

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1735/2022
PERMIT APPLICATION NO.TPA/53907

CATCHWORDS

Section 77 of the *Planning & Environment Act 1987*; Monash Planning Scheme;
Six dwellings – RGZ3, Cl. 22.01; Neighbourhood Character

APPLICANT	Yanbo Ma
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	3 Myriong Street CLAYTON VIC 3168
HEARING TYPE	Hearing
DATE OF HEARING	19 July 2023
DATE OF ORDER	31 August 2023
CITATION	Ma v Monash CC [2023] VCAT 1020

ORDER

- 1 Pursuant to 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: 2BScene Design
 - Drawing numbers: TP01 to TP09, Issue 4, VCAT Amendments
 - Dated: March 2023
- 2 In application P1735/2022 the decision of the responsible authority is set aside.
- 3 In planning permit application TPA/53907 a permit is granted and directed to be issued for the land at 3 Myriong Street Clayton VIC 3168 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - Construction of six dwellings and a reduction in the standard car parking requirement.

Tracy Watson
Member

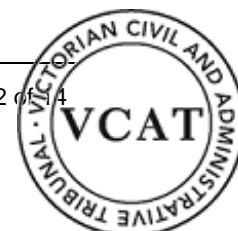


APPEARANCES

For Applicant	Daniel Bowden, town planner. Mr Bowden called expert evidence from Damien Hancox, traffic engineer.
For Responsible Authority	David De Giovanni, town planner.

INFORMATION

Description of Proposal	It is proposed to construct six dwellings, five of which are triple storey and one being double storey.
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.
Zone and Overlays	Clause 32.07 – Residential Growth Zone, Schedule 3 (RGZ3). No overlays apply to the subject site.
Permit Requirements	Clause 32.07-6 – Construct two or more dwellings on a lot. Clause 52.06-3 – Reduce the number of resident car parking spaces from twelve to ten.
Relevant Scheme, policies and provisions	Includes Clauses 11, 15, 16, 18, 21.04, 21.08, 22.01, 22.04, 22.05, 22.13, 32.07, 52.06, 55, 65 and 71.02.
Land Description	The subject site is located on the northern side of Myriong Street in Clayton. The subject site is a rectangular-shaped allotment with a frontage of 15.24 metres, an average depth of 50.7 metres, and a total site area of 773m ² . The subject site is located in an established residential area.
Tribunal Inspection	10 August 2023.



REASONS¹

What is this proceeding about?

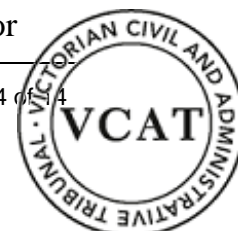
- 1 The permit applicant lodged an application for review with the Tribunal in response to the Council's decision to refuse to grant a permit for the proposed development. No non-party statements of grounds have been lodged with the Tribunal in relation to this proceeding.
- 2 This case is a correcting repeat appeal situation as another proposal, designed by a different architectural firm, has previously been considered by the Tribunal (*Yang v Monash CC* [2019] VCAT 1677). The current proposal has been prepared in response to the deficiencies of the earlier design response identified by the previous Tribunal. There is no dispute, in principle, regarding the suitability of the subject site for built form intensification, including a three-storey scale. Rather, the dispute is confined to the specific details of the proposed design response.
- 3 The Council rightly takes this position as the subject site has been clearly targeted for housing growth as demonstrated by its:
 - Residential Growth zoning, which permits buildings up to four storeys high.
 - Abuttals with other RGZ3 land (that is, there are no abuttals with a 'lower-order' residential zone).
 - Location within the Monash National Employment Cluster where local policy (such as at Clause 21.04) seeks residential growth and a variety of housing types and sizes.
 - Location within the 'Housing Growth Area – Clayton Activity Centre and Monash National Employment Cluster', pursuant to Clause 22.01, where 'larger footprint' developments are encouraged.
- 4 Based on the hearing process and all the relevant associated documentation, I consider that the key issue relates to whether the proposal has adequately responded to the earlier Tribunal's adverse findings.
- 5 I must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions, and the expert traffic engineering evidence, together with the applicable policies and provisions of the Monash Planning Scheme, I have decided to set aside the decision of the Responsible Authority. My reasons follow.

¹ I have considered the written and oral submissions of the two parties, including their tendered exhibits, and the expert traffic engineering evidence. In accordance with the Tribunal's practice, I do not recite or refer to all of the contents of those documents in these reasons.



