

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P947/2022  
PERMIT APPLICATION NO.TPA/53469

### CATCHWORDS

Monash Planning Scheme; Application pursuant to Section 77 of the *Planning and Environment Act 1987*; Residential Growth Zone 3 (RGZ3); Twelve triple storey dwellings; Strategic support; Monash National Employment Cluster; Clause 55; Design response; Internal amenity; Landscaping.

<b>APPLICANT</b>	Nunaland Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Monash City Council
<b>SUBJECT LAND</b>	49-51 Marshall Avenue CLAYTON VIC 3168
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	12 December 2022
<b>DATE OF ORDER</b>	13 December 2022
<b>CITATION</b>	Nunaland Pty Ltd v Monash CC [2022] VCAT 1431

### ORDER

- 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:
  - Prepared by: Jesse Ant Architects
  - Drawing numbers: Drawing Numbers TP00 to TP18, all marked Issue for VCAT, Revision C and dated 21-10-22.
- 2 In application P947/2022 the decision of the responsible authority is set aside.
- 3 In planning permit application TPA/53469 a permit is granted and directed to be issued for the land at 49-51 Marshall Avenue, Clayton in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
  - Construction of twelve triple storey dwellings in the Residential Growth Zone Schedule 3.

J A Bennett  
**Senior Member**



## APPEARANCES

For Nunaland Pty Ltd	Andrew Clarke, Town Planner of Clarke Planning Pty Ltd. He called expert evidence from the following witness: <ul style="list-style-type: none"><li>• Tony Aravidis, Landscape Architect of Species Landscape Architecture.</li></ul>
For Monash City Council	Peter English, Town Planner of Peter English & Associates Pty Ltd.

## INFORMATION

Description of proposal	Construction of twelve triple storey dwellings.
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	Residential Growth Zone - Schedule 3 ( <b>RGZ3</b> ).
Permit requirements	Clause 32.07-5 (construct two or more dwellings on a lot in RGZ3).
Relevant scheme policies and provisions	Clauses 11, 12, 15, 16, 21.01, 21.04, 21.06, 22.01, 22.04, 22.05, 22.13, 32.07, 52.06, 55, 65 and 71.02.
Land description	The site is located on the western side of the street. It comprises two lots with a combined frontage 34.44 metres, a depth of 42.37 metres and an area of 1,459.2 square metres. Each site contains a single storey dwelling.
Tribunal inspection	An unaccompanied inspection of the locality was undertaken before the hearing on 7 December 2022.

## ORAL DECISION AND REASONS GIVEN<sup>1</sup>

- 1 The application initially proposed the construction of fourteen triple storey dwellings on a mid-block site to the west of Monash University. The City of Monash (**Council**) refused the application on nine grounds. Substituted plans have reduced the number of dwellings to twelve.
- 2 After having heard from parties, received expert landscape evidence, and taken an overnight adjournment, I gave an oral decision to set aside Council's decision and grant a permit. What follows is a summary of the reasons given orally.
- 3 It is acknowledged by both parties that the site enjoys strategic support for more intensive and taller development than existed in the past given its inclusion in a RGZ3.
- 4 State and local planning policies are clear that the focus for additional and more intensive forms of housing is to be provided in such locations. Across the municipality eight categories for residential development have been identified, grouped into three levels of development potential – future development potential, limited development potential and incremental change. The Monash National Employment Cluster within which the site is located is within group one which has the highest level of development potential.
- 5 Despite the requirements of clause 55 including reference to neighbourhood character, the purposes of the RGZ3, unlike the other residential zones, do not include one concerning neighbourhood character. Given one of the strategies in clause 21.04-3 is to *support substantial residential growth within the Monash National Employment Cluster* it would be counter intuitive and inconsistent to then apply a neighbourhood character assessment which would have the effect of undermining the desire for substantial residential growth.
- 6 In part, residential development and character policy at clause 22.01-4 recognises that development in this area will be different where it suggests that *the scale of new residential development will generally comprise larger footprint apartment development* but also that *where possible on larger sites, development will be multi-level and set in open gardens*.
- 7 However, inexplicably the policy does not exclude or clearly distinguish between the relatively few areas of the RGZ3 and the great swathes of the residential areas of the municipality included in the NRZ and GRZ, where the Garden City character is more understandably sought to be retained.

---

<sup>1</sup> 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.



