 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P1902/2020Permit Application no.TPA/51468  |
| CATCHWORDS |
| Monash Planning Scheme; three attached dwellings; corner site; neighbourhood character. |

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| **Applicant** | Miriam Orwin |

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| **Responsible Authority** | Monash City Council |
| **Respondent** | Neil Alan Leister |

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| SUBJECT LAND | 60 Watsons RoadGLEN WAVERLEY VIC 3150 |

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| HEARING TYPE | Hearing  |

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| DATE OF HEARING | 21 July 2021 |

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| DATE OF ORDER | 3 August 2021 |

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| CITATION | Orwin v Monash CC [2021] VCAT 839 |

# Order

1. In application P1902/2020 the decision of the responsible authority is set aside.
2. In planning permit application TPA/51468 a permit is granted and directed to be issued for the land at 60 Watsons Road Glen Waverley VIC 3150, in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
* The construction of three dwellings.

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| Michael Nelthorpe**Member** |  |  |

# Appearances

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| For applicant | Mr Mark Waldon, town planner of St-wise Pty Ltd. He called the following witness:Mr Robert Thomson, landscape architect of habitat landscape environmental design consultants. |
| For responsible authority | Ms Adrianne Kellock, town planner of Kellock Town Planning. |
| For respondent | Mr Neil Leister in person. |

# Information

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| Description of proposal | Three attached dwellings |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.  |
| Planning scheme | Monash Planning Scheme. |
| Zone and overlays | General Residential Zone Schedule 3.Vegetation Protection Overlay Schedule 1. |
| Permit requirements | Clause 32.08-6: To construct two or more dwellings on a lot. |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 18, 21.04, 22.01, 32.08, 52.06, 53.18, 55, 65 & 71.02. |
| Land description | This rectangular site is located on the south-east corner of the intersection of Watsons Road and Whites Lane in Glen Waverley. It has a 12.19 metre frontage to Watsons Road, a 34.24 metre frontage to Whites Lane and an area of 648 square metres. A former milk bar and dwelling occupies the site. |
| Tribunal inspection | 29 July 2021.  |

# Reasons[[1]](#footnote-2)

## What is this proceeding about?

1. Miriam Onwin (**‘the Applicant’**) sought permission from Monash City Council (**‘the Council’**) to construct three attached dwellings at 60 Watsons Road, Glen Waverley. The Council refused to grant a permit and the Applicant seeks a review of this decision.
2. Mr Leister’s property is next door to the south of the site. He has joined this review.
3. The Council grounds of refusal are:
	* + - 1. The proposal is inconsistent with the Residential Development Policy at Clauses 21.04 and 22.01 of the Monash Planning Scheme in that it fails to achieve architectural and urban design outcomes that positively contribute to the neighbourhood character, having particular regard to the desired future character.
				2. The proposal does not adequately satisfy the objectives of Schedule 3 to the General Residential Zone of the Monash Planning Scheme.
				3. The proposal does not adequately satisfy the objectives and design standards of Clause 55 of the Monash Planning Scheme with regard to neighbourhood character, rear setback and private open space.
				4. The proposed development is not site responsive and is considered a poor design outcome for the site.
4. In submissions, the Council acknowledged that its grounds all relate to the proposal’s response to the preferred neighbourhood character outcome for the site. It is the key issue in this review.

## the proposal

1. Two dwellings face Whites Lane and have a ‘reverse living’ arrangement with the living areas on the first floor. North facing balconies of 17.6 square metres serve these areas. Attached single car garages are directly below. These dwellings have ground level open spaces with a minimum width of three metres to the rear and/or side.
2. The dwelling facing Watsons Road is conventionally arranged. Its ground floor living areas are served by a secluded private open space to the front and side. 1.8-metre-high steel picket fencing surrounds these spaces.
3. The proposal’s built form is shown in the image below:



*The proposal when viewed from the corner of Watsons Road and Whites Lane where Whites Lane is the ‘side street’.*