Does the proposal respond appropriately to the previous Tribunal decision?

- 6 The previous Tribunal (*Yang v Monash CC* [2019] VCAT 1677) considered a proposal for seven dwellings, six being triple-storey and one, being double-storey. The previous proceeding also included a third-party (the owner of three dwellings abutting the subject site to the east, at no. 5-7 Myriong Street). The current proposal has been prepared by a different design firm, and is for six dwellings, five triple storey, and one double storey.
- 7 While the previous Tribunal accepted a townhouse typology as appropriate, it found that the design response was unacceptable as: the ‘large block-like structure’ presented as too bulky along its east and west sides as obliquely viewed from the street; the extent of cantilevering was excessive, and included adverse visual impacts on the secluded private open space of the dwellings at no. 1 Myriong Street (in the absence of screen planting); no large canopy trees were provided; and too much hard paving was provided. These concerns are described at paragraph 26 of the previous decision.
- 8 Before turning to the changes made by the current proposal, which have been made in response to the findings of the previous Tribunal, it is important to discuss the relevant changes that have occurred in the intervening period between this decision (made in October 2019) and now.
- 9 I consider that the key changes, between the decision of the previous Tribunal and now, relate to the physical context of the subject site and surrounds. The first change is that no. 2/ 1 Myriong Street (which abuts the subject site to the west) now includes a double storey element. The second, more critical change, is that there is now a similarly intense development under construction, and nearing completion, nearby at no. 9 Myriong Street. This nearing completion development also comprises five, triple storey dwellings and one, double storey dwelling, and permits a resident parking reduction of two spaces. Lastly, the applicant advised that there have been changes to the Commercial 1 Zone land to the west.
- 10 The no. 9 Myriong Street development was approved by the Tribunal (*GNL Developments Pty Ltd v Monash CC* [2021] VCAT 1062) in September 2021, and was also a correcting repeat appeal situation. In this decision the Tribunal specifically endorsed the design response of a predominantly three-storey high building, with a double storey element at the rear, as an appropriate alternative to providing a building break, in the context of the RGZ3 which anticipates up to a four storey high scale (refer to paragraph 17 of the decision). Unlike in the decision of *Yang v Monash CC*, this decision was also made after the gazettal of Amendment C125 Part 2 to the planning scheme.
- 11 The Tribunal, in the no. 9 Myriong Street decision, also accepted: materiality as a way of breaking up and articulating a building; first floor



overhangs given the level of built form intensification sought for this location; and adherence with Standard B17 (refer to paragraph 20). Lastly, this Tribunal endorsed the concept that the degree/ level of landscaping required is proportionate to the siting and built form outcomes encouraged by the RGZ3 (refer to paragraphs 23 and 24), including adjacent to side boundaries.

- 12 The neighbourhood character findings of the Tribunal, in relation to no. 9 Myriong Street, weigh heavily in favour of the proposal before me, including the singular form of the proposed building. I agree with the Council's submission that every proposal needs to be considered on its merits, and that in this case, the key consideration is the subject site's immediate context. However, unlike the Council, I consider that in some ways the immediate context of the subject site is less sensitive than the immediate context of no. 9 Myriong Street (from a neighbourhood character standpoint). This is because no. 9 Myriong Street has an open, rear-landscape to its east, whereas the subject site is abutted by medium density developments along both of its side boundaries. In addition, as compared to no. 9 Myriong Street, the subject site is located closer to the commercially zoned land along Clayton Road. Again, these factors weigh in favour of the proposed design response.
- 13 In other words, the changes to the physical context of the subject site (in particular the development at no. 9 Myriong Street) strongly support the proposed design response.
- 14 I also note that since the previous Tribunal decision (*Yang v Monash CC* [2019] VCAT 1677), the Clayton Activity Centre Precinct Plan (January 2020) has been adopted by the Council. As this document is currently not the subject of a planning scheme amendment process, I have not given it any weight in my deliberations.
- 15 The previous Tribunal, in *Yang v Monash CC*, identified mid-level setbacks of 2.705 metres to 3.025 metres from the western side boundary as being problematic. The proposed development has acceptably increased the first floor western side setbacks, by providing setbacks of: 3.435 metres to Dwelling 1; 3.770 metres to Dwelling 2; 5.0 metres to Dwelling 3; 3.690 metres to Dwelling 4; and 5.0 metres to Dwelling 5. The previous Tribunal identified the 3.8 metres setback to the western balcony edge of the upper level as being problematic. The proposed development has appropriately responded to this concern by increasing the upper level western side setbacks to: 4.565 metres to Dwelling 1; and 5.560 metres to Dwellings 2 to 5, with additional recesses/ setbacks provided at each of the stairwells to break-up the upper level form. The increased western side setbacks have resulted in an acceptable reduction in the extent of cantilevering proposed (as compared to the previous design response).



