

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1065/2018
PERMIT APPLICATION NO. TPA/48792

CATCHWORDS

Three double storey dwellings; Non-compliance with mandatory garden area requirement; Reverse living; Insufficient balcony sizes for upper level principal living areas; Impacts on neighbouring trees; Overshadowing of neighbouring secluded private open space.

APPLICANT	Clayton Atlantic Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	8 Atlantic Street, Clayton
WHERE HELD	Melbourne
BEFORE	Rachel Naylor, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	12 November 2018
DATE OF ORDER	17 January 2019
CITATION	Clayton Atlantic Pty Ltd v Monash CC [2019] VCAT 78

ORDER

Amend permit application

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

Prepared by:	Innovation One Design Group
Drawing numbers:	TP 03 – TP 10, Issue A
Dated:	24/09/18

No permit granted

- 2 In application P1065/2018 the decision of the responsible authority is affirmed.
- 3 In planning permit application TPA/48792 no permit is granted.

Rachel Naylor
Senior Member



APPEARANCES

For applicant	Mr A Clarke, planning consultant of Clarke Planning
For responsible authority	Mr D De Giovanni, planning consultant

INFORMATION

Land description	<p>The site is located mid-block on the north side of Atlantic Street. It has an 18.29m width and a 41.15m length, creating a total area of 753sqm.</p> <p>The land is relatively flat with a 1.83m wide drainage and sewerage easement running along the rear (south) boundary. The front garden is mostly garden and the back garden contains a scattering of trees.</p> <p>A covenant on the site prevents quarrying unless for the purpose of building foundations, but otherwise has no relevance to this proposal.</p>
Description of proposal	<p>Construction of three double storey dwellings. Two are attached at the front of the site with a ‘reverse living’ style of design. The third dwelling is a separate building at the rear with a conventional layout including principal living areas on the ground floor. Two crossovers and driveways are proposed – one on the east side for Dwelling 1 and another on the west side that is shared by Dwellings 2 and 3.</p> <p>All of the dwellings contain three or four bedrooms, two car spaces and are constructed of brick and render with pitched roofs and eaves. Dwelling 2 has the maximum building height of 7.6m.</p> <p>The site coverage is 41.4% and the permeability is 36%.</p>
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	General Residential Zone Schedule 2 – Monash Residential Areas (GRZ2) No overlay controls apply



Permit requirements

Clause 32.08-6 Construction of three dwellings
on a lot in GRZ2



REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Clayton Atlantic Pty Ltd (the Applicant) seeks permission to construct three double storey dwellings on the land at 8 Atlantic Street, Clayton. The proposed layout comprises two attached double storey dwellings facing Atlantic Street and one double storey dwelling at the rear. The dwelling at the front on the east side (Unit 2) has its own driveway. The dwelling at the front on the west side (Unit 1) shares a driveway with Unit 3 at the rear. The single garage and tandem car space for Unit 1 are separated from Unit 1's building and its rear open space, and are attached/adjacent to the kitchen, laundry and an ensuite on the north side of Unit 3. A double garage for Unit 3 is located on the west side of Unit 3.
- 2 There are existing units/townhouses along all of the site's property boundaries, which means this site has five interfaces with neighbouring dwellings. I have received two statements of grounds expressing concern about the impact of this proposal upon the townhouses on 6 Atlantic Street.
- 3 Atlantic Street contains a number of properties that have been developed with units/townhouses, hence there is no doubt that this is a street that is undergoing change.
- 4 The Council advises its reasons for refusing this proposal do not take issue with the appropriateness of this site for medium density housing. Rather, it is the response of this design to its context that the Council finds unacceptable.
- 5 The Council has also determined that the substituted amended plans do not meet the mandatory garden area requirement required in the General Residential Zone. The Council considers it is about 8.5 square metres short of the required 35% of the site area. The Applicant agrees that about 4 to 5 square metres needs to come off the design of the development to meet the 35% requirement.
- 6 The parties both made reference to Amendment C125, part of which has not yet being included in the planning scheme but is with the Minister for Planning for approval. The Council does not seek to rely on its content. The Applicant came to the hearing prepared to address its content. During the hearing and after hearing the Council's submissions about the amendment, I orally advised the parties that I am giving no weight to proposed clause 22.01 and Schedule 6 to the General Residential Zone as contained in Amendment C125. This is because there is uncertainty as to when or if this part 2 of the Amendment will be approved, particularly as the Panel recommendations and the Council resolution in regard to Schedule 6 do not correlate.

¹ The submissions of the parties, the 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.



- 7 This means that I have reached my decision primarily based on the current planning scheme policies and controls as well as the existing features and characteristics of the site and its surrounds.
- 8 The key issues that I have considered in deciding that no permit should issue are:
- The non-achievement of the mandatory garden area requirement;
 - The on-site amenity impacts created as a result of the proposed 'reverse living' style of accommodation; and
 - The insufficient information to assess issues about overshadowing of neighbouring secluded private open space and impacts on neighbouring trees.
- 9 These are all issues that should be considered afresh as part of any new planning application prepared for medium density housing on this site.