- 8 As discussed in the many Tribunal cases tabled by Mr Clarke, policy does not mandate apartment development or preclude town houses, and the desire to set development in open gardens has the proviso - *where possible*.
- 9 I consider that the proposed development of twelve attached town houses in two rows of six is an acceptable response to the strategic context, local policy, and the site context. I say that for the following reasons:
- i The proposal at 3 storeys and with maximum height of 9.25 metres sits well below the maximum height for the RGZ3 of 13.5 metres and 4 storeys.
  - ii The front setback, side and rear setbacks achieve the clause 55 standards including those varied for the RGZ3. I note that the first floor framing elements intrude into the front setback by approximately 150 millimetres but I consider this inconsequential given it is a design feature that adds articulation to the front façades.
  - iii The site coverage and permeability achieve the relevant clause 55 standards (standards B8 and B9). There is no garden requirement in the RGZ3.
  - iv Resident car parking satisfies the rates in Clause 52.06.
  - v The amended design further articulates the built form using various materials, roof forms and window positions. The introduction of gabled framing elements to the front and sides adds additional visual interest to the building. Whilst cantilevering upper floor elements can sometimes be problematic because it adds visual bulk to the built form, I do not find that to be the case here where there remains sufficient separation between the two buildings for them to be viewed as two distinct structures.
  - vi The central driveway creates two distinct built form elements which reflect the original rhythm created by the two dwellings being replaced. It responds to policy seeking a break in building form – in this case in an east west alignment along the driveway rather than north to south along the spine of the buildings. As such, the break will be apparent from the street and contribute in a more positive way to breaking up the built form volume in a streetscape perspective.
  - vii The interface with adjoining properties has been well managed given the compliance with the relevant clause 55 standards. There are no unacceptable overshadowing or overlooking impacts, no walls on boundaries and no affected north facing windows.
  - viii I do not agree with Council that there are shortcomings with the internal amenity of these dwellings. With one minor exception, the rooms have minimum dimensions and areas which would match those if these were apartments. Living areas have access to ground level

open space or balconies. The front two dwellings also have access to non-secluded open space in the front setback.

- ix Whilst Council is critical about the provision of balconies for ten of the dwellings, the varied standard B28 does not preclude the provision of balconies. All except the street facing balcony for Dwelling 12 are north facing. Whilst those on the northern bank require screening, they provide unimpeded access to sunlight. The balconies in the southern bank do not require screening and offer good access to sunlight. These balconies also provide surveillance of the driveway. The two rear dwellings have ground level open space off living areas. I consider that the related objective to provide adequate open space for the reasonable recreation and service needs of residents has been met.
- x I support the separation of vehicular and pedestrian access and do not agree with Council that there are unacceptable dwelling entry outcomes by providing access to individual dwellings along the two sides of the site. I consider this a superior dwelling entry arrangement to those where pedestrian and vehicle access are shared along a driveway, and where dwelling entries are often sandwiched between garage doors.
- xi I accept that the two buildings are not set in an open garden setting, but the Species landscape plan demonstrates that the site can accommodate effective landscaping, including the provision of canopy trees and taller hedging planting along the side and rear boundaries.
- xii The retention of existing taller canopy trees along the front boundary adds an immediate landscape benefit to the site once it is redeveloped.
- xiii The absence of taller canopy vegetation beside buildings is common within the area, whether in the case of the original dwellings or the more recent medium density developments. Most sites have service yards on one side and a driveway with limited or no planting on one or both sides of the driveway.
- xiv Although the 2.4 to 3.4 metres side setbacks are occupied by pedestrian paths, I accept Mr Aravidis' evidence that there is sufficient space for taller clipped hedges between the paths and the side fences.
- xv I consider the proposed side boundary landscaping, together with the retained and new planting at the front and rear of the site will result in an attractive landscaped setting for the development.
- xvi Finally, I struggle to understand what an open garden setting means when applied to the RGZ3, in an area where original houses and newer medium density developments at a much lower intensity of built form do not provide an open garden setting. It is an outcome that



seems to be at odds with the substantial change anticipated for this area.

- 10 When balancing relevant planning provisions and the site context, I consider that the proposal meets the community benefit test in clause 71.02 and that it is an acceptable outcome as required by clause 65.
- 11 I will direct that a conditional permit is to be issued. Conditions have been modified slightly as discussed with Messrs English, Clark and Aravidis.
- 12 I do not agree with the draft conditions requiring deletion of the pea gravel paths in front of Dwellings 1 and 12 or the replacement of the Coastal Banksias with some other species. I agree with Mr Aravidis that the Banksias are an appropriate native tree to plant as he has suggested.
- 13 I have deleted those conditions requiring plan changes which are already shown on the substituted plans or are otherwise required to be done, such as the location of electricity meter boxes and corner sightline splays for the driveway.

J A Bennett  
**Senior Member**



## APPENDIX A – PERMIT CONDITIONS

<b>PERMIT APPLICATION NO</b>	TPA/53469
<b>LAND</b>	49-51 Marshall Avenue CLAYTON VIC 3168

### WHAT THE PERMIT ALLOWS

In accordance with endorsed plans:

- Construction of twelve triple storey dwellings in the Residential Growth Zone Schedule 3.