- 16 Overall, the current proposal provides for an increase in the Standard B17 building profile, as compared to the previous proposal. The Council was critical of the proposed location of the carport adjacent to Dwelling 6 at the rear of the site, which encroaches within the Standard B17 profile. However, I find that this is an acceptable outcome as it is a lightweight structure, and its positioning still allows for landscaping along its northern and western sides, including the planting of two canopy trees at its northern end.
- 17 In addition to the increased side setbacks, the overall height of the proposed building has been reduced to 8.96 metres to 9.47 metres, as compared to the previous proposal which had heights of 9.36 metres to 10.45 metres. This assists in reducing the overall visual massing of the building to an acceptable degree.
- 18 The increased side setbacks and decreased building heights also ensure that the visual impact of the building as viewed from the dwellings at no. 1 Myriong Street is now acceptable.
- 19 The other key changes that have been made which appropriately address the concerns of the previous Tribunal are that:
- There is now no side pedestrian pathway along the eastern side of the building, which reduces the extent of hard paving.
 - Dwelling 1 now actively addresses the street with ground level habitable spaces facing the street, rather than the previous garage interface.
 - Landscaping has been enhanced, including through the retention of the street tree and Tree no. 2 in the south-west corner of the site, and the planting of three canopy trees along the western side driveway. Overall, the proposed landscaping includes 17 canopy trees which is far in excess of the local variation to Standard B13. The landscaping response also includes other appropriate landscape elements to soften the appearance of the side driveway.
 - The building has been articulated via the variations provided in setbacks, balcony positioning and materiality.
- 20 The previous Tribunal also identified a number of on-site amenity concerns. All of these concerns were appropriately responded to in the detailed submissions of the applicant. The current proposal has substantially changed the layout of the dwellings (including the balcony arrangements), provided ground level courtyard areas, and has reduced the amount of screening required. I am satisfied that the current proposal now provides for an appropriate level of on-site amenity for future occupants.

- 21 In summary, I find that the proposal now provides an acceptable planning outcome in terms of its neighbourhood character and amenity impacts, and that all of the Clause 55 objectives of the planning scheme have been met.
- 22 The previous proposal did not require a reduction in car parking, hence this was not an issue discussed in the *Yang v Monash CC* Tribunal decision. The Council does not support the proposed car parking reduction given: the extent of parking restrictions in the street; and the 1.2 km distance of the site from the Clayton train station and Activity Centre core.
- 23 The reduction in parking relates to resident parking rather than visitor parking (as the subject site is within the PPTN), and future residents will be ineligible for parking permits under Council policy. The reduction relates to Dwellings 1 and 6 (each three-bedrooms) which have a single car space, rather than the standard two car spaces.
- 24 The parking restrictions in Myriong Street, including the time limits, will essentially prevent future residents from parking on Myriong Street. In other words, unlike the Council, I regard the existing on-street parking restrictions as a positive demand management tool, and not a negative one. This was confirmed in the evidence of Mr Hancox who said that it would be completely impractical for future residents (of Dwellings 1 and 6) to park a second car on the street.
- 25 Mr Hancox's evidence included a detailed car parking demand assessment in accordance with the requirements of Clause 52.06-6 of the planning scheme. The ABS data included in his evidence showed that for postcode 3168 (which includes Clayton), the car ownership rate for three-bedroom dwellings is 1.52 spaces per dwelling. This equates to a parking demand for the subject proposal of 9.12 spaces (less than the 10 spaces to be provided). Mr Hancox confirmed that that this ABS data is only available based on postcode areas, and that there is no ABS data at a finer-grained level.
- 26 Further, I consider that the subject site is well-located, as evidenced by its inclusion in the PPTN, and its being part of the Monash National Employment Cluster.
- 27 Overall, on the basis of Mr Hancox's evidence, I support the proposed reduction in on-site car parking. It is also noteworthy that a two resident car parking reduction was supported in relation to the development at no. 9 Myriong Street.
- 28 In conclusion, I am satisfied that the current proposal results in an acceptable planning outcome and appropriately responds to the findings of the Tribunal in both *Yang v Monash CC* and *GNL Developments Pty Ltd v Monash CC*.



