieve a neighbourhood character outcome that both local policy and local variations to the General Residential Zone support. This outcome, in summary, is to achieve a landscaped setting through increased rear setbacks and the limitation of buildings on side boundaries.
2. This intent is expressed at both local policy level and through the GRZ3 Schedule and Clause 55 variations. The Council has undertaken the necessary policy development and planning scheme amendment process to enshrine its preferred character for this area.
3. In many ways, this matter is one of detail over substance. By that I mean that the Council agrees there are no quantitative off-site amenity impacts to adjoining neighbours, such as non-compliance with Clause 55 Standards relating to such matters as overlooking or overshadowing.
4. In essence, the series of interrelated plan changes sought by the conditions seek to achieve a neighbourhood character outcome. I think it is commonly agreed now that neighbourhood character is more than just about streetscape impacts. Character can also be defined by the backyard-scape.
5. This matter relates principally to this issue of backyard character, with the conditions essentially seeking increased setback of the built form from the rear boundary, and to a lesser extent, the southern side boundary.
6. The Council says this arises from its character policy at Clause 22.01 which seeks, amongst other matters, to respect the character of surrounding development, including the maintenance of consistent setbacks and to provide for vegetation and large trees to be planted within side and rear setbacks.
7. Relevantly, the policy seeks to provide side and rear setbacks capable of supporting canopy trees *and* to provide rear setbacks that support a green corridor of open space created by backyards in the neighbourhood. It seeks to limit the length of walls on boundaries to ensure landscaping space is provided around buildings.
8. The preferred character statement for the Garden Suburbs Southern area notes that this character area will be notable for, amongst other matters, the maintenance of setbacks from at least one boundary and from the rear of the site.
9. Condition 1a) allows the garage to be built 4.2 metres from the rear boundary, less than the 5 metres sought in the GRZ3 Schedule. The applicants seek a setback of approximately 3.5 metres.
10. Condition 1c) allows the ground level family room to be set back in alignment with its neighbour to the south – a setback of approximately 4 metres and less than the 5 metres sought in the GRZ3 Schedule. The applicants seek a setback of approximately 3 metres.
11. In my view, with respect to the ground level rear setback, Conditions 1a) and 1c) adopt a balanced approach based on the contextual considerations of its two abutting developments. The setbacks sought by these conditions will respect the neighbouring context without slavishly seeking to apply the 5 metres setback sought by the GRZ3. It is the specific site context that supports this approach. Had the adjoining sites had greater rear setbacks, an argument could well have been put that the 5 metre setback was warranted. But I don’t think a lesser setback than its neighbours (which in themselves are less than 5 metres) is reasonable or supported by policy.
12. I am satisfied that the pulling back of the garage and family room walls from the rear boundary (as provided for in Conditions 1a) and 1c)), to generally coincide with the neighbouring development pattern is respectful of the existing and preferred neighbourhood character and will achieve a greater opportunity for enhanced landscaping within this rear backyard spine. This outcome is consistent with the landscaping character outcomes sought by the preferred character statement.
13. For these reasons, I will retain Conditions 1a) and 1c).
14. I now turn to the issue of the ground level southern boundary setback – Condition 1d). Effectively, the condition seeks to remove part of the built form from the side boundary and provide a 1 metre gap or break. This is because, as currently proposed, Dwelling 2 is built to both side boundaries. Council says that providing this setback will better reflect the prevailing detached character and provide increased opportunity for landscaping.
15. The condition will not remove all of the built form from this boundary as the family room of this dwelling will remain. In essence, this means that the dwelling will still be built to both side boundaries. The issue is whether the narrow 1 metre set back sought, for a length of wall in the order of 4.6 metres will provide any character or landscape benefit. In this instance, I do not find this to be the case.
16. With a width of 1 metre, and being located on the south side of the dwelling, adjacent the driveway on the adjoining property, I am unpersuaded that this is likely or capable of providing any significant landscaping value to the broader neighbourhood. Further, this dwelling is set back so far from the street that its existence on this side boundary will be largely imperceptible.
17. I am satisfied that the increased rear set back that I have affirmed, together with these findings makes it reasonable that Condition 1d) be deleted.
18. Finally, I deal with the conditions relating to the upper level rear set back. Conditions 1e) and 1f) seek a minimum 5 metre setback for parts of the building to improve visual bulk outcomes through improved articulation from the ground levels below.
19. On the basis that I am affirming Council’s decision to increase the ground level rear setback, this has consequential impacts on the level above.
20. Based on the plans considered by Council, the western upper level elevation at approximately 12.5 metres wide (on a 16.3 metre wide lot) has a flat vertical plane with no significant materiality change. In my view, this requires further refinement to achieve improved articulation.
21. The parties have agreed to vary Condition 1e) to pull back the setback of Bedroom 2 to meet the set back of 5 metres sought by Council while allowing the form to push further into the site above the garage. I agree that this is a reasonable and necessary response to address what I consider to be the lack of recession across the rear of the building. Without this change, I consider the building across this flat plane would appear as a continuous building mass, contrary to Council policy. On the basis that the parties agree with a revised wording of Condition 1e), I will make that variation.
22. I now move to Condition 1f). I am satisfied that this condition can be deleted. The variation to Condition 1e) will allow a sufficient degree of recession of the upper western elevation such as to avoid a monotonous or flat presentation.
23. With respect to Condition 1b), the parties have agreed on a revised wording of this condition. As this is agreed between the parties, I will make that variation.

## Conclusion

1. In summary, and for the reasons above, my findings are to:
* Retain Conditions 1a) and 1c).
* Vary Conditions 1b) and 1e) in the format agreed by the parties.
* Delete Conditions 1d) and 1f).

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1. The submissions of the parties, any supporting exhibits provided to 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)