## is the proposal an acceptable response to the preferred neighbourhood character?

1. Local planning policy on the preferred neighbourhood character does not exist in a vacuum. The site’s physical context is the key variable in any statutory assessment and other planning policies influence housing outcomes.
2. Ultimately, the decision-maker’s task is to integrate all relevant planning policies and balance conflicting objectives in favour of net community benefit and sustainable development.[[2]](#footnote-3)
3. I find that the proposal sits comfortably in this neighbourhood. Its bulk and appearance are similar to recently constructed two-storey dwellings nearby. The site does not appear crowded despite its rear setback being less than the preferred five metres.[[3]](#footnote-4) The openness of its setting opposite a retarding basin to the north and a school to the west helps absorb the proposal’s size. Its articulated elevation to Whites Lane reduces the impact of its bulk.[[4]](#footnote-5)
4. The proposal meets all Planning Scheme standards relating to the neighbours’ amenity.[[5]](#footnote-6) This includes the standard ensuring adequate sunlight to Mr Leister’s north facing windows.
5. Mr Thomson’s landscape plan includes a sizeable canopy tree in the Watsons Road frontage and nine other trees around the site’s perimeter. It achieves the outcomes sought by the preferred neighbourhood character statement.
6. These compact dwellings suit a range of smaller households and, most likely, will be more affordable than larger medium-density dwellings in the area.[[6]](#footnote-7) Through their design and the site’s corner location, they have achieved a more than acceptable level of internal amenity.
7. On this basis, I find the proposal properly integrates the planning policies that apply to the site and is an acceptable response to the preferred neighbourhood character.

#### On clause 21.04: Residential Development policy

1. This policy envisages incremental change for the site and surrounding area. I find that replacing a milk bar and dwelling with three dwellings is an incremental change.

#### On clause 22.01: Residential Development and Character policy

1. This policy identifies the site and surrounding area as being in the Garden City Suburbs Northern Area, where *‘modest dwellings, with simple pitched rooflines and articulated facades…will continue the prevailing development themes’*.
2. I find that the proposal responds to this policy through its simple pitched roofline and articulated facades. Its corner location with the views over the retarding basin allows it to use this form to accommodate three modest dwellings.
3. While the policy envisages the retention of *‘spacious garden settings’*, this translates to a baseline of 7.6-metre-deep front yards and courtyard gardens in medium density development.[[7]](#footnote-8) The proposal provides the required front setback and other garden areas that can be well landscaped.
4. I find that the statement of preferred neighbourhood character primarily describes mid-block development outcomes, where new housing is flanked by other dwellings on both sides. It acknowledges this by saying *‘architecture will usually be secondary in visual significance to the landscape of the area when viewed from the street’*.
5. On the side elevation of a corner lot, it is reasonable for architecture to be more prominent. On the Whites Lane side of this corner block, I find it is sufficient to provide landscaped areas that soften views to the building. On the Watsons Road frontage, the landscaped 7.6 metre setback reasonably meets the character objective.

#### On the Council’s particular submissions

1. I disagree that the proposal’s continuous built form is *‘out of character’* with its surrounds, given that dwellings of a comparable size are found diagonally opposite the site and immediately to the north of the retarding basin).[[8]](#footnote-9) These new dwellings are part of the mixed built form of this part of Glen Waverley.
2. I do not consider that the proposal is *‘overly prominent in the streetscape’* and *‘bulky from the public domain’*. Its northern façade is visible rather than prominent. Its upper floor balconies invite attention, but this is a positive attribute as it brings some surveillance to the street and the retarding basin.
3. I find it is acceptable that landscaping opportunities are constrained on the Whites Lane frontage. The street setback objective at clause 55 seeks to *‘respect the preferred character and make efficient use of the site’.* Accordingly, a two-metre setback is allowed along side streets. This proposal provides a three-metre setback, thus exceeds the standard and allows more space for landscaping.
4. I accept that the use of balconies for Units 60B and 60C averts the requirement of 75 square metres of open space per dwelling sought by Schedule 3 to the Zone. This should not be held against the proposal. The proposed ‘reverse living’ arrangement of these dwellings provides is site responsive and successfully achieving planning objectives on dwelling diversity.
5. Aside from this, setbacks of three metres or more are provided to the sides and rear of the building. I am satisfied that this provides an adequate sense of ‘spacious garden areas’ in a medium density development.
6. I am not persuaded that failing to provide a five-metre setback at the rear of the building is a fatal flaw. The site’s location on a corner means that it is adjacent to a two metre sideage to the neighbouring dwelling at 54 Whites Lane. There is no unreasonable loss of amenity to that property.
7. In character terms, there is no ‘backyard corridor’ nearby. The adjacent dwellings to the south (62 and 64 Watsons Road) have garages deep in their rear yards, and the dwelling opposite these rear yards (at 3 Elaine Court) extends deep into its lot. Aerial photography shows scattered canopy tree planting in spaces that are equivalent to the proposed 3.8 metre rear setback. Accordingly, this setback is acceptable.
8. For the above reasons, and on the evidence of Mr Thomson, I find against the Council’s submission that the proposed setbacks provide *‘minimal opportunities* *for the planting of canopy trees’*.
9. Finally, I acknowledge the Council’s concern about using part of the front and side setbacks as secluded private open space for Unit 60A. I accept that this is a new element in the character of the area. However, I am not persuaded that it outweighs the proposal’s benefits.
10. The fenced area along Whites Lane is well integrated in the design given that Units 60B and 60C have lower fences along this boundary. This avoids any sense of the higher fence being incongruent.
11. On Watsons Road, the fenced area is at a very open corner and is opposite a high steel picket fence surrounding the School. These features reduce the sense that the high steel picket fence is inconsistent with its surrounds. Further to this, the fence is setback three metres from the frontage, which allows for reasonable planting along the street’s edge.