What conditions are appropriate?

- 29 The draft planning permit conditions were discussed at the hearing. I have included a condition which requires the retention of Tree no. 2 which Mr Hancox said could be retained and still allow for adequate line of sight for drivers and pedestrians, due to the existing height of its canopy. I have also modified the waste management condition to allow for either a private or Council collection, and flexibility in terms of private vehicle access arrangements. The changes I have made are consistent with the waste management condition included in the permit for no. 9 Myriong Street.

Conclusion

- 30 For the reasons explained above, the decision of the Responsible Authority is set aside. A permit is issued subject to conditions.

Tracy Watson
Member



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/53907
LAND	3 Myriong Street CLAYTON VIC 3168

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Construction of six dwellings and a reduction in the standard car parking requirement.

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 considered by VCAT by 2BScene Designs, Issue 4, dated March 2023, but modified to show:
 - (a) Retention of existing Tree No. 2 located in the south-west corner of the site.
 - (b) Provision of a corner splay or area at least 50% clear of visual obstruction (or with a height of less than 1.2m) extending at least 2.0 metres long x 2.5 metres deep (within the property) on both sides of each vehicle crossing to provide a clear view of pedestrian on the footpath of the frontage road.
 - (c) The first floor north facing bedroom window of unit 6 to be treated to limit overlooking in accordance with Standard B22 at Clause 55.04-6 of the Monash Planning Scheme.
 - (d) The second floor west facing bedroom windows of units 2 to 5 to be treated to limit overlooking in accordance with Standard B22 at Clause 55.04-6 of the Monash Planning Scheme.
 - (e) Trees 1, 13, 15, 16 and 17 numbered as per the Arboricultural Report prepared by Bluegum dated 16 October 2018.
 - (f) Location of Tree Protection Fencing for trees 1, 13 and 16 as per the arborist report and a notation that all Tree Protection Requirements detailed in Section 7 of the Arborist's report are to be carried out to the satisfaction of the Responsible Authority.



- (g) A Landscape Plan in accordance with condition 3 of this permit.
- (h) A Waste Management Plan in accordance with condition 4 of this permit.
- (i) A Sustainable Design Assessment in accordance with condition 7 of this permit.
- (j) A Water Sensitive Urban Design Report in accordance with condition 10 of this permit.

all to the satisfaction of the responsible authority.

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.

Landscape Plan

- 3 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 show:
 - (a) The location of all existing trees, using the numbering detailed in the Arboricultural Report prepared by Bluegum dated 16 October 2018, indicating which are to be retained and removed. The 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) Retention of the Tree no. 2 located in the south-west corner of the site.
 - (d) The location of Tree Protection Zones and Tree Protection Fencing as detailed in the Arboricultural Report prepared by Bluegum dated 16 October 2018.
 - (e) The provision of at least two trees with a spreading crown in the front and rear setbacks that will grow to at least 10 metres in height. The trees must be planted as advanced specimens of at least 1.5 to 2 metres in height (dependant on species).
 - (f) The use of water efficient vegetation and mulched beds to accord with the Sustainable Design Assessment prepared by Passive Energy dated 7 September 2022.
 - (g) Driveway planting of sufficient height and spread to visually soften the fence line and paving, whilst maintaining pedestrian visibility splays.



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

Landscaping Prior to Occupation

- 4 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 Protection

- 5 Prior to any machinery or materials being brought on site, and before any works including demolition commences a tree protection fence must be erected around Trees numbered 1, 2, 13 and 16 in the endorsed plans to define the Tree Protection Zone (TPZ). The tree protection fence must be erected along the perimeter of the TPZ (or modified TPZ) and is to remain in place in accordance with Arboricultural advice until all construction is completed on the land, except with the prior written consent of the Responsible Authority.
- 6 The following basic tree protection measures are to be implemented:
 - (a) Before commencing work on site, the contractor is required to meet with the consultant arborist to review all work procedures, access routes, storage areas and tree protection measures.
 - (b) Once erected Tree Protection fencing must not be removed or altered without approval from the project arborist.
 - (c) Protective fencing needs to be in accordance with AS 4687. Signs identifying the TPZ should be placed around the protective fencing.
 - (d) Construction vehicles and storage areas must remain outside fenced areas always.
 - (e) If tree roots are encountered or damaged during construction, they need to be cut cleanly to sound tissue with sharp secateurs or a pruning saw.
 - (f) Surplus construction materials (e.g. soil, cement, base rock) are not to be stored or allowed to remain inside the tree's TPZ.
 - (g) Additional tree pruning required during construction must be carried out by an appropriately qualified contractor and in accordance with Australian Standards 4373: 2007, Pruning of Amenity Trees and not by construction personnel.
 - (h) All underground services including drainage and irrigation must be routed outside of trees' TPZs, if this is not possible excavation is to be carried out by tunnelling or boring beneath the TPZ.