NON-ACHIEVEMENT OF MANDATORY GARDEN AREA REQUIREMENT

- 10 At the hearing, the Council submitted and the Applicant agreed that the proposed layout of the development contained in the substituted amended plans does not meet mandatory garden area requirement despite the notation on the amended plans that there is a 35% garden area.
- 11 The minimum garden area requirement contained in Clause 32.08-4 of the General Residential Zone is a mandatory requirement that must be satisfied in order for a permit to issue. Clause 32.08-4 requires that an application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area of 35% for lots above 650 square metres.
- 12 The Council considers the design is about 8.5 square metres short of the required 35% of the site area. The Applicant considers about 4 to 5 square metres needs to come off the design of the development to meet the 35% requirement. These calculations were done in the lead up to and during the hearing, hence there is no material provided that illustrates the areas of the site included and excluded in the parties' calculations in accordance with the garden area definition in the planning scheme.
- 13 It is not the role of the Tribunal to undertake the exercise of illustrating the area of the site included and excluded in the garden area calculation. As a mandatory requirement, it is reasonable to expect that the plans submitted with a permit application or with a request to substitute amended plans will have illustrated and addressed this requirement. Indeed, even if a professional advocate appearing for an Applicant at a Tribunal hearing identifies a discrepancy in the lead up to a hearing, it is preferable for a plan to be provided at the hearing that illustrates compliance with the garden area requirement.



- 14 In this case, the Council and the Applicant agree that the mandatory garden area requirement is not met. It is unclear what changes could or would be made to the design to correct this. It is not the role of the Tribunal to anticipate or guess this, or to redesign a proposal to achieve this.
- 15 On the basis of the substituted amended plans and the submissions made by the parties, 35% of the site area is not provided as Garden Area, so the proposed development is prohibited and a permit cannot be granted.
- 16 On occasion, when the particular circumstances of a site and a proposal warrant it, it may be possible for the Tribunal to decide to grant a permit subject to a condition requiring compliance with this mandatory garden area requirement. However, in this case, the other key issues of concern have lead me to conclude that it is not appropriate in this case to impose such a condition where the design outcome of achieving compliance is not clear.

REVERSE LIVING ON-SITE IMPACTS

The reverse living concept

- 17 ‘Reverse living’ is a relatively new type of residential design that typically provides car parking, bedrooms and/or service areas on the ground floor and principal living areas on the first floor. This is different to the more traditional townhouse or unit style of development that provides ground floor living areas that integrate with ground level private open space areas, and often have a smaller first floor footprint that contains bedrooms. An example of a traditional form in this case is Unit 3 at the rear of the site. Whereas ‘reverse living’ is a modern housing product that reverses this traditional house layout, which is evident in this case in the design of Units 1 and 2. Reverse living is a legitimate form of housing but the resultant layout and form of such a building is not without its challenges.
- 18 For much of metropolitan Melbourne, reverse living is still a fairly new design concept, which means it is not a form of housing that is commonly identifiable yet in many of Melbourne’s suburbs. There are distinct differences in its layout and form to that of the traditional townhouse style of development. Reverse living often has quite extensive first floor footprints that cantilever over smaller ground floor footprints and therefore can contribute to a sense of visual bulk across a site. Also, elevated living areas and balconies need to be of sufficient size to cater for the needs of future residents. This may contribute to them having greater exposure to neighbours, so the need to screen these elements to limit overlooking can contribute further to visual bulk and create internal amenity issues. These are all challenges that need to be considered in achieving an acceptable design response.

Secluded private open space provision

- 19 In reverse living dwellings, the principal area of secluded private open space is generally provided at an upper level in the form of a balcony or roof deck that is adjacent to the principal living areas. In this case, Units



and 2 are provided with north facing balconies overlooking the street that are directly accessible from the open plan living and meals area.

- 20 Unit 1's balcony is 9 square metres in area (2m wide by 4.5m long) and Unit 2's balcony is 10 square metres in area (2m wide by 5m long). Each of these units contain four bedrooms and I am not persuaded this size of private open space accessible from the principal living area is acceptable for dwellings of this size.
- 21 Each of these units do have front garden areas of 40 to 42 square metres, but these are not secluded areas. Hence, their existence does not persuade me that the balcony areas are acceptable.
- 22 Each of these units also have back garden areas. Unit 1's back garden is 22 square metres and accessible by the master bedroom or a ground floor hallway because there is rear access through this back garden to Unit 1's car parking spaces. Unit 2's back garden is 31 square metres and accessible from the garage or the master bedroom. From a numerical perspective, these secluded areas appear to offer supplementary recreation space. However, I agree with the Council that these areas are compromised by their southern orientation and significant failure to meet standard B29 in clause 55 about solar access to open space. The Council advises Unit 1 requires a 6.95 metre setback to meet standard B29 and 3.4 metres is proposed; and Unit 2 requires a 7.13 metre setback and 5.2 metres is proposed.
- 23 For all of these reasons, the private open space provision in the proposed layout of Units 1 and 2 that each contain four bedrooms is not an acceptable design response.