#### On Mr Leister’s submissions

1. I agree with Mr Leister that the proposal recreates the three bedrooms/one bathroom/one living room model of the original 1960s dwellings of the area, whereas most families now want two living rooms and two bathrooms. I agree that the 1960’s dwellings can be extended as a family grows whereas the proposed dwellings cannot. However, I find this is not fatal to the proposal. These compact dwellings can be the first step on the property ownership ladder or an opportunity for empty nesters to downsize at a reasonable cost.
2. I accept that the north-facing balconies could be uncomfortably hot at the peak of summer, however the same applies to any north-facing room. Thankfully, Melbourne has less than two months of peak summer heat. At other times, the balconies will provide the benefit of warming sunlight in addition to daylight. Apart from this, Units 60B and 60C have south-facing ground floor courtyards to provide outdoor relief on the hottest of days.
3. Regarding overlooking, I am satisfied that the proposed south-facing windows will be obscured to 1.7 metres from finished floor levels in accordance with the relevant standard. This will avoid any unreasonable overlooking.
4. I regard the pruning of the proposed trees for powerline clearance to be one of the necessary compromises in this area. I agree with Mr Thomson that the trees proposed near these lines will continue to provide a landscape benefit.

## Are there any other issues?

1. The powerlines and elevated substation outside the site on Whites Lane will reduce the amenity of the balconies of Units 60B and 60C. I cannot control or influence the management and location of electricity infrastructure. I encourage the Applicant to investigate opportunities to relocate or minimise this infrastructure’s visual impact.
2. In a similar fashion, I cannot require the Applicant to check and, if necessary, replace ageing drainage or sewerage pipes during construction. However, I encourage them to adopt Mr Thomson’s advice on this issue.

## What conditions are appropriate?

1. At the hearing, we discussed the draft conditions circulated by the Council. As I foreshadowed, I have revised Condition 3 to refer to Mr Thomson’s plan.
2. I have adopted the Applicant’s submission that Condition 1c) allow the garage on the south boundary to have a maximum height of 3.2 metres.
3. I have deleted the requirement in Condition 3 to show trees to be removed and have deleted the prescriptions on canopy trees and soft landscaping. I am satisfied with Mr Thomson’s plan.
4. Finally, I have replaced the draft condition on the expiry of the permit with wording preferred by the Tribunal.

## Conclusion

1. 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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| Michael Nelthorpe**Member** |  |  |

# Appendix A – Permit Conditions

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| Permit Application No | TPA/51468 |
| Land | 60 Watsons RoadGLEN WAVERLEY VIC 3150  |

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| What the permit allowS |
| In accordance with the endorsed plans:* The construction of three dwellings.
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## Conditions

### Amended Plans

1. Before the development starts, amended plans drawn to scale and correctly dimensioned must be submitted to the satisfaction of and approved by the Responsible Authority. When approved, the plans will be endorsed and then form part of the Permit. The plans must be generally in accordance with the plans submitted to Council,but modified to show:
	1. The location and design of any proposed electricity supply meter boxes. The electricity supply meter boxes must be located at or behind the setback alignment of buildings on the site, or in compliance with Council’s “Guide to Electricity Supply Meter Boxes in Monash”.
	2. A corner splay or area at least 50 per cent clear of visual obstructions extending at least 2 metres along the frontage road from the edge of an exit lane and 2.5 metres along the exit lane from the frontage, to provide a clear view of pedestrians on the footpath of the frontage road. The area clear of visual obstructions may include an adjacent entry or exit lane where more than one lane is provided, or adjacent landscaped areas, provided the landscaping in those areas is less than 900mm in height.
	3. The maximum height above natural ground level of the garage wall of Unit 60A notated on the south elevation, which can be no more than 3.2 metres.
	4. Minimum sill heights of 1.7 metres above finished floor level to the following first floor windows:
		1. Unit 60B: south facing pantry window (which is within open plan kitchen); and
		2. Unit 60C: south facing kitchen window and east facing pantry window (which is within open plan kitchen).
	5. Fixed obscure glazing to a minimum height of 1.7 metres above finished floor level to the following first floor windows:
		1. Unit 60B: south facing dining room window and south facing kitchen window; and
		2. Unit 60C: south facing dining room window
	6. A notation for all proposed lattice and clothing line to be affixed to a sturdy free-standing frame, to the satisfaction of the Responsible Authority.
	7. A Landscape Plan in accordance with condition 3 of this Permit.