- (i) Trees retained on site are to be regularly watered (minimum weekly) during periods of dry conditions within the TPZ.
- (j) If trees are damaged during construction, it should be evaluated as soon as possible by the project arborist so that appropriate treatments can be applied.
- (k) Erosion control such as silt fencing, debris basins and water diversion methods shall be installed to prevent siltation and/or erosion within the tree protection zone.
- (l) If temporary access roads must pass over the root areas (TPZ) of trees to be retained a roadbed of 150mm of mulch or crushed rock shall be created to prevent soil compaction within the tree's root area. The roadbed material shall be maintained to a depth of 150mm throughout construction.
- (m) Once construction is completed all foreign (non-organic) debris needs to be removed from within the tree protection zone.
- (n) No works are to be carried out on the street tree (tree number 1) without prior consultation with Council's Horticulture Division.

Waste Management

7 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 Passive Energy dated 7 September 2022, except that the plan must be modified to show:

- (a) Any changes required by Condition 1 of this permit;
- (b) Waste collection to occur either by Council or a private contractor. If private waste collection occurs from within the site, the provision of swept path diagrams demonstrating that trucks can appropriately access/ egress the subject site.
- (c) Reference to Council's WMP Guidelines.
- (d) Provision for food organics recycling or future glass service and associated bin storage.
- (e) Management of hard waste, including that the property is ineligible for the Annual Hard Rubbish Collection.

The provisions, recommendations and requirements of the endorsed Waste Management Plan must be implemented and complied with to the satisfaction of the Responsible Authority.

8 No bin or receptacle or any form of rubbish or refuse shall be allowed to remain in view of the public and no odour shall be emitted from any receptacle so as to cause offence to persons outside the land.



Environmentally Sustainable Development

- 9 The Sustainable Design Assessment prepared by Passive Energy dated 7 September 2022 will be endorsed as part of the planning permit. The development must incorporate the sustainable design initiatives outlined in the SDA to the satisfaction of the Responsible Authority.

Stormwater Management in Urban Development

- 10 The Water Sensitive Urban Design Report prepared by Passive Energy dated 7 September 2022 will be endorsed as part of the planning permit. The development must incorporate the Stormwater Site Management initiatives and outlined in the WSUD Report to the satisfaction of the Responsible Authority

Electricity Supply Meters

- 11 The electricity supply meter boxes must be located in accordance with the endorsed plans. Alteration to their location at the request of the service authority is subject to prior Council approval and the location and design must be in accordance with Council's "Guide to Electricity Supply Meter Boxes in Monash".

Drainage

- 12 The site must be drained to the satisfaction of the Responsible Authority. Stormwater must be directed to the Point of Connection as detailed in the Legal Point of Discharge report. Stormwater must not be allowed to flow into adjoining properties including the road reserve.
- 13 Stormwater 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 any stormwater drainage works commencing.
- 14 No polluted and/or sediment laden stormwater 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 A plan detailing the stormwater drainage and civil works must be submitted to and approved by the Engineering Department prior to the commencement of any works. The plans are to show sufficient information to determine that the drainage and civil works will meet all drainage requirements of this permit. Refer to Engineering Plan Checking on www.monash.vic.gov.au.

Urban Design

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

Privacy screens

- 17 Prior to the occupancy of the development, all screening and other measures to prevent overlooking as shown on the endorsed plans must be installed to the satisfaction of the Responsible Authority. Once installed the screening and other measures must be maintained ongoing to the satisfaction of the Responsible Authority. The use of obscure film fixed to transparent glass or windows is not considered to be 'obscure glazing' or an appropriate response to screen overlooking

Satisfactory Continuation and Completion

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

Permit Expiry

- 19 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

- i within six (6) months afterwards if the development has not commenced; or
- ii 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 of conditions –