INSUFFICIENT INFORMATION TO ASSESS SOME ISSUES

- 24 There are two issues that arose during the hearing that require consideration, but I am of the opinion there is insufficient information before me to make a final decision about them. These issues are the impact of the development on neighbouring trees and the overshadowing of adjoining secluded private open space areas.

Impact on neighbouring trees

- 25 The Council's submission at the hearing raised concern about the impact of the proposal on tree 6 (as nominated in the arborist report submitted with the permit application). This tree is a Queensland Brush Box that is native, listed as juvenile and of high retention value with a useful life expectancy of 20+ years. The driveway for Units 1 and 3 encroaches into the TPZ by 23.3% and the garage of Unit 3 encroaches by 7.4%. The Council submits it does not appear that any existing encroachment from the garage at 3/6 Atlantic Street has been factored into this analysis.
- 26 The Applicant objected to this submission on the basis that it is not a ground of refusal and the Applicant had therefore not attended this hearing prepared to address this issue.



- 27 There are no planning controls that apply to vegetation in this neighbourhood. Nevertheless, undertaking a site analysis includes considering the notable features or characteristics of the site and the surrounding neighbourhood. This can include trees on adjoining properties. Whilst it is commonly accepted that a neighbour can cut back a canopy of an overhanging tree, the consideration of a proposed development can also impact upon tree roots and hence the viability of a tree. In this case, there are two trees on adjoining properties that appear to have their root zones impacted by this proposal – tree 6 (already mentioned) and tree 9. The Council’s submission at the hearing queries the impact on tree 9. Tree 9 is adjacent to Unit 2’s garage. It is a semi-mature exotic Bay Tree with a useful life expectancy of 10-20 years and a high retention value. The encroachment into the TPZ is 43%, which is described by the Applicant’s arborist as being ‘extremely high’.
- 28 The impact on the TPZs is acknowledged in the Council officer’s report and it then states:
- The arboricultural report does not recommend modifications to the proposal to protect adjacent trees subject to tree protection measures detailed in the report including the driveway within the TPZ of Tree No. 6 to be constructed using a permeable surface and be largely at grade and excavation for the footings of the garage of Unit 3 should be performed under the direct supervision of a qualified arborist.
- 29 If I had concluded that the majority of the proposal was worthy of a permit issuing, I would have granted leave to allow the Applicant the opportunity to address further the acceptability of these impacts upon the neighbouring trees. Given I have decided to refuse this proposal, this is an issue that should be further considered as part of any new permit application.

Overshadowing of adjoining secluded private open space areas

- 30 The Council identifies that one of the site’s constraints is its interface with ‘compact courtyards’ to the east, west and south.
- 31 Standard B21 specifies at least 75 percent or 40 square metres of secluded private open space, whichever is the lesser, of a dwelling should receive a minimum of five hours of sunlight between 9am and 3pm on 22 September. In this case, there is no information about the existing shadow affecting the adjacent courtyards, so it is not possible to ascertain whether standard B21 is met already. The Applicant made oral submissions about this, but there remains insufficient information in the application material to understand whether the assessment should begin for each of the adjoining dwellings on the basis that standard B21 is met, or is not met. If it is not met, standard B21 states the amount of sunlight should not be further reduced.
- 32 In regard to 3/6 Atlantic Street, the Applicant points out tree 6 is within its secluded private open space and already casts a shadow, which VCAT has ‘found to be relevant’. The Applicant was referring to a previous decision that I made in *Brelis & Ors v Moreland CC* [2011] VCAT 769. At paragraph 36, there is a discussion about overshadowing of a particular



neighbour's property. My decision makes mention of an existing tree that currently casts a shadow onto the neighbour and is to be removed; and that the new building will cast less shadow than that cast by the tree to be removed. The finding made was that the proposed building in that case did not significantly overshadow the neighbour. The tree was clearly the subject of submissions and material presented, and hence it is referred to in my reasons. I am not persuaded that this sentence or this paragraph should be relied upon to find that VCAT considers the shadow of trees is a relevant consideration when generally considering overshadowing impacts in accordance with clause 55.

- 33 The issue of overshadowing of neighbouring secluded private open space should be further considered as part of any new permit application.

ARE THERE ANY OTHER ISSUES?

- 34 The Council expressed concern about the layout, articulation, materials and finishes of the proposal not being respectful of the neighbourhood character. In my decisions, I often deal with neighbourhood character as the first issue because, if the design response is not acceptable for a particular neighbourhood, then there is no need to go on and consider the balance of the clause 55 objectives. In this case, I have taken a different approach because there are a number of specific aspects of the proposed design that require further consideration. Hence, in this case, the Council's concerns about the neighbourhood character are another issue, but not one that I have considered in detail given there are matters of design detail that demonstrate this proposal is not an acceptable design response.

CONCLUSION

- 35 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Rachel Naylor
Senior Member