### Layout not to be Altered

1. The development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.

### Landscape Plan

1. Concurrent with the endorsement of any plans requested pursuant to Condition 1, 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. The Landscape Plan must be generally in accordance with the Landscape Plan prepared by habitat landscape and environmental design consultants dated June 2020 (except for the ‘existing unidentified 9 metre high tree in the rear yard of 62 Watsons Road) and show:
	1. a planting schedule of all proposed trees, shrubs and ground cover, which will include the size of all plants (at planting and at maturity), pot / planting size, location, botanical names and quantities;
	2. the location and details of all fencing;
	3. the location of any retaining walls associated with the landscape treatment of the site; and
	4. details of all proposed surface finishes including pathways, accessways, patio or decked areas.

When approved the plan will be endorsed and will then form part of the permit.

### Tree Protection

1. Before any development (including demolition) starts on the land, a tree protection fence must be erected around all trees that are to be retained, or are located within or adjacent to any works area (including trees on adjacent land). The tree protection fence must remain in place until all construction is completed on the land, except with the prior written consent of the Responsible Authority.
2. No building material, demolition material, excavation or earthworks shall be stored or stockpiled within the Tree Protection Zone (TPZ) of any tree to be retained during the demolition, excavation and construction period of the development hereby permitted without the prior written consent of the Responsible Authority.

### Landscaping Prior to Occupation

1. Before the occupation of any 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 thereafter maintained to the satisfaction of the Responsible Authority.

### Drainage

1. The site must be drained to the satisfaction of the Responsible Authority.
2. A plan detailing the drainage works must be submitted to the Engineering Division prior to the commencement of works for approval. The plans are to show sufficient information to determine that the drainage works will meet all drainage requirements of this permit.
3. Stormwater discharge is to be detained on site to the predevelopment level of peak stormwater discharge. Approval of any detention system is required by the City of Monash prior to works commencing; or any alternate system.
4. No polluted and/or sediment laden runoff is to be discharged directly or indirectly into Council's drains or watercourses during and after development, to the satisfaction of the Responsible Authority.
5. The full cost of reinstatement of any Council assets damaged as a result of demolition, building or construction works, must be met by the permit applicant or any other person responsible for such damage, to the satisfaction of the Responsible Authority.

### Vehicle Crossovers

1. All disused or redundant vehicle crossovers must be removed and the area reinstated with footpath, naturestrip, kerb and channel to the satisfaction of the Responsible Authority.
2. Any new vehicle crossover or modification to an existing vehicle crossover must be constructed to the satisfaction of the Responsible Authority.

### Urban Design

1. The walls on the boundary of adjoining properties shall be cleaned and finished in a manner to the satisfaction of the Responsible Authority.

### Satisfactory Continuation and Completion

1. Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

### Permit Expiry

1. This permit as it relates to development (buildings and works) will expire if one of the following circumstances applies:
	1. The development is not started within two (2) years of the issue date of this permit.
	2. The development is not completed within four (4) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

**– End of conditions –**

1. The submissions and evidence of the parties, any supporting exhibits 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-2)
2. At clause 71.02 – Integrated decision making [↑](#footnote-ref-3)
3. The varied standard of Schedule 3 of the General Residential Zone encourages a five metre rear setback whereas 3.8 metres is proposed. [↑](#footnote-ref-4)
4. This elevation is articulated by well-designed entries to Units 60B and 60C, varied boundary fencing, large first floor balconies and overhanging eaves. [↑](#footnote-ref-5)
5. At clause 55. [↑](#footnote-ref-6)
6. These objectives are found at clauses 16.01-1S and 16.01-2S of the Planning Policy Framework. [↑](#footnote-ref-7)
7. These are the garden areas sought by the varied standards of Schedule 3 to the Residential Zone. [↑](#footnote-ref-8)
8. At 51 Whites Lane and 58 Watsons Road respectively. [↑](#footnote-ref-9)