## 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 prepared by Jesse Ant Architects Revision C, 21 October 2022, but modified to show:
  - (a) The location of external lighting (if any).
  - (b) A Sustainable Development Assessment in accordance with Condition 3.
  - (c) A Landscape Plan in accordance with Condition 4.
  - (d) A Tree Management Plan in accordance with Condition 6.
  - (e) A Waste Management Plan in accordance with Condition 21.

### Layout not to be Altered

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

### Sustainable Design Assessment

- 3 Concurrent with the endorsement of plans requested pursuant to Condition 1, an updated Sustainable Design Assessment must be submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Sustainable Design Assessment prepared by IBE Consulting (21 May 2022), except that the plan must be modified to show:
  - (a) Any changes arising by Condition 1 of this planning permit.



Upon approval the Sustainable Management Plan will be endorsed as part of the planning permit and the development must incorporate the sustainable design initiatives outlined in the SMP to the satisfaction of the Responsible Authority.

### **Landscape Plan**

- 4 Concurrent with the endorsement of any plans requested pursuant to Condition 1, a landscape plan generally in accordance with that prepared by Species Landscape Architecture, 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 show:
- (a) A survey and location of all existing trees, using botanical names to be retained and of those to be removed. The intended status of the trees shown on the landscape plan must be consistent with that depicted on the development layout plan.
  - (b) 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.
  - (c) The visitor bicycle parking area constructed in dark coloured pavers.
  - (d) An in-ground, automatic watering system linked to rainwater tanks on the land must be installed and maintained to the common garden areas to the satisfaction of the Responsible Authority.

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

### **Landscaping Prior to Occupation**

- 5 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.

### **Tree Management Plan**

- 6 Concurrent with the submission of amended plans required by Condition 1 and prior to any demolition or site works, a Tree Management Plan (TMP) must be submitted to and approved by the Responsible Authority. The TMP must be prepared by a suitably qualified and experienced Arborist and must be generally in accordance with the recommendations of the Bluegum Arborist report of 10 May 2022. The TMP is to make specific recommendation as to the demolition and construction requirements to ensure vegetation retained on the site and abutting land including the nature strip is not detrimentally impacted by the development. Key



recommendations of the plan are to be highlighted for inclusion on the endorsed development plans.

The recommendations contained in the approved TMP must be implemented to the satisfaction of the Responsible Authority.

- 7 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.
- 8 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.

### **Drainage**

- 9 The site must be drained to the satisfaction of the Responsible Authority.
- 10 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.
- 11 The private on-site drainage system must prevent stormwater discharge from the driveway over the footpath and into the road reserve. The internal drainage system may include either:
  - (a) A trench grate (minimum internal width of 150mm) located within the property boundary and not the back of the footpath; and/or
  - (b) Shaping the internal driveway so that stormwater is collected in grated pits within the property; and or
  - (c) Another Council approved equivalent.
- 12 All stormwater collected on the site is to be detained on-site to the predevelopment level of peak stormwater discharge. The design of an internal detention system is to be approved by Council's Engineering Department prior to drainage works commencing.
- 13 The nominated point of stormwater connection for the site is to the south-east corner of the property where the entire site's stormwater must be collected and free drained via a pipe to the 450 mm Council drain in the naturestrip via a Council approved saddle adaptor to be constructed to Council standards.

Note: If the point of connection cannot be located then notify Council's Engineering Department immediately.

- 14 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.
- 15 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**

- 16 The existing vehicle crossing is to be reconstructed to align with the proposed driveway. Modifications to the existing crossover must be constructed to the satisfaction of the Responsible Authority and be to Council standards.
- 17 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.
- 18 Approval of the proposed crossing, and a permit for installation or modification of any vehicle crossing is required from Council's Engineering Department.

### **Waste Management**

- 19 Concurrent with the endorsement of plans required pursuant to Condition 1, a Waste Management Plan must be submitted and approved by the Responsible Authority. The plan must be generally in accordance with the Waste Management Plan prepared by Leigh Design dated 31 March 2022, except that the plan must be modified to show:
  - (a) Any changes required by Condition 1 of this Planning Permit;
  - (b) Changes required pursuant to Council's assessment of the WMP dated 7 June 2022.
- 20 The provisions, recommendations and requirements of the endorsed Waste Management Plan must be implemented and complied with to the satisfaction of the Responsible Authority.

### **Satisfactory Continuation and Completion**

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

### **Permit Expiry**

- 22 This permit will expire in accordance with section 68 of the *Planning and Environment Act 1987*, if one of the following circumstances applies:
  - (a) The development has not started before 2 years from the date of issue.



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

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

- (c) within six (6) months afterwards if the development has not commenced; or
- (d) within twelve (12) months afterwards if the development has not been completed.

Council and the Victorian Civil and Administrative Tribunal are unable to approve requests outside of the relevant time frame.

--End Conditions--

